

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

ANDREW SIEMASZKO

)
)
)
)
)

IA-05-021

ASLBP No. 05-839-02-EA

NRC STAFF'S NOTICE OF APPEAL OF LICENSING BOARD
ORDER OF DECEMBER 22, 2005 AND ACCOMPANYING BRIEF

Sara E. Brock
Steven C. Hamrick
Counsel for NRC Staff

January 3, 2006

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	1
ARGUMENT	3
I. The Board Decision to Grant Discretionary Intervention Reflects a Misunderstanding of the Purpose Of Discretionary Intervention and is an Abuse of Discretion	3
II. Reviewing the 2.309(e) Standards for Discretionary Intervention Demonstrates that UCS/OCA Does not Qualify For Discretionary Intervention and the Board Decision to The Contrary is an Abuse of Discretion	6
A. UCS/OCA cannot be expected to meaningfully contribute to a sound record	6
1. UCS/OCA Contention 2	11
2. UCS/OCA Contention 3	12
3. UCS/OCA Contention 5	13
A. Petitioners interest in the proceeding and any effect the outcome of the proceeding may have on their interests	14
B. Examining the factors weighing against discretionary intervention demonstrates that UCS/OCA should not have been granted discretionary intervention	15
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>JUDICIAL DECISIONS</u>	
<i>Bellotti v. NRC</i> 725 F.2d 1380 (D.C. Cir. 1983)	4, 5
<i>Dellums v. NRC</i> 863 F.2d 968 (D.C. Cir. 1988)	3
<i>Moog Industries, Inc., v. FTC</i> 355 U.S. 411 (1958)	14
<i>Steele Co. v. Citizens for a Better Environment</i> 523 U.S. 83 (1998)	3
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>Advanced Medical Systems, Inc.</i> (One Factory Row, Geneva, Ohio 44041) CLI-94-6, 39 NRC 285, (1994)	14
<i>Alaska Dep't of Transp. and Pub. Facilities</i> (Confirmatory Order Modifying License) CLI-04-26, 60 NRC 399 (2004)	4, 14, 15
<i>Alaska Dep't of Transp. and Pub. Facilities</i> (Confirmatory Order Modifying License) CLI-04-38, 60 NRC 652 (2004)	9
<i>Arizona Public Service Commission</i> (Palo Verde) CLI-91-12, 34 NRC 149 (1991)	11
<i>Consumers Power Company</i> (Palisades Nuclear Power Facility) CLI-82-18, 16 NRC 50 (1982)	15
<i>Exelon Generation Company, LLC, et al.</i> (Early Site Permit for Clinton ESP Site) CLI-05-17, 62 NRC 5 (2005)	3
<i>First Energy Nuclear Operating Company</i> (Davis-Besse Nuclear Power Station, Unit 1) CLI-04-23, 60 NRC 154 (2004)	4, 14

<i>Georgia Institute of Technology</i> (Georgia Tech Research Reactor) CLI-95-10, 42 NRC 1 (1995)	11
<i>Georgia Institute of Technology</i> (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995)	11
<i>Maine Yankee Atomic Power Company</i> (Maine Yankee Atomic Power Station) CLI-04-05, 59 NRC 52 (2004)	4, 14
<i>Northern States Power Company</i> (Prairie Island Nuclear Generating Plant, Units 1 and 2) CLI-75-1, 1 NRC 1 (1975)	3
<i>Pacific Gas and Electric Co.</i> (Diablo Canyon Power Plant, Units 1 and 2) CLI-02-16, 55 NRC 317 (2002)	6, 9-12
<i>Portland General Electric Company</i> (Pebble Springs Nuclear Plant, Units 1 and 2) CLI-76-27, 4 NRC 610 (1976)	3-5, 10
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26 (1998)	7, 12
<i>Public Service Co. of Indiana</i> (Marble Hill Nuclear Generating Station, Units 1 & 2) CLI-80-10, 11 NRC 438 (1980)	14
<i>Sequoyah Fuels Corp. & General Atomics</i> (Gore, Oklahoma Site) CLI-94-12, 40 NRC 64 (1994)	4
<i>Yankee Atomic Electric Co.</i> (Yankee Nuclear Power Station) CLI-98-21, 48 NRC 185, 195 (1998)	3
<u>Atomic Licensing and Appeal Board:</u>	
<i>Consumers Power Company</i> (Palisades Nuclear Power Facility) ALAB-670, 15 NRC 493 (1982)	15
<i>Louisiana Power & Light Company</i> (Waterford Steam Electric Station, Unit 3) ALAB-732, 17 NRC 1076 (1983)	16

Virginia Electric and Power Company
(North Anna Power Station, Units 1 and 2)
ALAB-342, 4 NRC 98 (1976) 10

Virginia Electric and Power Company
(North Anna Power Station, Units 1 and 2)
ALAB-363, 4 NRC 631 (1976) 10

Atomic Safety and Licensing Board:

Alaska Dep't of Transp. and Pub. Facilities
(Confirmatory Order Modifying License)
LBP-04-16, 60 NRC 99 (2004) 9

Georgia Institute of Technology
(Georgia Tech Research Reactor)
LBP-95-6, 41 NRC 281 (1995) 11

REGULATIONS

10 C.F.R. § 2.309(e) 2, 4, 6, 10
10 C.F.R. § 2.309(e)(1)(I)-(iii) 6
10 C.F.R. § 2.309(e)(2) 15
10 C.F.R. § 2.309(e)(2)(I)-(iii) 7, 13
10 C.F.R. § 2.311©) 1
10 C.F.R. § 2.314(b) 2
10 C.F.R. § 50.5(a)(1) 13
10 C.F.R. § 50.5(a)(2) 13
10 C.F.R. § 50.9 13

MISCELLANEOUS

69 Fed. Reg. 2,182 (January 14, 2004) 5
70 Fed. Reg. 22,719 (May 2, 2005) 1

January 3, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	IA-05-021
)	
ANDREW SIEMASZKO)	ASLBP No. 05-839-02-EA
)	
)	

NRC STAFF'S NOTICE OF APPEAL OF LICENSING BOARD
ORDER OF DECEMBER 22, 2005 AND ACCOMPANYING BRIEF

INTRODUCTION

On December 22, 2005, the Atomic Safety and Licensing Board ("Board") in this proceeding issued a Memorandum and Omnibus Order ("Order") which, among other matters, granted discretionary intervention to the Union of Concerned Scientists and Ohio Citizen Action (UCS/OCA).¹ Pursuant to 10 C.F.R. § 2.311(c), the NRC Staff ("Staff") hereby files its notice of appeal and accompanying brief. As more fully discussed below, the Board's order should be reversed because permitting discretionary intervention in this proceeding on an enforcement order issued to an individual is unwarranted and, in the context of this case, constitutes an abuse of discretion.

BACKGROUND

On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" (Enforcement Order) to Andrew Siemaszko, who was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by NRC licensee FirstEnergy Nuclear Operating Company (FENOC). 70 Fed. Reg. 22,719 (May 2, 2005).

¹ The order also stayed the proceeding through February 1, 2006 and clarified the scope of the proceeding. The NRC Staff does not seek review of those portions of the order.

On April 22, 2005, Mr. Siemaszko filed his “Request for a Hearing in Response to Order Prohibiting Involvement in NRC-licensed Activities.” On May 13, 2005, the Union of Concerned Scientists and Ohio Citizen Action (UCS/OCA) filed their joint “Request for Hearing in Response to Order (IA-05-021) Banning Andrew J. Siemaszko From Involvement in NRC-Licensed Activities”(Petition), in which they requested leave to intervene.² On August 2, 2005, the Board issued a ruling (August 2 Order) determining that UCS/OCA had not established standing as a matter of right, but gave UCS/OCA the opportunity to amend their petition and seek discretionary intervention.³ August 2 Order at 5. On August 12, 2005, UCS/OCA filed their “Response of Ohio Citizen Action and Union of Concerned Scientists Regarding Discretionary Standing and Representation” (August 12 Response), in which they specifically requested discretionary intervention.⁴ On December 22, 2005, the Board issued an order (December 22 Order) granting UCS/OCA discretionary intervention. December 22 Order at 2.

² The petition listed both organizations but was signed solely by “David Lochbaum, Nuclear Safety Engineer, Union of Concerned Scientists.” Throughout the proceeding the sole representative of these two separate organizations has been David Lochbaum. The Board has treated the two organizations as one entity “UCS/OCA.”

³ Allowing UCS/OCA to file a new petition seeking discretionary intervention is inconsistent with Commission regulations. 10 C.F.R. § 2.309(e) requires a Petitioner who desires discretionary intervention to address the discretionary intervention factors in its initial petition. The Board explains its rationale by stating that UCS/OCA adequately met its § 2.309(e) obligations in its initial petition since the initial petition was prepared by two public interest groups, not a law firm. See December 22 Board Order at 3, n. 7. It is unclear how the Board determined that UCS/OCA had adequately addressed its § 2.309(e) obligation. UCS/OCA’s initial pleading contains no mention of § 2.309(e), discretionary intervention, or any of the factors related to discretionary intervention. Indeed, the Board itself found it necessary to explicitly ask UCS/OCA to address these factors. See August 2 Board Order at 5.

⁴ UCS/OCA’s August 12 Response does not include pagination. References to it in this pleading will include page numbers based upon the document available in ADAMS.

ARGUMENT

II. The Board Decision to Grant Discretionary Intervention Reflects a Misunderstanding of the Purpose Of Discretionary Intervention and is an Abuse of Discretion

The Commission has long valued public participation through adjudication in its licensing process because such participation is a vital ingredient to the open and full consideration of licensing issues. *See Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 615-16 (1976), *citing Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1, 2 (1975). It was in the context of a mandatory hearing regarding a construction permit that the Commission first allowed discretionary intervention. *See Pebble Springs*, 4 NRC at 610. In *Pebble Springs*, the Commission held that, at times, its regulatory responsibilities can best be met by allowing intervention as a matter of discretion to some petitioners who do not meet judicial standing tests. *See id.* at 616. The Commission noted that “[p]ermission to intervene should prove more readily available where petitions show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.” *Id.* at 617.

It is well-established that only persons adversely affected by an order have the right to request a hearing on the order. The petitioner must establish; (a) that he personally has suffered or will suffer a “distinct and palpable” harm that constitutes injury-in-fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998), *citing Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). Further, the scope of the issues that may be considered at a hearing are

bounded by the terms of the order. *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). In other words, for an enforcement order, “the threshold question, intertwined with both standing and admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the Confirmatory Order should be sustained.” *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). A petitioner may only intervene in an enforcement action upon a showing of injury from the contemplated action set out in the order. *See id.* at 158. A petitioner who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. *See Alaska Dep’t of Transp. and Pub. Facilities*, CLI-04-26, 60 NRC 399, 404 (2004); *see also Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 57-58 (2004). The Commission has allowed intervention in an enforcement action, but only where the petitioners themselves demonstrated cognizable interests that could be adversely affected by a particular outcome of the proceeding. *See Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994). In *Sequoyah Fuels*, Native Americans for a Clean Environment (NACE) petitioned for intervention to support a Staff enforcement order, arguing that if the order were not upheld, its members would suffer the discrete and particularized harm of the site not being adequately decommissioned. *Id.* at 74. In the instant case, the Board held that UCS/OCA did not meet these requirements and thus properly denied standing as a matter of right.

Petitioners who cannot meet the standing requirements may still seek discretionary intervention. The standards governing discretionary intervention are now set forth in 10 C.F.R. § 2.309(e). In its statement of considerations for the final rulemaking, the Commission explained that it was codifying the six-factor test presented in *Pebble Springs*, and that the case law evolving from the *Pebble Springs* decision should be applied in evaluating a request for

discretionary intervention. 69 Fed. Reg. 2,182, 2,201 (January 14, 2004). These criteria presume that granting discretionary intervention is extraordinary, and will not be allowed unless there are compelling factors in favor of such intervention. 69 Fed. Reg. 2,201.

Discretionary intervention is essentially a safety valve that may be used to admit persons who have demonstrated the ability to make a substantial contribution on an important health, safety, environmental, or legal issue, that will not otherwise be heard in the proceeding. See 69 Fed. Reg. at 2,201. The Board, in admitting UCS/OCA as an intervenor in the instant enforcement proceeding, virtually ignored the requirement that a discretionary intervenor be admitted only when the petitioner can make a unique substantial contribution.

In the instant case, the Board simply stated that “our decision to grant discretionary intervention status to UCS/OCA is based on our conclusion that they will, without question, meaningfully contribute to the development of a sound record on contested matters.” See December 22 Order at 3. As discussed in more detail below, the Board’s holding, however, is without any facts in the record upon which such a conclusion could be based. Moreover, the Board’s error is compounded by its failure to tie any ostensible contribution that UCS/OCA might make to any contention or discrete issue that UCS/OCA had raised and upon which it was being allowed to participate. This sweeping and unparticularized grant of discretionary intervention ignores the Commission’s clear intent in *Pebble Springs* and its progeny to limit discretionary intervention to circumstances where the interest and expertise of the petitioner can contribute to the Commission’s decision on an aspect of the case before it, that is within the scope of issues over which the Board has jurisdiction. See *Bellotti supra*. Indeed, if UCS/OCA had been admitted as of right, their intervention would have been limited to the specific contentions they had raised.

The Commission has recently reiterated the importance of allowing discretionary intervention only when there is a specific issue that petitioner has raised on its own on which the petitioner will contribute to the record: “[w]e have never, however, endorsed [discretionary intervention] for petitioners who do not specify any issues of concern to them. As opined by a Licensing Board 20 years ago, we did not intend that a petitioner should be entitled to discretionary intervention without an issue of its own worthy of exploration in an adjudication.” See *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 346 (2002). Reading UCS/OCA’s contentions, as admitted by the Board, belies the notion that Petitioners raised unique issues. See August 2 Order at 7 n. 20. These contentions merely address the basic questions of this case, i.e., whether Mr. Siemaszko violated NRC regulations, and, if so, what penalty is appropriate. UCS/OCA has not provided an issue of its own that is worthy of exploration. For the Board to grant discretionary intervention to UCS/OCA based on its conclusory determination that UCS/OCA would meaningfully contribute to the development of a sound record was, quite simply, an abuse of discretion and should be reversed by the Commission.

II. Reviewing the 2.309(e) Standards for Discretionary Intervention Demonstrates that UCS/OCA Does not Qualify For Discretionary Intervention and the Board Decision to the Contrary is an Abuse of Discretion

Section 2.309(e) requires that, in its initial petition, a petitioner seeking discretionary intervention address the following three factors weighing in favor of allowing intervention: (I) the extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record; (ii) the nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding; and (iii) the possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest. 10 C.F.R.

§ 2.309(e)(1)(I)-(iii). A petitioner must also address the following three factors weighing against

allowing intervention: (i) the availability of other means whereby the requestor's/petitioner's interest will be protected; (ii) the extent to which the requestor's/petitioner's interest will be represented by existing parties; and (iii) the extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding. 10 C.F.R. § 2.309(e)(2)(i)-(iii). Measured against each of the factors, it is clear that the Board's decision to admit UCS/OCA to the proceeding was an abuse of discretion.

- A. UCS/OCA has failed to demonstrate that it can be expected to meaningfully contribute to a sound record

The Board determined to admit UCS/OCA to the proceeding because, in its view, "they will, without question, meaningfully contribute to the development of a sound record on contested matters." The ability of a petitioner to reasonably be expected to assist in developing a sound record is the most significant factor weighing in discretionary intervention. The Board, in this regard, based its conclusion:

on the totality of our experience to date with the UCS/OCA. Based on Petitioners' written submissions in this proceeding and their oral presentations at our prehearing conferences, we have concluded that Petitioners are extremely knowledgeable in the factual, scientific, and regulatory areas that will be the focus of our hearings in this matter.

December 22 Order at 3-4. It is unclear to the Staff to what the Board is referring in finding that Petitioners are "extremely knowledgeable."⁵

As discussed above, discretionary intervention is reserved for rare cases where the petitioner has an issue of its own that will contribute to the record. Generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge. *See Private Fuel*

⁵ The three issues included in the December 22 Omnibus Order, discretionary intervention, the scope of the proceeding, and the several stay requests, represent the sum total of issues thus far considered in this case. UCS/OCA has declined to participate by brief in any of the stay requests or in determining the scope of the proceeding, and therefore, UCS/OCA has had little opportunity to demonstrate this knowledge.

Storage, L.L.C., (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 35 (1998).⁶ Determining that UCS/OCA's knowledge was sufficient to establish that it could meaningfully contribute to a sound record was unjustified given the facts of this proceeding and should be reversed.

As further support for its determination that UCS/OCA could meaningfully contribute, the Board stated:

UCS/OCA's broad experience with Commission proceedings stands in marked contrast with the circumstances of Mr. Siemaszko, a private individual with no previous experience with NRC enforcement proceedings, who is being represented in this matter pro bono by a small law firm with limited resources. As articulated by Mr. Siemaszko, it is reasonable to assume that the Davis-Besse investigation has been one of the most rigorous and extensive ever conducted by the NRC, and that representatives of the UCS/OCA have immersed themselves in the facts of this incident to a degree that would be impossible for Mr. Siemaszko to duplicate. We agree with Mr. Siemaszko that he simply lacks the knowledge and experience of the Petitioners. Accordingly, we conclude that the involvement of UCS/OCA in this proceeding will provide an invaluable contribution to the development of a sound record upon which the Board will evaluate the charges that have been levied against Mr. Siemaszko.

December 22 Order at 4. The Board appears to be permitting discretionary intervention to UCS/OCA because it believes that Mr. Siemaszko needs assistance. This rationale for granting discretionary intervention is unprecedented and would open the door to allowing discretionary intervention anytime a Board believes that a potential participant is more experienced in NRC proceedings than are the parties to the proceeding. Regardless, the Board's insinuation that UCS/OCA is more experienced than counsel for Mr. Siemaszko is simply not accurate.

Mr. Siemaszko is represented by the law firm of Clifford & Garde. Both named partners -

⁶ In the *Private Fuel Storage* licensing proceeding, Scientists for Secure Waste Storage (SSWS) contended that it was a group of renowned scientists, engineers and educators interested in presenting sound technical and scientific information to the Commission in connection with this proceeding. The Commission, nonetheless, held that generalized expertise was an insufficient substitute for particularized knowledge of the issues actually in dispute. See 48 NRC at 35.

Billie Garde and John Clifford - have entered appearances on behalf of Mr. Siemaszko and have both together participated in prehearing conferences. Ms. Garde is an experienced counsel who has specialized in representing employees and citizen organizations before the Commission since 1982.⁷ An extension of the Board's logic in this case would allow UCS/OCA admission to virtually any NRC proceeding in which they take an interest and request discretionary intervention.

As the Commission previously noted in the *Pacific Gas & Electric* (Diablo Canyon) proceeding, "there are other means by which [petitioners] can contribute to the proceeding, specifically by serving as witnesses for other parties or by amicus filings at appropriate times." 55 NRC at 346. To the extent that Mr. Siemaszko needs assistance from UCS/OCA, and they are willing to assist him, he may certainly call individuals from the organizations as witnesses if they have relevant and admissible testimony. Moreover, this proceeding is not about all the events leading up to the broader Davis-Besse enforcement action or the events in which UCS/OCA claims to have immersed itself, which raises the question of whether UCS/OCA has indeed demonstrated an ability to contribute to this particular enforcement proceeding. This proceeding is confined to the basis underlying just one enforcement action, that taken against Mr. Andrew Siemaszko. In order for UCS/OCA to be able to meaningfully contribute to a sound record they would need to establish particularized knowledge of the specific facts resulting in the Staff's order against Mr. Siemaszko, not generalized knowledge surrounding the events at

⁷ Most recently, Ms. Garde represented a party in a 2004 NRC adjudication. See *Alaska Dep't of Transp. and Pub. Facilities*, (Confirmatory Order Modifying License) CLI-04-38, 60 NRC 652 (2004) reversing LBP-04-16, 60 NRC 99 (2004). See also "Request for Public Comment on the Allegations Program, ML0037252930, May 11, 2000." Furthermore Ms. Garde represents of her law firm: "we don't want to do everything, but what we do, we do very well and efficiently. We believe our small size works to the advantage of our clients." See <http://www.cliffordgarde.com/CustomPage.shtml>. In contrast, the NRC Staff has been unable to ascertain any previous NRC adjudications where Ohio Citizens Action has been a party, and the most recent adjudications that the NRC Staff could locate where the Union of Concerned Scientists has been a party were in the early 1980's (Indian Point proceedings and TMI restart proceedings.)

Davis-Besse. This, they have not done. Thus, the Board's determination that UCS/OCA would contribute to a sound record due to Mr. Siemaszko's representation by a small law firm is without foundation and constitutes an abuse of discretion to the extent they considered it as a basis for granting discretionary intervention.

Discretionary interveners are limited to the issues they have specified as of particular concern to them. See *Pacific Gas and Electric Co. (Diablo Canyon)*, 55 NRC at 346. Previously, when the Commission has permitted discretionary intervention, it has carefully examined the contentions of the petitioner and decided that the petitioner had demonstrated that it could make a significant contribution to the record. For example, in the North Anna operating license proceeding, Sun Ship was granted discretionary intervention. See *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2)*, ALAB-363, 4 NRC 631, 633 (1976). Sun Ship, a contractor to the applicant, which manufactured steam generator and reactor coolant pump supports for the North Anna facility, raised contentions respecting the design and integrity of these structures in the event of a design basis accident. See *Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2)*, ALAB-342, 4 NRC 98, 100-101 (1976).⁸ In admitting Sun Ship, the Appeal Board held that the safety issue Sun Ship raised regarding integrity of the steam generators and reactor coolant pump supports was most serious and "that, given the role Sun Ship played in the fabrication of these particular supports, Sun Ship is well equipped to make a 'genuinely significant' contribution to that exploration". 4 NRC at 633.

⁸ In ALAB-342, the Appeal Board decided that there was good cause for the tardiness of the intervention, yet did not rule on the admission of Sun Ship, as it was waiting on resolution of standing questions that had been certified to the Commission in the *Pebble Springs* case. CLI-76-27, 4 NRC 610 (1976). Following the publication of *Pebble Springs*, the Appeal Board denied standing as a matter of right, but granted discretionary intervention in ALAB 363. 4 NRC at 633.

In the instant case, the Board makes no more than a passing reference to UCS/OCA's proposed contentions in its initial ruling denying UCS/OCA standing, and no mention of them whatsoever in its ruling allowing intervention as a matter of discretion. In a footnote the Board stated:

Thus, if admitted to this proceeding pursuant to 10 C.F.R. § 2.309(e), OCA/UCS would not be litigating their contentions as drafted, but rather would be limited to litigating the following:

Contention 2: Whether the facts support the conclusion that Andrew Siemaszko deliberately provided incomplete and inaccurate information in Condition Report No. 2000-1037 and Work Order No. 00-001846-000.

Contention 3: Whether the facts support the finding that Andrew Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOCO to be in violation of NRC Regulations.

Contention 5: Whether the 5 year suspension of Mr. Siemaszko, in light of all relevant aggravating, mitigating, and extenuating circumstances, is an appropriate sanction in this matter.

August 2 Order at 7 n 20.

It is well-established, however, that if a petitioner neglects to provide adequate support for its contentions, it is not within the Board's power to make inferences and redraft the contention in favor of the petitioner. *See Arizona Public Service Co. (Palo Verde) CLI-91-12, 34 NRC 149 (1991). See also Georgia Institute of Technology (Georgia Tech Research Reactor) LBP-95-6, 41 NRC 281, 305 (1995), vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1 (1995), aff'd in part, CLI-95-12, 42 NRC 111 (1995).* The argument against the Board redrafting contentions is even more compelling in a discretionary intervention setting, when discretionary intervention is supposed to be based on the petitioner's demonstrated unique ability to contribute to the record. The Board's action in redrafting the contention and admitting UCS/OCA on the basis of the Board-drafted contention ignores the

longstanding requirement that the petitioner have an issue of its own worthy of exploration in an adjudication. See *Pacific Gas and Electric*, 55 NRC at 346. The UCS/OCA contentions as drafted are inadmissible, and, therefore, provide no support for the grant of discretionary intervention.

As the Board has not provided any further discussions regarding UCS/OCA's contentions, the Staff below addresses the three contentions both as drafted by UCS/OCA and as rewritten by the Board in its August 2 Order. Since the contentions are a focal point for the purpose of determining whether UCS/OCA can contribute to a sound record, the Staff will review each contention in turn.

1. UCS/OCA Contention 2

Contention 2 as drafted by the Board parallels that presented by UCS/OCA. The question presented is "whether the facts support the conclusion that Andrew Siemaszko deliberately provided incomplete and inaccurate information in Condition Report No. 2000-1037 and Work Order No. 00-001846-000."⁹

UCS/OCA cannot reasonably be expected to assist in developing a sound record in regard to the facts surrounding the incomplete and inaccurate information submitted by Mr. Siemaszko in the Condition Report and Work Order. Quite simply, neither UCS nor OCA have shown that they have any first-hand knowledge of these facts. UCS/OCA refers to the fact that it has made a request pursuant to the Freedom of Information Act for information surrounding these events from the Agency and has monitored the events at Davis-Besse. See UCS/OCA August 12 Response at 2-3. However, all the events at Davis-Besse are not at issue in this proceeding. The only issue in this proceeding is whether an individual, Mr. Andrew Siemaszko, deliberately recorded incomplete and inaccurate information on Condition Report 2000-1037

⁹ This is the contention as drafted by the Board in the August 2 Order.

and Work Order 00-001846-000. Generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute. See *Private Fuel Storage*, 48 NRC at 35. This is not the type of particularized knowledge that demonstrates an ability to contribute to the proceeding. Therefore UCS/OCA Contention 2 does not provide support for its ability to contribute to a sound record.

2. UCS/OCA Contention 3

In marked contrast to the contention as rewritten by the Board, Contention 3 as proffered by UCS/OCA read as follows: “The NRC did not establish that Mr. Andrew J. Siemaszko deliberately violated 10 C.F.R. § 50.9.” UCS/OCA Petition at 12. The Board redrafted this contention to read:

“Contention 3: Whether the facts support the finding that Andrew Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOCO to be in violation of NRC Regulations”.

August 2 Order at 7 n. 20. As support for Contention 3, UCS/OCA alleges that the Staff cannot prove Mr. Siemaszko was aware that his actions violated 10 C.F.R. § 50.9. UCS/OCA Petition at 13. UCS/OCA has confused the standards found in 10 C.F.R. § 50.5(a)(1) and (a)(2). The violation Mr. Siemaszko was cited for is against 10 C.F.R. § 50.5(a)(2). Given the Board’s determination on the scope of this proceeding, the issue of scienter is simply irrelevant to this proceeding and this contention is inadmissible.¹⁰

UCS/OCA further argues, as a basis for this contention, that there is a “bias in the severity of NRC’s enforcement actions against workers as opposed to enforcement actions taken (or not taken) against supervisors, managers, and senior managers.” UCS/OCA Petition at 14. These broad policy concerns are simply irrelevant to the specific nature of this

¹⁰ See December 22 Order at 10.

proceeding.¹¹ An enforcement proceeding is limited to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. See *Alaska Dep't of Transp. And Pub. Facilities*, CLI-04-26, 60 NRC at 404; *Davis-Besse*, CLI-04-23, 60 NRC at 158; *Maine Yankee*, CLI-04-05, 50 NRC at 56. Since the UCS/OCA contention is inadmissible, it cannot provide support for permitting UCS/OCA discretionary intervention.

3. UCS/OCA Contention 5

Contention Number 5, as drafted by UCS/OCA, states “the NRC cannot single out Mr. Andrew J. Siemaszko for enforcement action because his actions and his actions alone were not responsible for either the severity or longevity of the problems at Davis-Besse.”¹² UCS/OCA Petition at 16. As a basis for this contention, petitioners assert that “Mr. Siemaszko was but one of many passengers on the Davis-Besse bus as it sped along with an improper safety focus. The NRC should ticket the driver of the bus or the driver and all the passengers. The NRC cannot drag one passenger from the rear of the bus and persecute him alone.” UCS/OCA Petition at 16. UCS/OCA are arguing that the Staff should have taken a different enforcement approach. It is well-established that one cannot seek to intervene in an enforcement proceeding to have a different penalty imposed. See *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980);

¹¹ Even if this claim were cognizable, UCS/OCA is not the proper party to raise the issue. 10 C.F.R. § 2.309(e)(2)(ii) requires the Board to examine, as a factor weighing against discretionary intervention, the extent to which the requestor's/petitioner's interest will be represented by other parties. Presumably, no one has a greater interest in finding and exposing alleged discriminatory enforcement practices in this case than Mr. Siemaszko. However, even if Mr. Siemaszko can show that others had engaged in identical unlawful activities, the NRC would not be obliged to withhold issuance of the suspension order because, as the Supreme Court has recognized, the NRC may utilize its “specialized, experienced judgment” for enforcement decisions that call for discretionary determination. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041) CLI-94-6, 39 NRC 285, 319 (1994) citing *Moog Industries, Inc., v. FTC*, 355 U.S. 411, 413 (1958).

¹² In contrast, Contention Number 5, as drafted by the Board states “Whether the 5 year suspension of Mr. Siemaszko, in light of all relevant aggravating, mitigating, and extenuating circumstances, is an appropriate sanction in this matter.” See August 2 Order at 7 n. 20. This is markedly different than the Contention propounded by UCS/OCA.

Alaska Dep't of Transp. And Pub. Facilities, 60 NRC at 407. Whether the Staff should take enforcement actions against other individuals is outside the scope of this proceeding. Thus, this contention is inadmissible. Since the contention is inadmissible, it cannot provide support for UCS/OCA's ability to contribute to a sound record.

Since UCS/OCA has failed to establish that they can meaningfully contribute to a sound record, the Board decision to the contrary was an abuse of discretion and should be reversed.

B. Petitioners' interest in the proceeding and any effect the outcome of the proceeding may have on their interests

Two other factors to be considered in regard to discretionary intervention are the petitioners' interest in the proceeding and any effect the outcome of the proceeding may have on their interests. In its decision granting discretionary intervention the Board stated that UCS/OCA's interest that it has "long sought consistent enforcement of the Commission's regulations." The Board further stated that the adverse effect the proceeding could have was that "misguided enforcement actions have the very real potential for undermining worker and public confidence in the NRC's oversight capability." December 22 Order at 3. These type of generalized enforcement interests are precisely the type of interests that the Commission has consistently held do not establish an interest in an enforcement proceeding. Rather:

In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners . . . to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.

Alaska Dep't Of Transp. And Pub. Facilities, 60 NRC at 407. The only enforcement proceeding in which a party has been granted discretionary intervention involved a confirmatory order to the Consumers Power Company which, among other things, restricted overtime for licensed operators at the Palisades Nuclear Power Facility. See *Consumers Power Co.* (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 494 (1982). The union sought intervention,

claiming that it was, in fact, harmed by the order restricting overtime.¹³ The actual tangible potential effect of the Staff enforcement order to the intervenors in the Palisades case stands in marked contrast to the complete lack of effect the instant order could have on either UCS or OCA. To find that UCS or OCA had an interest in the proceeding sufficient to permit discretionary intervention on this basis would open the door to the very type of unparticularized policy arguments that the Commission's Rules of Practice intended to exclude from adjudication. The Board's application of the discretionary intervention criteria under these circumstances was an abuse of discretion and should be reversed.

C. Examining the factors weighing against discretionary intervention demonstrates that UCS/OCA should not have been granted discretionary intervention

The Commission's regulations also require a licensing board to consider factors weighing against discretionary intervention, including the extent to which there are other means to protect the petitioner's interest; the extent to which the petitioner's interest will be represented by other parties; and the extent to which the petitioner's participation will inappropriately broaden the issues. See 10 C.F.R. § 2.309(e)(2). In its analysis of these factors, the Board simply made the conclusory determination that:

we have concluded that Petitioners have sufficiently explained why their interests would not be adequately represented by the other parties, that there do not exist other means of serving Petitioners interests that will be as efficient as admitting them to this proceeding, and that the issues to be resolved in this proceeding will not be broadened, nor will their resolution be delayed, by admitting UCS/OCA as a party to this proceeding.

December 22 Order at 4. A Licensing Board's failure to clearly set forth the basis for its decision is ground for reversal. See *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1087 n.12 (1983). The Board erred in this

¹³ Following settlement of the case, the Commission issued a decision vacating the Appeal Board's decision, noting that it should not be used for guidance. See *Consumers Power Company (Palisades Nuclear Power Facility)*, CLI-82-18, 16 NRC 50, 52 (1982).

determination in light of UCS/OCA's concession that their interests would be adequately represented by Mr. Siemaszko: "We expect that Mr. Siemaszko will primarily pursue these shared or overlapping interests and that our level of engagement during the proceeding will be limited to supplementing that effort on occasion." August 12 Response at 4. The only matter within the scope of this hearing is whether the enforcement order against Mr. Siemaszko should be sustained, and there is simply no basis in the record to suggest that Mr. Siemaszko (and his counsel) cannot adequately represent that interest.

Moreover, it is likely that admitting UCS/OCA to this proceeding will inappropriately broaden the issues of the proceeding since the Petitioners have conceded that they intend to use this hearing as a vehicle by which to pursue their broader goal of seeking programmatic correction of perceived weaknesses in the NRC's enforcement policy and practices. UCS/OCA stated that they "envision obtaining a sound record that the Board seeks that will provide us the body of information needed to pursue fixing the enforcement policy." August 12 Response at 5. This type of broad programmatic challenge to the agency policy is outside the scope of the proceeding and raises the very prospect of a broadening of the issues that the Commission's intervention criteria are meant to avoid. These factors weigh heavily against allowing discretionary intervention in this case. The Board's conclusory determination to the contrary is an abuse of discretion and should be reversed.

CONCLUSION

UCS/OCA has not shown that it may reasonably be expected to contribute to the development of a sound record on issues included in the scope of the order. Petitioners have not demonstrated any particularized knowledge about the alleged actions of Mr. Siemaszko, nor have they demonstrated any legally cognizable interest in the proceeding other than their general and inappropriate interest in second-guessing enforcement actions. The only issue properly before the Board is whether the enforcement order should be sustained. There is

simply no basis to find that Mr. Siemaszko, and his experienced counsel, will not, within the adversarial legal framework, be able to adequately represent any coinciding interest of UCS/OCA in maintaining consistent implementation of the NRC enforcement process.

Therefore, for the reasons described above, the Board order granting UCS/OCA discretionary intervention should be reversed.

Respectfully Submitted,

/RA/

Sara E. Brock
Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of January, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of) IA-05-021
)
ANDREW SIEMASZKO) ASLBP No. 05-839-02-EA
)
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S NOTICE OF APPEAL OF LICENSING BOARD ORDER OF DECEMBER 22, 2005 AND ACCOMPANYING BRIEF" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 3rd day of January, 2006.

Administrative Judge * **
Lawrence McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: lqm1@nrc.gov

Administrative Judge * **
E. Roy Hawken
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: erh@nrc.gov

Administrative Judge * **
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: psl@nrc.gov

Billie Pirner Garde * **
John M. Clifford
Sandy Shepherd
Clifford & Garde
1707 L Street, NW, Suite 500
Washington, D.C. 20036
E-mail: bpgarde@aol.com
jclifford@cliffordgarde.com
sshepherd@cliffordgarde.com

Atomic Safety and Licensing Board Panel *
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

David Lochbaum * **
Nuclear Safety Engineer
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, D.C. 20006
E-mail: dlochbaum@ucsusa.org

Jonathan Rund * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: jmr3@nrc.gov

Sandy Buchanan * **
Executive Director
Ohio Citizen Action
614 W. Superior Avenue, Suite 1200
Cleveland, OH 44113
E-mail: sbuchanan@ohiocitizen.org

Marcia Carpentier * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mxc7@nrc.gov

/RA/

Steven C. Hamrick
Counsel for NRC Staff