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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of

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IA-05-021

ANDREW SIEMASZKO

ASLBP No. 05-839-02-EA

**RESPONSE OF ANDREW SIEMASZKO TO NRC STAFF'S NOTICE OF APPEAL OF
LICENSING BOARD ORDER OF DECEMBER 22, 2005 AND ACCOMPANYING
BRIEF**

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January 13, 2006

TEMPLATE = SECY-021

SECY-02

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MEMORANDUM**

Andrew Siemaszko hereby supports the decision of the Atomic Safety and Licensing Board ("Board) granting discretionary intervention for Petitioners Union of Concerned Scientists ("UCS") and Ohio Citizen Action ("OCA") pursuant to 10 C.F.R. §2.309(e), and for the reasons set forth below ask the Commission to uphold the Board's Order.

BACKGROUND

Mr. Siemaszko is the target of an NRC enforcement action to bar him from employment in the nuclear industry for five years in connection with alleged wrongdoing in his role as a System Engineer at the Davis Besse plant. See, generally, April 21, 2005, *Order Prohibiting Involvement In NRC-Licensed Activities*, IA 05-021. It is Mr. Siemaszko's position that not only did he not commit the offenses of which he is accused by the Staff, but that his actions in forcing the Licensee to address the boric acid accumulation on the reactor head is the only reason that the cavity was eventually identified in the first place. In accordance with the rights provided to

Mr. Siemaszko by the United States Constitution and through the NRC regulations, Mr. Siemaszko requested and was granted such a hearing, and an Atomic Safety and Licensing Board (ASLB) was constituted to adjudicate the matter. Two public interest organizations, the Union of Concerned Scientists (UCS) and Ohio Citizen Action (OCA) sought admission to the hearing as intervenors as a matter of right, which has been denied by the Board; however, the Board sought information on the appropriateness of admitting the Petitioners as a matter of discretion. See, August 2, 2005, *Memorandum and Order (Ruling Denying the Request for Hearing of Ohio Citizen Action/Union of Concerned Scientists and Requesting Briefs on Appropriateness of Discretionary Intervention)*. UCS/OCA then filed their "Response of Ohio Citizen Action and Union of Concerned Scientists Regarding Discretionary Standing and Representation" (See August 12 Response), in which they specifically requested discretionary intervention. The Board then issued an order granting UCS/OCA discretionary intervention on December 22, 2005. See December 22 Order, at 2. The NRC Staff has filed an appeal to the December 22, 2005 order, and sought to have the Board's Order overturned.

ARGUMENT

I. The Board Decision to Grant Discretionary Intervention Reflects the Purpose Of Discretionary Intervention

It has been a long held position of the Commission that public hearings and public participation in the oversight of nuclear power are an important consideration for instilling public confidence in the oversight of the commercial nuclear power industry. In connection with that goal, public participation in hearings on matters of public concern has been a cornerstone of building public confidence. In the very first adjudicatory decision of the Commission they stated:

"we wish to underscore the fundamental importance of meaningful public participation in our adjudicatory process. Such participation, performed in the public interest, is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us." *Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975).¹

In connection with licensing hearings, it has been held that "[t]he Commission should be accorded broad discretion in establishing and applying rules for such public participation.

including rules for determining which community representatives are to be allowed to participate." *Portland General Electric CO.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 615 (1976). In this case, there has been a degradation in public confidence regarding the Davis-Besse events, and restoring that public confidence is critical to the NRC's mission. The Board correctly used such discretion when granting UCS/OCA discretionary intervention, explaining that the petitioners would provide meaningful contribution to the development of a sound record in the instant proceeding. A by product of that participation is the transparency afforded to the participants of the Commission's activities in responding to the Davis-Besse event.

The NRC Staff ("the Staff") in their opposition to the Board's Order granting discretionary intervention to UCS/OCA, posit that the Board ignored the requirement that discretionary intervenor be admitted only if they can "make a unique substantial contribution." *See January 3 Appeal* at 5. The Staff incorrectly interprets the legislative history applied of 10 C.F.R. 2.309(e). No where does in the history are the words "substantial" or "unique" used to describe the type of contribution needed to be made by the petitioner. 69 Fed. Reg. 2, 182, 2, 201 (January 14, 2004). The text actually explains that the petitioner must "contribute to the

¹ Mr. Siemaszko relies upon board orders in licensing cases as providing applicable guidance for matters of public policy and participation.

development of a sound record on important health, safety, environmental or legal issues.” and that another party in the matter cannot possess the same capability to represent that interest. *Id.* As explained by the Board in their decision, UCS/OCA wish to see consistent enforcement of the Commission’s regulations to avoid adverse action as a result of misguided actions that create the very real potential for undermining worker and public confidence in the NRC’s oversight capability. *See* December 22 Order at 3.

There is no dispute that Mr. David Lochbaum, the designated representative of UCS and OCA, has immersed himself in the numerous facts regarding the Davis-Besse near-miss incident. Indeed, the Staff does not dispute that he likely has the most exhaustive knowledge of the Davis-Besse record, outside of the Licensee (who is not a party to this proceeding) and the NRC Staff.² Moreover, the Staff does not challenge the position taken by Mr. Siemaszko that it will be impossible for Mr. Siemaszko to duplicate that degree of knowledge and understanding with the limited resources available to him. Therefore the Board correctly recognized the importance of UCS/OCA in the proceeding and its ability to contribute to the development of a sound record on important health, safety, environmental and evidentiary issues.

The Staff argues that the Board’s Holding is without any facts in which a conclusion can be based. *See* January 3 Appeal at 5. To the contrary, the Board explained that the decision was based on “the totality of our experience to date with UCS/OCA.” *See* December 22 Order at 4. The Board correctly recognizes the importance of UCS/OCA in this proceeding and not only did they rely upon the contentions provided by UCS/OCA but on prior positive and rewarding experiences with these public interest groups to come to their conclusion.

² Similarly, OCA has dutifully attended the numerous public meetings and forums conducted by the NRC Staff throughout the augmented inspection efforts. The combination of this knowledge base will ensure a complete, fair and accurate record is developed.

The Staff quotes a recent Commission decision that stated discretionary intervention is meant for a petitioner that raises a specific issue that on its own will contribute to the record. *See* January 3 Order at 6. The Staff misinterprets the Commission's decision in that they are not requiring a specific unique issue that, on its own, will contribute to the record but rather they are not endorsing petitioners for discretionary intervention when they do not *specify* any issues of concern to them. *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 346 (2002). Obviously, the difference between a licensing hearing and an enforcement hearing has to be recognized in evaluating the guidance of earlier Commission decisions. Diablo Canyon was a licensing proceeding.

The Board by granting UCS/OCA discretionary intervention has correctly recognized that by stating different contentions in their original petition, UCS/OCA did specify issues that concerned them and these issues are worth of exploration. The Board correctly reviewed UCS/OCA's petition and used their broad discretion to conclude that they would meaningfully contribute to the development of a sound record.

II. UCS/OCA Qualifies For Discretionary Intervention

A petitioner seeking discretionary intervention under Section 2.309(e) must address the following three factors 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 interest 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). The following three factors weighing against allowing intervention must also be addressed in the petition: (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).

In the legislative history of Section 2.309, the most important factor allowing for intervention is "the capability of the requestor seeking discretionary intervention to contribute to the development of a sound record on important health, safety, environmental or legal issues." 69 Fed. Reg. 2, 182, 2, 201 (January 14, 2004). The most important factor weighing against intervention as described in the legislative history is "the potential to inappropriately broaden or delay the proceeding." *Id.*

- A. The Board has correctly recognized that UCS/OCA can be expected to meaningfully contribute to the sound record

The Board in weighing the Petitioners' written submissions and their past experiences with UCS/OCA, as well as the contribution at the prehearing conferences, correctly decided that the Petitioners are "extremely knowledgeable in the factual, scientific, and regulatory areas that will be the focus of our hearings in this matter." *See* December 22 Order at 4. The Staff states in its appeal that is unsure what the Board meant as finding the Petitioners as "extremely knowledgeable." The Board clearly states that past experiences along with written and oral presentations allowed them to see the knowledge and expertise that UCS/OCA can provide to such proceeding. The Staff argues that "generalized expertise, even scientific eminence" is not a substitute for particularized knowledge. *See* January 3 Appeal at 7. Though this might hold true, it is inapplicable in the instant case because it has been shown that UCS/OCA does not simply bring "generalized expertise" to the table. As the Board correctly recognized, "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.” See December 22 Order at 4.

The Staff asserts that the Board is simply allowing for UCS/OCA to be permitted discretionary intervention because Mr. Siemaszko needs assistance. See January Appeal at 8. The Staff’s assertion is misleading and does not take the whole statement into context. The Board is explaining that because of UCS/OCA immersion in the near-miss incident at the Davis-Besse complex, their knowledge and their experience in that area cannot be matched by Mr. Siemaszko and would be “invaluable” to creating a sound record. The Commission has ruled that “[p]ermission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented.” *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 & 2), 50-339 OL, 4 NRC 631, 633 (1976). In the instant case, as recognized by the Board, Mr. Siemaszko simply cannot reproduce the type of knowledge on substantial issues of fact surrounding the entire near-miss incident, and therefore those issues will not be properly raised/presented; but, by allowing UCS/OCA discretionary intervention, the Board eliminates such a problem. The Staff argues that the information UCS/OCA “immersed” itself in has to be more than the just events before or after the near-miss. See January 3 Appeal at 9. UCS/OCA, as recognized by the Board, has not only immersed itself in the events before and after the near-miss, they have paid specific attention to Mr. Siemaszko’s situation and have studied the events and documentation that led to Enforcement Order against Mr. Siemaszko. See December 22 Order at 4.

The Staff argues that the UCS/OCA’s redrafted contentions should be ignored because

they were never really mentioned in the Board's order granting discretionary intervention and the Board has filed to hold UCS/OCA accountable to prove its ability to contribute to the scope of the proceeding. *See* January 3 Appeal at 11-12.

The Staff miscomprehends the state of the proceeding. The scope of the proceeding has now been defined by the Board, and not appealed by any of the parties. Advisable Contentions will be heard within the identified scope of the proceeding. In actuality, the Board talks about this specific topic in Footnote 7 of their order:

This Board has concluded that UCS/OCA, in its initial petition, adequately met its obligations under 10 C.F.R. § 2.309(e). However, to the degree it may be argued that the UCS/OCA initial petition was inadequate because the request for discretionary intervention was ambiguous, we note that the initial petition to intervene was prepared by two scientifically oriented public interest groups, not by a law firm. While a totally deficient *pro se* pleading may not be accepted, petitioners such as UCS/OCA are not held to the same pleading standards to which law firms may be required to adhere. Therefore, even if the initial petition had some technical shortcomings as a request for discretionary intervention, which we do not believe that it did, we would nevertheless grant discretionary intervention because, given Petitioners technical expertise and broad experience with NRC regulatory matters, we are convinced that UCS/OCA will meaningfully contribute to the development of a sound record on contested matters in this proceeding.

This policy of reading *pro se* petitions liberally has been paraphrased in numerous cases issued by the Licensing Board. *see e.g., International Uranium (USA) Corp.* (Source Material License Amendment), LBP-01-08, 53 NRC 204, 207-08 (2001); the Appeals Board. *see e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989); and the Commission. *see, e.g., Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999).

December 22 Order at 3 n 7.

It is obvious that the contentions were read more liberally because of the origin of the petitioner; therefore the Board correctly reframed such contentions in line with many decisions issued by the Board, and will hear those contention in the light of the identified scope of the proceeding.

1. UCS/OCA Ability to Contribute to the Development of the Record

The record regarding Mr. Siemaszko's actions and whether the penalty issued by the staff is warranted at all or warranted will be based upon a review of factors much broader than the staff acknowledges. Specifically, there are nine factors that the Staff should have considered in the initial enforcement document and enforcement boards have reviewed in reading decisions. *In the Matter Of Aharon Ben-Haim, PhD., Upper Montclair, New Jersey, Order Superceding Order Prohibiting Involvement in NRC'-Licensed Activities (Effective Immediately)* Docket No. IA 97-068, ASLB No. 97-731-01-EA; LBP-99-4, issued February 8, 1999, p. 29.³ Undeniably Mr. Lochbaum has developed a body of knowledge which will contribute to the sound development of the record in all of these nine factors.

As determined by the Board, Mr. David Lochbaum has clearly the most exhaustive knowledge regarding Davis-Besse and specifically this incident. This knowledge is only, arguably, trumped by the NRC Staff, but it is especially necessary in face of the attempts by the NRC to keep its case confidential, and the failure of the Staff to disclose the basis for the actions against Mr. Siemaszko. By correctly allowing UCS/OCA discretionary intervention into this proceeding, the Board is leveling the playing field. UCS/OCA's specific knowledge into the

³ The factors are as follows:

1. The level of the individual in the organization;
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing;
3. The safety consequences of the misconduct;
4. The benefit to the wrongdoer, e.g., personal or corporate gain;
5. The degree of supervision of the individual, e.g., how closely the individual is monitored or audited, and the likelihood of detection;
6. The employer's response, e.g., the disciplinary action taken;
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility;
8. The degree of management responsibility or culpability; and
9. Who identified the misconduct.

near-miss incident and Mr. Siemaszko's role in it, and analysis of these facts is irreplaceable in this proceeding and can only benefit the effort to establish a sound record

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

In granting discretionary intervention the Board had to review the petitioners' interest in the proceeding and any effect the outcome of the proceeding may have on their interests. The Staff argues that the petitioners' interests are general and therefore are the type the Commission has long held not to establish interest in an enforcement proceeding. *See* January 3 Appeal at 15. The Board correctly realizes the importance of this proceeding to UCS/OCA. Mr. Siemaszko's outcome can undermine the worker and public confidence of members of UCS/OCA in the NRC's oversight capability. By granting discretionary intervention to UCS/OCA, the Board is opening the door for the petitioners to protect their specific interests and the specific interests of their members. The Board "has broad discretion to provide hearings or permit intervention in cases where the avenues of public participation are not available as a matter of right." *See Consumers Power Co. (Palisades Nuclear Power Facility)*, ALAB-670, 15 NRC 493 (1982). The Board correctly used their broad discretion to allow the UCS/OCA the only available outlet to protect these interests.

C. Examining the factors weighing against discretionary intervention demonstrates that the Board made the correct decision to grant discretionary intervention to UCS/OCA

The Board correctly recognized that the factors weighing against discretionary intervention are not met by UCS/OCA. As stated earlier, the legislative history of the regulation states that the most important factor in weighing against discretionary intervention is "the potential to inappropriately broaden or delay the proceeding." 69 Fed. Reg. 2, 182, 2, 201

(January 14, 2004). UCS/OCA will not broaden the issues of the proceeding because the focus is on Mr. Siemaszko and the enforcement order against him, as evidenced by the three contentions discussed above. The Board correctly recognizes such in their order stating that "the issues to be resolved in this proceeding will not be broadened." *See* December 22 Order at 4.

Furthermore, it is obvious that this proceeding will actually be delayed more by the NRC's decision to appeal the Board's granting of discretionary intervention to the petitioners, along with their numerous requests for Stays, as opposed to allowing the petitioners into the proceeding. In fact, the Staff has delayed these proceedings for nine months already. These factors, also as they were correctly balanced by the Board, make it obvious that there is no weight towards not allowing discretionary intervention in this case.

The Staff explains that they believe the Board did not "clearly set forth the basis for its decision" thus leading to grounds for a reversal. *See* January 3 Appeal at 16. They base this assertion on a decision by the Board *In the Matter of Louisiana Power & Light Company*, (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983), was an appeal case where Oystershell Alliance and Save Our Wetland's, Inc. appealed the adequacy of the applicant revised pre-emergency public information brochure dealing with the issues of synergism and emergency planning. Unlike in the current case, that intervention had nothing to do with an individual enforcement action. The Staff however incorrectly interprets the statement and fails to provide the context for it. In this case, the Board states that "[d]espite the failure of a licensing board decision to explain its basis in reasonable detail, an appeal board need not necessarily reverse it. Instead, the appeal board may make factual findings based on its own review of the record and decide the case accordingly." *See Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983). Therefore, even if

it is found that explanation wasn't in "reasonable detail", the Commission is able to review the record themselves and see that within their broad discretion as intended by the legislation, the Board correctly granted discretionary intervention to UCS/OCA.

CONCLUSION

For all of the reasons stated herein, and to advance the cause of justice and provide a meaningful opportunity for a full and fair hearing in this enforcement case, ensuring that the Board is provided all material and important information necessary to the development of a full record, Mr. Siemaszko urges the Commission uphold the Board's December 22, 2005 Order granting UCS/OCA discretionary intervention in this proceeding.

Respectfully Submitted.

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NUCLEAR REGULATORY COMMISSION

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In the Matter of

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January 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Response of Andrew Siemaszko to NRC Staff's Appeal of Licensing Board Order of Decemer 22, 2005** were served this 13th day of January, 2006, by the means indicated (electronic mail *; regular U.S. Mail **; facsimile ***), on the following:

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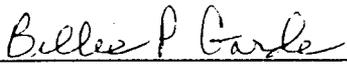
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