RAS 11894

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of	Docket No. IA-05-021-EA
ANDREW J. SIEMASZKO	ASLBP No. 05-839-02-EA
	June 23, 2006

RESPONSE TO ORDER DATED JUNE 14, 2006

(Providing Supplemental Briefing by Union of Concerned Scientists on the Subject of Discretionary Intervention)

INTRODUCTION

On June 14, 2006, the Board issued an Order directing the Union of Concerned Scientists (UCS) and Ohio Citizen Action (hereafter referred to as the Petitioners) to submit a supplemental brief of no more than 15 pages by June 26, 2006, on how the discretionary intervention standards articulated in the Commission's June 2, 2006, Memorandum and Order should be applied in the NRC's enforcement proceeding against Andrew J. Siemaszko.

DISCUSSION

The Commission's June 2nd order vacated the "discretionary intervention" portion of the Board's December 22, 2005, order due to two issues: (1) lack of admitted contentions, and (2) the Petitioners failure to meet the standard imposed in 10 C.F.R. § 2.309(e). It is difficult for the Petitioners to address these two issues because we believe the Board had already adequately dealt with both issues and, quite frankly, we don't see the Commission's point. Nevertheless, we will endeavor to explain how we believe the Board has already answered the Commission's questions.

TEMPLATE = SECY-37

SECY-02

Alleged Lack of Admitted Contentions

By letter dated May 13, 2005, the Petitioners sought a hearing in the NRC's proposed enforcement action against Andrew J. Siemaszko. On pages 4-20 of this letter, the Petitioners identified five (5) contentions and explicitly detailed how each contention met the specific criteria in 10 C.F.R. § 2.309(f)(1).

In a reply dated June 24, 2005, the Petitioners withdrew Contention No. 4 and reaffirmed our desire for admittance of Contentions 1, 2, 3, and 5.

In its August 2, 2005, order, the Board denied the Petitioner's request for standing and left open, for the moment, the question of our participation under the discretionary intervention provision of 10 C.F.R. § 2.309(e). Footnote 20 in the Board's order indicated that, if admitted under this provision, the Petitioners would be limited to litigating Contentions 2, 3, and 5, as reworded by the Board.

It was, and remains, our firm belief that the Board's rewording of our contentions did not fundamentally alter their original purpose, score, or objective. The Petitioners view the reworded contentions as having crisper definitions to facilitate subsequent decisions regarding the contentions. But the Petitioners respectfully disagree with the Commission and the NRC staff with respect to whether the Board's rewording corrected any defects or deficiencies in the original contentions. Whatever merits and flaws existed in the original contentions equally exist in the reworded contentions – the Board crafted a concise, clarifying restatement of the original contentions, an appropriate task conceded by the Commission in its June 2nd order (page 17).

In a reply dated August 12, 2005, the Petitioners clarified our request for participation under 10 C.F.R. § 2.309(e). On page 2 of this reply, the Petitioners accepted the Board's decision in its August 2nd Order that, if admitted, we would be limited to litigating only Contentions 2, 3, and 5.

In its reply dated August 29, 2005, the NRC staff expressed it opposition to participation

by the Petitioners. With the sole exception of footnote 2 on page 9, the NRC staff did not challenge the Board's identification of Contentions 2, 3, and 5, as litigation bounds should the Petitioners be granted participation. That sole exception contended that the Board's rewording of Contention 5 exceeded the Board's authority and role. The Petitioners question the timeliness of the NRC staff's belated objections to Contentions 2 and 3 since no objection whatsoever was made between the Board August 2, 2005, order and its December 22, 2005, order.

By order dated December 22, 2005, the Board granted the Petitioners discretionary intervention status. The Petitioners considered this decision, in conjunction with the Board's August 2nd order, to mean that we had discretionary intervention status with regard to Contentions 2, 3, and 5, as reworded by the Board.

The Petitioners believe that our discretionary intervention status will be confined to litigating Contentions 2, 3, and 5 submitted in our May 13, 2005, letter as reworded for clarity, succinctness, and a more efficient proceeding by the Board in its August 2, 2005, order. If the Board needs to explicitly chart the reasons for these Contentions being admissible, the Petitioners believe our May 13, 2005, letter provides the sound and complete bases to do so. In that submittal, the Petitioners went through each criterion in 10 C.F.R. § 2.309(f)(1) explicitly showing how each contention comported with the requirements – an analysis unchallenged by the NRC staff prior to the Board's December 22, 2005, order.

Alleged Failure to Satisfy Discretionary Intervention Standards

The Commission's order reiterated that discretionary intervention is "an extraordinary procedure," pointing out that no requests have been granted in the past dozen years and only eight such requests have been granted in the 30 years the current six-factor test has been applied.

Ironically, the Commission's order illustrates why the Petitioners need to be involved in this proceeding. The Commission provided only half of the context needed to understand and

apply its information. How many requests for discretionary intervention had been sought in the past 12 and 30 years? The Commission did not specify. If no one (else) has sought that status in the past 12 years and only 8 parties have done so in the past 30 years, the Commission's statistics carry one meaning; namely, all who try get in. But if dozens or hundreds of parties have sought discretionary intervention status but only 8 have been successful, that means something else; namely, select few who try get in. It is this type of context-deprived communication by the Commission and NRC staff that the Petitioners seek to prevent in the record for this proceeding. The Petitioners can and will contribute to a sound record by anchoring such utterances in their proper context so as to extract, explain and define their true meaning.

On page 11 of its June 2nd order, the Commission stated "that the Board – unlike the Commissioners – has seen Petitioners' representative, Mr. Lochbaum, and has had the opportunity to "take his measure" as a potential contributor to this particular hearing." The Commission failed to disclose to the Board that it deliberately chose not to see the Petitioners and our representative. By letter dated February 5, 2004, the Petitioners jointly wrote to the NRC Chairman and Commissioners begging them to conduct a public briefing on Davis-Besse before its restart, as the Commission had done before the restart of the troubled Millstone, DC Cook, and Salem reactors. The Commission had invited Mr. Lochbaum to present views during at least three Commission briefings conducted on Millstone and DC Cook. By letter dated February 25, 2004, NRC Chairman Diaz denied our request. The Commission conducted no public briefing prior to the restart of Davis-Besse. The Petitioners certainly tried to afford the Commission an opportunity to "take our measure" but the Commission declined.

On page 20 of its June 2nd order, the Commission tasked the Board with identifying the specific contributions the Petitioners could make to the proceeding. That tasking was prefaced by considerable discussion about general versus specific knowledge relative to a proceeding. In our June 24, 2005, reply, the Petitioners beginning on page 3 chronicle an extensive

involvement in the NRC's enforcement policy area (e.g., general knowledge) followed beginning on page 10 with a chronicle of extensive involvement in Davis-Besse's enforcement arena (e.g., specific knowledge). Clearly, the Petitioners possess both general and specific knowledge we will apply to this proceeding.

On page 21 of its June 2nd order, the Commission stated: "If the Board cannot identify specific contributions it expects from Petitioners, then the Board should deny their request to intervene as parties...". Unfortunately, we cannot explicitly now detail the instances where we will contribute to the soundness of the record. We can, however, point to specific instances during the recent Davis-Besse situation that illustrate the role we played there and expect to play here:

- On June 24, 2002, UCS submitted a formal allegation to the NRC's 0350 Panel for Davis-Besse regarding possible non-compliance with technical specifications for trisodium phosphate dodecahydrate (TSP) inside the reactor containment structure. We alleged that chronic operation of the reactor with small leakage of borated water could "pre-load" the containment with enough boric acid that the post-accident pH control intended from the TSP might be unattainable. By letter dated July 22, 2002, the NRC accepted this allegation into its process under tracking number RIII-02-A-0110. By letters dated February 23, 2003, and June 17, 2003, the NRC documented closure of allegation RIII-02-A-0110 following its determination that the actual leak at Davis-Besse did not compromise the post-accident pH control. On November 24, 2004, the NRC staff issued Information Notice 2004-21, "Additional Adverse Effect of Boric Acid Leakage: Potential Impact on Post-Accident Coolant pH," to all licensees with operating pressurized water reactors. By this information notice, the NRC alerted all PWR operators to the TSP concern we identified on June 24, 2002. We contributed positively to the overall record that very likely would have been deficient

on this point absent our involvement.

- On December 30, 2002, the NRC's Office of the Inspector General released its inquiry report for Case No. 02-03S, "NRC's Regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head." This report opened with the following:

  > *This Office of the Inspector General (OIG) event inquiry was based on concerns from the Union of Concerned Scientists (UCS) regarding a perceived lack of U.S. Nuclear Regulatory Commission (NRC) oversight of the Davis-Besse Nuclear Power Station (Davis-Besse).*

  The United States Senate Environment and Public Works Committee Subcommittee on Clean Air, Wetlands, and Nuclear Safety subsequently conducted an oversight hearing in 2003 where the NRC's Inspector General testified regarding the findings from this inquiry. Thus, UCS again contributed positively to the overall complete record regarding Davis-Besse and that record likely would have been incomplete absent the role we played.

- In spring 2003, both Ohio Citizen Action and UCS appeared on the *NOW Program with Bill Moyers* during a segment about Davis-Besse. One of us (Lochbaum) repeated on-air something he had been told by members of the NRC's 0350 Panel for Davis-Besse; namely, that the NRC did not know about boric acid on the reactor vessel head until after March 6, 2002. The very next business day, Mr. Lochbaum was contacted by someone who had worked at Davis-Besse in April 2000 when condition report 2000-0782 with color photographs (i.e., the infamous red photos) of boric acid atop the reactor vessel head was handed to an NRC inspector at Davis-Besse. UCS contacted members of the Ohio Congressional delegation who in turn contacted the NRC's Office of the Inspector General. That inquiry led to OIG Case No. 03-02S, "NRC's Oversigth of Davis-Besse Boric Acid Leakage and Corrosion

During the April 2000 Refueling Outage," issued on October 17, 2003.

On page 6 of its August 29, 2005, response, the NRC staff stated "the basis of the Petitioners' claimed knowledge if too vague to be useful in evaluating their ability to contribute to the development of the record" and on the following page the NRC staff stated "the Petitioners' access to this [Davis-Besse] information is not unique and thus would not contribute to the meaningful development of the record." The Petitioners disagree. We feel that the record clearly speaks to our understanding of the information and, more importantly, to our ability to assimilate the information so as to make positive contributes. It is not our possession of unique information that warrants our involvement in this proceeding – it is our demonstrated ability to uncover and call proper attention to previously discounted or overlooked information. In the TSP case outlined above, the NRC staff had all the information we did but failed to pursue the matter until we spotlighted it. Likewise, the NRC staff had all the information we did regarding regulatory oversight at Davis-Besse but hadn't documented the associated shortcomings until the two OIG reports we played a key role in initiating. We fully expect to replicate this role in this proceeding – subject, of course, to the bounds established by the Board in what we can litigate.

On page 11 of its August 29, 2005, response, the NRC staff had the unbelievable audacity to assert "The Petitioners' participation would inappropriately broaden the issues and delay the proceeding." First, the Petitioners cannot inappropriately broaden the issues for the simple reason that the Board determines what contentions are to be litigated via this proceeding and we will respectfully stay on the proper side of that bound. Second, in a proceeding where the NRC staff imposed a year-plus delay, it is offensive to the Petitioners for the NRC staff to even suggest that we would follow their lead in denying poor Andrew Siemaszko due process. We pledge to do nothing – NOTHING – that could protract the NRC's injustice against this innocent victim a single second. We point out that the target of NRC's misguided enforcement, Andrew Siemaszko, consistently supports our participation – something he probably would be loath to do

if he felt our participation would lengthen the time he remains falsely accused.

On page 23 of its June 2nd order, the Commission spoke of "the Board's implicit finding that Mr. Siemaszko needs special help from Petitioners both to develop a sound record and to mount an adequate defense against NRC Staff's enforcement order." The Petitioners read the Board's rulings, but never formed this impression regarding Mr. Siemaszko's defense needs. For the record, the Petitioners have nothing but the utmost respect for Mr. Siemaszko's counsel. In fact, if we were ever the target of misguided NRC enforcement action such as Mr. Siemaszko is enduring, we'd immediately contact Ms. Garde for help. It is sadly ironic that our participation to date has likely impeded rather than aided Mr. Siemaszko defense; on at least two occasions (June 24, 2005, and August 29, 2005), Mr. Siemaszko's counsel has filed documents with the Board in support of our participation. That effort represented *pro bono* time diverted from Mr. Siemaszko's defense, a diversion we sincerely regret. It is our hope – reasonable for the reasons articulated above – that can make sufficient positive contributions to this proceeding once it really gets underway to benefit all parties and more than compensate for the burden we have imposed on the Board and parties to date.

The Davis-Besse restart process provides insights on the role we expect to fill during this proceeding. During that restart process, we engaged on areas we felt were lagging. Our engagement contributed to a better outcome. We are not aware of any delay imposed by or resulting from our engagement. If we believed that our participation would not achieve that same result in this proceeding, we would not want to participate.

CONCLUSION

The Union of Concerned Scientists and Ohio Citizen Action believe the Board reached the right decision in granting us discretionary intervention status in this proceeding. We further believe that the Board was right to limit our participation to litigation of our Contentions 2, 3, and 5, as reworded by the Board for clarify. For the reasons specified above and in prior submittals,

we believe we have satisfied the legal requirements in 10 C.F.R. § 2.309 and look forward to participating in this proceeding to its conclusion.[1]

ON BEHALF OF OHIO CITIZEN ACTION
AND THE UNION OF CONCERNED SCIENTISTS

David A. Lochbaum
Director, Nuclear Safety Project

Washington, DC
June 23, 2006

[1] Copies of this order were sent this date by Internet e-mail transmission to all persons on the attached service list.

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NUCLEAR REGULATORY COMMISSION

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ANDREW J. SIEMASZKO	ASLBP No. 05-839-02-EA
	June 23, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response have been served upon the following persons by electronic mail this date, and by deposit of paper copies in the U.S. mail, first class, this date.

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David A. Lochbaum
Director, Nuclear Safety Project
Union of Concerned Scientists

Dated at Washington, DC
this 23rd day of June 2006