

July 7, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

ANDREW SIEMASZKO

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Docket No. IA-05-021

ASLBP No. 05-839-02-EA

NRC STAFF RESPONSE TO BOARD ORDER REGARDING
DISCRETIONARY INTERVENTION

INTRODUCTION

On June 14, 2006, the Atomic Safety and Licensing Board ("Board") in this proceeding issued an Order directing the Staff of the Nuclear Regulatory Commission ("Staff") to submit a supplemental brief addressing how the discretionary intervention standards articulated in the Commission's June 2, 2006, Order should be applied to the facts of this case.¹ Pursuant to 10 C.F.R. § 2.309(h), and for the reasons set forth below, the Ohio Citizen Action and Union of Concerned Scientists ("Petitioners") should not be granted discretionary intervention.

BACKGROUND

On April 21, 2005, the NRC Staff issued an Order to Andrew Siemaszko prohibiting his involvement in NRC licensed activities because he engaged in deliberate misconduct in violation of Commission regulations. On April 22, 2005, Mr. Siemaszko requested a hearing to challenge the Order; on May 17, 2005, the Staff responded. On May 13, 2005, Petitioners Ohio Citizen Action and the Union of Concerned Scientists submitted a request for hearing seeking leave to intervene in any hearing on Mr. Siemaszko's enforcement order. On June 7, 2005, the

¹ *Andrew Siemaszko*, CLI-06-16, 63 NRC ____ June 2, 2006; Licensing Board Memorandum and Order (Directing Supplemental Briefing on the Subject of Discretionary Intervention) (June 14, 2006) (unpublished) (June 14 Order).

NRC Staff filed its response, opposing the hearing request since Petitioners had failed to establish standing or proffer admissible contentions as required by 10 C.F.R. § 2.309. After a pre-hearing conference on June 16, 2005, both the NRC Staff and Petitioners filed supplementary briefs on the intervention request on June 24, 2005. On August 2, 2005, the Board issued an Order denying Petitioners intervention as of right.²

On August 12, 2005, Petitioners filed a response to the August 2 Board Order and requested discretionary intervention. On August 29, 2005, the Staff filed its reply to the Petitioners' request for discretionary intervention. On December 22, 2005, the Board issued an Order which granted discretionary intervention to Petitioners.³ On January 3, 2006, the Staff appealed the grant of discretionary intervention to the Commission, and, on June 2, 2006, the Commission issued a Memorandum and Order vacating and remanding the discretionary intervention portion of the December 22 Board Order.⁴ On June 14, 2006, the Board issued an Order directing Petitioners and the Staff to submit supplemental briefs on how the discretionary intervention standards articulated in the Commission Order of June 2 should be applied in the proceeding against Mr. Siemaszko.⁵ On June 23, 2006, Petitioners filed their "Response to Order Dated June 14, 2006" ("Response"). The Staff hereby responds to the Petitioners' filing and the June 14th Board Order.

² Licensing Board Order (Ruling Denying the Request for Hearing of Ohio Citizen Action/Union of Concerned Scientists and Requesting Briefs on the Appropriateness of Discretionary Intervention) (August 2, 2005) (unpublished).

³ Licensing Board Order (Granting Discretionary Intervention Status to Union of Concerned Scientists) (December 22, 2005) (unpublished).

⁴ *Siemaszko*, CLI-06-16.

⁵ June 14th Board Order.

DISCUSSION

I. Contentions

A. Legal Standards for Contentions

As stated by the Commission, prior to even considering whether Petitioners should be granted discretionary intervention, the Board must consider the threshold question of whether Petitioners have submitted at least one admissible contention. See *Siemaszko*, CLI-06-16, slip. op. at 10 (2006). In order to be admissible, the contentions as submitted must comport with the requirements set forth in 10 C.F.R. § 2.309(f). Under that regulation, Petitioners must state with particularity the contentions sought to be raised, and each contention must be accompanied by: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the Petitioners intend to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.⁶

In its August 2, 2005, Order, the Board did not explicitly rule on the Petitioners' proposed contentions, but in a footnote implicitly admitted three of the five contentions as redrafted by the Board. Therefore, the Commission's June 2 Order instructed the Board to determine whether any of the Petitioner's contentions were admissible *as submitted*.⁷ The Commission noted that the Board must not redraft an inadmissible contention to cure deficiencies and thereby render it

⁶ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁷ *Siemaszko*, CLI-06-16 at 10.

admissible, and that this bar on corrective redrafting is particularly compelling in the context of discretionary intervention. Thus, the Staff will briefly reiterate its opposition, set forth on its June 7, 2005 response to the OCA/UCS petition, to the admission of the three contentions Petitioners continues to desire to litigate⁸, as drafted by Petitioners.⁹

B. Specific Contentions

1. Contention No. 2

The facts do not support the NRC's conclusion that Mr. Andrew J. Siemaszko provided incomplete and inaccurate information in condition Report No. 2000-1037 and Work Order No. 00-001846-000.

Hearing Request at 9.

As the NRC Staff has previously argued, Petitioners' assertions regarding this contention do not actually dispute facts but instead criticize the Staff enforcement policy. As a basis for this contention Petitioners assert that "while the NRC develops procedures to guide its efforts, the agency seldom uses procedures to document completion of its efforts... It is duplicitous and just plain bad taste for the NRC to fault Mr. Siemaszko for incomplete and inaccurate recordkeeping when the agency itself keeps no records for its work process."

Hearing Request at 11. Beyond that nebulous statement, Petitioners put forward no supporting factual basis. A criticism of the Staff enforcement policy masquerading as a challenge to the facts should not be admitted to the proceeding.

2. Contention No. 3

⁸ The Staff assumes that Petitioners have withdrawn contentions 1 and 4 since Petitioners stated "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." See Response at 3.

⁹ Petitioners are incorrect in their assertion that the Staff has not challenged the admissibility of their proffered contentions. The NRC Staff filed its opposition to all proffered contentions on June 7, 2005, and has continued to maintain that all of Petitioners' contentions are inadmissible. See "NRC Staff Response to Hearing Request Filed by Ohio Citizen Action and the Union of Concerned Scientists."

The NRC did not establish that Mr. Andrew J. Siemaszko deliberately violated 10 C.F.R. § 50.9.

Hearing Request at 12.

As the Staff has previously argued, Petitioners are here trying to expand the scope of the proceeding to include broad policy issues regarding potential enforcement actions not taken by the Staff in the instant Order. Petitioners' underlying basis for the contention is that this enforcement action taken against Mr. Siemaszko is part of a continuing pattern of "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." Hearing Request at 14. However, enforcement proceedings are limited to whether the facts as stated are true and whether the remedy selected is supported by those facts.¹⁰ Petitioners' attempt to expand the proceeding to address broader issues of Staff enforcement policy is inadmissible; like Contention 2, this contention is an illusory challenge to the facts underlying the Order.

Petitioners clarified this contention somewhat in their June 24, 2005 filing stating:

In this instant case, the NRC staff did not make a determination that Mr. Siemaszko knew about the requirements of 10 CFR 50.9 and therefore knowingly violated them. In past cases involving the same enforcement policy, the NRC staff made such determinations and used such determinations to inform its decisions. This contention seeks to challenge the NRC staff's lack of similar determination in this case.

"Reply of Ohio Citizen Action and Union of Concerned Scientists to NRC Staff Response to Hearing Request," June 24, 2005 at 18-19.

To the extent that contention 3 does in fact seek to challenge the Staff's lack of a determination that Mr. Siemaszko knew about the requirements of 10 CFR § 50.9, this does not raise a litigable contention in the context of this proceeding, however, because the Staff's

¹⁰ See *Alaska DOT*, CLI-04-26, 60 NRC at 404; *Davis-Besse*, CLI-04-23, 60 NRC at 158; *Maine Yankee*, CLI-04-05, 59 NRC at 56.

enforcement order is premised on a violation of 10 CFR § 50.5(a)(2). Based on that regulation, the Board held that “to sustain the suspension order, we hold that the NRC Staff must prove Mr. Siemaszko deliberately provided information to a licensee which he knew to be incomplete or inaccurate in a respect material to the NRC, in violation of 10 C.F.R. § 50.5(a)(2).” See December 22, 2005 Board Order at 10. In so holding, the Board considered and specifically rejected the view that the Staff was required to prove that Mr. Siemaszko knew that he was causing a licensee to violate 10 C.F.R. § 50.9.¹¹ See *Id.* at 5-10. Thus, contention 3 was appropriately rejected by the Board in its December 22, 2005 Order, and should be dismissed.

3. Contention No. 5

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.

Hearing Request 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.” Hearing Request at 16. The basis offered for this contention again moves outside the scope of the proceeding by addressing the NRC Staff’s policy for enforcement actions. Petitioners are arguing that the Staff should have taken a different enforcement approach; however, as the NRC has previously asserted, Petitioners cannot seek to intervene in an enforcement proceeding to have a different penalty imposed.¹²

¹¹ This issue was briefed by the parties prior to the Board ruling. Notably, Petitioners chose not to file any briefs on this issue.

¹² See *Public Service Co. Of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980); *Alaska Dep’t of Transp. And Pub. Facilities*, 60 NRC at 407.

C. Conclusion

Petitioners have failed to proffer any admissible contentions. Since, as a threshold matter, Petitioners must have submitted at least one admissible contention in order to be considered for discretionary intervention, Petitioners cannot be granted discretionary intervention and their petition to intervene should be denied on that basis alone. Further, discretionary intervention should be denied based on a consideration of the applicable standards as discussed below.

II. Discretionary Intervention

A. Legal Standards for Discretionary Intervention

The standards governing discretionary intervention are set forth in 10 C.F.R. § 2.309(e). In its statement of consideration for the final rulemaking, the Commission codified the six-factor test presented in the *Pebble Springs*, now applied in weighing a decision to grant discretionary intervention.¹³ Section 2.309(e) requires that, in the initial petition, a petitioner seeking discretionary intervention shall address the following three factors weighing in favor of allowing intervention (“positive factors”): (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.¹⁴ A petitioner shall also address the following three factors weighing against allowing intervention (“negative factors”): (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

¹³ 69 Fed. Reg. 2201 (January 14, 2004).

¹⁴ 10 C.F.R. § 2.309(e)(1)(i)-(iii).

which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.¹⁵ The Commission reaffirmed that these six factors were relevant to the determination of whether to grant discretionary intervention, in vacating and remanding the earlier grant of discretionary intervention. See *Siemaszko*, CLI-06-16 slip op. (2006).

In their response to the Board's direction to provide supplemental briefs addressing the discretionary intervention standards, Petitioners did not address each of the factors articulated by the Commission's decision. Instead, they responded by generally arguing that they "don't see the Commission's point" in that the Board "has already answered the Commission's questions."¹⁶ The Staff responds below by addressing each of the factors weighed by the Commission in vacating the Board's Order, and argues that discretionary intervention should not be granted to Petitioners.

In weighing the six factors for discretionary intervention, a licensing board must keep in mind that discretionary intervention is "an extraordinary procedure" which should not be allowed unless there are "compelling factors in favor of such intervention."¹⁷ Based on this standard, the Commission noted that no requests have been granted in the past dozen years.¹⁸ In their June 23 Response, Petitioners contended that this "context-deprived communication" lacks "true meaning" without figures showing how many requests for discretionary intervention have been sought compared with how many have been granted. Response at 3-4. Further, Petitioners argued that the demonstrable lack of cases granting discretionary intervention points to the need for allowing Petitioners to participate. *Id.* This argument is unfounded and

¹⁵ *Id.*

¹⁶ Petitioners' Response to Order dated June 14, 2006 (June 23, 2006) at 1.

¹⁷ Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2201, 2220 (Jan. 14, 2004) ("Final Rule"). See also *Pebble Springs*, CLI-76-27, 4 NRC at 617; 69 Fed. Reg. At 2201.

¹⁸ *Siemaszko*, CLI-06-16 (June 2, 2006) at 4.

misunderstands the Commission's reliance on the statutory standard for granting discretionary intervention. In a footnote to their statement that "in the last dozen years, neither we nor our licensing boards have granted *any* requests for discretionary intervention," the Commission cited a considerable number of cases demonstrating this fact, concisely providing context where Petitioners claimed it is lacking.¹⁹ The strict standard for weighing discretionary intervention, by which the Board should carefully interpret the concrete facts of each case, is well established, and this standard was upheld by the Commission in its June 2 Order.

B. Ability to Contribute to a Sound Record

In the statements of consideration for the final rulemaking of 10 C.F.R. § 2.309(e), the Commission stated that the discretionary intervention standards "should ensure that only persons and entities who can meaningfully contribute to the development of a sound record on contested matters will be admitted as parties."²⁰ Accordingly, the most important factor weighed in granting discretionary intervention is the extent to which Petitioners "may be reasonably expected to assist in developing a sound record."²¹ To demonstrate their assistance in developing a sound record, Petitioners must show "significant ability to contribute on substantial issues of law and 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."²² Thus, in the enforcement proceedings against Mr. Siemaszko, Petitioners must show that they can contribute unique and specific information focused on the factual underpinnings of the Enforcement Order, and further that this information is based on their direct knowledge of the facts underlying the case.

¹⁹ *Id.* at 4-5.

²⁰ 69 Fed. Reg. at 2201.

²¹ *Siemaszko*, CLI-06-16 at 4.

²² *Pebble Springs*, CLI-76-27, 4 NRC at 617.

The Commission's Order stressed the distinction between general and specific knowledge with regard to the enforcement proceedings; while Petitioners may possess broad and general knowledge of the case, the Commission noted this was not a substitute for particularized knowledge of the issues in dispute. CLI-06-16 at 11. Generalized knowledge of the issues involved, even based on scientific expertise, does not justify discretionary intervention in the absence of specific knowledge of the case at hand.²³ Parties seeking discretionary intervention must have particularized knowledge relevant to the issues in dispute, and even scientific information may not be enough to satisfy the strict standard for allowing discretionary intervention. Here Petitioners wholly fail to demonstrate that they have such particularized knowledge.

The Commission stated in its Order that the Board must deny intervention if it "cannot identify specific contributions it expects from Petitioners."²⁴ In their own words, Petitioners cannot "explicitly now detail the instances where [they] will contribute to the soundness of the record."²⁵ Instead, in their June 23 Response, Petitioners detailed specific instances in which they identified concerns regarding Davis-Besse, including their submission of formal allegations regarding trisodium phosphate dodecahydrate (TSP) which prompted the NRC to take action.²⁶ In such instances Petitioners argued they have "contributed positively to the overall record" regarding Davis-Besse. However, these contributions relate to the general operation and oversight of the facility and do not relate to the record which supports the specific enforcement action against Mr. Siemaszko. Thus, Petitioners have failed to demonstrate any specific and

²³ CLI-06-16 at 11; *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998).

²⁴ *Siemaszko*, CLI-06-16 at 12.

²⁵ Petitioners' June 23 Response at 5- 7.

²⁶ *Id.*

unique knowledge relevant to whether Mr. Siemaszko deliberately provided inaccurate information in his Work Order and Condition Report.²⁷ While perhaps, by immersing themselves in the facts of the Davis-Besse incident, Petitioners have acquired second-hand knowledge of the broad issues related to Davis-Besse, they have not, however, acquired any direct knowledge relevant to determining whether Mr. Siemaszko actually provided an incomplete and accurate description of the work actions taken relative to the presence of boric acid deposits on the RPV head during the 12th refueling outage.

In sum, rather than address the requirements set forth in the Commission's June 2, 2006, Order by demonstrating their unique and specific knowledge that will contribute to the development of the record, Petitioners have instead provided instances demonstrating their generalized knowledge of, and involvement in, the Davis-Besse plant, but failed to demonstrate any specific knowledge of the facts at issue here. Conceding the foregoing, Petitioners stated "it is not our possession of unique information that warrants our involvement in this proceeding - it is our demonstrated ability to uncover" information.²⁸ However, an anticipated or speculative role of uncovering information is not one of the factors the Board must weigh in making the discretionary intervention decision. Further, NRC proceedings are not for private Attorneys General to vindicate broad policy matters.²⁹ It would be error to grant discretionary intervention in the face of this admission by Petitioners.

C. Petitioners Have Not Articulated Any Direct Property, Financial or other Interest in This Proceeding, or how this Proceeding May Affect Their Interests

The Commission reiterated in its June 2nd Order that in order to establish an interest in

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 7.

²⁹ *Nuclear Engineering Company*, (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 741 (1978).

the proceeding, a petitioner must demonstrate something more than merely a general policy interest in issues surrounding nuclear power. See CLI-06-16 at 15. Observing that the Petitioners' safety and environmental concerns are general in nature and are not specific to the pending enforcement action, the Commission noted that such generalized assertions are not sufficient to establish interests under 10 C.F.R. § 2.309(e).³⁰ *Id.* Petitioners have not offered concrete interests specific to this enforcement action in their June 23 Response. Despite having been directed to address the discretionary intervention standards, they did not address this factor, instead discussing only their potential contribution to the record.³¹ Thus, this factor weighs heavily against Petitioners.

D. Other Means Exist Whereby Petitioners' Interest Will be Represented

Other, more appropriate, means are available by which the Petitioners may pursue their interests, interests which, in the context of "legally cognizable interests," have not been shown to be affected by this proceeding. Indeed, in their response Petitioners note many ways in which they have pursued their interests over the years. Notably, they have submitted formal allegations, they have referred matters to the OIG, they have referred matters to Congress, and they have appeared on television. See Petitioners' "Response to Order Dated June 14, 2005" at 5-6. These are all more appropriate ways for Petitioners to vindicate their broad policy interests, rather than being granted party status in this narrow enforcement proceeding. Since other means exists to protect Petitioners' interest, this factor weighs heavily against them.

E. The Petitioners Interest Will Be Represented by Existing Parties

The only matter within the scope of this hearing is whether or not to sustain the Enforcement Order against Mr. Siemaszko, and it can be reasonably expected that

³⁰ See *Alaska Dep't of Transportation and Public Facilities*, 60 NRC at 407.

³¹ Petitioners' June 23 Response at 5-7.

Mr. Siemaszko would adequately represent that interest himself. This is not to say that Petitioners cannot offer assistance to Mr. Siemaszko in this proceeding. On the contrary, as the Commission noted, “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.”³² While Petitioners lack the particularized knowledge to justify discretionary intervention under the “extraordinary procedure” standard, Mr. Siemaszko can seek to use other mechanisms to benefit from Petitioners’ resources. This factor, therefore, weighs against Petitioners.

F. The Petitioners’ Participation Would Likely Broaden and Delay this Proceeding

Petitioners’ only comment on this factor was that they found it offensive that the Staff would suggest they might broaden and delay the proceeding. Response at 7. The only issues appropriate in this hearing are whether the Enforcement Order against Mr. Siemaszko is supported by the facts of this case and whether the 5-year sanction is appropriate. The Petitioners have consistently maintained that their interests in intervening in this proceeding go well beyond the Order. Most recently in their June 9 filing, Petitioners stated

If that (the reversal of the Order) were our sole interest, we could - at far greater convenience to us - volunteer to support Mr. Siemaszko’s counsel in a variety of ways up to and including serving as an expert witness. But, as we have discussed in prior submittal, we are equally interested in probing - within the clearly defined bounds established by the Board - the reasons why the NRC erred in deciding to take action against Mr. Siemaszko. From our public interest group perspective, it is as important to try to identify whatever process flaws factored in the NRC’s ill-advised action against Mr. Siemaszko as it is to undo the damage that action did to him. Identification of process flaws can contribute significantly to the record for this matter. We seek to prevent the next wrongful prosecution as much as remedy this one.

Response at 2.

³² *Pacific Gas & Electric* (Diablo Canyon), 55 NRC at 346.

Quite simply, beyond the factual basis for the action taken, the reasons why the NRC took the action against Mr. Siemaszko are not at issue in this proceeding. The participation of a party who has interests that go well beyond the issues in the proceeding does have the potential to broaden and delay the proceeding. This is especially true when a party's express interest is to raise issues outside the scope of the proceeding. For example, if the Staff is forced to appeal to the Board every time the Petitioners attempt to take discovery or otherwise raise an issue outside of the proceeding, this will delay the proceeding. Thus, this factor weighs against the Petitioners.

CONCLUSION

Petitioners have failed to proffer any admissible contentions, and their request for discretionary intervention should be denied on that basis alone. Additionally, they still fail to meet the standards for discretionary intervention as set forth in 10 CFR § 2.309(h). Based on the discretionary intervention factors that the Commission articulated in its June 2 Order, Petitioners have failed to demonstrate that they may reasonably be expected to contribute to the development of a sound record on issues included in the scope of the order. They have not demonstrated any particularized knowledge about the specific alleged actions of Mr. Siemaszko, but have, at best, merely shown second-hand knowledge of the Davis-Besse incident. They have not demonstrated more than a generalized interest in the proceeding.

Furthermore, there are alternative means by which Petitioners may participate in the proceeding to aid Mr. Siemaszko. For these reasons, the Board should deny discretionary intervention.

Respectfully Submitted,

/RA by Sara E. Brock/

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Sara E. Brock
Mary Baty
Counsel to NRC Staff

Dated at Rockville, Maryland
this 7th day of July, 2006

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

I hereby certify that copies of "NRC STAFF RESPONSE TO BOARD ORDER REGARDING DISCRETIONARY INTERVENTION" 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 7th day of July, 2006.

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