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Subject: I believe that the Nuclear Regulatory Commission (NRC) has made their worst decision since they prosecuted Thermal Science, Inc. (TSI) some ten years ago

I believe that the Nuclear Regulatory Commission (NRC) has made their worst decision since they prosecuted Thermal Science, Inc. (TSI) some ten years ago. In that case, NRC issued an Information Notice (December 22, 1994) indicating the Grand Jury indictment of TSI and Rubin Feldman, President, for allegedly making false statements to the NRC. No lower-level personnel were involved.

In a December 9, 1999 recap of the TSI story, the NRC advised that their Office of Investigations investigators found inconsistencies in TSI test reports. Results of the NRC investigation were forwarded to the U.S. Department of Justice (DOJ), which presented the matter to a Grand Jury which indicted TSI and its President. However, both the firm and its President were acquitted following a four-month criminal trial that ended in August 1995 (1). The NRC then attempted to administratively fine TSI \$900,000, but ultimately agreed to settle the matter for \$300,000 in order to bring the longstanding issue to closure without further litigation.

In the Davis-Besse case, which should not have been a surprise (2), NRC claimed that headquarters personnel had been misled as to the condition of the reactor vessel head, leading them to approve reactor operation past a deadline. However, there appears to be considerable evidence that the NRC was in no way deceived, had known of reactor coolant leaks and boric acid accumulations at Davis-Besse, that the extent of boric acid crystal accumulation was correctly portrayed (and shown to the NRC on videotape), and that some documents portrayed by the NRC as deceitful are, in fact, quite correct. Some of this evidence comes from reports from the NRC Inspector General's office, and some of it from groups critical of the NRC and Davis-Besse.

NRC knew that there had been leaks, in containment, and on the reactor vessel, at Davis-Besse. A regional inspector was shown pictures of the boric acid and rust mixture coming from the "weep holes" on the reactor head. NRC headquarters personnel were also aware that some portions of the reactor vessel head had not been inspected during outages, for various reasons, including boric acid crystal buildups.

At the public meeting held November 28, 2001, the utility estimated that Davis-Besse had between one and nine leaking Control Rod Drive Module nozzles. Based both on inspections at other plants and the analytic modeling NRC performed, the information available indicated that there were cracks and, likely, leaks at Davis-Besse.

The decision as to whether to allow Davis-Besse to operate beyond December 31, 2001 was almost exclusively a NRC Headquarters decision; few regional inputs were involved. NRC Headquarters personnel could easily have obtained

additional information from regional office or resident inspector personnel, or through requests for additional information from the utility (for example, a request for all nonconformance reports related to boric acid buildup).

The information supplied was more than adequate for NRC Headquarters personnel to make their decision, and that decision was, indeed, made, as documented in an NRC Inspector General report. The Order to have the plant shut down was drafted, reviewed, had support from the NRC legal group, and was sent to the Commission, essentially ready for issue. The utility clearly indicated that it would comply with shutting down if NRC was going to issue such an order.

The NRC's Office of Inspector General said that agency officials failed to uphold their mandate for keeping safety paramount to financial considerations by setting aside the shutdown order in the fall of 2001. The order was to be enforced no later than Dec. 31, 2001. Instead, senior NRC officials (Mr. Samuel Collins) let FirstEnergy keep operating the plant until Feb. 16 because they were "driven in large part by a desire to lessen the financial impact on FENOC that would result from an early shutdown." A written justification for this NRC decision was not developed until a year later.

NRC appropriately fined the utility, FirstEnergy, and sent its investigation to the Department of Justice, which presented the matter to a Grand Jury. NRC does not have criminal investigative authority (3)(although its investigators are classified and highly paid as criminal investigators), so a Grand Jury investigation was needed. According to an August, 2005 NRC Commission paper, "During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for criminal prosecution." No statistics were provided on how many cases were successfully prosecuted by DOJ.

The DOJ made a non-prosecution deal with top utility officials, and the Grand Jury indicted several low-level plant staffers, apparently expecting them to plead guilty. The staffers pleaded not guilty, and the trial has been considerably delayed while DOJ prosecutors try to understand the case. David Geisen pleaded not guilty to five counts of making false statements to a federal agency. Andrew Siemaszko and Rodney M. Cook, pleaded innocent to five and four counts of the same charge, respectively.

The NRC correctly notes that Condition Report No. 2000-1037 was initiated by Andrew Siemaszko on April 17, 2000. The condition was described as follows: "Inspection of the Reactor Head indicated accumulation of boron in the area of the CRD nozzle penetrations through the head." This Condition Report led to a Work Order being issued to correct the situation.

Central to the NRC's position that they were deceived is the phrase "Work performed without deviations." Andrew Siemaszko wrote these words on Work Order No. 00-001846-000 and signed his name on April 25, 2000. There is no record that the NRC reviewed this Work Order or associated Condition Report while making the decision to allow the plant to operate. However, the NRC cited this in its Order banning Siemaszko from working in the nuclear industry, stating that these four words misled the utility and the NRC into believing the reactor vessel head at Davis-Besse Ohio had been completely cleaned during the refueling outage in April 2000 and inspected to show no

signs of damage.

Page 2 of the work order defined three steps to be performed. Step 1 was assigned to the Radiation Test group and specified "Clean boron accumulation from top of reactor head and on top of insulation. See Andrew Siemaszko (Plant Engineering), for additional details." Step 1 was not signed by Siemaszko but by another worker.

Step 2 was assigned to the Mechanical section and specified "Remove and replace Lexan covers on reactor vessel head to facilitate cleaning." Step 2 was signed by Andrew Siemaszko on April 25, 2000. Step 3 was assigned to the Maintenance Services section and specified "If necessary manufacture replacement Lexan covers." Step 3 was signed by Andrew Siemaszko on April 25, 2000. Page 3 of the work order provided ample room to describe the work performed. The only entry on page 3 was "Work performed without deviations" by Andrew Siemaszko on April 25, 2000. Page 5 contained this discussion: "After initial cleaning a video inspection will be performed by the Framatome Technologies. Should additional cleaning be required the process will be repeated until most boric acid deposits are removed or as directed by HP [Health Physics]."

Andrew Siemaszko did not record that the cleaning task of Step 1 was performed without deviation (on April 25, 2000) because he was not responsible for that step. In fact, the reactor head cleaning activity under Step 1 was not even performed until three days later, on April 28, 2000. Somehow, the NRC has overlooked this significant date discrepancy.

Even if Andrew Siemaszko had been responsible for performing the head cleaning under Step 1 and his description on page 3 of the work order that "Work performed without deviations" had actually applied to head cleaning instead of Lexan cover installation, that would not have been a false or inaccurate statement. Page 5 of the work order clearly stated "Should additional cleaning be required [after the initial cleaning and subsequent video inspection] the process will be repeated until most boric acid deposits are removed or as directed by HP." It would not have been a deviation from the requirements contained in the work order, therefore, to complete Step 1 without removing all of the boric acid from the reactor head.

According to the FirstEnergy Root Cause Analysis Report, page 30, 12RFO (2000): An inspection video was required post cleaning. If the video revealed boric acid remaining on the RPV head, the cleaning steps were expected to be repeated. The RCS engineer acknowledges that the cleaning was not 100% successful and some boric acid deposits were left behind on the RPV head. The engineer stated that he was running out of time to continue cleaning the RPV head (the RPV head was scheduled to return to the RPV during the next shift). Outage management concurred that no additional time and dose should be spent because further attempts would not produce successful results and the results were believed to be acceptable.... FirstEnergy knew.

By letter dated October 30, 2001, the utility followed up on the commitment they had made to the NRC staff to provide "pictorial documentation of the visual examinations of the reactor pressure vessel head performed during the 10th, 11th and 12th refueling outages." The letter stated that "During the 12th refueling outage inspection, 24 of the 69 nozzles were obscured by

boric acid crystal deposits.” Not only did the utility inform the NRC that the reactor vessel head had not been fully cleaned and inspected during the Spring 2000 refueling outage, they submitted pictures of the boric acid covered head and Control Rod Drive Module nozzles to the NRC. These were not the only documents submitted to the NRC with similar information.

With the above evidence presented to them, can a federal jury find, without a shadow of reasonable doubt, that Andrew Siemaszko and the other three indicted individuals misled the NRC, or is an acquittal most likely? Will Andrew Siemaszko then prevail in his hearing before the NRC Atomic Safety and Licensing Board, presently on hold, or his complaint before the Department of Labor (for his dismissal), presently on hold? Most likely.

1. United States of America v. Thermal Science, Inc. (TSI): In this 1995 trial, TSI (the manufacturer of a variety of fire barrier materials, including a product that was used to protect various systems in nuclear power plants) and its president were indicted by the United States Attorney for the District of Maryland on four counts of false statements regarding tests submitted to the Nuclear Regulatory Agency in qualifying its product for use in nuclear power plants. Gordon Ankney of Thompson Coburn LLP acted as lead trial counsel during the four-month trial in the Maryland courthouse which resulted in acquittals of both defendants on all counts. Fully understanding the value of technology, the Firm's attorneys relied heavily on computer technology for presenting evidence during the trial, making Thompson Coburn one of the first firms to do so in a case of this complexity. Nearly a million documents, including detailed testing reports and a wide range of scientific documents, were available for use in the trial. The trial's judge and jurors expressed their appreciation of the Firm's use of the technology, for the ease of presentation of evidence and ultimately for reducing the length of the trial.

2. In 1971, thirty years before a hole was found in the reactor vessel head at Davis-Besse, a similar hole was found in Beznau-1 in Switzerland. “As a result of a leak in the seal weld of a control rod drive mechanism, an appreciable accumulation of boric acid residue was found on the reactor vessel head. The volume of this boric acid ‘snow’ was estimated at 1 to 2 cubic meters [35 to 70 cubic feet]”.....“After completion of the weld repair, inspection of the reactor vessel head uncovered a crescent shaped defect having maximum approximate dimensions of 1¼ inches in depth, 2 inches in width and encompassing 180 degrees around the adapter joining the control rod mechanism to the reactor vessel.” “Tests were begun in Pittsburgh and Europe to try and determine the exact attack mechanism that caused the indentation”, and superintendents of all operating pressurized water reactor plants were immediately notified of the situation by the AEC/NRC. They were cautioned to eliminate any accumulation of boric acid in contact with primary system components.” Since Davis-Besse did not begin operation until 1977, this 1971 notification was not sent to Davis-Besse.

3. An October 15, 1982, NRC memo indicates that “Section 161©) of the Atomic Energy Act, 42 U.S.C. 2201, authorizes the Commission to “make such studies and investigations [and] obtain such information . . . as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act or any regulations or orders issued thereunder.” Since the Atomic Energy Act contains criminal provisions, section 161©) can be read as authorizing the NRC to conduct criminal investigations. However, a more

specific provision in the Act should be construed as overriding the more general language in 161 (c). Section 221 (b) of the Atomic Energy Act, 42 U.S.C. 2271, provides that "[t]he Federal Bureau of Investigation of the Department of Justice shall investigate all alleged or suspected criminal violations of this Act." This section by its terms seems to give all criminal investigative authority under the Atomic Energy Act to the Department of Justice, and it would therefore appear that the NRC does not have the statutory authority to conduct criminal investigations.

.....whether the NRC should conduct criminal investigations under any circumstances. The simple legal answer to this question is that, since it does not have the statutory authority to do so, it should not."

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

ANDREW SIEMASZKO)

Docket No. IA-05-021

(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Exparte Communication (EMAIL ADDRESSED TO THE CHAIRMAN AND COMMISSION REGARDING THE ANDREW SIEMASZKO CASE) have been served upon the following persons by email.

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Docket No. IA-05-021
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[Original signed by R. L. Giitter]
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Dated at Rockville, Maryland
this 10th day of August 2006