

RAS 12223

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

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

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021

ASLBP No. 05-839-02-EA

September 12, 2006

ORDER

(Denying Discretionary Intervention Status to the Union of Concerned Scientists)

Introduction

On June 2, 2006, the Commission vacated the portion of this Board's December 22, 2005, Order in which we granted discretionary intervention status jointly to the Union of Concerned Scientists and Ohio Citizen Action (UCS/OCA). In addition, the Commission remanded this matter to the Board "for further proceedings consistent with the views [regarding the appropriate circumstances for granting discretionary intervention status set out in the Commission's Memorandum and Order]."¹

In remanding this matter, the Commission instructed that the granting of discretionary intervention status is "an extraordinary procedure"² and that the decision whether to grant discretionary intervention should be made "not through precedent, but through attention to the

¹ In the Matter of Andrew Siemaszko (Enforcement Proceeding), CLI-06-16, 63 NRC __, __ (slip op. at 3) (June 2, 2006) [hereinafter Remand Order].

² *Id.* at 4 (citing Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004)).

concrete facts of particular situations.”³ Accordingly, in acting upon the Commission’s remand, the Board sought to determine from the Commission’s guidance whether “concrete facts” that would justify the “extraordinary procedure” of granting discretionary intervention status to UCS/OCA are now present in this proceeding.

After extensive study of the Commission’s decision remanding this matter to the Board, and after examination of the facts of this case, the Board has concluded that the situation now presented does not warrant the extraordinary step of granting discretionary intervention status to UCS/OCA.

Litigation History

To put this decision in context, and thereby to convey a better understanding of how the Board reached its decisions on this remand, we believe that it will be helpful for us to once again outline the procedural history of this proceeding.

On April 21, 2005, after an exhaustive, five-year investigation, the Nuclear Regulatory Commission (NRC) Staff issued an Order to Andrew Siemaszko which, inter alia, prohibited his involvement in NRC-licensed activities for a period of five (5) years from the effective date of the Order.⁴ The Order provided for the opportunity to request a hearing and, on April 22, 2005, Mr. Siemaszko requested a hearing.⁵ On May 18, 2005, this Atomic Safety and Licensing Board was established,⁶ and the following day this Board granted Mr. Siemaszko’s request for a

³ Id. at 5 (quoting Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2) CLI-76-27, 4 NRC 610, 617 (1976)).

⁴ See Order Prohibiting Involvement in NRC-Licensed Activities: Andrew Siemaskzo, 70 Fed. Reg. 22,719 (May 2, 2005).

⁵ See Request for Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities - In the Matter of Andrew Siemaszko, IA-05-021 (April 22, 2005).

⁶ See In the Matter of Andrew Siemaszko: Establishment of Atomic Safety and Licensing Board (May 18, 2005) (unpublished).

hearing.⁷

While not opposing Mr. Siemaszko's request for a hearing, the NRC Staff filed a motion to delay this proceeding, and noted that its request for a delay was being made subject to the possibility that it might file subsequent requests for additional extensions.⁸ That initial request was followed up by several requests from the NRC Staff that this proceeding be stayed,⁹ all of which were granted by the Board.¹⁰ The most recent stay, which will run for an indefinite period and could last several years, was granted by the Board on March 2, 2006, and was affirmed by the Commission on May 3, 2006.¹¹

Meanwhile, two public interest groups, the Union of Concerned Scientists and Ohio Citizen Action, sought to intervene in the Siemaszko enforcement action.¹² Finding that UCS/OCA lacked standing within the meaning of 10 C.F.R. § 2.309(d), the Board denied the Petition to Intervene as a matter of right but sought briefing on the appropriateness of granting UCS/OCA "discretionary intervention" status pursuant to 10 C.F.R. § 2.309(e).¹³ The NRC Staff

⁷ See Licensing Board Order Granting Mr. Siemaszko's Hearing Request (May 19, 2005) (unpublished).

⁸ See NRC Staff Motion for Delay of Proceeding (May 17, 2005).

⁹ See NRC Staff Motion to Extend the Stay of the Proceeding (Aug. 19, 2005); NRC Staff Motion to Extend the Stay of the Proceeding (Dec. 6, 2005); NRC Staff Motion to Hold the Proceeding in Abeyance (Feb. 1, 2006).

¹⁰ See Licensing Board Orders (Granting NRC Staff Motions to Stay Proceedings) (July 22, 2005), (Sept. 29, 2005), (Dec. 22, 2005); Licensing Board Order granting NRC Staff Motion to Hold Proceeding in Abeyance (Mar. 2, 2006) (unpublished).

¹¹ See Commission Memorandum and Order, CLI-06-12, 63 NRC 415 (2006).

¹² See UCS/OCA Request for Hearing and Petition to Intervene (May 13, 2005) [hereinafter UCS/OCA Petition].

¹³ See Licensing Board Memorandum and Order (Denying UCS/OCA Petition to Intervene) (Aug. 2, 2005) (unpublished).

opposed the granting of discretionary intervention to UCS/OCA,¹⁴ but Mr. Siemaszko and UCS/OCA both strongly urged that discretionary intervention status be granted.¹⁵

Having fully considered UCS/OCA's initial petition and the additional briefing, the Board granted discretionary intervention status to them, concluding that they would "meaningfully contribute to the development of a sound record on contested matters' and that by admitting UCS/OCA into this proceeding we [would] not "inappropriately broaden or delay the proceeding."¹⁶

When the Board granted discretionary intervention status to UCS/OCA, we did so primarily because of the scope and complexity of the Davis-Besse investigation (the NRC Staff represented that the investigation had generated "some 70,000 pages of material"¹⁷). The Board believed, since UCS/OCA had spent more than three years studying the Davis-Besse incident and reviewing documents generated by the NRC's investigation,¹⁸ and since Mr. Siemaszko's counsel – who was from a small firm and was providing pro bono representation – would be starting from square one, that by allowing the participation of UCS/OCA as a party we would expedite these proceedings by allowing UCS/OCA to "meaningfully contribute to the development of a sound record on contested matters."¹⁹ In short, when the Board granted discretionary intervention status to UCS/OCA, we had concluded that we were presented with

¹⁴ See NRC Staff Reply – Discretionary Intervention (Aug. 29, 2005).

¹⁵ See Response of UCS/OCA – Discretionary Intervention (Aug. 12, 2005) [hereinafter UCS/OCA Response - Intervention]; Reply of Andrew Siemaszko - Discretionary Intervention (Aug. 29, 2005) [hereinafter Siemaszko Reply – Intervention].

¹⁶ Licensing Board Order (Granting Discretionary Intervention Status) (Dec. 22, 2005) at 2 (unpublished) (quoting Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. at 2201.

¹⁷ Prehearing Conference Transcript (Aug. 30, 2005) at 30.

¹⁸ See UCS/OCA Response - Intervention at 3.

¹⁹ 69 Fed. Reg. at 2201.

an “extraordinary situation” that justified our decision.²⁰

The NRC Staff appealed this Board’s Order granting discretionary intervention status to UCS/OCA.²¹ Acting on the NRC Staff’s appeal, on June 2, 2006, the Commission vacated the “discretionary intervention” portion of the Board’s Order dated December 22, 2005, and remanded the proceeding to the Board.²²

Discussion

Admissibility of UCS/OCS’s Contentions

In granting discretionary intervention status to UCS/OCA the Board did not expressly rule whether any of the contentions submitted by the petitioners were admissible under 10 C.F.R. § 2.309(f). Rather, in a request for additional briefing regarding, *inter alia*, discretionary intervention,²³ the Board stated that the Petitioners would be limited to litigating the following if they were admitted to the proceeding:

Contention # 2: Whether the facts support the conclusion that Andrew Siemaszko deliberately provided incomplete and inaccurate information in Condition Report

²⁰ What the Board viewed as relevant on this point was that finite resources would be available to prepare Mr. Siemaszko’s defense because he was represented by a small law firm on a *pro bono* basis. Given the limited resources available to Mr. Siemaszko, and the scope and complexity of the Davis-Besse investigation, the Board believed that (because UCS/OCA was experienced in NRC Proceedings and had spent more than 3 years studying the Davis-Besse incident and reviewing documents generated by the investigation) by allowing the full participation of UCS/OCA as a party to this proceeding we could compress the prehearing preparation period and allow UCS/OCA to meaningfully contribute to the development of a sound record on contested matters. That, we believed, was a sufficient basis for the Board to exercise discretion pursuant to 10 C.F.R. § 2.309(e) and admit UCS/OCA to these proceedings.

²¹ See NRC Staff’s Notice of Appeal (Jan. 3, 2006).

²² Remand Order, CLI-06-16, 63 NRC at __, (slip op. at 3).

²³ Licensing Board Order (Denying Request for Hearing [UCS/OCA] and Requesting Briefs on the Appropriateness of Discretionary Intervention) (Aug. 2, 2005) (unpublished) [hereinafter Board Order - Aug. 2, 2005].

No. 2000-1037 and Work Order No. 00-001846-000.²⁴

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.²⁵

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.²⁶

Based on the Commission's Remand Order, however, we must determine whether UCS/OCA have submitted at least one admissible contention. Accordingly, we hold that the Petitioners' Contention # 2, as recorded above, is admissible. UCS/OCA's Contention # 2, as narrowed by the Board, mirrors the Enforcement Order and is fully consistent with the description of an admissible contention in an enforcement proceeding as articulated by the

²⁴ UCS/OCA alleged that the paperwork prepared by Mr. Siemaszko accurately reflected both the work required and the work performed because the work order allowed cleaning of the reactor vessel head to be terminated without the removal of all boric acid deposits. UCS/OCA Petition at 10 (May 13, 2005). This is a factual dispute within the scope of this proceeding.

²⁵ In a Preliminary Order, before we had ruled on the scope of the proceeding, the standing of the Petitioners, or the admissibility of contentions, the Board set out what, from the ambiguous language of the Commission's Enforcement Order, would be the outside parameters of this proceeding. The contention language drafted by the Board, which appears in the text above, appeared in that preliminary order. Board Order - Aug. 2005 at 7 n.20. Subsequently, after the NRC Staff had a opportunity to explain the confused language of the Enforcement Order (the Order may have alleged either a violation of 10 C.F. R. § 50.5(a)(1), which requires a finding that the respondent acted willfully, or a violation of 10 C.F. R. § 50.5(a)(2) which does not require such a finding), the Board ruled on the scope of the proceeding. Specifically, in our Order of December 22, 2005, we held that the Commission's Enforcement Order alleged only a violation of 10 C.F.R. § 50.5(a)(2) and that, accordingly, willfulness was not an element to the charged violation. Board Order - Dec. 2005 at 10. Therefore, whether Mr. Siemaszko had actual knowledge of the requirements of 10 C.F.R. § 50.9 is not within the scope of this proceeding and, accordingly, UCS/OCA Contention # 3 is not within the scope of this proceeding.

²⁶ We have concluded that UCS/OCA Contention # 2, as narrowed by the Board, is admissible. We then proceeded to the issue of whether UCS/OCA should be granted discretionary intervention status. Because, as will be explained below, we resolve that issue in the negative, we need not, and do not, address the admissibility of UCS/OCA Contention # 5.

Commission in its Remand Order.²⁷ Moreover, UCS/OCA's petition, which relies on and describes the NRC's investigation of the Davis-Besse incident, as well as petitioners' expert review and analysis of that investigation, in this Board's judgment, meets all of the criteria for contention admissibility.²⁸

UCS/OCA's Contention # 2, as narrowed by the Board, is clearly within the scope of this proceeding and is adequately supported.²⁹ At issue then is whether the redrafting of the Contention, so as to narrow its scope, was within the Board's authority.

²⁷ Remand Order, CLI-06-16, 63 NRC __ (slip op. at 9).

²⁸ A petitioner must demonstrate that the "issue raised in the contention is within the scope of the proceeding," 10 C.F.R. § 2.309(f)(1)(iii), as defined by the Commission in its initial hearing notice. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). Contentions that fall outside the specified scope of the proceeding must be rejected. See Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). In addition, admissible contentions must be supported by "a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position." 10 C.F.R. § 2.309(f)(1)(v). Determining whether the contention is adequately supported, however, is not a determination on the merits. Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982). The petitioner does not have to prove its contention at the admissibility stage. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). Petitioner must, however, demonstrate that a contention asserts an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding," 10 C.F.R. § 2.309(f)(1)(iv). See Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. EPA, 417 U.S. 921 (1974). Admissible contentions must also "show that a genuine dispute exists" with regard to the issue in question. 10 C.F.R. § 2.309(f)(1)(vi). Finally, an admissible contention must provide a "brief explanation of the basis for the contention." 10 C.F.R. § 2.309(f)(1)(ii). "[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention." 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

²⁹ In NRC enforcement proceedings parties may not seek additional measures going beyond the terms of the order which triggered the hearing. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983); see also Sequoyah Fuels Corp. and General Atomics (Gore Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997). In the context of this enforcement action we are limited to adjudicate the issues set out in the Commission's Notice of Hearing, and neither the respondent, nor any intervenor, can expand or limit the scope of the proceeding. See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 200-05 (2004); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 289 (1979).

In editing Petitioners' contentions, we looked for guidance to the language of the enforcement order, which establishes the scope of the proceeding:

"If a hearing is requested by Mr. Siemaszko or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained." 70 Fed. Reg. at 22,722. (emphasis added)

The Enforcement Order thus restricted the scope of the proceeding consistent with the NRC's customary treatment of enforcement proceedings. This understanding regarding the scope of this proceeding was further clarified in the Commission's Remand Order in this proceeding which stated:

"Typically, enforcement orders limit adjudication to two issues only – whether the facts as stated in the order are true, and whether the proposed sanction is supported by those facts. For instance, an enforcement contention might appropriately address the factual underpinnings of the NRC Staff's finding of violation or the mitigating factors to be considered in determining the penalty."³⁰

While it is well established that Boards may not add material to enable a flawed contention to meet admissibility standards, we have considerable leeway to narrow contentions either by (1) eliminating parts of the contention that the petitioners do not support adequately or by (2) eliminating elements of the contention that fall outside the scope of the proceeding. Boards may narrow contentions at the moment of admission.³¹

For example, in Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004), the Order admitting petitioner's contention expressly stated that the Board "acted to further define and/or consolidate contentions when the issues sought to be

³⁰ Remand Order, CLI-06-16, 63 NRC __ (slip op. at 9).

³¹ Authority for narrowing the scope of a contention is found in 10 C.F.R. § 2.319(j), which authorizes the presiding officer to hold conferences "before or during the hearing for settlement, simplification of contentions, or any other proper purpose," and in section 2.329(c)(1), which specifies that a prehearing conference may be held for "simplification, clarification, and specification of the issues." See also Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

raised by one or more of the Petitioners appear related or when redrafting would clarify the scope of a contention.” LES, LBP-04-14, 60 NRC at 57. The LES Board then went on to admit several contentions while simultaneously applying limits to their scope.³² Because these restrictions were placed on the contentions at the moment of admission rather than beforehand, it is appropriate to characterize the LES Board’s action as admitting the contentions in part rather than as a two-step process of reformulation or redrafting followed by admission.

The Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253 (2004) case also included an example of the Board narrowing a contention at the time of admission – in that instance to bring the contention within the scope of the proceeding rather than just to eliminate elements that lacked support. The original contention included a wide range of water quality issues and read as follows:

The ER does not adequately address the adverse impact of operating one or two additional reactors on fish and other aquatic life health in Lake Anna and the North Anna River. In particular, the ER does not adequately consider the four primary impacts of the proposed reactors to the fish and other aquatic life at Lake Anna and downstream: increased water temperature, impingement, entrainment, and downstream flow rates. In addition, the ER does not address conflicts between Dominion’s proposals for water use and the requirements of the Clean Water Act (“CWA”) and its implementing regulations. Finally, the ER does not address the cumulative impacts of proposed Units 3 and 4 on the already-stressed aquatic systems in Lake Anna and the North Anna River.

North Anna, LBP-04-18, 60 NRC at 270-71.

The Board in North Anna found that parts of the contention were based on the Clean Water Act, which is enforced by the Environmental Protection Agency, and that those parts of

³² For example, in LES one contention on disposal security “was admitted, in that its bases (2) and (4) [were] sufficient to establish a genuine material dispute adequate to warrant further inquiry, albeit only as they challenge the adequacy of the LES contingency factor. The balance of the contention’s bases, including bases (1) and (3), fail[ed] to provide sufficient support for the contention in that they lack[ed] adequate factual or expert opinion support; fail[ed] to raise a material factual or legal dispute; and/or constitute[d] a general challenge to the financial assurance obligations related to decommissioning and disposal imposed by 10 C.F.R. §§ 70.23(a)(5), 70.25, so as to be an impermissible challenge to the Commission’s regulations.” LES, LBP-04-14, 60 NRC at 62 (citations omitted).

the contention were beyond the scope of an NRC proceeding. See id. at 271. As admitted, the contention included only one aquatic species, focused on water temperature, and read as follows:

The ER does not adequately address the adverse impact of operating one or two additional reactors on the striped bass in Lake Anna and the North Anna River. In particular, the ER does not adequately consider the impacts of the proposed reactors on the striped bass at Lake Anna and downstream arising from increased water temperature.

Id. at 276.³³

Following this guidance, we conclude that it is appropriate for the Board to narrow and admit UCS/OCA Contention # 2 as set out at page five supra. In so doing, we are limiting the Petitioners' contention so that it is within the narrow scope of this proceeding as established in the Commission Enforcement Order. As Petitioners' Contention # 2 was redrafted by the Board, if discretionary intervention were to be granted to UCS/OCA, the scope of the proceedings would not be expanded. The only issue that would be litigated in this proceeding would be whether to uphold the Commission's Enforcement Order barring Mr. Siemaszko from the nuclear industry for a period of five years.³⁴

³³ Although the examples referred to in the text deal with individual contentions, it is also possible for a Board to merge contentions and narrow them simultaneously, as was done in Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-04, 59 NRC 129 (2004). In that case the Board redrafted what it deemed to be the admissible sections of a number of contentions in order to create a new list of contentions. The admissible portions of seven different contentions were consolidated into only two. See id. at 166-67. See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 192-95 (1981) (emphasis added). (Petitioner was concerned with construction cost overruns as well as with operating costs, but the board ruled that such matters were outside the scope of the operating license proceeding and admitted only the part of the contention that was relevant to the proceeding. Id. at 195). Although Duke and Cleveland Electric represent a more radical approach than that employed in LES and North Anna, they do resemble those decisions in that the contentions were altered at the moment of admission rather than beforehand or afterwards.

³⁴ The Commission's authority to limit the scope of an enforcement proceeding was addressed and affirmed in Bellotti, 725 F.2d 1380. Bellotti, and post-Bellotti Commission decisions, established that the Commission may limit the scope of enforcement proceedings to whether the order should be sustained. See Boston Edison Company (Pilgrim Nuclear Power

The Appropriateness of Granting Discretionary Intervention Status to UCS/OCA

A board is authorized to grant discretionary intervention status to a petitioner who has not established standing to intervene as a matter of right pursuant to 10 C.F.R. § 2.309(e). In determining whether to grant discretionary intervention the Board is instructed by that regulation to “consider and weigh” the following:

- (1)(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;
- (2)(i) The availability of other means whereby the requestor’s/petitioner’s interests will be protected;
 - (ii) The extent to which the requestor’s/petitioner’s interests 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.

Station) 16 N.R.C. 44, 44-45 (1982); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 440-41 (1980). See also Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 58 (2004); Sequoyah Fuels Corp. And General Atomics (Gore, OK, Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 70 (1994). Having the authority to limit the scope of enforcement proceedings, the Commission typically “limit[s] adjudication to two issues only -- whether the facts as stated in the order are true, and whether the proposed sanction is supported by those facts.” CLI-06-16, 63 NRC at __ (slip op. at 9). See, e.g., Alaska Department of Transportation & Public Facilities (Anchorage, AK), CLI-04-26, 60 NRC 399, 404-11, reconsid’n denied, CLI-04-38, 60 NRC 652 (2004), petition for review docketed sub nom. Farmer v. NRC, No. 05-70718 (9th Cir. Feb. 11, 2005); Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 203 (2004). Utilizing this authority in Alaska Department of Transportation & Public Facilities, the Commission explained that “[f]or an enforcement order, the threshold question -- related to both standing and admissibility of contentions -- is whether the hearing request is within the scope of the proceeding as outlined in the order.” Accordingly, “[t]he only issue in an NRC enforcement proceeding is whether the order should be sustained,” and “[t]hus, the only matters at issue in this proceeding are the measures listed in the enforcement [order]. . . .” CLI-04-26, 60 NRC at 404-405.

No further guidance is given in the regulation. However, in the Federal Register Notice promulgating the regulation, it is noted that the Commission intended to incorporate the Pebble Springs³⁵ standards into the regulation, and that under those standards “discretionary intervention is an extraordinary procedure and will not be allowed unless there are compelling factors in favor of such intervention.”³⁶ The Commission then went on to note that, under its interpretation of Pebble Springs, “foremost among the factors in favor of granting discretionary intervention is whether the petitioner will assist in developing a sound record” and the “most important factor weighing against intervention is the potential to inappropriately broaden or delay the proceeding.”³⁷ Accordingly, in determining whether to grant discretionary intervention we must look to Pebble Springs and the cases interpreting that decision, particularly the Commission’s Remand Order in this proceeding, for guidance.

In Pebble Springs, the Commission held that Boards may “as a matter of discretion . . . grant intervention . . . to petitioners who are not entitled to intervention as a matter of right, but who may nevertheless make some contribution to the proceeding.” Pebble Springs, CLI-76-27, 4 NRC at 612. The Commission then went on to furnish guidelines explaining how such discretion should be exercised. In setting its guidelines, the Commission enumerated the six factors listed above, but also noted that “these are not the only factors which might be considered” and that “permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues. . . .” Id. at 616-17. The Commission in Pebble Springs then noted that:

in permitting adjudicatory boards to exercise discretion in ruling on question of participation, we recognize that judicial standing criteria

³⁵ See Pebble Springs, CLI-76-27, 4 NRC 610 (1976).

³⁶ 69 Fed. Reg. at 2201.

³⁷ Id. (citing Pebble Springs, CLI-76-27, 4 NRC at 617).

for intervention as a matter of right may, in a particular case, exclude petitioners who would have a valuable contribution to make to our decision-making process. Administrative procedures are sufficiently flexible to accommodate such petitioners.

Id. at 617. The Commission in Pebble Springs also cited with approval an opinion by Judge Friendly of the Second Circuit Court of Appeals in which he stated:

Agencies could well consider revision of their rules on intervention to distinguish between persons whose property rights are at stake and are thus entitled to all the rights of a party, and persons with a more generalized interest, a sort of super amicus curiae, whose participation can well be restricted to avoid undue prolongation of the hearing.

Id. at 615 (citing Pepsico, Inc. v. F.T.C., 472 F.2d 179, 184 n.4 (2d Cir. 1972)).³⁸

Accordingly, based on the terms of the Commission's Remand Order and relevant precedent, in determining whether to admit UCS/OCA as a matter of discretion we must, while keeping in mind that "discretionary intervention is an extraordinary procedure and will not be allowed unless there are compelling factors in favor of such intervention,"³⁹ turn to "the first and

³⁸ In addition, in determining whether to grant discretionary intervention in an enforcement action, we have guidance provided by the Appeals Board in Consumers Power Company (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493 (1982), which concluded that "boards are empowered to allow intervention in appropriate licensing and enforcement cases" Id. at 499. After a four page analysis of the six Pebble Springs factors, the Appeals Board in Palisades ruled that it was an abuse of discretion not to grant discretionary intervention status to the petitioner and, in so doing, noted that they were heeding the Commission's counsel in Pebble Springs where the Commission stated that our regulatory responsibilities can best be carried out by allowing intervention as a matter of discretion to some petitioners who do not meet judicial standing tests where such participation would likely produce a valuable contribution to the decision making process. Id. at 494. See also Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145, (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2) LBP-79-1, 9 NRC 73, 75 (1979); Ohio Edison Co. (Perry Nuclear power Plant, Unit 1), LBP-91-38, 34 NRC 229, 250-51 (1991).

³⁹ Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004).

(as the Commission has made clear) primary consideration⁴⁰ – whether the petitioner will assist in developing a sound record.

As noted above in the Litigation History section of this Memorandum, when the Board granted discretionary intervention status to UCS/OCA in December 2005, we did so primarily because of the scope and complexity of the Davis-Besse investigation and UCS/OCA's knowledge of that voluminous record.⁴¹ The Board believed, since UCS/OCA had spent more than three years studying the Davis-Besse incident and reviewing documents generated by the NRC's investigation, and since Mr. Siemaszko's counsel would be starting from a standing stop,⁴² that by allowing the participation of UCS/OCA as a party to this proceeding we would

⁴⁰ Perry Nuclear Power Plant, LBP-91-38, 34 NRC at 250-51 (citing Fermi, ALAB-470, 7 NRC at 475 and Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977)).

⁴¹ See supra. p. 4.

⁴² It is incumbent on the Board to correct a misconception that was apparently created by our Order granting discretionary intervention status to UCS/OCA which was dated December 22, 2005. In its Remand Order the Commission noted that this "Board gave insufficient weight to the fact that Ms. Garde [Mr. Siemaszko's attorney] has practiced in various legal capacities – adjudicatory and otherwise – before this agency since 1982." Remand Order at 13. Actually, we gave no weight to that fact since, at the time we initially ruled on the issue of discretionary intervention, that information was not in the record before us. The NRC Staff first introduced information regarding Ms. Garde's experience with NRC proceedings in its appeal memo to the Commission and, accordingly, we did not have the opportunity to weigh that information during our original decision making process. Nevertheless this new information was not in any way surprising to the Board. At all stages of this proceeding Ms. Garde has appeared competent and experienced in the extreme. While the Commission read our Order of December 22 as expressing "concern about Ms. Garde's background and ability to represent Mr. Siemaszko" (Commission Remand Order at 13) we have never had such a concern. What we intended to convey in our earlier Order was our perception that, because she was a member of a small law firm that was representing Mr. Siemaszko pro bono, there would be a finite limit to the resources that Ms. Garde and her firm could direct toward the preparation of Mr. Siemaszko's defense in any given day, week, month, or year. In allowing UCS/OCA into this proceeding as a party, it was our belief that we could expedite the resolution of this proceeding. Because the Petitioners had already spent three years studying the record of the extensive NRC investigation of Davis-Besse, the Board believed that the parties would be able to complete discovery and thereby bring this matter to a hearing and conclusion much more quickly if the Petitioners' resources, and the specific experience of UCS/OCA with the Davis-Besse incident and accident were added to the calculus.

both expedite these proceedings and allow UCS/OCA to utilize both its general experience with NRC proceedings and its more focused study and analysis of the Davis-Besse incident and the NRC's investigation of that incident to "meaningfully contribute to the development of a sound record on contested matters." It was not just that UCS/OCA "were extremely knowledgeable in the factual, scientific, and regulatory areas that will be the focus of the hearing," but also that they had spent years examining and analyzing the underlying incident that led us to grant their admission as a party.⁴³

However, it has now been approximately sixteen months since UCS/OCA initially sought to intervene in this proceeding and, because of the indefinite stay requested by the NRC Staff that was granted by the Board and affirmed by the Commission, it may be years before the stay is lifted and this Board is able to conduct a hearing to adjudicate the allegations which the NRC Staff made against Mr. Siemaszko. During the interim, three additional hearings arising out of the Davis-Besse incident have been granted,⁴⁴ and an Indictment has been handed up by a federal grand jury in the Northern District of Ohio charging Mr. Siemaszko and two other individuals with crimes allegedly committed at Davis-Besse.⁴⁵ In short, time has passed and significant events have occurred.

Accordingly, we must determine, given these occurrences, whether the circumstances at this time present the Board with "compelling facts in favor of intervention." 69 Fed. Reg. at 2201. We conclude that they do not.

At the time we initially considered whether to admit UCS/OCA as a party, it was our

⁴³ Board Order - Dec. 22, 2005, at 4 and 6.

⁴⁴ See David Geisen, IA-05-052; Dale Miller, IA-05-053; Steven Moffitt, IA-05-054; Licensing Board Order (Granting Hearing Requests) (Mar. 27, 2006) (unpublished). Adams Accession No. ML060860339.

⁴⁵ United States v. David Geisen, Rodney Cook, and Andrew Siemaszko, Case # 06 CR 712 Katz, (N.D. Ohio, Jan. 19, 2006).

belief that discovery could be expedited and that we would be promptly proceeding to a hearing on this matter. It is now clear that this administrative hearing will not proceed to a hearing for a considerable period. In addition, by the time that this hearing is conducted, Mr. Siemaszko will have had the benefit of discovery generated in the three administrative enforcement hearings arising from the Davis-Besse incident that have not been stayed, as well as the discovery generated in preparation for the pending criminal trial in the Northern District of Ohio and the information learned through the trial itself. In short, the material assistance that we anticipated would be provided by the participation of UCS/OCA as a party to this administrative proceeding will be provided through numerous other sources over the next few years. Accordingly, the value of their participation to the adjudicative process has been diminished by occurrences of the past several months.

Conclusion

Given the circumstances that currently exist, we are not presented with compelling factors in favor of granting discretionary intervention status. Accordingly, having found that UCS/OCA have not established standing as a matter of right pursuant to 10 C.F.R. § 2.309(d), the Board does not believe that it is authorized by 10 C.F.R. § 2.309(e), as that regulation has been interpreted and explained by the Commission, to exercise discretion and admit Petitioners

to this proceeding as a party. UCS/OCA's request for discretionary intervention is, therefore, denied.

IT IS SO ORDERED.⁴⁶

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 12, 2006

⁴⁶ Copies of this order were sent this date by Internet e-mail transmission to: (1) counsel for Mr. Siemaszko, (2) counsel for the NRC Staff, (3) David Lochbaum, Union of Concerned Scientists, and (4) Sandy Buchanan, Ohio Citizen Action.

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 LB ORDER (DENYING DISCRETIONARY INTERVENTION STATUS TO THE UNION OF CONCERNED SCIENTISTS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. IA-05-021
LB ORDER (DENYING DISCRETIONARY INTERVENTION
STATUS TO THE UNION OF CONCERNED SCIENTISTS)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of September 2006