RAS 11705

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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ANDREW SIEMASZKO	)	Docket No. IA-05-021

CLI-06-16

MEMORANDUM AND ORDER

This adjudication stems from an enforcement "Order Prohibiting Involvement in NRC-Licensed Activities" ("Enforcement Order") which the NRC Staff issued to Andrew Siemaszko.[1] The Enforcement Order found that Mr. Siemaszko had violated 10 C.F.R. § 50.5 by making material false statements in a matter within the NRC's jurisdiction. Specifically, the NRC Staff found that Mr. Siemaszko, while working as a systems engineer at the Davis-Besse Nuclear Power Station ("Davis-Besse") in Ohio, "deliberately provided materially incomplete and inaccurate information" in a condition report and a work order, "that are records that the NRC requires the Licensee to maintain." The Staff determined that this information "was material to the NRC because the presence of boric acid deposits on the [reactor pressure vessel] head is a significant condition adverse to quality that went uncorrected, in part, due to Mr. Siemaszko's actions. As such, the Staff found that Mr. Siemaszko had "engaged in deliberate misconduct" that caused FENOCO [FirstEnergy Nuclear Operating Company, the plant operator] to be in violation of NRC regulations.[2]

[1] 70 Fed. Reg. 22,719 (May 2, 2005).

[2] *Id.*

Mr. Siemaszko sought and was granted a hearing before the Atomic Safety and Licensing Board ("Board") to challenge the Enforcement Order.[3] The Union of Concerned Scientists and Ohio Citizen Action (collectively, "Petitioners" or "UCS/OCA") subsequently sought to intervene in the case. The Board issued an unpublished order determining that Petitioners had neither established standing as a matter of right nor clearly sought discretionary standing.[4] The Board, however, gave Petitioners an opportunity to clarify their intention, and they responded by requesting discretionary intervention.

On December 22, 2005, the Board issued an unpublished order which, among many other things, granted Petitioners' request for discretionary intervention.[5] On January 3, 2006, the NRC Staff filed the instant appeal of that ruling. (The remainder of the December 22nd

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[3] *See* Unpublished Board "Order (Granting Licensee's Hearing Request)," dated May 19, 2005, ADAMS Accession No. ML051390490. (ADAMS is the acronym for the NRC's Agencywide Documents Access and Management System, which is publicly accessible through the NRC's web page at http://www.nrc.gov.) Our enforcement rules provide for an automatic grant of such hearing requests. 10 C.F.R. § 2.202.

[4] Unpublished Board "Memorandum and Order," dated August 2, 2005, ADAMS Accession No. ML052140339 ("August 2nd Order"). The Board also ruled (*id.*, slip op. at 7 n.20) that Petitioners, if granted discretionary intervention, would be limited to arguing the following three contentions (as reworded by the Board):

> Contention 2: Whether the facts support the conclusion that Andrew Siemaszko deliberately provided incomplete and inaccurate information in Condition Report No. 2000-1037 and Work Order No. 00-001846-000.
>
> 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.
>
> 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.

[5] Unpublished Board "Memorandum and Omnibus Order," dated December 22, 2005, at 5, ADAMS Accession No. ML053620283 ("December 22nd Order").

Order is unchallenged.) The Staff asserts on appeal that granting discretionary intervention constituted an abuse of discretion. Although Petitioners filed no brief opposing the Staff's appeal, Mr. Siemaszko did. After reviewing the December 22nd decision and the appellate briefs, we vacate the "discretionary intervention" portion of the Board's order and remand that issue to the Board for further proceedings consistent with the views we set out below.

LEGAL STANDARDS

We will reverse a licensing board's determination on discretionary intervention only if the board has abused its discretion.[6] Under that review standard, the appellant faces a substantial burden. "It is not enough for [the appellant] to establish simply that the Licensing Board might justifiably have" reached the same conclusion as the appellant regarding the petition for discretionary intervention.[7] Rather, the appellant must persuade us "that a reasonable mind could reach no other result."[8]

This agency has "broad discretion to provide hearings or permit interventions in cases where these avenues of public participation would not be available as a matter of right"[9] – that is, discretionary intervention. In exercising this discretion, our presiding officers and licensing boards traditionally consider the following six factors, originally developed in case law but now codified in our regulations.

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[6] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 34 (1998) ("*PFS*"); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1149, *reconsid'n denied*, ALAB-402, 5 NRC 1182 (1977).

[7] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, *aff'd*, CLI-91-13, 34 NRC 185 (1991), quoting *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

[8] *WPPSS*, ALAB-747, 18 NRC at 1171.

[9] *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980), *aff'd*, *Save the Valley v. NRC*, 714 F.2d 142 (6th Cir. 1983) (Table). *See also Cities of Statesville v. AEC*, 441 F.2d 962, 976-77 (D.C. Cir. 1969).

Factors weighing in favor of allowing intervention [the "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;

Factors weighing against allowing intervention [the "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 which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.[10]

The first factor – assistance in developing a sound record – is the most important.[11]

When a licensing board balances these six factors, it must keep in mind that discretionary intervention is "an extraordinary procedure."[12] Indeed, in the last dozen years, neither we nor our licensing boards have granted *any* requests for discretionary intervention.[13]

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[10] 10 C.F.R. § 2.309(e)(1), (2). *See also Portland Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976).

[11] 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.

[12] Final Rule, 69 Fed. Reg. at 2201.

[13] *See Nuclear Fuel Services, Inc.* (Erwin, TN), LBP-04-5, 59 NRC 186, 196 n.11, *aff'd,* CLI-04-13, 59 NRC 244 (2004); *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 28-29 (2002); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 346 (2002); *PFS*, LBP-98-7, 47 NRC 142, 177-78 (1998), *aff'd*, CLI-98-13, 48 NRC at 34; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 358, *aff'd in part and rev'd in part on other grounds*, CLI-98-21, 48 NRC 185 (1998); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160-61 (1996); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 103 (1995). *Cf. PFS*, LBP-00-23, 52 NRC 114, 124 n.6, *aff'd*, CLI-00-21, 52 NRC 261 (2000) (stating in dictum that, had petitioner requested discretionary intervention, the Board would have denied the request); *Shieldalloy Metallurgical Corp.* (Cambridge, OH Facility), LBP-99-12, 49 NRC 155, 159 n.4, *aff'd,* CLI-99-12, 49 NRC 347 (1999) (same). *But cf. Sequoyah Fuels Corp.* (Gore, OK Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 75-76

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Only eight such petitions have *ever* been granted (without reversal)[14] during the thirty years we have applied the current six-factor test[15] – and the Commission or Appeal Board has taken the unusual step of declaring that *three* of those grants carry no precedential weight.[16]

Finally, because this agency resolves discretionary intervention motions largely on their facts,[17] NRC legal precedent is less helpful than on most other adjudicatory issues. As we stated in our seminal *Pebble Springs* decision, the practice of granting or denying discretionary intervention should develop "not through precedent, but through attention to the concrete facts of particular situations."[18]

THE BOARD'S DECEMBER 22 ORDER

Regarding the first and most important factor (ability to assist in developing a sound

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[13](...continued)
n.23, *aff'd*, CLI-94-12, 40 NRC 64 (1994) *(*not reaching issue but stating in dictum that petitioner had "made a sufficient showing under the *Pebble Springs* factors").

[14] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, *reconsid'n denied*, CLI-93-12, 37 NRC 355, 358-59, *clarified on other issues*, CLI-93-19, 38 NRC 81 (1993); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 250-51 (1991), *appeal denied*, CLI-92-11, 36 NRC 47 (1992), *petition for review denied*, *City of Cleveland v. NRC*, 68 F.3d 1361 (D.C. Cir. 1995); *Consolidated Edison Co. of NY* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 31 (1982), adopting as its own ruling the one-sentence dictum from LBP-82-25, 15 NRC 715, 736 n.10 (1982); *Consumers Power Co.* (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493, 499-506, *vacated as moot*, CLI-82-18, 16 NRC 50 (1982); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 87-88 (1979); *Black Fox*, ALAB-397, 5 NRC at 1148-49; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633-34 (1976); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-362, 4 NRC 627, 629 (1976).

[15] *Pebble Springs*, CLI-76-27, 4 NRC at 614-17.

[16] *Rancho Seco*, CLI-93-3, 37 NRC at 141; *Palisades*, CLI-82-18, 16 NRC at 52; *Pebble Springs*, ALAB-362, 4 NRC at 629.

[17] *Pebble Springs*, CLI-76-27, 4 NRC at 616.

[18] *Id.* at 617. *Accord Rancho Seco*, CLI-93-12, 37 NRC at 358.

record), the Board relied on "the totality of [its] experience to date" with Petitioners[19] and found that they could assist it in developing a sound record. According to the Board, "Petitioners' written submissions in this proceeding and their oral presentations at [the] prehearing conferences" demonstrate that they "are extremely knowledgeable in the factual, scientific, and regulatory areas that will be the focus of our hearings . . . ."[20] The Board also relied on Petitioners' "broad experience with Commission proceedings" which, according to the Board, "stands in marked contrast with the circumstances of Mr. Siemaszko, a private individual with no previous experience with NRC enforcement proceedings, who is being represented in this matter *pro bono* by a small law firm with limited resources."[21] The Board further concluded that "representatives of the UCS/OCA have immersed themselves in the facts of th[e] incident [at Davis-Besse] to a degree that would be impossible for Mr. Siemaszko to duplicate" and that "Mr. Siemaszko . . . simply lacks the knowledge and experience of the Petitioners."[22]

The Board also found that positive factor (ii) (nature of interests) supports a grant of discretionary intervention to Petitioners. According to the Board, Petitioners are "a nonprofit partnership of scientists and citizens combining rigorous scientific analysis, innovative policy development, and effective citizen advocacy to achieve practical environmental solutions and . . . ha[ve] long sought consistent enforcement of the Commission's regulations."[23]

The Board reached a similar conclusion regarding positive factor (iii) (adverse effect on interests). The Board concluded that "possible adverse effects . . . on [Petitioners'] interests

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[19] December 22nd Order, slip op. at 4.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 2-3 (footnotes and internal quotation marks omitted).

[are premised on the idea] that misguided enforcement actions have the very real potential for undermining worker and public confidence in the NRC's oversight capability."[24]

Finally, regarding all three negative factors, the Board found summarily "that Petitioners have sufficiently explained why their interests would not be adequately represented by the other parties, that there do not exist other means of serving Petitioners' interests that will be as efficient as admitting them to this proceeding, and that the issues to be resolved in this proceeding will not be broadened, nor will their resolution be delayed, by admitting UCS/OCA as a party to this proceeding."[25]

DISCUSSION

We initially observe that "abuse of discretion" is a high standard of review, and 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. We routinely accord substantial deference to the Board on matters involving standing[26] and also in the analogous area of credibility determinations.[27] Hence, we do not lightly set aside the Board's grant of discretionary intervention here.

But we find the Board's explanation of its ruling in some respects too cursory to evaluate fully and in other respects in error. Thus, we vacate the discretionary intervention portion of the December 22nd order and remand the matter to the Board for further consideration, consistent with today's decision.

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[24] *Id.* at 3 (footnote omitted).

[25] *Id.* at 4.

[26] *See*, *e.g.*, *PFS*, CLI-99-10, 49 NRC 318, 324 (1999).

[27] *See*, *e.g.*, *PFS*, CLI-03-8, 58 NRC 11, 25-27 (2003).

A. Need for an Admissible Contention

NRC procedural rules require a petitioner seeking to intervene as of right in NRC adjudication to demonstrate standing and to offer an admissible contention.[28] Although under our rules the "standing" requirement does not apply to petitions for discretionary intervention,[29] the "admissible contention" requirement does. Nothing in our rules of practice excuses a petitioner seeking discretionary intervention from proposing "at least one admissible contention," a general requirement covering *all* petitions to intervene.[30] Absent this requirement, a discretionary intervenor would be free to litigate issues it had not raised. This incongruity would give a discretionary intervenor a participatory role much broader than that of an intervenor as of right (who may litigate only its own contentions or those of another intervenor that it has properly adopted).[31]

As we stated in *Diablo Canyon* (a licensing proceeding), "we d[o] not intend that a petitioner should be entitled to discretionary intervention without an issue of its own worthy of

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[28] *See* 10 C.F.R. § 2.309(a), (d), (f).

[29] Discretionary intervention comes into play only "in the event that the petitioner is determined to lack standing to intervene as a matter of right under [10 C.F.R. § 2.309(d)(1)]." 10 C.F.R. § 2.309(e). The Commission's regulatory history makes clear that discretionary intervention was created to afford party status to petitioners unable to demonstrate standing:

> Under current agency case law, the Commission may . . . allow discretionary intervention to a person who does not meet standing requirements, where there is reason to believe the person's participation will make a valuable contribution to the proceeding and where a consideration of the other criteria on discretionary intervention shows that such intervention is warranted.

Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,724 (Dec. 3, 1998).

[30] *See* 10 C.F.R. § 2.309(a).

[31] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626-27 (2004); 10 C.F.R. § 2.309(f)(3).

exploration in an adjudication."[32] Although we have not previously had the opportunity to apply this requirement in an enforcement proceeding, we do so today.

To be admissible, a contention must meet certain specificity and basis requirements and also must fall within the scope of the proceeding.[33] The scope of an enforcement proceeding is narrow. 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.[34] For instance, an enforcement contention might appropriately address the factual underpinnings of the NRC Staff's finding of violation[35] or the mitigating factors to be considered in determining the penalty. By contrast, a contention seeking to challenge the agency's overall enforcement policy would fall outside the scope of the enforcement proceeding and therefore be inadmissible.

Although the Board in its August 2nd Order implicitly admitted three of the five proffered contentions,[36] it has yet to rule definitively on their admissibility. Nor has it explained why those

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[32] *Diablo Canyon*, CLI-02-16, 55 NRC at 346. *See also Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 194 (1982) (dictum: "We do not believe the Commission intended that a petitioner without a valid contention should be entitled to discretionary intervention, nor do we believe that a petitioner could qualify for discretionary intervention without a contention worthy of exploration in an adjudication").

[33] 10 C.F.R. § 2.309(f)(1).

[34] *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). *See generally Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

[35] *See*, *e.g.*, *North Anna*, ALAB-363, 4 NRC at 633 ("given the role that [Sun Ship] played in the fabrication of these particular supports, Sun Ship is well equipped to make a 'genuinely significant' contribution to that exploration").

[36] August 2nd Order, slip op. at 7 n.20 ("if admitted to this proceeding pursuant to 10 C.F.R. § 2.309(e), OCA/UCS would not be litigating their contentions as drafted, but rather

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three contentions are admissible. Therefore, we instruct the Board that, before it reconsiders the six discretionary intervention factors on remand, it must address the following threshold question: whether Petitioners submitted at least one admissible contention. If the Board finds that they have not, then it need not consider whether the six discretionary intervention factors, on balance, weigh for or against intervention.

When conducting its analysis, the Board should determine whether the contention is admissible *as submitted*. The Board may reframe contentions, following a determination of their admissibility, "for purposes of clarity, succinctness, and a more efficient proceeding."[37] But the Board must not redraft an inadmissible contention to cure deficiencies and thereby render it admissible.[38] Such an action would be tantamount to raising a new issue *sua sponte* without the required prior permission from the Commission.[39]

B. The Six Factors Relevant to Petitions for Discretionary Intervention

1. Ability to Contribute to a Sound Record

Pointing to "the totality of [its] experience to date" with Petitioners,[40] the Board allowed

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[36](...continued)
would be limited to litigating" the reframed contentions quoted at note 4, *supra*).

[37] *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-84-40A, 20 NRC 1195, 1199 (1984). *See also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1479, 1483 (1982).

[38] *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The bar against corrective redrafting is particularly compelling in the context of a request for discretionary intervention, for a Board rewrite of contentions undermines the very basis for granting discretionary intervention, *i.e.*, the *Petitioner's* demonstrated ability to contribute to the record.

[39] 10 C.F.R. § 2.340(a); *Duke, Cogema, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001).

[40] December 22nd Order, slip op. at 4. *See also id.*, slip op. at 3 n.7.

discretionary intervention chiefly because it found Petitioners "extremely knowledgeable in the factual, scientific, and regulatory areas that will be the focus of" the hearing.[41] The Board did not further explain its finding.

Petitioners, as organizations that, among other things, monitor and comment on nuclear power plant operations, no doubt have considerable general knowledge of issues related to power plants, including the Davis-Besse plant. But "generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute."[42] In justifying as "extraordinary [a] procedure" as discretionary intervention,[43] the Board should identify the *specific* contributions that Petitioners could offer.[44]

The Board's brief comment that Petitioners "have immersed themselves in the facts of th[e Davis-Besse] incident to a degree that would be impossible for Mr. Siemaszko to duplicate"[45] is too general to give us the necessary assurance that Petitioners would contribute to a sound record in this adjudication. We therefore remand this particular issue (*i.e.*, the ability to contribute to the development of a sound record) to the Board for further consideration. We also instruct the Board on remand to examine closely the relevant portion of the adjudicatory record[46] and to render a record-based analysis and finding on the question whether Petitioners

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[41] *Id.* at 4.

[42] *PFS*, CLI-98-13, 48 NRC at 35. The most vivid example of this practice is our refusal in *PFS* to allow discretionary intervention to a distinguished group of scientists -- including six Nobel laureates -- because their knowledge was not specifically relevant to the proceeding at bar. *See id.*, 48 NRC at 34-35, *aff'g* LBP-98-7, 47 NRC at 177-78.

[43] Final Rule, 69 Fed. Reg. at 2201.

[44] *See* August 2nd Order, slip op. at 7 n.20.

[45] December 22nd Order, slip op. at 4.

[46] The relevant portion of the adjudicatory record is limited to the Petition to Intervene containing the request for discretionary intervention, and any responsive Answers and Replies.

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would bring useful knowledge or insight to the proceeding beyond their general background knowledge and expertise.

If the Board cannot identify specific contributions it expects from Petitioners, then the Board should deny their request to intervene as parties, absent other "compelling" factors favoring intervention (which we briefly discuss in Part B.2 of this Order, below).[47] As we have previously observed, a denial of a motion for discretionary intervention does not eliminate all possibility of Petitioners' participation in the litigation, *e.g.*, Petitioners could request permission to participate as *amici curiae* on appropriate issues,[48] and/or their representative could serve as an advisor to Mr. Siemaszko, or (if qualified) as an expert witness.[49]

Before leaving our review of the Board's discussion of the "sound record" factor, we must address 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 the NRC

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[46](...continued)
See 10 C.F.R. § 2.309(h). The instant case, however, has a somewhat larger record because the Board allowed Petitioners to file an amended Petition to Intervene setting forth, arguably for the first time, their request for discretionary intervention. *See* note 4 and associated text, *supra*.

[47] When issuing our discretionary intervention rule, we characterized the "sound record" factor as "foremost" in importance, but we also indicated that other factors, especially the last (inappropriate broadening or delay of the proceeding) could overcome it. *See* Final Rule, 69 Fed. Reg. at 2201. Consistent with this principle, prior adjudicatory decisions have typically examined all six discretionary intervention factors, regardless of the result on the critical first factor ("assist in developing a sound record"). *See*, *e.g.*, *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422-23 (1977), *aff'g* LBP-77-36, 5 NRC 1292, 1296 (1977); *Perry*, LBP-91-38, 34 NRC at 250-51; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 & n.16 (1990), *aff'd*, ALAB-952, 33 NRC 521, *aff'd*, CLI-91-13, 34 NRC 185 (1991); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175, 179 (1981). Even so, we are aware of no NRC decision allowing discretionary intervention in the face of a negative finding on the "sound record" factor.

[48] *See* 10 C.F.R. § 2.315(d).

[49] *See, e.g., Diablo Canyon*, CLI-02-16, 55 NRC at 346*; PFS*, CLI-98-13, 48 NRC at 35.

Staff's enforcement order. The Board, for example, characterized Mr. Siemaszko's attorney, Billie Garde, as merely a member of "a small law firm with limited resources," representing him *pro bono*.[50] But Ms. Garde is not unfamiliar with NRC proceedings. The Board gave insufficient weight to the fact that Ms. Garde has practiced in various legal capacities -- adjudicatory and otherwise -- before this agency since 1982.[51] Most recently, she represented a petitioner in a 2004 enforcement adjudication against the Alaska Department of Transportation and Public Facilities.[52] She has also participated as counsel of record in three other NRC adjudications -- representing a petitioner to intervene in *Turkey Point*,[53] an intervenor in *Comanche Peak*,[54] and a licensee in *H&G Inspection Co.*[55]

In any event, even were the Board's concern about Ms. Garde's background and ability to defend Mr. Siemaszko better founded, we still would not rely on it to justify granting discretionary intervention. A policy of granting discretionary intervention whenever a petitioner has more experience or background than another participant or party could lead to complex and inappropriate comparative inquiries into various participants', parties', and lawyers' resources and experience. An open-ended approach like this would also be inconsistent with our view that "discretionary intervention is an extraordinary procedure, and will not be allowed unless

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[50] December 22nd Order, slip op. at 4.

[51] Letter from Ms. Garde to Mr. David Meyer (NRC), dated May 11, 2000, ADAMS Accession No. ML003725293.

[52] *Alaska Department of Transportation & Public Facilities* (Anchorage, AK), LBP-04-16, 60 NRC 99, *rev'd*, CLI-04-26, 60 NRC 399, *reconsid'n denied*, CLI-04-38, 60 NRC 652 (2004), *appeal docketed sub nom. Farmer v. NRC*, No. 05-70718 (9th Cir. Feb. 11, 2005).

[53] *Turkey Point*, LBP-90-24, 32 NRC 12 (1990), *aff'd*, ALAB-952, 33 NRC 521, *aff'd*, CLI-91-13, 34 NRC 185 (1991).

[54] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103 (1988).

[55] *H & G Inspection Co.*, ALJ-89-1, 29 NRC 319 (1989).

there are compelling factors in [its] favor."[56]

Discretionary intervention is meant to ensure a sound adjudicatory record, not simply to provide a second representative to assist (allegedly) ill-represented parties. Here, though, rather than concentrating on Petitioners' potential contribution to the record, the Board focused on what it considered the disadvantages of Mr. Siemaszko and his counsel. In other words, the Board largely based its "sound record" ruling *not* on Petitioners' relevant knowledge and experience (the test in 10 C.F.R. § 2.309(e)), but instead on Mr. Siemaszko's and his counsel's purported *lack* of such knowledge and experience. This was legal error.

We turn now, briefly, to the remaining five factors which must be considered when ruling on requests for discretionary intervention.

2. Other Discretionary Intervention Factors

The Board offered an incomplete explanation of how the remaining discretionary intervention factors affected its determination. The Board brushed aside in a single sentence all three of the so-called "negative" factors (other means to protect petitioners' interests, the adequacy of existing representation of petitioners' interests, and the potential for delay[57]), stating merely that Petitioners have "sufficiently explained" why those factors do not defeat discretionary intervention. But it is not self-evident why that is so, given that Mr. Siemaszko is contesting the enforcement order with able counsel, that Petitioners could participate in an *amicus*, advisory, or, potentially, even an expert-witness capacity, and that admitting additional parties could inappropriately delay the proceeding. We do not hold that the Board's findings necessarily constitute an abuse of discretion, only that they are unexplained and do not come to grips with seemingly contradictory considerations. The Board's terse, one-sentence statement

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[56] Final Rule, 69 Fed. Reg. at 2201.

[57] 10 C.F.R. § 2.309(e)(2).

addressing all three negative factors is, in our view, uninformative.

The same can also be said of the remaining two "positive" discretionary intervention factors – Petitioners' interests and the *Siemaszko* proceeding's potential effect on them.[58] Again, the Board simply states that Petitioners here meet those factors, but without providing a sufficient explanation. To all appearances, though, Petitioners' safety and environmental concerns are quite generalized, and not specific to this enforcement action.[59] While we would not expect discretionary intervenors to show the same kind of "injury-in-fact" necessary for standing as of right – indeed, the Board here has already held that Petitioners lack such injury[60] – our rules still contemplate something more specific than merely a general policy interest in issues surrounding nuclear power.[61] Again, we expect boards taking the "extraordinary" action[62] of allowing discretionary intervention to set out specific findings on each pertinent factor.

We therefore remand to the Board these issues as well, with instructions to conduct a more detailed analysis of these five factors.

CONCLUSION

For the foregoing reasons, we *vacate* the "discretionary intervention" portion of the Board's December 22nd Order, *remand* the "discretionary intervention" issue to the Board,

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[58] 10 C.F.R. § 2.309(e)(1)(ii) & (iii). Today's decision already addresses the other "positive" factor, *i.e.*, "assist[ance] in developing a sound record."

[59] The Board found potential injury because "misguided enforcement actions have the very real potential for undermining worker and public confidence in the NRC's oversight capability." August 2nd Order, slip op. at 3 (footnote omitted).

[60] *See* August 2nd Order.

[61] *See PFS*, LBP-98-7, 47 NRC at 177.

[62] Final Rule, 69 Fed. Reg. at 2201.

including the issue of whether Petitioners have submitted an admissible contention, and *direct* the Board to reconsider the issue in light of the views we express in today's decision.

IT IS SO ORDERED.[63]

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd of June, 2006.

Commissioner Gregory B. Jaczko respectfully dissents:

I offer a separate dissenting opinion on this Order because I disagree with the majority that discretionary intervenors seeking to participate in an enforcement proceeding should, in addition to meeting the other regulatory requirements, also be required to file admissible contentions. As the majority recognizes, the scope of enforcement proceedings is very narrow, typically limited to only two issues - whether the facts as stated in the order are accurate and whether the proposed sanctions are supported by the facts. With only two areas subject to admissible contentions, it seems a meaningless request to require those seeking discretionary intervention to restate one or both of these issues. The majority is concerned that absent an admissible contention requirement, a discretionary intervenor might have a much greater participatory role than that of an intervenor as of right. This concern, however, is not

[63] We recently affirmed a Board Order holding this proceeding in abeyance pending a related criminal proceeding. *See* CLI-06-12, 63 NRC ___ (May 3, 2006). Notwithstanding the abeyance Order, we expressly authorize the Board to resolve the discretionary intervention issue now, in order to avoid unnecessary procedural delay or confusion when the merits proceeding resumes.

persuasive in the context of an enforcement proceeding where all participants are limited to discuss only those issues specified in the order. Since requiring an admissible contention of discretionary intervenors in enforcement proceedings results in little more than an unnecessary and inefficient paperwork exercise, I do not support the Commission's holding in this regard.

Moreover, requiring those seeking discretionary intervention to file an admissible contention, in addition to meeting the regulatory requirements outlined in section 10 C.F.R. § 2.309(e), results in a largely duplicative analysis on the part of those determining whether or not to grant the intervention. The analysis that must be undertaken to determine if the discretionary intervention standards are met ultimately addresses the same concerns as the contention admissibility standards. For example, contention admissibility requirements aimed at ensuring that only issues within the scope of the proceeding are raised involve the same discussion as the element required to be addressed when reviewing whether the requestor for discretionary intervention would inappropriately broaden the issues or delay the proceeding (10 C.F.R. § 2.309(e)(2)(iii)). Likewise, ensuring that a contention has the necessary factual and evidentiary support in order to be admissible will involve the same discussion as addressing the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record (10 C.F.R. § 2.309(e)(1)(I)). Given the overlapping nature of the requirements for contention admissibility and for discretionary intervention in the context of an enforcement proceeding, requiring a requester to meet both offers no additional benefits to the process and at the same time appears inconsistent with the Commission's interests over the years in seeking additional efficiencies in adjudicatory proceedings.