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NUCLEAR REGULATORY COMMISSION

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021

CLI-06-12

MEMORANDUM AND ORDER

On March 2, 2006, the Licensing Board in this matter issued a split decision granting a motion by the NRC Staff to hold this enforcement proceeding in abeyance, pending a criminal action against Andrew Siemaszko in Federal District Court.¹ The dissenting judge would have denied the motion. On March 10, Mr. Siemaszko appealed the Board's decision.² We affirm.

BACKGROUND

This adjudication stems from an "Order Prohibiting Involvement in NRC-Licensed Activities" ("Enforcement Order") which the NRC Staff issued to Mr. Siemaszko on April 21,

¹ Unpublished "Memorandum and Order," ADAMS Accession No. ML060610647 ("March 2 Order"). (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>).

² Appeal of the Atomic Safety and Licensing Board's March 2, 2006 Order to Hold the Enforcement Proceeding Against Andrew J. Siemaszko in Abeyance, dated March 10, 2006 ("Appeal").

2005.³ 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. More specifically, the Enforcement Order 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 NRC 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 NRC Staff found that Mr. Siemaszko had "engaged in deliberate misconduct" that caused FENOCO (First Energy Nuclear Operating Company, the plant operator) to be in violation of NRC regulations.⁴

Two years after Mr. Siemaszko prepared those documents, FENOCO discovered that an acid leak had eaten a hole through the entire 6.63-inch-thick low-alloy steel cap on the reactor head -- leaving only the 0.202- to 0.314-inch-thick stainless steel clad material as the remaining reactor coolant system protection boundary. This discovery led to an NRC inspection which, among other things, resulted in the 2005 Enforcement Order at issue here. The Enforcement Order found Mr. Siemaszko in violation of section 50.5 and prohibited him from involvement in NRC-licensed activities for five years from the Enforcement Order's effective date.⁵ Upon receiving the Enforcement Order, Mr. Siemaszko sought and was granted a

³ 70 Fed. Reg. 22,719 (May 2, 2005).

⁴ See *id.* at 22,721.

⁵ The Enforcement Order, by its terms, does not become effective until the end of the enforcement hearing process. *Id.*

hearing before the Board.⁶

At the same time that the NRC was conducting its investigation and considering enforcement action, the United States Department of Justice (“DOJ”) was investigating criminal charges against Mr. Siemaszko. On January 19, 2006, a Federal Grand Jury in the United States District Court for the Northern District of Ohio issued a felony indictment charging Mr. Siemaszko with “willfully causing material facts to be concealed from the NRC.”⁷

From the beginning of the instant adjudication, both the NRC Staff and DOJ have articulated concerns that the Commission enforcement proceeding against Mr. Siemaszko could compromise the Federal criminal investigation and prosecution in Ohio. As a result, the Staff has requested, and the Board has granted, four separate stays of this proceeding.⁸ The most recent request was for a stay of indeterminate length, which a split Board granted in its March 2 Order and which is before us today.

Specifically, the Board’s March 2 Order suspends the adjudicatory proceeding “until the

⁶ Unpublished Board “Order (Granting Licensee’s Hearing Request),” dated May 19, 2005, ADAMS Accession No. ML051390490.

⁷ Indictment, *United States v. David Geisen, Rodney Cook, and Andrew Siemaszko*, Case No. 3:06CR712, Jan. 19, 2006, appended as “Attachment A” to NRC Staff Motion to Hold the Proceeding in Abeyance, dated Feb. 1, 2006. (Mr. Geisen is the subject of a separate NRC enforcement proceeding.)

⁸ See NRC Staff Motion for Delay of Proceeding, dated May 17, 2005, *granted*, unpublished “Memorandum and Order (Granting the NRC Staff’s Motion For A 120-Day Delay of Proceedings and Setting Case Schedule),” dated July 22, 2005, ADAMS Accession No. ML052030119 (“July 22 Order”); NRC Staff Motion to Extend the Stay of the Proceeding, dated Aug. 19, 2005, *granted*, unpublished “Memorandum and Order (Granting The NRC Staff’s Motion For A Stay Of This Proceeding until November 30, 2005),” dated Sept. 29, 2005, ADAMS Accession No. ML052720399 (“Sept. 29 Order”); NRC Staff Motion to Extend the Stay of the Proceeding, dated Dec. 6, 2005, *granted*, Unpublished Board “Memorandum and Omnibus Order,” dated Dec. 22, 2005, at 5, ADAMS Accession No. ML053620283 (“Dec. 22 Order”); NRC Staff Motion to Hold the Proceeding in Abeyance, dated Feb. 1, 2006, *granted*, March 2 Order. See also NRC Staff’s Application for a Temporary Stay to Preserve the Status Quo, dated Aug. 19, 2005, *granted*, unpublished “Order (Granting Temporary Stay to Maintain the Status Quo),” dated Sept. 14, 2005, ADAMS Accession No. ML052570709.

conclusion of the pending criminal proceeding, or until the NRC Staff advises the Board that this proceeding may move forward without having an inappropriate impact on the criminal proceeding.”⁹ The Board’s Order also requires the NRC Staff to file periodic status reports and gives Mr. Siemaszko the right to ask the Board to reconsider its March 2 Order “at any time . . . on a showing of materially changed circumstances.”¹⁰

GRANT OF MR. SIEMASZKO’S PETITION FOR INTERLOCUTORY REVIEW

Our regulations do not provide a right to appeal interlocutory orders like the Board’s March 2 Order. Consequently, we will treat Mr. Siemaszko’s “Appeal” as a petition for interlocutory review under 10 C.F.R. § 2.341(f)(2), which allows such review if the challenged Board decision threatens “immediate and serious irreparable impact” or “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.” Here, the effect of the Board decision is “pervasive” and “unusual” -- both in time and scope -- because the Board’s March 2 Order stops the entire proceeding in its tracks and because the Commission and its boards have rarely, if ever, held an enforcement proceeding in abeyance for an indeterminate length of time. We therefore grant interlocutory review.

AFFIRMANCE OF BOARD’S MARCH 2 ABEYANCE ORDER

In *Oncology Services Corp.*,¹¹ we held that five factors need to be balanced when deciding whether to delay an enforcement proceeding: length of delay, reason for delay, prejudice to the recipient of the enforcement order, risk of erroneous deprivation, and recipient’s assertion of a right to a hearing. As explained below, we agree with the Board that the five *Oncology* factors, on balance, favor holding this proceeding in abeyance to await the outcome of

⁹ March 2 Order at 2.

¹⁰ *Id.*

¹¹ CLI-93-17, 38 NRC 44 (1993).

the parallel criminal proceeding or other developments that might warrant lifting the March 2 Order.

In reaching this decision, we rely particularly on: the interlocking nature of the Grand Jury indictment and the NRC Enforcement Order; our Memorandum of Understanding with DOJ committing us to prevent our hearing process from being used to compromise criminal prosecutions;¹² the possibility that discovery in this enforcement proceeding would do just that; and, as recognized by Mr. Siemaszko, the circumstance that, by virtue of his indictment, he already is unemployable in the nuclear industry¹³ -- making speedy action on the NRC Staff's Enforcement Order less vital than in the usual case. Our bottom line here is that Mr. Siemaszko will suffer only negligible harm if there is a further delay in our proceeding -- even a potentially lengthy one -- whereas the government could be substantially harmed if we were to prematurely require discovery and a hearing. We also observe that affirming the Board's March 2 Order is consistent with our usual deference to boards' fact-based decisions.¹⁴

I. Length of Delay

The events at issue here occurred between four and six years ago, and Mr. Siemaszko's hearing has already been stayed for nine months -- since July 22, 2005. The Board, by granting the NRC Staff's motion for abeyance, has now further extended that stay until the conclusion of the criminal proceeding, or until the Staff advises that resumption of the proceeding will not have a negative impact upon the criminal proceeding -- both events without a date certain. Mr. Siemaszko asserts on appeal that this "unknowable" delay imposes on him an unacceptable and

¹² Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50,317, 50,319 (Dec. 14, 1988).

¹³ Appeal at 8.

¹⁴ See, e.g., *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, 189 (2004).

unfair burden.

Our decision in *Oncology*, while not specifying the exact point after which a delay in an enforcement proceeding becomes unacceptable, does indicate that delay is particularly problematic in cases involving witness testimony:

[T]o appreciate whether the delay is excessive one must analyze the nature of the proceeding. [Citation omitted.] For example, a delay may require a strong justification in a proceeding to revoke a license which depends to a great extent on the testimony of witnesses. However, in a civil penalty proceeding . . . depend[ing] less on witness testimony, a delay may need less justification.¹⁵

In witness-intensive cases, delay would “be tolerable only if the Staff can demonstrate an important government interest coupled with factors minimizing the risk of an erroneous deprivation.”¹⁶

Enforcement cases are, by their very nature, fact-specific and typically rely far more on witness testimony than do licensing adjudications. For this reason, we believe that the testimony of witnesses will likely prove significant here. In theory at least, a long delay could result in the fading of witnesses’ memories¹⁷ and runs the risk of witnesses’ unavailability. There is, however, no particular information in the record here that either access to witnesses or the witnesses’ memories will prove a problem. We nonetheless agree with the Board that the first factor (the open-ended nature of the delay) weighs against delaying this proceeding further.¹⁸

¹⁵ *Oncology*, CLI-93-17, 38 NRC at 53.

¹⁶ *Id.*

¹⁷ *Id.*, CLI-93-17, 38 NRC at 59. See also *Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-94-40, 40 NRC 323, 330 (1994), *petition for review denied on other grounds*, CLI-95-3, 41 NRC 245 (1995).

¹⁸ The Board pointed out that the length of the requested delay would depend on factors outside the Commission’s control, such as the trial schedule of the Northern District of Ohio. See March 2 Order at 2. We agree that this absence of control weighs against holding the case in abeyance pending the conclusion of the criminal proceeding in the Federal courts (perhaps including appeals). Certainly a stay of indeterminate length would adversely affect our own

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II. Reason for Delay

The NRC Staff's mere assertion that it wishes to protect DOJ's pending criminal prosecution of Mr. Siemaszko does not, without more, justify holding our parallel administrative proceeding in abeyance. The Staff, as the party supporting abeyance (and therefore carrying the burden of proof¹⁹), must make at least *some* showing of potential detrimental effect on the criminal case.²⁰ Here, the Staff maintains that Mr. Siemaszko might use the Commission's generous discovery rules²¹ to obtain evidence that would be unavailable to him under Rule 16 of the Federal Rules of Criminal Procedure.²² The Staff is also concerned that the evidence might then be improperly used to undermine the criminal proceeding. For support, the Staff relies on five DOJ affidavits.²³ The Board accepted the Staff's argument and found that the Staff's (and, ultimately, DOJ's) concerns about excessive discovery weighed in favor of holding the enforcement proceeding in abeyance.²⁴

The Staff's concerns must be considered to be serious ones. Indeed, we expressed

¹⁸(...continued)
"ability to plan and allocate resources for adjudicatory proceedings . . . by having a . . . proceeding lurking on the agency case docket, pending on a timetable to be triggered only by, and thus subject to the exclusive knowledge and control of," an entity other than ourselves. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001).

¹⁹ 10 C.F.R. § 2.325.

²⁰ See Sept. 29 Order at 5 n.7. See generally *Oncology*, CLI-93-17, 38 NRC at 53-57.

²¹ 10 C.F.R. §§ 2.704-2.709.

²² Fed. R. Crim. P. 16, *found in* 18 U.S.C. For instance, Rule 16 does not automatically provide for discovery using interrogatories and depositions, while our own rules do (10 C.F.R. § 2.706).

²³ The NRC Staff submitted five affidavits from DOJ's Thomas T. Ballantine, Esq., dated May 17, 2005, Aug. 18, 2005, Sept. 8, 2005, Dec. 6, 2005, and Feb. 1, 2006. Only the last of these is publicly available.

²⁴ March 2 Order at 2-3.

similar concerns when approving two lengthy stays (totaling 210 days) in the *Oncology* enforcement case.²⁵ But the weight to be given the Staff's reason for seeking an abeyance turns on the quality of the *factual record* -- i.e., DOJ's five affidavits supporting this and earlier delays. It was on this issue that the Board split. The two-judge majority found sufficient factual support in DOJ's affidavits, while the dissenting judge found the risks to the criminal prosecution minimal. The dissenting judge pointed to Mr. Siemaszko's departure from FENOCO, his consequent lack of supervisory control over potential witnesses, his lack of access to corporate databases and records, his limited financial resources, his residence far from the Davis-Besse facility, and DOJ's decision to open its files to Mr. Siemaszko in the criminal case.²⁶

Because four of the five DOJ affidavits (including the one with the most detailed factual justifications) are still under seal, we are foreclosed from publishing here a detailed analysis of the NRC Staff's and DOJ's reasons why they believe going forward with our enforcement proceeding might compromise the criminal case. Suffice it to say that, although the dissenting judge's views are not without force, DOJ's affidavits are, in our judgment, adequate to sustain the Board's conclusion that going forward with our enforcement proceeding, with its attendant discovery opportunities, has the potential to jeopardize the ongoing criminal prosecution.²⁷

²⁵ In that proceeding, both the Commission and the Board were concerned that any information made available to the licensee in the enforcement proceeding might undermine a parallel NRC investigation and its potential referral to the Department of Justice for possible criminal prosecution, as well as a concurrent state criminal investigation. See *Oncology*, CLI-93-17, 38 NRC at 48, 53-57; LBP-93-10, 37 NRC 455, 460-64 (1993); LBP-93-6, 37 NRC 207, 214 (1993).

²⁶ March 2 Order at 6-7 (McDade, J., dissenting). On appeal, Mr. Siemaszko relies on these same arguments. He also argues that our enforcement case and the criminal prosecution have different "foundations" and "do not substantially overlap," thus rendering it non-prejudicial to proceed with both simultaneously. See Appeal at 4, 6.

²⁷ See, e.g., *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 375 U.S. 95 (1963) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby

(continued...)

Based on the DOJ affidavits, we disagree with Mr. Siemaszko's chief point on appeal – namely, that the criminal prosecution and our enforcement proceeding “do not substantially overlap.”²⁸ The DOJ affidavits demonstrate that the NRC civil enforcement and the DOJ criminal cases are sufficiently intertwined to raise a realistic prospect of prejudice to the criminal prosecution if civil discovery and a civil hearing proceed prematurely. When issuing the Federal Rules of Criminal Procedure, the Supreme Court (with implicit Congressional approval²⁹) prescribed the disclosures necessary for a fair balance between criminal defendants' and prosecutors' interests. We therefore decline to restart our proceeding and, in effect, authorize discovery not contemplated by Federal criminal rules.

Our (and the Board's) decision to pay heed to DOJ's concern about possible prejudice to its criminal prosecution in this case is driven to a considerable extent by our long-established policy – memorialized in a formal Memorandum of Understanding – of deferring to DOJ when it seeks a delay in our enforcement proceedings pending the conclusion of DOJ's own criminal investigations or proceedings.³⁰ We do not lightly second-guess DOJ's views on whether, and how, premature disclosures might affect its criminal prosecutions.

III. Prejudice to the Recipient of the Enforcement Order

As the Board indicated, the next factor – prejudice to Mr. Siemaszko – “includes two components:” prejudice to his ability to litigate the enforcement proceeding and prejudice to his

²⁷(...continued)
obtain documents he would not otherwise be entitled to for use in his criminal suit”).

²⁸ Appeal at 6.

²⁹ See 28 U.S.C. §§ 2072-2074.

³⁰ Memorandum of Understanding, 53 Fed. Reg. at 50,319.

employment interests.³¹ Mr. Siemaszko argues that a victory in the NRC enforcement adjudication would enhance his chances of victory in criminal court.³² As the Board observed, however, the *opposite* of Mr. Siemaszko's argument might well be true: "If anything, Mr. Siemaszko would be better prepared to defend this administrative action after the completion of the criminal trial."³³ Most importantly, Mr. Siemaszko's appeal makes no claim of prejudice based on unavailable witnesses, stale evidence or fading memories. But, in any case, the Board's March 2 Order allows Mr. Siemaszko to seek reconsideration upon "a showing of materially changed circumstances."³⁴

As for prejudice to Mr. Siemaszko's employment interests, his indictment reduces that concern (as the dissenting judge below commented) to "little more than background noise."³⁵ Mr. Siemaszko is, as stated in his appeal, effectively unemployable in the nuclear industry at the present time.³⁶ He no longer works either for FENOCO at Davis-Besse, or elsewhere in the nuclear industry. His departure from Davis-Besse in September 2002³⁷ demonstrates that any "risk" to his "continued employment" there is unrelated to the subsequently-issued 2005 Enforcement Order.³⁸

³¹ See March 2 Order at 3.

³² Appeal at 8.

³³ March 2 Order at 3.

³⁴ *Id.* at 2.

³⁵ *Id.* at 7 (McDade, J., dissenting).

³⁶ Appeal at 8.

³⁷ NRC Staff Motion to Extend the Stay of the Proceeding, dated Dec. 6, 2005, at 5.

³⁸ See Sept. 29 Order at 6. And if, *arguendo*, Mr. Siemaszko still has a right to "continuing employment" at Davis-Besse or within the nuclear industry of which he could be deprived, then the Enforcement Order could not deprive him of that employment until the end of
(continued...)

In sum, we find that the absence of prejudice (the third factor) weighs in favor of granting the abeyance.

IV. Risk of Erroneous Deprivation of Rights

The NRC's Enforcement Order suspending Mr. Siemaszko from employment in the nuclear industry for five years – whether it is ultimately sustained or not – currently has no present effect on Mr. Siemaszko. By its own terms, the Enforcement Order cannot take effect until *after* a hearing. Moreover, as Mr. Siemaszko himself acknowledges, he cannot realistically expect to find employment in the nuclear industry so long as his indictment is outstanding.³⁹ In short, as the Board stated, “as a matter of law, Mr. Siemaszko has not yet been deprived of anything, much less deprived of anything erroneously,” by the NRC.⁴⁰ Therefore, we find that such lack of risk of deprivation weighs in favor of granting the abeyance.

V. Assertion of the Right to a Hearing

The Board, the NRC Staff and Mr. Siemaszko all agree that he asserted his right to a hearing and that he is entitled to one.⁴¹ We also agree. This factor weighs against holding this proceeding in abeyance.

VI. Balancing the Five Factors

As we stated in *Oncology*, when determining whether good cause exists for holding a proceeding in abeyance, the decisionmaker “must consider both the public interest as well as the interests of the person subject to the immediately effective order”, and “[t]he determination of

³⁸(...continued)
this proceeding (it is not effective until then) -- at which point the abeyance would have terminated.

³⁹ Appeal at 8.

⁴⁰ March 2 Order at 4.

⁴¹ See March 2 Order at 3; Appeal at 8; Answer at 10.

whether a delay is reasonable depends on the facts of a particular case and requires a balancing of the[se] competing interests.”⁴²

We find that the indeterminate length of the delay (the first *Oncology* factor) weighs against granting an abeyance, due to the delay’s potentially adverse effect on testimony. The amount of weight we give this factor is diminished, however, by Mr. Siemaszko’s failure to identify specific concerns – for example, particular witnesses whose availability or memory would be adversely affected by the delay.

Likewise, Mr. Siemaszko’s assertion of his hearing rights (the fifth factor) weighs against granting the abeyance. But the fifth factor is, by its nature, merely procedural,⁴³ and consequently is of little importance when balancing real-life equities.

The remaining three factors weigh in favor of granting the abeyance: the likely absence of prejudice to Mr. Siemaszko from delay (the third factor), the certain absence of any risk that he would be erroneously deprived of his rights (the fourth factor) and, most important, the showing of potential harm to DOJ’s criminal prosecution (the second factor). We conclude that the potential harm to Mr. Siemaszko from holding this enforcement proceeding in abeyance is less than the potential harm to the DOJ (and therefore the public) from going forward. We therefore uphold the Board’s grant of the NRC Staff’s request to hold this proceeding in abeyance.

⁴² CLI-93-17, 38 NRC at 49-50 (footnote omitted).

⁴³ See Sept. 29 Order at 5.

CONCLUSION

For the foregoing reasons, and for the reasons given by the Board, the Board's March 2 Order is *affirmed*.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of May, 2006.

Concurring Opinion by Commissioner Gregory B. Jaczko:

I offer a concurring opinion on this Order for a couple of reasons. Ultimately, I appreciate the legal and policy reasons for deferring to the Department of Justice when the agency's administrative actions could impact a criminal proceeding, and it is primarily because of the legitimate need for this deferral that I support the overall conclusion reached by my fellow Commissioners in this matter that the NRC's proceeding should be placed in abeyance pending the outcome of the criminal proceeding.

My disagreement with the Order stems from what appears to be an inconsistent treatment of the fact that the staff's Order in this case was not made immediately effective. On one hand, the Board states that prior to the indictment, the NRC staff's Order, even though not immediately effective, rendered Mr. Siemaszko "effectively unemployable", but on the other hand, the Commission argues that because the Order was not immediately effective, Mr. Siemaszko has not been legally deprived of anything. In fact, both statements appear to be

accurate. But regardless of whether Mr. Siemaszko has been legally deprived of anything, an Order which alleges activities that would render Mr. Siemaszko unemployable in the nuclear industry, even if not imposed until some potential future date, has practical, if not legal implications, that I believe merit greater weight than what the Commission's Order currently provides. In the end, however, I believe the need to limit harm to DOJ's criminal proceeding carries the greatest weight. Thus, although I believe the five *Oncology* factors should be addressed with a different tone, on balance, I believe the end result of abeyance is the correct one.

That said, I am not comfortable simply ignoring the real implications suffered upon Mr. Siemaszko by virtue of this Order. Instead, the Commission should recognize the need to balance the concerns regarding potential damage to a criminal proceeding with the reality that an NRC Enforcement Order, even if not immediately effective, has meaning in the nuclear world. Therefore, I believe that in the limited instances such as this where the record establishes that moving forward with the NRC's administrative proceeding could potentially damage a criminal proceeding because of the overlapping nature of the issues involved, and the staff's Order is not made immediately effective, any employment ban, if one is ultimately imposed upon Mr. Siemaszko, should be reduced by the amount of time the proceeding was placed in abeyance.