

May 17, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ANDREW SIEMASZKO) IA-05-021
)
)

AFFIDAVIT OF THOMAS T. BALLANTINE, TRIAL ATTORNEY

1. I am employed by the United States Department of Justice and have served as a Trial Attorney in the Environmental Crimes Section of the Environment and Natural Resources Division since October of 2000. Among my assignments, I am part of an investigative team considering whether the First Energy Nuclear Operating Company (FENOC), some of its employees, and/or contractors may have committed federal crimes in the course of responding to inquiries by the United States Nuclear Regulatory Commission (NRC) from September 2001 through the end of 2002. The team includes an Assistant United States Attorney from the Northern District of Ohio, a Senior Trial Attorney from my office, investigators from the NRC's Office of Investigation, and a Senior Reactor Inspector from NRC's Region III. I submit this affidavit in support of the application of the staff of the NRC for a stay of the above captioned proceeding.

2. In the summer of 2001, the NRC sent Bulletin 2001-01 to FENOC and other operators of pressurized reactors asking for written responses to questions concerning the potential that their reactors had or would develop vessel head penetration cracks (or "nozzle cracks"). One of FENOC's pressurized water reactors is the Davis-Besse Nuclear Power Station. On September 4, October 17, October 30, and November 1, 2001, FENOC sent letters to the NRC describing, among other things, Davis-Besse's reactor vessel head inspections from 1996, 1998, and 2000.

3. During the refueling outage that began February 16, 2002, workers discovered a cavity in the head of the Davis-Besse reactor. An NRC investigation into the cause of that cavity showed that one or more cracked nozzles had leaked reactor coolant water onto the head, which corroded and wasted away a large amount of carbon steel, leaving a hole approximately 5 to 7 inches long, 4 to 5 inches wide, and 6 inches deep, in the vessel head itself. The NRC also investigated the truthfulness of FENOC's responses to NRC's questions regarding nozzle cracking. Ultimately, NRC referred the case to the United States Department of Justice, for consideration of criminal prosecution. Federal prosecutors, including myself, then began an assessment of NRC's findings. The allegations in NRC's referral (the "OI Report") relate to potential violations of several criminal statutes, including, but not limited to Title 18, United States Code, Sections 371 (conspiracy) and 1001 (false statement). In addition, it references potential criminal violations of NRC regulations, including Title 10, Code of Federal Regulations, Section 50.9 (requiring "complete and accurate" information in all submissions to the Commission).

4. According to the NRC's Office of Investigation, Andrew Siemaszko supervised the inspection and cleaning of Davis-Besse's reactor vessel head in the spring of 2000. He also helped FENOC prepare some or all of its bulletin responses regarding Davis-Besse. The truthfulness of FENOC's bulletin responses is an issue referred to the Department of Justice by the Office of Investigation.

5. A federal grand jury began an investigation of this matter in November 2003. The investigation is nearing its conclusion and is expected to be complete by November of this year. The facts set forth in this affidavit are based on information obtained by the NRC's Office of Investigation before the grand jury investigation began.

6. Based on a review of (1) the order prohibiting involvement in licensed activity issued to Mr. Siemaszko on April 21, 2005, in the above-captioned administrative hearing, (2) discussion

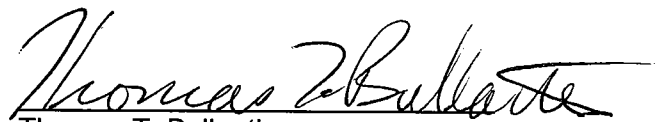
with the NRC's Office of the General Counsel, and (3) my understanding of the facts pertaining to the criminal and administrative proceedings, I believe that the facts and witnesses necessary for their resolution overlap. Further, based on discussions with counsel for the NRC staff, I understand that if the above-captioned hearing were to go forward, Mr. Siemaszko would be entitled to discovery that would far exceed the scope of discovery permitted under the Federal Rules of Criminal Procedure or other possible means (such as the Freedom of Information Act) available in a criminal proceeding. For example, during federal criminal investigations, witness statements are not made available to potential targets, subjects, or others. In this case, we have made a witness's own transcripts of earlier interviews available for him or her to review in a controlled setting, but have never released such statements to anyone outside of law enforcement. My understanding is that many such statements would be subject to discovery if the above-captioned administrative matter were to proceed. Likewise, the OI Report, which includes both investigative and deliberative matter, might also be discoverable. Most importantly, should the grand jury's investigation lead to an indictment of anyone, the prior statements of government witnesses need not be released, under Title 18, United States Code, Section 3500 (the Jencks Act), until after the witness testifies.

7. The Jencks Act, the Federal Rules of Criminal Procedure, the practices of the Department of Justice office, and the practices of the NRC's Office of Investigation in support of Department of Justice efforts recognize that in a criminal case, the government bears the burden of proof beyond a reasonable doubt, and that defendants have a Fifth Amendment privilege against self-incrimination. Accordingly, those laws, rules, and practices strike a balance between open disclosure and fairness to both parties that differs from the balance in civil or administrative proceedings. Allowing discovery to proceed in the above-captioned administrative hearing could alter that balance in a manner that would be substantially and unfairly prejudicial to the

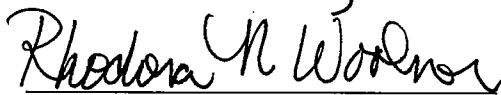
government's investigation and prosecution of the criminal case.

8. Therefore, I believe that if the above-captioned administrative hearing proceeds, the criminal investigation, the grand jury's investigation, and any resultant criminal prosecution would be substantially harmed. Further, I believe that the NRC staff's proposed stay of the above-captioned administrative hearing will allow for a fair and appropriate resolution of both the administrative and the criminal matters under investigation. In particular, I expect that this investigation will conclude with a charging decision soon, such that a stay of limited duration, until September 2005, will allow the Board to determine how to proceed with much better information. My office and the United States Attorney's Office for the District of Ohio stand ready to make periodic reports to the Board and to provide additional information, as appropriate.

9. Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.


Thomas T. Ballantine
Trial Attorney
Environmental Crimes Section
United States Department of Justice

Subscribed and sworn to before me
this 16TH day of May, 2005


Notary Public

My commission expires: _____
Rhodora N. Woolner
Notary Public for the District of Columbia
My commission Expires: April 30, 2010