

LBP-98-19

August 13, 1998

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

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Richard F. Cole, Special Assistant

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

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In the matter of  
  
INTERNATIONAL URANIUM (USA)  
CORPORATION  
  
(Receipt of Material from  
Tonawanda, New York)

Docket No. 40-8681-MLA-4

Re: Material License Amendment

ASLBP No. 98-748-03-MLA

**SERVED AUG 13 1998**

MEMORANDUM AND ORDER  
(Denial of Request for a Stay Filed by the State of Utah)

The State of Utah filed a Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay on August 6, 1998 (Request). The Stay requests that International Uranium (USA) Corporation (IUSA) be barred from receiving, processing or disposing of uranium-bearing material from Ashland 2, reportedly on its way to IUSA from Tonawanda, New York.

The facsimile transmission of the Request was received on the morning of August 7 and an on-the-record telephone prehearing conference was convened on August 7, 1998 at 2 PM. During the conference, the parties agreed to settlement negotiations and an exchange

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of information. The negotiations were to continue until close of business August 11, and the parties have reported that further negotiations would not be fruitful.<sup>1</sup>

I have decided to *dismiss* the Request as untimely, as urged by IUSA and by the Staff of the Nuclear Regulatory Commission at the August 7 telephone prehearing conference.

As IUSA ably and correctly argues on page 2 of its Opposition:

Under 10 C.F.R. § 2.1263, motions for stay or temporary stay of any licensing decision issued by the Commission "*must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later.*" NRC granted the subject license amendment on June 23, 1998. Thus, the State was required to file its Motion for Stay and Temporary Stay no later than July 23, 1998 (when it filed its Request for a Hearing), since the staff action complained of -- amendment of IUSA's license -- occurred prior to the filing.

In its Timeliness Brief, on page one, the State of Utah argued that the Staff action of granting a license amendment was *conditional* because waste material to be brought to the White Mesa Mill site was still subject to testing. I reject this interpretation. The requirement of a test was no different from any other license condition and there is, therefore, no reason to consider the Staff's licensing action to have been incomplete. See *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-74-23,7 AEC 947, 951-52 (1974); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1),

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<sup>1</sup>The following additional filings have been received: State of Utah's Response on the Timeliness of Its Motion for a Stay and Request for a Temporary Stay, August 10, 1998 (Timeliness Brief); State of Utah's Supplement to Its Motion for a Stay and Request for a Temporary Stay After Review of Information Provided by the Licensee (marked "Proprietary Pleading"), August 11, 1998 (Request Supplement); Amended Opposition of International Uranium (USA) Corporation to State of Utah's Request for a Stay, August 11, 1998 (Amended Opposition). The Amended Opposition was preceded by "Opposition of International Uranium (USA) Corporation to State of Utah's Request for a Stay" (Opposition).

ALAB-788, 20 NRC 1102, 1159 (1984)(A licensing board may refer minor matters that in no way pertain to the basic findings necessary for issuance of a license to the Staff for post-hearing resolution.)

The State of Utah also argues that its stay request is timely because the shipment of material from Tonawanda, New York, represented "changed circumstances" because this was the first time it became aware that a shipment was on its way to the site. Timeliness Brief at 2. This argument is, however, unpersuasive. In the law, circumstances are considered to be changed when they are not reasonably foreseeable. However, the very purpose of the license amendment was to receive material that is now being shipped. The shipment was foreseeable because it was the purpose of the amendment. Additionally, the State stated that it could not file earlier because there was no immediate harm impending. This argument, which is unaccompanied by a citation to authority, is not persuasive. A stay may be granted when a feared action is foreseeable and need not wait for the wrecker's ball to be in motion.<sup>2</sup> *Morales v. Transworld Airlines, Inc., et al.*, 112 S.Ct. 2031, 119 L.Ed.2d 157, 60 USLW 4444 (1992). (A general announcement by states' attorneys general about the intent to enforce a law constitutes the irreparable injury required for the issuance of an injunction.).

The State of Utah also argues that there is a rational foundation for the Presiding Officer to exercise his discretion to consider the stay timely. However, the state is in error

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<sup>2</sup>IUSA also is correct, in its Amended Opposition at page 2, in arguing that the State of Utah is incorrect in relying on *In the Matter of Hydro Resources, Inc.*, CLI-98-8, slip op. at 6, 49 NRC \_\_\_\_ (June 5, 1998). That case did not involve an untimely request for a stay.

in believing that it's argument is supported by *Matter of Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 372 at n. 196 (1989) and on *In the Matter of Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 138 [159?] (1986). Those decisions indicate the broad discretion of Licensing Boards over the timing of answers to motions even though the regulations do provide deadlines for answers. Changing deadlines for answers to motions traditionally falls within the management discretion of Licensing Boards and Presiding Officers. 10 C.F.R. § 2.1209(a). Furthermore, this discretion is acknowledged explicitly in 10 C.F.R. § 2.730(c). These cases do not stand for the proposition that a Presiding Officer may disregard the explicit words of 10 C.F.R. § 2.1263, which contains mandatory language ("must be filed").

This Memorandum and Order does not determine the merit of the concerns of the State of Utah. These may be considered in this case should the State of Utah be admitted as a party.

Utah's Request Supplement was marked "Proprietary Pleading." Generally, all materials become part of the public record. A participant seeking to have this material treated as proprietary should serve a motion on the members of the service list by August 19, 1998, pursuant to 10 C.F.R. § 2.790(b). The Request Supplement shall be considered proprietary until further order.

#### ORDER

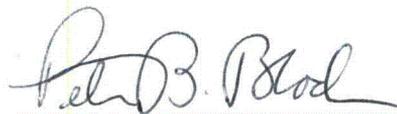
For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 13th day of August, 1998, ORDERED, that:

1. The State of Utah's Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay, August 6, 1998 (Request), is *denied*.

2. The filing of a petition for review by the Commission is mandatory for a participant to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.1253.

3. Within 15 days of the service of this decision, a petition for review may be filed with the Commission. The petition may be no longer than 10 pages and must address specific points set forth in the regulations. Answers may be filed within 10 days of service of a petition for review and also must address prescribed points. 10 C.F.R. § 2.786(b).<sup>3</sup>

4. The State of Utah's Supplement to Its Motion for a Stay and Request for a Temporary Stay After Review of Information Provided by the Licensee shall be treated, until further ordered, as proprietary. A participant seeking to maintain the allegedly proprietary nature of this material should serve on the members of the service list by August 19, 1998, a motion pursuant to 10 C.F.R. § 2.790(b).



Peter B. Bloch, Administrative Judge  
Presiding Officer

Rockville, Maryland

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<sup>3</sup>The appeal is a request for interlocutory review. Petitioners need to demonstrate that they are threatened with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision." 10 C.F.R. § 2.786(g)(1).

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Docket No.(s) 40-8681-MLA-4

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-98-19) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this  
13 day of August 1998

*Adria T. Byrdson*  
Office of the Secretary of the Commission