

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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**DOCKETED 4/12/02**

**SERVED 4/12/02**

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In the Matter of )  
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INTERNATIONAL URANIUM (USA)  
CORPORATION )  
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Docket No. 40-8681-MLA-10

(White Mesa Uranium Mill)  
\_\_\_\_\_)

**CLI-02-13**

**MEMORANDUM AND ORDER**

**I. Introduction**

The Glen Canyon Group of the Utah Sierra Club ("Sierra Club") has appealed its dismissal from this license amendment proceeding. In LBP-02-03, 55 NRC \_\_ (Jan. 16, 2002), the Presiding Officer found that the Sierra Club (as well as other petitioners) had failed to show any threat of injury from the proposed license amendment, and therefore lacked standing to intervene and to obtain an adjudicatory hearing. The proposed amendment would authorize the International Uranium (USA) Corporation ("IUSA") to receive and process up to 600,000 cubic yards (840,000 tons) of particular alternative feed material from a site in Maywood, New Jersey. The Maywood material consists of by-products from the processing of thorium and lanthanum from monazite sands.

On appeal, the Sierra Club alleges two procedural errors by the Presiding Officer: (1) that he failed to issue a ruling on whether the Sierra Club could submit additional affidavits; and (2) that he unreasonably rejected a Sierra Club response to an IUSA supplemental filing.

These two procedural decisions, the Sierra Club claims, “led to the [Presiding Officer’s] order to deny standing.”<sup>1</sup> We do not disturb the Presiding Officer’s ruling on the additional affidavits, but vacate and remand his ruling on the Sierra Club response.

## II. Background

The Sierra Club and two other petitioners (who have not appealed LBP-02-03) filed timely requests for hearing and petitions for leave to intervene. To aid in understanding the petitioners’ claims, the Presiding Officer held a telephone prehearing conference devoted to the issue of the petitioners’ standing. At the conference, the petitioners raised concerns over increased truck traffic, alleging a greater potential for “accidents and spills.”<sup>2</sup> The Presiding Officer thus focused the discussion upon the “incremental” impact from the added number of trucks associated with the Maywood license amendment.<sup>3</sup> Among the factors he considered was the number of truckloads used per week to transport the Maywood materials to the IUSA White Mesa mill site.<sup>4</sup> In addition, because there were allegations of “cumulative” injury, resulting from the total number of trucks bringing still-ongoing shipments of alternate feed to the mill from different parts of the country under various previous IUSA license amendments, the Presiding Officer also sought to learn how many trucks in all -- including the added number from the Maywood amendment -- might be heading to the IUSA mill site “on any particular day.”<sup>5</sup> After much discussion about the total numbers of trucks, counsel for IUSA offered to

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<sup>1</sup> Petitioners’ Brief on Appeal of Order Rejecting Petitioners’ Brief and Denying Standing to Intervene (Feb. 5, 2002)(“Appeal Brief”) at 1.

<sup>2</sup> See, e.g., Transcript of Telephone Conference (Nov. 28, 2001)(“Transcript”) at 19.

<sup>3</sup> See, e.g., id. at 20, 47.

<sup>4</sup> Id. at 16.

<sup>5</sup> “Memorandum,” (Nov. 15, 2001)(setting forth questions to be answered at telephone conference).

clear up any “confus[ion]” on the traffic issue by submitting a written supplemental filing providing a detailed description of the truck traffic in the mill area.<sup>6</sup> The Presiding Officer “accept[ed] that invitation.”<sup>7</sup>

At the prehearing conference, the Sierra Club was for the first time in this proceeding represented by counsel. The Sierra Club had submitted its original petition for intervention (as well as one filed later) pro se.<sup>8</sup> Acknowledging that its earlier petitions had “not been supported [adequately] by affidavit or testimony,” the Sierra Club’s counsel asked the Presiding Officer “to permit some leeway in having ... me supplement [those] concerns that the Sierra Club has raised with additional affidavits.”<sup>9</sup> She acknowledged that in an earlier IUSA-related license amendment proceeding, the Sierra Club also had “brought in [counsel only] at the last minute ... because they had had difficulty finding an attorney in this area that would represent them.”<sup>10</sup> In response, the Presiding Officer stated that he would consider the Sierra Club’s request “that it be allowed to supplement what is already on file,” and would rule on the request in due course.<sup>11</sup>

The telephone conference also included discussion of a truck accident which occurred in September 1999, involving a truck headed for the White Mesa mill. When questioned about

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<sup>6</sup> Transcript at 33.

<sup>7</sup> Id.

<sup>8</sup> The Sierra Club filed its original petition on September 24, 2001, but it lacked any supporting affidavits. Without seeking leave to do so, the Sierra Club filed on October 18, 2001, what appears to be another petition, titled “Petitioner’s Brief to Request Hearing to Intervene,” with two attached affidavits. While noting that this later filing was “clearly unauthorized,” the Presiding Officer accepted and considered it. See LBP-02-03, 55 NRC at \_\_\_\_ , slip op. at 9.

<sup>9</sup> Id. at 10-11.

<sup>10</sup> Transcript at 30-32.

<sup>11</sup> Id. at 57

the accident, IUSA stated that it would provide specific information on the accident in its supplemental filing on truck traffic.<sup>12</sup> The Presiding Officer made clear that the petitioners would have the opportunity to respond to IUSA's supplemental filing on truck traffic and on the 1999 truck accident.<sup>13</sup>

On December 5, 2001, IUSA submitted its supplemental filing.<sup>14</sup> The only petitioner to respond was the Sierra Club. Shortly after the Sierra Club filed its response, however, the Presiding Officer issued an order rejecting it as overbroad.<sup>15</sup> He reasoned that "in significant part the submission extends well beyond the matter of the accuracy or significance of the factual information supplied by the Licensee. In a word, it seeks to raise entirely new issues and, as such, manifestly cannot be deemed simply the response to the December 5 filing that had been authorized."<sup>16</sup> Later, the Presiding Officer turned to the Sierra Club's request to file additional affidavits, but "found no good cause" to allow the additional filing, given "the absence of some indication as to who might supply the affidavits and what they might contain."<sup>17</sup>

On the standing question itself, the Presiding Officer found that the Sierra Club's "broad interest in environmental protection ... is shared by many others and, as such, is of no assistance to it here."<sup>18</sup> The Presiding Officer ruled that the specific claims of the Sierra Club's

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<sup>12</sup> Id. at 45.

<sup>13</sup> Id. at 45-46, 57.

<sup>14</sup> See "International Uranium (USA) Corporation's Supplemental Filing in Response to Presiding Officer's Request for Additional Information" (Dec. 5, 2001) ("IUSA's Supplemental Filing").

<sup>15</sup> See "Memorandum and Order" (Rejecting Unauthorized Filing) (Jan. 2, 2002) ("Order Rejecting Filing").

<sup>16</sup> Id. at 2.

<sup>17</sup> LBP-02-03, 55 NRC at \_\_\_, slip op. at 17.

<sup>18</sup> Id. at 16.

members fared no better because they provide no “basis for a claim that the Maywood shipments would pose a threat to the affiant not present with regard to previously licensed activities at the mill.”<sup>19</sup>

The Sierra Club appealed, challenging as “arbitrary and capricious” both the Presiding Officer’s failure to allow additional affidavits and his rejection of the Sierra Club’s response to IUSA’s supplemental filing.<sup>20</sup>

### III. Analysis

#### 1. Timeliness of Appeal

IUSA initially urges dismissal of the Sierra Club’s appeal as untimely. Under our rules, appeals are due “within ten (10) days of service of the [Presiding Officer’s] order.”<sup>21</sup> IUSA argues that the order at issue here (LBP-02-03) was “served” on January 16, 2002, the date of the decision, and that therefore the Sierra Club’s appeal brief was due on January 26, 2002. Because the Sierra Club did not file its appeal until January 31, 2002, IUSA claims the appeal was five days late. IUSA is incorrect. Our rules add five days to filing deadlines when service is “by mail.”<sup>22</sup> The five extra days come into play here. The certificate of service attached to the Presiding Officer’s order states that “copies have been served” upon the parties “by U.S. mail, first class.”

Apparently, the Presiding Officer in this case also sent courtesy copies by electronic mail that the parties may have received prior to the official “service copy” sent by the Commission’s Office of the Secretary. But under our rules it is the “service copy” that counts

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<sup>19</sup> Id.

<sup>20</sup> Appeal Brief at 1.

<sup>21</sup> 10 C.F.R. § 2.1205(o).

<sup>22</sup> 10 C.F.R. § 2.710.

for the purpose of calculating deadlines. Because the Sierra Club had a total of 15 days in which to file an appeal, its appeal was timely.

## **2. The Presiding Officer's Procedural Rulings**

The Sierra Club's appeal maintains: (a) that the Presiding Officer "failed to issue" a ruling on its request to file additional affidavits, and (b) that it was "patently unfair" for the Presiding Office to reject the Sierra Club's response to IUSA's supplemental filing while at the same time giving "free rein" to IUSA.<sup>23</sup> These, of course, are fundamentally issues of case management and fair play, areas where we are loath to second guess the judgments of our presiding officers. "In procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case is necessary, maximum reliance on the proper discretion of a [presiding officer] is necessary."<sup>24</sup> Indeed, the Commission expects "presiding officers to instill discipline in the hearing process,"<sup>25</sup> and to "take appropriate action to avoid delay."<sup>26</sup>

Despite the substantial deference we accord presiding officers' procedural decisions, such decisions are reviewable on appeal for abuse of discretion.<sup>27</sup> We require an adequate record to perform our review function.<sup>28</sup> Here, the record shows that the Presiding Officer did

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<sup>23</sup> Appeal Brief at 3-4, 5.

<sup>24</sup> Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313, 314 (1974).

<sup>25</sup> "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18, 19, 21-22 (1998).

<sup>26</sup> 10 C.F.R. § 2.1209.

<sup>27</sup> See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 116-17 (1995).

<sup>28</sup> Cf. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997) ("The Commission considers an immediate remand ... the most efficient way to deal with what we view as an unclear Board discussion.").

not ignore the Sierra Club's request to file additional affidavits, but rejected it, and for good reason. The reasons for the Presiding Officer's rejection of the Sierra Club's response to IUSA's supplemental filing are not as clear. It is not obvious why the Presiding Officer viewed the Sierra Club response as significantly different from the IUSA supplemental filing -- which the Presiding Officer accepted and considered in his standing decision. Because we cannot discern from the record good reason for rejecting the Sierra Club's response, we are remanding that aspect of the case for the Presiding Officer to reconsider (or re-explain) his ruling, and if appropriate, to consider further the underlying question of the Sierra Club's standing.

**a. The Additional Affidavits**

The Sierra Club argues that the Presiding Officer simply "failed to issue a ruling" on its request to submit additional affidavits.<sup>29</sup> This is manifestly incorrect. In the Presiding Officer's ultimate decision rejecting the Sierra Club's standing, he referred specifically to the request to file additional affidavits, and rejected it for failure to give "good reason" -- i.e., an explanation of the source and content of the proposed affidavits:

Indeed, in seeking at the telephone conference leave to supplement the hearing request with further affidavits, Sierra counsel acknowledged the shortcomings of the papers that had been earlier filed by a lay person within the organization. Without, however, some indication as to who might supply those affidavits and what they might contain by way of showing of an injury-in-fact above and beyond harm that might flow from already licensed activities, no good reason existed for granting such leave. No such information was supplied during the conference, and none was forthcoming in response to the opportunity accorded counsel to make an offer of proof on the matter following the conference.<sup>30</sup>

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<sup>29</sup> Appeal Brief at 5.

<sup>30</sup> LBP-02-03, 55 NRC at \_\_, slip op. at 17.

Previously, when rejecting the Sierra Club's response to IUSA's supplemental filing, the Presiding Officer had explained in similar terms his disinclination to accept additional affidavits in the absence of any showing of good reason.<sup>31</sup>

In short, contrary to the Sierra Club's position on appeal, there was a Presiding Officer decision on the additional affidavits. Far from treating the Sierra Club severely, the Presiding Officer gave it repeated opportunities to make a case in favor of allowing additional affidavits, including an opportunity to file a written offer of proof.<sup>32</sup> The Sierra Club chose not to provide the information requested. It proceeded at its own risk when it left the Presiding Officer with little or no basis for allowing further affidavits. The Sierra Club cannot now complain that the Presiding Officer viewed the absence of an offer of proof in an unfavorable light. With the Sierra Club having supplied no persuasive reasons for allowing last-second additional affidavits, the Presiding Officer's decision to reject further affidavits was not "arbitrary and capricious."

#### **b. The Sierra Club's Response to IUSA**

We turn now to the last issue raised on appeal: whether the Presiding Officer erred in rejecting the Sierra Club's December 24, 2001 response to IUSA's December 5 supplemental filing on truck traffic impacts. The Presiding Officer rejected the Sierra Club response in its entirety, stating that it raised "entirely new issues" and went "well beyond" responding to the "accuracy or significance of the factual information supplied by the Licensee."<sup>33</sup> By contrast, according to the Presiding Officer, IUSA's supplemental filing "was appropriately limited to

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<sup>31</sup> See Order Rejecting Filing at 2-3.

<sup>32</sup> LBP-02-03, 55 NRC at \_\_\_, slip op. at 11.

<sup>33</sup> Order Rejecting Filing at 2.

supplying and commenting upon the significance of . . . factual information that I had requested.”<sup>34</sup>

On appeal, the Sierra Club argues that IUSA’s filing itself exceeded the scope of the information called for. “[A]t least one half of IUSA’s supplemental pleading” was devoted to additional topics regarding the new waste’s risk of harm,” the Sierra Club claims.<sup>35</sup> The Sierra Club therefore argues that it was “patently unfair to restrict Petitioner but allow IUSA free rein in its pleading.”<sup>36</sup> The Sierra Club goes on to emphasize that it was especially “unfair” for the Presiding Officer to have rejected the filing in its entirety, given that “he failed to set forth with any particularity or specificity which statements or arguments contained in the Petitioners’ response” were excessive.<sup>37</sup>

Having reviewed both IUSA’s December 5 filing and the Sierra Club’s response, we cannot readily ascertain why the Presiding Officer apparently relied on<sup>38</sup> the IUSA supplemental filing but rejected the Sierra Club’s response outright. Both filings seemingly addressed issues beyond what the Presiding Officer had intended.

As the Presiding Officer describes, IUSA was to “file a post-conference memorandum limited to providing certain additional factual information relating to two very specific matters: (1) truck traffic volume along the transportation corridor that the shipments in question here would employ; and (2) the circumstances of a 1999 accident that had been referred to by a petitioner

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<sup>34</sup> Id. at 3.

<sup>35</sup> Appeal Brief at 3.

<sup>36</sup> Id. at 3-4.

<sup>37</sup> Id. at 4.

<sup>38</sup> See LBP-02-03, 55 NRC at \_\_, slip op. at 12-14.

in the course of the conference.”<sup>39</sup> IUSA’s December 5 submission, though, went beyond these two narrow topics. IUSA presented additional argument addressing whether the shipment of materials would have any significant impacts.<sup>40</sup> Instead of simply addressing the actual truck volume in the area and the 1999 accident, IUSA devoted an entire section of its filing -- fully one-third -- to its argument on environmental impacts.<sup>41</sup>

IUSA pointed to specific NRC and Department of Transportation studies on the transportation of radioactive materials. These studies were said by IUSA to “conclu[de] ... that the transportation of radioactive materials, such as the Maywood materials, in accordance with all applicable ... regulations would not create a significant impact on public health and safety and the environment.”<sup>42</sup> IUSA went on to address the radiological “analyses that IUSA conducted in connection with a license amendment application for the Heritage Minerals, Inc. (‘HMI’) materials,” and then to compare the radiological activity of the Maywood materials -- at issue in this proceeding -- with that of the HMI materials.<sup>43</sup> This “analysis shows,” argued IUSA, that there could be “no significant incremental impact from truck traffic” because of the specific radiological “nature of the materials being transported.”<sup>44</sup>

In short, contrary to the Presiding Officer’s characterization, IUSA’s submission does not appear “appropriately limited to supplying and commenting upon” the narrow subjects of local truck traffic volume and a specific truck accident. The Sierra Club’s submission also went

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<sup>39</sup> Order Rejecting Filing at 1 (emphasis added).

<sup>40</sup> See IUSA’s Supplemental Filing at 2, 8-11.

<sup>41</sup> Id. at 8; see also id. at 10-11.

<sup>42</sup> Id. at 10.

<sup>43</sup> Id.

<sup>44</sup> Id. at 11.

beyond what the Presiding Officer intended, but much of it was in response to IUSA's entire submission, not merely to IUSA's truck traffic and accident information. A large portion of the Sierra Club response does address the traffic and accident issues,<sup>45</sup> but other portions deal with IUSA's comparison of the Maywood materials to the HMI materials,<sup>46</sup> IUSA's reliance upon particular NRC transportation studies,<sup>47</sup> and IUSA's reliance upon the transportation impacts analysis provided in a 1979 Final Environmental Statement prepared for the White Mesa mill.<sup>48</sup>

Although some of the Sierra Club's filing may have gone beyond even IUSA's submission, much of it responded to it. It is not clear, then, why the Presiding Officer rejected all of the Sierra Club's filing. Perhaps there were sound reasons of case management or fairness for the Presiding Officer's incongruent handling of seemingly similar supplemental filings. But the record before us does not make those reasons apparent.

In these circumstances, where we are uncertain of the basis for the Presiding Officer's ruling, we have decided to return the case to him for reconsideration and clarification. The Presiding Officer has greater knowledge than the Commission of the precise issues involved in this proceeding, and is therefore in a better position to assess what portions of the Sierra Club's filing, if any, might be permissible. He may -- and indeed ought -- to "strike any portion" of pleadings before him that he finds "cumulative, irrelevant, immaterial, or unreliable." See 10 C.F.R. § 2.1233(e).

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<sup>45</sup> See, e.g. Sierra Club's Response to IUSA's Supplemental Filing (Dec. 24, 2001) ("Sierra Club's Response") at 7-13.

<sup>46</sup> See id. at 15-20.

<sup>47</sup> Id. at 14; 20-21.

<sup>48</sup> Id. at 9-10, 15.

Accordingly, we direct the Presiding Officer to reconsider whether to accept any portion of the Sierra Club's filing, and if appropriate, to reconsider the Sierra Club's standing to intervene in this proceeding.

### V. Conclusion

For the reasons stated in this decision, the Commission hereby vacates LBP-02-03 and the unpublished Memorandum and Order (Rejecting Unauthorized Filing) of January 2, 2002. The Commission remands the proceeding to the Presiding Officer to reconsider whether to accept any portion of the Sierra Club's response to IUSA's supplemental filing, and if appropriate, to reconsider the Sierra Club's standing to intervene in this proceeding.

IT IS SO ORDERED.

For the Commission<sup>49</sup>

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, MD  
This 12<sup>th</sup> day of April, 2002

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<sup>49</sup> Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.