UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Richard A. Meserve
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

DOCKETED 10/1/02

SERVED 10/1/02

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

CLI-02-21

MEMORANDUM AND ORDER

I. Introduction

For the second time in recent months, the Glen Canyon Group of the Sierra Club (Sierra Club) has appealed its dismissal from this license amendment proceeding. After a Commission remand, the Presiding Officer has again found that the Sierra Club lacks standing to challenge the proposed license amendment.[1] The International Uranium (USA) Corporation (IUSA) opposes the Sierra Club appeal. We affirm the Presiding Officer's decision.

II. Background

Earlier this year, the Presiding Officer issued an initial decision rejecting the Sierra Club's petition to intervene for lack of standing.[2] The Sierra Club appealed that decision based upon

[1] See LBP-02-12, 55 NRC 307 (2002).

[2] See LBP-02-03, 55 NRC 35 (2002).

two alleged procedural errors of 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. In CLI-02-13, 55 NRC 269 (2002), the Commission affirmed the Presiding Officer's rejection of the late-filed affidavits, but vacated and remanded on the issue of the rejected Sierra Club response. The Presiding Officer had struck the Sierra Club response in its entirety on the ground that it exceeded the scope of the specific issues that were to be addressed. In remanding, the Commission noted that not only the Sierra Club, but also IUSA, "seemingly addressed issues beyond what the Presiding Officer had intended," and that therefore we could not readily discern why the Presiding Officer had relied upon the IUSA filing but rejected the Sierra Club's response outright. We therefore remanded the case for the Presiding Officer to reconsider -- or at least clarify -- his reasons for rejecting the entire Sierra Club filing, and, if appropriate, to consider further the underlying question of the Sierra Club's standing.

The Presiding Officer now has reaffirmed his decision to strike the Sierra Club response in its entirety.[3] The Presiding Officer further held that even if had he accepted the response, it would have made no difference in his conclusion that the Sierra Club had failed to establish standing to intervene.[4]

III. Analysis

Under NRC rules, a "presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order."[5] To achieve

---

[3] See LBP-02-12, 55 NRC at 312-13.

[4] Id. at 313-14.

[5] 10 C.F.R. § 2.1209.

those ends, presiding officers have "all powers necessary," including the discretion to regulate the course of the hearing and the conduct of the participants and dispose of procedural matters.[6] On their own initiative they may "strike any portion" of pleadings found "cumulative, irrelevant, immaterial, or unreliable."[7]

Absent an abuse of discretion, the Commission is loath to upset a Presiding Officer's management of a proceeding. As we stressed earlier in this very case, in "procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is essential."[8] Here, after our initial remand, the Presiding Officer has given ample grounds for why he chose to strike the Sierra Club's response. He recounted numerous difficulties he had had with the Sierra Club's actions both in the course of this proceeding and in an earlier license amendment proceeding involving the receipt and processing of material from the Molycorp site in California. In both proceedings, initial petitions for intervention were filed by lay persons, yet at the prehearing conference stage a Sierra Club counsel appeared, attempting to remedy deficiencies in the lay-filed petitions.

In the current proceeding, for example, counsel for the Sierra Club conceded at the prehearing conference that the Sierra Club still did not "have enough facts before the court" to show the injury alleged from this license amendment.[9] She acknowledged that the "concerns that

---

[6] See id.

[7] See 10 C.F.R. § 2.1233.

[8] CLI-02-13, 55 NRC at 273.

[9] Telephone Conference Hearing Transcript (Nov. 28, 2001)("Transript") at 12-13.

have been set forth by the Sierra Club have not been supported by affidavit or testimony,"[10] that the lay-filed petitions and affidavits contained "conclusory statements,"[11] and that the Sierra Club "need[ed] further investigation" to set forth with basis the specific injury alleged.[12] She then asked the Presiding Officer if the Sierra Club could file "more affidavits that give more specifics."[13] The Presiding Officer took the matter under advisement but asked the Sierra Club to submit an offer of proof, indicating who would submit an affidavit and what it would purport to show. When no offer of proof was submitted, he denied the request.

Later, the Presiding Officer allowed both IUSA and the Sierra Club to submit a supplemental filing intended only to address two very specific transportation issues: (1) truck traffic volume along the transportation corridor involved in the truck shipments at issue in this license amendment; and (2) the circumstances of a particular 1999 truck accident. When the Sierra Club's filing included not only these issues but others as well, the Presiding Officer struck the filing.

In directing the Presiding Officer to reconsider his decision, the Commission noted that IUSA also had discussed issues exceeding the scope of the two topics, and that much of the Sierra Club filing seemingly responded to matters first raised by IUSA.[14] Now, after remand, the Presiding Officer explains that even if IUSA "exceeded the charter that had been given it," all of its submission was still essentially related to the "possible incremental impact of the truck

---

[10] Id. at 10-11.

[11] Id. at 10;15.

[12] Id. at 14.

[13] Id. at 19.

[14] See CLI-02-13, 55 NRC at 276.

transportation of the Maywood material en route to the Mill from the railhead at Cisco," but that "the same cannot be said for the Sierra December 24 filing," which (according to the Presiding Officer) "sought to introduce entirely new issues into the proceeding that had absolutely nothing to do with the truck transportation of the Maywood materials."[15] These included groundwater impacts at the White Mesa mill site -- a topic entirely unrelated to truck traffic.[16] By its own admission, the Sierra Club filing also sought to address "unanswered" questions posed to the licensee during the telephone conference.[17]

In short, the Presiding Officer found that the Sierra Club filing contained an abundance of unrelated new issues, representing "a backdoor approach to opening the proceeding at a very late date to claims far removed" from those that had been "put on the table."[18] The Presiding Officer thus viewed the Sierra Club filing as "an endeavor by counsel to subvert the orderly conduct of the adjudicatory process."[19] Moreover, given "the past history" of the Sierra Club's repeated and late attempts to correct earlier deficiencies, he found the December 24 filing "manifestly beyond toleration."[20] He thus struck the filing in its entirety "to make it clear to Sierra that there were definite limits to the extent that [he] was willing to continue to allow it to cure deficiencies in lay-prepared submissions."[21]

---

[15] LBP-02-12, 55 NRC at 312.

[16] See id. at 311.

[17] See id.

[18] Id. at 312-13.

[19] Id. at 313.

[20] Id. at 312.

[21] Id. at 313.

Given the background as recited by the Presiding Officer, and the "substantial deference" we owe his procedural rulings,[22] we cannot say that he abused his discretion in striking the Sierra Club's December 24 submission. On appeal, the Sierra Club does not really come to grips with the Presiding Officer's procedural ruling, but instead seeks to recast its concerns to include many more issues than the alleged injury from an increase in truck traffic. To that effect, the Sierra Club returns to its original September 24, 2001, intervention petition, and to a later petition from October 18, 2001, both of which cited a litany of claims, not simply the traffic-related concerns which later became the focus of this proceeding. The Sierra Club thus argues that "the ultimate issues" raised in its hearing request "were in no manner confined to the incremental impacts related to truck transportation," and that therefore "any conclusion [by the Presiding Officer] that the December 24 filing should be dismissed because it brought forth new issues in the proceeding that were not associated with transportation issues is without basis."[23]

The Sierra Club's view of "the ultimate issues" is incorrect. Regardless of what issues the Sierra Club may have raised earlier, the supplemental filing at issue here was to focus only on the two transportation matters outlined by the Presiding Officer in the prehearing conference. At that conference, Sierra Club's counsel referred only to the issue of alleged harm from the "increase in truck loads" and the potential for a truck accident. As she herself characterized the Sierra Club's position, the increases in trucks and concomitant potential for more truck accidents were "the basic nutshell of Sierra's concern."[24] Indeed, she discounted the adequacy of the Sierra Club

---

[22] See CLI-02-13, 55 NRC at 273.

[23] Petitioner Sierra Club's Appeal of April 26, 2002, Memorandum and Order (Responding to Commission Remand in CLI-02-13)(May 10, 2002)("Sierra Club Appeal") at 13.

[24] Transcript at 11 (emphasis added).

original hearing petitions -- declaring them conclusory and unsupported.[25] And, significantly, in its prior appeal to the Commission, the Sierra Club made absolutely no mention of the original hearing petitions or any of their allegations. Instead, that appeal raised only two issues: the Presiding Officer's decision to reject the Sierra Club's December 24, 2001 filing, and his decision to disallow the filing of additional affidavits. The Commission decided those two issues. [26] The Sierra Club cannot now introduce entirely new arguments that could have been raised before the Commission in the prior appeal. Effectively, the Sierra Club has waived any arguments relating to the Presiding Officer's analysis of the original hearing petitions.

In short, the Presiding Officer did not abuse his discretion in rejecting the Sierra Club's December 24 filing, and we therefore affirm his dismissal of the proceeding. We do not, however, reach the Presiding Officer's alternate holding that the December 24 filing, even were it admitted, would not support a finding of standing.[27] That aspect of the Presiding Officer's decision raises complex factual and legal questions that we need not decide definitively in today's decision. But we offer a word of caution to guide future cases.

As we see it, the series of Presiding Officer and Commission decisions in the International Uranium cases have left the law of standing in materials license amendment cases in something of a confused state.[28] In the Presiding Officer decision under review here, for example, the

---

[25] See, e.g., id. at 10, 12-13, 15.

[26] See CLI-02-13, 55 NRC at 274-77.

[27] See LBP-02-12, 55 NRC at 314-15.

[28] See LBP-01-8, 53 NRC 204, aff'd, CLI-01-18, 54 NRC 27 (2001); LBP-01-15, 53 NRC 344, aff'd, CLI-01-21, 54 NRC 247 (2001); LBP-02-3, 55 NRC 35, vacated, CLI-02-13, 55 NRC 269 (2002); LBP-02-06, 55 NRC 147, aff'd, CLI-02-10, 55 NRC 251 (2002). In three decisions, the Commission provided relatively narrow, summary affirmances. Our failure to take these earlier occasions to provide more detailed, vigorous guidance on standing may have led the Presiding Officer to assume that the Commission fully endorsed all of the reasoning found in these earlier

Presiding Officer correctly stressed that in license amendment cases petitioners must allege a "distinct new harm or threat apart from the activities already licensed."[29] But the Presiding Officer also has implied in his standing discussions that a petitioner may lack standing simply because an alleged injury resembles one that occurred at some discrete point in the past, even if the old injury no longer poses any threat. For example, in his original standing decision the Presiding Officer inquired whether "hearing requestors pointed to any threat posed by the Maywood [truck] shipments that was not equally present with respect to earlier [shipments]."[30] And in his latest decision, he seemed to call for harm of a type or degree "never previously encountered in the assessment of the prior amendment applications."[31]

There may be circumstances when a "previously encountered" injury, associated with an earlier licensing action, may no longer exist (as with truck traffic impacts that ended when shipments under an earlier license amendment were concluded). In such a case, the re-emergence of a similar -- yet altogether new -- alleged harm, associated with a new licensing action, could prove sufficient for standing, if set forth in detailed fashion and with adequate

---

decisions.

[29] LBP-02-03, 55 NRC at 45; see, e.g., Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 190-92 (1999); see also International Uranium (USA) Corp., LBP-99-08, 49 NRC 131, 134 (1999)(where injuries claimed "amount[ed] to a generalized grievance" over operations at the White Mesa mill, and not a "distinct and palpable harm from the proposed licensing action").

[30] LBP-02-03, 55 NRC at 45.

[31] See LBP-02-12, 55 NRC at 315.

basis.[32] Already suffered harm, in short, does not necessarily preclude standing based on fresh harm of the same type.

In today's decision we need not analyze this standing question in full. We leave it, potentially, for another more appropriate occasion, and affirm the Presiding Officer's decision on procedural grounds.

IV. Conclusion

For the reasons given in this decision, the Commission hereby affirms LBP-02-12.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of October 2002.

[32] See, e.g., Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 56 (1st Cir. 2001); Hall v. Norton, 266 F.3d 969 (9th Cir. 2001); Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996).