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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 40-8681-MLA-4
INTERNATIONAL URANIUM	)	ASLBP No. 98-748-03-MLA
(USA) CORPORATION	)	
(source material license amendment,	)	May 24, 1999
Ashland 2 material)	)	

STATE OF UTAH'S BRIEF ON APPEAL OF LBP-99-5

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STATE OF UTAH'S BRIEF ON APPEAL OF LBP-99-5

I. INTRODUCTION

The State files this Brief pursuant to the Commission's Order, CLI-99-13 (April 26, 1999), granting the State's petition for Commission review of LBP-99-5 -- a decision by the presiding officer upholding a license amendment to International Uranium (USA) Corporation ("IUC") in a Subpart L proceeding. The license amendment allows IUC to receive, process and dispose of alternate feed material from the Ashland 2 portion of the Formerly Utilized Sites Remedial Action Program ("FUSRAP") site, near Tonawanda, New York (hereafter "Ashland 2 material").

IUC operates the White Mesa uranium mill located near Blanding, Utah. The controversy surrounding the White Mesa mill's receipt and processing of alternate feed material is not new. In 1989, the State challenged a license amendment request by the previous White Mesa mill operator, UMETCO, to process Teledyne Wah Chang's zirconium ore processing wastes. *See* In the Matter of UMETCO Minerals

Corporation (Source Materials License No. SUA-1358), LBP-93-7, 37 NRC 267 (1993).

The State has not challenged IUC's alternate feed requests when the material at issue has had a high uranium content.[1] When the material at issue, however, has a average uranium content of 0.008% and the mill operator is receiving millions of dollars for the receipt of the material, the State's jurisdiction may be invoked if the licensee is processing the material for the purpose of changing the classification of the material to allow disposal into the mill's tailings impoundment. Such is the case in this appeal of LBP-99-5 upholding NRC's approval to IUC for the receipt, processing and disposal of the Ashland 2 material.

II. BACKGROUND

The genesis of the Ashland 2 material begins in the 1940's at the Haist property, now called the Ashland 1 site, in Tonawanda, New York. Here, the Manhattan Engineer District ("MED") disposed of approximately 8,000 tons of uranium ore processing residues and contaminated soils. NRC Staff Technical Evaluation Report ("TER") at 1. In 1960, the Haist property (Ashland 1 site) on which the MED tailings were located was transferred to Ashland Oil Company, where, in 1974, Ashland Oil constructed two petroleum storage tanks and a drainage ditch. TER at 1-2. During this period, about 6,000 cubic yards of MED-related residues, commingled with an indeterminate quantity of soils containing inorganic constituents, were removed from

[1] In an IUC amendment request to process the Cotter Concentrates, the alternate feed material had a uranium content of ten percent.

the Ashland 1 site to the Ashland 2 site. The Ashland 2 site adjoined an industrial landfill that accepted chemical and industrial byproducts during the period 1957 to 1982. TER at 1-2.

In the late 1980's the U.S. Department of Energy ("DOE") under FUSRAP performed a Remedial Investigation to define the nature and extent of radiologic contamination arising from uranium processing activities conducted by the Manhattan Engineer District and to support the selection of remedial action alternatives for the entire Tonawanda site.[2] The U.S. Army Corps of Engineers is now responsible for conducting the remediation of the Ashland 2 FUSRAP site. The contract awarded to IUC for the Ashland 2 material covers the transportation costs of the materials to the White Mesa mill in addition to a fee of $90 per cubic yard. Testimony of Robert F. Herbert, supporting State of Utah's December 7, 1998 Brief in Opposition to International Uranium (USA) Corporation's Source Material License Amendment,

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[2] The State's initial concerns about the lack of an adequate analysis of the content of the Ashland 2 material stemmed from the reliance by the licensee, the NRC Staff and the Army Corps of Engineers and its contractor, ICF Kaiser, on DOE's Remedial Investigation ("RI") to determine whether the Ashland 2 material contained listed hazardous waste. This approach is inherently flawed because the RI determination relating to hazardous waste was with respect to characteristic waste -- not listed hazardous waste. The State, after months of negotiations with IUC and after receipt of written investigations and data (such as field sampling protocol and methodology, data from the Ashland 2 site, in-depth Resource Conservation and Recovery Act ("RCRA") analysis conducted by IUC's consultant Jo Ann Tischler, and a letter from the New York RCRA program), and State of Utah RCRA experts' review of relevant data and reports, withdrew its claim that the Ashland 2 material may contain listed hazardous waste. Joint letter from attorneys for the State and IUC to the Presiding Officer, dated October 26, 1998.

("Utah Brief in Opposition"), at 8. The total fee IUC will receive for receipt of 45,000 cubic yards of Ashland 2 material delivered to the White Mesa mill is $4,050,000.

The original 8,000 tons of MED-produced tailings (waste filter cake) contained an average residual uranium content of 0.54%. During the past half century, however, the original MED-related wastes have been diluted, dispersed and commingled with other soils and contaminants. The MED-wastes were spread over roughly two-thirds of the Haist (Ashland 1) property between 1944 and 1946. Then in 1974, part of the MED-waste was commingled with refinery-related contaminated soils, and picked up and moved from the Ashland 1 site to the Ashland 2 site – a site abutting an industrial landfill. TER at 1-2. DOE's investigations estimated that the maximum depth of radioactive contamination at the Ashland 2 site to be nine feet. *See* USDOE "1996 BEMR: Ashland 2" (Hearing File Document 11) at 2. To clean up the 115 acre Ashland 2 site, the remedial action contractor has excavated the contaminated areas and shipped the contaminated soils to the White Mesa mill.[3]

The Ashland 2 material has a very low uranium content ranging from non-detectible to 0.05%. In three different estimates, taken from DOE documents, the average uranium content of the Ashland 2 material ranged from a high of 0.058% to a low of 0.008%. *See* Herbert Testimony at 7.

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[3] The State motioned for a temporary stay of the license amendment pending the hearing, on information and belief that shipments of the Ashland 2 material were enroute to the White Mesa mill, but the motion was denied. Memorandum and Order dated August 13, 1999.

On May 8, 1998, IUC submitted a request to the NRC for an amendment to its Source Material License No. SUA-1358 that would allow IUC to receive and process material from the Ashland 2 FUSRAP site. *See* Hearing File Document 1. Initially, the amount of material comprising the Ashland 2 material was projected to be 25,000 tons; however, the actual amount of Ashland 2 material is about 45,000 cubic yards.[4] Herbert Testimony at 6.

The State was granted a request for a hearing under Subpart L in another IUC license amendment request to take 200,000 cubic yards of alternate feed material (called the "Ashland 1 materials") from the same Tonawanda FUSRAP site that contained the Ashland 2 material. That proceeding has been held in abeyance pending the outcome of this appeal. Memorandum and Order (Docket No. 40-8681-MLA-5) (Hearing Held in Abeyance), dated February 19, 1999.

After various written briefings on the issues by the State, IUC and the NRC Staff, the Presiding Officer issued a decision on February 9, 1999, generally holding that if a licensed uranium mill processes and extracts uranium from material that does not contain listed hazardous waste, then the statutory and guidance requirements have been met. LBP-99-5.

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[4] A cubic yard is roughly equivalent to a ton.

III. STANDARD OF REVIEW

IUC applied to the Staff for an amendment to its materials license that would allow it to receive, process and dispose of alternate feed material. The Staff concluded that the amendment met the requirements of 10 CFR Part 40, Appendix A and the *Final Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores*, 60 Fed. Reg. 49,296-97 (1995) ("Alternate Feed Guidance"). TER at 3 and 6. The State challenged the issuance of the license as being inconsistent with NRC regulations and the Alternate Feed Guidance.

The Commission's Alternate Feed Guidance relates directly to the determinations the Staff must make in reviewing and granting license requests to process materials other than natural ores (*i.e.* alternate feed material). Likewise, the Presiding Officer was bound by the Commission's Alternate Feed Guidance in deciding whether to uphold the Ashland 2 license amendment the Staff granted to IUC. "A Commission policy statement is, of course, binding on its adjudicatory boards." In the Matter of Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732, n.9 (1982) (*citing* Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 51 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979) (hereafter "Grand Gulf Nuclear"). Accordingly, the Commission has a sound legal footing for reversing

the Presiding Officer's decision to the extent that the Presiding Officer acted contrary to the directives in the Alternate Feed Guidance.

In addition, final responsibility and authority for weighing the evidence, making findings and selecting the decision does not rest with the Presiding Officer; it rests with the Commission. "[W]here substantial record evidence can support more than one result, the subordinate's choice must yield to the agency's precisely because the 'responsibility for making the determination is committed to the Commission.'" In the Matter of Duke Power Company (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 403 (1976) (*citing* McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert denied*, 353 U.S. 918 (1957) (hereafter Catawba"); *accord* Fidelity Television, Inc. v. FCC, 515 F.2d 684, 700 (D.C. Cir.), *cert denied* 423 U.S. 926 (1975). *See also* In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998). Accordingly, to the extent that the administrative record, considered as a whole, will fairly sustain a result the Commission deems preferable to the result selected by its initial decision maker, the Commission may "substitute its judgment for its subordinate's." Catawba, 4 NRC at 403. In the IUC Ashland 2 case, the record compels a result that the Ashland 2 material license amendment request does not fall within the Commission's Alternate Feed Guidance.

IV. ARGUMENT

A. The Presiding Officer Erred in Either Not Applying or Misapplying the Commission's Alternate Feed Guidance

The Presiding Officer's decision in LBP-99-5 is fundamentally flawed because the Presiding Officer basically throws out the Commission's Alternate Feed Guidance and invokes his own test to determine whether processing contaminated soils with a low uranium content is permitted under the Atomic Energy Act.

To approve a request by a uranium mill to process and dispose of alternate feed material, the Commission, under the Alternate Feed Guidance, requires the Staff to determine: (1) whether the feed material is ore; (2) whether the feed material contains hazardous waste; and (3) whether the ore is being processed primarily for its source material content (by applying the Co-disposal Test or the Licensee Certification and Justification test). Alternate Feed Guidance, 60 Fed. Reg. at 49,296-97. At the heart of the controversy below was whether IUC satisfied the licensee certification and justification test that the Ashland 2 material was to be processed primarily for its uranium content or for the disposal of waste.[5]

The Presiding Officer looks to the Atomic Energy Act ("AEA") and the Uranium Mill Tailings Reclamation Control Act ("UMTRCA") to determine the

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[5] The Certification and Justification Test requires the licensee, on a case-specific basis and with reasonable documentation, to justify that the proposed processing is primarily for the source material content "based on financial considerations, the high uranium content of the feed material, or other grounds." Alternate Feed Guidance, 60 Fed. Reg. at 49,397

scope of "processed primarily for" in the definition of 11e.(2) by product material.[6]

The Presiding Officer proclaims:

> [W]hen the extraction of uranium is the principal reason that ore is processed, it meets the test of this section and is byproduct material.... If, on the other hand, the material were processed primarily to remove some other substances (vanadium, titanium, coal, etc.) and the extraction of uranium was incidental, then the processing would not fall within the statutory test and it would not be byproduct material within the meaning of the Atomic Energy Act.

LBP-99-5 at 3. Neither the AEA nor UMTRCA provide the answer arrived at in LBP-99-5. The Commission has grappled with the scope of "processed primarily for" and has spelled out in the Alternate Feed Guidance the tests required to meet the "processed primarily for" requirement. The Presiding Officer is required to apply the Commission's guidance instead of making up his own test. Grand Gulf Nuclear,16 NRC at 1732, n.9

In sharp contrast to the lack of constraints under the Presiding Officer's test is the discussion in the proposed guidance on the policy issue surrounding the "primarily for source material" requirement:

> The potential of converting material that would have to be disposed of as LLW [low level waste] or mixed waste into ore, for processing and disposal as 11e.(2) byproduct material [is a significant issue]. The possibility of converting such wastes to 11e.(2) byproduct can be very attractive ... because of the high cost of disposing of LLW and especially of mixed waste.

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[6]The complete definition is: "The tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014e.(2).

Proposed Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores, 57 Fed. Reg. 20,525, 20,533 (1992) ("Proposed Guidance"). The Alternate Feed Guidance attempts to safeguard against sham processing by requiring the licensee to provide adequate documentation that justifies processing alternate feed material primarily for its source material content because of financial consideration, the high uranium content of the alternate feed material or other grounds. Alternate Feed Guidance at 60 Fed. Reg. 49,397.

Unlike the Commission's guidance, the Presiding Officer's decision is devoid of any protection against using a uranium mill to process material for the primary purpose of transforming the classification of the material to allow it to be disposed of in the mill tailings impoundment. Safeguards against what is allowed in the front end of the mill are critical because of the way in which 11e.(2) material is defined. The waste products from processing material through a uranium mill are considered to be 11e.(2) material; therefore, the Presiding Officer's approach of evaluating whether or not some minute quantity of uranium may be extracted from alternate feed material is no test at all. Moreover, it is outside the bounds of the Commission's Alternate Feed Guidance.

In the Utah Brief in Opposition before the Presiding Officer, the State believes it established through the written testimonies of William J. Sinclair and Robert F. Herbert, and by the lack of opposing evidence or documentary support, that IUC is

processing the Ashland 2 material primarily for payment of a disposal fee. The State showed that the average uranium content of the Ashland 2 material may be as low as 0.008 percent. Herbert Testimony at 7; Remedial Investigation Report for the Tonawanda Site, Tonawanda, New York, Bechtel National, Inc., February 1993, Final Report, Table 4-42. Moreover, the State showed that uranium extracted from the Ashland 2 material may have a value of only $68,000, before deducting mill operating and processing costs. Herbert Testimony at 8. In stark contrast to the low uranium content and low financial value of any uranium that may be extracted from the Ashland 2 material is the over four million dollar payment to IUC by the waste cleanup contractor for receipt at the White Mesa mill of the Ashland 2 material. *See e.g.*, Herbert Testimony at 9; Utah Brief in Opposition at 5-9.

The Presiding Officer compounds error upon error in not heeding the Commission's Alternate Feed Guidance when he analyzed the arguments supporting and opposing the Ashland 2 license amendment. The Presiding Officer took the State's arguments to be a test of the licensee's motive or purpose for receipt of the Ashland 2 material instead of arguments why the licensee failed to justify and document under the Alternate Feed Guidance any satisfactory or plausible grounds to show that IUC was not engaged in sham processing. LBP-99-5 at 2-3.

The Presiding Officer's first error was to resort to interpretation of the AEA and the legislative history of UMTRCA in searching for the meaning of "processed

primarily for." LBP-99-5 at 3-4. The Presiding Officer need have looked no further than the third step of the Commission Alternate Feed Guidance which spells out how the "processed primarily for" test is to be met. In fact, the Presiding Officer was obligated to follow established Commission guidance and policy. Grand Gulf Nuclear, 16 NRC at 1732, n.9

The Presiding Officer's second error was relying on the fact that IUC "produced the lowest bid for recycling" the Ashland 2 material. LBP-99-5 at 5. An important policy underlying the guidance is to guard against the potential for owners of alternate feed material to pay a mill operation substantially less to process the material for its uranium content and dispose of the resulting 11e.(2) byproduct material than to pay the high cost of disposing of the same material in a hazardous, mixed or low level waste facility. Proposed Alternate Feed Guidance, 57 Fed. Reg. at 20,532. Missing from the Presiding Officer's decision is any mention of the fact that the other four bids for disposal of the Ashland 2 material were from licensed disposal companies. Utah Brief in Opposition at 6 and Herbert Testimony, Exh. 3. The idea that IUC was the lowest bidder to dispose of the Ashland 2 material supports the State's claim that the Ashland 2 license amendment request did not fall within the Alternate Feed Guidance.

The third error by the Presiding Officer was his assertion that IUC "would remove some uranium from the materials and would make at least a small profit on

that activity." LBP-99-5. There is absolutely nothing in the record to substantiate that IUC will make any profit from uranium extracted from the Ashland 2 material. The State established that any potential range of uranium values from the Ashland 2 material did not include IUC's costs of handling, processing and disposing of the Ashland 2 material. Such costs, which are not documented in the record, must be deducted from any proceeds from the sale of uranium before the Presiding Officer can pronounce that IUC will "make . . . a small profit."

The fourth error was the Presiding Officer's claim that "from an environmental standpoint, it is preferable to extract uranium before burying waste materials that contained it." LBP 99-5 at 5-6. This sweeping statement does not differentiate between the lower environmental protection, monitoring and design standards in place at a uranium mill under 10 CFR Part 40, Appendix A in contrast to the environmental protections required for hazardous waste facilities (RCRA, 40 CFR § 264, Subpart N), low level radioactive waste facilities (10 CFR Part 61) and mixed waste facilities (Part 61 and RCRA). By way of examples, performance standards under Part 40, Appendix A, are for 200 to 1,000 years[7] whereas Part 61 uses time frames of 1,000 to 10,000

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[7]Criterion 6(1) of Appendix A states: "In disposing of waste byproduct material, licensee shall ....close the waste disposal area in accordance with a design which provides reasonable assurance of radiological hazards to be effective for 1,000 years to the extent reasonably achievable, and in any case, for at least 200 years."

years[8]; Part 61 requires groundwater modeling of the unsaturated and saturated zone of the underlying aquifer (10 CFR § 61.13) but Appendix A requires no groundwater modeling at all; and Appendix A, Criterion 13, merely lists parameters without requiring any protection standards and does not in any way incorporate any of RCRA's required protection standards for those parameters. Therefore, there is no support for the Presiding Officer's conclusion that extraction of uranium from wastes originating from a remedial cleanup site and disposal in a Part 40, Appendix A regulated facility are more environmentally benign than disposing of cleanup wastes directly in a RCRA, low level or mixed waste facility. To the contrary, Part 61 and RCRA impose much more stringent environmental controls and safeguards than Part 40 Appendix A.

Finally, it is obvious that the Presiding Officer's decision is an abdication of the Alternate Feed Guidance when the decision is in lockstep with IUC's May 13, 1998

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[8]As stated in NUREG-1573, Branch Technical Position on a Performance Assessment Methodology for Low-Level Radioactive Waste Disposal Facilities (Draft for Public Comment, May 1997) at p. xiii:

> Part 61 does not specify a time of compliance for meeting the post-closure performance objective of 10 CFR 61.41.....To reduce unnecessary speculation regarding the performance assessment, a period of 10,000 years (*i.e.*, the period of regulatory concern) is sufficiently long to capture the peak dose from the more mobile long-lived radionuclides and to demonstrate the relationship of site suitability to the performance objective. Shorter periods, such as the 1,000 years being used in dose assessments for site decommissioning, are considered generally inappropriate for assessments of LLW facilities.

petition to the Commission requesting a revision to the Alternate Feed Guidance – a revision that has not occurred. Moreover, the Presiding Officer's decision also tracks the National Mining Association's "White Paper" (Recommendations for a Coordinated Approach Regulating the Uranium Recovery Industry). In Section V of the White Paper (NRC's Alternate Feed Policy), the Mining Association claims that if a uranium mill is processing alternate feed material -- even if it has below 0.05% uranium content -- it should be presumed that the mill is processing it primarily for its source material content. There would be absolutely no need for IUC or the Mining Association to continue to push such measures if the Presiding Officer's decision were to become the guiding principle for Staff approval of alternate feed material license amendment requests. Clearly, LBP-99-5 must not be upheld by the Commission.

B. There is an Insufficient Administrative Record to Support the Presiding Officer's Decision or the Staff's Grant of the License Amendment Request

As described in the background information above, over the past 50 years a wide array of industrial activities and less than desirable disposal practices occurred at the Tonawanda FUSRAP site. The contamination at the site consists of a host of both radiological constituents and indicator constituents for listed hazardous waste. Moreover, the uranium content of the Ashland 2 material ranged from non-detectible to 0.05% and IUC was awarded a substantial sum to take the Ashland 2 material off the hands of the cleanup contractor. Given these circumstances, one would expect NRC

Staff to be rigorous and circumspect in its review of the IUC Ashland 2 amendment request. One would also expect the Staff to demand IUC provide adequate and relevant documentation to substantiate claims by IUC that its request meets the Alternate Feed Guidance. The time the Staff spent to review the amendment request and the hearing file the Staff compiled in this case are indicative of the Staff's scanty review of the Ashland 2 amendment request.

As discussed in more detail below, review of the hearing file in this case shows that there is inadequate documentation to support the Staff's hazardous waste determination or the "primarily processed for" determination under the Alternate Feed Guidance. Similarly, the Presiding Officer had an inadequate record before him, had he deigned to conduct a probing review of the Staff's amendment approval. Accordingly, in weighing the evidence in the record, the Commission should determine that the Ashland 2 amendment request does not meet the Alternate Feed Guidance and vacate the Presiding Officer's and the Staff's determinations in this case.[9] *See* Grand Gulf Nuclear, *supra*, 16 NRC at 1732, n.9.

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[9] The State is disappointed that the President and Chief Executive Officer of IUC, Mr. Earl Hollens, chose to ignore the ex parte communication edict in 10 CFR 2.780 by corresponding directly with the Commission on the substance of the issues before the Commission in this appeal. The nine page May 13, 1999 letter and 45 pages of attachments (one of which was a copy of LBP-99-5 -- the decision now being briefed to the Commission) also casts aspersions on the State's actions and motives with respect to alternate feed materials. The Commission should not consider or allow the Hollens' letter to bias or influence its decision in this appeal.

IUC's Ashland 2 license amendment request is dated May 8, 1998. NRC issued its approval of the request on June 23, 1998. Hearing File Document 12 (Letter from Holonich, NRC to Rehmann, IUSA enclosing Technical Evaluation Report and License Amendment). The TER contains NRC's determination that the Ashland 2 material meets the definition of ore; does not contain listed hazardous waste; and meets the "primarily processed for" test. TER at 4-6. The documents reviewed by NRC Staff to make these determinations are contained in the TER Reference section. TER at 8. *See also* Hearing File. It took NRC Staff about six weeks to conclude that soils to be excavated from a site highly contaminated from half of century of pollution-causing activities, for which IUC would be paid four million dollars to accept the soils at the mill, met the Commission's Alternate Feed Guidance.

The Staff's "primarily processed for" determination is unsupported by the record. The Staff did not conduct an independent and critical analysis of the issue. Instead it relied on the two-and-a-half pages of undocumented and unsupported generic claims IUC presented in its license request. TER at 5-7; IUC License Amendment Request at 5-8 (Hearing File Document 1).

Under the Licensee Certification and Justification Test, the Alternate Feed Guidance requires:

> The licensee must certify under oath or affirmation that the feed material is to be processed primarily for the recovery of uranium and <u>for no other primary purpose</u>. The licensee must also justify, with <u>reasonable documentation</u>, the certification. The justification can be based on <u>financial considerations</u>, the

high uranium content of the feed material, or other grounds.

60 Fed. Reg. at 49,297 (*emphasis added*).

NRC Staff's articulated rationale that the licensee met the justification test appears to hinge on the peak efficiency of running the mill "to recover the relatively low concentration of uranium" in the Ashland 2 material. TER at 6. Such efficiencies are described by the Staff as: reducing the financial costs of stockpiling ore on the mill site; reducing the time between milling the ore and getting the ore to market; smoothing out the variability in conventional ore production by processing the Ashland 2 material with conventional ores; and retaining trained mill workers. TER at 5.

The Staff's determination fails because there is no documentation whatsoever to objectively support the benefits IUC claims will accrue from processing the Ashland 2 material. Furthermore, IUC cannot base its claim on the "high uranium content" of the Ashland 2 material. Even the Staff acknowledge this fact. TER at 6. The financial considerations espoused by IUC and adopted by the Staff lack not only documentation but also credibility. The justification that IUC will be able to commingle the Ashland 2 material with conventional ores or process the Ashland 2 material at the same time as it processes convention ores flies in the face of IUC's current mill operations. A simple inquiry by NRC Staff to IUC would show that IUC has not had a conventional ore run since IUC took over operation of the White Mesa mill. Rather, IUC relies on

alternate feed materials for its feed stock. Similarly, none of the other efficiencies or reasons mentioned by IUC are supported by any calculations and quantification of benefits.

By contrast, the record shows that IUC will be paid over four million dollars (or $90 per cubic yard) to dispose of the Ashland 2 material. Mr. Herbert's testimony shows that the gross market value of uranium extracted from the Ashland 2 material ranges from $68,040 to $616,613 (or $1.51 to $13.72 per cubic yard). Herbert Testimony at 8-9. The numbers speak for themselves. It is obvious that IUC's primary purpose is disposal, not reprocessing or mill efficiency.

Also reflective of the inadequate record, are documents the NRC Staff's relied on in making its hazardous waste determination.[10] The first three documents in the reference section of the TER are summary documents that do not address, at all, whether the Ashland 2 material may contain listed hazardous waste.[11] The next two documents are generic DOE documents about DOE's FUSRAP program. Moreover, NRC relied on an inadequate cleanup sampling and analysis plan and did not request

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[10] Even though the State eventually resolved this issue with IUC, this does not take away from the fact that the Staff did not have an adequate record before it in making its hazardous waste determination at the time it approved the Ashland 2 license amendment request.

[11] The two Corps of Engineers documents (Record of Decision and Proposed Plan for the Ashland 1 and Ashland 2 sites) are decisional documents that summarize DOE's Remedial Investigation of the sites. *See* Hearing File Document 5. The third document, DOE's "1996 BEMR: Ashland 2," is a 3 page document that gives a brief overview of the Ashland 2 site. *See* Hearing File Document 11.

or review sample results taken from the Ashland 2 site. *See* Sinclair Testimony at 5.[12]

The evidence in the record does not support the decisions made by Staff or the Presiding Officer. Instead, the record cries out that IUC is processing the Ashland 2 material not to extract uranium but for the purpose of changing the classification of the material to allow it to be disposed of in the White Mesa tailings impoundment. The State urges the Commission to exercise its power by selecting the only reasonable result that is supported by the record: vacate LBP-99-5 and the Staff's approval of the Ashland 2 license amendment request.

C. If Allowed to Stand, the Presiding Officer's Decision Would Create Overlapping Regulation and Compromise Environmental Protection.

Uranium is ubiquitous in almost any earthen material. The holding in LBP-99-5, that, so long as a uranium mill is extracting some minute portion of uranium from alternate feed material, has the hallmark of converting uranium mills into waste disposal facilities. Allowing LBP-99-5 to stand will usurp and impinge upon other statutory programs.

The Presiding Officer's decision has the potential for sanctioning uranium mills to accept clean up soils that may contain hazardous waste, mixed waste, PCBs, and low level radioactive waste ("LLRW"). The foregoing categories of waste have their own

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[12] Mr. Sinclair, who participated in negotiations with IUC to resolve the hazardous waste question, concluded "[i]n essence, the State was forced to perform the hazardous waste evaluation that NRC should have performed before approving the Ashland 2 amendment." Sinclair Testimony at 5-6.

established regulatory programs, and are regulated under RCRA, Toxic Substances Control Act ("TSCA"), 10 CFR Part 61 or equivalent State programs.

The unbridled discretion outlined in LBP-99-5 would allow a mill to process whatever it wants so long as some quantity of uranium can be extracted. There appears to be no requirement for Staff to conduct a vigorous RCRA analysis based upon relevant documentation.[13] Nor are there any controls against the ultimate disposal of PCBs, mixed waste and LLRW in the mill tailings impoundment. Such practices infringe upon TSCA (PCBs); RCRA (hazardous waste, mixed waste and solid waste); and 10 CFR Part 61 or equivalent Agreement State program (LLRW). Furthermore, acceptance of low level waste by a uranium mill may require approval by the appropriate Interstate Compact on Low Level Radioactive Waste -- another legal arena in which LBP-99-5 runs afoul.

Over the last decade the State of Utah has established by statute, regulation and policy a comprehensive waste management scheme for commercial solid, industrial, hazardous and radioactive wastes. *See e.g.*, Utah Code Ann. Title 19, Chapters 3 and 6. As part of Utah's control of waste disposal, it has enacted siting criteria and requires legislative and gubernatorial approval for expansion of existing commercial waste

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[13] The Presiding Officer claims "[t]he adequacy of the Staff's safety review is irrelevant." LBP-99-5 at n.9. Consequently, under LBP-99-5 no adjudicatory review of how the Staff conducts its RCRA review of alternate material would be available. Thus, the potential is wide open that some alternate feed material may contain listed hazardous waste.

facilities or approval of new facilities. In addition, the State has a comprehensive groundwater discharge permit program to protect all waters of the State – not just potable drinking water sources as is the case under 10 CFR Part 40, Appendix A. *See* Sinclair Testimony at 4.

By allowing material with a de minimis uranium content to be considered alternate feed material (*e.g*, below 0.05%), NRC frustrates the State's efforts at regulating commercial waste disposal practices in Utah. Environmental protection dictates that when the White Mesa mill is conducting business as a waste disposal facility it be treated the same as any other waste disposal facility in Utah. Of primary State interest is protection of the State's natural resources and of critical concern is the protection of all groundwater resources. The Sinclair testimony describes the inferior groundwater protection system in place at the White Mesa mill in contrast to similar waste facilities in Utah. *See* Sinclair Testimony at 3-5; *see also* Herbert Testimony at 9-10. The uncertain regulatory regime created by LBP-99-5 weakens environmental protection of Utah's natural resources.

V. CONCLUSION

There is no factual or legal basis for the decision rendered in LBP-99-5. Nor is there a record that will sustain the Staff's approval of the Ashland 2 license amendment request. Moreover, if those decisions are allowed to stand, other regulatory programs under the jurisdiction of the State will be trammeled. The State urges the Commission

to exercise its reasoned judgment and sustain the result demanded by the record in this case: overturn LBP-99-5 and the Staff's determination that the Ashland 2 licence amendment request meets criteria established in the Alternate Feed Guidance.

Dated this 24th day of May, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S APPEAL OF LBP-99-5, dated May 24, 1999, was served on the persons listed below by U. S. Mail, first-class, postage prepaid, and by e-mail (unless otherwise noted) this 24th day of May, 1999.

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