

RAS 1811

DOCKETED
USNRC
June 5, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

'00 JUN 14 A10:04

OFFICE OF GENERAL COUNSEL
RULES AND ADJUDICATION
ADJUDICATION STAFF

In the Matter of)
)
HYDRO RESOURCES, INC.)
P.O Box 15910)
Rio Rancho, NM 87174)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

INTERVENORS' MOTION FOR PARTIAL RECONSIDERATION OF CLI-00-08

Pursuant to 10 C.F.R. §§ 2.1259(b) and 2.771, Intervenors Eastern Navajo Diné Against Uranium Mining and and Southwest Information and Research Center ("ENDAUM" and "SRIC") hereby move for partial reconsideration of CLI-00-08, the Commission's Memorandum and Order of May 25, 2000. CLI-00-08 reverses the Presiding Officer's decision in LBP-99-13, 49 NRC 233 (1999), on the ground that Hydro Resources, Inc. ("HRI") has failed to submit an adequate financial assurance plan for decommissioning the Crownpoint Project. ENDAUM and SRIC seek reconsideration of that portion of CLI-00-08 which permits HRI to retain its invalid license.

Background

This case involves a proposed uranium leach mine that was licensed in January of 1998, before the commencement of an adjudicatory hearing. The NRC Staff exercised its authority to issue the license before the hearing pursuant to 10 C.F.R. § 1205(m), which provides that "[t]he filing or granting of a request for a hearing or petition for leave to intervene need not delay NRC staff action regarding an application for a licensing action covered by this subpart."

Template = SECY-041

SECY-02

In CLI-00-08, the Commission held that HRI was required to submit its decommissioning funding plan prior to licensing. CLI-00-08, slip op., at 13. The Commission also found that the Presiding Officer erred in concluding that questions about HRI's financial assurance plan for decommissioning the Crownpoint Project could be left for post-hearing resolution or a second round of hearings closer to the time of operation. Id. Instead, the Commission ruled that the Intervenor was entitled to a hearing on the adequacy of HRI's decommissioning plan, cost estimates, and financial assurance plan, in the licensing proceeding. Id., slip op. at 13-15.

In fashioning a remedy, the Commission declined to revoke HRI's license, but instead imposed a license condition which prohibits HRI from using the license until the NRC Staff has approved its decommissioning and financial assurance plan. Id., slip op. at 15-16. The Commission explained its ruling as follows:

In these circumstances, we could, in theory, simply invalidate HRI's license, and call upon our staff to reissue the license only after it has obtained, and is satisfied with, the requested cost-estimate information. However, as a matter of our equitable discretion to fashion sensible remedies, we decline to impose a draconian remedy when less drastic relief will suffice. We choose instead to impose the following condition on HRI's license: the company is prohibited from using its license until the NRC staff has approved its decontamination, decommissioning and reclamation plan, including the requisite financial assurance plan and cost estimate. This condition will protect intervenors' interest by placing them in the same position they would have been in if the staff had approved the financial assurance plan, including cost estimates, prior to issuing the license.

Id.

In a footnote, the Commission further elaborated on its reasoning:

HRI has indicated that its purpose in obtaining a license now is not to enable it immediately (or even in the near future) to conduct mining and milling operations, but rather to gain a valuable asset (the license) that would increase the net worth of the company, enable it to attract new capital, and position it to take advantage of future uranium mining opportunities if and when they arise (citation omitted) . . . Invalidating

the HRI license would return this protracted proceeding to the beginning and presumably require HRI to start over again. This is unnecessary, given the posture of the case and the nature of the financial assurance issue. The NRC staff's error in issuing HRI a license prematurely was procedural. It is not yet clear whether any substantive defect defeating the license exists. Conditioning HRI's actual use of the license on obtaining NRC staff approval of a financial assurance plan, subject to a subsequent hearing, leaves intact intervenors' ability to demonstrate substantive defects in HRI's financial assurance submission.

Id. slip op., at 15, n.18.

ARGUMENT

The Commission Should Reconsider Its Decision Not to Vacate the HRI License.

NRC regulations at 10 C.F.R. §§ 2.1259(b) and 2.771 permit a "dissatisfied litigant in a Subpart L proceeding" to "seek reconsideration of a final determination by the Commission or a presiding officer based on the claim that the particular decision was erroneous." Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355 (1992). A movant seeking reconsideration "must do so on the basis of an elaboration upon, or refinement of, arguments previously advanced, generally on the basis of information not previously available." Id., citations omitted.

ENDAUM and SRIC request the Commission revisit its decision not to grant the Intervenor's request that the Commission reject HRI's license application as inadequate to meet NRC financial assurance requirements and the requirements of the Atomic Energy Act, and revoke HRI's license because it was unlawfully issued. See Brief of Intervenor ENDAUM and SRIC on Review of Partial Initial Decision LBP-99-13, Financial Assurance for Decommissioning at 30, (August 13, 1999). Intervenor respectfully submit that the Commission was legally required to revoke HRI's license, and that it lacked "equitable

discretion" [see CLI-00-08, slip op. at 15] to fashion an alternative remedy which allowed HRI to retain the license.

The limits of the Commission's discretion in this proceeding are bound by the Commission's own regulations. Union of Concerned Scientists v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978); United States v. Nixon, 418 U.S. 683, 695-96 (1974); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 388-89 (1957). The Commission lacks discretion to let the HRI license stand despite its noncompliance with NRC safety regulations, because it previously "divested itself" of any discretion it may have had. Union of Concerned Scientists v. NRC, 711 F.2d at 381. This divestment was made in the preamble to the proposed version of the procedural regulations for materials licensing. See Notice of Proposed Rulemaking, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,089-10 (May 29, 1987).¹

The proposed version of the informal hearing regulations contained language identical to the current 10 C.F.R. § 2.1205(m), which permits the issuance of a materials license, based on the NRC Staff's review, before the conclusion of licensing hearings. See proposed § 1205(l), 52 Fed. Reg. at 20,093. In proposing the regulation, the Commission recognized that the "agency action" involved in a licensing hearing is the "granting or denying [of] a materials license." 52 Fed. Reg. at 20,090. The Commission also recognized the "right" of the interested public to

¹ Intervenors believe the Atomic Energy Act also limits Commission discretion such that it may not allow an invalid license to stand. In any event, it is not necessary to reach this question, given the clear limit established by the Commission's regulations.

“challenge the requested licensing action.” In other words, the Commission recognized the public’s right to seek a decision denying the issuance of a license. 52 Fed. Reg. at 20,09.

Balanced against the public’s hearing right, the Commission found that the license applicant has the “right” to a “reasonably prompt administrative assessment of and determination about its application so it can go forward with its planned activities.” *Id.* Into this “balance,” the Commission weighted “the governmental interest in avoiding delay in the administrative process that will be caused by halting all action on the application pending notice of opportunity for hearing and any hearing,” and the substantially lesser hazard posed by materials licenses in comparison to nuclear reactor licenses.² *Id.* Taking all these factors into account, the Commission found that “an appropriate balance is struck by [the Commission’s] present practice of not requiring that completion of any requested hearing be a prerequisite to every licensing action by the agency.” *Id.*

Thus, the “balance” struck in the rulemaking gave a license applicant the benefit of obtaining a license based on staff approval only, without awaiting the outcome of a hearing; while on the other hand, it maintained the full right of interested members of the public to challenge the validity of the license in an adjudicatory hearing.³ Under this balance, it was

² As a counterweight to the early issuance of the license, the Commission also added a provision allowing interested persons to request a stay of the effectiveness of the license pending the outcome of the hearing, if they believe the effectiveness of the licensing action would be harmful to their interests. *Id.* In other words, an intervenor could seek a stay of the Staff’s licensing action pending the outcome of the proceeding, *i.e.*, pending the ultimate determination by the Presiding Officer regarding whether the license should be granted or denied.

³ Intervenors do not necessarily concede the lawfulness or fairness of Section 1205(m). However, it is not challenged for purposes of this motion.

understood that the early issuance of the license was not necessarily permanent, but subject to the outcome of the hearing which might result in reversal of the Staff's licensing decision.

The Commission's decision in CLI-00-08 upends this balance by refusing to honor the Intervenor's right to obtain the denial of HRI's license through the adjudicatory process. In fact, as discussed in CLI-00-08 at pages 9 and 15, the Commission explicitly *relies* on the fact that the Staff previously had issued the license, as justification for refusing to revoke it. *Id.*, slip op. at 9, 15. This circular reasoning leads to an unfair result that was not contemplated by the framers of Section 1205(m).⁴ The Commission must respect the balance that was struck in promulgating 10 C.F.R. § 1205(m), and confine its discretion to the limits of that rulemaking.

The Commission has also asserted several other rationales for its decision not to revoke HRI's license, none of which can serve to justify upsetting the balance struck in the Notice of Proposed Rulemaking for Subpart L. First, the Commission expressed concern that invalidating HRI's license would decrease the value of the license as an asset to HRI. CLI-00-08, slip op. at 15, n. 18. Again, the Commission improperly used the early issuance of HRI's license as a bootstrap rather than a qualified right that is balanced against the Intervenor's right to challenge the license. Moreover, the NRC has no cognizable interest in promoting HRI's economic welfare. Finally, the fact that HRI may have obtained false value by virtue of the NRC staff's

⁴ The Commission states that the license condition prohibiting HRI from using its license until the Staff has approved a decommissioning plan "will protect intervenors' interests by placing them in the same position they would have been if the staff had approved the financial assurance plan, including cost estimates, prior to issuing the license." CLI-00-08, slip op. at 16. This can hardly be considered protection under the statutory and regulatory scheme for licensing of nuclear facilities. The "protection" for which the Intervenor's have labored for over five years, and to which they are now entitled under the Commission's regulations and Section 189(a) of the Atomic Energy Act, is the denial of a license that Intervenor's have demonstrated to be deficient.

mistaken decision to issue a license in 1998 does not justify the perpetuation of the mistake.

Moreover, the Commission is incorrect in supposing that revocation of HRI's license would not take it back to the very "beginning" of the license application process. CLI-00-08, slip op. at 15, n. 18. HRI would be put in the same position as every other license applicant whose application is rejected as deficient by a Licensing Board or the Commission. It is the Commission's routine practice to reject the relevant portion of a license application without prejudice, allowing the applicant to amend. The only difference here is that HRI's license must also be revoked. Presumably, the NRC Staff would re-issue the license once this information was reviewed and deemed adequate.

Finally, the Commission cites the "nature of the financial assurance issue," in connection with its opinion that the "NRC staff's error in issuing HRI a license prematurely was procedural." Id. Whether or not the Staff's error was procedural, the result is substantive: HRI holds a license for which there is no demonstration whatsoever of HRI's ability to clean up the Crownpoint Project site after operations cease, as required by Appendix A to 10 C.F.R. Part 40. There can be no doubt that this is a fundamentally important safety requirement in the body of NRC regulations.⁵ Moreover, there is no question that compliance with this requirement is essential to any licensing determination that the Crownpoint Project will be operated safely.⁶

⁵ As the Commission stated in the preamble to the regulations establishing Criterion 9 of Appendix A, a financial surety for decommissioning is meant "to protect the public from the possibility of a licensee's inability to perform the required decommissioning and reclamation." *See* Intervenors' August 13 Brief at 13-14, citing 45 Fed. Reg. 65521, 65526 (October 3, 1980).

⁶ See 10 C.F.R. § 40.32, which requires that in order to license a materials facility, the NRC must determine that issuance of a source materials license "will not be inimical to the

The Commission's characterization of this serious deficiency in the HRI license as procedural defect is also misleading, because it implies that the problem can easily be cured by the submission of information that is already at hand, easily obtainable, and noncontroversial. As demonstrated in the Intervenor's evidentiary presentation (see ENDAUM's and SRIC's Written Presentation on Hydro Resources, Inc.'s Lack of Technical and Financial Qualifications, at 16-24 (January 11, 1999)),⁷ HRI's uncertain financial status, as well as the poor operating history of its parent company, Uranium Resources, Inc., raises significant questions about HRI's ability to decommission the Crownpoint Project safely. Thus, it is inappropriate to characterize the lack of a decommissioning plan for the Crownpoint Project as a procedural defect.

common defense and security or to the health and safety of the public."

⁷ See also Written Testimony of Michael F. Sheehan, Ph.D., attached as Exhibit 1 to ENDAUM's and SRIC's Written Presentation on Financial Assurance for Decommissioning (January 11, 1999) (hereinafter, "Sheehan Testimony"). Dr. Sheehan stated that a license applicant that is not well qualified financially is more likely to have problems that affect the public health, safety and the environment because the applicant will have (1) a tendency to cut corners because of poor capitalization or financial condition; (2) an unstable financial situation increases risk of events that may affect the public health, safety and the environment; (3) an inability to fund appropriate responses to unsafe events; and (4) a downward spiral of performance. (Sheehan Testimony, at 19-23). Further, Dr. Sheehan testified: "...Uranium Resources, Inc. ('the Company') [HRI's parent company] lacks the financial capability to conduct this project in a responsible manner or to provide the necessary financial assurance . . . Moreover, the Company's financial situation appears to be deteriorating. . . .A firm with these financial characteristics cannot undertake a project of the magnitude of the proposed Crownpoint operation . . ." (Sheehan Testimony, at 20-23).

Conclusion

For the foregoing reasons, this Motion for partial reconsideration should be granted.

Respectfully submitted,



Geoffrey H. Fettus

Douglas Meiklejohn

Lila Bird

NM ENVIRONMENTAL LAW CENTER

1405 Luisa Street, Suite 5

Santa Fe NM 87505

(505) 989-9022



Diane Curran

HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP

1726 M Street, N.W., Suite 600

Washington DC 20036

(202) 328-6874

DOCKETED
USNRC
June 5, 2000

'00 JUN 14 A10:04

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)

HYDRO RESOURCES, INC.)
P.O. Box 15910)
Rio Rancho, NM 87174)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2000, I caused to be served copies of the foregoing:

INTERVENORS' MOTION FOR PARTIAL RECONSIDERATION OF CLI-00-88

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas S. Moore*
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Mitzi Young, Esq.
John T. Hull, Esq.
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
1726 M Street, N.W., Suite 600
Washington DC 20036

William Paul Robinson
Chris Shuey
SRIC
P.O. Box 4524
Albuquerque, NM 87106

Kathleen Tsosie
ENDAUM
P.O. Box 150
Crownpoint, NM 87313

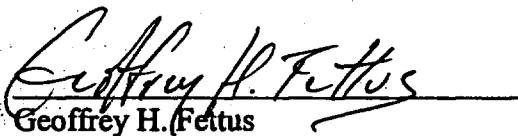
Eric Jantz, Esq.
DNA - People's Legal Services
PO Box 116
Crownpoint, NM 87313-0116

Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson, Esq.
Frederick Phillips, Esq.
David Lashway, Esq.
SHAW PITTMAN
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

Jep Hill, Esq.
Jep Hill & Associates
P.O. Box 30254
Austin, TX 78755

Dated at Santa Fe, New Mexico,
June 5, 2000


Geoffrey H. Fettus