

November 15, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)	
P.O. Box 777)	ASLBP No. 95-706-01-ML
Crownpoint, New Mexico 87313)	
)	

NRC STAFF'S RESPONSE TO INTERVENORS' MOTION
TO SUSPEND PROCEEDING PENDING REINSTATEMENT OF
AGENCYWIDE DOCUMENT ACCESS AND MANAGEMENT SYSTEM

INTRODUCTION

Pursuant to the Presiding Officer's scheduling Order dated November 5, 2004, the staff of the Nuclear Regulatory Commission ("NRC Staff") hereby responds to the motion filed by Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center (collectively, "Intervenors") to suspend this licensing proceeding pending reinstatement of the Agencywide Document Access and management System ("ADAMS"). For the reasons set forth below, the Staff submits that the Intervenors' motion should be denied.

BACKGROUND

On October 25, 2004, the NRC temporarily suspended public access to ADAMS, its on-line document library, pending a security review of the library, to ensure that potentially sensitive information is removed from public access on th agency web site.¹ The review, when complete is intended to ensure that documents that might potentially be useful to terrorists will not be

¹ See "Letter from John T. Hull to Administrative Judges providing notification of the unavailability of ADAMS documents to the public" dated October 25, 2004; see *also* Press Release: NRC Initiates Additional Security Review of Publicly Available Documents; Temporarily Suspends Agency's On-Line Library ("October 25 Press Release").

accessible, while still maintaining public access to information regarding NRC activities.² The NRC has prioritized restoration of public access as soon as possible to documents connected to ongoing adjudicatory proceedings.³ On November 2, 2004, Intervenors moved to have the Board suspend the proceeding until ADAMS is full restored.⁴

DISCUSSION

I. Standard for Suspension of a Proceeding

The NRC's interest in conducting efficient and expeditious administrative proceedings is significant.⁵ In order to establish that a proceeding should be held in abeyance or suspended, the moving party must demonstrate the existence of "immediate threats to public health and safety requiring such a drastic action,"⁶ or that suspension is required in order to prevent irreparable injury or "substantial prejudice."⁷ As discussed below, the Intervenors have failed to establish any of these factors, and their Motion to Suspend should thus be denied.

² See October 25 Press Release.

³ *Id.*

⁴ See "Intervenors' Motion to Suspend Proceeding in Pending Reinstatement of Agency Documents Access and Management System" dated November 2, 2004 ("Motion to Suspend"). In his "Order (Schedule for Written Presentations)" dated November 5, 2004 ("Scheduling Order"), the Presiding Officer directed the Staff and the licensee to respond to the Motion to Suspend by November 15.

⁵ See, e.g. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999), citing *Duke Power Co* (Catawba Nuclear Station), CLI-83-19, 17 NRC 1041, 1048 (1983).

⁶ See, e.g. *Pacific Gas and Electric Co.* (Diablelo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-04, 57 NRC 273, 277 (2003).

⁷ See, e.g. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-05-09, 41 NRC 404, 405 (1995).

II. Motion to Suspend Fails to Meet the Standard for Suspension of a Proceeding

The Intervenors allege that proceeding with the case while they are unable to access ADAMS would “deprive them of a meaningful opportunity for a hearing.”⁸ While they presently lack access to ADAMS, the Intervenors have been receiving hard copies of all relevant licensing documents during the six-year course of this proceeding (pursuant to the hearing file requirements of 10 C.F.R. § 2.1231),⁹ and they do not identify any specific documents, the lack of which prevents them from effectively litigating their interests. Thus, while the temporary shutdown of ADAMS may deprive the general public from access NRC documents, the Intervenors are in a very different position than the general public. Because the burden of showing substantial prejudice and therefore a need to suspend the proceeding lies with the party seeking suspension, the Intervenors must do more than generally and vaguely allege that “information that is potentially relevant” is inaccessible.¹⁰ The Intervenors fail to identify any specific documents - apart from those in the Hearing File which they already have in their possession - which they need in order to effectively participate in this proceeding. They have thus not shown why suspension of this proceeding is warranted.

Moreover, their request that the proceeding be suspended until ADAMS is fully restored¹¹ is too broad, because it is clearly unnecessary to suspend the proceeding until every single NRC document has been reviewed and restored to ADAMS. The Intervenors have not shown how the

⁸ Motion to Suspend at 3.

⁹ See, e.g., Staff counsel’s letter to the Presiding Officer and parties dated May 16, 2000; August 31, 2000; and March 25, 2004. This proceeding remains governed by the provisions of 10 C.F.R. Part 2 in effect prior to February 14, 2004.

¹⁰ See Motion to Suspend at 4.

¹¹ Motion to Suspend at 3, 6.

overwhelming majority of NRC documents might have relevance to contested issues in the proceeding.

The Intervenors state that they will be prejudiced by not having access to any newly generated information relevant to the license issued to Hydro resources, Inc. (“HRI”).¹² This proceeding has been at a standstill for months, and the license cannot now be used. There has been no recent exchange of documents between the Staff and HRI.

The Intervenors argue that the temporary shutdown of ADAMS harms the public because the shutdown deprives those seeking information about the *HRI* proceeding the opportunity to educate themselves, thereby hindering public comment on NRC safety and environmental documents.¹³ However, the Intervenors do not have standing to represent the general public’s interest in this proceeding.¹⁴ Additionally, the Intervenors have failed to offer any reason to believe that continuing the proceeding would have any adverse impact on public health and safety or cause any irreparable injury to the public, which is the standard for suspension of a proceeding.¹⁵ The temporary interruption of the public’s access to documentary information regarding this proceeding

¹²See Motion to Suspend at 4.

¹³See Motion to Suspend at 4-5.

¹⁴See *Chemetron Corp.* (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 19 (1994) (“[N]othing in the Commission’s regulations authorizes requestors to undertake to represent the general public as if they were private attorneys general”); see also *Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 50 (1994); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 484 (1977).

¹⁵See *Diablo Canyon, supra*, CLI-03-04, 57 NRC at 277.

without anything more is not sufficient to override the strong public interest in ensuring the prompt resolution of contested issues.¹⁶

III. November 5 Scheduling Order

In his Scheduling Order, the Presiding Officer set a schedule for the parties' written presentations under 10 C.F.R. § 2.1233.¹⁷ The Presiding Officer stated that the Intervenors' first written presentation "shall be filed 45 days from the date set in the Presiding Officer's order resolving" the Motion to Suspend.¹⁸ He further required, *inter alia*, that each party shall include, in its written presentations, all appropriate ADAMS accession numbers and Hearing File numbers for that material.¹⁹

Should delays keep the portion of ADAMS related to the *HRI* docket from being restored in the near future, it would be difficult, if not impossible, for parties other than the Staff to satisfy the requirement to provide ADAMS accession numbers. But that issue can be addressed later, if at the time that the first written presentation becomes due, that portion of ADAMS has not been restored.²⁰ In the meantime, the lack of ADAMS accession numbers should not prevent the Intervenors from preparing their written presentations. The accession numbers can be added later when they become available on ADAMS.

¹⁶ See *Hydro Resources Inc.*, CLI-01-01, 53 NRC 31, 38-39 (2001).

¹⁷ See Scheduling order at 1.

¹⁸ See *id.* at 2.

¹⁹ *Id.* at 4.

²⁰ Public access to portions of ADAMS and the electronic hearing docket may be restored sometime later this week. The Staff will keep the Board and parties informed of any developments affecting document access.

CONCLUSION

For the forgoing reasons, the Staff submits that suspension of this proceeding pending restoration of the general public's access to ADAMS is not warranted. The Intevenors have failed to show, with sufficient specificity, how the ADAMS shutdown harms their interests. The Motion to Suspend should therefore be denied.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of November, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' MOTION TO SUSPEND PROCEEDING PENDING REINSTATEMENT OF AGENCYWIDE DOCUMENT ACCESS AND MANAGEMENT SYSTEM" in the above-captioned proceeding have been served on the following persons this 15th day of November, 2004, by deposit into the U.S. Mail, first class (or as indicated by an asterisk, through the Nuclear Regulatory Commission's internal mail system), and by electronic mail (except as indicated by a double asterisk).

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