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'99 MAY 27 P4:19

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECURITY
RULEMAKING AND
ADJUDICATION STAFF

BEFORE THE COMMISSION

In the Matter of)
)
HYDRO RESOURCE, INC.) Docket No. 40-8968-ML
2929 Coors Road, Suite 101) (Leach Mining License)
Albuquerque, New Mexico 87120)

NRC STAFF RESPONSE TO ENDAUM AND SRIC
MOTION FOR RECONSIDERATION OF
MAY 3, 1999 ORDER AND REQUEST FOR EXPEDITED REVIEW

Mitzi A. Young
Counsel for NRC Staff

May 27, 1999

SECY-EHD-006

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NUCLEAR REGULATORY COMMISSION

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INTRODUCTION

By Order, dated May 3, 1999 (unpublished), the Commission directed, *inter alia*, that no additional petitions for Commission review are to be filed in this proceeding until the Presiding Officer completes his consideration of all questions related to Church Section 8 property. Order at 2.¹ By motion filed May 13, 1999, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC) asked that the Commission reconsider its Order, to the extent it directs parties to file a single petition for review of 30 pages or less within 14 days of the Presiding Officer's final decision on the Church Rock Section 8 portion of the Crownpoint Uranium mining project at issue in this proceeding. ENDAUM's And SRIC's Motion For Reconsideration Of May 3, 1999 Order; *Expedited Review Requested*, dated May 13, 1999 (Motion) (emphasis in

¹ The Order extended the time for the Commission to rule on Intervenors' petitions for review of four partial initial decisions that had been issued in this proceeding. Order at 1. Two decisions, LBP-99-18 (May 11, 1999), and LBP-99-19 (May 13, 1999) were issued after the Order.

original). Intervenors claim that the 30-page limit amounts to a reduction (by half) of the page limit allowed by the regulations contrary to the Commission rules of procedure and Intervenors' right to a meaningful hearing opportunity. Motion at 1, 2-6.

For the reasons stated below, the Staff believes the Commission should deny the Motion.²

DICUSSION

Intervenors argue that reconsideration³ is warranted because they are entitled to file a 60-page petition for review under 10 C.F.R. §§ 2.786 and 2.1253 (since the Presiding Officer could issue six more partial initial decisions and any petition for review which they might choose to file could be as long as ten pages) and the Commission exceeded its authority when it reduced the page limit. See Motion at 4.⁴

² The caption to Intervenors' motion indicates that "expedited review" is requested. While this request is not addressed in the text of the motion, presumably Intervenors seek expedited consideration of their motion consistent with the projected date for the Presiding Officer to rule on all disputes concerning Church Rock Section 8, *i.e.*, June 15, 1999. See Hydro, CLI-99-1, 49 NRC ___, slip op. at 4 (January 29, 1999). The Staff does not object to expedited consideration of the Motion.

³ Reconsideration may be granted to clarify the meaning or intent of certain language in an earlier decision, *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 390-91 (1995), however, reconsideration is granted at the discretion of the Commission, *id.*, CLI-95-17, 42 NRC 229, 234 n.6 (1995), citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980).

⁴ Intervenors note that the Commission only may provide alternate hearing procedures involving the conduct of military or foreign affairs function or to adjust time periods "for good cause shown." *Id.* at 4, citing, 10 C.F.R. §§2.700a, 2.711(a). While Intervenors' reading of the regulations is correct, it ignores the Commission's inherent supervisory authority over Commission adjudications, which includes providing the Commission's view on substantive or proceeding matters. See *Hydro Resources, Inc.*, CLI-98-22, 48 NRC 215, 217 (1998).

These arguments should be rejected. As the Commission has stated on a number of occasions, it has inherent supervisory authority over the conduct of NRC adjudicatory proceedings. See e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977) (the Commission is responsible for the actions and policy of the agency, has the authority to review and act upon any adjudicatory matter before a Commission tribunal, and takes action to avoid unnecessary delay or excessive inquiries in licensing proceedings); *id.*, CLI-90-3, 31 NRC 219, 229 (1990) (the Commission is responsible for its adjudicatory boards, which act on authority delegated by the Commission); *Baltimore Gas & Electric* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 39, 52-53 (1998) (the Commission issues orders pursuant to its supervisory authority to speed up the adjudicatory process without prejudicing the right to meaningful participation). It therefore stands to reason that the Commission, which can delegate functions to adjudicatory officers and tribunals, retains the power to regulate the course of the hearing, dispose of procedural matters, and take any other action consistent with the Atomic Energy Act (AEA), the regulations and sections 551-558 of title 5 of the United States Code. See 42 U.S.C. § 2241 (AEA Section 191); 10 C.F.R. § 2.718(e), (f), (m).

In the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998), the Commission emphasized that its objective is to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's mission. Intervenors' assertion that the Commission does not have the authority to impose a page limit on its filing ignores (1) that the Commission is entitled to

construe its regulations and structure the appellate phase of this proceeding in a manner consistent with efficiency and fairness, (2) that petitions for review are to be "concise" and (3) that the Commission grants review as a matter of discretion and, hence, should have the latitude to structure requests for review. See *Union of Concerned Scientists v. NRC*, 920 F.2d. 50, 54, 55-56 (1990) (deference afforded to NRC procedural rules due to the Commission's broad responsibility in achieving statutory objectives; the NRC may adopt rules and pleading schedules designed to expedite its proceedings); 10 C.F.R. §§ 2.786(b)(2), (b)(4). A page limit that can focus the parties' concerns and deter filings on trivial matters is reasonable given the limited scope of this 10 C.F.R. Part 2, Subpart L, proceeding dealing with only one area of the authorized mining project.

Consistent with the Commission's desire for expedition in this proceeding, see CLI-99-1, *supra*, slip op. at 3-4, the Presiding Officer now has issued a partial initial decision regarding six of ten written presentations filed by Intervenors.⁵ As a practical matter, the decision to rely on issuance of multiple partial initial decisions to expedite disposition of contested matters should not automatically result in a 10-page (petition for review) allowance per partial decision issued. To do so would emphasize form over substance since, if the Presiding Officer, instead, had elected to issue a single initial decision, Intervenors would be entitled to file only a 10-page petition for review (and not ten pages per written presentation).⁶

⁵ The ten written presentations filed by Intervenors are listed in the Motion. See Motion at 2, n.3.

⁶ If Intervenors are correct that the Commission lacks the authority to reduce the petition for review page limit, the Commission also would lack the authority to permit a
(continued...)

Intervenors have made no showing that the 30-page limit will prevent them from adequately identifying matters warranting Commission review and thus preclude their "meaningful participation" in this proceeding. Moreover, it cannot be credibly shown that 30 pages is insufficient until the issuance of the Presiding Officer's final decision on Church Rock Section 8.⁷ Intervenors' complaints are, thus, premature and better left for briefing if, and when, the need arises. Therefore, the request to revise the 30-page limit should be denied as premature.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 27th day of May 1999

⁶(...continued)

petitioner to exceed the page limit in 10 C.F.R. § 2.786(b)(2) -- a result that could be inconsistent with fairness in complex litigation.

⁷ It is possible that the Presiding Officer may issue fewer than six partial initial decisions by combining related topics.

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In the Matter of)
) Docket No. 40-8968-ML OFFICE OF THE SECRETARY
) HYDRO RESOURCES, INC.) ADJUDICATORY STAFF
) 2929 Coors Road, Suite 101) (Leach Mining and Milling License)
) Albuquerque, New Mexico 87120)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ENDAUM AND SRIC MOTION FOR RECONSIDERATION OF MAY 3 ORDER AND REQUEST FOR EXPEDITED REVIEW" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, by e-mail and U.S. Mail, first class, this 27th day of May, 1999:

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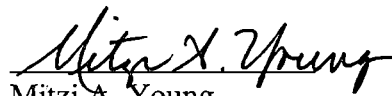
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