

May 24, 1999
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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 MAY 25 P1:13

BEFORE THE COMMISSION

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

OFFICE OF THE CHIEF OF STAFF
RULEMAKING AND
ADJUDICATION STAFF

NRC STAFF'S RESPONSE
TO ENDAUM'S AND SRIC'S PETITION FOR INTERLOCUTORY REVIEW

INTRODUCTION

By petition dated May 14, 1999,¹ Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) (hereinafter, "Petitioners"), requested the Commission to (1) review unpublished orders of the Presiding Officer dated April 21, 1999 ("Memorandum and Order (Questions)") (hereinafter, "April 21 Order"), and May 4, 1999;² (2) stay this proceeding, pending consideration of their Review Petition; and (3) strike from the record materials filed by the Staff and Hydro Resources, Inc. (HRI) in response to the April 21 Order. The April 21 Order pertains to questions the Presiding Officer propounded to the Staff concerning groundwater and National Environmental Policy Act (NEPA) issues. See April 21 Order, at 1-3, ¶¶ 1-7, and

¹ See "ENDAUM's and SRIC's Petition For Interlocutory Review Of Presiding Officer's April 21, 1999 And May 3 [sic], 1999 Orders Granting The Staff Additional Opportunity And Time To Present Information, Request For A Stay Of Those Orders And Request To Strike Material" (Review Petition).

² The Petitioners mis-identify the Presiding Officer's order dated May 4, 1999 ("Memorandum (Denial of Motion for Reconsideration)") (hereinafter, "May 4 Order") as having been issued on May 3, 1999.

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4, ¶ 1. Pursuant to the April 21 Order, the "NRC Staff Response To Questions Posed In April 21 Order" (Staff's Response), was filed on May 11, 1999. The April 21 Order gave the other parties an opportunity to file responses on May 10, and provided that replies to any such responses could be filed by May 24, 1999. *See* April 21 Order, at 4, ¶¶ 2-3. HRI chose to respond to the April 21 Order, and did so by its filing dated May 11, 1999.

For the reasons discussed below, the Staff requests the Commission to deny the Review Petition.³

BACKGROUND

By petition for interlocutory review, dated March 12, 1999 (March 12 Petition), the Petitioners requested the Commission to review and reverse orders of the Presiding Officer concerning questions he had propounded regarding technical qualification issues. On March 23, 1999, the Commission denied the March 12 Petition, rejecting the argument that questions propounded by the Presiding Officer had altered the proceeding's structure, and finding no need to interfere with the Presiding Officer's inquiry into fact-specific questions. *See* CLI-99-07, 49 NRC ___, slip op. at 2.

Similarly, by petition for interlocutory review, dated March 26, 1999 (March 26 Petition), the Petitioners requested the Commission to review and reverse orders of the Presiding Officer concerning questions he had propounded regarding air emissions issues. On April 6, 1999, the Commission denied the March 26 Petition, again finding no need to inject itself into the Presiding Officer's fact-specific inquiry, and adding that pursuant to

³ Insofar as the Commission's unpublished procedural order filed in this proceeding, dated May 3, 1999, may be read as prohibiting the Review Petition, the Staff moves in the alternative to strike the Review Petition.

10 C.F.R. § 2.1233(a), the Presiding Officer here has discretion to seek additional information. *See* CLI-99-08, 49 NRC ___, slip op. at 2.

DISCUSSION

A. Standard of Review

As before (*see* March 12 Petition, at 3; March 26 Petition, at 4), the Petitioners seek interlocutory review pursuant to 10 C.F.R. § 2.786(g)(2), whereby the Commission may choose to review a ruling if it finds that the challenged order affects the proceeding's structure "in a pervasive or unusual manner." *See* Review Petition, at 3.⁴ This standard for review is a high one which is not often met. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994). Even an order expanding the issues to be decided in a proceeding has been found not to justify the extraordinary step of the Commission taking interlocutory review pursuant to 10 C.F.R. § 2.786(g)(2). *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

B. Petitioners Fail To Meet Review Standard

The Petitioners fail to explain why CLI-99-07, CLI-99-08, and the above-cited cases, should not control here. Instead, the Petitioners simply make the same arguments for interlocutory review which the Commission has already rejected in this proceeding.

⁴ The other review standard (not relied on here by the Petitioners), set forth in 10 C.F.R. § 2.786(g)(1), states that the Commission may grant interlocutory review if it finds that a petitioner faces "immediate and serious irreparable impact" which cannot be later remedied by granting a petition for review of a presiding officer's final decision.

The Petitioners first argue that the questions propounded in the April 21 Order give the Staff a second chance to submit information, thereby evidencing the Presiding Officer's improper bias in favor of the Staff, in violation of his duty under 10 C.F.R. § 2.718 to act as an impartial judge. *See* Review Petition, at 4-8. *Cf.* March 12 Petition, at 8-10; and March 26 Petition, at 4-8. As framed, Petitioners' argument implies that the Presiding Officer's questions merely repeated points made in the Petitioners' initial written presentations, and that the Staff thus had prior notice to address the points, but either chose not to do so, or did so inadequately. *See* Review Petition, at 4-6, and nn. 7-9. This argument lacks both a factual and a legal basis.

Factually, the April 21 Order's questions reflect the Presiding Officer's effort "to analyze the record and to obtain new information in order to resolve the merits." May 4 Order, at 1. For example, the April 21 Order's first question was based, in part, on laboratory work reported in Tables 4.8 and 4.9 of the 1997 Final Environmental Impact Statement, NUREG-1508 (FEIS), prepared for HRI's proposed project. In responding to this question, the Staff provided a detailed discussion regarding the FEIS Table 4.8 and 4.9 data, and related information in the FEIS.⁵ *See* Exhibit 1 of Staff's Response (affidavit of William Ford), at ¶¶ 10-22. FEIS Tables 4.8 and 4.9 are not referenced by the Petitioners in their initial groundwater presentation filed in January, 1999. The Staff was thus not on notice that

⁵ The charge that the April 21 Order unfairly gave the Staff an opportunity to provide information (*see* Review Petition, at 6-7) is misleading, for as the Staff emphasized, most of the requested information was already in the FEIS, and was thus part of the HRI Hearing File. *See* Staff's Response, at 1-3. However, there should be no question that presiding officers have the latitude to decide whether a record is complete or not, and whether additional questions are necessary, pursuant to 10 C.F.R. § 2.1233(a).

these Tables needed to be addressed, and it is therefore inaccurate to charge that the Presiding Officer's April 21 Order gave the Staff a "second chance" to discuss the data in these Tables. Review Petition, at 6. Similarly inaccurate is the Petitioners' statement that the Presiding Officer asked the Staff to submit "a new or amended presentation." Review Petition, at 8. The April 21 Order requested further discussion on discrete issues to help resolve the merits of the case, not a new presentation responding to all of the NEPA and groundwater issues in dispute. See April 21 Order, at 1-3, ¶¶ 1-7; and May 4 Order, at 1. Moreover, the discussion in Exhibits 1 and 2 to the Staff's Response, provided pursuant to the April 21 Order, simply clarifies FEIS material.

Legally, the Petitioners fail to explain why the April 21 Order affects the proceeding in a pervasive or unusual manner, so as to merit interlocutory review. A presiding officer has clear authority to propound questions to parties pursuant to 10 C.F.R. § 2.1233(a), to help resolve issues in NRC subpart L proceedings. The decisions relied on by the Petitioners all emphasize a presiding officer's discretion to ask questions pursuant to 10 C.F.R. § 2.1233(a).⁶ See Review Petition, at 8-9, nn. 13-15. If a licensing board or presiding officer is merely acting in accordance with the Commission's procedural rules, interlocutory review of such actions is not appropriate. See *Cleveland Electric Illuminating Co.* (Perry

⁶ See *Rockwell International Corporation* (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-718 (1989); *Curators of the University of Missouri* (Trump-S Project), LBP-91-14, 33 NRC 265, 266 (1991); and *Curators of the University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 116-117 (1995). *Rockwell* is not on point factually, as the decision criticizing the presiding officer's questions was made in the context of a proceeding where such questions had been posed before hearing requests had been ruled on, and before parties had submitted their initial written presentations. See *Rockwell*, 30 NRC 709, at 717-718.

Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982). Moreover, the Petitioners' argument is not supported by any of the discussion in the Statement of Considerations published with the promulgation of the final subpart L rules. *See* 54 Fed. Reg. 8269-75 (February 28, 1989).

In furtherance of their bias claim, the Petitioners reference partial initial decisions finding against their interests in this proceeding, where the Petitioners were not given an opportunity to submit more information. *See* Review Petition, at 6 n.11; *cf.* March 12 Petition, at 8-10, and nn. 18-20; and March 26 Petition, at 6-9, and nn. 9-10. In issuing partial initial decisions, the Presiding Officer is following the Commission's directive to expedite this phase of the proceeding. *See* CLI-99-1, 49 NRC 1, 3 (1999). In this situation, any presiding officer issuing partial initial decisions could be accused of bias by the losing party. Granting interlocutory review in such situations, absent extraordinary circumstances not present here, would serve to delay rather than expedite proceedings.

The Petitioners further contend that the April 21 Order violates the schedule established for this phase of the proceeding. *See* Review Petition, at 8. However, no showing is made that the April 21 Order jeopardizes the June 15, 1999 date by which all issues relating to HRI's Section 8 property are to be ruled on by the Presiding Officer.

The Petitioners also maintain that the FEIS must be supplemented, but they fail to specify what information the FEIS lacked. *See* Review Petition, at 9-10. Moreover, the Petitioners do not explain how this argument supports their request for interlocutory review.

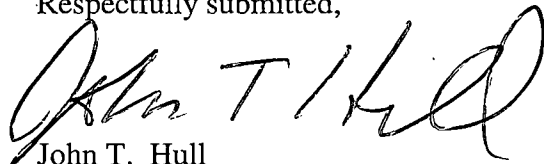
Finally, without any supporting argument, the Petitioners request that the Commission stay the proceeding, and strike the Staff's Response to the April 21 Order, and

the May 11 response made by HRI. *See* Review Petition, at 10. The Petitioners offer no reason why they chose to wait until after the May 10 deadline established by the April 21 Order, before attempting to block consideration of the Staff and HRI responses. If the Petitioners wanted the record to be as it was prior to April 21, 1999 (*see* Review Petition, at 11), they should have acted prior to May 10. Instead, they apparently decided to first review the Staff and HRI responses, before moving to strike them. The Commission should refuse to endorse this tactic, which, if successful, would create much wasted time and effort.

CONCLUSION

Accordingly, for all of the reasons discussed above, the Petitioners have failed to establish that the April 21 Order constitutes a matter which affects this proceeding in a pervasive or unusual manner. Thus, the Commission should deny the Review Petition, and all requests for relief contained therein.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of May, 1999

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENDAUM'S AND SRIC'S PETITION FOR INTERLOCUTORY 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 via e-mail and express mail this 24th day of May, 1999:

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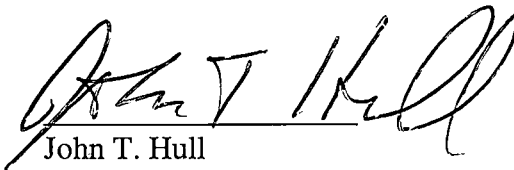
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