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March 18, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF THE
PUBLIC
ADMINISTRATOR

_____)	
In the Matter of:)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
2929 Coors Road, Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
_____)	

**HYDRO RESOURCES, INC. OPPOSITION TO ENDAUM'S
AND SRIC'S PETITION FOR INTERLOCUTORY REVIEW
OF PRESIDING OFFICER'S REQUEST FOR INFORMATION
TO THE PARTIES**

INTRODUCTION

Hydro Resources, Inc. ("HRI") is filing this Opposition to Eastern Navajo Dine Against Uranium Mining's ("ENDAUM") and Southwest Research and Information Center's ("SRIC") Petition for Interlocutory Review of the Presiding Officer's Request for Information to the Parties in this licensing proceeding. The Presiding Officer, exercising his discretion pursuant to 10 C.F.R. § 1233(a), has requested that all parties respond to specific questions (the "March 3 Order"). To obtain interlocutory review of the March 3 Order (and subsequent, March 9 Order, denying reconsideration of the March 3 Order) (jointly the "Orders"), Petitioners must show that the Orders threaten Petitioners with "immediate and serious irreparable impact, or the Orders will affect the basic structure of the proceeding in a pervasive or unusual manner." Petitioners' Brief at 2. Petitioners have failed to show either of these and their request for interlocutory review, therefore, must be denied.

U.S. NUCLEAR REGULATORY COMMISSION
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OF THE COMMISSION

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ARGUMENT

Pursuant to NRC regulations, "(N)o interlocutory appeal may be taken to the Commission from a ruling of the Presiding Officer." 10 C.F.R. § 2.730(f). The Commission has a long standing policy disfavoring interlocutory appeals except in the most "compelling circumstances where. . .there is an emergency situation requiring an immediate, final determination of an issue." See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CL1-94-15, 40 NRC 319 (1994). The criteria contained in section 2.786(g) establish the very limited circumstances in which interlocutory review may be appropriate. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CL1-94-2, 39 NRC 91,93 (1994). Thus, interlocutory appeals to the Commission are not appropriate unless the ruling appealed from 1) threatens immediate irreparable harm, or 2) "affects the basic structure of the proceeding in a pervasive or unusual manner." See 10 C.F.R. § 2.786(g). Petitioners claim that the questions posed by the Presiding Officer change the structure of the proceeding, requiring interlocutory review. However, Petitioners provide nothing to support their claim that the questions posed by the Presiding Officer meet this high standard.

In their attempt to demonstrate how the Presiding Officer's questions posed in the March 3 Order pervasively change the proceeding, Petitioners state that the questions will require a change to the briefing schedule and that the questions pertain to issues that are already part of the proceeding. See Petitioner's Brief at 3. From this, Petitioners conclude that because neither party asked for an extension, the Presiding Officer's request for information changes the nature of the proceeding. Petitioners further argue that the request for information prejudices them because it gives HRI and the Agency Staff a second chance to raise issues that were not raised earlier. Id. at 5-6. Petitioners misconstrue the role of the Presiding Officer in licensing

proceedings and the applicable precedent defining the standard for obtaining an interlocutory appeal.

The Role of the Presiding Officer

The Presiding Officer is given broad powers to manage the licensing proceeding so that a fair and impartial hearing may be had. The Presiding Officer's broad authority includes the discretion to propose written questions to the parties to ensure a complete record. See 10 C.F.R. § 2.1233(a). Here, the Presiding Officer's questions seeking clarification of HRI's technical qualifications are appropriate to clarify and complete the record. If the Presiding Officer is limited in his role to such an extent that questions may not be asked of the parties requesting more information, his role will be limited to "act as an umpire blandly calling balls and strikes for adversaries appearing before it" Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965). Passive management of hearings is not the intended role of the licensing board in these proceedings and is contrary to the dictates of NRC regulations.

Petitioners Misuse Precedent

Petitioners rely on Rockwell Int'l Corp., ALAB-925, 30 NRC 709 (1989) to argue that the Presiding Officer has pervasively changed the basic structure of the litigation. Petitioners' Brief at 5. Rockwell Int'l, is inapposite to the facts at hand. In Rockwell, the Presiding Officer asked for substantial amounts of information from the parties before their initial written presentations has been submitted. See id. at 717. The Presiding Officer also, without any justification, admitted nine intervenors in the proceeding and directed Agency Staff to join in, and offered to broker confidential settlement negotiations between the parties.

The Commission found that the Presiding Officer went beyond his intended role by requesting information that was not at issue and encouraging intervenors to litigate additional

issues. The Commission's main concerns with the Presiding Officer's actions were that requesting substantial information before the parties presented their cases and adding additional parties to the proceeding would significantly increase the issues before the licensing board, the number of litigants, and the length of the proceeding. These concerns are inapplicable to the present case.

Petitioners neglect to discuss the numerous cases where interlocutory appeal has been denied. Typically, the Commission has found that the Order at issue must have a profound and unusual impact to affect the basic structure of a proceeding within the meaning of 10 C.F.R. § 2.786(g). See e.g., Sacramento Mun. Util. Dist., CLI-94-02, 39 N.R.C. 91 (1994); Safety Light Corp., CLI-92-09, 35 N.R.C. 156 (1992). Cf. Long Island Lighting Co., ALAB-888, 27 N.R.C. 257 (1988) (finding that an erroneous finding does not alter the shape of the adjudication); (petitioner must make a strong showing that the Order's impact on petitioner or the public interest is indeed "unusual," Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-634, 13 NRC 96 (1981)).

The caselaw generally demonstrates the reluctance of the Commission to grant interlocutory appeals in the absence of a truly unusual ruling or actions by the Presiding Officer. The information requested of Petitioners, HRI, and NRC Staff bears directly on the technical qualifications issues that are central to the licensing board proceedings. The questions presented to the parties are consistent with the Presiding Officer's duty to ensure a clear and complete record.

Inequitable Treatment of Parties

Petitioners also claim that the Presiding Officer's questions amount to preferential treatment of HRI and NRC Staff. Petitioners Brief at 5. Petitioners argue that the Presiding

Officer is giving HRI and NRC Staff a second chance to litigate certain issues. To bolster this claim, Petitioners argue that since the licensing board has previously ruled against them without posing additional questions, the Presiding Officer must rule against HRI and NRC Staff.

Petitioners further claim that the difference in results that the parties may experience in this proceeding is not only inequitable but a violation of the Presiding Officer's duty to conduct "a fair and impartial hearing." Id. (citing 10 C.F.R. § 2.738). Petitioners provide no support for this contention in their brief.

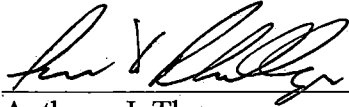
CONCLUSION

As the Presiding Officer stated in his March 9, 1999 Order, he will direct questions to the parties, "when there is a serious question that has been raised in the record and not fully argued."

March 9 Order at 2 (emphasis in original). Petitioners have failed to carry their burden of showing how the Presiding Officer's Order warrants an interlocutory appeal pursuant to 10 C.F.R. § 2.786(g)(2). Absent a showing that the Orders change the proceeding in an unusual way, Petitioners must save their complaint for an appeal following final ruling by the Presiding Officer.

For these reasons the Commission should refuse to grant Petitioners' request for interlocutory appeal and allow the licensing board proceeding to proceed under the direction of the Presiding Officer.

Respectfully submitted this 18th day of March, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, HYDRO RESOURCES, INC.'S OPPOSITION TO INTERVENORS' PETITION FOR INTERLOCUTORY REVIEW, in the above-captioned proceeding were sent to the following by overnight mail on this **18th day of March, 1999**.

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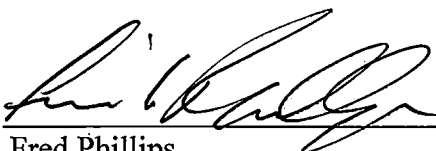
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