

DOCKETED
USNRC
April 13, 1999

'99 APR 14 P 4 :02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL RULINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Agent

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.'S RESPONSE
TO INTERVENORS' MOTION FOR LEAVE TO SUBMIT
REPLY BRIEF REGARDING ENVIRONMENTAL JUSTICE**

INTRODUCTION

Hydro Resources, Inc. ("HRI") submits this response to Intervenors' April 5, 1999 motion ("Motion") seeking leave to submit a reply to HRI's March 25, 1999 presentation regarding environmental justice issues.¹ For the reasons set forth below, Intervenors' motion should be denied.

STANDARD OF REVIEW

The Nuclear Regulatory Commission ("NRC") Subpart L process, see 10 C.F.R. Part 2, Subpart L (§§ 2.1201 – 2.1263), was designed to permit the informal adjudication (instead of the NRC formal trial-type hearing as specified in Section 554 of the Administrative Procedures Act,

¹ See Hydro Resources, Inc.'s Response to Intervenors' Brief Regarding Environmental Justice ("HRI Response").

20243

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date FE

Copies Received 3

Add'l Copies Reproduced 0

Special Distribution _____

OGC R105

5 U.S.C. § 551 et seq.), of concerns of a party challenging a licensing action to apprise the Commission of those concerns and to provide an adequate record for determining their validity. See Kerr-McGee Corporation (West Chicago Rare Earths Facility) CLI-82-2, 15 NRC 232, 253 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). The Subpart L regulations generally provide that after a party has filed its initial written presentation, leave must be obtained to file any further presentations, subject to the discretion of the Presiding Officer. 10 C.F.R. § 2.1233(d). In the informal Subpart L process, section 2.1233(a) expressly accords the Presiding Officer the discretion to manage the proceeding and to determine the sequence in which the parties present their arguments, data, informational materials, and other written evidence.² Curators of University of Missouri, CLI-95-41 NRC 71, 116-17 (1995).

Moreover, unlike the formal adjudicatory process, Section 7(c) and the APA does not apply to informal Subpart L proceedings. Instead, the intervenors are entitled only to some sort of procedures for notice, comment, and statement of reasons for the agency action. Id. at 119. Perhaps most importantly, Subpart L does not accord intervenors the right to speak last regarding the issues in a materials license proceeding. Id. at 117.

ARGUMENT

Intervenors fail to show that reply is warranted. Each of Intervenors' bases for requesting reply are meritless. First, ENDAUM and SRIC assert that the Presiding Officer should strike the

² Intervenors cite Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) for their argument that in the context of formal adjudications, "the Appeal Board has held that the Presiding Officer's discretion is subject to the limited "right" to present rebuttal testimony where it is needed for 'full and true disclosure of the facts.'" Intervenors misstate the rule in that case (and the Presiding Officer therefore, was misled to rely on it in his March 24, 1999 decision granting Intervenors' motion to reply to HRI's written presentation regarding groundwater issues). In Long Island Lighting Co., a formal adjudication case, the Appeal Board, citing 5 U.S.C. § 556(d) (APA's rules for formal adjudications), stated "the right to submit rebuttal evidence and conduct cross-examination [] is not unlimited; it is bounded by a need for full disclosure of the facts." Based on this rule and the fact that intervenor made only a "generalized claim" of prejudice, the Board denied intervenor's request that additional cross-examination was required.

testimony of Dr. Stan Albrecht, or in the alternative, grant them an opportunity to reply to Dr. Albrecht's testimony based on their challenge to Dr. Albrecht's credentials. Intervenors complain that there is nothing in the record to indicate that Dr. Albrecht is qualified to testify on environmental justice issues. Intervenors state that the "only information about any of his publications is the vague references to unlisted publications that are made in Albrecht's two affidavits." To HRI's astonishment, Intervenors ignore Dr. Albrecht's resume. Dr. Albrecht's resume was submitted by HRI to the Presiding Officer and served on Intervenors via Federal Express on February 19, 1998, as an attachment to Dr. Albrecht's February 18, 1998 affidavit in support of HRI's Response to Petitions to Intervene. As set forth in his nineteen (19) page resume, Dr. Albrecht has substantial experience, both academic and practical, to testify about environmental justice issues.³ Thus, contrary to Intervenors' assertions, Dr. Albrecht is well-qualified to testify as to environmental justice issues.

Similarly, Intervenors complain that the "testimony of Dr. Albrecht is being presented for the first time" therefore they should be given the opportunity to respond. Dr. Albrecht's testimony merely restates his previous testimony dated February 18, 1998 (presented to the Presiding Officer and Intervenors on February 19, 1998). For this very reason, HRI submitted Dr. Albrecht's previous affidavit along with his more recent affidavit when filing on environmental justice issues.⁴

³ A witness is qualified as an expert by knowledge, skill, experience, training or education. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732 n. 67 (1985), citing Fed. R. Evid. 702.

⁴ Dr. Albrecht did not find it necessary to cite new information in his affidavit as he states on page 5: "In summary, the presentations of Bullard and Benally do not bring forward any new issues of Environmental Injustice through the development of resources as proposed by HRI."

Intervenors also complain that reply is warranted because HRI included in its response the affidavits of members of the Navajo community that support the project and the affidavit of Richard Clement, Jr., President of HRI. Intervenors ignore the rule that the Commission's regulations and practice do not preclude an applicant from submitting post-application affidavits into the record of a materials licensing proceeding. Such affidavits fall within the types of documents that the Presiding Officer has the discretion to allow into the record pursuant to section 2.1233(d). The Commission practice of permitting the licensee to file such supplemental supporting evidence in a Subpart G proceeding applies equally well to a Subpart L proceeding. Curators of University of Missouri, CLI-95-1, 41 NRC at 114. Among the reasons HRI submitted the affidavits was to counter Intervenors' assertions that the community surrounding the Church Rock project is against the project and to further emphasize the fact that HRI and the Staff adequately involved the public in the NEPA/environmental justice evaluation process as public participation is the cornerstone of a NEPA/environmental justice inquiry.⁵

With regard to Intervenors' claim that reply is necessary because HRI wrongly asserts that "an environmental justice analysis of demographic data is not required," Intervenors misconstrue HRI's argument to create confusion. As stated on page 10 of HRI's brief, the NMSS guidance only calls for an environmental justice analysis of demographic data within a four (4) mile radius (50 sq. miles) if the proposed facility is located outside city limits or in a

⁵ Intervenors' assertion that they should be permitted to respond to the affidavit of Richard Clements because "there is nothing in the record to indicate that Mr. Clements is an expert on environmental justice" is laughable. Nowhere in his affidavit does Mr. Clements assert that he is an environmental justice expert (nor does HRI hold him out as an environmental justice expert). Rather, Mr. Clements' affidavit was presented to highlight information already in the record regarding the extent of HRI's contacts with the surrounding community regarding the project. In addition, to the extent Intervenors claim a reply is warranted to attack the credibility of Ernest Becenti, they have already done so in their brief regarding NHPA, NAGPRA, and cultural resources, therefore, should not be permitted to do so again here at HRI and the government's expense.

rural area.⁶ Because Church Rock and Crownpoint are more than four miles from the Church Rock Section 8 project, see FEIS at 3-55, an environmental justice analysis of Crownpoint and Church Rock is not required. Of course, an environmental justice analysis of demographic data is required for the four mile radius surrounding the Church Rock Section 8 project and was completed as reflected in the FEIS. In fact, although unnecessary beyond the four mile radius, an environmental justice analysis was completed using a 50-mile radius in the FEIS. See FEIS at 3.10; HRI's Brief at 10, fn. 13.

Finally, Intervenors seek to reply to further argue that the "mitigative measures proposed by the NRC are not adequate to protect public health and safety at Church Rock Section 8:" Notwithstanding the fact that they already have submitted page upon page in their written presentation on this point and merely seek to prolong this process further, Intervenors again ignore the fact that public health and safety are not implicated by ISL mining and that there is no "public" at Church Rock Section 8 as there are no residences there and the public will not have access. Thus, Intervenors' claim is lacking. In sum, Intervenors have failed to show why it is necessary for the Presiding Officer to permit a reply on environmental justice issues.⁷ The voluminous record and the parties' briefs and accompanying materials are more than adequate to reach a determination regarding environmental justice.

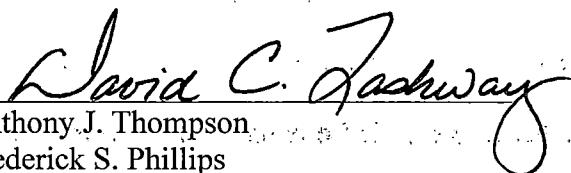
⁶ As discussed in HRI's brief on page 10, fn. 11, Intervenors wrongly assert that Appendix B of the Draft Standard Review Plan calls for an analysis of demographic data within a 50-square mile radius of the proposed project.

⁷ As discussed above, the Presiding Officer in a Subpart L proceeding has broad discretion to determine the point at which the intervenors have been accorded sufficient opportunity to respond to issues raised by the licensing. Curators of University of Missouri, CLI-95-1, 41 NRC at 116-17.

CONCLUSION

For the aforementioned reasons, Intervenors' request that the Affidavit of Dr. Albrecht be stricken from the record should be denied. In addition, Intervenors' request to reply to HRI's written presentation on environmental justice issues should be denied.

Respectfully submitted this 13th day of April, 1999.



Anthony J. Thompson
Frederick S. Phillips
David C. Lashway
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037-1128
Tel.: (202) 663-8000
Fax: (202) 663-8007

Jeptha P. Hill
Law Office of Jeptha P. Hill
816 Congress Avenue, Suite 1100
Austin, Texas 78701-2443

ON BEHALF OF HYDRO RESOURCES, INC.
2929 Coors Road, Suite 101
Albuquerque, New Mexico 87120

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

99 APR 14 P 4 :02

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Agent

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of:

HYDRO RESOURCES, INC.
2929 Coors Road, Suite 101
Albuquerque, NM 87120

Docket No: 40-8968-ML
ASLB No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, HYDRO RESOURCES, INC.'S RESPONSE TO INTERVENORS' MOTION FOR LEAVE TO SUBMIT REPLY BRIEF REGARDING ENVIRONMENTAL JUSTICE, in the above-captioned proceeding were sent to the following by overnight mail on this 13th day of April, 1999:

Administrative Judge
Peter B. Bloch, Presiding Officer
Atomic Safety and Licensing Board
Two White Flint North
11545 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
One White Flint North
11555 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Administrative Judge
Thomas D. Murphy
Special Assistant
Atomic Safety and Licensing Board
Two White Flint North
11545 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Adjudicatory File
Atomic Safety and Licensing Board
One White Flint North
11555 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Office of Commission Appellate
Adjudication
One White Flint North
11555 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Atomic Safety and Licensing Board Panel
One White Flint North
11555 Rockville Pike
U.S. Nuclear Regulatory Commission
Rockville, Maryland 20852

Jep Hill, Esq.
Jep Hill and Associates
816 Congress Avenue, Suite 1100
Austin, Texas 78701

Richard F. Clement, Jr., President
Hydro Resources, Inc.
2929 Coors Road, Suite 101
Albuquerque, New Mexico 87120

Mitzi Young
John Hull
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Douglas Meikeljohn
Johanna Matanich
New Mexico Environmental Law Center
1405 Luisa Street Suite 5
Santa Fe, NM 87505

Mr. Mark Pelizza
Vice President
URI, Inc.
Lockbox 12 – 12750 Merit Drive, Suite 1020
Dallas, TX 75251

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg
2001 S Street, N.W., Suite 430
Washington, D.C. 20009

Mitchell W. Capitan, President
Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 471
Crownpoint, New Mexico 87313

W. Paul Robinson
Chris Shuey
Southwest Research and Information Center
P.O. Box 4524
Albuquerque, New Mexico 87106

Marilyn Morris
c/o Roderick Ventura
and Samuel D. Gollis
DNA - People's Legal Services, Inc.
P.O. Box 306
Window Rock, AZ 86515

Grace Sam
c/o Roderick Ventura
and Samuel D. Gollis
DNA - People's Legal Services, Inc.
P.O. Box 306
Window Rock, AZ 86515

David C. Lashway
David C. Lashway
SHAW PITTMAN POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, DC 20037

Counsel for Hydro Resources, Inc.