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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant
Robin Brett, Special Assistant

In the matter of HYDRO RESOURCES, INC. (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120)	Docket No. 40-8968-ML Re: Leach Mining and Milling License ASLBP No. 95-706-01-ML

MEMORANDUM AND ORDER
(Attorney Misconduct Allegations)

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On August 26, 1999, Hydro Resources, Inc. (HRI), filed a "Motion for Suspension Or, in the Alternative, Reprimand or Censure and Request for Attorneys Fees." HRI alleges improper conduct by counsel for Eastern Navajo Dine Against Uranium Mining ("ENDAUM"), the Southwest Research and Information Center ("SRIC") and the New Mexico Environmental Law. HRI relies on 10 C.F.R. § 2.713 as authority for its motion. That section requires counsel "to conduct themselves with honor, dignity, and decorum as they should before a court of law."[1]

[1]ENDAUM and SRIC (Intervenors) filed a "Response in Opposition to HRI's Motion for Sanctions" on September 20, 1999 (Intervenors' Response). The Staff filed a

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HRI relies on several different grounds, each discussed in a separate section of this memorandum, to support its motion. In response, Intervenors rebutted each of these arguments and argued that the Presiding Officer lacks jurisdiction over this motion because Phase I issues have already been appealed to the Commission. Intervenors also request that they be reimbursed for their fees in responding to HRI's motion, which they allege to be frivolous.

The jurisdiction argument of Intervenors is, of course, pivotal. If I lack jurisdiction because of the appeal to the Commission, then I cannot act on this motion. However, I find that this motion is best handled by the Presiding Officer who heard Phase I of the case and that it should be decided promptly. Intervenors properly cite *Vogtle* for the proposition that an adjudicator loses jurisdiction over concerns/contentions that have been addressed in a decision that is appealed, *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987) (once the Board issues a decision which disposes of a particular issue on the merits and a notice of appeal is filed, the Board loses jurisdiction to act further on that issue) (*citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1327 (1982)). Intervenors do not show, however, that the matter raised by HRI's motion was previously litigated and they do not cast doubt regarding the Presiding Officer's authority to consider the past conduct of the same parties and counsel in the latter parts of a multi-phase proceeding.

"Response to Motion For Suspension, Alternative Relief and Attorneys Fees" on September 27, 1999 (Staff Response). On September 30, 1999, HRI filed a motion to reply to the responses filed by the other parties. That motion is denied for failure to state adequate grounds to permit the reply, which is not provided for in the rules.

I note that HRI previously requested that Phase II be held in abeyance and that request was granted in my October 19, 1999 memorandum and order in LBP-99-40. Thus, it could be argued that the current motion for sanctions also should be held in abeyance. However, I consider it important to resolve this issue right now, in Intervenors' favor, as they should not be held in suspense about whether the present attorneys will be acceptable to commence Phase II of this case, if and when that event transpires.

Having determined that I do have jurisdiction and that this matter shall not be held in abeyance, I have determined that HRI's motion should be denied on the merits.

I. Alleged *ex parte* Contacts

With respect to this issue, I find that the Staff has carefully considered this issue and that it accurately expresses my conclusions with respect to this issue. The Staff argument, with which I am in agreement, is:

> HRI argues that oral and/or written statements by Diane Curran, Chris Shuey, and Johanna Matanich, on behalf of SRIC during a public Commission meeting concerning proposed changes in uranium recovery regulation specifically violated admonitions by the Commission that parties refrain from making statements regarding issues presently pending in litigation before an NRC tribunal. See Motion at 7-10, *citing* Letter from Annette Vietti-Cook to Diane Curran, dated June 14, 1999 (Motion, Exhibit B) and "Staff Proposals for Uranium Recovery Regulatory Issues SECY Papers 99-011, 99-012 and 99-013 - Public Meeting," Transcript dated June 17, 1999, at Tr. S-5 to S-6.
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> Pursuant to 10 C.F.R. § 2.780(a) and (c), interested persons may not make, or knowingly cause to be made to any Commission adjudicatory employee, any *ex parte* communication relevant to the merits of the proceeding.
>
> In this instance, the Commission acknowledged, beforehand, that aspects of the generic issues to be discussed during a June 17, 1999 meeting were being litigated in certain ongoing proceedings and admonished the parties that it would not entertain any case-specific issues or facts involved in adjudicatory proceedings. *See* Motion, Exhibit B, at 1-2. Mindful that comments during the meeting could be of concern to parties in ongoing proceedings, the Commission also invited the parties to attend, and indicated

that, "if circumstances should so warrant, the parties to the adjudications will be provided an opportunity to submit written comments on the statements and discussions that take place at the June 17 meeting to the dockets in the pending adjudications." *See id.* at 2. The Commission repeated its admonition against case-specific arguments during the public meeting on generic rulemaking issues, Tr. S-5 to S-6, and served a copy of the June 17, 1999 meeting transcript on the parties, *See* Memorandum from Annette Vietti-Cook to Parties, dated June 24, 1999 (Intervenors' Response, Exhibit 3).

HRI argues that Intervenors ignored the Commission's directions when they discussed chemical concentrations in HRI's lixiviant and comparisons with characteristics of the Crownpoint water supply (in the prepared statement by Diane Curran and others, which included pages from the FEIS); and discussed jurisdictional issues. *See* Motion at 9-11. HRI contends that the fact that copies of the transcript of the meeting, including copies of written statements provided to the Commission, were served in the proceeding does not excuse Intervenors' disruptive, contemptuous and prejudicial conduct, and, thus, requires the imposition of sanctions. *See id.* at 10.

Intervenors argue (1) that the motion (made two months after the meeting attended by counsel for HRI) is untimely, (2) that Intervenors' statements did not constitute *ex parte* communication as defined in 10 C.F.R. § 2.4 ("an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given") and (3) that the case-specific information was not prejudicial, but shared publicly for illustrative purposes only in discussing generic issues. *See* Intervenors' Response at 13-14.

While the Staff agrees that the discussion of case-specific issues was inappropriate, the Staff questions whether sanctions are warranted in circumstances where HRI was not prejudiced by Intervenors' statements since: (1) the statements were made on the public record and distributed to the parties; (2) the statements consisted of information that was publicly available (*e.g.*, the published FEIS for HRI's project); (3) HRI's counsel, although present as counsel for the National Mining Association, *see* Tr. S-3, did not object; and (4) HRI waited until months after the meeting to complain about the conduct.[2]

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[2]In determining whether the submission of an *ex parte* communication has so tainted the decision making process as to require vacating a Board's decision, the Commission has considered: the gravity of the *ex parte* communication, whether the contacts could have influenced the agency's decision, whether the party making the contacts benefitted from the Board's final decision, whether the contents of the communication were known to others parties to the proceeding, and whether vacating the Board's decision would serve a useful purpose. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 506 (1986) (*citing, Professional Air Traffic Controllers*

> In essence, HRI has not shown that the alleged *ex parte* statements have or will likely affect any decision in this proceeding or that Intervenors' statements were contemptuous or disruptive. Rather, it appears that the Motion reflects a generalized allegation of prejudice resulting from the submission of an alleged *ex parte* communication by counsel to an adjudicator, but does not warrant disqualification of the counsel. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 504-05 (1986) (a movant must show that the *ex parte* communication resulted in a prejudicial ruling). Consequently, no sanction is warranted.

II. Alleged Improper Statement to the Press

HRI asserts that the following statement by Doug Meiklejohn to a reporter shows an unequivocal accusation that the Presiding Officer is biased:

> This is a legal proceeding with serious consequences for real people. This is not an exercise in which HRI and the staff are to be given as many chances as they need to get their information right. *He is simply not dealing with them the same way he's dealing with us.*

While I disagree with this statement, I also find that it is within the bounds of allowable comment. The statement was made in good faith. It does not allege unscrupulous conduct by the Presiding Officer. It is a comment concerning Intervenors' dissatisfaction. I would not create a disincentive for speaking to the press about such a matter. I consider that this is fair comment and that a Presiding Officer should not take steps to sanction that kind of remark to the press.

These remarks by Intervenors are far less disruptive than the far more disruptive comments made by parties in cases cited by HRI on pp. 14-15 of its motion:

> D.R. 8-102(B) provides, in pertinent part, that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." In In re Paul G. Evans, 801 F.2d 703 (4th Cir. 1986), the Fourth Circuit upheld the district court's disbarment of an attorney for a violation of DR 8-102(B) where the attorney drafted a letter to a

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Organization v. Federal Labor Relations Authority, 685 F. 3d 547, 564-65 (D.C. Cir. 1982)).

Magistrate who had ruled adversely to his client, accusing the Magistrate of incompetence and religious and racial bias. Similarly, in In the Matter of Greenfield, 24 A.D.2d 651 (N.Y. App. Div. 1965), the court upheld the suspension of an attorney from practice for writing letters to a judge accusing him, without any basis in fact, of misconduct in office, and circulating the letters to other officers of the court.

III. HRI Alleges That Some of Intervenors' Appeal Arguments are Improper

HRI argues, on page 16 of its motion, that:

> In their March 26, 1999 Petition for Interlocutory Review, Intervenors begin their brief by stating: "For the second time in three weeks, the Presiding Officer has demonstrated this is not an impartial proceeding." See Petition for Interlocutory Review (March 26, 1999) at 1. Intervenors go on to argue that interlocutory review is warranted because the HRI proceeding is being affected in a pervasive or unusual manner as "it is hard to imagine any action that could more pervasively and unusually affect this proceeding than this new confirmation that the case is not being handled in an impartial manner." Id. at 2. Further, they argue that the various orders issued to date in the HRI proceeding "demonstrate that this proceeding is not impartial," that the Presiding Officer "favorably treat[ed]" the Staff and HRI, and that "[t]he Presiding Officer has violated his principal duty by favoring the Staff." Id. at 4-8. In sum, Intervenors charge that the Presiding Officer is biased.[3]

Initially, I find that I lack jurisdiction to determine whether improper conduct has occurred in a filing before the Commission, which has the power to regulate its own proceedings. Even if that were not the case, however, I would find that this allegation, with which I disagree, is within the bounds of permissible argument. No sanctions are warranted.

IV. Failure to Cite Adverse Authority

HRI has argued that Intervenors improperly failed to cite adverse authority to the Presiding Officer so that he would have a balanced view of the law. After carefully considering the record, I do not consider the failure to cite adverse authority to be

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[3]We note that this is not the only occasion that Intervenors make this charge, see article entitled "Anti-nuke activists claim judge is biased" (March 31, 1999) (attached as Exhibit C).

sufficiently important or egregious to merit sanctions. I again agree with the Staff, at pp. 16-17 of their Response, that:

> HRI argues that lawyers have a professional obligation to inform boards of legal authority that the lawyer knows is adverse to the position he or she propounds. Motion at 17, *citing Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174 n.21 (1983), *citing* Rule 3.3(a)(3) of the ABA Model Rules of Professional Conduct. HRI also notes that "[c]ounsel appearing before the NRC adjudicatory tribunals 'have a manifest and iron-clad obligation of candor. This obligation includes the duty to call to the tribunal's attention facts of record which cast a different light upon the substance of arguments being advanced in administrative proceedings.' *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 532 (1978)." Motion at 17.
>
> In almost every instance cited by HRI, the Staff or HRI pointed out Intervenors' misstatements or omissions regarding regulations, case law or the record in filings in the proceeding. *See* Motion at 19-20. Thus, the Presiding Officer has been generally informed of shortcomings in Intervenors' pleadings and weighed Intervenors' arguments accordingly. HRI does not demonstrate that such deficiencies were the result of intentional attempts to mislead the Presiding Officer. Intervenors claim that any errors, when made, were not intentional and have not disrupted the proceeding or been prejudicial. *See* Intervenors' Response at 20-22, 25-27. Intervenors have also admitted to [a] . . . mistake. *See* Intervenors' Response at 36.

V. Failure to Follow April 21, 1999 Order

Although Intervenors failed to follow directions contained in the April 21, 1999, I did not find their lapse to be sufficiently egregious to strike their filing. The lapse certainly is not important enough to justify sanctions.

VI. Disparagement of HRI Experts

HRI alleges that Intervenors unfairly libeled their experts. However, they have not presented persuasive arguments showing precisely how Intervenors were guilty of bad faith. In the absence of a compelling argument showing that Intervenors' argument was lacking in good faith, this allegation has not adequately been established.

VII. Request for Sanctions Against HRI Attorneys

Intervenors' Request for sanctions against HRI for filing the motion concerning reimbursement for attorneys fees lacks merit. HRI enjoys the same privilege as Intervenors and it may file documents making good faith allegations. To hold otherwise would inhibit lawyers from fully representing their clients. While it is tempting to place sanctions on parties in order to expedite proceedings, sanctions may be imposed only if the need has been so clearly demonstrated that the adverse effects on the representation of clients may reasonably be accepted.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this10th day of December, 1999, ORDERED, that:

All pending allegations concerning attorney misconduct or requests for sanctions for attorney misconduct are *dismissed*.

Peter B. Bloch, Administrative Judge
Presiding Officer

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
HYDRO RESOURCES, INC.	Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MISCONDUCT ALLEGATIONS RULING** have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
10 day of December 1999

Office of the Secretary of the Commission