

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

DOCKETED 1/29/99

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

SERVED 1/29/99

Docket No. 40-8968-ML

In the Matter of)
)
HYDRO RESOURCES, INC.)
)
(2929 Coors Road Suite 101,)
)
Albuquerque, NM 87120))
_____))

CLI-99-1

MEMORANDUM AND ORDER

In this Subpart L proceeding, several intervenors challenge Hydro Resources, Inc.'s, license to conduct an in situ leach mining project in McKinley County, New Mexico. The proceeding is complicated. It already has been the subject of several Commission decisions, including one issued last October that rejected a petition for review challenging a scheduling order issued by the presiding officer. Hydro Resources, Inc., CLI-98-22, 48 NRC 215 (1998). Today, exercising our inherent sua sponte supervisory authority over adjudications,⁽¹⁾ we review another of the presiding officer's scheduling orders, this one issued on January 21, 1999, and reaffirmed on January 25. It extends the deadline for intervenors' final briefs from February 1 until March 5. We vacate that scheduling order and require intervenors to file their briefs by February 16.

We are loath, of course, to supervise filing schedules in matters being handled by Licensing Boards and presiding officers, but we will do so when appropriate. See Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998). In this longstanding case, we repeatedly have advised the parties and the presiding officer of our interest in resolving as many issues as possible as soon as possible. Indeed, our commitment to expedition and efficiency is what persuaded us *not* to second guess the presiding officer's decision last September to bifurcate his consideration of the case between issues of immediate concern and those of more remote concern:

The Presiding Officer's decision to concentrate on deciding the most time-critical issues at the outset should conserve resources and expedite decisions, and thus is consistent with our guidance calling on presiding officers "to establish schedules for promptly deciding the issues before them, with due regard for the complexity of contested issues and the interests of the parties." Statement of Policy on Conduct of Adjudicatory Proceedings, 48 NRC at 20. Our most recent decision in this very proceeding stressed our interest in fair, but speedy, decisionmaking. See CLI-98-16, 48 NRC 119, 120 (1998).

48 NRC at 217.

In the current order, the presiding officer inexplicably granted intervenors a *five-week* extension of briefing time, nearly three weeks *more* than intervenors themselves had requested. (Intervenors had asked for a February 16 deadline; the presiding officer established a March 5 deadline.) When the licensee, Hydro Resources, filed a motion to reconsider and vigorously opposed the extension of time, the presiding officer issued a one-page order refusing to reconsider and commenting that "[i]n light of the complexity of the record, a deadline for Intervenors' Final Brief prior to March 5, 1999, would not contribute to an efficient determination of this case." See Order dated Jan. 25, 1999.

We do not question the complexity of this proceeding. It has generated innumerable issues and hundreds of pages of briefs and affidavits. The presiding

officer and the parties face a formidable task in bringing coherence to the many factual and legal questions posed by the proceeding. That said, however, we expect the parties and the presiding officer to continue to move expeditiously toward a resolution. It does not advance that goal to stretch out briefing deadlines well beyond what even the hard-pressed parties themselves need or request, as the presiding officer appears to have done here. In fact, the policy statement on adjudicatory proceedings that we issued last summer explicitly discourages extensions of deadlines absent extreme circumstances, for fear that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case. See CLI-98-12, 48 NRC at 21. Accordingly, we vacate the presiding officer orders of January 21 and January 25 setting a March 5 filing deadline for intervenors' next round of briefs, and establish the deadline for February 16.⁽²⁾ In fairness, we also suggest that the presiding officer look favorably on a two-week extension of the deadline for responsive briefs by Hydro Resources and the NRC staff should those parties so request.

We have two final points on case management. First, our understanding from the presiding officer's original decision to divide the case into segments, and to allow staggered briefing of issues, was that he would issue a series of partial decisions as he resolved the set of issues presented by each briefing phase. That continues to be our expectation. A series of partial decisions, rather than one grand decision at the proceeding's end, would accommodate efficient appellate review by the Commission, if it is sought. See 10 C.F.R. § 2.1253.

Second, the presiding officer thus far has resolved various threshold controversies before him with admirable dispatch, frequently within a few days of the parties' submissions. We anticipate that he will continue to do so, although we fully recognize the complexity of many of the merits controversies awaiting decision. See, e.g., Presiding Officer Order dated Jan. 26, 1999 ("Motions to reply or to request oral argument should be made promptly," because "[t]he Presiding Officer is proceeding to prepare analyses and draft decisions" and must "allocate time efficiently"). Our expectation is that the presiding officer will complete his series of merits decisions on all matters related to the Church Rock Section 8 property -- the first area where Hydro Resources intends to engage in mining -- no later than June 15. If he cannot do so, we ask that he issue an order stating the reasons why the June 15 date is impracticable and establishing an alternate final decision date. See generally CLI-98-12, 48 NRC at 21 (Commission "strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding").

IT IS SO ORDERED.

For the Commission⁽³⁾
[Original signed by
Annette Vietti-Cook]

Annette Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of January, 1999.

1. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998).

2. February 16 is the deadline requested by intervenors in their January 19 motion for an extension of time. In view of the presiding officer's January 21 decision to establish a March 5 deadline, we cannot now deny intervenors' extension request outright, and thereby leave intact the original February 1 deadline. At this point, intervenors undoubtedly are in no position to file adequate pleadings by the original deadline. We caution all parties in this case, however, to pay heed to the guidance in our policy statement that ordinarily only "unavoidable and extreme circumstances" provide sufficient cause to extend filing deadlines. See CLI-98-12, 48 NRC at 21.

3. Commissioners Dicus and Merrifield were not available for the affirmation of this Memorandum and Order. Had they been present, they would have affirmed the Memorandum and Order.