

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

DOCKETED 4/6/99

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

SERVED 4/6/99

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

Docket No. 40-8968-ML

CLI-99-08

MEMORANDUM AND ORDER

On March 26, 1999, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") filed a petition with the Commission for interlocutory review of the Presiding Officer's Memorandum and Order (Questions Concerning Radioactive Air Emissions) (LBP-99-15), issued on March 18, 1999, and reaffirmed on March 23 in response to a motion for reconsideration. In particular, the Presiding Officer's order posed a series of questions to the parties related to the radioactive air emissions from the project. The Intervenor seeks reversal of the March 18 order because, in their view, the Presiding Officer has inappropriately provided Hydro Resources, Inc. (HRI) and the NRC Staff with a second opportunity to address issues that these parties had failed to address earlier. Intervenor argues that the Presiding Officer is not conducting this case impartially but has shown bias toward the NRC Staff and HRI.

In determining whether to grant a petition for interlocutory review, the Commission considers whether the Presiding Officer's action either (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. 2.786(g)(1) & (2); see Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-15, 40 NRC 319 (1994); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). Intervenor seeks review and reversal pursuant to the second standard. The Commission, however, does not agree with Intervenor that the Presiding Officer's order has altered the basic structure of the proceeding in a pervasive or unusual manner. We recently denied a similar petition for interlocutory review in this proceeding, see CLI-99-07, 49 NRC \_\_\_ (March 23, 1999), and do so again here.

As we stated in CLI-99-07, the propriety of the Presiding Officer's inquiry turns on fact-specific questions. We see no reason to interfere in the proceeding at this time, especially where such interference is likely to cause delay while we obtain appellate briefs and undertake the detailed inquiry necessary to resolve Intervenor's bias complaint. However, our denial of interlocutory review does not reflect any position on the substance of the bias question. Intervenor may raise their bias concerns on appeal if, in the end, they do not prevail before the Presiding Officer on the merits of a particular issue and can show prejudice from information that entered the record improperly or unfairly as a result of the Presiding Officer's questions.

Contrary to Intervenor's view, our refusal at this time to review the propriety of the Presiding Officer's supplemental inquiries does not undercut our commitment to resolve this licensing proceeding as expeditiously as possible. The Presiding Officer appears on course to decide all issues before him promptly. Our rules give him discretion to seek additional information. See 10 C.F.R. 2.1233(a). For the Commission now to decide on a question-by-question basis whether the Presiding Officer properly exercised that discretion would delay rather than expedite the proceeding.

Intervenor also sought a stay of the Presiding Officer's March 18 and March 23 orders pending disposition of the petition for review. In view of our denial of the petition, the stay request is moot.

For the foregoing reasons, the petition is denied.

IT IS SO ORDERED.

For the Commission<sup>(1)</sup>  
[Original Signed by Annette Vietti-Cook]

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6th day of April, 1999.

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1. Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.