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COMMISSIONERS:

SERVED 05/27/99

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

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

Docket No. 40-8968-ML

CLI-99-18

MEMORANDUM AND ORDER

In this Memorandum and Order, we address two recent filings by Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") in this proceeding. The first is a May 13, 1999, motion for reconsideration of a May 3, 1999, Commission order. The second is a May 14, 1999, petition for interlocutory review of the Presiding Officer's Memorandum and Order (Questions), issued on April 21, 1999, and reaffirmed on May 3 in response to a motion for reconsideration. We address each of these filings in turn.

Intervenors Motion for Reconsideration

Intervenors seek reconsideration of a May 3, 1999 procedural order issued by the Secretary. That Order indicates that, among other things, "each party may file a single petition for review, not to exceed 30 pages, addressing all remaining challenges to decisions rendered by the Presiding Officer" after the Presiding Officer has issued his final decision related to the "section 8" property. Intervenors believe that the 30 page limit set out by the Commission is too short and, instead, urge the Commission to extend the limit to 60 pages on the ground that the Presiding Officer may issue as many as six additional partial initial decisions, giving rise to a potential for six petitions for review, which ordinarily are governed by a ten-page limit. See 10 C.F.R. § 2.786(b)(2).

The Commission's "plenary supervisory authority allows it to interpret and customize its process for individual cases." **Baltimore Gas & Elec. Co.** (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 53 (1998). Thus, contrary to the Intervenors' view, page limit adjustments are lawful. However, the Commission understands the practical concern the Intervenors have raised here and vacates the 30 page requirement in the May 3 order. We will allow parties to file a single petition and responses up to 60 pages in length. No more than ten pages, however, may be devoted to any individual partial initial decision.

For the foregoing reasons and to the above extent, the motion for reconsideration is granted.

Petition for Interlocutory Review

The Presiding Officer's April 21, 1999, order posed a series of questions to the parties related to groundwater, the adequacy of the Final Environmental Impact Statement (FEIS), and environmental justice. The Intervenors seek reversal of the 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 those parties had failed to address earlier. Intervenors argue that the Presiding Officer is not conducting this case impartially and has shown bias toward the NRC Staff and HRI. Intervenors have previously filed similar petitions in this proceeding that were denied by the Commission. See CLI-99-07, 49 NRC ____ (March 23, 1999), and CLI-99-08, 49 NRC ____ (April 6, 1999).

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). Intervenors seek review and reversal pursuant to the second standard. As with our earlier decisions on similar issues, the Commission does not agree with Intervenors that the Presiding Officer's order has altered the basic structure of the proceeding in a pervasive or unusual manner. As such, we deny Intervenors petition.

As we stated in CLI-99-07 and again in CLI-99-08, 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 undertake the detailed inquiry necessary to resolve Intervenors' bias complaint. However, as we stated in CLI-99-08, our denial of interlocutory review does not reflect any position on the substance of the bias question. Intervenors 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.

Intervenors have suggested that the Presiding Officer's questions regarding the adequacy of the FEIS will require the Staff to prepare a supplement to that document. However, we note that this is not always the case. Ultimate National Environmental Policy Act (NEPA) judgments with respect to any facility are to be made on the basis of the entire record before the adjudicatory tribunal. **See, e.g., Philadelphia Electric Co.** (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 196-197 (1975). Accordingly, the Presiding Officer's modification of information in an FEIS does not always require recirculation or a supplement. **See, e.g., Niagara Mohawk Power Corp.** (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 372 (1975). In issuing the questions in the April 21 order, the Presiding Officer appears only to be seeking additional information. The need, or lack thereof, for a supplement to the FEIS is speculative at this time.⁽¹⁾

Intervenors also sought a stay of the Presiding Officer's April 21 and May 3 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⁽²⁾
[Original Signed by Annette L. Vietti-Cook]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of May, 1999.

1. See 10 C.F.R. §51.92; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996).

2. Commissioner Diaz was not available for affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.