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February 4, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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
ASLBP No. 95-706-01-ML

**PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM
AND ORDER (PROCEDURAL ISSUES) OF
FEBRUARY 4, 1999 AND REQUEST FOR STAY
*EXPEDITED REVIEW REQUESTED***

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), Grace Sam and Marilyn Morris hereby petition for review, pursuant to 10 C.F.R. § 2.786(g), of the Presiding Officer's Memorandum and Order (Procedural Issues) (January 4, 1999) ("January 4 Order") which denies Intervenors' request to schedule the Intervenors' motions for leave to reply and/or request oral argument ten days after the filing of their last presentation or the filing of a response brief, whichever occurs later. The January 4 Order also denies Intervenors' request to extend the February 16, 1999, filing date for Intervenors' written presentations by one week, to February 23, 1999. The Commission should take review because the bifurcation order imposes serious and irreparable impacts, by depriving the Intervenors of their right to a meaningful hearing opportunity.

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I. SUMMARY OF DECISION.

In a motion served on January 3, 1999, the Intervenors moved the Presiding Officer to schedule the Intervenors' motions for leave to reply and/or request oral argument ten days after the filing of their last presentation or the filing of a response brief, whichever occurs later. Intervenors' Motion to File Motions for Leave to Reply and/or Request Oral Presentations after their Final Presentations and Motion for Extension of Filing Date (February 3, 1999) (February 3 Motion). Previously, the Presiding Officer had directed Intervenors to promptly file motions for reply/requests for oral argument, since he had extended the deadline for presentations to March 5, 1999. Intervenors argued that, in light of the Nuclear Regulatory Commission's ("NRC's") Memorandum and Order, CLI-99-1 (January 29, 1999), which shortened the time before Intervenors' final written presentations to February 16, 1999, Intervenors will not be able to file such motions before submitting their final presentations. February 3 Motion at 1.

In addition, Intervenors requested an extension of the February 16, 1999 filing date for Intervenors' written presentations of one week, to February 23, 1999. More than a week passed after the issuance of the Presiding Officer's Order of January 21, 1999 setting the deadline on March 5, 1999, before the Commission's January 29, 1999, Order revising that deadline to February 16, 1999. Intervenors argued that they had expended time and resources in consideration of a March 5, 1999 filing deadline, which renders a February 16, 1999 deadline an extreme hardship. February 3 Motion at 2.

On February 4, 1999, the Presiding Officer denied both requests. February 4 Order at 2. The Presiding Officer denied the request to schedule motions for leave to reply/request oral argument, citing the Commission's directive in CLI-99-1 to issue partial initial decisions, and holding that it would be inconsistent to delay partial decisions until such motions are received. Id. at 1-2. The Presiding Officer denied the request to extend the February 16, 1999 deadline stating he lacks the authority to do so in light of CLI-99-1. Id. at 1.

II. BACKGROUND.

Intervenors have diligently sought to present carefully prepared written presentations in this proceeding.¹ To date, they have filed three sets of presentations, which were filed, pursuant to agreement of the parties, on November 9, 1998, December 7, 1998 and January 11, 1999.² These filings present Intervenors' concerns in accordance with the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1998), directing Intervenors to cover general concerns challenging "the validity of the license issued to HRI" and concerns related specifically to Church Rock Section 8. Id. at 2-3.

¹ Both the Presiding Officer and the Commission have noted the complexity of issues involved in this case. January 21, 1999 Order and January 29, 1999 Commission Order. Presiding Officer Order (January 21, 1999); Memorandum and Order (Filing Deadline) at 1 (January 25, 1999) (citing complexity of the record); Memorandum and Order, CLI 99-1, at 3 (January 29, 1999).

² Joint Notice of Modification of Schedule for Written Presentations (November 5, 1998); Notice of Scheduling Agreement (January 4, 1999).

On January 19, 1999, Intervenors filed a motion to extend the filing date for their final set of presentations to February 16, 1999, citing the experience of the Intervenors in filing the three previous segments of presentations, the limited time available after the January presentations, the effort required for these presentations, and the lack of prejudice to any party. See Intervenors' Motion for Extension of Filing Deadline (January 19, 1999) ("January 19 Motion"). Intervenors explained the extension would allow them to file some of their written presentations, while, under the February 1, 1999 deadline, they likely could not have filed a single presentation. January 19 Motion at 5. On January 21, 1999, the Presiding Officer ordered that the Intervenors could file a revised schedule extending the deadline for the last filing to May 5, 1999.

Intervenors filed that revised schedule on January 25, 1999, and in addition, provided notice of their intent to file, by March 26, 1999, motions for leave to reply to HRI's and the NRC Staff's previously filed responses, or request oral argument. Notice of Revised Schedule for Written Presentations 1-2, 3 (January 25, 1999).³ On January 26, 1999, the Presiding Officer issued a Memorandum and Order (Motions to Reply or for Oral Argument) ("January 26 Order"), apparently in response to the Notice of Revised Schedule filed by ENDAUM and SRIC. The January 26 Order states:

Motions to reply or to request oral argument should be made promptly,

³ Also, on January 25, 1999, HRI filed, and the Presiding Officer denied, a motion for reconsideration of the extension of the filing deadline. Hydro Resource's Inc.'s Motion for Reconsideration of the Presiding Officer's Order Extending the Filing Deadline for Intervenors' Final Brief to March 5, 1999 (January 25, 1999); Memorandum and Order (Filing Deadline) (January 25, 1999).

preferably within 10 days of the response to which they are directed. The Presiding Officer is proceeding to prepare analyses and draft decisions. It is important that motions and requests be available so that the Presiding Officer may allocate time efficiently. Now that the schedule for written presentations has been extended, prompt motions and requests should be feasible and will be required. January 26 Order at 1.

On January 29, 1999, the Commission issued CLI-99-1 which vacated the Presiding Officer's orders and set March 5, 1999, as the deadline for final presentations, and setting February 16, 1999 as the deadline. CLI -99-1 at 3.

III. IN LIGHT OF THE NEW SCHEDULE IMPOSED BY CLI-99-1, INTERVENORS SHOULD BE ALLOWED TO FILE MOTIONS FOR LEAVE TO REPLY OR REQUEST ORAL ARGUMENT AFTER THEIR FINAL WRITTEN PRESENTATIONS ARE FILED.

The Presiding Officer's January 26, 1999, Order indicates that, given the extension of time for filing presentations until March 5, the Intervenor should be preparing motions for leave to reply or to request oral argument in response to the briefs filed by HRI and the NRC Staff. The Order states, "Now that the schedule for written presentations has been extended, prompt motions and requests should be feasible and will be required." *Id.* at 1. However, the assumption of a March 5 deadline has been changed by CLI 99-1, which now sets a deadline of February 16. Under this new schedule, the Intervenor will be hard pressed to prepare their initial presentations on the remaining issues, including cumulative impacts, need for the project, cost/benefit analysis and environmental justice. Under the circumstances, it is not feasible to also file motions for leave to reply and oral argument on responses previously filed by HRI and the Staff.

Therefore, Intervenors should be allowed to file motions for leave to reply or requests for oral presentations ten days after their last presentation is filed, or a response is received, whichever event occurs later.⁴

The Presiding Officer claims that, in accordance with CLI-99-1, he must issue his partial initial decisions without waiting for motions/requests. Such a conclusion violates all notions of fairness. First of all, CLI 99-1 directs the Presiding Officer to submit all the initial partial decisions by June 15, 1999, but Intervenors seek only to submit their motions/requests ten days after their final presentation (currently due on February 16) or ten days after each response, whichever is later. Second, after going through what has proved to be an exhausting schedule for presentations, Intervenors were led to believe they had been afforded time to prepare motions/requests. The February 4 Order denies Intervenors due process by arbitrarily refusing time to prepare these motions/requests.

IV. THE DEADLINE FOR FINAL PRESENTATIONS SHOULD BE MOVED FROM FEBRUARY 16, 1999, TO FEBRUARY 23, 1999.

The changes in the filing schedule over the last several weeks have caused extreme prejudice to Intervenors' ability to prepare their case. While the Presiding Officer has a duty to avoid delay, he also has a duty to conduct a fair and impartial hearing. 10 C.F.R. § 2.1209. The hearing must be regulated to provide intervenors a meaningful opportunity to participate. See Atomic Energy Act, 42 U.S.C. § 2239

⁴ Intervenors do not seek leave to file a motion/request in response to the liquid waste briefs filed by HRI and the NRC Staff, in light of the order the Presiding Officer issued today on that concern.

(a)(1)(A) (1994); Union of Concerned Scientists, v. NRC, 735 F.2d at 1437, 1446 (D.C. Cir. 1984), cert. den. 469 U.S. 1132 (1985), quoting Bellotti v. NRC, 725 F.2d 1380, 1389(DC Cir. 1983). The Presiding Officer has stated that CLI-99-1 prevents any change in the February 16, 1999 deadline. Intervenors did not seek review of CLI-99-1 in the February 3 Motion. Rather, they sought extension of the current deadline on the basis of new circumstances, which were not before the Board or the Commission. CLI-99-1 does not remove the Presiding Officer's authority to schedule the remainder of the proceeding.

The schedule in this proceeding has taken several turns in the past weeks. On January 19, 1999, unable to fully prepare their fourth segment of presentations before February 1, 1999, Intervenors sought an extension of the deadline to February 16, 1999. The Presiding Officer granted an extension until March 5, 1999 on January 21, 1999. Then, on January 29, 1999, the Commission changed the deadline to February 16, 1999.

Between January 21 and 29, Intervenors operated under the assumption that the deadline for their final round of presentations was March 5. Their counsel used the additional time for more thorough preparation of their evidentiary materials than they otherwise would have considered possible, including obtaining testimony from an expert on the relationship between environmental justice and public health in the Crownpoint/Church Rock area. Moreover, in response to the Presiding Officer's January 26, 1999, order, counsel used time that otherwise would have been devoted solely to the preparation of the final round of presentations to research motions for leave to reply

and/or requests for oral presentations on liquid waste⁵, cultural resources, and performance based licensing issues.⁶

Intervenors reasonably based these decisions regarding the use of their counsel's time on the instructions in the Presiding Officer's January 21 and 26 orders, which extended the deadline until March 5 and required Intervenors to begin working on motions for leave to reply/requests for oral argument. Under these circumstances, it is now impossible to meet the February 16, 1999 deadline, and it will be extremely prejudicial to the Intervenors' ability to prepare their final presentations and participate in this proceeding in a meaningful way. Accordingly, Intervenors respectfully request an extension of the time for filing their final round of presentations until February 23, 1999.

An extension to February 23 will not prejudice any party. The NRC Staff has taken final action in this proceeding by issuing a license to HRI. Source Materials License SUA-1508 Hearing Record ACN 980116066 (January 5, 1998). HRI does not plan to begin operations until the year 2000. Affidavit of Mark S. Pelizza, Attachment A at 3, in support of HRI's Response to Scheduling Conference Briefs of All

⁵ Intervenors cannot complete a motion for leave to reply on liquid waste, given the Presiding Officer's decision on that concern today. However, Intervenors are now faced with the additional responsibility of appealing that decision to the Commission in a limited time.

⁶ In addition, counsel for the Intervenors have made plans that prevent them from devoting all their time to this case, in reliance on the March 5, 1999 deadline. For instance, one of Intervenors' counsel, Diane Curran, who has major responsibilities in the case, made family travel plans for the weekend of February 13 and 14, including the purchase of nonrefundable airline tickets. And, Rod Ventura, lead counsel for Grace Sam and Marilyn Morris, has committed to travel plans for that same weekend.

Petitioners (September 9, 1998).⁷ And, given the number of presentations already submitted in this case, it is extremely unlikely the one week delay of the submission of the last set of presentations would create a delay in the ultimate resolution of this proceeding.

III. THIS PETITION MEETS THE STANDARD FOR REVIEW.

One of the two standards in 10 C.F.R. § 2.786(g) must be met for interlocutory review: either the aggrieved party is threatened with immediate and serious irreparable impact, or the order will affect the basic structure of this proceeding in a pervasive or unusual manner.⁸ An irreparable impact arises in the situation where the Commission faces "a discrete legal question, more easily resolved now, lest [the Commission] be unable later to tailor meaningful relief."⁹ Here, the Commission should take review because the Presiding Officer has deprived Intervenors of their opportunity to seek leave to reply and/or request oral argument during this final phase of written

⁷ HRI has previously argued that is prejudiced by extension of the final presentation deadline because a delay makes it more "difficult and expensive" to raise working capital. Hydro Resources, Inc.'s Motion for Reconsideration of the Presiding Officer's Order Extending the Filing Deadline for Intervenors' Final Brief to March 5, 1999, at 3-4 (January 25, 1999). Intervenors acknowledge that HRI is in dire financial condition; ENDAUM's and SRIC's concern in this regard is explained in their written presentation on HRI's Lack of Financial and Technical Qualifications, filed on January 11, 1999. However, HRI's financial trouble is longstanding, and will not be exacerbated by a brief delay in filing one segment of presentations. In any event, the fact that one party possesses fewer resources to devote to a proceeding than others does not relieve a party of its hearing obligations. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982).

⁸In the Matter of Oncology Services Corporation, CLI 93-13, 37 N.R.C. 419, 420-421 (1993).

⁹Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2) CLI 95-15, 42 N.R.C. 181, 184 (1995) (finding that possible erroneous disclosure of documents that may be absolutely privileged satisfies irreparable impact test).

presentations, and may continue to issue partial initial decisions before receiving their motions/requests. In addition, the Presiding Officer has refused to exercise his scheduling authority, even though extreme circumstances are present, to extend the final written presentation deadline to February 23, 1999, depriving Intervenors of their opportunity for meaningful participation in this hearing. These issues can be readily resolved now to avoid injury and conserve resources.

IV. REQUEST FOR STAY OF PROCEEDING.

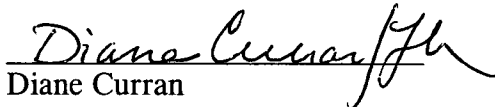
If it is not possible for the Commission to review this petition in expedited manner, and issue a decision prior to the current presentation deadline of February 16, 1999, Intervenors request that the Commission direct the Presiding Officer to halt all matters pending in this proceeding, pending the Commission's Order.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission grant review of the Presiding Officer's decision in the January 4 Order.

Respectfully Submitted this 4th day of February, 1999.


Johanna Matanich
Douglas Meiklejohn
Lila Bird
New Mexico Environmental Law Center
1405 Luisa Street Suite 5
Santa Fe, N.M. 87505
(505) 989-9022


Diane Curran
Harmon, Curran, Spielberg,
& Eisenberg, LLP
2001 "S" Street, Suite 430
Washington, DC 20009
(202)328-3500

Roderick Ventura JLM

Roderick Ventura

Samuel D. Gollis

DNA - People's Legal Services, Inc.

PO Box 306

Window Rock, AZ 86515

(520)871-5643

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2929 Coors Road)	
Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that:

On February 4, 1999, I caused to be served copies of the following:

PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM AND ORDER (PROCEDURAL ISSUES) OF FEBRUARY 4, 1999 AND REQUEST FOR STAY *EXPEDITED REVIEW REQUESTED*

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

Shirley Ann Jackson, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Edward McGaffigan, Jr.,
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch*
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Jep Hill, Esq.
Attorney for Hydro Resources, Inc.
Jep Hill & Associates
P.O. Box 2254
Austin, TX 78768

Mitzi Young
John T. Hull
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Roderick Ventura
Samuel D. Gollis
DNA - People's Legal Services, Inc.*
PO Box 306
Window Rock, AZ 86515

Diane Curran
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
2001 "S" Street, N.W., Suite 430
Washington DC 20009

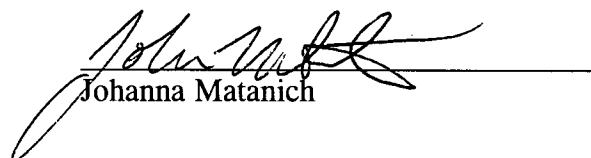
Herb Yazzie, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson
Frederick Phillips
David Lashway
SHAW, PITTMAN, POTTS &
TROWBRIDGE*
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

William Paul Robinson
Chris Shuey
Southwest Research and Information
Center
P.O. Box 4524
Albuquerque, NM 87106

Mitchell Capitan
ENDAUM
P.O. Box 471
Crownpoint, NM 87313

Dated at Santa Fe, New Mexico,
February 4, 1999,


Johanna Matanich