UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

'99 NOV 29 A11 :56

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| In the Matter of: | ) | |
| HYDRO RESOURCES, INC.<br>P.O. Box 15910<br>Rio Rancho, New Mexico 87174 | ) | Docket No. 40-8968-ML<br>ASLBP No. 95-706-01-ML |

**OPPOSITION OF HYDRO RESOURCES, INC. TO MARILYN MORRIS' AND GRACE SAM'S PETITION FOR REVIEW OF PRESIDING OFFICER'S MEMORANDUM AND ORDER PLACING HEARING IN ABEYANCE**

## I. INTRODUCTION

Hydro Resources, Inc. ("HRI"), respectfully opposes the Petition (hereinafter, "Petition") of Marilyn Morris and Grace Sam (hereinafter, "Intervenors") requesting review of the Presiding Officer's Memorandum and Order of October 19, 1999 (LB-99-40), placing this hearing in abeyance (hereinafter, "Order"). HRI opposes the Petition on the grounds that Intervenors fail to show that review of this interlocutory Order is warranted, Intervenors fail to satisfy the standards for review of a final or interlocutory order, and because placing this hearing in abeyance is appropriate and is consistent with Nuclear Regulatory Commission ("NRC") policy.

## II. ARGUMENT

### A. Review of the Presiding Officer's Interlocutory Order is Not Warranted.

As the Presiding Officer explicitly stated (Order at 5), the Order placing this hearing in abeyance is interlocutory in nature, deferring consideration of issues peculiar to contemplated future phases of the Crownpoint project pending a determination that

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such phases will go forward. The Order is simply a scheduling determination, "not a final decision of the whole controversy."[1]

An order of the Presiding Officer is final for appellate purposes where it either disposes of a major segment of a case or terminates a party's right to participate. Orders which do neither are interlocutory. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984). Interlocutory appellate review of a Presiding Officer's orders is disfavored and will be undertaken only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma site), CLI-94-11, 40 NRC 55, 59 (1994).

"No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." 10 C.F.R. § 2.730(f); see also In re HRI, 47 NRC 314, 325 (1999). Interlocutory appeal will be granted only where the Presiding Officer's order either (1) threatens the appellant 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); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994); Sacramento

[1] Black's Law Dictionary defines "interlocutory" as: "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." *Black's Law Dictionary*, Fifth Edition, at 731 (1979).

Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). Intervenors have failed to make this showing.

Intervenors do not attempt to satisfy the first of the two criteria. See Petition at 9-10. Instead, Intervenors state, conclusorily, that their "Petition meets the second criteria for review . . . ." Petition at 9. Intervenors support their conclusion only by stating that "characterizing the decision as interlocutory delays the proceeding. . . ." and that "characterizing the October 19 Order as interlocutory" is wrong because "it is clearly final with respect to the abeyance issue. . . ." Petition at 9-10. Intervenors do not explain how the Presiding Officer delays the proceeding by characterizing the Order as interlocutory or, for that matter, by placing in abeyance aspects of a hearing that are not, and may never be, necessary for hearing. Similarly, Intervenors make no attempt to describe how the Order, which defers the consideration of contingent events awaiting the occurrence of the contingencies, "affects the basic structure of the proceeding in a pervasive or unusual manner."

Intervenors fail to satisfy either of the NRC's criteria for taking interlocutory review of the Order placing in abeyance consideration of issues that may never ripen. Consequently, Intervenors' request for interlocutory review of the Order should be denied.

**B. Review is Not Warranted Whether or Not the Order is Interlocutory.**

Assuming, arguendo, that Intervenors are correct that the Order placing remaining aspects of the hearing in abeyance is not an interlocutory order (Petition at 3-9), Intervenors still have failed to demonstrate that review of the Order is warranted. Intervenors note that "[T]he standard for Commission review

of a full or partial initial decision of a presiding officer are (sic) set forth in 10 C.F.R. §2.786(b)(4)." Petition at 3. Intervenors state that they "seek review pursuant to the second and third of these standards," i.e., 10 CFR § 2.786(b)(4)(ii and iii). Id.

The standards to which Intervenors refer state that "[T]he petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

. . .

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised . . . .

10 CFR § 2.786(b)(4)(ii), (iii). Intervenors have not demonstrated that either of these considerations is raised by the Presiding Officer's decision to place the remainder of this hearing in abeyance.

The Order placing the remainder of this hearing in abeyance essentially is a scheduling order, a determination that HRI will provide eight months' notice prior to moving beyond the first phase of the Crownpoint project and that hearing of issues implicated by such notice will then be scheduled. Order at 4-5. Scheduling orders are within the discretion of the Presiding Officer and generally will not be disturbed absent a "truly exceptional situation." Virginia Electric & Power Co. (North Anna Power Station, Unit 1 & 2), ALAB-584, 11 NRC 541, 467 (1980); see also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-541, 9 NRC 436, 438 (1979) (scheduling orders generally not subject to review, particularly on an interlocutory basis).

Even if one were to characterize the Order as something other than a scheduling order, Intervenors, as noted above, have failed to demonstrate that review is warranted.

**1. Intervenors fail to establish that the Order is based upon or incorporates a necessary legal conclusion that is unprecedented or contrary to law.**

Intervenors do not specify a "necessary legal conclusion (that) is without governing precedent or is a departure from or contrary to established law" that justifies review of the Order. 10 CFR § 2.786(b)(4)(ii). Intervenors do allege that the Order violates the National Environmental Policy Act ("NEPA") by impermissibly segmenting the proceedings and that the Order is arbitrary and capricious and therefore violates section 10(e) of the Administrative Procedures Act ("APA"). Petition at 5-9. Intervenors' allegations are without merit.

a) The Order does not violate NEPA.

Intervenors declare that "placing the proceedings in abeyance effectively segments the project for NEPA purposes" (Petition at 5; citation to prior brief omitted) and that "NRC's regulations implementing NEPA are part of the NEPA process itself and placing the proceedings in abeyance results in an impermissible segmentation of the proceedings." Petition at 5-6 (citation to prior brief omitted). Intervenors misapprehend NEPA and the cases interpreting it.

The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., requires that all federal agencies use a "systematic, interdisciplinary approach" to incorporate environmental considerations "in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332. For any "major Federal actions significantly affecting

the quality of the human environment," a detailed Environmental Impact Statement ("EIS") must be prepared. Id.

Interpreting NEPA, the courts have made clear that "environmental factors, as compiled in the (EIS), be considered through agency review processes." Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F. 2d 1109, 1118 (D.C. Cir. 1971). Moreover, the courts have made clear that consideration of environmental consequences in an EIS may not be confined to discrete component parts of a contemplated project.

"A comprehensive impact statement may be necessary in some cases . . . thus, when several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." Kleppe v. Sierra Club, 427 U.S. 390, 410; 96 S.Ct. 2718, 2730; 49 L.Ed. 2d 576 (1976). "'Segmentation' or 'piecemealing' occurs when an action is divided into component parts, each involving action with less significant environmental effects. (citation omitted). Segmentation is to be avoided in order to 'insure that interrelated projects [,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions. (citation omitted). . . . proposals should be included in the same EIS if they are 'connected,' that is, if they are 'closely related' such that they are 'interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(iii) (citations omitted). Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988).

NEPA, and the cases interpreting it, make clear that the EIS is to assess the entire contemplated project and may not break up or segment the project into component parts. In this case, the EIS assesses the contemplated project in its entirety and Intervenors have

had an opportunity to challenge the entire EIS. NEPA does not preclude deferring "current litigation of matters not in current controversy." Order at 4.

b) The Order Does Not Violate the APA

Intervenors argue that placing the remainder of this hearing in abeyance violates section 10(e) of the Administrative Procedures Act ("APA"). Petition at 7 – 10. More specifically, Intervenors assert that placing this matter in abeyance "significantly departs from established NRC policy" and therefore is arbitrary and capricious, in violation of the APA. Petition at 7 – 9. This argument, too, lacks merit.

The Presiding Officer has elected to defer hearing particular issues that do not now need to be decided and may never need to be decided. This discretionary scheduling does not "significantly depart() from NRC policy" and Intervenors are unable to demonstrate otherwise. Intervenors argue that the NRC has not previously scheduled a hearing in precisely this manner. Petition at 8. This bald allegation hardly demonstrates that deferring hearing on issues not currently ripe "significantly departs from established NRC policy" and Intervenors are unable to cite to any such policy.

Intervenors also allege that "placing the proceeding in abeyance explicitly violates NRC regulations implementing NEPA," citing 10 CFR § 51.104 as the violated NRC regulation. Petition at 8. That regulation expressly empowers the Presiding Officer to decide issues arising under NEPA; it does not require the Presiding Officer to decide issues that he has deemed not yet ready for decision.[2]

[2] The NRC has made clear that an EIS can be limited to a particular phase of a project where that phase "will not result in any irreversible or irretrievable commitments to the remaining segments . . . ." (U.S. Department of Energy, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), 16. NRC 412, 1982 NRC LEXIS 107, *24 (1982)) and where the phase under review "has substantial independent utility," where approval does not foreclose "alternatives to subsequent portions of the plan," and where it is not highly probable that the succeeding phases of the project will be carried out in the near future. Commonwealth Edison Company (Braidwood Station, Units 1 & 2), 22 NRC 805, 1985 NRC LEXIS 19,

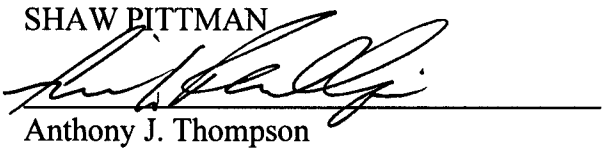
Finally, Intervenors state that deferring hearing of issues not presently requiring decision is "against the specific wishes of the Commission with respect to this proceeding." Petition at 8. HRI submits that whatever "the specific wishes of the Commission with respect to this proceeding," they do not include compelling the unnecessary expenditure of all parties' time and resources hearing issues that do not now, and may never, require resolution.

## III. CONCLUSION

The Presiding Officer's decision to defer hearing issues associated solely with future phases of this hearing is practical, reasonable, and appropriate. For all of the reasons set forth above, HRI respectfully requests that Intervenors' Petition for Review be denied.

Respectfully submitted this 23rd day of November, 1999.

SHAW PITTMAN



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*11-12. The facts of the instant case likewise make phased review appropriate. Of course, here, the EIS addresses all phases of the contemplated project.

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, Opposition to Marilyn Morris' and Grace Sam's Petition for Review of Presiding Officer's October 19, 1999, Order To Hold Hearing In Abeyance and Opposition to EDNAUM and SRIC's Petition for Interlocutory Review of Memorandum and Order of October 19, 1999, in the above-captioned proceeding have been served on the following by electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 23rd day of November, 1999.

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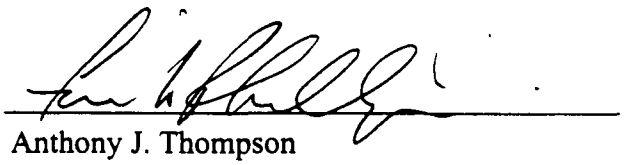

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