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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULES AND PRACTICE  
ADJUTANT GENERAL

In the Matter of:	)	Docket No. 40-8968-ML
	)	
	)	Re: Leach Mining and
HYDRO RESOURCES, INC.	)	Milling License
PO Box 15910	)	
Rio Rancho, NM 87174	)	ASLBP No. 95-706-01-ML
	)	

**MARILYN MORRIS AND GRACE SAM'S PETITION FOR REVIEW OF PRESIDING OFFICER'S OCTOBER 19, 1999 MEMORANDUM AND ORDER GRANTING HRI'S MOTION TO HOLD HEARING IN ABEYANCE**

**INTRODUCTION**

Intervenors, Marilyn Morris and Grace Sam ("Intervenors") respectfully petition the Commission for review of the Presiding Officer's Memorandum and Order (Motion to Hold in Abeyance), LB-99-40 (October 19, 1999) ("October 19 Order") pursuant to 10 C.F.R. §2.786.

Intervenors request the Commission to reverse the Presiding Officer's October 19 Order and require that the remainder of the hearing proceed or, alternatively, that Hydro Resources, Inc.'s ("HRI's) license to for Section 17, Unit 1, and Crownpoint be revoked. In support of their Petition, Intervenors argue the following. First, the Presiding Officer's October 19 Order, despite being characterized as interlocutory, is in fact final with respect to the abeyance issue, and the Commission should therefore review that issue.. Second, if the October 19 Order is deemed final, the Petition meets the standards for review in 10 C.F.R. §2.786(b)(4). Finally, even if the October 19 Order is deemed an interlocutory order, Intervenors meet the standards for

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U.S. DEPARTMENT OF JUSTICE  
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Report of Inspection

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review under §2.786(g).

## **I. SUMMARY OF DECISION AND ARGUMENTS BELOW**

The order for which Intervenor's seek review was issued based on Hydro Resources, Inc.'s ("HRI's") September 14, 1999 Motion to Place Hearing in Abeyance ("Abeyance Motion"). October 19 Order at 1. The Presiding Officer granted HRI's request that the remainder of the hearing be placed in abeyance, on the condition that HRI provide all parties eight months notice before it begins operations at Section 17, Unit 1, and Crownpoint. Id. at 5. The Presiding Officer also characterized the October 19 Order as interlocutory. Id.

In their response, Intervenor's argued that placing the proceedings in abeyance violates the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and their due process rights under the Fifth Amendment to the United States Constitution.

Intervenor's Marilyn Morris And Grace Sam's Response To HRI's Motion To Place Hearing In Abeyance, Proposed Schedule For Phase II, And Motion To Revoke HRI's License For Section 17, Crownpoint, and Unit 1 ("Sam Response") (September 27, 1999) at 3-18. Intervenor's have liberty and property interests at risk, and placing the hearing in abeyance will effectively foreclose their opportunity to be heard on those deprivations, in violation of the Fifth Amendment to the Constitution. Id. at 13-18. Furthermore, placing the hearing in abeyance is a significant departure from established Nuclear Regulatory Commission ("NRC") procedure for which the Presiding Officer gives no reasonable explanation and is therefore arbitrary and capricious under the APA. Id. at 9-13. Finally, placing the hearing in abeyance violates the NRC's own regulations implementing NEPA and is therefore an impermissible segmentation of the project under that statute. Id. at 4-9.

## II. STANDARDS FOR REVIEW

The standard for Commission review of a full or partial initial decision of a presiding officer are set forth in 10 C.F.R. §2.786(b)(4). That provision states that a petition for review may be granted, in the Commission's discretion, "giving due weight to the existence of a substantial question with respect to the following considerations: (i) [a] finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (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; (iv) [t] the conduct of the proceeding involved a prejudicial or procedural error; or (v) [a]ny other consideration which the Commission may deem to be in the public interest." 10 C.F.R. §2.786(b)(4)(i)-(v). Ms. Morris and Ms. Sam seek review pursuant to the second and third of these standards.

The standard for Commission review of an appeal from an interlocutory order are enumerated in 10 C.F.R. §2.786(g). In re: Hydro Resources, Inc., 47 N.R.C. 314, 320 (1998). Under that section, the Commission will review an interlocutory order if it threatens the adversely affected party with immediate and serious irreparable impact, which cannot be alleviated through review of the presiding officer's final decision, or if it affects the basic structure of the proceeding in a pervasive or unusual manner. Id. If the Commission deems the October 19 Order to be interlocutory, Intervenors seek review under the second standard.

## III. ARGUMENT

- A. The October 19 Order Is Not An Interlocutory Order With Respect To The Abeyance Issue And The Commission Should Grant Review Under The Standards Enumerated In 10 C.F.R. §2.786(b)(4).

In the October 19 Order, the Presiding Officer ruled that HRI's Abeyance Motion be granted, provided that HRI give all parties eight months notice prior to beginning operations on Section 17, Unit 1, and Crownpoint. October 19 Order at 5. The Presiding Officer also ruled that the October 19 Order is an interlocutory decision. Id. Despite the Presiding Officer's characterization of the decision as interlocutory, the October 19 Order must be considered final, with respect to the abeyance issue.

As a general principle, an order is considered "final" when that order ends the litigation on the merits and leaves nothing for the court to do but execute judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). The purpose of the finality requirement is to avoid constant disruption of the trial process, to prevent appellate bodies from deciding issues that may be resolved later in the trial, and to promote efficiency by consolidating into one appeal all issues a party feels were in error at the trial stage. Barassi v. Matison, 636 P.2d 1200, 1203 (Ariz. 1981). There are, however, exceptions to this general rule. An appellate court may review a collateral order. Coopers v. Livesay, 437 U.S. at 468, *citing* Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541 (1949). Review of a collateral issue is appropriate when the order conclusively determines the disputed question, resolves an important issue completely separately from the merits of the action, and is effectively unreviewable on appeal from a final judgment. Id.

Here, the abeyance issue in the October 19 Order is reviewable as a collateral order. First, the October 19 Order conclusively places the proceedings in abeyance, effectively resolving that disputed issue. October 19 Order at 5. Second, this issue was resolved separately from the proceeding's merits. The abeyance issue is a procedural issue, decided separately from

the proceeding's merits, the remainder of which will ostensibly be decided whenever HRI decides to begin operations on Section 17, Unit 1, and Crownpoint. October 19 Order at 2. Finally, the abeyance order is effectively unreviewable on appeal from a final judgement. If HRI does not begin operations at Section 17, Unit 1, and Crownpoint for years, Intervenors will never have a meaningful opportunity to appeal that issue because by then, Intervenors may no longer have access to legal representation. If HRI does begin operations at the aforementioned sites, the abeyance issue becomes moot, and Intervenors suffer the prejudice of the interim delay without being given the opportunity to address the source of that delay. Therefore, the October 19 Order is reviewable as a collateral order with respect to the abeyance issue and should be reviewed under 10 C.F.R §2.786(b)(4).

1. The NRC Regulations Implementing NEPA Are Part Of The NEPA Process And Therefore, Placing The Hearing In Abeyance Is An Impermissible Segmentation Of The Project.

In the October 19 Order, the Presiding Officer determined that placing the proceedings in abeyance would not violate NEPA's prohibition on segmentation. October 19 Order at 3. The Presiding Officer justified his conclusion by reasoning that placing the hearing in abeyance would not impermissibly segment the project because the Final Environmental Impact Statement ("FEIS") considers the entire project and that Intervenors were free to challenge the validity of the entire license if there were grounds to do so. Id. This reasoning, however, does not address Intervenors' argument that placing the proceedings in abeyance effectively segments the project for NEPA purposes. See Sam Response at 4-9.

Intervenors concede that the FEIS covers the entire project. Id. at 7. However, Intervenors argued below, and now argue, that the 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. Id. at 6.

The plain language of NEPA and §51.104 of the NRC regulations implementing NEPA is clear on this matter. NEPA section 102(2)(C) requires that all federal agencies generate an environmental impact statement for any proposed major federal action significantly affecting the environment, and that the environmental impact statement shall accompany the proposal through the existing agency review processes. 42 U.S.C. §4332(2)(C). If this language were not clear enough, the Circuit Court for the District of Columbia interpreted this provision in Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir 1971). In that case, the court had to decide whether the Commission's NEPA responsibilities may be carried out completely outside the hearing process. Id. at 1117. The court decided unequivocally that the environmental impact statement must be considered through the entire agency review process. Id. at 1117-18. In rendering its decision the court stated that "[t]he Act is addressed to agencies as a whole, not only their professional staffs ... [c]ompliance to the 'fullest' extent would seem to demand that environmental issues be considered at every important stage in the decision making process ... " Id. at 1118. By implication, this ruling means that the NEPA process does not end with the FEIS, but continues through the entire agency review process. Thus, when a hearing before an Atomic Safety and Licensing Board is segmented, as it has been in this case, the entire NEPA process for the proposed project is segmented. This violates NEPA. *See eg.* Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2nd Cir. 1988); Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976).

The NRC regulations that implement NEPA also suggest that these proceedings are part

of the NEPA process. Section 51.104 of the NRC regulations implementing NEPA requires the presiding officer to decide matters in controversy among the parties within the scope of NEPA and that subpart. 10 C.F.R. §51.104(a)(3). This mandate puts these proceedings squarely within the scope of the NEPA process. Since the proceedings are within NEPA's scope, and NEPA prohibits a project from being considered piecemeal, placing the hearing in abeyance effectively prevents all the issues within NEPA's scope from being considered and therefore constitutes an illegal segmentation of this project. The Commission should therefore grant review because the October 19 Order substantially departs from established law and because this issue presents an important question of law and policy. Upon review, the Commission should reverse the October 19 Order, or alternatively, revoke HRI's license for Section 17, Unit 1, and Crownpoint.

2. Placing The Hearing In Abeyance Violates The Administrative Procedure Act And Should Therefore Be Granted Review Under 10 C.F.R. §2.786(b)(4).

Placing these proceedings in abeyance violates §10(e) of the APA and is therefore contrary to established law. 5 U.S.C. §706(2)(A). The Commission should therefore grant review under 10 C.F.R. §2.786(b)(4)(ii) and (iii).

Under §10(e), an agency action or finding is arbitrary and capricious when the administrative agency deviates significantly from its established policy on a matter without reasonable explanation. Citizens Awareness Network, Inc. v. N.R.C., 59 F.3d 284 (1st Cir. 1995). Here, the Presiding Officer has departed from established NRC policy on Subpart L proceeding and has not given a reasonable explanation for doing so.

In this case, the October 19 Order placing the hearing in abeyance significantly departs from established NRC policy for three reasons. First, the NRC has never permitted segmenting a

proceeding by geographic region, but only by issue. *See eg.*, Long Island Lighting Company (Shoreham Nuclear Power Station Unit 1), LBP-83-30, 17 N.R.C. 1132, 1136 (1983). Past proceedings have been segmented by issue to promote efficient management of a lengthy case. Id. Here, segmenting the proceedings by geographic region would accomplish the opposite, potentially dragging the proceedings well into the next century.

Second, placing the proceeding in abeyance explicitly violates NRC regulations implementing NEPA. As noted above, §51.104 requires that the presiding officer must decide all issues put in controversy by the parties that are within NEPA and the implementing regulations' scope. 10 C.F.R. §51.104(a)(3). By placing the hearing in abeyance, the Presiding Officer has refused to decide NEPA related issues concerning Section 17, Unit 1, and Crownpoint. This is a departure from established NRC policy.

Finally, by placing the hearing in abeyance, the Presiding Officer has acted against the specific wishes of the Commission with respect to this proceeding. In In re: HRI, the Commission praised the Presiding Officer for denying Intervenors' request for an extension of time to submit written presentations, because "the ruling ... is consistent with the Commission's frequently expressed intention that this proceeding move to completion in an expeditious manner." In re: HRI, 49 N.R.C. at 25. The Presiding Officer's October 19 Order undermines this expressed intention by delaying resolution of three quarters of HRI's license until some undetermined future date. This is a significant departure from NRC policy.

In addition to significantly departing from established NRC policy, the Presiding Officer has not offered a reasonable explanation for the departure. The only explanation for placing the hearing in abeyance offered by the Presiding Officer was that Intervenors have had the

opportunity to challenge the validity of the entire license. Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1998) at 2-3. This cannot be considered a reasonable explanation because Intervenors have been prohibited from raising any issues pertaining to operations at Section 17, Unit 1, and Crownpoint. Id. at 2. In effect, this explanation is unreasonable because the totality of operations contemplated by the license have not been considered. Because the October 19 Order is arbitrary and capricious under §10(e) of the APA, the Commission should grant review under §2.786(b)(4)(ii) and (iii).

B. Intervenors' Petition For Review Meets The Standards Of 10 C.F.R. §2.786(g).

Even if the Commission deems the October 19 Order an interlocutory decision, review should still be granted because Intervenors' petition for review meets the standards enumerated in 10 C.F.R. §2.786(g).

Intervenors' Petition meets the second criteria for review, which provides that the Commission will grant interlocutory review if the presiding officer's order affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. §2.786(g)(2). In this case, the October 19 Order clearly affects the basic structure of the proceeding in a pervasive and unusual manner.

First, characterizing the decision as interlocutory delays the proceeding, contrary to the Commission's expressed preference for a speedy disposition of this case. In re: HRI, 49 N.R.C. 25 . There, the Commission declined to grant Intervenors' interlocutory appeals because, it reasoned, the "Presiding Officer's ruling ... is consistent with the Commission's frequently expressed intention that this proceeding move to completion in an expeditious manner." Id. Here, the October 19 Order is diametrically opposed to the Commission's wishes for this

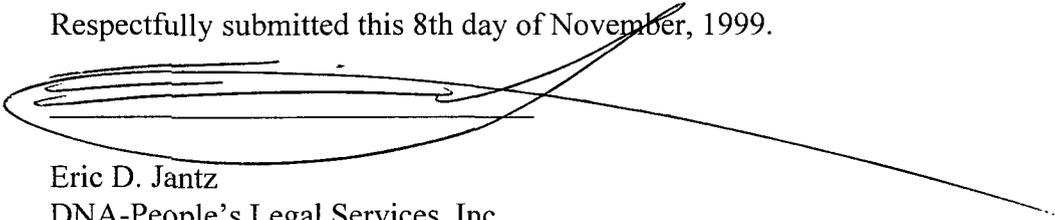
proceeding. The October 19 Order places the hearing in abeyance until such time that HRI decides to commence operations at Section 17, Unit 1, and Crownpoint. October 19 Order at 5. HRI has not indicated when it plans to begin operations on the aforementioned sites. Abeyance Motion at 2. Therefore, this proceeding could be extended indefinitely. Clearly, this does complete the proceeding in an expeditious manner.

Characterizing the October 19 Order as interlocutory, in addition to delaying the proceeding indefinitely, also effectively forecloses the Intervenors' right to appeal the decision to place the proceedings in abeyance. The Commission has stated on numerous occasions that it does not ordinarily entertain interlocutory appeals. See eg. In re: Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 48 N.R.C. 132, 134 (1998), In re: HRI, 47 N.R.C. 314, 325 (1999). That being the case, the standard for the Commission to accept an interlocutory review is higher than for review of a final order. Thus, by characterizing the October 19 Order as interlocutory, when it is clearly final with respect to the abeyance issue, the Presiding Officer has unjustly raised the bar for Intervenors to seek review. This in itself affects the basic proceeding structure in a pervasive and unusual manner. For the above reasons, the October 19 Order affects the basic structure of the proceeding in a pervasive and unusual manner and should be granted review by the Commission. Upon review, the Commission should reverse the October 19 Order, or alternatively, revoke HRI's license for Section 17, Unit 1, and Crownpoint.

## **CONCLUSION**

For the foregoing reasons, Intervenors respectfully request that the Commission grant review of the October 19 Order and reverse the ruling of the Presiding Officer.

Respectfully submitted this 8th day of November, 1999.



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**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 1999, I caused to be served copies of the foregoing: "MARILYN MORRIS AND GRACE SAM'S PETITION FOR REVIEW OF PRESIDING OFFICER'S OCTOBER 19, 1999 MEMORANDUM AND ORDER GRANTING HRI'S MOTION TO HOLD HEARING IN ABEYANCE", 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

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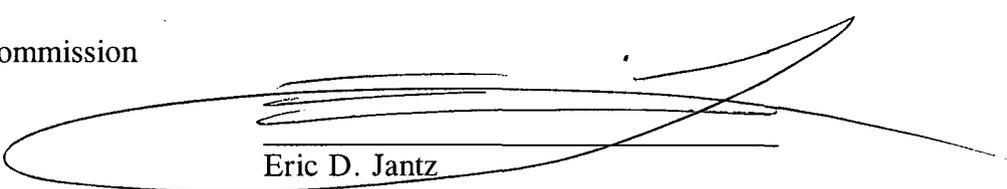
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