November 8, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
P.O Box 15910	)	
Rio Rancho, NM 87174	)	ASLBP No. 95-706-01-ML
	)	

PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM AND ORDER OF OCTOBER 19, 1999

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(g), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby petition for interlocutory review of LBP-99-40, Memorandum and Order, Motion to Hold in Abeyance (October 19, 1999), which places certain portions of the Crownpoint Uranium Mining project hearing in abeyance until, at some indefinite future time, the licensee finds it economical to proceed with those portions of the project. The Commission should take review because the order to place the hearing in abeyance imposes serious and irreparable impacts on the Intervenors and affects the proceeding in a manner that is wholly pervasive, by indefinitely and unjustifiably postponing completion of the hearing to which Intervenors are entitled under the Atomic Energy Act ("AEA"), and by unlawfully segmenting the environmental decision making process in violation of the National Environmental Policy Act ("NEPA").

I. FACTUAL BACKGROUND AND SUMMARY OF DECISION

As described in previous filings before the Commission, Hydro Resources Inc. ("HRI")

U.S. NUCLEAR REGULATORY COMMISSION
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Distributed to Commission on 11/10/99

has applied for and obtained a license to build and operate several in situ leach mines and a uranium mill in Church Rock and Crownpoint, New Mexico, a project known as the "Crownpoint Uranium Project." The NRC Staff issued a Final Environmental Impact Statement ("FEIS") for the entire Crownpoint Project in February, 1997, and a Safety Evaluation Report ("SER") in December, 1997. HRI received an operating license from the Staff on January 5, 1998. License No. SUA-1508.

The license allows mining on all four sites for which HRI seeks permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), conditioning operations on compliance with certain license conditions. More than four months after the license was issued, in May 1998, the Presiding Officer granted the hearing requests filed by ENDAUM, SRIC, Marilyn Morris and Grace Sam. LBP-98-9, 47 NRC 261. Prior to the evidentiary presentations, the Presiding Officer granted HRI's request for "partial bifurcation" of the proceeding, ruling that "Phase I" of the hearing would be limited to (1) any issue that challenges the validity of the license issued to HRI and (2) any aspect of the license concerning operations on Church Rock Section 8, or transportation and treatment of materials from Section 8. Memorandum and Order, Scheduling and Partial Grant of Motion for Bifurcation (unpublished), slip op. at 2-3 (September 22, 1998). Despite the fact that the NRC had licensed the entire Crownpoint Project, Intervenors were prohibited from presenting concerns relating to the license conditions affecting Church Rock Section 17, Unit 1, or Crownpoint. Id., slip op. at 3. Instead, the Presiding Officer ruled that at the conclusion of the hearing he would determine, "based in part on HRI's operating plans at that time," whether issues affecting Section 17, Unit 1 or Crownpoint would be decided immediately or placed "in suspense" because they are not ripe. Id., slip op. at 3.

Between November 1998 and May 1999, the Intervenors and the other parties submitted their evidentiary presentations. The Presiding Officer subsequently ruled in favor of HRI on all evidentiary issues, culminating in the issuance of LBP-99-30, Partial Initial Decision Concluding Phase I, (August 20, 1999). In LBP 99-30, the Presiding Officer also ordered HRI to file a scheduling brief for the remainder of the case. Id., slip op. at 77. In place of a scheduling brief, HRI filed a motion seeking to place issues concerning Section 17, Unit 1, and Crownpoint in abeyance indefinitely. HRI's Motion to Place Hearing in Abeyance (September 14, 1999).

On October 19, 1999 the Presiding Officer granted HRI's Motion and placed the proceedings in abeyance, stating that because HRI has no present intention to mine anywhere but Section 8, it would be a waste to litigate the validity of the license with respect to the other sections. LBP-99-40, slip op. at 2. The Presiding Officer ordered HRI to give eight (8) months of notice prior to mining areas covered by the license but not yet subject to a hearing. Id., slip op. at 5.

II. THIS PETITION MEETS THE STANDARD FOR REVIEW

One of 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 harm that could not be remedied by a later appeal, or the order in question will affect the basic structure of the proceeding in a pervasive or unusual manner.[1] Review is warranted in this instance on both grounds.

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[1] Georgia Power Company (Vogtle Electric Generating plant, Units 1 & 2) CLI-94-15, 40 NRC 319 (1994).

A. Placing the Hearing in Abeyance Would Cause Serious and Irreparable Impact to the Intervenors.

The Presiding Officer's decision to place the rest of this proceeding in indefinite abeyance will cause Intervenors serious and irreparable harm by substantially compromising their ability to make a meaningful challenge to the license for the Crownpoint Project. Although a license has been issued that permits HRI to mine the *entire* Crownpoint Project, the Intervenors have only been able to obtain a hearing on a portion of the project, *i.e.*, Phase I. As discussed in Section II.B.3 below, their prospects for obtaining Commission or judicial review of Phase I issues are thrown into doubt by LBP-99-40. Moreover, completion of the hearing on the rest of the project has now been deferred for an unknown period -- possibly months, years, or even decades.[2] Given HRI's and the Presiding Officer's pattern of conduct so far, it is also likely that the remainder of the hearing will be drawn out and conducted piecemeal, on one section of the mining project at a time: just Section 17, followed by just Unit 1, followed by just Crownpoint.

As a result of this extended, piecemeal structure for completion of the litigation, the Intervenors will be required to remain fully prepared for litigation on any given section of the Crownpoint Project, for a period of potentially many years. Thus, they must maintain their corporate status, continue to retain lawyers and experts, and stand at the ready to resume the litigation -- all at the whim of HRI. This constitutes a tremendous and prejudicial burden on the

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[2] And as a the Commission is well aware, the period of waiting will certainly be longer than the five year term of HRI's present license. Under the timely renewal doctrine, see 10 C.F.R. § 2.109, a license automatically will be extended pending a renewal decision, if the licensee applies for renewal on a timely basis. The extension is for as long as it takes the NRC to decide whether to renew the license. Moreover, the NRC has no deadline for making renewal decisions. Thus, as a practical matter, the HRI license may be extended indefinitely, now that it has been granted.

Intervenors' resolve and resources.[3] The prejudice to the Intervenors is all the more severe in light of the fact that HRI already has the license: HRI now has a tremendous incentive to "wait out" the Intervenors. If, at some point, the Intervenors are unable to maintain their readiness to resume the litigation, HRI will have *carte blanche* to commence mining, without any further hearings. This categorically unfair result was never intended by the AEA or the APA, which guarantee the public the right to a timely hearing.

Moreover, LBP-99-40 irreparably injures the Intervenors' interest under NEPA in obtaining a full and fair review of the environmental impacts of the Crownpoint Project, by segmenting consideration of the various sites of the Crownpoint Project into numerous separate licensing proceedings.[4] For instance, the separate and sequential consideration of mining impacts at Section 8 and Section 17 may result in irreparable and irretrievable impacts to Section

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[3] The Presiding Officer's statement that Intervenors may memorialize their expert testimony in affidavit form, LBP-99-40 at 4, does not cure this prejudice. Intervenors' expert affidavits may grow stale and dated with time, while HRI continues to update its information regarding the proposal. Moreover, if an expert is not available at the time for evidentiary presentations to defend his or her affidavit, the affidavit will have questionable value. *See* Louisiana Power and Light Co. (Waterford Steam Electric station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n. 13 (1983) (affirming Licensing Board's rejection of prefiled written testimony in Subpart G proceeding, where witness refused to appear at hearing). *See also* 10 C.F.R. § 2.1235(a) (providing for oral presentations, including testimony, where Presiding Officer finds it is "necessary to create an adequate record for decision.").

[4] *See* discussion in Section II.B.2, below. *See also*, Carolina Power and Light Company, et al. (Shearson Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2111 (1982) (holding that even where one unit of a project may be completed much later than another, "the effects of effluents on the environment are more realistically viewed in the aggregate from multiple units, rather than piecemeal.").

8, in violation of NEPA.[5]

Unless the Commission takes review of LBP-99-40 now and reverses the Presiding Officer's decision to hold the remainder of the proceeding in abeyance, the Intervenors' rights to a timely a meaningful hearing under the AEA and the APA, and their right to full and fair consideration of environmental issues under NEPA, will be irreparably and irretrievably harmed. These statutory violations cannot be cured if the Commission waits until the end of the entire hearing to review them. By that point, the damage will have been done.

B. Placing the Hearing in Abeyance Would Affect the Proceeding in a Pervasive and Unusual Manner.

LBP-99-40 will also have a pervasive and unusual effect on the proceeding. LBP-99-40's effect is "pervasive" because it profoundly affects the timing of the resolution of the entire case: Intervenors now have no prospect of resolving their concerns about the Crownpoint Project at any time certain in the future.[6] The effect is "unusual" because it delays the resolution of the hearing far beyond what is reasonable to expect in a case where the Intervenors requested a hearing almost five years ago, and where a license has already been issued to the applicant.[7]

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[5] ENDAUM's and SRIC's Scheduling Conference Brief at 26-27 (September 2, 1998). As discussed in the Scheduling Brief and the attached Third Affidavit of Michael G. Wallace (Ex. 1), the ore bodies in Sections 8 and 17 form continuous zones and are hydrologically connected, with Section 17 positioned upstream of but contiguous with Section 8. If Section 17 is mined after Section 8, as planned by HRI, contaminated groundwater may flow from Section 17 into restored portions of Section 8, thus requiring additional work and expenditures for restoring Section 8.

[6] As discussed in Section II.B.3 below, this is true for both Phase I of the proceeding as well as the subsequent phases.

[7] LBP-99-40 also constitutes a highly unusual, indeed unlawful, application of the Commission's doctrine permitting phased litigation. Generally, phasing a hearing is done for a

Moreover, the decision to hold the proceeding in abeyance pervasively and unusually taints the entire proceeding with violations of the timeliness requirements of the AEA and the APA, and NEPA's prohibition against segmentation of environmental decision making. LBP-99-40 also pervasively and unusually frustrates judicial review of the NRC's decision to license the Crownpoint Project, by permitting HRI to hold a license while it holds off indefinitely any agency decision on the validity of the license that could be reviewed by a court.

1. Placing the Hearing in Abeyance Would Violate the AEA and the APA.

Both the AEA and the APA require that hearings must be held in a timely manner. Section 189(a) of the AEA requires that a hearing must be held "upon the request" of an interested party, not whenever the agency gets around to it. 42 U.S.C. § 2249(a). The Courts have also held that the hearing opportunity under the AEA must be "meaningful," which also implies timeliness. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C.Cir. 1984), cert. denied, 469 U.S. 1132 (1985), quoting Belloti v. NRC, 725 F.2d 1380, 1389 (D.C.Cir. 1983) (emphasis in original). Further, the APA requires that an agency, "within a reasonable time, shall set and complete proceedings required to be conducted . . . and shall make its decision." 5 U.S.C. § 558(c). These statutes, taken together, guarantee interested members of

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limited time, to achieve judicial economy and fairness to the litigants. *See* Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983). Postponing the conclusion of a hearing for an unlimited period, simply to serve the convenience of one of the litigants when a license has been granted and all issues are ready for adjudication, is completely beyond the scope of actions contemplated by the Commission in establishing this doctrine. The Commission should take review of the Presiding Officer's clear abuse of the doctrine.

the public a reasonably prompt hearing following their request.[8]

The extended delay granted to HRI by LBP-99-40 would violate the timely hearing requirements of the AEA and APA. It is now almost five years since the Intervenors first requested a hearing, one and one-half years since the hearing was granted, and almost two years since the license was issued. The only justification that has been offered for delaying the resolution of the hearing is the economic convenience of HRI. Once a licensing action is proposed and taken, however, there can be no such justification for delaying completion of the timely hearing guaranteed by the AEA. The law entitles Intervenors to a timely resolution of their concerns.

2. Placing the Hearing in Abeyance Would Violate NEPA.

LBP-99-40 erroneously concludes that holding this proceeding in abeyance does not violate NEPA, based on three grounds: because the FEIS considered the entire project, because Intervenors were permitted to challenge the validity of the entire license, and because the overall effects of the project were "twice considered" by the NRC. LBP-99-40, slip op. at 3. None of these grounds has merit. Regardless of whether the Staff's FEIS considered the Crownpoint Project as whole, the crucial fact remains that the Presiding Officer has not considered the project as a whole in this adjudicatory proceeding. Moreover, by segmenting adjudicatory consideration of the Crownpoint Project into numerous discrete phases separated by time, the Presiding Officer has also erected a structure whereby the Commission is likely to consider the project piecemeal

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[8] In addition, LBP-99-40 would violate Intervenors' due process right to a prompt hearing on their health and safety and environmental concerns. *See* Barry v. Barchi, 443 U.S. 55, 65 (1979); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

in its review of the Presiding Officer's decisions. This defeats NRC regulations requiring that the FEIS must "accompany the application . . . through, and be considered in, the commission's decision making process."[9] Here, the FEIS as a whole has *not* accompanied the Presiding Officer's decision making process, nor is it likely to accompany the Commission's decision making process. Instead, only some pieces of the FEIS have been reviewed by the Presiding Officer, thus guaranteeing that the FEIS will be reviewed by the Commission in piecemeal fashion. The Commission must take review now and reverse this "mockery" of the NEPA decision making process.[10]

3. Placing the Hearing in Abeyance Would Frustrate Commission or Judicial Review.

If allowed to stand, LBP-99-40 will also frustrate the Intervenors' ability to obtain meaningful Commission or judicial review of the licensing of the Crownpoint Project. The scope of the licensing action on which ENDAUM and SRIC obtained a hearing was the entire Crownpoint Project, including all four sites, and HRI has received a permit to mine and mill on all four sites.[11] Intervenors are entitled to obtain review of that licensing action.

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[9] 10 C.F.R. § 51.94; Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1117-1118 (D.C.Cir. 1971).

[10] Calvert Cliffs, 449 F.2d at 1117-1118. Notably, prior to the commencement of this hearing, the NRC properly prohibited HRI's request to "break out" Section 8 for separate licensing and FEIS preparation. Letter from Joseph Holonich, NRC, to Richard F. Clement, President, HRI (June 17, 1996). The NRC insisted that the licensing of entire Crownpoint Project be treated as one proposal for purposes of NEPA review. By permitting the segmentation of the hearing into numerous distinct smaller phases, the Presiding Officer has effectively reversed the initial determination to review the Crownpoint Project as a whole.

[11] *See* Notice of Availability of Draft Environmental Impact Statement; Notice of Opportunity for Hearing, 59 Fed. Reg. 56,557 (November 14, 1994). The Notice of Hearing

Now that the hearing phase has been split into multiple phases, however, it appears to be entirely within the Commission's discretion to consolidate and postpone pending petitions for review of any single aspect of the case until all aspects of the case, involving all four sites, have been heard. Because the hearing on the rest of the Crownpoint Project has now been postponed indefinitely by LBP-99-40, such a consolidated review could be put off for years, if not forever. As a result, it is possible that HRI will be allowed to go ahead with mining activities on some sections of the Crownpoint Project, long before Commission review takes place, or before Intervenors are able to seek judicial review.[12] Thus, LBP-99-40 may effectively deprive Intervenors of their right to seek judicial review of the issuance of HRI's license under the Hobbs Act. [13]

CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission grant review

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refers to three sites: Church Rock, Unit 1, and Crownpoint. Subsequently, HRI split the Church Rock site into two parts: Section 8 and Section 17.

[12] By Order dated September 27, 1999, the U.S. Court of Appeals for the District of Columbia Circuit dismissed Intervenors' petitions for review of four of the Presiding Officer's Partial Initial Decisions in this proceeding, on the grounds that by petitioning the Commission for review of the four decisions, the Intervenors had rendered them nonfinal; and that the NRC has not issued a decision that disposes of all issues in the licensing proceeding. This decision calls into question whether Intervenors may seek judicial review of any single aspect of the HRI licensing decision until all aspects have been reviewed by the Commission.

[13] As the Court of Appeals recognized in Commonwealth of Massachusetts, et al. v. Nuclear Regulatory Commission, 924 F.2d 311, 322 (D.C.Cir. 1991), an NRC order is final if it "disposes of all issues as to all parties in the licensing proceeding, that is, if it consumates the agency's decision making process and results in granting, denying, suspending, revoking of amending a license." By divorcing the issuance of the license from the administrative review process in this case, the NRC further undermines the Court's concept of finality.

of the Presiding Officer's decision to hold this proceeding in abeyance.

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November 8, 1999

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NUCLEAR REGULATORY COMMISSION
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In the Matter of	)	
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P.O. Box 15910	)	ASLBP No. 95-706-01-ML
Rio Rancho, NM 87174	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 1999, I caused to be served copies of the foregoing:

PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM AND ORDER OF OCTOBER 19, 1999

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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Dated at Santa Fe, New Mexico,
November 8, 1999

Geoffrey H. Fettus

NEW MEXICO
ENVIRONMENTAL LAW CENTER

November 8, 1999

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

Re: Matter of the Application of Hydro Resources Inc., Docket No. 40-8968-ML, ASLBP No. 95-706-01-ML

Dear Sir or Madam:

Please find an original and two copies of ENDAUM's and SRIC's Petition for Interlocutory Review of Memorandum and Order of October 19, 1999 (LBP-99-40). I have also enclosed one extra copy of the document and a stamped, self-addressed return envelope.

I would appreciate it if you would file the original and the copies of the Petition for Interlocutory Review. I would also appreciate it if you would date-stamp the extra copy and return it to me in the self-addressed envelope.

If you have any questions regarding this filing, please contact me at your earliest convenience at (505) 989-9022.

Thank you for your assistance in this matter.

Sincerely,

Geoffrey H. Fettus

Geoffrey H. Fettus

cc: Service List

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