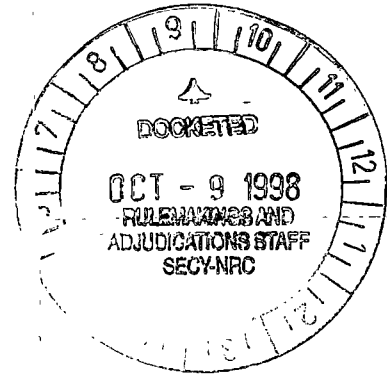


October 8, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Assistant



In the Matter of: )

HYDRO RESOURCES, INC. )

2929 Coors Road, Suite 101 )

Albuquerque, NM 87120 )

Docket No. 40-8968-ML

ASLB No. 95-706-01-ML

Re: Leach Mining and Milling License

**HYDRO RESOURCES, INC.'S RESPONSE  
TO ENDAUM'S AND SRIC'S JOINT REQUEST  
FOR DIRECTED CERTIFICATION OF  
SEPTEMBER 22, 1998 BIFURCATION ORDER**

**I. INTRODUCTION**

On September 22, 1998, the Presiding Officer issued an Order granting, in part, Hydro Resources, Inc.'s ("HRI's") June 4, 1998 and September 2, 1998 requests for bifurcation of the licensing proceeding such that ENDAUM and SRIC (jointly, hereinafter "Intervenors") may submit written presentations with respect to "any aspect of the HRI license concerning operations at Church Rock Section 8 or with respect to the transportation or treatment of materials extracted from Section 8," but are precluded from presenting concerns relating to

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Church Rock Section 17, Unit 1, or the Crownpoint sections at this time.<sup>1</sup> Under the Order, Intervenor may also raise "any issue that challenges the validity of the license issued to HRI."<sup>2</sup> In response to the Order, on September 30, 1998, Intervenor filed a joint Request For Directed Certification ("the Request") of the decision by the Presiding Officer to bifurcate the proceeding. HRI responds to Intervenor's request as follows:

## II. ARGUMENT

In sum, Intervenor argues that the decision of the Presiding Officer to bifurcate the proceeding warrants directed certification to the Commission because: (1) bifurcation of the proceeding would be detrimental to the public interest and would result in unusual delay; (2) the decision affects the basic structure of the proceeding in a pervasive and unusual way; and (3) bifurcation results in an unlawful segmentation of the proceeding under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, ("NEPA"). With respect to arguments one and two, as discussed at length below, there is nothing unusual or detrimental to the public interest about the Presiding Officer's Order; the Order merely imposes some reasonable schedule on these proceedings, a matter entirely within the discretion of the Presiding Officer. Moreover, whether to certify questions or refer a ruling to the Commission also are matters entirely within the Presiding Officer's discretion. Applying the facts of this case to the relevant regulations and caselaw, Intervenor's request for certification and/or referral is wanting.<sup>3</sup> With regard to Intervenor's final argument, as discussed in HRI's

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1. Memorandum and Order, Scheduling and Partial Grant of Motion for Bifurcation, at 2-3 (Sept. 22, 1998, Bloch, P.) (hereinafter, "the Order").

2. *Id.* at 3.

3. Intervenor's Motion, entitled Request for Directed Certification, cites the regulatory provisions applicable to certification and to referral. The Motion probably is more accurately characterized as a request for referral.

previous filings with the Board, the bifurcation of the proceeding is fully consistent with NEPA and does not raise any novel issue requiring Commission consideration. Therefore, the Presiding Officer should deny Intervenor's and SRIC's Request For Directed Certification.

**A. It is Entirely Within the Discretion of the Presiding Officer Whether to Refer the Order or Certify a Question to the Commission for Review**

At the outset, it is important to recognize that the decision whether to refer a ruling or certify a question to the Commission is one that is entirely within the discretion of the Presiding Officer. Intervenor's clearly misunderstand this principle as they state on page 3 of their brief that "as provided in 10 C.F.R. § 2.730(f), a Licensing Board ruling *should* be referred to the Commission when a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense."<sup>4</sup> Not only do Intervenor's misstate the law, they completely ignore relevant sections of the regulation upon which they rely. Section 2.730 states:

*(f) Interlocutory appeals to the Commission. No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session.*<sup>5</sup>

Thus, section 2.730(f) generally precludes interlocutory appeals but allows referrals to be made to the Commission as a discretionary matter in only the most compelling

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4. Request at 3 (emphasis added).

5. 10 C.F.R. § 2730(f) (emphasis added).

circumstances.<sup>6</sup> Intervenor somehow completely ignore the NRC's general ban on interlocutory appeals. Moreover, contrary to Intervenor's assertion, the Presiding Officer **may** refer the ruling to the Commission if he deems it appropriate, but is not required to do so.<sup>7</sup>

Intervenor ignores the discretion granted the Presiding Officer with respect to deciding whether to certify issues to the Commission. Pursuant to 10 C.F.R. § 2.718(i), the Presiding Officer has the authority to "certify questions to the Commission for its determination, either in his discretion or on direction of the Commission."<sup>8</sup> Here, the Commission has not directed that the Presiding Officer certify a question; therefore, it is within the power of the Presiding Officer to determine whether certification is appropriate.

In support of their Request, Intervenor argues on pages 3-4 that the scheduling order warrants directed certification to the Commission because "bifurcation of the proceeding would be detrimental to the public interest and would create unusual delay, because it indefinitely postpones a hearing on which the Intervenor is prepared to go ahead with their case."<sup>9</sup> It is hardly believable that Intervenor argues that they are prepared to go ahead with their case, while at the same time their Joint Motion for Reconsideration filed on September

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6. See e.g., 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); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).

7. See e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977), and, Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982) (Recognizing authority to certify questions to Commission and that authority should be exercised sparingly.)

8. 10 C.F.R. § 2.718(i). Notably, ENDAUM and SRIC fail to cite the certification regulation in the Request yet have requested "directed certification" of the bifurcation order.

9. Request at 3-4.

30, 1998, pleads that they are not prepared to go forward and require additional time to prepare experts.<sup>10</sup> Even assuming Intervenor are ready to go ahead with their case, they fail to offer any support for their bald assertion that the Order is detrimental to the public interest and would create unusual delay.<sup>11</sup> Throughout their Request, Intervenor make no attempt to explain how or to whom bifurcation causes detriment or what "unusual delay" will result therefrom.

**B. Referral of the Bifurcation Ruling or Certification of a Question to the Commission is Unwarranted**

As discussed above, despite the general ban on interlocutory appeals in section 2.730(f), NRC regulations provide that a litigant may request that a Licensing Board certify a question to the Commission pursuant to 10 C.F.R. § 2.718(i), or refer a ruling to the Commission under 10 C.F.R. § 2.730(f). Pursuant to 10 C.F.R. § 2.786, the Commission should exercise its discretion to review a ruling or a certified question only in the most compelling circumstances.<sup>12</sup> Under section 2.786(g), the Commission may conduct discretionary interlocutory review of a certified question or a referred ruling only if the question or ruling: (1) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for

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10. See In the Matter of Hydro Resources, Inc., Joint Motion for Reconsideration by ENDAUM, SRIC, Marilyn Morris and Grace Sam of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998, ASLB, Docket No. 40-8968-ML (Sept. 30, 1998).

11. Similarly, ENDAUM and SRIC argue on page 4 that the license "has already issued", thus the Order is detrimental to the public interest and create unusual delay. Here again, ENDAUM and SRIC fail to explain why this is detrimental to the public interest or how it creates unusual delay. They also claim on page 4 that the "delay is both unnecessary and unfair" yet ignore the fact that they themselves asked for additional time to prepare their experts and offer no evidence suggesting that the Order is in some way unfair.

12. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983).

review of the presiding officer's final decision; or, (2) affects the basic structure of the proceeding in a pervasive or unusual manner.<sup>13</sup>

Intervenors fail to demonstrate that the September 22 Order causes irreparable harm that could not be alleviated by Commission review at the end of the proceeding, or that it affects the basic structure of the proceeding in such a pervasive or unusual manner as to warrant review.

**1. The Bifurcation Order Does Not Cause Intervenors Irreparable Harm**

Notably, ENDAUM and SRIC fail to raise the argument, or offer any evidence in support of the argument, that they have been adversely affected by the Order with immediate and serious irreparable harm. Apparently, therefore, not even Intervenors can articulate how the issuance of the order will result in irreparable harm that would warrant Commission review.

**2. The Bifurcation Order Does Not Pervasively or Unusually Affect the Proceeding**

On page 4 of the Request, Intervenors assert that the decision of the Presiding Officer to bifurcate the proceeding warrants directed certification to the Commission because the decision "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner."<sup>14</sup>

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13. 10 C.F.R. § 2.786. See also, Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); Georgia Power Co. (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); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 236 (1991).

14. Request at 4.

In support of their argument, Intervenor's complain that Presiding Officer based his scheduling decision on "HRI's financial needs" and that beginning the proceedings with Church Rock Section 8 "does not constitute the ordinary management of the hearing."<sup>15</sup> Intervenor's misread the September 22 Order. The Presiding Officer's rationale for the scheduling decision is provided on page 2:

"Intervenor's . . . are prohibited, **on the grounds of ripeness**, from making detailed challenges to parts of the project that have been scheduled many years into the future and that will be completed only if conditions in the uranium market permit profitable mining at that time."<sup>16</sup>

Thus, the Presiding Officer based his scheduling decision on ripeness, not, as Intervenor's suggest, on "HRI's financial needs."

Moreover, Intervenor's fail to recognize that NRC has stated plainly: "[r]eview of interlocutory rulings pursuant to the second criterion of § 2.786; i.e., the Board ruling affects the basic structure of the proceeding in a pervasive or unusual manner, is granted only in *extraordinary* circumstances."<sup>17</sup> Clearly, the September 22 Order, a scheduling order establishing a logical sequence for presentation of evidence in this case, does not give rise to *extraordinary* circumstances warranting Commission review.

Notably, Intervenor's ignore the line of cases holding that interlocutory review is not favored where a contention is not admitted into a proceeding.<sup>18</sup> If the outright denial of

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15. Id.

16. Order at 2 (emphasis added).

17. NRC Staff Practice and Procedure Digest, Office of General Counsel, U.S. NRC (1997) (emphasis added).

18. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, (3-94 (1994)); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135; Project Management Corp. (Clinch River Breeder reactor Plant), ALAB-326, 3 NRC 406; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986).



admission of a contention into a proceeding fails to warrant review, it is preposterous to suggest that merely deferring consideration of a particular issue warrants review.

**3. Bifurcation of the Proceeding is Fully Consistent with NEPA and Does Not Raise Novel Issues Requiring Commission Consideration.**

Finally, Intervenors argue that the decision of the Presiding Officer to bifurcate the proceeding warrants directed certification to the Commission because bifurcation results in an unlawful segmentation of the proceeding under NEPA, thus raising a "novel" issue worthy of Commission review.<sup>19</sup> As discussed in HRI's previous filings with the Board, the bifurcation of the proceeding is merely a scheduling choice that has nothing to do with segmentation to avoid the assessment of cumulative impacts and does not raise any novel issue requiring Commission consideration.

Intervenors misunderstand the September 22 Order. The order in no way segments the NEPA process, but rather merely sets a logical schedule for reviewing all of Intervenors' concerns pertaining to the HRI license, including the environmental impact statement drafted by NRC. The purpose of the Order is merely to schedule issues for consideration beginning with those that are presently ripe for review, particularly activities related to Section 8 and any issues pertinent to the project generally.

Scheduling arrangements are not novel and are within the discretion of the Presiding Officer.<sup>20</sup> As pointed out by the Presiding Officer in the September 22 Order, "the absence of

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19. Request at 5.

20. See 10 C.F.R. § 2.1209; see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983) (citations omitted); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 95(1986).

rigid scheduling criteria established by statute or regulation suggests that adjudicatory boards are to decide for themselves under all the circumstances when hearings should be held on specific issues.”<sup>21</sup> The Presiding Officer's scheduling determinations will not be altered absent a "truly exceptional situation”<sup>22</sup> and are reviewed only for an abuse of discretion.<sup>23</sup> Thus, the Presiding Officer's scheduling arrangement is not novel but, rather like in every other ASLB proceeding, merely organizes sequentially the manner in which matters will be addressed. Surely, Intervenors realize the impracticality of attempting to address all issues surrounding HRI's license simultaneously. Moreover, the scheduling order does not give rise to a "truly exceptional situation” and does not constitute an abuse of the Presiding Officer's discretion.<sup>24</sup>

### III. CONCLUSION

For the reasons stated above, HRI respectfully requests that the Presiding Officer deny ENDAUM's and SRIC's September 30, 1998 Request for Directed Certification of the Bifurcation Order.

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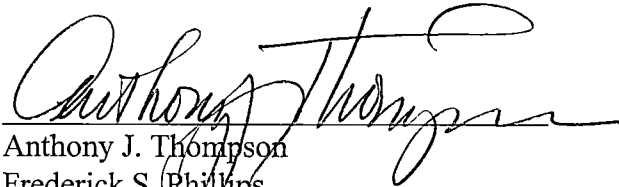
21. Order at 2, citing, Potomac Electric Power Company (Douglas Point Nuclear generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975).

22. Public Service Co. of New Hampshire, *supra*.

23. Wisconsin Electric Power Co., *supra*.

24. See In the Matter of Hydro Resources, Inc., HRI's Opposition to Intervenors' Joint Motion for Reconsideration of Presiding Officer's Memorandum and Order of September 22, 1998, ASLB, Docket No. 40-8968-ML (October 6, 1998).

Respectfully submitted the 8 day of October, 1998.



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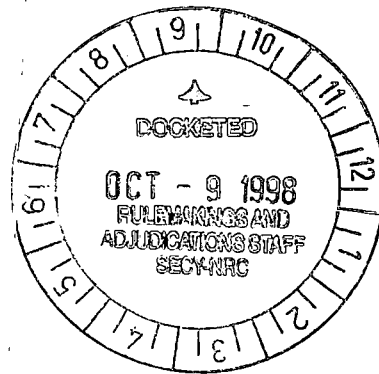
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In the matter of )

HYDRO RESOURCES, INC. )

2929 Coors Road )

Suite 101 )

Albuquerque, New Mexico 87120 )

Docket No. 40-8968-ML

ASLBP No. 95-706-01-ML

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing documents (HRI's Response To ENDAUM's And SRIC's Joint Request For Directed Certification Of September 22, 1998 Bifurcation Order) in the above-captioned proceeding have been served on the following by Facsimile or as otherwise indicated (or, in the instances where a fax number is not available, as indicated by an asterisk, by Certified Mail, Return Receipt Requested) on this 8th day of October, 1998.

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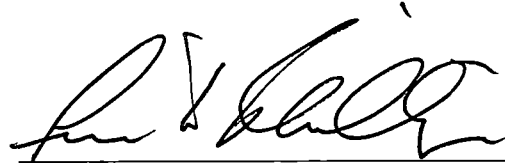
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