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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge Peter B. Bloch, Presiding Officer

In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
(2929 Coors Road, Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120))	
)	

**ENDAUM'S AND SRIC'S REQUEST FOR DIRECTED
CERTIFICATION OF BIFURCATION ORDER**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(f), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby seek directed certification of the Presiding Officer's decision to bifurcate this proceeding in Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) at 4 (September 22, 1998) ("September 22 Order").¹

BACKGROUND

This case involves Hydro Resources Inc.'s ("HRI's") application to build and operate several in situ leach mines and a uranium mill in Church Rock and Crownpoint, New Mexico, known as the "Crownpoint Uranium Project." The NRC Staff issued a Final Environmental Impact Statement ("FEIS") for the entire

¹ ENDAUM and SRIC also intend to seek Commission review of the bifurcation decision.

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U.S. NUCLEAR REGULATORY COMMISSION
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Crownpoint Project in February of 1997, and a Safety Evaluation Report ("SER") in December of 1997. HRI received an operating license from the Staff on January 5, 1998. The license allows mining on all three sites for which HRI seeks permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), but conditions operation of the second two mines on compliance with certain license conditions.

On June 4, 1998, HRI filed a request to bifurcate the proceeding, on the ground that it has not made a final decision to mine at Section 17, Unit 1 or Crownpoint, and "no such decision probably will be made at least for the next few years." Request for Partial Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding at 13 ("HRI's Request"). Accordingly, HRI requested that the Presiding Officer bifurcate this proceeding geographically, so that only concerns relating to Section 8 would be heard at this time, and concerns relating to all other "phases" of the project would be heard "if and when those issues become ripe."² *Id.* at 16.

By order dated July 1, 1998, the Presiding Officer denied HRI's Motion, and postponed determination of that matter until a Scheduling Conference, at which HRI and the Staff would be required to discuss the extent to which they "are prepared to

² The Intervenor's opposed HRI's Motion. ENDAUM's and SRIC's Opposition to HRI's Request for Reconsideration or Clarification of LBP-98-9 and HRI's Request for Bifurcation (June 22, 1998) (hereinafter "ENDAUM's and SRIC's Opposition"). See also Marilyn Morris' Response to HRI's Request for Partial Clarification or Reconsideration...(June 18, 1998). The NRC Staff supported HRI's Motion. NRC Staff's Response to HRI's Motions for Reconsideration and for Bifurcation (June 26, 1998) (hereinafter "NRC Staff's Response").

demonstrate the invalidity of the allegations that the Intervenor may develop within their areas of concern." *Id.* at 4. Memorandum and Order (HRI Motion for Reconsideration and Motion for Partial Clarification) (hereinafter "July 1 Order").

HRI again requested bifurcation of the proceeding in its Scheduling Conference Brief (September 2, 1998), and the NRC Staff supported the request. HRI's Brief on Suggested Scheduling Submitted Pursuant to the Presiding Officer's July 30, 1998 Memorandum and Order, at 2-3 (September 2, 1998); NRC Staff's Response to July 30 Order at 9 (August 31, 1998). ENDAUM and SRIC opposed bifurcation, on the grounds that it would violate the National Environmental Policy Act ("NEPA") and the requirement for a meaningful and timely hearing under the Atomic Energy Act and the Administrative Procedure Act, and would waste the resources of the parties and the Presiding Officer. *See* ENDAUM's and SRIC's Scheduling Conference Brief (September 2, 1998).

On September 17, 1998, the Presiding Officer conducted a scheduling conference at which he entertained further arguments from the parties regarding the issue of bifurcation. Subsequently, the Presiding Officer issued the September 22 Order, in which he granted HRI's request to bifurcate the proceeding. The Presiding Officer concluded that:

Intervenor will not be prejudiced if they are permitted to challenge the issuance of the HRI license but they are prohibited, on the ground 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. The absence of 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 specified issues. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 3), ALB-277, 1 NRC 539 (1975).

Id. at 2. Accordingly, the Presiding Officer direct that Intervenor may submit written presentations in two areas only: (1) "any issue that challenges the validity of the license issued to HRI;" and (2) "any aspect of the HRI license concerning operations on Church Rock Section 8 or with respect to the transportation or treatment of materials extracted from Section 8." *Id.* at 2-3. Other concerns relating to Section 17, Unit 1, or Crownpoint, "may not now be presented as part of the first phase of this proceeding." *Id.* at 3. The Presiding Officer also stated that he would make a determination "at the conclusion of this phase of the proceeding, based in part on HRI's operating plans at that time, whether issues covered by this paragraph would be determined immediately or would be placed in suspense because they are not yet ripe for determination."

ARGUMENT

Directed certification of the Presiding Officer's decision is warranted and should be granted, on the following grounds:

1. 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." Here, 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 Intervenors are prepared to go ahead with their case. Moreover, the hearing is on a license that has already issued, and thus there should be no reason to delay any aspect of the proceeding. *See* ENDAUM's and SRIC's Scheduling Conference Brief at 14-16. Notably, the Commission recently emphasized that its objectives include providing a "fair hearing process" and "avoid[ing] unnecessary delays in the NRC review and hearing process." CLI-98-12, Statement of Policy on Conduct of Adjudicatory Proceedings, 63 Fed.Reg. 41872, 41873 (August 5, 1998). In particular, NEPA related issues are generally appropriate for interlocutory review. In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 N.R.C. 503 (1977) (NEPA issues suited for interlocutory review because Commission guidance on NEPA is valuable and issues are not fact-dependent).

ENDAUM and SRIC submit that the open-ended postponement of issues in the hearing to which they are entitled imposes a delay that is both unnecessary and unfair to them.

2. Review is also warranted under the Commission's standard for interlocutory review at 10 C.F.R. § 2.786(g)(2), because the Presiding Officer's decision to bifurcate the proceeding "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." In effect, the Presiding Officer has decided to hold a major part of this proceeding in abeyance for an unknown period of time, on the basis of HRI's financial

needs. This does not constitute the ordinary management of the hearing to ensure an efficient and fair proceeding, but the indefinite suspension of the hearing. Moreover, the suspension of issues is highly prejudicial to the Intervenor because the license for the HRI project has already issued. Thus, the effect of the bifurcation order is both pervasive and unusual, therefore warranting Commission review.

3. Recent Commission pronouncements and decisions demonstrate that Commission review is favored regarding "novel" issues such as the question of whether bifurcation of a project by mine site is permitted under NEPA and the Atomic Energy Act. In CLI-98-12, the Commission states that it:

encourages the licensing boards to refer rulings or certify questions or proposed contentions involving novel issues to the Commission in accordance with 10 CFR 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding.

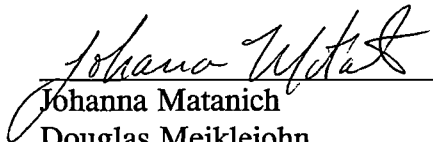
Id. at 9. Consistent with this policy pronouncement, the Commission recently took *sua sponte* review of the question of whether a licensee should be "permitted to effectuate a major operational change requiring several license amendments through separate amendments requests rather than through a single request." *North Atlantic Energy Service Corporation* (Seabrook Station, Unit No. 1), CLI-98-18 (September 17, 1998). As the Commission observed, the Intervenor contended that the separate consideration of the requested license amendment would constitute "segmentation," undermining the NRC's ability "to accurately assess the actual safety implications of the overall change."

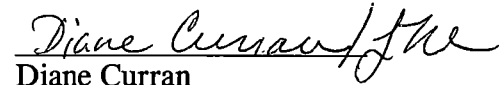
Id. at 1. The circumstances presented by the instant case create similar, if not more significant questions, about whether the proceeding has been unlawfully segmented under NEPA. Here, both the FEIS and the SER for the facility addressed the *entire* Crownpoint Project, thus acknowledging that the environmental impacts of and alternatives to the proposal must be examined as a whole. Nevertheless, the Presiding Officer has decided to bifurcate the proceeding and to address only a small portion of the project.

Accordingly, the hearing is designed to address the Crownpoint Project piecemeal rather than as a whole, in violation of NEPA. *See* ENDAUM's and SRIC's Scheduling Conference Brief at 19-25. The Intervenors further argued at the scheduling conference that segmentation of the hearing will violate NEPA because it would prevent the Presiding Officer from considering the project's cumulative impacts, reasonable alternative issue, will lead to the irretrievable commitment of resources before a final review, and this investment of resources may create bias in the decisionmaker when reviewing delayed issues. Transcript of Scheduling Conference, September 17, 1998 at 155 - 157, 161-162, 183-191, 193-199; 216-222. As the Commission observed in CLI-98-17, "the 'segmentation' issue is novel and has broad implications for this and other proceedings." *Id.* at 1. Therefore, it is appropriate for certification.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Presiding Officer to refer its decision to bifurcate this proceeding to the Commission for review.


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CERTIFICATE OF SERVICE

I hereby certify that:

On September 30, 1998, I caused to be served copies of the following:

ENDAUM'S and SRIC's Request for Directed Certification of Bifurcation Order

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. The parties marked by an asterisk (*) were also served by e-mail. The envelopes were addressed as follows:

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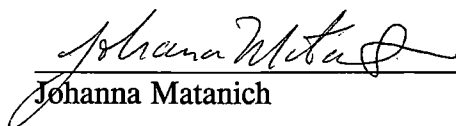
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