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October 7, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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))	
)	

**PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM AND
ORDER (SCHEDULING AND PARTIAL GRANT OF MOTION FOR
BIFURCATION) OF SEPTEMBER 22, 1998 AND REQUEST FOR STAY**

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 review of that aspect of the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1998) ("September 22 Order") which places the hearing on certain geographic areas of the license application for the Crownpoint Uranium Mining project "in suspense" if the licensee does not find it economical to proceed with those areas of the project.¹ *Id.* at 2-3. The Commission should take review because the bifurcation order imposes serious and irreparable impacts and affects the proceeding in a manner that is both pervasive and unusual, by unlawfully segmenting the environmental decision making process in violation of the National Environmental Policy Act ("NEPA"), and by indefinitely and unjustifiably postponing completion of the hearing

¹ENDAUM and SRIC have also requested the Presiding Officer certify the bifurcation issue for review. ENDAUM's and SRIC's Request for Directed Certification of Bifurcation Order (September 30, 1998).

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to which the Intervenor is entitled to under the Atomic Energy Act ("AEA").

I. SUMMARY OF DECISION.

As described in the Licensing Board decision granting the Intervenor's request for a hearing, Hydro Resources Inc. ("HRI") has applied for 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." *Hydro Resources Inc.*, LBP 98-9, 47 N.R.C. 261, 263-267 (1998). The NRC Staff issued a Final Environmental Impact Statement ("FEIS") for the entire Crownpoint Project in February of 1997, and a Safety Evaluation Report ("SER") in December of 1997. *Id.* 47 N.R.C. at 266. 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.

On June 4, 1998, HRI filed a request to bifurcate the proceeding geographically, so only concerns related to Section 8 would be heard at this time, on the ground that it has not made a final decision to mine at Section 17, Unit 1 or Crownpoint.² The Presiding Officer granted "partial bifurcation" in the September 22

² 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, 16 (June 4, 1998).

Order.³ He ruled that Intervenor's may submit their written presentations with respect 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 or treatment of materials from Section 8. September 22 Order at 2-3. However, concerns relating only to the license conditions affecting Church Rock Section 17 or Unit 1 or Crownpoint may not be presented. *Id.* at 3. At the conclusion of the hearing, a determination will be made "based in part on HRI's operating plans at that time", whether issues affecting Church Rock Section 17, Unit or Crownpoint would be determined immediately or placed "in suspense" because they are not yet ripe. *Id.* at 3. Because HRI has already stated that its decision to mine Unit 1, Section 17 or Crownpoint is several years off, it is a forgone conclusion that the Presiding Officer will place these issues in suspense. *See* HRI Request at 13.

II. BIFURCATION UNLAWFULLY SEGMENTS DECISION MAKING AND ILLEGALLY POSTPONES COMPLETION OF THE HEARING.

A. Bifurcation Violates NEPA.

The Presiding Officer's decision to bifurcate this proceeding constitutes a gross violation of NEPA. This project is a single project which the licensing board must review in its entirety under NEPA. All foreseeable actions must be reviewed as a

³The Intervenor's have presented briefs on this issue three times. *See* ENDAUM's and SRIC's Opposition to HRI's . . . Request for Bifurcation (June 22, 1998); ENDAUM's and SRIC's Scheduling Conference Brief (September 2, 1998); ENDAUM's and SRIC's Response to Scheduling Briefs, at 1-2 (September 9, 1998). In addition, on September 17, 1998, Intervenor's presented their oral arguments regarding bifurcation.

single project.⁴ The FEIS, the SER, and the license consistently refer to the Crownpoint Uranium Project as a single project. FEIS at xix-xxi, 1-1, 2-1, 2-32; SER at 1, 2-3; §§ 3.0, 3-14, 4.0-9.0; SUA-1508. Moreover, the NRC Staff previously recognized that "separate licensing" of the Church Rock site would constitute improper segmentation under NEPA. Letter from Joseph Holonich, NRC, to Richard F. Clement, Jr., HRI at 2 (June 17, 1996) (Hearing File Acn. 9606200055).

Once a project is properly defined, the FEIS must accompany the decision making process until a record of decision is issued.⁵ Because this proceeding is before the licensing board, the agency decision making process is not final. Notably, a record of decision has yet to be issued. Therefore, the Presiding Officer must consider the entire project before making environmental or health related findings. By making decisions on HRI's license before review of Section 17, Unit 1 and Crownpoint, the Presiding Officer will engage in the type of piecemeal and ill-informed decision making

⁴Regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1502.4(a), 1508.25(a)(1), 1508.25(c) (connected actions and cumulative impacts should be discussed in the same EIS). *See also Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975) (Agency approved leases for 30,000 plus acres making possible the future approval of mining plans for individual tracts within the leased area, and the Court found the agency's limitation of EIS scope to first five year mining plan for 770 acres violated NEPA); *Carolina Power and Light Co., et al.* (Shearon 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.").

⁵10 C.F.R. § 51.94 (the EIS must "accompany the application . . . through, and be considered in, the commission's decision making process."); 10 C.F.R. § 51.102(a) (Commission decision must be accompanied by a public record of decision); 40 C.F.R. § 1505.2 (requiring record of decision); 10 C.F.R. § 103 (defining record of decision).

that is prohibited by NEPA.⁶ Review of the Presiding Officer's decision will be consistent with the Commission's grant of sua sponte review of a segmentation issue in *North Atlantic Energy Service Corporation* (Seabrook Station Unit No. 1) CLI 98-18 (1998)⁷ (holding that "[t]he 'segmentation' issue is novel and has broad implications for this and other proceedings," and this issue could benefit from early review).

B. Bifurcation Violates the AEA and the APA.

Bifurcation also deprives Intervenors of their right to a timely and meaningful hearing on HRI's license application. Section 189(a)(1) of the AEA requires that in "any proceeding" for the granting of an operating license, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."⁸ The hearing must offer an opportunity for "'meaningful public

⁶A piecemeal examination of the Crownpoint Project will likely impair the Presiding Officer's ability to review other parts of the Project. *See Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 240-241 (3d Cir. 1980), cert. den. 449 U.S. 1096 (1981). If Section 8 is separately addressed, the Presiding Officer risks taking a distorted view of the rest of the project that will favor approval of all licensed activities.

⁷Recent 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 AEA. 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 C.F.R. 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.

Policy on Conduct of Adjudicatory Proceedings, CLI 98-12, 63 Fed.Reg. 41782, 41874-41875 (August 5, 1998).

⁸Atomic Energy Act, 42 U.S.C. §2239(a)(1)(A) (1994).

participation.'"⁹ A meaningful opportunity means having an opportunity to be heard on "all material factors bearing on the licensing decision raised by the [hearing] requester." *Id.* at 1443. The Administrative Procedures Act requires that agencies, "*within a reasonable time, shall set and complete proceedings* required to be conducted . . . and shall make its decision." 5 U.S.C. § 558(c) (emphasis added). By placing issues in suspense, at the discretion of the licensee, the Intervenor is deprived of their right to a prompt hearing and decision on all issues. The NRC Staff has already decided that HRI provided enough information to justify the issuance of a license. Neither the license, the SER, nor the FEIS leaves any licensing issues unresolved. All issues are ready for determination. The Presiding Officer has no lawful basis for indefinitely postponing most of the hearing on a license that has already issued.

C. The Presiding Officer's Basis for the Order Is Inconsistent with the Purpose of Bifurcation.

The Presiding Officer granted partial bifurcation based on the fact that HRI will only mine in the future if "conditions in the uranium market permit profitable mining at that time." September 22 Order at 2. The Presiding Officer would indefinitely place completion of this proceeding in limbo, to be resumed only at HRI's convenience. This is not a legitimate use of bifurcation, which is a litigation tool for the efficient management of hearing issues. *Long Island Lighting Co.* (Shoreham Nuclear Power

⁹*Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1446 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985), *quoting Bellotti v. NRC*, 725 F.2d 1380, 1389 (D.C. Cir. 1983) (emphasis in original).

Station, Unit 1), LBP 83-30, 17 N.R.C. 1132, 1136 (1983). In considering the appropriateness of bifurcation, Licensing Boards look instead to whether issues are independent enough such that separating issues that are ready for hearing from those that are not would prevent the record from "wither[ing] on the vine." *Id.*¹⁰ Holding the resolution of issues in indefinite suspense will defeat, rather than serve the Commission's goal of ensuring timely and efficient hearings.

III. THIS PETITION MEETS THE STANDARD FOR REVIEW.

One of the 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 impact, or the order will affect the basic structure of this proceeding in a pervasive or unusual manner.¹¹ Review is warranted here on both of these grounds.

A. Bifurcation of the Proceeding Would Cause Serious and Irreparable Impact to the Intervenors.

An irreparable impact arises in the situation where the Commission faces "a discrete legal question, more easily resolved now, lest [the Commission] be unable

¹⁰It would decrease rather than increase efficiency to bifurcate by geographic area, as HRI suggests. There are numerous issues common to all of the mining sites, which are most efficiently addressed in a single proceeding rather than in separate, redundant proceedings. The safety and environmental findings undergirding the issuance of the license are not restricted to any particular part of the Crownpoint Project, but cover all aspects of the Project. In addition, Intervenors will use the same hydrologist, geochemist, economists, cultural resource experts and other experts for Section 8 as for Section 17, Crownpoint, and Unit 1. Intervenors would be severely prejudiced by having to hire the same witnesses for separate phases.

¹¹*In the Matter of Oncology Services Corporation*, CLI 93-13, 37 N.R.C. 419, 420-421 (1993).

later to tailor meaningful relief."¹² Here, the Commission should take review because the Presiding Officer has unlawfully segmented the NEPA decision making process, distorting the consideration of environmental impacts and alternatives through the conduct of a piecemeal environmental evaluation of the record.¹³ This issue is purely legal and can be readily resolved now to avoid injury.

Moreover, if bifurcation is allowed, the Intervenor will lose the opportunity to raise issues that are placed in suspense. The license HRI holds does not require notice and a hearing before Section 17, Unit 1 or Crownpoint are mined. The NRC Staff admits that further notice is not required when the NRC Staff approves the fulfillment of performance-based license conditions that are required before HRI moves to those sites. NRC Staff Response to Requests for Hearing at 46 n.43 (March 5, 1998). Therefore, if HRI moves to areas beyond Section 8, Intervenor will not be entitled to a hearing on issues related to these areas; their only remedy would be to submit a petition for enforcement, which lies in the Staff's discretion.

¹²*Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2)* CLI 95-15, 42 N.R.C. 181, 184 (1995) (finding that possible erroneous disclosure of documents that may be absolutely privileged satisfies irreparable impact test).

¹³Importantly, interlocutory review of NEPA related issues is generally favored by the Commission. *In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI 77-8, 5 N.R.C. 503 (1977) (taking review of an Appeal Board order affecting the standards governing NEPA analysis because the issue is of "obvious significance, will provide useful guidance for the rest of the case, and the issue is not fact dependent"); *In the Matter of Florida Power and Light Company (St. Lucie Nuclear Power Plant Unit No. 2)* ALAB-404, 5 N.R.C. 1185, 1187-1188 (1977) ("the decision-making process can be prejudiced by a commitment of resources to a project").

B. Bifurcation Would Affect the Proceeding in a Pervasive and Unusual Manner.

Review of an interlocutory order may also be granted where the order affects the proceeding in a pervasive and unusual manner.¹⁴ In this case, the Presiding Officer has decided to hold a major part of this proceeding in suspense for an unknown period of time, on the basis of HRI's economic position. He splits the case geographically, despite the fact that the Intervenors have not presented geographically specific issues.¹⁵ This is not the ordinary case management to ensure an efficient and fair proceeding, but the indefinite suspension of a legally required hearing, based solely on the licensee's convenience. The Presiding Officer's decision to suspend a major part of the hearing does not even satisfy the standard for abeyance. Resumption of this hearing will not await a measurable event, such as a relevant decision in another court. Instead, completion of the proceeding lies in the discretion of the licensee.

Moreover, the suspension of issues is highly prejudicial to the Intervenors because the license for the HRI project has already issued. While HRI now has the legal right to mine at Church Rock and Crownpoint, the Intervenors have been deprived of an opportunity to fully challenge that right. By suspending part of a

¹⁴10 C.F.R. §2.786(g)(1); *Safety Light Corporation et al. (Bloomsburg Site Decontamination and License Renewal Denials)*, CLI 92-13, 36 N.R.C. 79, 85-86 (1992) (a consolidation order for a Subpart L and a Subpart G proceeding affected the proceeding in a pervasive and unusual manner).

¹⁵Intervenors note that it is impossible to decipher from the September 22 Order which portions of the Intervenors' issues cannot be presented; this confusion will lead to chaos when written filings are submitted, undermining the entire proceeding.

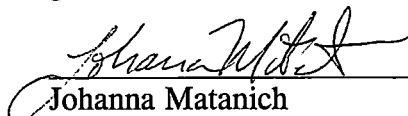
hearing on a license after it has already issued, the Presiding Officer has significantly and adversely affected the fundamental structure of the licensing proceeding as contemplated by the AEA and NRC procedural regulations. Thus, because the effect of the bifurcation order is both pervasive and unusual, it warrants Commission review.

IV. REQUEST FOR STAY OF PROCEEDING.

The bifurcation order fundamentally alters the nature of this proceeding. Moreover, as discussed in note 9, it imposes great and unnecessary economic burdens and inconvenience on the Intervenors. In addition, because of the overlap of issues, the bifurcation order creates enormous confusion regarding the content of the Intervenors' written filings. Therefore, in order to conserve the parties' limited resources, the Intervenors respectfully request the Commission to direct the Presiding Officer to halt all proceedings pending before it, pending the Commission's order.¹⁶

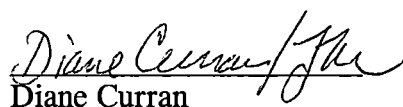
V. CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission grant review of the Presiding Officer's decision to bifurcate this proceeding.



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¹⁶See *In the Matter of North Atlantic Energy Service Corporation (Seabrook Station Unit No. 1)* CLI 98-18, 47 N.R.C. ___, (1998) (halting proceeding pending Commission review of segmentation issue).

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NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
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HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
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Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
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CERTIFICATE OF SERVICE

I hereby certify that:

On October 7, 1998, I caused to be served copies of the following:

Petition for Interlocutory Review of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998

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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Dated at Santa Fe, New Mexico,
October 7, 1998,


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