

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Shirley Ann Jackson, Chairman
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OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)

HYDRO RESOURCES, INC.)

(2929 Coors Road Suite 101,
Albuquerque, NM 87120))

SERVED OCT 23 1998

Docket No. 40-8968-ML

CLI-98-22

MEMORANDUM AND ORDER

In this Subpart L proceeding, several intervenors challenge Hydro Resources, Inc.'s, license to conduct an in situ leach mining project in McKinley County, New Mexico. The license authorizes mining on four separate properties. On September 22, 1998, the Presiding Officer issued a scheduling order that, among other things, "bifurcated" the proceeding -- i.e., split it into phases whereby the Presiding Officer would first consider and decide issues pertinent to the only one of the properties (the so-called "Church Rock Section 8" property) where mining activity may begin soon, and reserve until later issues pertinent solely to the remaining three properties. More recently, on October 13, the Presiding Officer issued a second order on bifurcation, where he declined to certify the question for immediate interlocutory review by the Commission.

In the meantime, however, two intervenors, the Eastern Navajo Diné Against Uranium Mining and the Southwest Research and Information Center, already had petitioned the Commission for interlocutory review of the Presiding Officer's September 22 ruling to bifurcate

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the proceeding, and had sought a stay of all proceedings pending Commission action on the petition for review. The intervenors also have filed a motion to expedite a Commission ruling on whether to grant interlocutory review. We have decided to act promptly on the petition for review and hereby deny it as premature. We deny the stay motion as moot.

The Commission does not readily entertain petitions for review of interlocutory rulings by presiding officers or licensing boards, particularly on scheduling or other "housekeeping" matters, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g)(1) and (2); see Oncology Services Corporation, CLI-93-13, 37 NRC 419 (1993). The Commission also stands ready, as we recently have emphasized, to use its supervisory authority to step into ongoing adjudications when necessary to clarify its view on substantive or procedural questions. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998); cf. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-18, 48 NRC __ (Sept. 17, 1998) (adjusting filing deadlines).

Here, intervenors argue that the Presiding Officer's bifurcation will result inevitably in an unlawful "suspension" or "segmentation" of issues vital to the proper resolution of claims under the National Environmental Policy Act and the Atomic Energy Act. We believe that it would be premature to rule on the "suspension" or "segmentation" questions now. The Presiding Officer has not definitively decided whether to "suspend" consideration of certain issues. As we understand the Presiding Officer's ruling, "bifurcation" means only that the Presiding Officer will devote his (and the parties') efforts first to issues relevant to the initial phase of the Hydro project, and will leave until later issues that relate solely to the project's remaining phases. As his most recent order on the bifurcation question explicitly states:

No decision has yet been made concerning possible delay in determining any of the issues in this case. At the end of this phase of litigation, [the Presiding Officer] will then determine whether to proceed immediately with the remainder of the case or wait until there is greater confidence that HRI [Hydro] will [proceed with the other phases]...."

Presiding Officer Memorandum and Order (Reconsideration of the Schedule for the Proceeding) at 4 (Oct. 13, 1998).

The Presiding Officer's decision to concentrate on deciding the most time-critical issues at the outset should conserve resources and expedite decisions, and thus is consistent with our guidance calling on presiding officers "to establish schedules for promptly deciding the issues before them, with due regard for the complexity of contested issues and the interests of the parties." Statement of Policy on Conduct of Adjudicatory Proceedings, 48 NRC at 20. Our most recent decision in this very proceeding stressed our interest in fair, but speedy, decisionmaking. See CLI-98-16, 48 NRC __ , __ (Sept. 15, 1998), slip op. at 1.¹

The intervenors' concern that the Presiding Officer's bifurcation order will leave some vital issues unaddressed need not be resolved now. The nature of undecided questions will be clearer, and the Presiding Officer (and ultimately the Commission itself) will be better positioned to assess whether additional issues require immediate adjudication, after the parties submit their initial presentations and the Presiding Officer issues his initial decisions. It would be unproductive and premature for the Commission to consider now whether litigation on some questions can be suspended indefinitely given that the Presiding Officer himself has not yet decided to do so and in a situation where additional developments may shed more light on the question. Compare Louisiana Energy Services (Claiborne Enrichment Center), CLI-95-7, 41

¹The Commission has also issued two other decisions in this proceeding, CLI-98-8, 47 NRC 314 (1998), and CLI-98-4, 47 NRC 111 (1998).

NRC 383, 384 (1995) (interlocutory Commission review denied on issue that the Atomic Safety and Licensing Board would possibly have to revisit in light of new federal legislation).²

Similarly, we are not persuaded to take interlocutory review based on the intervenors' vague argument that they are harmed because the September and October Presiding Officer orders have not clearly defined the issues which are ripe for litigation in the first phase. The Presiding Officer has defined a category of issues that will fall into the first phase of litigation, i.e., all issues pertinent solely to Church Rock Section 8, and issues clearly relevant jointly to Section 8 and the other sites. This is enough of an outline to proceed with the first phase. To avoid expense and delay, if the intervenors have specific questions about the ripeness of a certain issue, they should address those questions to the Presiding Officer. We expect the Presiding Officer to continue to manage the case with an eye toward a prompt resolution of all outstanding issues.

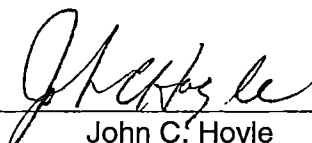
² Recently, the Commission issued a sua sponte order granting interlocutory review on an Atomic Energy Act "segmentation" issue that was potentially dispositive of a major portion of the case and that we characterized as "novel." North Atlantic Energy Service Corporation (Seabrook Station Unit No. 1), CLI-98-18, 48 NRC __ (Sept. 17, 1998). Here, by contrast, the intervenors' "segmentation" issue is not potentially dispositive and, with the case in its current posture, principally concerns questions of timing, i.e., when particular claims are ripe for presentation and decision.

In conclusion, we have considered the petition for review on an expedited basis and have decided to deny it. Specifically, we decline review of the Presiding Officer's bifurcation approach, as reflected in his September 22 and October 13 orders, and deny as moot the motion to stay proceedings pending appellate review.

IT IS SO ORDERED.

For the Commission





John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of October, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMO & ORDER (CLI-98-22) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
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