



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 9, 1999

Thomas S. Moore, Presiding Officer
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas D. Murphy, Special Assistant
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Regulatory Commission
Washington, D.C. 20555

In the Matter of
HYDRO RESOURCES, INC (HRI)
Docket No. 40-8968-ML

Dear Administrative Judges:

Pursuant to 10 C.F.R § 2.1231 (b-c), the Staff is updating the HRI Hearing File by enclosing a copy of a letter from HRI to the NRC's Executive Director of Operations, dated October 19, 1999. The undersigned was made aware of the October 19 letter earlier this week.

Sincerely,

John T. Hull
Counsel for NRC Staff

Enclosure: As stated

cc w/encl: Geoffrey Fettus, Esq.
Anthony Thompson, Esq.
Diane Curran, Esq.
Eric Jantz, Esq.

SECY
ASLB Panel
Adjudicatory File
OCAA

21054

HRI, INC.

(A Subsidiary of Uranium Resources, Inc.)

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October 19, 1999

Via Facsimile # 301-415-2700 and U.S. Mail

Mr. William D. Travers
Executive Director of Operations
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Washington, D.C. 20852

Re: Invoice AM4811-99: Hydro Resources, Inc.'s Certification of Small Entity Status and Request for Fee Waiver

Dear Mr. Travers:

On August 9, 1999 Hydro Resources, Inc. (HRI), received an invoice from the Nuclear Regulatory Commission (NRC) totaling \$74,100 for the fourth quarter installment of the annual fee assessed to HRI for Fiscal Year 1999. A copy of the invoice is attached for your review. According to the invoice, the total Fiscal Year 1999 annual fee assessed to HRI is \$109,000. The assessed fee relates to HRI's NRC source materials license (SUA-1508), issued January 5, 1998, which authorizes HRI to conduct *in situ* leach ("ISL") uranium recovery for a five-year period in Church Rock and Crownpoint, New Mexico. For the reasons discussed in detail below, HRI respectfully certifies that it is a small entity pursuant to 10 C.F.R. § 171.16(c), and as such is entitled to reimbursement for monies paid to NRC on 2/28/99 in excess of the total fees due for Fiscal Year 1999 (i.e., \$1,800). Additionally, HRI requests that NRC grant it an exemption with respect to the annual fee.

I. BACKGROUND

As you are probably well aware, license SUA-1508 has been subject to challenge since the day it was granted. In fact, HRI continues to defend the license in several fora, including a 10 C.F.R. Part 2, subpart L proceeding before Judge Peter Bloch, a proceeding before the Commission regarding appeals from decisions of Judge Bloch, and a proceeding before the U.S. Court of Appeals for the District of Columbia.

By way of background, on April 13, 1988, Hydro Resources, Inc. first applied to the U.S. Nuclear Regulatory Commission ("NRC") for a license to construct and operate ISL mining facilities on a plot known as Section 8, located approximately six miles north of the town of Church Rock, New Mexico. HRI subsequently amended its license application twice to encompass ISL mining operations on two leased properties near the town of Crown Point, New Mexico, ISL mining on part of another parcel near Church Rock, and a central processing facility at Crownpoint to dry and package yellowcake.

After nearly a decade of exhaustive study which is amply reflected in the voluminous Environmental Impact Statement, Safety Evaluation Report ("SER"), and multiple iterations of the

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Consolidated Operations Plan ("COP"), NRC issued HRI a source materials license, subject to a series of administrative conditions, permitting HRI to construct and operate ISL facilities on an incremental basis over a twenty year period. The license provides that HRI may first construct and operate ISL mining facilities at Church Rock Section 8 and effectively prohibits operations beyond Section 8 prior to a successful groundwater restoration demonstration at Section 8.

Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), and Southwest Research and Information Center ("SRIC"), and Grace Sam and Marilyn Morris requested an NRC hearing on HRI's license and successfully moved to intervene. Since that time, the parties have compiled a hearing record of more than 20,000 pages of documents in the informal, Subpart L hearing. Notably, after filing in excess of 10,000 pages, Intervenorers have failed to raise any evidence of adverse effects on safety and health from the more than twenty (20) years of ISL mining operations in the United States. Accordingly, the Presiding Officer recently dismissed the claims made by ENDAUM and SRIC, deciding in favor of HRI on all issues. Unsatisfied, ENDAUM and SRIC petitioned the Commission for review of the Presiding Officer's decisions. HRI has filed a motion seeking sanctions against ENDAUM and SRIC for their actions during the proceedings. Regardless of whether sanctions are imposed, HRI cannot be compensated for its losses due to the frivolous litigation as HRI has spent 10 years at a cost exceeding \$10 million to attain and defend SUA-1508, and yet remains unable to commence operations at the site.

II. HRI IS A "SMALL ENTITY"

10 C.F.R. § 171.16(c) provides¹:

A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification with the annual fee payment, the licensee may pay reduced annual fees for [sic.] as shown below. Failure to file a small entity certification in a timely manner could result in the denial of any refund that might otherwise be due.

(1) A licensee qualifies as a small entity if it meets the size standards established by the NRC (See 10 CFR 2.810).

(2) A licensee who seeks to establish status as a small entity for purposes of paying the annual fees required under this section shall file a certification statement with the NRC. The licensee must file the required certification on NRC Form 526 for each license under which it is billed.

¹ 10 C.F.R. § 171.16(c) was amended by Final Rule published in the Federal Register on June 10, 1999. The following discussion relies on the amended rule.

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10 C.F.R. § 171.16(c)(1), (2). To qualify as a small entity under 10 C.F.R. § 2.810, the NRC uses the following guide:

(a) A small business is a for-profit concern and is a-

(1) Concern that provides a service or a concern not engaged in manufacturing with average gross receipts of \$5 million or less over its last 3 completed fiscal years; or

(2) Manufacturing concern with an average number of 500 or fewer employees based upon employment during each pay period for the preceding 12 calendar months.

We note that section 2.810 also states that "[a] licensee who is a subsidiary of a large entity does not qualify as a small entity for purposes of this section." 10 C.F.R. § 2.180(e).

HRI is a small entity as defined in section 2.810. HRI's parent, URI, Inc. is also a small entity under section 2.810. Moreover, Uranium Resources, Inc., the parent of HRI and URI, Inc. is also a small entity under the rule. HRI has enclosed a completed Certification of Small Entity Status (NRC Form 526). As indicated on the certification, HRI's annual fee for Fiscal Year 1999 should be \$400.00. Accordingly, NRC should reimburse HRI \$34,500 as it paid \$34,900 for Fiscal Year 1999 on 2/28/99. We note that the certification is timely in light of the June 10 and July 20 revisions to the rule.

III. EXEMPTION

Additionally, NRC should grant HRI an exemption from the assessed fee of \$74,100. The annual fee charged to HRI for SUA-1508 is assessed by NRC pursuant to 10 C.F.R. Part 171. Specifically, the regulations set forth in Part 171 set out the annual fees charged to persons who hold material licenses issued by NRC. See 10 C.F.R. § 171.3, 171.16. Section 171.16 requires that 10 C.F.R. Part 40 licensees, like HRI, pay an annual fee for each license it holds on the date the annual fee is due. 10 C.F.R. § 171.16. The basis for the annual fee is the sum of NRC budgeted costs for each fiscal year for: (1) generic and other research activities directly related to the regulation of materials licenses, and (2) other safety, environmental, and safeguards activities for materials licenses. Id.

Part 171, however, provides for exemptions for some licensees. Specifically, section 171.11 provides:

(b) The Commission may, upon application by an interested person or on its own initiative, grant an exemption from the requirements of this part that it determines is authorized by law or otherwise in the public interest. Requests for exemption must be filed with the NRC within 90 days from the effective date of the final rule establishing the annual fees for which the exemption is sought.

10 C.F.R. § 171.11(b). Section 171.11(d) provides another basis for the grant of an exemption:

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The Commission may grant a materials licensee an exemption from the annual fee it determines that the annual fee is not based on a fair and equitable allocation of NRC costs. The following factors must be fulfilled as determined by the Commission for an exemption to be granted:

- (1) There are data specifically indicating that the assessment of the annual fee will result in a significantly disproportionate allocation of costs to the licensee, or class of licensees; or
- (2) There is clear and convincing evidence that the budgeted generic costs attributable to the class of licensees are neither directly or indirectly related to the specific class of licensee nor explicitly allocated to the licensee by Commission policy decisions; or
- (3) Any other relevant matter that the licensee believes shows that the annual fee was not based on a fair and equitable allocation of NRC costs.

10 C.F.R. § 171.11(d).

With regard to 171.11(b), based on the discussion above, particularly the fact that HRI is unable at the present time to utilize its license to begin operations, it is within the public interest to grant an exemption.² HRI has not budgeted for such a huge fee increase because when it paid NRC \$34,900 on 2/28/99, it did so based on the assumption (which was correct at the time) that it was paying the total annual fee due for Fiscal Year 1999. Due to the retroactive nature of the rebaseline rule, see 64 Fed. Reg. 38816, HRI now must confront a fee far in excess of the amount it has traditionally paid or is presently able to pay. Compounding HRI's problems is the fact that the domestic uranium market is at an historic low which makes the project that is the subject of SUA-1508 uneconomical at this time; therefore, revenue to HRI in the near future will be limited. Finally, we note that since the fees assessed HRI in the past have been less than \$100,000, it has traditionally made a lump sum payment for each fiscal year. Under the rebaseline rule, the HRI's fee exceeds \$100,000, therefore, it must make payments on a quarterly basis pursuant to 10 C.F.R. § 171.13. Again, HRI has not budgeted for such a payment.

With respect to 171.11(d), clearly the annual fee assessed to HRI, as well as other similarly situated licensees, is not based on a fair and equitable allocation of NRC costs. No other class of licensees crosses the \$100,000 threshold as a result of the rebaselining. Thus, only solution miners are subject to the quarterly payment requirement. Moreover the retroactive nature of the rebaselining is not only inequitable and unfair: it is of questionable legality. See *Bowen v. Georgetown Hospital*, 468 U.S. 204 (1988)

² We note that request for an exemption has been filed within 90 days from the effective date of the final rule establishing the annual fees for which it is sought. See 64 Fed. Reg. 38816 (July 20, 1999), modifying 64 Fed. Reg. 31475 (June 10, 1999).

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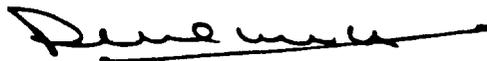
(holding retroactive application of agency rule unconstitutional). Finally, there is a lack of reasonable relationship between (1) the cost to solution miners, specifically HRI, of NRC's regulatory program upon which the assessed fee is based and (2) the benefit derived from such services. It is a fundamental principal of law that there must be a reasonable relationship between the costs to licensees of a regulatory program and the benefit derived from regulatory services.³ Here, this principal has clearly been violated. For example, a portion of the fees assessed to solution miners, including HRI, is due to NRC costs related to Agreement State oversight. Neither HRI, nor any other solution miner assessed a NRC fee receives any benefit from Agreement State oversight.

IV. CONCLUSION

In conclusion, HRI certifies that it is small entity pursuant to 10 C.F.R. § 171.16(c), and as such is entitled to reimbursement for monies paid to NRC on 2/28/99, 1999 in excess of the total fees due for Fiscal Year 1999 (*i.e.*, \$1,800). Additionally, HRI requests that NRC grant it an exemption with respect to the annual fee set forth in invoice AM4811-99.

Of course, should you have any questions or concerns regarding this matter, do not hesitate to contact me.

Sincerely,



Paul Willmott
Chairman
Hydro Resources, Inc.

Enclosures

cc: Mr. James Turdici
Mark S. Pelizza
Anthony J. Thompson

Document #: 825912 v.1

³ NRC's authority to prescribe fees for "regulatory services" under 10 C.F.R. Part 170 is based on the Independent Appropriations Act of 1952 (IOAA), 31 U.S.C. § 9701. To be valid under the IOAA, a fee must "be reasonably related to, and may not exceed the value of the services to the recipient, whatever the agency's costs may be." *See Central & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985).