

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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'99 SEP 15 P 4:39

BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
RULES, PRACTICE AND
ADJUDICATION STAFF

In the Matter of:)
)
)

HYDRO RESOURCES, INC.)
P.O. Box 15910)
Rio Rancho, New Mexico 87174)
_____)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**MOTION TO STRIKE INTERVENORS' REPLY BRIEF ON REVIEW OF
PARTIAL INITIAL DECISION LBP-99-13, FINANCIAL ASSURANCE FOR
DECOMMISSIONING, AND REQUEST FOR ATTORNEYS' FEES**

I. INTRODUCTION

Hydro Resources, Inc. ("HRI"), hereby moves to strike Intervenors Eastern Navajo Dine Against Uranium Mining's ("ENDAUM") and Southwest Research and Information Center's ("SRIC") Reply Brief on Review of Partial Initial Decision LBP-99-13, Financial Assurance for Decommissioning. In addition, HRI hereby moves for sanctions against Intervenors and their counsel, Douglas Meiklejohn, Johanna Matanich, and Lila Bird of the New Mexico Environmental Law Center and Diane Curran of Harmon, Curran, Spielberg & Eisenberg LLP, in the amount of HRI's costs, including reasonable attorneys' fees, incurred in the preparation of this motion, according to proof. HRI brings this motion on the grounds that Intervenors and their counsel once more have blatantly disregarded the rules governing this proceeding and again have grossly distorted the plain meaning of words beyond reasonable recognition.

This matter is properly brought before the Commission, as it is the Commission's Memorandum and Order CLI-99-22 (the "Order") that establishes the procedural rules

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that Intervenor most recently have ignored. Among other things, the Order establishes a briefing schedule for the parties, including Intervenor, to present additional argument pertaining to the Presiding Officer's partial initial decision LBP-99-13 regarding financial assurance. The Order states:

The Commission sets the following briefing schedule:

- (1) Intervenor ENDAUM and SRIC shall file their brief within 21 days of the date of this order. The brief shall not exceed 30 pages.
- (2) The NRC staff and HRI shall file their responsive *briefs* within 21 days after receipt of Intervenor's *briefs*. Their *briefs* shall be no longer than 30 pages.
- (3) Intervenor may file *a* reply *brief* within 10 days of receiving the *briefs* of the NRC staff and HRI. *The* reply *brief* shall be no longer than 10 pages.

CLI-99-22 at 25 (emphasis added).

The Order is plain on its face and reasonable minds could hardly disagree as to its meaning: the Intervenor were permitted to file *a* *brief*, NRC staff and HRI were permitted to file responsive *briefs* and the Intervenor were permitted to file *a* *reply* *brief* *not to exceed 10 pages*. Nevertheless, the Intervenor have the audacity to proclaim in a footnote on the first page of their *16 page* Reply Brief: "CLI-99-22 permitted a ten-page reply to each Response Brief. The Intervenor have consolidated their replies into one brief that is less than twenty pages in length." Intervenor's Reply Brief at 1, fn.1.

Intervenor's distortion of the Commission's unambiguous Order continues to mock this adjudicatory process and insults the intelligence and patience of all the parties hereto. Intervenor's conduct in this instance is no aberration, but rather is completely consistent with their practice of re-writing the rules and the law to suit their particular

purposes.¹ Intervenors' conduct is disruptive and contemptuous of these proceedings and causes the Commission and other parties hereto to expend time and money to no proper purpose. HRI, NRC staff, the Presiding Officer, and the Commission should not have to endure Intervenors' unprofessional practices.

HRI should not be compelled to proceed according to *Intervenors'* rules. HRI respectfully requests that Intervenors be required to comply with the plainly-stated rules governing this proceeding, that Intervenors' Reply Brief, filed in flagrant disregard for the Commission's Order, be stricken in its entirety, and that HRI be awarded its costs of bringing this Motion, including reasonable attorneys' fees, according to its proof.

II. LEGAL STANDARD

Section 2.713 of NRC's regulations governs the appearance and practice of parties and their representatives before the NRC in adjudicatory proceedings. See 10 C.F.R. § 2.713 (1997). That section provides, in pertinent part:

(a) . . . In the exercise of their function under this subpart, the Commission . . . function[s] in a quasijudicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

...

(c) Reprimand, censure or suspension from the proceeding.
(1) A presiding officer . . . may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party representative of a party who shall . . . be guilty of . . . disruptive or contemptuous conduct.

Id.

¹ Numerous examples of Intervenors' distorting procedural rules and/or substantive law are set forth in HRI's Motion for Sanctions presently pending before the Presiding Officer.

Under the Commission's Rules of Practice, the parties are entitled to a fair and impartial hearing according to law and the Presiding Officer (or Commission) is to take appropriate action to avoid delay and to maintain order. 10 C.F.R. § 2.714; In the Matter of Public Service Company of New Hampshire, et al., (Seabrook Station, Units 1 and 2), 18 N.R.C. 1184 (1983) (“Seabrook”). Where it is necessary to the orderly conduct of a proceeding, a party who refuses to comply with the rules governing the proceeding, or who is guilty of disorderly, disruptive or contemptuous conduct may be reprimanded, censured or suspended from participation in the proceeding. 10 C.F.R. § 2.713(c)(1); id.

In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 1981 LEXIS 125 (1981), the Commission specified that it expects judges to actively manage their hearings and to impose sanctions where parties fail to fulfill their obligations. Instructing judges on the appropriate means for managing hearings, the Commission stated:

Fairness to all involved in NRC’s adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. . . . When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available For example . . . refuse to consider a filing by the offending party . . . dismiss one or more of party’s contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, *its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or part of a pattern of behavior . . .* and all of the circumstances.

Id. at 1981 NRC LEXIS at 4-5 (emphasis added).

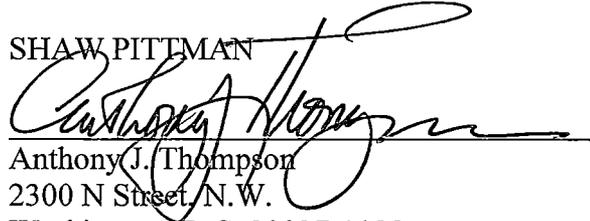
Based on a review of the standard set forth above, Intervenor's motion should be stricken and sanctions should be imposed.

III. CONCLUSION

Intervenor's persist in conduct that is disruptive and contemptuous of these proceedings. In this instance, Intervenor's intentionally and without credible explanation ignored an Order of the Commission and filed a brief exceeding the Commission's page limit by more than 50 percent. Accordingly, and for all the reasons set forth above, HRI respectfully requests that Intervenor's Reply Brief on Review of Partial Initial Decision LBP-99-13, Financial Assurance for Decommissioning, be stricken in its entirety and that HRI be awarded its costs of this Motion, according to proof.

Respectfully submitted this 14th day of September, 1999.

SHAW PITTMAN



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, Motion to Strike Intervenor's Reply Brief on Review of Partial Initial Decision LBP-99-13 and for Sanctions in the above-captioned proceeding has been served on the following by electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 14th day of September, 1999.

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