

April 28, 1999

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 APR 28 P 4:34

BEFORE THE COMMISSION

In the Matter of)

HYDRO RESOURCES, INC.)

2929 Coors Road, Suite 101)

Albuquerque, New Mexico 87120)

OFFICE OF THE CLERK
RULEMAKING AND
ADJUDICATIONS STAFF

Docket No. 40-8968-ML

NRC STAFF'S RESPONSE TO PETITIONERS' MOTION
FOR LEAVE TO FILE A REPLY

INTRODUCTION

This Subpart L proceeding concerns the Staff's January 5, 1998 issuance of a materials license to Hydro Resources, Inc. (HRI). On April 23, 1999, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Petitioners"), filed "ENDAUM's and SRIC's Motion To Strike NRC Staff Filing^[1], Or In The Alternative, For Leave To Reply To The Staff's Filing And Responses Filed By HRI And The Staff To ENDAUM's and SRIC's Petition For Review of PBL [sic]-99-13 (Financial Assurance For Decommissioning)" (April 23 Motion).² For the reasons discussed below, the Commission should deny the Petitioners' April 23 Motion.

BACKGROUND

On March 10, 1999, the Presiding Officer issued LBP-99-13, his "Partial Initial Decision (Financial Assurance For Decommissioning Issues)," 49 NRC _____, slip op. (Financial Decision), denying the Petitioners' request to revoke HRI's license based on their financial surety concerns.

¹ The referenced filing, discussed *infra*, is a letter dated April 8, 1999, which the Staff sent to the Presiding Officer and parties.

² The signed (hard copy) April 23 Motion has not yet arrived. Citations to the April 23 Motion are to the electronic version of the document.

See Financial Decision, at 6. Therein, the Presiding Officer considered the Petitioners' January 11, 1999 written presentation on financial assurance for decommissioning issues; HRI's response brief, dated February 11, 1999; and the Staff's response brief, dated February 18, 1999 (Staff's Financial Brief).

On March 30, 1999, the Petitioners jointly filed with the Commission "Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision On LBP-99-13, Financial Assurance For Decommissioning" (Review Petition). In opposition thereto, on April 14, 1999, the Staff filed "NRC Staff's Response To Petition For Review Of LBP 99-13" (Staff's Response).

Between the March 10, 1999, issuance of the Financial Decision, and the March 30, 1999, filing of the Review Petition, the Staff received a letter from HRI dated March 19, 1999, enclosing draft surety documents generated as the result of comments made to HRI by the State of New Mexico on previously-submitted draft surety documents.³ See Staff's Response, at 4-6 and n. 8. By letter dated April 8, 1999, the Staff forwarded copies of the March 1999 surety documents, and HRI's March 19, 1999, cover letter, to the Presiding Officer and parties. The Petitioners seek to have this April 8 letter, and its attachments, stricken from the record. See April 23 Motion, at 1.

DISCUSSION

The April 23 Motion is based on the erroneous premise that the record is now closed with respect to the adequacy of HRI's proposed financial surety arrangements, and thus the Staff's April 8 letter was subject to the requirements of 10 C.F.R. § 2.734 for reopening a closed record. See April 23 Motion, at 3-4. The premise that the hearing record must be reopened to accept the March

³ HRI had sent draft surety documents to the State of New Mexico and the Staff by cover letter dated December 11, 1998. See Exhibit 2 to the Staff's Financial Brief. These HRI drafts were sent to the attention of the staff's HRI Project Manager, Robert Carlson, who was out on leave during the month of December, 1998. As a result, staff counsel did not learn of these materials until mid-January of 1999. The Staff alerted the Presiding Officer that it was "in the process of reviewing" the HRI drafts, and that a determination of the surety's adequacy had not yet been made. See Staff's Financial Brief, at 3 n.4.

1999 surety documents implies that the record is closed regarding an issue raised below, but not decided by the Presiding Officer. The Petitioners cite no authority supporting this novel concept, which would be particularly ill-suited for use here, since the Presiding Officer is still in the process of issuing partial initial decisions. There is thus no basis for claiming that the Commission, rather than the Presiding Officer, has jurisdiction pertaining to the adequacy of the December 1998 and March 1999 surety drafts. *See* April 23 Motion, at 6-7. The issue regarding the adequacy of HRI's proposed financial surety arrangements remains to be decided by the Presiding Officer.

This is evident from a review of the Presiding Officer's Financial Decision, which makes no findings pertaining to the adequacy of the draft surety documents attached to HRI's December 1998 letter. This very absence of a ruling is a basis for one of the Review Petition's arguments. *See* Review Petition, at 3-4, and 7-8. The Petitioners now alternatively claim, contrary to their stated position in the Review Petition, that the adequacy of HRI's proposed surety documents⁴ should be considered by the Commission. *See* April 23 Motion, at 6-7.

Moreover, absent from the April 23 Motion is any mention of the Staff's obligation, pursuant to 10 C.F.R. § 2.1231(b)-(c), to keep the hearing file updated with copies of any letters received from HRI which pertain to the license application.⁵ The Petitioners seek to turn this ministerial act on the Staff's part (*i.e.*, filing the April 8, 1999 letter) into a basis for allowing the Petitioners to file a reply

⁴ The December 1998 surety documents are drafts of (1) a performance bond; (2) a performance guarantee bond; and (3) a trust agreement. *See* Exhibit 2 of the Staff's Financial Brief. The March 1999 surety documents are slightly revised versions of the December 1998 surety documents. For example, the only difference between the 1998 and 1999 performance bond drafts is that the latter contains one additional paragraph. Similarly, the 1999 performance guarantee bond draft, compared to the 1998 performance guarantee bond draft, contains the same additional paragraph added to the 1999 performance bond draft, and replaces the reference to "Section 3107.A.11" of New Mexico's "Water Quality Control Commission Regulations" with a general cite to these same regulations.

⁵ The Petitioners state that the Staff's April 8 letter "purportedly" updates the hearing file (April 23 Motion, at 2), but offer no reasons to conclude that the April 8 letter was, in fact, submitted for some other purpose.

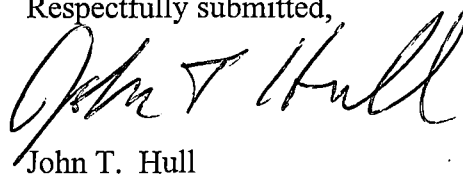
to the Staff's Response. Such replies are prohibited by 10 C.F.R. § 2.786(b)(3), absent leave from the Commission. The Commission should accordingly reject this attempted end-run around the requirements of 10 C.F.R. § 2.786(b)(3).

CONCLUSION

Since the adequacy of HRI's surety materials remains to be determined, there should be no question that the March 1999 surety documents were properly made part of the hearing file, pursuant to 10 C.F.R. § 2.1231(b)-(c), by the Staff's April 8 letter. Accordingly, even if the Commission grants the Review Petition, the subject of the surety's adequacy would not be properly before the Commission, since there is no Presiding Officer decision on this point for the Commission to review.

As discussed above, the April 23 Motion lacks merit, and should therefore be denied by the Commission.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of April, 1999

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)
)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
)
) (Re: Leach Mining and Milling License)
2929 Coors Road, Suite 101)
)
Albuquerque, New Mexico 87120)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITIONERS' MOTION FOR LEAVE TO FILE A REPLY" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks via e-mail and express mail this 28th day of April 1999:

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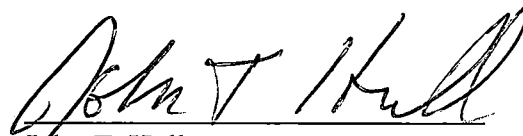
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