

DOCKETED
March 12, 1999 NRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

'99 MAR 18 P3:37

In the Matter of)
)
HYDRO RESOURCES, INC.)
(2929 Coors Road, Suite 101)
Albuquerque, NM 87120)

OFFICE OF SECURITY
RULEMAKING AND
ADJUDICATIONS STAFF

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

**ENDAUM'S AND SRIC'S PETITION FOR INTERLOCUTORY REVIEW OF
PRESIDING OFFICER'S ORDERS GRANTING
HRI AND THE STAFF ADDITIONAL OPPORTUNITY AND TIME
TO PRESENT INFORMATION CONCERNING QUALIFICATIONS,
AND REQUEST FOR A STAY OF THOSE ORDERS
*EXPEDITED REVIEW REQUESTED***

INTRODUCTION

Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), petition the Commission for interlocutory review of the Presiding Officer's Orders dated March 3, 1999 and March 9, 1999. These Orders have substantially altered the basic structure of this proceeding by finding that Hydro Resources, Inc. ("HRI") has not demonstrated that it is qualified to conduct the Crownpoint Uranium Project ("CUP") but providing HRI and the NRC Staff with a second chance and more time to address HRI's qualifications. ENDAUM and SRIC request that the Commission reverse the March 3 and March 9 Orders, and that the Commission stay those Orders during its review of this Petition.

ARGUMENT

I. SUMMARY OF DECISION AND ARGUMENTS BELOW.

Hydro Resources, Inc. ("HRI") applied for a source and byproduct materials

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license to build and operate ISL mines and a mill in Crownpoint and Church Rock, NM. ENDAUM's and SRIC's concerns on HRI's lack of technical and financial qualifications to build and operate the Crownpoint Project were admitted. LBP-98-9, 47 NRC 261, 280-282 (1998). Pursuant to the schedule set by the Presiding Officer, ENDAUM and SRIC filed written presentations on HRI's lack of qualifications.¹ HRI filed its Response to ENDAUM and SRIC on February 11, 1999² and the Staff filed its Response on February 18, 1999.³ Neither HRI nor the Staff complained of insufficient time to prepare its presentation. In addition, neither HRI nor the Staff has requested an opportunity to supplement or to amend its presentation.

The March 3 Order was entered by the Presiding Officer *sua sponte* without any request from any party. The Order cites ENDAUM's and SRIC's argument that 10 CFR §40.32(b) requires a showing that a license applicant *is* qualified, not a showing that the applicant *will become* qualified. The Order also states that this argument "is supported by 10 CFR §40.32(b), which requires a finding that "The Applicant *is* qualified by reason of training and experience." March 3 Order at 2.

The March 3 Order states that the Staff's Response referred to the Safety Evaluation Report, which did not specifically state that HRI is technically qualified.

¹ ENDAUM's and SRIC's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Hydro Resources, Inc.'s Lack of Technical and Financial Qualifications ("ENDAUM's and SRIC's Brief").

² HRI's Response to Intervenor's Brief with Respect to Hydro Resources, Inc.'s Technical and Financial Qualifications, etc. (HRI's Response").

³ NRC Staff's Response to Intervenor's Presentations on Technical Qualification, Financial and Decommissioning Issues (Staff's Response").

Id. The Order also concludes that HRI's Response "does not present any analysis of why HRI should be considered to be technically qualified." *Id.* The Order directs HRI to answer three questions on its qualifications pursuant to 10 CFR §2.1233, and states that ENDAUM and SRIC may respond to HRI's answers within 12 days.⁴

On March 8, 1999 ENDAUM and SRIC filed a motion for reconsideration of the March 3 Order. The March 9 Order denied that motion.

II. THE STANDARD FOR REVIEW.

The standards for interlocutory review are set forth in 10 CFR § 2.786(g): either the aggrieved party is threatened with immediate and serious irreparable impact, or the order will affect the basic structure of the proceeding in a pervasive or unusual manner.⁵ ENDAUM and SRIC seek review pursuant to the second of these standards. The Orders issued by the Presiding Officer grant a second opportunity and an unrequested extension of time for HRI and the Staff to address the issue of HRI's qualifications, even though the Commission has directed that unrequested extensions

⁴ The Order also provides that the Staff may answer the questions simultaneously with HRI. The questions are: (1) What is the factual basis for finding that HRI is qualified for licensing by reason of training and experience; (2) To what extent, if any, is the financial condition of HRI relevant to a determination that it is qualified by reason of training and experience; and (3) To what extent, if any, is the Texas investigation and allegations referenced by Intervenors relevant to a determination that HRI is qualified for licensing by reason of training and experience? *See* Intervenors Brief at Attachment 3. March 3 Order at 3.

⁵ In the Matter of Oncology Services Corporation, CLI 93-13, 37 N.R.C. 419, 420-421 (1993).

of time should not be granted. CLI-99-1 at 3; January 29, 1999.⁶ Those Orders also provide disparately favorable treatment to HRI and the Staff at the expense of parties ENDAUM and SRIC, raising a question about the impartiality of this proceeding.

III. THE MARCH 3 AND MARCH 9 ORDERS PERVASIVELY AFFECT THIS PROCEEDING BY GRANTING AN UNREQUESTED EXTENSION OF TIME IN VIOLATION OF THE COMMISSION'S DIRECTION.

A. The March 3 Order violates the strict schedule for this proceeding, which has been confirmed by the Commission.

The Commission has stated that this case is to be conducted expeditiously, and that "it does not advance that goal to stretch out briefing deadlines well beyond what even the hard-pressed parties themselves need or request." CLI-99-1 at 3. The March 3 Order should be reviewed and vacated because it does just that: it provides HRI and the Staff with an opportunity to amend their Responses in order to provide information that could have and should have been presented in those Responses, and it invites HRI and the Staff to submit such information.⁷

Moreover, neither HRI nor the Staff has requested this opportunity; the March 3 Order's request for information amounts to an extension of the deadlines for HRI's and the Staff's Responses, an extension that no party has requested. This is

⁶ The Commission stated that in its *sua sponte* review of the Presiding Officer's January 21, 1999 Order extending to March 5, 1999 the deadline for the Intervenors to file their final presentations. The Commission reversed that Order on the grounds that expeditious resolution of this matter was not advanced by extending the time for filing those briefs beyond what the Intervenors had requested. CLI-99-1 at 3.

⁷ ENDAUM and SRIC retain their right to assert that there is no such information.

contrary to the Commission's direction, and the Order should be vacated.⁸

B. An extension is inappropriate because the parties have had ample opportunity to address the issues involved.

Each of the parties has briefed the issue of HRI's qualifications, and each party has had an opportunity to address the issues that are raised by the March 3 Order. The first issue, HRI's lack of technical qualifications, is raised directly by 10 CFR §40.32(b) and was addressed extensively by ENDAUM and SRIC in their Brief.⁹ ENDAUM and SRIC raised the issue of HRI's lack of qualifications and met their burden of going forward on this issue.¹⁰

HRI and the Staff knew that this issue was raised by ENDAUM and SRIC; HRI and the Staff also each had an opportunity to respond to ENDAUM's and SRIC's Brief and to address the issue of HRI's qualifications. HRI and the Staff chose not to

⁸ The Order's direction to the parties that they answer the three questions posed should be vacated. The Order's findings (March third Order at 1-2), which are correct, should be the basis for the ruling on HRI's lack of technical qualifications.

⁹ ENDAUM and SRIC cited the Atomic Energy Act's and the NRC regulations' requirements for source materials licenses applicants to be qualified by reason of training and experience. ENDAUM and SRIC also pointed out that HRI "does not have its own expertise but relies instead on the expertise of its parent corporation Uranium Resources, Inc." ENDAUM and SRIC further demonstrated that the record of Uranium Resources, Inc. and its wholly owned subsidiary URI indicates that HRI is not qualified since Uranium Resources, Inc. has not mined in conditions like those at the CUP sites and because Uranium Resources, Inc. has a history of problems and violations at other projects. ENDAUM's and SRIC's Brief at 2-5, 11-14.

¹⁰ See Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), quoting Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973).

Because the ultimate burden of proof in this matter is HRI's (*id.*), HRI had the burden of demonstrating that it is qualified by experience and training.

use that opportunity. The Presiding Officer correctly determined that neither HRI nor the Staff provided any basis for a finding that HRI is qualified. March 3 Order at 2.

The March 3 Order's second question is whether HRI's financial condition is relevant to its qualifications. This issue too was addressed by ENDAUM and SRIC in their Brief,¹¹ and it was addressed by HRI and the Staff in their Responses.¹²

Finally, all the parties also had an opportunity to and did address the third question asked by the March 3 Order, the relevance of the URI operations in Texas.¹³

¹¹ ENDAUM and SRIC argued that 10 C.F.R. §§40.32(c), (d), and (e) taken together indicate that the financial capability of an applicant is relevant. ENDAUM and SRIC Brief at 16-17. ENDAUM and SRIC also explained, quoting the detailed testimony of Dr. Michael Sheehan, (Exhibit 1 to ENDAUM's and SRIC's January 11, 1999 Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Financial Assurance Issues) the reasons why an applicant's financial condition is relevant to the licensing decision. *Id.* at 17-18.

¹² HRI asserted that there is no financial qualification requirement, that its license is a prerequisite to obtaining financing, that its market analysis indicates that the CUP will be profitable, and that HRI will not attempt to operate the Project unless market conditions are favorable. HRI Response at 12-15. The Staff argued that HRI's financial condition is not a subject for Staff inquiry. Staff Response at 9.

ENDAUM and SRIC do not concede that any of the points that HRI and the Staff have asserted are correct.

¹³ ENDAUM and SRIC pointed out that the NRC will disregard corporate forms when that is appropriate; that the evidence here indicates that Uranium Resources, Inc. participates actively in and controls the management of HRI; that HRI is operated and directed by Uranium Resources, Inc.; that Uranium Resources, Inc., HRI, and URI conduct themselves as one entity; that Uranium Resources, Inc. is responsible for HRI's conduct; that HRI relies upon the experience of Uranium Resources, Inc. and URI; and that disregarding the corporate form is appropriate to achieve the purposes of the Atomic Energy Act. ENDAUM's and SRIC's Brief at 4-10.

HRI alleged that once it is operating, HRI will be independent from URI; that regardless of the relationship of HRI, URI, and Uranium Resources, Inc., HRI had shown itself to be qualified; and that the operations in Texas are different from the CUP. HRI Response at 2-12. The Staff argued that piercing the corporate veil is not warranted. Staff's Response at 10.

ENDAUM and SRIC do not concede any of HRI's and the Staff's arguments.

The parties have had opportunities to and have argued the issues raised by the March 3 Order. Although HRI and the Staff did not submit information showing that HRI is qualified, that does not mean that they did not have an opportunity to do so or that the issue has not been fully argued. The March 9 Order's assertion that the issues have not been fully argued (March 9 Order at 2) is simply wrong.

C. The request for additional information violates the Subpart L procedural rules.

The Presiding Officer may ask questions of parties (10 C.F.R. §2.1233), but it is not appropriate to do that if the parties have already had opportunities to address and have addressed the issues. Such questions should be for the purpose of following up on and clarifying the information that parties provide in their written presentations, not to ask for a new or amended presentation.¹⁴ See Rockwell International Corporation (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-718 (1989).

There, the Appeal Board instructed the Presiding Officer "to comply with both the letter and intent of the Subpart L rules", and indicated that pursuant to 10 CFR §2.1251, the Presiding Officer is to examine and decide only issues properly put into controversy by the parties. 30 NRC at 723. See also NRC Policy on Conduct of Adjudicatory Proceedings; Policy Statement (August 5, 1998), 63 FR 41872, 41874.

A party that chooses to address an issue in a specific manner or not to address

¹⁴ The March 9 Order's reliance on Texas Utilities Generating Company, et. al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410 (1983) is misplaced. That was a Subpart G formal proceeding, and it did not address the standards for information requests pursuant to 10 C.F.R. §2.1233.

the issue has made a choice and should live by it.¹⁵ The purpose of 10 C.F.R. §2.1233 requests for information should be to insure a complete record, not to give parties additional opportunities to address issues.¹⁶ This is particularly true when the parties involved are represented by counsel, especially experienced counsel, as counsel for HRI and the Staff appear to be.¹⁷ Requests for additional information should not be used to provide HRI and the Staff with second opportunities to make their presentations, particularly when they have not requested those opportunities.

IV. THE MARCH THIRD ORDER PERVASIVELY CHANGES THE PROCEEDING BY PROVIDING INEQUITABLY FAVORABLE TREATMENT TO HRI AND THE STAFF.

The March 3 Order finds that neither HRI nor the Staff has filed information indicating that HRI is qualified. The March 3 Order responds by giving HRI and the Staff a second chance to address to provide information on that issue. That is not the treatment that has been afforded to ENDAUM and SRIC in this matter.

The Presiding Officer has determined on several issues that ENDAUM and SRIC did not submit adequate information to support their claims, but they were not given second chances to do so. For example, the Presiding Officer made such

¹⁵ See Curators of the University of Missouri (Trump-S Project), LBP-91-14 (ASLBP No. 90-613-02-MLA), 33 NRC 265, 266 (1991).

¹⁶ Cf. Curators of the University of Missouri (Trump-S Project), CLI-95-1, 41 NRC 71, 116-117 (1995).

¹⁷ The Commission does not hold *pro se* parties to the high standards it expects attorneys to achieve (see Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-1247 [1984]), but they are required to present their cases. Attorneys, on the other hand, particularly experienced attorneys, are held to high standards. See Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576-577 (1975).

findings concerning ENDAUM's and SRIC's presentation on the CUP's impacts on cultural resources.¹⁸ The Presiding Officer did not, however, request more information; rather, on the basis of those and other findings, the Presiding Officer ruled that ENDAUM and SRIC had "not demonstrated that there is a defect in the NRC's proof of compliance with 36 C.F.R. §800.4(d)," and denied ENDAUM and SRIC any relief. LBP-99-9 at 9-12.

Similarly, in LBP-99-10,¹⁹ the Presiding Officer rejected arguments presented by ENDAUM and SRIC that the performance based license grants HRI authority to modify its operations.²⁰ The Presiding Officer did not, however, request that ENDAUM and SRIC answer questions about what changes HRI is permitted to make under the performance based license. Instead, he rejected their claims. *Id.* at 12. The Presiding Officer also ruled on other factual issues raised by ENDAUM and SRIC on this issue. For example, the Presiding Officer rejected their claims concerning the record on which the license is based and their arguments concerning the license's delegation of authority to HRI. *Id.* at 5-8. On none of these or any other issues did the Presiding Officer pose questions to the parties that would have

¹⁸ For example, LBP-99-9 (the February 19, 1999 Partial Initial Decision on Issues Related to the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) and Cultural Resources found that the testimony of an ENDAUM and SRIC witness was not helpful, and that their brief "did not explain what official action was taken by the NRC and what regulations apply to that action." LBP-99-9 at 6.

¹⁹ February 19, 1999 Partial Initial Decision (Performance-Based Licensing).

²⁰ The Presiding Officer determined that "[t]he number and breadth of express requirements in HRI's license restrict application of PBL [Performance Based Licensing] to a very few, discrete, operational changes. LBP-99-10 at 6-7.

given ENDAUM and SRIC a second opportunity to present their positions.²¹

The Presiding Officer has "the duty to conduct a fair and impartial hearing according to law" (10 CFR §2.738); he therefore must accord the same treatment to HRI and the Staff as he does to ENDAUM and SRIC. If the Presiding Officer makes a finding against HRI and the Staff, he must rule against them just as he has ruled against ENDAUM and SRIC. The Presiding Officer has violated his principal duty by favoring HRI and the Staff. Although he found that they had not provided necessary information, he chose not to rule against them, but to point out to them that they have not provided information that could be the basis for a ruling in their favor, inviting them to submit that information, and giving them an opportunity to do so.

V. REQUEST FOR STAY OF PROCEEDING.

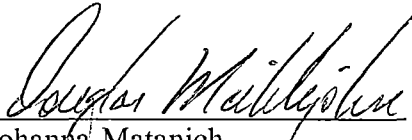
Because the March 3 Order calls for information to be submitted by HRI on March 15th and by ENDAUM and SRIC 12 days later, ENDAUM and SRIC request that the Commission stay this proceeding until the Commission rules on this Petition.

CONCLUSION

For these reasons, the Commission should review and reverse the March 3 and March 9 Orders. The Commission also should direct the Presiding Officer to disregard any further submissions by HRI or the Staff on this issue, and to rule on the issue of HRI's qualifications on the basis of the March 3 Order's findings.

²¹ ENDAUM and SRIC do not concede the accuracy of any of the Presiding Officer's findings on these and other issues on which he has ruled against ENDAUM and SRIC in the three partial initial decisions that have been issued.

Dated: March 12, 1999.



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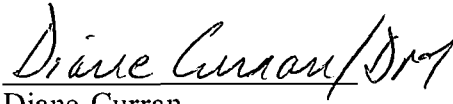
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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 1999 I caused to be served copies of:

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ADDITIONAL OPPORTUNITY AND TIME TO PRESENT INFORMATION
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upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. §2.712. Service was also made via facsimile to the parties marked below with a + and by electronic mail to the parties marked below by an asterisk. The envelopes for first class mail service were addressed as follows:

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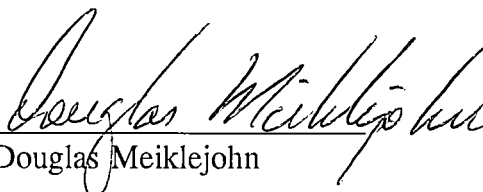
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March 12, 1999.


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