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March 20, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULING MAKING AND
ADJUDICATIONS STAFF

_____)	
In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
2929 Coors Road)	
Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
_____)	

**INTERVENORS' REPLY TO HRI'S AND STAFF'S RESPONSES TO
INTERVENORS' PETITION FOR REVIEW OF LBP-99-1**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), Grace Sam and Marilyn Morris submit the following reply to Hydro Resources, Inc.'s Opposition to Intervenors' Petition for Review of Presiding Officer's February 3, 1999 Partial Initial Decision Regarding Liquid Waste Disposal Issues (March 2, 1999) ("HRI's Response") and the NRC Staff's Response to Petition for Review of LBP-99-1 (March 5, 1999) ("Staff's Response"). Intervenors oppose HRI's request to defer briefing of any petitions for review that are granted in this proceeding. Intervenors also dispute the Staff's assertion that their Petition for Review was untimely.

FACTS

LBP-99-1, the Presiding Officer's Partial Initial Decision (Waste Disposal Issues), was served via first class mail on February 3, 1999. On February 23, 1999,

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Intervenors filed their Petition for Review. Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision (Waste Disposal Issues) ("Petition for Review"). On March 2, 1999, HRI filed HRI's Response, arguing that the Petition for Review lacks merit, and if review is granted, briefing should be deferred "until the Presiding Officer has issued decisions on each of the issues being addressed in the current hearing and the Commission has decided which of the issues, if any, will be granted review." HRI Response at 3-4. The Staff served its response on March 5, 1999, arguing that the Petition for Review was not timely filed, and review is not warranted. Staff Response at 2-3.

ARGUMENT

I. THE COMMISSION SHOULD NOT DEFER BRIEFING OF THE PETITION FOR REVIEW.

HRI's request that the Commission defer briefing of the issues in LBP-99-1 until all partial initial decisions in this hearing are issued, and then consolidate all issues on review, is contrary to Commission regulations and policy and will not promote efficient decision making. HRI's request should therefore be denied.

Deferred briefing is inconsistent with the NRC's regulations at 10 C.F.R. § 2.1253 (requiring the immediate filing of petitions for review following partial initial decisions), and it directly contradicts the Commission's directive in this proceeding that the case be decided in manageable portions. CLI-99-1 states, "A series of partial decisions, rather than one grand decision at the proceeding's end, would accommodate

efficient appellate review by the Commission, if it is sought." CLI-99-1 at 3-4 (January 29, 1999).

Deferred briefing will not achieve the efficiency suggested by HRI. Separate briefing of issues on appeal allows the Commission to review and decide matters efficiently. Briefing can commence immediately as issues are presented to the Commission, rather than at the end of this hearing.

Contrary to HRI's argument, consolidating the issues for review would not conserve resources. Intervenors have filed written presentations on ten distinct areas of concern for which there is very little overlap. For example, Intervenors' concerns regarding liquid waste involve interpretation of 10 C.F.R. §§ 40.31(h), 40.32 and Appendix A, 10 C.F.R. Part 20, and the application of the record to those regulations, while Intervenors' concerns regarding cultural resource protection involve interpretation and analysis of the National Historic Preservation Act and the Native Graves Protection and Repatriation Act. *See* LBP-99-1 at 5-10; LBP-99-9 at 4-10.¹

¹ Where factual overlap exists, Intervenors have already combined issues into the same presentation, which can be addressed in a single partial initial decision. In each of their presentations, where relevant, Intervenors have included their National Environmental Policy Act concerns regarding the adequacy of the Final Environmental Impact Statement ("FEIS"), NUREG-1508, in addressing environmental impacts. *See* ENDAUM's and SRIC's written presentations on liquid waste disposal (November 9, 1999), cultural resources (December 7, 1999), performance-based licensing (December 7, 1999), radioactive air emissions (January 11, 1999), and groundwater protection (January 18, 1999). Indeed, LBP-99-1 addresses both Intervenors' concerns regarding NRC regulations on liquid waste disposal and the adequacy of the FEIS in addressing the environmental impacts of liquid waste disposal. LBP-99-1 at 5-10 and 10-13.

Because the issues involved in each of these separate areas of concern are complex, consolidation of briefing would only confuse the issues. Moreover, deferred briefing would unfairly burden the parties' resources. Each area of concern has already required extensive briefing; a single briefing would impair the parties' ability to efficiently and effectively address all issues. Since the issues do not overlap, briefs with entirely separate sections would be necessary. Allowing for separate briefing on review, will therefore, promote the orderly and efficient disposition of this case.

HRI also threatens that review of partial initial decisions according to the Subpart L regulations may result in serial appeals of each partial initial decision to the Court of Appeals. HRI Response at 4-5. This concern is already addressed in the procedures for appeal to the Court of Appeals. The Court of Appeals has jurisdiction to review all final orders in licensing proceedings. *See* 42 U.S.C. § 2239; 28 U.S.C. § 2342(4); *Florida Power & Light v. Lorion*, 470 U.S. 729, 739-740 (1984). By reviewing only final orders, which dispose "of all issues as to all parties in the licensing proceeding", the Court avoids disrupting the agency proceeding. *Commonwealth of Massachusetts v. NRC*, 924 F.3d 311, 322 (D.C.Cir. 1991). In addition, the efficiency of the Court of Appeals' review process is irrelevant in this proceeding, because the Court has authority to consolidate petitions for review if it so chooses. *Id.*, 924 F.3d at 315.

II. INTERVENORS' PETITION FOR REVIEW WAS TIMELY FILED.

The NRC Staff argues that Intervenor's' Petition for Review is untimely because

LBP-99-1 was served by electronic mail. Staff Response at 2 note 3. Contrary to the Staff's argument, the Presiding Officer did not make formal service of LBP-99-1 on the parties by electronic mail.² While the Presiding Officer did send an electronic copy of LBP-99-1 to the parties, his message clearly identified the copy as a "courtesy copy" to the parties, and he did not forward it electronically to the Commission. A copy of the Presiding Officer's electronic message is attached to Intervenors' Motion for Leave to Reply as Exhibit 1. As shown on the certificate of service attached to LBP-99-1, formal service was carried out by first-class mail. Consistent with the regulations, the Intervenors timely filed their Petition for Review on February 23, 1999, which is within 20 days of service of LBP-99-1. *See* 10 C.F.R. §§ 2.786(b)(1) (allowing 15 days for a response) and 2.710 (allowing an additional five days where service has been effected by first class mail).

CONCLUSION

For the foregoing reasons, the Commission should reject HRI's suggestion to defer briefing of any petitions for which review is granted. The Commission should also reject the Staff's argument that Intervenors' Petition for Review was untimely.

Respectfully submitted,

² Moreover, contrary to the Staff's argument, the Presiding Officer has not adopted electronic service as the rule for every filing in this proceeding. The Presiding Officer has only directed that written presentations and responses be filed electronically, not that all pleadings must be filed electronically. *See* Staff Response at 2 note 3; Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) at 3-4 (September 22, 1998).

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CERTIFICATE OF SERVICE

I hereby certify that:

On March 22, 1999, I caused to be served copies of the following:

**INTERVENORS' REPLY TO HRI'S AND STAFF'S RESPONSES TO
INTERVENORS' PETITION FOR REVIEW OF LBP-99-1**

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 and e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

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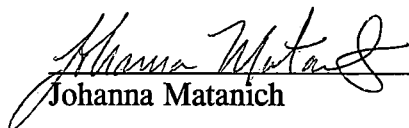
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