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'99 APR -7 P12:26

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATION STAFF

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

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

**HYDRO RESOURCES, INC.'S RESPONSE TO ENDAUM/SRIC MOTION TO STRIKE  
RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF PBL-99-9 AND  
MOTION FOR LEAVE TO FILE OUT OF TIME**

I. INTRODUCTION

Hydro Resources, Inc. ("HRI") respectfully submits the following Motion for Leave to File Out of Time and Response to the Motion to Strike filed by Intervenors Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") on April 1, 1999 (hereinafter, "Motion to Strike"). Intervenors' Motion to Strike asks the Commission to strike HRI's response ("HRI's response") to the ENDAUM and SRIC Petition for Review of LBP-99-9. Intervenors' Motion to Strike asks that the Commission strike HRI's response on the basis that it was filed out of time. HRI respectfully requests that the Commission deny Intervenors' Motion to Strike. Also, HRI respectfully requests that the Secretary grant HRI permission to file out of time.

SECY-EHD-006

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## II. FACTUAL BACKGROUND

The ENDAUM/SRIC Petition for Review ("Petition") was received by counsel for HRI by electronic mail on March 12, 1999 and by first class mail on Monday, March 15, 1999. According to the certificate of service accompanying the Petition, the Petition was filed by ENDAUM/SRIC via electronic mail and first class mail on March 11, 1999. Accordingly, pursuant to the Commission's rules set forth at 10 C.F.R. §§ 2.786(b)(3) and 2.710, HRI was required to file its response to the Petition within fifteen (15) days of filing. Thus, HRI's response should have been filed by March 26, 1999. HRI's response to the Petition was filed on March 29, 1999, one day late (March 27 and 28 fell on a weekend).

## III. ARGUMENT

Counsel for HRI received ENDAUM/SRIC Petition for Review via electronic mail on March 12, 1999. When calendaring response dates for many pending motions in the above captioned matter, counsel for HRI computed the due date for HRI's response to be March 29, 1999. The mistake in computation was based on the fact that ENDAUM/SRIC used a Corel WordPerfect "date code" in the certificate of service accompanying the Petition such that when HRI's counsel opened (and printed) the electronic version of the Petition and accompanying certificate of service on March 12 in order to review the documents and calendar a response date, "March 12, 1999" was inserted in place of "March 11, 1999" on the certificate of service both in the service line and signature line.<sup>1</sup> Thus, when opened or printed the certificate of service read:

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<sup>1</sup> Johanna Matanich, Counsel for ENDAUM/SRIC confirmed during a telephone conference on April 6, 1999, that a "date code" was used in the certificate of service accompanying the Petition. Notably, a "date code" was not used in the ENDAUM/SRIC Petition for Review of LBP 99-10 (Performance Based Licensing) that was

Footnote continued on next page

On March 12, 1999, I caused to be served copies of the following:

INTERVENORS' PETITION FOR REVIEW OF PRESIDING  
OFFICER'S PARTIAL INITIAL DECISION LBP-99-9

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 e-mail to the parties marked below by an asterisk.

The insertion of March 12, 1999 in the certificate of service due to the use of a "date code" caused counsel for HRI to believe that the ENDAUM/SRIC Petition was not actually served until March 12, 1999, and thus, that HRI's response was due fifteen days thereafter, on March 29, 1999 (again, allowing for the weekend).

Simply stated, HRI's brief which Intervenor ask to have stricken was late filed as a consequence of a technical "glitch" that resulted in human error occurring in the midst of responding to several motions and presentations within the same time period. Although HRI's response was filed out of time, the Secretary has the authority to include them in the record. See 10 C.F.R. § 2.772. Including HRI's response in the record will help ensure that the record of this proceeding is complete and furthers the goal of a fair and impartial final ruling. Significantly, allowing this filing causes no material delay in the above captioned proceeding; Intervenor do not claim otherwise. Perhaps most importantly, allowing HRI's filing results in no prejudice to any party and, indeed, ENDAUM/SRIC do not even suggest that any prejudice results from this filing. Conversely, striking HRI's pleading because of harmless error results in significant prejudice to HRI, the party charged with the burden of defending its license.

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filed on March 11, 1999, thus, HRI's response to that petition was timely filed on March 26, 1999 as the electronic mail version of the certificate of service indicated that it had been served on March 11.

Although there is no clear standard for when the Secretary should allow late responses by parties to be included in the record (10 C.F.R. § 2.780(c) merely states when “good cause” is shown), some guidance may be found by analogy to the standard employed for determining whether to allow late-filed petitions for intervention. In deciding whether to allow an intervention petition to be filed out of time, a Presiding Officer should consider: “1) good cause, if any, for failure to file on time, 2) the availability of other means whereby the petitioner’s interest will be protected, 3) the extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record, 4) the extent to which the petitioner’s interest will be represented by existing parties, and 5) the extent to which the petitioner’s participation will broaden issues or delay the proceeding.” 10 C.F.R. § 2.714(a)(1)(i)-(v).

NRC has determined that in applying the balancing test, some factors outweigh others. Notably, late filings have been allowed where the interest of the party was strong and the lateness was not egregious. See, e.g., Puget Sound Power and Light Co., (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981 (1982). In Puget Sound, the Licensing Board found that a filing two months late was not egregious and allowed the late petition because there would be no delay in the proceeding caused by the late filing. Ruling that the most important considerations were the amount of time a filing was late and whether it delayed the proceedings, the Licensing Board allowed the late filing even though the other factors of the five-part test weighed against it. See id.

Although this balancing test is not directly applicable to the instant case, the same broad principles should apply. Intervenors have not suggested that HRI’s filings were egregiously late or cause any material delay in these proceedings. Likewise, Intervenors have not shown that

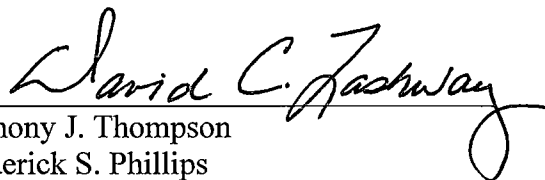
HRI's filing results in any prejudice. All parties have received HRI's response and the proceeding is poised to move forward on the basis of a complete record.

HRI believes that timely filing of all briefs and responses is critical to the fair and expeditious completion of this proceeding. HRI's filings were late because of a one-day error in calendaring due to a technical "glitch." HRI previously has submitted its pleadings in a timely manner and will continue to do so as this proceeding moves forward.

#### IV. CONCLUSION

Based on a technical "glitch," counsel for HRI made an administrative mistake causing HRI's response to Intervenors' Petition for Review to be filed one day late. No harm has come to these proceedings or any party by virtue of this mistake. Consequently, HRI respectfully requests that the Secretary grant HRI's Motion for Leave to File Out of Time and that the Commission deny Intervenors' Motions to Strike.

Respectfully submitted this 6th day of April, 1999.



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ON BEHALF OF HYDRO RESOURCES, INC.  
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Albuquerque, New Mexico 87120

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

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, HYDRO RESOURCES, INC.'S RESPONSE TO ENDAUM/SRIC MOTION TO STRIKE RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF PBL-99-9 AND MOTION FOR LEAVE TO FILE OUT OF TIME, in the above-captioned proceeding has been served on the following by over-night mail on this 6th day of April, 1999.

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