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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '99 APR -6 P 3:46

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

**ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO REPLY
TO THE RESPONSES FILED BY HRI AND THE NRC STAFF
TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW
OF PBL-99-10 (PERFORMANCE-BASED LICENSING)**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move the Commission for leave to reply to the Responses to ENDAUM's and SRIC's Petition for Review of LBP-99-10, the Presiding Officer's Partial Initial Decision on performance based licensing issues.¹ This motion is made pursuant to 10 C.F.R. §§2.730 and 2.786(b)(3) on the grounds that the Commission should exercise its discretion to permit ENDAUM and SRIC to address several issues raised by HRI and the NRC

¹ LBP-99-10, Partial Initial Decision (Performance-Based Licensing Issues) was issued on February 19, 1999. ENDAUM' and SRIC's Petition for Review of Presiding Officer's Partial Initial Decision (Performance-Based Licensing) (ENDAUM's and SRIC's Petition") was filed on March 11, 1999. The NRC Staff's Response to ENDAUM's and SRIC's Petition for Review of LBP-99-10 ("Staff's Response") was filed on March 22, 1999; HRI's Opposition to Intervenors' Petitions for Review of Partial Initial Decision Regarding Performance-Based Licensing (LBP-99-10) ("HRI's Response") was filed on March 25, 1999. HRI's Response addressed ENDAUM's and SRIC's Petition and the Petition for Review of LBP-99-10 filed by Intervenors Marilyn Morris and Grace Sam. HRI's Response at 1.

U.S. NUCLEAR REGULATORY COMMISSION
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Staff in their Responses.

ENDAUM and SRIC also reiterate here their opposition to HRI's request for deferred briefing. On that point, ENDAUM and SRIC incorporate their argument set forth at pages 2-4 of their March 20, 1999 Reply to HRI's and Staff's Responses to Intervenors' Petition for Review of LBP-99-1.²

Counsel for ENDAUM and SRIC has contacted counsel for HRI, the Staff, and Intervenors Marilyn Morris and Grace Sam to determine the positions of those parties on this motion. At the time of filing this motion, counsel for ENDAUM and SRIC had not heard back from counsel for HRI. Counsel for Ms. Morris and Ms. Sam have indicated that they support the motion; counsel for the Staff has indicated that the Staff opposes this motion.

FACTUAL BACKGROUND

ENDAUM and SRIC appealed LBP-99-10 on March 11, 1999. The Staff filed its Response on March 22, 1999, and HRI filed its Response on March 26, 1999. HRI and the Staff both asserted that the Petition should be denied; both also raised arguments that had not been raised before. ENDAUM and SRIC should be able to reply to those and other arguments raised by HRI and the Staff.

ARGUMENT

ENDAUM and SRIC seek to reply to the inaccurate assertion by HRI and the

² ENDAUM and SRIC request that the Commission consider ENDAUM's and SRIC's objection to deferred briefing as a continuing objection to that proposal whenever it is raised by HRI. *See, e.g.* Hydro Resources, Inc.'s March 29 1999 Opposition to Intervenors' Petition for Review of LBP-99-9 at 8.

Staff that issues not addressed by the Presiding Officer were not addressed because they are not material. HRI's Response at 4; Staff's Response at 5-6. HRI and the Staff assert that the test for materiality is whether an issue has merit.³ *Id.* That is not correct. An argument is material if it would be considered by a reasonable individual in reaching a decision. *Cf. Consumers Power Company* (Midland Plant, Units 1 and 2), ALAB-774, 16 N.R.C. 897, 910 (1982).

The issues not considered by the Presiding Officer in LBP-99-10 are material; these issues include ENDAUM's and SRIC's arguments that performance based licensing violates the Atomic Energy Act and the Administrative Procedures Act because there is no regulation or policy adopted pursuant to those statutes authorizing such licensing. Also not addressed by LBP-99-10 were arguments by ENDAUM and SRIC that HRI's license violates the Administrative Procedures Act because the license is so confused and self-contradictory that it is arbitrary and capricious, and that the license violates the National Environmental Policy Act by eliminating NRC review of changes in the Project before those changes are made. These issues are material and should have been considered. ENDAUM and SRIC therefore should be able to present arguments on these points in a reply.

ENDAUM and SRIC also should be given an opportunity to reply to the Staff's inaccurate assertion that two of the "issues" raised by ENDAUM and SRIC were not raised below. Staff's Response at 4-5. The Staff has asserted for the first

³ ENDAUM and SRIC do not waive their positions that their arguments that were not addressed by the Presiding Officer have merit.

time in its Response that ENDAUM and SRIC cannot raise in their appeal Condition 10.6 of HRI's License (SUA-1508) and the methods to be used for liquid waste disposal because those items were not raised below. *Id.* Contrary to the Staff's assertion, however, these are not new issues. They are examples from the record below that support ENDAUM's and SRIC's position asserted previously⁴ that the performance based license leaves decisions to HRI.

The final issue sought to be addressed by ENDAUM and SRIC in a reply is the Staff's incorrect assertion that the Presiding Officer ruled that the incorporation into HRI's license of the internal contradictions in HRI's application is not germane. Staff's Response at 4.⁵ If permitted to reply, ENDAUM and SRIC will demonstrate that they have not raised any issues that were determined by the Presiding Officer not to be germane.

As is reflected in LBP-98-9, the Presiding Officer ruled that ENDAUM's and SRIC's area of concern about HRI's application being "disjointed, incoherent, and contradictory" was not germane. Hydro Resources, Inc., LBP-98-9, 47 N.R.C. 261 at 280-281. On the other hand, the Presiding Officer ruled that ENDAUM's and SRIC's area of concern on performance based licensing is germane. *Id.*

The issue that ENDAUM and SRIC have raised here is that the performance

⁴ ENDAUM's and SRIC's December 7, 1999 Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Performance Based Licensing Issues at 21-30.

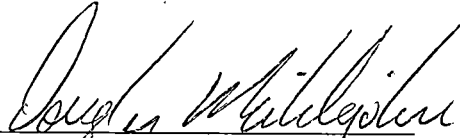
⁵ This assertion was raised by the Staff in its January 19, 1999 Response to Intervenor's Presentations on Performance-Based Licensing Issues at page 15, n. 17.

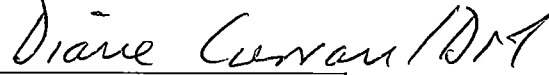
based license issued to HRI (SUA-1508) violates applicable law and regulations because it incorporates the inconsistent and self-contradictory terms of the application. The point is not that the application is inconsistent and self-contradictory but that the performance based license incorporates those inconsistencies and self-contradictions. That issue is germane.

CONCLUSION

For the foregoing reasons, the Commission should grant ENDAUM and SRIC the opportunity to reply so that they may address the points outlined above.

Dated: April 1, 1999.


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_____)	

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 1999 I caused to be served copies of:

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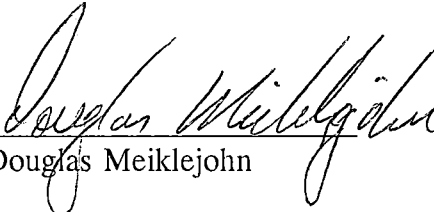
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