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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Before Administrative Judge Peter B. Bloch, Presiding Officer

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)	
)	

**ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO FILE
A REPLY BRIEF AND REBUTTAL TESTIMONY ON ISSUES OF
FINANCIAL ASSURANCE FOR DECOMMISSIONING AND
FINANCIAL AND TECHNICAL QUALIFICATIONS
OR, IN THE ALTERNATIVE, TO STRIKE DOCUMENTS
SUBMITTED ON THOSE ISSUES**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1233(d), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move the Presiding Officer for leave to file a reply brief and rebuttal testimony in response to the presentations by Hydro Resources, Inc. ("HRI") and the Nuclear Regulatory Commission ("NRC") Staff on the adequacy of HRI's financial assurance for decommissioning. A reply brief and rebuttal testimony are necessary to respond to new information provided for the first time in the Staff's presentation, to make a complete record, and to correct serious prejudice to the Intervenors caused by

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the omission of this new information from the hearing file.

Intervenors also request leave to reply to HRI's and the Staff's Responses on HRI's technical and financial qualifications. This reply is necessary to address allegations of fact made by HRI's counsel (and adopted by the Staff) that are not supported by evidence in the record and to respond to misstatements of law by HRI.¹

In the alternative, Intervenors move the Presiding Officer to strike portions of HRI's and the Staff's Responses and documents on which those Responses are based.

This motion is opposed by HRI and the Staff.

FACTUAL BACKGROUND

On January 11, 1999, Intervenors submitted their written presentation in support of their opposition to HRI's materials license application, as amended, and its license, on Financial Assurance for Decommissioning issues ("Intervenors' Financial Assurance Presentation") and their written presentation on HRI's lack of technical and financial qualifications ("Intervenors' Qualifications Presentation").

HRI responded in a single document filed on February 11, 1999 ("HRI's Response"), and the Staff also responded with a single document filed on February 18, 1999 ("Staff's Response").²

¹ In accordance with the Presiding Officer's September 22, 1998 Order, ENDAUM and SRIC have not attached their reply to this motion.

² This motion is timely because it is filed within ten days of ENDAUM's and SRIC's counsel's February 16th receipt of the complete HRI Response and within eight days of counsel's February 18th receipt of the Staff's Response.

ARGUMENT

I. ENDAUM AND SRIC SHOULD HAVE AN OPPORTUNITY TO FILE A REPLY AND REBUTTAL TESTIMONY ON FINANCIAL ASSURANCE FOR DECOMMISSIONING.

Intervenors should be given an opportunity to reply and to provide rebuttal testimony because they have been severely prejudiced by the failure of the Staff to include in the record new information that the Staff made available for the first time in its Response. The Intervenors also should be permitted to reply to HRI's arguments presented in its Response.

A. A reply should be permitted when that is necessary to make a full factual record.

Although the Subpart L regulations do not explicitly provide a right to reply,³ the NRC has recognized, in Subpart G proceedings, a limited "right" to present rebuttal testimony where it is necessary for "full and true disclosure of the facts". Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) (upholding Licensing Board's ruling that parties examine witnesses in depositions with transcripts to be filed instead of testimony). Here, there cannot be a full disclosure of the facts unless Intervenors are permitted to file a reply and rebuttal testimony.

B. Intervenors should have an opportunity to reply to the Staff's Response.

³ Leave must be obtained to file any presentations following a party's initial written presentation. 10 C.F.R. § 2.1233(d).

Intervenors' Financial Assurance Presentation demonstrates that HRI's license application fails to satisfy federal law and regulations governing financial assurance for decommissioning because HRI failed to submit a decommissioning financial assurance plan as part of its application. The Financial Assurance Presentation also addresses the failure of the Final Environmental Impact Statement ("FEIS") to discuss the environmental impacts of HRI's failure to provide sufficient financial assurance for the cleanup of the Crownpoint Project site. See Financial Assurance Presentation at 11-19 and Affidavit of Dr. Michael F. Sheehan at 12-19 (January 7, 1999).

The Staff's Response claims that only 10 C.F.R. Part 40, Appendix A, Criterion 9 requirements apply to the Crownpoint Project, and therefore, surety arrangements need only be established before operations begin and not before licensing. The Staff asserted in its Response, however, that financial assurance documents, which meet the requirements of Criterion 9, were submitted by HRI and attached a document dated June 2, 1997 in support of its argument. Staff Response at 4, fn. 4, Exhibits 1 and 2. The Staff admits that its exhibits were omitted by the Staff from the HRI Hearing File. *Id.* These documents were not made available for Intervenors' review until February 18, 1999. Neither the NRC Staff nor HRI informed Intervenors of the alleged financial assurance documents until Intervenors received the Staff's Response. This is highly prejudicial and the Intervenors should have an opportunity to reply to address this plan.

Section 2.1231(a) of 10 C.F.R. provides that the NRC staff shall prepare a hearing file within 30 days of the presiding officer's order granting a request for a hearing, and that the hearing file be made available to the petitioner. 10 C.F.R. § 2.1231(b) states that the hearing file shall consist of:

the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application.

10 C.F.R. § 2.1231(c) goes on to state that:

The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials for the docket, the presiding officer, and the applicant or any party or § 2.1211(b) participant in a manner consistent with the way the hearing file was made available initially under paragraph (a).

The NRC Staff failed to fulfill its obligation to include HRI's alleged financial assurance plan, which is dated June 2, 1997, in the hearing file. Instead, the Staff waited until after ENDAUM and SRIC submitted their presentation to attach this document to its Response. The Intervenors' right to review relevant information that is material to their argument on financial assurance for decommissioning has been severely prejudiced. ENDAUM and SRIC, therefore, should be granted leave to file a reply and rebuttal testimony, after an opportunity to review the new information revealed by the Staff. *See, e.g.,* LBP-98-9, 47 N.R.C. 261, 284 (May 13, 1998)

(ordering HRI and NRC Staff to inform the Presiding Officer and the parties as early as possible about "substantial new information that is developed by HRI or the Staff"); In the Matter of Sequoyah Fuels Corporation, LBP-94-39, 40 N.R.C. 314, 317 (November 22, 1994) (finding that it would not be fair for an Intervenor to file written presentations setting forth all of their concerns without access to the hearing file), *citing* 54 Fed. Reg. 8272 (February 28, 1989).

In the alternative, the Staff's Response (including its Exhibits 1 and 2) should be stricken from the record in this proceeding for relying on information that was neither provided in the hearing record nor made available to the Intervenors.

C. Intervenors should be permitted to reply to HRI's Response.

HRI's response to financial assurance issues primarily argues that the Intervenor's expert witness, Dr. Michael F. Sheehan, is not qualified to address in situ leach ("ISL") mining, the application of NRC regulations to ISL mining, and HRI's compliance with NRC regulations. HRI also claims that its plans for financial assurance for decommissioning can be found in its responses to RAI's Q.1-92.

HRI's argument as to Dr. Michael F. Sheehan is that his qualifications as an economist, with extensive experience in public utility economics, do not qualify him to discuss the application of NRC financial assurance requirements to HRI's proposed ISL project. HRI Response at 16. HRI fails to cite any factual basis or expert opinion to support the notion that the analysis of financial assurance for the decommissioning of

ISL mines requires ISL industry-specific economics knowledge.

The qualifications of an expert witness are established through a showing of academic training or relevant experience, or a combination of the two. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), 22 N.R.C. 681, 720 and fn. 52 (1985); Fed. R. Evid. 702. Dr. Sheehan is qualified by both experience and education to testify about HRI's financial assurance. Dr. Sheehan, besides holding a Ph.D. in economics, is an attorney licensed to practice in Oregon and Iowa. Sheehan Testimony, Exhibit A at 1. For more than 20 years, Dr. Sheehan has analyzed and testified to the economic risks and environmental safety factors associated with public utility activities. Sheehan Testimony at 2-5. He is more than qualified to testify in this matter. Intervenors should be given the opportunity to file a reply presentation, which demonstrates Dr. Sheehan's expertise. In the alternative, ENDAUM and SRIC request the Presiding Officer review the qualifications of Dr. Sheehan through voir dire at an oral presentation.

II. ENDAUM AND SRIC SHOULD BE PERMITTED TO REPLY ON THE TECHNICAL AND FINANCIAL QUALIFICATIONS ISSUES.

Intervenors also filed on February 11, 1999 their brief concerning HRI's lack of technical and financial qualifications. HRI's Response presents as facts statements by its counsel that are not evidence, and these statements have been adopted by the Staff in its Response. HRI's Response also mischaracterizes the applicable law. The Intervenors should be permitted to reply to the Responses on these points.

HRI's Response consists largely of the unsupported factual allegations of its counsel, who are not witnesses in this proceeding and are neither sworn to provide testimony nor qualified to do so. Moreover, the Staff has adopted without qualification several of those unsupported factual assertions. The Presiding Officer should either strike these allegations or permit the Intervenors to reply to them.

Evidence can only be presented by a witness who is both qualified to provide the testimony and sworn to tell the truth. See Louisiana Power and Light Co. (Waterford Steam Electric Station Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982); Fed. R. Evid. 603. HRI's Response, however, consists largely of factual assertions by HRI's counsel. These allegations are made without references to the record or other support, or any indication that counsel are qualified to testify. Moreover, the Staff adopted these allegations. Staff Response at 10-11.

For example, HRI sets forth without support assertions covering HRI's holdings in New Mexico (Response at 2); the services Uranium Resources, Inc. will provide to HRI (*id.*), data about the injection pressures that are used at URI's operations at Kingsville Dome in Texas and the depths at which URI's wells are completed there (*id.* at 3-4); and mapping of mine workings in Section 17 (*id.* at 4-5). In addition, although HRI supports some of its allegations concerning URI's history in Texas with attachments, other allegations are made without support from either attachments or the

record. These allegations include the following matters of fact: information relating to excursions at the Kingsville Dome facility and the influence on that facility of the Gulf of Mexico (*id.* at 7); and the influence on excursions of the distance between a wellfield and monitoring wells. *Id.*

Perhaps most impressively, HRI's counsel purport to contradict without support from experts, other witnesses, or the record, the sworn testimony of William Staub, an expert with significant qualifications who, among his other experience, has been a consultant for the NRC. (*Id.* at 6-7; *see also* testimony of William Staub, Exhibit 2 to ENDAUM's and SRIC's January 18, 1999 Brief concerning Ground Water Issues, at 1-3 and his resume [Exhibit A to that testimony]).

These statements are neither evidence nor based on evidence. HRI's attorneys are not witnesses, and there is nothing in the record to indicate that one or more of them has any qualifications to make these statements. There is nothing in the Response to indicate which of HRI's three attorneys on the pleading purports to have the qualifications and the knowledge to make the Response's allegations.

If the Intervenor's are not permitted to address these unsubstantiated allegations in a reply, they should be stricken from the record.

The Intervenor's also should be permitted to reply to HRI's argument that it needs to be licensed in order to be qualified economically to conduct the proposed

mining operation.⁴ This argument is contrary to the requirements of the NRC regulations that an applicant for a license has the burden of proof to demonstrate that the license should be issued. 10 C.F.R. § 2.732. The Intervenors should have an opportunity to address this argument.

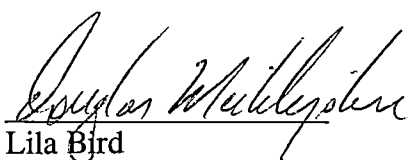
CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, ENDAUM and SRIC respectfully request that the Presiding Officer grant their motion to file a reply and rebuttal testimony on financial assurance for decommissioning. Because they will need to have the financial assurance plan that the Staff has provided analyzed by their experts, the Intervenors request that they be given 20 days from the Presiding Officer's ruling on this motion to file that reply and rebuttal testimony. If leave to reply is not granted, the Intervenors request that the Staff's Response (including Exhibits 1 and 2) be stricken.

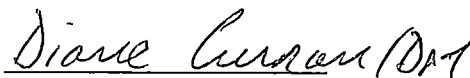
ENDAUM and SRIC also request that they be given leave to file a reply on the issues of Financial and Technical Qualifications. ENDAUM and SRIC request that they be given 10 days from the Presiding Officer's ruling on this Motion to file that reply. ENDAUM and SRIC also request that if they are not permitted to reply, the Presiding Officer strike the unsupported allegations of HRI's Response.

⁴ This argument is based in part on the statement of Joe Card. Although HRI refers to it as an affidavit, the version of it provided to the Intervenors does not indicate that it is a sworn statement.

Respectfully submitted this 26th Day of February, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that:

On February 26, 1999, I caused to be served copies of the following:

ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO FILE A REPLY BRIEF AND REBUTTAL TESTIMONY ON ISSUES OF FINANCIAL ASSURANCE FOR DECOMMISSIONING AND FINANCIAL AND TECHNICAL QUALIFICATIONS OR, IN THE ALTERNATIVE, TO STRIKE DOCUMENTS SUBMITTED ON THOSE ISSUES

to the following parties marked by an asterisk via e-mail. Service was also made upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. The envelopes were addressed as follows:

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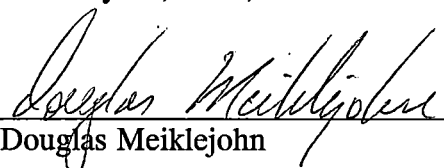
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February 26, 1999,



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