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FACTUAL BACKGROUND

On January 11, 1999, ENDAUM and SRIC submitted their initial presentation regarding the failure of HRI's license application and the Final Environmental Impact Statement ("FEIS") to address radioactive air emissions at the Crownpoint Project. ENDAUM's and SRIC's Brief Regarding Radioactive Air Emissions at the Crownpoint Project. The brief was supported by the Testimony of Bernd Franke, and a report by Mr. Franke regarding his review of Crownpoint radon and gamma radiation. Testimony of Bernd Franke; Crownpoint Uranium Solution Mining Project: Review of Outdoor Radon Levels and External Gamma Radiation (January 5, 1999) (hereinafter "Franke Report"). HRI and the Staff both filed briefs and testimony in opposition to ENDAUM's and SRIC's position. Hydro Resources, Inc.'s Response to Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's January 11, 1999 Brief Regarding Radioactive Air Emissions at the Crownpoint Project (February 11, 1999) and Affidavit of Alan C. Eggleston, Ph.D (February 10, 1999); NRC Staff's Reponse to Intervenors' Presentation on Air Emission Issues (February 18, 1999) and Affidavit of Christopher A. McKenney (February 18, 1999).

ARGUMENT

I. STANDARD FOR REBUTTAL PRESENTATIONS.

The NRC's Subpart L regulations do not provide any specific procedures for the

filing of rebuttal presentations. Instead, the regulations generally provide that after a party has filed its initial written presentation, leave must be obtained to file any further presentations, subject to the discretion of the Presiding Officer. 10 C.F.R. § 2.1233(d). In the context of formal adjudications, the Appeal Board has held that the Presiding Officer's discretion is subject to the limited "right" to present rebuttal testimony where it is needed 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 decision to require parties to conduct cross-examination, redirect examination, and recross examination in depositions, with deposition transcripts to be filed in lieu of testimony). The requirement to base a decision on a complete and accurate record is no less vital for informal proceedings.

In order to ensure the making of a complete and factual record here, an opportunity for reply briefs and rebuttal testimony should be provided. In the context of filing contentions, the Commission has long recognized that intervenors cannot be "required to have anticipated *in the contentions themselves* the possible arguments their opponents might raise as grounds for dismissing them." *Houston Power & Light Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979) (emphasis in original) (requiring Board to give intervenors opportunity reply to arguments against admissibility of contentions). Likewise, intervenors cannot be held to anticipate every factual and legal assertion the applicant will make in response to a

Subpart L initial presentation.²

The opportunity to file reply presentations is also required in order to ensure that the burden of proof is properly allocated to HRI on health and safety issues and to HRI and the Staff on environmental issues.³ As permitted by 10 C.F.R. § 1233(a), the Presiding Officer established the order of presentations so that the Intervenors should file first, followed by HRI and the Staff, and denied the Intervenors' request to schedule time for replies.⁴ Memorandum and Order (Scheduling and Partial Grant of

² In contrast, where a party seeks to submit *surrebuttal* testimony, the Appeal Board has found it appropriate to inquire whether the party requesting surrebuttal "should have anticipated the attack upon its evidence." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 397 note 101 (1990) (affirming denial of leave to present rebuttal testimony). It should be noted that in *Seabrook*, the opportunity to present surrebuttal testimony was only denied after the part had received an opportunity to present both direct *and* rebuttal testimony. *Id.* Similarly, in *Cellular Mobile Systems of Pennsylvania v. FCC*, 782 F.2d 182, 201-02 (D.C. Cir. 1985), cited by the Appeal Board in ALAB-932, the Court of Appeals upheld an ALJ's denial of leave to file rebuttal testimony following a "myriad of opportunities the parties had to present evidence, in direct and rebuttal cases and in argumentation," and of which the complaining party "vigorously took full advantage." *Id.* at 202. Here, in contrast, ENDAUM and SRIC seek leave to rebut the legal arguments and factual evidence presented by HRI and the Staff for the first time in their presentations. ENDAUM and SRIC should not be required to anticipate what HRI's and the Staff's specific attacks might be.

³ See *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996) for a discussion of the allocation of the burden of proof.

⁴ In an order dated July 30, 1997, the Presiding Officer requested that the parties file proposed schedules for the litigation. The Intervenors proposed a schedule under which they would file presentations first, but would also have an opportunity for reply presentations. ENDAUM and SRIC's Scheduling Conference Brief at 32 (September 2, 1998); Scheduling Conference Brief of Marilyn Morris and Grace Sam at 16-19 (September 2, 1998). HRI and the NRC Staff suggested a schedule whereby Intervenors would file first, followed by HRI and then the Staff, without providing for leave to reply. HRI's Brief on Suggested Scheduling Submitted

Motion for Bifurcation) at 4 (September 22, 1998) As a result, while ENDAUM and SRIC have now had the opportunity to address the unsworn and general assertions in the license application documents and FEIS, they have not had any opportunity to address the more specific assertions, supported by legal citations and expert affidavits, which HRI and the Staff have made in response to ENDAUM's and SRIC's presentations. To rule on this record, without providing ENDAUM and SRIC with an opportunity to respond to these arguments and assertions, would effectively shift the burden of proof from HRI and the Staff to the intervenors. To allow a reply would also be consistent with NRC precedent regarding the conduct of Subpart L proceedings, in which replies have typically been a part of Subpart L hearing schedules. *See In the Matter of Advanced Medical Systems, Inc.*, LBP 98-32, 48 NRC ____, 1998 WL 916930, at 3 (1998) (scheduling reply presentations for the Staff renewal applicant, which filed its presentation before the other parties); *In the Matter of Frank J. Calabrese Jr.*, LBP 97-16, 46 NRC 66, 69 (1997) (noting that applicant had opportunity to submit reply presentation to Staff's initial presentation). In order to ensure that proponent of the license carries its burden of proof in the hearing, an opportunity should be provided for other parties to answer the legal sufficiency and

Pursuant to the Presiding Officer's July 30, 1998 Memorandum and Order at 6 (September 2, 1998); NRC Staff's Response to July 30 Order at 7 (August 31, 1998). The Presiding Officer decided to require the Intervenor to file first, without providing for a right of reply. Memorandum and Order (Scheduling and Partial Grant of Bifurcation) at 4 (September 22, 1998).

factual probity of claims made by the proponent, during the hearing, which are intended to prove the applicant's entitlement to a license.

II.. ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO FILE A REPLY PRESENTATION TO ADDRESS THE LEGAL AND FACTUAL ERRORS IN HRI'S AND THE STAFF'S INITIAL PRESENTATIONS AND TO RESPOND TO ADDITIONAL INFORMATION.

ENDAUM and SRIC seek leave to reply to a number of legal and factual claims which are unsupported, misleading, or rely on new information not previously disclosed on this record. For instance, ENDAUM and SRIC seek to explain why legal arguments made by HRI and the Staff regarding the proper interpretation of Part 20 are incorrect, inconsistent with the purpose and requirements of Part 20, and absurd in their result. As an example, HRI and the Staff contend that the relatively high radon and gamma radiation levels at Church Rock constitute "background" radiation. This argument ignores language in 10 C.F.R. § 2.1003 stating that background does not include decay products from source materials. Moreover, it is inconsistent with the Commission's statement of purpose for Part 20, which is to control the possession, etc., of licensed material by a licensee "in such a manner that the total dose to an individual (including exposures to licensed and unlicensed radioactive material and from radiation sources other than background radiation) does not exceed the standards for protection against radiation prescribed in the regulations in this part." 10 CFR § 20.1001 (b). It also yields the absurd result that the NRC could license as many nuclear facilities as it wished in a single location, allowing total emissions to exceed regulatory standards,

if only each licensee could say that the emissions from other facilities were beyond its control. The proper interpretation of Part 20 in this case also constitutes a legal issue of tremendous importance to the residents of Church Rock, and appears to be an issue of first impression, thus warranting full ventilation on this record.

ENDAUM and SRIC also seek an opportunity to respond to material factual assertions made for the first time in HRI's and the Staff's presentations. This opportunity is needed to correct the unfairness of requiring them to prepare presentations based on an incomplete hearing record.⁵ For instance, HRI and the Staff both assert, for this first time in their presentations, that the radioactive concentrations at Church Rock may have changed from levels recorded in the Draft Environmental Impact Statement, due to the placement of a temporary radon cover on mill tailings cells in 1995 (McKenney Affidavit at ¶6 at 4) and various measures taken by HRI for the United Nuclear Corp., such as removal of byproduct and source material and the sealing of mine vents and the main shaft. Eggleston Affidavit at 2-3. None of this information was contained in the hearing record when ENDAUM and SRIC prepared their initial presentation. ENDAUM and SRIC should have the opportunity to address the probity of these new factual allegations.

⁵ The Board has held 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. *Sequoyah Fuels Corporation* (Source Material License No. SUB-1010), LBP 94-39, 40 NRC 314 (1994). Likewise, it would not be fair for an Intervenor to have to complete its written presentations before information omitted by the Staff from the hearing file is presented.

ENDAUM and SRIC also seek to address the relevance and adequacy of new factual information provided by HRI about radon and gamma levels at other sites around the country. For instance, Tables 1 and 3 of the the Eggleston Affidavit present radon data from around the country and from a Texas site that are intended to show relatively high radon levels at various locations in the U.S, even where there has been no past uranium mining. The evidence is intended to undermine ENDAUM's and SRIC's argument that high radon levels at Church Rock are man-made. If allowed to reply, ENDAUM and SRIC will present rebuttal testimony demonstrating that these data cannot be compared with the Church Rock data in a meaningful way, because no information is provided about the history of most of the sites represented, about whether the numbers represent averages, or about the actual measurements that were made.

ENDAUM and SRIC also seek an opportunity to address numerous aspects of HRI's brief and affidavits which misrepresent or distort the facts about radiation hazards and the assertions in Mr. Franke's report. For instance, they seek to correct the implication in HRI's brief at 4 that there is no significant radiation risk from outdoor radon. Another example is HRI's attempt to dispose of Mr. Franke's concern regarding high gamma readings downwind of the Church Rock site, by arguing that "gamma radiation is not transported through wind and therefore, Intervenors' speculative assertions are baseless." HRI Brief at 8. As Mr. Franke would demonstrate in his rebuttal testimony, he has not testified that gamma radiation is transported by wind.

Rather, his concern is that soil containing gamma particles may be transported by wind.

This is only one of numerous distortions of Mr. Franke's testimony.

ENDAUM and SRIC also seek leave to respond to arguments by HRI and the Staff regarding the adequacy of the source term calculation for the Crownpoint Project, and the appropriateness of performing uncertainty analysis. They seek to submit rebuttal testimony pointing out the numerous analytical and factual defects in HRI's defense of its failure to conduct an uncertainty analysis, as well as the errors in HRI's characterization of Mr. Franke's report. In addition, ENDAUM and SRIC seek to respond to HRI's and the Staff's criticisms of Mr. Franke's analysis regarding potential releases from the Crownpoint Project. They should be given the opportunity to respond to the numerous specific and highly technical arguments by HRI and the Staff regarding the reasonableness of Mr. Franke's assumptions and methods, and their erroneous characterization of the manner in which Mr. Franke performed his analysis.⁶ ENDAUM and SRIC seek an opportunity to make a complete record on these complex and novel technical issues by presenting Mr. Franke's rebuttal testimony.

CONCLUSION

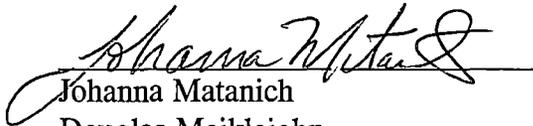
The above are just a few examples of the numerous instances in which HRI's and

⁶ For instance, Mr. McKenney mistakenly calculates the source term by dividing the air concentration by the lowest dispersion coefficient (i.e., the maximum dilution), when the correct method is to use the highest dispersion coefficient (i.e., the minimum dilution) for the calculation.

the Staff's presentations contain legal errors, new information, inadequately supported factual assertions, misrepresentations of the facts, or distortions of Mr. Franke's report. In a matter this complex, it is not possible to list every single error or piece of information to which ENDAUM and SRIC should be allowed to reply. To stop the debate at this point, without allowing ENDAUM and SRIC to respond to HRI's specific legal arguments and citations and their specific attacks on Mr. Franke's factual assertions and calculations, would result in an incomplete record that is insufficient to allow a meaningful decision on the adequacy of HRI's and the Staff's evidence, that is unfair, and that effectively places the burden of proof on the Intervenors.

Accordingly, for the foregoing reasons, ENDAUM's and SRIC's Motion for Leave to Reply should be granted. In consideration of the novelty of the legal issues, the complexity of the technical issues involved, and the need to prepare expert rebuttal testimony along with a brief, ENDAUM and SRIC request that they be given a period of twenty days, from the Presiding Officer's order granting this motion, to submit their reply presentation.

Respectfully submitted,


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

OFFICE OF SECRETARY
RULEMAKINGS 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)
_____)

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 SUBMIT REPLY BRIEF
AND REBUTTAL TESTIMONY IN RESPONSE TO HRI'S AND STAFF'S
INITIAL PRESENTATIONS REGARDING AIR EMISSIONS**

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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