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April 2, 1999

'99 APR -5 P1:22

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY  
RUEF...  
ADJUTANT GENERAL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Agent

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In the Matter of: )  
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 )  
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 ("HRI's") RESPONSE TO THE ENDAUM/SRIC AND  
GRACE SAM/MARILYN MORRIS MOTIONS TO STRIKE  
HRI'S RESPONSES TO INTERVENORS' NEPA AND ENVIRONMENTAL JUSTICE  
ISSUES BRIEFS DATED MARCH 25,1999 AND MARCH 29, 1999**

Hydro Resources, Inc. ("HRI") respectfully submits the following response to the motions to strike filed by ENDAUM & SRIC (on March 29) and by Grace Sam and Marilyn Morris (on March 30, 1999) (jointly, "Intervenors' Motions to Strike"). Intervenors' Motions to Strike ask the Presiding Officer to strike HRI's responses ("HRI's responses") to the final presentations of ENDAUM & SRIC ("ENDAUM & SRIC brief") and Grace Sam and Marilyn Morris ("Sam/Morris brief") regarding NEPA/Cost-Benefit/Cumulative Impacts and Environmental Justice issues. Intervenors' Motions to Strike ask that the Presiding Officer strike HRI's responses for having been filed out of time. HRI respectfully requests that the Presiding Officer deny Intervenors' Motions to Strike.

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OF THE COMMISSION

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## **FACTS**

Both the ENDAUM/SRIC brief and the Sam/Morris brief were received by counsel for HRI on Monday, February 22, 1999. Pursuant to the Presiding Officer's September 22, 1998 Order setting the schedule for this proceeding, HRI is required to file all responses to Intervenors' briefs within 30 days of HRI's receipt thereof. Thus, HRI's responses should have been filed by March 24, 1999. HRI's response to the ENDAUM/SRIC brief was filed on March 25, 1999, 31 days after receipt. HRI's response to the Sam/Morris brief was filed on March 29, 1999, 35 days after receipt.

## **ARGUMENT**

### *Discretion of the Presiding Officer in Licensing Board Proceedings*

The Presiding Officer is granted wide latitude to manage Licensing Board proceedings to ensure a fair hearing. See 10 C.F.R. § 2.718. The Presiding Officer manages all aspects of the proceeding including, but not limited to, approval of intervenors, presentation of evidence, and ruling on the motions of parties. See 10 C.F.R. §§ 2.718, 2.714. As part of these functions, the Presiding Officer can authorize parties to file out of time, and accept responses and briefs that are not timely filed.

### *HRI's Response to the ENDAUM/SRIC Brief*

Counsel for HRI received the ENDAUM/SRIC briefs on NEPA and Environmental Justice issues on February 22, 1999. Some two weeks later, when calendaring response dates for

several pending motions, counsel for HRI computed the due date for HRI's response to be March 25, 1999. The mistake in computation was based on the mistaken belief that February 22 was the President's Day holiday which would have precluded receipt of the briefs via overnight delivery on that day (HRI's counsel does not have the delivery receipts and based this mistaken judgment on the certificate of service reflecting that the ENDAUM/SRIC briefs had been sent on February 19 and concluded that, because of the intervening "holiday," the briefs could not have been received until February 23, making the response date March 25). Unfortunately, although February 22 is Washington's birthday, the previous Monday, February 15, 1999, was the President's Day holiday (when counsel's office was closed and the briefs could not have been received).

The mistaken belief that February 22, 1999 was a holiday caused counsel for HRI to believe that the ENDAUM/SRIC briefs were not actually received until February 23, 1999, and thus, that HRI's responses were due thirty days thereafter, on March 25, 1999.

*The Response to Grace Sam and Marilyn Morris Dated March 29, 1999*

As with the ENDAUM/SRIC brief, it appears that counsel for HRI received the final written presentation for Grace Sam and Marilyn Morris on February 22, 1999. Counsel for HRI had intended HRI's response filed March 25 to respond to Intervenors generally. However, upon post-filing reflection, HRI's counsel realized that a summary additional response directed specifically to the Sam/Morris brief was appropriate.

Simply stated, HRI's briefs which Intervenors ask to have stricken were late filed as a consequence of human errors occurring in the midst of responding to several motions and presentations within the same time period. Although HRI's responses were filed out of time, the

Presiding Officer has the authority to include them in the record. See 10 C.F.R. § 2.718.

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 these filings causes no material delay in these proceedings; Intervenors do not claim otherwise.

Perhaps more importantly, allowing these filings results in no prejudice to any party and, indeed, neither ENDAUM/SRIC nor Sam/Morris even suggest that any prejudice results from these filings. Conversely, striking these pleadings because of harmless error results in significant prejudice to HRI, the party charged with the burden of defending its license.

Although there is no clear standard for when a Presiding Officer must allow late responses by parties to be included in the record, 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, the 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. § 23714(a)(1).

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. No Intervenor has suggested that HRI's filings were egregiously late or cause any material delay in these proceedings. Likewise, no Intervenor has shown that these filings result in any prejudice. All parties have received HRI's responses and the proceeding is poised to move forward on the basis of a complete record.

HRI agrees with Intervenors that timely filing of all briefs and responses is critical to the fair and expeditious completion of this proceeding. HRI also agrees that where there is a foreseeable need to seek an extension, a motion requesting such extension should be filed with the Presiding Officer and all interested parties.<sup>1</sup> HRI's filings were late because of a one-day error in calendaring and an oversight in not specifically addressing the arguments set forth in HRI's response filed on March 25 to all of the Intervenors. HRI previously has submitted every pleading in a timely manner and will continue to do so as this proceeding moves forward.

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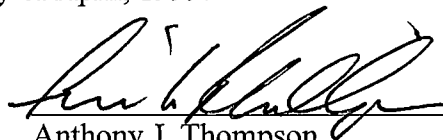
<sup>1</sup> With regard to Intervenors' attempts to reach Mr. Phillips and/or Mr. Lashway regarding these issues, Mr. Phillips was in and out of the office on March 25, in only very briefly on March 26, and out of the office entirely on March 29 and 30. Mr. Lashway was out of the office for part of March 26 and 29, and all of the remainder of this week. HRI's

Footnote continued on next page

## CONCLUSION

Counsel for HRI made two administrative mistakes causing its responses to Intervenor's final presentations to be filed one and five days late. No harm has come to these proceedings or any party by virtue of these mistakes. Consequently, HRI respectfully requests that the Presiding Officer deny Intervenor's Motions to Strike.

Respectfully submitted this 2nd day of April, 1999.



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ON BEHALF OF HYDRO RESOURCES, INC.  
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Footnote continued from previous page

counsel did not make a point of discussing this issue with Intervenor's earlier because, as explained above, counsel did not recognize that timeliness was an issue.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'99 APR -5 P1:23

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Agent

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

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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 copies of the foregoing documents, HYDRO RESOURCES, INC.'S ("HRI's") RESPONSE THE ENDAUM/SRIC AND SAM/MORRIS MOTIONS TO STRIKE HRI'S RESPONSES TO INTERVENORS' PRESENTATIONS ON NEPA AND ENVIRONMENTAL JUSTICE ISSUES in the above-captioned proceeding were sent to the following by electronic mail (where possible) and overnight mail on this 2nd day of April, 1999.**

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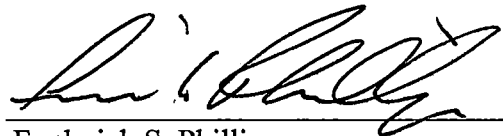
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