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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

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OFFICE OF SECRETARY  
RULES 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 PETITION FOR INTERLOCUTORY REVIEW OF  
THE PRESIDING OFFICER'S ORDERS GRANTING THE STAFF AN  
ADDITIONAL OPPORTUNITY TO ADDRESS THE FEIS'S TREATMENT OF  
RADIATION IMPACTS, AND REQUEST FOR STAY OF THOSE ORDERS**

***EXPEDITED REVIEW REQUESTED***

**INTRODUCTION**

For the second time in three weeks, the Presiding Officer has demonstrated that this is not an impartial proceeding. The Presiding Officer issued Orders on March 18 and 23 giving the Nuclear Regulatory Commission ("NRC") Staff a second chance to address the adequacy of the Final Environmental Impact Statement's ("FEIS") treatment of combined impacts of radiation from the Crownpoint Uranium Project ("CUP") and elevated radiation levels in the CUP area ("the combined radiation impacts issue").<sup>1</sup> March 18 Order, 11. This is an issue that, in the Presiding Officer's own words, "the Staff *inexplicably*" did not address. March 23 Order, 2, (emphasis added).

<sup>1</sup> The Order issued on March 18, 1999, LBP-99-15, is titled Memorandum and Order (Questions Concerning Radioactive Air Emissions) ("March 18 Order"); the Order issued on March 23, 1999 is titled Memorandum and Order (SRIC-ENDAUM Motion for Reconsideration) ("March 23 Order").

U.S. NUCLEAR REGULATORY COMMISSION  
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This action comes soon after the Presiding Officer gave Hydro Resources, Inc. ("HRI") and the Staff each a second opportunity to address HRI's technical qualifications.<sup>2</sup> ENDAUM and SRIC sought interlocutory review of the March 3 and March 9 Orders to that effect, but the Commission ruled that ENDAUM and SRIC had not demonstrated that they were threatened with immediate and irreparable harm that could not be addressed in a later appeal, or that the rulings affected the proceeding in a pervasive or unusual manner. CLI-99-07 (March 23, 1999), 2.

It is hard to imagine any action that could more pervasively and unusually affect this proceeding than this new confirmation that the case is not being handled in an impartial manner. Moreover, because six of ENDAUM's and SRIC's areas of concern have yet to be decided by the Presiding Officer, this is a critical issue on which action must be taken immediately.

On that basis, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") petition the Commission for interlocutory review of the March 18 and 23 Orders. The Orders have altered the basic structure of this proceeding pervasively and unusually by demonstrating that the Presiding Officer is not conducting this case impartially but favors the Staff and HRI. ENDAUM and SRIC request that the Commission stay the Orders during its review and reverse them.

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<sup>2</sup> March 3, 1999 Memorandum and Order (Questions Concerning the Technical Qualifications Issue) ("March 3 Order") directing the parties to provide information on HRI's qualifications; March 9, 1999 Memorandum and Order (Motion for Reconsideration of Technical Qualification Decision) ("March 9 Order") denying ENDAUM's and SRIC's motion for reconsideration of the March 3 Order.

## **ARGUMENT**

### **I. SUMMARY OF DECISION AND ARGUMENTS BELOW.**

ENDAUM's and SRIC's concerns on the FEIS's analysis of the combined radiation impacts issue were admitted in the proceeding addressing HRI's application for a source and byproduct materials license. LBP-98-9, 47 NRC 261, 280-282 (1998). Pursuant to the schedule set by the Presiding Officer, ENDAUM and SRIC filed a written presentation on this issue, which included arguments directly challenging the adequacy of the FEIS.<sup>3</sup> The Staff filed its response on February 18, 1999; the Staff's Response did not address ENDAUM's and SRIC's arguments as to the inadequacy of the FEIS.<sup>4</sup> The Staff did not ask for more time to prepare its response and it has not requested an opportunity to supplement or amend its response.

The Presiding Officer issued the March 18 Order without a request from any party. The Order cites ENDAUM's and SRIC's arguments on the inadequacy of the FEIS's treatment of the combined radiation impacts issue, and states that the Staff did not address the issue. March 18 Order, 2-5. ENDAUM and SRIC moved for reconsideration of the March 18 Order; the March 23 Order denied their motion.

### **II. THE STANDARD FOR REVIEW.**

Section 2.786(g) of 10 C.F.R. provides for interlocutory review if the aggrieved party is threatened with immediate and serious irreparable harm, or if the

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<sup>3</sup> See ENDAUM's and SRIC's January 11, 1999, Brief Regarding Radioactive Air Emissions at the Crownpoint Project ("ENDAUM's and SRIC's Brief") at 19-23.

<sup>4</sup> NRC Staff's Response to Intervenors' Presentations on Air Emissions Issues, February 18, 1999 ("Staff's Response").

order affects the basic structure of the proceeding in a pervasive or unusual manner.<sup>5</sup>

ENDAUM and SRIC seek review pursuant to the second standard; the March 18 and 23 Orders affect this proceeding pervasively and unusually by confirming that it is not impartial. The Orders unfairly favor the Staff and HRI over ENDAUM and SRIC.

The Orders also violate the schedule for the proceeding and the Subpart L rules.

**III. THE MARCH 18 AND MARCH 23 ORDERS Pervasively Affect the Proceeding by Confirming that it is Not Impartial.**

**A. The Orders Demonstrate that this Proceeding is Not Impartial.**

The March 18 Order discusses and analyzes the parties' briefs, and addresses the FEIS's treatment of the combined radiation impacts issue. The Order points out that HRI disputes ENDAUM's and SRIC's arguments as to that discussion, and that the Staff did not respond to those arguments. *Id.* at 2-5. As the Presiding Officer put it: "[T]he NEPA issue has been squarely raised and is already contested, even though the Staff inexplicably abstained from the fray." March 23 Order at 2.

On that basis, the Order directs the parties to answer six questions, including:

6. Has the FEIS adequately addressed the combined impacts of radiation from the project and from elevated levels of radiation in the area of the project?

*Id.* at 11. The Order also states that HRI,<sup>6</sup> ENDAUM, and SRIC have addressed this question and need not answer it again although they can file responses on it. *Id.*

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<sup>5</sup> In the Matter of Oncology Services Corporation, CLI 93-13, 37 N.R.C. 419, 420-421 (1993).

<sup>6</sup> ENDAUM and SRIC do not concede the validity of any of the arguments presented by HRI on this issue.

The March 18 Order favors the Staff inequitably. The Order finds that the Staff has not addressed the FEIS's treatment of the combined radiation impacts issue, but gives the Staff a second chance to address the issue and invites it to do so.

Moreover, this is the second occasion on which the Presiding Officer has provided such favorable treatment to the Staff and HRI.<sup>7</sup> On March 3, the Presiding Officer issued an Order giving HRI and the Staff a second opportunity to address whether HRI is qualified by reason of training and experience. March 3 Order, 3. All of the parties had filed their briefs on that issue, and no party had requested an extension of time or another chance to address the issue. Despite that, just as he has given the Staff a second chance here, the Presiding Officer decided *sua sponte* to give HRI and the Staff a second opportunity to address the qualifications issue. Although the Commission found in CLI-99-07 (page 2) that the March 3 Order did not affect this proceeding in a pervasive or unusual manner, the March 18 Order demonstrates that there is a pattern of bias by the Presiding Officer.

The Presiding Officer's earlier favorable treatment of the Staff and HRI was especially egregious because it involved an issue on which the Presiding Officer found that ENDAUM and SRIC had presented a valid argument to which HRI and the Staff had not responded. *Id.* at 2-3. Similarly, the March 18 Order is most inappropriate because ENDAUM and SRIC addressed the FEIS's analysis of the combined radiation impacts issue, and the Staff simply did not respond even though the Staff normally

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<sup>7</sup> The March 18 and 23 Orders also favor HRI because of its interest in upholding the FEIS under the National Environmental Policy Act ("NEPA").

bears the burden of proof to demonstrate that the FEIS is adequate.<sup>8</sup> ENDAUM and SRIC met their burden of going forward and the Staff did not meet its burden of showing that the FEIS is adequate.

This is not the treatment that has been afforded to ENDAUM and SRIC. For example, the Presiding Officer found that ENDAUM and SRIC did not submit adequate information to support their claims concerning the CUP's impacts on cultural resources. The Presiding Officer did not, however, give ENDAUM and SRIC a second chance to present their case; rather he ruled against them.<sup>9</sup> In LBP-99-10, the Presiding Officer rejected ENDAUM's and SRIC's arguments that the performance based license grants HRI authority to modify its operations,<sup>10</sup> but the Presiding Officer did not request that ENDAUM and SRIC answer questions about what changes HRI is permitted to make under the performance based license.

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<sup>8</sup> See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI 93-19, 17 NRC 1041, 1049 (1983); Louisiana Energy Services (Claiborne Enrichment Center). LBP-96-25, 44 NRC 331, 338 (1996).

<sup>9</sup> LBP-99-9 (the February 19, 1999 Partial Initial Decision on Issues Related to the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) and Cultural Resources) found that ENDAUM and SRIC had "not demonstrated that there is a defect in the NRC's proof of compliance with 36 C.F.R. §800.4(d)," and denied ENDAUM and SRIC relief. LBP-99-9 at 9-12.

<sup>10</sup> February 19, 1999 Partial Initial Decision (Performance-Based Licensing). The Presiding Officer determined that "[t]he number and breadth of express requirements in HRI's license restrict application of PBL [Performance Based Licensing] to a very few, discrete, operational changes. LBP-99-10 at 6-7.

Instead, he rejected their claims.<sup>11</sup> LBP-99-10 at 12.

The Commission too has provided different treatment to HRI and the Staff than it has provided to ENDAUM and SRIC. When the Presiding Officer entered an order on January 21, 1999 extending to March 5, 1999 the deadline for ENDAUM and SRIC to file their final presentations, the Commission reviewed the order *sua sponte* and reversed it. The Commission did so on the grounds that the goal of resolving this matter expeditiously was not advanced by extending the time for filing those briefs beyond what the parties had requested. CLI-99-1 at 3. By contrast, when the Presiding Officer went beyond granting an extension of time not requested by any party by telling the Staff and HRI to present information concerning HRI's qualifications and giving them time in which to do so (March 3 and March 9 Orders), the Commission denied ENDAUM's and SRIC's petition for review. CLI-99-07 at 2.

The Presiding Officer has "the duty to conduct a fair and impartial hearing according to law" (10 C.F.R. §2.718); he therefore must accord the same treatment to HRI and the Staff as he does to ENDAUM and SRIC. If the Presiding Officer makes a finding against HRI and the Staff, he must rule against them just as he has ruled against ENDAUM and SRIC. The Presiding Officer has violated his principal duty

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<sup>11</sup> The Presiding Officer also ruled on other factual issues raised by ENDAUM and SRIC. For example, the Presiding Officer rejected their claims concerning the record on which the license is based and their arguments concerning the license's delegation of authority to HRI. *Id.* at 5-8. On none of these or any other issues did the Presiding Officer pose questions to the parties that would have given (continued) ENDAUM and SRIC a second opportunity to present their positions.

ENDAUM and SRIC do not concede the accuracy of any of the Presiding Officer's findings on these and other issues on which he has ruled against ENDAUM and SRIC in the partial initial decisions that have been issued.

by favoring the Staff. Although he found on March 18 that it had not provided necessary information, he chose not to rule against the Staff, but pointed out to the Staff that it needed to provide information. He also invited the Staff to submit information, and gave it an opportunity to do so.

**B. The Confirmation that the Proceeding is Not Impartial Affects the Proceeding Pervasively and Unusually.**

The pattern of bias by the Presiding Officer is clear. It is quite apparent that whenever the Presiding Officer decides that ENDAUM and SRIC have not provided the information that he finds they need for a ruling in their favor, he will rule against them. On the other hand, whenever the Presiding Officer finds that HRI or the Staff has not provided information that he needs in order to rule for them, he will request that information and give them time to present it. Contrary to the Presiding Officer's rulings, it is not his function to help HRI and the Staff present their cases. This is a legal proceeding with serious consequences for real parties, not an exercise in which HRI and the Staff are to be given extra chances to get their presentations right.

The Presiding Officer's demonstrated biased handling of this proceeding affects it in the most pervasive and unusual manner possible. The Presiding Officer's most fundamental duty is to conduct an impartial proceeding. 10 C.F.R. §2.718. He has violated that duty, and it is the Commission's obligation to reverse him.

**IV. THE MARCH 18 AND 23 ORDERS VIOLATE THE COMMISSION'S DIRECTION FOR THE CONDUCT OF THIS PROCEEDING.**

The Commission has stated that it expects this proceeding to be conducted expeditiously, and that "it does not advance that goal to stretch out briefing deadlines

well beyond what even the hard-pressed parties themselves need or request." CLI-99-1; January 29, 1999. All of the parties have had ample opportunity to address the FEIS's treatment of combined radiation impacts. As is reflected in the March 18 and 23 Orders, ENDAUM and SRIC and HRI addressed the issue and the Staff chose not to do so. The March 18 and 23 Orders provide the Staff with an unrequested opportunity to amend its written presentation for the purpose of providing information that could have and should have been presented in that written presentation.<sup>12</sup> This is contrary to the Commission's direction and those Orders should be vacated.

**V. THE ORDERS VIOLATE THE SUBPART L RULES.**

The Presiding Officer may ask questions of parties (10 C.F.R. §2.1233), but it is not appropriate to do that if the parties have already had opportunities to address and have addressed the issues. Such questions should be for the purpose of following up on and clarifying the information that parties provide in their written presentations, not to ask for a new or amended presentation.<sup>13</sup> A party that chooses to address an issue in a specific manner or not to address the issue has made a choice and should

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<sup>12</sup> ENDAUM and SRIC do not waive their argument that there is no basis for an argument that the FEIS adequately addressed the combined radiation impact issue.

<sup>13</sup> See Rockwell International Corporation (Rocketdyne Division), ALAB-925, 30 NRC 709, 717-718 (1989). There, the Appeal Board instructed the Presiding Officer "to comply with both the letter and intent of the Subpart L rules", and indicated that pursuant to 10 C.F.R. §2.1251, the Presiding Officer is to examine and decide only issues properly put into controversy by the parties. 30 NRC at 723. See also NRC Policy on Conduct of Adjudicatory Proceedings; Policy Statement (August 5, 1998), 63 FR 41872, 41874.

live by it.<sup>14</sup> The purpose of 10 C.F.R. §2.1233 requests for information should be to insure a complete record, not to give parties additional opportunities to address issues.<sup>15</sup> This is particularly true when the parties involved are represented by counsel, especially experienced counsel, as counsel for the Staff appear to be.<sup>16</sup>

## VI. REQUEST FOR STAY OF PROCEEDING.

Because the March 18 Order calls for additional information, ENDAUM and SRIC request the Commission to stay the proceeding until the Commission rules.

## CONCLUSION

The Commission should reverse the March 18 and 23 Orders. In addition, the Commission should direct the Presiding Officer to disregard any further submissions by the Staff or other parties on this issue, and to rule on the adequacy of the FEIS's treatment of the combined radiation impacts issue on the basis of the information previously submitted by the parties.

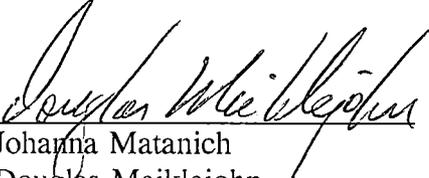
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<sup>14</sup> See Curators of the University of Missouri (Trump-S Project), LBP-91-14 (ASLBP No. 90-613-02-MLA), 33 NRC 265, 266 (1991).

<sup>15</sup> Cf. Curators of the University of Missouri (Trump-S Project), CLI-95-1, 41 NRC 71, 116-117 (1995).

<sup>16</sup> The Commission does not hold *pro se* parties to the high standards it expects attorneys to achieve (see Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-1247 [1984]), but they are required to present their cases. Attorneys, on the other hand, particularly experienced attorneys, are held to high standards. See Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576-577 (1975).

Dated: March 26, 1999.

  
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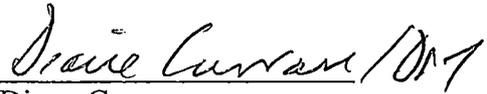
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OFFICE OF SECRETARY  
FULL-TIME STAFF  
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Docket No. 40-8968-ML  
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**CERTIFICATE OF SERVICE**

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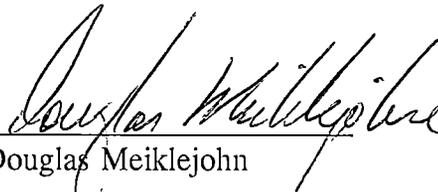
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Dated at Santa Fe, New Mexico  
March 12, 1999.

  
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