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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS 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

**HYDRO RESOURCES, INC.'S OPPOSITION
TO ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO REPLY TO HRI'S AND NRC
STAFF'S OPPOSITIONS TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF
PBL-99-10 (PERFORMANCE-BASED LICENSING)**

As the proceedings attendant to the challenge of Source Materials License SUA-1508, issued to Hydro Resources, Inc. ("HRI") on January 5, 1998, stagger ever-onward, it appears that to death and taxes another of life's certainties may be added: that petitioners Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (jointly, "Intervenors") will unabashedly avail themselves of every opportunity to file frivolous papers with the Presiding Officer and the Commission. Intervenors' filings, which are both remarkable for their sheer volume and their utter lack of merit, generally attempt to create issues where none reasonably exist and to obfuscate the legal and factual issues legitimately being aired in this proceeding. Intervenors' "throw enough of it against the wall and hope that something sticks" style of litigation thinly veils their primary objective: to litigate HRI to death. Intervenors' tactics are directly at odds with the goals of the informal adjudicatory process embodied in subpart L, which was intended specifically to reduce the cost and delay often

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attendant to license challenges. See Curators of University of Missouri, 41 NRC 71, 116-117.

The Commission should not countenance this abuse of the subpart L informal hearing process.

BACKGROUND

The Presiding Officer rendered his partial initial decision addressing performance-based licensing ("PBL") issues on February 19, 1999 (LBP-99-10 or the "decision"). As noted in the Presiding Officer's decision, "[T]here are many issues raised by the Intervenors, but on careful analysis the issues appear to be either irrelevant or incorrect." LBP-99-10 at 1. The Presiding Officer goes on to state

Issues covered by this decision involve allegations that Performance Based Licensing (PBL) violates the Atomic Energy Act (AEA), the NRC regulations and the Administrative Procedures Act (APA). Intervenors allege that the AEA does not authorize PBL; the NRC doesn't authorize PBL by policy or regulation; that the AEA requires license amendments to be approved by the NRC and that notice and hearing requirements of the AEA are violated. (citations omitted). This decision also considers Intervenors' claim that the National Environmental Protection Act (NEPA) is violated. (citation omitted). Finally, the Intervenors contend that, in violation of the APA, the PBL license condition issued by the Staff is arbitrary and capricious; consists of many documents filed over a decade; and therefore creates substantial doubt as to the actual license terms. (citation omitted).

LBP-99-10 at 1-2.

ENDAUM and SRIC filed their petition seeking review by the Commission on March 11, 1999. NRC Staff filed its response opposing the petition on March 22, 1999 and HRI filed its response opposing the petition on March 26, 1999. Intervenors now request permission to reply to Staff's and HRI's oppositions to the petition for review ("Intervenors' Motion"), alleging that Staff and HRI both raise in their oppositions arguments not raised previously. Intervenors' Motion does not even attempt to show good cause for invoking the Commission's discretion to permit a reply. Examination of the reasons proffered by Intervenors in support of their request to

reply reveal Intervenors' request to be baseless; simply the latest in Intervenors' seemingly unceasing series of filings designed to further protract this hearing and to impose greater financial hardship on HRI. For these reasons, and for the reasons set forth below, HRI respectfully requests that the Commission deny Intervenors' Motion for Leave to Reply.

ARGUMENT

Intervenors' argument in support of their Motion is, in a word, absurd. First, Intervenors contend that they need to reply to HRI's and the Staff's characterization of some issues raised below by Intervenors. Intervenors' Motion at 2. Specifically, Intervenors complain that HRI and NRC Staff were wrong to assert that several issues raised by Intervenors were not material because they were meritless. Id. Intervenors contend that this characterization warrants a reply because, Intervenors contend, "the test for materiality is (not) whether an issue has merit. . . An argument is material if it would be considered by a reasonable individual in reaching a decision." Id. (citations omitted). Do Intervenors really mean to suggest that a reasonable person should consider their arguments, no matter how lacking in merit, in reaching decisions in this matter?

Intervenors follow up this astonishing logic by enumerating the "material" "issues not considered by the Presiding Officer in LBP-99-10":

That performance based licensing violates the Atomic Energy Act ("AEA") and the Administrative Procedures Act ("APA") because those statutes do not specifically authorize PBL;

That HRI's license violates the APA because the license is arbitrary and capricious; and

That the PBL license condition violates the National Environmental Policy Act ("NEPA").

Intervenors' Motion at 3.¹ As quoted hereinabove, the Presiding Officer's ten page partial initial decision LBP-99-10 specifically states that "[I]ssues covered by this decision involve allegations that" PBL violates the AEA, NRC regulations, and the APA because PBL is not specifically authorized by statute or regulation, that PBL violates the AEA by not requiring license amendments subject to notice and hearing and NRC approval, that PBL violates NEPA, and that the license is confusing and arbitrary and capricious. LBP-99-10 at 1-2. Indeed, LBP-99-10 addresses those issues; whether in a manner warranting Commission review can be determined without additional input from Intervenors.

CONCLUSION

Intervenors' Motion oversteps the line of zealous advocacy and crosses into the province of the frivolous and abusive. The Presiding Officer's partial initial decision PBL-99-10 addresses the issues raised by Intervenors. Dissatisfied with the Presiding Officer's determination of the issues they had raised, Intervenors, as is their right, petitioned the Commission for review. HRI and NRC Staff, believing Intervenors' Petition to be without merit, have opposed said Petition. Intervenors' Petition for Review fails to establish a substantial question of fact, law, or policy and should be denied.² Intervenors' requested reply to HRI's and NRC Staff's responses to Intervenors' Petition adds nothing to this process but additional delay

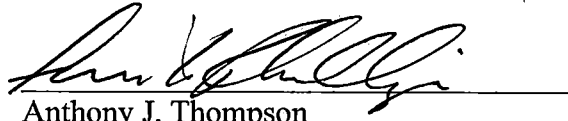
¹ Intervenors also contend that certain assertions of the Staff were inaccurate and warrant reply. Intervenors' Motion at 3. HRI defers to the Staff's response to these contentions.

² Notably, the NRC has in recent years consistently voiced support for performance-based approaches to regulating the nuclear industry. See, e.g., Elements of an Approach to Performance-Based Regulatory Oversight," NUREG/CR-5392 (January 1999); see, also, HRI's Brief in Opposition to Intervenors' Briefs on the Issue of Performance-Based Licensing, Docket No. 40-8968-ML (docketed January 19, 1999), fn. 23.

and expense. HRI respectfully requests that the Commission deny Intervenors' Motion and asks that Intervenors' repeated, flagrant abuse of this informal hearing process no longer be tolerated.

For all of the foregoing reasons, licensee, HRI, respectfully requests that Intervenors' Motion for Leave to Reply be DENIED.

Respectfully submitted this 16th day of April, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, HYDRO RESOURCES, INC.'S ("HRI's") OPPOSITION TO INTERVENORS' MOTION FOR LEAVE TO REPLY (LBP-99-10), in the above-captioned proceeding has been served on the following by electronic mail (denoted by an asterisk) and first class mail on this 16th day of April, 1999.

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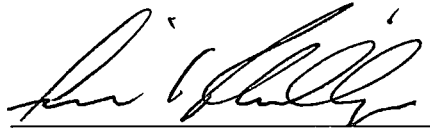
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