

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

May 20, 2011

MEMORANDUM AND ORDER
(Granting Motion for Protective Order)

The Department of Energy (DOE) moves for a protective order quashing deposition notices for Kevin Coppersmith and Michael Gross served by the State of Nevada.¹ Since that motion, the State of Nevada has noticed four additional depositions with the intent to schedule seven more “within the next few weeks . . . unless deposition discovery is suspended.”² On May 16, 2011, DOE moved to supplement its motion to cover the additional depositions.³

¹ U.S. Department of Energy’s Motion for Protective Order (May 5, 2011) at 1.

² State of Nevada Answer to DOE Motion for Protective Order (May 16, 2011) at 2 [hereinafter Nevada Answer]; see also State of Nevada’s Notice Duces Tecum of the Intention to Take the Oral Deposition of John A. McClure (May 6, 2011); State of Nevada’s Notice of Duces Tecum of the Intention to Take the Oral Deposition of Michael Anderson (May 11, 2011); State of Nevada’s Notice Duces Tecum of the Intention to Take the Oral Deposition of Edward Thomas (May 12, 2011); State of Nevada’s Notice Duces Tecum of the Intention to Take the Oral Deposition of Gerald Gordon (May 13, 2011).

³ U.S. Department of Energy’s Motion to Supplement its Motion for Protective Order (May 16, 2011) at 2.

Nye County, Nevada opposes DOE's motion.⁴ Clark County, Nevada and the State of Nevada itself do not oppose the protective order motion, provided that, if and when active discovery resumes, their opportunity to take discovery is not unreasonably limited.⁵ No other party opposes DOE's protective order motion.

As the Board has recognized, continuation of the Yucca Mountain proceeding remains subject to congressional funding and other uncertainties.⁶ When we denied DOE's previous motion to suspend this proceeding (primarily because no discovery was then threatened or underway), we did so without prejudice to the right of DOE or of any other party to seek a protective order if burdensome discovery were, in fact, initiated.⁷ We acknowledged that, in the uncertain environment surrounding this proceeding, "[p]rudence and common sense may counsel careful allocation of resources."⁸

Although two depositions might ordinarily not appear burdensome, the two in question presage the thirteen depositions that the State of Nevada noticed, or intends to notice, based upon an apparent misunderstanding of the Board's February 25, 2011 order.⁹ As explained in that order, the schedule contemplated by Case Management Order #2 has been derailed "for reasons beyond the control of the Board or of most of the parties."¹⁰ Currently, first phase discovery is keyed to the NRC Staff's issuance of Volume 3 of its Safety Evaluation Report, and

⁴ Nye County, Nevada's Answer to Department of Energy Motion for Protective Order (May 13, 2011) at 1.

⁵ Clark County, Nevada's Answer to the Department of Energy's Motion for Protective Order (May 13, 2011) at 1; Nevada Answer at 1.

⁶ See CAB Order (Denying Motion to Renew Temporary Suspension of the Proceeding (Feb. 25, 2011) at 2 (unpublished) [hereinafter Feb. 25, 2011 Order].

⁷ Id. at 3.

⁸ Id.

⁹ See Nevada Answer at 4.

¹⁰ Feb. 25, 2011 Order at 2.

the Staff has announced that the schedule for that volume is “indeterminate.”¹¹ In this context, the Board said that—when and if circumstances change—we intend to move this proceeding forward “as expeditiously as circumstances permit.”¹² In so stating, however, we did not mean that we intend to move forward without regard to the rights of the parties or a reasonable opportunity for further discovery.

In light of the uncertain course of this unique proceeding, the apparent desires of the vast majority of the parties (including the State of Nevada that “does not object to suspending deposition[s]”¹³), and our responsibility to control discovery to avoid undue and potentially unnecessary expense,¹⁴ DOE’s motion to quash the depositions of Kevin Coppersmith and Michael Gross is granted.

The Board expects that, having clarified the intent of our February 25, 2011 order, the State of Nevada will voluntarily withdraw the additional deposition notices covered by DOE’s motion to supplement. Thus, DOE’s motion to supplement is denied. The parties are admonished that, until developments warrant the need to establish a new discovery schedule, the Board will look with disfavor upon the noticing of additional depositions—absent a compelling reason, such as the potential unavailability of a witness at a later date. In the unlikely event it should become necessary, the Board, on its own motion, will take all

¹¹ Id. at 3.

¹² Id.

¹³ Nevada Answer at 1.

¹⁴ See 10 C.F.R. § 2.1018(c)(1).

appropriate steps to ensure all parties' rights are protected.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 20, 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **MEMORANDUM AND ORDER (Granting Motion for Protective Order)**, dated May 20, 2011, have been served upon the following persons by Electronic Information Exchange.

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