

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-892-HLW-CAB04 Thomas S. Moore, Chairman Paul S. Ryerson Richard E. Wardwell
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In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	May 16, 2011

STATE OF NEVADA ANSWER TO DOE MOTION FOR PROTECTIVE ORDER

On May 5, 2011, the U.S. Department of Energy (DOE) moved for a protective order quashing two deposition notices served by the State of Nevada (Nevada). DOE also suggested that the Licensing Board issue an order indicating that it will not require the parties to accede to any additional deposition requests at least through the end of Fiscal Year 2011 (FY 2011) and that a modified schedule for completion of discovery should be developed so that Phase 1 discovery would not close until at least ten months after discovery re-activation.

For the reasons set forth below, Nevada does not object to suspending deposition discovery until the end of FY 2011 as requested by DOE provided that, if the suspension is lifted, Nevada (and the other parties) will then be able to exercise their full discovery rights.

Factual Background

Shortly after the Licensing Board denied DOE's motion to suspend the proceeding, Nevada began the process of reviewing DOE's party witness list and the admitted Nevada Phase

I contentions to determine how the deposition discovery process might best be re-started. At the end of March, Nevada counsel contacted DOE counsel to begin a series of good faith “meet and confer” discussions on resuming deposition discovery against DOE. Nevada counsel informed DOE counsel that Nevada wanted to serve notices of deposition for thirteen named DOE party witnesses (all identified in DOE’s party witness list) and proposed a schedule for doing so that began in late June and ended in early August. DOE was understandably opposed to re-starting the discovery process, essentially for the reasons now articulated in its Motion. Nevada was concerned that failure to do deposition discovery might lead to a loss or limitation on discovery because the proceeding was not suspended.

Notices of deposition for the first two of the thirteen DOE party witnesses – Kevin Coppersmith (NEV-SAFETY- 164 through 167) and Michael Gross (NEV-SAFETY- 144 and 145) were served on April 25, 2011. The notices were served after the completion of Congressional action on the DOE and NRC budgets for the remainder of FY 2011 so that this Congressional action could be taken into account. After DOE’s motion was filed, Nevada served four additional notices of deposition on the following DOE party witnesses: John McClure (NEV-Safety-129 and 144) served on May 2, 2011; Michael Anderson (NEV-Safety-124 through 130 and 142 through 145) served on May 11, 2011; Edward Thomas (NEV-Safety-130 and 143) served on May 12, 2011; and Gerald Gordon (NEV-Safety-124 through 127, 129 and 142) served on May 13, 2011. Seven more notices will be served within the next few weeks (see Exhibit A), and others may follow, unless deposition discovery is suspended.¹ The depositions are currently planned to be taken in various parts of the Country and at one location in Canada approximately sixty days after service of the notices although the precise sequence, dates, and

¹ Nevada construes DOE’s motion as fully applicable to all deposition notices that Nevada may serve in the foreseeable future, as well as those already filed.

locations are subject to change based on further discussions with DOE (a transmittal letter for each notice explains this). Obviously, Nevada will also produce its corresponding party witnesses for deposition if requested by DOE.

Argument

DOE does not argue that the two notices will cause an undue burden or expense because of any specific problems of scheduling, location, duration, sequencing, or derivative document production, or that the notices do not comply with a Licensing Board order (including Case Management Order No. 2) or Commission regulation. Rather, DOE's Motion addresses the general question whether it is now necessary and appropriate to engage in deposition discovery under the current and unique circumstances of this proceeding.

Nevada believes that a suspension of discovery, obviating the need for these depositions, is the appropriate course of action until such time as the future of Yucca Mountain and this proceeding is clarified. Accordingly, Nevada does not object to suspending deposition discovery through the end of FY 2011 provided that, if the suspension is lifted, Nevada (and the other parties) will then be able to exercise their full discovery rights. DOE represents (Motion at 6) that "Congress has not appropriated sufficient funding for this proceeding to be completed." Deposition discovery could prove to be wasteful under this circumstance, especially considering that deposition discovery could easily be re-started should that become necessary. Even if DOE may not have demonstrated that it would suffer irreparable harm if deposition discovery proceeds, this should not be fatal to a suspension of discovery because the Commission has not insisted on such a showing in circumstances similar to ours. *See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-91-15, 34 NRC 269 (1991), *reconsideration denied*, CLI-92-6, 35 NRC 86 (1992).

Given a choice, Nevada would not restart deposition discovery because it would entail large and potentially unnecessary litigation expenses. Nevada issued the notices (and will continue to issue notices) only because a fair reading of the Licensing Board's February 25 Memorandum and Order suggests strongly that Nevada (and other affected parties) must now proceed with time consuming and expensive deposition discovery or face the risk that such discovery will be curtailed or be considered waived. While such a curtailment or waiver would be inconsequential if the proceeding is finally terminated for lack of funding or other reasons, curtailment or waiver would be highly prejudicial if otherwise should prove to be the case.

Conclusion

Nevada does not object to suspending deposition discovery through the end of FY 2011 provided that, if the suspension is lifted, Nevada (and the other parties) will then be able to exercise their full discovery rights.

Respectfully submitted,

(signed electronically)

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Dated May 16, 2011

Exhibit A

EXHIBIT A

DOE Party Witness	Relevant Contentions	Date of Deposition	Location of Deposition
Kevin Coppersmith	NEV-Safety-164 through 167	June 28, 2011	Walnut Creek, CA
Michael Gross	NEV-Safety-144 and 145	June 29, 2011	San Rafael, CA
John McClure	NEV-Safety-129 and 144	July 7, 2011	Belle Vernon, PA
Michael Anderson	NEV-Safety-124 through 130 and 142 through 145	July 12, 2011	Las Vegas, NV
Edward Thomas	NEV-Safety-130 and 143	July 13, 2011	Las Vegas, NV
Gerald Gordon	NEV-Safety-124 through 127, 129 and 142	July 14, 2011	Las Vegas, NV
David Shoosmith	NEV-Safety-124 and 142	July 21, 2011	Ontario, Canada
David Enos	NEV-Safety-124 through 127	July 26, 2011	Albuquerque, NM
Peter Swift	NEV-Safety-159 and 160	July 27, 2011	Albuquerque, NM
Cedric Sallaberry	NEV-Safety-159 and 160	July 28, 2011	Albuquerque, NM
Don Beckman	NEV-Safety-128, 129, 143 and 145	August 2, 2011	Las Vegas, NV
David Sevougian	NEV-Safety-159	August 3, 2011	Las Vegas, NV
Clifford Hansen	NEV-Safety-144, 159 and 160	August 4, 2011	Las Vegas, NV

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *State of Nevada Answer to DOE Motion for Protective Order* has been served upon the following persons by the Electronic Information Exchange:

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