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	)	**Docket No. 63-001-HLW**
U.S. DEPARTMENT OF ENERGY	)	**ASLBP No. 09-892-HLW-CAB04**
(High Level Waste Repository)	)	**June 20, 2011**

U.S. DEPARTMENT OF ENERGY'S MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION OF JUNE 10, 2011 CAB ORDER

DOE moves the Board pursuant to 10 C.F.R. § 2.323 for leave to seek reconsideration and rescission of the *sua sponte* Order (Regarding Use of LSN) (June 10, 2011) to the extent that it requires circulation of document indices "as soon as practicable, so there can be an opportunity to confer and consult . . . as to their adequacy while the [Licensing Support Network (LSN)] remains operational."

There are three compelling circumstances for granting such leave and for granting the reconsideration and rescission DOE seeks. First, the June 10, 2011 Order is inconsistent with the document index requirement set forth in 10 C.F.R. § 2.1019(i). Second, the document index requirement of the June 10, 2011 Order imposes an "undue and potentially unnecessary expense" upon the parties, thereby undermining the relief the Board provided in granting DOE's May 5, 2011 Motion for Protective Order. Third, this document index requirement will not materially advance the Board's goal of having discovery commence without undue delay attributable to any

LSN unavailability. The Board's actions to date to preserve the LSN and ensure that parties take possession of LSN documents relevant to Phase 1 Nevada safety contentions witnesses are sufficient to ameliorate such concerns.

I. DOE Has Met the "Possession of Documents" Requirement of the June 10, 2011 Order.

The June 10, 2011 Order directs DOE, Nevada, and other parties to "identify and take possession of documents from the LSN they may wish to use in" depositions that may commence following resolution of FY 2012 budget issues as well as "documents from the LSN that must be indexed for the benefit of other parties pursuant to 10 C.F.R. § 2.1019(i)." June 10 Order p. 2. DOE has a copy in a searchable database of all documents on the LSN. Accordingly, it has met the "possession" requirement of the June 10, 2011 Order.

DOE, moreover, has cooperated with Nevada to ensure it receives a copy of DOE's public LSN document collection. DOE is planning to provide this to Nevada by August 31, 2011. DOE likewise will cooperate in making available copies of its public LSN collection to other parties for a reasonable cost should they so request.

II. The Board Should Reconsider and Rescind the Document Indexing Requirement of the June 10, 2011 Order.

The June 10, 2011 Order also directs preparation and exchange of the document indices required by 10 C.F.R. § 2.1019(i)(1) "as soon as practicable" to allow consultation regarding their adequacy "while the LSN remains operational." The Board should rescind this expanded and accelerated indexing requirement to avoid the "undue and potentially unnecessary expense" that would result. Memorandum and Order (Granting Motion for Protective Order) (May 20, 2011) p. 3.

Section 2.1019(i) requires that "[a]fter receiving written notice of the deposition . . . and ten days before the scheduled date of the depositions, the deponent shall submit an electronic

index of all documents in his or her possession, relevant to the subject matter of the deposition." This requirement in the final regulations was the product of extensive negotiation among potential parties.[1] It is direct and detailed about when the index must be created and when it must be submitted. In particular, it specifies that the index must be created only "[a]fter receiving written notice of the deposition . . . ." In addition, the regulation provides that the deadline for submitting the index is "ten days before the scheduled date of the deposition."

Section 2.1019(i) sensibly manages the substantive and timing burdens of deposition preparation among the deposing and defending parties, thereby benefitting both. By predicating the production of the index on service of the written notice, the regulation ensures that the defending party prepares indices (a) only for a witness actually to be deposed and (b) only of those documents in the possession of the witness that relate to the topics identified for the deposition. Moreover, by requiring production of the index at least 10 days before the deposition, the regulation ensures that the deposing party has sufficient time to request that a paper copy of any documents on the index that have not previously been electronically provided be brought to the deposition. Thus, the existing indexing requirement of 10 C.F.R. § 1019(i) reflects a judgment, arrived at in the rule-making process, that the burden of such information disclosures should not be imposed unless and until a potential witness is the subject of a deposition notice. Such a burden should not be expanded without similar notice and comment

[1] Twenty-four years ago the Commission established the High Level Waste Licensing System Support Advisory Committee to formulate rules to be used in the licensing of a high-level waste repository. The members of the Committee included organizations representing the major interests likely to be affected by the rules. 53 FR 44411, 44412 (Nov. 3, 1988). The members, which included NRC, DOE, and Nevada, negotiated over the proposed rules. After over a year of negotiations, the Committee achieved nearly unanimous consensus on the rules, including the essentially identical predecessor of current rule § 2.1019(i). The NRC thereupon published the proposed rules for comment, and following comment, adopted them. 54 FR 14925 (April 14, 1989). Amendments to those rules, including § 2.1019, have followed the same path.

protections. *See e.g., In the matter of Pa'ina Hawaii, LLC*, 63 N.R.C. 99, 110, 2006 NRC LEXIS 9, *20 (ASLB Jan. 24, 2006), *citing Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 654, 110 S. Ct. 2043, 2050 (1990); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) (finding that rules relating to information disclosure were substantive rules subject to the notice and comment rule-making process); *Revak v. National Mines Corp.*, 808 F.2d 996, 1002 n.10 (3rd Cir. 1986) (o*verruled on other grounds by Mullins Coal Co. v. Director Office of Workers' Compensation Programs, United States Dept. of Labor, et al.,* 484 U.S. 135, 108 S. Ct. 427 (1987)) (agency's obligation to abide by its own regulations "is especially important if a regulation follows notice and comment, for the regulation then is the product not only of agency expertise but also of public participation . . .").

The June 10, 2011 Order is inconsistent with that scheme. "Notwithstanding the regulation," June 10, 2011 Order p. 3, the June 10, 2011 Order requires preparation of indices even though there are no outstanding deposition notices or scheduled depositions and even though the topics about which witnesses are to be deposed in most cases have not been identified. What § 2.1019(i) directs to be done after and on account of the service of deposition notices, the June 10, 2011 Order directs to be done before and in the absence of such notices.

Every witness identified will not necessarily be deposed. Even if deposed, the depositions will not necessarily proceed on every topic for which a witness has been identified. By accelerating the timing of the document index requirement, the June 10, 2011 Order expands the document index requirement beyond witnesses who have received notices of deposition and beyond documents "relevant to the subject matter of the deposition."

Expanding and accelerating § 2.1019(i)(1)'s indexing requirement will not advance this proceeding and will instead result in waste. In granting DOE's Motion for Protective Order quashing deposition notices, the Board acknowledged that "[p]rudence and common sense may counsel careful allocation of resources." The same principle supports reconsideration and relief here.

The June 10, 2011 Order would require parties to prepare indices for depositions that may never be noticed. A party defending a deposition cannot ascertain what documents must be indexed without knowing (i) what is in the potential deponent's possession and (ii) what is relevant to the subject matter of the deposition. A party defending a deposition cannot know these two things without consulting with the deponents. Without deposition notices, this amounts to engaging in material aspects of deposition preparation for every one of the *potential* deponents about the broadest possible scope of topics. For DOE, this preparation would span 44 witnesses identified in connection with Phase I Nevada safety contention witnesses compared to the anticipated 13 or so witnesses for which DOE recently obtained relief. It would involve numerous conferences between the potential deponents and counsel and likely necessitate travel to the potential deponents' respective locations to review documents for relevance and create document indices. It also involves conferring and consulting about the adequacy of the indices even though the parties do not know who is deposing whom and on what topic. In short, this provision requires expensive and unnecessary preparation of indices for a witness pool over three times as large as that for which the Board recently issued protective relief.

For all of the effort required to prepare document indices prior to the shut-down of the LSN for depositions that may or may not take place, there is no reason to expect that the document index will help reduce the volume of LSN documents that a party needs to take

possession of prior to the shut-down of the LSN. DOE's relevant documents are all required to be in DOE's LSN collection and are currently searchable on the LSN, making it -- and not what is in the potential deponent's possession -- the primary source of documents relevant to the potential depositions. Accordingly, the document index requirement will not be a shortcut to the universe of relevant documents. It will not relieve parties from a need to independently search the LSN and take possession of documents relevant to Nevada Phase I safety contentions. In the case of DOE, the indicies required will be burdensome to produce prior to the shut-down of the LSN and would likely contain no more than a fraction of documents "relevant to the subject matter of the deposition."

Imposing an expanded and accelerated document index requirement, moreover, is not necessary to expedite discovery. An index is required only ten days in advance of a scheduled deposition. 10 C.F.R. § 2.1019(i). There is no reason to believe that meeting this ten-day time frame will be problematic if discovery resumes, or that lack of access to documents previously on the LSN will be an issue for deposition scheduling.

The CAB has already taken steps that ensure preservation of the LSN collections of all the parties. The June 10, 2011 Order further directs parties to take possession of LSN documents they wish to use in deposing all previously identified Phase 1 Nevada safety contention witnesses. This will allow parties to engage in deposition preparation notwithstanding any LSN unavailability. Consequently, there is no need to require parties at this time to incur the undue and potentially unnecessary expense associated with identifying and preparing an index of documents in the possession of potential deponents.

The Board should accordingly grant DOE this leave and ultimately reconsider and rescind the indexing requirement in its June 10, 2011 Order.

Certification Pursuant to 10 C.F.R. § 2..323(b)

DOE certifies that, in accordance with 10 C.F.R. § 2.323(b), it has notified all other parties of its intent to file this motion.

The State of Nevada stated that it concurs in the motion.

The following parties do not oppose the filing of the motion and reserve the right to respond to it: Clark County; NRC Staff.

The following parties stated they had no position on the motion and reserved the right to respond to it: Aiken County; Clark County; Florida Public Service Commission; Four Counties; Inyo County; NARUC; NCAC; NEI; Nye County; State of South Carolina; State of Washington.

The remaining parties had not responded as of the time DOE filed this motion.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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CERTIFICATE OF SERVICE

I hereby certify that copies of **U.S. DEPARTMENT OF ENERGY'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF JUNE 10, 2011 CAB ORDER** have been served on the following persons on this 20th day of June 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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