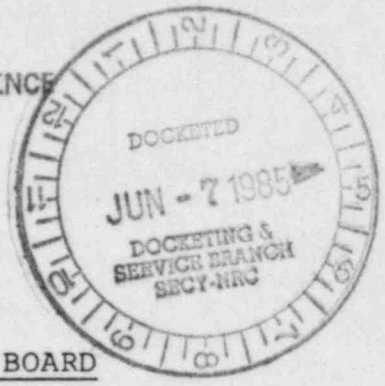
RELATED CORRESPONDENCE



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
KERR-McGEE CHEMICAL CORPORATION	Docket No. 40-2061-ML ASBLP No. 83-495-01-ML
(West Chicago Rare Earths Facility)	

MOTION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY SUBPOENA OF JAMES R. GRANT

Pursuant to 10 C.F.R. § 2.720(f), Kerr-McGee Chemical Corporation ("Kerr-McGee") and James R. Grant, Ph.D., request the Board to quash a subpoena issued for the production of documents by Dr. Grant. This subpoena was issued ex parte at the request of the State of Illinois pursuant to 10 C.F.R. § 2.720 and was served on June 6, 1985. Kerr-McGee contends that such discovery is inappropriate at this time because Dr. Grant is a consultant retained by Kerr-McGee in preparation for this proceeding and the documents in his possession relate to his work as a litigation consultant. If the Board declines to quash the subpoena, Kerr-McGee and Dr. Grant move in the alternative for its modification.

I. Factual Background

Dr. Grant's initial work for Kerr-McGee was performed while he was employed by Law Engineering Testing Company. While

he was with Law Engineering, Dr. Grant provided advice to Kerr-McGee on the disposal cell design that was presented in the amendments to Kerr-McGee's Stabilization Plan. Dr. Grant left Law Engineering in September 1983, and all of the documents in the possession of the firm relating to the West Chicago project were returned to Kerr-McGee.

After Dr. Grant left Law Engineering, his new firm, James L. Grant & Associates, Inc., was retained to provide expert advice on a variety of issues raised by the State and others in connection with this proceeding and related litigation. All documents currently in Dr. Grant's possession relate to his litigation-related work.

II. Motion to Quash

A number of recent cases have established that the federal civil rule governing discovery from experts, Fed. R. Civ. P. 26, is equally applicable to NRC proceedings. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-17, 17 NRC 490 (1983); Boston Edison Co. (Pilgrim Nuclear Generating Station Unit 2), LBP-75-42, 2 NRC 159 (1975).[1/] Rule

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1/ A contrary conclusion was reached in General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-76-33, 8 NRC 461 (1978). However, that decision was expressly disapproved in Carolina Power & Light Co. and Seabrook. Moreover, the discovery permitted in General Electric concerned only the identities of experts, not the broad-ranging discovery sought by the State here.

26(b)(4) provides:

> Discovery of facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter upon which the expert is expected to testify and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope . . . as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not be be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. (emphasis added)

Rule 26(b)(4) thus sets up a two-part regime under which certain limited discovery may be had of experts who will be witnesses at trial, but no discovery may be had of consultants who are not to be witnesses absent a showing of exceptional circumstances.

It is likely that Kerr-McGee will ultimately decide to designate Dr. Grant as a witness in this proceeding. However, Dr. Grant has not yet completed his technical analysis and related work, and until he has done so, Kerr-McGee will not be in a position to make a final decision on his status as a witness. Unless and until he is designated as a witness,

neither he nor his files are appropriately subject to discovery, absent a showing of "exceptional circumstances." Manolete v. Bolger, 96 F.R.D. 179 (D. Ariz. 1982).[1/]

The State's Application for Issuance of Subpoenas states facts that demonstrate only that Dr. Grant has some connection with this proceeding. Such a showing is minimally necessary to support a subpoena to an ordinary witness, 10 C.F.R. § 2.720(a); it is far from sufficient to meet the high burden imposed on the State by Rule 26(b)(4)(B). See Barnes v. City of Parkersburg, 100 F.R.D. 768 (S.D. W. Va. 1984). There are in fact no "exceptional circumstances" here. Kerr-McGee has placed no bar in the way of a full analysis of all relevant technical issues by the State's own experts.[2/] Absent such a bar, the State can hardly claim that it is "impracticable" for it to obtain the facts and opinions it needs from its own experts.

The restrictions of Rule 26(b)(4) apply to discovery of documents as well as to other modes of discovery from experts. Baise v. Alewel's, Inc., 99 F.R.D. 95 (W.D. Mo. 1983); Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1973). A broad ranging

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1/ The subpoena to Dr. Grant is at best premature. Even if he is to be a witness, it makes little sense to subject him to discovery at this time, because his work is not yet complete. If Kerr-McGee ultimately decides not to use his testimony, Rule 26(b)(4) provides that his litigation-related work is fully protected from discovery both now and in the future, absent exceptional circumstances.

2/ Indeed most, if not all, of the relevant technical data in Kerr-McGee's possession have been or will be produced to the State through regular discovery.

request for all of an expert's files, such as the State has made here, is improper even in the context of an expert witness. Baise v. Alewel's, Inc., 99 F.R.D. at 97-98. Where the consultant has not been designated as a witness, none of his files should be subject to discovery. The subpoenas issued for Dr. Grant's files should therefore be quashed.

In any event, discovery of Kerr-McGee's experts is premature. Discovery of the underlying facts through document requests and interrogatories is still underway. Discovery relating to experts is best held at a later stage, after their work is substantially complete and their opinions are formed. Indeed, the State is taking exactly this approach with respect to discovery relating to its own experts.

Shortly after filing the application for this subpoena, the State responded to an interrogatory from Kerr-McGee as follows:

> 118. Identify each expert witness whom the State expects to call at the hearing in this proceeding, the subject matter on which each is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, a summary of the grounds for each opinion, and all documents on which each such opinion is based.
>
> RESPONSE: This question was asked by Kerr-McGee in its first set of interrogatories. The People have nothing to add to the answer made thereto.

State of Illinois' Answers to Kerr-McGee's [Second] Set of Interrogatories and Document Requests (May 20, 1985). The previous answers to which the State makes reference identified two experts, but declined "to provide details about [their] ... testimony" or about any studies, calculations, or analyses that

they had undertaken. People's Responses to Kerr-McGee Interrogatories and Request for Documents, Nos. 64-66 (Sept. 17, 1984). Moreover, in response to Kerr-McGee's request for documents on which those witnesses would rely, the State responded "N/A". Id., No. 67.

The State is thus seeking through the instant subpoena to force Kerr-McGee and Dr. Grant to divulge documents reflecting their preparation for the hearing at the very time the State has refused to provide similar discovery to Kerr-McGee. In light of the foregoing, any discovery of Kerr-McGee's experts is at best premature. To the extent that discovery from experts is permitted under the rules, it should be reciprocal. Once the work of the experts has advanced sufficiently, the parties should establish a reasonable schedule for the exchange of information relating to expert testimony. At an appropriate future time, Kerr-McGee is prepared to discuss the matter with the State in good faith and will arrange for discovery from its expert witnesses without the need for the formality of a subpoena. Only if such negotiations are unsuccessful should the Board be involved.

III. MOTION TO MODIFY SUBPOENA

If the Board declines to quash the subpoena on the ground that Dr. Grant's files are currently exempt from production under Rule 26(b)(4)(B), Kerr-McGee and Dr. Grant request in the alternative that the subpoena be modified. Dr. Grant estimates that the documents that would be subject to the subpoena constitute at least two full file drawers of

documents. Accordingly, Dr. Grant requests that the subpoena be modified to permit him to make the documents available for inspection at his own office rather than at the offices of the Attorney General. Indeed, any other approach would interfere with Dr. Grant's on-going work. Further, Kerr-McGee requests a reasonable extension to enable it to screen Dr. Grant's files to remove any privileged documents.[1/]

Conclusion

The State's subpoena seeking access to Dr. Grant's files constitutes a circumvention of the rules of discovery relating to experts. The central policy behind the rules on discovery from experts is to permit a party to consult with experts freely in preparing its case without fear of disclosure of that preparation process to an opposing party. See Fed. R. Civ. P. 26, Advisory Committee Note. Only when that expert is designated as a witness do the countervailing policies supporting effective cross-examination require some limited dis-

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1/ Kerr-McGee will screen Dr. Grant's files to remove documents protected by the attorney-client and work product privileges. Such documents have not lost their privileged status merely because they have been made available to Kerr-McGee's consultants. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593-94 (3d Cir. 1984); Miller v. Haulmark Transport Systems, 104 F.R.D. 442 (E.D. Pa. 1984); Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972); Baise v. Alewel's, Inc., supra. Communications by Kerr-McGee's counsel to Dr. Grant and documents prepared by Dr. Grant at the direction of counsel as part of the preparation for this proceeding are also protected work product. 10 C.F.R. § 2.740(b)(2); Sprague v. Director, Office of Workers' Compensation Programs, 688 F.2d 862, 869-70 (1st Cir. 1982); Baise v. Alewel's, Inc., supra.

covery of the expert's preparation of his testimony. Because Dr. Grant has not yet been designated as a witness and his work is ongoing, Kerr-McGee's legitimate expectation of confidentiality in the use of consultants to prepare for this proceeding should be protected. Moreover, any discovery relating to experts should be reciprocal. Accordingly, Kerr-McGee requests that the subpoena be quashed and that discovery of experts be postponed. In any event, the subpoena should be modified to alleviate the burdens it needlessly and unfairly imposes.

Respectfully submitted,

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Date: June 7, 1985

RELATED CORRESPONDENCE

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NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	
Kerr-McGee Chemical Corporation	)	Docket No. 40-2061-ML
	)	ASLSP No. 83-495-01-ML
(West Chicago Rare Earths Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of a Motion to Quash or, In the Alternative, to Modify Subpoena of James L. Grant have been served by hand (or as noted by an asterisk, by Express Mail) on this 7th day of June, 1985, as follows:

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