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**NUCLEAR REGULATORY COMMISSION**

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Pre-License Application Matters

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SECY-032

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of )  
 ) Docket No. PAPO-00  
 DEPARTMENT OF ENERGY ) ASLBP No. 04-829-01-PAPO  
 )  
 ) NEV-01  
 (High-Level Waste Repository:)  
 Pre-License Application )  
 Matters) )

Tuesday, July 27, 2004

The oral argument came to order in room T3B45 of White Flint II, Rockville, MD at 9:00 a.m.

Before:

Honorable Thomas S. Moore, Administrative Judge  
 Honorable Alex S. Karlin, Administrative Judge  
 Honorable Alan S. Rosenthal, Administrative Judge

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I-N-D-E-X

<u>Argument</u>	<u>Page</u>
State of Nevada	
Joseph R. Egan . . . . .	5
Department of Energy	
Michael R. Shebelskie . . . . .	48
Nuclear Regulatory Commission	
Mitzi Young . . . . .	140

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P-R-O-C-E-E-D-I-N-G-S

8:58 a.m.

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2

3 JUDGE MOORE: The Pre-License Application

4 Presiding Officer, known by the acronym, PAPO, Board

5 is hearing argument this morning on the state of

6 Nevada's July 12, 2004 motion to, among other things,

7 strike the Department of Energy's June 30, 2004

8 certification of availability of its document

9 collection for discovery.

10 Sitting this morning with me is, on my

11 right, Judge Karlin, on my left, Judge Rosenthal. I

12 am Thomas Moore. Counsel, if they had not already

13 informed the court reporter, they should do so now,

14 starting with the staff. Introduce yourself, counsel

15 of record.

16 MS. YOUNG: Good morning. My name is

17 Mitzi Young. I'm here representing the NRC staff.

18 With me at counsel table is Janice Moore, also the

19 Office of General Counsel, and Jeff Ciocco of the

20 Office of Nuclear Materials Safeguard Safety.

21 MS. IRWIN: My name is Donald Irwin with

22 Hunt & Williams, representing the Department of

23 Energy. With me at counsel table and delivering the

24 argument this morning is my partner, Michael

25 Shebelskie.

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MR. EGAN: My name is Joseph Egan, representing the state of Nevada, and with me here are my partners Marty Malsch and Charlie Fitzpatrick.

JUDGE MOORE: Thank you. Arguments this morning will be in accordance with the terms of our July 23 order. To recap that, the state of Nevada will begin and shall have up to 75 minutes of argument and may reserve up to 25 minutes of that time for rebuttal. I would caution counsel that rebuttal is just that, to be strictly confined to responding to the arguments advanced by other counsel.

The state of Nevada will be followed by counsel for the Department of Energy who will have 60 minutes for argument to be followed by counsel for the NRC staff who shall have 15 minutes for argument.

After studying the participants filings, the Board determined that it would be helpful to it to hear further from the LSN Administrator. Accordingly, the Board requested that the Chief Administrative Judge make him available. And pursuant to 10 CFR 2.1011(c)(3), the Board will direct questions to the LSN Administrator this morning. Unfortunately, the LSN Administrator is on business out of town, so we will be -- he will be responding to our questions via telephone link. Therefore, at a convenient time

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1 during the Department of Energy's presentation, we  
2 will interrupt that and the Board will direct its  
3 questions to the LSNA.

4 Two quick announcements. Unfortunately,  
5 the elevators are subject to a state inspection this  
6 morning between 10 and 10:30 and all will be out of  
7 service for some portion of that time, so we will try  
8 not to break during that period to cause any of you  
9 any inconvenience. Secondly, counsel should be  
10 reminded that the microphones in front of them are  
11 live and can be muted only by their action in pushing  
12 the button to mute them.

13 That said, we will proceed with argument.  
14 Counsel for the state of Nevada, please present your  
15 argument from the podium.

16 MR. EGAN: Thank you. I'd like to thank  
17 the Licensing Board for hearing Nevada's motion today  
18 and particularly for doing it so expeditiously. I  
19 also want to say how delighted I am to be opposite my  
20 friend and colleague, Don Irwin, who happens to be the  
21 man who sponsored me for admission to the bar. He's  
22 probably wishing he hadn't done that right now.

23 MS. IRWIN: Oh, no. We wouldn't be here  
24 without that.

25 (Laughter.)

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1 MR. EGAN: Your Honors, even at this very  
 2 early stage, we find this Yucca proceeding has already  
 3 taken on kind of a Kafkaesque quality. After doing  
 4 virtually nothing to collect and identify relevant  
 5 documentary material for 15 years and after failing to  
 6 begin uploading documents onto the LSN for 33 months  
 7 after it was made available, DOE suddenly shifted into  
 8 work drive sometime around the end of May in the face  
 9 of dire warnings by its own Inspector General and in  
 10 what appears now to be a desperate effort to meet a  
 11 licensing deadline that has no practical meaning  
 12 outside the world of politics and contractor bonuses.

13 You're being asked by DOE now, and indeed  
 14 incredibly by the staff, to bend all the written  
 15 rules, all the written understandings and commitments  
 16 and abandon the very purpose of the LSN so that  
 17 prematurely DOE can kick off this process. All this  
 18 when of course we have no NRC licensing rule and we  
 19 have no EPA standard, leading, at least, Nevadans to  
 20 wonder, "What's the rush?"

21 I certainly dare say that Nevada's already  
 22 having its own glitches with the LSN, and so we're  
 23 very sympathetic to the notion that humans are not  
 24 perfect, that software systems are prone to bugs and  
 25 that all the issues that will be contested are not

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1 totally known and, yes, that DOE is populated by good,  
2 reasonable people who try hard -- all points of which  
3 are irrelevant to our motion and to this hearing  
4 today.

5 What is germane today are the following  
6 points that Nevada argues: One, DOE's initial  
7 certification, on its face, by its own literal terms,  
8 fails to satisfy the plain commands of the LSN rule;  
9 two, the regulations and every piece of history  
10 concerning them, as well as every shred of common  
11 sense and every principle of civil discovery, require  
12 DOE's documentary material to be available on the LSN  
13 where the existence and the integrity, the  
14 accessibility and the accountability of those  
15 documents are not subject to manipulation and bedlam  
16 by the proponent.

17 JUDGE ROSENTHAL: Would you be so kind as  
18 to point to the specific provisions of the NRC  
19 regulations that you believe clearly mandate that the  
20 documents all be indexed on the central site before a  
21 certification is put forth?

22 MR. EGAN: Yes, Your Honor.

23 JUDGE ROSENTHAL: I'd note specifically  
24 which regulation.

25 MR. EGAN: First, I'd like to direct you

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1 to the very definition of the LSN. LSN is defined by  
2 NRC as, quote, "the combined system that makes  
3 documentary material available electronically to the  
4 parties," Section 2.1001. It's LSN that makes the  
5 documents available. That's the definition of LSN.

6 Secondly, Mr. Graser, the LSN  
7 Administrator, has artfully listed a variety of other  
8 regulatory provisions on Page 9 of his answers to the  
9 Board's questions. I won't burden you by repeating  
10 every one of them, but we certainly agree that all of  
11 those provisions, including statements of  
12 consideration and preambles, indicate that the  
13 documents are required to be available on the LSN.

14 And, finally, one provision that Mr.  
15 Graser did not reference, but that we believe is  
16 extremely important, is Section 2.1001(c)(4), which  
17 delineates the LSN Administrator's responsibilities,  
18 and it refers there to his role in assuring, quote,  
19 "the integrity of documentary material certified in  
20 accordance with Section 2.1009(b) by the participants  
21 to be in the LSN."

22 And, of course, by definition, is the  
23 combined system that makes documentary material  
24 available. It, therefore, follows that the term,  
25 "availability," as used in the regs in Section 2.1003,

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1 is expressly linked in the regs to the term, "in the  
2 LSN." And, indeed, how could it be otherwise? The  
3 very essence of Subpart J is to make a repository of  
4 documents available within the control of NRC to the  
5 public.

6 JUDGE ROSENTHAL: A member of the public  
7 can obtain access to a document if it's on the DOE web  
8 site, can it not?

9 MR. EGAN: Well, Your Honor, in the real  
10 world, the answer to that is maybe. It's not yes, and  
11 it's not no. There are some documents that are  
12 available on that site, but the vast majority of  
13 documentary material relevant to this proceeding is  
14 not available on that site.

15 Moreover, the very short history of that  
16 site in existence since June 30 illustrates the bedlam  
17 associated with DOE controlling the document  
18 repository. We don't know how many documents are  
19 there. DOE first said 1.2 million. Then DOE changed  
20 the number in these pleadings to 2.1 million. Then  
21 DOE removed 175,000 documents from the LSN and later  
22 another 26,000 from the LSN. We don't know if those  
23 were removed from Yucca Vista or not.

24 JUDGE ROSENTHAL: There may be an issue as  
25 to completeness, but it is true, is it not, that those

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1 documents that are in fact on the DOE web site are  
2 accessible?

3 MR. EGAN: Your Honor, if they were there  
4 on the web site and the software was working, yes,  
5 they would be available to the public. They would not  
6 be subject to the control or the audit of the LSN  
7 Administrator, as the regs require, but they would be  
8 conceivably and potentially available to the public.

9 JUDGE MOORE: Counsel, would they be  
10 available through the same search engine as on the  
11 LSN?

12 MR. EGAN: I'm not a software expert but  
13 from what I understand from reading the answers Mr.  
14 Graser presented to the Board, the software is very  
15 similar. However, he says that the Yucca Vista site  
16 does not meet the design requirements of the  
17 regulation.

18 JUDGE MOORE: Your previous answer in  
19 response to Judge Rosenthal, you didn't mention  
20 Section 2.1001(e), which was recently enacted by the  
21 Commission, and I shall read a portion of it to you.  
22 It says, "Each potential party, interested  
23 governmental participant or party shall continue to  
24 supplement its documentary material available to other  
25 participants via the LSN with any additional material,

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1 et cetera." Does that not also.--

2 MR. EGAN: Yes, it does, Your Honor, and  
3 I believe that was one of the provisions Mr. Graser  
4 mentioned in his answers.

5 Your Honor, I'd like to bring us back to  
6 the issue of the face of the certification, because we  
7 believe that examination of DOE's certification ought  
8 to end this inquiry. We believe that it fails on the  
9 very words that it states. And that's irrespective of  
10 whether you believe that the documents should be  
11 available in or on the LSN or on Yucca Vista or both.

12 NRC's certification rule, 2.1009(b),  
13 contains two very explicit requirements: First,  
14 requires the responsible official to certify that the  
15 procedures specified in 2.1009(a) have been  
16 implemented; second, it requires DOE's responsible  
17 official to certify that, quote, "to the best of his  
18 knowledge the documentary material specified in  
19 Section 2.1003 has been identified and made  
20 electronically available," unquote.

21 DOE's certification fails this literal  
22 test. Though Mr. Arthur appears to state that DOE has  
23 implemented procedures, as required by 2.1009(a)(2),  
24 he distinctly does not certify that to the best of his  
25 knowledge the documentary material specified in 2.1003

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1 has been identified and made electronically available.

2 Why does he not say that? Very simply  
3 because he cannot. Had he said it, it would have been  
4 a false statement, and there are civil and criminal  
5 penalties for making a deliberately false  
6 certification, and his lawyers surely know that.

7 Instead, Mr. Arthur certifies only that to  
8 the best of his knowledge the material has been  
9 identified from those documents submitted to CACI by  
10 April 15, 2004 and that it's only those documents that  
11 have been made electronically available. Indeed, he  
12 does not even say that DOE has identified the  
13 documentary material required under 2.1003; rather, he  
14 states DOE will provide additional documents as they  
15 are identified.

16 JUDGE MOORE: Counsel, I'm sure you have  
17 studied closely the Department of Energy's response to  
18 your motion and their responses to our questions.  
19 Have you been able to do the math and get a total of  
20 those documents that have not yet been identified, to  
21 cull that from their answer?

22 MR. EGAN: Yes, sir. And I've also done  
23 my own tests, if you'd like to hear those now.

24 JUDGE MOORE: I would like to hear what  
25 that number is.

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1 MR. EGAN: Okay. By any reasonable  
2 account, Your Honor, there are millions of documents  
3 meeting the identification requirements of 2.1003 that  
4 are not and never have been available on Yucca Vista  
5 let alone on the LSN. We know this because the  
6 documents we in Nevada most want to see and have most  
7 awaited to review are either not there at all or are  
8 withheld as privileged or present in header-only  
9 format.

10 Let's just look at what DOE admits in its  
11 pleading. First --

12 JUDGE MOORE: First of all, let's back up.  
13 You said millions.

14 MR. EGAN: Millions of documents.

15 JUDGE MOORE: So you don't have a count as  
16 to whether that's two or ten?

17 MR. EGAN: No, I don't, Your Honor.

18 JUDGE MOORE: And you couldn't figure out  
19 from their pleading whether it was two or ten.

20 MR. EGAN: It's at least over four.

21 JUDGE MOORE: Okay. Thank you.

22 JUDGE KARLIN: And when you mean four,  
23 you're referring to the archival emails --

24 MR. EGAN: Yes, sir.

25 JUDGE KARLIN: -- that they've referenced

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1 as four million.

2 MR. EGAN: Yes, sir.

3 JUDGE KARLIN: Would you propose -- they  
4 have made the position that those have a minuscule, if  
5 any, relevance. How would you suggest we approach  
6 those? For example, they have cited that there is a  
7 good faith standard that should be used that was in  
8 the preamble to the Federal Register in '89 when these  
9 rules were first promulgated. Good faith effort, rule  
10 of reason, and I quote, "DOE will not be expected to  
11 make an exhaustive search of its archival material  
12 that conceivably might be within the topical  
13 guidelines but has not been reviewed or consulted in  
14 any way in connection with DOE's work or its license  
15 application."

16 So they cite that statement and say, "We  
17 haven't cited these emails, we're not using them in  
18 support of our application, they're archival, they're  
19 four million, they're of de minimis value." How  
20 should we apply that or deal with that language when  
21 trying to decide whether they should produce all these  
22 four million or some part of them?

23 MR. EGAN: That's a very good question,  
24 Your Honor, and the answer is, first, the language you  
25 quoted from the Statement of Considerations 15 years

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1 ago relates to a discussion of Category 1 and Category  
2 documents; that is where the party either wants  
3 documents that support it or wants documents that do  
4 not support it, and it applied a good faith test,  
5 realizing that until contentions were filed you  
6 couldn't possibly know the scope of every issue that  
7 would be litigated. However, even conceding --

8 JUDGE KARLIN: Well, let me stop you  
9 there. I do understand that at several other places  
10 there is a distinction between Category 1 and Category  
11 2, which are sort of the reliance and the non-reliance  
12 --

13 MR. EGAN: Right.

14 JUDGE KARLIN: -- and the Category 3,  
15 which is the relevance. Most recently, even on June  
16 14 of '04, the Commission makes statements to that  
17 effect, which I think are useful or helpful. But in  
18 1989, the regulation I'm looking at, on Page 14934, I  
19 do not think that distinction is referenced to the  
20 three different categories.

21 MR. EGAN: Okay.

22 JUDGE KARLIN: And I just grapple with how  
23 you define that rule or that instruction with these  
24 four million emails.

25 MR. EGAN: Your Honor, Nevada is perfectly

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1 willing to accept a good faith standard for  
2 production, and we understand perfection can't be had,  
3 but let me tell you the radical distinction here that  
4 DOE itself has made. DOE, itself, in its own  
5 pleadings, collected the current employee emails,  
6 okay, and if you look at the number that they  
7 collected and the number that they screened and found  
8 relevant, it's over 99 percent, okay? How can they  
9 now say that the four million emails of people who no  
10 longer are there are zero percent relevant? We know  
11 in the couple of emails that we were able to dig up --

12 JUDGE MOORE: Well, that's not fair,  
13 Counsel. They didn't say zero, they said de minimis.

14 MR. EGAN: De minimis. That's funny.

15 JUDGE MOORE: How did you get the figure  
16 of 99 percent?

17 MR. EGAN: In their pleadings, they give  
18 a table that shows the number of emails. It's Lux  
19 Exhibit 17.

20 JUDGE MOORE: Seventeen.

21 MR. EGAN: Exhibit 17. It shows the  
22 number of emails made available and the number  
23 excluded from the document collection.

24 JUDGE MOORE: Right.

25 MR. EGAN: And if you take that

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1 percentage, it's like one percent.

2 JUDGE MOORE: Okay.

3 MR. EGAN: And the more important point,  
4 Your Honor, is really that we don't care that DOE's  
5 not going to cite these emails. The rules preclude  
6 them from citing anything that they haven't offered  
7 into the LSN anyway. We want to cite those emails.  
8 The few emails that we've been able to find so far  
9 have been incredibly damning to DOE.

10 For example, the Chlorine-36 emails that  
11 are in Exhibit 7, Chlorine-36 is going to be probably  
12 the most hotly contested issue in the licensing  
13 proceeding, because it really is the benchmark as to  
14 whether or not this mountain can isolate waste or not.  
15 These emails illustrate the history of that discovery  
16 of the Chlorine-36 and the incredible impact that had  
17 on this project at the time. We want those emails.  
18 They're extremely relevant to this proceeding.

19 JUDGE MOORE: So your position would be  
20 for them to produce all the emails and for us to  
21 disregard this preamble language as being not  
22 applicable in this situation?

23 MR. EGAN: No. My recommendation would be  
24 that they apply a good faith effort to follow 2.1003,  
25 and a good faith effort to follow 2.1003 when they

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1 have the software available and they have the emails  
2 available would be simply to screen them. What's the  
3 big deal?

4 JUDGE MOORE: Counsel, if that statement  
5 was made by the Commission in 1989, speaking of  
6 archival material, we're now 15 years later.

7 MR. EGAN: Yes, we are.

8 JUDGE MOORE: At what point does from 1989  
9 to 2004 become archival?

10 MR. EGAN: Well, I don't know, but all I  
11 know is that there are thousands, thousands of  
12 documents in Yucca Vista now that go way back to the  
13 1970s or early 1980s, the mid-1980s. Do a search;  
14 they're all over the place. So what is the criteria?  
15 There certainly was no criteria applied in this  
16 screening process that said, "Here are the archival  
17 materials and here are the new materials."

18 JUDGE MOORE: Well, let's go one step  
19 further. Can DOE put a label of archival on something  
20 and therefore take it out of the realm of --

21 MR. EGAN: There's nothing in the rule,  
22 Your Honor, nothing at all, other than that Statement  
23 of Considerations from 15 years ago on completely  
24 different system.

25 JUDGE MOORE: So if something were

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1 generated in 1997, DOE could call it archival and  
2 escape those?

3 MR. EGAN: Well, if somebody resigned from  
4 DOE on April the 14th, their emails are gone, okay?  
5 Lake Barrett's emails are not available. He's the  
6 Program Manager. We don't have his emails. They're  
7 considered archival, and they're not there. To us  
8 that's just -- that would not survive any rule of  
9 civil litigation.

10 JUDGE MOORE: Outside of those millions of  
11 so-called archival documents, DOE in its pleadings  
12 lists enumerable other categories. Have you been able  
13 to tote those?

14 MR. EGAN: Yes, sir.

15 JUDGE MOORE: And what kind of number do  
16 you have?

17 MR. EGAN: Well, it's different numbers  
18 for different categories. First of all, and this is  
19 a biggie, DOE says only half of its documents are  
20 there in text format. So of the 2.1 million  
21 documents, half of them are just a header, like a  
22 privilege log, and you try to pull up --

23 JUDGE MOORE: Now, can you tell whether  
24 they carry a privilege designation in the header?

25 MR. EGAN: A lot of them do and a lot of

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1           them don't.

2                   JUDGE MOORE: For those that don't, do you  
3 know whether they're classified or safeguards?

4                   MR. EGAN: Well, let me tell you the  
5 experiment we did, Your Honor, and I'm prepared to  
6 offer an affidavit from my legal assistant to this  
7 effect. We did a search for one of the most critical  
8 topics in this proceeding, which is alloy 22  
9 corrosion. Alloy 22 is the waste package material  
10 that DOE is maintaining has to last 10,000 or 100,000  
11 or however many years. We believe that alloy 22 is  
12 going to corrode very quickly, and we've done studies  
13 to that effect. So we want to see what DOE knows  
14 about alloy 22 corrosion.

15                   We punched it in, Yucca Vista, 9,261 hits.  
16 Four thousand eight hundred seventy-six of those were  
17 header only; no document whatsoever. Of the first 100  
18 of those, 39 were designated privileged, and we'll  
19 mark that for you if you're interested.

20                   JUDGE ROSENTHAL: And as to the balance?

21                   MR. EGAN: As to the balance, they were  
22 designated public with no document. And these are  
23 documents designated privileged that are like  
24 literature review of alloy 22 corrosion. I mean on  
25 their face, these documents have no credible

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1 privilege.

2 JUDGE MOORE: Now, are you under the rules  
3 -- may you make a request and they have to turn over  
4 those other 69 documents or whatever the number would  
5 be within five days? Have you made such a request?

6 MR. EGAN: Your Honor, we took the first  
7 19 of these 39 of these 4,876, we made a request to  
8 the document help desk that we wanted these documents  
9 that were listed as header only.

10 JUDGE MOORE: And what date did you do  
11 that?

12 MR. EGAN: We did that, let's see --

13 MR. FITZPATRICK: July 16.

14 MR. EGAN: July 16. Okay. Thank you.  
15 And they responded several days later, and I'd like to  
16 play the voicemail, if you don't mind, of their  
17 response.

18 JUDGE MOORE: Fine.

19 (Voicemail played.)

20 SHARON: My name is Sharon. I'm calling  
21 from the Yucca Mountain Project in Las Vegas. You had  
22 left a message with us early this morning, and I  
23 apologize for taking so long to get back to you. I  
24 wrote down your number incorrectly and couldn't get  
25 through.

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1 I wanted to let you know that your request  
2 for the information has been turned over to our  
3 document handlers. We, unfortunately, cannot release  
4 that any of that information to you. We are the  
5 middlemen, so to speak. If you could give us a few  
6 days and then call again if you don't see anything.  
7 Ninety-nine percent of the time our turnaround is ten  
8 working days from the date of the original request.

9 So I just wanted to let you know. If you  
10 have any other questions, please don't hesitate to  
11 call me.

12 JUDGE MOORE: Excuse me. Could the court  
13 reporter get that? Thank you.

14 MR. EGAN: Your Honor, the point is if  
15 we're to do what DOE suggests and treat this as a  
16 simple matter of a few disputed documents, we're going  
17 to be here thousands of times asking for documents,  
18 thousands of times. Because I've only just begun to  
19 tell you these categories. I could sit here for the  
20 next three hours.

21 We did a search for Steve Brocoum  
22 documents. He's one of DOE's staffers who's been most  
23 critical of the site characterization. Two hundred  
24 and forty out of his 250 were header only. Forty-  
25 eight of the first 50 were privileged. We searched

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1 for documents involving the current Director, Margaret  
2 Chu. Forty-four of the first 50 of her documents were  
3 privileged. Over 500 of the first 700 Barrett  
4 documents were header only. Your Honor, it's clear  
5 that the system is a total sham.

6 JUDGE ROSENTHAL: Did I understand you to  
7 say that on a number of these headers where they were  
8 not accompanied by text, that there was no indication  
9 as to privilege?

10 MR. EGAN: An extremely large number were  
11 labeled, "privileged," and the title of document  
12 seemed to indicate no possible conceivable privilege  
13 whatsoever, Your Honor.

14 JUDGE ROSENTHAL: But where you had a  
15 header but no text, there was always an indication as  
16 to why the text was with --

17 MR. EGAN: No. No, sir. In a very large  
18 number, it said, "public," and there was no document.

19 JUDGE ROSENTHAL: Well, that's what I  
20 thought you'd said earlier.

21 MR. EGAN: Yes.

22 JUDGE ROSENTHAL: Public would convey to  
23 me the notion that they were not privileged or subject  
24 to some kind of security --

25 MR. EGAN: That's correct.

1 JUDGE ROSENTHAL: And yet there was no  
2 explanation as to why. There was just a header  
3 without the accompanying document.

4 MR. EGAN: I can give you the explanation,  
5 Judge Rosenthal. The explanation is that DOE wanted  
6 to up its document count, but it knew it didn't have  
7 enough time to scan these documents into the system.  
8 There's millions of pages of documents that it would  
9 have had to put in to satisfy the rule.

10 JUDGE ROSENTHAL: So you're telling me  
11 that there's a substantial number of headers on their  
12 web site that are not accompanied by text nor  
13 accompanied by a claim of privilege.

14 MR. EGAN: That is correct, Your Honor.

15 JUDGE MOORE: On the headers that note  
16 privilege, do any of the headers state what the  
17 privilege claim is?

18 MR. EGAN: No, sir. And we have not found  
19 a single document that appears to have a credible  
20 privileged basis, not a single one. Lux Affidavit 7,  
21 five out of the five documents that they labeled  
22 privileged, when they went and looked at them they  
23 deemed them not justifiably privileged and released  
24 them. That's 100 percent, Your Honor.

25 We have documents that have duplicates in

1 the system, some of which are privileged and some of  
2 which are not for the same document, which says their  
3 screening software is bogus.

4 JUDGE ROSENTHAL: Now, can you provide a  
5 rough estimate as to how many documents fall in the  
6 category of headers, no text and labeled public or at  
7 least not labeled privileged?

8 MR. EGAN: I would say that it's well over  
9 750,000.

10 JUDGE MOORE: Can you tell me --

11 MR. EGAN: That's my estimate.

12 JUDGE MOORE: -- what your estimate of the  
13 number of documents carrying a privileged claim in the  
14 header?

15 MR. EGAN: I have no idea, Your Honor.  
16 All I can say it's a very large number.

17 JUDGE MOORE: But Judge Rosenthal and I  
18 are not planning to live to be past 100. Can you tell  
19 me

20 JUDGE ROSENTHAL: Speak for yourself.

21 (Laughter.)

22 MR. EGAN: I'm just going to take a rough  
23 guess, based on the percentages that we've  
24 encountered, of probably a quarter of a million.

25 JUDGE MOORE: We'll have to live longer

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1 than 100.

2 JUDGE KARLIN: May I ask, in terms of the  
3 standards, again, that we should be applying to the  
4 completeness with which DOE or any other party, I  
5 guess, provides their documents and makes them  
6 available, we have a 2.1012(b) substantial and timely  
7 compliance criteria, which, I believe, applies when  
8 deciding -- when the Board later should decide whether  
9 a participant may be a party to the proceedings. DOE  
10 and perhaps some other people in this room are in an  
11 interesting category because it's hard to conceive  
12 that DOE would not be allowed to be a party to its own  
13 application. Nor does the rule, as seen by its own  
14 straight terms, apply to DOE. But is that the rule  
15 that we should to DOE, substantial compliance?

16 MR. EGAN: No, sir, absolutely not.

17 JUDGE KARLIN: Okay.

18 MR. EGAN: The NRC staff has attempted to  
19 write a new standard here for DOE's initial  
20 certification that just doesn't exist in the  
21 regulations nor is it even plausibly sensical. They  
22 call this timely and substantial compliance, but for  
23 one thing, how does timeliness relate to this initial  
24 certification?

25 JUDGE KARLIN: I agree.

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1 MR. EGAN: The only relevant time here is  
2 whether it's been made six months before the  
3 submission of the application. PAPO can't gauge  
4 whether the initial certification's timely by that  
5 standard. It relates only to the filing of the  
6 application.

7 Second, nowhere in the rule does the rule  
8 allow merely substantial compliance. If you look at  
9 2.1003(a), which is the key provision defining  
10 documentary material and availability, it requires the  
11 production of, quote, "all documentary material," not  
12 substantially all documentary material.

13 JUDGE KARLIN: But does not substantial  
14 compliance apply to Nevada and any other participant?

15 MR. EGAN: Your Honor, the provision your  
16 citing, my belief is that, it relates to the fact that  
17 once DOE makes a certification, we are under a  
18 deadline. DOE's under no deadline. DOE could have  
19 said, "You know what? We're not ready to certify.  
20 We're going to spend another three months identifying  
21 these documents," and then it could certify. Once DOE  
22 certifies, Nevada's got to certify by September 30.  
23 NRC has 30 days to certify. What that means is we're  
24 scrambling to certify now, and of course it's, again,  
25 in the context of reliance documents. We're the ones

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1 who are going to be writing the contentions, okay?  
2 So, yes, timely and substantial has meaning to us.

3 JUDGE KARLIN: So you're saying with  
4 regard to the trigger, DOE can choose when to do the  
5 initial certification and then that triggers the  
6 certifications and the requirements on the other  
7 parties. I understand that. But in fact DOE has had  
8 15 years, it would seem, to gather these documents  
9 together, and the state of Nevada has had 15 years to  
10 know that it would be gathering these documents  
11 together. It's not like you're surprised that you've  
12 got 90 days to produce these documents.

13 MR. EGAN: That's correct, but there may  
14 be intervenors who haven't known for 15 years that  
15 they're going to participate in this. For example,  
16 NRDC, I can tell you right now, has not decided  
17 whether they're going to participate. They may well  
18 do, and they may well not. So it makes sense to me.  
19 If you look at 2.1 --

20 JUDGE MOORE: Excuse me, Counsel. Let's  
21 get to the Department's argument with respect to the  
22 authority of the PAPO Board to deal with the relief  
23 you seek.

24 MR. EGAN: Okay. Your Honor, it's clear  
25 that DOE wants to reduce PAPO's authority to that of

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1 a ministerial clerk, and that's just not what the  
2 rules say. Incredibly, the staff seems to indicate it  
3 couldn't find any authority -- I'm sorry, the staff  
4 agrees with Nevada on this, but DOE purports to say  
5 that it couldn't find any authority for the PAPO to  
6 negate the certification or even to extend the time  
7 period for Nevada to comply. That's just plain and  
8 simply wrong.

9 2.1010(a) gives PAPO the authority to rule  
10 on disputes over electronic availability of documents  
11 during the pre-license application phase, including  
12 claims of privilege. Our motion's a broad-scale  
13 dispute over electronic availability. DOE says that  
14 under 2.1010(b), PAPO can only rule on individual  
15 claims of document withholding, but PAPO's more  
16 general grant of authority explicitly states that PAPO  
17 has the authority -- it includes disputes over  
18 privileges. Thus, it must include more than disputes  
19 over privileges.

20 And 2.1010(e) says PAPO has, quote, "all  
21 the general powers specified in Sections 2.319 and  
22 2.321(c). If you go to those sections, it says that  
23 PAPO has all the authority to take any actions  
24 consistent with the Atomic Energy Act, all of NRC's  
25 regulations and the Administrative Procedure Act.

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1           It's hard to imagine how PAPO could have  
2 broader authority than that. That's extremely broad  
3 authority. That gives you the power to issue  
4 sanctions, it gives you the power to dismiss a party,  
5 it gives you the power to throw documents out, throw  
6 pleadings out, fine attorneys. You have extremely  
7 broad powers under these rules.

8           Under 2.1323, a filing may be struck from  
9 the record if it's not supported by appropriate  
10 references to factual basis. So 2.1009 says DOE has  
11 to make the certification to PAPO. It doesn't say go  
12 to the staff, it doesn't say go to the LSN  
13 Administrator, it doesn't say go to the Commission.  
14 You certainly have the power to determine whether  
15 you're going to accept this document. DOE --

16           JUDGE MOORE: The relief you're seeking  
17 deals directly with the need of the state of Nevada to  
18 certify its documents 90 days from the certification  
19 of the Department of Energy. So our action with  
20 regard to the Department of Energy's certification  
21 obviously affects when you must fulfill your  
22 regulatory obligation. That said, we can deal with  
23 that problem and grant you relief if that were  
24 appropriate without in any way infringing, could we  
25 not, upon the Director of NMSS' authority to determine

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1 whether the certification is valid for purposes of  
2 docketing that, an ultimately filed application?

3 MR. EGAN: Exactly, Your Honor. But I  
4 would emphasize.

5 JUDGE MOORE: And they're two different  
6 determinations of certification.

7 MR. EGAN: Two completely different  
8 determinations. And I would emphasize, Your Honor,  
9 that that's really the sideline of our request for  
10 relief. The purpose of LSN was to make documentary  
11 material available to the parties so that they would  
12 have the opportunity to formulate reasonable  
13 contentions of in advance of what's going to be a very  
14 rapid proceeding in NRC space. That's the key.

15 JUDGE MOORE: And for a period of six  
16 months.

17 MR. EGAN: Six months. And so we're  
18 challenging the initial certification. Our main  
19 remedy is we think this Board should just simply rule  
20 on the face of this document, "It does not satisfy the  
21 rules. We're remanding it back to you, so you can  
22 choose whether or not you want to actually certify it,  
23 if and when you're able, or not." It's a very modest  
24 remedy we're seeking.

25 JUDGE ROSENTHAL: Do we need to reach the

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1 issue as to whether availability means the  
2 accessibility on the central site or can we simply  
3 determine this matter on the basis of your assertion  
4 of incompleteness?

5 MR. EGAN: I think that you could end the  
6 inquiry by simply ruling that the certification fails  
7 on its face. That would --

8 JUDGE ROSENTHAL: Fails on its face  
9 because?

10 MR. EGAN: Because it doesn't follow the  
11 cookbook. It doesn't reiterate the words that the  
12 regulations require you to swear to. It doesn't have  
13 it in there.

14 JUDGE ROSENTHAL: And that's because --

15 MR. EGAN: That's because they can't do  
16 it, Your Honor.

17 JUDGE ROSENTHAL: -- it's incomplete?

18 MR. EGAN: That's because it is so  
19 stunningly incomplete that for them to make that  
20 statement they could go to jail.

21 JUDGE ROSENTHAL: So we could decide this  
22 matter on the basis of the completeness issue without  
23 reaching the question as to whether availability means  
24 the central LSN site.

25 MR. EGAN: Yes, sir. And the way we view

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1 it is if you're not going to do that, then we would  
2 fall to the next problem, which is that it's not  
3 available on LSN, and that's another separate  
4 independent ground for not accepting the  
5 certification. And the third independent ground is  
6 that the documents just aren't there.

7 JUDGE MOORE: Can we stay on that ground,  
8 if I may, the ground that availability on the LSN is  
9 somehow a required prerequisite, setting aside the  
10 completeness issue that Judge Rosenthal was talking  
11 about. I mean, as I understand it, the position is  
12 that before a party can certify or a participant can  
13 certify that their documents are available under  
14 2.1003 and 9, you're saying that the LSN Administrator  
15 has to have indexed them and crawled them and audited  
16 them and completed his job before the participant can  
17 certify that his or her documents are available.

18 MR. EGAN: Yes, sir.

19 JUDGE MOORE: That's a prerequisite.

20 MR. EGAN: Although I believe from Mr.  
21 Graser's answers and from some of the papers I've read  
22 on the process that the indexing is the auditing.  
23 It's not like there's some kind of quality assurance  
24 function that goes on for months after indexing.

25 JUDGE MOORE: Okay. Well, stay with me on

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1 that one then. I'm troubled by the June 14, 2004  
2 Federal Register discussion on what appears to be this  
3 very question that's been raised in the briefs, Page  
4 32840. It seems to me that the state of Nevada raised  
5 this very question and it was answered in the  
6 negative; that is, it was answered by the Commission.  
7 You, I believe, as I understand these comments,  
8 pointed out to the Commission that there is a problem;  
9 that is, DOE will certify that its documents are  
10 available but the LSN Administrator will not have  
11 completed his indexing and auditing, and there may be  
12 a time lag between those two events. And therefore  
13 you advocated or asked, as I understand, the state  
14 asked that the trigger be the LSN Administrator's  
15 certification. You asked for there to be one, and you  
16 asked that to be the trigger. NRC rejected that,  
17 saying, "Well, that's not what was part of this  
18 rulemaking." So it didn't really get to the merits  
19 very much.

20 But it then went on to say, "Yes, we  
21 recognize it will be" -- and if I read this, "The NRC  
22 is pursuing an approach with DOE to assure that the  
23 DOE collection has been indexed and audited by the LSN  
24 Administrator in approximately the same time frame as  
25 the DOE certification." The relevance of that, seems

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1 to me, that NRC is saying, and the very question that  
2 was asked is recognizing that there is a different  
3 point of time of DOE certification and LSN  
4 Administrator's indexing, and they're saying, "So be  
5 it," and that is exactly where we are today, isn't it?

6 MR. EGAN: Well, Your Honor, I'm going to  
7 respectfully disagree with you on the meaning and the  
8 context of that, and let me parse it out for you if I  
9 can.

10 JUDGE MOORE: Okay. Yes.

11 MR. EGAN: First of all, it's very clear  
12 in the Commission's discussion here that this issue is  
13 outside the very scope of the rulemaking that they're  
14 in the process of having, okay? So it's a preamble of  
15 a preamble. It did not purport in any way to trump  
16 any other provision of the rules that require this  
17 stuff to be made available on the LSN. That's point  
18 number one.

19 Point number two is that what Nevada asked  
20 for here was for a second independent certification by  
21 the LSN Administrator. Nevada's been asking for that  
22 for 15 years. And the reason Nevada wanted that is  
23 because we wanted the LSN Administrator to audit the  
24 documents, we wanted the LSN Administrator to inspect  
25 them and say, "This is a reasonable collection, and

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1 I'm going to certify myself individually of DOE's  
2 certification." It was this provision that did not  
3 make it into the rule. It was not rejected because  
4 it's outside the scope of the rulemaking. The  
5 Commission just said, "We can't rule on that here."

6 But it did discuss the issue. It said it  
7 was, quote, "pursuing an approach with DOE to ensure  
8 that the DOE collection has been indexed and audited  
9 by the LSN Administrator in approximately the same  
10 time frame." Well, my point on this would be that  
11 they pursued an approach that obviously did not work  
12 for the simple reason that DOE grossly prematurely  
13 certified. And you can read the correspondence  
14 between Mr. Graser and the DOE staff that's occurring  
15 at this time where he is telling them, "You've got a  
16 train wreck coming down the pike, and you need to do  
17 something." This hoped for approach that the NRC had  
18 never saw the light of day.

19 And in any event, I would argue, and I'll  
20 give you some numbers, Mr. Graser said it's going to  
21 take him six more weeks to index the remainder of  
22 DOE's documents, okay? But his estimate of six weeks,  
23 he says, is expressly predicated on the number of  
24 documents that DOE fibbed about when they made the  
25 certification. He says it's based on the 1.2 million.

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1 Well, we now know that DOE's got 2.1  
2 million, and what that means is that using the same  
3 rate of loading that he's been having between May 5  
4 and July 23 when he signed that document, 8,100  
5 documents a day, we're talking early November. How  
6 could it be construed as approximately the same time  
7 frame for Nevada to have to satisfy its LSN  
8 requirement on September 30 weeks before DOE's even  
9 satisfied it's?

10 So we don't think that the --

11 JUDGE MOORE: How much time would that  
12 leave you to do discovery on the LSN?

13 MR. EGAN: It depends on when they file  
14 and document the application, Your Honor.

15 JUDGE MOORE: Well, they say they're going  
16 to do it by the close of this calendar year.

17 MR. EGAN: Well, we'll see whether they do  
18 or not.

19 JUDGE MOORE: So that would give you,  
20 instead of six months, something under two.

21 MR. EGAN: Right. And this whole idea  
22 they have about the remedy here is for the delay of  
23 the docketing really is an insidious suggestion,  
24 because, first of all, that's a provision that relates  
25 simply to the timeliness of the certification, not to

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1 the substantive content or the legal propriety of it.  
2 It simply says, "You've got to verify, NMSS, that this  
3 certification came in six months before." And if it  
4 didn't, if DOE did what you just suggested they're  
5 going to do, Judge Moore, and files anyway on December  
6 30, which I think they will too because Bechtal gets  
7 a \$36 million bonus, the rules say in that case when  
8 you've violated that provision, then the remedy is for  
9 NMSS to delay the docketing. And that only makes  
10 sense. The whole point here is to give the parties  
11 six months.

12 So I don't make much of this notion that  
13 we have some remedy. DOE would be the first to be in  
14 here and say, "Now that we're in the license  
15 application process, you're objections to the initial  
16 certification are long since mooted."

17 JUDGE ROSENTHAL: Let me ask you this  
18 question on, again, what availability means. Now, you  
19 may have problems with DOE waiting to the last minute  
20 to put its documents into the system, but let's leave  
21 that aside. The fact is, is it not, that DOE has no  
22 control over the way these documents are indexed by  
23 the LSN central site? Now, hypothetically, supposing  
24 that DOE had put all of its documents into the system  
25 in a timely fashion, in its system, and for some

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1 reason or other, the central site procedures crashed  
2 and the documents didn't get indexed on the LSN site,  
3 wouldn't it be unfair, in that hypothetical situation  
4 at least, to say to DOE, "Well, that's tough. You  
5 can't put in a certification even though you had  
6 everything in your site because of problems over which  
7 you had no control in terms of their being indexed in  
8 the central site."

9 MR. EGAN: Your Honor, I don't see how it  
10 could be unfair when for 33 months Mr. Graser was  
11 begging them to load their documents onto the LSN,  
12 begging them.

13 JUDGE MOORE: All right. That's the fact  
14 here. That's the face here.

15 MR. EGAN: Right.

16 JUDGE MOORE: But I'm looking at this  
17 abstractly --

18 MR. EGAN: Okay.

19 JUDGE MOORE: -- as to whether -- I mean  
20 it may be in these circumstances that the answer is  
21 the one that you're now suggesting, but if you're  
22 looking at this as an abstract issue as to what  
23 availability means, and on the one hand, you have DOE  
24 with its site and no control over what happens in  
25 terms of indexing onto the other site, if you look at

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1 it abstractly, isn't there something to be said for  
2 the DOE position as to what availability means?

3 MR. EGAN: Well, let me answer that like  
4 this, Your Honor: If I'm in a civil litigation or in  
5 administrative litigation and we have normal  
6 discovery, I send a document production request to my  
7 adversaries. They produce a huge amount of documents.  
8 I send my paralegals over, we copy them, we Bate stamp  
9 them, we bring them back to my office and they're  
10 sitting in a repository. I now have control over that  
11 production. If they destroy a document, I know it.  
12 If they doctor a document, I know it. If they add a  
13 document, I know it. If they remove a document, I  
14 know it.

15 The whole principle here is that these are  
16 big adversaries. These people have different  
17 motivations, and the civil discovery system, which LSN  
18 is designed to be a surrogate of, does not entrust  
19 adversaries with the documents. It's just a principle  
20 of civil litigation that this LSN was designed to be a  
21 surrogate of. So the answer is, no, it would not be  
22 fair, Your Honor, because we know what DOE does with  
23 the documents.

24 JUDGE MOORE: Counsel, doesn't that issue  
25 -- isn't that issue resolved if available means

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1 available via the LSN?

2 MR. EGAN: Yes, it is.

3 JUDGE MOORE: Because necessarily the LSN  
4 must do whatever the LSN does before the documents  
5 become public?

6 MR. EGAN: Yes, sir. It's the case that  
7 the LSN -- first of all, when you punch in a request,  
8 you know exactly how many hits you have. You know  
9 exactly how many documents are there. Once they have  
10 an accession number, you know if the document's been  
11 removed or not.

12 JUDGE ROSENTHAL: You're telling me that  
13 availability has to mean the LSN central site because  
14 of the integrity factor; is that basically --

15 MR. EGAN: Yes, sir. And the  
16 accountability factor. Otherwise it's no different  
17 than the FOIA process where DOE has a bunch of  
18 documents and they can provide what you want and you  
19 can contest what you want.

20 JUDGE MOORE: Counsel, I'd like to turn  
21 for a moment to good faith production. Can you help  
22 me in ascertaining what are the elements that go into  
23 the good faith standard which the Department says is  
24 applicable to their production, which the staff says  
25 it's applicable to their production, and I assume you

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1 agree --

2 MR. EGAN: I agree.

3 JUDGE MOORE: -- is applicable to document  
4 production. What are the elements that go into good  
5 faith?

6 MR. EGAN: Well, Your Honor, the operative  
7 phrase is good faith in meeting 1.003 -- or 1003 which  
8 says that you must provide all your documentary  
9 material. Obviously, no one can provide perfectly all  
10 the documentary material, so the standard of good  
11 faith, in my view, is applied to the word, "all."  
12 It's applied to the word, "all." And --

13 JUDGE MOORE: You started your argument by  
14 listing the litany of horrors, from your perspective,  
15 committed by the Department of Energy and stated  
16 something to the effect that they had had 15 years  
17 knowledge that they were going to have to do this and  
18 15 years to do it and waited until --

19 MR. EGAN: May the 5th.

20 JUDGE MOORE: Of last year?

21 MR. EGAN: This year. This year.

22 JUDGE MOORE: Well, but didn't they start  
23 the process on May the 5th of 2003?

24 MR. EGAN: Your Honor, they had what they  
25 call a call memo, which interestingly was only sent

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1 out to existing contractors. It was not sent to any  
2 previous contractors, okay? And they said, "Send us  
3 all your documents and certify that you've done that."  
4 We don't have any of those certifications. We don't  
5 know whether they exist.

6 JUDGE MOORE: But is an element of good  
7 faith the fact that one waits until one strike before  
8 midnight before acting? Is that an element of good  
9 faith?

10 MR. EGAN: That is absolutely, in our  
11 view, Your Honor, flagrant bad faith, flagrant bad  
12 faith. If you read the answers that DOE gave to your  
13 questions, there are bullet points talking about tens  
14 of thousands of documents that they did not include.  
15 I mean here's the element --

16 JUDGE MOORE: What are the other elements  
17 --

18 MR. EGAN: Well, here's the key element,  
19 Your Honor, of good faith. If they had waited six  
20 more months, they might have been able to do this. If  
21 they had just waited for all the contractors to get  
22 their documents in, they might have been able to do  
23 this. But the reason they went forward now is because  
24 of the artificial licensing submission deadline.  
25 There's no rational explanation. It is not a rational

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1 thing they did until you understand why they did it.

2 JUDGE MOORE: But that has nothing to do  
3 with good faith, does it?

4 MR. EGAN: Your Honor, good faith, I don't  
5 see how anybody could say that this is good faith when  
6 for 33 months Mr. Graser was begging them to provide  
7 documents and they waited until May the 5th of this  
8 year to do so, to provide their first document.

9 JUDGE MOORE: And the LSN has been  
10 available --

11 MR. EGAN: Since October 2001, according  
12 to Mr. Graser.

13 JUDGE MOORE: And the Department of Energy  
14 has known that?

15 MR. EGAN: Yes, sir. And not only have  
16 they known it, there's a paper trail of, as I said,  
17 Mr. Graser begging them to begin the process precisely  
18 so we wouldn't be in a situation where they're  
19 deleting 175,000 documents the day after certification  
20 and crashing the system.

21 JUDGE MOORE: In my perusal of all the  
22 materials that have been filed, it is apparent that  
23 the Department of Energy, for some time, at least a  
24 year, has taken the position that available means  
25 available in a method of their choosing on their own

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1 web site divorced from the LSN or means or and means  
2 available so that the LSN may begin the process of  
3 crawling the documents so that they can ultimately  
4 become available.

5 MR. EGAN: I'm going to disagree with you.

6 JUDGE MOORE: That's not the case?

7 MR. EGAN: Well, Your Honor, a very key  
8 point of disagreement is that some staffers in the  
9 bowels of Bechtal SAIC have taken that position, but  
10 on August 9, 2002, DOD's General Counsel construed the  
11 LSN regulations and issued a broadly distributed memo  
12 saying, quote, "The LSN will be an Internet-based  
13 discovery system that will contain all of DOE's  
14 documents relative to the licensing proceeding." DOE  
15 is responsible for loading the LSN with all of its  
16 discovery documents no later than six months in  
17 advance of submission of a license application.

18 JUDGE MOORE: Is that document something  
19 you submitted to us?

20 MR. EGAN: I'm going to mark it as Hearing  
21 Exhibit 1 right now and give it to you, Your Honor.

22 JUDGE MOORE: And that's a memorandum from  
23 whom?

24 MR. EGAN: From the General Counsel, Lee  
25 Liberman Otus, to distribution broadly within the DOE

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1 complex. She also stated, "Subpart J requires DOE to  
2 include all documentary material in the LSN." That's  
3 the General Counsel of DOE speaking and issuing  
4 instructions to the DOE as to her construction of the  
5 regulations.

6 JUDGE MOORE: And what date is that?

7 MR. EGAN: August 9, 2002.

8 JUDGE KARLIN: On that point, Mr. Egan,  
9 we've been talking on the LSN, I guess is the phrase,  
10 or in the LSN. As I understand the LSN definition, it  
11 is, "a combined system," and it goes on from there.

12 MR. EGAN: Yes, sir.

13 JUDGE KARLIN: And I take that to mean  
14 there is a central portal and then there is a separate  
15 web servers that each of the participants would  
16 create, and the central portal indexes and accesses  
17 and verifies what comes from the portals. So the LSN  
18 is a combined system of the central portal and the  
19 individual portals. So is something in the LSN when  
20 it's in the individual portal?

21 MR. EGAN: Your Honor, the genius of the  
22 LSN is that it matched up to a web-based system where  
23 the parties could have their individual repositories  
24 but where the LSN could keep total accountability of  
25 the documents --

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1 JUDGE KARLIN: I understand its  
2 accountability function.

3 MR. EGAN: -- on a separate server.

4 JUDGE KARLIN: I understand its  
5 accountability function.

6 MR. EGAN: And so now the words --

7 JUDGE KARLIN: I'm just wondering is it in  
8 the LSN if it's in the combined system? This is  
9 certainly a component of the LSN. Is it in there?

10 MR. EGAN: If it's in the combined system,  
11 which Yucca Vista's is not --

12 JUDGE KARLIN: Oh, okay.

13 MR. EGAN: -- all by itself it's not, but  
14 if it's --

15 JUDGE MOORE: Counsel, you have used one  
16 hour.

17 MR. EGAN: Okay. I'm going to rest my  
18 direct oral argument for now, I believe. Thank you.

19 JUDGE MOORE: Counsel for DOE?

20 MR. SHEBELSKIE: Yes, sir. Good morning.  
21 My name is Mike Shebelskie, appearing on behalf of the  
22 Department of Energy. And we appreciate the  
23 opportunity to explain the facts to the panel this  
24 morning, because the facts will show, and do show,  
25 that the Department of Energy made a substantial good

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1 faith production. The facts will show that the  
2 Department of Energy's initial certification was  
3 proper and met the regulatory requirements. And the  
4 facts will show that the relief that Nevada's asking  
5 for here should not be granted.

6 JUDGE ROSENTHAL: Do you dispute the claim  
7 of Mr. Egan that there was some -- I think he  
8 estimated that possibly 750,000 documents that are in  
9 the DOE web site with a header but no text and with no  
10 indication that those documents were privileged?  
11 Indeed, I think he said that they were labeled,  
12 "public." Now, if that's the case, I have some  
13 difficulty in understanding how you're going to be  
14 able to persuade me, at least, that there's been  
15 substantial compliance.

16 MR. SHEBELSKIE: Your Honor, I do not  
17 dispute the approximate range of numbers that Mr. Egan  
18 gave in that regard, but, again, you have to look at  
19 the regulations. The regulations provide in Section  
20 1003 that a bibliographic header only needs to be  
21 provided for certain categories of documents, such as  
22 documents that cannot be imaged, also documents that  
23 are subject to a claim of privilege. So there will  
24 be, and the regulations contemplate that there will be  
25 documents in header-only format on the LSN.

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1 JUDGE ROSENTHAL: But these, according to  
2 Mr. Egan, were labeled, "public." So I would assume,  
3 therefore, they're not being claimed as privileged.

4 MR. SHEBELSKIE: Well, I don't know the  
5 number of the approximately 700,000 he says that had  
6 this public designation in the access control field,  
7 but let me make two points with respect to that  
8 particular issue, Your Honor. First is that the  
9 regulations do not specify that a party producing a  
10 document in header-only format for a claim of  
11 privilege is required to put in the header, either  
12 that the document is privileged, much less the basis  
13 for the asserted privilege. There simply is nothing  
14 in the regulations that requires that.

15 JUDGE MOORE: Let's go to a step down from  
16 that. Are there any other -- through this process, as  
17 I understand it, there was a Federal Advisory  
18 Committee and there were extensive technical working  
19 groups of which DOE had major participation. Now, are  
20 there any agreements coming out of that Federal  
21 Advisory Committee or the technical working groups by  
22 which DOE agreed to do that, i.e. put in the header  
23 field, "privileged?"

24 MR. SHEBELSKIE: That was going to be the  
25 second point I was going to address, dropping down to

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1 the guidelines that the LSN Administrator had  
2 developed, which he admits, of course, are not binding  
3 as regulations are. In the guidelines that the LSN  
4 Administrator has established, he specified or had a  
5 list of additional terms or fields for the  
6 bibliographic headers, some of which he indicated, in  
7 his opinion, under the guidelines ought to be  
8 mandatory, others not mandatory. There is no  
9 mandatory field under even the guidelines for a  
10 privileged designation. There is in a second  
11 category, entitled, "Required if Available," something  
12 called an access control field.

13 Now; what is an access control field?  
14 Well, you have to, I think, understand the evolution  
15 of this system and where the LSN Administrator was  
16 coming from. So I understand that he had a prior  
17 career, as it were, at the Department of Energy  
18 working on the Records Management System, and he knew  
19 that the Records Management System, which is the  
20 electronic database that preserves records for the  
21 Office of Civilian Radioactive Waste Management for  
22 this project, had a field called access control.

23 How that field is used within the  
24 Department of Energy's Record Management System, you  
25 have two designations: PUB and PRIV, P-R-I-V. And

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1 what that indicates is who within the Department who  
2 has access to this database has access to that  
3 particular document. A PUB designation in the access  
4 control field in the Record Management System means  
5 that the document is essentially freely available to  
6 users within the Department on that database. A PRIV  
7 designation in the access control field indicates that  
8 the access is restricted within the Department. That  
9 is all the designations mean in the access control  
10 field in the Record Management System.

11 And for the documents that the Department  
12 of Energy put on its LSN web server that came from the  
13 Record Management System, those documents had attached  
14 to them already the access control fields and either  
15 a PUB or PRIV designation from the contemporaneous  
16 designation in that field, and they got carried over  
17 and transported up with the document that now appears  
18 on the Record Management System, because that's what  
19 available information was for that field. And there  
20 was no discussion in the guidelines that you had to  
21 create and use that field for additional documents to  
22 designate whether they were privileged or not.

23 JUDGE MOORE: So did DOE, as a member of  
24 the Federal Advisory Committee, consent to -- because,  
25 as I understand it, all of those guidelines came out

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1 of the Committee and were then put back before the  
2 Committee for approval; is that the process?

3 MR. SHEBELSKIE: There was a collaborative  
4 process, yes, Your Honor.

5 JUDGE MOORE: So did DOE agree to provide  
6 that?

7 MR. SHEBELSKIE: They agreed to provide it  
8 under the guidelines if it was available and they  
9 would provide it --

10 JUDGE MOORE: Okay. Well, you just told  
11 me that as part of your normal recordkeeping process  
12 it is available.

13 MR. SHEBELSKIE: Yes.

14 JUDGE MOORE: Okay.

15 MR. SHEBELSKIE: And it was provided.

16 JUDGE MOORE: Okay.

17 MR. SHEBELSKIE: In every instance where  
18 it existed on the document.

19 JUDGE MOORE: So how do you have documents  
20 -- if your recordkeeping system requires this  
21 designation, how are there these document that don't  
22 carry such a designation?

23 MR. SHEBELSKIE: Because not all the  
24 documents that we produced, by any means, came out of  
25 the Record Management System. As described in the

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1 certification and in our papers here, we went above  
2 and beyond capturing and producing documents from the  
3 Record Management System. There was the call memo  
4 that was alluded to, and I'll discuss in a little more  
5 detail later. We also did reviews of over six million  
6 archival emails of active users. The documents that  
7 were identified for production from those sources and  
8 those document collections outside the Record  
9 Management System did not bear any access control  
10 field, because they were not founded and grabbed from  
11 the record processing database.

12 JUDGE ROSENTHAL: You'll have to bear with  
13 me because I come from the Grover Cleveland era, but  
14 I'm still having some difficulty in following this.  
15 We're told by Mr. Egan that there's, he said,  
16 approximately 750,000 documents that had headers, no  
17 text and no designation of privilege, and my  
18 understanding was that you didn't dispute the accuracy  
19 of that factual assertion. Now, I don't still  
20 understand how those documents became accessible to  
21 the public on your web site if all that they had was  
22 a header, no text and no claim of privilege. Now, I'm  
23 obviously missing something, and you'll, I'm sure,  
24 straighten me out in that regard.

25 MR. SHEBELSKIE: Well, I'll attempt to.

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1 I think, though, let me make clear one point first.  
2 I think, Your Honor, your question goes to a different  
3 issue. The issue of whether or not a privileged --  
4 there must be a field in the header that indicates  
5 what is privileged, that's separate from you're  
6 asking.

7 JUDGE ROSENTHAL: Yes. That's not my --  
8 my question goes to the completeness of your going on  
9 to your own system in terms of the legitimacy of the  
10 certification, which is being challenged by the state.

11 MR. SHEBELSKIE: Yes. Again, if you look  
12 at Section 1003, that section tells us in what form  
13 documents must be provided to be made available. It  
14 provides that there must be a bibliographic header for  
15 each document in a certain format, and there's no  
16 dispute that the electronic files for our  
17 bibliographic headers meet those technical electronic  
18 formats. The regulation also provides that in certain  
19 circumstances a full text and image of the document  
20 will be provided and linked to the bibliographic  
21 header. However, 1003 clearly states that a  
22 bibliographic header only, without the full text and  
23 image, can be provided for several categories of  
24 documents, such as documents that cannot be imaged,  
25 copyrighted documents, classified documents and

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1 documents that are subject to a claim of privilege.

2 To the best of our knowledge, every  
3 document that we have put out on our LSN web server  
4 where there was only a bibliographic header and not a  
5 link to the actual text of the document falls into one  
6 of those categories. We produced them in header-only  
7 because they were either subject to a claim of  
8 privilege by us or it falls into those other  
9 categories that the regulations permit us to do that  
10 in.

11 JUDGE MOORE: Is it your position that you  
12 have put forth a bibliographic header -- made  
13 available a bibliographic header for each category of  
14 material?

15 MR. SHEBELSKIE: Absolutely.

16 JUDGE MOORE: So there are no  
17 bibliographic headers that are missing from any of the  
18 documents appearing in your collection?

19 MR. SHEBELSKIE: Yes, sir.

20 JUDGE KARLIN: If I may, I think I would  
21 -- I'm looking at 2.1003, and it has four categories  
22 of documents and how they are to be made available.  
23 And for all of them let's just start with an  
24 electronic header, bibliographic header is required.  
25 So that's a given. The first category is all

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1 documentary material of electronic file nature shall  
2 be made available and we shall have that document.  
3 The second is image format documents, which we are to  
4 see and are to be provided into the system. And the  
5 third seems to be a relatively rare category, which  
6 would be an electronic file which is not suitable for  
7 image or searchable text. I'm not sure how many of  
8 those that are either not an image or not a text. And  
9 the fourth is the one we're sort of talking about  
10 here: A header is still required for the limited set  
11 of documents which are either a claim of privilege,  
12 claim of confidential, financial or commercial or  
13 safeguards.

14 And so you would expect that most  
15 documents would be provided in full image or full text  
16 form except for those which a claim of privilege of  
17 some sort is being made under Number 4. Are we to  
18 understand that -- well, let me refer you to your  
19 Exhibit Number 17 where you have shown us a summary of  
20 documents that were made available and documents that  
21 have not been available. And there's 872,210 not made  
22 available. Are those documents for which a privilege  
23 is being claimed or is that something else?

24 MR. SHEBELSKIE: I understand the source  
25 of confusion on our part in answering the question.

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1 When the Board asked us to identify those documents  
2 that we had made available and those we had not made  
3 available, we understood the question to say to the  
4 Department, "Look at the entirety of the universe of  
5 documents you have collected and had in your  
6 possession. From that universe," divided up in these  
7 various collections because that's how we have  
8 preserved them, "what number, what subset did you grab  
9 to put out on the LSN?"

10 JUDGE KARLIN: All right.

11 MR. SHEBELSKIE: So, for example, on this  
12 chart, on Exhibit 17, the RIS, that's the Record  
13 Management System, that's the program's electronic  
14 database, that database has 1.3 million documents,  
15 approximately.

16 JUDGE KARLIN: So the column in the total  
17 of the RIS, okay --

18 MR. SHEBELSKIE: As of approximately now,  
19 when the date these numbers are current, there were  
20 1.3 million documents in that database from its  
21 inception back in the last '80s, 1987, up through May  
22 or June of 2004. Out of that collection of 1.3  
23 million documents, the processes that were described  
24 in the certification plan resulted in the Department  
25 identifying approximately 846,000 of them as

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1 documentary material, and that's the subset that went  
2 out on our participant web server. There is a  
3 bibliographic header for all 846,000 of those  
4 documents. The remaining 509,000 documents were that  
5 portion of the Record Management System, or the RIS,  
6 that was determined by the Department not to be  
7 documentary material and therefore, quite properly  
8 under the regulations, it didn't put out on the LSN in  
9 any form. And that is true for all the categories on  
10 that chart.

11 JUDGE KARLIN: So those are simply not the  
12 documentary material. For example, they would be  
13 covered by the exclusions to documentary material.

14 MR. SHEBELSKIE: They would be covered by  
15 the exclusions.

16 JUDGE KARLIN: Right.

17 MR. SHEBELSKIE: They would fall outside  
18 the basic definition.

19 JUDGE KARLIN: Right, because the  
20 exclusions, it seems to me, cover copyrighted  
21 material. It's not something for which a privilege is  
22 asserted. Exclusions come under copyrighted. So in  
23 the 509,000 documents not made available, I would  
24 expect to see many, many documents that might be  
25 copyrighted. I would not expect to see any of them in

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1 the ones that were made available but were claimed a  
2 privilege, because copyright is not a privilege under  
3 the regs, it is an exclusion from the definition of  
4 documentary material.

5 MR. SHEBELSKIE: Right.

6 JUDGE KARLIN: But yet I think we are  
7 seeing, from what I understand from the briefing and  
8 the information we were given, that we're having  
9 documents that were made available maybe only in  
10 header form and someone says, "Well, we didn't give it  
11 to you because it's copyrighted."

12 MR. SHEBELSKIE: That is correct.

13 JUDGE KARLIN: Something's been  
14 miscategorized for that to -- that does not compute  
15 under the regs.

16 MR. SHEBELSKIE: On the copyright issue,  
17 in particular, Your Honor, I think there's two issues.  
18 One is in the Record Management System associated with  
19 this, you'll see in the paper, there are these two  
20 other databases called the Data Information Retrieval  
21 System and then there's another one that is set up to  
22 help the Department track the information that is  
23 cited in its technical work papers that go into this  
24 project. And to make sure that we have grabbed and  
25 identified for the LSN all of the information, as the

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1 best we knew it at the time, that we were going to  
2 cite and rely on, we went and instructed it to grab  
3 all the references from those databases.

4 Now, some of those references are going to  
5 be copyrighted references but we included them out of  
6 an abundance of caution so the world can see here's  
7 what our database is of all the citations we have in  
8 our work papers up to this point. Where those  
9 citations may have been copyrighted, then a header-  
10 only was provided, not a link to the image.

11 JUDGE KARLIN: Okay. Let me go back to  
12 Exhibit 17 to understand it. So would it be correct  
13 to say that the not made available column, 872,000 and  
14 some, are not documents for which you're claiming  
15 privilege and have provided a header but simply  
16 documents that you have determined are not within the  
17 definition of documentary material or are otherwise  
18 subject to the exclusions from documentary material?

19 MR. SHEBELSKIE: Correct. Absolutely.

20 JUDGE KARLIN: Okay. Now, on the two  
21 million or so that have been made available, some of  
22 those have been made available in full text or image

23 --

24 MR. SHEBELSKIE: Yes, sir.

25 JUDGE KARLIN: -- and some have been made

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1 available with only a header.

2 MR. SHEBELSKIE: Yes, sir.

3 JUDGE KARLIN: And those with only a  
4 header are those that are either a claim of privilege  
5 under 2.1003(a)(4) or a claim that they just -- of  
6 1.003(a)(3), which is you just couldn't make an  
7 electronic document available.

8 MR. SHEBELSKIE: Yes.

9 JUDGE KARLIN: Okay. And of the two  
10 million then, how many of those are there header only  
11 and how many are actual image?

12 MR. SHEBELSKIE: Approximately half.

13 JUDGE KARLIN: Okay. So about a million  
14 of them are image and a million of them are header  
15 only.

16 MR. SHEBELSKIE: Yes. I believe about  
17 1,050,000 are full text and --

18 JUDGE MOORE: Counsel, you heard a tape  
19 earlier by the state of Nevada that made a request,  
20 which, as I read the regulations for those header-only  
21 documents, you have five days to produce the document,  
22 and the tape essentially said, "We're very sorry. We  
23 can't help you. Call back and maybe we can. And we  
24 average 99 percent of the time ten days to produce  
25 those documents." Are you prepared today to tell me

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1 that tomorrow or probably yet today when the state of  
2 Nevada requests for that, I guess, something about a  
3 million header-only documents that you're going to  
4 produce a copy for them within five days?

5 MR. SHEBELSKIE: Let me answer two points  
6 to that, Your Honor.

7 JUDGE MOORE: Well, yes or no first.

8 MR. SHEBELSKIE: Well, obviously no,  
9 because many of these documents are subject to claims  
10 of privileges.

11 JUDGE MOORE: Okay. The non-privileged  
12 ones.

13 MR. SHEBELSKIE: But, obviously, I don't  
14 think the regulations are contemplating a turnover of  
15 a million documents --

16 JUDGE MOORE: No, but the regulations  
17 certainly contemplated something, and they asked for,  
18 I can't remember the number, but I think it was five  
19 or 15 or 17 or 19, and they couldn't get them. So  
20 what's the answer to that tape that they played?

21 MR. SHEBELSKIE: Yes. I never heard that  
22 tape before today. I don't know anything about it.  
23 Here is what I know. We were informed on Thursday,  
24 last Thursday, that the state's Counsel's Office had  
25 made a request that week, Monday or Tuesday, for 19

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1 documents. The information call center forwarded the  
2 request onto our litigation support contractor that  
3 manages the electronic database, informed counsel,  
4 said that they asked for 19 documents.

5 Those documents were reviewed and I  
6 believe the count was either 17 or 18 of them we  
7 decided we could provide to them. There was one  
8 remaining, I believe -- one was copyright, and I think  
9 one claim of privilege was still going to be asserted  
10 to. The remaining 17 would be made available, and it  
11 was my understanding that on Monday, yesterday, which  
12 would be the fifth business day, at least, from the  
13 request, the information center responded to the  
14 requester, I believe it was the secretary at the  
15 Counsel's Office, that the documents were being  
16 available. And, indeed, all but one had actually been  
17 loaded the image up on to our LSN web server, and the  
18 one remaining one was privileged.

19 JUDGE MOORE: I'm sorry. I perhaps  
20 misunderstood the tape. I don't want to take the time  
21 to have it read back, but I believe counsel for the  
22 state of Nevada said it was the 16th --

23 MR. SHEBELSKIE: I believe he did, Your  
24 Honor.

25 JUDGE MOORE: -- of July. And unless I'm

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1 mistaken, this is the 27th, and you said it was made  
2 available yesterday, the 26th.

3 MR. SHEBELSKIE: No, Your Honor. I said  
4 I didn't know anything about a request being made on  
5 the 16th. The first request that counsel and the  
6 litigation support contractor had been apprised of was  
7 a request made a week ago, Monday or Tuesday.

8 JUDGE MOORE: So you're ignorant of the  
9 matter on --

10 MR. SHEBELSKIE: Absolutely.

11 JUDGE MOORE: -- which the tape was  
12 played. Okay.

13 MR. SHEBELSKIE: Absolutely. But I can  
14 tell you when that request came in, the one I do know  
15 about, which I understood was the first one, that we  
16 put the processes in motion toot sweet, to get the  
17 documents turned around within five days. And we did.

18 JUDGE MOORE: Well, okay. But then that  
19 tape is, what you're telling me, an aberration?

20 MR. SHEBELSKIE: It certainly is an  
21 aberration. It's not the policies and procedures that  
22 the information center and our litigation support  
23 contractor have in place to respond. I can't say  
24 anything further about the tape. I don't know who's  
25 on it, I don't know the facts and circumstances. I

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1 would be glad to, after the hearing, investigate it if  
2 there was a request that came in that did not get  
3 forwarded to us to make sure it gets followed up and  
4 doesn't happen again.

5 JUDGE MOORE: And so now let me make sure  
6 I understand your answer. The Department of Energy,  
7 by your representations, is fully prepared to meet the  
8 five-day standard in the regulations for turning over  
9 documents that don't have text in the electronic  
10 retrieval system.

11 MR. SHEBELSKIE: Well, obviously, for  
12 reasonable requests for non-privileged documents.  
13 Now, the predicate of this is --

14 JUDGE MOORE: Okay. Let's turn to your  
15 response, if we may, to the Board's questions. Do you  
16 have that in front of you?

17 MR. SHEBELSKIE: Yes, sir.

18 JUDGE MOORE: Turn to Page 16, first full  
19 paragraph, please. These are the four million  
20 archival documents that I believe, if I understand all  
21 this correctly, are in the works right now for  
22 processing?

23 MR. SHEBELSKIE: The four million archival  
24 emails?

25 JUDGE MOORE: Correct.

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1 MR. SHEBELSKIE: No, sir. May I explain?

2 JUDGE MOORE: What's the status of those  
3 four million?

4 MR. SHEBELSKIE: They are archival emails  
5 that we believe we do not need to search, pursuant to  
6 the direction from the Commission that we do not need  
7 to do an exhaustive search.

8 JUDGE MOORE: That was an 1989 direction.  
9 Do any of those emails -- are they dated after 1989?

10 MR. SHEBELSKIE: Yes, certainly, sir.

11 JUDGE MOORE: How are they then archival  
12 in the sense that that statement appeared in 1989 and  
13 it would seem to me that that's something other than  
14 archival, it's recent history?

15 MR. SHEBELSKIE: Actually, Your Honor,  
16 here are the facts. The Department has had in place  
17 since 1987 a Record Management System, the electronic  
18 database that I referred to. That system is governed  
19 by procedures that require the submittal and storage  
20 and permanent storage on this Record Management System  
21 of the project documents created in the development of  
22 the technical work product for Yucca Mountain and  
23 other matters. That is the source of the database --  
24 those are the Department's records that it uses and  
25 relies on for its developmental work on this project.

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1 That is the source of the recordation for the  
2 technical products to support the application and the  
3 citing of materials.

4 The Department has an email system. Email  
5 systems, and I don't want to go beyond my capabilities  
6 in the IT world, but backup tapes are made of all  
7 email systems in any large organization to protect  
8 against catastrophic failures. For example, in the  
9 9/11 terrorist attacks, several companies where the  
10 buildings were hit lost their email systems, but they  
11 had off-site just snapshot tapes of raw data so that  
12 they could go back, at the cost of several millions of  
13 dollars, and try to reconstruct the emails in case  
14 there was that type of catastrophic failure. That's  
15 what these backup tapes are. And after so many months  
16 they would ordinarily, maybe six months or so, on that  
17 order of magnitude, be destroyed and a new backup tape  
18 copied over the existing one.

19 So these backup tapes are truly archival.  
20 They are not used and relied upon to preserve the  
21 records of the Office of Civilian Radioactive Waste  
22 Management. The only reason these backup tapes we  
23 have here now exist is because the Department saved  
24 them in order to do a document production from other  
25 litigation, not this lawsuit. But when it was

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1 preparing and assembling its documents for this Record  
2 Management System -- I mean for the LSN, it realized,  
3 "Well, we do have these backup tapes and do we need to  
4 do anything, ought we do anything?"

5 JUDGE KARLIN: Well, question if I -- on  
6 the archival. I'm trying to get at that again. As I  
7 understand the distinction between current e-mail and  
8 archival e-mail, as you've explained it in this page  
9 16, is current e-mail is e-mail for anyone who is a  
10 current employee and archival e-mail is for people who  
11 are no longer employees. So that if, for example, and  
12 this, I think that Mr. Egan suggested if an employee  
13 quit a week ago, then putting it literally, then his  
14 e-mail would be considered archival.

15 My question is really what is the cut off,  
16 current date, between archival and current? Is it the  
17 date when the M&O contractor changed?

18 MR. SHEBELSKIE: No. Because on that  
19 particular point when the M&O contractor changed,  
20 there were procedures put into place and we put into  
21 the record here the governing high level contract who  
22 saved the original M&O contractor's documents, most of  
23 which were in this record management system.

24 JUDGE KARLIN: Were they archived? Where  
25 is the archive? What's the distinction between

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1 archived and current?

2 MR. SHEBELSKIE: Right. We do not draw a  
3 distinction by date on archive because our record  
4 management system, obviously captures documents going  
5 back to the 1980s when it was created. And even  
6 earlier, people put into the record management system  
7 documents even from the 1970s that they thought were  
8 important, and needed to be preserved pursuant to  
9 project procedures.

10 Also, e-mails are found in the record  
11 management system and some -- I forget the right  
12 count, but it's in the tens of thousands of e-mails  
13 from the record management system, had to produce on  
14 the LSN because those are the e-mails that according  
15 to the departmental policies and procedures, if they  
16 needed to be saved, to be preserved the record  
17 management system, were copied and loaded into the  
18 record management system.

19 The backup tapes are archival, truly  
20 archival, because that is their function. It's not a  
21 question of date. They are there in an unconverted  
22 form, not used and relied upon in consultation for  
23 supporting the licensee application.

24 Now there were some 10 million e-mails on  
25 these backup tapes. That's an upper bound because

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1 there's going to be lots of duplication. Now the  
2 distinction between the active and inactive uses comes  
3 in play this way. As I said, the Department, I  
4 believe, fairly could have said, under the guidance of  
5 the archival documentation that it could proceed in  
6 good faith without having produced from those archival  
7 e-mails because it had the record management system in  
8 place at all times to capture the appropriate  
9 documentation.

10 JUDGE MOORE: Excuse me. What was read to  
11 you earlier, part of the statement of considerations  
12 for the LSS, or system that was a centralized system  
13 that was to be designed and built by DOE, is that  
14 correct?

15 MR. SHEBELSKIE: I believe, yes.

16 JUDGE MOORE: Now we have a different  
17 system, different regulations, different statements of  
18 consideration since the 1989.

19 Point to me the language today in the  
20 current regulations that in any way capture that  
21 archival distinction?

22 Because I'm having trouble with your  
23 argument in this sense, what is it about the word  
24 "all" that am I missing?

25 MR. SHEBELSKIE: First point, Your Honor,

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1 is that the reference to archival materials back in  
2 the record was not somehow contingent to the type of  
3 technology that was contemplated at the time.

4 JUDGE MOORE: It clearly appears in the  
5 1987 or 1989 LSS rule a system that was not built and  
6 designed and built by DOE and turned over to the NRC.

7 So you're telling me those regulations  
8 are, the statement of considerations are still  
9 operative?

10 MR. SHEBELSKIE: Absolutely, Your Honor,  
11 because it's discussing the -- in the context of how  
12 broad a net must the Department cast to define  
13 documentary material. And in that regard, the fact  
14 that the good faith production does not require an  
15 exhaustive search of archival materials makes sense  
16 regardless of the particular technology involved.

17 JUDGE MOORE: Let me ask on that. That  
18 statement was made -- I'm not sure how valid it is,  
19 any more, but 1989, is it therefore by definition  
20 anything created by 1989 cannot be archival because  
21 it's obviously -- wasn't archival at that date?

22 MR. SHEBELSKIE: No, because actually the  
23 other language in that commentary talks about it being  
24 materials not relied on and consulted in preparation  
25 for licensing --

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1 JUDGE KARLIN: Well, let me ask about  
2 this. I still don't understand if I got an answer in  
3 terms of the date of what's archival and what isn't.  
4 So let me try and phrase it a different way.

5 Archival e-mails. If I looked in those  
6 for million e-mails, what's the latest date on the e-  
7 mail that I would find? 1999? 2003? 2004? What's  
8 the latest dated e-mail that's in those archives?

9 MR. SHEBELSKIE: I do not believe there  
10 are any in 2004 because those are captured on a  
11 separate system as stated in the motion, in our  
12 papers. Certainly, for 2002. and there certainly may  
13 be some in 2003, but let me, pertaining to that  
14 factual question.

15 But also, Your Honor, to go back to your  
16 question, you also have to think about the definition  
17 of documentary material in terms of how broad the net  
18 you must cast or how broad you must cast the net.

19 There are three categories of documentary  
20 material. The first category of the documents the  
21 Department intends to cite and rely on.

22 JUDGE KARLIN: We're aware --

23 MR. SHEBELSKIE: Those aren't the e-mails.  
24 Those aren't the archival back-up tape e-mails.

25 JUDGE KARLIN: So definitionally, your

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1 archival material cannot include any of the materials  
2 that the regulations call for to be produced?

3 MR. SHEBELSKIE: Let me be clear on this.  
4 What I'm saying is if you look at the definitions of  
5 the three categories of documentary material, and then  
6 you look at the 2.1 million documents that we  
7 identified and collected through the other  
8 collections, we have high confidence that these  
9 archival e-mails are not going to have anything that  
10 we're citing and relying on that's not already  
11 captured. The e-mails are not reports and studies.  
12 The reports and studies are captured --

13 JUDGE MOORE: How about the category that  
14 the material may not be supportive of the application?

15 MR. SHEBELSKIE: All right, you then take  
16 that category of these 4 million e-mails, what are  
17 they? They are a snapshot of the inboxes at some  
18 particular point in time, unadulterated, unfiltered.

19 You have every e-mail that was in the  
20 system at the time. They are not coded and classified  
21 by subject matter. They are not even all converted  
22 and could even be searched.

23 We know from the reviews that we did -- we  
24 took 6 million of those e-mails because there are 10  
25 million e-mails total. And we took 60 percent of them

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1 and had them reviewed by some 2300 people who were  
2 still on the project. And what we found is that you  
3 had a lot of junk e-mail because think of all the spam  
4 that comes in --

5 JUDGE MOORE: Put a percentage on it for  
6 me.

7 MR. SHEBELSKIE: In terms of what people  
8 identified as just potentially relevant, the upper  
9 bound was around, just shy of just 10 percent. And  
10 that was, Your Honor, just under a standard we told  
11 them to use of broad potential relevance.

12 We did not ask them to try to make the  
13 further refinement of documentary material.

14 JUDGE MOORE: What's the percent number  
15 that you'd put on the term you used several times on  
16 page 16 of de minimis?

17 MR. SHEBELSKIE: From the inactive --

18 JUDGE MOORE: From all the categories on  
19 page 16, you use de minimis to describe several of  
20 them on 15 and 16, don't you?

21 MR. SHEBELSKIE: Right.

22 JUDGE MOORE: Just what do you mean by  
23 definitionally -- de minimis means trifling. Are we  
24 talking 1/10th of a percent, 1 percent, 3 percent, 5  
25 percent, 10 percent?

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1 MR. SHEBELSKIE: Well, with respect to  
2 some of those categories on 16, Your Honor, for  
3 example, documents -- there were the five entities  
4 that didn't respond fully, completely to our comment.  
5 These were outside of our control. The question was  
6 asked how many documents might they have? We can't  
7 imagine, given the circumstances, the work they were  
8 doing, that they could have more, in those cases  
9 probably a handful of any documents that anyone might  
10 consider documentary material. We certainly have no  
11 active knowledge of it.

12 With respect to the archival e-mail -- I  
13 want to get back to -- to finish out on those e-mails.  
14 Because we had actually -- you asked me about Category  
15 2, and these archival e-mails. We know from our  
16 review of the 6 million that were already reviewed,  
17 we're talking about a very low percentage that would  
18 ever be considered even potentially relevant.

19 But we also know from those e-mails that  
20 we're picking up the e-mails that are in even that 4  
21 million group because of the way the e-mails work. If  
22 I author an e-mail and send it to you --

23 JUDGE MOORE: I understand your answer.  
24 Counsel raised two categories, Chlorine 36 and the  
25 corrosion rate of a metal. And the e-mails involving

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1 some individuals, apparently, in DOE of which they are  
2 familiar.

3 And he gave some numbers. Why didn't any  
4 of those show up?

5 MR. SHEBELSKIE: As I understood what he  
6 was saying, Your Honor, is that they did a search and  
7 they found documents on those topics. Rather, the  
8 point that counsel was making was that a certain  
9 number of those documents were on the LSN server in  
10 bibliographic header only. So it wasn't a contention  
11 that the documents weren't there on the topic.

12 JUDGE MOORE: I see.

13 MR. SHEBELSKIE: So that's how I  
14 understood that.

15 JUDGE ROSENTHAL: Those documents, you  
16 would say that they were either privileged or subject  
17 to copyright or not producible in either image or text  
18 form?

19 MR. SHEBELSKIE: Yes sir.

20 JUDGE ROSENTHAL: One of those categories?

21 MR. SHEBELSKIE: Yes sir. And that, I  
22 think, illuminates the approach that the regulations  
23 are contemplating here. Instead of the blunderbuss  
24 approach of striking the certification.

25 JUDGE ROSENTHAL: Well, I find it somewhat

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1 surprising, but of course, I'm not an authority in  
2 this area, that there would be as many as 750,000  
3 documents and my impression was that that figure  
4 excluded those labeled as privileged; 750,000 that  
5 either were not reproducible or were subject to  
6 copyright. That seems to me to be a very substantial  
7 number of documents.

8 MR. SHEBELSKIE: No, Your Honor, as I  
9 understand it and understand the facts, and even the  
10 contention of opposing counsel, that the 750,000  
11 figure you were describing including the privilege --

12 JUDGE ROSENTHAL: I thought it was just  
13 the ones that were labeled public up at the top?

14 MR. SHEBELSKIE: No.

15 JUDGE ROSENTHAL: I'll get that clarified  
16 on --

17 JUDGE MOORE: Time is short. Your answers  
18 are long. We all have a great many more questions.

19 Just while we're on the numbers. Before  
20 we move on to other subject, page 16, second full  
21 paragraph, you use the number 55,104 documents in your  
22 category 3 that have not been produced.

23 How long will it take the Department to  
24 process those 55,000 documents?

25 MR. SHEBELSKIE: Right. We asked our

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1 contractor that and did beseech them to put them to  
2 the top of the queue to process.

3 JUDGE MOORE: How long, please?

4 MR. SHEBELSKIE: They'll go out on a  
5 rolling basis because they're being processed now. I  
6 think the estimate that we had was approximately the  
7 last batch going out somewhere -- is it 4 to 6 weeks,  
8 6 weeks probably being the upper bound.

9 JUDGE KARLIN: Could we focus on this for  
10 a minute? I think this is a bit of a digression, but  
11 it's going to help me.

12 AS I understand those 55,000 documents are  
13 documents that were created before April 15th --

14 MR. SHEBELSKIE: Not necessarily before.

15 JUDGE KARLIN: Okay, but there's a  
16 category that were created before the certification  
17 occurred on June 30th and a category that were created  
18 after the certification occurred.

19 With regard to the category that was  
20 created after the certification was made, I understand  
21 that 2.1003(e) imposes a legal duty upon a participant  
22 to supplement as to those documents.

23 So there's a regulation that addresses  
24 the after created documents with regard to the  
25 documents that were in existence before June 30th, but

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1 which you didn't provide these 55,000 and there's  
2 others here where I see statements by DOE that they  
3 intend to make them promptly available and will fix  
4 that and will provide that.

5 But is there any legal obligation for DOE  
6 to provide any of those documents except for the  
7 6-month deadline when you must supplement again? As  
8 I see it, there's no legal obligation and if there's  
9 no legal obligation, well, how can we hold you to  
10 that?

11 Is there a legal obligation for you to  
12 supplement those documents which were in existence  
13 before the date that you certified?

14 MR. SHEBELSKIE: I believe that there is,  
15 Your Honor.

16 JUDGE KARLIN: Where, what reg?

17 MR. SHEBELSKIE: I think it is inherent,  
18 throughout the -- is there a regulation that says that  
19 point blank? No. But the regulations contemplate,  
20 for example, that -- or this Commission has recognized  
21 as the proceeding continues because of the reliance-  
22 type documents, categories, pre-existing documents  
23 will suddenly turn out to become relevant.

24 JUDGE KARLIN: But if we wanted to order  
25 you or any other party to supplement in 2 weeks or 30

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1 days or something, let's say reasonable time frame,  
2 what regulation, what authority could we cite to force  
3 you to supplement those documents that were created  
4 before June 30th? Is there any?

5 MR. SHEBELSKIE: I don't think there is  
6 a regulation that specifically prescribes that.

7 JUDGE MOORE: Exactly. I think that  
8 counsels that -- the reason for that is that there is  
9 an expectation that all those documents would be  
10 provided and within reason --

11 MR. SHEBELSKIE: Within reason, yes.

12 JUDGE MOORE: And that perhaps 2.4 million  
13 e-mails might not be within reason and 55,000  
14 documents might not be within reason. Those are large  
15 numbers. But you know, my concern is we may not have  
16 any power to order you to supplement with regard to  
17 those and it would only be your good graces that we  
18 would have to rely on.

19 And I'm not sure whether that's a fair  
20 thing to do.

21 MR. SHEBELSKIE: Well, certainly the  
22 document has in place the procedures and as part of  
23 the certification to do the on-going processing and  
24 we're obviously going to live by that.

25 These 55,000 documents that are in this

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1 gap between really it's the end of May, beginning of  
2 June and June 30th because CACI was able to process in  
3 the appropriate form everything that it got up to that  
4 point.

5 There's really only 55,000 documents that  
6 are -- that fall within this gap. But that's just an  
7 upper bound number.

8 We don't know how many, if any of those  
9 documents, in that group really would constitute  
10 documentary material because they haven't been  
11 reviewed and subject to the procedures and standards  
12 set forth in our initial certification.

13 JUDGE KARLIN: There's another figure on  
14 page 16 of 26,000, how long will it take you to  
15 process those?

16 MR. SHEBELSKIE: I believe those are the  
17 quickest ones to process and probably -- more on the  
18 magnitude of 3 to 4 weeks.

19 JUDGE KARLIN: And so are these times  
20 cumulative?

21 MR. SHEBELSKIE: No, they proceed --  
22 generally, they proceed contempor -- simultaneously.

23 JUDGE KARLIN: On page 26, the last  
24 paragraph you use the number 12,000. How long will it  
25 take you to process those documents?

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1 MR. SHEBELSKIE: Those 12 -- there are  
2 approximately 12,000. Those are documents after June  
3 30th.

4 JUDGE KARLIN: Okay.

5 MR. SHEBELSKIE: Well --

6 JUDGE KARLIN: That's fine. Now when you  
7 turn the page to 17, page 17, are the 18,000 number  
8 there different from the -- inclusive of the 12,000 on  
9 the previous page?

10 MR. SHEBELSKIE: No, that is a different  
11 number.

12 JUDGE KARLIN: And what number is that,  
13 quickly, and how long will it take for you to process  
14 those

15 MR. SHEBELSKIE: That number represents e-  
16 mails from the backup tape systems that could not be  
17 converted. They had technical problems. So we don't  
18 have the ability to review them right now, to process  
19 them. We don't even know what they are in terms of  
20 content of these e-mails.

21 Because of the nature of these things,  
22 they have not been able to be converted.

23 JUDGE KARLIN: Thank you. I would like to  
24 focus on I believe your Exhibit 20, where you're  
25 responding or dealing with I think specific documents

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1 that the State of Nevada raised as concerns. Starting  
2 with the proposition that we've talked about Exhibit  
3 17, which I think is summarized to say there's two  
4 million or so documents that have been made available  
5 and half of those have been made available in full  
6 text or image. Half of them have just been headers  
7 because they're either privileged or can't be made  
8 available from a technical perspective.

9 So half of them are privileged, or  
10 otherwise technically not, approximately, a million.  
11 Okay, so if we go to page 3 of your Exhibit 20, I'm  
12 trying to understand the process that you're going  
13 through on these privacy and privilege claims. As I  
14 read your explanation of Document 6, you indicate that  
15 the document was in a header only format because it  
16 was flagged by DEN privacy and privilege screening  
17 software. And then as a part of the ongoing processes  
18 and procedures, you would have reviewed this  
19 document's header only status, but in light of the  
20 motion you expedited your review and determined that  
21 the privacy concern flag did not require, as I assume,  
22 it to be private.

23 So as I understand it, there's a two-step  
24 privacy analysis, or privilege analysis that you're  
25 going through. First, there's electronic software

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1 which screens them and second there's, as part of your  
2 ongoing processes, you're doing further review, I  
3 expect by human beings or some other effort.

4 MR. SHEBELSKIE: Just so. Of each  
5 document where the software electronic search terms  
6 indicated where subject to privileged claims.

7 JUDGE KARLIN: So, and with regard to this  
8 Document 6, it's obvious -- it seems to me that you  
9 had not completed the full two-step process on that  
10 document as of the date you certified and made  
11 documents available.

12 MR. SHEBELSKIE: That would be correct,  
13 Your Honor. In our certification, we were upfront  
14 about this and we stated that certain documents had  
15 been designated as identifying sensitive and  
16 classified information or privacy protected  
17 information through the software and that we were  
18 going to do the additional step of reviewing each of  
19 those hits from the electronic searches to do a double  
20 validation.

21 JUDGE KARLIN: Don't you think that that  
22 full validation should have been done before you ever  
23 certified in the first place? You have not completed,  
24 as I can understand from this, your privilege review  
25 and you've been caught with three or four or five

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1 documents right here. Let's set that aside. But you  
2 are still in the middle of doing your privilege  
3 review. You haven't finished it yet.

4 MR. SHEBELSKIE: This is an additional  
5 privilege review that we have taken upon ourselves and  
6 one we presume that all responsible litigants  
7 involving collections involving millions of documents,  
8 would constantly be doing this. Revisiting and  
9 validating and making sure that the designations --  
10 they still want to assert the designations.

11 JUDGE KARLIN: But you weren't reacting to  
12 any external deadline for this making the documents  
13 available on certification. There's not statute or  
14 reg. that imposes June 30 or April 15 on you. I mean,  
15 isn't it incumbent upon you and can't we require DOE  
16 to complete its privilege review rather than to leave  
17 it sort of half way done and the State of Nevada or  
18 any other applicant to have to come back after you for  
19 whatever few documents they seemed to have picked up  
20 on the side somewhere?

21 MR. SHEBELSKIE: Well, the fact that the  
22 Department in the effort to make sure that it can  
23 produce and put out there as much of the documentation  
24 as it possibly can, and to avoid in the future, and  
25 during the three years of the proceedings, disputes

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1 over privileged documents, disputes over derivative  
2 discovery. It's trying to take on the additional step  
3 of doing the manual review of each individual document  
4 to validate the search results from the computer's  
5 search terms.

6 We used computer search terms, which is  
7 commonly used to identify documents of this kind in  
8 large, massive productions of this kind, and we have  
9 adopted the mantra that we ought not to be penalized  
10 for the fact that we're doing that.

11 JUDGE KARLIN: One last question then.  
12 How many documents -- you've got a million privileged  
13 documents, or a million documents that haven't been  
14 provided. Of those million, how many have completed  
15 the step two privilege analysis and how many are still  
16 have only completed step one? 50/50? 90/10?

17 MR. SHEBELSKIE: No, no. There are a team  
18 of 20 to 30 reviewers looking at all the documents  
19 that had privilege hits from the software, in addition  
20 to manual hits, but the double validating computer  
21 hits. And we're probably talking several hundred  
22 thousand of the documents of the million will be  
23 individually reviewed to have that additional tier of  
24 eyes on human review to validate.

25 JUDGE KARLIN: But as of this moment,

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1 you're saying several hundred thousand have completed  
2 step two -- had the personal, individual review?

3 MR. SHEBELSKIE: No, we're saying several  
4 hundred thousand, we are teeing up for --

5 JUDGE KARLIN: Will be.

6 MR. SHEBELSKIE: Will have additional  
7 review.

8 JUDGE KARLIN: So there's a least a  
9 several hundred thousand for which you have not  
10 completed your privileged review yet? You've claimed  
11 privilege.

12 MR. SHEBELSKIE: No, the --

13 JUDGE KARLIN: We understand it's a two  
14 step process.

15 MR. SHEBELSKIE: But the second process  
16 hasn't finished, no. That would be correct as a  
17 factual matter.

18 JUDGE MOORE: How long will that process  
19 take?

20 MR. SHEBELSKIE: With the team of 20 to  
21 30, our litigation support contractor -- last week  
22 they were averaging 20,000 documents a day of review.  
23 And then you have to have processing. So you're  
24 probably talking --

25 JUDGE KARLIN: So that's 20 people doing

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1 a thousand a piece?

2 MR. SHEBELSKIE: It's a large effort.  
3 It's a serious undertaking, an expensive undertaking.

4 JUDGE MOORE: Last question before we  
5 break. They State of Nevada got a response from you,  
6 I believe it was 50 percent of the things that were  
7 claimed privilege were not privileged. You turned  
8 them over. Is that roughly accurate?

9 MR. SHEBELSKIE: I think maybe four or  
10 five of the documents, some of them we determined had  
11 not been relevant. That's why they were produced.

12 JUDGE MOORE: Forty percent? Four of the  
13 twelve or so? Thirty to forty percent. Now where you  
14 claimed privilege then because of the thorough  
15 privilege review it was not. Tell me, you have stated  
16 that the standard to which you're going to be held is  
17 good faith in the document production. Is a 30 to 40  
18 percent error rate a good faith production?

19 MR. SHEBELSKIE: Your Honor, there is no  
20 magic percentage that you can say on a group of twelve  
21 documents, or any larger group of documents. Because  
22 here's what the certification requires.

23 JUDGE MOORE: We know that. Just do you  
24 consider a high error rate -- knowing that you haven't  
25 completed the review, an element that should go into

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1 determining good faith?

2 MR. SHEBELSKIE: I think what you need to  
3 do is look at what the results turn out to be.  
4 Because we can't speculate now what those percentages  
5 --

6 JUDGE MOORE: Well, we have a sample.

7 MR. SHEBELSKIE: You have a sample of 12.  
8 But let's posit that does turn out to be a high rate  
9 in the number or even higher. Because here's the  
10 point I want to make. Determining in July, August, or  
11 September, particularly with respect to a document  
12 that a participant says they want, that is not  
13 worthwhile to fight over whether not to claim  
14 privilege on, doesn't undermine the fact that at the  
15 time of the certification, there was a process to  
16 identify documents that were subject potentially to  
17 privilege claims.

18 JUDGE MOORE: Thank you. We'll take a  
19 break right now for precisely 15 minutes. It is now  
20 four minutes until 11, and at the point we'll come  
21 back and the Board has a number of questions for the  
22 licensing support network administrator who will be  
23 contacted that will then give the Department an  
24 opportunity to respond with the remainder of their  
25 time to his questions, recognizing and I believe the

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1 Board has a number of additional questions for DOE.  
2 And the answers were long and the time was short so  
3 we'll try to do better at least on the answers when we  
4 come back so we'll now recess for 15 minutes.

5 (Off the record.)

6 JUDGE MOORE: This is Judge Rosenthal and  
7 Judge Karlin and the counsel for the staff of the  
8 Department of Energy and the State of Nevada. Would  
9 you please state your full name?

10 THE WITNESS: Daniel Joseph Graser.

11 JUDGE MOORE: Mr. Graser, I'm now going to  
12 put you under oath.

13 WHEREUPON,

14 DANIEL JOSEPH GRASER  
15 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE  
16 DEPARTMENT OF ENERGY AND, HAVING FIRST BEEN DULY SWORN,  
17 WAS EXAMINED AND TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 JUDGE MOORE: Thank you. Will you please  
20 state for the record your position?

21 THE WITNESS: I am the licensing support  
22 network administrator.

23 JUDGE MOORE: And would you be so kind as  
24 to briefly, and very briefly, give us your curriculum  
25 vitae.

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1 THE WITNESS: Yes, sir. I joined the  
2 ASLTP in 1998 as the LSN Administrator just after a  
3 responsibility for the LSN was transferred to ASLTP.  
4 Prior to that, I was with NRC's Office of the Chief  
5 Information Officer. Beginning in 1994, I was a staff  
6 assistant to the deputy director of IRM, Moe Levin,  
7 while he was the LSN Administrator. And I had primary  
8 responsibility for the LSS and LSN technical and  
9 procedures development at that time, with the  
10 exception of two years while I was acting as a team  
11 leader for software development on another project.

12 My 10 years at NRC have all been actively  
13 involved in the LSS and LSN program management. Prior  
14 to joining NRC, I was with the Department of Energy.  
15 And the nine months immediately before coming to NRC,  
16 I was the director of OCRWM's Office of Information  
17 Resource Management. I did that for approximately  
18 nine months, replacing Barbara Sourney. While Ms.  
19 Sourney was the director between 1988 and late 1993,  
20 I was the Department of Energy's LSS project manager  
21 and that included being the project manager for  
22 building the Department of Energy's licensing support  
23 system prototype in 1989 and 1990.

24 And I was also the program manager for the  
25 DOE grant to establish a super computer facility at

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1 the University of Nevada, Las Vegas. Between 1988 and  
2 the present time, I've participated in every LSN, ARP  
3 meeting with the exception, I believe, of one. And  
4 I've been involved with the LSN and the LSS since  
5 1988. I have 29 years of experience in the  
6 information management field, including 26 years at a  
7 management level.

8 JUDGE MOORE: Thank you. If you would  
9 turn to your answers to the questions that were sent  
10 to you for response by the PAPO Board, on page seven  
11 your answer to question three. You state that  
12 specific variations on the process for the LSN to  
13 spider the Department of Energy's collection and you  
14 go on to cite as an example the Department's agreement  
15 to stage blocks of 30,000 documents. What was  
16 involved in the Department of Energy to comply with  
17 that agreement that you had with them to do that?

18 THE WITNESS: What was involved in that  
19 agreement?

20 JUDGE MOORE: Yes. What lead to it?

21 THE WITNESS: Well, what lead to that  
22 particular agreement was the fact that the spidering  
23 software, or the indexing software for the LSN, is a  
24 piece of software that once it is launched, it will  
25 process its way through an entire directory until it

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1 comes to the end of the directory and it will attempt  
2 to spider or index everything it finds that it has not  
3 seen before.

4 When we analyze that process, considering  
5 the potential size of the Department of Energy  
6 collection, we realized that once the spider was  
7 launched, if it was going to go through hundreds of  
8 thousands or a million documents located on a server,  
9 that software routine would be running continuously.

10 And if there was some technical problem  
11 with the spidering process, everything in that load  
12 prior to encountering a technical problem, would have  
13 been lost and we would have had to start all over. We  
14 therefore decided that it would be best if we could  
15 develop a routine where we modify the spider so it  
16 would -- so it would only have to process a limited  
17 number of documents and if we therefore had some  
18 technical problem, we would lose a batch of processing  
19 rather than days or weeks of processing.

20 JUDGE MOORE: Okay, now in that answer you  
21 say as coordinated agreed upon with the Department of  
22 Energy. So the Department agreed to give you batches  
23 of documents?

24 THE WITNESS: Yes, that's correct.

25 JUDGE MOORE: And did they always comply

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1 with that?

2 THE WITNESS: There were a number of  
3 instances where the Department of Energy did not make  
4 any documents available for indexing. I recollect at  
5 least two nights where the Department of Energy did  
6 not have documents available for the spider when the  
7 spider commenced at midnight. There was also another  
8 situation where the Department of Energy placed  
9 documents out instead of putting them in two blocks of  
10 20,000. The blocks were one block of 10,000 and  
11 another block of 30,000.

12 That caused the spider to stack up and not  
13 complete its processing within 24 hours and the next  
14 batch commenced on top of it and we therefore had to  
15 stop that process and go back, fix the batch files,  
16 and start over.

17 JUDGE MOORE: In the same question,  
18 question three, on page eight of your answer you  
19 referenced the access control prior to initial  
20 certification LSN guideline number 23.

21 THE WITNESS: Yes.

22 JUDGE MOORE: What were the circumstances  
23 surrounding the need for you to issue that guidance in  
24 March of 2004?

25 THE WITNESS: The circumstances around

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1 that went back to the LSNARP meeting in December a few  
2 months before that. And at that point in time, the  
3 Department of Energy stated its position that it  
4 intended to make the document collection available,  
5 first available, at the time of the certification.  
6 And you know, when we came back from that ARP meeting,  
7 we identified that as an issue to the Commission and  
8 based on that, we received directions from the  
9 Commission to identify strategies that would allow the  
10 spidering process to commence without the DOE document  
11 collection being made available prior to the 30th of  
12 June, when they eventually certified.

13 JUDGE MOORE: Do you know whether the  
14 statement in the June 14, 2004 Federal Register final  
15 rule statement of considerations, which I know you  
16 don't have in front of you, to the effect that in  
17 response to a question raised by the State of Nevada,  
18 when the Commission stated and I quote "the NRC is  
19 pursuing an approach with DOE to ensure that the DOE  
20 collection has been indexed and audited by the LSN  
21 Administrator in approximately the same time frame as  
22 the DOE certification" whether that's the effort that  
23 was behind that statement in the June 14, 2004  
24 statement of considerations on the final rule  
25 amendments to the LSN?

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1 THE WITNESS: Yes, I believe that the  
2 meetings that we had with the Department of Energy and  
3 the discussions we had about ways to implement the  
4 spidering were known to the crafters of that statement  
5 consideration.

6 JUDGE MOORE: In response to the paper for  
7 question 14, you indicate that since only 24,588 DOE  
8 documents have been added since the initial 25,209  
9 post-certification deletions, it is problematic  
10 whether "header only" information for all these 25,209  
11 deleted documents have been available for subsequent  
12 spidering by the LSN. I simply do not understand your  
13 answer. Would you be so kind as to state it in terms  
14 I can understand?

15 THE WITNESS: Yes, sir. Prior to June  
16 18th, we had successfully loaded bibliographic and  
17 text files that the Department of Energy made  
18 available under the Guideline 23. And we uploaded  
19 643,000 plus documents at that time. Subsequent to  
20 getting to that number of documents, the Department of  
21 Energy indicated that they wished to commence deleting  
22 documents. And so in that regard, documents were  
23 deleted up until the date of certification.

24 Now, subsequent to the certification, the  
25 Department of Energy identified to us documents that

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1 we had bibliograph and tech still fitting in our  
2 system. And they notified us that those documents had  
3 subsequently been identified as containing privileged  
4 material. In order to remove that material, we had to  
5 delete the 25,209 documents. Therefore there is no  
6 tech in the bibliograph file available on the LSN for  
7 any of those items that had been previously in it.

8 JUDGE MOORE: There's no header for those  
9 deleted documents that you claim privilege.

10 THE WITNESS: That is correct.

11 JUDGE KARLIN: Mr. Graser, this is Alex  
12 Karlin -- Judge Karlin. If I understand that  
13 correctly, with regard to the 25,000 documents which  
14 you were asked to remove from the system by DOE, as I  
15 understand it because they were privacy or otherwise  
16 subject to some claim of privilege, did you then  
17 remove them from the licensing support network system  
18 and remove the headers as well? And if so why? Isn't  
19 there supposed to be a header there anyway?

20 THE WITNESS: Yes, sir, we removed the  
21 entire record for those documents because within the  
22 licensing support network structure, when a deletion  
23 is processed, in order to clear out the text file we  
24 have to delete the associated structure data. That's  
25 the way the software works.

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1 JUDGE KARLIN: Thank you.

2 JUDGE MOORE: I interrupted you. Would  
3 you care to complete your answer?

4 THE WITNESS: Yes, thank you. As I was  
5 saying, we had deleted the 25,209 documents as  
6 requested by the Department of Energy and that  
7 included removing the bibliographic and the text files  
8 in order to insure that all of the privileged  
9 information had been removed. And as I indicated in  
10 my answer, subsequent to that the Department of Energy  
11 has made additional documents available for indexing  
12 and some of those documents, in fact, a good portion  
13 of those documents have been provided by the  
14 Department of Energy in a header only format.

15 And the point I was making in my answer is  
16 if we deleted 25,209 and added back somewhere in the  
17 vicinity of 700 documents fewer, that the  
18 bibliographics for at least some of the documents in  
19 the 25,209 deletion set would be a physical  
20 impossibility, that all of the headers had managed to  
21 get back to the LSN for those documents that were  
22 previously on the LSN had been made available via the  
23 LSN and you know, subsequently removed from the LSN.

24 JUDGE MOORE: Judge Rosenthal has a  
25 question.

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1 JUDGE ROSENTHAL: In the course of its  
2 response to Nevada's motion, the DOE suggests that  
3 some of the problems in terms of getting matters onto  
4 the central site were due to technical problems that  
5 you encountered.

6 And my question is this. It's my  
7 understanding that you had been exhorting DOE for some  
8 time to begin the process of getting the documents in  
9 a position where they could be indexed by your people.  
10 And I'm wondering whether some of the problems that  
11 have been encountered in some of the difficulties in  
12 getting the DOE documents onto the central site might  
13 have been in your judgment avoided had DOE responded  
14 affirmatively to what I understand were exhortations  
15 made over a period of considerable time.

16 THE WITNESS: Yes, that's correct. In my  
17 technical and professional opinion, technical problems  
18 in building a database of this complexity and this  
19 magnitude, should have been -- were anticipated and  
20 that is one of the reasons why we were very careful,  
21 for example, to couch our statements about load  
22 capacity and load capability. Couch that in terms of  
23 assuming that all of the documents load successfully.

24 In the course of normal ADP operations,  
25 especially at the start-up time of activities, it

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1 should be anticipated by anybody who is a competent  
2 professional in this field that there will be  
3 unanticipated situations that have to be resolved as  
4 they are encountered.

5 I would also like to respond to the  
6 statement that there were technical problems. I would  
7 just like to clarify for the record, during the first  
8 week of operations, we were very -- we planned and we  
9 were very intent on not attempting to start loading  
10 batches of 30,000 documents on day one. And the LSN  
11 technical project manager, Matt Schmidt, as an active  
12 and positive action on our part, requested that the  
13 Department of Energy commence loading the database  
14 with small batches. And every day we stepped through  
15 the process, we incremented the size of the batch  
16 load.

17 That was not due to any technical  
18 problems. That was a conscious management choice that  
19 we felt was prudent to ensure that as we continued to  
20 ramp up the loading process, we wanted to do it in  
21 increments to identify if any load capacity issues  
22 arose when we reached a certain batch size. Once we  
23 began loading the Department of Energy documents, we  
24 had no technical problems with the LSN side and in  
25 fact, we were able to come up to a capacity of loading

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1 as many as 40,000 documents in a 24-hour cycle, the  
2 40,000 documents being broken up into two batches of  
3 20,000.

4 So in fact, we were technically in a  
5 position to successfully load even in excess of the  
6 30,000 we had targeted.

7 JUDGE MOORE: The Department of Energy  
8 explained earlier to us something about the  
9 bibliographic headers and points to the regulations  
10 pointing out that the regulations themselves do not  
11 spell out any required information for a bibliographic  
12 header.

13 Can you tell me what the derivation of  
14 your guidelines or other so called requirements for  
15 bibliographic headers has been?

16 THE WITNESS: The bibliographic structure  
17 is a direct result of a technical working group that  
18 was chartered by the Licensing Support System Advisory  
19 Review Panel. That technical working group on  
20 bibliographic headers structures was operating in the  
21 1993 through 1995 time frames. And at that point in  
22 time, the technical working group brought before the  
23 full LSSARP its recommendations, a recommended  
24 structure for bibliographic data with recommendations  
25 for the field content and the field structures.

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1           Those recommendations were based on the  
2 bibliographic treatment that were already being used  
3 at that time by the Department of Energy and the  
4 Nuclear Regulatory Commission and were additionally  
5 adapted to reflect the sort of information capture  
6 that the other parties and potential parties  
7 anticipated being able to implement as reflected by  
8 the technical working group membership.

9           The LSN bibliographic structure is  
10 currently reflected in an LSN administrator guideline  
11 and it has subsequently been, subsequent to 1994 and  
12 1995, has subsequently been adapted to reflect changes  
13 and developments in the technical programs of both DOE  
14 and NRC in terms of how they treat bibliographic  
15 header records. And it has also been adapted to  
16 reflect the changes in the structure of the database  
17 from being a mainframe base to a web based system.  
18 Those changes were done again in coordination with  
19 members of the LSN advisory review panel by my  
20 affording the membership the opportunity to review and  
21 comment on the LSN A guidelines.

22           JUDGE MOORE: Is it accurate that this was  
23 a consensus of the advisory committee?

24           THE WITNESS: I do not recall if it was  
25 ever brought before the LSNARP with a request that a

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1 consensus vote be taken.

2 JUDGE KARLIN: Mr. Graser, this is Judge  
3 Karlin. A question on page 15 of your submission,  
4 question number 12. Essentially, I think what we were  
5 trying to ask there is from a technical standpoint,  
6 can you help us understand whether what DOE has done  
7 setting aside completeness issues and just technical  
8 design standards, whether they are compliant or not  
9 with what you understand to be the regulatory  
10 requirements -- what we understand to be regulatory  
11 requirements?

12 Your answer seems to be at the bottom of  
13 the page, at least with regard to one element that  
14 preliminary analysis of the website indicates that  
15 they're not compliant with a particular HTML  
16 requirement. Could you (a) talk about that and (b) is  
17 that a significant difficulty, a substantial problem?  
18 Are they compliant with the technical standards or  
19 not? That's what we're really trying to get to.

20 THE WITNESS: I'll answer the second  
21 question first. I think this particular issue is a  
22 non-issue. And the reason I make that statement is  
23 because that particular section of subpart j was  
24 focused on data content that was going to be exchanged  
25 between systems. And it was intended to cover

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1 specifically the format of the content of information  
2 that the various systems would have to be sharing and  
3 it was therefore using standards that if computer  
4 systems on ends were adhering to the standards, that  
5 would help ensure the exchange of data.

6 The standard regarding the HTML was  
7 intended to cover documents that a party may have  
8 wanted to submit into the LSN system where the  
9 document format had been structured as an HTML  
10 document. And in that regard, the Department of  
11 Energy webpage that it is using as an interface  
12 doesn't really contain documentary material content.  
13 And so in that regard, this particular standard has no  
14 effect and I think in support of that, all we have to  
15 do is look at the fact that the Department of Energy  
16 was able to structure the content of documents in  
17 conformance with standards that allowed in excess of  
18 600,000 documents to be successfully loaded. So  
19 that's why I say this particular standard, trying to  
20 apply it to the DOE webpage, it is a misallocation of  
21 that particular standard.

22 JUDGE MOORE: When did the Nuclear  
23 Regulatory Commission start making its documents  
24 available to the LSN?

25 THE WITNESS: To the best of my

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1 recollection, it was May 2003.

2 JUDGE MOORE: And did the process in  
3 loading those documents go seamlessly or were there  
4 many problems that had to be resolved?

5 THE WITNESS: It did not go seamlessly.  
6 There were technical issues and there continue to this  
7 day to be some technical issues that we encounter with  
8 the NRC document collection. And as those problems  
9 were encountered, we had the time and the opportunity  
10 to work through those problems. At this point in  
11 time, the NRC collection is essentially complete and  
12 we are down to resolving approximately 100 documents  
13 where the documents are so large that the indexing  
14 software is having difficulty getting through them.  
15 We expect to be able to get those documents converted  
16 and loaded manually into the system in time for any  
17 NRC certification activity. But those documents have  
18 already been made available for the indexing process  
19 and we've made at least one attempt, and in many cases  
20 multiple attempts, to get those documents into the  
21 system. And the only thing holding them back is a  
22 technical issue with the timing out of the spidering  
23 software.

24 JUDGE MOORE: Is your experience in  
25 dealing with the NRC fairly typical of a new search

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1 and retrieval electronic database?

2 THE WITNESS: My experience with the NRC  
3 collection?

4 JUDGE MOORE: Correct.

5 THE WITNESS: Yes, I think it is typical  
6 and it is to be expected that the first time you  
7 attempt to load a new database you do encounter  
8 technical processing issues.

9 JUDGE MOORE: Is that something in the  
10 information technology world well known?

11 THE WITNESS: I would say any experienced  
12 practitioner would say that in every database  
13 application that they have ever built they have always  
14 encountered some technical anomalies during the first  
15 couple of weeks. Very often, those sorts of things  
16 are shook out or shaken out during the process of test  
17 and evaluation before a system goes operational. But  
18 even with extensive testing, when you believe you have  
19 an operational system eventually you will still find  
20 database issues that were not anticipated and that are  
21 experienced during the normal course of operations.

22 JUDGE MOORE: On page six of its answer to  
23 the State of Nevada's motion, the Department of Energy  
24 states that at the rate of 150,000 documents a week  
25 "there would have been sufficient time between May 5

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1 when the Department started providing documents and  
2 June 30 for the LSN Administrator to index the  
3 documents that the Department produced in full text."  
4 From your experience with the Department and with its  
5 document collection, was it in fact feasible to spider  
6 an index that collection from May 5 -- in the time  
7 period from May 5 to June 30th?

8 THE WITNESS: Again, as I indicated,  
9 30,000 documents a day and 150,000 documents a week  
10 was a target and we had always identified that as our  
11 target. We had never given an indication that we were  
12 able to guarantee that performance. So I think making  
13 a statement that given the number of documents and the  
14 period of time between May 5th and June 30th, I think  
15 it is entirely speculative to come to the conclusion  
16 that that was something somebody could rely on.

17 JUDGE MOORE: Was that fact ever made  
18 known by you to DOE's technical team?

19 THE WITNESS: Which fact?

20 JUDGE MOORE: That you could not  
21 seamlessly load documents at a rate of 30,000  
22 documents a day and 150,000 documents a week?

23 THE WITNESS: Again, I believe that every  
24 time that we had discussions, technical discussions  
25 with the Department of Energy, we indicated that the

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1 target was 30,000 per day, 150,000 per week. And on  
2 many occasions, I emphasized to them that was assuming  
3 that their server functioned properly 100 percent of  
4 the time, our system functioned 100 percent of the  
5 time. And that was done at numerous technical  
6 exchanges.

7 It was also brought to the attention of  
8 the Department of Energy at the December 2003 ARP  
9 meeting, where we were recounting our experiences with  
10 the NRC document collection and did indicate to them  
11 the percentage of errors and failed document indexing  
12 activities. We did express the percentage of errors  
13 that we were finding with the NRC collection. And so  
14 at least as far back as December, we had real world  
15 experience that we were sharing with all of the  
16 parties.

17 JUDGE MOORE: On page seven of the  
18 Department of Energy's answers to Nevada's motion, the  
19 Department states that the LSN Administrator has  
20 temporarily ceased indexing because of technical  
21 difficulties and that these difficulties are not due  
22 to problems with the Department of Energy files. What  
23 technical difficulties is the LSN now experiencing and  
24 what is the cause of those, if you could tell us?

25 THE WITNESS: Yes. It is a correct

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1 statement that the technical problems we were having  
2 are not the result of the DOE document format. The  
3 problems that we were experiencing, especially  
4 subsequent to July 7, were problems associated with  
5 attempting to delete the documents that were already  
6 in the LSN system for which the Department of Energy  
7 submitted the call back list of 25,209. In order to  
8 expeditiously accommodate the DOE request and to get  
9 that potentially Privacy Act covered information out  
10 of the public realm, we had to essentially do custom  
11 coding to expeditiously remove that material as  
12 quickly as possible to minimize the inadvertent  
13 release. And in the course of doing that custom  
14 coding development, we were able to successively get  
15 the Department of Energy documents deleted, but that  
16 did cause some other piece of the LSN processing  
17 software to start giving us false information. And so  
18 it is technically correct to say it was not the DOE  
19 document format that caused any of those problems.  
20 Conversely, it was the unusual situation of having to  
21 expeditiously process such a large number of deletions  
22 under tight time constraints that wasn't a direct  
23 cause of the problems that we subsequently  
24 experienced.

25 JUDGE MOORE: When you put into effect

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1 your guideline, I think it's 23, the access control  
2 guidelines that permit the -- well, I guess that's not  
3 the guideline that permits the deletion of documents  
4 or is it?

5 THE WITNESS: There is a separate  
6 guideline covering the routine deletion of documents.  
7 I believe that's guideline 14.

8 JUDGE MOORE: Did any of your guidelines  
9 ever anticipate deleting over half the documents or  
10 about half the documents that you loaded?

11 THE WITNESS: I don't think that I  
12 anticipated that the volume of deletions was going to  
13 be so extensive. We didn't have indications from  
14 Harry Leek that there would be a significant number --  
15 but significant is an ill-defined term, and I  
16 certainly had very little indication that that number  
17 was going to be in the hundreds of thousands.

18 JUDGE MOORE: Mr. Graser, thank you very  
19 much. We have no further questions for you. Thank  
20 you for your patience in explaining this to us. And  
21 good day.

22 THE WITNESS: Okay, thank you very much.

23 JUDGE MOORE: Department of Energy?

24 MR. SHEBELSKIE: Yes sir.

25 JUDGE ROSENTHAL: I would like, if you

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1 would, to start off. I will be quite frank as to what  
2 one of my major concerns is. It was illuminated by  
3 the response of Mr. Graser. As your opponents, the  
4 State of Nevada, emphasized, DOE, despite what  
5 apparently were exhortations on the part of Mr.  
6 Graser, perhaps others, waited until this May to start  
7 the process of loading onto its Web site.

8 As Mr. Graser indicated, this is  
9 apparently one of the causes of some of the problems  
10 that have led to much of this material on the DOE Web  
11 site not having been spidered, if that's the term,  
12 onto the central site.

13 It seems to me offhand that given one of  
14 the roles of the center site is to ensure the  
15 integrity of the documents that are made accessible to  
16 the public, that it's not unreasonable to interpret  
17 availability in terms of the central site.

18 And it seems to me further that we  
19 wouldn't be dealing with this availability issue had  
20 DOE started the process much earlier, as it had been  
21 asked to do. Had it done so, it seems to me probable,  
22 maybe not a certainty, that we wouldn't have to be  
23 dealing with this issue at all of availability, at  
24 least, because the documents that DOE had put on its  
25 Web site would now be over on the central Web site.

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1           So I would like to know from you: one,  
2 why DOE obviously foot-dragged, resisted apparently  
3 the exhortations that were made of it; and whether you  
4 disagree with my suggestion that had it responded to  
5 those exhortations, we might not be faced with the  
6 availability problem, although we might still have the  
7 matter of completeness.

8           MR. SHEBELSKIE: I do disagree, Your  
9 Honor. The simple matter is --

10          JUDGE ROSENTHAL: I'm sure you would.

11          MR. SHEBELSKIE: The simple matter is the  
12 Department of Energy did not foot-drag, and it did not  
13 have in place the collection of the documents in the  
14 electronic format in the infrastructure to support  
15 that volume of documents.

16          The two million electronic files are  
17 maintained on its servers. Those documents were not  
18 completely collected, processed, and infrastructure in  
19 place until this year.

20          JUDGE MOORE: Excuse me.

21          MR. SHEBELSKIE: Yes?

22          JUDGE MOORE: You said you didn't  
23 foot-drag?

24          MR. SHEBELSKIE: No, sir.

25          JUDGE MOORE: Well, why did you start as

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1 late as you started? Isn't that the classic  
2 definition of foot-dragging? And if I'm not mistaken,  
3 from what I have heard today and what I have read in  
4 the statements of considerations, DOE has had 15 years  
5 of advance notice that it was going to have to do  
6 this. Is that correct?

7 MR. SHEBELSKIE: More than.

8 JUDGE MOORE: Since at least 1989?

9 MR. SHEBELSKIE: And before 1989, the  
10 Department of Energy established the record management  
11 system to capture and preserve the documents that  
12 would serve as the basis for the documentary material.

13 The state is absolutely wrong in saying we  
14 waited until two years ago to begin collecting  
15 documents. The 1.3 million documents that are in the  
16 record management system are as a result of a process  
17 in place more than 15 years ago.

18 After the site selection process was  
19 finalized, after the president approved the site for  
20 Yucca Mountain and Congress ratified that selection,  
21 that was not until 2002. Promptly upon that, that was  
22 the occasion for the first call memorandum, exhibit 1  
23 to this hearing, where the counsel's office of the  
24 Department of Energy sent out the broadcast memorandum  
25 to tell people to identify, segregate, and preserve

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1 all documents that are potentially relevant to Yucca  
2 Mountain because until that point, there had not been  
3 a final site selection process.

4 So it is absolutely fundamentally wrong to  
5 say the department foot-dragged. It didn't start  
6 collecting documents until two years ago.

7 JUDGE MOORE: What was the date of your  
8 contract with CACI?

9 MR. SHEBELSKIE: The day of the contract  
10 with CACI I do not remember. I will have to check on  
11 that.

12 JUDGE MOORE: Your papers say it was May  
13 of 2003, I believe.

14 MR. SHEBELSKIE: There was a call memo, a  
15 second call memo, that went out in May of 2003  
16 instructing people to start producing the documents  
17 that they had isolated and segregated pursuant to the  
18 prior call memorandum.

19 JUDGE MOORE: Why did you want until May  
20 of 2003 to hire a litigation support contractor to do  
21 all of this?

22 MR. SHEBELSKIE: That is government  
23 contracting, Your Honor. Contractors had to be vetted  
24 and hired. These are not idle undertakings. These  
25 are not simple systems. These are not like PCs on

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1 people's desks.

2 JUDGE MOORE: All given, but within 15  
3 years notice of knowing how long it takes to move the  
4 government snail forward, why didn't you start the  
5 prodding process sooner?

6 MR. SHEBELSKIE: Until there is site  
7 selection, until the statutory process culminated in  
8 Congress' determination, it was inappropriate to  
9 expend those types of monies on that process, Your  
10 Honor. We were preserving the documents in the  
11 meanwhile.

12 I will also add that in the Summer of --  
13 sorry.

14 JUDGE MOORE: Go ahead.

15 MR. SHEBELSKIE: And we did work with the  
16 administrator in the Summer of 2003. And, in fact,  
17 the documentation then shows this. We made a proposal  
18 to them how to deal with this indexing issue for the  
19 availability concern.

20 The administrator rejected that proposal.  
21 He did not come back until, I think it is, the Winter  
22 of 2004 with his proposal that culminated in the  
23 access control guidelines from March of 2004.

24 Then we thereafter began rolling out the  
25 documents on an early release basis, May 5.

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1 JUDGE ROSENTHAL: So it's the department's  
2 position that you have had data in electronic form  
3 since the '80s and that you could not have made any of  
4 the older data available to the LSN anywhere close to  
5 the date on which the LSN was turned on in 2000 or  
6 whatever it was, 2001?

7 MR. SHEBELSKIE: Absolutely on 2001. At  
8 that time, the 2001 date, all the department had then  
9 and all that was done in 2001 was an experimental test  
10 on a test server that had somewhere in order of  
11 magnitude of 100 or a couple of hundred dummy  
12 documents on there to test. There was not the  
13 infrastructure in place to support anywhere near the  
14 collection of documents that we had.

15 Even the LSN administrator's answers tell  
16 us he had to significantly increase the capacity this  
17 year.

18 JUDGE MOORE: Let's go back historically.  
19 Now, in 1989 or perhaps it's cited in one of your  
20 pleadings in 1987, there was a memorandum of  
21 understanding between NRC and DOE about this subject.  
22 And in 1989, there was a regulation written by the NRC  
23 that put the design and construction of the LSS on  
24 DOE.

25 Did DOE ever produce the LSS? Because we

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1 wouldn't be sitting here had they done that.

2 MR. SHEBELSKIE: No because the  
3 regulations were changed to eliminate the LSS.

4 JUDGE MOORE: When were they changed?

5 MR. SHEBELSKIE: They were changed  
6 certainly before the site characterization.

7 JUDGE MOORE: In 1997. What did DOE do  
8 between 1989 and 1997?

9 MR. SHEBELSKIE: Well, there was an  
10 extensive discussion and dealings between DOE and the  
11 LSN administrator to discuss the capacities and design  
12 features of the -- what might turn out to be the LSN  
13 after the site selection process.

14 Also getting back to the fundamentals from  
15 a regulatory perspective, though, there is ultimately  
16 no requirement from a regulatory matter that the  
17 department pre-released documents to the LSN  
18 administrator for early crawling. That was precisely  
19 the point that --

20 JUDGE MOORE: Let's get to that point now  
21 that you brought it up. For your interpretation, it  
22 is that 2.1003 requires nothing more than you make  
23 documents electronically available. Is that your  
24 interpretation?

25 MR. SHEBELSKIE: Yes, on our LSN server

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1 where they are.

2 JUDGE MOORE: Now, interestingly, what the  
3 State of Nevada just provided us this morning seems to  
4 indicate from the general counsel of DOE in August 9th  
5 of 2002 that something more than that is required.  
6 Are you disavowing this position of your general  
7 counsel?

8 MR. SHEBELSKIE: I don't believe that's a  
9 proper interpretation of her memorandum, Your Honor.  
10 Just so we are clear from the infrastructure --

11 JUDGE MOORE: Okay. But I am correct that  
12 you believe that 2001 means literally that all you  
13 have to do is make your documents available on your  
14 server and make it available to the central LSN  
15 system? Is that your position?

16 MR. SHEBELSKIE: Yes.

17 JUDGE MOORE: Okay. Now --

18 MR. SHEBELSKIE: But our server is the LSN  
19 system.

20 JUDGE MOORE: All by itself?

21 MR. SHEBELSKIE: No.

22 JUDGE MOORE: Well, then that is not the  
23 case, then.

24 MR. SHEBELSKIE: Let me clarify, Your  
25 Honor. Under the LSN, each participant, the

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1 Department of Energy, the state as well, --

2 JUDGE MOORE: Okay. I understand that.

3 MR. SHEBELSKIE: -- has their own hardware  
4 where the files are maintained.

5 JUDGE MOORE: I understand that. Now  
6 let's look at some other provisions. How do you  
7 explain 2.1003(e)(6), I think it says, that says all  
8 of your supplementation, 3(e)(6), all of your  
9 supplementation, must be via the LSN?

10 MR. SHEBELSKIE: Yes.

11 JUDGE MOORE: How can something be via the  
12 LSN if it's not available through the central LSN Web  
13 site?

14 MR. SHEBELSKIE: Your Honor, that  
15 requirement speaks to the fact that supplementations,  
16 instead of making paper copies available to opponents,  
17 you load them onto the LSN system. It has nothing --

18 JUDGE MOORE: It says must be available  
19 via the LSN. Now, to be available in that context via  
20 the LSN as a participant, the State of Nevada would  
21 need to be able to go to the LSN Web site using the  
22 LSN document search engine, using the LSN indexing  
23 process, and identify what it wants. The LSN then  
24 sends the command out to DOE's document server to  
25 retrieve that document. That is via the LSN, is it

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1 not?

2 MR. SHEBELSKIE: I agree.

3 JUDGE MOORE: Okay. That is what  
4 2.1003(e)(6) says. Now, if that is true for the  
5 supplementation responsibility that you have, why does  
6 that not equally hold true and why is it not fairly  
7 implied to be in 1003(a)?

8 MR. SHEBELSKIE: Because we are dealing  
9 with 1009, the criterion for our certification. Our  
10 certification, our ability to make our certification,  
11 is not dependent in 1009 or 1003 upon the LSN  
12 administrator's completion of his indexing.

13 JUDGE MOORE: Well, if you read 1003(a) in  
14 splendid isolation, that would be true, but is it not  
15 a fundamental tenet of regulatory construction, just  
16 like statutory construction, that reading things  
17 literally and in splendid isolation is not what it is  
18 all about but, rather, you must read all portions of  
19 the chapter, that that would be subpart J, and make  
20 sense of the whole?

21 And in doing that, do you not quickly come  
22 to the conclusion, especially in light of all of the  
23 statements in the various statements of consideration  
24 that have been issued over the years in various rules  
25 and rules amendments regarding this, that via the LSN

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1 is exactly what is implied in 2.1003(a) and as a  
2 technical matter, you can only get the document out of  
3 the LSN via the LSN by reaching through the portal,  
4 which is the thing that does the spidering and does  
5 the indexing? Is that not true?

6 MR. SHEBELSKIE: That latter point is  
7 true, but 1009 does not have the same language as the  
8 regulation about the supplementation.

9 JUDGE MOORE: Okay. Before we get to 9,  
10 let's get to 1003, where that's where the "make  
11 available" language first appears.

12 MR. SHEBELSKIE: Yes, sir.

13 JUDGE MOORE: And you're saying that that  
14 does not mean make available via the LSN? It just  
15 means make available on DOE's own Web server?

16 MR. SHEBELSKIE: What I am saying, it  
17 doesn't make available in 1003, doesn't have any  
18 language that says availability requires completion of  
19 an indexing.

20 JUDGE MOORE: Now, let's apply a little  
21 common sense to this. How else can you get a document  
22 out of the LSN unless it has been spidered and indexed  
23 and all of the other attributes of the LSN so that you  
24 reach through the portal to find your documents using  
25 that Web server?

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1 MR. SHEBELSKIE: Well, actually, through  
2 our Web portal, you get into that same server.

3 JUDGE MOORE: Different question. It  
4 doesn't say, "through DOE's Web server." It says,  
5 "through the LSN." Is there not one LSN?

6 MR. SHEBELSKIE: No.

7 JUDGE MOORE: No?

8 MR. SHEBELSKIE: There is one LSN, yes,  
9 comprised of multiple servers, but we're not --

10 JUDGE MOORE: And how many portals?

11 MR. SHEBELSKIE: The regulations don't  
12 state, but we're dealing with this motion, with the  
13 department's ability to make a certification under  
14 1009. And yes, of course, the regulations or the  
15 guidelines contemplate that the administrator will  
16 call the collection. But there is nothing in 1009  
17 that says that indexing must occur and be completed  
18 before we certify.

19 That is indeed the position that the  
20 commission in its rulemaking last month expressly  
21 noted wasn't a requirement.

22 JUDGE MOORE: Well, that's, I believe,  
23 from where I sit, not a fair reading of what they said  
24 in June. I believe, rather, that that was a direct  
25 reference to what the administrator said, that the

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1 commission had instructed the LSN administrator, if I  
2 understood him correctly, to make this access control  
3 so none of the DOE documents had to be public until  
4 DOE said they were. That was the process that was  
5 implemented that the commission was hoping would make  
6 this problem go away.

7 JUDGE ROSENTHAL: What in terms of  
8 availability, what function in terms of availability,  
9 does the central site perform that is not performed by  
10 the individual sites of the various parties?

11 I mean, if the DOE site availability is  
12 precisely the same as availability on the central  
13 site, my question would be, why was there a central  
14 site at all? I mean, people could just go to the  
15 various individual sites and find the particular  
16 documents on them.

17 I thought that the central site performed  
18 in the context of availability the function of  
19 ensuring integrity. And if that is an essential  
20 element of availability, then it seems to me  
21 availability requires these documents to be on the  
22 central site.

23 MR. SHEBELSKIE: If that were the case,  
24 the regulations would imbibe that we cannot certify  
25 until we make our documents available and the LSN

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1 administrator had completed his indexing and all of  
2 whatever validation and auditing processes or  
3 functions he was required to do.

4 That is not how the regulation reads. The  
5 commission refused to amend the regulations to impose  
6 such a requirement because fundamentally the  
7 department cannot control the indexing, the auditing,  
8 validation by the LSN administrator. And it would be  
9 unfair to impose that burden and condition on the  
10 department's ability to make its initial  
11 certification.

12 JUDGE MOORE: I don't understand why it is  
13 unfair.

14 MR. SHEBELSKIE: Because it is a matter  
15 outside our control.

16 JUDGE MOORE: So is whether it is going to  
17 rain tomorrow.

18 MR. SHEBELSKIE: Yes. And our  
19 certification is not dependent upon that.

20 JUDGE MOORE: Is that unfair? I'm sorry.  
21 You have totally lost me on your unfairness argument

22 --

23 MR. SHEBELSKIE: Right. All --

24 JUDGE MOORE: -- that DOE has had months,  
25 if not years, of opportunity to get its documents out

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1 there. And indeed, from what we gather listening to  
2 Nevada and certainly by your own admission in your  
3 papers, your certification came at a time before you  
4 have completed your whole process, certainly, as  
5 regard as Judge Carlin has pointed out in his  
6 questioning to you with regard to privilege claims.  
7 And there is a substantial number of documents that  
8 came after an arbitrary cutoff of April 15th that  
9 aren't in your system.

10 So your unfairness process is difficult  
11 for me to understand if the goal of this whole  
12 process, as I perhaps mistakenly thought it was, was  
13 to give all participants six months from the date of  
14 certification to do their document discovery. And,  
15 yet, what you're doing is taking away more than the  
16 six months. You are taking away from their six  
17 months' time.

18 Yet, if the process is one that you  
19 reached through the portal for all of the documents,  
20 the portal that is run by the LSN, then at that point,  
21 it is a seamless system. It all works the same for  
22 everybody.

23 Under your system, there are certainly a  
24 lot of hiccups, if not something worse, in the road.  
25 And it comes out of the hide of the participants

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1 trying to use the system.

2 Is that fair to them?

3 MR. SHEBELSKIE: There's a lot in that  
4 question, Your Honor.

5 JUDGE MOORE: There sure is. But there's  
6 a whole lot that you have done that needs explaining.

7 MR. SHEBELSKIE: Let me explain what we  
8 did and why it is reasonable, why it meets the good  
9 faith standard. Let me give you the big picture  
10 stepped back.

11 We produced on and put onto our server;  
12 that is, houses our collection of LSN documents -- and  
13 that is the same hardware, the same electronic files  
14 that the LSN administrator's search engine will reach  
15 to. We put out 2.1 million documents.

16 We gather those 2.1 million documents, do  
17 the processes set forth in our certification plan  
18 described generally in our brief, where we grab the  
19 documents from our record management system that goes  
20 back until the 1980s.

21 We supplemented that with several hundred  
22 thousand documents that were gathered as a result of  
23 the call memorandum after the Yucca Mountain site  
24 characterization was finalized.

25 We reviewed six million archival e-mails,

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1 six million out of the ten million, the e-mails of  
2 some --

3 JUDGE MOORE: That's all great, but let's  
4 assume you had 100 million documents. Did you not  
5 have a responsibility to deal with 100 million  
6 documents?

7 MR. SHEBELSKIE: And we dealt with all of  
8 our documents.

9 JUDGE MOORE: Okay. Fine. So these  
10 numbers, then, from the argument you appear to be  
11 making, how are they relevant? You have cited them in  
12 your papers. You cited you have a large number that  
13 you hadn't yet processed.

14 MR. SHEBELSKIE: No. We had at most  
15 80-some thousand that haven't been processed because  
16 they fell in this gap, this gap which is a necessary  
17 consequence of a production that is made in the midst  
18 of a large, massive-scale project still underway.

19 JUDGE MOORE: Let me get to a couple of  
20 other things. Did the House appropriations committee  
21 order the department to file an application by the end  
22 of this calendar year?

23 MR. SHEBELSKIE: Your Honor, I can't  
24 comment on that, although I don't think that is true.

25 JUDGE MOORE: Why can't you comment on

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1 that?

2 MR. SHEBELSKIE: Because I don't have  
3 facts to say that was the case. But I don't want to  
4 pretend that I have comprehensive knowledge of the  
5 entire budgetary process.

6 JUDGE MOORE: How did DOE select April  
7 15th, 2004 as the cutoff date?

8 MR. SHEBELSKIE: Right. To electronically  
9 process the couple of million document collection that  
10 we had, we knew the size would be in that range  
11 certainly. It takes a lot of time to process, to  
12 format, to create the electronic images of the  
13 documents, to create the files, to validate them, and  
14 all the steps that have to be done.

15 The litigation support contractor  
16 estimated a volume of documents it needed about a 6 to  
17 8-week lag. It turns out they were able to beat that  
18 expectation. And, as I said, they processed  
19 documents. Some groups come in as late as May 22nd or  
20 so and others into June.

21 To get back to a response, Judge Carlin --  
22 for reflection, I think I need to correct something I  
23 said. You said, is there authority for the board to  
24 order production of, say, 50 or 80 thousand documents  
25 in the gap? Yes. In section 1010(b), the board has

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1 the authority to order the production of withheld  
2 documents if those documents qualify as documentary  
3 material.

4 This gap, this group of gap documents,  
5 which -- not all of which can be documentary material,  
6 but even as upper bound, we're talking 3.5 percent of  
7 our entire document collection. And that exists only  
8 as a result of the practical consequence and how --

9 JUDGE MOORE: Right. Did the department  
10 choose the date June 30th, 2004 to certify?

11 MR. SHEBELSKIE: Sure. The department has  
12 as a schedule, a working schedule, to file this  
13 application at the end of December 2004. And you back  
14 up six months from that. There is nothing wrong with  
15 that.

16 JUDGE MOORE: I'm glad you have said that.  
17 Was that working schedule created with any  
18 relationship to the document production and  
19 identification process?

20 MR. SHEBELSKIE: If I understand your  
21 question, Your Honor, --

22 JUDGE MOORE: Well, let's make it very  
23 clear so you do understand it.

24 MR. SHEBELSKIE: I would say yes.

25 JUDGE MOORE: Was the date of June 30th

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1 taken into account in -- I'm sorry. I have it  
2 backwards. Was the selection of December 30th for  
3 when the department chose to file its application, was  
4 that decision made with any recognition of the  
5 document discovery requirements of the department?

6 MR. SHEBELSKIE: I believe so, Your Honor,  
7 because knowing that selecting December -- every  
8 project has to have a schedule for completion.  
9 Selecting December of 2004 as the schedule for  
10 completion dictates that the obvious consequence of  
11 the department, they have to make their certification  
12 in June.

13 JUDGE CARLIN: A couple of questions on an  
14 entirely different tack, I guess.

15 If you could, in the State of Nevada's  
16 motion, exhibit 3, they attach an IG report of the  
17 Department of Energy of May 2004, just a couple of  
18 months old, I guess. And this gets me back to the  
19 four million e-mails question a little bit.

20 In that report -- I don't know whether you  
21 have it available. There is --

22 MR. SHEBELSKIE: I have it back at counsel  
23 table, but maybe I can answer without looking at it.

24 JUDGE CARLIN: Yes. Perhaps you can. The  
25 remaining challenges, I think that's on page 2 of the

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1 details of findings. The IG is talking about  
2 challenges that the department is facing in May of  
3 '04. And it talks about these e-mails.

4 Additionally, about 6.4 million electronic  
5 mail documents have not been processed, of which 3.1  
6 million belong to personnel currently associated with  
7 Yucca. Perhaps the others are the archival ones that  
8 we're talking about. I'm not sure.

9 The department initially planned to use  
10 software to eliminate irrelevant items. And because  
11 of the problems with the software, the project must  
12 manually review their electronic mail documents.

13 It goes on to say that it is a daunting  
14 challenge for this manual review to occur. And the  
15 department officials said they were still trying to  
16 improve the effectiveness of the software in hopes of  
17 using it to process the remaining 3.3 million e-mails.

18 So it sounds to me like this IG report  
19 indicates that, at least as of May, the department was  
20 still intending to process these 6.4 million e-mails  
21 and somewhere along the line kind of gave up on the 4  
22 million and just said, "Forget it. We're not even  
23 going to try with those."

24 MR. SHEBELSKIE: I'm glad you gave me the  
25 opportunity to correct that.

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1 JUDGE CARLIN: Okay.

2 MR. SHEBELSKIE: It was published in May  
3 but obviously had a life much before that.

4 JUDGE CARLIN: Yes.

5 MR. SHEBELSKIE: The department had taken  
6 this group of archived e-mails and said, "Let's do  
7 something with them," at least and identified -- took  
8 out a group of six million of them to review. The  
9 department's personnel reviewed all six million of  
10 those.

11 At the time of our certification, that  
12 review had been complete with the exception noted in  
13 our answer. There were a group of about 20  
14 individuals who, for one reason or another, couldn't  
15 get through the review. Some were on sick leave, et  
16 cetera.

17 So the IG report commentary and that point  
18 is true. It is a daunting past, but 2,300 people  
19 stepped up to the bar and did the job.

20 JUDGE CARLIN: Well, let me ask that.  
21 Let's go to page 17, I think it is.

22 MR. SHEBELSKIE: If I could get my copy of  
23 it, Your Honor?

24 JUDGE CARLIN: Yes, of your answers.

25 MR. SHEBELSKIE: Yes, sir.

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1 JUDGE CARLIN: Okay. Now, the IG report  
2 refers to 6.4 million e-mails. Your answers to these  
3 questions refer at the top of page 16 to category 2 of  
4 four million archival e-mails. Then towards the next  
5 page, at the top of page 17, with respect to group 5  
6 -- let me see.

7 What is group 5? A limited number of  
8 e-mails where the active users were not available or  
9 able to complete their reviews. That's how you  
10 describe group 5 on page 15.

11 With respect to group 5, only a handful of  
12 persons, approximately 20 out of the more than 2,300  
13 reviewers couldn't complete them. Now, you just said  
14 something like 20 out of 2,300.

15 MR. SHEBELSKIE: Right.

16 JUDGE CARLIN: Is that what you are  
17 referring to --

18 MR. SHEBELSKIE: Yes.

19 JUDGE CARLIN: -- with regard to the 6.4  
20 million archival e-mails?

21 MR. SHEBELSKIE: There were ten million  
22 archival e-mails in the backup tapes altogether. Six  
23 million of them were authored by the 2,300 people on  
24 the project.

25 JUDGE CARLIN: So they're still current

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1 employees or still current people on the project?

2 MR. SHEBELSKIE: Yes. And they reviewed  
3 all 6 million or 6. whatever it is million of those  
4 documents. That is the process the IG report was  
5 referring to. And that process is complete.

6 JUDGE CARLIN: That process. Okay.  
7 Great. I have another one or two perhaps in that. I  
8 think that's going to be it.

9 JUDGE MOORE: While Judge Carlin is  
10 perusing his notes, I have one question that you can  
11 perhaps help me with. If I understood you correctly,  
12 June of 2003, DOE was prepared to essentially build a  
13 parallel system to the LSN on its Web server with an  
14 index and everything. And then it had proposed that  
15 it would turn that over to the LSN-A.

16 MR. SHEBELSKIE: Had proposed in the year  
17 2003. I didn't mean to suggest they could have done  
18 it right then.

19 JUDGE MOORE: If DOE was prepared at that  
20 point to spend the time, effort, and money to do that,  
21 why didn't they just turn the documents over to the  
22 LSN and have the same thing done? I just can't  
23 understand that you are going to build a separate  
24 system and not just turn it over.

25 MR. SHEBELSKIE: No. DOE did not tell the

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1 LSN administrators in June of 2003 -- and the letter  
2 doesn't say it -- that we are ready right then to turn  
3 over an index of 2.1 million documents.

4 There was a proposal made that as we go  
5 forward and we are getting our stuff together, we will  
6 build in tandem an index. So we make our  
7 certifications available.

8 JUDGE MOORE: As you build it in tandem,  
9 why couldn't you have provided it to the LSN for  
10 spidering, which was up and running and waiting? I  
11 understand they're willing.

12 MR. SHEBELSKIE: One of the problems was  
13 that there were no guidelines in place to preserve the  
14 confidentiality of documents that we released for  
15 early crawling.

16 We had asked for a counter proposal. That  
17 was not forthcoming from the administrator until this  
18 --

19 JUDGE MOORE: Okay. Fine. But that's  
20 rather a different subject than building a parallel  
21 system. Did you request whatever you call it, the  
22 privacy retention ability, when your original proposal  
23 was found to be not technically feasible?

24 MR. SHEBELSKIE: There were certainly  
25 discussions about, "Well, then what can" --

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1 JUDGE MOORE: Have you worked with that  
2 proposal to the LSN in --

3 MR. SHEBELSKIE: I don't know if there was  
4 a specific proposal, as opposed to identifying the  
5 administrator. Here is our problem. There is no  
6 system in place to protect this information that is  
7 released for early crawling.

8 JUDGE MOORE: Okay. You came forward with  
9 that. That proposal surfaced, then, in March of 2004,  
10 which is many months after June of 2003. Why didn't  
11 you propose such a thing in June of 2003?

12 MR. SHEBELSKIE: The administrator did not  
13 come back, would not give us a proposal on how to  
14 safeguard documents. The department was not going --  
15 these documents that were safeguarded have lots of  
16 personnel information in them.

17 JUDGE CARLIN: I found a spot that I would  
18 like to talk about, page 18 of your answer. There  
19 you're responding to question number 6. There were a  
20 couple of just minor points I needed to understand.

21 There is this employee concerns program  
22 set of materials, both from Becthel SAIC, I guess, and  
23 the OCRWM staff or maybe the predecessor. You claim  
24 these are protected under the Privacy Act.

25 The question was one that dealt with

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1 whether or not an electronic header had been provided  
2 for all documents. You have indicated that that has  
3 not with regard to these and that you only provided it  
4 for the file, the employee concerns file.

5 I think that is a defect. Why didn't you  
6 just simply give one for each of the documents in the  
7 file?

8 MR. SHEBELSKIE: Right. I'm glad --

9 JUDGE CARLIN: I mean, those files I think  
10 could be quite relevant. That is often where people  
11 with challenges or difficulties about what is going on  
12 put their concerns. I think having each document, a  
13 header for each document, would be useful.

14 MR. SHEBELSKIE: Yes. Your Honor, to flag  
15 this issue, we put that in our certification plan so  
16 the world would know that we had done this.

17 Why did we do it? There are special  
18 protections that apply to the employee concerns  
19 program documentation, the Privacy Act as well as this  
20 commission's regulations. Potentially, theoretically,  
21 if we had produced documents from those files with  
22 individual identifying information to our litigation  
23 support contractor, we might have been in violation of  
24 those regulations.

25 If we had put out a header for each

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1 document in a file, we would have to fill out the  
2 bibliographic fields, which indicate author, name,  
3 date. And there are codes that would provide  
4 potentially identifying information so someone could  
5 look at the headers and say, "Aha. Jane Doe filed a  
6 complaint on this about this subject, violating the  
7 confidentiality restrictions we are coming upon."

8 JUDGE CARLIN: Okay.

9 MR. SHEBELSKIE: We are glad to make  
10 available, we will make available, the individual  
11 documents. We welcome discussion with the state about  
12 how to go about doing that without compromising our  
13 other restrictions on us.

14 JUDGE CARLIN: Okay. I am not sure how  
15 that is significantly different than other privileged  
16 documents, where sometimes even the titles and the to  
17 and from may begin to reveal information of concern,  
18 but I think it is something that does need to be made  
19 available on a per-document, not per-file, basis.

20 The next page, 19 -- and I just wanted to  
21 double-check this -- there is an indication that the  
22 Department of Energy did not make available documents  
23 that had been in the possession of its current outside  
24 counsel, your good firm.

25 I assume you are not taking the position

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1 that simply because someone transfers a possession of  
2 a document to your firm it is automatically  
3 privileged.

4 MR. SHEBELSKIE: No. And that didn't  
5 happen

6 JUDGE CARLIN: Okay.

7 MR. SHEBELSKIE: We weren't asserting that  
8 at all.

9 JUDGE CARLIN: It sounded that way, but  
10 I'm sure it's not meant that way.

11 MR. SHEBELSKIE: No, no.

12 JUDGE MOORE: The board has been  
13 exceedingly liberal in your time. It has long since  
14 expired. Staff?

15 MR. SHEBELSKIE: Thank you, Your Honor.

16 MS. YOUNG: Good afternoon. And thank you  
17 for the opportunity to come before you today. Once  
18 again, I am Mitzi Young, representing the NRC staff.

19 The issue the board has before it today is  
20 a unique one to the extent that this tests a system  
21 conceded by the commission as early as 1989 with  
22 respect to making documents available, both to  
23 potential parties in the proceeding and the general  
24 public.

25 As you know, the system initially started

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1 as the licensing support system, which would have been  
2 uniquely available to parties in the proceeding but  
3 then was changed later through the Web base combined  
4 system of the LSN to individuals nationwide.

5 The staff does not take a position with  
6 respect to the individual disputes regarding documents  
7 identified by the State of Nevada. The staff is here  
8 today only to help the board in determining some  
9 standard with respect to the Department of Energy's  
10 performance and complying with requirements for making  
11 documents electronically available.

12 The staff suggests that Nevada has not met  
13 its burden to identify that the Department of Energy  
14 has substantially failed to meet its burden to make  
15 documents available as a result of good faith efforts  
16 and that much of the information you have heard this  
17 morning is more of a supplementation of Nevada's  
18 motion, rather than a re-argument of the grounds  
19 initially provided in its written filing.

20 With respect to the standard for  
21 determining DOE's compliance,

22 JUDGE CARLIN: Ma'am, may I stop you  
23 there? Did you just say that you believe the state  
24 has not met its burden in showing that DOE has not  
25 substantially complied with the regulations?

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1 MS. YOUNG: That's correct. They have  
2 only identified in their exhibit, I believe, 14  
3 documents and only --

4 JUDGE CARLIN: But I thought you weren't  
5 taking a position on that issue and your only concern  
6 was sort of the proper interpretation of the  
7 regulation, specifically what constitutes "make  
8 available" and that sort of thing. So are you taking  
9 a position on whether the state has met its burden or  
10 not?

11 MS. YOUNG: Not with respect to whether  
12 individual documents should or should not have been  
13 made available.

14 JUDGE CARLIN: Okay.

15 MS. YOUNG: Generally when you determine  
16 the compliance or performance of a party with respect  
17 to discovery, what kind of standard are you going to  
18 use to determine whether that performance has been  
19 adequate.

20 In this case, we are arguing, as other  
21 parties are arguing, that the good faith standard is  
22 one that you should look at and that the standard that  
23 expressly in the regulations is restricted to judging  
24 the performance of potential parties in a proceeding  
25 is one the board may look to in determining the

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1 Department of Energy's compliance.

2 JUDGE ROSENTHAL: The good faith issue  
3 doesn't go, does it, to the question as to whether  
4 availability means on Mr. Graser's Web site?

5 MS. YOUNG: Well, the staff would suggest  
6 that good faith is in terms of taking reasonable  
7 efforts to identify and make documents electronically  
8 available.

9 JUDGE ROSENTHAL: Electronically available  
10 where? Now, there is an issue here as to whether  
11 availability means on the DOE Web site or whether  
12 availability means on the central site. Now, that  
13 doesn't deal with good faith, --

14 MS. YOUNG: Certainly.

15 JUDGE ROSENTHAL: -- the issue as to what  
16 is the definition of availability, because obviously  
17 if availability means on the Graser Web site, it can't  
18 possibly support the claim that there is good faith,  
19 at least not in my judgment.

20 So I want to know, what is the staff's  
21 position on the meaning of availability?

22 MS. YOUNG: With respect to availability  
23 for certification purposes, it's that --

24 JUDGE ROSENTHAL: Well, that's I think  
25 what we're here for, yes.

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1 MS. YOUNG: Yes.

2 JUDGE MOORE: Let me interject. If I am  
3 reading 2.1009 correctly, it says, "as required by  
4 2001." So let's just speak in terms of 2001. What  
5 does it mean in that section? Because that's  
6 encompassed by --

7 MS. YOUNG: I believe it says it's  
8 required by 1003.

9 JUDGE MOORE: You're correct.

10 MS. YOUNG: 1003. And 1003 specifically  
11 --

12 JUDGE MOORE: They're all linked. So we  
13 only need discuss it in the first one, 2003.

14 MS. YOUNG: With respect to 1003, 2.1003,  
15 each party or potential party to this proceeding must  
16 make documents available to other parties. The means  
17 they do that is to initially through their server  
18 identify documents, either by bibliographic header  
19 with a textual version, full text searchable, or an  
20 image version, or if the document is not acceptable or  
21 cannot be made available either by textual or image  
22 version, you do that with a bibliographic header only.

23 JUDGE MOORE: Okay.

24 JUDGE ROSENTHAL: That doesn't answer. My  
25 question, again, is looking at good faith, determining

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1 whether DOE has acted in good faith at this point, how  
2 are we defining the word "availability"? Is  
3 availability in terms of simply the DOE Web site or is  
4 availability in terms of the documents being on the  
5 central portal Web site? Which is it?

6 MS. YOUNG: What I am trying to explain is  
7 --

8 JUDGE ROSENTHAL: I want the answer to the  
9 question. I want to know what the staff's position is  
10 as to availability. Now, please answer that directly.  
11 Then you can come forth with --

12 MS. YOUNG: But the staff's position is  
13 not in the two boxes that you identify, Judge  
14 Rosenthal. The staff's position is availability is  
15 making documents available to the LSN central Web site  
16 for crawling, that that is the definition that is in  
17 2.1011 when it talks about you have documents on a  
18 server that can be crawled. That is for integrity  
19 purposes as --

20 JUDGE MOORE: That is the staff's  
21 position. Can you back it up, please, counsel, and  
22 tell me, what is the overriding purpose of the LSN?  
23 Was it not to provide all parties six months of  
24 document discovery, a minimum of six months?

25 MS. YOUNG: A minimum of six months either

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1 counting back from the date of submission of a license  
2 application or from the date of potential docketing of  
3 a license application? There are two six-month  
4 periods.

5 JUDGE MOORE: Does it not start with the  
6 availability of the LSN?

7 MS. YOUNG: The LSN --

8 JUDGE MOORE: Because that is the only one  
9 that you can plan for prospectively. Otherwise it's  
10 just I'm very sorry you're out of time when you go to  
11 do it retrospectively.

12 MS. YOUNG: Well, the LSN has been  
13 available the entire time, even before the --

14 JUDGE MOORE: But there is nothing on it.

15 MS. YOUNG: But for certification, it does  
16 not say in 2.1009 that the LSN software has to have  
17 completed its indexing in order for you to certify  
18 that you have implemented procedures and identified  
19 documents to be made electronically available.

20 JUDGE MOORE: Is there any other way to  
21 extract a document out of the LSN than if it has been  
22 spidered and indexed?

23 MS. YOUNG: The only way a search and  
24 retrieval plan could result in receiving a document  
25 out of the combined system of the LSN is through the

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1 central portal site maintained by the LSN  
2 administrator. That is correct.

3 JUDGE MOORE: If that is true, isn't that  
4 what 2.1003 common sensically means?

5 MS. YOUNG: Well, I know it is a hard sell  
6 in terms of the staff's position, but the  
7 interpretation that we are here to present to you  
8 today, 2.1009, is that individual parties have taken  
9 steps to make their documents available to the LSN  
10 spider recalling software for indexing, which would  
11 guarantee the integrity at some point later. That is  
12 the staff's position.

13 JUDGE ROSENTHAL: As long as the documents  
14 are on the DOE Web site and available for spidering  
15 onto the --

16 MS. YOUNG: And that Web site has been  
17 made available to the indexing, crawling spidering  
18 software. That's the staff's position.

19 JUDGE ROSENTHAL: Okay.

20 JUDGE CARLIN: I appreciate that. I see  
21 that that is the staff's position, and it seems to be  
22 the same as the Department of Energy's on this point.  
23 But my question, you stated that absent from the  
24 regulations is an explicit requirement that for  
25 certification purposes, documentary material must be

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1 in the LSN. And that is in your answer at page 6.

2 There are, however, quite a few  
3 references, some very recent, about making it in the  
4 LSN that concern me and perhaps need to be thought  
5 through. The state I think has identified some of  
6 them.

7 As recently as two weeks ago, on July 6th,  
8 when the NRC issued the reg guide 3.69, in the  
9 preamble -- I call it the preamble to that discussion  
10 -- 7 times NRC says it must be in the LSN. It must be  
11 made available in the LSN. Looking at the reg guide  
12 itself, 3.69, 7 times at least, it says, it has got to  
13 be in the LSN.

14 The prior version of the reg guide, which  
15 is a draft of 2002, seven or eight times, it doesn't  
16 say, "available via the LSN." It says, "available in  
17 the LSN," slight nuance. But the same theme seems to  
18 be in there.

19 This change that happened on June 14th of  
20 2004 supplementing, when you supplement your  
21 information, you must do it via the LSN.

22 Why do we have all of these straws in the  
23 wind that it must be in or via the LSN if the position  
24 is so clean that it doesn't have to be in the LSN?

25 Isn't there that combined with the whole

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1 purpose of this system, which is to give everyone sort  
2 of a clean six months to review these documents  
3 without squabbling about whether they are in there or  
4 they are not? Isn't that enough to say the state is  
5 right?

6 MS. YOUNG: Well, the reg guide, any  
7 statements in the reg guide, can't be construed as  
8 setting forth any type of requirement. And much of  
9 the language in that reg guide was written in a more  
10 general broad sense and not with hopefully the time,  
11 attention, and detail that is normally reserved for  
12 trying to put something in the regulation.

13 JUDGE MOORE: Counsel, does it make a  
14 difference --

15 MS. YOUNG: But if I could --

16 JUDGE MOORE: -- that something in the  
17 regulation itself references, the reg guide?

18 MS. YOUNG: That's with respect to the  
19 scope of documentary material, Judge Moore.

20 JUDGE MOORE: Right. But is that not some  
21 kind of blessing by the commission on what is in that  
22 reg guide, --

23 MS. YOUNG: But you have --

24 JUDGE MOORE: -- more so than the normal  
25 reg guide that never gets mentioned in the regulation?

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1 MS. YOUNG: Judge Carlin was not really  
2 referring to every single statement in the reg guide.  
3 What 2.1001 refers to is in terms of the definition of  
4 documentary material with respect to helping parties  
5 and potential parties identify what information might  
6 be relevant for making it available electronically.

7 But the most recent change, if I could  
8 address that point because the staff probably should  
9 have distinguished it in its brief to 2.1003(e) that  
10 talks about a continuing obligation to supplementing  
11 material that you have previously made available via  
12 the LSN, this with respect to a 2.1009 certification  
13 would be a statement that the official designated with  
14 responsibility to make documents electronically  
15 available has implemented procedures to ensure that  
16 such supplementation will occur; in other words,  
17 documents after the certification, there is a means to  
18 identify those and provide a supplement to that  
19 collection.

20 So the staff wouldn't necessarily read  
21 this as strictly as the board is in terms of this  
22 phrase informing what is needed for a 2.1009  
23 certification.

24 JUDGE CARLIN: Okay. I think I follow  
25 that, but I am going to focus on the supplementation

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1 question that I asked of DOE that troubles me. If we  
2 read the regulation, "make available," the way I think  
3 you are reading it, I think I have a problem.

4 DOE has certified as of June 30th that,  
5 here, we have made these documents available. Next,  
6 when they submit their application, six months minimum  
7 from that point, let's say, they have to update their  
8 certification -- the regs say that -- and make  
9 available any other documents that they have,  
10 presumably ones that have been created subsequently.

11 Now we have this 2.1003(e), which says  
12 there is a duty to supplement via the LSN. We set  
13 that aside. Let's forget about whether it is via the  
14 LSN or not for the moment. Let's just think about, is  
15 there a duty to supplement? This duty to supplement  
16 is to be for documents, additional material created  
17 after the time of initial certification.

18 So, as I see it, there's a set of 55,000  
19 documents that DOE has said it has that were created  
20 before June 30th, 2004. And is there a duty incumbent  
21 upon them to make those documents available absent us  
22 ordering them to? And if we ordered them to, would we  
23 have the power to order them to?

24 The duty to supplement only applies to  
25 documents created after June 30th. And your reading

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1 of it, it seems to me, would say, "Well, then there is  
2 no duty to supplement for anything before."

3 MS. YOUNG: I guess I misspoke. And if I  
4 misled the judges, I apologize. The staff has argued  
5 in our brief, tried to explain that with respect to  
6 the three classes of document material, it is possible  
7 that due to subsequent events, the scope of document  
8 material may change. And that could also encompass  
9 documents that were in existence at the time of  
10 initial certification.

11 JUDGE CARLIN: Right.

12 MS. YOUNG: DOE under the regulations is  
13 already required to update its certification with  
14 additional documents at the time it submits a license  
15 application. So in terms of the board having to order  
16 that using this provision, it's not necessary because  
17 the regs already contemplate that DOE will update a  
18 certification.

19 JUDGE CARLIN: Yes, but that I'm thinking  
20 is a different angle.

21 MS. YOUNG: That could be --

22 JUDGE CARLIN: That goes to the class 1,  
23 2, 3 issue, right, and the fact that classes 1 and 2  
24 of the documentary material definition is sort of the  
25 reliance documents and the non-supporting documents.

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1 The scope of that will become clear once the  
2 contentions are admitted in --

3 MS. YOUNG: But also cone DOE submits its  
4 license application.

5 JUDGE CARLIN: Right.

6 MS. YOUNG: The state consideration  
7 referred to both periods.

8 JUDGE CARLIN: Right, right. No. I  
9 agree.

10 MS. YOUNG: There are two different events  
11 that might change the scope of your information.

12 JUDGE CARLIN: I agree with that, but I am  
13 just thinking that -- let's assume that it's a  
14 reliance-based document, it's a third category for  
15 which there is no sort of delay in being able to  
16 determine whether it needs to be submitted.

17 If it is a reliance-based document and it  
18 was created before June 30th, 2004 and DOE just  
19 happened to miss it, maybe there's one of those and  
20 maybe there are four million of those or whatever.

21 If we let this certification go and say  
22 that it was good enough, is there any point we can  
23 come back to them and say, "We want those documents  
24 now" and they say, "Well, upon what basis? Cite me a  
25 regulation, Your Honor, that you can demand that I

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1 produce that. I know I have to update for  
2 after-created documents. I know I have to update on  
3 six months from now. But is there any basis that I  
4 have to update for these ones that I got away with  
5 just now?"

6 If they get away with it here, how can we  
7 require them to update?

8 MS. YOUNG: Well, under 2.1001, a party,  
9 a potential party, is to identify and make available  
10 subject to the claims of privileges, et cetera,  
11 documents, all reports and studies, that are relevant  
12 to the topical guidelines and license applications.

13 So, therefore, any document that falls in  
14 that category that predates the certification within  
15 a reasonable period of time for document processing  
16 because understanding many of the arguments you heard  
17 today about the complexities and those that were heard  
18 from Dan Graser with respect to the time it takes to  
19 do document scanning, screening, and then  
20 indexing/spidering, whatever that is, there is going  
21 to be some time lag, some period of time that  
22 documents may be dated that they wouldn't be captured  
23 in a party certification.

24 I don't think there is any requirement  
25 under the regulations that it be instantaneous that as

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1 of 3:00 p.m. on June 30th, when DOE certified that  
2 that was the time, that every document in existence as  
3 of that point in time on the calendar had to be made  
4 electronically available. I think that is  
5 unreasonable.

6 JUDGE CARLIN: I agree. I think there is  
7 some time lag. What I am concerned about on those  
8 55,000 documents, let's say, is my understanding is  
9 that if they were created subsequently to June 15th,  
10 2004 and before April 15th, the cutoff date and the  
11 certification date, if they were created in that  
12 period, I can understand, yes, there has to be some  
13 time lag. That may be too much of a time lag, but  
14 there may be some that are created during that time  
15 lag.

16 My understanding is that those 55,000,  
17 some of them preceded that April 15th date. And it  
18 hasn't found them yet or gotten around to it. I am  
19 troubled by those.

20 MS. YOUNG: And if DOE can show they had  
21 good faith efforts to identify both groups of  
22 documents and to do the screening with respect to  
23 those documents to determine their relevancy, if any,  
24 to a position they might take in the proceeding or  
25 whether they involve information related to reports

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1 and studies, then that is a burden that DOE would have  
2 to make.

3 JUDGE CARLIN: Right.

4 JUDGE MOORE: Ms. Young, on June 3rd,  
5 2003, licensing support network advisory review panel  
6 meeting, you took a position as OGC's representative,  
7 as I understand it, completely different from what you  
8 seem to be saying today. I have a quotation of you  
9 speaking, "So I think in terms of DOE's planning that  
10 they need to have in mind that in terms of what Dan  
11 and I assume -- that's Dan Graser of the LSN  
12 administering it -- has explained, loading documents  
13 on the LSN is not something that transpires overnight.  
14 And so you can't wait until June 30th to load 45  
15 million documents, for example."

16 Mr. Graser interrupts and says, "Or pages.

17 "Ms. Young: Or pages, right. And because  
18 things take time, there has to be some type of  
19 staggered process. And that is one of the things that  
20 the certification official is going to have to explain  
21 to the pre-license application presiding officer, that  
22 to the best of their knowledge -- and if their  
23 knowledge is an understanding of the limitations of  
24 the LSN, in terms of being able to recall documents,  
25 that the documents have been made electronically

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1 available. And these factors are going to have to be  
2 taken into consideration.

3 "Now, of course, the rules do allow the  
4 flexibility that you substantially complied with  
5 those, but I don't know how substantially complied  
6 with the requirement -- I don't know how you  
7 substantially comply with the requirement if you wait  
8 until one minute before midnight to load a substantial  
9 number of documents in terms of making them available  
10 to the NRC and to the public."

11 MS. YOUNG: Yes. The position --

12 JUDGE MOORE: Now, is that not rather 180  
13 degrees from what you are saying today?

14 MS. YOUNG: Not at all. And I heard you  
15 repeat my remarks to counsel for DOE in asking  
16 questions about the minute before midnight. Again,  
17 your efforts with respect to LSN and making documents  
18 electronically available in terms of your discovery  
19 obligations in the proceeding have to be judged by a  
20 standard of good faith. Did you take reasonable steps  
21 to comply with the requirements of the regulations?

22 There was no statement included in there  
23 that certification in crawling had to be completed for  
24 a certification. It was just buttressing or  
25 encouraging DOE to consider their obligation and how

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1 a board as you are now convened might view their  
2 actions with respect to compliance with the rules.

3 JUDGE MOORE: Excuse me. And I quote, "If  
4 their knowledge is an understanding of the limitations  
5 of the LSN."

6 MS. YOUNG: And that was referring to the  
7 LSN.

8 JUDGE MOORE: The LSN being the central  
9 portal Web site.

10 MS. YOUNG: No, I did not say the LSN is  
11 the central portal Web site.

12 JUDGE MOORE: Please define LSN for me.

13 MS. YOUNG: LSN is the combined system  
14 with respect to making documents electronically  
15 available to parties, potential parties, and  
16 participants in the proceeding.

17 JUDGE MOORE: And is it like a chain? It  
18 doesn't work with -- is the weakest link or it only  
19 works as well as its weakest link or is it a true  
20 portal system, where you go in and grab it out of the  
21 central LSN?

22 MS. YOUNG: You have just jumped past my  
23 working knowledge on the LSN. I am not a technical  
24 person.

25 JUDGE ROSENTHAL: You're using LSN in this

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1 instance synonymously with DOE's Web site. In other  
2 words, DOE's Web site for these purposes is LSN. Is  
3 that the way I understand you correctly?

4 MS. YOUNG: For purposes of the argument

5 --

6 JUDGE ROSENTHAL: When you talk about the  
7 words "LSN," you were not referring to Mr. Graser's  
8 operation?

9 MS. YOUNG: I was referring to LSN in  
10 terms of the global system. Each party has a role in  
11 supplying a piece of what is the combined system with  
12 information that is later spidered and crawled by the  
13 indexing software.

14 JUDGE ROSENTHAL: I have just one question  
15 for you. You started out by saying you weren't going  
16 to become involved in the individual disputes. But  
17 then you said your position was that DOE has acted in  
18 good faith.

19 MS. YOUNG: No. Judge Rosenthal, I  
20 thought I said that Nevada has not met its burden to  
21 show that DOE is not acting in good faith. I gave no  
22 judgment in terms of the --

23 JUDGE ROSENTHAL: How can you say that?  
24 Nevada came forward. And they said there are all of  
25 these documents that have not been supplied. Now, if

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1 they are right about that, DOE comes in and has an  
2 explanation.

3 Now, either you are taking the position  
4 that Nevada is wrong in contending that these  
5 documents were providently not provided, at least the  
6 certification couldn't be provided without those  
7 documents being in the Web site, or you can't take a  
8 position on the show cause.

9 You say that they didn't establish it.  
10 Well, if you're saying that they didn't establish  
11 their case on that, you're saying that the arguments  
12 that they have advanced are just wrong with respect to  
13 the significance of the documents that were not  
14 supplied.

15 MS. YOUNG: If I was mistaken in trying to  
16 portray the staff's position, let me try to restate it  
17 now. It's that Nevada has not met its burden to show  
18 that DOE's actions were not made in good faith with  
19 respect to substantially complying with the  
20 regulations. And that was primarily with respect to  
21 the interruptions in availability of the DOE site or  
22 interruptions in availability of DOE's actions via the  
23 central LSN site. It was not with respect to  
24 positions taken with respect to individual documents.

25 JUDGE MOORE: Ms. Young, I find there is

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1 an interesting contradiction perhaps in your overall  
2 position. Now, you say Nevada, the State of Nevada,  
3 has not met its burden on its motion to demonstrate  
4 that DOE has not produced all the documents that it  
5 needs to for its certification. No?

6 MS. YOUNG: No. I was trying to say that  
7 the State of Nevada has not met its burden to show  
8 that the certification by DOE should be stricken as  
9 being wholly inadequate, which is one of their  
10 arguments.

11 JUDGE MOORE: Okay.

12 MS. YOUNG: The other argument is that to  
13 the extent documents were made available, there were  
14 service interruptions and outages due to all of the  
15 activities taken with respect to --

16 JUDGE MOORE: That's a different point.

17 MS. YOUNG: -- removing privacy  
18 information.

19 JUDGE MOORE: You have no difficulty  
20 standing in front of me and saying Nevada didn't meet  
21 its burden, but are you familiar with 2.232 of the  
22 commission's regulations that gave Nevada ten days  
23 from the initiating event to file their motion?

24 MS. YOUNG: Correct.

25 JUDGE MOORE: Now, if I know my calendar

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1 correctly and can remember the dates, did not DOE file  
2 its certification on June 30th?

3 MS. YOUNG: Correct.

4 JUDGE MOORE: And was not DOE's server  
5 down then until July 6th by their own admission?

6 MS. YOUNG: I believe that's what the  
7 papers that you have before you --

8 JUDGE MOORE: Now, how many days did that  
9 leave the State of Nevada to put forth its case to  
10 meet the commission's ten-day window to come forward  
11 with a motion?

12 MS. YOUNG: From the 6th?

13 JUDGE MOORE: For the first six days,  
14 actually seven days, the server is down. So they  
15 can't even look at DOE's Web site because there is  
16 nothing there. So I don't understand your argument in  
17 the sense that you have to apply reasonableness.

18 DOE has had a seemingly great period of  
19 time in which to pick a date on which they are going  
20 to certify, a date not required by any regulation, a  
21 date solely within their purview.

22 Nevada, on the other hand, has ten days,  
23 the first six of which they can't even look at the DOE  
24 server, putting aside whether or not that qualifies  
25 under the regulations of making documents available.

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1           Yet, you are claiming that similar  
2           reasonableness in meeting their burden doesn't need to  
3           be taken into account. Perhaps it's me, but I'm  
4           missing something here because, on the one hand, DOE  
5           has had 15 years and the State of Nevada had 4 days.

6           MS. YOUNG: But I don't believe the staff  
7           has argued before you, either today or in its  
8           pleading, that Nevada's motion was untimely. So I  
9           guess I am confused.

10          JUDGE MOORE: No. You said they didn't  
11          meet their burden. It took four days to make that  
12          burden by demonstrating the documents weren't  
13          available.

14          MS. YOUNG: Oh, that is your argument,  
15          that somehow the showing that Nevada has to make is  
16          lesser because of --

17          JUDGE MOORE: Well, under the regulations,  
18          they have ten days from the initiating event to file  
19          their motion. Because in your terms and your terms  
20          only DOE's LSN wasn't available on June 30th, July 1,  
21          July 2nd, July 3rd, July 4th, July 5th, until July  
22          6th, I believe that it wasn't available until July  
23          6th, then that ate a huge portion of the 10-day period  
24          and window that the commission's regulations allow for  
25          the State of Nevada to make its case to show what

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1 documents are or are not available. In light of that,  
2 is not their showing sufficient to meet their burden?

3 MS. YOUNG: Well, given that period of  
4 time, Nevada did identify information that was  
5 available on the 6th. And they even indicated in  
6 their brief that the site was functioning, in part,  
7 when it filed its motion on the 14th, I believe, or  
8 12th if I have the date wrong.

9 JUDGE CARLIN: I just have one question.  
10 The Department of Energy has taken a position in its  
11 brief that we don't have authority to grant a motion  
12 to strike, that somehow there is no regulatory or  
13 other authority. What is the staff's assessment of  
14 that? Do you have any thoughts or positions on that?

15 MS. YOUNG: I think this board has  
16 whatever powers it can reasonably construe out of the  
17 delegation of authority that was given initially to  
18 Judge Bullwerk from the commission. And that included  
19 the powers to regulate the conduct of the parties in  
20 the proceedings. So when discovery is at stake, you  
21 have the jurisdiction to be able to issue orders  
22 addressing that conduct.

23 JUDGE CARLIN: All right. Thank you.

24 JUDGE MOORE: Thank you, Ms. Young. Your  
25 time is up.

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1 MS. YOUNG: Thank you.

2 JUDGE MOORE: Rebuttal by the State of  
3 Nevada?

4 MR. EGAN: Your Honors, don't let this  
5 mass of papers scare you. I promise to be brief.

6 Here we are at the end of this hearing.  
7 And we now know that of 2.1 million documents on a DOE  
8 Web site, half of them are unavailable, half. Now,  
9 our argument is that there are still millions missing.  
10 I had said over four. I now am going to change that  
11 because of the inspector general discussion to say  
12 over six million are missing.

13 The point is here we are at the initial  
14 start of LSN. And what we have is a system that is an  
15 utter, complete failure. And if this is how the LSN  
16 proceeding, this portion of the license application,  
17 is supposed to work, it has been the biggest failure  
18 in the history of NRC in my view after 15 years.

19 I want to direct the panel's attention to  
20 one more regulation in answer to Ms. Young. And that  
21 is 2.1011(c)(4). That provision makes it very clear  
22 that the words "in the LSN," "in the LSN," are  
23 explicitly tied to 2.1009. It's a slam dunk. How  
24 could it be any clearer?

25 So Ms. Young's argument that there is no

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1 connection between in the LSN and the certification is  
2 just wrong.

3 JUDGE ROSENTHAL: What does LSN mean? I  
4 am hearing, I think, from both DOE and from the NRC  
5 staff that, at least in some context, when the word  
6 "LSN" appears, it doesn't mean solely the central site  
7 maintained by Mr. Graser, but it can mean any of the  
8 constituent parts thereof, including the DOE site?

9 I am sort of confused as to just what that  
10 term means, maybe in different contexts different  
11 things. What is your --

12 MR. EGAN: Well, Judge Rosenthal, that is  
13 why the commission explicitly defined what it means in  
14 section 2.1001 as the LSN is the combined system that  
15 makes electronic documents available.

16 JUDGE ROSENTHAL: Okay. So it's the  
17 combined system, but is it necessarily -- I mean, the  
18 combined system has a number of parts to it. It's got  
19 your client's Web site. It's got DOE's Web site.  
20 It's got NRC's Web site. It may have some -- the  
21 servers. Excuse me. You will have to excuse my  
22 non-familiarity with these wonderful terms in the  
23 great wide world but is all of these different  
24 servers, which are part of the whole.

25 Now, the whole is the LSN, which includes,

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1 then, Graser and it includes all of the other parts.  
2 Now, when the term is used about something "via LSN,"  
3 can that be via DOE server or via NRC server or does  
4 that focus upon the central?

5 MR. EGAN: Your Honor, the only way I can  
6 answer that is to say that you cannot find a  
7 regulation, you cannot find a statement of  
8 consideration, you cannot find a reg guide or a piece  
9 of correspondence in the record that would remotely  
10 suggest that.

11 JUDGE ROSENTHAL: That would remotely  
12 suggest what?

13 MR. EGAN: That the discrete parts can be  
14 considered to be LSN.

15 JUDGE ROSENTHAL: Okay. But if it's the  
16 whole, then how is it you can zero in on something  
17 having to be available on Dan Graser's?

18 MR. EGAN: Because Dan Graser is the only  
19 portal where the whole is available. The whole is not  
20 available on DOE's Web site. Nevada won't be  
21 available there. NRDC won't be available there.  
22 Public Citizen won't be available. The only place the  
23 whole is available is on Dan Graser's portal.

24 JUDGE ROSENTHAL: So on that basis, you  
25 would say, when you see the words "LSN," that would

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1 mean Dan Graser's portal?

2 MR. EGAN: Yes, sir. And every piece of  
3 history here suggests that as well as the rules  
4 themselves.

5 I want to mark as an exhibit a FOIA  
6 request that we made that goes to some of the issues  
7 that Mr. Shebelskie testified to. Our FOIA request --  
8 exhibit number 2 I'm marking it as -- is dated May  
9 27th. And it asks for all the criteria and the  
10 procedures and the protocols that DOE used to get its  
11 document collection. Okay?

12 (Whereupon, the aforementioned  
13 document was marked for  
14 identification as Exhibit  
15 Number 2.)

16 MR. EGAN: We have the call memo. We know  
17 that there is a call memo. We actually think the call  
18 memo is very good. We think that the General  
19 Counsel's Office did a very good job on the call memo,  
20 which the call memo sent things out to all of the  
21 various offices and said, "Please deliver" and said,  
22 "Please certify that you have delivered."

23 We haven't seen any of the certifications.  
24 We haven't seen what happened between Ms. Otis'  
25 instructions of August 9th, 2002 and June 30th, when

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1 they certified. And we would really like to find out  
2 what happened in the interim. That is why we filed  
3 this FOIA request.

4 Even though it is probably one of the most  
5 modest ones we have ever filed, we have not gotten a  
6 response. We would like to respectfully move that the  
7 board compel a response to this FOIA as part of a  
8 discovery request.

9 In any event, in respect to the allegation  
10 that we haven't put any evidence in the record, I am  
11 here to offer this document collection of screen shots  
12 for the first 4,900 documents responsive to the search  
13 term "alloy-22 corrosion" on DOE's Yucca Vista Web  
14 site.

15 The first 4,900 documents right here,  
16 alloy-22 corrosion, every one of them is a header-only  
17 document, every one. And you can go through here.  
18 There are tens of documents per page. And you can  
19 read these reports. There are certainly things that  
20 can be text-imaged, every single one of them.

21 JUDGE ROSENTHAL: By copyright?

22 MR. EGAN: Well, I guess it's possible  
23 that there are a lot of copyrighted authors in the DOE  
24 complex, but some of these are e-mails. Some of these  
25 are correspondence. We generally don't copyright

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1 those things.

2 JUDGE ROSENTHAL: Privileged?

3 MR. EGAN: Privileged, there is a very  
4 large portion of these that are labeled privileged for  
5 no possible reason.

6 JUDGE MOORE: I'm sorry, counsel. You  
7 have lost me. You have a stack of how many documents?

8 MR. EGAN: We typed the search term  
9 "alloy-22 corrosion." And these are the documents  
10 that came up.

11 JUDGE MOORE: Now, you said those were  
12 header only?

13 MR. EGAN: They're only header only.

14 JUDGE MOORE: So there is no document  
15 associated with the header?

16 MR. EGAN: No.

17 JUDGE MOORE: Well, are those documents or  
18 just the printout of the header?

19 MR. EGAN: Just the header. This is all  
20 we get.

21 JUDGE MOORE: Okay.

22 MR. EGAN: Now, if we wanted these  
23 documents, we would have to do what we just did that  
24 you heard on the voice mail. We would have to go to  
25 the help desk and say, "Here. Forty-nine hundred

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1 document requests. Please fork these over in five  
2 days." Okay? This may be several million pages of  
3 documents.

4 JUDGE ROSENTHAL: But according to what I  
5 understood DOE counsel to state, since all of these  
6 have simply the header, one is to assume that the  
7 reason that there is only the header is either because  
8 there is no text, there is no image, there is  
9 copyright, or there is privilege. And that's what we  
10 would say, I take it, with respect to every one of  
11 them.

12 MR. EGAN: Well, if they would, they would  
13 be lying because any person can read this. That is  
14 why I will leave it here for anyone to see. I was  
15 hoping not to have to scan this entire thing. I want  
16 to leave it for inspection by anyone.

17 JUDGE CARLIN: And I would point out I  
18 think, strictly speaking, copyright is not a  
19 legitimate category. If it's copyrighted, it  
20 shouldn't be in there at all.

21 MR. EGAN: That's a very good point.

22 JUDGE CARLIN: It's an exclusion, not a  
23 privilege.

24 MR. EGAN: That's right. Right.

25 JUDGE CARLIN: So the only documents, I

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1 think, if that is 4,900, for which there are headers,  
2 you can either say, "There is not an image," "There is  
3 not a file," and "It's privileged." Those are the  
4 three grounds, privilege being the different  
5 categories of --

6 JUDGE MOORE: Counsel?

7 MR. EGAN: Yes, sir?

8 JUDGE MOORE: Is there a date on the  
9 bibliographic header?

10 MR. EGAN: Yes, sir, there is.

11 JUDGE MOORE: Is that the date of the  
12 header or the date of the document?

13 MR. EGAN: The date of the document.

14 JUDGE MOORE: Are all of those post-June  
15 30th?

16 MR. EGAN: Oh, no. None of them are  
17 post-June 30th.

18 JUDGE MOORE: Are they post April 15th of  
19 this year?

20 MR. EGAN: No. There may be one or two of  
21 them that are, but the very vast majority are  
22 pre-April 15th.

23 JUDGE MOORE: And this was just one  
24 search?

25 MR. EGAN: One search.

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1 JUDGE MOORE: One search term?

2 MR. EGAN: For one of the several thousand  
3 searches that my 25 technical experts want to make.  
4 This happens to be one of the most important ones, but  
5 every one, every single one, delivers the same result.

6 I am not here to say that this is just one  
7 little thing we are interested in or that Bob Lexa's  
8 exhibit number 7 just happens to be a few little  
9 documents we want. This is every single search. And  
10 I really encourage the board to go on and do their own  
11 search. You will see what comes up. It is garbage  
12 in/garbage out.

13 Here is an even better example of garbage  
14 in/garbage out that goes to the privileged testimony  
15 that was made. I will call this exhibit number 4. We  
16 wondered. If there are six million e-mails from  
17 people on the Yucca Mountain project on nuclear waste  
18 fund money sending e-mails back and forth and they are  
19 not relevant to this proceeding, what the heck are  
20 these people doing on government time?

21 Well, we typed in the word "party" and did  
22 a search term for the word "party," and what we turned  
23 up was dozens of parties. Here is one called  
24 "Party!"; "bachelor party," "party for Debbie,"  
25 "Claire's party," "Holly's party," "December 13th

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1 party," "Thanks for the party," "party 7/1,"  
2 "end-of-the-year party," "post-holiday party,"  
3 "housewarming party," "pool party." Every one of  
4 these is marked "privileged," every single one. What  
5 does that say about DOE's privilege screening  
6 software?

7 And now you understand why we want that  
8 FOIA answered. We want to see the software protocol  
9 that would let a pool party go through as a relevant  
10 document but would keep alloy-22 corrosion out. What  
11 kind of a piece of software is that?

12 JUDGE ROSENTHAL: Well, isn't it your  
13 position that the privilege review, the two-step  
14 privilege review, one was software and then with a  
15 human being who applies some common sense to it, must  
16 be completed before the documents can be considered  
17 made available?

18 MR. EGAN: I don't know how you could in  
19 good faith do it otherwise, Your Honor.

20 JUDGE MOORE: Counsel, what I am troubled  
21 by is counsel for DOE has stood before us and assured  
22 us that all documents within reason have been made  
23 available somewhere.

24 You are pointing out now massive instances  
25 that rebut his general statements. And, indeed, in

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1 DOE's filings in your initial motion, they make light  
2 of the documents that you have requested before and  
3 you have noted that weren't available. And they have  
4 responded to those 12 requests.

5 Can this be resolved without a full-blown  
6 evidentiary hearing, sworn witnesses and exhibits as  
7 to what is going on?

8 MR. EGAN: Your Honor, all I can say is  
9 that this may be the world's first perpetual motion  
10 machine. What we are talking about here is thousands  
11 of motions to compel. And that is not what the LSN  
12 was all about.

13 JUDGE MOORE: That I guess is what I have  
14 to ask. Wasn't all of this to be resolved by the LSN?  
15 But even assuming that DOE had made all of this  
16 available so that it was crawled and we were now in  
17 that posture, we would be standing here with your  
18 motion?

19 I assume what is going to follow if this  
20 holds true with motion after motion after motion of  
21 the needle in the haystack or the keys to the  
22 warehouse. Here is the key to the warehouse. I asked  
23 for this. And what I get is irrelevancy. Is that  
24 what is coming?

25 MR. EGAN: That's what's coming, Your

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1 Honor, in a massive form.

2 JUDGE MOORE: And that is because in  
3 making its documents available, what has happened,  
4 they haven't just dumped everything in. So what is  
5 the screening mechanism they have used? Do you know?

6 MR. EGAN: Well, it is a complete black  
7 box, Your Honor. We don't know until we get the FOIA  
8 answered. You know, we heard testimony that DOE  
9 hasn't been foot-dragging.

10 I just want to remind the board that under  
11 the Nuclear Waste Policy Act, the license application  
12 was legally required to be filed in 90 days after the  
13 site recommendation.

14 Now, what that ought to have meant to a  
15 credibly run organization acting in good faith was  
16 that sometime before the site recommendation, you get  
17 your documents together. And very shortly thereafter,  
18 you file them on the LSN.

19 So I don't think they can justify good  
20 faith on foot-dragging, but even if they could, let's  
21 just say, for the sake of argument, that they haven't  
22 been foot-dragging. Okay? What are we left with? We  
23 are left here now with something that is really almost  
24 a comedy for us. I've got 25 real experts --

25 JUDGE MOORE: Counsel, I hate to

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1 interrupt, but if it is a comedy for you, I'm afraid  
2 it is a tragedy for us.

3 MR. EGAN: One final point I want to make  
4 is the 55,000 documents are not in the gap. I just  
5 want to make sure that Your Honor understands that.  
6 The 55,000 documents are documents that were asked to  
7 be provided by the call memo before April 15th. And  
8 the people didn't comply with the instruction.

9 They're not documents that were produced  
10 in between the time they said, "We're cutting this  
11 off, and we're certified." They're not in the gap.  
12 Okay? I don't have a problem that there has to be a  
13 gap. It may not be two-months, but I don't have a  
14 problem with a gap.

15 My final point is let's just not forget  
16 the elephant in the room here. The elephant in the  
17 room is not that DOE foot-dragged. It's that it  
18 prematurely certified. And it did so for an  
19 artificial restriction imposed on it either by the  
20 appropriations committee or the program management or  
21 the White House. I don't know. But they have the  
22 option at DOE to delay the certification until they  
23 did substantially comply. They did not do that.

24 JUDGE MOORE: Counsel, let's deal for just  
25 a moment. I'm troubled by the archival problem. DOE

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1 counsel has said they have no intention of even  
2 reviewing. I believe the number is four million  
3 archival documents. The authority that was cited for  
4 that was the language from the 1999 LSS statement,  
5 rule on the LSS -- 1989. I'm sorry.

6 Can you tell me, is that valid authority  
7 for that? If not, why not? And are we to expect  
8 downstream motions, outside of the LSN document  
9 requests and motions to compel and following?

10 MR. EGAN: Okay. In turn, the word  
11 "archival" is a term that DOE has contorted into  
12 Orwellian form. "Archival" as used in that statement  
13 of consideration in 1989 probably means something  
14 along the lines of what you would find in Webster's  
15 Dictionary.

16 JUDGE MOORE: As historical?

17 MR. EGAN: As historical. DOE's  
18 definition of "archival" just means somebody who is  
19 not here anymore at DOE. So what that means is that  
20 if Margaret Chu, who runs the program, had decided to  
21 retire on April 14th, her e-mails would be completely  
22 off limits.

23 JUDGE CARLIN: Doesn't that just mean  
24 something that is on a backup tape? Whether that  
25 backup tape was made yesterday or ten years ago, it's

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1 on a backup tape that is archival. That is what I  
2 seem to get out of it. It's not just simply the --

3 MR. EGAN: It would be impossible to draw  
4 a line through it that would not be completely  
5 arbitrary.

6 JUDGE MOORE: But if it is a backup tape,  
7 if there is nothing in front of it that has been  
8 searched and guaranteed to have already covered  
9 everything on the backup tape, it is not something  
10 that necessarily must be searched and part of the  
11 document collection?

12 MR. EGAN: We certainly believe so. And  
13 we think it is mandatory in the rule.

14 JUDGE CARLIN: Well, what about the  
15 proposition that the documentary material has this  
16 three-pronged definition? One is documents they are  
17 going to rely on. They say, "We are not going to rely  
18 on any of those four million e-mails."

19 The last one is reports that have been  
20 prepared. It is clearly these e-mails are not reports  
21 that have been prepared, although they might have  
22 something attached to them that could be a report.

23 Setting those two aside, the last is  
24 non-supporting documents. Now, they have some  
25 extensible experience or base having gone through the

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1 6.4 million e-mails and finding nothing, virtually  
2 nothing, in there that meets the non-supporting  
3 category either.

4 So based upon that experiential base, we  
5 don't need to worry about the four million because:  
6 a) we're not going to rely on them, b) they're not  
7 reports, and c) the chances that there is some  
8 non-supporting information there is so infinitesimal  
9 that it's beyond the can of what 1989 said, "Look, you  
10 have got to have a rule of reason here."

11 MR. EGAN: Your Honor, it's even worse  
12 than you're suggesting because based on the testimony  
13 that we just heard from DOE today, exhibit 17 of DOE,  
14 where it says, "Not made available," e-mail, if you  
15 believe Mr. Shebelskie, that should not say, "1,209."  
16 It should say "5,001,009," 5 million, because he  
17 claimed they were already reviewed. I don't believe  
18 it.

19 JUDGE CARLIN: I believe he was claiming  
20 that they were not documentary material so that they  
21 don't fit the definition one way or the other --

22 MR. EGAN: Right. But that --

23 JUDGE CARLIN: -- because they're not  
24 documentary material.

25 MR. EGAN: But that would put the "Not

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1 made available" category at five million. And  
2 certainly --

3 JUDGE CARLIN: Well, it is documentary  
4 material not made available.

5 MR. EGAN: Right.

6 JUDGE CARLIN: And if it is not  
7 documentary material at all, then it won't get into  
8 this chart at all.

9 MR. EGAN: Let me just suggest that --

10 JUDGE CARLIN: That's how I read it.

11 MR. EGAN: Okay. In the past 15 years, as  
12 e-mail has come to dominate commerce, it is the case  
13 that in a litigation, the very first documents you  
14 seek every time are e-mails.

15 The reason for that is something all of us  
16 know. E-mails tell the truth a lot. People's guard  
17 is down. They are not filtered through the  
18 bureaucratic mechanism. And e-mails always tell the  
19 story. That's why lawyers ask for e-mails first.

20 I can assure you that DOE may not rely on  
21 these e-mails. And I am sure they won't rely on them,  
22 but we are going to rely on those e-mails because we  
23 know those e-mails are relevant to the Yucca Mountain  
24 licensing proceeding. That is all they are about,  
25 Your Honor.

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1 JUDGE MOORE: Counsel, wrap up. And as  
2 you do, I'm still not clear on your answer whether we  
3 can decide this case without having to have an  
4 evidentiary hearing, at least as to the issue of  
5 whether DOE has, in fact, made a good faith --

6 MR. EGAN: Your Honor, I think there is a  
7 number of ways that you could resolve the case. As I  
8 suggested at the beginning, you could resolve the case  
9 by simply saying DOE has not certified, not that  
10 you're striking the certification. It's just that  
11 they have not yet certified as the, rules require.  
12 When you are able and ready to do that, please come  
13 back, a very simple judicial economy way of resolving  
14 this dispute in my view.

15 And they ought to be on notice by now that  
16 if we are to come back here again, the same issues of  
17 on the LSN versus not will be there unless they are  
18 resolved beforehand.

19 And I believe DOE will execute the proper  
20 prudence and attempt to resolve those.

21 JUDGE MOORE: Thank you, counsel.

22 MR. EGAN: Thank you very much.

23 JUDGE MOORE: Thank all of you. The  
24 matter will be taken under consideration. We stand  
25 adjourned.

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(Whereupon, at 1:27 p.m., the foregoing  
matter was adjourned.)

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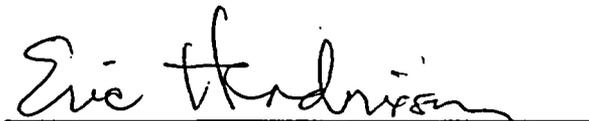
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before the United States Nuclear Regulatory Commission  
in the matter of:

Name of Proceeding: High Level Waste Repository  
Pre-License Application  
Matters

Docket Number: PAPO-00;  
ASLBP No. 04-829-01-PAPO

Location: Rockville, MD

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