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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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 In the Matter of : Docket No. PAPO-00
 :
 U.S. DEPARTMENT OF ENERGY : ASBLP No.
 : 04-8239-01-PAPO
 (High Level Waste Repository: :
 Pre-Application Matters) :
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Hearing Room T3BB45
 U.S. Nuclear Regulatory Commission
 Two White Flint North
 11545 Rockville Pike
 Rockville, Maryland

Wednesday,
 May 4, 2005

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chair
 THE HONORABLE ALEX S. KIRLIN, Administrative Judge
 THE HONORABLE ALAN S. ROSENTHAL, Administrative Judge

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APPEARANCES:On Behalf of the U.S Nuclear Regulatory Commission:

TYSON SMITH, ESQ.
JEFF CIOCCO, ESQ.
JANICE MOORE, ESQ.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - 0-15 D21
Washington, D.C. 20555-0001
(301) 415-4073

On Behalf of the U.S. Department of Energy:

MICHAEL SHEBELSKIE, ESQ.
KELLY L. FAGLIONI, ESQ.
DONALD P. IRWIN, ESQ.
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

On Behalf of the State of Nevada:

ROBERT J. CYNKAR, ESQ.
JOSEPH R. EAGAN, ESQ.
CHARLES J. FITZPATRICK, ESQ.
MICHAEL G. MALSCH, ESQ.
Egan, Fitzpatrick, Malsch & Cynkar
The American Center at Tysons Corner
8300 Boone Boulevard, Suite 340
Vienna, Virginia 22182
(703) 891-4050

On Behalf of the Nuclear Energy Institute:

ELLEN C. GINSBURG, ESQ.
Nuclear Energy Institute
1776 I Street, N.W.
Washington, D.C. 20006-3708
(202) 739-8140

TIMOTHY J. WALSH, ESQ.
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, D.C. 20037
(203) 663-8000

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On Behalf of the Nuclear Information and Resource
Services:

KEVIN KAMPS, pro se
Nuclear Waste Specialist
Nuclear Information and Resource Services
1424 16th Street, N.W., Suite 404
Washington, D.C. 20036
(202) 328-0002, Ext. 14

ALSO PRESENT:

DANIEL J. GRASER - LSN Administrator

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P R O C E E D I N G S

(8:59:32 a.m.)

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2
3 CHAIRMAN MOORE: The Pre-License Application
4 Presiding Officer Board known by the awful acronym
5 PAPO, has convened this case management conference to
6 address the subject of the contents of privilege logs
7 and the associated procedures for efficiently and
8 expeditiously resolving privilege disputes.

9 I'm Judge Thomas Moore. On my left is Judge
10 Alan Rosenthal, on my right is Judge Alex Karlin. If,
11 starting on my left counsel would introduce themselves
12 for the record, we would appreciate it.

13 MR. SMITH: Certainly. My name is Tyson
14 Smith, NRC Staff. I have with me Janice Moore and
15 Jeff Ciocco.

16 MR. GRASER: I'm Dan Graser. I'm the LSN
17 Administrator.

18 MR. IRWIN: I'm Donald Irwin from Hunton &
19 Williams, representing the Department of Energy. With
20 me are my partners, Michael Shebelskie and Kelly
21 Faglioni.

22 MR. FITZPATRICK: I'm Charles Fitzpatrick,
23 representing the State of Nevada. And with me are my
24 partners, Joseph Eagan, Martin Malsh, and Robert
25 Cynkar.

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1 CHAIRMAN MOORE: No other parties or
2 potential parties filed any proposed case management
3 orders or comments on those that were filed with us.
4 Are there any other counsel and their information
5 technology specialists with them that wish to be
6 seated in the circle?

7 MR. KAMPS: I'm Kevin Kamps from NIRS.

8 CHAIRMAN MOORE: Please come up and have a
9 seat.

10 MS. GINSBERG: Ellen Ginsberg, Nuclear Energy
11 Institute. With me is Tim Walsh.

12 CHAIRMAN MOORE: If each of you would once
13 again identify yourself for the court reporter, and at
14 our discretion we will, as stated in our earlier April
15 13th order, call upon you for comments, when
16 appropriate.

17 MR. KAMPS: My name is Kevin Kamps with
18 Nuclear Information and Resource Service.

19 JUDGE KARLIN: Are you counsel for them?

20 MR. KAMPS: Pro se, at this point.

21 MS. GINSBERG: Ellen Ginsberg, Nuclear Energy
22 Institute, counsel for Nuclear Energy Institute.

23 CHAIRMAN MOORE: Thank you. We set forth the
24 issues and the order in which we would address those
25 issues in our earlier April 19th memorandum to all of

1 you. As should be evident from that memorandum, we
2 have a full agenda today. We previously directed all
3 counsel to confer and identify the areas of agreement
4 and disagreement, so we expect all counsel to avoid
5 repetitious answers to our questions, and to keep
6 their comments and answers short and to the point.
7 My colleague, Judge Rosenthal, especially likes yes
8 and no answers.

9 We will start with Question 1 so that we can
10 begin to see the magnitude of the problem which
11 confronts us. And in that regard, I would like to
12 thank counsel for DOE for their filing last evening
13 setting forth their best estimates of DOE's documents
14 for which they will claim privilege, breaking those
15 privileges down by type. That document in a nutshell
16 says that DOE is claiming in the LSN approximately
17 140,000 documents with privilege claims.

18 Staff, how many documents do you have in the
19 LSN, and expect to have in the LSN, and what's the
20 breakdown of privilege claims?

21 MR. SMITH: Well, we expect to have in the
22 hundreds of privilege documents rather than thousands
23 or tens of thousands, but right now it's very
24 difficult for us to estimate what those might be.
25 It's going to depend on the content of the license

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1 application, as well as any admitted contentions.

2 CHAIRMAN MOORE: How many documents do you
3 have now?

4 MR. SMITH: Currently we have no privilege
5 documents on the LSN.

6 CHAIRMAN MOORE: Okay. But you expect
7 hundreds, not thousands.

8 MR. SMITH: That's correct.

9 CHAIRMAN MOORE: Are we talking under 500?

10 MR. SMITH: I think 500 to 1,000 is probably
11 the appropriate range.

12 JUDGE KARLIN: Well, may I ask; the Staff
13 certified last year to about 25,000 if I'm correct,
14 and none of those were claimed to have any privilege?
15 They were header only, no header onlies?

16 MR. SMITH: That's correct, they were no
17 header onlies for privilege purposes.

18 CHAIRMAN MOORE: State of Nevada.

19 MR. FITZPATRICK: Nevada's ballpark estimate
20 at this time is about in the range of 1,000. We
21 anticipate the likelihood we will just claim some
22 attorney-client, and attorney work product, and likely
23 not have any in the other categories.

24 CHAIRMAN MOORE: And how large a collection
25 does DOE plan for the LSN?

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1 MR. FITZPATRICK: Nevada?

2 CHAIRMAN MOORE: I'm sorry, Nevada. It's
3 going to be a long day and I can't get it right from
4 the start.

5 MR. FITZPATRICK: Think what you'll be saying
6 by the end of the day. We don't have our arms around
7 the total collection, but we're talking in probably
8 terms of hundred thousand range, rather than millions.

9 CHAIRMAN MOORE: Does NEI - I know they have
10 a collection on the LSN. It's relatively modest; a
11 thousand documents or so, if I remember correctly.
12 How many header-only documents and privilege claims
13 will you have?

14 MS. GINSBERG: I don't know the exact number,
15 but it would be a very limited number, Your Honor.

16 CHAIRMAN MOORE: Does NIRS have any documents
17 they're planning to put on the LSN?

18 MR. KAMPS: We do, a small number. And
19 again, attorney-client privilege, and attorney work
20 product would be the only.

21 CHAIRMAN MOORE: Have you coordinated with
22 the LSN Administrator about that to-date?

23 MR. KAMPS: No, not yet. We followed the
24 process.

25 CHAIRMAN MOORE: I would suggest that before

1 you depart today, you and Mr. Graser at least touch
2 base so that all the necessary technological wheels
3 can be greased.

4 Before we move on to Question 2, DOE - what's
5 your best estimate of when the DOE LSN collection will
6 now be certified so we can begin to put all of this in
7 the context of a schedule?

8 MR. SHEBELSKIE: Yes, sir. DOE plans to
9 certify this summer. Obviously, our objective is to
10 make a quality production when we do that, so we don't
11 have a specific date, but summer is our goal.

12 CHAIRMAN MOORE: Well, summer goes from June
13 23rd or 4th to September 23rd or 4th. Can you narrow it
14 down to June, July, August, or September for us? A
15 lot of people's schedules depend on what you're doing.

16 MR. SHEBELSKIE: Yes, sir. I believe we are
17 very optimistic it will certainly be before September.
18 We'd like to have it before August.

19 CHAIRMAN MOORE: What's your percent
20 confidence factor in that?

21 MR. FITZPATRICK: To what degree of
22 confidence.

23 CHAIRMAN MOORE: I'm sorry.

24 MR. FITZPATRICK: To what degree of
25 confidence.

1 CHAIRMAN MOORE: Yes, to what degree.

2 MR. MALSH: In some part it will depend upon
3 what comes out of this conference in terms of what
4 work we have to do with our remaining privilege
5 documents. But for that factor, I would have a very
6 high confidence before August.

7 CHAIRMAN MOORE: And can you give me, Mr.
8 Shebelskie, your current best estimate of the total
9 size of the DOE collection?

10 MR. SHEBELSKIE: Approximately 3.5 million
11 documents, Your Honor.

12 CHAIRMAN MOORE: Now of that 3.5 million,
13 some of those are currently on the LSN and publicly
14 available. Correct?

15 MR. SHEBELSKIE: Yes, sir.

16 CHAIRMAN MOORE: How many, do you know?

17 MR. SHEBELSKIE: I believe the estimate would
18 be about 1.6 million.

19 CHAIRMAN MOORE: Are you currently loading or
20 making available documents for processing to the LSN?

21 MR. SHEBELSKIE: Yes, sir.

22 CHAIRMAN MOORE: When do you plan -- do you
23 plan to make any of those public before you certify?

24 MR. SHEBELSKIE: The new documents, I can't
25 say at this point, Your Honor. The documents are

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1 being loaded. We may have to make certain adjustments
2 to the headers based on what comes out of this
3 hearing, and so I think it will ultimately be a
4 question of whether all that clean-up work and QC work
5 is completed, vis a vis the Crowley.

6 CHAIRMAN MOORE: Let's move on to Question 2.
7 Mr. Graser, we invited you to this case management
8 conference so that you could address the questions of
9 whether the LSN as proposed by the DOE and Staff
10 proposal is a suitable system for electronic privilege
11 logs, and whether the bibliographic header fields can
12 be successfully used in the manner DOE and NRC Staff
13 have proposed. Is the LSN hardware and software an
14 appropriate tool to use for electronic privilege logs?

15 MR. GRASER: The LSN hardware and software
16 platform is not an appropriate software environment to
17 house an electronic version of a privilege log.

18 CHAIRMAN MOORE: If the LSN is not an
19 appropriate tool, what type of tools are needed?

20 MR. GRASER: If I can go back - that was a
21 two-part question. The second part of the question
22 was whether or not the LSN bibliographic data was able
23 to be used as part of the privilege log. And the
24 answer to that second part of the question is that the
25 existing LSN bibliographic data would be able to be

1 re-used. It does not map to the full number of fields
2 of information that have been discussed, but the data
3 that is available on the LSN is reusable.

4 CHAIRMAN MOORE: Okay. What type of tools do
5 you need to use for electronic privilege log?

6 MR. GRASER: If you want to provide the
7 capability to do searching, sorting of materials, and
8 generating various types of reports, an appropriate
9 database structure would be a relational database-type
10 of package, software package. That sort of a package
11 would allow you to do searching, as well as sorting
12 and generating reports in various formats, and even
13 printing those reports out and publishing them in
14 another format.

15 CHAIRMAN MOORE: And if the LSN is not
16 suitable, I take it doesn't have that capability.

17 MR. GRASER: The LSN does not have that
18 capability. It's essentially a text search engine
19 that is being utilized to handle some structured data.

20 CHAIRMAN MOORE: Do you have at your disposal
21 another system that has the necessary capabilities?

22 MR. GRASER: We do have access to relational
23 database software packages. That software package,
24 for example, is part of the Digital Data Management
25 System, which is the system we're developing for use

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1 to support the hearings. That does have a relational
2 database package capability.

3 CHAIRMAN MOORE: And it's up and running now,
4 because it's installed in this courtroom. It's in
5 front of us right now, although not in use today.

6 MR. GRASER: It is installed, and it is
7 operational. Yes.

8 CHAIRMAN MOORE: Conceptually, how would
9 using the DDMS work for privilege log?

10 MR. GRASER: Well, conceptually, the way the
11 existing LSN bibliographic data could be used would be
12 to identify privileged items. The parties have all
13 demonstrated an ability to place an XML format
14 bibliographic header on their servers, and the parties
15 would be able to go into their existing data stores,
16 extract the documents that were identified as the
17 relevant items, and use the existing XML bibliographic
18 header from the Licensing Support Network as the basis
19 to then add additional fields of information, whatever
20 fields of information are determined to be appropriate
21 to support the privilege log. And then it would be a
22 relatively simple matter to take those modified
23 versions of the bibliographic header and deliver them
24 back to the Nuclear Regulatory Commission in an
25 electronic format that was specified to the database

1 structure that's eventually agreed upon. And we would
2 then be able to take CDs or electronic files of those
3 bibliographic data and load that database, and make it
4 available.

5 CHAIRMAN MOORE: Because this material is
6 privileged, can it be sent over the Internet or not,
7 because the DDMS is an Internet-based system.

8 MR. GRASER: My recommendation would be to
9 transmit the data using a CD-Rom.

10 CHAIRMAN MOORE: And overnight mail, I
11 assume.

12 MR. GRASER: Overnight mail. My
13 recommendation would be not to transmit any sort of
14 sensitive, unclassified material using Internet
15 protocols. It starts to become fairly complicated
16 from a security perspective.

17 CHAIRMAN MOORE: Does the Staff have any
18 questions for the Licensing Support Network
19 Administrator?

20 MR. SMITH: So I want to make sure I'm
21 understanding correctly; that you believe that we
22 could use the existing XML files that contain
23 bibliographic headers modified in whatever way
24 necessary to make them compatible with the DDMS
25 system. And then using that, the database of

1 privilege logs would be maintained by the LSN
2 Administrator?

3 MR. GRASER: It would not necessarily need to
4 be in a format compatible with the DDMS. We could set
5 up a separate database, separate data file. It would
6 be resident on the DDMS host machine, and we have the
7 capability to administer that database to handle the
8 loading, and making that information available through
9 the DDMS portal to all of the parties.

10 CHAIRMAN MOORE: Mr. Graser, would you take
11 two minutes to explain what the Digital Data
12 Management System is to those that should have some
13 familiarity with it already, I would hope.

14 MR. GRASER: The Digital Data Management
15 System is a comprehensive hearing support environment
16 that's being developed by ASLBP. It integrates
17 courtroom presentation technologies together with an
18 electronic version of the contents of the docket to
19 provide availability in the courtroom for documentary
20 materials that are in the docket, and to make those
21 materials readily and quickly available for use in the
22 hearing.

23 It's a software environment that is Internet
24 accessible, as well as accessible at the various
25 attorney work stations, and at the bench in the ASLBP

1 hearing environments. And that database capability
2 has been developed with an eye towards supporting the
3 High-Level Waste proceedings. We have the ability to
4 make it available to the parties to the proceeding in
5 a secure environment, to provide access to those
6 individuals who are involved.

7 CHAIRMAN MOORE: And in a nutshell, you will
8 assign passwords to the users. The system is limited
9 to the parties to the proceeding, and you can then
10 allow them access, and the privilege log then becomes
11 a searchable database.

12 MR. GRASER: That's correct.

13 CHAIRMAN MOORE: Staff, do you have any other
14 questions for Mr. Graser?

15 MR. SMITH: Yes. And is this system ready to
16 handle this now, or what would be the time frame for
17 letting us know what exactly would be necessary for us
18 to use this system?

19 MR. GRASER: The system is currently
20 operational, and we're pending an interim authority to
21 operate the system from the Office of Information
22 Services. We expect that within the next week, so
23 within a week we will have an operational capability
24 to support establishing such a database.

25 CHAIRMAN MOORE: DOE, do you have any

1 questions for Mr. Graser?

2 MR. GRASER: And make it available to the
3 parties.

4 MR. SHEBELSKIE: Yes, sir. Mr. Graser, let
5 me ask you about that database. Are you saying that
6 information that would already be in fields of
7 bibliographic headers of privileged documents on the
8 LSN could simply be copied and transposed over to the
9 database, or would that have to be a separate sort of
10 creation of entries for those documents into the
11 database?

12 MR. GRASER: The bibliographic headers that
13 have already been prepared for making documents
14 available on the LSN, those bibliographic headers are
15 resident on each of the parties' document collection
16 servers. I believe that it's a relatively simple
17 matter to either copy or go back to the original
18 database environment that was used to generate those,
19 so you could either make a copy of an existing LSN
20 bibliographic header and copy that over to some other
21 database environment that would allow you to add
22 additional fields of information.

23 MR. SHEBELSKIE: The parties, when we were
24 discussing the proposed case management order, were
25 under the belief from our experience and our knowledge

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1 that all of the existing fields in the bibliographic
2 headers on the LSN now are, in fact, searchable,
3 including the comment field. Is that correct?

4 MR. GRASER: Yes, they're all searchable.

5 MR. SHEBELSKIE: All right. And one last
6 question that I have is, I understand that the comment
7 field now as currently configured has a 1,000
8 character limit to it on the LSN, and we were
9 wondering whether that field could be expanded to
10 accommodate more characters on the LSN.

11 MR. GRASER: Expanding the field structures
12 in the LSN is a fairly complicated process, and time-
13 consuming process. Our estimate is that assuming
14 funds were available, and assuming approximately three
15 months worth of procurement activity on the federal
16 side, it's then an additional three-month activity to
17 modify the database field structures, do all of the
18 testing, and then attempt to unload and reload the
19 database into the new structure, so it's many months
20 worth of work downstream, and it's a fairly
21 complicated activity to attempt to do that at this
22 stage on the LSN.

23 MR. SHEBELSKIE: That prompts one additional
24 question, Your Honor. And with respect to the DDMS
25 database then, would there have to be additional then

1 procurement activities, or testing activities if we
2 decide, as a result of these discussions on case
3 management orders, about additional fields that have
4 to be created, things like that?

5 MR. GRASER: The DDMS hardware and software
6 platforms are currently available to us, so there is
7 no procurement activity involved in them. It's a
8 relatively simple matter to build a structured
9 database capability based on the type of bibliographic
10 structure already used for the LSN. It's a relatively
11 simple matter to use the existing software packages,
12 and simply create a second database, and this database
13 would be the privilege log file.

14 Building that system is not particularly
15 difficult. It doesn't need to be particularly
16 difficult. It could become very difficult, depending;
17 but it's generally akin to designing and developing a
18 Microsoft Access database, relatively straightforward
19 development activity, and we have the ability to
20 support that with existing federal staff that works
21 for the LSN Administrator.

22 MR. SHEBELSKIE: Your Honor, no further
23 question, but just an observation we would make.
24 There was discussion about mechanics or procedures for
25 transmittal of the privileged information, or

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1 sensitive, or unclassified information. I would think
2 that in the privilege log itself, you would not have
3 the privileged or sensitive --

4 CHAIRMAN MOORE: Correct.

5 MR. SHEBELSKIE: Or images of the privileged
6 documents themselves, and so we may not need to have
7 those types of procedures for this mechanism we're
8 talking about.

9 CHAIRMAN MOORE: That would seemingly be
10 true, so could the Internet, Mr. Graser, then be used
11 for the transmission of the basic information that the
12 parties would supply to the DDMS file?

13 MR. GRASER: Yes. That was a correct
14 interpretation. The Internet could be used.

15 CHAIRMAN MOORE: And so, to capsulize, if I
16 understand this, the parties can take the information
17 they already have in the bibliographic header that's
18 in electronic form, transport it and supplement it
19 after supplementation to you, and you put it into the
20 DDMS file, and we have an electronic privilege log
21 that's available to all the parties 18-hours a day, or
22 something like that.

23 MR. GRASER: That's correct.

24 CHAIRMAN MOORE: Do you have any other
25 questions, DOE?

1 MR. SHEBELSKIE: May I check with our
2 technology --

3 CHAIRMAN MOORE: While we're doing that,
4 we'll have the State of Nevada.

5 MR. FITZPATRICK: Yes, Judge Moore; Charles
6 Fitzpatrick. First off, excuse if there's any
7 simplistic questions come out of this end. Our IT
8 specialist, coming from a company called CompullT in
9 Grand Rapids, a fellow named Ken Rastello, was mugged
10 last night as he arrived from the airport, and lay in
11 an alley all night. And this morning he's apparently
12 by now in a hospital, but as of 7:30 this morning he
13 was just awakening from getting mugged, and all his
14 luggage, wallet, cell phone, computer, all that was
15 taken, so we're a little bit naked for IT specialist
16 here today.

17 But I was going to make the same observation
18 that Mike Shebelskie made, and I think it wasn't in
19 response to Mr. Graser's answer, but your question, as
20 far as transmitting privileged information. I think
21 that it's either going to be a completely privileged
22 document, which would be header-only. There would be
23 no transmittal of the privileged document, or posting
24 on the LSN, or else you redact --

25 CHAIRMAN MOORE: There should be no

1 privileged information.

2 MR. FITZPATRICK: A redacted version which
3 would have privileged information stripped out, so I
4 don't think that comes up. But I did have a question
5 for Mr. Graser; in reviewing the different fields in
6 the bibliographic header as they now exist with the
7 same Mr. Rastello, so I'll bring up his comment - he
8 observed that there's a field that seems fairly
9 general in nature for the description of documents and
10 their content called "Descriptors", which the
11 allowance proscribed in the guidelines from NRC for
12 that field is 5,000 characters, which seems to be
13 about two-and-a-half pages of typed information.

14 Given that, why is it necessary -- why
15 couldn't that particular field be used to capture the
16 necessary predicate information that a party supplies
17 to justify the use of a privilege claim?

18 MR. GRASER: Why could it not be used inside
19 the LSN?

20 MR. FITZPATRICK: Right. Why do we have to
21 do this process of adding more fields to the
22 bibliographic header, if that field is laying there
23 with 5,000 characters?

24 MR. GRASER: Well, if you dumped all of the
25 information into that particular field, it would

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1 probably be extremely difficult to attempt to sort on
2 any of that information. Now some of the fields of
3 data that have been proposed, for example, include
4 Copy E names, which are currently not in the LSN
5 bibliographic header, an expanded description of the
6 document, identification of authors, addressees, and
7 copies who happen to also be legal counsel. And if
8 you attempted to throw all of that various type of
9 information into a text field in the LSN, the LSN does
10 not provide any sort capabilities, and it does not
11 allow you to manipulate subsets of data so as to
12 generate any sort of a report. So it would provide
13 the full text search capability, but it would not be
14 able to organize that information into a useful work
15 product.

16 MR. FITZPATRICK: But are you saying that the
17 existing fields in the bibliographic header for
18 author, and recipients, and title, and so on, that if
19 you combine them with the description of why the
20 document is a privileged document, and put that in the
21 descriptors field, that there would still have to be
22 more information? I mean, I don't know if you've seen
23 the draft proposal, but we proposed, for instance, to
24 exchange lists of all counsel representing every party
25 so that there wouldn't have to be an indication in

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1 every document of every attorney who was involved. It
2 would say Nevada Counsel, or something like that.

3 I'm just trying to probe, because it seems to
4 be a big step, whether it's really necessary, whether
5 the existing fields for author, recipient, title and
6 so on, plus descriptors describing why it's privileged
7 could not be sufficient. I'm not sure I understand.
8 I don't want you to say again about the sorting. I
9 guess, I --

10 MR. GRASER: If it was your intent merely to
11 make it searchable, you could put that information in
12 the descriptors field. And if you wanted to do
13 nothing else with that -- the other --

14 CHAIRMAN MOORE: Am I correct, Mr. Graser,
15 that 130 bibliographic headers would have to be
16 changed for the DOE collection?

17 MR. GRASER: That's correct. I was going to
18 make the point that if there are any documents
19 currently on the LSN, that you would have to augment
20 with the additional information to be responsive to
21 the fields of information. That would involve two
22 transactions; one to delete the existing documentary
23 bibliographic header, and then a second transaction to
24 replace it with the updated bibliographic header.

25 It seems to me that if you are going through

1 the process of adding any additional information to a
2 record, it would be a cleaner process to do the
3 augmentation, and put it into a software tool that's
4 amenable to do what you're trying to do.

5 CHAIRMAN MOORE: Mr. Graser, is there a way
6 in which under the current LSN structure, that the
7 PAPO Board can track any of this, because I'm assuming
8 that we're going to have a large number of challenges
9 to claims of privilege, and the privilege logs are
10 going to reside somewhere. When we have to track the
11 challenges and the resolution of all those challenges
12 for all time, is that capability on the LSN right now?

13 MR. GRASER: There is no tracking capability
14 and no fields currently available to support that,
15 again with the exception of that descriptors field.
16 And then that would involve having to go through an
17 LSN document deletion and replacement every time you
18 did a transaction that you wanted to track.

19 CHAIRMAN MOORE: So is there any significant
20 difference in the amount of work for the parties whose
21 documents they are, and for which they're claiming
22 privilege, to transport the current information from
23 the bibliographic header set up in the LSN, supplement
24 it, and transport it electronically, than redo a
25 bibliographic header that's in the current setup? It

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1 strikes me that this should be pretty much a wash, as
2 far as effort on the part of the parties.

3 MR. GRASER: I would say the assessment of
4 the additional work may depend on the existing
5 structure that the parties have in place to build
6 their own database environment. But from what I know
7 of the way the parties have set things up, it seems to
8 me in my analysis that the amount of work necessary to
9 identify an existing LSN bibliographic record, and
10 then to extract that record, and to augment it with
11 any additional information is going to be the same
12 work in either scenario.

13 At that point in time the new item would
14 either need to be made available to be re-spidered and
15 re-indexed, and that's probably roughly a wash with
16 the amount of work it takes to put the document in a
17 file or on a CD and send it to us. So I would say
18 from my assessment that it would be a wash.

19 CHAIRMAN MOORE: Do either of you have
20 anything that you would like to ask Mr. Graser?

21 MS. GINSBERG: Just a clarification. I
22 understood that there would be a password assigned if
23 you went to what you're describing as the second
24 scenario, the separate set. Would the availability be
25 just in the courtroom, or would it be from a remote

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1 location, as well?

2 MR. GRASER: It is available from remote
3 locations, as well.

4 MS. GINSBERG: Thank you.

5 MR. GRASER: It's an Internet application.

6 MS. GINSBERG: All right. Thank you.

7 MR. GRASER: Any web browser, any location,
8 but you would still need to have a password and ID to
9 get into that system.

10 CHAIRMAN MOORE: Mr. Shebelskie.

11 MR. SHEBELSKIE: Your Honor, in conferring
12 with our technology specialists, if I could summarize
13 their comment as saying the devil will always be in
14 the details. And their question is really a process-
15 oriented one; which is, would we have a schedule for
16 knowing or any sense of an estimate of when a
17 requirements document might be ready for their review.
18 And then what would the process be to define those
19 requirements with the IT people on both sides, as it
20 were, to confer, because I think that's really where
21 their questions lie.

22 CHAIRMAN MOORE: Mr. Graser, I'm assuming you
23 will make yourself available to the IT specialists of
24 all of the parties to grease the IT wheels, so that
25 all of this could work.

1 MR. GRASER: Yes, sir.

2 CHAIRMAN MOORE: And am I correct that in
3 your LSN guidance, and the current Subpart J rules of
4 the Commission, the basic form format and
5 technological requirements for documents are already
6 spelled out for electronic documents?

7 MR. GRASER: Yes.

8 CHAIRMAN MOORE: And so that information is
9 basically the foundation on which you would build?

10 MR. GRASER: That would be my recommendation.
11 The parties have already demonstrated an ability to
12 properly structure XML bibliographic header data, and
13 I think that's evidenced by the fact that we have a
14 number of the parties have already successfully loaded
15 documents.

16 CHAIRMAN MOORE: Okay. Now you can meet with
17 the parties' IT specialists. What's the most
18 efficient way in which all of those things can be
19 done; today, now, lunch, this evening, tomorrow - to
20 move this along just as quickly as possible.

21 MR. GRASER: To move it along I think there
22 needs to be some consensus and some direction as to
23 exactly which fields of information need to be made
24 available.

25 CHAIRMAN MOORE: Well, that's the goal for

1 today. So sometime subsequent, you say it would be
2 helpful for you to meet with all of them.

3 MR. GRASER: Yes, sir.

4 CHAIRMAN MOORE: Would you make sure that
5 before you allow any of them to escape you have all
6 exchanged the relevant information so that can be
7 done?

8 MR. GRASER: Yes, sir.

9 CHAIRMAN MOORE: Let's move on then to
10 Question 3. We have set forth our view in Appendix A
11 of Question 3. The necessary information so that if
12 in a privilege log it would demonstrate prima facie
13 that the privilege is properly claimed, it would allow
14 one challenging that prima facie case to make that
15 challenge, and it would allow us to, from those
16 documents, decide the validity or invalidity of the
17 privilege claim. Starting with the Staff, our
18 question to you is, is our list over-inclusive, under-
19 inclusive, or in error, and in which way?

20 MR. SMITH: Well, first I'd like to say that
21 I think the approach that we agreed on in our case
22 management order was a fair and reasonable approach
23 that struck a balance between the burden of producing
24 the detailed information, and quick resolution of
25 privilege claims. But with respect to the specific

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1 list you provided, with regard to the attorney-client
2 privilege, we find it acceptable with one
3 clarification; and that is with respect to number
4 five. It talks about the primary purpose for which
5 the document was created and transmitted. We believe
6 that should be revised to state "the primary purpose
7 of the communication contained in the document", and
8 that gets to one of the questions we're going to talk
9 about later, which is that for the attorney-client
10 privilege, it protects the communication or the legal
11 advice itself in whatever form or document that takes.

12 With regard to the work product privilege --

13 CHAIRMAN MOORE: One at a time. DOE.

14 MR. SHEBELSKIE: Yes, sir. First, the
15 Department of Energy would like to echo the sentiments
16 of the Staff, that in the discussions among the
17 parties and the other participants in the development
18 of the proposed joint case management order, all the
19 experienced counsel in those discussions thought that
20 the information set forth in the proposed order was,
21 in fact, sufficient for them to make an assessment as
22 to whether or not they would want to challenge the
23 privilege claim. And then they set up the process for
24 the informal dispute resolution to answer any
25 questions they might have, that might also obviate the

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1 need for challenges, and so we would endorse that
2 concept.

3 Moving to the specifics that the Board has
4 set forth on the attorney-client privilege, there are
5 several matters I'd like to bring to the Board's
6 attention. On Category 2 with respect to job title or
7 capacity, I think it would be appropriate to indicate
8 on an individual's name what organization they work
9 for, whether it's the Department of Energy, BSC,
10 Hunton and Williams, whatever. And I think that gives
11 the parties information they need for the type of
12 assessment the Board has in mind. But I think job
13 title or capacity doesn't add to that sort of initial
14 assessment, and in many cases would be impractical;
15 and let me give you an example.

16 Let's say that an attorney in the Office of
17 General Counsel is communicating to someone in the
18 Office of Civilian Radioactive Waste Management,
19 providing legal advice. You're looking at the email,
20 you can tell that. We know the author is an attorney
21 working in OGC in his or her capacity as a lawyer.

22 JUDGE KARLIN: Well, let me stop you there.
23 How do we know he's working, or she is working in
24 their capacity as a lawyer, as practicing lawyers
25 often work in their capacity as lawyers, and

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1 oftentimes they don't.

2 MR. SHEBELSKIE: Right.

3 JUDGE KARLIN: Don't we think that's a
4 relevant element to whether there's a privilege here?

5 MR. SHEBELSKIE: Yes, sir, Your Honor. And
6 we have a —

7 JUDGE KARLIN: How do we know that from what
8 you've proposed? And we don't know that, I think,
9 from what you've proposed in your order.

10 MR. SHEBELSKIE: Right. Well, what we
11 propose in the order is that we would provide a list,
12 either in your header you indicate the name of the
13 person is Counsel, Hunton and Williams, or OGC,
14 whatever. Failing that, you have a separate list that
15 indicates the lawyers.

16 Your Honor, you're right that the lawyer has
17 to be acting in his or her capacity as a lawyer at the
18 time, and I think you would indicate that they're
19 acting as a lawyer. The problem is what their exact
20 title is, whether it's General Counsel, Deputy General
21 Counsel, Assistant Deputy General Counsel.

22 CHAIRMAN MOORE: But it says "job title or
23 capacity".

24 MR. SHEBELSKIE: That is true. And if you
25 mean by "capacity" counsel, Office of OGC —

1 CHAIRMAN MOORE: For example, as opposed to
2 paralegal.

3 MR. SHEBELSKIE: That's true. What we were
4 concerned about is having to put a specific title,
5 such as Deputy Assistant General Counsel, something
6 like that. I think it's fine to put this person is in
7 the Office of General Counsel, lawyer in Office of
8 General Counsel. This person is with the Office of
9 Civilian Radioactive Waste Management, this person is
10 with Bechtel-SAIC. That level of information, so
11 people know what organization fits in; but the
12 additional detail I think is really burdensome and
13 unnecessary to make that prima facie assessment. And
14 sometimes you really won't be able to get it for
15 historical documents.

16 JUDGE ROSENTHAL: Well, isn't it important to
17 know the capacity of the individual, in what capacity,
18 serving as an attorney?

19 MR. SHEBELSKIE: Yes, sir, Your Honor.

20 JUDGE ROSENTHAL: All right. So that if this
21 job title were eliminated it was just capacity, would
22 that you think satisfy you?

23 MR. SHEBELSKIE: I think that would satisfy
24 me for counsel, indicate they're acting as counsel and
25 what organization they're counsel of.

1 JUDGE ROSENTHAL: Because I thought your
2 point was that you really can't tell from job title
3 what particular capacity the individual is acting in
4 at the time.

5 MR. SHEBELSKIE: I think it's that, Your
6 Honor, in addition to the fact that the job title will
7 sometimes be difficult, the exact job title in the
8 government bureaucracy they had three years ago, may
9 be difficult to have.

10 CHAIRMAN MOORE: But the capacity will never
11 be, because you can't claim the privilege legitimately
12 without knowing that.

13 MR. SHEBELSKIE: I agree, Your Honor, for the
14 attorneys.

15 CHAIRMAN MOORE: So something that says job
16 title or capacity, I'm failing to see how that's a
17 problem.

18 MR. SHEBELSKIE: Let's move, though, from the
19 attorneys. I agree that for the attorneys you want to
20 indicate this person is the attorney, whether it's the
21 author or the recipient. Let's look, though, at the
22 client side of it. It's an email from the attorney,
23 acting as an attorney, to someone in the Office of
24 Civilian Radioactive Waste Management.

25 Now many times we're not going to know what

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1 precise job title they had in the hierarchy at the
2 time three years ago, because job titles change and
3 whatnot. WE know, and we have to know, of course,
4 that they are with the Department of Energy, that
5 they're in the Office of Civilian Radioactive Waste
6 Management, so I'm not sure in that context what
7 capacity means. If you mean the capacity is they're
8 in the Office of Civilian Radioactive Waste
9 Management, and they are employed by the Department of
10 Energy, the employer --

11 JUDGE KARLIN: Well, I think capacity in that
12 context means, to me, perhaps are they the client?
13 I'm not looking for an UpJohn Control Group-type of
14 analysis, but by the same token, we have to have
15 someone who -- a communication needs to be from or to
16 an attorney, from or to a client, as such, for
17 purposes of legal advice, et cetera, et cetera. And
18 simply because someone has a title of attorney, or
19 someone works at the Department of Energy doesn't
20 mean, perhaps, that they are the client. So we need
21 to establish somehow, I think, in the grappling of
22 that how we assure and show prima facie on the
23 privilege log, if we can, if you can, that this is an
24 attorney communicating with a client, et cetera.

25 MR. SHEBELSKIE: That is a helpful

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1 clarification for us, and I think that would be
2 appropriate. We could indicate, for example, that a
3 document is from a lawyer in the Office of General
4 Counsel to this individual, who at the time was
5 working in the Office of Civilian Radioactive Waste
6 Management. If that's the level of information you're
7 asking for, I think that's fair and reasonable.

8 JUDGE KARLIN: Well, I think what we're
9 asking for is not just the information, but perhaps
10 some assurance from counsel that this person is an
11 attorney, acting as such; this person is a client,
12 acting as such. Of course, there's other privileges,
13 like the work product, where a person might not be a
14 client, but might be someone who's being asked by the
15 lawyer to do a task, or to do some work, or that sort
16 of thing, so that might apply separately.

17 MR. SHEBELSKIE: Yes. I think that type of
18 attestation has to be implicit in the assertion.

19 CHAIRMAN MOORE: Any others?

20 MR. SHEBELSKIE: Yes, sir. One other point
21 on number 2. And again, I think this is more in the
22 nature of clarification. It is stated there that you
23 would provide all persons known or believed to have
24 received -- I'm sorry, I'm on number 3 now, Your
25 Honor. A statement there of all persons known or

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1 believed to have received or seen the document, or
2 summary thereof; and again, I think this is more in
3 the nature of clarification for us to understand your
4 expectations.

5 CHAIRMAN MOORE: This goes directly to the
6 confidentiality --

7 MR. SHEBELSKIE: Absolutely. It's a question
8 of diligence. And for example, Your Honor, say we
9 have a document authored two years ago, and the
10 authors and recipients - we know meets all the
11 qualifications for an attorney-client communication.
12 The person was in counsel's office, acting capacity as
13 counsel substantively, et cetera, et cetera, to the
14 client, but both of those people are gone now from the
15 Department, for example. We have no indication on the
16 face of the document that it was broadcast to anybody.
17 We have no indication from any other source of
18 information available to counsel doing the privilege
19 reviews that it was sent. I think in a normal case
20 you would then say without any sort of red flag or
21 reason to believe to the contrary, it was a
22 confidential communication - what degree of diligence
23 do we need to do to track down, to find something.

24 CHAIRMAN MOORE: Well, one, for example,
25 would be what's the normal practice in the office, and

1 I'll give you an example. I see in my capacity here
2 as the Associate Chief Administrative Judge of the
3 Panel, an incredible amount of things that are stamped
4 at the bottom "sensitive, attorney-client privilege,
5 cannot be released without permission of OGC." That
6 same document goes to every comparable person in this
7 agency, I assume. If that document is truly attorney-
8 client privilege, I'm not in that link, and I
9 shouldn't be. And I suspect that DOE is no different
10 from the NRC since our parents a long time ago were
11 the same in the AEC for much of what is done. That
12 would just be a guess, so some determination, and the
13 attorney by signing the privilege log under our rules
14 has an obligation to essentially do some due diligence
15 that it is what it represents to be.

16 MR. SHEBELSKIE: I think that's fair. And,
17 obviously, an indication would be if there's nothing
18 on the face of the document that shows it was
19 distributed beyond the distributees, and there is no
20 reason to believe from the normal type of office
21 practices that it wasn't sort of a wide agency
22 distribution memo you're describing.

23 CHAIRMAN MOORE: Now another example, emails.
24 If you don't examine for an email that is sent, the
25 original electronic document for BCCs, you'll never

1 know. But again, if they're blind CCs on it, they may
2 well be outside of the loop of what is legitimately
3 attorney-client privilege. And the only way you're
4 going to know that for those emails that are sent, you
5 have to open the original document, electronic
6 document and look. And then if there are six BCCs on
7 it, you need to know who those persons are, and
8 divulge who those persons are in the privilege log, do
9 you not?

10 MR. SHEBELSKIE: I think that's why the
11 copyholders of the document, shown on the document.
12 The scenario, for example, I was concerned about with
13 emails is, if I sent you an email and only direct it
14 to you, if you printed out the email and shared it
15 with somebody, I'd have no historical record of that.
16 And so I didn't -- again, what your expectation is.

17 CHAIRMAN MOORE: That's a given. But also,
18 if it is the practice, which goes back to my previous
19 example, of a government agency to be very liberal in
20 how supposed attorney-client privilege documents are
21 disseminated, that is something you should know before
22 making a good faith representation that this is
23 subject, legitimately subject to attorney-client
24 privilege.

25 MR. SHEBELSKIE: I think we understand your

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1 expectations there. Number four --

2 JUDGE KARLIN: Well, before we move on from
3 that.

4 MR. SHEBELSKIE: Yes, sir.

5 JUDGE KARLIN: I think this is a productive
6 area of discussion, and it may be that the other
7 parties can address this, as well. I see in your
8 proposed second case management order you have the
9 phrase "to disclose all recipients, including all
10 copyholders as shown on the document." And you just
11 mentioned that phrase, and that did concern us a
12 little bit because what does it mean to say "as shown
13 on the document"? An example being blind copies, I
14 may have an email which does not show that there are
15 BCs sent off to other people. I think we're
16 suggesting that appropriate diligence requires looking
17 at the original sender email to understand the Bcs.
18 It may not be shown on the piece of paper or the
19 electronic document that I might have in my
20 possession. If that's the interpretation that you all
21 jointly had in that, that's helpful; that is, "as
22 shown on the document" means as shown on the original
23 email, not on the one that you or I may have received.

24 MR. SHEBELSKIE: Right. May I just ask one
25 question of our IT people for a minute? I wanted to

1 clarify something. When we do our reviews of emails
2 that are generated within the DOE email system, we are
3 pulling up in the emails in a way that shows any blind
4 copyholders on the email. If an email came from
5 outside the system to in the DOE, we don't have that.

6 CHAIRMAN MOORE: Obviously, a recipient
7 email, no one has that capability, unless you go back
8 to the original recipient.

9 MR. SHEBELSKIE: Correct.

10 CHAIRMAN MOORE: And in some instances, I
11 don't discount the fact that that may be necessary, in
12 others it may not --

13 MR. SHEBELSKIE: I just wanted to clarify
14 that.

15 CHAIRMAN MOORE: -- as part of attorney's
16 representation that this is entitled to the claim of
17 privilege.

18 MR. SHEBELSKIE: Right.

19 CHAIRMAN MOORE: To make that in good faith,
20 there are some instances where you would have to go
21 back. Anything else?

22 MR. SHEBELSKIE: Not on that, Your Honor.
23 Although, on number 4, on relationship - we had a
24 question of really what your expectations were on
25 that, if it is really in the nature of the sort of

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1 observations Judge Karlin made about verifying that
2 the author and the recipients are in an attorney-
3 client relationship.

4 JUDGE KARLIN: Yes, that was the, I think,
5 intent of that.

6 MR. SHEBELSKIE: All right. Number five
7 again I think is, for our purposes, clarification to
8 understand what you mean by that, because we thought
9 that if you -- by the time you got to number five, if
10 you have laid out the identities of the authors and
11 recipients, who's the attorney, who's the client, that
12 there's an attorney-client relationship, we weren't
13 sure what else number five intended to capture.

14 JUDGE KARLIN: Well, I think -- are you
15 asking a question what is that intended to capture?

16 MR. SHEBELSKIE: Yes. How much information?

17 JUDGE KARLIN: Well, there are situations
18 where there is an attorney-client relationship, and
19 one of those, the client or the attorney, will
20 generate a report, which is in the nature of a status
21 report, which is circulated to a large number of
22 people who just simply want to have a status report,
23 and it is neither providing, nor requesting legal
24 advice. And so the purpose of the document is not to
25 provide or to request legal advice, but is simply to

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1 give a larger CC audience a status report. That, in
2 my interpretation, would not qualify; but that is a
3 practice that is sometimes done within corporations,
4 attempt to use the cover of the privilege for a non-
5 legal advice purpose.

6 CHAIRMAN MOORE: Do you concur in the Staff's
7 view for number five, that it's the primary purpose of
8 the communication contained within the document, that
9 should be the focus of five?

10 MR. SHEBELSKIE: Yes, sir, Your Honor. I
11 think our question really went to how much — what
12 type of detailed information, statement of facts do
13 you want, as opposed to the statement from counsel who
14 has asserted this is a privilege document, saying yes,
15 we've looked at the substance of this document. We
16 know it's genesis and context, and this is a document
17 that the primary purpose of which is the provision of
18 legal advice, as opposed to one of these non-
19 privileged purposes. Whether you were looking for
20 that kind of statement in a vowel, or whether there
21 was evidence you wanted us to adduce to document that
22 assertion.

23 JUDGE KARLIN: I think that's a good
24 question. I think, on the one hand, what we're
25 pointing to is we want counsel to evaluate the

1 document and represent to us when they place a
2 document on the privilege log, that they have
3 evaluated the document, and it is for the primary
4 purpose of legal advice, obtaining or requesting.
5 What more you can provide in terms of factual support
6 for that, I'm not sure. I have to think about that.
7 I mean, I think that without revealing the advice —

8 MR. SHEBELSKIE: That was our problem,
9 thinking about it.

10 JUDGE KARLIN: Yes. We don't want you to
11 reveal the privileged information, but we do want to
12 emphasize that it's going to have to be for that
13 purpose, the primary purpose of legal advice.

14 CHAIRMAN MOORE: And one of the things we had
15 in mind is that although this might come as a shock to
16 you, we all didn't fall off the turnip truck just
17 yesterday; that the way large quantities of documents
18 have to be processed in an organization is somewhat of
19 a pyramid, and sometimes there are gaps in the
20 pyramid, starting with paralegals, or even other
21 contract employees. And they really are making these
22 determinations through the many levels, and sometimes
23 there's a gap. We're well aware of that, and so when
24 it comes to the privilege log, though, that's where we
25 want to ensure that it got looked at.

1 MR. SHEBELSKIE: Yes. I can assure you that
2 every document we claim attorney-client privilege on
3 is going to be reviewed by at least one lawyer, if not
4 multiple.

5 CHAIRMAN MOORE: And number five is aimed at
6 the simple statement that the primary purpose was
7 communication between the attorney and the client that
8 is entitled to the privilege.

9 MR. SHEBELSKIE: Yes, sir.

10 JUDGE KARLIN: And there might be situations
11 where the memo itself might say something as bald as
12 we're requesting legal advice or requesting your
13 advice, and you could just sort of says memo says we
14 are requesting legal advice. We're providing legal
15 advice.

16 I've been in the position of requesting and
17 providing legal advice, and sometimes I put those
18 words in there on purpose in order to assure privilege
19 would fully exist.

20 MR. SHEBELSKIE: One last point then from us,
21 Your Honor, again for clarification purposes; number
22 seven - the phrase "degree of confidentiality", again
23 we weren't sure what was meant by that. Obviously,
24 you list the authors and all the known recipients of
25 the document, and that gives you some information

1 about the degree of confidentiality, and any other
2 people you know, or reasonably believe have received
3 the document, as you said. You provide that kind of
4 factual information.

5 CHAIRMAN MOORE: This is the factual
6 counterpart of the earlier question; is that,
7 attorney-client documents, to retain the privilege,
8 must be treated as such by the sender and the
9 recipient of the document. And when attorney-client
10 communications are not so treated through office
11 practices and things like that, that allow them to be
12 looked at by anybody, to be seen by anybody; and if
13 that is the office practice, then that document,
14 unless you can -- the presumption assumably is that
15 someone did see it that shouldn't have been seeing it,
16 because they're just left lying around.

17 Once again, in government agencies, much
18 that's not attorney-client privilege is claimed to be
19 such, and it is left lying around. That is what this
20 is aimed at. Is it treated with the respect an
21 attorney-client document is supposed to be? Is it
22 kept in a file drawer that is only accessible to the
23 attorneys? Is it left stacked up on desks where all
24 the cleaning people, all the secretaries who don't
25 work for this attorney or anybody else can see it, and

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1 probably have? Is it left out so that all those
2 expert bureaucrats who can read things upside down,
3 and they do regularly come into an office and read
4 everything on a desk? I mean, that's what we're
5 talking about. Is that the practice of the office
6 that deals with this.

7 MR. SHEBELSKIE: I agree in part, and
8 disagree in part, Your Honor. I certainly agree with
9 the concept that the documents have to be kept
10 appropriately confidential.

11 CHAIRMAN MOORE: This goes to the diligence
12 factor.

13 MR. SHEBELSKIE: Right.

14 CHAIRMAN MOORE: The attorney is stating that
15 yes, they know that these documents were given the
16 respect in the organization with which they are given.
17 That's all.

18 MR. SHEBELSKIE: All right.

19 CHAIRMAN MOORE: And that can't be determined
20 unless the attorneys know something about the
21 organization for which they're claiming privilege.

22 MR. SHEBELSKIE: Yes.

23 JUDGE KARLIN: And it might be possible for
24 you to put into that field something like the document
25 was retained in secure, non-public files of the

1 attorney and the client, and not otherwise divulged
2 outside the attorney-client relationship.

3 MR. SHEBELSKIE: Would it be proper or
4 appropriate to make statements that apply to classes
5 of documents? For example, let's take emails -
6 instead of putting on statements with every email that
7 might be claimed privileged, that kind of information
8 - instead saying to the extent that these are emails
9 sent from Hunton and Williams to the Department of
10 Energy, the Hunton and Williams email system is a
11 secure firewall system, and the DOE email system is a
12 secure firewall system that requires password
13 protection.

14 CHAIRMAN MOORE: Always when you're dealing
15 with electronic documents and you're storing them
16 electronically, are they stored on a GroupWise system,
17 for example, that everybody in the office who's not
18 involved with this attorney-client matter has access
19 to. And lo and behold, if you will look, you may well
20 find that they're stored in a way in which anybody in
21 the organization, even those that don't have a
22 legitimate need, can readily access.

23 MR. SHEBELSKIE: I understand that concern,
24 and that's an appropriate concern.

25 CHAIRMAN MOORE: And that's what we're

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1 shooting at.

2 MR. SHEBELSKIE: Right.

3 CHAIRMAN MOORE: And this goes to, once
4 again, the attorney's representation that the document
5 can legitimately be claimed as privileged.

6 MR. SHEBELSKIE: Okay.

7 CHAIRMAN MOORE: Any other ones?

8 MR. SHEBELSKIE: Not on that, Your Honor.

9 CHAIRMAN MOORE: I have one quick question
10 about the proposal in Section 3-I(3) and (4); that in
11 effect removes from the definition of "documentary
12 material"; and hence, the need to even provide a
13 bibliographic header for any document dealing with
14 communications between and among various named
15 attorneys, attorneys in various named government
16 offices and law firms. It provides no such exclusion
17 for attorney communication documents, as I read it, of
18 other potential parties. And I guess my question is,
19 why should you be special? Why should you be treated
20 differently, and in that regard, I would call your
21 attention to your filing of April 25th in which you
22 said, and I quote, "The proposed joint order should
23 prescribe uniform obligations that apply equally to
24 all participants, just as the obligation to preserve
25 and produce emails and other documents applies equally

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1 to all participants. The procedures regarding
2 privilege designation should be of consistent
3 application." Now that, to us, brings up the problem
4 of we must treat all parties in this matter equally
5 and fairly, obviously. And if your's is an automatic
6 exemption, speaking only for myself, it's got to be
7 automatic for all, or it doesn't apply for anyone.

8 MR. SHEBELSKIE: Two observations; first, we
9 agree that the provision should be applied equally and
10 fairly to all parties. Second, the genesis for this
11 proposal actually came from the State. This was
12 something the State had wished, and they may expand
13 upon their reasonings for this. We agree with that,
14 and Staff agreed with this approach, as well.

15 Your Honor, the comment I would make, as I
16 understand this order, it does allow all the
17 participants in the proceeding to have the benefit of
18 this carve-out for their counsel's communications.
19 It's just that in our discussions in development of
20 the order, no other participant came forward and
21 identified themselves. And there is language in this
22 provision that says "at the time of another
23 participant's certification", if they want to invoke
24 this benefit, they just identify who their counsel is,
25 and to what extent they've applied it.

1 CHAIRMAN MOORE: But it allows a challenge to
2 that where it doesn't allow a challenge to everybody
3 else's counsel.

4 MR. SHEBELSKIE: Oh, I see - the challenge
5 concept. Well, I thought -- if you wanted to amend it
6 that way to allow potential challenge, that would be
7 fine.

8 CHAIRMAN MOORE: That's one problem I have.
9 The second problem I have is, in effect, you have
10 carved out an exception for the definition of
11 documentary material in the Commission's rules, and
12 said automatically that even though it is documentary
13 material, it doesn't have to have a bibliographic
14 header and be placed in the LSN.

15 MR. SHEBELSKIE: Well, again, the State can
16 expand upon their reasoning for this. It was our view
17 that the subject communications of this provision
18 really would not be documentary material, because at
19 least from the Department of Energy's perspective,
20 we're not going to cite or rely on anything that --
21 these are just pure attorney-to-attorney
22 communications within the privilege sphere. We're not
23 citing or relying on any of those types of
24 communications. The views expressed back and forth
25 between the attorneys are not going to be evidence,

1 and we're not talking about reports and studies. So
2 we thought that for clarification purposes and
3 processing purposes, we concurred with the State's
4 concept.

5 CHAIRMAN MOORE: State of Nevada.

6 MR. FITZPATRICK: Yes, I think I concur with
7 what Mr. Shebelskie said. We hadn't really focused on
8 the issue of challenging someone's designation of
9 counsel. We had focused on the requirement that
10 although counsel are named in the document for these
11 parties, that any party to the proceeding, who joined
12 the proceeding, could designate their counsel and they
13 would have the same opportunity.

14 CHAIRMAN MOORE: But I'm still concerned. I
15 don't see that it is necessarily an automatic, under
16 the definition of documentary material, that this
17 material would be excluded. It may well be
18 privileged, in all likelihood it is privileged, but
19 the rules provide that for documentary material that
20 meets that definition, it gets a bibliographic header,
21 claim of privilege, and is subject to challenge.

22 Now obviously, that would require some work
23 that might not otherwise be required, but it does
24 comply with the rules. I wouldn't expect any of those
25 documents to be challenged.

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1 MR. FITZPATRICK: And I think that was part
2 of the State's thinking, Your Honor, that since what
3 we're talking about are just the pure attorney-to-
4 attorney communications, not the attorney-to-client.

5 CHAIRMAN MOORE: No, we understand that.

6 MR. FITZPATRICK: That since they would not
7 -- we would not imagine that they would ever be
8 challenged.

9 CHAIRMAN MOORE: But if it meets the
10 definition of documentary material, speaking only for
11 myself, I'm loathe to carve out an exception that says
12 it doesn't have to comply with the rule.

13 MR. SHEBELSKIE: We also -- it was our view
14 that the pure attorney-to-attorney communication, that
15 does not include any draft report, I mean a report
16 being transmitted, just the attorney-to-attorney
17 discussing, would not be documentary material either.

18 MR. FITZPATRICK: I think that was our view.
19 It wasn't that we were creating a special privilege
20 category of documentary material that wouldn't have to
21 meet the rules for documentary material, but rather
22 that this was not, by definition, documentary
23 material.

24 JUDGE ROSENTHAL: Why not?

25 MR. FITZPATRICK: Because it isn't anything

1 that a party intends to rely on in their proceeding.

2 CHAIRMAN MOORE: Okay. Do you have anything
3 else on the attorney-client privilege?

4 MR. FITZPATRICK: Going back to the general
5 question that's on this question number three. We
6 didn't take issue with really any of the specifics of
7 your component parts of your Appendices A, B, and C;
8 other than, the reason that we agreed to a much more
9 simple degree of description, apparently - apparently
10 agreed to a much more simplistic description in the
11 individual categories was very much tied to the
12 general agreement at the beginning of the draft case
13 management plan on page two, describes what needs to
14 be in the header. And it says, and this was muchly
15 discussed as to the extent of it, the scope of it,
16 what would be contained in it, and so on - "A subject
17 matter description containing sufficient information
18 to enable the participant to evaluate the privilege
19 claim."

20 CHAIRMAN MOORE: We understand that. We also
21 are well aware of when that discretion is left to
22 those in the privilege log, and one only need to
23 peruse the case law where the courts have said time
24 and time again that that kind of conclusory statements
25 by attorneys are not helpful. And why we spelled this

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1 out was because if we left it for each attorney to
2 decide, and then the privilege logs are done, and the
3 contests begin on the face of it, there's neither in
4 many, many cases a prima facie establishment of the
5 privilege, an ability to challenge that, and three -
6 certainly ability for us to decide it intelligently.

7 JUDGE ROSENTHAL: I think in that regard, I
8 mean from my standpoint, I wanted to see sufficient
9 information to enable us to make informed judgments on
10 contested privilege claims, and so that's important
11 from my standpoint. Now it might be that less
12 information would be required for you to determine
13 whether you wanted to challenge a privilege claim that
14 DOE might advance, but from my standpoint, I want
15 enough on the table to make my task, as a decider of
16 contested claims, as easy as possible. When I look at
17 the number of potential disputes that will be
18 presented to us, that reaffirms my bottom line. So
19 from my perspective with respect to all of these items
20 on A, B, and C, they're designed to make our task as
21 easy as possible, whether or not you might feel that
22 they were necessary in order to decide whether to
23 dispute that particular claim.

24 MR. SHEBELSKIE: In that respect, Your Honor,
25 perhaps we should give thought to what might be

1 essentially described as a two-step privilege log
2 concept, because I think the parties in their
3 discussions acknowledged that for a large percentage,
4 well over half or more of the documents, that they
5 would understand the context of the documents. I mean,
6 they see an email from the Director of the OPRM
7 Program to the Secretary, they know who those people
8 are, how they -- et cetera. And the vast majority of
9 these legal privilege documents will not be subject to
10 a challenge, and so they're given this degree of
11 information that Mr. Fitzpatrick describes to help the
12 parties, their knowledgeable counsel understand the
13 context of these documents, get their preliminary
14 sense of the ones they want to pursue. We had this
15 informal meeting confer process to flesh-out any
16 questions they have. As a result of that process, I
17 think everybody's expectation is a much smaller subset
18 may ever get teed up to the Board for resolution.
19 When it matures to that process --

20 CHAIRMAN MOORE: Can you put a number on
21 that?

22 MR. SHEBELSKIE: No, Your Honor, I can't.

23 CHAIRMAN MOORE: Well, that's why we loose
24 sleep at night. But when they start with 104,000, and
25 I can go through your list, and we can whittle it down

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1 very quickly, but we're still into a number that's in
2 the thousands.

3 MR. SHEBELSKIE: Right, but only a small
4 percentage of those we think will go to the Board.
5 But when they come to the Board on a motion to
6 compel --

7 CHAIRMAN MOORE: No, those are the ones that
8 we see thousands that we're going to have to deal
9 with, and that's why we have these concerns. But in
10 many ways, we're getting ahead of ourselves, and many
11 of these questions we will be getting to in the
12 context of our other questions.

13 MR. FITZPATRICK: Let me just respond to
14 Judge Rosenthal. I don't think we anticipated
15 accepting a lesser degree of information than what you
16 need to make the judgment of whether it's privileged
17 or not. We need to make the same judgment whether
18 it's privileged or not. I simply was suggesting that
19 our agreement -- you weren't there on the phone to see
20 the bona fides oozing from every pore of Mr.
21 Shebelskie's body when we spoke, but --

22 CHAIRMAN MOORE: We can well imagine that the
23 towels were very wet.

24 MR. FITZPATRICK: Absolutely, but to give you
25 an example - and we discussed examples of why there

1 would be more information or less information needed
2 to meet this standard of sufficient information. If
3 a letter went from Mr. Irwin to Secretary Bodman -
4 Subject: Legal Advice on X - you wouldn't need
5 anything else. If a letter went from Smith to
6 Jones —

7 CHAIRMAN MOORE: Let me interrupt. There's
8 another aspect that I wouldn't have expected you all
9 to have included it, since there were no others at the
10 table. But the way the system is set up, the way the
11 Commission set the system up with the LSN is there's
12 the bibliographic header, and we have not yet
13 identified, and will not identify all the potential
14 parties until we have contentions. And I say that
15 because even though if they're a potential party with
16 documents, hopefully we have identified them, but
17 there may well be potential parties without documents
18 that needed to go into the LSN.

19 They all can challenge and request documents
20 that are claimed to be privileged. And so the
21 privilege log becomes really the essence of being able
22 to dispose of any such disputes very quickly. Even
23 though you may be very sophisticated in some of these
24 documents and immediately dismiss them, and not worry
25 about it - from our perspective, the universe is

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1 larger than just the table here.

2 MR. SHEBELSKIE: Well, of course, in the
3 development of this proposed order, it was an open
4 public process. We had other participants
5 participating.

6 CHAIRMAN MOORE: I recognize that, but it
7 doesn't solve the problem of when it happens, and all
8 of this process, you all must remember is driven by a
9 six-month time period in which all document discovery
10 has to be completed, and hopefully - certainly the
11 lion's share of all these privilege disputes resolved.
12 If it weren't for that six-month window in which all
13 this has to be accomplished, then a less efficient
14 system and more traditional document discovery system
15 would be feasible, in our estimation. But because we
16 have a six-month window in which it all has to be
17 done, we don't see a way in which that can be
18 accomplished with less than this kind of disclosure
19 for privileged documents.

20 JUDGE KARLIN: If I may respond to Mr.
21 Fitzpatrick, and the whole discussion here I think has
22 been a good one - you raised the point, I think, and
23 it's a valid point, that in the proposed case
24 management order you have agreed upon a subject matter
25 description containing sufficient information to

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1 enable the participant to evaluate the privilege
2 claim. And in the abstract that sounds -- that's
3 okay. I mean, we're trying to get to the same point,
4 but what we want to do is fill-in and flesh-out what
5 that is, in a bit more specific manner, rather than
6 leaving it wide open.

7 Many privilege logs that we see, that get
8 filed here in the ASLBP or in court many times, never
9 really accomplish substantiating the privilege or
10 showing a prima facie case for the privilege. They
11 just list a bunch of documents, and say that they're
12 privileged, and they label them as privileged, and
13 that's all you get. And that doesn't push the process
14 any further, and we're trying to push this process as
15 far and as fast as we can, so that this matter can be
16 efficiently handled and resolved, and fairly handled
17 and resolved.

18 We would like to have privilege logs, which
19 as we said on January 24th, do not just simply
20 identify documents as, apparently, privileged; label
21 them as privileged, but substantiate the privilege,
22 and provide detail, so that we will never have to deal
23 with the issue. Once that privilege log is produced
24 to the public and to each other, you all will
25 understand. And you can challenge and contest, and

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1 resolve them without our involvement. But we are not
2 interested in reading 100,000 documents to see whether
3 it's really privileged or not, so I guess our concept
4 with this -- you're on the right page with regard to
5 what you put in there. It follows with the Federal
6 Rules of Civil Procedure and our own rules, which
7 simply say enough information that will enable other
8 parties to assess the applicability of the privilege.
9 Right. You could have repeated that phrase, as well;
10 but we want to flesh that out, fill that in, and get
11 more specific so that we can avoid these privilege
12 disputes entirely.

13 CHAIRMAN MOORE: Does NEI or your
14 organization --

15 MR. KAMPS: Nuclear Information Resource
16 Service.

17 CHAIRMAN MOORE: Pronounce the acronym, NIRS.

18 MR. KAMPS: It's Nuclear Information and
19 Resource Service, NIRS.

20 CHAIRMAN MOORE: Do either of you have any
21 comments?

22 MS. GINSBERG: We don't have anything to add
23 on this subject.

24 CHAIRMAN MOORE: Let's move on to the work
25 product privilege. Staff, we're either in error,

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1 under-inclusive, or over-inclusive.

2 MR. SMITH: Over-inclusive with respect to
3 number six; and that is, whether the document contains
4 opinion work product, fact work product, or both. We
5 believe this requirement is not necessary to establish
6 or assert the privilege. There's no distinction
7 between fact work product, or opinion work product.

8 CHAIRMAN MOORE: Well, I beg to differ with
9 you, but if it's just fact work product, oftentimes
10 you can do it under a protective order with redaction,
11 can you not?

12 MR. SMITH: Well, fact work product is not
13 routinely and normally discoverable in civil
14 litigation. You have to show a special need and undue
15 hardship in order to get access to factual work
16 product. And there's a Supreme Court case, the D.C.
17 Circuit has said quite simply that, "The work product
18 privilege simply does not distinguish between factual
19 and deliberative materials."

20 CHAIRMAN MOORE: Is that all you have?

21 MR. SMITH: With respect to work product
22 privilege, yes, it is.

23 JUDGE KARLIN: Well, let me ask this
24 question; would it be burdensome for you to -- what we
25 are contemplating is work product would be labeled

1 work product, factual work product, opinion, or mental
2 impressions. There is a significant difference in
3 terms of its availability, substantial need, that sort
4 of thing; and if we can have that distinction
5 reflected, this may help us manage this case. Is
6 there a problem in doing that?

7 MR. SMITH: Well, I think in any instance the
8 answer is likely to be both exist. There's going to
9 be some factual work product intertwined with some
10 deliberative work product, and those won't necessarily
11 be easily segregable unless there's a particular need
12 or undue hardship.

13 JUDGE ROSENTHAL: You can state both. That's
14 the burden that's associated with number six.

15 MR. SMITH: I think we're just concerned that
16 when you have to have this extra layer of review, or
17 analysis, or attorney review in order to establish
18 this particular element that we don't think is really
19 necessary to assert the privilege, in the first
20 instance.

21 CHAIRMAN MOORE: Is that all?

22 MR. SMITH: That's all with respect to work
23 product.

24 CHAIRMAN MOORE: Mr. Shebelskie.

25 MR. SHEBELSKIE: On work product, obviously

1 to the extent it uses the same terminology at
2 attorney-client, that we have the same issues, but we
3 won't repeat those. The one additional observation we
4 have is, on number six, the parenthetical descriptions
5 of opinion work product and fact work product seem to
6 suggest that the work product has to either be
7 counsel's mental impressions, or prepared by counsel;
8 that is to say, attorney work product as opposed to
9 other categories of litigation work product. And we
10 had a briefing on that, and I think the parties' views
11 are stated on that.

12 JUDGE KARLIN: Yes, the i.e. should be e.g.

13 MR. SHEBELSKIE: Thank you. That was our
14 only unique comment on work product.

15 CHAIRMAN MOORE: State of Nevada.

16 MR. FITZPATRICK: The only other — five and
17 six are the ones that bear maybe a lot of attention,
18 but we're going to get off into a different topic a
19 little later on about the whole subject of in
20 anticipation of litigation, so maybe we should hold
21 that for then.

22 Also, we'll get off into the subject of
23 documents partially work product and not, and the need
24 to segregate the requirement of segregation under both
25 FOIA and LSN. And maybe that need not be addressed

1 here because, I guess we're just talking about what
2 would be in the header, specifically; and so the
3 header might not necessarily have to recite the
4 document is partially privileged and partially not.

5 CHAIRMAN MOORE: Well, part of this is the
6 privilege log survives throughout the course of the
7 litigation, of course. And once we pass the admission
8 of contentions stage, we still have document discovery
9 the old-fashioned way, if you will, under the rules.
10 And at that point, this designation certainly plays a
11 part. And that's why the notion of doing it up front
12 as opposed to doing it subsequently, to us, made
13 little sense. And you, Mr. Shebelskie, with 26,000 -
14 you haven't segregated them between attorney-client
15 and work product claimed documents, obviously the
16 burden is going to fall greatest upon you for the
17 litigation work product privilege. Does that
18 distinction make sense?

19 MR. SHEBELSKIE: Between attorney-client and
20 litigation work product?

21 CHAIRMAN MOORE: And fact work product.
22 Because one is never discoverable, and one may well
23 be.

24 MR. SHEBELSKIE: Well, you're right. Now I
25 agree with the Staff that for purposes of asserting

1 the privilege, a prima facie showing. It doesn't
2 matter whether it's opinion work product or fact work
3 product. I also, though, agree with Judge Rosenthal,
4 that when you're looking at the document, you're
5 obviously making an assessment whether it's litigation
6 work product. In most cases, it's probably going to
7 be a combination of both opinion and work product, and
8 stating opinion, fact, or both is not necessarily
9 burdensome - if that's all we have to state.

10 CHAIRMAN MOORE: Let's move on to Appendix C,
11 the deliberative process.

12 MR. SMITH: Certainly, I would say over-
13 inclusive with respect to number 10; and that's the
14 degree of confidentiality with which the document was
15 treated at the time of its creation and subsequently.
16 We believe that this goes beyond what is required to
17 assert the privilege; and, therefore, doesn't serve
18 any purpose.

19 Courts have consistently held that the party
20 urging the release of such information has the burden
21 of demonstrating that the information has been
22 officially disclosed, so even a leak of the document
23 itself wouldn't affect the existence of the privilege.
24 And, of course, the privilege still attaches to
25 deliberative documents, even after a final decision

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1 has been made.

2 JUDGE KARLIN: Question - this number 10 is
3 the same for all three of the privileges. Do you
4 raise the same concern in all three, or just here?

5 MR. SMITH: Just here.

6 JUDGE KARLIN: Is there some difference
7 between this one and the other two privileges, where
8 it's not appropriate here?

9 MR. SMITH: Yes. The difference is that the
10 burden in demonstrating confidentiality with respect
11 to attorney-client and work product lies with the
12 party asserting the privilege; whereas, the burden of
13 demonstrating that a document is publicly available or
14 is not confidential in the instance of deliberative
15 process lies with the party urging a document's
16 release.

17 JUDGE KARLIN: Well, the party asserting a
18 deliberative process privilege has the burden of
19 carrying that privilege.

20 MR. SMITH: Correct. And that doesn't
21 incorporate a duty to demonstrate confidentiality.

22 JUDGE KARLIN: Can you give us some case law
23 on that?

24 MR. SMITH: Not currently. I'd be happy to
25 provide something.

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1 JUDGE KARLIN: Okay. Perhaps before the end
2 of the day, you could give us something.

3 MR. SMITH: Yes. Perhaps by talking to the
4 parties, I can get that.

5 JUDGE KARLIN: Thank you.

6 CHAIRMAN MOORE: DOE.

7 MR. SHEBELSKIE: Yes. In the first instance,
8 I would comment on number 10. The Department does
9 agree with the Staff on this, that the traditional
10 prima facie elements for deliberative process
11 privilege does not require confidentiality. And this
12 is different from attorney-client litigation work
13 product privilege because, as we understand the
14 privilege, the fact that someone else in the
15 Department, for example, maybe looks on the desk of
16 somebody and sees it doesn't defeat the privilege.
17 It's not a control-group concept on deliberative
18 process, that sort of thing, so we think that is not
19 necessary for the prima facie showing.

20 In addition, on number six, this is a subtle
21 issue, but I think it's an important one - six is
22 written as a statement of the specific decision, or
23 potential decision in the Supreme Court case of, I
24 think it's *United States v. Sears*, or I may have the
25 parties flipped. The court there held that it does

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1 not require a specific decision, as opposed to a
2 decision-making process, and we would urge that
3 formulation, which is consistent with settled case
4 law.

5 JUDGE KARLIN: In that regard you're meaning
6 that some decision-making processes do not result in
7 a decision?

8 MR. SHEBELSKIE: They do not result in a
9 decision, as well as —

10 JUDGE KARLIN: Decide not to decide.

11 MR. SHEBELSKIE: They decide not to decide.
12 Also, when the options and policies are being debated,
13 at a formative stage they may not decide really what
14 ultimate decisions they are trying to decide they want
15 to make, as opposed to the beginning of the process.

16 JUDGE KARLIN: Well, I guess we're looking
17 for a decision-making process, some evidence that
18 there is a decision-making process going on.

19 MR. SHEBELSKIE: Yes.

20 JUDGE KARLIN: I think you all have in the
21 proposed second case management order, I guess at page
22 12, covered some of the same ground, I think.

23 MR. SHEBELSKIE: Yes. I'll tell you, this
24 was one of the most debated issues certainly between
25 DOE and the State.

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1 CHAIRMAN MOORE: Do you have some proposed
2 language for us?

3 MR. SHEBELSKIE: Yes. Actually, the State --
4 we put in the proposed order on page 9 a formulation
5 of the requirements, and we attached to the proposed
6 order an example that came from the NRC that Nevada
7 held up to us as sort of their view of the gold
8 standard of a statement that they needed to assess it.
9 And I think the Department felt comfortable that that
10 was a correct level of information, and what was
11 appropriate.

12 But the specific issue of number six, I think
13 the phrase "decision-making process" should be
14 provided there. And then, of course, the other issues
15 that are common to all three, about job title and
16 capacity, relationship, et cetera, are the same
17 observations.

18 MR. FITZPATRICK: I'm just not sure to the
19 extent that we're comfortable with these templates,
20 we're comfortable with the decision involved. And I'm
21 a little concerned at vaguing it up to the decision-
22 making process, almost as though we might -- that
23 might be some sort of a procedure that's followed in
24 the decision-making process, rather than --

25 CHAIRMAN MOORE: I'm sorry. Let me have you

1 back up a minute. You're speaking of number six, the
2 deliberative process privilege, and you're not
3 comfortable with this phraseology, but Mr. Shebelskie
4 has just informed us that on page 9 of what I've
5 called the DOE-NRC Staff proposal, the language, "the
6 specific decision-making process to which the document
7 relates", is your language.

8 MR. FITZPATRICK: Where are you referring to
9 now?

10 CHAIRMAN MOORE: Page 9.

11 MR. FITZPATRICK: What paragraph?

12 CHAIRMAN MOORE: It's 3-H(3), I believe.
13 Maybe 2-H(3). No, 3-H(3).

14 MR. FITZPATRICK: We interpreted that to
15 mean, we meant that to mean the particular topic -
16 let's put it that way - as to which a decision was
17 being made, not in some general way, what is the
18 Department's decision-making process. Well, here's
19 the chain of command, something like that. In other
20 words, what's needed is still specificity.

21 JUDGE KARLIN: I think that is the correct
22 interpretation. I mean, the wording is "the specific
23 decision-making process to which the document
24 relates." I think we're on the same wavelength that
25 there has to be something specifically identified.

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1 And if there was a decision made, I think we want to
2 know what that decision was. There may be cases where
3 a decision was not made; and, therefore, you can't
4 correlate it with a specific decision.

5 MR. FITZPATRICK: And as to the suggestion
6 that at some early formative stage, people create
7 documents, make analyses and things, and without
8 knowing it's going to contribute later on to a
9 particular decision, I'd suggest then maybe this
10 privilege doesn't apply. In other words, the
11 privilege is designed to protect the thought processes
12 and decision-making. Even if you want to make a
13 foolhardy suggestion, you're free to do it without
14 later embarrassment. If you don't know you're
15 contributing and making a suggestion for an option for
16 a decision, then it doesn't fall under this privilege
17 in the first place.

18 JUDGE KARLIN: I agree. Let me mention one
19 other thing, though. Let's go to the letter that is
20 the gold standard here for helping us resolve
21 deliberative process. It doesn't seem to help me very
22 much. All it seems to say is these are an email from
23 Mr. Cordes to Jones, et al, discussing his impressions
24 of what the EPA's views on possible actions responding
25 to D.C. Circuit's July 9th decision. "Mr. Cordes'

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1 observations are deliberative and pre-decisional."
2 Why? That sounds kind of conclusory to me, what issue
3 was NRC deliberating? What decision was before NRC?
4 The government had lost the case, and he simply
5 attended a meeting over at EPA. It was legal options
6 relating to ongoing litigation. The litigation was
7 over with. NRC had lost. U.S. Government had lost.
8 I'm not sure. All I'm saying is this document doesn't
9 give me the information. It's conclusory.

10 MR. FITZPATRICK: Can I respond to that?

11 JUDGE KARLIN: Yes.

12 MR. FITZPATRICK: Okay. First off, the word
13 "gold standard" is not my word, for sure. But let me
14 give you a little background, and you'll understand
15 why it's better than nothing. And actually, it's
16 quite helpful under the circumstances.

17 I proposed a FOIA request to the Nuclear
18 Regulatory Commission, and this document was a
19 responsive document, but it was withheld in its
20 entirety. And the document I'm talking about is not
21 this thing that's attached, but the letter discusses
22 an email from Cordes to Jones, et al.

23 JUDGE KARLIN: Yes.

24 MR. FITZPATRICK: Okay. That was withheld in
25 its entirety. I challenged that, and this was what

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1 was provided to me in response. Now it explains -- it
2 provided to me most of Mr. Cordes' email. It still
3 withheld a portion, but it provided most of the email,
4 which gave you the context of what the discussions
5 were about. And then it withheld a portion, and it
6 explained, "In the withheld portions, Mr. Cordes
7 describes to the Commission's legal assistants his
8 impressions of the EPA's views on possible action
9 responding to the D.C. Circuit's July 9 decision
10 vacating and remanding." And again, you're right in
11 observing that those of us who are in the forest may
12 be more sophisticated about the issues than other
13 parties, but to us in the forest, we're well aware of
14 the requirement that certain agencies re-do
15 regulations with respect to the time of compliance for
16 Yucca Mountain isolation of waste. And so this was
17 very informative as to what Mr. Cordes was
18 communicating to his staff, and that it was to his
19 staff, and not to third parties. That was very
20 important to us.

21 And so in the context of our phone
22 discussions, why would I give Mr. Shebelskie a
23 document from another agency and say this is what you
24 should do, DOE. It was because I had just received
25 two FOIA responses from DOE, which I mentioned to Mr.

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1 Shebelskie, and I say up front, Mr. Shebelskie and his
2 firm had nothing to do with these responses, nothing
3 at all to do with them. But one of them identified 84
4 responsive documents --

5 JUDGE KARLIN: Well, I don't think we need to
6 go into all that. I'd like to just say that document
7 on its face doesn't tell me, an independent third-
8 party or a judge, or a special master why it's
9 deliberative. It just concludes that it is
10 deliberative, and pre-decisional. What is the issue
11 being deliberated? When was the decision reached?
12 Ongoing litigation - what was the litigation that was
13 ongoing? I thought that litigation was over with.
14 It's just the document doesn't reflect the information
15 needed to evaluate whether it qualifies or not.

16 JUDGE ROSENTHAL: Couldn't Mr. Cordes have
17 been addressing the issue of whether to seek
18 certiorari? We don't know. I mean, you're suggesting
19 that what he was discussing was the matter of what was
20 needed for compliance with the court's decision. It
21 could have easily have been, depending on his timing,
22 whether the Solicitor General should be asked to file
23 a petition for certiorari, and seek a Supreme Court
24 ruling.

25 MR. FITZPATRICK: That could have been, sir.

1 The reason that it was a satisfactory response to us
2 was that our FOIA request had inquired into
3 communications between this agency and industry
4 representatives, or outside agencies with respect to
5 the issue. And so for us, this was a helpful
6 response, because the redacted portion, he was
7 communicating to his staff only, and it said what he
8 was communicating about, so that was satisfactory.

9 CHAIRMAN MOORE: I have one final question on
10 this privilege. In the proposal, in Section 3-H(2),
11 uses the term "appropriate government official with
12 respect to deliberative process privilege." In DOE,
13 Mr. Shebelskie, what is the appropriate level of
14 officeholder for determining the applicability of the
15 privilege? My goal is, if we can reach agreement here
16 as to what it is, at what level? Obviously, it
17 doesn't have to be the secretary under the case law,
18 it doesn't probably have to be the deputy secretary,
19 may not even have to be the assistant secretary; but
20 then we get into the gray area. If we can reach
21 agreement on where that is, because I don't think it
22 is at all fact-dependent, because what the privilege
23 is about, as you know, is that a responsible official
24 has looked at it personally, and made the
25 determination personally that this is subject to the

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1 privilege. It's not something that is down in the
2 weeds with the minions and then signed-off on.

3 MR. SHEBELSKIE: I agree with that concept.
4 I agree with that principle, yes.

5 CHAIRMAN MOORE: Can we reach agreement as to
6 where that line can be drawn in DOE? I have no idea
7 what your management chart looks like.

8 MR. SHEBELSKIE: I think the parties would
9 have to confer on that further, Your Honor. That was
10 not anything we discussed about. Well, we can get
11 back with you on that.

12 CHAIRMAN MOORE: How long would it take?

13 MR. SHEBELSKIE: I would say a couple of
14 weeks.

15 CHAIRMAN MOORE: Weeks?

16 MR. SHEBELSKIE: Two weeks from today,
17 because we need to go back and talk with DOE, and then
18 confer.

19 CHAIRMAN MOORE: Well, yes. We'll be setting
20 some schedules, but I can tell you that we're going to
21 have to do things on a lot quicker scale than weeks.

22 JUDGE KARLIN: And on that same point, I
23 think we ought to inquire of the other two agencies,
24 NRC, State, who your appropriate level person is for
25 purposes of asserting deliberative process.

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1 CHAIRMAN MOORE: What we see, if I remember
2 again, there's an enormous number of these that are
3 coming from DOE's documents. That's why if we can all
4 agree on where the line is drawn, that will remove -
5 what we believe will remove a lot of disputes.

6 It's now 10:45. Let's take a ten minute
7 break, and reconvene at 10:55. Thank you.

8 (Whereupon, the proceedings in the above-
9 entitled matter went off the record at 10:44:07 a.m.
10 and went back on the record at 10:55:05 a.m.)

11 CHAIRMAN MOORE: We will turn to question 4,
12 first the Staff in the Section 3(i)(2)(c) of the
13 proposal. It seems to indicate that confidential
14 client discussions regarding legal advice are covered
15 by the attorney-client or work-product privilege.
16 What's the legal basis of it?

17 MR. SMITH: If I may first respond to Judge
18 Karlin's query for a citation with respect to the
19 ability to process privilege.

20 CHAIRMAN MOORE: Excellent.

21 MR. SMITH: There's several of them, but, in
22 particular, Public Citizen v. The Department of State.
23 It's 276 F.3d 634, specifically page 645, and that's
24 from the D.C. Circuit in 2002. It reaffirms that the
25 burden is on the requester to establish that the

1 specific record in the public domain duplicates that
2 which is being withheld.

3 JUDGE KARLIN: Okay. Thank you.

4 MR. SMITH: You're welcome. And with respect
5 to the question regarding confidential client
6 discussions regarding legal advice, indeed -- and this
7 is something that all the parties in our conference
8 over these questions agree that this privilege does
9 exist -- and the legal basis is, indeed, the attorney-
10 client privilege.

11 JUDGE KARLIN: Can I ask everyone to try to
12 speak into the mikes as this goes along? You may be
13 unaware of it being in here, but it is being televised
14 and the mikes are very directional. So thank you.

15 MR. SMITH: Is that better?

16 JUDGE KARLIN: Yes.

17 MR. SMITH: The privilege itself is intended
18 to promote the full and frank communication between
19 the attorney and the client. And as such, the
20 privilege attaches to the confidential communication
21 or the legal advice itself, rather than to a
22 particular document that contains the information or
23 the communication.

24 Since the client, in these instances, is the
25 organization as a whole, it's inefficient for the

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1 attorney-client communication to be limited from the
2 attorney to a particular member of the organization.
3 That would mean that the attorney would have to repeat
4 the communication to every member of the client
5 organization in order for the attorney-client
6 protection to apply.

7 Instead, the privilege reaches -- better
8 stated as confidential client communications that
9 sought or contain legal advice.

10 JUDGE KARLIN: Would you repeat that?
11 Confidential client communications?

12 MR. SMITH: Certainly. I guess the --

13 JUDGE KARLIN: Doesn't confidential attorney-
14 client communication mean that it has to be a
15 communication between an attorney and a client?

16 MR. SMITH: The communication does, yes. But
17 a document may contain a communication between an
18 attorney and client and itself not be between an
19 attorney and a client. Let's say an attorney provides
20 advice to the head of a particular division, who then
21 forwards or in a note relays, "Our attorneys told us
22 X, Y, and Z. This is their legal advice." That kind
23 of information --

24 JUDGE KARLIN: So it's second-hand hearsay
25 that some -- a client then tells to another part of

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1 the client organization, "This is what our lawyer
2 said," and that's privileged as well?

3 MR. SMITH: That's correct. That would
4 cover --

5 JUDGE KARLIN: Is there case law on that? I
6 mean, I've never heard of that.

7 MR. SMITH: Well, for instance, the privilege
8 -- the elements of the privilege, one of the cases
9 that was mentioned in -- the case in your recent order
10 on this respect talks about in re grand jury
11 investigation, notes that the privilege applies to
12 where legal advice is sought from a professional legal
13 advisor in that capacity, the communications relating
14 to that purpose.

15 Now, the communication can be between the
16 client to the client, sharing the legal advice that
17 was provided from the attorney.

18 JUDGE KARLIN: Again, is there any case law
19 on that that says a communication from one person in
20 the client organization to another person in the
21 client organization is within the attorney-client
22 communication privilege?

23 MR. SHEBELSKIE: I can provide you some case
24 law on that point.

25 JUDGE KARLIN: Please. All right.

1 MR. SHEBELSKIE: I'll give you three cites --
2 representative cites from recent cases. One is a D.C.
3 Circuit case from 2002. It's a Federal Trade
4 Commission v. GlaxoSmithKline, at 294 F.3d 141; two
5 District Court decisions of recent vintage, one from
6 the Southern District of Indiana in 2002, it's at
7 204 Federal Rules, Decision 129; and then a Northern
8 District of Illinois decision in 2000, 192 F.R.D. 242.

9 What those cases --

10 CHAIRMAN MOORE: I'm sorry. The last number,
11 2 --

12 MR. SHEBELSKIE: 242.

13 CHAIRMAN MOORE: Thank you.

14 MR. SHEBELSKIE: What those cases hold, like
15 the Staff points out, is that where a client is an
16 organization -- and this -- the case law shows it's
17 true for both corporations and governmental agencies,
18 that the employees of those organizations have to be
19 permitted to discuss the legal advice given by their
20 counsel in order to implement it.

21 And recognizing -- and this is in distinction
22 from a broad -- we're not talking about a broadcast-
23 wide communications throughout, for example, the
24 entire department. But if you, for example, the three
25 -- the board members wanted to confer with counsel,

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1 and Judge Karlin discussed with counsel a particular
2 issue and then he relayed it to the remaining two
3 members, here is what the counsel said on the question
4 we asked advice about, and this is what we have to do
5 according to our lawyers.

6 That discussion, these case laws recognize
7 our privilege because the employees have to have those
8 kind of communications to relay the advice of counsel
9 to the people who then implement it.

10 JUDGE ROSENTHAL: Well, what are the
11 limitations on the dissemination of the attorney's
12 advice within the organization in order to retain its
13 privileged status? I take it it can't go to anybody.

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

15 JUDGE ROSENTHAL: Well, what's the standard?

16 MR. SHEBELSKIE: I'll try to paraphrase the
17 standard directly from the cases. It is that the
18 employees who are having that communication, the
19 distribution is to the employees within that
20 organization who are responsible for either
21 implementing the decision, if that's the advice, or
22 who are required to then act upon that advice.

23 Generally, it's looking to a management type
24 of personnel. They, obviously as a bright line test
25 say it's not sort of the broadcast distributions

1 throughout the organization --

2 JUDGE ROSENTHAL: The advice, then, must be
3 relevant --

4 MR. SHEBELSKIE: To the person's job.

5 JUDGE ROSENTHAL: -- to the performance of
6 the official duties of the individual to whom the
7 advice is disseminated.

8 MR. SHEBELSKIE: Yes, sir. Exactly.

9 JUDGE ROSENTHAL: And these cases stand for
10 that proposition.

11 MR. SHEBELSKIE: Yes, sir.

12 CHAIRMAN MOORE: Where does -- I'm confused
13 as to how the train works. We have the communication
14 in a document that is privileged from the attorney to
15 a member of the client organization. Then, that
16 member of the client organization writes another
17 member to state from the legal advice capturing, at
18 least in some part, that legal advice onto a third
19 employee. Now, that's not covered by the privilege,
20 is it?

21 MR. SHEBELSKIE: No. We weren't trying to
22 suggest that scenario. The kind of communication that
23 we had in mind, that all the parties had in mind, was
24 where that second communication is of the nature of
25 our lawyer -- has said, "Here's the advice of our

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1 lawyer. We asked our lawyer this. We three people
2 are in the management group, who have to now act on
3 this. Here's our advice of lawyer. Here's our advice
4 of counsel." Boom.

5 As opposed to, Judge Moore, I think what
6 you're trying to get at is let's say the lawyers say
7 you need to do X. Then the client goes out and starts
8 implementing X. We're not talking about that. The
9 acts they take to -- in compliance with the advice of
10 counsel, but it's the -- what precedes that, it's
11 where the non-lawyers who are -- who have the job
12 duties and responsibilities that this advice relates
13 to, are just disseminating to the appropriate
14 officials, "This is the advice of counsel."

15 MR. FITZPATRICK: I agree with that. I mean,
16 we were not denying the possibility that a privilege
17 could be waived if, you know, the captains of industry
18 just willynilly spread it around the company. That
19 would come under the heading of, you know, what's the
20 degree of diligence in protecting confidentiality.

21 Again, we are envisioning more like, you
22 know, the CEO is going to have a meeting of, you know,
23 the board of directors or something, and he has to
24 communicate the advice so a decision can be made.
25 That's the type of communication I think we had in

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1 mind when we sort of validated that as a continuation
2 or extension of the attorney-client privilege.

3 CHAIRMAN MOORE: Okay. Let's move on to
4 question 5 with respect to the work-product privilege.
5 What specifically is encompassed by the phrase,
6 "Prepared in anticipation of or for the hearing" found
7 in the Commission's regulations in Section
8 2.1018(b)(2). Staff?

9 MR. SMITH: Yes. And this language also
10 parallels the traditional work-product privilege,
11 which is also found in Section 2.705(b)(3) of the
12 Staff's regulations.

13 "Prepared in advance of litigation" means,
14 particularly with respect to hearing, means materials
15 prepared for a hearing, either presently ongoing or
16 reasonably anticipated, but materials prepared in the
17 ordinary course of business or pursuant to regulatory
18 requirements or for other non-litigation purposes
19 would not be covered.

20 I guess "in advance of litigation" has a
21 causal element to it that the document must have been
22 prepared because of litigation or impending
23 litigation, based on some objective setbacks.

24 CHAIRMAN MOORE: Okay. Let me ask you a
25 question that I will also ask of Mr. Shebelskie. In

1 the DOE's April 25th filing, in footnote 2, you will
2 find the suggestion that a draft of the application is
3 entitled to that privilege. Not the comments by an
4 attorney on it that are included in that footnote, but
5 the draft itself.

6 The test you just recited, how would you
7 determine -- where would you come out at whether the
8 draft is entitled to the privilege?

9 MR. SMITH: It's difficult for us to say
10 right now without having seen or having access to --

11 CHAIRMAN MOORE: It's a draft. You see
12 draft applications all the time, or certainly your
13 staff does, the technical staff.

14 Okay. Let's move on. Mr. Shebelskie?

15 MR. SHEBELSKIE: Yes, sir. First on what the
16 standard is, we think that the standard under
17 1018(b)(2) should be the same standard as under the
18 general rules of adjudication, 705(b)(3).

19 And that standard, as traditionally
20 interpreted by the Commission, is consistent with the
21 standard under the Federal Rules of Civil Procedure,
22 which are identically phrased, as represented, for
23 example, in the Shoreham Nuclear Power case at 16 NRC
24 1144.

25 And that standard is whether -- and I'll

1 quote -- "In the light of the nature of the document,
2 and the factual situation of the particular case, the
3 document can be fairly said to have been prepared or
4 obtained because of the prospect of litigation." And
5 I think the operative phrase there is "because of the
6 prospect of litigation."

7 And that test, as applied by the D.C. Circuit
8 and the Commission, looked to whether the document
9 would have been created anyway or for some independent
10 reason other than litigation or for the administrative
11 proceeding.

12 And where a document was created for use in
13 the administrative proceeding, and not for some other
14 independent reason, whether it's the ordinary course
15 of business or some independent regulatory
16 requirement, that document is fairly said to be
17 prepared in anticipation of litigation. I think
18 that's the black letter law test here.

19 Now, as applied to --

20 CHAIRMAN MOORE: You agree on the test. Now

21 --

22 MR. SHEBELSKIE: Yes.

23 CHAIRMAN MOORE: -- let's go to your
24 footnote.

25 MR. SHEBELSKIE: Yes, sir.

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1 CHAIRMAN MOORE: Do you stand by that
2 footnote for a draft -- not the comments on the draft
3 but the draft application?

4 MR. SHEBELSKIE: Well, first of all, yes, we
5 do stand by that, Your Honor. I make two points here.
6 First, of course, preliminary drafts are not
7 producible in the LSN. They're excludable as
8 documentary material under the regulations in any
9 event. But this particular document that we're
10 talking about -- and let's make clear what we're
11 describing here.

12 We're not talking about the technical work
13 product like the scientific report --

14 CHAIRMAN MOORE: We understand.

15 MR. SHEBELSKIE: -- that are -- provide the
16 foundation. This document that's called -- is a
17 derivative document that sort of provides a roll-up
18 description of the underlying science. It is prepared
19 only for one reason. It is being prepared for filing
20 with the NRC as part of the adjudicatory process.
21 There is not --

22 JUDGE KARLIN: Well, wait a second. Let me
23 stop you there. I don't think it is being prepared
24 for the adjudicatory process. It's being prepared --
25 an application is prepared, so that you can submit it

1 to the Staff. It's required in the normal regulatory
2 process. It's got nothing to do with an
3 administrative hearing or litigation. You've got to
4 file an application. So in the ordinary course, that
5 document is prepared because of the normal process for
6 getting a license, not because of a hearing.

7 MR. SHEBELSKIE: Well, in the context of the
8 Yucca Mountain proceeding, as I understand it, there's
9 an automatic hearing in context with our application
10 and --

11 JUDGE ROSENTHAL: But that doesn't mean that
12 the document is prepared as an incident of the
13 hearing. Maybe the hearings down the road, but
14 whether or not there's a hearing, the application has
15 to be filed, it has to indeed receive the technical
16 review of the Commission staff. It will go to hearing
17 to be sure, but this doesn't mean that it's prepared
18 as a hearing document or is in connection with a
19 hearing.

20 It just means that there will be a hearing,
21 but the document has to be prepared and filed in order
22 to obtain, in the first instance, NRC staff
23 acceptance.

24 CHAIRMAN MOORE: Well, I mean, isn't the
25 proximate cause -- I'm sorry. Isn't the "because of"

1 test in the CADC and every other Circuit, except the
2 Fifth, essentially the same as the proximate cause
3 test? Because of --

4 MR. SHEBELSKIE: Yes. Well, primarily
5 because of. And here, Your Honors, as I understand
6 it, the license application document itself is a
7 necessary fundamental part of the record. It will
8 become a part of the record in the proceeding, and it
9 is not being prepared for some independent regulatory
10 reason.

11 For example, in the Shoreham case that I
12 cited, an issue there was Suffolk County's emergency
13 preparedness plan. Suffolk County argued that that
14 was litigation work-product, but as it turned out that
15 Suffolk County had an independent obligation under New
16 York State law and FEMA regulations to prepare that
17 document. It had to do it independent of anything in
18 connection with the administrative proceedings.

19 CHAIRMAN MOORE: Can you get a license
20 without filing -- can you get a construction permit
21 for Yucca Mountain without filing an application with
22 the NRC?

23 MR. SHEBELSKIE: No. But that doesn't mean
24 that the document is not prepared in anticipation of
25 litigation. It is only being prepared for purposes of

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1 this administrative proceeding.

2 CHAIRMAN MOORE: So we're into a dual-purpose
3 document. The test we're talking about that deals
4 with dual-purpose documents, when they can have a
5 subsidiary purpose. But the test, as you articulated
6 it, is -- can fairly be said to have been prepared
7 because of the proposed litigation. I'm sorry,
8 because of the prospect of litigation.

9 Now, if you can't get a license without
10 filing an application with the technical staff,
11 recognizing that the license is the technical nuts and
12 bolts that the Staff is going to review, how do you
13 meet that test? I'll give you your comments on it.

14 MR. SHEBELSKIE: Right. Well, the -- I would
15 say the technical nuts and bolts they're going to
16 review are the information that's cited and relied on
17 in the license application. And we're not claiming
18 litigation work-product on that.

19 The litigation -- why isn't the license
20 application document analogous to the complaint in a
21 lawsuit? A plaintiff cannot recover a claim unless it
22 files that complaint to initiate the proceeding, and
23 that's what the license application does.

24 CHAIRMAN MOORE: I would just venture a wild
25 guess that the technical staff might have -- of the

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1 NRC might have some objection to you characterizing
2 what is put before them as -- as analogous to the
3 complaint in a piece of civil litigation. That said
4 --

5 MR. SHEBELSKIE: The analogy is with respect
6 to what commences the process. And normally the
7 document that commences the process --

8 JUDGE KARLIN: Well, the process I think, if
9 you use the word "administrative proceeding" and the
10 process -- I mean, I think that's part of the
11 ambiguity or the rub. You know, there are several
12 early site permit applications that have been filed.
13 There's an application that's been filed for LES in a
14 uranium enrichment facility. All those have mandatory
15 hearings, so there's an analog there.

16 But I don't think those applications that
17 were submitted by those applicants were prepared
18 because of the hearing that might ensue or that would
19 ensue -- the mandatory hearing that would ensue.
20 Those applications were prepared because that's the
21 way you -- you get a license.

22 You submit it to the Staff, they evaluate it
23 carefully, and it may or may not be that some party
24 will raise an issue about some sub-element of that
25 license application. But the license application was

1 not prepared because of the prospect that there would
2 be a mandatory hearing, but it was prepared in the
3 ordinary course as part of the administrative process
4 that has been set up here.

5 That's our interpretation, and the purpose of
6 this question was to elicit some discussion of
7 "prepared in anticipation of litigation" versus
8 "prepared in anticipation of submitting of an
9 application."

10 CHAIRMAN MOORE: In that regard, can you give
11 me an approximation of the number of cases in which
12 DOE is claiming that litigation work-product privilege
13 that might involve the drafts of the application that
14 we're talking about, or is this an academic question?

15 MR. SHEBELSKIE: If I understand your
16 question, I'm not aware of any litigation that this
17 issue --

18 CHAIRMAN MOORE: I'm sorry?

19 MR. SHEBELSKIE: I'm not aware of any
20 litigation, other than --

21 CHAIRMAN MOORE: No, no, no. Documents. How
22 many such documents are in your collection that you're
23 claiming the privilege on the basis of litigation
24 work-product that fall into the category of drafts of
25 the application?

1 MR. SHEBELSKIE: Well, I believe the drafts
2 of the application, preliminary drafts, are excluded
3 from the LSN regulations, irrespective.

4 CHAIRMAN MOORE: It was an academic question.

5 MR. SHEBELSKIE: All right.

6 CHAIRMAN MOORE: Nevada, do you have anything
7 to add?

8 MR. FITZPATRICK: A lot. A lot, Your Honor.
9 This is a very critical issue. First of all, this
10 effort to render the draft license application as some
11 de minimis piece of paper is inaccurate.

12 First of all, NRC's license application
13 review plan, which is piece by piece, section by
14 section, to be directed to an analysis of that license
15 application and its required component parts, is 400
16 pages. The review document is 400 pages. The license
17 application is estimated -- we've heard estimates of
18 5,000 pages.

19 Bechtel, the M&O contractor, signed a
20 contract five years ago in which they -- this isn't
21 something that just cropped up recently. They signed
22 an agreement five years ago, which had certain
23 schedules and scheduler goals and bonuses. And if
24 they met the goal, which was the culmination,
25 obviously, of a tremendous amount of work, of meeting

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1 a July of last year date -- deadline for the draft
2 license application, which they met, they would get a
3 bonus of \$11 million.

4 So now we're not talking about some
5 preliminary piece of paper. As a matter of fact, it
6 categorically fits into the definition of a circulated
7 draft. I mean, that sucker went all the way to the
8 top of DOE, if not beyond. And so --

9 CHAIRMAN MOORE: Well, there's no question
10 that circulated drafts, under the Commission's
11 regulations, that DOE has -- by regulation, waives the
12 privilege, litigation work-product privilege for
13 circulated drafts. Do you agree with DOE's
14 interpretation of the Commission's regulations that a
15 draft of the application is not documentary material?

16 MR. FITZPATRICK: No. A draft of the
17 application is documentary material, because
18 documentary material --

19 CHAIRMAN MOORE: Distinct from a circulated
20 draft.

21 MR. FITZPATRICK: A preliminary draft of a
22 license application might not be documentary material.
23 This is not -- the document that we are discussing, I
24 believe we are discussing, one that was pointed to for
25 years of preparation, and culminated last July and

1 resulted in payment of tens of millions of dollars for
2 its accomplishment, and an \$11 million bonus for its
3 achievement on a particular date, is not a preliminary
4 draft. And I don't think it's contended that it is.

5 I think the decisive case, as far as this
6 issue of, you know, is it a requirement for the
7 administrative proceeding --

8 CHAIRMAN MOORE: Please stop.

9 MR. FITZPATRICK: Is it a requirement --

10 CHAIRMAN MOORE: Go ahead.

11 MR. FITZPATRICK: Is it a requirement that is
12 simply in anticipation of litigation? Well, I mean,
13 I think on the face of it, the fact that years ago --
14 for all of the decade of the '90s there have been
15 different versions of the license application review
16 plan generated by NRC.

17 It is without regard to whether DOE picks up
18 any opponents whatsoever. If Nevada chose not to
19 oppose the application, if there were no intervenors,
20 then the requirements would still exist for that
21 license application to be filed in order for them to
22 build the Yucca Mountain repository.

23 So I think -- you talked about approximate
24 causation. I think a "but for" test is appropriate.
25 If they can point to a document and say, "But for

1 Nevada's," or someone else's opposition, and our
2 preparation to deal with that in an evidentiary
3 proceeding, we wouldn't prepare this document, then
4 maybe that argument can be made of litigation work-
5 product.

6 But if it's a document that had to be created
7 anyway, and this Commonwealth Edison case says, "Even
8 if it's created by an attorney, that doesn't protect
9 it. These programs and reports were assumed by
10 applicant under its obligations to the NRC staff and
11 the Commission's regulations, that the drafts may have
12 been prepared with an eye toward litigation and by
13 applicant's attorneys, rather than its technical staff
14 and consultants, should be of more interest to NRC's
15 technical staff than to the Licensing Board.

16 "The input of counsel to documents required
17 under the regulatory process and otherwise
18 discoverable cannot immunize those documents from
19 discovery. Counsel, in this case, were assisting in
20 a management function that is outside the scope of
21 both the attorney-client and work-product privileges."

22 I mean, I don't think the assertion here is
23 made that it's attorney-guided work-product, but that
24 it's under this subhead F that we object to in the
25 draft management plan of non-attorneys performing work

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1 under the direction of other non-attorneys.

2 And while that privilege may exist under
3 certain circumstances, it doesn't exist where, as
4 here, the requirements that are being fulfilled by
5 those scientists and engineers are NRC regulatory
6 requirements. Otherwise, that draft LA footnote is a
7 stalking horse for every document DOE has generated
8 from 1987 when the focus was placed on Nevada's Yucca
9 Mountain as the repository.

10 There isn't a document you could think of
11 that wasn't, from that date on, known to be done in
12 this general, vague way in preparation for a licensing
13 proceeding. That's not the test. It has to have been
14 done -- and I suggest in a "but for" sense, if it can
15 be shown that but for the opposition and an
16 evidentiary, adversarial proceeding coming up, it
17 wouldn't have been done --

18 CHAIRMAN MOORE: Let's move on to question 6.

19

20 MR. IRWIN: I would like to add one -- one
21 point. Totally apart from the question of whether
22 there has been a circulated draft or not, Mr.
23 Fitzpatrick's remarks concerning the Bechtel SAIC
24 contract, the payment of bonuses, and the relationship
25 of any of those materials, first of all, are totally

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1 non-record.

2 They have no part in this proceeding, and
3 they do not relate to the content of the draft. And
4 we ask the Board, help the parties stay within the
5 confines of the issues before it. And I make that
6 remark simply because there is nothing on the record
7 about that, and we do not believe it informs the
8 decision of the Board today.

9 CHAIRMAN MOORE: Let's move on to question 6.
10 For each of the -- for purposes of discussion, we'll
11 call them privileges, the archaeological privilege, the
12 privacy information, and the business proprietary
13 confidential information, clearly, those are protected
14 information.

15 The treatment of those essentially was, we'll
16 get back to it in the proposal. Well, it's time.
17 What we need to do is establish a schedule for when
18 we're going to get back to it, and it's got to be
19 sooner rather than later.

20 Staff, what do you think is a reasonable time
21 in which the parties can hammer out for us their views
22 of all of the relevant factors that need to be shown
23 for each of those so-called privileges? And we don't
24 need to get into, at this time, as to a schedule of
25 when a privilege log about these things would need to

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1 be done. We'll reach that this afternoon.

2 MR. SMITH: First, if I may, our proposed
3 case management order, we had thought that it would be
4 an additional and unnecessary burden to provide the
5 detailed privilege logs for these three privileges,
6 because for most of them they will be produced under
7 full text pursuant to a protective order.

8 CHAIRMAN MOORE: We'll get to the procedures.
9 Just how long for -- will it take you all to at least
10 attempt to agree on what the factors -- relevant
11 factors are for each of these privileges?

12 MR. SMITH: We met as requested and agreed
13 that one month should be an appropriate time for us to
14 resolve these issues.

15 CHAIRMAN MOORE: Okay. Is that -- I can tell
16 you from our standpoint, we started this process on
17 January 24th. We're three months behind where we'd
18 like to be. So speaking for myself, one month is
19 going to have to be shortened considerably.

20 MR. SHEBELSKIE: Certainly, one month is the
21 greater of the plenty, Your Honor. If you would like
22 us to do it on a more expedited basis, we'll commit to
23 that.

24 CHAIRMAN MOORE: Does Nevada think that we
25 should be spending a month before you can get back to

1 us on this?

2 MR. FITZPATRICK: That's not necessary, Your
3 Honor. Whatever period you think is appropriate.

4 CHAIRMAN MOORE: Okay. We will take up this
5 afternoon the subject of where in the process, if any,
6 privilege logs are going to be necessary for these
7 privileges.

8 Let's move on to 7. These are the employee
9 concern program files that DOE indicates that they
10 have. The first question, of course, is: what, if
11 any, privilege covers this material? Staff?

12 MS. FAGLIONI: If I may respond on behalf of
13 DOE after Staff.

14 CHAIRMAN MOORE: Do you want us to start with
15 DOE?

16 MR. SMITH: I think that would probably be
17 appropriate.

18 CHAIRMAN MOORE: That's their material.

19 MR. SMITH: Their material.

20 CHAIRMAN MOORE: Mr. Shebelskie?

21 MR. SHEBELSKIE: Ms. Faglioni will address
22 that, Your Honor.

23 MS. FAGLIONI: Your Honor, in terms of
24 typical privileges, as we've been referring to them,
25 I think it's fair to say they fall under the Privacy

1 Act system of records. There are also more general
2 privacy protections that apply, in addition to there
3 being FOIA exclusions and proprietary treatment.

4 But more specifically, rather than speaking
5 in terms of what privilege applies, what protection is
6 appropriate, I think is going to get us more precisely
7 to the end of the game, particularly under 2.1018 of
8 the LSN regulations. Parties are certainly entitled
9 to apply for protection of certain materials, and it
10 lists the factors under which that protection should
11 apply and what the Board could consider.

12 I suggest that these are a very appropriate
13 case for applying a privilege and a protection to this
14 set of documents under NRC case law and guidance,
15 recognizing that confidentiality of these files is
16 something that has to be protected in order for --

17 JUDGE KARLIN: May I ask, are you suggesting
18 we create a privilege? I mean, you just bypassed
19 whether there is a privilege and say, "Well, issue a
20 protective order anyway, because it's a good idea."

21 MS. FAGLIONI: No, sir. I think that a
22 privilege applies to these documents. It applies
23 under the Privacy Act for systems of records that
24 contain personnel information.

25 JUDGE KARLIN: So we delete the person's name

1 and birthday and that sort of thing, and we still have
2 the whistleblower complaint that something is unsafe
3 out there.

4 MS. FAGLIONI: That's right. You have other
5 Privacy Act -- other than just the person who
6 complains, I think you have people who are interviewed
7 in the process. There's lots of personal identifying
8 information, other than just the complainant. But
9 certainly I think it gets -- that the Privacy Act
10 protections gets you to that level of protection.

11 CHAIRMAN MOORE: Okay. Why are we treating
12 this category or class of material the same way that
13 we're going to treat the category and the way you've
14 treated the category of things called "privacy"?

15 MS. FAGLIONI: Because there is a regulation,
16 particularly I'll refer you to Part 63.9, that
17 requires a licensee to maintain a safety-conscious
18 work environment, that the employee concerns program
19 is integral to meeting that requirement, that
20 confidentiality is a cornerstone of an effective
21 employee concerns program, and thus maintaining a
22 safety-conscious work environment. And that requiring
23 disclosure of the employee concerns files, even in a
24 redacted form, can compromise the confidentiality and
25 thus the licensee's ability to establish and maintain

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1 that safety-conscious work environment.

2 JUDGE ROSENTHAL: I don't understand that to
3 be a response to Judge Moore's question. Why cannot
4 this be put under the rubric of privacy?

5 MS. FAGLIONI: I think --

6 JUDGE ROSENTHAL: Isn't this the privacy of
7 the employee, or some aspects of the employee's
8 existence or activities, or whatever, that's sought to
9 be protected?

10 MS. FAGLIONI: And let me jump into the --
11 the level of protection, because it may be -- maybe
12 it's playing a little word game here. I think there
13 are circumstances in which redaction is the
14 appropriate way to treat them, and the question
15 becomes, do you just wholesale redact and make
16 available all these files? Do you make them available
17 in a redacted form available to the public on the LSN?

18 And that's where we think we need to get into
19 considering, what's the right balance to strike on the
20 level of protection that is accorded to these files?
21 And it should be different than the other materials.

22 CHAIRMAN MOORE: Are we agreed as a starting
23 point that this material can be turned over to the
24 parties to the litigation, assuming there is some,
25 under protective order, an affidavit of non-

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1 disclosure, with appropriate redactions if that's
2 necessary?

3 MS. FAGLIONI: I agree, with one caveat. And
4 that is, before we get to the point of turning it over
5 on a wholesale basis, I think that what this Board
6 ought to entertain is a request and a showing of need
7 for that, and a showing of an inability to get the
8 information that is represented in these files
9 elsewhere. And that is an added measure of protection
10 and a showing of --

11 JUDGE KARLIN: Well, how can you show need?
12 I mean, we're dealing with employee concerns files,
13 where employees come forward with concerns to DOE or
14 to the contractor, M&O, whoever, and they say, "I
15 think something is unsafe, or something is going on
16 incorrect."

17 And how in the world is any -- any
18 environmental group or state or local government going
19 to have access to that unless some congressional panel
20 decides to, you know, subpoena the documents? I don't
21 think there's -- it's pretty obvious that it's a
22 relevant and important set of documents, unvarnished
23 concerns about the safety of what's going on out
24 there.

25 So it's of, I think, high value in this

1 proceeding to understand what those documents might
2 show.

3 MS. FAGLIONI: And a couple of points. One
4 is not every file in the employee concerns files are
5 going to be that kind of a file. So you've got to
6 look at the subject matter that is addressed by the
7 concern, and you've got to make some determination
8 that it does have some bearing on the licensing.

9 And we have made a cut at that. But even
10 within that cut --

11 CHAIRMAN MOORE: I was going to say, you have
12 made the determination that it is relevant to make it
13 documentary material to provide a bibliographic
14 header.

15 MS. FAGLIONI: Even within that cut, in terms
16 of deciding whether there ought to be a header out
17 there for it, and whether it ought to be in play as
18 documentary material, beyond that you have a special
19 concern about any kind of disclosure jeopardizing a
20 participant's willingness to come forward, even
21 knowing that some day this could be redacted, is going
22 to have a chilling effect on their desire to come
23 forward and participate in the program, if wholesale
24 this stuff can just be released without any kind of
25 showing as to this particular subject matter, for

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1 example.

2 CHAIRMAN MOORE: Well --

3 MS. FAGLIONI: It may have resulted --

4 CHAIRMAN MOORE: Excuse me. You're banting
5 around words like "wholesale." Now, the starting
6 point is a protective order and turning it over in
7 some form, either in toto or redacted, to the parties
8 to the litigation. Does that -- are you claiming that
9 that is wholesale banting about?

10 MS. FAGLIONI: Well, it depends on whether or
11 not, for example, Nevada came in and said, "Give me
12 every single one of your employee concerns documents
13 in a redacted form." That's a wholesale turning them
14 over without a showing of a need for that particular
15 document that can't be fulfilled with access to a
16 different document.

17 For example, if a concern turned into a
18 corrective action, there would be all sorts of
19 documents out there in the corrective action program
20 that don't need this level of protection.

21 CHAIRMAN MOORE: What if it didn't?

22 MS. FAGLIONI: But if it didn't, that may
23 contribute to a showing of need for why you need to
24 get into this employee concerns file in particular.

25 CHAIRMAN MOORE: But that assumes that all

1 corrective actions are the proper corrective action
2 for the complaint.

3 MS. FAGLIONI: Well, it may or may not assume
4 it. But you can certainly have access to a set of
5 documents before you break into the employee concerns
6 files and jeopardize the confidentiality and the risk
7 of discrimination, if identifying information can be
8 gleaned, even from redacted forms. That needs to be
9 considered on a case-by-case basis.

10 CHAIRMAN MOORE: What's the risk of
11 dissemination under protective orders? Are you
12 suggesting --

13 MS. FAGLIONI: If it's only --

14 CHAIRMAN MOORE: -- that litigants will not
15 abide, as lawyers and members of the bar, and meet
16 their responsibilities?

17 MS. FAGLIONI: Well, I'd suggest that
18 somebody who gets a redacted document could use that
19 redacted document to figure out who to go depose, and,
20 therefore, they could have jeopardized the
21 confidentiality of someone interviewed in the process,
22 someone who made a complaint, because they can get
23 enough information, even though no names are given,
24 from the circumstances from interviews of people to go
25 depose the person.

1 And that person, who thought they were coming
2 forward under a protection of confidentiality -- and
3 that was the whole enticement of the program and the
4 guarantee of the program and a guarantee of non-
5 retaliation against them -- that it be confidential,
6 that they can then be subject to deposition or have
7 redacted versions of their statements put out onto the
8 LSN, for example.

9 I mean, as long as we're having protections
10 that say redacted versions then don't get distributed
11 at a hearing, they don't get put out onto the LSN,
12 they are getting copies only when they come in and
13 they show they have a need for this particular
14 document, I think those are adequate protection.

15 CHAIRMAN MOORE: Once again, you've mixed
16 apples with oranges. We started with documents turned
17 over to litigants under a protective order that may be
18 turned over wholesale in the sense of non-redacted or
19 redacted. Those documents -- I thought our discussion
20 was under a protective order. That is distinct from
21 any dissemination which you automatically bring into
22 this.

23 Can we be agreed that these documents can be
24 turned over under a protective order, either in toto,
25 the complete document, or in a redacted form?

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1 MS. FAGLIONI: I would be agreed that upon a
2 showing of need, which I think is often --

3 CHAIRMAN MOORE: Okay. Let's get -- let's
4 get to their showing.

5 MS. FAGLIONI: Okay.

6 CHAIRMAN MOORE: If there's not a paper
7 trail, how do you ever make the showing? And even
8 with a showing, why is it necessary? Why can't they
9 just be turned over under the protective order, with
10 all of the protections that go with that?

11 MS. FAGLIONI: Why is a showing necessary,
12 even with a protective order. Let me address that
13 first. Because I think these are a special set of
14 files. I think these are above and beyond, in terms
15 of level of confidentiality and risk of non-
16 discrimination, which directly tie into regulatory
17 obligations of a licensee, and that you put the
18 program in a catch 22 and say, "Prove that you're
19 effective." And yet, whenever you have an effective
20 program, you jeopardize its effectiveness by opening
21 the door to discovery, even under a protective order.

22 CHAIRMAN MOORE: How many files are we
23 dealing with?

24 MS. FAGLIONI: Number of files, we are --

25 CHAIRMAN MOORE: Documents.

1 MS. FAGLIONI: Number of documents? In the
2 range of 5,000, which I believe is reflected on the
3 chart we provided.

4 JUDGE KARLIN: A couple of points. I think
5 we've talked about, you know, producing it under a
6 protective -- a redacted version under a protective
7 order, and that was the line of inquiry we just went
8 through.

9 I'm not sure whether that is necessarily the
10 consensus of where we go with this thing in the sense
11 of, if it's redacted, if the privacy information of
12 the individuals has been removed and redacted, I'm not
13 sure it should be limited to protective order. Why
14 not make it available on the LSN? I think that's
15 important information.

16 I just don't see anything you can cite to us
17 -- you know, chapter, verse, case law -- that says
18 there's a privilege to this, other than privacy. I
19 understand the privacy, and we can -- we're going to
20 redact that out, you know, and what other privileges
21 -- I mean, that's what this question was designed to
22 get. What privilege are we talking about?

23 MS. FAGLIONI: Well, and I suggest two
24 things. One is that -- that you allow us to submit
25 briefing, because it is a critical -- critically

1 important --

2 JUDGE KARLIN: Why is it critical? I think
3 the confidentiality in question -- people who come
4 forward under employee concerns programs, I'm not sure
5 to what extent they are enticed or they figure their
6 confidentiality is a key element of that. I've been
7 in the corporate world. I've seen companies and
8 people who do that. It seems the confidentiality is
9 more important to the company than it is to the
10 individual.

11 MS. FAGLIONI: Well, Your Honor, I would
12 refer you, for example, to the NRC inspection
13 procedure 40001, which expressly recognizes that
14 confidentiality is integral. When they go in and they
15 do an onsite inspection, one of their objectives under
16 this particular procedure is to assess the process for
17 resolving safety-related concerns reported by a
18 licensee or contractor employees, while preventing any
19 retaliatory action against those employees.

20 JUDGE KARLIN: Right. I think retaliatory
21 actions -- many in the corporate world, in the
22 business world, in the government world, many
23 documents are labeled and treated confidential. But
24 when you get into a courtroom, they're not
25 confidential. And that's where we are essentially

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1 now. I mean --

2 MS. FAGLIONI: But you are inquiring
3 specifically about --

4 JUDGE KARLIN: -- this is a legal privilege
5 we're talking about here, not some business
6 confidentiality.

7 MS. FAGLIONI: But you are inquiring
8 specifically about where is the basis for the
9 protection that DOE is seeking for these documents.
10 And I am suggesting that even in the NRC's inspection
11 manual, and why is confidentiality so particularly
12 important, even in their subparts where they describe
13 more generally how to protect against retaliation,
14 they specifically ask about assessing the environment
15 for reporting concerns, if and how the licensee
16 publicizes the employee concerns program as an avenue
17 for employees to report concerns when they are
18 reluctant to report them to their line organization,
19 assess how employees are assured that confidentiality
20 will be preserved if they wish to maintain
21 confidentiality, evaluate --

22 JUDGE ROSENTHAL: So you are telling us that
23 it is not possible, through the redaction process, to
24 provide the degree of confidentiality to which these
25 employees are entitled, the degree of confidentiality

1 which they are promised?

2 MS. FAGLIONI: Do I think that it's --

3 JUDGE ROSENTHAL: I mean, redaction doesn't
4 enable it, that it's either you disclose this
5 information and these employees' confidentiality is by
6 the boards in its disclosed and redacted form. The
7 only alternative is not to have a redacted version at
8 all. That's what you're telling me?

9 MS. FAGLIONI: I don't think it is that black
10 and white, and that's why I suggest that their be a --
11 number one, a showing before you break into it. And
12 then, once you have that showing, you are striking a
13 balance between a heightened level of concern for
14 confidentiality in this particular circumstance and
15 the need for discovery.

16 And that's exactly what 2.1018 is designed to
17 allow this Board to do, and that's to strike a balance
18 between a heightened level of concern for protection
19 and the need for discovery. And something beyond just
20 the protective order, bare bones, is merited in this
21 circumstance where even the NRC case law and the NRC
22 guidance in the inspection manuals say confidentiality
23 is critically important to the success of maintaining
24 a safety-conscious work environment.

25 CHAIRMAN MOORE: Staff, do you have anything

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1 non-repetitive to add?

2 MR. SMITH: Yes. Staff understands and can
3 appreciate DOE's concern with the protection of their
4 program. Barring that, the Staff believes that some
5 of these documents can be protected under additional
6 privileges in addition to those expressed by the
7 Department, such as the deliberative process
8 privilege, perhaps there's an ongoing law enforcement
9 investigation related to it, or some other important
10 governmental interest that may be affected.

11 So trying to craft a specific privilege that
12 would cover every document in a program may not be
13 possible. That's why we understand and can appreciate
14 the need for some sort of qualified privilege to
15 attach to the program.

16 CHAIRMAN MOORE: Are you aware of any
17 judicial or -- decision or decision from a quasi-
18 judicial body such as this one that has ever
19 recognized the privilege for these documents?

20 MR. SMITH: I think that perhaps the better
21 term would be a qualified immunity rather than a
22 specific privilege from production of these documents.
23 And, no, I'm not aware of any particular instance
24 where such a multi-tier --

25 CHAIRMAN MOORE: Nevada?

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1 MR. FITZPATRICK: Your Honor, a couple of
2 basic things. First of all, there is an attempt to
3 invent a privilege here where none exists. That's
4 pretty basic. But let's look at the gross program
5 overview.

6 There are two kinds of employees here --
7 employees who desire to have their confidentiality
8 protected, and those who don't. Many don't. I mean,
9 I represent some whistleblowers at Portsmouth. They
10 don't. They're public about it.

11 And so I think you hit a nerve when you
12 suggested that a lot of times it's the company that
13 has the great interest in confidentiality rather than
14 the employee. Absent the handful of perhaps, you
15 know, frivolous employee concerns that may be raised,
16 that may be unwarranted and dispatched, the employee
17 concerns litany would read like a road map of serious
18 health and safety concerns at Yucca Mountain
19 repository.

20 Therefore, with the provision that, you know,
21 name and key information about an individual may be
22 worthy of protection, certainly the content of every
23 concern about health and safety and its ultimate
24 outcome is discoverable.

25 There is no such protection under FOIA. If

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1 you ask DOE, which I have -- FOIA requests regarding
2 employee concerns -- you get the information. You
3 might get it with the employee's name, you know,
4 removed. I mean, I have received FOIA responses that
5 said, in 1996, we have no problem with silica in the
6 underground tunnel at the tunnel boring machine. And
7 several years later, admissions have been made that
8 readings throughout that period were high.

9 So, no, you can't depend on just seeing
10 corrective actions taken after the fact, because
11 sometimes, at least once -- one out of one -- example
12 that I know of, there was, in fact, a concern -- a
13 threat to the life of the individuals in the tunnel,
14 which -- the response to which was, there is no
15 problem, and so no corrective action is necessary.

16 JUDGE ROSENTHAL: Right. But all of this
17 information comes in under a protective order, so that
18 the parties have it. And the question is simply
19 whether the public should receive a redacted version.

20 MR. FITZPATRICK: Well, I don't think that
21 DOE at all, Your Honor, is conceding that all of the
22 information should come in under the protective order.
23 I think -- I heard that there's a need to know, has to
24 be shown by, say, Nevada.

25 JUDGE ROSENTHAL: Well --

1 MR. FITZPATRICK: The need to know is by
2 statute. It's definition, it's documentary material,
3 all of it has to be on the LSN when it's certified.
4 End of discussion. That's the need to know.

5 As far as protecting the employee from
6 retaliation, DOE's lawyers are sitting here suggesting
7 their own client will retaliate if they find out what
8 their employees have done.

9 JUDGE ROSENTHAL: Let me ask you -- I don't
10 know. Maybe I misunderstood what DOE was suggesting.
11 Are you suggesting that there has to be a need to know
12 asserted and demonstrated in order to have the
13 information come in under protective order?

14 MS. FAGLIONI: I am suggesting that level of
15 protection is appropriate.

16 JUDGE ROSENTHAL: Well, I don't understand
17 the basis for that at all. I mean, I understood you
18 to suggest that you might, in certain circumstances,
19 not be able to put forth a redacted version to the
20 public, which -- without jeopardizing the expectation
21 of the employee to confidentiality.

22 But I can't see for the moment how you can
23 justify requiring a need-to-know showing in order to
24 have it come in under a protective order. That
25 doesn't seem to me to involve jeopardizing the

1 employee's confidentiality at all.

2 MS. FAGLIONI: Well, let me specifically
3 refer you to 2.1018(c)(1). How do I justify that? I
4 justify that with reference to your own rules that
5 say, "Upon motion by a party, potential party,
6 interested governmental participant, or the person
7 from whom discovery is sought, and for good cause
8 shown, the presiding officer may make any order that
9 justice requires to protect the party, potential
10 party, interested government participant, or other
11 person from annoyance, embarrassment, oppression, or
12 undue burden, delay, or expense, including one or more
13 of the following: that discovery not be had at all,
14 that the discovery may be only had on specified terms
15 and conditions" --

16 JUDGE KARLIN: Okay. I think we can read our
17 reg. We understand we have authority to do that.
18 What we're looking for, I think, is some privilege
19 that applies to this. You have suggested privacy.

20 The Staff has suggested there may be other
21 privileges that attach to certain cases and situations
22 -- deliberative process, investigative -- if it's
23 still under investigation, there might be that sort of
24 a privilege. But absent something like that, you
25 know, we -- I can only speak for myself. I'm not

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1 inclined to issue or create new privileges under the
2 guise of this proceeding. And that's, I think, what
3 that would be doing.

4 I'm not really interested in any response to
5 that point. Just that I understand what 1018 says,
6 and --

7 MR. IRWIN: Judge Karlin, may I add
8 something? I think the framework of this discussion
9 has been useful, and the subject -- this particular
10 subject is a very important one. Rather than asking
11 DOE for case law or any other party for case law
12 substantiating the exclusion of requests for this
13 material, I think we need to think of it from the
14 other perspective. Nobody else has ever challenged,
15 in a wholesale fashion, the privacy of these record
16 systems.

17 This kind -- the employee concerns and
18 safety-conscious work environment, a number around
19 hard core regulations has been a creature of
20 Commission policy, one attempt at rulemaking, and
21 consistent influence from the Staff and the Commission
22 for about the past 15 years.

23 It is fundamental to the modern concept of a
24 safety-conscious licensee where responsibility begins
25 at the bottom, responsibility flows all the way up,

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1 and the protection of confidentiality is important.

2 Now, here, let me parse this a little bit.
3 There's a distinction, I believe, between turning
4 information over to parties under a protective order
5 and putting it onto the LSN wholesale. There is no
6 institution comparable to the LSN anywhere. Other
7 licensees -- the only thing comparable would be the
8 Public Document Room, and other licensees don't put
9 their employee concerns records into the Public
10 Document Room.

11 Second, the nature of redactions is a tricky
12 business in employee concerns files, because name,
13 rank, and serial number doesn't do it. If you know
14 that the employee works in Area X, and there happen to
15 be five employees in Area X, it is very easy to
16 identify that employee. That doesn't necessarily mean
17 that a redaction is impossible. What I'm saying is
18 that it's a more subtle and painstaking job than is
19 the case in some other kinds.

20 Third, the nature of the request being made.
21 A request -- the example Mr. Fitzpatrick gave a couple
22 of minutes ago is illustrative. The request he made
23 was for files apparently concerning silica and health
24 threats from it. That's different from saying, "Turn
25 over your entire set of employee concerns files."

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1 Employee concerns files relating to Issue X or Issue
2 Y are much more nearly focusable.

3 There is a delicate balance in any kind of
4 licensing environment between the protection of the
5 anonymity of employees and all the channels to
6 preserve their privacy and their own feelings,
7 justified or not, about the threats to that from doing
8 what may be regarded as squealing, for whatever
9 reason, or however one wants to characterize it, and
10 the ability to nurture and develop a true feeling of
11 collective responsibility.

12 That is the policy at issue here. And before
13 this Board makes a decision which would treat an
14 employee concerns file like an inadvertent invitation
15 to a pool party, I urge you to think very, very
16 carefully.

17 CHAIRMAN MOORE: Do you disagree with Nevada
18 that you would have to turn this over -- information
19 over in redacted form under a Freedom of Information
20 Act request?

21 MR. IRWIN: I disagree, if the contention is
22 that we'd have to turn our entire employee concerns
23 files over. Yes, sir.

24 CHAIRMAN MOORE: And what exemption under
25 FOIA would you claim that?

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1 MR. IRWIN: I would start with the privacy
2 exemption that Ms. Faglioni mentioned, and I would
3 second the Staff's observation that there may be a
4 host of additional exemptions available or applicable
5 on a case-by-case basis.

6 Now, I'm not not disagreeing categorically,
7 Judge Moore. What I'm saying is that what -- this is
8 a very --

9 CHAIRMAN MOORE: Pardon me. If you have
10 other privileges that apply to these materials, you
11 claim those other privileges. So if it's an ongoing
12 investigation, if that would qualify not to turn the
13 information over, you claim such a privilege.

14 MR. IRWIN: And I think that a privilege
15 might be asserted in a fairly wide fashion, sir.

16 CHAIRMAN MOORE: But it has to be ongoing; it
17 can't have concluded. And those things can be
18 examined, as they are in FOIA turnover litigation all
19 the time.

20 MR. IRWIN: Sure.

21 CHAIRMAN MOORE: But as a category,
22 recognizing the sensitivity which this material is
23 due, I really fail to understand why redaction is not
24 the answer. Now, we will discuss this afternoon how
25 to challenge overredaction. We will challenge this

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1 afternoon whether a privilege -- a challenge to things
2 that were turned over under a protective order should
3 have been -- a privilege should have been claimed at
4 all. We'll get to those.

5 But I don't understand why, as a category or
6 class of material, these cannot be treated as any
7 other Privacy Act material. And recognizing that this
8 may be material that doesn't go out, for the sake of
9 argument, on the LSN in a redacted form. I just don't
10 understand how -- what you seem to be saying is you
11 want an absolute privilege for this material as a
12 class. And I just don't understand that.

13 MR. IRWIN: No, sir, I'm not saying that.
14 What I am saying is that there -- they deserve
15 threshold showings of need, as Ms. Faglioni suggested,
16 in the way that many other kinds of material don't,
17 simply because not only of their individual nature but
18 because of the collective concern for the integrity of
19 what is inherently a difficult and trust-building
20 process that affects any licensee.

21 CHAIRMAN MOORE: Okay. But if the
22 confidentiality is -- can be preserve by redaction --
23 let's not talk about over and underredaction, that can
24 be fought out on a case-by-case basis. But why -- you
25 really do seem to be saying, if I'm at all hearing it

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1 correctly, that this is an absolute privilege that
2 requires a showing of need before you can see it at
3 all.

4 MR. IRWIN: I wouldn't say it would be an
5 absolute privilege, because that would suggest there
6 would be no means of penetrating the bar. What I am
7 saying is that this is different from safety analyses.
8 This is different from ordinary QA documentation.

9 These get -- and particularly when you have
10 people who are not public volunteers, they are the
11 private victims, or they've been brought in.

12 JUDGE ROSENTHAL: Well, maybe so, but I don't
13 --

14 MR. IRWIN: That's very important, Judge
15 Rosenthal.

16 JUDGE ROSENTHAL: I don't understand. Again,
17 there are certain recognized privileges. One of them
18 is privacy, and it seems to me that it's very possible
19 that some of this employee concern material might come
20 under the umbrella of privacy. If it does, then it
21 comes in initially by way of a protective order, and
22 so the parties have access to it.

23 And then, there's the matter as to whether --
24 and, if so, on what basis it can be supplied to the
25 public in redacted form without invading the

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1 employee's legitimate expectancy of confidentiality,
2 or, to put it another way, privacy.

3 But I'm hearing the suggestion that it
4 doesn't come in at all. It doesn't come in, even
5 under protective order, so parties have access to it
6 without the showing of need. And I can tell you -- I
7 can't speak for my colleagues, but I'm totally off the
8 reservation on that part of this issue.

9 MR. IRWIN: Well, I don't think this issue
10 has ever been faced before in Commission proceedings.
11 Every other situation I know of, it has been assumed
12 that these records are sacrosanct. And I'm not
13 prepared to say that the entire class or category is
14 sacrosanct from examination by other parties.

15 What I am saying is that there is an interest
16 in the integrity of the collection of records as a
17 whole beyond that of the contents of individual files.

18 And when you make the collection as a whole
19 potentially subject to examination, there is a very
20 important policy issue, which licensees have spent
21 years and years trying to buttress that it can be
22 jeopardized.

23 I don't want to repeat myself, but I think
24 you understand my point.

25 CHAIRMAN MOORE: I think we are getting into

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1 repetition. Quickly.

2 MR. FITZPATRICK: Just quickly, on FOIA, we
3 requested one particular type FOIA. If we had
4 requested all FOIAs -- if we had sent a FOIA for all
5 employee concern information filed, we would have
6 gotten it. The exemptions are not -- existence of
7 exemptions are the same.

8 And I believe that every time the agency
9 delivers information via a FOIA, I believe that at the
10 same time it delivers it to its Public Documents Room.

11 The second point is there is a lot of talk
12 about the guarantees of confidentiality. That's just
13 sort of being made up as we go along here.

14 Let me go to the Bible. This is the
15 Department of Energy Employee Concerns Program Guide,
16 and it says, "The extent to which confidentiality can
17 be granted depends on factors such as the ability to
18 protect the individual's identity, since the employee
19 concern records may be subject to disclosure under the
20 Privacy Act or the Freedom of Information Act."

21 And it goes on to say, "Confidentiality will
22 not be extended to any person who, in the course of
23 his or her employment, due to the nature of his or her
24 position, is required to provide such information."
25 So I surely think that -- I hope -- in the nation's

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1 repository for nuclear waste --

2 CHAIRMAN MOORE: Okay. We'll get back to
3 this subject --

4 JUDGE KARLIN: Can I just cover one last
5 thing here? I think we're done with this one, but
6 you'll note the question that we ask in number 7 --
7 and we'll get back to that -- was three-fold, really.
8 First was, what privilege, if any, applies to employee
9 concerns, and we have vetted that somewhat here.

10 Second is, what is the essential minimum for
11 a prima facie substantiation of such -- any such
12 privilege? And third is, what is your expeditious
13 timeframe from getting back to us with a proposal on
14 that subject? This is, again, one of the parts of the
15 proposed second case management order that you
16 submitted that kind of had a, "Well, we'll get back to
17 you on that," or "we're still working on it."

18 And, obviously, our contemplation is that we
19 want some expeditious submission on that, because we
20 want to rule and move on on that issue.

21 CHAIRMAN MOORE: Let's move to number 8,
22 which is another schedule question concerning an
23 expeditious schedule for the parties to develop a
24 proposed generic protective order, an affidavit of
25 non-discovery -- disclosure, rather, covering all

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1 categories of protected documents, except safeguards.

2 Staff, there are lots of examples residing in
3 ADAMS that can serve as a starting point, so you don't
4 need to reinvent the wheel.

5 MR. SMITH: With respect to the protective
6 order for non-safeguards information, the parties
7 agree that we could reach agreement within 30 days.

8 MR. SHEBELSKIE: Department agrees that the
9 sort of examples you referred to, Judge Moore, on the
10 LSN -- on ADAMS provide probably 99 percent of what we
11 need, so we can do it very expeditiously, whatever
12 schedule you direct us to.

13 MR. FITZPATRICK: Agreed.

14 CHAIRMAN MOORE: But if we're talking in
15 terms of single-digit days, can you all reach
16 agreement in that time with the material that has
17 already been used in past cases?

18 MR. SHEBELSKIE: I think for non-safeguards
19 information, it's relatively --

20 CHAIRMAN MOORE: We recognize safeguards is
21 going to create -- and your 30 days is a reasonable
22 time for safeguards. Let me comment on --

23 MR. SHEBELSKIE: Your Honor? On the
24 safeguards, though, I think the Staff had a different
25 view on that.

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1 CHAIRMAN MOORE: We'll get to safeguards --

2 MR. SHEBELSKIE: Oh, okay.

3 CHAIRMAN MOORE: -- separately.

4 MR. SHEBELSKIE: All right.

5 CHAIRMAN MOORE: I think what we're
6 contemplating for a protective order is -- is not a
7 protective order that will include all of the
8 procedures that can be found in many of our protective
9 orders on how the parties will -- or a scheme, for
10 example, that is proposed I believe in your -- no, I'm
11 sorry. I misspoke.

12 The LS -- the LES case has a protective order
13 in it, for example, of fairly recent origin that sets
14 forth procedures, whereas when documents are turned
15 over under protective order, if a party contests the
16 fact that they are proprietary, that if the owner of
17 the document does not, within 10 days, establish that
18 it is proprietary, it will automatically be considered
19 non-proprietary. We're not talking about those kinds
20 of things.

21 What we're talking about is all of the nuts
22 and bolts, what's protected, how it will be protected,
23 how it's to be shipped, how it's to be exchanged, who
24 can exchange it, how it's to be treated once it's in
25 the recipient's possession, all of those things.

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1 We contemplate putting all the rest of those
2 matters in the case management order, so you don't
3 need to plow those fields.

4 Let's move on, then, to number 8. I'm sorry,
5 number 9. This is safeguards. Now, again, we need to
6 set a schedule for coming up with the appropriate
7 protective order and affidavits of non-disclosure for
8 how we're going to deal with this in an ever-changing
9 world and ever-changing environmental -- or ever-
10 changing regulatory environment.

11 For example, we know that the NRC has a
12 proposed regulation out amending Part 73, which deals
13 with safeguards. So I guess the first question of the
14 staff is: when is it likely that that will be dealt
15 with and issued as a final regulation?

16 MR. SMITH: We do not know, Your Honor. It
17 depends on, I presume, the number and the complexity
18 of comments received.

19 CHAIRMAN MOORE: Well, that period closed in
20 March 9th, or something like that.

21 JUDGE KARLIN: March 20th.

22 CHAIRMAN MOORE: Is it possible for the staff
23 to get the date on which that rule may see the light
24 of day? And the reason this, in our view, is
25 important is that if it's inevitable that that rule is

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1 going to be issued, it makes no sense to craft things
2 under today's standards when they're going to change
3 tomorrow.

4 What do you think is a schedule in which the
5 staff can wrestle with the other parties a proposed
6 protective order dealing with all of the ins and outs
7 of safeguards, including all of the requirements of
8 Part 73, that those are met, and the things like
9 security clearances -- I'm sorry, criminal background
10 checks, the whos, wheres, and whys for that, how long
11 it'll take the Staff to turn those around, what kind
12 of a schedule the staff will be able to deal with in
13 doing those, or whether any of that responsibility
14 falls on DOE.

15 We recognize it's a large globe that you'll
16 have to balance, but it needs to be done, and we think
17 the sensible approach is to have you all try to -- to
18 negotiate what you believe will meet the regulatory
19 requirements and your needs for safeguards material.

20 Venture a guess on a time period.

21 MR. SMITH: Three months, Your Honor.

22 CHAIRMAN MOORE: Okay.

23 MR. SMITH: And I might add that we don't
24 believe that three months is a particular burden to
25 participants, because --

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1 CHAIRMAN MOORE: We understand that.

2 MR. SHEBELSKIE: Your Honor, the experts in
3 the security area don't give me any reason to
4 contradict the Staff's projections of schedules here.
5 I will admit that I'm not the most knowledgeable
6 person in this area, but I understand there's flux
7 with the regulations. There are a variety of
8 different types of information beyond just safeguards
9 information.

10 CHAIRMAN MOORE: Yes.

11 MR. SHEBELSKIE: And there's probably about
12 10 or so different classifications of information that
13 we're dealing with here. I'll tell you, obviously, we
14 are committed to address this as expeditiously as we
15 can, but those knowledgeable in this area tell me with
16 so many different areas not to overpromise the
17 schedule.

18 CHAIRMAN MOORE: And you're going to have to
19 wrestle with uniformity, recognizing that DOE has one
20 calendar and the NRC uses another calendar.

21 MR. SHEBELSKIE: Absolutely.

22 CHAIRMAN MOORE: And different definitions.
23 You're going to have to make all that mesh, because in
24 this proceeding I think we're all of agreement it
25 makes absolutely no sense to be dealing with dual sets

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1 of anything. It's -- and whether it's agreed that it
2 will be DOE's standard or NRC's standard is basically
3 an irrelevancy, as long as everybody can get on the
4 same page of music with this.

5 Nevada, how long do you think is a reasonable
6 time?

7 MR. FITZPATRICK: I don't think we have
8 information of that category to protect, and so we're
9 sort of relying on the good faith of the other
10 entities.

11 CHAIRMAN MOORE: But you are going to want to
12 get it, no doubt.

13 MR. FITZPATRICK: Well, and consistent with
14 that, other than classified information, it is
15 documentary material needing to be identified on the
16 LSN. So certainly the time table should be one that
17 facilitates its delivery to the LSN prior to
18 certification.

19 CHAIRMAN MOORE: Well, certainly, the
20 bibliographic header requirement stands. I don't
21 think anyone is questioning that. It's how one will
22 deal with all of the nuts and bolts of when a request
23 for the document is made. And we are perfectly
24 prepared to deal with this as a separate category,
25 recognizing that it creates enormous problems.

1 We will get back to you, obviously, on a
2 schedule. But, Mr. Shebelskie, you have yet to give
3 me a number.

4 MR. SHEBELSKIE: I'm sorry. I said from our
5 sources, we don't have any reason to think -- I mean,
6 three months is with our projection as well, given the
7 number of categories we have.

8 JUDGE KARLIN: May I ask, I mean, isn't three
9 months a relatively extraordinarily long amount of
10 time, if everyone sort of locked themselves in a room
11 and started working on this? Why do we need to wait
12 three months? I understand that the Staff -- that the
13 NRC has a proposed rule out there February 11th.

14 I'm not understanding that that rule is
15 likely to go final within this three-month period, and
16 so that's not the issue. And I'm not sure whether
17 we're going to sit around on our hands until the reg
18 does go final. We need to move this thing forward.
19 LSN will be out there in three months -- August, July,
20 two months.

21 Are we going to say that none of this
22 security information can be accessed by anyone until
23 such time as three months, plus whatever, goes by?
24 I'm concerned about that. And then, there's more than
25 just these three parties to be concerned about. I

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1 mean, there's the others who might want to be asking
2 for this information. I just think three months is a
3 little bit too long.

4 MR. FITZPATRICK: Well, we're concerned, too,
5 Your Honor, because, I mean, your initial order came
6 out in January as far as deciding how to handle
7 privileged materials. And so it hopefully isn't being
8 thought about now. It's been thought about for three,
9 four months already, and so, again, if it's
10 documentary material, it should be available either on
11 the --

12 JUDGE KARLIN: Oh, that's a given. It's
13 going to a header. That's a given. I just think we
14 ought to buckle down and do it better than three
15 months.

16 CHAIRMAN MOORE: Well, we'll wrestle with
17 schedules. Let's now take a recess for lunch. It's
18 now 12:10. Let's reconvene at 1:00.

19 Thank you.

20 (Whereupon, at 12:10 p.m., the proceedings
21 in the foregoing matter recessed for lunch,
22 and came back on the record at 12:59 p.m.)

23 JUDGE MOORE: We will start with Question 10,
24 but before we do, Mr. Shebelskie, you indicated this
25 morning that it was DOE's current intention to certify

1 their document collection this summer, and we pinned
2 it down to late July-August, I guess.

3 The question which naturally follows onto
4 that, which I failed to ask, was what is DOE's current
5 intention as to when they will file their application.
6 Because a great deal of what we have to do and what
7 the parties have to do flows from that.

8 Is it an automatic six months or are they
9 going to take longer?

10 MR. SHEBELSKIE: I'll let Mr. Irwin respond
11 to that.

12 MR. IRWIN: Your Honor, as the regulations
13 require, it's going to be a minimum of six months. We
14 are still awaiting some actions beyond DOE's control,
15 including issues by EPA of a final set of regulations
16 responding to the D.C. Circuit's decision of last
17 summer. I can't give you an answer of the degree of
18 specificity that having listened to your questions I
19 know you'd like. It's not going to be years
20 obviously, but I can't promise you it will be six
21 months.

22 JUDGE MOORE: I'm sorry?

23 MR. IRWIN: It will not be years, but I can't
24 promise you it's going to be 180 days. I just don't
25 know. We're not in control of all the facts.

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1 JUDGE MOORE: In all likelihood then, it will
2 be a period greater than the six months from the time
3 of certification?

4 MR. IRWIN: Yes, but whether it would be a
5 material amount I don't know. I really -- please
6 don't try to pin me down further when I just can't
7 control it.

8 JUDGE MOORE: Mr. Irwin, because so many
9 actions of this Board and the panel, as well as the
10 parties, depend on that, the Board would appreciate
11 that you keep us informed of the latest current
12 estimates as quickly as you get them.

13 MR. IRWIN: We'd be happy to.

14 JUDGE MOORE: You will not bother us by
15 filing a weekly status report saying that it now
16 appears to be X, and then a week later it appears to
17 be Y. Because a great many people -- and schedules
18 are totally dependent on that, and we've been hanging
19 fire for far too long, and we have to have some
20 definitive answers soon.

21 JUDGE ROSENTHAL: When you referred to six
22 months or more, was that from today or was that from
23 the date of certification?

24 MR. IRWIN: I was referring to the date of
25 certification, Judge Rosenthal.

1 JUDGE ROSENTHAL: So your present feeling is
2 that it will be at least six months from the date of
3 certification.

4 MR. IRWIN: From the date which Mr.
5 Shebelskie described it.

6 JUDGE ROSENTHAL: Right, okay.

7 MR. IRWIN: A couple of hours and many ideas
8 ago.

9 JUDGE MOORE: Let's turn to Question 10 and
10 address the question of deadlines for requiring a
11 participant who withholds a document on the ground of
12 privilege either (a) to list the document on a
13 privilege log that provides a prima facie
14 substantiation of the claimed privilege or (b)
15 provides a full text of the document to the requester
16 under terms of an appropriate protective order and
17 provides a redacted version to the LSN.

18 Staff?

19 MR. SMITH: With respect to Question A,
20 production of the privilege log, we believe that
21 should be tied to the production of the bibliographic
22 header on the LSN.

23 JUDGE MOORE: Well, the collection can't be
24 certified without the bibliographic header.

25 MR. SMITH: Correct.

1 JUDGE MOORE: We're talking about once --
2 let's backup.

3 JUDGE KARLIN: Let me ask a question on that,
4 if I may. Are you saying that the privilege log needs
5 to be produced at the same time the certification for
6 the LSN occurs?

7 MR. SMITH: We believe for the initial
8 certification and for the initial set of documents,
9 yes.

10 JUDGE KARLIN: Is there a regulatory
11 provision that says that? I mean, 1003(a)(4) says
12 that if you have a privilege document, all you have to
13 do is produce the header. It doesn't say you've got
14 to produce a privilege log.

15 But you're suggesting we should add that into
16 the mix?

17 MR. SMITH: No, I'm not suggesting that you
18 should add that in. I'm simply saying that we're
19 prepared to make it available at that time.

20 JUDGE KARLIN: Okay. I'm sorry.

21 Is it a legal requirement? Do you think we
22 could require that of a party? Could we require that
23 of DOE or the state or anyone else out there?

24 You're willing to do it, and I appreciate
25 that. That's valuable, but is it something we could

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1 require?

2 MR. SMITH: I'm not sure. I don't believe
3 so. It's not something we've looked into in any
4 particular focus.

5 MR. SMITH: Okay.

6 JUDGE MOORE: Let's back up a step further in
7 that regard. Can the process start? There are
8 100,000 -- I'm sorry -- 1.-some number million
9 documents currently publicly available on the LSN that
10 were put there by DOE. Some number of those have
11 bibliographic headers. Is there any reason why the
12 process could not start as to the documents that are
13 publicly available, requests for the documents,
14 privilege logs disputes so that we can get started on
15 that as opposed to waiting for DOE certification for
16 the rest of its collection?

17 MR. SMITH: We're not really in a position to
18 say whether that kind of information can be provided
19 now. I would refer you to DOE for that. The staff --

20 JUDGE MOORE: Well, the staff has 25 or
21 30,000 documents --

22 MR. SMITH: Correct.

23 JUDGE MOORE: -- currently publicly
24 available, but as I understand it, none of those are
25 bibliographic header only, hence no privilege claims.

1 MR. SMITH: That's correct.

2 JUDGE MOORE: DOE?

3 JUDGE KARLIN: Maybe we should stick with the
4 staff for the second part of that question.

5 JUDGE MOORE: Oh.

6 JUDGE KARLIN: The first was when could you
7 make the privilege logs available, and you're saying
8 at the time of initial certification.

9 MR. SMITH: Actually I'm saying at the time
10 that you add a document to the LSN. So that could be
11 initial certification. There's also obviously the
12 supplement --

13 JUDGE KARLIN: Right, with a supplement in
14 mind.

15 MR. SMITH: -- doing a separate
16 certification.

17 JUDGE KARLIN: Right, but the second part
18 then is when would you be able to appropriately --
19 what deadline could we put on as to providing the full
20 text under a protective order and the redacted one.

21 See, our contemplation here is that they'll
22 have a choice. You'll either provide a privilege log
23 for a document or you'll provide the full text of the
24 document under a protective order and provide a
25 redacted version for the public and for the LSN, and

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1 now we're getting to the latter. What's the timing to
2 doing the latter?

3 MR. SMITH: I think there's an implicit
4 assumption into that that you have to produce the full
5 text under the protective order and a redacted
6 version.

7 JUDGE KARLIN: Exactly.

8 MR. SMITH: We don't believe that's the case,
9 and that's a function of what specific privilege is
10 applicable. Certain privileges you cannot provide
11 under a full text. For example, deliberative process,
12 attorney --

13 JUDGE KARLIN: then you put it on a privilege
14 log.

15 MR. SMITH: Correct.

16 JUDGE KARLIN: And so there's an either/or
17 here. Either provide a privilege log, which you've
18 just told us you can do that immediately, or -- and so
19 if you've got something you want to have under a
20 privilege log and you don't want to provide any
21 redacted version or protective order version, then you
22 give us a privilege log. So they have a choice there,
23 and you make the choice. We'll give you a privilege
24 log or you say we're going to give you full text under
25 a protective order and a redacted version for the

1 public.

2 And now a question really is: when can we
3 expect that? Five days, ten days, seven working days?

4 MR. SMITH: In our proposed case management
5 order, we'd agree that seven days was an appropriate
6 time for making the document available to the parties.

7 JUDGE KARLIN: Right.

8 MR. SMITH: Upon request.

9 JUDGE KARLIN: And we're asking a different
10 question here.

11 MR. SMITH: If I'm understanding you
12 correctly, I guess, we don't see an urgent need if the
13 party has the document already in full text form or
14 unredacted form for that to be added to the LSN in any
15 particular time frame. I think a reasonable time,
16 depending on the constraints of the LSN and other
17 activities that are ongoing would be appropriate.

18 JUDGE MOORE: How did you all arrive at seven
19 business days? To my knowledge, the concept of
20 business days can be nowhere found in the Commission's
21 rules of practice. How did you -- why should we
22 interject a term that is nowhere in the Commission's
23 regulations and has never been used in Commission
24 adjudications?

25 MR. SMITH: There's no particular reason for

1 that other than that we thought that five days might
2 be -- which is one of the other time frames that's
3 sprinkled throughout Subpart J was too short for
4 providing this, especially if it ran over a weekend,
5 to produce a document to --

6 JUDGE MOORE: Well, six months to get
7 document discovery done with three million documents
8 out extant is too short, but unfortunately that's what
9 the Commission has said.

10 That being the starting point, business days
11 seems to imply to us that people either want to use
12 the weekend productively for work, or they don't want
13 to work at all, and only one of those in this
14 litigation is going to be acceptable.

15 So speaking only for myself, the concept of
16 business days is a concept I think that we don't wish
17 to interject into the adjudicatory process.

18 MR. SMITH: That's perfectly acceptable to
19 the staff.

20 JUDGE KARLIN: Still haven't gotten an
21 answer, I guess. Maybe we're not clear as to what
22 we're looking for. The contemplation of this
23 question, and it may not be how it turns out, is that
24 people will certify their documents on the LSN.
25 Subsequently someone will file a request for some

1 documents. I want all of your documents related to
2 Alloy 22.

3 There will then be a deadline for providing
4 those documents. Some of them may be privileged. If
5 those documents are privileged, then in response to
6 that request you have two options. One is put it on
7 a privilege log, and some of them you put on a
8 privilege log and not provide the document at all.

9 The other option is provide the full text of
10 the document to the requesting party under a
11 protective order that you all are going to write and
12 submit to us, and then provide a redacted version
13 probably at some later date onto the LSN so that the
14 public and everyone else can see that document.

15 Our question really is you've answered the
16 first part of that question (a), which is you can do
17 it. My question then is the second part, (b): how
18 long do you think we should give the parties after a
19 request has been received to provide a full text
20 version under a protective order to the requesting
21 party and to provide a redacted version and put it on
22 the LSN? Five days, ten days?

23 JUDGE MOORE: And that can be one or two
24 steps.

25 MR. SMITH: We believe there should be two

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1 steps. One, after the request within seven days,
2 maybe ten days, you would provide the full text or the
3 redacted version to the parties in the protective
4 order, again, because it depends on what privilege you
5 are asserting.

6 JUDGE MOORE: We understand.

7 MR. SMITH: And then within some reasonable
8 time after that, you would --

9 JUDGE MOORE: What is that reasonable time?

10 JUDGE KARLIN: No, no, it doesn't depend on
11 what kind of privilege you're asserting. If you're
12 asserting a privilege or you don't want to provide --
13 if you have to redact it, then you just give them a
14 privilege log. The redacted version is for the public
15 benefit, not for the requesting parties' benefit. The
16 requesting party either gets a privilege log or a full
17 text. The public gets the redacted version.

18 So how long does it take to provide the full
19 text of the document under a protective order? You
20 know, five, ten days.

21 And how long does it take to provide a
22 redacted version for the LSN?

23 MR. SMITH: We had not contemplated, at least
24 staff hadn't contemplated doing both.

25 JUDGE KARLIN: Well, this is what this

1 question asks.

2 MR. SMITH: Right.

3 JUDGE KARLIN: Didn't you read it?

4 MR. SMITH: And my approach to the answer
5 would be that we didn't believe that both were
6 necessary, and that it would depend on the privilege
7 whether you would provide the full text or the
8 redacted version. It was the choice of the producing
9 party.

10 JUDGE KARLIN: Well, that's not how we wrote
11 it. So, okay, you don't have --

12 MR. SMITH: I understand your question now is
13 asking when are we going to do both. As to the first
14 part of that question, seven, ten days, and as to the
15 second question, some reasonable time. I think a
16 month would be appropriate.

17 JUDGE MOORE: A month for both?

18 JUDGE KARLIN: No, for the redacted.

19 JUDGE MOORE: A redacted version?

20 MR. SMITH: I would submit that's a large
21 burden for the parties to have to produce a redacted
22 version for every privileged document and one that's
23 not necessary for the conduct of the proceeding.

24 JUDGE KARLIN: Well, let me ask this as a
25 function of the staff and ostensibly some protector of

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1 the public interest as well. Isn't there a public
2 interest in not having this entire proceeding
3 conducted under the cloak and secrecy of protective
4 orders and have some of these documents available to
5 the public, i.e., an interest in having the redacted
6 versions put on the LSN to the public and other
7 interested persons can look at them?

8 MR. SMITH: Certainly, and the broad
9 definition of potential party allows for any public
10 person or participant who wants access to these
11 documents and agrees to follow the Board's and
12 Subpart J submits to their authority would have access
13 to these documents. If we get the full text of the
14 document --

15 JUDGE ROSENTHAL: Aren't there members of the
16 public that do not want to become participants to any
17 extent in the proceeding, who nonetheless have a
18 legitimate interest in what's going on in the
19 proceeding and a legitimate interest in the documents
20 that are being considered?

21 MR. SMITH: Absolutely, and all publicly
22 available documentary material would be available on
23 the LSN as would eventually redacted documents so
24 chosen by the producing party.

25 JUDGE ROSENTHAL: I thought you were

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1 suggesting that there really wasn't a need for the
2 public at large to see a good number of these
3 documents that have been received under protective
4 order, and that therefore, putting the staff or other
5 parties to the redacting burden was alarming.

6 Did I misunderstand you?

7 MR. SMITH: I believe so. We were just
8 suggesting that there's a balance to be struck and
9 that any potential party who desires to see this
10 information has a way to gain access to it.

11 JUDGE ROSENTHAL: I'm not talking about
12 potential parties. I'm talking about a member of the
13 public has no intention of becoming a party or
14 becoming actively involved, but nonetheless has a
15 decided interest in the proceeding.

16 I would think that that would describe a
17 fairly substantial number of the Nevada citizens.

18 MR. SMITH: I agree.

19 JUDGE MOORE: DOE?

20 MR. SHEBELSKIE: Yes, sir. I think there are
21 four or five issues imbedded in the question.

22 JUDGE MOORE: Well, let's just answer the
23 first (a) and (b) and then we have a lot more that
24 we'll get to.

25 MR. SHEBELSKIE: All right. With respect to

1 (a), it is the department's position that the
2 privilege log in the first instance is not a
3 requirement tied to a party's or participant's initial
4 certification. That is not one of the requirements in
5 the regulations. That's the first point.

6 Second, we agree with the view that if
7 documents are being produced in full text under a
8 protective order, that at that point we don't see a
9 need to create a privilege log type entry whether it's
10 in the headers or on a separate database for those
11 kinds of documents because in that instance, the
12 participants have the best information available on
13 where they want to challenge the privilege. They have
14 the full text of the document.

15 With respect to then the categories of
16 privilege documents --

17 JUDGE MOORE: Well, let me interject. They
18 don't necessarily have all of the information. They
19 may have a lion's share of it.

20 MR. SHEBELSKIE: Right.

21 JUDGE MOORE: Okay.

22 MR. SHEBELSKIE: Well, let me footnote that,
23 Judge Moore. With respect to the department's
24 documents, I'll put security aside for a moment, but
25 the documents we're talking about producing under a

1 protective order from DOE, and apparently it is DOE
2 who is the issue here --

3 JUDGE MOORE: Privacy, perhaps employee
4 concerns which are perhaps grouped as privacy, the
5 archeological privilege.

6 MR. SHEBELSKIE: Archeological privilege is
7 proprietary and privacy. I think for those categories
8 of documents when a participant or party has the full
9 text of the document, they really have the ability to
10 make the assessment whether there is that kind of
11 information in it, and so, therefore, we think as a
12 practical matter there's no need certainly at that
13 point for any type of entry on a privilege log for
14 those documents.

15 With respect --

16 JUDGE MOORE: Now, that leads right into
17 what's the reasonable time for getting it on to the
18 LSN.

19 MR. SHEBELSKIE: Right.

20 JUDGE MOORE: In a redacted.

21 MR. SHEBELSKIE: Right.

22 JUDGE MOORE: Because there isn't an
23 immediate need by the requester who's taking part in
24 the litigation.

25 MR. SHEBELSKIE: That's true. On that point,

1 Your Honor, I would make two observations. One is the
2 view that the staff expressed here in that certainly -
3 - and DOE shares this -- that the purpose of the six-
4 month period is to allow the participants the ample
5 time to review documents, prepare for contentions and
6 the licensing proceeding, and providing the documents
7 in full text accomplishes that. Putting redacted
8 versions on the LSN doesn't further that purpose.

9 Putting that redacted documents, to answer
10 your question, also is a very expensive process. Now,
11 the largest category with respect to DOE is the 70,000
12 general prep. privacy documents here. Assuming that
13 number stayed at 70,000 and doesn't go down, I asked
14 our litigation support contractors to give me an
15 estimate of what it would cost to put out redacted
16 copies of all those 70,000, assuming that they didn't
17 do the redactions. They just showed up on their door.

18 There may be legal costs involved in
19 preparing redactions and vetting it, but just from the
20 IT processing side, what would be entailed in putting
21 those out? And the estimate is that in the
22 neighborhood of \$500,000 just to process those
23 documents from an IT perspective.

24 JUDGE MOORE: Now, is that in paper or
25 electronic?

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1 MR. SHEBELSKIE: How they get it. In other
2 words, the redacted document has to be a separate
3 document on the LSN, and so they have to create a
4 separate electronic image for it, OCR text.

5 JUDGE MOORE: I understand. Okay.

6 MR. SHEBELSKIE: Yes. So from the time they
7 receive it to its turnkey on the LSN, the estimate for
8 that 70,000 was a half a million dollars.

9 We also think that when the participants are
10 dealing with that group of documents, the vast
11 majority of them are not going to be documents that
12 they are concerned about because keep in mind, you
13 know, 98, 99 percent of our documents of the 3.5
14 million are going to be available to the participants
15 either in full text --

16 JUDGE MOORE: We understand that. Now,
17 you've got a \$500,000 price tag, but that price tag
18 won't stick if you have to do it in three days, but
19 what's a \$500,000 estimate? Is that 30 days, 60 days
20 or 90 days?

21 MR. SHEBELSKIE: I believe it's between 30
22 and 60 days, and obviously the timing also in part
23 depends on how many we're asking for. In other words,
24 if the state came in and simply said on the day after
25 our certification, "Give us all 70,000 of these

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1 privacy documents," so suddenly we have to redact them
2 en masse and produce them out and put them on the LSN
3 in one lump sum, that takes more time and effort than
4 if there are a series of more rifle shot requests
5 along the way.

6 So how long it takes to put a document on the
7 LSN will depend upon the volume of the request.

8 JUDGE MOORE: Is there a way of capturing
9 that in specific terms? Reasonableness is a term that
10 is in the eye of the beholder, and although this Board
11 are the most reasonable people you'll ever run across,
12 even we don't always agree on the number of days that
13 define that term.

14 Can you pin it down to days? Forty-five
15 days?

16 MR. SHEBELSKIE: I would say as a
17 presumption. Forty-five days from an IT technological
18 perspective I understand seems reasonable, but there's
19 a predicate to that, however, Your Honor, and that is
20 that's assuming that the redaction is prepared and
21 been turned over to the IT people to process and put
22 on the LSN.

23 There has to be lead time in advance of that
24 to identify and prepare the redaction, and that's an
25 additional time component.

1 JUDGE MOORE: How long?

2 MR. SHEBELSKIE: That will again vary on the
3 type of document and the volume of the document. For
4 example, business proprietary information.

5 JUDGE MOORE: I accept what you're telling
6 me. How long? Is that pushing it to 60 days?

7 MR. SHEBELSKIE: I should think so, Your
8 Honor, especially if we get a lump sum request.

9 JUDGE KARLIN: Well, let's just go back to
10 the Question No. 10. I mean, the question is there.
11 It has been out there since April 18th or 19th, I
12 think it is. How long do you think we should require
13 if we write an order to require the party to provide
14 the full text document under a protective order to the
15 requesting party.

16 MR. SHEBELSKIE: Full text to the requesting
17 party under a protective order, I think we can do it
18 in now we said business days, but you said ten
19 calendar days.

20 JUDGE KARLIN: Okay. Now, how much to
21 provide a redacted version to the LSN?

22 MR. SHEBELSKIE: All right. That's where the
23 rub comes in. Yeah, I think as a presumption that the
24 IT processing time as I understand it would be about
25 45 days. Forty-five days is a good rule of thumb

1 assuming the redactions have already been done, and,
2 Your Honor, I'd like to be heard on the point as to
3 whether or not there should be an automatic rule or
4 requirement that if a document is given under full
5 text under a protective order, then the producing part
6 would have to automatically put a redacted version out
7 on the LSN. Here's why.

8 As I was about to say, with the 70,000
9 privacy documents, now, they've been vetted for
10 privacy information, people's Social Security numbers,
11 et cetera, et cetera. We think that these things,
12 many of these are marginally relevant at best and will
13 not be of any use. The participants will not use
14 these in the proceedings.

15 We have a process in the proposed joint order
16 that any participant who receives the documents, and
17 every participant can get them, that they identify
18 ones they want to use. They bring that back to us.
19 Then we just agree on the appropriate redactions and
20 push that one out.

21 So what we put out on the LSN in redacted
22 form to conserve the costs are those documents that
23 the participants have identified are useful to them,
24 and I think we can fairly assume that the state will
25 have every interest in making sure that any document

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1 that is of interest to its citizens will be out on the
2 LSN.

3 JUDGE ROSENTHAL: You're not saying useful to
4 the parties. You're saying useful to the citizenry,
5 and you would leave it to Nevada to make the
6 determination as to what would or would not be found
7 useful to its citizens.

8 MR. SHEBELSKIE: Well, yes.

9 JUDGE ROSENTHAL: That's what it amounts to.

10 MR. SHEBELSKIE: Yes, Your Honor, or even
11 another participant.

12 We have had discussions with the state on
13 this. I have every confidence in their good faith on
14 this, and they recognize that, yeah, probably a lot of
15 these documents they're not going to think are really
16 germane to the proceeding. But we put in provisions
17 in the order that they come to use. They propose
18 redactions. We say okay, and we put those out.

19 JUDGE MOORE: Nevada?

20 MR. FITZPATRICK: Your Honor, we'd like to go
21 back to something really basic. There's no provision
22 in 10 CFR 2 for some sort of a phased approach to
23 creating a certified LSN over a period of time,
24 ensuing weeks and months after the LSN is certified.

25 Basically there's two kinds of documents,

1 three kinds: unprivileged, totally privileged, and if
2 it's totally privileged, presumably it's going to be
3 a header only. We're not going to see the document if
4 it's totally privileged. And then there's the in
5 between group where the word redaction has come up.

6 Now, by definition, the unprivileged portions
7 of a document which is, in part, privileged and, in
8 part, not privileged -- the not privileged parts of
9 the document are by definition documentary material.
10 We wouldn't be discussing them. They would be on the
11 table. They wouldn't be in this conversation and on
12 the LSN or given to us unless they contain documentary
13 material relevant to the reg. guide and so on.

14 And so now what you have is DOE reviews a
15 document --

16 JUDGE KARLIN: Mr. Fitzpatrick, I mean, we've
17 read your brief, and we understand that that addresses
18 the issue of redaction and your argument that a
19 document that ultimately require redaction must be on
20 the LSN at the moment of certification. You've
21 briefed that issue, and you've briefed it, and all of
22 the parties have briefed that issue. So I don't think
23 we need to hear that. I mean, we are beyond that
24 point. So we don't need to hear that argument.

25 MR. FITZPATRICK: Well, all right. Then I'm

1 not sure --

2 JUDGE KARLIN: Basically nothing in the
3 regulations which says that in order to certify
4 compliance a party has to produce the redacted
5 versions of any document. One thousand three I think
6 it's (a)(4) says that for documentary material for
7 which a privilege is claimed, all you need to do is
8 put a header up there, and there's no subcategory that
9 says documented material which is entirely privileged,
10 versus a documented material which is partially
11 privileged.

12 So not seeing anything in the regs. that
13 supports your argument, we're beyond that point, and
14 this question really would just get onto when do you
15 think people should be required to produce these
16 documents.

17 MR. FITZPATRICK: Your Honor, I guess I need
18 to direct your attention with all due respect back to
19 the specific wording of the reg. that you're talking
20 about, which is Section 4 of 2.1003.

21 JUDGE KARLIN: We've read the briefs. We
22 don't want to go there. We've got a limited amount of
23 time today, and I don't think --

24 MR. FITZPATRICK: Your Honor --

25 JUDGE KARLIN: -- we need to rehash that.

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1 Can you answer the Question No. 10, timing?

2 MR. FITZPATRICK: Yes. The question, Your
3 Honor, is under the law DOE and all of the parties are
4 required to deliver if they have redacted information,
5 if they have unprivileged documentary material, it has
6 to be on their LSN at the time of the certification.
7 There's no special category for late delivery of
8 redacted documents.

9 Let me just illustrate from a case --

10 JUDGE KARLIN: We've read the brief. Please,
11 please, what we would like is an answer to this
12 question. What are the appropriate deadlines for
13 requiring a participant to do (a) and to do (b)?

14 We've really asked the staff and DOE to do
15 that, and they've with some difficulty tried to give
16 us estimates. We would like that estimate from you.

17 MR. FITZPATRICK: The D.C. Circuit -- and
18 this is not in our brief -- the D.C. Circuit recently
19 said the focus in FOIA is information, not documents.
20 An agency cannot justify withholding an entire
21 document simply by showing that it contains some
22 exempt material. And that's the problem we have here,
23 is the section that you're referring to, Section 4 of
24 103 doesn't say anything about privileged documents.
25 It refers to documentary material which by definition

1 is not a document but rather information which is
2 privileged.

3 And so information which is privileged is not
4 produced at all on the LSN. Information which is not
5 privilege must be produced on the LSN, and Mr. Graser
6 has kindly provided an LSN guideline, amended it just
7 a couple of months ago to explain --

8 JUDGE MOORE: We understand your argument.
9 Assume we reject it. Please answer Question 10.

10 MR. FITZPATRICK: And the answer to Question
11 10 is that the parties must provide redacted material,
12 which is unprivileged documentary material at the
13 time.

14 JUDGE MOORE: Okay. I just wanted your
15 position, but assume for the purposes of answering
16 Question 10 that your position is rejected.

17 MR. FITZPATRICK: Well, Your Honor, you've
18 been very good about protecting the interests of third
19 parties not in this room, and so this isn't a Boy's
20 Club among these three, and here we have a situation
21 where if we request a document from them, the boys in
22 this room, we might get it in X number of days.
23 That's not the purpose of the LSN.

24 The purpose of the LSN is to provide all of
25 this documentary material to the world.

1 JUDGE MOORE: We understand we're going to
2 have to wrestle with that question. Assume for the
3 purposes of answering Question 10 that we wrestle with
4 it and we find out that we don't accept your argument.
5 What is the time period in which you think a redacted
6 version should be provided to the LSN? And is the
7 time period in which you think it's reasonable to turn
8 over the document in toto to the requesting party?

9 MR. FITZPATRICK: If I have to pick a time,
10 Your Honor, which I absolutely do at this point, I
11 would say it needs to be a very short time, such as
12 ten days, and I'll tell you why that's not
13 unreasonable.

14 In order to make the determination of whether
15 it's privileged in whole, not at all or privileged in
16 whole and unprivileged in part, in whole and in part,
17 the document has to have been read and parsed by an
18 attorney. So if the decision has been made at the
19 time of LSN certification, this cluster is going to be
20 redacted --

21 JUDGE MOORE: It has already been done.

22 MR. FITZPATRICK: You've already read it.
23 You're already seen what part is privileged. So it
24 shouldn't take you very long to deliver the non-
25 privileged portion of it to anyone who wants it.

1 JUDGE MOORE: Two weeks.

2 JUDGE KARLIN: And let me ask the question.
3 The approach that is contemplated here says that when
4 a party or potential party requests a document and the
5 owner of that document provides it under a protective
6 order to the requester, it also calls for the
7 provision of a redacted version to be put on the LSN
8 for the public.

9 Now, the question earlier is Nevada was
10 perhaps a representative, a good representative of its
11 citizenry. Do you think we can or should dispense
12 with putting a redacted version on the LSN?

13 MR. FITZPATRICK: Not at all. It's
14 documentary material, and it should be made available
15 to the public. We certainly can't speak for every
16 citizen in Nevada.

17 JUDGE ROSENTHAL: Isn't it certainly true as
18 has been suggested by DOE that a good number of these
19 documents would have no possible conceivable interest
20 to the public at large?

21 I mean, what the DOE's suggestion was was
22 that you folks, as presumably those who have the
23 principal interest in the citizenry of the state would
24 make a judgment as to whether the particular document
25 contained material that would be of sufficient

1 interest to the Nevada populous that DOE should be put
2 to the burden of supplying in redacted form.

3 I mean, it seems to me, frankly, that DOE is
4 quite right when it suggests that a good number of
5 these documents that will be subject to a protective
6 order would have no possible interest to the
7 citizenry. I mean, it seems to me that that was a
8 reasonable suggestion on the part of DOE as to the way
9 that, on the one hand, the interest of the Nevada
10 populous and, on the other hand, avoidance of a
11 substantial burden to DOE could be accommodated.

12 MR. FITZPATRICK: Your Honor, first of all,
13 the only relevance decision that I know that's made is
14 whether it's documentary material or not, whether it
15 meets the Reg. Guide 3.69 and the license application
16 review plan. It wouldn't be on the table if it did
17 not meet the relevance test.

18 Assuming it meets the relevance test, I don't
19 know who it is that's suggesting they'd make a second
20 cut of what the citizenry of Nevada ought to see.
21 Certainly we don't have time to go through 3.5 million
22 documents and make that decision, and the citizenry of
23 Montana and New York have just as much right under the
24 law to these documents as the citizenry of Nevada.

25 And the Commission said the Commission does

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1 not believe that the mere availability of documents in
2 hard copy without electronic full text search
3 capability will permit adequate substantive review of
4 the documents in the proceeding by the staff or any
5 other party.

6 So that's the definition of the LSN, is
7 electronically gathered documents. The definition of
8 the LSN administrator is someone who is controlling
9 the integrity of the electronic document thing.

10 JUDGE KARLIN: Well, let me follow up on
11 that. I think that's the gist of our concern. Let's
12 assume the number of documents that will be provided
13 to the requester under a protective order. Fine.

14 Now, the question is: should those documents
15 also be available in redacted form to the public or to
16 the other potential participants on the LSN?

17 If the answer is, yes, perhaps so, one way to
18 accomplish that is to automatically require the
19 provider of the document to provide a redacted version
20 and put it on the LSN within X days of the request,
21 and that's what this contemplates here.

22 Another way and I think is what DOE is
23 suggesting is perhaps -- and what is somewhat
24 suggested in your proposed case management order -- is
25 that the burden would be more on the requester who

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1 would look at the document it received under the
2 protective order and could then propose a redacted
3 version to be put on the LSN.

4 In either case, the idea would be that people
5 other than just the requester and the provider would
6 be allowed some access to the redacted version. It's
7 just a matter of who has the burden of requesting it
8 or putting it on the LSN because what we're concerned
9 about is, you know, there's more than just three
10 parties to this proceeding, and there's a concern
11 about just throwing everything under the cloak of
12 protective orders.

13 MR. FITZPATRICK: What sounds wrong with that
14 on the face of it is that the reason for redacting
15 information from a particular document is that that
16 part of the document contains privileged information.
17 So you're suggesting that DOE turn over the document
18 in full to the party that requested it, and that the
19 requester assert the privilege that DOE is claiming.

20 JUDGE KARLIN: No, that the requester propose
21 a redacted version for placement on the LSN. I
22 believe that's part of what's in the proposed case
23 management --

24 MR. FITZPATRICK: How would the requester
25 decide what portions to redact? It's the DOE that's

1 claiming any portion of it. I mean, I guess we could
2 uniformly say we don't think any of this --

3 JUDGE MOORE: So what you're saying in a
4 nutshell is that that's just a recipe for more
5 disputes, not less.

6 MR. FITZPATRICK: Well, more disputes, but
7 more than that, it's a recipe for, as last year at
8 this time, DOE prematurely certifying an incomplete
9 database, and this time with the extra twist of lime
10 of placing on the parties' recipient the duty to
11 finish their job.

12 JUDGE MOORE: No, I understand your position.

13 PARTICIPANT: Your Honor, may I make two
14 comments? Oh.

15 JUDGE MOORE: Please.

16 MR. KAMPS: Thank you, Your Honor.

17 Just briefly, I'd just like to say that the
18 Yucca Mountain proposal is of more interest than just
19 to Nevada. Our organization represents members in all
20 50 states who have a serious interest in this
21 proposal, especially along transportation lines, but
22 not only that. Other states that may be targeted for
23 a second repository in the future are concerned about
24 precedents that will be set by this proceeding.

25 So in our opinion, erring on the side of full

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1 disclosure is the only way to go.

2 JUDGE MOORE: Thank you.

3 There are several additional questions for --

4 MR. SHEBELSKIE: Judge Moore, may I add one
5 point and ask a question about something we didn't
6 talk about?

7 The word we didn't talk about was the
8 copyright documents. We were talking about providing
9 copies of the archeological business, proprietary and
10 privacy, but not the copyright.

11 JUDGE MOORE: Copyright is not a problem.

12 PARTICIPANT: It's labeled as copyright in
13 the bibliographic header. It's an automatic under
14 your proposal, and we fully accept that approach.

15 MR. SHEBELSKIE: Well, we under that we have
16 in our system 3,000 documents that are copyright
17 protected that were electronically processed in the
18 past for independent reasons, and we can provide those
19 under this provision.

20 There are another referenced here 20,000
21 documents that are copyright protected that were never
22 electronically processed in the system and our concern
23 is that --

24 JUDGE MOORE: I'm sorry. Back up there.
25 Twenty thousand that?

1 MR. SHEBELSKIE: Were never electronically
2 processed historically.

3 JUDGE MOORE: Okay.

4 MR. SHEBELSKIE: Well, let me back up. The
5 LSN regulations talk about copyright documents.

6 JUDGE MOORE: Correct.

7 MR. SHEBELSKIE: And the exclusion of them
8 from the LSN. It so happens that for independent
9 reasons DOE along the way had made electronic
10 versions, copies, from 3,000 copyright protected
11 documents, and so they were swept up in the broad
12 grasp we did. So headers exist for those.

13 JUDGE MOORE: Okay, and does the header say
14 it's copyright --

15 MR. SHEBELSKIE: Copyright protected.

16 JUDGE MOORE: Okay.

17 MR. SHEBELSKIE: But if the Court so -- we
18 cannot voluntarily reproduce copies of those to give
19 to people because we'd be in violation of the
20 copyright order.

21 JUDGE MOORE: No, we fully understand that,
22 but your proposal says for copyrighted material, upon
23 the request, it will be turned over to the requester.

24 MR. SHEBELSKIE: Yes.

25 JUDGE MOORE: And we presume -- or an address

1 to the library and the shelf on which it can be found.

2 MR. SHEBELSKIE: Very good.

3 JUDGE MOORE: We understand what the
4 copyright implications are.

5 JUDGE ROSENTHAL: Could you give me about a
6 one minute response to Mr. Fitzpatrick's objection to
7 your suggestion that he be the gatekeeper on what
8 particular materials on the protective order require
9 redaction?

10 MR. SHEBELSKIE: Yes, sir. DOE has made a
11 very broad collection -- has employed a very broad
12 methodology to sweep up any possibly relevant
13 document. I think we already have in the record from
14 last summer the call memorandum from the Office of
15 General Counsel that totally affected employees.
16 Don't limit your production really to documented
17 material, but anything that has any possible bearing
18 on the licensing.

19 So we are going to have, Judge Rosenthal,
20 lots of documents that the department is producing and
21 collected for the LSN out of an abundance of caution
22 in the interest of making sure everything is there.

23 A lot of these 70,000 documents, for example,
24 on the privacy side will be documents and personnel
25 records that have some security clearance information,

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1 Social Security numbers. You have a lot of E-mails
2 that have personal information intermeshed with other
3 information and I think will turn out to be largely of
4 no moment to the other participants.

5 And Mr. Fitzpatrick and the Nevada legal team
6 I have no doubt if they find their documents in the
7 70,000, they want out there on the LSN, and I know
8 they'll operate in good faith, but they'll also
9 zealously represent the interest that they represent.
10 We'll identify those.

11 JUDGE ROSENTHAL: Thank you.

12 JUDGE MOORE: In 15 seconds or less, when you
13 turn over what you're calling those marginal
14 documents, will you have already done any redaction?

15 MR. SHEBELSKIE: I believe none of those have
16 been redacted yet.

17 JUDGE MOORE: Now, the problem with Privacy
18 Act information is their view of it in good faith and
19 your view of it in good faith may be at opposite ends
20 of the spectrum, and what happens if under your scheme
21 it's their error or they pass it back to you and
22 you're the final judge. Is that what the scheme is?

23 MR. SHEBELSKIE: The scheme, as I believe the
24 order contemplates, is that if they want to put out --
25 they tell us they want to do it. Here's what they

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1 would redact.

2 JUDGE MOORE: Okay. I understand.

3 MR. SHEBELSKIE: And then we would say,
4 "Fine. Let it go. If not, we have a dispute
5 resolution process."

6 JUDGE MOORE: I have several other questions
7 about ten and the areas that are encompassed by this.
8 Under Rule 11 of the Federal Rules of Civil Procedure
9 and under the Commission's own rules on signature of
10 pleadings, there is a requirement that the attorney
11 essentially is standing behind it, has done due
12 diligence. It is what it represents to be. Necessary
13 investigation has been done. It's not done for
14 nefarious purposes. It's done in good faith.

15 Do you have any objection to us spelling that
16 out so that the attorneys are signing the privilege
17 log that demonstrates that the attorney is making
18 these representations?

19 MR. SHEBELSKIE: I think that standard
20 applies to any document, any pleading.

21 JUDGE MOORE: Okay. Staff, do you have any
22 problem with that?

23 MR. SMITH: No, we do not, Your Honor.

24 MR. FITZPATRICK: No objection.

25 JUDGE MOORE: Section 2(c) of the proposal

1 states that a participant shall not be precluded from
2 subsequently claiming additional privileges or
3 supplementing the information in the bibliographic
4 header which is supposed to suffice as the privilege
5 log under your proposal. Why should there be an
6 opportunity for more than one bite of the apple in an
7 efficient system where we have over 100,000 documents
8 in the DOE collection that are claimed privileged with
9 the prospect of a hundred if not thousands of
10 privilege disputes?

11 Why shouldn't it be done the first time, done
12 correctly on the privilege log? DOE.

13 MR. SHEBELSKIE: Well, obviously all of the
14 parties recognize that the privilege determinations
15 would be made in good faith. I think the view was,
16 the recognition was that obviously with a collection
17 of our size, but even with 1,000 documents or more,
18 the size that the other participants are talking
19 about, that there could be the odd case where on
20 further reflection you add a further privilege.

21 For example, the line between attorney-client
22 communication and litigation work product can often be
23 a gray one. The document we receive the same
24 protection --

25 JUDGE MOORE: In that case, wouldn't the

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1 lawyer claim both?

2 MR. SHEBELSKIE: Yes, Your Honor, but I think
3 there's just a recognition that good faith mistakes
4 can be made.

5 JUDGE MOORE: Why put the worm out in front
6 of the trout and then after the trout goes to strike,
7 oops, I pull it back and I'm going to put a grub out
8 in front of the trout.

9 MR. SHEBELSKIE: I don't think that's the
10 paradigm. I don't think anybody thought that this
11 process ought to be sort of a "gotcha" thing, that if,
12 in fact, the privilege logs were made in good faith,
13 the privilege determinations are made in good faith,
14 and there was an innocent mistake made, that that
15 shouldn't be a per se preclusion. That's all.

16 JUDGE MOORE: See how jaded we become
17 presiding over these proceedings over the years?

18 (Laughter.)

19 JUDGE MOORE: Staff, do you agree with DOE
20 that there should be an opportunity for multiple bites
21 at the apple?

22 MR. SMITH: We don't see it so much as
23 multiple bites at the apple as much as Mr. Shebelskie
24 pointed out, potential good faith mistakes that
25 weren't identified the first time through, but if we

1 are aware of this requirement in the case management
2 order, we will be able to take steps to insure that we
3 do identify that.

4 JUDGE MOORE: Nevada?

5 MR. FITZPATRICK: I concur. I mean, life
6 isn't perfect, and if someone named Irwin, you know,
7 wrote an E-mail to someone, someone on the team might
8 consider it attorney-client privilege. It turns out
9 it's a different Irwin. It's not Don. It's Bill
10 Irwin, and so we say, "Well, then turn it over."

11 And they say, "Well, now that you brought it
12 up, Bill Irwin was, you know," whatever, you know, and
13 it's a different privilege.

14 I mean that would be correcting a mistake.
15 That wouldn't be bites at the apple, I don't think.
16 That was the intent of the parties.

17 JUDGE KARLIN: On that point I think we're
18 talking about page 2 of your all's proposed case
19 management order, Subparagraph 2(c), the last
20 sentence, and I think our concern is articulated here.
21 We don't want a lot of bites at the apple.

22 Maybe we might end up incorporating a
23 standard not too different from what you did for
24 inadvertently produces, which is a different issue
25 we'll get into, which is upon a showing of good faith

1 perhaps would allow a party to assert an additional
2 privilege.

3 But I mean our contemplation or one
4 contemplation is that we don't look at the text of the
5 document. We look at the privilege log and what you
6 all have submitted in challenging that, and we rule,
7 and we don't go any further than that, and rather than
8 reading the text of 100,000 or 30,000 documents.

9 JUDGE MOORE: So isn't the way to convey that
10 that you must get the privilege right in the vast
11 majority of cases live with the consequences of
12 getting it wrong with the possibility of coming in to
13 demonstrate inadvertent a good faith mistake.

14 MR. SHEBELSKIE: That notion, yes, Your
15 Honor.

16 JUDGE MOORE: Let's get to the most difficult
17 question of redaction. Your proposal indicates that
18 in turning over redacted copy to the requester it can
19 be a paper copy. Now, the Commission has gone to
20 great time and expense to design and develop the LSN,
21 which was a system that was intended to speed
22 dramatically through having electronic discovery
23 process document discovery.

24 And frankly, speaking only for myself, I'm at
25 wit's end to understand why any paper should enter

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1 into this process. So in that regard, can DOE provide
2 redacted copies of electronic documents that show
3 character for character redaction instead of paper.

4 MR. SHEBELSKIE: Can it technologically?
5 Yes, but there are other issues related to that.

6 JUDGE MOORE: Quickly, what are the issues?

7 MR. SHEBELSKIE: Let me understand. You say
8 character for character redaction.

9 JUDGE MOORE: In other words, the same way as
10 if you do it manually, you take a magic marker and you
11 black it out; then you Xerox that so that there's no
12 bleed; and you turn over the Xerox copy.

13 That black magic marker blots out areas that
14 have been redacted. A character for character
15 redaction should show the areas that's been redacted, but
16 doesn't show what was redacted.

17 MR. SHEBELSKIE: So a nonredacted text
18 doesn't bleed indistinguishably to the next section?

19 JUDGE MOORE: As opposed to it all gets
20 crunched back together without knowing what was
21 redacted, and one would never know whether DOE had not
22 a clue about grammar or whether, in fact, there was a
23 document or a redaction.

24 MR. SHEBELSKIE: Right. I believe, Judge
25 Moore, that the recent guidance issued by the

1 Administrator's Office on redacted documents addresses
2 that and provides the electronic specifications to
3 accomplish what you're describing there.

4 JUDGE MOORE: And so you said you had issues.
5 What are the issues?

6 MR. SHEBELSKIE: The issue is timing. In
7 other words, let's say the day after we certified the
8 state says, "All right," or any participant gets this
9 request. "We want 5,000 of these redacted documents.
10 We want them in redacted form."

11 To create the electronic image of the
12 electronic version I suspect we'll undoubtedly take
13 more than ten days.

14 JUDGE MOORE: Okay, but as far as timing, is
15 not the amount of work involved and hence the time and
16 labor the same whether you do it manually or
17 electronically?

18 MR. SHEBELSKIE: Actually, No, Your Honor.
19 I wouldn't say so. In other words, if I had a
20 document in front of me, a paper document, I could
21 make the redaction like this. I could make a
22 photocopy of it. I could give it to the requested
23 participant promptly. I then have to give it over to
24 the IT people to create the electronic OCR text, the
25 imaging of it, all the manicuring of it. The two --

1 JUDGE MOORE: But that same process, if not
2 you, someone who might have the IT capability can do
3 all of that electronically the same time and the
4 amount of time with the correct redaction software
5 that you can do it manually, can they not?

6 MR. SHEBELSKIE: I think identifying -- in
7 other words, if you've got a request in that said, "We
8 want these ten documents in redacted form," then the
9 IT group has to go and grab those ten documents,
10 transmit it to the lawyers who are going to do the
11 redaction. I can go to IT people who can describe
12 these processes in more detail, but actually I think
13 it is much more cumbersome to bundle up that
14 information, send it to the lawyer system. They do
15 the electronic redaction and it goes back.

16 JUDGE MOORE: So it's your position that the
17 time and labor involved to do it manually is less than
18 the time and labor involved to do it electronically?

19 MR. SHEBELSKIE: Yes, with the added point
20 that we can get the paper redacted versions in the
21 interim.

22 If it took us more than the ten days, we
23 could get the paper ones done in that scenario.

24 JUDGE MOORE: Well, before we talk about the
25 ramifications of that, Mr. Graser, I would like you as

1 an IT expert to tell me if in your opinion with an
2 electronic database whether electronic redaction takes
3 more time and labor than manual redaction.

4 MR. GRASER: It depends.

5 (Laughter.)

6 JUDGE MOORE: I thought I was asking an IT
7 specialist, not a lawyer.

8 MR. GRASER: There are a lot of elements to
9 it. The immediacy and the availability of the
10 original electronic document and if, in fact, it's
11 that far removed from the person doing the redaction,
12 then there is time and logistics associated with that.

13 JUDGE MOORE: But aren't those same time and
14 logistics getting the paper copy? Because it's in
15 electronic form. It has got to be transferred into a
16 paper copy that then all of those other steps have to
17 be taken.

18 MR. GRASER: Yes.

19 JUDGE KARLIN: Well, why is that not a wash?

20 MR. GRASER: There are other factors as well.
21 If you are going to black out a Social Security
22 number, that could be done relatively quickly in a
23 paper mode, and pulling up the image files, depending
24 on the speeds of the system, the size of the files, it
25 could actually be quicker to do it on the piece of

1 paper.

2 I mean there are a lot of extenuating
3 circumstances, and I would hesitate to just off the
4 top of my head say they -- a blanket statement could
5 be made. It depends if you are dealing with PDF
6 documents versus TIFF images. It depends on how the
7 documents are structured going --

8 JUDGE MOORE: I understand.

9 MR. GRASER: Too many factors to make a
10 blanket statement, sir.

11 JUDGE MOORE: It's the ramifications of using
12 paper. Six months, which is the period in which the
13 Commission has decreed the document discovery must be
14 completed. If the document holder turns over in
15 response to document requests very large numbers of
16 paper documents, we're right back to the old quill and
17 parchment approach to document discovery.

18 The six month period presumably was set by
19 the Commission recognizing that an electronic document
20 database could be done at a much greater speed.
21 Assuming that the Commission is acting reasonably, as
22 we must, how can you put this shoe into this very
23 tight fitting or the foot into this very tight fitting
24 shoe if there's large amounts of paper that a party
25 can't search with an electronic search engine and they

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1 have to go back to the old fashioned way.

2 It seems to me that there's no way to honor
3 the six month period of time in which all of this must
4 be accomplished and allow large amounts of paper in
5 response to header only document requests.

6 MR. SHEBELSKIE: Your Honor, I would say two
7 observations in response to that. The first is I
8 don't believe in context that we are talking about a
9 potential group of a large number of documents. From
10 the DOE's perspective, all those 70,000 privacy
11 documents we're prepared to turn over in full text
12 under a protective order so that there won't be this
13 issue of having to redact those, delay for redaction
14 purposes.

15 I really think that the redaction issue comes
16 into play with the deliberative process documents
17 here. We're sort of talking in the upper bounds now
18 of that entire group of in the neighborhood of 4,000
19 documents, and I really think that number will come
20 down, and not all of those will be subject to
21 appropriate redaction.

22 So I think if you're talking -- 4,000 though
23 is an upper bounds in the context of DOE's production.

24 JUDGE MOORE: How many pages?

25 MR. SHEBELSKIE: You know, Your Honor, I

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1 don't have that count available. I'm sorry. But
2 we're talking about 4,000 documents out of a
3 collection of 3.5 million. If it took us some 30 to
4 45 days to put out on the LSN redacted images of that
5 group of documentation, there's plenty of other
6 documents out there to occupy the parties for those
7 30, 45 days, and if the requester has a burning desire
8 to look at those redacted copies before we roll them
9 out on the LSN, we're willing to make them available
10 and pay for copies.

11 JUDGE MOORE: Well, let's hear from Nevada
12 quickly in response.

13 MR. FITZPATRICK: First of all, we agree that
14 it goes back to the old fashioned way. Nevada can't
15 be looked at as some monolithic one thing. Nevada
16 means there's a delivery to an attorney of box-fulls
17 of documents. The people who really need the
18 documents are a team of expert consultants from
19 England and various parts, 30 probably people.

20 That would assume that I would read those
21 documents, and I would know just what each
22 participant --

23 JUDGE MOORE: Let's cut to the quick. Are
24 you in agreement that it's very small subset of four
25 or 5,000 documents?

1 MR. FITZPATRICK: I don't understand that
2 it's that small. For instance, they didn't mention
3 the litigation work product category where documents
4 maybe in part discoverable and in part not. That
5 could be redactions.

6 But there was a presumption about the
7 redaction, the time it takes for redaction, that I did
8 not understand before when it was discussed, and that
9 was that the clump of documents to be redacted would
10 have to be returned to counsel to conduct that
11 process, and what I don't understand about that is at
12 the time of certification, it has to be known; in
13 other words, to put something on the header that says
14 this is one of those animals that's going to be a
15 redactable one.

16 Who has read the document? Who has decided
17 this is the part that's redactable and this is the
18 part that's not? Why is it as long as the work is
19 going to be done, the eyes are going to read a
20 physical document, why isn't that decision converted
21 into an act, whether it's a yellow highlighter that
22 will later turn into a redaction?

23 But to suggest that they'll all be returned
24 again for that decision a second time after they've
25 been put up on the LSN as to be redacted --

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1 JUDGE MOORE: Well, I see a very simple
2 solution that assumes you're right, that there is a
3 small subset. You're still some months away from
4 certification. Certainly the most practical answer to
5 this is that that subset of documents is tackled
6 immediately so that this doesn't become a problem for
7 getting the electronic redactions done.

8 JUDGE KARLIN: But I don't think that's
9 necessarily as easy a solution as suggested here
10 because we just talked about the 70,000 documents that
11 are privacy, I guess, and if people ask or make a
12 request for documents that cover there, they're going
13 to have to produce them, and they may produce redacted
14 versions.

15 JUDGE MOORE: I'm sorry. I thought I
16 understood that those could be done in short order.

17 MR. SHEBELSKIE: The 70,000 documents, we
18 have electronic images of the full text of those
19 documents. We will produce them in full text under
20 protective order, and --

21 JUDGE MOORE: Electronically.

22 MR. SHEBELSKIE: Electronically and in a
23 searchable format, and we can turn that over in
24 whatever that time period was, ten days.

25 JUDGE KARLIN: Right, but our question, which

1 I think is Number 10, which was still on, provide a
2 full text under protective order and provide a
3 redacted version. And so you've still got to produce
4 the 70,000 or whatever it is in a redacted version.

5 MR. SHEBELSKIE: Unless we were going to go
6 with that approach, yes.

7 JUDGE MOORE: Mr. Graser.

8 MR. GRASER: Yes. I would just like to
9 clarify something that may facilitate the discussion
10 or it may just make it more confused.

11 JUDGE MOORE: Only the former.

12 MR. GRASER: Subpart J requires a
13 bibliographic pattern and text. The only time it
14 requires an image be made available in the LSN is
15 where the text is not susceptible to being used, such
16 as in the case of images and diagrams and so forth.

17 In the old days, in the olden days of
18 litigation support when you were doing character to
19 character elimination of text from a text file, it's
20 a relatively simple matter to put in a bracket "text
21 deleted" or "text sanitizes" or you know, "figure
22 removed" or "formula removed," put those in square
23 brackets, and in the old days there were cataloguing
24 mechanisms to clean up text, if you will, to make a
25 sanitized version or a text searchable version of the

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1 full text available.

2 So there may be some situations where turning
3 it around doesn't involve having to go through reams
4 of image materials.

5 JUDGE MOORE: Because it's already --

6 MR. GRASER: Initially the text is already
7 there. It is at least theoretically available to you
8 if you've already got an image version of the
9 document.

10 JUDGE MOORE: And your answers to our
11 inquiries, was that a distinction that you took into
12 account?

13 MR. SHEBELSKIE: Yeah, I think I would want
14 my IT support personnel to respond to this because I'm
15 quickly going out of my element here, in all honesty.

16 Let me comment though on the process side.
17 If what we were talking about is taking a group with
18 an upper bounds of 4,000 documents that are sort of
19 still in review for deliberative process and preparing
20 redactions, marking those up for redactions, that's a
21 much more manageable group of numbers.

22 If we're talking, however, about even though
23 we provide 70,000 documents under a protective order
24 in full text, additionally redacting each and every
25 one of those irrespective of the participants' views

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1 of the relevance of them, that really is a very
2 expensive and time consuming process, coming very late
3 in the game.

4 JUDGE MOORE: Well, the corollary is that if
5 it's not turned over electronically, then the time it
6 takes to deal with it is even longer than the time it
7 takes for you to do the translation.

8 MR. SHEBELSKIE: Well, let me clarify. When
9 we turn over the 70,000, they will be in electronic
10 searchable format.

11 JUDGE MOORE: But you turn over the paper.
12 There's no searchable format except the old fashioned
13 way, whereas if you turn -- and there's no way to do
14 it without the redactions being done by you -- you
15 turn it over electronically and they can throw it into
16 a system that even if it's not yet on the LSN, they
17 can throw it into a system that makes it searchable,
18 and then they can use that.

19 That's not available if you turn it over as
20 image versions on -- I'm sorry -- with paper images.
21 And so all they have available are papers that have to
22 be gone through.

23 MR. SHEBELSKIE: But what we're talking about
24 here in this actual context is a group of a couple
25 thousand documents for a short period of time because

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1 of that 30 to 45 days it takes to roll these things
2 out on the LSN.

3 JUDGE MOORE: Okay. Let's move on.

4 MR. SMITH: If I may add an observation, that
5 the focus on six months may not be particularly
6 appropriate because the pre-license application phase
7 runs until a license application is actually docketed,
8 which counts in a three-month acceptance review, which
9 expands the time for this discovery phase that you
10 were talking about.

11 JUDGE MOORE: That gets into other issues,
12 but at some point this monstrous application of
13 varying lengths, here we've heard 5,000 and I've heard
14 numbers as high as 10,000 pages that forms the crux of
15 contentions, at some point in this process that has to
16 be mastered, and that's the period that you're talking
17 about.

18 By bleeding the document discovery process
19 into that, you complicate the ability to deal with
20 that massive application, the down side to ignoring
21 this six month period.

22 A couple other questions. If we require
23 redacted documents in electronic form, how should they
24 be delivered? Because now the sensitive information
25 is presumably gone.

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1 So is there any reason that it can't be
2 transmitted electronically to a person over the Net,
3 for example, with whatever layers of security the
4 parties believe is appropriate, or is that something
5 we would have to prescribe? Staff?

6 (Pause in proceedings.)

7 JUDGE MOORE: Well, let's move on. DOE?
8 We'll come back to the staff.

9 MR. SMITH: Excluding safeguards information.

10 JUDGE MOORE: Oh, everything today is
11 excluding safeguards with the exception of the
12 schedule.

13 MR. SMITH: We think that would be an
14 acceptable method of transmission.

15 JUDGE MOORE: DOE.

16 MR. SHEBELSKIE: That's probably acceptable.
17 The parties also thought that just putting them on a
18 CD-ROM would work.

19 JUDGE MOORE: Nevada?

20 MR. FITZPATRICK: Yeah, I thought that's what
21 we -- under LSN Guideline 14 that's been recently
22 amended, it provides for treating a redacted document
23 as a separate document electronically provided. So I
24 assume that's what we --

25 MR. SMITH: And I might add depending on the

1 participant, there may be limits to the size of
2 documents that can actually be sent electronically.
3 So we may have to deal with that in a certain way.

4 JUDGE MOORE: If we don't set six time lines
5 for these various activities, 30 days, 45, 60, 90,
6 whatever it is, and we use terms like "reasonable
7 time," let's talk about a couple parts of your
8 proposal.

9 For example, in 4(a)(2), you talk about on a
10 showing of good cause moving in sort of a reasonable
11 cutoff date on privilege challenges. What are the
12 factors that go into a good cause determination? The
13 size of the document collection that is claimed to be
14 privileged that parties are wrestling with, is that a
15 relevant factor?

16 MR. SHEBELSKIE: That would be a relevant
17 factor. On that point, Your Honor, I think that
18 point, however, is tied up with another aspect of the
19 order. The state did not want the ten day rule for
20 filing motions necessarily to be triggered by a
21 party's certification.

22 JUDGE MOORE: We understand.

23 MR. SHEBELSKIE: As a necessary consequence
24 of that, however, we thought, well, if you're not
25 going to start the clock when we certify, there ought

1 to be some mechanism whereby though the clock does
2 stop eventually. So that if you've been sitting on
3 these documents for six months and not making
4 privilege challenges, suddenly don't come in on the
5 180th day and say, "Oh, wait a minute, Board. We have
6 a bunch of privileges challenges now and we want you
7 to delay things," so there had to be some mechanism to
8 provide a reasonable accommodation for the interest of
9 the overall schedule.

10 JUDGE MOORE: And is there a consensus among
11 you as to a date certain as to when that cutoff should
12 be?

13 MR. SHEBELSKIE: We're glad to say within six
14 months of our certification. I mean if we have to do
15 all of our work in six months, then our opponent
16 should as well.

17 JUDGE MOORE: Nevada?

18 MR. FITZPATRICK: We have limited resources
19 to review three and a half million documents. That's
20 not pages. That's documents.

21 JUDGE MOORE: Well, it should be limited
22 resources to review one third less because for a year
23 now or close to a year some of that has been out
24 there.

25 JUDGE KARLIN: Well, it's not even that.

1 It's the documents for which privilege is claimed. So
2 our universe of about 130,000 --

3 MR. FITZPATRICK: Well, I mean, the safeguard
4 that we put in was instead of putting a time limit, in
5 other words, certainly it should be made within a
6 reasonable time of discovery of a problem document,
7 but the tradeoff, as Mike started to say, that was
8 made was if rather late assertion of complaint about
9 a document is made, it won't then be used as a basis
10 to delay some other activity in the case.

11 JUDGE MOORE: Well, I think the concern is on
12 five months, three weeks somebody challenges 30,000 as
13 opposed to someone who has been regularly making the
14 challenges, and there's a similar number being claimed
15 at five months, three weeks that have been claimed
16 from one month, one week.

17 MR. FITZPATRICK: If that's the concern, then
18 a remedy would certainly be to require regular
19 periodic assertions of any claims and not let them
20 stack up. In other words, if somebody said nothing,
21 made no complaints for six months and then made
22 30,000, that wouldn't be acceptable.

23 JUDGE MOORE: Well, we can get into that when
24 the question about the discovery plan.

25 JUDGE KARLIN: But I do want to say, I mean,

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1 this Board or at least I'm speaking for myself, I
2 don't think we want to encourage or impose a
3 requirement that within ten days of the certification,
4 DOE's certification, the state or anybody else has to
5 immediately challenge every one of the 130,000 claimed
6 privileges in order to preserve it.

7 So obviously we want to avoid being inundated
8 at the outset, but we don't want to have somebody sit
9 in the weeds and sand bag it at the end either, and I
10 see where you all have tried to grapple with that
11 tension in this page 12, Section what, 4(a)(1) and
12 (2), and we're trying to work on that and see how we
13 can do that.

14 And I think some of our questions dealing
15 with discovery plans or some other case management
16 approach to prioritize the issues and plan them out
17 might help us do that.

18 MR. CYNKAR: Your Honor, could I add one
19 thing to what my partner said?

20 We're not interested in making any frivolous
21 challenges or even a lot of challenges. We may choose
22 not to challenge documents that we think are
23 improperly privileged, but we think that during the
24 course of the administrative litigation we don't know
25 what document we're going to be interested in until we

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1 see what we need for a contention and until that
2 contention is challenged.

3 There may be points at every step in the
4 litigation that we say, "Okay. Here's a document that
5 we want to use and now we do want to challenge it,"
6 whereas, I'm sure that the Board wouldn't expect us to
7 challenge every conceivable document. We don't want
8 to. We only want to challenge documents that we think
9 are a necessary predicate for our litigation.

10 JUDGE MOORE: What you're saying is that
11 those challenges in your view might extend beyond the
12 period of six months.

13 MR. CYNKAR: As they do in any normal civil
14 litigation. Until the discovery --

15 JUDGE MOORE: Normal in these regulations,
16 I'm afraid, is an oxymoron.

17 MR. CYNKAR: But normally there's a cutoff
18 date for all discovery in any civil litigation, and
19 certainly it's not six months from --

20 JUDGE MOORE: Let's have the staff and the
21 potential applicant respond to that. Staff, do you
22 have a problem with allowing privilege claims,
23 challenges to claims of privilege to be made beyond
24 the period of document discovery on the LSN?

25 MR. SMITH: Well, looking at Appendix D,

1 there is an end to discovery listed there. It's day
2 608, "discovery complete." So --

3 JUDGE MOORE: You're looking at Appendix D of
4 Subpart J?

5 MR. SMITH: Yes, that's correct.

6 JUDGE MOORE: What page?

7 MR. SMITH: Part 2, Appendix, and if you're
8 looking in the 2005 CFRs on page 141.

9 JUDGE MOORE: And so that's well beyond the
10 six month period for document discovery on the LSN.

11 MR. SMITH: Correct, but there's additional
12 discovery that starts on day 100.

13 JUDGE MOORE: But so you don't have a problem
14 with challenges to claims of privilege on
15 bibliographic header only documents extending beyond
16 six months after the certification of the document
17 collections?

18 MR. SMITH: So long as there's a relief valve
19 of sorts which we've tried to accomplish in A(2),
20 which --

21 JUDGE MOORE: I understand.

22 DOE?

23 MR. SHEBELSKIE: Yes, Your Honor. The number
24 of documents that we have that we're not going to
25 produce under a protective order is in the

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1 neighborhood of 30,000. Now, that may seem like a lot
2 in some instances, but it's less than one percent of
3 our collection.

4 I think as Your Honor mentioned earlier
5 today, the Commission's expectations is that all of
6 the parties' counsel will be working very hard. We
7 think that a presumption that most of those should be
8 vetted within six months is appropriate. If there's
9 some appropriate good cause like it was made later,
10 that's fine, but we think the sort of rule to row
11 should be six months as the greater than plenty for
12 this modest amount of documents in context.

13 JUDGE MOORE: But why force something that
14 might not need to happen at all?

15 MR. SHEBELSKIE: Right. Because there are
16 resource issues, Your Honor. You know, the department
17 certainly would like some, for lack of a better term,
18 closure or certainty about whether we are beyond the
19 point of privilege challenges on certain documents.
20 So we have IT resources that can be deployed to other
21 purposes of getting documents together for litigation
22 purposes, for rediscovery of other parties. You know,
23 there will be many concurrent tasks at this stage open
24 end flaps out there indefinitely.

25 JUDGE MOORE: Well, it's not indefinite. It

1 certain would draw to a close when all of discovery
2 ceases.

3 MR. SHEBELSKIE: Well, the six months we like
4 as a presumption absent good cause. That's our view.
5 Again, I don't think we said ironclad, shut the door.

6 JUDGE MOORE: Well, then a good cause
7 determination was until X, Y, and Z happened I didn't
8 know that I would be interested in this document.
9 That generally isn't good cause.

10 MR. SHEBELSKIE: Yes, that's right. Well, I
11 think in this kind of context it is. In other words,
12 Your Honor, there are going to be issues. I know
13 we're going to get onto this about generic issues that
14 will apply to classes of documents. We don't want
15 this sort of stuff hanging out there for months on
16 end.

17 JUDGE MOORE: Okay. I have one last question
18 that deals with your proposal in Section 2(g), where
19 the proposal provides that an offer -- that after
20 providing a bibliographic header for a document and
21 claiming a document is privileged, upon a request for
22 a document, a party can then claim that the document
23 is not documentary material at all and not produce a
24 bibliographic header or produce the document.

25 Isn't after you certify the collection, isn't

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1 it too late to be claiming that it's not documentary
2 material? Once it's on and the collection is
3 certified, it's definitionally documentary material,
4 and it's to be treated as every other piece of
5 documentary material. If it's privileged, you claim
6 the privilege. It can be disputed. If it's not
7 privileged, it gets turned over.

8 MR. SHEBELSKIE: Your Honor, I welcome the
9 chance to clarify this because this was not intended
10 to address the scenario where post certification a
11 party decides to take a document off the LSN. Rather,
12 it goes to this issue.

13 As the state was able to point out and had
14 examples from documents in the department's collection
15 that were loaded onto the servers last year, there
16 were certain documents that are just, frankly,
17 irrelevant. I mean, they put into the record an
18 example of an E-mail concerning the invitation to a
19 pool party.

20 Now, we suggested to the state certification
21 was struck. We're not certified. We could if we
22 wanted to remove that header from the LSN because
23 we're not certified yet, but we asked the state do you
24 want us to take the header off or do you want us to
25 leave that header on there even though we determined

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1 it's not relevant?

2 Their request was for us to leave it on the
3 LSN for informational purposes of their own. Just
4 note in the header that it's one of these ones from
5 last summer that we've since deemed to be irrelevant,
6 and that's the only intended application for this,
7 Your Honor.

8 JUDGE MOORE: That was the only thing that
9 provision was designed to --

10 MR. SHEBELSKIE: Yes, sir.

11 JUDGE MOORE: -- cover, not any new documents
12 --

13 MR. SHEBELSKIE: Correct.

14 JUDGE MOORE: -- for which there's a
15 bibliographic header only. When you reexamine upon
16 request your claim or privilege, you say, "Well, it's
17 not documentary material."

18 MR. SHEBELSKIE: Correct.

19 JUDGE MOORE: It wasn't intended to cover
20 that.

21 MR. SHEBELSKIE: It was not intended to cover
22 that.

23 JUDGE MOORE: Nevada, are you willing to live
24 by that representation?

25 MR. FITZPATRICK: Yeah. I mean, if we're

1 talking about the removal of a document from the whole
2 system that was on there at one point, I mean, if it
3 had --

4 JUDGE MOORE: Well, I may have misread, but
5 my reading of Section 2(g) didn't suggest it was so
6 limited. It suggests that any document that has a
7 bibliographic header when the request for the document
8 is made, that the owner of the document can then say,
9 "Oops, that's not documentary material," and not have
10 to defend that document, defend a privilege claim for
11 that document. They can just essentially say, "No,
12 it's not documentary material."

13 Now, whether that header is removed or not is
14 another issue, but I'm informed that it intended only
15 to cover the situation of the old documents that are
16 currently out there, publicly available.

17 MR. FITZPATRICK: I understood it to refer to
18 erroneously included documents that a party decided
19 this isn't really necessary, and my reaction to that
20 if that's what their meaning was, is that any party
21 can choose to include any document it wants on its LSN
22 database, and so if there was a disagreement about
23 push and pull, you put it on yours.

24 JUDGE MOORE: Okay. So what's the harm in
25 just not having a system that covers it if it's not

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1 documentary material and it's sought? If you've
2 claimed a privilege for it, you have to defend it or
3 if you don't want to defend a privilege claim, you
4 just turn it over.

5 MR. SHEBELSKIE: Well, that was the point,
6 Your Honor. If we have from this last summer
7 collection documents that aren't documentary material
8 but headers had been created for them inadvertently
9 last year in any event, I think the parties recognized
10 that there was no need even if they're privileged to
11 create a privilege log for them because they just
12 simply weren't relevant, and indeed, under the
13 regulations we could have taken them off.

14 JUDGE MOORE: -- is made, you just turn it
15 over, and the game is over and nobody has to fight the
16 dispute.

17 MR. SHEBELSKIE: Well, actually, Your Honor,
18 what I would say instead is if there were documents
19 from last year's collection that we provided, that we
20 got the headers for that we have since determined are
21 irrelevant, I think the appropriate thing to do would
22 just be to remove those from the LSN and not have the
23 system at all.

24 JUDGE KARLIN: I agree. I think this
25 provision doesn't even belong here. If it's not

1 documentary material, it shouldn't be on the LSN at
2 all, and this clause should just be deleted, you
3 know.

4 JUDGE MOORE: Question 11.

5 MR. FITZPATRICK: Your Honor, can I just --
6 something you just mentioned we were talking about a
7 moment ago, which was the issue of when to raise
8 challenges to documents, and Mr. Shebelskie addressed
9 it and I'd just respond that, you know, if there was
10 a short period of time, I mean, the six months was
11 intended to be a head start on discovery. As you've
12 pointed out and the regs. provide, the close of
13 discovery in this proceeding comes 690 days after the
14 Federal Register notice of hearing, and so there's an
15 enormously long period of what you call regular, old
16 fashioned discovery. You know, this is a preview.
17 this is an early thing. This was not intended to
18 foreclose anything at the end of six months. There's
19 nothing in the regs about that.

20 If we were to put on some sort of a system
21 where we were required to make a challenge to a
22 privileged document by the end of six months, our hand
23 would be forced to challenge many documents that we
24 might possibly want and not know it.

25 JUDGE MOORE: DOE says that's preferable to

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1 a cut of 1,000 deaths I guess would be the way to put
2 it.

3 MR. FITZPATRICK: But, see, I mean, we're
4 going to take Steve Groken's (phonetic) deposition
5 four years from now, and we won't know until we gather
6 the documents relevant to a person's deposition what
7 are the relevant documents, and if one of them,
8 pursuant to search turns out to say, "Oh, this is
9 privileged," --

10 JUDGE MOORE: We understand the parties'
11 positions. Let's move on to --

12 MR. FITZPATRICK: One other point. I thought
13 I heard you suggesting something earlier, and if I did
14 it might be worth pursuing, and that was some of these
15 categories of protected, so-called 140,000. Some of
16 the categories maybe should be addressed earlier than
17 certification. I think our hypersensitivity, which
18 you have detected, to suggestions that redacted
19 documents be made after certification and, no, doggone
20 it, they should be made -- there's this very limited
21 six month period for three and a half million
22 documents. Any dividing of days into documents, it's
23 a lot.

24 And so you know, last year at this time,
25 pursuant to the agreement with, you know, Mr.

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1 Graser --

2 JUDGE MOORE: We understand.

3 MR. FITZPATRICK: -- there wasn't a single
4 document to reach June 30.

5 JUDGE MOORE: Has Nevada ever made a request
6 of DOE on those publicly available documents, any of
7 those header only documents out there for the document
8 since last June 30th?

9 MR. FITZPATRICK: Yeah, we asked for the
10 draft license application, and we were told no.

11 JUDGE MOORE: But that's not a header only
12 document on the LSN. For any header only document on
13 the currently publicly available --

14 MR. FITZPATRICK: There is no LSN at this
15 time. It was vacated, and as a matter of fact, I did
16 a search a week ago for, quote, unquote, seismic
17 analysis. What could be more scientific?

18 Eighty-three of the first 150 documents were
19 header only. Now, I don't know what the privilege is.
20 Here we are a year down the road from that, and you
21 know, --

22 JUDGE KARLIN: Well, let me go back to that.
23 I think our question or, I mean, one of our
24 curiosities is DOE has certified last year a million
25 documents on the LSN, a number of header only

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1 documents on the LSN. We issued a ruling last year
2 striking that certification saying that it was
3 inadequate, in various respect not complete, not on
4 the LSN. Some of the documents hadn't been spidered,
5 et cetera.

6 Is there anything legally that's preventing
7 any party at this moment to file a request under
8 Section 1004 or 1018 for documents that are on the
9 LSN, header only, that DOE has got now?

10 MR. FITZPATRICK: Yes.

11 JUDGE KARLIN: Because there are documents on
12 the LSN.

13 MR. FITZPATRICK: There are no documents on -
14 -

15 JUDGE KARLIN: No, there are documents.

16 MR. FITZPATRICK: Well, there is no LSN
17 though. There is no certified LSN, and as Mr.
18 Shebelskie said three minutes ago, they reserve their
19 right to withdrawn documents --

20 JUDGE KARLIN: Well, you seem to be
21 artificially shortening the period of time you might
22 have if you would assert a claim for some documents
23 from DOE today. Tomorrow under 1004 or 1018 we would
24 then have an issue as to whether or not you could
25 properly pursue that or not.

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1 But no one has done that. So we're all
2 waiting once again.

3 MR. FITZPATRICK: Well, we've sent lots of
4 FOIA requests, but our reluctance to send a request
5 under 1018 is the definition of the period of time
6 when requests are appropriate under 1018.

7 Our understanding runs from certification
8 until docketing, and we're not there. So we have no
9 rights under 1018 that we know of. We could send a
10 request for admissions and do some other things --

11 JUDGE KARLIN: That's the question which --

12 MR. FITZPATRICK: -- which I don't think we
13 can do.

14 JUDGE KARLIN: -- we're asking. That's the
15 question we're asking.

16 MR. SHEBELSKIE: I agree with the state's
17 view of the time in which the methods for discovery
18 under 1018 kick in.

19 Let me also add, I think, a very practical
20 point here. As I think the Board can tell from our
21 listing the privilege documents that in very short
22 order we are suddenly -- Administrators are continuing
23 to call our documents -- you know, 98 percent of these
24 documents are suddenly going to become available in
25 full text here in the summer.

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1 And I think that we moot this issue.

2 JUDGE MOORE: Let's move on to Question 11.
3 In addition to waiver of the privilege, what other
4 options are available for dealing with an untimely,
5 incomplete, or insufficient privilege log?

6 Staff?

7 MR. SMITH: Pursuant to our proposed case
8 management order, the first step would be to invoke
9 the informal dispute resolution process that we have
10 laid out in there to seek the --

11 JUDGE MOORE: Well, as you can probably
12 gather from the order, we're not fans of your informal
13 dispute resolution. We think that's a time consuming
14 step that will result in few, if any, positive
15 results.

16 MR. SMITH: Okay. Beyond that, any sanction
17 should be proportional to the inadequacy of the
18 privilege log. For example, for a modest violation,
19 the Board could order a party to supplement its
20 privilege log or for a more serious violation, you
21 could waive the privilege or disqualify an attorney or
22 a firm or even strip a potential party of its
23 potential party status.

24 And then beyond that, since privilege logs
25 are part of document discovery, you could impose any

1 of the items in 10 CFR 210.18(c)(1) that limit or
2 regulate how discovery is obtained.

3 JUDGE MOORE: DOE?

4 MR. SHEBELSKIE: We agree with the staff that
5 there is a range of options available to the Board.
6 In the first instance, we think the appropriate remedy
7 ought to be an order to correct the specific
8 deficiencies that have been identified.

9 If --

10 JUDGE KARLIN: Doesn't that get us back to
11 the second bite at the apple issue? I mean, why don't
12 we just say we want a privilege log which establishes
13 a prima facie case? If it fails to do that, you'd
14 lose the privilege, and that document is produced.

15 MR. SHEBELSKIE: I think it all depends on
16 what the incomplete or insufficiency is. That's
17 obviously one of the options, yes. I think it
18 ultimately will be to tailor it to the facts and
19 circumstances.

20 For example, Your Honors, I could imagine
21 that if Nevada, for example, has insufficiencies or
22 incomplete privilege log, DOE would not be interested
23 in, as a form of relief, delay in the proceeding,
24 although Nevada, on the flip side, may be interested
25 in that.

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1 So I think it will be tailored to what party
2 made the deficiency and what is the nature and degree
3 of the insufficiency?

4 JUDGE MOORE: Nevada?

5 MR. FITZPATRICK: I think we kind of agreed
6 with that. It could range anything from remedy this
7 within so many days if it deals with one or a few
8 documents up to last summer's punishment of
9 decertification and an interim one if it was a
10 systemic problem, but perhaps not rising to the level
11 of warranting decertification.

12 And just hypothetically, of course, if it was
13 DOE's failure, the requirement of NRC to certify 30
14 days and Nevada 890, would be stayed until such time
15 as the problem was fixed.

16 So this is sort of a sliding scale, and it
17 would have to be decided based on the severity.

18 JUDGE MOORE: In normal litigation, speaking
19 only for myself, I would have no disagreement with
20 what you've proposed. This is not normal litigation.
21 The time limits that are being imposed on the parties
22 and on us to get this done are, needless to say
23 unreasonable, but we must live with them.

24 That said, do we not have to recognize that
25 up front and get it right the first time or pay the

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1 consequences for not so doing?

2 MR. SHEBELSKIE: As applied to this specific
3 context, Your Honor, if participants are going to be
4 allowed to mount challenges beyond, say, the six
5 months period and we're not going to have an iron
6 curtain drawn at that point, then I think maybe you
7 can have some more flexibility on what kind of
8 remedies.

9 JUDGE MOORE: Take Exhibit 1 where it has got
10 to be done in six months. This is one bite of the
11 apple, and you lose on the privilege. You didn't make
12 your prima facie case in your privilege log. You turn
13 it over.

14 I see no other way to get this done in six
15 months, very frankly.

16 MR. SHEBELSKIE: I think there should be
17 parity though, that if there's going to be that kind
18 of one bite at the apple up front exacting
19 requirement, then there ought to be equally exacting
20 requirements on the tail end of when these challenges
21 can stop.

22 JUDGE MOORE: Six months.

23 JUDGE KARLIN: Let me mention one thing that
24 may be not apparent, is that the contemplation might
25 be that privilege logs are only provided after a

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1 request for documents is submitted. Party A requests
2 documents from Party B. Party B responds by providing
3 some of those documents and declining to provide the
4 other documents and provides a privilege log in lieu
5 thereof.

6 This plan would be one where the privilege
7 log is not provided once and for all at the outset, at
8 the moment of certification, but is provided in
9 response to specific requests. So they may not all
10 come in at once.

11 MR. SHEBELSKIE: That's right.

12 MR. FITZPATRICK: How do you know how to
13 make a request, Your Honor? How do you know what the
14 identity is of the documents that are out there
15 that --

16 JUDGE MOORE: The bibliographic header on the
17 LSN.

18 JUDGE KARLIN: Let's say I was thinking of
19 formulating a contention based upon problems with
20 Alloy 22. I would submit a request to DOE for all
21 documents related to Alloy 22, header one or full
22 text, and they would then have to respond and give me
23 a privilege log on any ones that they thought were
24 privileged.

25 MR. FITZPATRICK: But my understanding of the

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1 concept of the LSN is that I wouldn't request all
2 documents having to do with Alloy 22.

3 JUDGE MOORE: Just bibliographic headers that
4 have to do with --

5 MR. FITZPATRICK: Nor would I request
6 bibliographic headers. Six months before LA, they
7 would have every one of them either bibliographic
8 header or plus full text on an LSN prior to certifying
9 it under --

10 JUDGE MOORE: That's a given. that's a
11 given. So your request is of DOE, "I want all
12 bibliographic header documents that have the term
13 'Alloy 22' in them."

14 MR. FITZPATRICK: And are not produced in
15 full text, but just biblio header.

16 JUDGE MOORE: If they're full text you go get
17 them yourself.

18 MR. FITZPATRICK: All right. Our effort over
19 the past weeks with NRC and DOE negotiating has been
20 to come up with a methodology to identify at the time
21 of the certification why the documents were privileged
22 so that you all wouldn't be burdened with thousands of
23 quarrels after the fact.

24 You know, if I asked for the documents having
25 to do with seismic analysis, just the first 150, and

1 83 with a bibliographic header and I asked for them
2 and they say, "Well, now we will have to sit down and
3 produce a privilege log with respect to those, well,
4 then we are constantly eating up this six months,
5 eating, eating, eating.

6 We are supposed to have full and fair
7 discovery of all documentary for a full six months,
8 and these steps just eat away at it. That's why the
9 whole premise of this negotiation, whether you like it
10 on bibliographic headers or whether Mr. Graser says it
11 should be done a different way, is that it was
12 consistent with at least disclosing at the time of the
13 certification here are the ones we're not giving you
14 and here's why.

15 JUDGE MOORE: We're not here to reargue the
16 point that you've been arguing all sine lunch. Assume
17 for the rest of the discussion that we do not read the
18 regulations the same way you do and that when DOE
19 certifies their collection they have bibliographic
20 headers with the full text document under it, and they
21 have bibliographic headers that don't have a full text
22 document under it.

23 You are requesting privileged documents.
24 Those are header only documents in various and sundry
25 categories. You make the request. They have a time

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1 certain in which to respond to your request. Either
2 they turn over the documents because they no longer
3 want to pursue the privilege claim.

4 Two, they turn over a redacted version of it,
5 or

6 Three, they turn over nothing and give you a
7 privilege log that prima facie establishes their
8 entitlement to claim the privilege.

9 MR. FITZPATRICK: Now, I'm assuming that
10 before an attorney decided that it would be DOE's
11 decision to put up bibliographic header only because
12 the document was privileged --

13 JUDGE MOORE: Correct.

14 MR. FITZPATRICK: -- or privileged in part,
15 that that same attorney had a reason why. Why was it
16 privileged?

17 So why not put that decision on paper when he
18 made that decision prior to certification instead of
19 some weeks or months later?

20 JUDGE KARLIN: Because there's nothing in the
21 regulations that says DOE must do that or any other
22 party. That's why not. It might be a good idea, but
23 that's not what the regs. say. Can we change the
24 rules now?

25 JUDGE MOORE: In any event, that may be an

1 argument that you may wish to challenge their
2 certification on, it would seem to us, rather than
3 pushing that into privilege log space.

4 Do you have any other questions? I have a
5 couple.

6 In Section 2(d) of the proposal, it states
7 that a party who inadvertently produces a privilege
8 document should be permitted upon a showing of good
9 faith inadvertence to reclaim the document from other
10 participants.

11 My question is: does a party's negligence in
12 erroneously producing a privileged document enter into
13 the determination of good faith inadvertence?

14 Staff?

15 MR. SMITH: I believe that good faith
16 inadvertence is a far cry from negligence.

17 JUDGE MOORE: So it's something different
18 from negligence?

19 MR. SMITH: Yes.

20 JUDGE MOORE: So if it's negligence, it can't
21 be good faith inadvertence?

22 MR. SMITH: Correct.

23 JUDGE MOORE: DOE?

24 MR. SHEBELSKIE: The answer to your question
25 is does negligence bear on the analysis? The answer

1 is yes.

2 JUDGE MOORE: Yes?

3 MR. SHEBELSKIE: Yes.

4 JUDGE MOORE: Are the two mutually exclusive?

5 MR. SHEBELSKIE: No. In other words, you can
6 have under the case law as we understand it -- a party
7 could have an accidental release. I think you get
8 into questions --

9 JUDGE MOORE: It's a good faith inadvertence.

10 MR. SHEBELSKIE: That's right. I mean,
11 someone might call that negligence, but --

12 JUDGE MOORE: If somebody just didn't do
13 their job in screening it --

14 MR. SHEBELSKIE: That's not negligence.

15 JUDGE MOORE: Okay. Nevada?

16 MR. FITZPATRICK: I tend to think that
17 negligence would be the failure to do what a
18 reasonably prudent attorney would do in making the
19 decision, but reasonably prudent attorneys could still
20 make mistakes.

21 If it's a mistake, an inadvertent, it should
22 be forgiven and a second bite, if you will, taken.

23 MR. SHEBELSKIE: Let me give you another
24 example that's real world, I think.

25 JUDGE MOORE: Along those same lines, once

1 the document has been erroneously produced for
2 whatever reason and a recipient has already
3 disseminated it, can it be reclaimed? How wide does
4 the dissemination have to be?

5 Let's assume the obvious case. It's
6 privileged. The claim of privilege was mistakenly
7 overlooked and the document was turned over, and it
8 was immediately disseminated through the wonders of
9 the electronic world, and it's out there.

10 Can it be reclaimed?

11 MR. SHEBELSKIE: Can it be reclaimed at all?

12 Yes.

13 JUDGE MOORE: No, because it's not going to
14 come up until we go to trial when you're claiming it's
15 privilege.

16 MR. SHEBELSKIE: Right.

17 JUDGE MOORE: And the whole world had it.

18 MR. SHEBELSKIE: Right. You're right, Your
19 Honor. If the whole world has it, then I think it's
20 lost. The types of considerations that bring to bear
21 on this, as I've seen them, the case law, is the time
22 it took to discover the inadvertent release. That's
23 a relevant factor. What has happened to the document
24 in the interim.

25 You could imagine, for example, a scenario --

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1 JUDGE MOORE: I understand, but the
2 electronic world is that once it's out in the
3 electronic world, unfortunately, it's out.

4 MR. SHEBELSKIE: For example, your honor, as
5 I understand how the system, the LSN system can work,
6 a party can put a full text document into the LSN on
7 their collection, and you might be able to try whether
8 someone has seen the document, his on the document
9 through a search term.

10 If that were the case and you could show
11 that, you know, it was out there for one week and
12 nobody hit onto the document, then you might say that
13 hasn't been released to the world.

14 JUDGE MOORE: True, but that same document
15 can be transmitted once it is on the LSN through some
16 other electronic media.

17 MR. SHEBELSKIE: Absolutely.

18 JUDGE MOORE: Okay. So in your proposal, why
19 are the first two sentences of Section 2(d) needed?
20 And assuming they are needed, why is not the second
21 sentence redundant of the first?

22 MR. SHEBELSKIE: May I answer that?

23 JUDGE MOORE: Go ahead, DOE.

24 MR. SHEBELSKIE: Yes. The first sentence had
25 its genesis in a request from the state. The state

1 wanted to be able, as we understand it, to produce
2 documents that otherwise might be privileged to save
3 on processing time or whatever. They wanted to be
4 able to put those documents out there even though they
5 might arguably be privileged, as a convenience on them
6 and their schedules, and IT processing side or whether
7 they just wanted to get the information out there in
8 the public.

9 We thought that was a fine goal if that's
10 what their objective was, and we're willing to
11 accommodate it from DOE's stand. We didn't have a
12 concern with that, but we did not want the flip side,
13 however, to be, all right, if a party like the state
14 decides they don't want to assert privilege, and they
15 want this protection of not having a subject matter
16 waiver, that will be their decision to make.

17 We don't want that to be used as a sword
18 against us to say, "All right, DOE. You now have to
19 be compelled to produce your privileged documents
20 because doing so won't be a waiver."

21 JUDGE MOORE: So in your view both of those
22 sentences are necessary. They're not redundant.

23 MR. SHEBELSKIE: Yes, sir.

24 JUDGE MOORE: Let's move on to Question 12.
25 What's the schedule to develop the processes and

1 related timetable for the early identification of
2 significant representative disputes dealing with the
3 fundamental document discovery privileges used?

4 The one that comes to mind is the discussion
5 this morning about whether a document is created --
6 whether the draft application is created for purposes
7 of the technical staff or whether the litigation is
8 the -- it's created for that purpose.

9 Unfortunately, we're not in a position to
10 wrestle with what might be representative groups of
11 cases that are going to highlight these issues that
12 are bound to come up and that are applicable to this
13 whole class. Is there a method or mechanism by which
14 you all can at this point stake out those so that
15 right off the bat, once the collections are certified,
16 those are the ones that come before us that then will
17 have precedence for all of you in making your
18 determinations whether you want to go forward and
19 claim privilege or you want to stand on your
20 privilege.

21 Staff.

22 MR. SMITH: Well, I hesitate to mention it,
23 but when we had discussed this amongst ourselves, we
24 again talked about the proposal we had in our case
25 management letter.

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1 Beyond that, it's difficult for us to
2 identify the disputes at least from the staff's
3 perspective because we don't know the factual
4 circumstances or what privileges may be asserted for
5 these documents, nor am I sure that the parties
6 themselves have completed that process themselves.

7 JUDGE MOORE: We understand all of those, and
8 one of the reasons we're tossing it out is is there a
9 way that this can happen sooner rather than later
10 because it may solve a lot of the problems and a lot
11 of the disputes downstream? It may not be possible.

12 DOE.

13 MR. SHEBELSKIE: Is it possible? Yes, to
14 some degree. I think in our discussions we have been
15 -- there are some concepts that we have obviously been
16 talking about on generic privilege issues, and we
17 think that some of those might be able to be teed up
18 if the state, for example, were interested in filing
19 such a motion based on that generic legal issue, you
20 know, shortly after certification within ten days or
21 whatever.

22 Then you'd have the subsequent question of
23 applying the ruling to specific documents. Many of, I
24 think, privilege challenges will be highly fact
25 dependent on particular documents. There will

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1 certainly be categories of documents that could be
2 subject to a generic privilege challenge.

3 From our perspective, because we do want to
4 make that six month period move along, you know,
5 obviously we're willing to continue to consult with
6 the state --

7 JUDGE MOORE: Well, one of the --

8 MR. SHEBELSKIE: -- to identify those for our
9 post certification period.

10 JUDGE MOORE: It is traditionally done are
11 representative sample, and the parties then must
12 categorize their cases into the type of privilege, and
13 then you put forth a selection of those that you feel
14 are representative of how that privilege is used
15 throughout your collection for that privilege, and we
16 cherry pick from that and decide them.

17 And then one more draconian way is you live
18 or die by the results of that or you get to go back
19 and re-catalogue your privilege claims to make sure
20 that you have properly claimed the privilege and put
21 forth another representative sample.

22 That's common in litigation with massive
23 claims of like kind privileges.

24 MR. SHEBELSKIE: That's certainly a
25 possibility, Your Honor. I think the parties have not

1 discussed that specific concept and how it might be
2 applied here.

3 I think the types of more common issues that
4 would affect classes of documents that the parties
5 have discussed have been like the discussion we had
6 this morning, questions about who is the client, more
7 generic questions like that as opposed to what might
8 be sort of a random sample of attorney-client
9 communication document that says, "Look at them to see
10 whether they're privileged or not."

11 I mean, they may have questions about whether
12 the E-mail system was adequately secure. They haven't
13 raised that, but you know, if that was a generic
14 question, you could kind of address that without the
15 context of a specific document.

16 JUDGE MOORE: Nevada?

17 MR. FITZPATRICK: I think as a general rule,
18 our perception of generic problems will have to come
19 after we see the database and what they claim. There
20 are some exceptions which we've come across in the
21 give-and-take of this management plan discussion and
22 this hearing which could be resolved and hopefully
23 will be beforehand because if they're not, they will
24 be issues later.

25 And that is what may be withheld, if

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1 anything, under employee concern program documents.
2 What is meant by in anticipation of litigation in this
3 context, and can purely scientific documents somehow
4 be mischaracterized as privileged?

5 Those are a couple of issues that I think we
6 perceive those will be a problem if not addressed
7 ahead of the certification.

8 JUDGE KARLIN: That's what we're grappling
9 with. The question would be: should we try to issue
10 an authoritative, binding ruling now on the meaning of
11 "prepared in anticipation of the hearing" as opposed
12 to "prepared for the application," or should we wait
13 and see a document that you present to us that
14 represents and presents that issue?

15 Maybe it's more efficient to rule now, but
16 you know, one contemplation of this is for you all to
17 sit down together perhaps and to come up with a plan
18 of identifying key early generic discovery issues that
19 we could present and brief and resolve quickly even
20 before the certification.

21 Do we have to wait for certification to start
22 sorting some of these out? I guess you're saying no.
23 You didn't think --

24 MR. FITZPATRICK: I'm saying on those two I
25 think it would be prudent to decide them ahead of time

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1 because if a large chunk of those 26,000 AC or work
2 product are work product and they're work product by
3 some engineer or scientist that directed the work of
4 another engineer or scientist, and we may end up
5 arguing that, no, those had to be done for the NRC if
6 Nevada didn't exist.

7 JUDGE KARLIN: Right.

8 MR. FITZPATRICK: And they may say, "No, we
9 think it's privileged."

10 JUDGE KARLIN: And I take it that the staff
11 and the DOE agree with that? I mean --

12 MR. SHEBELSKIE: Well, Judge Karlin --

13 JUDGE KARLIN: You all have briefed, for
14 example, the issue of what is representative work
15 product and we could issue a ruling on that in the
16 next few weeks or days. I think we think that's
17 appropriate to do even though we don't have a specific
18 piece of paper or example of that in front of us.

19 MR. SHEBELSKIE: Well, I think on that
20 particular point though, Your Honor, as our discussion
21 this morning illuminated, that that often is going to
22 be, other than a generic statement of what the
23 standard is, there's no specific documents and fact
24 patterns in front of you of what's in the LSN to make
25 that decision. And so it's a hypothetical decision.

1 Now, we agree that the department would like
2 to get resolution of the appropriate degree of
3 protection and how we go about dealing with these
4 employees concerns, files, documents, because we have
5 to resolve that to make our certification.

6 I think though on other issues, until we
7 certify if we keep having a series of motions from the
8 state on the motion to compel type issues teed up, the
9 landscape will constantly be changing and we won't be
10 able to stabilize our processes you can certify.

11 JUDGE MOORE: Well, as a practical matter, if
12 we issue a tentative case management order that
13 clearly keys you to our thinking on these issues, then
14 if you were to take that on a very short clock and try
15 to negotiate among yourselves using that as the
16 outline and come to something that you can all live
17 with, with things like employee concerns, files, that
18 would then avoid our ruling and the appeal process and
19 who knows when that's going to get resolved and coming
20 back and be eating into this six month time?

21 Does that have any appeal to you as a way to
22 try to resolve some of these, using as the guide that
23 it's best that you all work it out and it's something
24 that you can live with after you incorporate our
25 thinking on how the most efficient, effective way to

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1 do this, knowing that we will displease all of you,
2 and it's better to be partially displeased than
3 totally displeased and you can live with that?

4 Does that have any appeal to you as how we
5 should march forward, or do you want us just to issue
6 the order?

7 MR. SHEBELSKIE: Your Honor, I think from our
8 perspective, on the employee's concerns files program,
9 it would be instructive to get insight from you, but
10 I would suggest that we have some very expedited
11 submittals by the parties on that beforehand to help
12 inform your thinking, but we would welcome your
13 insights on that.

14 On the other issues, my concern is other than
15 stating perhaps what do you want to call them?
16 Abstract principles of law or general standards? I
17 think we all can agree that the standard for
18 litigation work product, for example, is because of
19 the prospect of litigation.

20 How that applies to a particular document in
21 a particular context --

22 JUDGE KARLIN: Well, we understand that
23 applying the general principle to a specific document
24 will require specific documents, but I mean, we could
25 issue a ruling that said the work product privilege

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1 applies to non-attorneys, which seems to be what the
2 state would like us to do or you would like us to do
3 and the state challenges. Sorry.

4 Or we could say that it does not apply.

5 MR. SHEBELSKIE: Right.

6 JUDGE KARLIN: And that generic ruling you
7 all would resolve something, and then we would just be
8 looking at specific documents and whether or not that
9 was actually prepared for litigation.

10 MR. SHEBELSKIE: That's helpful then because
11 I think what would be most helpful is for us to
12 concern first in short order, whether it's seven or
13 ten days, and get a list of topics to you.

14 JUDGE KARLIN: Well, okay. But we ought to
15 ask the state. We haven't heard from the state yet as
16 to the resolution of issues before they're presented
17 in a specific document.

18 No, I don't know that we did. I didn't
19 remember.

20 PARTICIPANT: Yes, we did. We said they
21 couldn't decide without --

22 JUDGE MOORE: Well, go ahead. Be repetitive.

23 JUDGE KARLIN: Sorry if I missed it.

24 MR. SMITH: Having heard it, it's unclear to
25 us, not having any particular issues that we've

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1 identified, to state with any confidence or certainty
2 what either the state or the department or other --

3 JUDGE KARLIN: But my concern was the timing.
4 The question is: do we have to wait until the
5 certification before we can grapple with or try to
6 resolve some of these issues.

7 MR. SMITH: But from today, it sounds like
8 we've agreed that there are at least a couple of
9 controlling issues of the law that we can address
10 beforehand. That may not and probably won't end the
11 debate over a particular document.

12 JUDGE KARLIN: Right.

13 MR. SMITH: But it can get us somewhere down
14 the line perhaps.

15 JUDGE KARLIN: Thank you, yeah.

16 JUDGE MOORE: It's now a minute before three
17 o'clock. Let's take a quick ten-minute break and then
18 finish this up as quickly as we can.

19 Thank you.

20 (Whereupon, the foregoing matter went off
21 the record at 2:58 p.m. and went back on the
22 record at 3:11 p.m.)

23 CHAIRMAN MOORE: Let's turn to Question 13.
24 What's the role of document requests pursuant to 10
25 CFR 2.1004.

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1 MR. FITZPATRICK: Your Honor, could I just
2 revisit something that we talked about with readiness?

3 CHAIRMAN MOORE: I'm sorry. Revisit
4 something that you all were talking about just before
5 the break. And it came about because I mentioned
6 doing the search where more than 50 percent of the
7 documents were header only.

8 And the conversation went into, well, you
9 know, if there is 10,000 and 5,000 are header only,
10 you ask them for the documents and then they either
11 can change their mind or give them to you. And they
12 can tell you why they are privileged at that time.

13 The problem we see with that is that if we
14 don't find this out -- you know, certification occurs.
15 There is a rule that says you have ten days from the
16 date of certification to challenge the certification.
17 It would be impossible to do every conceivable search
18 on three and a half million documents that would lead
19 one to --

20 MR. FITZPATRICK: I believe this morning it
21 was made clear that we were in agreement that the ten-
22 day period was something that would not -- was not
23 workable in that context.

24 JUDGE KARLIN: Well, let me clarify. I think
25 -- and there are two contexts. One is the

1 certification. If DOE certifies on June 30th of this
2 year, you all have, I guess, ten days within which to
3 challenge that certification just like you did last
4 year.

5 Now if the certification is done, and there's
6 not a whole bunch of redacted documents up there, you
7 know, then you might want to pose your challenge. I
8 think you know from us how it is going to turn out but
9 you can file that. You've got ten days to file that.

10 Now with respect to any specific document,
11 we've already said that when someone requests -- you
12 request documents, then there will be a response filed
13 by DOE and you can -- they'll either give you the
14 document, they'll give you a privilege log, or they'll
15 give you a document under protective order, you know
16 these various options we've laid out.

17 And what we have said is we don't expect all
18 challenges to every privilege to have to be made
19 within the first ten days -- 130,000 privilege claims.
20 But we do think if you've got a problem with the
21 generic certification itself, then you need to do that
22 within ten days.

23 MR. FITZPATRICK: That's -- the issue we were
24 bringing up now is that it's not possible in the
25 context of this header only -- just, you know, misuse

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1 of header only to the tune of 50 percent of documents
2 in various things.

3 It would not be necessarily possible to go
4 through the process of discovering the problem, you
5 know, excessive abuse of header only, requesting the
6 documents from DOE, and then, you know, getting either
7 the documents in response or is what you are
8 suggesting if they committed that sin, you wouldn't
9 ask for the documents. You'd challenge them for
10 having done so in the first place?

11 In other words, there wouldn't be time in ten
12 days to do all those searches to try to find out what
13 they had put up header only. Ask for those documents
14 from DOE. Give DOE time to deliver them or refuse to
15 deliver them. Or give you a privilege log, which I
16 guess they'd compose at that time, all within ten
17 days. That couldn't happen.

18 JUDGE KARLIN: No, no, it wouldn't happen in
19 ten days. No, not at all.

20 MR. FITZPATRICK: And so how would you
21 preserve your right to challenge generically the
22 deficient certification?

23 JUDGE KARLIN: Well, I guess if I understand
24 your position from your brief, and going back to the
25 position on the brief is that DOE is obliged to

1 provide redacted versions of all of its privileged
2 documents on the same day that it certifies
3 generically. I don't know where that comes from in
4 the regs but that's your position.

5 Okay, if that's your position, then I suggest
6 you -- on the day they certify, you start looking
7 through what they have provided. And if you find zero
8 documents redacted, then you can probably argue that
9 well they haven't done what you think they should do,
10 which is provide redacted versions.

11 And if they haven't done that, then you might
12 challenge -- if you think that that is a requirement
13 of certification, you can challenge the certification
14 on that basis. It seems to me that is what would
15 happen. And you can do that within ten days.

16 MR. IRWIN: One what I hope would be a quick
17 point on the theory that it is not repetitive is that
18 I have not spoken of it before. We were thinking
19 during the break about the Board's suggestion about
20 giving preliminary thought on one or more issues of
21 some significance that have been discussed today. And
22 then permitting parties to respond.

23 I think that is entirely appropriate with
24 respect to which issues -- with respect to issues
25 which have been briefed. These are serious issues and

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1 the parties have done a pretty good job briefing them.

2 There have been a couple of other issues
3 raised today, employee concerns, files being among
4 them, which are also serious issues but which the
5 parties have not had an opportunity to brief.

6 CHAIRMAN MOORE: We are well aware of that.

7 MR. IRWIN: And we'd suggest that the Board
8 provide the parties a brief opportunity before
9 reaching a decision.

10 CHAIRMAN MOORE: Let's move on to Question
11 13. Staff?

12 MR. SMITH: There is no relationship between
13 documents requested pursuant to 2.1018 and under
14 2.1004. 2.1018(a)(1), sub (iii) deals with obtaining
15 access to privileged or graphic-oriented documents for
16 which only a bibliographic header was provided. That
17 is documents that are in the universe of those
18 identified on the LSN.

19 2.1004 is, in essence, a process for
20 correcting mistakes. It addresses documents which are
21 identified at some point after a certification or the
22 time in which they should have been added to the LSN
23 but weren't. Or were inadvertently excluded from the
24 LSN.

25 When the party recognizes that, they have an

1 obligation to notify the other parties that they have
2 identified such a document and make that document
3 available within five business days upon request.

4 CHAIRMAN MOORE: Doesn't 2.1004 only deal
5 with the latter half? Not the obligation to make the
6 document available but the request for the document
7 has to come within five days? Or does it deal with
8 both aspects?

9 JUDGE KARLIN: Yes, it's the five days.

10 CHAIRMAN MOORE: Okay. My mistake. Go
11 ahead.

12 JUDGE KARLIN: 2.1004 amendments and
13 additions, you've characterized as being a function to
14 correct mistakes.

15 MR. SMITH: Yes.

16 JUDGE KARLIN: It has the five-day provision.
17 That's a curious and interesting interpretation. You
18 would think if it was to correct mistakes that it
19 would also specify the document must, therefore, be
20 put on the LSN in full-text version. It doesn't say
21 that.

22 All it says is if a party wants to request a
23 document, you've got to make it -- and they request
24 it, you've got to make it available within five days
25 to that party. You're not really correcting the

1 mistake of not having it on the LSN.

2 MR. SMITH: Well, this would also apply after
3 the period for producing documents on the LSN has
4 passed. So it would apply at all times.

5 JUDGE KARLIN: Right. But it doesn't correct
6 the mistake, the mistake being it wasn't put on the
7 LSN. It doesn't put it on the LSN. It doesn't say
8 any you shall put it on the LSN.

9 MR. SMITH: Correct. If the purpose of the
10 LSN is make documents available to participants and
11 potential participants in the parties, that same
12 purpose is served by filing electronic notice,
13 notifying the participants that this document has been
14 identified and is now available. And then upon
15 request, they get it.

16 JUDGE KARLIN: Well, okay. But if there was
17 -- it only corrects the mistake vis a vis the
18 particular person who requests the document. The
19 corollary to this would be and the document needs to
20 be put on the LSN if it is simply to request an
21 inadvertent mistake on the LSN.

22 So what if a party at any point -- it seems
23 to me that the literal language of this regulation is
24 that at any point after the LSN -- after the
25 certification has been made, a party can request a

1 copy of it. And it has to be provided within five
2 days or such other time as we set.

3 I'm sorry, I don't know about --

4 CHAIRMAN MOORE: Judge Karlin's question goes
5 to authenticity. If one wants to use the document
6 subsequently, they need the original, not an
7 electronic image.

8 JUDGE KARLIN: No, no, no, no. It doesn't go
9 to authenticity.

10 CHAIRMAN MOORE: Well, that is also
11 encompassed within 2.1004, is it not?

12 JUDGE KARLIN: A header-only document is --
13 DOE certifies to header-only document. And State
14 requests a copy of that document under 2.1004.

15 MR. SMITH: That would be done under 2.1018.

16 JUDGE KARLIN: Well, why can't they do it
17 under 1004 that says a document that has not been
18 provided to the other parties in the LSN, DOE has not
19 provided the text of that document or made available,
20 shall be made provided within five days after it has
21 been requested. Is there anything that says that you
22 can't use that mechanism to request a document?

23 MR. SMITH: No. There is nothing that says
24 you can't. But looking at the history of 2.1004 and
25 its evolution from 1989 to the current -- 1989 to the

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1 current, as initially conceived 2.1004 provided a
2 mechanism for amendments and additions made to
3 documentary material which are already included on the
4 LSN, on the document database, including a process for
5 verifying that the documents that were added were
6 added correctly.

7 At that time, there was a section that dealt
8 with -- 2.1004(d) that addressed documents that had
9 been incorrectly excluded from the database. Now this
10 -- that exact section is the language that has
11 remained in 2.1004 except for some revisions to take
12 out references to the old LSS and LSSA and add the LSN
13 and LSNA.

14 JUDGE KARLIN: Okay. I think the legislative
15 history helps a little bit.

16 MR. SMITH: Yes. It was basically designed
17 to -- it reflects the understanding that it takes time
18 -- in two points. It takes time to add a document to
19 the LSN. And so if you are making it available to the
20 parties within five days, you are accomplishing the
21 goal of sharing the information quickly -- quicker
22 than it would take if you were add it to the LSN.

23 At the same time, this document, if it is
24 discovered after the period in which you are required
25 to add documents to the LSN, it still provides a

1 mechanism for making those documents available to the
2 parties. And it puts the burden on the party who
3 realizes that they incorrectly excluded the document.

4 JUDGE KARLIN: Well, okay. This is -- okay,
5 that's a helpful explanation. And perhaps that is the
6 answer although I do understand that last year when,
7 if I remember, the state made a request for documents
8 under the LSN, they did it under this section. And it
9 wasn't to correct a mistake. It was to get some
10 header-only documents that they wanted to get the full
11 text of.

12 MR. SMITH: Yes.

13 JUDGE KARLIN: They were using it as an
14 equivalent to 1018.

15 MR. SMITH: And that is an incorrect way to
16 use 2.1004.

17 JUDGE KARLIN: It doesn't appear that way
18 from the literal language. It appears that it was a
19 legitimate thing to do. But --

20 MR. SMITH: From the literal language but by
21 looking at the history of it, it's quite clear that it
22 was intended to encompass inadvertent exclusions.

23 JUDGE KARLIN: All right. Thank you.

24 CHAIRMAN MOORE: Is 2.1004 also to be used
25 for things for which there is not an image on the LSN?

1 MR. SMITH: No, 2.1018 --

2 CHAIRMAN MOORE: No, no, no, things that
3 can't be imaged.

4 MR. SMITH: Right. Those documents that
5 can't be imaged are still required to have a
6 bibliographic header --

7 CHAIRMAN MOORE: Right.

8 MR. SMITH: -- on the LSN. And the way you
9 would --

10 CHAIRMAN MOORE: You would show that those
11 under --

12 MR. SMITH: 2.1018.

13 CHAIRMAN MOORE: -- 2.1018 not 1004.

14 MR. SMITH: That is correct.

15 CHAIRMAN MOORE: Now what happens if I want,
16 for authenticity purposes, the original or a certified
17 copy of the original? Not the electronic form because
18 that is not an original document. Do I go under
19 2.1004? Or 2.1018? It would seem to me it has to be
20 under 2.1004.

21 MR. SMITH: To us, it should be under 2.1018.
22 That is the method for obtaining access to or the
23 production of copies of documentary material.

24 CHAIRMAN MOORE: Yes this is separate. DOE?

25 MR. SHEBELSKIE: Yes, sir. We read it more

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1 like the view Judge Karlin was expressing. If you
2 look at 1018, there are several methods of discovery
3 listed there. But 1018 doesn't provide I'll say
4 details about how that is employed. You have, for
5 example, entry upon land for inspection.

6 As a technique, you go to 1020, I think it
7 is, to get details about timing and the method for
8 doing that. The same with depositions. 1018 says you
9 can do depositions. 1019, it gives you the
10 implementing details.

11 We had read 1004 as giving flesh on the
12 bones, specifying the mechanics, logistics, timing,
13 for requests under 1018(a)(1)(iii). So because it
14 just says you can make a request for access. But it
15 doesn't tell you what time periods, how that is done.
16 So that was our view of it.

17 With respect to the point about
18 authenticating images, I would add 1003 requires the
19 parties or any participant when they certify to
20 provide a statement where authenticating images can be
21 provided. And you can either put them on the LSN
22 yourself connected with the headers or presumably make
23 them available somewhere else.

24 So that's our taking of it. I'll admit the
25 legislative history of it is ambiguous in this

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1 respect. I think everybody agrees that the title of
2 the regulation doesn't match the text. And I don't
3 think there is anything further.

4 JUDGE KARLIN: And one of the reasons we
5 asked this question is because your proposed second
6 case management order consistently referred to 1018
7 and never referred to 1004 I don't think. And so I
8 wondered whether there was --

9 MR. SMITH: Right.

10 JUDGE KARLIN: -- a conscious thought there
11 that that is something lying out -- lurking out there
12 as a separate process that doesn't exist.

13 MR. SHEBELSKIE: No. And nothing about 1004,
14 Judge, is that it makes a reference to electronic
15 notice in that first sentence which is not a
16 terminology that appears anywhere else in the
17 regulations on the LSN and we think in context, it has
18 to be meaning the bibliographic header because there
19 are no other electronic notices contemplated in these
20 regulations.

21 CHAIRMAN MOORE: What is the rule of thumb in
22 statutory construction when the heading of a status
23 says white and the text says black? Is there one? I
24 mean I have never run across this where the two were
25 totally at odds.

1 MR. SHEBELSKIE: Sometimes statutes and
2 regulations will expressly have provisions that say
3 that the title don't govern. I think the general rule
4 of thumb is that the text of the regulation is what is
5 substantive.

6 CHAIRMAN MOORE: You ignore the title?

7 MR. FITZPATRICK: We concurred merely after
8 some research with the NRC view that this was a
9 leftover from something at least a decade old that
10 Parts A, B, and C of something that had a D
11 disappeared out and left this in. And that this
12 wasn't intended to be a broad discovery tool. And
13 that 2.1018 was. But not yet.

14 JUDGE KARLIN: Okay.

15 MR. FITZPATRICK: Not at this time. Not
16 until the pre-license application period so called.

17 CHAIRMAN MOORE: This probably is as good a
18 time as any to bring it up. Section (2)(a) of the
19 proposal limits applicability to parties, potential
20 parties, and interested government participants who
21 have made certifications pursuant to 10 CFR 2.1003.

22 Does not any case management order need to
23 apply to all potential parties, even those who don't
24 have initial document certifications because they have
25 no documents? Staff? While you're thinking of it,

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1 DOE?

2 MR. SHEBELSKIE: Yes, the question though is
3 in this context, what is potential party? The
4 potential party.

5 CHAIRMAN MOORE: Nevada?

6 MR. FITZPATRICK: I don't think we really
7 have a position on it but, you know, other than the
8 definition of the term potential party.

9 MR. SMITH: I don't believe that we had
10 really focused as a group on that.

11 CHAIRMAN MOORE: Okay. Fine. Let's move on
12 to 14, which is the same question -- a similar
13 question which is same or similar question. Staff?

14 MR. SMITH: Well, potential party as defined
15 in the regulations is a party or its representative
16 who has access to the LSN, agrees to abide by Subpart
17 J, and submits to the authority of the Board.

18 CHAIRMAN MOORE: Correct me if I'm wrong.
19 Anyone has access to the LSN.

20 MR. SMITH: That is correct. Historically,
21 however, there were additional requirements to gaining
22 access to the LSN. There was a whole section in
23 Subpart J that addressed gaining access to the LSN.

24 At the time, that included requirements to
25 demonstrate the nature of a party's right under the

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1 Atomic Energy Act, the nature and extent of their
2 interest in the proceeding, possible effect of any
3 order it might have on their interest as well as some
4 relevance to one of the topical guidelines.

5 When that section was removed
6 contemporaneously with making the LSN a web-based
7 system, there was no update to how that might effect
8 discovery. So what we are left with is the definition
9 of potential participant which includes access to the
10 LSN, which is apparently meaningless at this stage.

11 CHAIRMAN MOORE: The second half of 14 --

12 MR. SMITH: Right.

13 CHAIRMAN MOORE: -- if anybody is allowed to
14 request them, then it goes back to -- it essentially
15 in your view has no current meaning.

16 MR. SMITH: Well, I guess we would -- as far
17 as a process for determining who is a potential party,
18 we had discussed and I believe we had agreed that one
19 possibility would be for a potential participant to
20 submit a motion to the Board requesting potential
21 party status along with an accompanying certification
22 that would acknowledge the authority of the Board,
23 would agree to follow Subpart J, and then would also
24 include a list and description of the relationship
25 between this potential party and any of its

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1 representatives which might have access to or need to
2 sign an affidavit of non-disclosure or protective
3 order.

4 And depending on the timing of that request,
5 the requirements of 2.1019 might also come into play.

6 CHAIRMAN MOORE: DOE? Okay. Well, maybe
7 we'll hear everyone out first. But I have some
8 questions about that.

9 MR. SHEBELSKIE: Your Honors, I think this is
10 an instance where an ounce of history is worth a pound
11 of logic because the definition here, as the staff
12 points out, is a historical anachronism. That the
13 definition literally that we see here read the same
14 under the old LSS regime and all that was done was to
15 substitute LSN for LSS without synching up the fact
16 that the LSN is a very different critter
17 technologically than the LSS.

18 Because if read literally the way it reads
19 now, Judge Moore, I think your observation was that
20 any member of the public would be a potential party
21 here. And that can't have been the intent and
22 objective because under 1018 potential parties have
23 discovery rights and there has to be something in
24 between. Something less than the full public.

25 JUDGE KARLIN: Why can't that have been the

1 intent? Why can't that be the proper reading? Any
2 member of the public may have an interest in raising
3 a contention concerning this proceeding and want to
4 request documents and take a look at them. So isn't
5 that a logical -- it certainly could -- I think it
6 could have been -- it could be a logical and fair
7 reading.

8 I understand that there is a history to this
9 regulation. And that it had standing requirement
10 essentially or standing-like requirements in there
11 which are totally non-existent any more. The deletion
12 of those indicates to us, therefore, that obviously
13 you don't have to have standing of any kind in order
14 to be a potential participant.

15 MR. SHEBELSKIE: Well, Judge Karlin, even the
16 -- well, the rulemaking on the LSN regulations where
17 this change came about did not really comment that the
18 LSN's primary objective was simply to get everything
19 out there into the public. It's prime thrust was to
20 provide a mechanism for discovery -- expedited
21 discovery for the participants in a fair and equitable
22 way in order to keep on to the track.

23 JUDGE ROSENTHAL: But if there isn't a
24 standing requirement, we can't read one into it, can
25 we?

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1 MR. SHEBELSKIE: Here -- I don't think you --
2 even under the old regime, Your Honor, I don't think
3 it was requiring a final determination of standing.
4 What the old regulations required was that this
5 petitioner or potential party file what was called a
6 petition but it could be a motion, whatever, that set
7 forth the nature and extent of its interest, its
8 request to be made a potential party, and the possible
9 effect the proceeding could have on its interest.

10 JUDGE ROSENTHAL: But it doesn't have to do
11 any of those things under the existing regulation,
12 does it?

13 MR. SHEBELSKIE: No, you are right, Your
14 Honor. The existing regulations don't require it.
15 But here's maybe perhaps the rubric though. The
16 potential parties do have to submit to your
17 jurisdiction. I think that provides you the
18 regulatory basis to specify what must a participant do
19 to submit to your jurisdiction.

20 Well, one of the things they have to do is
21 file something with you. You could provide, as some
22 sort of check, a statement from them as an
23 articulation of what their possible interest is for
24 standing because I think everybody here recognizes --
25 we were discussing this issue before today, that, you

1 know, there are obviously recognized players who are
2 going to come to the table.

3 And we don't want to arbitrarily cut those
4 off. Rather we just want some mechanism for the Board
5 to police if things get out of hand on this.

6 JUDGE ROSENTHAL: Well, I understand
7 certainly that you wouldn't want a Yankee Stadium full
8 of participants. On the other hand, I don't
9 understand how the power that we have been given would
10 extend to precluding a person from participating
11 because we were not satisfied that they had a
12 sufficient interest.

13 One time there was a requirement that they
14 establish an interest. Today, that requirement has
15 been removed. And I think we have some powers in
16 terms of our ability to control a proceeding and all
17 of that. But it doesn't seem to me we have the
18 authority to impose a requirement that one time was in
19 the regulation and subsequently was removed.

20 MR. SHEBELSKIE: Well, Your Honor, you also
21 have powers -- one of the requirements even expressly
22 in the regulation now is that these potential
23 participants not only must submit to your jurisdiction
24 but must comply with Subpart J. Obviously that means
25 they have to have procedures and systems in place to

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1 comply with their LSN certification requirements.

2 CHAIRMAN MOORE: But what if they don't have
3 any documents?

4 MR. SHEBELSKIE: It seems hard to believe
5 that someone who could be a legitimate potential party
6 doesn't have documents.

7 JUDGE KARLIN: Well, isn't that predisposing
8 the definition of legitimate potential party?
9 Potential party is anyone who can access the Web and
10 will agree to comply with these regs. And so, you
11 know --

12 JUDGE ROSENTHAL: I could understand very
13 readily someone not having any contribution in terms
14 of documents but determining on the basis of his, her,
15 or its examination of what's on the Web and available
16 to it has certain concerns which it is prepared to
17 translate into contentions. I mean it doesn't seem to
18 me that there is an equivalence between having
19 documents to include on the LSN and having party
20 status.

21 MR. SHEBELSKIE: Your Honor, then maybe the
22 place we should look at is under 1018(c) where the
23 Board has the authority to issue protective orders to
24 protect the parties against undue harassment,
25 oppression, cost, et cetera.

1 So that if, for example, we had the Yankee
2 Stadium full of people who suddenly decide to appear
3 and act as potential parties and start bombarding with
4 a bunch of activity, the Board could at that point say
5 -- DOE could file a motion to say well, this is really
6 just more in the nature of harassment as opposed to
7 legitimate --

8 JUDGE ROSENTHAL: I don't know if we have
9 that authority. But that is a -- it seems to me a
10 quite different question as to whether we can impose
11 at the threshold under our control powers a limitation
12 upon participation based upon whether the individual
13 has or has not demonstrated to us a sufficient
14 interest.

15 I mean clearly if it becomes a Ringling
16 Brothers' circus, we have the powers to do what is
17 necessary to control it. But that's a different
18 question, I think, than what we can or should be doing
19 at the threshold.

20 MR. SHEBELSKIE: Yes, I guess the question
21 is, Your Honor, would you want to wait until it
22 becomes the Ringling Brothers' circus to act as
23 opposed to let's establish some presumptions now and
24 say if a potential party comes -- such intervener
25 acting in this proceeding in this pre-license phase

1 and DOE and whoever decides -- believes in good faith
2 that that person never would have standing to act as
3 a party in this proceeding, shouldn't we have the
4 ability to get some advanced ruling on that instead of
5 waiting until things get out of hand.

6 JUDGE ROSENTHAL: I couldn't hear you on
7 that. What --

8 JUDGE KARLIN: Well, one follow up on that
9 and we've talked about protective orders here quite a
10 bit and as that might be a mechanism for sharing
11 privileged -- full text of privileged information,
12 protective orders, and, you know, 1018(c) and others
13 talk about protective orders. Any potential party can
14 get in, presumably, under that protective order.

15 If they are willing to sign the agreement --
16 or does the consequence here mean that anybody who can
17 access the Internet and agrees to comply and signs a
18 protective order agreement gets all the privileged
19 documents you all are willing to share amongst
20 yourselves here?

21 MR. SHEBELSKIE: That would make the
22 protective order meaningless, Your Honor.

23 JUDGE KARLIN: Why? They're just like anyone
24 else. They've signed a protective order. They've
25 agreed to be bound by it. They've agreed to be bound

1 by the rules of this proceeding. And they meet the
2 qualifications of a potential party.

3 MR. SHEBELSKIE: Well, there would be no
4 qualification in that scenario for a potential party.
5 And you can imagine abusive tactics being taken by
6 opponents who will simply say well let's just send out
7 mass e-mails to everybody and bombard -- let's try to
8 get 250,000, a million people from the State of Nevada
9 to add protective orders.

10 JUDGE KARLIN: Well, we could manage the
11 Yankee Stadium scenario.

12 CHAIRMAN MOORE: Up until the point their
13 contentions are filed and they have to establish their
14 standing, there seems to be two totally different
15 universes we're living in here, one of which has, as
16 far as we can determine, has any precedent in legal
17 proceedings where you don't have a proceeding yet you
18 have this thing called document discovery with
19 potential parties.

20 JUDGE KARLIN: Well, I think there is a
21 precedent, FOIA. You don't have to be outstanding to
22 file a FOIA request.

23 MR. SHEBELSKIE: The point of a protective
24 order, I think, is to provide limited distribution to
25 protect the integral integrity of the privileged

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1 information. If any of the -- I mean if the
2 population of the United States could call and get
3 this information, then it's not protected anymore.

4 CHAIRMAN MOORE: But there are penalties for
5 violating it.

6 JUDGE KARLIN: So who is entitled to be under
7 the protective order? And who isn't? How do we throw
8 people out and say you're not a potential party?
9 Because the regs clearly say potential parties --
10 potential participants can be within the protective
11 order. And if they sign the protective order, they
12 get the documents.

13 Now the reg defines potential participant
14 very broadly. We didn't write this. But it's a
15 conundrum we're trying to grapple with.

16 MR. SHEBELSKIE: It is no doubt a conundrum
17 and I would think what we need to do is look at the
18 regulations as a whole. It still uses in the
19 definition of potential parties granted access to the
20 LSN.

21 That language -- I mean there is no concept
22 of granting access. I think a mistake was made
23 frankly. And the question is can we fashion an
24 approach to provide access, reasonable access, to the
25 universe of potential parties who under established

1 standards, you know, nobody really is going to be
2 contesting -- are the potential parties and curtail
3 the Ringling Brothers' scenario that we all fear about
4 and think would be inappropriate.

5 I think you have general authority under the
6 LSN regulations 1018(c) and the general adjudicatory
7 rulemaking to provide tiers of access to privileged
8 information so that the statutory parties, the
9 effected governmental units, and potential parties who
10 make some pre-showing of potential standing are the
11 ones who get access to this privileged information.

12 CHAIRMAN MOORE: Doesn't this all argue for
13 getting redacted copies under the LSN as quickly as
14 possible of everything that can be to avoid what we
15 see as a potential nightmare?

16 MR. SHEBELSKIE: No because I really think,
17 Your Honor, what the purpose of these LSN regulations
18 was for discovery for what would traditionally be
19 thought of as the parties and potential parties and
20 not the public at large. That is not really
21 referenced in the rulemaking.

22 If that was the intent of the Commission,
23 they wouldn't have talked about using this as a
24 discovery to benefit the litigants. They would have
25 just talked about getting it out to the public at

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1 large. And that's not the language they used to
2 express their intent.

3 JUDGE KARLIN: To a potential party is -- how
4 do we distinguish which member of the public is a
5 potential party and which one isn't? I mean there may
6 be people out there who want to read these regulatory
7 -- read these documents so they can decide whether
8 they have a contention or gripe. Or they want to file
9 a contention. We're just troubled by this obviously.

10 CHAIRMAN MOORE: Nevada, do you have anything
11 to add?

12 MR. FITZPATRICK: Not a whole lot. But we're
13 not interested in being a party to placing artificial
14 limitations on what is intended to be -- I mean, you
15 know, there are 106 nuclear power plants and there are
16 other locations where waste is going to be brought
17 from. This is a national concern and project.

18 And so I think that was the intent. I mean
19 Ivan Inkins said we want to make documents available
20 to the public -- to everyone in the public six months
21 before LA. And, I mean that was a DOE gentleman.

22 And so our position is that Shoshone Indians
23 may not have a document, a dog in the hunt, but
24 they're entitled to look at all the documents on the
25 LSN and they're entitled to participate as long as

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1 they agree to the terms under potential parties.

2 JUDGE ROSENTHAL: Well, let me ask you this
3 question. And that is if a person or organization is
4 regarded as a potential participant, is entitled if
5 he, she, or it signs a protective order to have access
6 to all of these privileged documents, what kind of, in
7 the real world against Joe Smith or Mary Brown, what
8 kind of a sanction is available?

9 We know what the sanctions are available in
10 the case of you lawyers because if you violate the
11 protective order, you're up for potential disbarment.
12 Now here's members of the public. We don't know who
13 they are. We don't know their background. We don't
14 know whether there is good faith or not.

15 They come forward and they say we want to
16 participate. And under this regulation we can. And
17 we're perfectly prepared to sign a protective order
18 that will give us access to all of these privileged
19 materials.

20 Now it seems to me that as I think was
21 suggested by the DOE lawyers, that that could have, in
22 the real world, the effect of rendering the protective
23 order meaningless.

24 MR. SHEBELSKIE: Yes. Because, Your Honor,
25 one citizen --

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1 JUDGE ROSENTHAL: I asked, I think, Mr.
2 Fitzpatrick --

3 MR. SHEBELSKIE: Oh, I'm sorry.

4 JUDGE ROSENTHAL: -- for his response.

5 MR. FITZPATRICK: I didn't know it was
6 directed to me but --

7 JUDGE ROSENTHAL: Yes. I mean you were
8 talking about this. You think the public --

9 MR. FITZPATRICK: I think you make a good
10 point with the lawyers, you know, having evident-ready
11 sanctions available.

12 But, you know, in turn, the protected
13 documents pursuant to any protective order I've seen
14 will be made available to staff members, consulting
15 experts, and people like that, many of whom are not
16 subject to any particular sanction by your Board. And
17 so I don't think that there's no ready sanction.

18 CHAIRMAN MOORE: Well, but derivatively they
19 are. And secondly, if it is crafted properly, and we
20 will assure that it is, 5 U.S.C. 1001 comes into play,
21 which is criminal sanctions as well as civil penalties
22 can come into play.

23 So there are sanctions against all those
24 people you mentioned. The problem, as Judge Rosenthal
25 has pointed out, when you have John Q. Public pro se,

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1 seemingly on the face of the regulations he or she is
2 a potential party, how, as a practical matter, can one
3 determine the bona fides to determine whether that
4 person can obtain this material even though they are
5 willing to sign the protective order.

6 Because in the real world, there are --
7 especially if we are to believe even half of what we
8 read in the paper, there are lots of folks that are
9 willing to sign a protective order to obtain documents
10 that they have no intention of complying with the
11 protective order. I mean that's the problem that we
12 face here.

13 And it is closely tied to what we're going to
14 be faced after contentions on the standing issue
15 because, as you have rightly pointed out, the
16 transportation routes, although today unknown,
17 assuming that it has got to be by truck or by rail, it
18 would seem that anybody who lives by a road or by a
19 railroad track within X distance is going to be having
20 standing which encompasses most of the population of
21 the United States.

22 MR. SHEBELSKIE: Your Honor, let me add an
23 example, which I should have mentioned earlier but it
24 is one we had discussed before and I just forgot it,
25 a real concern we have, for example, with these

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1 privacy documents, we have documents with personal
2 identifying information, social security number, if we
3 adopted this approach that maybe the state is
4 advocating here, what would stop someone who was -- a
5 criminal interested in identity theft from simply
6 submitting a document saying we submit to the
7 jurisdiction, getting copies of these 70,000
8 documents. They're criminals. They aren't going to
9 be bound -- care about the protective order --

10 JUDGE ROSENTHAL: But you're just agreeing
11 with what I said.

12 MR. SHEBELSKIE: Yes.

13 JUDGE ROSENTHAL: I mean I don't -- if you
14 had a question or challenge to it, I don't think you
15 need to reinforce it.

16 MR. SHEBELSKIE: All right.

17 CHAIRMAN MOORE: Let's ask NIRS what their
18 view of this problem and how we are to wrestle with it
19 is.

20 MR. KAMPS: Well, you did make the point that
21 45 states and the District of Columbia are identified
22 by the DOE as preliminary transport route corridor
23 states. So there is that issue.

24 But -- and this is something that I brought
25 up at the pre-meetings leading up to this -- that not

1 only the Western Shoshone National Council, the
2 Western Shoshone Tribe but other tribes in Nevada and
3 Southern California and tribes along the transport
4 routes, there's a burden of responsibility on the
5 Department of Energy to deal with them in a government
6 to government relationship.

7 And I said it at the first meeting that that
8 has not occurred. So, unfortunately, a lot of those
9 players have not been informed even about this
10 proceeding at this point. So there is some potential
11 trouble, I think, ahead on that front.

12 But just in terms of environmental groups,
13 public interest groups, there is tremendous interest
14 across the country. In 2002 at the time of the big
15 votes in Congress, there were 700 organizations across
16 the country that expressed opposition to Yucca
17 Mountain for geologic reasons, concerns about
18 transportation.

19 So it's -- these are, you know, trustworthy
20 organizations. They have addresses. They have a
21 reputation, a good reputation. So I would put that
22 out there in terms of good faith towards the process.

23 CHAIRMAN MOORE: Are most of these
24 organizations, if they're going to participate, are
25 going to be represented by counsel? Or --

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1 MR. KAMPS: I think it would be a mix. I
2 think some would have counsel. Some would have to,
3 due to lack of resources, represent themselves. And
4 that is another point I wanted to make earlier. Just
5 that the Department of Energy has had, since 1987, in
6 one sense, to get everything together. And so it is
7 a concern that this six-month discovery period be so
8 strictly enforced that that's the end of discovery
9 when under the Nuclear Rights Policy Act, DOE was
10 supposed to file its license application 90 days after
11 the President's signature. And here we are three
12 years.

13 So it's just such a double standard that one
14 player seems to have unlimited time to get their act
15 together. And then --

16 JUDGE ROSENTHAL: We don't have any control
17 over that basically. I mean we didn't set the rules.

18 CHAIRMAN MOORE: Does NEI have any light to
19 shed on the darkness here?

20 MS. GINSBERG: Just briefly, Your Honor. We
21 recognize the national scope of this project. And we
22 understand that there will be interests across the
23 nation that will be interested in participating.
24 However, if you look at the approach you've taken this
25 morning and the nature of the inquiry, you are making

1 every effort to ensure that there is both expedition
2 and efficiency here in this proceeding.

3 And it is our contention that you have the
4 authority and you could create some limited criteria
5 by which you could ensure that the efficiency and the
6 appropriate process be in place to make sure that the
7 Yankee Stadium does not occur.

8 And we would encourage you strongly to take
9 that approach.

10 CHAIRMAN MOORE: Let's move on to the
11 Question 15. And the question of --

12 JUDGE KARLIN: If I may, just one point in
13 response to the NIRS' position. I think it ought to
14 be useful to look at the definition of party as well.
15 There is a definition of party in local governmental
16 units, which I would take to include Indian tribes,
17 are parties. They're not potential parties. They're
18 parties by definition from the get-go it would seem.

19 So if there is an Indian tribe, a Native
20 American organization that meets those criteria, they
21 will be a party from the get-go.

22 CHAIRMAN MOORE: Let's turn to 15, the
23 settlement proposal. Specifically does the
24 interjection of a settlement judge dispute resolution
25 process at the point in which has been proposed to us

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1 increase the likelihood of significant delays in the
2 ultimate resolution of privilege disputes in light of
3 this six-month window?

4 And we're frank to state that interjecting it
5 at that point, we see no benefit in this at all after
6 the document requests and the responses to those
7 requests. And for those documents that are now going
8 to be in dispute with a privilege log at that point,
9 in our view it makes -- if there is going to be any
10 settlement mechanism, it should be at that point when
11 all the information is on the table.

12 Frankly what we see in the proposal that you
13 have conjured is just a burden shifting to avoid the
14 unpleasant task of things like complete privilege
15 logs. So with that as some background, how is this
16 going to avoid delay?

17 MR. SMITH: Well, I'm no glutton for
18 punishment so I'm not going to defend it in light of
19 what you've said. In particular, I will say that the
20 parties, we had agreed that this informal resolution
21 process in tandem with our production of not as
22 detailed privilege log formats as you see to require
23 was acceptable to us.

24 And if you feel -- if the Board feels
25 otherwise, then we're willing to accept that.

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1 CHAIRMAN MOORE: Okay. DOE?

2 MR. SHEBELSKIE: This proposal was one that
3 the state requested. The state felt that it would --
4 this process would help it to quickly decide which
5 documents it wanted to challenge, bring to the Board,
6 and which ones not to.

7 We take them at face value that they will
8 engage in this process in good faith because it will
9 be expedited. It won't have briefing. We're willing
10 to participate in that process because we, in our
11 discussions with the state, think that it would
12 facilitate it -- their decision-making.

13 CHAIRMAN MOORE: Nevada?

14 MR. CYNKAR: Your Honor, I'm the one who
15 invented this process. And it seems counterintuitive
16 perhaps but we really don't want to be before the
17 Board challenging frequently. That's something that
18 we're trying to avoid.

19 And I know these attorneys from the past. I
20 have a lot of faith in them that we can work in good
21 faith. And it was my expectation that a large number
22 of privilege disputes could be resolved within an
23 hour.

24 CHAIRMAN MOORE: Well, it is our expectation
25 that once there is a privilege log for the privileges

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1 such as attorney-client, work product, and
2 deliberative process, that either they're going to be
3 able -- the owner of the document is going to make a
4 prima facie case or not.

5 And you are going to -- the requestor is
6 immediately going to be able to tell whether there is
7 a prima facie case. And then if it goes to dispute
8 resolution, whether it is us or some other mechanism,
9 it's going to be able to be decided.

10 Up until you get to that point, it's an
11 exchange of phone calls and that kind of thing on an
12 informal basis whether or not it involves a settlement
13 judge. And we see that not as a particularly helpful
14 step in moving the ball.

15 MR. CYNKAR: And I would say that based on
16 what I've heard today and what you've telegraphed in
17 terms of your thinking, I would agree with you. And
18 think that this may be a redundant process that we
19 don't need.

20 Because if you're going to specify in the
21 kind of detail it seems you are what the parameters of
22 these various privileges are, and we can even possibly
23 apply them to discreet categories of documents, then
24 I think there is a heavy burden on the privilege log.
25 And there shouldn't be a lot of cases of accidental

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1 mislabeling.

2 So I --

3 CHAIRMAN MOORE: And very frankly, what we
4 seek to avoid here is burdenship because the burden is
5 on the claimer of the privilege. And that is an
6 indisputable point. And we want to keep it there.
7 And so from our standpoint, I think I'm fairly
8 capsulizing our thinking on this.

9 So let's then move on to 16.

10 JUDGE KARLIN: Well, if I may, you know a
11 settlement judge might have a time and place in this
12 process somewhere along the line. It seems the way it
13 is structured here is not very productive or
14 effective. It's perhaps too early in the process.

15 Our thought is that, you know, the privilege
16 log be submitted. The parties then take a look at
17 that. If that does not resolve the dispute, a motion
18 to compel can be filed. Of course, one must consult
19 with the opposing counsel before you file a motion to
20 compel. That's a requirement.

21 In that motion to compel, one can request the
22 appointment of a settlement judge perhaps. And then
23 the respondent could, you know, agree or not agree to
24 a settlement judge.

25 It just -- the settlement judge needs to have

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1 something to sink his or her teeth into in order to
2 resolve the dispute. And really the way it is
3 structured now, there's nothing that is given to that
4 person to help decide the dispute.

5 MR. CYNKAR: Right. And particularly if
6 there are penalties for mislabeling a document as
7 privileged, that also works in that direction.

8 JUDGE KARLIN: Did you all look at the
9 appointment of a Discovery Master? Did you all
10 discuss that? I mean that something that is uniquely
11 provided for in these regs. And I see you didn't
12 propose that.

13 MR. SHEBELSKIE: Well, I think that the title
14 to us under this proposal would not matter. It's the
15 function.

16 JUDGE KARLIN: Well, the difference being a
17 Discovery Master issues a binding ruling subject to
18 appeal. What the settlement judge issues is non-
19 binding.

20 MR. SHEBELSKIE: I think the difference the
21 state had in mind was to try to have a settlement
22 judge opine on the issues on the way it would be
23 expedited wouldn't require briefing and so, therefore,
24 it would be less expensive on the parties.

25 CHAIRMAN MOORE: But we would think that the

1 complete privilege log making the prima facie case
2 should, in the attorneys' minds resolve the question
3 of whether it should be challenged. In the first
4 instance, whether the privilege should continue to be
5 insisted upon. Secondly, whether it should be
6 challenged.

7 And it certainly provides anyone who is
8 resolving the dispute the tools to resolve it right
9 then and there.

10 Let's turn to 16. Under your proposal, how
11 do you get around the portion of the rules requiring
12 a joint motion for the appointment of a settlement
13 judge? And this one, I guess we could conjure up
14 something that would be a floating authority for a
15 settlement judge.

16 But it certainly this -- each dispute is
17 going to be over a document and a privilege claim, not
18 a continuing thing. That's different from the way
19 settlement judges usually are appointed here.

20 MR. SMITH: I think based on what I just
21 heard from Judge Karlin in that possible application
22 of a settlement judge that he described, when you've
23 identified a particular document and you have to
24 confer before you file a motion to compel, maybe in
25 lieu of a motion to compel, that might be the time to

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1 jointly request with the two parties, if you've
2 identified a controlling issue of law, and request at
3 that point that a settlement judge be --

4 CHAIRMAN MOORE: DOE, do you have anything to
5 add to that?

6 MR. SHEBELSKIE: Just -- we wonder whether
7 under Section 2.332, the general case scheduling and
8 management provisions, Subpart (a) (3) that allows the
9 scheduling order to address any other matters
10 appropriate in the circumstances of the proceeding,
11 given the unique nature of this proceeding, we might
12 be able to set up a process.

13 CHAIRMAN MOORE: Nevada?

14 MR. CYNKAR: Your Honor, I think the Board
15 has convinced me today that we don't need a settlement
16 judge. But I think that -- Judge Karlin in answer to
17 your question about a Master, I think at some point we
18 would like to have a Discovery Master. But probably
19 it would be after the filing of the license
20 application when, you know, traditional discovery
21 begins.

22 CHAIRMAN MOORE: Let's turn to 17. Would
23 this process be materially advanced by requiring a
24 discovery plan which would have the parties indicating
25 and scheduling when they will be requesting privileged

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1 documents either by category or some other screening
2 mechanism? And, therefore, be able to come up with
3 some semblance of a plan that would indicate to all
4 the parties the workload that was going to be
5 involved?

6 Staff, is this something worthwhile in
7 pursuing?

8 MR. SMITH: Based on our discussions amongst
9 ourselves, we agreed that it would probably not be
10 particularly useful in light of the fact that, again,
11 unless there is some general document discovery
12 matters that we can identify, which we've talked about
13 some of those today, a discovery plan would probably
14 be most useful after, at least, the license
15 application, potentially some contentions had been
16 filed that would help focus the issues to be resolved
17 in discovery.

18 CHAIRMAN MOORE: DOE?

19 MR. SHEBELSKIE: I think DOE agrees that the
20 type of highly formalized discovery plan contemplated
21 by 2.705 is probably premature at this time.

22 Going on from that though, your suggestion I
23 think is a salubrious one that if the parties continue
24 their dialogues to come up with what might be an
25 orderly schedule and progression for the six-month

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1 interval we've been talking about because I think it
2 is important for planning purposes for the parties and
3 the Court to know that.

4 CHAIRMAN MOORE: Nevada?

5 MR. FITZPATRICK: I think I concur that it is
6 premature. And that it's only after we view the
7 certified database that -- first certified database
8 that we would be able to make judgment as to what
9 requests might be made and a schedule for them.

10 CHAIRMAN MOORE: Alex, do you have anything
11 that falls under 18?

12 JUDGE KARLIN: No. Well, yes.

13 CHAIRMAN MOORE: Let's -- in the context of
14 No. 18, which we thank Counsel for DOE providing us a
15 representative sample of the privilege logs in use
16 before the Federal Claims Court in the litigation
17 there, we have just a couple questions.

18 JUDGE KARLIN: Yes, I have a few questions on
19 the privilege log. Is that a static document? Or is
20 it an evergreen changing privilege log in that
21 litigation?

22 MR. SHEBELSKIE: The privilege log as been
23 supplemented, as I understand it, on maybe three
24 occasions by the addition of new documents to it. So
25 I think you have the initial privilege log and then

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1 four supplements. I'm not aware of it changing the
2 internal entries.

3 CHAIRMAN MOORE: And you're not counsel for
4 DOE in that litigation.

5 MR. SHEBELSKIE: That is correct. So I have
6 limited knowledge.

7 JUDGE KARLIN: Okay. But I'm just concerned
8 that if it is a changing document versus something
9 that is set in stone and not changing and then I guess
10 you're answering that it is subject to some change and
11 the litigation is still ongoing and that sort of
12 thing.

13 And I note that you filed your pleading
14 yesterday and it said approximately 900 documents are
15 on that privilege log.

16 MR. SHEBELSKIE: Yes, sir, 900 documents in
17 our LSN collection are on that privilege log.

18 JUDGE KARLIN: Right, okay. And another
19 question in that regard, the first column on that
20 privilege log is LSN Accession Number. Is that --

21 MR. SHEBELSKIE: No, that should be
22 Participant Accession Number.

23 JUDGE KARLIN: Okay. Participant.

24 CHAIRMAN MOORE: So do you have that
25 information appearing on the privilege log in an

1 electronic format that could be transported the same
2 way the information, a bibliographic header and then
3 supplemented to, if we use the DDMS as the privilege
4 logs?

5 MR. SHEBELSKIE: It is in an electronic
6 format. But not the same one that you're describing.
7 It is on a -- basically, as I understand it, an Excel
8 spreadsheet so it can be e-mailed, it can be
9 electronically transmitted. But not on the same
10 database though.

11 CHAIRMAN MOORE: At this point, we would like
12 --

13 JUDGE KARLIN: I still have a question on
14 that. So this document you gave us is not an actual
15 copy of the privilege log. It's some rewritten
16 version of it?

17 MR. SHEBELSKIE: No, no. Well, I added the
18 LSN --

19 JUDGE KARLIN: The LSN --

20 MR. SHEBELSKIE: -- I added the LSN column on
21 it so --

22 JUDGE KARLIN: So you didn't go to the
23 privilege log, Xerox a page of it, and show it to us.
24 You rewrote it.

25 MR. SHEBELSKIE: We added the column for LSN

1 Accession Number.

2 JUDGE KARLIN: Yes, okay. You added that
3 column. Right. Okay.

4 Is there anything that lays out what you must
5 place in the privilege log in the nature of a case
6 management order in that litigation mandating the
7 contents of the privilege log?

8 MR. SHEBELSKIE: That is an excellent
9 question which I didn't think of. And we will -- if
10 you're interested, I can get you a response tomorrow.

11 JUDGE KARLIN: That would be helpful.

12 MR. SHEBELSKIE: All right.

13 JUDGE KARLIN: Okay.

14 CHAIRMAN MOORE: It is now almost ten after
15 four. First I'd like to thank you all for your
16 preparation in moving the ball and your willingness to
17 sit down and discuss these issues and work with one
18 another to try to reach common ground. I think that
19 that sets an excellent tone for us moving forward in
20 this most difficult adjudication that is in front of
21 all of us.

22 That said, we'd like to recess briefly for 15
23 minutes. And then we'll reconvene at 25 minutes after
24 four briefly. And at that point, if you have any
25 additional questions for us, we will entertain them.

1 And we, at that point, can fill you in on our thinking
2 where we wish to go.

3 We'll reconvene in 15 minutes, at 25 minutes
4 after four.

5 (Whereupon, the foregoing matter went
6 off the record at 4:09 p.m. and went
7 back on the record at 4:42 p.m.)

8 CHAIRMAN MOORE: We will hold a second case
9 management conference on Tuesday, May 18th -- I'm
10 sorry. We changed the date. Wednesday, May 18th at
11 9:00 a.m.

12 The parties technical experts shall meet with
13 the licensee support network administrator to discuss
14 the implementation of using the DDMS as privilege logs
15 as soon as Mr. Graser can exchange the information
16 with all the parties' technical experts and arrange
17 that but no later than next Friday, a week, which is
18 May 13th.

19 By May 12th -- Thursday, May 12th, the
20 parties are to provide us all their suggestions
21 regarding Appendix A, B, and C for those three
22 privileges.

23 By May 12th, the parties are to provide us --

24 JUDGE KARLIN: And the suggestions include if
25 you have a legal position on something, whether it is

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1 correct or incorrect, a brief or brief citation to a
2 case.

3 PARTICIPANT: What was that date?

4 CHAIRMAN MOORE: My May 12th, the parties are
5 to provide us any additional briefing they wish on
6 Question 4 with a four-page limit.

7 Also by May 12th, the parties will give us
8 their agreement or separate positions on the position
9 on the organization chart of their respective
10 organizations for the official who can authorize the
11 assertion of the deliberative process privilege. And
12 frankly we expect you all to agree on that so that
13 that can be taken off the table in any future
14 disputes.

15 By May 12th, the parties shall brief the
16 employees' concerned files issues with a ten-page
17 limit on those briefs.

18 By the close of business Monday, May 16th,
19 the parties will provide us a joint proposed
20 protective order and affidavit of non-disclosure
21 covering all protected categories of information
22 except safeguards.

23 MR. IRWIN: Again, also excluding kind of
24 security -- I'm sorry, classified information also?

25 CHAIRMAN MOORE: Classified does not enter

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1 into the picture at all. Safeguards and son of
2 safeguards is what is excluded. Everything but that.
3 Those are obviously proprietary, the employees'
4 concerns, archeological privilege and I'm forgetting
5 two. But I -- you know what they are from today's
6 discussion.

7 By July 1st, the parties will provide us with
8 a joint proposed protective order and affidavit of
9 non-disclosure for all safeguards information or their
10 separate positions. This is safeguards, not
11 classified.

12 JUDGE KARLIN: Would you repeat that? I want
13 to make sure we got that right. Can you repeat that?

14 CHAIRMAN MOORE: Again, by July 1st, the
15 parties will provide us with a joint proposed
16 protective order and affidavit of non-disclosure for
17 all safeguards information or their separate positions
18 on safeguards information.

19 JUDGE KARLIN: Do we want them to include in
20 that any procedures that they might recommend that
21 would be different from the general case management
22 procedures?

23 CHAIRMAN MOORE: Absolutely. With regard to
24 safeguards, it is a clean slate. And your starting
25 point is Part 7321. And you are going to have to deal

1 with your respective safeguards experts and each
2 others and try to find common ground because very
3 frankly, it has been our experience that we're all at
4 the mercy of the experts on this one.

5 By May 16th, the parties shall provide us
6 briefs on the issue of potential parties as it applies
7 to receiving documents under a protective order and
8 affidavit of non-disclosure. And, again, with a ten-
9 page limitation.

10 JUDGE KARLIN: I think the potential party
11 issues is sort of anything you have to tell us on
12 potential party but obviously focus on one -- on the
13 issue we talked about here, protective orders.

14 CHAIRMAN MOORE: That is correct.

15 JUDGE KARLIN: Okay.

16 CHAIRMAN MOORE: By May 12th, DOE will inform
17 us whether there is an underlying case management
18 order for the spent fuel litigation dealing with the
19 privilege log and provide us a copy please.

20 And lastly, by May 12th, the parties shall
21 submit -- what was that one --

22 JUDGE KARLIN: Any further briefing you have
23 --

24 CHAIRMAN MOORE: On what was the issue.

25 JUDGE KARLIN: -- on the issue of Mr.

1 Fitzpatrick's persistent issue, which is the --

2 CHAIRMAN MOORE: Yes, submit --

3 JUDGE KARLIN: Whether or not --

4 CHAIRMAN MOORE: -- any briefs on the issue,
5 limited to ten pages, on the --

6 JUDGE KARLIN: Requirement that the initial
7 LSN certification must include redacted versions of
8 any documents that are redactable under FOIA.

9 CHAIRMAN MOORE: And since you've all heard
10 each other's positions today, you know where each
11 party is coming from on that issue, if you didn't know
12 already, so that you can respond to the arguments of
13 each other.

14 Are there any questions? Yes?

15 MR. FITZPATRICK: Just one. I didn't hear
16 anything, I don't think, about any briefing on the
17 issue of the Commissioner application of anticipation
18 of litigation.

19 CHAIRMAN MOORE: Yes, that is correct. We
20 have decided that we're going to be, unfortunately, in
21 the position of having to react when the cases come.
22 Our plan of proceeding is after we receive and study
23 your briefs and have the next case management
24 conference on privilege logs and procedures, we will
25 fully understand all the parties' positions.

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1 You now have a very good indication of our
2 position on how we think it should be structured. We
3 plan on then instructing you to -- and at the next
4 conference, we will be giving you our positions on all
5 of these matters you've briefed and provide us further
6 briefing on, and we will then, in a session much
7 shorter than today, be sending you off to give us your
8 joint proposed case management order.

9 We will then do our editing of it, which
10 should be minor at that point, and issue it with the
11 proposed protective orders and affidavits of non-
12 disclosure that will be used. And we hope to have
13 this wrapped up in relatively short order.

14 We will then tackle the safeguards and
15 classified problems. But one at a time. First
16 safeguard. Then classified because there is no
17 classified information on the LSN. And we don't have
18 to worry about it some time until the future.

19 MR. CYNKAR: Your Honor, can we tackle also
20 the issue of the draft license application? Or is
21 that something you also want to defer?

22 JUDGE KARLIN: It is the same issue as the
23 one you just asked about which is the prepared in
24 anticipation of hearing versus prepared for the
25 application.

1 CHAIRMAN MOORE: And that -- in your comments
2 on the work product privilege, you are free to give us
3 your views on that. And in that same vein, there
4 appears to be a differing view as to the regulations
5 and what's it called -- concurrent drafts?

6 JUDGE KARLIN: Oh, preliminary draft versus
7 circulated draft?

8 CHAIRMAN MOORE: Circulated drafts with
9 concurrence change and whether by negative
10 implication, all other drafts are excluded from the
11 language of the regulations.

12 And if memory serves correctly, the
13 legislative history will be of some use to you all in
14 wrestling with that. And in that regard, we had said
15 you should limit your briefing to no longer than ten
16 pages on that, I would think. I don't think we set a
17 page limit.

18 JUDGE KARLIN: Do you mean on comments on
19 Appendices A, B, and C?

20 CHAIRMAN MOORE: Yes.

21 JUDGE KARLIN: No, we didn't impose it.

22 CHAIRMAN MOORE: So with that issue, ten
23 pages should be sufficient.

24 JUDGE ROSENTHAL: I think it is fair to say
25 that where these so-called briefs are due on the same

1 day, they could be one document. They do not have to
2 be separate documents.

3 Of course, you would have to, on each of
4 those issues, observe the page limit that Judge Moore
5 has established. But it can be a combined brief.

6 CHAIRMAN MOORE: We were just trying to, as
7 quickly as we could, go through all the matters that
8 we dealt with today to get this to you as soon as
9 possible. Yes?

10 MR. FITZPATRICK: I just wanted to make sure
11 you didn't make a mistake. Early in the list, you
12 said briefing on Item 4. And then just now you seemed
13 to indicate you thought there was briefing on work
14 product privilege, which I didn't hear. Question 4
15 has to do with that, you know, client discussions
16 regarding, which I thought was -- it seemed to be
17 fairly non-controversial. Is that something you want
18 briefed?

19 Number 5 is work product.

20 JUDGE KARLIN: Yes, that is what we want.

21 MR. FITZPATRICK: Okay. And so is there a
22 briefing on work product --

23 CHAIRMAN MOORE: And all of you are free to
24 certainly be much more brief than any suggested page
25 limits that we've set.

1 MR. CYNKAR: Just to alleviate my confusion.
2 Is the briefing on Appendices A, B, and C, does that
3 have no page limit?

4 CHAIRMAN MOORE: Ten pages.

5 MR. CYNKAR: Okay.

6 CHAIRMAN MOORE: And included in that is the
7 question as part of the deliberative process
8 privilege.

9 Now, do any of you have questions for us?
10 Staff?

11 MR. SMITH: Will this be memorialized in some
12 writing?

13 CHAIRMAN MOORE: Yes, but not until we get
14 the transcript.

15 MR. SMITH: Okay. And do we know the
16 approximate time frame for that?

17 CHAIRMAN MOORE: Well, because of severe
18 budgetary constraints, I opted for a three-day
19 transcript instead of overnight. So you will not see
20 it before early next week because we won't have a
21 transcript until Monday.

22 MR. SMITH: I have a couple of additional
23 comments.

24 CHAIRMAN MOORE: That's why we went through
25 this now. And I think you should all be clear on what

1 you have to do and the time limits for doing it.

2 MR. SMITH: Yes. A couple of other points in
3 response to questions you'd asked us to find out when
4 we expected rulemaking on safeguards information to be
5 complete. And the answer is probably not before
6 September. But that's only an estimate.

7 Wrapped up in that is also that there won't
8 actually be any safeguards information until a license
9 application is submitted. So in terms of the timing -
10 -

11 CHAIRMAN MOORE: I can't answer that. I do
12 now know -- let's see, there is no safeguards
13 information on the LSN.

14 JUDGE KARLIN: No, no, that's not correct.
15 I think the LSN --

16 CHAIRMAN MOORE: Well, the son of safeguards
17 --

18 MR. GRASER: There are homeland-sensitive
19 screening bibliographic header only --

20 JUDGE KARLIN: Well, I don't know what is
21 actually on the LSN but the way I read the
22 regulations, they certainly contemplate that headers
23 need to be provided for safeguards information.

24 MR. SMITH: Certainly. The definition -- I'm
25 sorry, the definition of safeguards information is

1 information submitted by an applicant or a licensee.
2 So until the department has actually submitted some
3 information to us as an applicant that would qualify
4 for the definition of safeguards information, there
5 won't be any header on the LSN --

6 JUDGE KARLIN: Oh, I see.

7 MR. SMITH: -- nor will there be any
8 information to make available pursuant to a protective
9 order.

10 CHAIRMAN MOORE: Well, right now there is
11 information, header only, on the LSN that involves
12 this category of things under the heading of Homeland
13 Security-sensitive or -- does that not fall within the
14 rubric of safeguards?

15 MR. SMITH: It does not.

16 CHAIRMAN MOORE: And how it is to be treated?
17 Does it fall within the definitions of the proposed
18 rules on how this kind of information is to be
19 treated?

20 MR. SMITH: I don't believe so.

21 CHAIRMAN MOORE: So that information can be
22 included as protected information under the protective
23 orders that we're instructing you to go wrestle with?

24 MR. SMITH: That was our understanding.

25 CHAIRMAN MOORE: Is that DOE's understanding?

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1 MR. SHEBELSKIE: I don't think so, Your
2 Honor.

3 CHAIRMAN MOORE: I didn't think that would
4 be. All right. Before we come back to you and you
5 discuss with your security people, Nevada?

6 MR. MALSCH: Yes, Judge Moore, I think our
7 concept would be that although some of this material
8 may not actually be technically safeguards
9 information, we would like to see the whole issue
10 wrapped up in the same discussion of protective orders
11 on safeguards information.

12 CHAIRMAN MOORE: Okay.

13 MR. MALSCH: So we'd like to see that
14 resolved by July 1.

15 CHAIRMAN MOORE: I think that's probably a
16 sensible approach. So it will be safeguards and, for
17 lack of another term, son of safeguards information.

18 MR. SMITH: Other sensitive unclassified
19 information.

20 CHAIRMAN MOORE: Yes. We can save some time.
21 Everyone agrees, and I assume you will, that we'll
22 deal with the sensitive unclassified at the same time
23 we deal with safeguards so it presumably is some
24 reasonably small subset. And we'll just have to deal
25 with it in that context. And if it engenders delay,

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1 so be it.

2 JUDGE KARLIN: Yes, on that concept, the
3 Department of Energy has OCNE information. They have
4 OOU information that are not necessarily comprehended
5 within the definition of safeguards information of the
6 NRC but which you all have attempted or proposed to
7 cover by the safeguards proposal. And, you know, sort
8 of said we'll deal with that later.

9 So there is OOU and OCNE information that DOE
10 has that may be put on the LSN headers and may be
11 requested by parties such as the State of Nevada. So
12 I don't think we can put this off until the
13 application is submitted.

14 MR. SMITH: That's fine. I just wanted to
15 clarify --

16 JUDGE KARLIN: Yes, that's helpful.

17 MR. SMITH: -- the definition of safeguards
18 material and identify that there are different types
19 of materials that we're talking about including under
20 this "safeguards" protective order or joint proposed
21 order.

22 CHAIRMAN MOORE: Did you have any other
23 matters?

24 MR. SMITH: I did have one other -- last --
25 I guess it's really a question for you via the LSN

1 administrator. And that is how will these privilege
2 logs that are going to be added to the DDMS, how will
3 they become part of the record for the proceeding? I
4 guess how are they added to the electronic hearing
5 docket? Do they need to be -- these are questions
6 that we are unclear on.

7 CHAIRMAN MOORE: Well, I have a reasonable
8 understanding of the DDMS. And it will be a file in
9 the DDMS which will be accessible to all the parties.
10 Because it is a Web-based system, it is accessible to
11 them from their own locations through a password
12 security system. And we, of course, will deal with
13 that through Mr. Graser so that everyone will have
14 access.

15 And it will appear as an electronic document
16 that will be able to be used and searched. And it
17 will be also used from the Board's standpoint as the
18 tracking mechanism for keeping track of all the
19 privilege requests, who turned things over, what is
20 outstanding and what's not.

21 Because if there are hundreds or thousands of
22 these there has to be a tracking mechanism. And this
23 will provide it. It will essentially be the record.
24 And what can be done, the DDMS is totally separate
25 from the LSN but we can generate reports periodically

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1 on some basis and put those into the LSN for public
2 consumption if that need be done.

3 But it would be available to you and to the
4 Board, all the parties who are involved in the
5 privilege requests, denials, privilege logs. It will
6 all be there.

7 MR. SMITH: I understand that, I guess. My
8 question is really how does that become part of the
9 electronic hearing docket? I mean this information is
10 going to be maintained by the LSN administrator on
11 some standalone system --

12 CHAIRMAN MOORE: That I can't answer other
13 than it can be plugged into ADAMS through the normal
14 process for putting all documents and the record into
15 the DDMS. But Mr. Graser, can you answer that
16 question directly?

17 MR. GRASER: The system would have the
18 capability of generating comprehensive listings of all
19 of the items in the database. And on an interval, as
20 directed, the contents of the database could be
21 generated as a report and rendered as a PDF document.
22 And it could be added to the electronic hearing docket
23 as a document.

24 As Judge Moore indicated, it could be placed
25 on the LSN for public access. So whatever we are

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1 directed to do, if we are directed to figure out a way
2 to get a copy of the database listing into the docket,
3 we will figure out a way to do that.

4 That was somewhat a good set up for one of
5 the questions I had in terms of having the meeting.
6 What was the Board's expectation as the outcome of the
7 meeting of the technical experts?

8 CHAIRMAN MOORE: For you to be able to
9 respond all the parties' questions. And should they
10 not -- should there be anything that is unresolved at
11 the next conference, you will present that to us for
12 resolution.

13 MR. GRASER: Okay.

14 CHAIRMAN MOORE: And from what I understood
15 from today's discussion, the manner in which
16 bibliographic header information is being provided by
17 the parties is pretty much the same manner in which
18 all future information on the privilege logs will be
19 provided. So that kind of thing is well understood
20 already.

21 JUDGE KARLIN: One of the things I might say
22 is that from reading the proposed case management
23 order, it appeared that the Counsel had operated very
24 logically but hadn't really consulted their IT people
25 very closely in terms of what the LSN is capable of

1 doing and not doing.

2 So consequently, the proposed case management
3 order said the LSN will do this, the LSN will do that.
4 We'll put this on the LSN. And I think what I am
5 hearing is that no, the LSN is not built that way.
6 And your technical people probably could have told you
7 that in a second if you'd asked them that.

8 And so perhaps we just need to talk with the
9 IT people more closely to see, you know, before we
10 come up with an idea that just is not suitable for the
11 LSN.

12 CHAIRMAN MOORE: Any other questions?

13 MR. SHEBELSKIE: I have no other questions,
14 thank you.

15 CHAIRMAN MOORE: DOE?

16 MR. FITZPATRICK: No questions.

17 CHAIRMAN MOORE: Nevada?

18 MR. GRASER: No, sir.

19 CHAIRMAN MOORE: NIRS? NEI?

20 (No response.)

21 CHAIRMAN MOORE: I would like to thank you
22 all for your participation today. And, again, thank
23 you for the work you've put in in trying to reach
24 common ground. And I hope that this will remain our
25 way of proceeding for the next -- I'll ask DOE to tell

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1 us how long.

2 (Laughter.)

3 CHAIRMAN MOORE: I don't think any of us here
4 can promise we'll be here at the end of this road.

5 (Laughter.)

6 CHAIRMAN MOORE: Thank you. We stand
7 adjourned.

8 (Whereupon, the above-entitled hearing was
9 concluded at 5:06 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: U.S. Department of Energy
High Level Waste Repository:
Pre-Application Matters
Docket Number: PAPO-00
Location: Rockville, MD

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
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transcript is a true and accurate record of the
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