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NUCLEAR REGULATORY COMMISSION

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High-Level Waste Repository
Pre-Application Matters

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Docket Number: PAPO-00; ASLBP No.: 04-8239-01-PAPO

Location: Rockville, Maryland

Date: Tuesday, July 12, 2005

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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		ASLBP No.
(High-Level Waste Repository:		04-8239-01-PAPO
Pre-Application Matters)		



Hearing Room T3BB45
 U.S. Nuclear Regulatory Commission
 Two White Flint North
 11545 Rockville Pike
 Rockville, Maryland

Tuesday, July 12, 2005

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

Before Administrative Judges:

THE HONORABLE THOMAS S. MOORE, Chairman

THE HONORABLE ALEX S. KARLIN

THE HONORABLE ALAN S. ROSENTHAL

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

(8:59 a.m.)

CHAIRMAN MOORE: Good morning, ladies and gentlemen. The prelicensing application presiding officer board is hearing argument this morning on the State of Nevada's June 6th motion to compel production of the Department of Energy's draft license application.

Pursuant to our order of June 30th, one counsel for the State as movant will argue first and have one hour for argument, reserving no more than 15 minutes for rebuttal. One counsel for DOE will argue next with a total of one hour for argument.

Will counsel for both the state and DOE please introduce yourselves for the court reporter?

MR. FITZPATRICK: Charles Fitzpatrick for the State of Nevada.

MR. EAGAN: Joe Eagan for the State of Nevada.

MR. IRWIN: Donald Irwin for the Department of Energy.

MR. SHEBELSKIE: Michael Shebelskie for the Department of Energy.

CHAIRMAN MOORE: Although we have not yet transitioned to real-time court reporting, as is

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1 obvious with our court reporter, counsel should be
2 aware that the Digital Data Management System is now
3 operational in this hearing room. And the argument
4 this morning is being videotaped. Once we do
5 transition to real-time court reporting and the panel
6 staff and all counsel are trained and receive
7 passwords, then transcripts will be available to you
8 on the DDMS.

9 With that, counsel may now proceed. Would
10 you please stay at the podium?

11 MR. FITZPATRICK: Good morning, Your
12 Honor.

13 May it please the Court, Charles
14 Fitzpatrick for the State of Nevada.

15 Let me sort of as background, we're here
16 to consider the dispute of the propriety of a
17 particular document, particularly important large
18 document, being required to be placed on the LSN
19 network by DOE or not required to.

20 I think an appropriate starting point
21 would be a DOE statement of what the purposes of the
22 LSN are. And, therefore, it's got its own guidance as
23 to its goals. It speaks in its OCRWM licensing
24 support network strategic approach in 2001 about what
25 NRC's goals in establishing the LSN were.

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1 And DOE says, "The Commission believed
2 that the LSN could facilitate the timely NRC technical
3 review and the timely petitioner discovery type review
4 of DOE's license application by providing access to
5 relevant documents before DOE submits its license
6 application," which, of course, we all know that's not
7 going to happen until six months after the LSN
8 certification.

9 DOE went on, "The NRC also believed that
10 early provision of these documents would allow for a
11 thorough, comprehensive technical review of the
12 license application by all parties and potential
13 parties to the HLW licensing proceeding resulting in
14 better focused contentions in the proceeding."

15 So it was evident to DOE that the goal
16 that NRC set out for the LSN was to provide as much as
17 possible the license application-related information,
18 the licensing application, licensing information,
19 which would be so valuable to the users of the system.

20 Now, here today we're focused on one
21 document, the draft license application delivered by
22 Bechtel, the contractor, to DOE in July of 2004. In
23 order to answer the question of whether it ought to be
24 on the LSN, we noted down in our briefings, that the
25 sides have, to three primary questions. With respect

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1 to the draft LA, it the document for material, number
2 one? Is it a circulated draft, number two? And,
3 number three, is it privileged? Let me go to the
4 third item first about the privilege.

5 We sought to obtain the draft LA on a
6 number of different occasions through a number of
7 different methods. The first was a FOIA request was
8 turned down. It was privileged. It was claimed it
9 was privileged.

10 The second was correspondence to DOE's
11 counsel. And it was declined because it was
12 privileged.

13 The third was a letter from the governor
14 of Nevada to the Secretary of Energy. It was declined
15 because it was privileged. Then we came to this PAPO
16 proceeding on May 18th at the hearing on that day when
17 the subject was brought up.

18 In fact, it was DOE who brought up the
19 subject that this matter ought to be entertained in
20 brief so that it can be decided before the LSN
21 certification and not become an issue after the
22 certification and risk its viability. And in that May
23 18th hearing, they said that it was privileged.

24 The Board ordered Nevada to request it
25 again in writing, DOE to decline if they still so

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1 chose and explain the reasons in some detail. And the
2 Board mentioned in respect to the privilege reasons,
3 "You should refer to the component parts of those
4 templates that we have already set out for you for
5 deliberative process and litigation work product if
6 you assert those privileges."

7 The response came from DOE counsel. And
8 it asserted "not documentary material, not circulated
9 draft, and it's privileged." What privilege?
10 "Process privilege and litigation work product
11 privilege."

12 So Nevada filed its motion to compel,
13 argued against all four issues, explained why it ought
14 not be considered deliberative process privilege
15 because that privilege is waived by the terms of the
16 rule as to circulative drafts.

17 CHAIRMAN MOORE: And on that subject,
18 haven't they waived by not briefing it under the
19 procedure we've set out any claim to such privilege
20 now or --

21 MR. FITZPATRICK: Well, not only that
22 privilege but litigation work product. In other
23 words, it's pretty axiomatic that the advocate of a
24 privilege to withhold documents bears the burden of
25 proving the privilege, establishing its elements.

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1 When it was to do so was made readily clear here by
2 the Board, said, "Nevada, can you explain exactly why
3 you should not have it?"

4 We even briefed, not knowing what their
5 analysis would be, why it couldn't be litigation work
6 product, but they declined to even assert that and
7 said that it was premature to assert that. And we
8 believe that by not taking the opportunity when it was
9 specifically given them, 40 pages worth, to explain
10 the basis of the privilege, that it has been waived
11 and no privilege applies --

12 JUDGE ROSENTHAL: Do you contend that the
13 deliberative process privilege would not apply to this
14 document if it were concluded that this was not within
15 the exemption provided for circulated drafts?

16 MR. FITZPATRICK: No, Your Honor. The
17 issue only comes up if it is a circulated draft or a
18 final document. Those are the documents required to
19 be on the LSN in the first place.

20 If it were not one of those, then it may
21 well be. If it was a preliminary draft, it may well
22 be subject to deliberative process, but that wouldn't
23 even come up because if they could show that it was a
24 preliminary draft, it need not be. It's not
25 documentary material. And it wouldn't be --

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1 JUDGE ROSENTHAL: I understand that, but
2 what I'm getting at, again, is assuming that this is
3 documentary material but assuming that it does not
4 come within the definition of circulated draft, would
5 you acknowledge that in that circumstance, it would be
6 protected by the deliberative process privilege?

7 MR. FITZPATRICK: If it were not a
8 circulated draft --

9 JUDGE ROSENTHAL: In other words, if it's
10 a circulated draft, then that privilege does not
11 apply.

12 MR. FITZPATRICK: And if it's a final
13 document, a final LA, of course, it has to be made
14 public anyway.

15 JUDGE ROSENTHAL: Right. But what I'm
16 getting at is whether on its face without regard to
17 the exemption, it would qualify as entitled to the
18 deliberative process privilege.

19 MR. FITZPATRICK: If it were not a
20 circulated draft, it might well qualify for that
21 privilege if it were properly asserted by the party.

22 JUDGE ROSENTHAL: Oh. So you're saying
23 that there wasn't a proper assertion of it. You're
24 claiming that there was a waiver?

25 MR. FITZPATRICK: Well, there was a

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1 waiver. They agreed that -- I mean, it's kind of moot
2 because if it's not a circulated draft, it doesn't get
3 on the LSN. And if it is circulated draft, it's
4 conceded that the deliberative process privilege is
5 waived.

6 JUDGE KARLIN: But it is probably not
7 moot. And when we get to the docketing period because
8 once a docketing occurs in the derivative discovery,
9 preliminary drafts can be obtained and discovered, can
10 they not, under section 102.1019(i)(2)?

11 And since we need to be alert to that, I
12 think the question is a valid one because certainly
13 there's a problem here I think, which is, "Well, isn't
14 this just a matter of timing?" All preliminary
15 drafts, not otherwise privileged, must be produced in
16 the derivative discovery if they're requested.

17 And so this is a circulated draft. It
18 simply delays the production of this document or
19 accelerates the production of this document by six
20 months, let's say.

21 MR. FITZPATRICK: I see your point now,
22 Judge. Yes. In other words, if the discovery starts
23 under, say, depositions with document production under
24 210.19, begins sometime hence and preliminary drafts
25 are asked for of documents such as this document and

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1 the issue is raised then, there would be an issue
2 raised perhaps of, is this a subject to deliberative
3 process?

4 And I suspect that his position at the
5 time will be that 210.19 specifically says and makes
6 discoverable drafts. It's not referring to the
7 circulated draft of the final that is already in the
8 LSN. It's referring to more preliminary drafts. And
9 so I think there would be a good argument that the
10 privilege doesn't apply then.

11 CHAIRMAN MOORE: But even under discovery
12 in the Federal Rules of Civil Procedure, if experts
13 are relying on that material, whether they are
14 testifying or don't testify, the privilege no longer
15 stands.

16 MR. FITZPATRICK: If any witness relies on
17 it, that would waive the privilege at that time, Your
18 Honor.

19 CHAIRMAN MOORE: So if Nevada were so
20 inclined, all of this material could be obtained by
21 seeking out during depositions those authors of this
22 material, presumably our experts having written it, to
23 obtain it that way.

24 MR. FITZPATRICK: I think as mentioned in
25 Mr. Arthur's statements of 72 different sections of

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1 the draft LA, different disciplines, engineering
2 disciplines and so on. And yes, we would anticipate
3 taking depositions in almost every one of those areas
4 depending on contentions and at that time seeking the
5 drafts written by those people and testing their
6 testimony by the changes in their draft.

7 CHAIRMAN MOORE: So if that is an accurate
8 recitation of the law, it is to some extent just a
9 matter of a question of timing.

10 MR. FITZPATRICK: I don't think that
11 210.19 contemplates those documents being made
12 available until such time as that discovery is
13 underway, but certainly once that discovery was
14 underway, these very same documents that we're talking
15 about would be made available, just at a later date.

16 CHAIRMAN MOORE: What is the purpose
17 behind the Commission's waiver of the deliberative
18 process privilege in 10 CFR 2.1001, I guess it is, 1
19 or 3? One.

20 MR. FITZPATRICK: I could only believe
21 that it's -- with the goal of open transparent
22 proceeding, this is certainly one of the most publicly
23 watched proceeding and will be when it's underway.
24 And so not only the final document that actually gets
25 published but what may be called the predecessor

1 document that may have been tested and checked and
2 challenged and corrected --

3 JUDGE ROSENTHAL: What I don't understand,
4 then, is why these various requirements. I mean, the
5 document has to be non-final. It has to be circulated
6 for supervisory concurrence or signature, which the
7 original author or someone else in the concurrence
8 process has to have nonconcurred, whatever that means.

9 I have some difficulty in understanding
10 why, following up on Judge Moore's question, the
11 Commission might have in your judgment decided to
12 waive or exempt, rather, from its application this
13 particular well-known privilege when these particular
14 circumstances are present.

15 I mean, I don't see the relation of the
16 nonconcurrence, the circulation for supervisory
17 concurrence or signature to the matter of whether as
18 part of this disclosing everything possible process --
19 in other words, it seems to me that if the Commission
20 really wanted everything on the table, they would have
21 just said, "Drafts of license applications are to be
22 disclosed." Instead, they have these various
23 conditions.

24 I don't understand their relation to
25 whether or not the deliberative process privilege

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1 should or should not be available.

2 MR. FITZPATRICK: Well, I think that, for
3 one thing, there could be an argument made that every
4 single document created by, say, the Department of
5 Energy with respect to the Yucca Mountain project from
6 about 1988 or whenever the statute was passed focusing
7 on Yucca alone, that every document from then until
8 the final license application or perhaps the final
9 site recommendation once they made up their mind in
10 2002 to recommend it, that every other document
11 leading up to that, arguably, could have been withheld
12 absent NRC defining some terms, could have been held
13 on the basis of deliberative process privilege.

14 And perhaps NRC was trying to strike a
15 balance between at one end having something more for
16 the public and participants in the proceeding to look
17 at just the final document and, yet, not every single
18 preliminary draft from day one because DOE is already
19 posting something like three and a half million
20 documents as it is with just circulated drafts and
21 final drafts required.

22 JUDGE ROSENTHAL: I understand that, but
23 I don't understand why nonconcurrence should have been
24 a critical factor in determining whether the privilege
25 was available or not. And, of course, there seems to

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1 be considerable difference of opinion between you and
2 the opposition as to precisely what nonconcurrence
3 means. But why might the Commission have --

4 MR. FITZPATRICK: Well, I can only --

5 JUDGE ROSENTHAL: -- considered that as
6 being a pivotal factor in determining whether the
7 privilege was available or not?

8 MR. FITZPATRICK: Well, I think I can only
9 suggest that if a document floated up through the
10 ranks with no adverse comments, if it was published in
11 the form that it was written by its authors, there
12 would be no other relevant document, really, for the
13 public or participants to focus on.

14 If, on the other hand, the higher-ups in
15 the chain, you know, the department heads and so on
16 and the high management of DOE, if someone at those
17 levels disagreed in some significant way with the
18 draft and caused it to be changed or insisted that it
19 be changed, then that document becomes a document of
20 interest to the NRC and the public. In other words,
21 a significant issue has been raised.

22 JUDGE ROSENTHAL: In some significant way.
23 So that merely editorial revisions would not
24 constitute nonconcurrence. This would have to be
25 going to the substance of the document, rather than

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1 the way the particular thought was expressed.

2 MR. FITZPATRICK: I think that's right,
3 Your Honor. DOE procedures draw a dividing line
4 between mandatory nonconcurrence and non-mandatory.
5 I think they call them optional.

6 But in any event, correcting the ones that
7 are not mandatory or even dealing with them is
8 discretionary on the part of the author. But
9 mandatory nonconcurrences must be dealt with, must be
10 --

11 JUDGE KARLIN: I think they used the word
12 "mandatory" comments.

13 MR. FITZPATRICK: Pardon?

14 JUDGE KARLIN: They used the word
15 "mandatory" comments.

16 MR. FITZPATRICK: Mandatory comments?

17 JUDGE KARLIN: Yes.

18 CHAIRMAN MOORE: Can you enlighten me --

19 JUDGE KARLIN: They are assiduous in
20 avoiding the word "concurrence" I think in that
21 respect.

22 CHAIRMAN MOORE: Can you enlighten me on
23 whether there are any standards for what is a
24 mandatory and what is a non-mandatory comment?

25 MR. FITZPATRICK: I didn't see them in the

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1 procedures, the DOE procedures, that I have seen. I
2 saw them referenced and how they would be treated, the
3 mandatory ones.

4 Let me read you, if I might, just a piece
5 from DOE procedure that touches on that because I
6 think it's instructive in this whole picture that
7 we're dealing with of "Okay. A document to be this
8 circulated draft that has to be non-final." Well we
9 all agree with that. "It has to have been circulated
10 up a chain for concurrence."

11 CHAIRMAN MOORE: Let me interrupt you at
12 that point. Is there a difference in your mind
13 between signature or concurrence? The regulation uses
14 the conjunction "or," not "and."

15 MR. FITZPATRICK: I think there is.

16 CHAIRMAN MOORE: And what is that
17 distinction?

18 MR. FITZPATRICK: The time lines that I
19 have seen and I can offer here with respect to the
20 sequence anticipated by DOE in 2004 called for a draft
21 license application to be produced or delivered by
22 Bechtel to DOE in July, followed by a technical
23 review, followed by a management review, during either
24 of which there could be these mandatory comments or
25 nonconcurrences. But then as a separate item, once

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1 those were all revised and came to rest, then there
2 was a document put forward for signature and then for
3 production.

4 And so I think that there are two
5 different things. The document that was delivered by
6 Bechtel in 2004 in July was very definitely delivered
7 to DOE for concurrence and to be put into the pipeline
8 of checks, which it was. It was intensely reviewed,
9 in the words of Ms. Chu. It was reviewed for weeks by
10 senior managers, according to Mr. Arthur.

11 JUDGE ROSENTHAL: DOE insists that this
12 wasn't really for the purpose of obtaining
13 concurrences. Now, is there a factual issue involved
14 here that has to be resolved?

15 MR. FITZPATRICK: Well, I think there is
16 a common sense issue, Your Honor. Picture that DOE
17 has worked for 22 years, from 1988 to 2002, doing the
18 research, the analysis, the tests.

19 For the last several years of that time,
20 they have put together now a draft license
21 application. It has undergone six months of intensive
22 review. That was the plan. I mean, it was scheduled
23 for six months of intensive review and then in
24 December to be signed and delivered to the NRC.

25 Now, if one wants to suggest that the

1 review that was conducted wasn't for concurrence,
2 that's not credible. Ms. Chu testified or stated to
3 the TRB that many revisions were made, many comments
4 were made and revisions as a result.

5 CHAIRMAN MOORE: You used the word
6 "testified" for Ms. Chu, for the Nuclear Waste
7 Technical Review Board at DOE. Were they under oath?

8 MR. FITZPATRICK: No, I don't believe so.
9 I misspoke. They stated these things.

10 JUDGE KARLIN: May I focus on the
11 unresolved objection argument that the DOE presents?
12 Clearly in the regs, there is a preamble or statement
13 of consideration that specifies that the objection or
14 nonconcurrence must be unresolved. What do you make
15 of that?

16 I mean, it seems to be a bald, flat
17 statement by the Commission in the statement of
18 consideration. And the resolution of a contention by
19 amending the draft, the DOE argues, automatically
20 means it's not a circulated draft. There appears to
21 be an argument that there has to be an unresolved
22 contention.

23 Do you accept that? And, second, what is
24 the meaning of "unresolved"?

25 MR. FITZPATRICK: I don't know if 17 years

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1 after the last time I saw that used, -- I think it was
2 1989, and that's not in the reg. That was in this --

3 JUDGE KARLIN: But it is all we have got.

4 MR. FITZPATRICK: It's in a statement of
5 considerations. Of course, after that gets put into
6 effect and the words "unresolved nonconcurrence"
7 become part of the glossary, then parties can
8 manipulate their procedures in such a way as to not
9 use words like "concurrence" or "nonconcurrence" or in
10 a way that makes it literally impossible for there to
11 be an unresolved nonconcurrence.

12 Let me read from DOE's 2003 procedure.
13 Toward the end of this little six-month span of what
14 happens when it gets in that pipeline --

15 CHAIRMAN MOORE: Is this before us, what
16 you're reading?

17 MR. FITZPATRICK: No, Your Honor. I can
18 give you a copy.

19 MR. SHEBELSKIE: Your Honor, let me
20 interpose an objection. This I think would be the
21 third document that Mr. Fitzpatrick has referred to
22 from his argument that it's not part of the exhibits
23 to the motion.

24 MR. FITZPATRICK: Well, I sent Mr.
25 Shebelskie yesterday a list of the documents that I

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1 was going to refer to and, in fact, faxed him one that
2 he didn't have. So there's no surprise here.

3 MR. SHEBELSKIE: Well, too, it depends on
4 what use you will make of these.

5 MR. FITZPATRICK: Okay. The use I'll make
6 of this particular document is to show the judges the
7 resolution process for comments and nonconcurrence
8 that DOE used.

9 CHAIRMAN MOORE: Mr. Fitzpatrick, please
10 proceed.

11 MR. FITZPATRICK: Technical team review is
12 responsible for providing comments on the draft
13 material through the review coordinator for their
14 department organization along with specific
15 recommendations for resolving the comments.

16 The authors of the document working with
17 LAD, License Application Division, the section leads,
18 provide responses to all mandatory comments.
19 Reviewers are then responsible for accepting or
20 rejecting the comment responses.

21 For any rejected comment responses, the
22 appropriate author should attempt to negotiate an
23 acceptable resolution with the reviewer. If the
24 comments cannot be resolved satisfactorily, the
25 dispute is resolved in consultation with the LAD

1 section lead, the Bechtel LAP manager, -- that's
2 License Application Project -- the DOE Office of
3 License Application and Strategy, reviewers, LAD
4 section leads, licensing leads, authors as needed may
5 be requested to attend one or more comment resolution
6 meetings for each technical team review, where
7 comments that could not be resolved are discussed and
8 resolved.

9 In other words, what you have here is a
10 procedure that says there will never be a
11 nonconcurrency that is not resolved because if there
12 is, when you sit down the authors and the reviewers
13 and if they can't negotiate a resolution, we're going
14 to form a committee. And the committee will make a
15 resolution. They will resolve the problem. And so --

16 JUDGE ROSENTHAL: So they would not be
17 regarded as being unresolved, even if somebody in the
18 chain who had raised the question to begin with is
19 adamant that there is a problem?

20 MR. FITZPATRICK: Well, the problem,
21 Judge, -- and this is where we come into how will we
22 ever know factually without discovery where the
23 unresolved, non-resolved nonconcurrences exist is
24 because under this procedure, there is going to be a
25 resolution.

1 In other words, something is going to go
2 into the document, whether it's what the author wants
3 or whether it's what some reviewer wanted or whether
4 this committee of referees has to get in there and
5 resolve the fight.

6 But, in any event, a resolution will be
7 made. And, as a consequence, DOE would always be able
8 to say, "This is not a circulated draft because there
9 is not an unresolved comment." I suppose "unresolved"
10 means if the commenter was told, "Your comment is
11 rejected. Go away."

12 CHAIRMAN MOORE: I understand.

13 MR. FITZPATRICK: Then it's resolved.

14 CHAIRMAN MOORE: Putting aside the
15 definition of circulated draft, isn't that process one
16 that you would necessarily have to go through to file
17 a license application?

18 You can't file a license application, at
19 least in my opinion, that says, "Well, staff, you can
20 take your choice between A or the dissenting view, B,
21 on any particular issue."

22 You can't do that. So necessarily
23 technical matters amongst a diverse group have to be
24 resolved before they can go forward with a resolution
25 or a united front on an issue. The best minds they

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1 have have to come to a conclusion on it.

2 Not everyone might be satisfied, but
3 that's the way all processes work. Decisions have to
4 be made.

5 MR. FITZPATRICK: Commercial entities are
6 the same way. If they're going to make a
7 presentation, they've got to come to a conclusion of
8 what they're going to present. But if you strictly
9 follow that, which is very logical and I believe true,
10 then it kind of emasculates the existence of
11 circulated drafts.

12 CHAIRMAN MOORE: Only if you interpret it
13 the way DOE interprets.

14 MR. FITZPATRICK: Right, or -- and this is
15 very important -- or if the document meets the further
16 description in circulated draft of a document that it
17 has been decided will not be finalized. And that's
18 what happened with this document because in July of
19 2004, two things happened that month of interest. One
20 was the draft LA.

21 The other was the courts of civil appeals
22 in D.C. Circuit came out with an opinion which they
23 vacated, the 10,000-year stand. I have a news
24 clipping in here, but I don't want to offend anyone.
25 But it's attached to our motion. But it's a news

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1 clipping at the time of the filing of the delivery of
2 the draft LA.

3 Alan Benson, DOE spokesman, says in answer
4 to questions, "Are you still going to go forward with
5 this draft LA?" And you said yes because --

6 CHAIRMAN MOORE: All your exhibits --

7 MR. FITZPATRICK: You said this draft LA
8 is predicated upon the 10,000-year standard that has
9 just been vacated. And Mr. Benson said, "It is DOE's
10 position that as long as appeals are open and a
11 mandate has not been issued by the Court of Appeals,
12 that the 10,000-year standard is the viable standard.
13 Therefore, that's what this draft LA is predicated
14 upon.

15 Now, four months later, on November 7th,
16 the mandate did issue. Appeals times went away. And
17 only one appellant appealed. The mandate was issued
18 November 7th. And November 22nd, DOE announced after
19 having gone through all of these months of rigorous
20 review and revision of this draft LA continuing the
21 forecast that would be published in December on
22 November 22nd for the first time, they said, "We have
23 decided not to" right after the mandate.

24 So it is my position that at that point,
25 DOE decided -- and that's why another reason it meets

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1 the definition of circulated draft, that this draft
2 would not be put in final and published because it
3 can't be.

4 CHAIRMAN MOORE: So this one is one that
5 you would characterize as essentially died on the
6 vine?

7 MR. FITZPATRICK: In fact, died two ways.
8 I think there are two provisions. One is that a
9 decision made not to finalize and publish it because
10 they're going to have to finalize it and publish it
11 under new different standards.

12 The other is died on the vine by passage
13 of a substantial amount of time without action to
14 finalize.

15 CHAIRMAN MOORE: I was going to ask you
16 what that substantial amount of time -- again, there's
17 nothing in the regulations that so say, but in the
18 1988 proposed rule and statement of considerations,
19 then in the 1989 final rule and statement of
20 considerations, the word "significant" appears in
21 reference to time in regard to things dying on the
22 vine. What does that mean?

23 MR. FITZPATRICK: I have two definitions
24 I'd like to throw out for what's a substantial time
25 without a final LA. One is that because all these

1 time lines that DOE created show a six-month span of
2 time for review of the draft LA until the final and
3 because they went five and a half of those six months
4 continuing to forecast the December date and only at
5 the end of November pulled the plug. I believe they
6 were within two or three weeks of their own deadline
7 for filing the final LA.

8 So going to a point where you're three
9 weeks from ready to file it, how long is a substantial
10 delay from that three weeks in not filing it? Well,
11 we are now nine months past November. And the final
12 LA is not in sight.

13 So I say that when you are down to the
14 five-yard line with two minutes left in the game and
15 then two games later, you're still on the five-yard
16 line, that's a substantial amount of time.

17 The other totally different approach to
18 what is a substantial amount of time -- and Mr. Kamps,
19 whom I don't think is here today, but he should get
20 credit for this, pointed out that under the law, DOE
21 was required to file its license application, its
22 final license application, within 90 days of the final
23 site recommendation.

24 The final site recommendation, they made
25 it in February, but then it was vetoed by the governor

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1 of Nevada. And then Congress overruled that on July
2 23, 2002. Three months hence was October 23, 2002,
3 the date by law by which DOE was required to file its
4 license application.

5 Now we are 33 months past that, not 3
6 months, 33 months past that. And, again, the final
7 license application is not on the horizon. But
8 something else --

9 CHAIRMAN MOORE: What does that have to do
10 with the significant amount of time for one dying on
11 the vine?

12 MR. FITZPATRICK: Because what was not
13 anticipated by the NRC back in 1989 when it used that
14 little phrase, "significant amount of time," was that
15 there would ever be a circumstance where not three
16 months after the SR but three years after the SR and
17 a year after a complete, thorough, comprehensive draft
18 LA is sitting out there on a shelf, the most desirable
19 document for Nevada and other participants to see, to
20 get to work on, you know, the contentions, the whole
21 purpose of the LSN. Remember, information about the
22 license and good contentions.

23 And so that has been sitting there for a
24 year while we champ at the bit to see it to get to
25 work on good contentions. And that's another

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1 definition of what is a significant time that that has
2 lain on the vine dying. It's lain on the vine dying
3 for a year now. And it should either be delivered to
4 us or it should die completely.

5 As a matter of fact, since DOE says that's
6 not a document it relies on, it's not documentary
7 material because they don't rely on it, I think they
8 should either give it to us or destroy all copies of
9 it because if they're not relying on it, they don't
10 need it anymore.

11 CHAIRMAN MOORE: Let's move on to your
12 third number element in the definition of documentary
13 material and reports or studies. You state in your
14 supporting brief that the draft license amendment is
15 unquestionably a report or a study within the meaning
16 of element 3. Why is a draft license application a
17 report or a study within the meaning of 10 CFR 2.001?

18 MR. FITZPATRICK: Because by its nature,
19 by its definition, it contains reports of analyses and
20 studies done by expert engineers and technicians and
21 scientists and geologists and hydrologists over many,
22 many years done by or on behalf of DOE. There's a --

23 CHAIRMAN MOORE: DOE's position is that
24 the license application -- and by that, I am assuming
25 they mean what we all call the safety analysis report

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1 -- doesn't do any such thing but only relies upon
2 other studies and information and analyses and that
3 those they are making available presumably in the LSN.

4 MR. FITZPATRICK: Your Honor, that's very
5 disingenuous to suggest. I've read what you're
6 talking about. I've read it in the brief. I've read
7 it in their letter declining to give us the document
8 that the license application isn't documentary
9 material. It cites some, but the some is over there.
10 It's not the license application.

11 The problem with that, I mean, it
12 basically trivializes it to kind of a transmittal
13 letter. But what's wrong with that is that 10 CFR
14 63.21 doesn't talk about page after page of analysis
15 of this, analysis of that. All these things will be
16 contained in materials submitted with or something.
17 These are the component parts of a license application
18 itself.

19 3.69 lists the topical subject of
20 documents which must be in the LSN.

21 CHAIRMAN MOORE: Well, I would agree with
22 you that the standard review plan doesn't anticipate
23 having to look somewhere else for all of this.

24 MR. FITZPATRICK: Well, the license
25 application review plan in the words of NRC

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1 anticipates the content of the license application.
2 And it's 400 pages of checklists of every little thing
3 that would be checked, not in a transmittal letter but
4 in an application full of studies and reports.

5 CHAIRMAN MOORE: Mr. Fitzpatrick, you
6 didn't tell me at the beginning of your argument how
7 much time you wish to reserve for rebuttal.

8 MR. FITZPATRICK: Fifteen minutes, please.

9 CHAIRMAN MOORE: Okay. You're still
10 within your 45.

11 MR. FITZPATRICK: Okay. Let's see. I
12 think that -- well, I'm kind of jumping around a
13 little because we've jumped around a little. But we
14 were in a position --

15 JUDGE KARLIN: I have a question. As I
16 understand your position, there can be multiple
17 circulated drafts. Each time a document -- let's say
18 the license application is distributed for agreement
19 among supervisors if we convert the language and some
20 supervisor has a mandatory comment that says, "No. I
21 don't like this. I think this needs to be fixed," is
22 it true, then, each time that happens, then we'll have
23 -- and it goes back down for a change, then we have a
24 different circulated draft that has to be produced?

25 MR. FITZPATRICK: If it happened as you

1 described, that could be the case, but I don't think
2 that -- I mean, when you picture a massive 5,800-page
3 draft document, I don't think that each time a
4 suggestion or a significant change is required, that
5 it goes back to the drawing board, gets that tweak and
6 comes back up. I mean, that's why --

7 JUDGE KARLIN: Well, there are 70 chapters
8 or subchapters, we are told. And presumably there are
9 teams working on that. And DOE would have it that
10 those are not supervisory reviews or technical
11 reviews, so you can just ignore what's going on over
12 there.

13 But if we do focus on that, each one of
14 those, there may be a substantive, significant problem
15 that is then addressed and resolved, shall we say.
16 How do we draw a line as to how many circulated drafts
17 you would want to have?

18 MR. FITZPATRICK: Well, we don't want to
19 have 800 if there were 800 changes made. I think
20 that's why we focused on an identifiable draft that
21 was delivered on an identifiable day, July 26, 2004.

22 It may be characterized as a circulated
23 draft because after its delivery, it underwent a
24 certain treatment, which brings about that
25 characterization. But it's that draft that is the

1 circulated draft.

2 If you get into circulated draft 1, 2, 3,
3 4, there could be hundreds. And we would be getting
4 one a day or more than one a day if they were
5 delivered to us, but I think --

6 JUDGE KARLIN: Will the state have any
7 circulated drafts?

8 MR. FITZPATRICK: Yes, Your Honor. We
9 will have circulated drafts and final drafts of every
10 contention

11 JUDGE KARLIN: Do you have a concurrence
12 process that you undergo?

13 MR. FITZPATRICK: There will be a
14 concurrence process from the experts.

15 JUDGE KARLIN: So that if the DOE were to
16 ask for a copy of the circulated drafts of your
17 contentions to date --

18 MR. FITZPATRICK: To date?

19 JUDGE KARLIN: -- or, you know, once the
20 LSN gets started --

21 MR. FITZPATRICK: They won't have to ask.
22 They'll be on the LSN.

23 JUDGE ROSENTHAL: Let me ask you this
24 question going to nonconcurrence. Now, obviously down
25 the road, any issue that is raised with respect to a

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1 particular portion of the draft is going to be
2 resolved. I mean, somebody is going to make the
3 ultimate decision.

4 But if somebody in the chain is not
5 satisfied with the ultimate resolution by somebody
6 above him and says, "I don't agree," then does this
7 fit the definition of the original author or others in
8 the concurrence process having nonconcurred?

9 MR. FITZPATRICK: It certainly would, Your
10 Honor.

11 JUDGE ROSENTHAL: All right. Now,
12 supposing that the individual says, "Well, if I had my
13 way, I would go differently, but I am a team player.
14 And I have to be a team player in order to guarantee
15 my bonus. And so I am going to go with the flow"?
16 How would you regard that?

17 MR. FITZPATRICK: Well, I guess I would
18 regard it as a scientist sacrificing his integrity on
19 the altar of the almighty dollar. But we wouldn't
20 find out about that until discovery.

21 JUDGE ROSENTHAL: But for the purposes of
22 --

23 MR. FITZPATRICK: This analysis?

24 JUDGE ROSENTHAL: -- this analysis,
25 determining whether a circulated draft is involved,

1 that would not be a nonconcurrence even if for a
2 motive that you would think improper, the individual
3 decides not to press the disagreement with what his
4 superiors have decided is the appropriate course.

5 MR. FITZPATRICK: And we couldn't know
6 those facts until time for discovery.

7 JUDGE ROSENTHAL: Well, now, in this case,
8 of course, again, DOE is insisting that this hasn't
9 been in a concurrence process, but if we were to treat
10 the review that has taken place and is being such a
11 process, how are we to determine whether along the
12 line there has been somebody who has said that they
13 disagree and that that disagreement has survived the
14 determination of the superiors to "resolve" the issue
15 at hand? We know that as a matter of fact.

16 I mean, there has to be somebody who has
17 not concurred. How do we determine if we regard what
18 has transpired as being, in fact, a concurrence
19 process, whether there has been a nonconcurrence?

20 MR. FITZPATRICK: I think that the
21 process, the procedure adopted by DOE, which I read
22 from before, establishes a situation where whether a
23 person goes along begrudgingly to save his butt or
24 whatever reason he goes along or even if a person is
25 adamant, you know, in his disagreement, it doesn't

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1 matter because the procedure mandates a resolution.
2 Even if it's taken out of the hands of the author and
3 do by --

4 JUDGE ROSENTHAL: The word "resolution,"
5 which it does appear, I appreciate, in the statement
6 of considerations of 1989, I don't see that word in
7 the definition provided in 2.1001.

8 MR. FITZPATRICK: No.

9 JUDGE ROSENTHAL: There it is a matter of
10 nonconcurrence. And I thought that I received from
11 you the view that even if it's resolved in the sense
12 that the superior has said, "Okay. This is the way
13 we're going," that there is a nonconcurrence if
14 somebody in the chain says that's all well and good.
15 Superiors' view will carry the day. But I just don't
16 agree with it.

17 Now, is that a nonconcurrence, even though
18 in the DOE sense it's been resolved?

19 MR. FITZPATRICK: Sure, that is a
20 nonconcurrence. And reason dictates that there is any
21 number of those issues that persist.

22 JUDGE ROSENTHAL: Well, how do we know
23 whether at the end of the day, there is a
24 nonconcurrence? In other words, all of these things
25 have been resolved. But how do we know whether

1 somebody still says insofar as I'm concerned, "This is
2 wrong"?

3 MR. FITZPATRICK: That requires --

4 JUDGE ROSENTHAL: That's a fact question.

5 MR. FITZPATRICK: That requires discovery
6 of facts. That requirement that there still be a
7 nonconcurrence is not recited in the current
8 definition. It's an explanatory note from 1989.

9 And if it still persists, then yes, common
10 sense must dictate that where there is a procedure to
11 hammer down every nonconcurrence until it is resolved,
12 it is inevitable that sometimes the person who
13 disagreed still disagrees.

14 JUDGE ROSENTHAL: Well, how do we
15 determine whether that is the case today or back in
16 July 2004 with respect to the draft that you're trying
17 to get?

18 MR. FITZPATRICK: We can only go by common
19 sense and future discussion.

20 JUDGE ROSENTHAL: Does common sense tell
21 you whether there's a remaining nonconcurrence?
22 Common sense might tell you that this should be
23 regarded as a concurrence process, but it doesn't tell
24 you, does it, whether or not, in point of fact,
25 somebody retained their nonconcurrence, if you will,

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1 after the matter was resolved by presumably a higher
2 authority?

3 MR. FITZPATRICK: No. I mean, scientists,
4 reasonable scientists, will differ on points --

5 JUDGE ROSENTHAL: I see.

6 MR. FITZPATRICK: -- endlessly and
7 sacrifice their view, go along with the majority but
8 still feel that their view is correct.

9 JUDGE ROSENTHAL: Do you say it's
10 inevitable given the number of issues that were,
11 technical issues that were, on the table?

12 MR. FITZPATRICK: Fifty-eight hundred
13 pages and 72 issues. In 72 issues, I think so.

14 JUDGE ROSENTHAL: Okay.

15 MR. FITZPATRICK: Let me read one final
16 thing, Your Honor. We --

17 CHAIRMAN MOORE: We recognize we have been
18 questioning you. I have a couple of more questions.
19 Judge Kirlin does.

20 MR. FITZPATRICK: Okay. Can I --

21 CHAIRMAN MOORE: So go ahead and make your
22 point.

23 MR. FITZPATRICK: Just one point. We
24 didn't get to do discovery. And so, of course, we
25 have had to try to find documents on Web sites and

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1 things like that to provide information. But as to
2 these issues of this circulated draft issue, we are
3 left to depend on the credibility of an affidavit by
4 Mr. Ziegler.

5 JUDGE KARLIN: Let me jump in there. I
6 mean, perhaps we have questions that are factual
7 questions. What questions should we ask of DOE
8 factually? What documents might we ask them to
9 produce in the short term that might help us in a key
10 way resolve whether this has been a circulated draft?

11 MR. FITZPATRICK: Well --

12 JUDGE KARLIN: I note, for example, that
13 there is a reference in the DOE's material to
14 something called a license application management
15 plan. And it seems to me that that might be an
16 interesting document to see how it was managed. There
17 might be cover memos that were used to distribute to
18 the draft license application which would reveal what
19 kind of review was expected.

20 I'm just wondering if you have any
21 thoughts as to what we might ask to help --

22 MR. FITZPATRICK: Sure. The document that
23 I read from before which specified the resolution
24 procedure, the hammer it down until it's resolved
25 procedure, that's a lengthy document done in 2003, not

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1 long before the LA was published. And it's called
2 management plan for the development of the Yucca
3 Mountain license application.

4 And that document is a fund of a list of
5 documents to be provided because it tells the steps
6 from the creation by an author to who the individuals
7 will be, not by name but by position, who will perform
8 a technical review, licensing review, legal review,
9 and then, you know, there's also the subject of these
10 committees that will be formed to hammer out
11 disagreements.

12 I think the minutes of meetings of those
13 committees, the records of the mandatory comments and
14 non-mandatory comments, all of those would be
15 valuable.

16 CHAIRMAN MOORE: Does that management plan
17 have a concurrence process?

18 MR. FITZPATRICK: They don't call it that.
19 It's a comment process.

20 CHAIRMAN MOORE: Does it have anything for
21 -- in the NRC, there's an animal called a dissenting
22 professional view or opinion.

23 MR. FITZPATRICK: I didn't see that
24 anywhere, Your Honor.

25 Let me finish, if I may. We're left to

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1 rely for facts on Mr. Ziegler, who said a couple of
2 things. He said the July '04 was not circulated to
3 DOE management for its concurrence. It underwent a
4 working level review.

5 He also said he and John Arthur read
6 portions of the July '04 draft to learn of the license
7 application's general state of preparedness. Well,
8 first off, I don't think that's believable just before
9 after 20 years on the project they're about to in
10 December file the thing, but --

11 CHAIRMAN MOORE: All of that is in your
12 brief.

13 MR. FITZPATRICK: But Mr. Ziegler spoke.
14 I guess he didn't testify, but he spoke to the senior
15 management, NRC, DOE quarterly management meeting in
16 November 22, 2004. And he listed accomplishments of
17 DOE in the past quarter. They meet quarterly. And
18 one of them was "completed a comprehensive management
19 review of the license application."

20 CHAIRMAN MOORE: Now, that's Mr. Ziegler
21 speaking?

22 MR. FITZPATRICK: That's Mr. Ziegler. So
23 we don't have to look to just Mr. Arthur and Ms. Chu
24 to contradict what Mr. Ziegler said.

25 CHAIRMAN MOORE: Again, when and where was

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1 that?

2 MR. FITZPATRICK: That was Mr. Ziegler
3 speaking to the DOE, NRC quarterly management meeting,
4 Rockville, Maryland, November 22nd, 2004.

5 CHAIRMAN MOORE: Now, that was not an
6 exhibit to your file?

7 MR. FITZPATRICK: That was not an exhibit.
8 I just found it. But I will certainly provide --

9 CHAIRMAN MOORE: One final question before
10 you sit down. Recognizing that there could be many,
11 many drafts, as you discussed with Judge Kirlin
12 before, if you were to divide things into two major
13 categories here, are there really two circulated
14 drafts? What happens to the deliverable in July of
15 2004 from Bechtel/SAIC?

16 Now, contractors are clearly covered under
17 the regulations in the meaning of documentary
18 material. And is there not a circulated draft
19 situation that exists with the contractor independent
20 of what happens with that material that goes to DOE?

21 MR. FITZPATRICK: If I understand your
22 question correctly, yes. Before the July 26th date
23 happened, there was a very complete, thorough process
24 from the beginning drafts through what they call the
25 working draft, which underwent very similar reviews:

1 a technical team review, a licensing team review. All
2 of those things happened within the Bechtel
3 organization before July 26th.

4 CHAIRMAN MOORE: All right. Now, stop
5 right there. Why is not that material subject to the
6 same argument that it should be produced as a
7 circulated draft and be put on the LSN?

8 MR. FITZPATRICK: Your Honor, I think it
9 is. And I thought of taking it a step further, but I
10 thought it would be too conceptually kind of baffling.
11 I thought of suggesting --

12 CHAIRMAN MOORE: Well, give us a little
13 credit.

14 MR. FITZPATRICK: I'm sorry. Well, I mean
15 it baffled me. That's what I meant. But I considered
16 arguing that what Bechtel delivered on July 26th was
17 from Bechtel's perspective a final deliverable, a
18 final document.

19 CHAIRMAN MOORE: Well, if it's a final
20 document, then it's not a circulated draft.

21 MR. FITZPATRICK: Well, vis-a-vis DOE, it
22 became a circulated draft, then. But, in other words,
23 that --

24 CHAIRMAN MOORE: But as a contractor --

25 MR. FITZPATRICK: As a contractor.

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1 CHAIRMAN MOORE: -- for DOE under the
2 definition of documentary material, is that same
3 deliverable subject to the same analysis?

4 MR. FITZPATRICK: It's subject to the same
5 arguments and the same analysis that a -- almost like
6 a second reason the July 6th document should be put on
7 the LSN and should be, you know, called a circulated
8 draft is because of the treatment it received at the
9 hands of its contractor.

10 CHAIRMAN MOORE: Thank you. Now would
11 probably be an excellent time for a ten-minute recess.
12 We'll reconvene in ten minutes. It's now 9:58. So at
13 eight minutes after, we'll reconvene. Thank you.

14 (Whereupon, the foregoing matter went off
15 the record at 9:55 a.m. and went back on
16 the record at 10:05 a.m.)

17 CHAIRMAN MOORE: Mr. Shebelskie.

18 MR. SHEBELSKIE: Good morning. If it
19 please the Court, Michael Shebelskie on behalf of the
20 Department of Energy.

21 JUDGE ROSENTHAL: Mr. Shebelskie, before
22 you get into the legal argument, with the indulgence
23 of my colleagues, I would like to address a brief
24 concern I have which is quite frankly, again, the
25 legal merit or lack of merit to your position,

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1 notwithstanding - I don't understand, frankly, what
2 the advantage, apart from naked legal strategy, there
3 might be to your position in this case. And let me
4 just, if I may, take a moment to pursue that thought
5 with you.

6 Let's assume hypothetically that you file
7 your application in February, and let's assume also
8 hypothetically that the Commission docket it with
9 some expedition. A *Federal Register* notice is then
10 published, and at that point Nevada, as well as any
11 other groups or individuals wishing to participate has
12 30 days in which to file its contentions.

13 Now if we assume on my hypothetical that
14 a period of no more than three months lapses between
15 the time that Nevada gets the application that's been
16 filed, and the time that it has to file its
17 contentions, I would think as a matter of certainty
18 there's going to be an application, motion for a
19 substantial extension of time based upon the fact (1)
20 that DOE took something in the order of 20 years to
21 prepare this application. They had control over when
22 it was filed, even though, as it turns out, it's being
23 filed several years after Congress had directed it to
24 be filed. Third, they will have had for some three
25 months a document that may be 10,000 pages in length

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1 considering what might be accompanying it by way of
2 appendices, and they would say that without an
3 extension of some months, there would be a plain due
4 process violation.

5 Now I'm not going to be sitting on this
6 case once it reaches the docketing stage, so I can say
7 without being accused of prejudgment that I would
8 think that even if the Licensing Board was not
9 receptive to the motion, even if the Commission is not
10 receptive to it, it would get a very receptive ear in
11 any federal court in this land.

12 Now this could have been avoided,
13 obviously, or at least a lot of wind taken out of
14 their sails if at this point they got the draft
15 application, rather than have to wait until perhaps
16 February in my hypothetical to get the final one.

17 Now my two questions for you are; number
18 one, under my hypothetical, do I assume correctly that
19 DOE would violently oppose any extension at all,
20 notwithstanding the circumstances that I've set forth.
21 And number two, just what practical advantage, besides
22 litigation strategy, if somebody wants something you
23 oppose it, is there to not giving them the document at
24 this point; and, therefore, reducing the viability of
25 any argument after the final application is in their

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1 hands that they haven't had sufficient time to prepare
2 their contentions based upon this extraordinarily
3 lengthy document.

4 Now I'm addressing this from the
5 standpoint of practicality. I'm not addressing it
6 from the standpoint of whether your argument does or
7 does not have legal merit. But I just can't
8 understand, frankly, why it is in DOE's best interest
9 to take the position it's taking, whether it has legal
10 merit or not. So getting now off the soapbox and
11 letting you respond, and I'm hopeful my colleagues
12 will not take this out of your time.

13 MR. SHEBELSKIE: Thank you. In response
14 to your first question, Judge Rosenthal, frankly, I
15 have not spoken with the client about the question of
16 whether or not DOE would oppose an extension or not,
17 so I'm not authorized to say anything on that. I
18 would say, though, that it would depend upon the facts
19 and circumstances at the time of the request, a month
20 extension, two-month extension, who knows?

21 Also, it will depend upon what precedes
22 any such request for an extension. We don't know at
23 this point what will transpire between an August
24 certification and submittal of the LA. There may be
25 any number of circumstances where information is

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1 provided on different bases that may obviate that type
2 of concern.

3 To address the second point, though, the
4 practical thing; is this just some knee-jerk reflexive
5 litigation position? The answer is no. Under your
6 construction there, Judge Rosenthal, what would make
7 most sense would be providing, perhaps, the most
8 current LA at the time we certify, but that's not what
9 the State has asked for. The State has made a very
10 specific particular request for a particular draft at
11 a point in time that will ultimately be a year and a
12 half stale by the time that we submit our LA; that a
13 draft LA that, in part, addresses a regulatory
14 standard that has been, in part, vacated by the Court
15 of Appeals.

16 The genesis of this request by the State
17 is most peculiar, and I don't think is made for the
18 purpose of engendering that effective six month
19 period. And I can't help that on the final point in
20 response to your question, Judge Rosenthal, pointing
21 out that ultimately the Commission struck this balance
22 and defined what should be done in the six month
23 period. And, frankly, I can think of things that
24 would help DOE in terms of getting advanced
25 contentions from the parties, and that would, too,

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1 accelerate the schedule, and reduce the possibility of
2 delays. And if we're going to get involved in this
3 sort of mix now to help the schedule, I think the
4 relief there ought to be by petition to the Commission
5 to address it, so every interested party can address
6 that.

7 Turning now to the legal arguments of the
8 specific motion framed by the State, I think it is
9 important, as in all regulatory interpretations, to
10 stand back and take a big picture view of the
11 regulations as a whole. It is, of course, quite
12 obvious that there is no provision in the regulation
13 that says when DOE makes its initial LSM
14 certification, it provides at that time any draft of
15 the license application, much less the then current
16 draft. And, indeed, the regulations differentiate the
17 license application from documentary material calling
18 it, instead, a basic licensing document.

19 CHAIRMAN MOORE: Let's speak to that,
20 which is your first point.

21 MR. SHEBELSKIE: Yes, sir.

22 CHAIRMAN MOORE: Now you argue that that
23 distinction in listing a basic licensing document by
24 name, the license application in 10 CFR 2.1003(b) in
25 contravention to the definition of documentary

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1 material in Section 2.1003(a)1 defeats their argument.

2 Now how do you reconcile your position
3 with the Commission's Statement of Considerations for
4 the June 14th, 2004 final rule amending Part 2,
5 Subpart J of the rules of practice that states at page
6 32.843 of Volume 69 in the *Federal Register* that:

7 "The Commission is providing further
8 information and clarification on the responsibilities
9 of LSN participants in regard to the three classes of
10 documentary material in Section 2.1001", then it goes
11 on. And, of course, that is the definition of
12 documentary material, which we're speaking of the
13 first element or first classification. I'm sorry,
14 with respect to the third classification.

15 It then goes on with regard to that and
16 says, "Reports and studies will also include basic
17 licensing documents relevant to licensing, such as the
18 DOE EIS." Now although it doesn't name the license
19 application as a basic licensing document, it does
20 name the EIS as a basic licensing document, which also
21 appears in Section 10 CFR 2003. So hasn't the
22 Commission already decided that this is documentary
23 material?

24 MR. SHEBELSKIE: No, I don't believe so.
25 Obviously, the first point is that there is no

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1 discussion in even that Statement of Consideration
2 about the status of the license application itself.
3 You look, though, at the regulatory history as a whole
4 going back to the late 80s, and NEI set forth all
5 those nice summation of the cites in its brief, where
6 time after time, the Commission was referring to
7 documentary material as the information that's going
8 to support the license application.

9 Time and time again the Commission is
10 drawing that distinction between this document that is
11 the license application versus the documentary
12 material that has the information that supports the
13 positions DOE will take, or that doesn't support those
14 positions, or reports and studies. And I really think
15 that in that particular case of that 2004 commentary,
16 what the Commission really was getting at there was
17 that the two categories, plus the reports and studies,
18 would be the basic information that's going to be
19 relevant to the license application proceeding.

20 I think that really was the context, and
21 I don't think it was intended to be, and isn't on its
22 face, an express resolution of this particular issue.

23 CHAIRMAN MOORE: I'm sorry. It
24 specifically lists the DOE EIS, and specifically is
25 talking about basic licensing documents, because if

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1 you take -- which is precisely your argument
2 substituting license amendment for DOE EIS.

3 MR. SHEBELSKIE: Right. But if you then
4 take that and apply it to the regulatory language and
5 use license application for the phrase reports and
6 studies, the regulatory text of that third category
7 makes no sense whatsoever, because it would read you
8 have to produce on the LSN the license application
9 that's relevant to the license application. That is
10 an extraordinarily convoluted way --

11 CHAIRMAN MOORE: Well, let's just then
12 substitute safety analysis report.

13 JUDGE KARLIN: Or we could substitute the
14 draft license application that is relevant to the
15 license application. I don't think that's convoluted
16 or inappropriate, at all.

17 MR. SHEBELSKIE: No. But you look again
18 at the regulations as a whole, and it was quite clear
19 that the Commission did not expect or intend that the
20 license application, or the SAR portion of it, to be
21 completed at the time of the LSN certification. And
22 the regulations and the Statements of Consideration
23 are very clear that what the LSN is contemplating is
24 production of final documents.

25 There is no statement in the 15 years of

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1 the rule-making that the Commission expected any
2 particular draft to be produced at the time of our LSN
3 certification.

4 JUDGE KARLIN: I think that's a bit of a
5 different issue, which is whether it's a final
6 document or not. I mean, I thought your argument was
7 to us to say that look, there's documentary material
8 that has to be produced under 1003-A, and then there's
9 basic licensing documents that have to be produced
10 under 1003-B. And they are different; there's a
11 dichotomy between those, and never the twain shall
12 meet. And, obviously, the licensing application, you
13 say is a basic licensing document. That is what it
14 says in 1003-B.

15 What I think this June 14th, '04 Statement
16 of Consideration says is no, no, studies and reports
17 in the definition of documentary material includes
18 basic licensing documents, so the proposed dichotomy
19 that you set up doesn't exist.

20 MR. SHEBELSKIE: Well, I know that
21 statement there and, again, all I can say is I believe
22 in context, that one statement measured against the
23 preceding 14 years of history does not clearly state
24 a firm resolution by the Commission that they were
25 intending to address and resolve this position that we

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1 are pointing out, and the dichotomy between
2 Subsections A and B.

3 Be that as it may, obviously, even if it
4 were -- even if the license application, that
5 document, is considered subsumed within one or any of
6 the categories of documentary material, its production
7 at the time of DOE's anticipated LSN certification
8 only applies to final versions of the document, unless
9 a particular draft would meet the definition of this
10 very special exception for circulated drafts. And the
11 question was raised in the State's argument, what did
12 the Commission mean by this? What's the context? Why
13 non-concurrences matter?

14 Well, I think the historical perspective
15 of that is quite illuminating. The Commission's
16 preference, as stated in the 1989 Statements of
17 Considerations was the final documents were all that
18 it was intended to have produced. And as a matter of
19 negotiated rule-making, coming out of the LSS Advisory
20 Review Panels, the State, and the Staff, and DOE
21 talked about this concept of circulated drafts,
22 recognizing that the NRC had a formalized procedure
23 for circulated drafts, DOE had it at the time. And
24 what was anticipated was reaching that kind of
25 document, a document within the meaning of a non-

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1 concurrence in those established processes.

2 CHAIRMAN MOORE: All right. In 1989, what
3 was the DOE established concurrence process, and do
4 you have a document that you can give us that spells
5 that out?

6 MR. SHEBELSKIE: I don't have one with me.
7 There were procedures. In general, what was
8 anticipated is any document of any consequence, and I
9 think the Commission recognized this and would demand
10 it, would go through an iterative process, a very
11 heavy iterative process; whether it's the license
12 application, whether it's a report or study being
13 developed by scientists on some technical issue; that,
14 of course, there's going to be back-and-forth. There
15 will be many, many drafts. There will be comments on
16 those drafts. There's nothing in the rule-making that
17 shows that the Commission intended to grab all of
18 those.

19 What the non-concurrence in part of the
20 procedures that NRC, as I understand it, and DOE had
21 it, was then when you have a document that is
22 presumptively final, that is being circulated for the
23 decision-makers to say all right, this document is
24 ready for prime time. It is ready for your signature,
25 or it's ready for your approval. Tell your supervisor

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1 go ahead and sign it, and make it a final document,
2 make it releasable. It's ready for external release.
3 And in that process someone says I non-concur on it,
4 and registers a non-concurrence - and there was forms
5 for that - that is what was in place in the late 80s,
6 and I think that is what is intended here. Because
7 fundamentally, what the State is arguing about
8 circulated drafts -- yes, sir.

9 JUDGE ROSENTHAL: Well, I've got two
10 questions. First of all, you're saying that the
11 process has to be specifically labeled as one of
12 concurrence. I mean, what Nevada is arguing is that
13 you have to look at this as a practical matter, and
14 given the fact that the -- there was some conversation
15 at that point of filing this LA late in that year,
16 it's not realistic to look upon this as being other
17 than a concurrence process, no matter what label DOE
18 might have put on it. Now what is your response to
19 that?

20 MR. SHEBELSKIE: No, I'm not suggesting
21 that this is -- one could just simply use a formal
22 label and evade the substantive intent. But when you
23 look at substantive intent in terms of what is a non-
24 concurrence, you also have to look at the substantive
25 intent of what stage of development is the document

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1 at, where it draws this non-concurrence objection.

2 JUDGE ROSENTHAL: Well, doesn't it have to
3 be in a fairly advanced stage since the thought was to
4 get the LA on file by what was it - November was the
5 contemplation.

6 MR. SHEBELSKIE: Oh, I'm sorry. I thought
7 you asked me a different question. I thought you were
8 asking me doesn't the document have to be at a
9 sufficiently advanced state for it to be subjected to
10 this process, that substantively draws a non-
11 concurrence --

12 CHAIRMAN MOORE: Mr. Shebelskie, isn't
13 that argument directly contradicted by the very
14 language of the definition of a circulated draft, in
15 which the original author -- now the original author
16 is somewhere down there in the bowels next to the
17 furnace cranking it out. And the original author,
18 when he or she produces that product, it's final.
19 What happens to it thereafter, who knows? But as far
20 as it being at a fairly advanced state, they're
21 allowing in the wording of the regulation the original
22 author to be taking the exception to it.

23 Now presumably then the original author's
24 work, if it's no longer recognizable, is something
25 different than what that original author did, so this

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1 advanced state leaves me troubled because of the
2 language of the regulation.

3 MR. SHEBELSKIE: I still think you have to
4 look, though -- one can talk in generalities and try
5 to apply it to hypotheticals. The motion here is
6 directed to particular documents, so let's talk about
7 the facts of this specific version of the draft LA.

8 CHAIRMAN MOORE: No. Let's go back to how
9 advanced this draft has to be in light of the language
10 of the regulation that brings into play the original
11 author.

12 MR. SHEBELSKIE: Well, I think at a
13 minimum, the original author has to say as far as I'm
14 concerned, this document is ready to go.

15 JUDGE ROSENTHAL: Well, who is the
16 original author, somebody in Bechtel?

17 MR. SHEBELSKIE: Of the license
18 application?

19 JUDGE ROSENTHAL: Yes.

20 MR. SHEBELSKIE: There are -- I think the
21 point was made, there are teams of authors working on
22 the respective sections of it.

23 JUDGE ROSENTHAL: So Bechtel's teams
24 presented the 70 something chapters, or whatever
25 they're called, to DOE. Now in so far as the

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1 individuals who prepared those chapters, this is the
2 final product.

3 MR. SHEBELSKIE: No.

4 CHAIRMAN MOORE: It's not.

5 MR. SHEBELSKIE: No, sir. As the contract
6 itself, the Bechtel contract itself notes, this July
7 deliverable was not contemplated to be presumptively
8 a final document that the authors at Bechtel and the
9 National Labs who were working with them, viewed as
10 final, because there are many drafts that precede it,
11 and there were many drafts that followed July of 2004,
12 and continue to today.

13 The July, 2004 was a milestone for
14 purposes of adjusting the fees with Bechtel, where
15 they said at this point in time, Bechtel, you're going
16 to take all the very drafts that you have of these
17 different sections, we're going to combine them
18 together, and we're going to then sit back and do
19 further reviews. The contract contemplated as a
20 draft, all of whatever statements -- disregard Mr.
21 Ziegler's affidavit on this and look at the exhibits
22 of the State. All the presentations, all the
23 discussions about the LA leading up to July and
24 following July make very clear that the LA was still
25 viewed very much as a draft, as incomplete. I believe

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1 as late as July itself, it was described in June - and
2 this is Exhibit 14 of the State's exhibits on page 6 -
3 as being only 59 percent complete.

4 JUDGE KARLIN: May I ask on that, Exhibit
5 12 of the State's initial brief appears to be "Yucca
6 Mountain Project Summary Schedule Milestone
7 Descriptions", et cetera. And on the third page, I
8 guess, of that, there is a discussion or there's a PSS
9 event, which is Project and Office Manager's
10 Concurrence of LA. And it goes on to talk about the
11 milestone, "resolve comments and obtain their
12 concurrence." Do you see where I'm trying to follow?

13 MR. SHEBELSKIE: Yes, sir.

14 JUDGE KARLIN: And then on the next page
15 of that there's a "submit draft LA to DOE offices for
16 concurrence." And concurrence is discussed there as
17 some events that occurred. Is that your process, and
18 did that occur on this document?

19 MR. SHEBELSKIE: That did not occur with
20 respect to this July draft. Now the particular
21 exhibit we're looking at is outdated and wasn't the
22 current procedure, but I think the relevant part here,
23 the analog, Judge Karlin, is if you went to the second
24 page of the exhibit.

25 JUDGE KARLIN: All right.

1 MR. SHEBELSKIE: And it's the milestone
2 description there discussing a chapter review. "The
3 interactive comment resolution process, a revised
4 document, verification of comment resolution and
5 consistency check."

6 That really is, for purposes of this
7 document, the analog that the July, 2004 draft was
8 objected to, as Mr. Ziegler explained in his
9 affidavit.

10 JUDGE KARLIN: Right. So that refers to
11 DOE complete staff review of draft license
12 application, and it's called a chapter review. You're
13 calling that a staff review, and then the next stage
14 is for there to be this Project and Office Management
15 Concurrence step. And are you saying that it never
16 got to that step?

17 MR. SHEBELSKIE: That is correct. Here is
18 the basic process. The draft came in July of 2004,
19 and was subjected to the chapter review process, which
20 is this working level review of scientists and
21 engineers at DOE working in collaboration with BSC,
22 National Labs, whatever. And they developed comments
23 and gave the comments back in August. As Mr. Ziegler
24 testified, those comments were all given back in
25 August.

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1 What's set in motion then was the process
2 for the author teams to look at the comments, respond
3 to the comments. The responses could be literally
4 adopting exactly what was said, or this iterative
5 process back and forth discussing the comments. As
6 the author teams and the technical review teams worked
7 through that iterative process, new drafts of the
8 various sections emerged, starting emerging in
9 September.

10 JUDGE KARLIN: Well, let me ask; was it
11 entirely sequential or was any of this going on
12 concurrently? For example, I'm curious to know who
13 the OCRM Project and Office Managers are. I mean, is
14 Mr. Ziegler an Office Manager or Project Manager? Is
15 Mr. Arthur, is Ms. Chu? Apparently, they were reading
16 this document. The purpose of the reading might be
17 the thing you can talk about, but at least they're
18 reading it. Right?

19 MR. SHEBELSKIE: Mr. Arthur and Mr.
20 Ziegler were certainly looking at portions of the July
21 draft in August, but then when revised -- the next
22 draft came out starting in September, it's my
23 understanding that Mr. Arthur and Mr. Ziegler, and
24 some others at the OCRWM offices in Las Vegas were
25 reviewing those draft chapters as they were coming out.

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1 JUDGE KARLIN: So the Office and Project
2 Managers were reviewing the document, and did they
3 ever submit any suggestions, comments, feedback to
4 whoever they had gotten it from, saying we like it, we
5 want this change, we want this adjusted, agreement,
6 non-agreement? I don't want to use the word
7 concurrence.

8 MR. SHEBELSKIE: Right. I think maybe
9 four points in response to that. They did not
10 participate as part of this chapter review process in
11 August. The September, 2004 draft starts coming out.
12 It was not - and I don't want to testify here, but my
13 understanding that what happens is that the iterative
14 process between the chapter authors and the review
15 teams were ongoing in September.

16 JUDGE KARLIN: Are you suggesting that
17 each time, say there's a July 26, 2004 version of this
18 document. That's what they'd asked for. That's the
19 one they asked for. And let's say some comment is
20 received, and they say oh, well, there's some typos on
21 the document, we need to change those; is that now a
22 different document that they don't get?

23 MR. SHEBELSKIE: Well, I would think --

24 JUDGE KARLIN: And if there's some other
25 changes, now you've got a second version, which is

1 September '04 you're referring to.

2 MR. SHEBELSKIE: Right.

3 JUDGE KARLIN: So you're saying well,
4 that's not what they've asked for, and they're not
5 going to get that even if they win this motion.

6 MR. SHEBELSKIE: Well, the fact that these
7 later and earlier drafts not lost on the State. For
8 some reason they decided they want this particular
9 moment in time. The point is, the second sort of
10 milestone that the exhibit you're referring to - it
11 was recognized that after the team process was
12 complete, that the document would get into a state -
13 I don't want to use an adverb - that it would then be
14 submitted to OCRM officers for that type of review
15 that you've described. But that point never occurred,
16 because the combination of events; that was --

17 JUDGE KARLIN: Oh, but Mr. Arthur says on
18 9/20 that "Myself and a number of our senior managers
19 have been spending continuously over three weeks, and
20 will complete next week and a half a full review,
21 integrated review of every section of the license
22 application."

23 MR. SHEBELSKIE: Yes.

24 JUDGE KARLIN: Now those guys, I guess,
25 Mr. Arthur and his senior managers, maybe some of them

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1 are OCRWM Office and Project Managers.

2 MR. SHEBELSKIE: No, Mr. Arthur and his
3 staff below him did look at drafts as they emerged in
4 September, and probably in October, as well, and gave
5 comments.

6 JUDGE KARLIN: Three weeks straight.

7 MR. SHEBELSKIE: Yes.

8 JUDGE KARLIN: You know, just casual
9 review to go to sleep at night or something.

10 MR. SHEBELSKIE: No, I mean, they read
11 them and gave comment. But here's the point, Judge
12 Karlin; for purpose of the circulated draft, a
13 circulated draft is not a draft that is submitted to
14 anybody for comments and reviews, even submitted to a
15 supervisor for review. It would be remarkable to
16 think on a substantive document of this kind that a
17 John Arthur of this world would never be given the
18 opportunity to look at one of the drafts as they're
19 coming along, to review it, and even to make
20 suggestions on it, but it did not reach to the point
21 of maturity where BSC or those under Mr. Arthur at DOE
22 said all right, Mr. Arthur, this document is now being
23 submitted to you for your concurrence, as opposed to
24 your suggestions/recommendations.

25 JUDGE KARLIN: And so the point is that it

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1 was submitted to them. They did read it, some spent
2 a lot of time on it, submitted to managers and
3 supervisors for their review. They were reviewing it,
4 but your point is that it wasn't for purposes of
5 concurrence or signature.

6 MR. SHEBELSKIE: Absolutely.

7 JUDGE KARLIN: Now I understand it might
8 not have been for signature, but again, why wasn't it
9 for concurrence? If we interpret concurrence as
10 simply agreement, I mean Mr. Ziegler's declaration is
11 very carefully drafted, and repeats several times that
12 it was not distributed to DOE management for
13 concurrence or signature.

14 MR. SHEBELSKIE: That's right.

15 JUDGE KARLIN: Now we find that it was
16 distributed to DOE management, that they did spend
17 three-four weeks on it, they submitted some comments,
18 but the key operative - they weren't submitted for
19 concurrence or signature.

20 MR. SHEBELSKIE: Yes.

21 JUDGE KARLIN: Now let's set aside that it
22 wasn't for signature, because it hadn't reached that
23 final sign-off stage, but wasn't it for concurrence in
24 the sense of I don't agree with this, or I do agree
25 with this?

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1 MR. SHEBELSKIE: No.

2 JUDGE ROSENTHAL: Why was it submitted?
3 What other purpose of submitting it to them? I would
4 suppose that the objective was to have them look at
5 it, and to determine whether, in their judgment, there
6 were some problems with it that required
7 rectification. Now it might be that this was at a
8 much too early stage for the final process, which
9 would lead to people putting their initials or
10 signatures on the bottom line, but as Judge Karlin
11 points out, it's in terms of concurrence or signature.
12 It isn't "and", and I would think, as I understand the
13 word "concurrence", a document is presented to an
14 official up the line to take a look at. What they
15 want the individual to determine is whether in the
16 parlance he or she concurs in what is said, or
17 believes that there have to be some changes.

18 MR. SHEBELSKIE: And I think that's what
19 our fundamental disagreement is. The concurrence
20 process that existed at DOE and NRC, which is the
21 paradigm and the background for the definition of
22 circulated draft, did not encompass as concurrence
23 process, giving a review, and you can call it whatever
24 you want - a sneak preview, give it to you for looking
25 at it. It happens all the time. If I'm working on a

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1 document for you that you have to concur on, Judge
2 Rosenthal, I can have it and I'm working on it as a
3 draft. And I would say I would like you to look at
4 this in its current state, give me your feedback so as
5 I finalize the document I can take into account that.

6 JUDGE ROSENTHAL: This wasn't written with
7 a specific knowledge of what the DOE process might
8 have been. This might have been looked at from the
9 standpoint of what is the common meaning of
10 concurrence. And again, it seems to me that whatever
11 may be the formal process of DOE, the labels that DOE
12 may place on it, that if a document is presented to a
13 senior level or relatively senior level official to go
14 over, the thought is that this individual is going to
15 either concur or suggest their changes.

16 Now in that connection, I'd like to ask
17 you the same question as I asked Mr. Fitzpatrick;
18 which is, here is this circulated draft exception to
19 this well-recognized privilege. And it has these
20 terms "circulated for supervisory concurrence or
21 signature." And it has this element of non-
22 concurrence by somebody. What do you think the
23 Commission had in mind in employing this term as
24 defined in the regulation to make, in certain
25 circumstances, this well-recognized privilege

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1 unavailable? I mean, what's the significance of the
2 non-concurrence? What is the significance of the fact
3 that it has to have been circulated for supervisory,
4 et cetera? Why are those things pivotal as to whether
5 you were able to plead the deliberative process
6 privilege?

7 MR. SHEBELSKIE: I believe the
8 Commission's intent is perhaps most revealed by a
9 statement of what it thought a non-concurrence meant,
10 which was a formal unresolved objection. I don't
11 think the Commission was trying to get at any comments
12 that are provided on drafts. I don't think it
13 encompasses even -- I don't think the concept of a
14 formal unresolved objection encompasses comments that
15 even the ultimate supervisor approval makes on a
16 preliminary draft that he's been given to give
17 comments on. I think that phrase, "formal unresolved
18 objections", dovetails with the formalized concurrence
19 processes that NRC and DOE had in 1989, and is the
20 backdrop for the promulgation of this standard in the
21 rule-making then.

22 CHAIRMAN MOORE: Okay. And again I ask
23 you, what was DOE's process in 1989? What was NRC's,
24 and what was the formal objection --

25 MR. SHEBELSKIE: Yes, well --

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1 CHAIRMAN MOORE: -- that was in existence
2 at each of those agencies in 1989, actually 1988,
3 which is identical between the proposed rule and the
4 final rule.

5 MR. SHEBELSKIE: As I understand it, and
6 as it still exists at DOE, there is a process for
7 concurrence review where the document, it goes up to
8 the next person in the chain, says this document -
9 everybody working on it below you has signed-off on
10 it. There's nothing further they say needs to be
11 done. It's ready for you to give your final seal of
12 approval on it, and that person registers a non-
13 concurrence, and there's actually a form for that, as
14 I understand it, at DOE. That is not a process that
15 reaches out and grabs drafts that people have given
16 comments on.

17 CHAIRMAN MOORE: Okay. Now first of all,
18 why didn't you include that procedure as an exhibit to
19 your brief?

20 MR. SHEBELSKIE: Infirmative thinking.

21 CHAIRMAN MOORE: Secondly, is that same
22 1989 process in existence today?

23 MR. SHEBELSKIE: Yes, at DOE, at least.
24 I'm not going to speak for NRC.

25 CHAIRMAN MOORE: Okay. Now was that

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1 process followed for this license application?

2 MR. SHEBELSKIE: As I understand it, Judge
3 Moore, that regulation or that internal procedure
4 policy at DOE strictly speaking doesn't apply to the
5 license application. Instead, what applies to the
6 license application is this management plan that was
7 referenced to, that has the concept of at this stage -
8 at least on July, 2004 and what followed - the time
9 period we're talking about here - this working team
10 review for development of comments. And so, it is
11 certainly contemplated, even under the management
12 plan, that there will come a time where all the
13 working people say to John Arthur, this is ready for
14 your concurrence, and you have to give your blessing.

15 CHAIRMAN MOORE: Well, put yourself in my
16 shoes just for a moment. Now how am I supposed to
17 determine all this when you, once again, didn't
18 include that - what I guess we'll call a Yucca
19 Mountain License Review Plan - as an exhibit to your
20 opposition? How do we know any of this? You have
21 kept us totally in the dark. You have Ziegler's
22 affidavit - his declaration - I stand corrected -
23 says, frankly, nothing.

24 MR. SHEBELSKIE: No. It describes what
25 the actual process this draft was subjected to.

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1 JUDGE KARLIN: Can I ask; we've talked
2 about concurrences and what that constitutes, a formal
3 sort of thing, formal unresolved, and then there's
4 these mandatory comments. In this State Exhibit 12,
5 the page that talks about concurrence, "Project and
6 Office Manger's Concurrence of License Application -
7 OCRMW - resolve comments." Did any of the Project and
8 Office Managers of OCRM submit comments on this draft?
9 Do you know?

10 MR. SHEBELSKIE: I believe the answer to
11 that is no, that you had the comments that were
12 generated on --

13 JUDGE KARLIN: I thought you were saying
14 earlier that they did receive it. I mean, they
15 obviously read it for three-four weeks. Did they ever
16 offer comments?

17 MR. SHEBELSKIE: Again, let me be clear,
18 because I'm talking about two different draft
19 versions.

20 JUDGE KARLIN: Mandatory comments on
21 either one, the September, '04, the July, '04 - did
22 they submit comments?

23 MR. SHEBELSKIE: The people who reviewed
24 it, well I'll say Arthur and Ziegler is my
25 understanding - subject to final check - that they

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1 gave comments, sure.

2 JUDGE KARLIN: Were any of them mandatory
3 comments?

4 MR. SHEBELSKIE: I do not believe they
5 were described as mandatory comments, because it was
6 not part of that technical team review from the
7 management plan.

8 JUDGE KARLIN: And, obviously, we want to
9 set aside form over substance, and whether they
10 labeled it mandatory or not. But if they did label it
11 mandatory, then that would be an acknowledgment of
12 some significance, because it sounds like a mandatory
13 comment is a formal objection that has to be dealt
14 with either by changing something, or justifying
15 what's in there.

16 MR. SHEBELSKIE: But even a mandatory
17 comment, if one wants to characterize it as a formal
18 objection, doesn't create a non-concurrence, because
19 if you have the person in the management chain, for
20 example as Mr. Arthur, says here's a comment. I want
21 you to make this change or I'm requiring you to make
22 this change. Okay. He isn't non-concurring the
23 document if the change is made.

24 JUDGE KARLIN: But if it's not, he has.

25 MR. SHEBELSKIE: Well, then the document

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1 will stop. I mean, the license application --

2 JUDGE KARLIN: Oh, yes.

3 MR. SHEBELSKIE: Yes, but the license
4 application hasn't stopped.

5 JUDGE KARLIN: Well, let me switch you to
6 a very different subject. When we talk about 1989,
7 the preamble, and I'm troubled by some of that. On
8 the one hand you talk about, and the NRC says that in
9 order to be a circulated draft, it has to be, I guess,
10 an unresolved objection. And I'm not sure what that
11 is, but then on the next paragraph, virtually, they
12 say however, in order to be a circulated draft, the
13 internal decision-making process must be completed.

14 MR. SHEBELSKIE: Yes.

15 JUDGE KARLIN: And I'm not sure what that
16 means, but it seems like those two are directly
17 inconsistent, that if it's completed, if the decision-
18 making process is completed, necessarily, all comments
19 have been resolved.

20 MR. SHEBELSKIE: No. No.

21 JUDGE KARLIN: A decision has been made.
22 We're going to send this application in, as is.

23 MR. SHEBELSKIE: No. And I was thinking
24 about that and trying to figure out how those two
25 sentences interact. Actually, I think they are

1 complimentary because, let's say, I have a document
2 that I'm submitting to you for concurrence review, and
3 I think it's final. I'm finished with it. I give it
4 to you, and you look at it and say well, Shebelskie,
5 look, I think you need to make this change to it. You
6 give that to me and I look at it. Now one might say
7 you've made an objection at that point. You give it
8 back to me and I look at it, and I say well, you know,
9 on hindsight, I think you're right. I'll agree to
10 make that change. I give it to you, you make that
11 change, and then we're both happy. So at that point,
12 the decision-making process is over. But what we can
13 also look back and say your comment to me, call it
14 what you will at the time, is not an unresolved
15 objection.

16 I think the paradigm the two sentences get
17 at is the following; where a document is submitted to
18 you, then you're going to have to send it to Judge
19 Moore. You look at it and you say --

20 JUDGE KARLIN: Well, let's change the
21 situation where you make a suggestion, or you give me
22 a draft, I make a suggestion, someone else makes
23 another suggestion, and then some of those are
24 accepted, some aren't, but the final -- once the final
25 version is submitted to whoever it's going to be

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1 submitted to, everything's been resolved, hasn't it?

2 MR. SHEBELSKIE: Well, you may have an
3 outstanding -- in the concurrence process, as I
4 understand it - again, if there's someone higher than
5 you in the process --

6 JUDGE KARLIN: Yes, someone higher up.

7 MR. SHEBELSKIE: -- you can make this
8 objection, you come back to me and I say well, I
9 disagree with you, respectfully, and we're going to
10 elevate it to Judge Moore, the next person in the
11 process. And Judge Moore says I agree with the
12 Shebelskie view of the world, not the Judge Karlin
13 view of the world. Respectfully, your objection is
14 overruled, and you stand fast on it.

15 JUDGE KARLIN: Right.

16 MR. SHEBELSKIE: You're not satisfied with
17 our resolution. In that case, I think you have --

18 CHAIRMAN MOORE: It's resolved, isn't it?

19 MR. SHEBELSKIE: No, it doesn't --

20 CHAIRMAN MOORE: That's what the
21 bureaucracy is all about.

22 MR. SHEBELSKIE: No. I think Judge
23 Karlin's, in that objection on the draft submitted to
24 him for concurrence, is not resolved in the sense that
25 was intended. We're not suggesting otherwise.

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1 CHAIRMAN MOORE: So then you agree that
2 unresolved is someone in the chain, as Judge Rosenthal
3 earlier said in talking to State Counsel, stands pat,
4 objects.

5 MR. SHEBELSKIE: Stands pat, objects, and
6 either -- on the document that's being submitted to
7 that person for the concurrence review, not a working
8 preliminary look-see of the document. But stands pat,
9 and either because that person stands pat, that's what
10 causes the document to die on the vine, because you're
11 the highest person in the decision-making process, or
12 it is overruled by someone higher up in the decision-
13 making process.

14 CHAIRMAN MOORE: And it moves on.

15 JUDGE KARLIN: And that's not a
16 resolution?

17 JUDGE ROSENTHAL: That's a funny, to my
18 way of thinking, again in common parlance, and maybe
19 common parlance doesn't govern interpretation of the
20 Commission's regulations or Statement of
21 Considerations, but I regard a issue as being resolved
22 when the last person with the authority to make the
23 final decision says it's X or it's Y.

24 Now the fact that somebody down below in
25 the chain may still believe that he or she was right,

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1 and that the ultimate decision-maker was wrong, to me,
2 that doesn't make the issue unresolved, as I
3 understand the meaning of unresolved in common usage.

4 MR. SHEBELSKIE: And I would agree with
5 you and --

6 JUDGE ROSENTHAL: And you're telling me
7 that it has a special meaning here that departs from
8 what is the common understanding of the term. Is that
9 it?

10 MR. SHEBELSKIE: Well, I would agree you
11 in common parlance that's exactly what it means, but
12 Judge Moore pointed out there is one special word in
13 the definition here about the author, the original
14 author disagreeing. So I think we have to take into
15 account some situation where the original -- a
16 scenario where the original author --

17 JUDGE ROSENTHAL: I don't see the word -
18 am I missing something? I don't see the word
19 "resolved" or "unresolved", either one, in 2.1001. I
20 know that there's that word in the Statement of
21 Considerations, but I'm reading the regulation as it
22 finally appeared, and all I see is that "non-final
23 document circulated for supervisory concurrence or
24 signature", and "there must be a non-concurrence in
25 the concurrence process." I don't see "resolution" at

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1 all, so why should I read it in?

2 MR. SHEBELSKIE: Right. Because there is
3 no regulatory definition in 2.1001 of what a non-
4 concurrence is. As the State itself points out in its
5 brief, the term "non-concurrence" then is not a
6 standard term of art in the NRC regulation, so it's
7 perhaps ambiguous. You look to the Commission's
8 Statement of Intent.

9 JUDGE KARLIN: But you're not helping us
10 define what's a non-concurrence. You're helping us
11 define -- you're adding a new adjective to it, which
12 is unresolved non-concurrence. I mean --

13 MR. SHEBELSKIE: No, unresolved objection.

14 JUDGE KARLIN: -- this define concurrence,
15 resolved or unresolved, is a separate matter entirely.
16 It's not a definition of concurrence.

17 MR. SHEBELSKIE: Well, the first part of
18 the definition, even the regulation is that the
19 document has been submitted to the supervisors or
20 managers --

21 JUDGE KARLIN: For supervisory review.

22 MR. SHEBELSKIE: Signature or approval.

23 JUDGE KARLIN: Signature or concurrence.

24 MR. SHEBELSKIE: And that, I think,
25 conveys the notion that the document is ready for the

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1 supervisor, the manager's approval or signature.

2 CHAIRMAN MOORE: Well, that takes care of
3 signature, but that doesn't take care of concurrence.
4 Are you reading those unlike the State, not to be --
5 I'm sorry, to be synonyms?

6 MR. SHEBELSKIE: I'm reading concurrence
7 to mean that sort of elevated final state of
8 preparation that's contemplated in the NRC and DOE
9 established practice for what concurrence review
10 means.

11 CHAIRMAN MOORE: Is that different from
12 signature?

13 MR. SHEBELSKIE: Yes, because --

14 CHAIRMAN MOORE: Okay. Let's go back to
15 where we left off before.

16 MR. SHEBELSKIE: May I just finish that
17 last point; because if the three of you have to concur
18 on the document before it goes out, you may, Judge
19 Moore, be the only person who signs it, the final
20 person who signs, it goes under your signature, but
21 the other two judges need to concur in it before it
22 goes out.

23 CHAIRMAN MOORE: You told me that DOE in
24 '88 and '89 had a formal process for review of
25 documents that could loosely be described as some sort

1 of a concurrence process. You said further that that
2 process was not followed for this license amendment -
3 I'm sorry - application, and that there was some other
4 process that was followed for this license
5 application. What is the name of that process, and
6 where can we find that process?

7 MR. SHEBELSKIE: All right. It's the LA
8 Management Plan. I mean, there's a draft of one
9 either in or alluded to in the State's brief, and what
10 the level of review that this draft that we're talking
11 about was subjected to, was that --

12 CHAIRMAN MOORE: I'm just looking for the
13 procedure. And you indicated, as I said, that you
14 expressed your view as to what step this July
15 deliverable from Bechtel SAIC was in that Yucca
16 Mountain Review Plan.

17 First of all, is the fact that DOE had
18 procedures that were in effect, and were or were not
19 followed, relevant to our decision as to whether this
20 is a circulated draft?

21 MR. SHEBELSKIE: Well, I think I would go
22 back to Judge Rosenthal's point about you look at the
23 substance, under the policy for concurrence review,
24 what is substantively a non-concurrence? We've talked
25 about that. Then comport that same substantive

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1 approach to what this draft LA in the summer of 2004
2 was subjected to, and it's quite clear that it was
3 still very much a draft, not subjected to a process
4 where DOE managers at any level were asked to concur
5 in it.

6 CHAIRMAN MOORE: Okay. Let's then get to
7 that, but let's first talk about Mr. Ziegler and Mr.
8 Arthur, just so that I can place them in some
9 management structure. Is Mr. Arthur superior in the
10 management chain to Mr. Ziegler?

11 MR. SHEBELSKIE: Yes, sir. I believe Mr.
12 Ziegler is --

13 CHAIRMAN MOORE: Now, I'm just curious; we
14 have the State who provided us with reams of
15 statements from Mr. Arthur, who's a Deputy Director,
16 and his superior, the Director, Ms. Chu. And you came
17 up with an inferior official to file the declaration.
18 Now here's my problem, because when I put the inferior
19 officer's statement with the superior officer's
20 statement, I really can't reconcile the two. And I
21 would like to know how you reconcile, again with what
22 Judge Karlin brought up, the September 20th statement
23 of Mr. Arthur on page 41 and 42 of the State's Exhibit
24 8, with Mr. Ziegler's statement on paragraph 6, page
25 2 of his declaration, where he says we read portions

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1 of the July, 2004 draft LA to learn of the license
2 application's general state of preparation. And Mr.
3 Arthur is saying that they spent three weeks, and
4 we're going to spend another week and a half - that's
5 four weeks of higher level management time going over
6 this. I can't reconcile those two. How do you do
7 that?

8 MR. SHEBELSKIE: First, in terms of Mr.
9 Ziegler's position. Mr. Ziegler is the Director of
10 the License Application under Mr. Arthur, so Mr.
11 Ziegler is the person who really on more a day-to-day
12 basis than Mr. Arthur is involved in the drafting
13 work, under his staff of the license application. The
14 technical review teams that reviewed the July, 2004
15 draft were, in that structure, under Mr. Ziegler.
16 Yes, you might call him an inferior position in a
17 hierarchy, but real world terms, Mr. Ziegler is the
18 Director of Licensing --

19 CHAIRMAN MOORE: So you would reconcile
20 them, if I'm not reading too much into what you're
21 saying, that Mr. Arthur before the Nuclear Waste
22 Review Board didn't know what he was talking about.

23 MR. SHEBELSKIE: No, sir, I didn't say
24 that. The first point was just on the relationship,
25 why Mr. Ziegler provided the declaration.

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1 Again, I think this goes back to what I
2 was talking about with Judge Karlin. The July, 2004
3 draft was subjected to the review team process in
4 August, and the teams gave back their comments to BSC
5 in August. Starting in September, revised drafts of
6 the various sections started emerging from BSC. As
7 they emerged from BSC, they were given back to the
8 review teams to look at, to see if the comments, the
9 mandatory comments had been appropriately resolved, or
10 whatever other issues there might have been.

11 As those revised drafts came out, as the
12 September, 2004 draft came out, those chapters were
13 looked at by Mr. Ziegler and Mr. Arthur, and they were
14 looked at for purposes, for their review. They gave
15 comments on it, yes; but it was not a --

16 JUDGE KARLIN: Well, that's the key, as I
17 understand Mr. Ziegler's declaration, is management
18 reviewed this. The question is for what purpose, and
19 when? But apparently it was September, because Mr.
20 Arthur is talking of September 20th, and three weeks
21 of review, and another week and a half, so timewise --
22 and DOE is shooting for filing this application. I
23 mean, you're coming to the line here. This is
24 December, '04, so somebody must be paying some serious
25 attention to this application at this point, I would

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1 expect. Sounds like they were. But I think the
2 niggling point is, well, what purpose was this review?
3 If it was for your concurrence, that's one thing. If
4 it was just -- and what did the cover memo look like?
5 How are we going to figure out what the purpose of Mr.
6 Arthur's four and a half weeks of review of this
7 document was? How can we tell that? He spent a lot
8 of time on it. Is there a cover memo that says I want
9 you to review this for purposes of your general
10 edification, or did this cover memo say for purposes
11 of your concurrence? That would be dispositive, of
12 course.

13 MR. SHEBELSKIE: Right. And I am
14 confident there is no memo like that.

15 JUDGE KARLIN: I'm confident, too.

16 MR. SHEBELSKIE: No, because if you look
17 at the contract that had existed at that time, what
18 was contemplated was in July, 2004 there would be this
19 draft that was delivered. Still very much a draft,
20 wasn't being tendered by BSC as a final work product.

21 JUDGE KARLIN: Well, it was being tendered
22 by BSC as some major milestone --

23 MR. SHEBELSKIE: Not as a final work
24 product.

25 JUDGE KARLIN: Reasonably big bucks being

1 paid for it, and if it met the criteria, and it met
2 the criteria.

3 JUDGE ROSENTHAL: We're looking at
4 substance rather than form. It seems to me, off-hand,
5 that there are factual issues here that -- I mean, you
6 indicated before correctly that you didn't want to be
7 in the position of testifying. And it seems to me
8 that there are a lot of loose ends here with respect
9 to what actually was being done, and for what purpose.
10 We do have this indication that there were some high
11 level officials taking a very close look at this
12 document, and you're telling us, and this may be
13 correct, that that was not as part of, in fact, a
14 concurrence process. Maybe so, maybe not, but this
15 regulation, for better or for worse, appears to me to
16 make the ultimate decision here very likely hinge upon
17 two questions; one, whether this was, in fact, being
18 circulated for supervisory concurrence, if not the
19 signature. And two, whether there was, in fact,
20 somebody along the line that didn't concur. And I'm
21 just unclear in my own mind - I can't speak for my
22 colleagues - whether those are pivotal considerations,
23 as I seem to think they are. We have a factual basis
24 at-hand for making an informed judgment. My
25 colleagues may not agree with me on that, but I'm

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1 having that problem.

2 MR. SHEBELSKIE: Right. Well, I think it
3 is quite clear from even all the exhibits, and even
4 the additional exhibits that the State alluded to
5 today, that even as late as early November, 2004, when
6 he talks about there was a reference to Mr. Ziegler's
7 presentation or statement before the NRC Management
8 Meeting in November of 2004. In that very document,
9 Mr. Ziegler explains that the LA document is still a
10 draft. I think he refers to it as 83 percent complete
11 at that time, and subsequently the mandate was
12 finalized in the EPA ruling which affected things,
13 too. But you look at the schedule in the BSC contract
14 contemplating that the deliverable of what BSC would
15 consider the final document to DOE wouldn't occur
16 before November of 2004, and that would be the
17 document that BSC would tender to DOE for purposes of
18 getting DOE's concurrence and approval on it. And I
19 think the entirety of the record here is clear that
20 even in September of 2004, that you had a draft
21 document that had not been submitted to DOE management
22 for approval, or concurrence, or signature. I mean,
23 the bottom line, the document just wasn't at that
24 stage of development and ready for that process.

25 JUDGE KARLIN: Well, I think one of the

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1 things I'm hearing is that you're sort of breaking
2 this into different documents - there's a July, '04
3 document, there's a September, '04 document, because
4 there were some revisions that occurred. I don't
5 know, maybe there's an October. We haven't gotten
6 that far yet. We've only had an hour here, and maybe
7 whatever, but I don't think that's going to fly very
8 well with us.

9 I mean, for example, Ms. Chu makes a
10 statement on February 9th, I think, it's Nevada's
11 initial brief, Exhibit 10, on page 16 she says -
12 talking about what they did. "We reviewed the draft
13 intensively and made many comments which were
14 incorporated in our second draft, which was delivered
15 to us in November of '04." So I would think that the
16 July draft, with some tweaking as it went along, was
17 the draft that existed until this second draft of
18 November, '04 occurred. Therefore, when we talk about
19 was the July draft reviewed, I think what we've been
20 meaning is, was the document which was changing, let's
21 say, evolving a little bit as the process went on,
22 reviewed up until the November, at least the November
23 '04 draft. I'll posit that the November, '04 draft
24 may be a different draft than what the State had asked
25 for, but everything up until then, I'm going to call

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1 the July draft.

2 MR. SHEBELSKIE: All right. Well, Judge
3 Karlin, that, I think, illuminates another part of the
4 Alice In Wonderland aspect of the State's view of the
5 definition of circulated draft. If we're going to
6 take the view that a draft becomes a circulated draft,
7 even though it is a draft, even though it was
8 understood to be a draft, even though the author did
9 not think it was finalized and was submitting it for
10 comments and commentary, then you're going to get in
11 the world where virtually every version of the license
12 application draft will be considered a circulated
13 draft. All the comments on it would have to be part
14 of the circulated draft, and not just for the license
15 application, but for all the reports and --

16 JUDGE KARLIN: No, it would have to go to
17 supervisory concurrence or signature. I appreciate
18 that if someone -- if I've got a document and I send
19 it down to lower levels of the organization to review,
20 technical review, that might not be supervisory, but
21 once it starts going up the hill to Chu, and Mr.
22 Arthur, it sounds like it's going up there, and it's
23 clearly gone to managers and supervisors. They spent
24 a lot of time on it. They have said some comments. We
25 don't know what happened to those comments. I think

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1 we can distinguish and say it's not going to be every
2 document that ever came down the pike.

3 MR. SHEBELSKIE: I would disagree. We
4 have the view, also, within the contractor - well,
5 then what about the drafts that were inside BSC? BSC
6 managers looked at them. The definition of circulated
7 draft isn't tied to the fact that well, it's a fairly
8 advanced draft, and a lot of work had gone into it,
9 that people who have managerial responsibilities at
10 the participant looked at the copy of the draft, even
11 commented on the draft. If that were the case, then
12 the exclusion for drafts from the LSN functionally
13 won't have much meaning.

14 JUDGE ROSENTHAL: Is there likely to be a
15 circulated draft as you used the term before there's
16 a certification?

17 MR. SHEBELSKIE: Well, there will be -
18 before certification.

19 JUDGE ROSENTHAL: Yes.

20 MR. SHEBELSKIE: Two parts to that, Judge
21 Rosenthal. Circulated draft meaning does it have a
22 non-concurrence on it. I can't say whether that will
23 happen or not.

24 JUDGE ROSENTHAL: As I understand it, in
25 this world, using the term "non-concurrence" broadly,

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1 you're always going to have a situation where
2 technical members disagree on a particular matter.
3 But let's assume that there is somebody along the line
4 that would not concur in some substantive portion of
5 one of these 70 chapters, whatever they are, is there
6 likely to be a circulated draft; in other words,
7 something that goes through this concurrence process,
8 as you envisage the concurrence process.

9 MR. SHEBELSKIE: Before mid-August or so.

10 JUDGE ROSENTHAL: Before certification.

11 MR. SHEBELSKIE: I would think not under
12 the current schedule.

13 JUDGE KARLIN: But do you posit that there
14 can only be one circulated draft of any document?

15 MR. SHEBELSKIE: No, I don't posit that.

16 JUDGE ROSENTHAL: So there can be more
17 than one that would go through this formal concurrence
18 process that you say is a condition precedent for
19 being regarded as a circulated draft? I would think
20 it would -- that you would want, under your analysis
21 of what concurrence process is all about, you would
22 want to get it into this more or less final shape,
23 after all of these reviews. And then tada, the
24 concurrence process and it moves through it. I mean,
25 it seems to me as you envisage the term, it would be

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1 unlikely that there would be multiple concurrence
2 processes.

3 MR. SHEBELSKIE: I agree, unlikely, but I
4 think the question was, could it ever happen? I mean,
5 do I exclude that possibility, and I don't. I'm not
6 sure it would ever exist, but if I sent you my final
7 document, you non-concurred and that stopped, and then
8 I, for whatever reason, sent you the same document
9 again and you non-concurred again, slightly change it,
10 I don't know. That might be a scenario.

11 JUDGE KARLIN: Okay. Another question.
12 If I understand the analysis, the decision-making
13 process has to be complete. There's this language in
14 the Statement of Considerations.

15 MR. SHEBELSKIE: Yes.

16 JUDGE KARLIN: In the license application
17 context, what does that mean? The application to be
18 filed, or essentially filed?

19 MR. SHEBELSKIE: Well, it reached that
20 point in DOE where DOE says this is approved for
21 filing.

22 JUDGE KARLIN: So it's within a week or
23 something, very close to the filing deadline. Let's
24 just call it the filing. If the decision-making
25 process has to be complete, then that is tantamount,

1 it sounds to me, if we accept that proposition, to be
2 saying any draft - there can be no circulated draft of
3 the license application until the license application
4 is filed.

5 MR. SHEBELSKIE: Yes, that would be the
6 case.

7 JUDGE KARLIN: Okay. In the meantime,
8 we've got this 2.1019(i)2, which talks about
9 preliminary drafts, and says that in the derivative
10 discovery, one can obtain preliminary drafts. So I'm
11 troubled because it sounds like what's the point of
12 making circulated drafts available earlier if you
13 can't get it until after it's been filed anyway?

14 MR. SHEBELSKIE: Well, the definition of
15 circulated draft would apply to all documentary
16 material. We've just been discussing in terms of
17 license application. If there are documents,
18 documentary material that are produced in conjunction
19 with our initial certification, and they're
20 circulated, and --

21 JUDGE KARLIN: I mean, in the derivative
22 discovery after docketing, the State can ask for all
23 the preliminary drafts, whether circulated or not.
24 And you may argue that they're a litigation work
25 product or they're deliberative process privilege, and

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1 maybe such arguments can be presented, but they can
2 get all preliminary drafts that are not otherwise
3 privileged. And if we define circulated draft in such
4 a way that it can only exist after a license
5 application is filed, then it renders that concept a
6 nullity, almost. Why even have a circulated draft
7 when you get can all the preliminary drafts?

8 MR. SHEBELSKIE: Well, first, Judge
9 Karlin, let me address that point about the scope of
10 the derivative discovery. I disagree that in
11 derivative discovery there is some carte blanche
12 ability in this particular instance for the State
13 simply to say produce all your drafts of the license
14 application. I think that's too expansive a reading
15 of the scope of the derivative discovery, and
16 ultimately --

17 JUDGE KARLIN: Well, just put it in the
18 context of a deposition then. Someone is deposed, you
19 can ask the preliminary drafts can be produced, they
20 can be required to be produced.

21 MR. SHEBELSKIE: Well, recognizing in our
22 view the regulations that the scope of the derivative
23 discovery is not a matter within the pre-license
24 application phase.

25 JUDGE KARLIN: Absolutely.

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1 MR. SHEBELSKIE: Okay. Good.

2 JUDGE KARLIN: I accept that, but I'm
3 trying to -- you're rendering to circulated draft
4 definitionally tantamount to preliminary draft, which
5 makes it useless. Why is it even there if we have to
6 wait until application is filed?

7 MR. SHEBELSKIE: Except in that point, the
8 derivative discovery phase you're talking about
9 though, Judge Karlin, is going to follow the filing of
10 the license application. At that point, the decision-
11 making process with respect to the license application
12 is complete.

13 JUDGE KARLIN: Right.

14 MR. SHEBELSKIE: So if there is a
15 circulated draft of the license application, and
16 assuming arguendo that one could obtain a copy of it
17 for purposes of the derivative discovery, the issue
18 about the decision-making process not being complete
19 has fallen by the wayside because that process is
20 complete.

21 JUDGE KARLIN: Yes, certainly the
22 decision-making process is complete, and that's my
23 problem, is you've got to wait until the license
24 application is filed before you can get the circulated
25 draft, at which time you can just as well get the

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1 preliminary draft. Call it what you will.

2 MR. SHEBELSKIE: Well, I think the reason
3 for the Statement of Consideration by the Commission
4 is that until that decision-making process is resolved
5 and worked out, and finalized, you don't know whether
6 you have a formal unresolved objection, which is, I
7 believe, the way the Commission understood and meant
8 the concept of a non-concurrence in the regulation.

9 JUDGE KARLIN: Well, actually, there is a
10 period between the filing of the license application
11 and docketing.

12 MR. SHEBELSKIE: Well, that's true, too.

13 JUDGE KARLIN: Thirty days, whatever,
14 during which the circulated draft would presumably
15 become available --

16 MR. SHEBELSKIE: Part of a supplemental
17 obligation on the LSN, so there is that possibility.

18 JUDGE KARLIN: It isn't very long, but it
19 makes it of very little use at that point in time.

20 MR. SHEBELSKIE: And I think, Judge
21 Karlin, this does loop back to this concept of what
22 did the Commission mean by putting the license
23 document in Subpart B instead of documentary material.
24 I think that really highlights that the Commission
25 viewed the license application as something different

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1 than the documentary material it was calling --

2 JUDGE KARLIN: Well, I read that very
3 differently. I think all that 1003-B does is to
4 instruct the parties as to who is to file the
5 document. It's trying to sort out the documents and
6 say okay, the author of the document is the one that
7 has to file that.

8 MR. SHEBELSKIE: Well, but why would that
9 -- if that were the case, Judge Karlin, why would that
10 provision be limited to license application and the
11 EIS.

12 JUDGE KARLIN: Because they're so huge.
13 I think they're very large documents, and maybe that's
14 part of it.

15 MR. SHEBELSKIE: I mean, why wouldn't
16 there have been a regulation simply said the party
17 that authors the document has the obligation to --

18 CHAIRMAN MOORE: Well, if you'd like us to
19 write the regulation, I'm sure we could do a better
20 job, but that's a different question. Let's go to the
21 point you just raised about the Commission including,
22 in your view, not including the license application in
23 the meaning of documentary material. When you
24 certify, will every report, study, database, computer
25 program referenced or cited in that July, '04

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1 deliverable already be in the LSN?

2 MR. SHEBELSKIE: Recognize that I do not
3 have encyclopedic knowledge of every citation in the
4 July draft, I'll answer it this way; that the license
5 application is - obviously, they have numerous
6 references - and as the State, for example, in one of
7 their exhibits has a statement from John Arthur
8 describing the foundation of the license application
9 being these AMRs, Analysis Model Reports, and there
10 are a lot of other citations.

11 As the draft is being developed, the way
12 it's set up is for electronic links for those
13 citations to the underlying source documents in our
14 electronic document collection. And we have set up
15 processes and procedures to go in, as part of our LSN
16 certification, and make sure we grab the documents
17 that are cited, that are linked to the license
18 application, to grab it that way. That's the first
19 part.

20 I think your next question might be well,
21 what if there had been a citation in the July draft
22 that's not in the whatever, 2005 draft? If that
23 citation existed that, again, as I understand how the
24 process sets up the record retention practice, that
25 citation would be existed in our record processing

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1 center, and we are grabbing so broadly from there, we
2 are grabbing all the reports and studies, and analyses
3 and data, and calculations and computations from that
4 record processing center independently of whether -
5 scientific notebooks, too - independently of whether
6 they are specifically cited and relied in the most
7 current version of the license application. Does that
8 answer your question?

9 CHAIRMAN MOORE: The purpose of my
10 question was that if, in your view, the license
11 application doesn't contain documentary material, but
12 relies on documentary information, and all that
13 information will be provided. If it is not provided,
14 then almost definitionally you have handicapped, you
15 have violated the regulations, assuming one accepted
16 your view of them. And have handicapped anyone that's
17 attempting to oppose or even support this license
18 application.

19 MR. SHEBELSKIE: I'm glad you raised that
20 point, and I think it loops back to the very first
21 observation Judge Rosenthal was making. Our
22 production is grabbing all of these AMRs, all these
23 Analytical Model Reports that support the LA. And
24 we're actually grabbing extensively from the
25 development process for that. We are reaching down

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1 into the design and engineering drawings, scientific
2 notebooks, the results of experiments, calculations,
3 data. All the technical information as it exists at
4 the time we file our certification is going to be
5 forthcoming.

6 CHAIRMAN MOORE: Okay. Why haven't you
7 made it publicly available now?

8 MR. SHEBELSKIE: Yes. We have actually
9 made 1.3 million documents available.

10 CHAIRMAN MOORE: That was last year.

11 MR. SHEBELSKIE: That's right.

12 CHAIRMAN MOORE: Only the material that
13 you previously certified.

14 MR. SHEBELSKIE: That's right. And since
15 then, over the course of 2005, we have been doing two
16 things. We have been reviewing those million that
17 were header-only, completing the privilege review
18 process.

19 CHAIRMAN MOORE: Right now if you look at
20 the LSN, there are no more than those 1.2 million
21 documents. The loading schedule, though, shows that
22 in March you started loading, and you're now over 3
23 million documents that only DOE knows what they are.
24 None of them have been made public. Once again, I
25 have this strange dichotomy. You're asking me in

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1 interpreting 2.1001, to read into the definition of a
2 circulated draft the fact that it's unresolved, the
3 fact that the decision-making process has to be
4 complete, which is material that only appears in the
5 Statement of Consideration.

6 I go to the Statement of Considerations
7 that deals with the LSN, and I find the Commission
8 says all potential parties should get it out there as
9 soon as they can. Once it's delivered and made
10 available to the LSN, it's expected to be made public.
11 That means that starting in March, those new documents
12 should have been made public, and you haven't made any
13 of them public.

14 Why on the one hand should I read anything
15 into the Statement of Considerations that you're
16 urging me to in regard to the definition of a
17 circulated draft, and you're ignoring the Commission's
18 statements on the LSN that that material is supposed
19 to be made public, and not wait for your
20 certification?

21 MR. SHEBELSKIE: First, ultimately, this
22 is something outside the scope of this motion that the
23 State has framed, but let me address that point,
24 though, generally, Your Honor, because I think it is
25 appropriate.

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1 First, as a matter - you also look at that
2 commentary, and I think a lot of that commentary
3 you're referring to was in the era where the license
4 application was going to come only 90 days after the
5 site recommendation, because there's also commentary
6 from the Commission in the more recent rule-making
7 where when the State said well, we want more than six
8 months for review of the documentary material before
9 the LA is tendered, the Commission said repeatedly
10 that in their view the six month period review was
11 adequate. But the reason why, Your Honor, for the
12 documents that have been loaded starting in March are
13 under this access control procedure that the LSN
14 Administrator has set up, is because we don't want a
15 repeat of the situation we had last year. We were
16 advanced loading documents, and getting them scanned
17 and crawled while we -- we had basically three or four
18 processes going on simultaneously, with relevancy
19 reviews, privilege reviews, and scanning, because we
20 wanted to get the complete production out there as
21 soon as possible, but you couldn't really do it in a
22 linear process, sequential process - you review for
23 relevance, then you stop, review for privilege, stop,
24 review and scan 3 million documents. We would have
25 been out into 2006 or 7, and so we wanted to go that

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1 when we turn the switch in August, we said all right,
2 these are the documents that are out there. We
3 finished our reviews. Everything is done.

4 CHAIRMAN MOORE: I'll give you our
5 decision in August of last year to March when you
6 started loading again. When you were doing all those
7 things, but since you started loading those documents,
8 making them available, why weren't they made publicly
9 available?

10 MR. SHEBELSKIE: Because the reviews were
11 not yet complete on them, Your Honor.

12 CHAIRMAN MOORE: Since March, how many
13 documents have you requested to be removed?

14 MR. SHEBELSKIE: Your Honor, I'm afraid I
15 don't have that -- I didn't come prepared for that.

16 CHAIRMAN MOORE: Any?

17 MR. SHEBELSKIE: Yes.

18 CHAIRMAN MOORE: How many? You don't
19 know.

20 MR. SHEBELSKIE: No. I mean, for example,
21 we gave a list of 60,000 --

22 CHAIRMAN MOORE: Those were all from the
23 prior --

24 MR. SHEBELSKIE: No, some had not been
25 previously crawled before, Your Honor, by the NRC.

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1 I'm afraid, Your Honor -- and we also have processes
2 ongoing now where the project people are looking at,
3 here's the ones that we are presumptively going to put
4 out in full text. We're giving you on the project a
5 month or so, speak now or forever hold your peace
6 before we release these - just privacy information or
7 other privileged information, because we recognize
8 once we release them, we're not going back.

9 JUDGE KARLIN: Can I ask, do you have any
10 circulated drafts that you're going to be putting on
11 the LSN, not of the license application, necessarily,
12 but of any other reports and other documents?

13 MR. SHEBELSKIE: Right. Well, we made
14 this decision, Judge Karlin, with respect to the
15 underlying technical documents, like the reports and
16 studies, and analyses and AMRs, that we could have
17 gone through -- I mean, all these documents go through
18 a lot of drafting iterations, as you might imagine.
19 And we could have gone through and said this one is
20 not a circulated draft, this one is not, this is not,
21 this one is not. We also recognize though that was,
22 in part, going to be a very time-consuming and
23 expensive process, and we said well, we have these
24 drafts in our record compilation system. We're not
25 culling them out because they do or do not meet the

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1 definition of circulated draft, so we are voluntarily
2 producing many, many drafts of these technical
3 underlying documents so people can see the development
4 of the science. You don't need to see the draft
5 license application. We're going to be producing all
6 the details, warts and all, for the development of the
7 science on the project.

8 CHAIRMAN MOORE: Well, I would like to
9 just add one caveat. It's the difference between the
10 numbers that have been bandied around - 5,800 pages
11 and 70 chapters, and millions of pages. That strikes
12 some of us as --

13 MR. SHEBELSKIE: Millions of pages for the
14 license application?

15 CHAIRMAN MOORE: Well, so that the public
16 can see how the science was developed.

17 MR. SHEBELSKIE: Oh.

18 CHAIRMAN MOORE: And you have, under your
19 view of the world, not making any of this public, so
20 everybody is going to have precisely six months,
21 that's a huge difference. And that's, I think, one of
22 the underlying tensions in all of this that we're
23 having. With that said --

24 MR. SHEBELSKIE: That said, but there's
25 another point, keep in mind. You know, there has been

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1 a multi-year process occurring with the NRC on this
2 KTI process, Key Technical Issues on some 300 topics
3 where the Commission or the Staff said here are some
4 technical issues we want you to respond to, reports
5 responding to all that. The State and others are not
6 coming into this cold in August on the science and
7 background by any means.

8 CHAIRMAN MOORE: Switching subjects, going
9 back to 2.1001, the definition of a circulated draft -
10 does DOE equate managers with supervisors,
11 specifically in Mr. Ziegler's declaration?

12 MR. SHEBELSKIE: I think for these
13 purposes, Ziegler and Arthur would qualify.

14 CHAIRMAN MOORE: But when they both refer
15 to other managers, are those managers supervisors,
16 because generally, a manager is a supervisor. He's
17 managing something, and usually they manage people
18 along with the something else.

19 MR. SHEBELSKIE: Right. Well, that's a
20 generalized statement. I mean, I think the concept
21 that Mr. Arthur was referring to was that he and Mr.
22 Ziegler, and I think there's a Mr. Dyer, were looking
23 at the drafts that were coming out as a result of the
24 comments from the technical review teams.

25 CHAIRMAN MOORE: Were any members of the

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1 technical review teams identified by Mr. Ziegler
2 exercising authority as supervisors?

3 MR. SHEBELSKIE: I don't believe so, Your
4 Honor.

5 CHAIRMAN MOORE: Is that a guess, or --

6 MR. SHEBELSKIE: No, no. I mean, it's my
7 understanding no, because these are staff level-type
8 scientists and engineers, some of whom aren't even in
9 DOE so, obviously, couldn't be --

10 CHAIRMAN MOORE: Were any members of the
11 technical review teams who provided mandatory comments
12 exercising authority as supervisors?

13 MR. SHEBELSKIE: No.

14 JUDGE KARLIN: Well, I think, if I may, an
15 operative word in that question and answer may be the
16 technical review team. Are they supervisors, and
17 you're saying no. If you take that out of it, and
18 just say were any of the managers or supervisors who
19 reviewed this document, because there were clearly
20 managers and supervisors who reviewed this document -
21 the key is for what purpose, if I understand it. So
22 take the technical review team out of those questions,
23 and say --

24 MR. SHEBELSKIE: If the question is, does
25 John Arthur and Joe Ziegler have supervisory

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1 responsibilities, in their capacity at DOE, well the
2 answer would be yes. I don't think you can deny that
3 in the real world. But again, they were not part of
4 the technical review teams.

5 CHAIRMAN MOORE: Was Mr. Ziegler in a
6 position to know whether there were any unresolved
7 non-concurrences?

8 MR. SHEBELSKIE: Yes, absolutely.

9 CHAIRMAN MOORE: Was he in a position to
10 know whether there were any non-concurrences?

11 MR. SHEBELSKIE: Yes, absolutely. I mean,
12 if you want to call what could happen in that review
13 level a non-concurrence; but yes, he was familiar and
14 has first-hand knowledge of what came out or didn't
15 come out of, as the case might be, the technical
16 review team. Because I said, he's the Director of the
17 License Application Preparation at DOE.

18 CHAIRMAN MOORE: Now I just have one more
19 question along these lines. If from what Judge Karlin
20 said, the material that he pointed you to from the
21 exhibits in the State's initial filing, when the
22 director of the office, Ms. Chu, said that there was
23 a second draft in November, at that time the Court of
24 Appeals had ruled, and the standard, the 10,000 year
25 standard had been invalidated, and the mandate had

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1 issued.

2 MR. SHEBELSKIE: Let me say, the post
3 10,000 year standard had been invalidated.

4 CHAIRMAN MOORE: Correct. Did that draft
5 at that point, being essentially the July deliverable,
6 because we now know that in November there was a
7 second draft. Did that first one essentially die on
8 the vine at that point?

9 MR. SHEBELSKIE: No, because --

10 CHAIRMAN MOORE: You got a different
11 standard. It's a whole different ball game now.

12 MR. SHEBELSKIE: Right. But you have --

13 CHAIRMAN MOORE: I recognize some parts of
14 it are going to stay.

15 MR. SHEBELSKIE: Exactly.

16 CHAIRMAN MOORE: But it's going to look
17 substantially different in a lot of analyses,
18 presumably.

19 MR. SHEBELSKIE: Well, the portion of the
20 draft LA that might address the post 10,000 year
21 period would have to take into account the Court of
22 Appeals ruling, but that is not the same as saying
23 that that portion of the July draft that may have been
24 written in anticipation of the partially invalidated
25 rule died on the vine because of a non-concurrence.

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1 It changed because of a change in regulations.

2 CHAIRMAN MOORE: Right. But does the --

3 MR. SHEBELSKIE: And it becomes
4 irrelevant, by the way.

5 CHAIRMAN MOORE: Do we have to connect the
6 non-concurrence with the dying on the vine? That
7 draft, of which there may -- let's assume that there
8 were non-concurrences, that draft isn't going forward.
9 Why does the dying on the vine have to be --

10 MR. SHEBELSKIE: Well, because I think
11 that's what -- I think this ties back to Judge
12 Rosenthal's point. What is the Commission trying to
13 get at? The Commission is trying to get at those
14 documents that are so important because they were at
15 a presumptively final stage, and they stopped or died
16 on the vine because of this non-concurrence that was
17 reached. If a draft or a portion of a draft document
18 didn't continue with a certain analysis because the
19 regulations changed, I think that has nothing to do
20 with the concept of circulated draft.

21 Furthermore, I think it makes that earlier
22 draft addressing a different regulatory standard
23 irrelevant and not even documentary material under any
24 definition, because it's addressing a different
25 standard.

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1 CHAIRMAN MOORE: Well, as I read the
2 Statement of Considerations, the dying on the vine, as
3 we're calling it, has absolutely no connection with
4 the non-concurrence. What it has a connection to is
5 the conclusion of the decision-making process.

6 MR. SHEBELSKIE: Right. But also, Your
7 Honor, I just think in context, you have to read that
8 as a whole, and that has to be what the Commission is
9 talking about. But in any event, the license
10 application hasn't died on the vine. It hasn't died
11 on the vine because of the invalidation of the EPA
12 standard. Analyses are being modified to take into
13 account the impact of the Court of Appeals decision,
14 but it's not a draft that's dying on the vine.

15 CHAIRMAN MOORE: Help me out. Are there
16 5,800 pages and 70 chapters in the July deliverable?

17 MR. SHEBELSKIE: Approximately, yes. It's
18 not millions of pages. I don't know where that number
19 crept into.

20 CHAIRMAN MOORE: So now we take a sub-
21 chapter and there is - whatever the terms mean, we can
22 agree for my hypothetical that there is a non-
23 concurrence.

24 MR. SHEBELSKIE: On that sub-chapter --

25 CHAIRMAN MOORE: On some sub-chapter of

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1 those 70 chapters. Now is that July deliverable, does
2 it have a non-concurrence?

3 MR. SHEBELSKIE: No, as a whole? No. I
4 would say not.

5 CHAIRMAN MOORE: What does it take then to
6 have a non-concurrence, you got to have a non-
7 concurrence on all 70 chapters?

8 MR. SHEBELSKIE: I think if you had this
9 magical non-concurrence on a chapter or section of the
10 license application, it at most should extend to that.
11 Why should a non-concurrence -- here's my problem with
12 answering your question, Your Honor. If there is a
13 non-concurrence on the license application, I don't
14 see how the license application goes forward, is all.
15 So it sort of moves ultimately into the final product.

16 CHAIRMAN MOORE: Well, it gets resolved,
17 but I don't want to go down there yet.

18 MR. SHEBELSKIE: Okay.

19 CHAIRMAN MOORE: It gets resolved by being
20 overruled, or dying on the vine.

21 MR. SHEBELSKIE: Yes. But if your point
22 is, if there is one section or subsection that meets
23 whatever standard is of circulated draft, does that
24 mean suddenly all 5,800 pages and all comments on all
25 5,800 pages get produced? I can't imagine that is the

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1 result intended by the --

2 CHAIRMAN MOORE: What gets produced, the
3 limited amount?

4 MR. SHEBELSKIE: I would think so, at
5 most. That was the subject of a non-concurrence.

6 CHAIRMAN MOORE: Which leads me to, isn't
7 that the purpose behind this whole provision for the
8 circulated draft, that it's because there is an
9 objection or a non-concurrence, presumably these are
10 technical matters, presumably it's by someone with
11 technical knowledge, that should be brought to the
12 fore, and allowed to see the light of day? Isn't that
13 what's behind this?

14 MR. SHEBELSKIE: Well, the language talks
15 about a document submitted for management or
16 supervisor. It doesn't --

17 CHAIRMAN MOORE: I know what the language
18 says, but let's talk about what's behind it. Why
19 would you come up with this concept to waive the
20 deliberative process privilege, if it wasn't to get
21 the -- and put it in terms of a non-concurrence, but
22 for to get the non-concurrence out to see the light of
23 day. Can we agree on that?

24 MR. SHEBELSKIE: We can agree on that, but
25 I think your statement, though, sort of begs the

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1 question. Yes, the purpose was to get the non-
2 concurrence out there. But okay, it begs the
3 question. Then what is the non-concurrence, at what
4 level must it take place? And it's quite clear the
5 Commission - I mean, both the regulatory text and the
6 rule-making - wasn't contemplating every draft or
7 technical people --

8 CHAIRMAN MOORE: Needless to say, your
9 time is up, and we've vested you with lots of
10 questions. We'll take a very brief five minute recess
11 before we hear rebuttal.

12 MR. SHEBELSKIE: Thank you, Your Honor.

13 (Whereupon, the proceedings in the above-
14 entitled matter went off the record at 11:39 a.m. and
15 went back on the record at 11:44 a.m.)

16 JUDGE KARLIN: Well, I guess DOE has
17 abandoned the field. Is this what we are to
18 understand?

19 CHAIRMAN MOORE: We are getting perilously
20 close to a waiver. Mr. fitzpatrick, 15 minutes for
21 rebuttal?

22 MR. FITZPATRICK: Your Honors, if I could,
23 I would like to just try to answer quickly a couple of
24 questions that have been brought up before. And one
25 that has come up over and over and I think I am

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1 hearing the other conversations lends a little
2 insight. Why did NRC provide in its regulations the
3 unusual step of not just final documents but something
4 else, something before that? They defined it
5 circulated drafts, which we can quibble over.

6 It was something not final and, yet, it
7 was something that would be produced. It was
8 something that would normally be subject to a
9 deliberate process. Yet, the Commission wanted that
10 waived. Why did they want the public to see it? They
11 wanted the public to see it because the differences
12 between the final license application for, you know,
13 the most important waste repository that has ever been
14 built and the, let's call it, last serious draft
15 before that, the differences between them would reveal
16 the key differences that scientists had in the program
17 or that scientists had with the politicians in the
18 program and how those differences of opinion were
19 resolved.

20 And if they were resolved in a way that
21 simply imposed a resolution, which I think that is
22 what the procedure says, then the NRC wanted to enable
23 the scientists whose positions that they advocated for
24 saw them overridden, either by other scientists or
25 politicians, would come to light of day, as the phrase

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1 was used. And the public would hear at least the
2 semifinal issues that were key issues.

3 And a couple of examples that I am sure we
4 all read about, a lot of discussion was had between a
5 cold repository and a hot repository. That is
6 discussed with ACNW with TRB all the time. The
7 differences are in billions. And there are arguments
8 on both sides. There --

9 JUDGE ROSENTHAL: It is only if the
10 scientist with the dissenting opinion decides to stick
11 to his guns. I mean, if, for whatever reason, he
12 decided to get on board, so to speak, even though his
13 misgivings might have remained, then you would agree
14 that his initial disagreement would never come to
15 light. Is that right?

16 MR. FITZPATRICK: Potentially if the
17 circulated draft with its commentaries was made
18 available, you would learn about it, even though it
19 had been overruled.

20 JUDGE ROSENTHAL: Well, but it's not a
21 nonconcurrence if he doesn't stick to his guns. Then
22 it doesn't become a circulated draft. Isn't that
23 right? I mean, circulated draft has as a condition
24 that there be a nonconcurrence.

25 MR. FITZPATRICK: I don't know the

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1 composition of the draft, whether it is coupled with
2 the comment sheets and concurrences and their
3 resolution or not.

4 JUDGE ROSENTHAL: Let me ask you another
5 question which seems to me pivotal. DOE says, "Look
6 it, we have a concurrence process. What existed here
7 with respect to that draft was not a concurrence
8 process. It was in the sense an early review and that
9 you do not get to concurrence," I understand their
10 argument to be, "until basically it's gotten to a very
11 final stage.

12 And that's the point when then it's run
13 through the various levels of concurrence for their
14 agreement.

15 Now, what is wrong with that argument if,
16 in fact, this is in their way of operating -- I
17 recognize we're not going to talk form over substance.
18 But they would say that as a matter of substance, this
19 is a very preliminary look at this. This isn't what
20 we regard as being a concurrence process. And let's
21 assume that they have got a written document that
22 bears that out.

23 MR. FITZPATRICK: Well, I don't think they
24 have got a written document that bears that out, Your
25 Honor.

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1 JUDGE ROSENTHAL: All right.

2 MR. FITZPATRICK: I think that is a
3 litigation position being taken right now after 24
4 years of preparation of for the general preparation of
5 analyses and scientific studies, years of preparation
6 of the license application itself. And you get down
7 to November and the months just before November, when
8 the highest officials, John Arthur and his senior
9 managers, are reviewing the document. And to suggest
10 that that was just kind of a casual glance to see the
11 status when this monumental tome is going to be
12 submitted in December is not credible.

13 But you just have to read the rest of the
14 sentences of Arthur and Chu in the exhibits that were
15 read by Judge Kirlin before. After Mr. Arthur talked
16 about him and his senior managers spending three weeks
17 and another week coming for the review, the question
18 is, what kind of review? Well, he says, "And it will
19 complete in the next week," the full review,
20 integrated review of every section. With that, there
21 will still need to be a lot of editing,
22 cross-references, and all the necessary integration to
23 bring that together.

24 And Ms. Chu didn't just say, "We reviewed
25 the draft intensively." She said, "And made many

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1 comments which were incorporated." So both of those
2 officials, both higher than Mr. --

3 CHAIRMAN MOORE: What statement of Chu's
4 was that?

5 MR. FITZPATRICK: That's the same
6 statements that have been cited just the following --

7 CHAIRMAN MOORE: Is that September or is
8 that February?

9 MR. FITZPATRICK: Hers is February.

10 CHAIRMAN MOORE: Fine.

11 MR. FITZPATRICK: His was September. And,
12 in other words, just this dichotomy between the
13 testimony of Ziegler and Arthur, let's not be confused
14 that Arthur was a general up here in the castle and he
15 talked about what he thought his troops were doing,
16 but Ziegler really knew what his troops were doing.
17 No. Arthur says, "Myself and a number of our senior
18 managers have been" -- he's talking about what he's
19 doing. So I don't think he made that up.

20 But a couple of other issues, like ceramic
21 versus titanium. That's been an issue argued back and
22 forth in good faith by scientists. It's an \$8 billion
23 decision. And so the people who advocated ceramic are
24 probably still nonconcurring to this day and will
25 until they die.

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1 Maybe the biggest unresolved
2 nonconcurrence of them all was created by the court in
3 July because you have asked a few times about what is
4 the name of the document that really tells us what
5 DOE's procedure is. It's a big, fat thing, and it's
6 called "Management Plan for the Development of Yucca
7 Mountain License Application," April 2003, and there's
8 a VIN number. It's an LSN, 001315478.

9 And something struck me in that document
10 that tells me why did the whole thing come to a
11 grinding halt when the mandate was issued because it
12 says at page 13, -- this is DOE's review -- "The
13 Office of General Counsel will work with the Office of
14 Civilian Radioactive Waste Management and Bechtel to
15 assure that appropriate legal review and advice are
16 provided in a timely and efficient manner throughout
17 the entire process." I suggest that --

18 CHAIRMAN MOORE: Now, what page was that,
19 please?

20 MR. FITZPATRICK: I'm sorry. That was
21 page 13 of that document. And I have to believe that
22 a good faith attorney providing regulatory advice
23 would suggest to his client that it would be
24 inappropriate to submit a license application in
25 December when there is literally no standard for your

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1 work to be tested against.

2 CHAIRMAN MOORE: My last question to DOE's
3 counsel was that July deliverable in the time frame
4 now of November, where Ms. Chu says we had a second
5 draft and we had the mandate issued to the Court of
6 Appeals on the Court of Appeals decision striking the
7 post-10,000-year standard. Was that now a draft or a
8 license application that essentially died on the vine
9 because there was going to have to be a whole new path
10 taken?

11 MR. FITZPATRICK: I'm not inside their
12 heads, but I would say apparently so because it is --
13 the standard that it was crafted around has been
14 pulled out from under.

15 CHAIRMAN MOORE: Do you read the statement
16 of considerations to tie the decision to not go
17 forward with something to a nonconcurrence in the '88
18 and '89 statement of considerations for the rule?

19 MR. FITZPATRICK: I mean, I guess there
20 could be a lot of reasons for a decision not to go
21 forward: financing and different things. But for a
22 particular path of action, a series nonconcurrence by
23 a high-ranking official could bring it to a halt.

24 CHAIRMAN MOORE: Do you like, if I
25 understood Mr. Shebelskie correct, tie the

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1 nonconcurrency to the decision not to go forward?

2 MR. FITZPATRICK: No, not necessarily.
3 One thing that I would like to clarify, there was talk
4 about drafts and drafts before July, drafts and drafts
5 after July as though there was no particular landmark
6 there other than the fee was paid at that moment.

7 That does not begin to capture the import
8 of that document and the reason why we ask for that
9 document. In other words, if there were really tons
10 of drafts before and after, why did we hone in on one?
11 I would like to --

12 CHAIRMAN MOORE: You can put it up on the
13 screen right there if you'll just --

14 MR. FITZPATRICK: I don't think it's in
15 here.

16 CHAIRMAN MOORE: If there's someone in the
17 control room, that should light it up.

18 MR. FITZPATRICK: I don't think so.

19 CHAIRMAN MOORE: It should show up right
20 here momentarily. It's on all the monitors.

21 MR. FITZPATRICK: All right. This is
22 another VIN document.

23 CHAIRMAN MOORE: Well, you had better give
24 us copies because we don't have monitors in front of
25 us. There it comes. It will be up there. It just

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1 had to warm up.

2 MR. SHEBELSKIE: Your Honor, I would
3 object to the use of this. This was not an exhibit
4 attached to their briefing. It, as it states,
5 represents a draft. We have no idea of the date of
6 the draft, that it has any connection to the actual
7 review processes that were followed.

8 And we were given this accession number to
9 pull up this document yesterday afternoon, I think in
10 a little bit of gamesmanship here to try to use this
11 draft we have no context for to try to make some point
12 here in --

13 CHAIRMAN MOORE: I think he's going to
14 give us context. What is it?

15 MR. FITZPATRICK: May I respond to that?
16 You have just seen your future life. This is a
17 DOE-created document put on the LSN by DOE. And do
18 you hear the squawking at your looking at it?

19 MR. SHEBELSKIE: No, I don't object to
20 your looking at it. What I object to is that we don't
21 have to be given the chance to develop the evidence
22 that responds to whatever point they want to make
23 about this. He wants to say this was the time line
24 that was used for the review of the draft in 2004.
25 And I have no knowledge, in fact, that it was this

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1 document.

2 MR. FITZPATRICK: Of course, the documents
3 on the LSN come with no explanation, and we have had
4 no discovery. The second document I put before you --

5 CHAIRMAN MOORE: One second, Mr.
6 Fitzpatrick.

7 (Pause.)

8 JUDGE KARLIN: Just a factual
9 clarification. Is this on the LSN now?

10 MR. FITZPATRICK: Yes. Yes, Your Honor.
11 And the VIN number is a little hard to read, but it's
12 in the corner up there. That's the DOE's --

13 JUDGE KARLIN: Oh, I see. Yes.

14 MR. FITZPATRICK: -- accession number.

15 JUDGE KARLIN: It's cut off. It's cut off
16 on our Xerox. Okay. And this license --

17 MR. FITZPATRICK: The second document --

18 JUDGE KARLIN: -- document, is that on the
19 LSN?

20 MR. FITZPATRICK: I don't believe it is.

21 JUDGE KARLIN: Are either of these
22 documents in the -- have access numbers in the ADAMS
23 system? Are they in ADAMS?

24 MR. FITZPATRICK: I believe the first time
25 line probably does because it's in the LSN, but I'm

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1 not sure of that. The second document was simply
2 distributed at a meeting by Steven Cereghino, a
3 presentation by Cereghino.

4 And the limited point of both of these
5 documents, I mean, I am not vouching for whether these
6 specific numbers of weeks and things that are cited in
7 here were followed by anyone. These were both DOE
8 publications, though.

9 And the point, the simple point, to be
10 made, the first one, the skeletal little one, it shows
11 near the left about second entry in is a complete LA
12 draft and to the right of that, LA technical review,
13 four months; integrated LA review, two months; and
14 then LA submittal to NRC.

15 JUDGE ROSENTHAL: Is this rebuttal of
16 anything that --

17 MR. FITZPATRICK: Yes, Your Honor.

18 JUDGE ROSENTHAL: This is rebuttal, and
19 you shouldn't be advancing new material to support --

20 CHAIRMAN MOORE: I take it this is
21 rebuttal of the time line that has been posited by DOE
22 with Ziegler's affidavit that says the only review was
23 this technical review compared to the time line in the
24 contract that is an exhibit in DOE's filing.

25 MR. FITZPATRICK: That, Your Honor, but

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1 also rebuttal to the position taken in direct argument
2 that there was really nothing particularly special
3 about the draft LA that we're talking about. There
4 were just dozens of drafts before, dozens of drafts
5 after. And that had no particular import.

6 Both of these drafts illustrate that the
7 draft LA was a unique document which once delivered
8 was anticipated to undergo -- and both of them show
9 the same thing. One of them says four months and two
10 months. This one has 22 weeks and 4 weeks. Either
11 way it's a half a year.

12 JUDGE KARLIN: But it doesn't say that.
13 It doesn't say, "The draft LA submitted by BSC on July
14 26." It just says -- what am I looking at -- "right
15 LA draft."

16 MR. FITZPATRICK: Which?

17 JUDGE KARLIN: This document here.

18 MR. FITZPATRICK: Okay.

19 JUDGE KARLIN: Which draft? There are
20 multiple drafts. There are still drafts going on.
21 I'm not sure if the --

22 MR. FITZPATRICK: That was the -- well --

23 JUDGE KARLIN: It doesn't say the
24 BSC-delivered final draft is now the trigger for all
25 this time frame.

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1 MR. FITZPATRICK: Combining our knowledge
2 of this with our knowledge from the Bechtel-DOE
3 contract, which specified July 26 as the draft LA
4 submittal date and awarded an \$11 million bonus for
5 it, this --

6 CHAIRMAN MOORE: Mr. Fitzpatrick, you have
7 made your point in rebuttal. I think now you are
8 beating a dead horse.

9 MR. FITZPATRICK: Okay. No. The point
10 was simply the treatment given the document. And it
11 was consistent with the full testimony or full
12 statements of Chu and Arthur.

13 I would like to just make a final comment
14 about the 60,000 documents that were talked about in
15 this room about being removed from the LSN. I think
16 the order of the Board was that before they were
17 removed, we would be provided a list of them to have
18 the opportunity -- I think Mr. Malsch would review
19 1,000 a day for 60 days. That's how I remember the 60
20 days.

21 We have yet to get that list. So I hope
22 that the documents haven't been removed.

23 CHAIRMAN MOORE: I believe that list was
24 published on the LSN, was it not?

25 MR. FITZPATRICK: I have not heard of it.

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1 CHAIRMAN MOORE: I think you should check
2 it. If you have any problems, you'd better be filing
3 a motion with us.

4 MR. FITZPATRICK: And the other thing was
5 simply that we concur with anyone who is at a loss to
6 understand the procedure where last year everything
7 was withheld until June the 30th and then dumped on
8 the public and then the redo this year, starting March
9 1st, 30,000 a day, 150,000 a week, 2 million from then
10 until now.

11 And for some reason, the ones that were
12 put up in March are still not ready to be seen by the
13 public. Why were they sent to NRC in March if four
14 months later they're still not ready to be released to
15 the public? It's more? Got you.

16 By the way, the conclusion on the primary
17 argument we're here for is I think we have shown that
18 the draft LA we're talking about of July is
19 documentary material. It's not privileged. And it
20 was a circulated draft. And it should be made
21 available --

22 CHAIRMAN MOORE: Thank you very much.

23 Mr. Shebelskie, in light of Mr.
24 Fitzpatrick's raising these documents, specifically to
25 these particular matters, do you have anything you

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1 would like to add? You got them yesterday.

2 MR. SHEBELSKIE: Just two points.

3 CHAIRMAN MOORE: From there. That's fine.

4 MR. SHEBELSKIE: Just note perhaps the
5 obvious that Mr. Cereghino's presentation is one from
6 2001. The other time line is an undated draft. As we
7 know, it's very much of a draft because it even makes
8 a mistake about the six-month time period, refers to
9 it as an eight-month time period.

10 My general point here is what is important
11 is not what some general level of abstraction of a
12 review process was discussed in 2001, some other
13 times, but the real world review that was done.

14 And even looking at these abstractions,
15 you see that there is even a reference on the time
16 line to a technical review team process review of what
17 was occurred.

18 CHAIRMAN MOORE: Okay. Fine. One last
19 question for you on a personal note from me. I'm
20 going to be absent from the office for a number of
21 weeks, and I would like to have my vacation ruined.
22 So bring me up to date on what your certification
23 might be, notion, as of today as well as your filing
24 of the application.

25 MR. SHEBELSKIE: Would it be amiss to ask

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1 what your dates of vacation are?

2 CHAIRMAN MOORE: I'm sorry?

3 MR. SHEBELSKIE: When do you return from
4 your vacation?

5 CHAIRMAN MOORE: Not until the 16th of
6 August.

7 MR. SHEBELSKIE: Your vacation will not be
8 ruined.

9 CHAIRMAN MOORE: No. When one leads with
10 the chin, one is entitled to get hit.

11 MR. FITZPATRICK: Your Honor, just sort of
12 a housekeeping thing.

13 CHAIRMAN MOORE: Yes. Go ahead.

14 MR. FITZPATRICK: I see where you set a
15 meeting for next Tuesday. I was going to suggest --
16 I discussed with Mr. Shebelskie the only thing I know
17 is if you're making an agenda, we a few days ago both
18 submitted, both parties submitted, safeguards,
19 material protective orders with some disagreements and
20 retention policy whose comment period goes to list
21 Friday.

22 CHAIRMAN MOORE: Yes.

23 MR. FITZPATRICK: And there is one
24 disagreement on that at least pending what other
25 people send in. Those two issues and any motions for

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1 reconsideration of your second case management plan
2 would seem to be the thing's ripe for next week, but
3 those were just so you wouldn't forget those two.

4 CHAIRMAN MOORE: No. We had not. And we
5 set that as a tentative date. At the time we were not
6 expecting obviously the delay in the filing of the
7 materials regarding safeguards and preservation of
8 electronic records. And so that was moved back a
9 week. And I think because of our attempts to prepare
10 thoroughly for this, we have not had a lot of time to
11 go over that material.

12 And at this point, I think all we can say
13 is keep it open on your calendars. And by the end of
14 this week, we will notify you if we're going forward
15 and what issues we'll be going forward on.

16 MR. FITZPATRICK: Okay, Your Honor. Then
17 if we have comments to make on the retention policy
18 issue, for example, rather than guess that you will
19 have a hearing, we should respond --

20 CHAIRMAN MOORE: No. They should be
21 filed. I believe we set a seven-day.

22 MR. FITZPATRICK: Seven.

23 CHAIRMAN MOORE: I don't have the order in
24 front of me.

25 MR. FITZPATRICK: Right.

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1 CHAIRMAN MOORE: And I apologize for not
2 having made that explicit in the extension. It is
3 implicit that if we move one date by a week, we were
4 moving the other one by a week.

5 MR. FITZPATRICK: Very good.

6 CHAIRMAN MOORE: Is there anything else?

7 MR. SHEBELSKIE: No, sir.

8 MR. FITZPATRICK: Were you cancelling next
9 Tuesday's hearing or were you not when you spoke?

10 CHAIRMAN MOORE: I'm sorry? Your
11 question?

12 MR. FITZPATRICK: Were you cancelling next
13 Tuesday's hearing or did I misunderstand?

14 CHAIRMAN MOORE: No. I said we will
15 notify you --

16 MR. FITZPATRICK: Thank you.

17 CHAIRMAN MOORE: -- by the end of this
18 week and to keep it open on your calendars.

19 MR. FITZPATRICK: Thank you.

20 JUDGE ROSENTHAL: As a matter of idle
21 curiosity in terms of whether we go forward next week
22 or not, are the parties in a position to tell us now
23 whether we're going to be confronted with motions for
24 reconsideration of the second case management order?

25 MR. SHEBELSKIE: Your Honor, the only

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1 issue we have been looking at is on the copyright
2 issue. We just want to think back through for a
3 second, but at most, that might be it and not even
4 then.

5 MR. EAGAN: Your Honor, I think it's
6 unlikely that Nevada will file such, but I wouldn't
7 want to be held rock solid to it.

8 CHAIRMAN MOORE: On the copyright, Mr.
9 Shebelskie, we essentially took what we thought we had
10 agreed upon at conference and added something that
11 went back many years from the old advisory review
12 committee understandings of many years ago.

13 MR. SHEBELSKIE: Right, right. I'm not
14 saying you didn't. I read the order over the weekend.
15 I will confess this is my second confession of the
16 affirmity of mind. When I read it, I was thinking,
17 "Could we have gotten them with the privilege?" I
18 said, "No. Copyright."

19 I just can't remember what we said on
20 that. But I asked my paralegal to pull the
21 transcript. I'm going to look at that. That's why I
22 think it is unlikely. But that was the only thing
23 that caught my eye.

24 CHAIRMAN MOORE: I see the staff lawyers
25 in the audience, though they're not at counsel table.

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1 Does the staff have anything? Are they likely to file
2 a motion for reconsideration due tomorrow?

3 MS. MOORE: Your Honor, Janice Moore.

4 CHAIRMAN MOORE: She's identifying herself
5 now.

6 MS. MOORE: Right. Janice Moore, counsel
7 for NRC staff.

8 We have one question that we are looking
9 at concerning footnote 1 in your protective order. We
10 have not made a final decision of whether or not we
11 need to have clarification of that. We're still
12 looking. That is the motion that --

13 CHAIRMAN MOORE: That concludes today's
14 session, then. And I only wish that you had all been
15 able to reach the same kind of agreement on this
16 question of circulated draft as you have done with the
17 case management orders.

18 That aside, we thank you for your
19 participation today. We will take the matter under
20 advisement. We are adjourned.

21 (Whereupon, at 12:10 p.m., the foregoing
22 matter was adjourned.)

23

24

25

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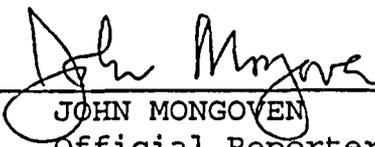
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