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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

PAPO CASE MANAGEMENT CONFERENCE

* * * * *



IN THE MATTER OF:

US DEPARTMENT OF ENERGY Docket No. PAPO-00
(HIGH LEVEL WASTE ASLBP No. 04-829-01-PAPO
REPOSITORY:
PRE-APPLICATION MATTERS)



Thursday, October 13, 2005

The above-entitled matter came on for
hearing, pursuant to notice, at 9:20 a.m.

BEFORE:

- THOMAS MOORE, Chair
- ALEX KARLIN, Administrative Judge
- ALAN ROSENTHAL, Administrative Judge

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

9:15 a.m.

1 JUDGE MOORE: On the record. Please be
2 seated. I would like to apologize to all of you for
3 the snafu with the court reporter. We'll take all
4 necessary steps to ensure that doesn't happen again.
5 Good morning. I am Judge Thomas Moore. On my left is
6 Judge Alan Rosenthal. On my right is Judge Alex
7 Karlin.
8

9
10 The Pre License Application Presiding
11 Officer Board has convened this case management
12 conference this morning to address the NNPI issues
13 involved with developing fair and efficient case
14 management procedures for resolving disputes over
15 identifying, protecting and granting access to
16 safeguards information on classified and controlled
17 nuclear information, official use only information
18 Navy nuclear, proposing information and export control
19 information. That is going to be a difficult task
20 just as the names imply.

21 Earlier in a September 19th order, we
22 identified the matters and questions that we wish to
23 address this morning. We also instructed the parties
24 as they are well aware to confer with one another so
25 that we could try to eliminate repetition in

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1 responding to our inquiries.

2 When we postponed the conference from
3 September 27th to today, one of the reasons sought by
4 the Department of Energy was the need for further
5 consultation among the participants. We trust that
6 that two week interval has given all the participants
7 time to further confer and there will be no need for
8 any repetition.

9 Now as should be obvious from the
10 questions that we have asked, many of them are
11 directed to matters within the purview of DOE and
12 similarly matters within the purview of NRC Staff. In
13 those instances, there will be no need for multiple
14 answers unless there's a dissenting view.

15 The conference this morning is being
16 broadcast on the agency's broadband network and as
17 you're all painfully aware already, it is also being
18 recorded. It is being recorded, of course, so
19 there'll be no doubt on how cooperative counsel will
20 be in helping us resolve these problems. That said,
21 we'll begin with counsel for the NRC Staff, to
22 introduce themselves for the record.

23 MR. CUMMINGS: David Cummings and Janice
24 Moore and Harry Wedewer, Counsel for the NRC Staff.

25 MR. IRWIN: I'm Donald Irwin with the

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1 Department of Energy. I would like to introduce to
2 the Board two colleagues of mine who will be handling
3 most of the Board's inquiries this morning. The Board
4 has not yet met them. Furthest to my right is my
5 colleague, Ed Noonan. Next to him is my partner,
6 Jeffrey Edwards. Mr Edwards will be handling most of
7 the questions this morning. You know Mr. Shebelskie
8 and me.

9 MR. MALSCH: And Marty Malsch for the
10 State of Nevada.

11 JUDGE MOORE: One quick announcement
12 before we begin. Pursuant to NRC security
13 requirements, anyone leaving the floor will have to be
14 escorted. We appreciate your cooperation.

15 A couple matters before we delve into
16 sensitive information, questions and inquiries, we
17 recently received DOE's monthly status report, the
18 fifth such report. When we back in May issued an
19 order that we confirmed in a July Management Order for
20 those reports to be filed, I think the Board all had
21 in mind a month and year for giving us your current,
22 best, good faith estimate of when DOE would be
23 certifying its document collection and filing a
24 license application. So in the future, we would
25 appreciate if you could try to do that, pin it down to

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1 a month and a year. We recognize this is an estimate.
2 It is nothing more than that. But for planning
3 purposes for all concerned, we think that will be
4 helpful.

5 Our other concern in that regard is that
6 we would greatly appreciate, Mr. Irwin, if you would
7 ensure that, your Counsel DOE, both the left and right
8 hand of the organization are in sync and so that if
9 portions of DOE is talking to the staff and the
10 Commission of the NRC and informing them of matters as
11 to when they'll certify or when they're likely to be
12 filing an application, it would be most helpful that
13 that information be passed on in the monthly status
14 report to us as well. In that regard, do you have
15 anything to supplement your last status report?

16 MR. IRWIN: No Your Honor.

17 JUDGE MOORE: We're just curious. Believe
18 it or not, we do read the trade press and recently in
19 *Inside Energy*, there was an article that seemed to
20 indicate that a license application wouldn't be filed
21 until certain investigations were complete involving
22 the USGS investigations that until the EPA standards
23 had been finalized and several other matters. Do you
24 have any light to shed on when any of those matters
25 might be completed?

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1 MR. IRWIN: No Your Honor, and I cannot
2 even speculate as to whether or not the report by that
3 reporter is factually accurate. I understand the
4 Department's obligation to this Board as a matter of
5 trying to help the planning and logistics of this
6 proceeding going and we will do our best to keep the
7 Board accurately apprised. Sometimes as just what
8 you've indicated is the case, events are linked to
9 other events and it's hard to draw absolute straight
10 lines to dates on a calendar but we'll do our best to
11 keep the Board accurately apprised.

12 JUDGE ROSENTHAL: Are you questioning the
13 accuracy of the portions of that article to which
14 Judge Moore referred or are you just saying you just
15 don't know?

16 MR. IRWIN: Judge Rosenthal, I'm saying
17 that it's just not part of any information that I have
18 first-hand knowledge of. There are lots of things
19 that reporters report on in this town that may be of
20 varying degrees of currency or accuracy. To be honest
21 with you, sir, I'm not sure I have read that
22 particular article. I've seen literally a dozen
23 articles speculating on what's going on DOE.

24 JUDGE ROSENTHAL: This was stated.
25 Presumably this reporter didn't make this up out of

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1 the whole cloth, that he or she had spoken to somebody
2 in DOE who the reporter felt was knowledgeable.

3 MR. IRWIN: It's a free town, Your Honor.
4 Lots of reporters report lots of things. I checked
5 with authoritative persons within DOE before coming
6 here and asked whether they wished to have us
7 supplement the current monthly report and they
8 indicated there was nothing to add.

9 JUDGE MOORE: On that related subject, the
10 schedules in the second case management order which
11 DOE is preparing privilege logs, redacted material and
12 employee concern files, can you give us any update on
13 how that progress is coming?

14 MR. SHEBELSKIE: I'm glad to report that
15 we are making good progress, Your Honor. We had
16 structured our schedule with the idea that had we
17 certified at the end of September we would be able
18 obviously to meet the schedules called for in the case
19 management order.

20 Obviously even with the delay that we
21 talked about in the last status report, we are
22 continuing with the work on the privilege log and the
23 redaction. So certainly we would keep that work going
24 on track at full speed. So we have basically
25 completed that work by the time we would certify if we

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1 certified along the kind of schedule that we're
2 talking about.

3 JUDGE MOORE: When the Board issued that
4 order, it certainly is fair to say it was the
5 contemplation of the Board and we came to that
6 conclusion from the representations of the parties
7 that we were looking at an August-September time frame
8 for certification and set those schedules accordingly.
9 It now is mid October and if things hold, in your last
10 status report for example, you indicated that there
11 would be no certification until after your appeal to
12 the Commission on our September 22nd order regarding
13 Nevada's motion to compel that was completed. We
14 could many months yet before your certification.

15 It is our view now that in light of that
16 delay those schedules are perhaps overly generous in
17 setting an additional six weeks time frame, for
18 example, for privilege logs to be finished after the
19 certification. So if you're holding to the same
20 schedule which we're pleased to hear that you are,
21 when will that work be completed and we will in the
22 next case management order modify those schedules
23 according?

24 MR. SHEBELSKIE: Frankly, I don't think I
25 can give you specifics today. But we can either file

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1 after this hearing a submittal that would give a
2 status report where we are on that.

3 JUDGE MOORE: Certainly and then we will
4 move that schedule accordingly.

5 MR. SHEBELSKIE: For example, Judge Moore,
6 I believe I'm correct in saying that the bulk, for
7 example, the employees concerns file documents have
8 already been delivered to Mr. Grazer for inclusion on
9 the protected file. I know the privilege log work
10 which the law firm is preparing is in progress and
11 that the redaction work is well in hand. So I think
12 we might be able to give a very hopefully satisfactory
13 report to the Board on that.

14 JUDGE MOORE: Does the State of Nevada
15 have anything to add in that regard?

16 MR. MALSCH: No, we do not.

17 JUDGE MOORE: Does the Staff?

18 MR. CUMMINGS: No Your Honor.

19 JUDGE MOORE: An outstanding matter which
20 we should also quickly address is DOE's deletion of
21 documents from its publicly-available LSN document
22 collection. As you all will recall, we faced that
23 situation in May at the case management conference in
24 which there were an outstanding list of 60,000
25 documents which were on the publicly-available DOE

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1 collection which DOE wished to delete having concluded
2 that they were not relevant and hence not documentary
3 material within the meaning of the Commission's
4 regulation.

5 It was agreed by all at that time that an
6 appropriate process would be to post those 60,000
7 accession numbers on the LSN and absent any objection,
8 they would then be deleted. We've heard no objection
9 and presumably that's all been done.

10 Now since then there have been a number of
11 instances that Mr. Grazer has brought to our attention
12 that fall into several categories. The first category
13 is like the 60,000 documents that DOE has identified
14 additional documents that they wish to delete as
15 irrelevant and not documentary material. Apparently
16 the process that we designed before has not been
17 followed. Let's deal with that group. DOE.

18 MR. SHEBELSKIE: Yes sir. Two points.
19 First I want to clarify when we spoke last summer
20 about the 60,000 we didn't make clear and subsequently
21 our automated support contract to clarify for me that
22 of that 60,000 approximately only 4,000 were in the
23 collection of documents that had been previously
24 indexed and included into the LSN. The remaining
25 56,000 or so had never been crawled and were only on

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1 the DOE website. But nonetheless we posted the
2 accession numbers for all 60,000 documents so people
3 could look in both locations.

4 What we have posted now, Your Honor, on
5 September 6th as a result of continuing work and
6 cleanup on the collection have identified an
7 additional approximately 6,100 that had been
8 previously crawled and indexed by Mr. Grazer last year
9 or the LSN administrator last year. Two thousand
10 eight hundred of those approximately had header-only
11 format and 3,300 approximately in full text format.
12 We provided a list of the accession numbers to Mr.
13 Grazer's system for those 6,100 documents and they
14 were posted I believe around September 7th.

15 JUDGE MOORE: Okay. And do you have an
16 objection to just following the same procedure that
17 was followed before?

18 MR. SHEBELSKIE: No sir. And I think at
19 one point also the Board had, we got indication, a
20 question about perhaps some communication between DOE
21 and Nevada's counsel about that list of accession
22 numbers. I don't know if you still had a question but
23 I just wanted to clarify in case you did.

24 You may remember from one of our prior
25 conferences that Nevada counsel had expressed that

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1 they were unaware about that posting of the 60,000
2 accession numbers from earlier this summer. So when
3 we were about to post this next list, I called counsel
4 for the state to let them know we were doing this so
5 they could check the list so they wouldn't be caught
6 unaware of that.

7 JUDGE MOORE: So that group of 6,100 is
8 taken care of. Now as I understand it, there is an
9 additional troublesome group.

10 JUDGE MOORE: There was a group of 14,000,
11 I guess this is not the troublesome one, that had
12 never been crawled before and we understood from Mr.
13 Grazer that we had permission to remove those from our
14 website and we did that. Then there was a group of
15 875 documents that had been indexed last year.

16 JUDGE MOORE: And have been available on
17 the publicly-available collection since last June 30th
18 or thereabouts.

19 MR. SHEBELSKIE: Yes sir.

20 JUDGE MOORE: Okay.

21 MR. SHEBELSKIE: For approximately a year
22 or so. That group broke down as follows. There was
23 one document that was a potential employees concerns
24 file. There were 16 documents that implemented that
25 were official use only, 42 that were believed to be

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1 subject to the archeologic privileged pursuant to the
2 requisite statutes, 104 with privacy information, 54
3 with business proprietary information, 584 were
4 subject to copyright protections and 74 were subject
5 to one or more of the primary legal privileges.

6 We understood from Mr. Grazer that we had
7 permission to -- We weren't planning to remove these
8 from the LSN but to convert them to header-only status
9 with obviously the bibliographic header and if
10 appropriate, the privilege log requirements. We
11 understood from Mr. Grazer that we had permission to
12 proceed with the conversion to header-only status of
13 the one employees concerns file document and the 16
14 security sensitive related documents.

15 JUDGE MOORE: That leaves the rest.

16 MR. SHEBELSKIE: That leaves the rest.

17 JUDGE MOORE: What is your suggestion
18 followed by Staff and Nevada?

19 MR. SHEBELSKIE: Right. Our suggestion
20 there is that we have the list of accession numbers.
21 Let me back up. This is not a new issue. It's my
22 understanding that over the course of the past year
23 and a half or a little bit more there had been other
24 instances and a process set up that the LSN
25 administrator has to be not only be a lead but any

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1 participant where if they have had indexed a full text
2 document that they subsequently believe is privileged
3 that they give notice to LSN administrator the
4 accession number.

5 He then does the appropriate callback and
6 conversion and then he posts the accession number on
7 his system so everybody can see what was done. The
8 reason I understand that was set up that way sometime
9 ago was because of the concern that all the
10 participants would have that if they had a document
11 that was released in full text that was subject, they
12 realized later, to a privileged they should at least
13 convert it to header only to stop the bleeding and
14 then give the world notice. So if anybody wanted to
15 challenge that, they would have the header information
16 and otherwise could take up the matter.

17 JUDGE MOORE: We dealt with this problem
18 in the July 8th second case management order on
19 inadvertent publication of privileged documents and
20 set up a procedure. Doesn't that fit the bill here?

21 MR. SHEBELSKIE: We understood that
22 provision of the case management order to be addressed
23 to two points. One was the recognition that the
24 inadvertent release would not wait the privilege per
25 se and be fact and circumstances analysis. And then

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1 also it was the issue that if other participants had
2 gotten copies of the document, for example, let's say
3 that one of these documents we're talking about here
4 the state had downloaded the document and then had a
5 copy in their possession, that there would be a
6 process if we wanted to reclaim the document from the
7 participant as opposed to the fact that it's sitting
8 out there in this 800 and some documents in a mass of
9 three or 1.5 million documents or so that are publicly
10 available now sitting out there on the LSN converting
11 to header-only status which we thought was a separate
12 question from getting copies back from anybody who may
13 have downloaded the printed out copies.

14 JUDGE MOORE: Mr. Malsch, do you have any
15 light to shed on how this problem could be dealt with?

16 MR. MALSCH: So far we've not had a
17 problem. We've on some occasions asked to get copies
18 or to refer to some documents that were sought to be
19 removed and I think those have been resolved. We've
20 not had a problem so far.

21 JUDGE MOORE: Do you object to the
22 conversion of documents that are currently publicly
23 available on the LSN DOE collection that will be
24 withdrawn, replaced, that are there with header in
25 text to be replaced by header only because there's now

1 a privilege claim?

2 MR. MALSCH: We don't object to that.
3 Presumably there'll be a header. We'll be able to
4 challenge the claim if we have to but I think that's
5 consistent with the Board concept of inadvertent
6 disclosure.

7 JUDGE MOORE: Staff.

8 MR. WEDEWER: Our comments would be the
9 same as the state's, Your Honor. We haven't had to
10 deal with this situation yet with our own documents.
11 But we have no objection to DOE proceeding as they
12 want to and our understanding was that the Board had
13 dealt with this in the second case management order
14 for reclaiming a privilege.

15 JUDGE KARLIN: May I? Question first for
16 the state and then perhaps DOE. Does it make any
17 difference whether the event occurs pre or post
18 certification? If once that party has certified that
19 all of its documents are available and it's on the LSN
20 and crawled and publicly available, does that party
21 then have a unilateral right to remove documents and
22 put them into a header-only status or does the
23 situation change once certification has occurred?

24 MR. MALSCH: Frankly, I hadn't thought
25 about that. Perhaps it may be that one has modify the

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1 certification.

2 JUDGE KARLIN: Yes, once you're certified,
3 it would seem to put some primathor ***24:09 of
4 accuracy on the documents. It may be a different
5 situation now one with precertification and there's a
6 need to clean up the database.

7 MR. SHEBELSKIE: Judge Karlin, I could see
8 the reasonableness of that with the exception perhaps
9 of security or sensitive related information because
10 I think that is a different form of protection. In
11 other words, it's one thing to say some privacy
12 information may have been released. It's out there.
13 So unfortunately we can't claim it back without giving
14 it some notice or some other procedure. But if it
15 turned out whether it was from the Staff or DOE or
16 some other participant turned out they had some
17 sensitive, unclassified information that got through
18 the grid, in the interest of security that probably
19 ought to be able to reclaimed giving notice of course
20 that it was done and the reason for it.

21 JUDGE KARLIN: Right. Putting the notice
22 after the fact, after the removal of the privilege
23 document and header-only status. It seems to me that
24 you're correct in characterizing our second case
25 management order is literally addressing retrievable

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1 documents from the other parties or potential parties.
2 Perhaps we would need to address this situation as
3 well in some future order because I think status on
4 the LSN is quite important as well and we need to make
5 sure that things are not willy-nilly added or removed
6 without some public notice and opportunity.

7 MR. SHEBELSKIE: Yes sir, and of course
8 we're giving the accession numbers so people could see
9 they were done and also we did understand that this
10 was for at least us still in the precertification
11 phase because the court had been very clear once we
12 actually certified it expected the collection to be
13 stabilized.

14 JUDGE KARLIN: Thank you.

15 JUDGE MOORE: Mr. Shelbelskie, I guess I'm
16 not clear although the second case management order
17 ends by saying to reclaim the document from other
18 potential parties the practical reality of the
19 electronic world is that documents can't be physically
20 reclaimed per se and it comes into play later if
21 someone wishes to ever use that document in the
22 hearing. Of course, it would then be inadmissible
23 absent showing that the document wasn't privilege.

24 That said I guess that the procedure that
25 was laid out that says upon timely motion a potential

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1 party that inadvertently produces a privileged
2 document and that suggests to me you're producing it
3 on the LSN may be permitted in appropriate
4 circumstances and upon a showing of good faith
5 inadvertent to reclaim the document. Why isn't that
6 the way to go in all of this?

7 MR. SHEBELSKIE: Your Honor, I think that
8 I have two observations. One is that struck us as
9 applying to the post certification time period not in
10 precertification where participants may be doing any
11 number of adjustments to clean up their collections
12 and second, we understood that that motion was with
13 respect to reclaiming it from other participants if
14 they had made downloaded copies, etc. You could still
15 have a process it strikes me where again if a party
16 even has released whether it's pre or post
17 certification full text of a document besides later
18 inadvertently released that it was privileged. They
19 ought to be able to convert that, obviously we're
20 talking about a good faith claim here, to header only
21 as I said to stop the bleeding, to stop any further
22 disclosure and then perhaps it might be appropriate
23 for that participant to follow up with a motion then
24 to the Board to say we did this for these reasons and
25 these are the accession numbers and here's why and

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1 then the Board can at least, if anyone wants to
2 challenge that it was not inadvertently released or
3 some other facts and circumstances makes it
4 inappropriate to call it back that could be done.

5 I think that problem would be if you have
6 to file that motion first, call attention. Okay,
7 we've released inadvertently ten attorney-client
8 communication documents. Here they are. Here are
9 the accession numbers. We call attention to that --

10 JUDGE MOORE: Obviously, you wouldn't give
11 the accession numbers. We'll take the matter under
12 advisement. We're dealing with a relatively small
13 number of documents and as you have pointed, this is
14 a classic case of a needle in a haystack. They are
15 not likely to be found. They haven't been found
16 apparently in a year and a half. So we'll take it
17 under advisement and issue an appropriate order on how
18 we want to wrestle with this.

19 MR. SHEBELSKIE: Thank you, Your Honor.

20 JUDGE MOORE: Let's then move on to
21 sensitive information. Although in the September 27th
22 telephone conference you gave us numbers there were
23 unrecorded. Let's first get the estimates of how many
24 of these various documents we're going to be wrestling
25 with and that's a two part question. Turn to question

1 no. 2 of our September 19th order. A is "After the
2 application is filed, how many do you expect" and B
3 "After contentions are admitted, how many do you
4 estimate?" Start with DOE.

5 MR. EDWARDS: Jeff Edwards, Your Honor.
6 Currently, we have ten UCNI documents. There are 40
7 DOE generated SGI documents.

8 JUDGE MOORE: Could you repeat that? I'm
9 sorry. DOE?

10 MR. EDWARDS: DOE generated SGI documents,
11 40. Ten UCNI documents and in the sake of
12 completeness, we're actually relooking at those UCNI
13 documents because we're surprised at any UCNI
14 documents would qualify. So we're relooking at those.
15 We have 500 OUO documents and currently something on
16 the order of 4,600 NNPI documents. With respect to
17 the future --

18 JUDGE MOORE: Excuse me. You mentioned a
19 new category to us. Export Control documents.

20 MR. EDWARDS: Thank you. The Export
21 Control documents we have now concluded actually fall
22 within one of the other categories. So we don't see
23 the need to address ECI documents as a separate
24 category. There may be additional requirements from
25 the regulations with respect to documents that fall

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1 within one of those other categories that are ECI
2 documents. But that's not necessarily unique to those
3 type of documents either. But there are other
4 regulations that control those.

5 JUDGE MOORE: Aren't they all NNPI or do
6 they qualify for anything else?

7 MR. EDWARDS: That's a good question.
8 They probably are not NNPI. NNPI, it may cover them.
9 They actually appear to be mostly all OOU documents.

10 JUDGE MOORE: Okay. But I think NNPI
11 dealt with export issues as well until I thought the
12 export control might be overlapped there.

13 MR. EDWARDS: There is some overlap there.
14 But when you look at the underlying substantive basis
15 for the unclassified sensitive classification, it
16 actually appears to fall more appropriately as an OOU
17 document. And in fact, the OOU internal DOE guides
18 addressing OOU specifically reference ECI information.

19 For the future, I'll tell you what I know
20 and I can't tell you what I don't know. With respect
21 to UCNI documents, currently we do not anticipate any
22 additional UCNI document on the database. With
23 respect DOE-generated SGI and OOU, again there is a
24 possibility that additional documents within that
25 category will be generated and will be on the LSN. I

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1 just can't quantify them today. And with respect to
2 NNPI, today we have with us the NNP attorneys, Mr.
3 Putzu and Mr. O'Brien, and their security expert and
4 if they could address specifically the NNPI, that I
5 think would probably be more efficient.

6 JUDGE MOORE: Staff.

7 JUDGE KARLIN: Let me follow up on that.
8 Mr. Edwards, once the application is filed in the
9 future for DOE on the SGI and the other categories,
10 isn't it expected or I seem to expect that once you
11 file an application the application may have plans
12 associated with security and safeguarding of nuclear
13 materials? Those documents will then be out there in
14 the files and in NRC Staff's hands and would that not
15 inevitably increase the universe of SGI documents that
16 DOE and NRC might be claiming?

17 MR. EDWARDS: Yes. I think you're right.
18 I think it will increase. There are really two time
19 periods to look at in the future going forward between
20 now and the filing of the license application and then
21 post filing. Obviously, there will become some
22 stabilization when the application is filed, but also
23 with the respect to the information that will be
24 ultimately filed with the application, there may be
25 additional information filed subsequent to that. So

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1 there should be, I would think, between now and the
2 time of the filing of the license application some
3 increase. I just can't tell you how much. Then there
4 may be an additional increase after the license
5 application.

6 JUDGE MOORE: And somewhere I ran across
7 something indicating that it was DOE's intention to
8 file subsequent to the license application a physical
9 security plan several years delayed. In that in the
10 contemplation of the DOE and how you're going to file
11 the application?

12 MR. EDWARDS: It is -- There are a lot of
13 moving parts obviously. It is a matter of some
14 discussion that perhaps some plans will not be filed
15 with the license application and in fact are not
16 required to be filed with the license application.

17 JUDGE MOORE: And if that's the case, a
18 great deal of SGI information, if that I guess is what
19 it would be, would be forthcoming much further down
20 stream.

21 MR. EDWARDS: Exactly. That's why I was
22 talking about the difference between the time periods
23 pre license application and post license application.

24 JUDGE MOORE: Staff.

25 MR. IRWIN: Yes Your Honor. If

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1 information we will be claiming are privileged or
2 otherwise protected from disclosures and in a large
3 part are dependent upon what DOE relies on and files
4 with its application, at this time we can't not
5 provide an estimate as to the likely numbers that we
6 will be claiming privileged. However, we would
7 believe that those numbers will increase upon
8 application filing and contentions.

9 JUDGE MOORE: When you filed the proposed
10 joint order pursuant to our earlier instructions, you
11 indicated that other than Staff, DOE and State of
12 Nevada, there had been no engagement of other
13 potential parties. Earlier we had encouraged you all
14 to reach out to the potential parties so that they
15 would be included in this process. Why were they not
16 included here and did the additional two weeks time
17 give you an opportunity to give them an opportunity to
18 comment and have input into this?

19 MR. EDWARDS: I'll begin with a slight
20 clarification. During the process that Mr. Malsch and
21 Mr. Cummings and the DOE representatives have gone
22 through, we did in fact talk with, I believe, NEI and
23 we talked with NIRS certainly in the context of there
24 was an original extension of the filing date for the
25 draft protective order back in the summer and we

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1 talked with them at that time about whether they had
2 any disagreement or objection to the extension of the
3 time and they did not. Nor at that time, did they
4 express any interest in participating in the
5 conversations with respect to the draft protective
6 order.

7 It's been filed for a significant amount
8 of time. We've not, at least with respect to DOE,
9 received any comments, any calls, any letters, any
10 questions, from any other party interested. In fact,
11 I don't think there's any other party participating
12 today. It appears to be, I think it's fair to say,
13 that this is an issue that largely involves the State
14 and DOE and NRC because of the nature of the topic
15 under discussion.

16 JUDGE ROSENTHAL: So none of the Nevada
17 counties that have a possible interest in this
18 proceeding expressed any interest in involvement on
19 these issues. Is that correct?

20 MR. EDWARDS: Not to DOE, sir.

21 JUDGE MOORE: Mr. Malsch, as the
22 representative of the State of Nevada undoubtedly you
23 must be in contact with other potential opponents to
24 the DOE license application. Have they expressed no
25 concern and interest in being involved in this area so

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1 that their voice can be heard?

2 MR. MALSCH: Well, our contacts have
3 actually been fairly limited, but they've not
4 expressed an interest. Let me just add that I think
5 in the very first meeting that was held on the whole
6 subject of a protective order there was a fairly wide
7 representation of a variety of interests including I
8 think some local interests and public group interests
9 and I recall at that meeting at some people including
10 myself raised the issue about the possible need later
11 on to address these issues involving sensitive
12 information. So certainly the issue has been on the
13 table from the very beginning and I think it's fair to
14 say that those who were especially interested in the
15 topic have had ample opportunity to participate. On
16 the other hand, we wouldn't object to some additional
17 comment period being explicitly offered if that's what
18 the Board would like.

19 JUDGE KARLIN: On question one that we
20 asked, there was a second part that we may be somewhat
21 rhetorical and addressed whether or not the three
22 entities here in front of us are representative. We
23 understand you may have gone to some effort to try to
24 get involvement and there has been no external
25 comment.

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1 But I think speaking only for myself there
2 is a concern that this is a tiny universe here of
3 three, two of them being the withholders if I might
4 state it that way of information, the holders of
5 information who would seek to assert privileges on
6 security basis and safeguards and the third, the
7 State, being a well represented entity with some
8 special status under the regulations in terms of for
9 example trustworthiness and reliability. This is not
10 something that is a question for at least the State's
11 designated representative by the governor.

12 So what about the environmental groups,
13 the smaller entities, even individuals? I think we
14 need to think about that and hopefully the Staff needs
15 to think about that as well if they would seek to
16 assert concerns or investigate concerns about
17 potential safeguards or UCNI matters, individual
18 living in the path of the facility. What daunting
19 obstacles is this individual going to face or this
20 smaller entity going to face? I think we're creating
21 something here which necessarily is going to be
22 serious and a balancing act.

23 But I think the balancing act has to keep
24 those individuals and smaller entities in mind
25 somehow. I fear we don't have a representative group

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1 here in the well today.

2 MR. MALSCH: Judge Karlin, I think that's
3 a fair comment and you are certainly correct that in
4 our discussions, it has been very clear to us and in
5 our review of the various regs and orders become clear
6 to us that representatives of the governor and State
7 do enjoy a certain special status here. So I could
8 not purport to represent any other group.

9 MR. EDWARDS: If I might.

10 MR. MALSCH: Thank you. I'm finished.

11 MR. EDWARDS: If I might. Judge Karlin,
12 the stating of the concern as you articulate it, I
13 might take a little bit of issue with in this regard
14 at least with respect to the DOE. The issue we're
15 dealing with today is not really withholding
16 information. There's no attempt to prevent
17 information from being disclosed such as might exist
18 with respect to traditional privileges,
19 attorney/client, deliberative process, attorney work
20 product on the one hand.

21 We're not talking today about withholding
22 information. All we're talking today about is how to
23 disseminate the information and that's the issue that
24 arises with respect to the unclassified protected
25 sensitive information.

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1 JUDGE MOORE: I think we really understand
2 that and I don't think that Judge Karlin was
3 suggesting to the contrary. I think we can move
4 forward.

5 MR. EDWARDS: But just one final point if
6 I could. There are statutory and regulatory processes
7 for access that really define how access is to be
8 given whether it's to the State or to an environmental
9 organization. They apply to everybody the same and
10 that's what we're trying to incorporate into this
11 process.

12 JUDGE KARLIN: I understand that and we
13 are trying to set a process whereby pursuant to some
14 protective order and some processes people might
15 achieve access but we have to go through reliability,
16 trustworthiness, need-to-know, is it really safeguards
17 information at all, whether they have the proper
18 security systems in place and to the extent we add on
19 anything that is not regulatory required, we are in
20 fact creating hurdles that would limit and prevent
21 access to the information.

22 So we need to have as I think the statute
23 says with regard UCNI and SGI the minimum requirements
24 that are needed not to add on to those. So the extent
25 we add on to those we effect a withholding from people

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1 who might otherwise have access to the documents.

2 MR. IRWIN: Judge Karlin, if I could just
3 underscore a point that Mr. Malsch made a couple of
4 minutes ago concerning the issue of active interest in
5 the process which has taken place to date. As the
6 Board will remember the parties cooperatively made
7 pretty sure that there was a broad notice distributed
8 in the first of the series of meetings on this issues
9 last winter and there were probably a dozen outside
10 groups and individuals, perhaps more, in addition to
11 the three principals who attended that initial
12 meeting.

13 Every subsequent step of the way, the
14 Board's orders, the parties responses, and so forth
15 have been distributed to the full list. Nobody knows
16 what lurks in the hearts of men but the fact of the
17 matter is there's been a lot of information
18 distributed and I don't think we've gotten much active
19 response.

20 JUDGE KARLIN: If I might say, I think
21 that's excellent and I commend you for that and I ask
22 you to continue that. We can't do much about them not
23 participating except to write or develop whatever we
24 end up with an eye in mind to those individuals and
25 not just the State who is the requestor here.

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1 MR. IRWIN: I agree. I just wanted to
2 make sure that the record reflect that the parties
3 have been making this kind of effort.

4 JUDGE KARLIN: Thank you.

5 JUDGE MOORE: Staff, at the September 27th
6 telephone conference you indicated, if my memory is
7 correct, that you were in full compliance with our
8 previous ruling that pursuant to 10 CFR
9 2.1003(a)(4)(iii) that you would be producing in
10 header-only format on the LSN-SGI documents.

11 MR. CUMMINGS: Yes Your Honor.

12 JUDGE MOORE: And that you just told us
13 this morning again that you have no such documents at
14 this time. Is that correct?

15 MR. CUMMINGS: That is correct, Your
16 Honor.

17 JUDGE MOORE: And so that we're clear in
18 the Staff's view, all SGI documents in the future that
19 become part of the Staff's collection will be put on
20 in header-only format.

21 MR. CUMMINGS: If they qualify as
22 documentary material, Your Honor.

23 JUDGE MOORE: DOE, do you agree in a
24 comparable situation that UCNI and NNPI and OOU
25 information will have to put on if it's documentary

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1 material in a header-only format on the LSN?

2 MR. EDWARDS: Yes sir.

3 JUDGE MOORE: Let's then move on to
4 Question 4 and as is obvious from these questions and
5 should be obvious from the prior case management order
6 and the structure in which we set up, we frankly view
7 this material in much the same way. It is protected
8 information that has to be dealt with. Starting with
9 DOE, who should have the burden of proof in proving
10 the documentary material claimed to be protected,
11 sensitive information may be withheld?

12 MR. EDWARDS: This question, Your Honor,
13 raises an overarching fundamental question that goes
14 to the heart of a number of these questions and it has
15 to do with the authority and jurisdiction of the PAPO
16 Board to revisit questions of designation of
17 protected, unclassified, sensitive information.

18 We spent a lot of time looking at that
19 issue. We've had a significant number of
20 conversations with the Staff and the State on that
21 issue to see whether we can reach agreement and I
22 think at the outset there are at least with respect
23 to, let me just speak to UCNI and OOU information
24 because there may be some distinctions between the
25 types of information.

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1 JUDGE MOORE: And I assume NNPI.

2 MR. EDWARDS: Again I would like the Navy
3 Nuclear Program to have the opportunity to address the
4 NNPI. They really are the experts with respect to
5 that and they're here today.

6 With respect to the UCNI and OUO
7 information when you look at the regulations and Part
8 1017 at least with respect to UCNI, they seem to be
9 very clear in 1017.14 that the final authority with
10 respect to the questions of designation and access
11 with respect to UCNI information rests with the
12 Secretary of DOE and the process that the DOE sets up
13 internally to deal with designations.

14 We're talking about specific types of
15 information. There are certain processes that exist
16 that are documented that require a number of hoops to
17 be jumped through with respect to both UCNI and with
18 respect to OUO. I have the people here today if the
19 Board would like to hear what those processes are
20 before those designations are made. In addition,
21 there are processes that exist within the originating
22 agency with respect to UCNI and OUO for questioning or
23 challenging those designations and also questions of
24 access.

25 We do not believe and we've looked at

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1 regulations in Subpart G and we've looked at the
2 regulations in Subpart J and it's not crystal clear
3 obviously. But there is a distinction between
4 questions of privilege and questions of documents
5 otherwise exempt from disclosure or documents that may
6 be disclosed only pursuant to special processes. I
7 think that's a very important distinction to keep in
8 mind in terms of making decisions regarding what
9 agency, what entity, ultimately has the authority to
10 make --

11 JUDGE ROSENTHAL: May I ask? A judicatory
12 proceeding being conducted by the NRC, it would seem
13 to me in that circumstance that the ultimate
14 determination as to whether particular documents are
15 privileged or not falls within the realm of the
16 adjudicatory body. My impression is that this is
17 basic to the conduct of adjudicatory proceedings that
18 ultimately falls to the adjudicatory body to determine
19 whether particular documents are privileged and
20 therefore are beyond the realm of the proceeding.

21 Now you're telling me if I understand you
22 correctly that we have to defer to the determinations
23 of a litigant before us. Maybe that's so, but that
24 comes as a surprise to me.

25 MR. EDWARDS: I think analysis might be

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1 different than the one I proffer if in fact we were
2 talking about absolute privileges that prevented the
3 disclosure of information. But we're not. We're
4 talking about how to control the dissemination of
5 information which is a very different question. When
6 you look at the regulations in 2.709 or you look at
7 the regulations in 2.1010, they seem to me to
8 contemplate for example dealing with the dissemination
9 of information pursuant to protective order and do not
10 contemplate the Board or an entity within the NRC
11 going back and questioning or relooking at
12 designations that have been given by those who by
13 statute and regulation have the authority to do so.

14 JUDGE KARLIN: Well, I think you're
15 getting into some of the other questions, obviously
16 Question No. 6 which is the DOE authority UCNI. We
17 cited the regulation that you cited in terms of
18 ultimate authority. But I am concerned with regard to
19 UCNI. Do we not simply treat a claim of privilege and
20 this is a claim of withholding of documents or making
21 it available but only pursuant to a protective order
22 as a 3.390? Isn't it just an instance of the FOIA
23 exemptions?

24 MR. EDWARDS: There's clearly overlap
25 under FOIA and we've looked at and I'm sure you have

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1 the FOIA world for some guidance with respect to how
2 to deal with this information. But frankly, I think
3 that creates issues that don't really need to exist,
4 for example --

5 JUDGE KARLIN: If we're looking at a
6 document and it's requested in our proceeding, do you
7 not need to say to us that that's exempt from
8 disclosure under FOIA exemption 1, 2, 3, or 4 because
9 there is a statute such as Section 148 of the Atomic
10 Energy Act which says that this material be withheld
11 and therefore the proper regulatory route is to go
12 through the FOIA exemption which gets you to the
13 statutory exemption?

14 MR. EDWARDS: Sure.

15 JUDGE KARLIN: So our reference point is
16 2.390.

17 MR. EDWARDS: Yes, and I think it would be
18 appropriate for the Board to say, "Have you gone
19 through the hoops?"

20 JUDGE KARLIN: No, we go through the
21 hoops. I don't know that there's -- The question is
22 in this proceeding you as an applicant as a litigant
23 are obliged to make your documentary material
24 available. This material let us assume meets that
25 definition and yet you claim that it is exempt under

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1 FOIA because there is a statutory exemption that
2 enables it to work. Do we not then examine (a)
3 whether it's really qualifies for that exemption and
4 (b) is there a need-to-know and (c) do these people
5 have the qualifications and all the questions we
6 articulated in No. 5? Do you unilaterally the answers
7 to all the questions in No. 5, a through f?

8 MR. EDWARDS: The answer is to the extent
9 that the designations have been made by the
10 originating authorities pursuant to their processes
11 the answer is yes.

12 JUDGE KARLIN: And was that intent of the
13 proposed protective order that you submitted because
14 it used the word "originator" multiple times? At some
15 point earlier you indicated that this took some
16 thought and some analysis but it seemed to me, was
17 that the subtle meaning of those provisions even then
18 back on July 8th when you submitted it?

19 MR. EDWARDS: The answer to that question
20 is our thinking on this whole issue is refined partly
21 because of the questions that you raised. I can't
22 tell you that when we were working on the original
23 protective order I anticipated the PAPO Board raising
24 question that indicated to us that they were going to
25 or thought that they would go back and relook at

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1 designations of UCNI and OOU information for example.

2 JUDGE KARLIN: Well, that's the first
3 question. That's 5(a) whether the item or document
4 qualifies for privilege or protection. You're
5 suggesting or saying that it's your position and I
6 think DOE needs to speak for NNPI documents as well.
7 You have four lawyers sitting there. If you need to
8 get a fifth up here to talk about NNPI, I think we
9 ought to because it all fits into the same category
10 and we'll have some NNPI questions.

11 Presumably the four of you ought to be
12 able to speak to these issues. It's not really that
13 much of a question of some esoteric, NAVSEA document.
14 It's a question of whether the procedures under
15 Subpart J of Part 2 of our regs.

16 MR. EDWARDS: For that question, the
17 answer is the same NNPI.

18 JUDGE KARLIN: Okay. And the answer being
19 that you make the unilateral determination and this
20 Board has no jurisdiction to review that if it's
21 challenged.

22 MR. EDWARDS: That's correct.

23 JUDGE KARLIN: But what if the material
24 you seek is important to an issue that someone wants
25 to raise? Does that mean then that somehow your

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1 application does not go forward with regard to the
2 NNPI that's in concern?

3 MR. EDWARDS: No, it means that they get
4 access to the document pursuant to the procedures that
5 are in the document.

6 JUDGE KARLIN: What if you decide that
7 you're not going to give them access because you
8 decide they don't have a need-to-know or you decide
9 that it's this, that or the other and we disagree?

10 MR. EDWARDS: Let's talk about that with
11 respect to UCNI and OOU for example. The regulations
12 provide --

13 JUDGE KARLIN: Just talk UCNI because I'm
14 not even sure OOU exists. We have a question about
15 that.

16 MR. EDWARDS: Okay. And UCNI may not
17 exist. We only have 10 documents being looked at
18 again. The regulations in Part 1017 with regards to
19 UCNI allows special access and special access requires
20 only four things. You identify who gets it. You
21 identify what's requested. You identify the purpose
22 and you agree to abide by the access rules. In fact
23 when you look at the UCNI guidance and orders and
24 manuals on special access, it specifically
25 contemplates there that lawyers, law firm, those

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1 working with lawyers would get special access with
2 respect to the UCNI information.

3 That's why with all due respect it should
4 not really be an issue. All they need to do is
5 identify who they are and what the purpose is in
6 working on the license application agree to abide by
7 the dissemination requirements which are in whatever
8 the protective order is and then they get access.

9 JUDGE ROSENTHAL: Well, that's what you
10 say. But we have a requester and if I understand your
11 position, DOE, the party, rather than this Board, the
12 adjudicator, determines whether (a) the requester has
13 a need-to-know, (b) whether the requester is
14 trustworthy and reliable, and (c) whether the
15 requester has the technical competence to evaluate the
16 information. Now those are the things that you're
17 telling me DOE applying whatever regulations it has
18 for filtering through those questions makes the
19 unilateral determination and if DOE determines that
20 the requester doesn't have a need-to-know or is not
21 trustworthy or is not qualified, then the requester
22 doesn't get that information.

23 MR. EDWARDS: No sir. That's not what I'm

24 --

25 JUDGE ROSENTHAL: That's not your

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1 position.

2 MR. EDWARDS: No, and the reason it's not
3 is because trustworthy and reliability, technical
4 competence, and need-to-know are not prerequisites for
5 special access to UCNI information. That's really my
6 point with respect to the UCNI. Nobody needs to show
7 those things.

8 JUDGE ROSENTHAL: What about other
9 categories of information that we're dealing with?

10 JUDGE KARLIN: Let me follow on the need-
11 to-know, your whole regs, 1017.16, routine access and
12 special access. Both of them use the phrase "need-to-
13 know."

14 MR. EDWARDS: Not with respect to special
15 access. That's not one of the requirements for
16 special access.

17 JUDGE KARLIN: Special access doesn't use
18 the phrase need-to-know but it says, "The purpose for
19 which the UCNI is needed, e.g., UCNI be used for
20 commercial or other private purposes or will it be
21 used for public benefit to fulfill statutory and
22 regulatory responsibilities." Now the purpose for
23 which the UCNI is needed is a question. I don't know
24 what the criteria are that you use and no one else
25 would seem to know if they just read the regs. But

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1 you need to make a decision. What do you need it for?

2 MR. EDWARDS: I've had a lot of
3 discussions with the security people at DOE with
4 respect to special access for UCNI and just as I have
5 articulated the criteria here that is the criteria.
6 You identify who you are.

7 JUDGE KARLIN: So if I give you a purpose.
8 The purpose is I want to use it for insulation on my
9 house that's sufficient.

10 MR. EDWARDS: No, I can't tell you there's
11 no --

12 JUDGE KARLIN: Or is there some
13 substantive criteria behind that?

14 MR. EDWARDS: I can tell you obviously we
15 deal in absolutes. I can tell you that when the DOE
16 security office evaluates the purpose that's
17 articulated, they do not evaluate the merit of that
18 purpose. All they do is try to determine whether it's
19 a purpose that would result in unauthorized
20 dissemination of the information.

21 JUDGE KARLIN: One of the things we're
22 trying to do is come up with a process and get you to
23 propose a process that would address this or at least
24 that's what we hoped in the first instance would occur
25 with regard to the SGI and the decisions of the NRC

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1 and it would seem that there is a Staff determination
2 that's made and there is deference, considerable
3 deference, at least the language of one of the
4 decisions that the boards give to those
5 determinations. But ultimately the board needs to
6 review that and make a determination. You're
7 suggesting that there is no such second step with
8 regard to anything that DOE throws a blanket of UCNI
9 over.

10 MR. EDWARDS: That's correct and also that
11 there's not a need for there to be. That access --

12 JUDGE KARLIN: Well, the Staff would say
13 the same to us with regard to their determinations of
14 safeguards information. We'll make the determination.
15 Don't worry your heads about it, Board. There's no
16 need for you to get involved. We'll just simply
17 decide who gets the stuff and who doesn't. But we
18 don't do that with the Staff. I guess we're going far
19 afield from who have the burden of proof here. We're
20 not really addressing that. We're covering it over
21 under other issues.

22 MR. EDWARDS: It underlies the questions.

23 JUDGE KARLIN: But what's the statutory
24 authority for us or the regulatory or any other
25 authority for us lacking any such authority in your

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1 mind to make rulings in this proceeding on those
2 claims of privilege?

3 MR. EDWARDS: First, again and I don't
4 mean to quibble, but it's not really a claim of
5 privilege. We're talking about a different issue than
6 privilege.

7 JUDGE KARLIN: A four year exemption.

8 MR. EDWARDS: We're talking about an
9 exemption from disclosure. There are processes that
10 exist to have those questions addressed that exist in
11 the already existing regulations and processes that
12 exist. One hundred forty-seven of the AEA, 148 of the
13 AEA, both have subprovisions that provide for judicial
14 review but there's a requirement that there be an
15 exhaustion of administrative remedies.

16 There's a process. I'm not saying that
17 the decision gets made and it never gets questioned.
18 I'm just saying it gets questioned pursuant to the
19 processes that already exist.

20 JUDGE MOORE: When I read the UCNI
21 regulations, they clearly don't seem to anticipate the
22 particular question that is before us. They all seem
23 to be written in the context of a contractor
24 relationship with DOE or an employee relationship with
25 DOE.

1 MR. EDWARDS: Right.

2 JUDGE MOORE: If that's the case and you
3 seem to be agreeing, then I find it a stretch to say
4 that these regulations set up a process when they
5 don't anticipate this situation and don't cover this
6 situation.

7 MR. EDWARDS: I think you're exactly
8 right. I think that we're in sort of in between land
9 in terms of what we're dealing with here. In
10 traditional litigation, traditional licensing
11 litigation, when you would do the discovery subsequent
12 to the filing of a licensing application for example,
13 you have something that defines the issues in dispute
14 and you have that context to make decisions regarding
15 how to deal with privileged documents on the one hand
16 or sensitive documents on the other hand and in fact
17 we've had discussions among ourselves at the counsel
18 table about all flavors of documents on the LSN are
19 not vanilla. We have different kinds of documents and
20 perhaps there should be processes to deal specifically
21 with sensitive information separate and apart from the
22 rules that govern the other information once we have
23 an LA file for example that defines the issues.

24 The problem is we then run into some other
25 scheduling deadlines that are in the regulations that

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1 would have to be dealt with. But we've explored that
2 issue. So the only regulations that I know of that
3 specifically deal with sensitive information are 2.709
4 and 2.1010 that deal with SGI. Neither of those
5 regulations contemplate a relook at the designation.
6 What they do is contemplate handling the information
7 through protective order.

8 JUDGE MOORE: That said if the UCNI
9 regulations don't apply, then why doesn't the
10 traditional adjudicatory model? You, DOE, the
11 applicant, obviously are submitting to the
12 jurisdiction of the NRC when you submit a license
13 application. As such, you are required to file an
14 application and all relevant documentary material.
15 The NRC regulations in this instance with the
16 preapplication document discovery scheme that has been
17 set up require such information to at least in header-
18 only format be placed on the LSN.

19 MR. EDWARDS: Right.

20 JUDGE MOORE: Why isn't that model the
21 appropriate model to follow? You submit to the
22 jurisdiction the NRC as an applicant and necessarily
23 its adjudicatory boards and the Commission as the
24 appellate authority and any such disputes are resolved
25 in the same manner in which they're always resolved in

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1 that adjudicatory model.

2 MR. EDWARDS: I guess I get back to the
3 point that I've been making is that I follow
4 everything you say until you get to the last sentence
5 when you talk about disputes and I think with respect
6 to special access to UCNI information there shouldn't
7 be a dispute. I don't think that's an issue. I think
8 we're dealing with an issue that won't ever arise.
9 Special access is specifically contemplated to deal
10 with litigation involving UCNI information.

11 JUDGE MOORE: So essentially all DOE's
12 position is take off the table any challenge to the
13 validity of the claim of UCNI information or NNPI or
14 OOU.

15 MR. EDWARDS: That is correct and yes, to
16 answer your question. Yes, and I don't foresee any
17 issues regarding access under special access.

18 JUDGE MOORE: What if you're wrong and you
19 can't foresee properly or clearly rather?

20 MR. EDWARDS: Because of the unique nature
21 of the documents we're talking about, we're talking
22 about information that is sensitive for some reason,
23 if I'm wrong, then I suggest that we address that
24 issue when it arises in that context rather than
25 trying to develop a rule at this point to deal with

1 sensitive information that may never be needed.

2 JUDGE KARLIN: With regard to your
3 argument based on 2.1010, I don't see where you're
4 coming from. Certainly under .1010 this Board makes
5 a determination. It's not just a matter of accepting
6 a litigant's label that something is privileged and I
7 will continue to use that term or exempt under FOIA
8 and just simply saying, "Okay, we'll accept that and
9 therefore now let's work on a protective order." I
10 think that our jurisdiction includes and our duty
11 includes to evaluate when raised whether or not it is
12 privileged.

13 For example, .1010(b)(2) whether the
14 material is excluded under 2.1005 and .1005 includes
15 classified material, for example. So I guess the
16 Board makes the determination whether this stuff is
17 really classified material which I would think would
18 be equal or perhaps not greater protections and the
19 Board makes those determinations or at least that's
20 called for.

21 Three, whether it's privileged, whether
22 it's qualified privileged or absolute, if qualified
23 then we just get to the issue of the protective order
24 and fashioning an appropriate protective order, etc.
25 I think the only way that I can currently see how this

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1 would come in is that you would claim an exemption
2 under 2.390. This is exempt under exemption two or
3 three of FOIA because there is a separate statute, 148
4 of the Atomic Energy Act which says this has a special
5 status. And yes, then we'd have to look at that.

6 So I'm looking for your authority for the
7 proposition we lack any jurisdiction. I could
8 understand if you cite your own regs, 1017.14(c)
9 because I cited it and we cited it in our question.
10 There's a regulatory issue there.

11 MR. EDWARDS: Right.

12 JUDGE KARLIN: But I'm looking for is
13 there something else here that would help, case law,
14 other situations, where this has come up?

15 MR. EDWARDS: I have cited to you the
16 authority that I'm currently aware of that would
17 address the issue. The problem is it doesn't address
18 it specifically. You look at .1010 for example. Ten-
19 ten says whether the material is privileged or not.
20 There's a certain amount of deference obviously that
21 goes with respect to this kind of designation and
22 there are processes that exist.

23 With all due respect, the processes that
24 exist require a certain amount of expertise that the
25 people within those agencies have in terms of

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1 identifying in the information. If they have gone
2 through the steps that are required by their own
3 processes, then that designation should remain and
4 then the access is granted as is provided.

5 JUDGE MOORE: I would be more receptive to
6 your suggestion that we adopt a wait-and-see procedure
7 because there's only ten UCNI documents at this point
8 in time and one of the downstream questions is in as
9 I read the definition of UCNI and it uses the
10 conjunctive "and" for all of the steps you must go
11 through to end up with UCNI, not the disjunctive.

12 MR. EDWARDS: Right.

13 JUDGE MOORE: I'm quite curious as to what
14 this information could be that meets all those steps.
15 That we'll get to later.

16 MR. EDWARDS: That was sort of my point.

17 JUDGE MOORE: But you have told me there
18 are 500 OOU documents and 4,600 NNPI documents.
19 Unfortunately, it's hard to be saying that those
20 aren't going to present a problem. Your analysis that
21 you're giving us would seemingly have to fit the NNPI
22 regulations of DOE as well and as the materials that
23 we have looked at in that regard seem to have the same
24 problem as the UCNI regulations, they are written for
25 contractors and contractor employees relationships

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1 with DOE and don't seem at all to anticipate an
2 adjudicatory context.

3 That said, waiting to see on the 4,600
4 that may rear their heads here and the 500 OOU
5 documents may put us into a serious time crunch
6 downstream dealing with all of this. Whereas if we
7 are able to map out a process now and the road map
8 will be clear, we then can follow it as opposed to
9 making it up as we go along when we're faced with the
10 crisis. That's where my problem is.

11 That's why we think it fits into the mold
12 of privilege whether it's primary or secondary
13 privilege that you do have a burden it would seem to
14 me that if you can challenge in a traditional
15 adjudicatory context what the material is because even
16 with a privilege whether it's qualified or absolute,
17 the determination ultimately is in the adjudicatory
18 system of whether the material qualifies for that
19 absolute privilege and this would seem to me to be
20 akin to absolute or qualified privilege materials. I
21 think the analogy fits.

22 MR. EDWARDS: With respect to the last
23 point, again it's different because you're not talking
24 about withholding information for two reasons. You're
25 talking about how to control access (1) to sensitive

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1 information too and there is a special quality to that
2 information as opposed to a piece of correspondence,
3 for example, that attorney/client privilege is claimed
4 for. Again, with respect to the questions about the
5 NNPI documents, it may be a good idea to get Mr. Putzu
6 up here to address those.

7 JUDGE ROSENTHAL: Maybe I'm missing
8 something but if there's a determination that a
9 requester does not have a need-to-know or that the
10 requester is not trustworthy, isn't in those
11 circumstances a matter of withholding the document not
12 making it available to that requester under certain
13 terms and conditions?

14 MR. EDWARDS: That's not an issue with
15 respect to UCNI.

16 JUDGE ROSENTHAL: A thought that the
17 question five was not restricted to UCNI. I thought
18 it was each category with sensitive information. Am
19 I wrong about that?

20 MR. EDWARDS: No, it addresses each one.
21 I'd defer to the Staff with respect to how that would
22 be handled with SGI.

23 JUDGE KARLIN: I think we already went
24 over this ground. Need-to-know you assert is not an
25 issue with regard UCNI special access. Okay. Let's

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1 play with that word for a minute. That word is not in
2 the special access reg but there is a reg that says
3 you have to evaluate the purpose for which the people
4 want it.

5 All right. Let's just talk about that.
6 Let's say you decide no, this purpose is not a valid
7 purpose and you decide not to give them that document.
8 That is an exclusion. You're excluding or withholding
9 that document from that individual on some basis of
10 their purpose is not good enough. Right?

11 MR. EDWARDS: If they say their purpose is
12 to participate in this proceeding, that's good enough.

13 JUDGE KARLIN: So if John Doe who lives in
14 a home in Amagorsa Valley and seeks to have
15 information down wind, down gradient and he wants to
16 look at this stuff, his purpose is fine.

17 MR. EDWARDS: For special access, yes.

18 JUDGE KARLIN: Okay. And the other
19 criteria that they're out there under UCNI regs?

20 MR. EDWARDS: You identify who requests
21 it, identify what's requested, the purpose and an
22 agreement to abide by the dissemination regulations.

23 JUDGE ROSENTHAL: So you're not concerned
24 with whether that individual is trustworthy.

25 MR. EDWARDS: Not for UCNI, sir.

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1 JUDGE MOORE: Moving on to same questions
2 NNPI, it can't be that easy.

3 MR. EDWARDS: No. There's a need-to-know
4 requirement for NNPI.

5 JUDGE MOORE: That determination if I'm
6 hearing you correctly is not reviewable by an
7 adjudicatory tribunal.

8 MR. EDWARDS: No, it's not reviewable --
9 It is reviewable by the processes that exist for
10 reviewing decisions made regarding NNPI.

11 JUDGE MOORE: Where?

12 MR. EDWARDS: I really do need -- I don't
13 know. I need Mr. Putzu here.

14 MR. NOONAN: Your Honor, may I approach?
15 You requested some documents from us.

16 JUDGE MOORE: Certainly. Thank you. Have
17 these been made available to the others, to the State?

18 MR. CUMMINGS: Your Honor, we have already
19 provided those documents to the clerk that we were
20 asked to provide.

21 JUDGE MOORE: Please identify yourself.

22 MR. PUTZU: Your Honor, I'm Frank Putzu.
23 I'm an attorney with the Naval Sea Systems Commission
24 and represent naval reactors and Commander Greg
25 O'Brien, the Staff judge advocate for Naval Reactors

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1 is here as well and head of our security, Mr. Pat Carr
2 and Mr. Robert Ghish who is in charge of these
3 documents, actually knows the ins and outs of the
4 documents themselves.

5 JUDGE MOORE: First, welcome and thank you
6 for your participation.

7 MR. PUTZU: Thank you.

8 JUDGE MOORE: We look forward to you
9 shedding a great deal of light on some very shadowy
10 areas.

11 MR. PUTZU: I've been following the
12 conversation as it's been going back and forth with
13 NNPI. First, understand that the reason why there's
14 4,600 documents is we're dealing with a very sensitive
15 military technology which would for obvious reasons
16 lend itself to more security consideration. NNPI
17 itself is a creator of 10 USC Section 130. That's the
18 basic overarching authority that exists.

19 The classification, we deal with the
20 fundamental question of the classification of the
21 information itself as in NNPI rests with Division of
22 Naval Reactors under Executive Order 12344. This is
23 codified at 44 USC 7158. That executive order is now
24 law and it gives over the Division of Naval Reactors
25 the administration of all security issues.

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1 I don't want to get too far afield from
2 UCNI because in some senses it's the same. The
3 original classification rests with Naval Reactors and
4 ultimately there's an appellate process that ends with
5 the Director of Naval Reactor whether that information
6 was properly classified. There's a process that goes
7 from our security person to the director of external
8 affairs to the deputy director and finally to Admiral
9 Donald.

10 JUDGE MOORE: One point of clarification.
11 When you use the word "classified," you're not talking
12 about restricted information.

13 MR. PUTZU: No.

14 JUDGE MOORE: Or national security
15 information. You're talking about labeling it as
16 something as opposed to a classification of national
17 security.

18 MR. PUTZU: That's correct. Forgive me.
19 I should have used the word "designated" not
20 "classified." Designated as NNPI and that's an
21 important point because this is in the final analysis
22 unclassified yet sensitive data. The classification
23 documents which is where we could potentially get into
24 some issues we don't have them here. This is an
25 unclassified issue.

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1 When Mr. Edwards talks about access,
2 that's really not blowing smoke. These folks are
3 going to get access even to the NNPI stuff. So for
4 example, Judge, when you had posed the question about
5 some person coming in and the purpose is because I
6 want to find out whether this is going over the air of
7 my house. The answer is yes. They can get access to
8 that material.

9 Now how they get access is a function of
10 the protective order, the process that we follow, the
11 process that this body will ordered to be followed in
12 the protective order and things of that nature. We
13 may make the documents available for inspection or
14 have copies. For example, everyone on this board and
15 the NRC Staff will be able to get copies of this
16 material.

17 JUDGE ROSENTHAL: But now is the issue of
18 trustworthiness taken into account? You talk about
19 protective orders. But obviously --

20 MR. PUTZU: For NNPI, it is not taken into
21 account.

22 JUDGE ROSENTHAL: Not at all?

23 JUDGE MOORE: Is need-to-know?

24 MR. PUTZU: Need-to-know as I mentioned is
25 we're consistent with what Mr. Edwards has said.

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1 Need-to-know in this context for the unclassified by
2 sensitive NNPI data is extremely low threshold. That
3 is to be honest with you we can't even imagine someone
4 not being able to cross. If it's related to this
5 proceeding in any manner, the need-to-know is simply
6 not going to be an issue even for NNPI.

7 JUDGE ROSENTHAL: What is the issue?

8 MR. PUTZU: Well, I'm not quite sure
9 myself, Your Honor.

10 JUDGE ROSENTHAL: It seems to me from what
11 you're saying that it's a pro forma inquiry whether
12 the individual has a real need-to-know, whether the
13 individual is trustworthy, all of that doesn't make
14 any difference one way or the other. The individual
15 that's requested a document is going to get it. What's
16 the standard?

17 MR. PUTZU: I think what Mr. Edwards
18 mentioned this morning and it's certainly our review
19 at Naval Reactors that this is much less of a legal
20 issue than it is a security process issue. So when
21 you say what's the standard, the standard is is this
22 person going to be following the process that's set
23 forward in controlling the information. Ultimately
24 the issue is how will the information be controlled.

25 JUDGE ROSENTHAL: But that's a

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1 trustworthiness issue, isn't it, because if the
2 individual isn't trustworthy, then the individual
3 can't be counted upon to comply with whatever
4 procedures you might have?

5 MR. PUTZU: Forgive me, Your Honor. In
6 that instance, we may just make the documents
7 available for inspection. If we have some individual,
8 and we're speculating granted, but my view is just
9 flat out untrustworthy, can't believe a word he says,
10 just is going to go to the *Washington Post* the next
11 day with all the stuff, in that instance we've gotten
12 past the need-to-know threshold because they're
13 related to this proceeding. We may have to make the
14 documents only available for inspection and control
15 the copies that are going out and things of that
16 nature.

17 JUDGE KARLIN: Do you conduct any kind of
18 a check of the person in question? Do they have to be
19 a citizen? Do they have to give you their social
20 security numbers? Is there any kind of a check on it?

21 MR. PUTZU: Forgive me. I was looking at
22 Mr. Carr to confirm this but the answer is they do
23 have to be an American citizen and I think beyond that
24 no for NNPI now.

25 JUDGE KARLIN: For NNPI.

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1 MR. PUTZU: Yes sir.

2 JUDGE KARLIN: So there's no criminal
3 check or any kind of preliminary security check done.

4 MR. PUTZU: No.

5 JUDGE KARLIN: How does this compare to
6 what the NRC does with regard to SGI?

7 MR. PUTZU: I can't answer that, Your
8 Honor.

9 JUDGE KARLIN: It seems a little
10 different.

11 MR. PUTZU: I do also want to -- One other
12 thing that popped into my brain sitting here. The
13 seminal case, you asked about the PAPO board's
14 jurisdiction to review the designation. The Supreme
15 Court in 1987 in the Department of Navy v. Egan
16 actually addressed that issue.

17 JUDGE ROSENTHAL: Do you have a cite for
18 that?

19 MR. PUTZU: Yes, I do. If you give me a
20 moment here. It's the seminal case. It's 44 U.S. 518
21 decided in 1988 and it's the seminal case. There's
22 lot of litigation that flowed out of this in the
23 circuit courts about the control of classified
24 information. That specific case is whether a security
25 clearance was warranted and the Supreme Court decided

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1 that that was solely an executive branch function. It
2 rested with the originating agency.

3 JUDGE MOORE: But that was classified
4 material.

5 MR. PUTZU: This was classified material,
6 yes.

7 JUDGE MOORE: The fascinating thing here
8 is we have Subpart I of the Commission's Part 2
9 regulations specifically dealing with classified
10 information in the NRC adjudicatory process. That has
11 been anticipated and dealt with. Here we're dealing
12 presumably with something less than classified and
13 logically one would think that you would have less
14 stringent procedures all the way across the board
15 therefore.

16 MR. PUTZU: Well, I hope we've made clear
17 that we do have considerably less stringent procedures
18 across the board for this stuff.

19 JUDGE MOORE: But it is your position that
20 the determination once again of whether this label of
21 NNPI or the designation of NNPI is something solely
22 and exclusively within the domain of the Department of
23 the Navy.

24 MR. PUTZU: Under Executive Order 12344,
25 13292 and the Supreme Court decision, yes it is.

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1 JUDGE MOORE: Now once again, I've looked
2 at the regulations and as I read them, they don't seem
3 to anticipate what we're dealing here with at all.
4 What's wrong with the traditional adjudicatory model?
5 DOE is the applicant. They submit to the NRC's
6 jurisdiction. The Department of Navy and presumably
7 it's the Nuclear Fuel which is seen to go into Yucca
8 Mountain is a trailer to DOE in that regard.

9 So you're not a party before the NRC. DoD
10 is not a party before the NRC. Rather it's DOE and
11 it's only the happenstance that you wish certain
12 material to put in Yucca Mountain that brings you in
13 front of us as essentially a client of DOE.

14 MR. PUTZU: I'm not sure I'd characterize
15 it as us being dragged kicking and screaming into this
16 process.

17 JUDGE MOORE: I didn't mean to imply that.

18 MR. PUTZU: Let me just make something
19 clear because Naval Reactors is a very unique
20 organization. Under the Executive Order I cited 12344
21 and 42 USC 7158, Naval Reactors is a joint
22 organization of both the Department of the Navy and
23 the Department of Energy.

24 JUDGE MOORE: Okay. That just makes the
25 jurisdiction more complete, more direct.

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1 MR. PUTZU: Understood.

2 JUDGE MOORE: By submitting as an
3 applicant to the NRC's jurisdiction, why aren't you
4 necessarily submitting to the adjudicatory process and
5 the determination of what is appropriate and what is
6 not appropriate in the adjudicatory process with of
7 course the ultimate authority being the Commission
8 themselves?

9 MR. PUTZU: We are submitting the umbrella
10 idea of course to the adjudicatory process. We're
11 talking specifically about NNPI which is considered
12 national security information. That's the designation
13 of NNPI. Under the executive orders, the Supreme
14 Court decisions and a host of cases following that,
15 the decision about whether information is in fact
16 properly designated rests with the executive branch.

17 JUDGE ROSENTHAL: You're telling us that
18 really in this instance it's not a very significant
19 issue because if I understand you correctly as long as
20 this individual is a United States citizen and
21 expresses some interest in the proceeding and as long
22 as I suppose it isn't Osama, that he's going to get
23 this material anyway.

24 MR. PUTZU: Yes sir.

25 JUDGE ROSENTHAL: What I'm hearing is that

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1 from your standpoint this is not a very significant
2 issue in reality as a practical matter as opposed to
3 this issue is to legal authority.

4 MR. PUTZU: Your Honor, I think that's a
5 very fair characterization.

6 JUDGE KARLIN: May I ask? When the
7 protective order was submitted, the proposed
8 protective order on July 8th, there was a provision
9 and we noted this in our questions, I think at
10 footnote seven, that the PAPO Board shall resolve all
11 disputes. That seemed to say on the one hand that if
12 there were disputes concerning whether there's a need-
13 to-know, whether the material is accurately
14 classified, etc., that we would resolve those
15 disputes. This might not be a fair question for you,
16 Mr. Putzu, but perhaps Mr. Edwards or Mr. Irwin would
17 address that.

18 MR. EDWARDS: The provision you cite you
19 cited accurately. At least from DOE's perspective,
20 there are potentially disputes that can arise with
21 respect to these documents that the PAPO Board would
22 have authority and jurisdiction over. I can't tell
23 you exactly what they might be under our position
24 until I have that context. I did not contemplate when
25 we were drafting this order and I agreed to this

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1 language at that time that they would include
2 reviewing the executive branch designation.

3 JUDGE KARLIN: One of the things I think
4 that we should acknowledge is that we issued our
5 second case management order on the same date, I guess
6 it was, July 8th and with that as a model, it might
7 have been pushed or prodded you in a different
8 direction in terms of exactly how we would have like
9 to have seen the structure.

10 So we ask for a protective order in a
11 nondisclosure agreement and such procedures as you
12 would like to give us and you gave us a protective
13 order and the nondisclosure agreement. I think we're
14 focusing now more a bit on the procedures that might
15 proceed that and a third case management order if it
16 were ultimately developed.

17 JUDGE MOORE: I guess I'm troubled. It
18 looks like in light of your answers to us that SGI
19 safeguards information has been driving the train in
20 many respects for this NNPI and OUO and UCNI
21 information almost needlessly. There seems to be two
22 totally different levels at which this should be
23 approached. Yet the proposed order DOE stepped
24 forward and dutifully followed in the Staff's
25 footsteps with SGI. Would life be made easier in

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1 working through this if SGI was treated with one set
2 of rules and procedures and the other materials are
3 treated totally differently where appropriate?

4 MR. EDWARDS: I think the answer is that
5 even under the construct that I offer, the draft
6 protective order would work. Clearly though as time
7 has gone on and the questions have been asked and
8 we've engaged in this dialogue this morning, there
9 clearly are distinctions I believe.

10 JUDGE MOORE: Because overriding this, you
11 still have Section 181 of the Atomic Energy Act that
12 we're charged with only imposing the minimum
13 procedures necessary in all of this and I have trouble
14 rectifying all that has been proposed with minimum
15 procedures in light of what I hear this morning that
16 it's not necessary.

17 MR. EDWARDS: I understand.

18 JUDGE MOORE: Mr. Malsch, you have
19 patiently sat while we've been wrestling with this.
20 Do you have anything up to this point that you would
21 like to add?

22 MR. MALSCH: Actually, we have a lot that
23 we'd like to add.

24 JUDGE MOORE: Would you like to do it
25 before a recess or after?

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1 MR. MALSCH: I'm happy to do it now.

2 JUDGE KARLIN: Are we still on question
3 four or just all of them? Who has the burden of
4 proof?

5 JUDGE MOORE: I think we've slid into
6 five.

7 MR. MALSCH: I think I would be talking
8 about questions four and five but the overarching
9 question that seems to be debated here. I think our
10 position is that DOE's position is outrageous and
11 absolutely unsupportable. It's outrageous because for
12 these many decades DOE has been assuring the State and
13 the counties and the public and the Congress that when
14 it comes before the NRC it will be treated no
15 differently than any other applicant and now it's
16 asking for special favors.

17 It's unsupported because there's
18 absolutely statutory basis for the DOE's claim of this
19 authority and in fact, such statutes and authority
20 that does exist suggests and indicates very strongly
21 to the contrary. Just look at the Commission's
22 regulations, 10 CFR 2.1010 clearly contemplates that
23 Board will rule on questions of privilege and that's
24 what we're talking about here.

25 I recall that the last governmental entity

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1 that claimed the right to refuse to comply with a
2 discovery order of the Commission was the State of New
3 York, Suffolk County and a township in Shorum (PH) and
4 they were dismissed from the proceeding as a party.
5 That's how strongly the Commission felt about its
6 authority over other governmental entities.

7 Furthermore, this is not just a question
8 of procedures. It's a basic question of access. Not
9 only is it possible that we and other parties might
10 get access denied because of need-to-know or
11 trustworthiness considerations. But there's a more
12 fundamental problem from Nevada's standpoint and
13 that's this. Virtually any expert that has any degree
14 of substantial expertise on Yucca Mountain matters has
15 either worked for DOE, is working for DOE or hopes to
16 work for DOE in the future.

17 JUDGE MOORE: It's the citizenship
18 requirement.

19 MR. MALSCH: It's the citizenship
20 requirement because DOE well knows we have had to go
21 outside the United States specifically to experts from
22 the U.K. to get expertise so we could participate
23 meaningfully in the application and in this
24 proceeding. So some of these requirements implicate
25 a citizenship requirement. So it is essential from

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1 our standpoint that we not facilitate a process in
2 which DOE can abuse its authority and deprive Nevada
3 of the right to participate meaningfully in the
4 proceeding.

5 JUDGE MOORE: In your view with UCNI of
6 course special access, I think that's what it's
7 called, doesn't require citizenship. It doesn't have
8 a citizenship requirement. Is to your knowledge there
9 a citizenship requirement for all NNPI information?

10 MR. MALSCH: I don't know whether there is
11 but I believe there is in some of the other
12 regulations.

13 JUDGE MOORE: Let me stop right there. Is
14 there a citizenship requirement for NNPI information?

15 MR. EDWARDS: Yes sir.

16 JUDGE MOORE: Now we are beginning to see
17 where the conflict comes. How is that to be dealt
18 with? Now in the UCNI regulations, the assistant
19 secretary if I'm remembering them correctly, has the
20 authority seemingly to waive any and all requirements
21 for anything. Is there a similar provision for NNPI?

22 MR. EDWARDS: Could we have just one
23 moment?

24 MR. PUTZU: Your Honor. Sorry. I was
25 consulting with our security expert on that. We're

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1 not aware of any provision for waiver. The real issue
2 is then we have to ask what country are they a citizen
3 of because there are different national security lists
4 depending on which country in which they hold their
5 citizenship.

6 JUDGE MOORE: I'm sorry. One, I believe
7 I was told that there is a citizenship requirement.

8 MR. PUTZU: Yes, there is.

9 JUDGE MOORE: And, two, that there's no
10 waiver provision. But then if that's the case, what
11 possible difference does it matter of what one's
12 citizenship is or maybe there's an exception depending
13 on the circumstances?

14 MR. PUTZU: Just based upon my own
15 experience, this issue arises when dual citizenship is
16 held, a citizen of the United States and a citizen of
17 another country.

18 JUDGE MOORE: Well, it's a safe bet that
19 we won't be dealing with dual citizenship.

20 MR. PUTZU: We've dealt with it, Your
21 Honor.

22 JUDGE MOORE: So then the long and the
23 short of it is for NNPI information. Do you have here
24 a security expert so that if we say something he'll
25 immediately raise a red flag?

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1 MR. PUTZU: Yes, we do. He has.

2 JUDGE MOORE: I believe it's fair to say
3 that a lot of this deals with fuel that's going to go
4 into Yucca Mountain.

5 MR. PUTZU: Yes sir.

6 JUDGE MOORE: And how that is packaged and
7 with what that is packaged and criticality concerns
8 undoubtedly will come into play in this proceeding and
9 undoubtedly will be matters in which the State of
10 Nevada is very concerned about. Now they're telling
11 us that literally all of their experts, putting aside
12 security, this doesn't deal with physical security
13 issues. This deals with more traditionally nuclear
14 engineering issues and criticality issues.

15 Mr. Malsch is informing us that literally
16 all of their experts are foreign nationals. And
17 that's been forced upon them by circumstance which we
18 don't need to get into here. If we accept that at
19 face value for a moment, does that mean that the State
20 of Nevada is essentially barred from being able to
21 challenge all such matters?

22 MR. PUTZU: First, I would like to consult
23 with my security expert before answering this
24 question.

25 JUDGE MOORE: Certainly.

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1 MR. PUTZU: The answer to your question
2 offhand is no because there would still be
3 representatives from the State of Nevada counsel and
4 other witnesses they won't have access --

5 JUDGE MOORE: No, you're talking about -

6 MR. PUTZU: You're asking me -- I cannot
7 commit to you that we're going to --

8 JUDGE MOORE: We're talking about
9 criticality matters. You need criticality experts who
10 get into things that I will speak only for myself as
11 a legal member of this panel that are way beyond me.

12 MR. PUTZU: Your Honor, you're asking me
13 to commit to my client violating federal law by
14 allowing foreign nationals in and I cannot do that.

15 JUDGE MOORE: No, I'm doing no such thing.

16 JUDGE ROSENTHAL: No.

17 JUDGE MOORE: The reason we're having this
18 is as a case management conference and not a formal
19 argument per se is so that we can get these matters
20 out on the table, know what we're dealing with and how
21 to deal with them.

22 JUDGE ROSENTHAL: Maybe I can put the
23 question this way so it doesn't tread into dangerous
24 water. Let us assume that the State of Nevada has an
25 expert who is not a citizen of the United States who

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1 Nevada believes is an important witness on questions
2 going to the storage of this Naval fuel into Yucca
3 Mountain. They have this witness. Now it's my
4 understanding that the Navy has a nonwaivable
5 regulation requiring United States citizenship which
6 would have the automatic effect if we have to honor
7 that of precluding the State of Nevada from utilizing
8 this witness because the witness would not have access
9 to these documents.

10 Now if that is the case and we are bound
11 as is being suggested to honor that regulation, the
12 regulation saying that it must be a U.S. citizen,
13 isn't the necessary consequence of that our Board and
14 it wouldn't be this PAPO Board, it would be the board
15 on the merits saying okay, Nevada is precluded by
16 virtue of a DoD regulation from contesting the
17 inclusion of this Navy fuel and the consequence of
18 that would necessarily be that if a license is granted
19 the license would have to exclude the inclusion in
20 Yucca Mountain of Navy fuel? That seems to me to
21 automatically follow.

22 MR. PUTZU: Right.

23 JUDGE ROSENTHAL: They're precluded
24 because of your regulation from effectively
25 challenging the inclusion of the nuclear Navy fuel in

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1 the reactor.

2 MR. PUTZU: Your Honor, let me answer that
3 question in two ways. First legally that's enormously
4 complicated what the consequences are. I want to
5 underscore we are not invoking the State's Secrets
6 Doctrine, the National Security doctrine or asking
7 this tribunal to do anything anywhere close to that.
8 So it's not the consequences of -- If Nevada chooses
9 of its own free will to get an expert who --

10 JUDGE ROSENTHAL: No, it says that it's
11 required to do that by circumstances and let us assume
12 for the sake of this morning's discussion that he's
13 right that the experts in this field that have United
14 States citizenship have been coopted by DOE so that
15 they have to resort to foreign nationals who under
16 your nonwaiveable regulation that we are supposed to
17 honor are precluded from having access to this
18 material.

19 MR. PUTZU: Your Honor, in my experience,
20 first we'll take at face value the assertion that
21 there can't find a single American expert on this and
22 we'll just take that at face value although that seems
23 a little specious to me. But we'll take that at face
24 value. The second part of your question is then what
25 happens in that specific situation.

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1 I'm reluctant to answer that in full
2 because it's a very complicated legal question. I
3 think my sense is no it doesn't get dismissed. My
4 experience has been that we don't get to use the
5 document then in support of our case. The document is
6 treated as outside the scope of the case. It's also
7 as if it didn't exist and the government is not
8 entitled to use that document at all during the course
9 of the proceeding.

10 The second part I think is a factual
11 question. The premise of the question was intriguing
12 because there was the nonwaiveable and there was a
13 series of assumptions on there. I would really
14 respectfully request the Court that I have a chance to
15 consult with my security expert on all the nuances
16 implied in your question before I feel comfortable
17 giving you a full and complete answer.

18 JUDGE ROSENTHAL: You might not want to
19 use the document but the fact of that matter is the
20 document might cut against DOE's inclusion of the
21 nuclear fuel.

22 MR. PUTZU: Let me suggest this then.
23 This Board will be able to have access to that
24 document. That's why it's so hard to get ahead of
25 ourselves on this and I think Mr. Edwards is correct

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1 about getting ahead of ourselves. That's something we
2 would work with this Board to assess what the value of
3 that document is at all.

4 JUDGE ROSENTHAL: But you can tell us now.
5 That may be down the road. But you can tell us now
6 (1) that you have a regulation that requires United
7 States citizenship, (2) insofar as you now know that's
8 not waiveable, and (3) the Navy's position is that we
9 are obliged to honor that regulatory requirement. Now
10 that you're telling me.

11 MR. PUTZU: I'm answering question one
12 yes. Question three is yes. Question two I would
13 like to consult further with my security expert before
14 giving you a final expert.

15 JUDGE MOORE: Okay. While you consult,
16 we'll take a ten minute recess. Then we'll hear
17 further from Mr. Malsch and the Staff and it's now
18 11:05 a.m. We'll reconvene at 11:15 a.m. Thank you.
19 Off the record.

20 (Whereupon, the foregoing matter went off
21 the record at 11:05 a.m. and went back on the record
22 at 11:16 a.m.)

23 JUDGE MOORE: On the record. Mr. Malsch,
24 I interrupted you on the citizenship point. Would you
25 please continue where you were before I interrupted

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1 you?

2 MR. MALSCH: Yes, Your Honor. I just have
3 a few additional points. As I indicated, DOE is here
4 claiming a special power or privilege that no other
5 applicant or licensee possesses and there's no
6 indication anywhere that Congress intended to give
7 them any such thing, not in 1974 Reorganization Act
8 which first gave NRC authority over DOE. In fact, the
9 legislative history of that act indicates that its
10 purpose was to enhance NRC and Commission authority
11 not take it away in this respect.

12 Not in the Nuclear Waste Policy Act.
13 Section 114 says that the Yucca Mountain application
14 is to be considered in accordance with the laws
15 applicable to such applications and then there follows
16 a number of statutory exceptions dealing with such
17 things as time deadlines. The exception mentioned by
18 DOE is nowhere mentioned there.

19 JUDGE ROSENTHAL: All right. But if the
20 Navy has a regulation which states that the Naval fuel
21 information will be made available only to United
22 States citizens, we have the power to say that for the
23 purposes of this adjudicatory proceeding that
24 requirement is overridden.

25 MR. MALSCH: I think you would have that

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1 power although I don't think that's the kind of thing
2 we're likely to challenge. I think we're most likely
3 to challenge the classification decision in the first
4 instance.

5 JUDGE MOORE: If that's the case listening
6 to DOE if that's a decision they tell us is not
7 challengeable here that that is a process that can
8 only be determined by DOE and/or the Navy and it can't
9 be reviewed elsewhere.

10 MR. MALSCH: I'm sorry. I don't find that
11 anyplace in any statute. I think that's unsupported.
12 In fact, it seems to me that this is an issue that
13 actually the Nuclear Waste Policy Act expressly
14 contemplated. Section 8 provides for a process
15 whereby the President should decide whether or not
16 defense nuclear waste should be placed in a civilian
17 repository based upon cost and national security
18 considerations. That's one of the facts mentioned.

19 President Reagan made that decision in
20 1985. It seems to me that if the Navy or DOE no
21 longer wishes to abide by the same rules that applies
22 to anybody else it's perfectly within the prerogative
23 of the President and DOE to reconsider that decision
24 and decide not to put Navy nuclear fuel in a
25 repository. But once that decision is made, this does

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1 mean the decision is made by the President and the
2 Secretary that they will treat Navy fuel like any
3 other fuel, any other source of high level waste and
4 will subject themselves to the Commission's
5 jurisdiction just as would be the case had they made
6 no such decision.

7 JUDGE ROSENTHAL: So if the Navy has a
8 definition for NNPI and particular documents come
9 clearly within that definition, you're telling us that
10 we're prepared to say, "Well, Navy, that's fine for
11 you to define it for whatever other purposes you may
12 have but we're perfectly free as an adjudicatory board
13 passing on a DOE application to come up with a
14 different definition under which this material would
15 not so qualify." Is that what you're telling us?

16 MR. MALSCH: Yes, for two reasons, but
17 with a qualification. The main reason is that I don't
18 think any of these regulations or internal orders were
19 drafted with this kind of a process or proceeding in
20 mind. I just don't think the drafters even thought
21 about the consequences that would result if they were
22 applied in a case in which DOE is appearing in an
23 adjudicatory proceeding. So I just don't think they
24 contemplated this kind of situation.

25 I will say that if we're talking about

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1 matters outside the Commission's expertise, then the
2 review ought to be deferential. I'm not suggesting
3 that anybody --

4 JUDGE ROSENTHAL: I don't know whether
5 it's a matter of expertise. The Navy sets up a
6 definition for NNPI material and that certainly is
7 prerogative just as this agency sets up definitions
8 for certain materials within its possession. It seems
9 to me that's a perfectly reasonable entitlement on the
10 part of the Navy. I'm having some trouble in
11 understanding why we're free to say, "Well, Navy, you
12 may regard this particular material as NNPI, but we've
13 chosen to come up with a different definition and this
14 particular material doesn't happen to come within our
15 definition." I'm having some difficulty in
16 understanding the basis for our taking that kind of
17 action or having the authority to take that kind of
18 step.

19 MR. MALSCH: All we would be asking would
20 be for the Board and the Commission to decide whether
21 or not the regulations are reasonable and whether as
22 applied in a particular context the document at issue
23 has been properly categorized. I think that's in the
24 nature of how one debates and considers claims of
25 privilege which I think this is just a subset of.

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1 JUDGE ROSENTHAL: Well, it seems to me
2 just offhand, and I speak for myself alone, that you
3 would be on a sounded ground saying that the Navy
4 cannot at one and the same time apply their U.S.
5 citizenship requirement and thereby denying perhaps
6 Nevada the opportunity to have the material examined
7 by their qualified witnesses and nonetheless be able
8 to push for the inclusion of their material in Yucca
9 Mountain.

10 MR. MALSCH: Judge Rosenthal, that could
11 be part of it. If, for example, the Navy decided that
12 it need not or would not be disposing of its wastes at
13 Yucca Mountain or if for some other reason it was
14 decided that the documents at issue were not
15 documentary material because they were not relied upon
16 in the application and had no bearing on the
17 proceeding, then the issue doesn't arise because it's
18 simply not documentary material. I'm assuming in this
19 discussion that we have genuine documentary material
20 that is relevant to the application and to the
21 proceeding.

22 JUDGE KARLIN: Mr. Malsch, you worked on
23 the proposed protective order that you all submitted
24 to us. What do you make of all this language about
25 the originator shall determine this and the originator

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1 shall determine that? You seemed to have agreed to
2 that language.

3 MR. MALSCH: Absolutely. That's
4 consistent with our other discussions on other matters
5 in which in the first instance the owner of the
6 document and the asserter of the privileges gets a
7 chance to decide and resolve the matter informally.
8 But frankly, I had thought all along from the
9 beginning that the paragraph that gave the Board
10 authority to resolve disputes under this order make
11 this Board the ultimate arbitrator of disputes
12 including disputes over whether materials are properly
13 classified.

14 JUDGE KARLIN: Okay. And if we go to
15 Question 5, we have these subparagraphs and issues.
16 There may be others. There may be fewer for some
17 particular categories where need-to-know may not be
18 relevant for a category or trustworthiness. But I
19 think thinking of the second case management order, we
20 developed procedures for trying to deal with privilege
21 issues, protection issues, and there were three
22 different procedures, one for primary privileges, one
23 for secondary and the other for employee concerns.

24 Our thought is, our thought was and is
25 questioned, do any of those provide a model by which

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1 we can handle this. I mean let's start with the
2 proposition that the possessor of the document, the
3 claimer of the privilege, may make an initial
4 determination of whether it qualifies for the SGI or
5 UCNI and maybe there's deference and maybe there's
6 considerable deference or maybe there's total
7 deference depending on your point of view. But there
8 needs to be a process whereby these issues can be
9 resolved and where appropriate brought to this Board
10 for determination. What do you think? Have you
11 thought about those six or seven categories and how we
12 could address them?

13 MR. MALSCH: Do you mean the categories in
14 the Board's order?

15 JUDGE KARLIN: Whether it really qualifies
16 for the privilege? Whether there's a need-to-know?
17 These are not so foreign from attorney work product?
18 Is it really attorney work product and if it is, it's
19 a qualified privilege? Does the claimant have a
20 substantial need to see the material if somewhere
21 along the line the court or in this case this Board
22 makes those determinations?

23 MR. MALSCH: We had thought under the
24 order we had submitted that was the process that would
25 be followed, that initially there would be requests

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1 made to the owner of the document that an effort would
2 be made to resolve it informally. But ultimately
3 there would be a right to file a motion to compel and
4 have the Board resolve it.

5 JUDGE MOORE: When you said "we" you were
6 speaking about Nevada?

7 MR. MALSCH: Yes. I can only speak for
8 Nevada.

9 JUDGE KARLIN: Thank you.

10 JUDGE MOORE: We were told earlier that an
11 executive order is the ultimate source for the
12 determination that the Navy relies upon in determining
13 whether something is NNPI. That always brings up the
14 question as an independent regulatory agency whether
15 executive orders apply to the NRC and whether this
16 particular one applies to the NRC. Are you familiar
17 with the executive order that was cited?

18 MR. MALSCH: I have to say I am not.

19 MR. PUTZU: Your Honor, if I may. That
20 executive order is codified. It was enacted by
21 Congress and is now the statute of 42 USC 7158.

22 JUDGE MOORE: Thank you.

23 MR. MALSCH: My principal point on all
24 these is that none of these --

25 JUDGE KARLIN: Let me ask. Was that cited

1 in your submission, the proposed protective order?
2 You've cited NAVSEA multiple times. I didn't see that
3 one. I saw that one cited.

4 MR. EDWARDS: I don't think it was.

5 JUDGE MOORE: Go ahead, Mr. Malsch.

6 MR. EDWARDS: It is in the notebook we
7 provided you.

8 MR. MALSCH: Frankly, I received the
9 notebook just a few days ago and the Staff just
10 provided me today its notebook. So I would not claim
11 that I've gone over every word of those notebooks. My
12 basic principle is that if we're talking about orders
13 and regulations that I don't think any of them were
14 drafted with this particular problem in mind. I think
15 they were drafted primarily with protecting
16 information in the hands of contractors and the like
17 and internal delegations of authority.

18 JUDGE MOORE: Staff, this is not a pond in
19 which you have an oar because your material is SGI.
20 Do you have anything that sheds any real light on
21 this?

22 MR. CUMMINGS: We have not found anything
23 in the files about this.

24 JUDGE MOORE: The suggestion has been made
25 by DOE that we may wish to consider not developing a

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1 process as we have in the second case management order
2 for other types of privileged or protected information
3 and do this on a more case-by-case basis if the
4 problem arises. What I see happening and I'd like you
5 to respond to this is that headers go on to the LSN,
6 documents are sought and on a case-by-case basis we
7 are dealing with this.

8 Now there's 5,000 such animals out there.
9 At some point, DOE will certify this document
10 collection and at some point, DOE will file a license
11 application. The only question Judge Rosenthal and I
12 have will it be in our lifetime but that aside.

13 Then we're on a very tight regulatory
14 clock and the Commission has very stringent rules
15 about contentions and late-filed contentions. If
16 we're dealing with these on a case-by-case basis, that
17 clock will have run and expired and then we're into,
18 through no fault of any party seeking to file a
19 contention, the clock will have run and we're into
20 late-filed contentions and just because I didn't fall
21 off the turnip truck yesterday, I would venture a
22 guess that we will see from DOE if not others late-
23 filed contentions, you haven't met the five criteria,
24 why couldn't it all have been done sooner. That just
25 is the way things happen. That counsels me against

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1 rushing to embrace doing this on a case-by-case basis
2 which we will ultimately be doing but without the
3 benefit of defined procedures on precisely how it's
4 going to be done so that these are resolved now, not
5 while that clock is ticking on potential parties time.

6 Mr. Irwin, what's your response to that?

7 MR. IRWIN: I guess categorically there
8 are a number of paths down which this board could go
9 and I must say that we're going down a couple, at
10 least one today, that was a little bit of a surprise
11 in the discussions for instance with Nevada over the
12 past several weeks. The issue of access to documents
13 through foreign experts has never arisen once.

14 But if the Board were to try to lay down
15 guidelines, presumably one could be that a challenge
16 occasioned by inability to obtain access to a document
17 would at least satisfy the lack of timeliness issue if
18 that were the only basis for lack of timeliness for a
19 late-filed contention. Sheer unavailability of a
20 document or a basis obviously prima facie sounds like
21 a reason you couldn't do something sooner.

22 I would like to think that issue through
23 a little bit. We do understand and we sympathize with
24 the Board's desire to shape what is potentially an
25 unruly proceeding and make it come out in something

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1 like the three to four year time frame when it begins
2 with something like an orderly result. We're really
3 in sympathy with that goal.

4 I think as Mr. Edwards was suggesting
5 these three issues, UCNI, OUC and NNPI, may with the
6 exception of the U.S. citizenship business collapse
7 into a fairly small subset of issues and while I would
8 like to consult with my colleagues a little bit about
9 it, it may will be that with the parties having heard
10 each other more fully today than perhaps we were
11 hearing each other in the past several days on at
12 least a couple of issues that have turned out to be
13 pretty contentious today, we may be able to propose
14 something that will at least reduce to an irreducible
15 minimum the number of issues that remain in
16 controversy before this Board.

17 MR. PUTZU: Your Honor, just one. Just to
18 follow up on the U.S. citizenship. During the break
19 I did consult with our head of security. It is in
20 fact a waiveable requirement. The Director of the
21 Naval Nuclear Propulsion Program can look at it on a
22 case-by-case basis and that's when you get into dual
23 citizenship, foreign nationals of what country and
24 that sort of thing. But there is a process.

25 JUDGE MOORE: Is there a formal process

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1 that is regulatory spelled out for that?

2 MR. PUTZU: I'm not quite sure it's in
3 writing. It's really pursuant to the National Defense
4 Policy Committee that deals with a lot of these
5 security issues. But there is a process that can be
6 available.

7 JUDGE MOORE: Let's turn for a moment to
8 a part of Question 5 that we haven't touched upon.
9 For NNPI and UCNI, assuming there is any UCNI, can
10 those documents be redacted so that they lose their
11 designation as UCNI and NNPI and presumably OUO?

12 MR. EDWARDS: I think the answer to that
13 is can they be redacted. Yes. Is it necessary to
14 redact them? It should not be necessary to redact
15 them because access would be provided. But can they
16 be redacted? Yes, but they probably in that instance
17 would lose their utility.

18 JUDGE MOORE: If the sensitive information
19 is not inextricably intertwined with the rest of the
20 document and they can reasonably be redacted, by that
21 I'm always mindful of years ago when I used to see FBI
22 files that were redacted, there would be one word on
23 a page and the entire rest of the page was blackened
24 out, but assuming we're not dealing with that kind of
25 thing, would it speed this process because it's a

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1 relatively small number of documents that we redact
2 them while we have the luxury of time and that may in
3 and of itself avoid this category of information most
4 if not all of these disputes?

5 MR. EDWARDS: Let me ask Mr. Putzu to
6 answer.

7 JUDGE MOORE: Let's put that one on the
8 shelf for post lunch and you can cogitate on it.

9 MR. EDWARDS: Fair enough.

10 JUDGE MOORE: Mr. Malsch, I asked Mr.
11 Irwin the question that inevitably arises when the
12 clock starts and we're pushed as to what always rises
13 the argument, it's now late-filed contention, the time
14 has expired. He suggested that we could essentially
15 adopt a presumption that if lack of access to
16 documents would fulfill the good faith requirement
17 that would negate the problem of late-filed
18 contentions. Do you have anything in that regard
19 you'd like to comment on?

20 MR. MALSCH: I'm not sure this Board
21 actually has the authority to do that although the
22 Commission certainly would I suppose. My only initial
23 reaction would be that that's one that would defeat
24 the whole purpose of the LSN which was to give parties
25 access to lots of documents well in advance of the

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1 filing of contentions and my experience has been that
2 litigating admissibility of late contentions based
3 upon late availability of information tends out to be
4 very difficult, very time consuming and problematic.
5 It would be nice if that could all be avoided.

6 JUDGE ROSENTHAL: I think that Judge
7 Moore's question was in terms of whether the adoption
8 at this point of a case-by-case approach rather than
9 trying to formulate some generic procedures at this
10 time was a good idea. That was something that had
11 been suggested by DOE counsel and I'm sort of
12 interested in your reaction to the proposal that this
13 be done on a case-by-case basis. I would also then be
14 interested in Staff counsel's reaction.

15 MR. MALSCH: I think this is such an
16 important issue. This is DOE basically saying that it
17 will submit to the full jurisdiction of the
18 Commission. I think this is such an important issue
19 that it's worth resolving now because it may arise in
20 a whole number of other context.

21 MR. EDWARDS: If I could just -- It is not
22 DOE saying that. DOE is saying it submits to the
23 jurisdiction of this Board and the question is what is
24 that jurisdiction.

25 JUDGE ROSENTHAL: What's the Staff view on

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1 case-by-case versus an endeavor at this point to set
2 forth some kind of generic?

3 MR. CUMMINGS: I believe a process can be
4 put in place as far as SGI access disputes. So I
5 don't think a case-by-case, well, going at this
6 without a set procedure or process that could be laid
7 on a case management order is necessary for SGI.

8 JUDGE KARLIN: If I may follow up on that,
9 you really haven't had much of chance to address
10 Questions 4 and 5. So perhaps we could ask you to
11 turn to that. Even though you indicate there are no
12 SGI documents or not that many at this point, I really
13 anticipate that as the application is filed and things
14 begin to grow that universe will grow considerably and
15 there will be SGI in the Staff's hands. How should we
16 treat the burden of proof, the general dispute
17 resolution, for the issues there? I assume you will
18 not assert that we don't have jurisdiction. So
19 certainly we can get over it quickly.

20 MR. CUMMINGS: I think I can go through
21 this pretty quickly. I would separate the burden of
22 proof question into the two, the first question that
23 you asked was on the claiming of privilege. For that,
24 I think analogizing it to FOIA as I believe Judge
25 Karlin you mentioned, the burden I believe would rest

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1 with the agency withholding that information to
2 demonstrate how it fell within the withholding statute
3 with a great deal of deference given to the agency's
4 determination.

5 JUDGE KARLIN: Is it analogy to FOIA or is
6 it actually our 2.390 that we have to use?

7 MR. CUMMINGS: I think it would be the
8 2.390 reg.

9 JUDGE KARLIN: And doesn't that reg apply
10 to both SGI and UCNI equally?

11 MR. CUMMINGS: Well, we don't really want
12 to go into that more. We've tried to look into it to
13 see if we found anything dispositive either way and as
14 we have not I hesitate to venture into that.

15 JUDGE KARLIN: All right.

16 JUDGE MOORE: Well, why don't I ask the
17 question this way? Does the Staff see a
18 distinguishing feature that would make the analogy
19 inapt?

20 MR. CUMMINGS: I think we would have to
21 examine the underlying statutory authority that is
22 claimed how this information arises. With SGI, we are
23 not obviously claiming this type of protection and
24 authority that the Board does not have authority over
25 the information. So it's difficult to analogize

1 without looking into it further.

2 JUDGE KARLIN: So the privilege claimant
3 has the burden of asserting the privilege prima facie.

4 MR. CUMMINGS: Yes, Your Honor. And for
5 the remaining issues which would involve essentially
6 your access questions which would be need-to-know,
7 trustworthiness and reliability, adequacy of the
8 information protection system, I believe all of these
9 questions the burden should lie on the movement, the
10 process. We contemplated in the proposed protective
11 order envisioned the requester of a document seeking
12 the document from either the originator or in the
13 specific case of SGI where SGI was originated by
14 another individual or potential party but was also
15 held by the NRC, then the NRC would make the
16 determination.

17 JUDGE MOORE: Could you help me with this?
18 DOE tells us they have 40 SGI documents. How does DOE
19 possess SGI documents that didn't originate with the
20 Staff because SGI is a Staff designation, not a DOE
21 designation?

22 MR. CUMMINGS: It's a Commission
23 classification essentially but other agencies or
24 individuals can through use of other SGI information
25 create SGI. That may not necessarily be in the hands

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1 of the NRC at the beginning.

2 JUDGE MOORE: If that's the case, can UCNI
3 documents in the Staff's view be transformed to SGI?

4 MR. CUMMINGS: No Your Honor. Talking
5 with our security experts, we would keep the
6 classification if it was UCNI or NNPI. If that
7 classification was given, we would not seek to change
8 that into SGI UCNI. Presumably if DOE has made that
9 classification --

10 JUDGE MOORE: You said "we." That's NRC.

11 MR. CUMMINGS: The NRC, yes.

12 JUDGE MOORE: Can DOE take their UCNI
13 documents and decide that they would rather have them
14 be SGI documents?

15 MR. CUMMINGS: It would have to fit under
16 the 147 of the Atomic Energy Act definition of SGI.

17 JUDGE MOORE: But definitionally, 147
18 applies to NRC. One forty-eight applies to DOE. So
19 that couldn't happen.

20 MR. CUMMINGS: It sets up the categories
21 of information. Now if DOE were -- First, it's my
22 understanding that information that would be claimed
23 as UCNI would not qualify under the categories of SGI.

24 JUDGE MOORE: So the NNPI problem would
25 also. You couldn't make it go away by having this all

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1 become SGI then.

2 MR. CUMMINGS: That is my understanding,
3 Your Honor.

4 MR. EDWARDS: I think Mr. Cummings is
5 correct.

6 JUDGE MOORE: I'm sorry.

7 MR. EDWARDS: Mr. Cummings is correct on
8 that.

9 JUDGE MOORE: Hope springs eternal.

10 JUDGE ROSENTHAL: Mr. Cummings, looking at
11 these categories under five, I could see where the
12 requester could legitimately be required to sustain
13 the burden on such matters as need-to-know and
14 technical competence. But it seems to me that where
15 it comes to a matter of trustworthiness the burden
16 might be appropriately placed upon the person
17 challenging access to demonstrate that that individual
18 is not trustworthy.

19 MR. CUMMINGS: I understand, Your Honor,
20 but I would view this more in the terms of the process
21 that we were setting forth which was that in the first
22 instance the requester would come, in the cases of SGI
23 either held by the NRC or dually held, they would seek
24 access from the NRC. The NRC would then make a
25 determination on a need-to-know and trustworthiness

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1 and reliability and the like. And if we were to deny
2 access, at that point they would file, the requester
3 would file, with this Board a motion to compel seeking
4 access to that information. We believe that in
5 seeking access they are going to have to demonstrate
6 to the Board that they have all of the necessary
7 elements to establish access which would include
8 trustworthiness and reliability.

9 JUDGE ROSENTHAL: Well, again I can see
10 that with respect to all but the trustworthiness. It
11 seems to me that if there is an issue as to
12 trustworthiness, that the burden might well be put on
13 the resistor to demonstrate that this individual for
14 X reason or Y reason is untrustworthy.

15 I don't know how one demonstrates that one
16 is trustworthy. Sort of says, "Well, I don't have a
17 criminal record" or whatever. If there's a question
18 as to the individual's trustworthiness it seems to me
19 that the question should be raised by the resistor and
20 the resistor should have the burden of at least going
21 forward on that.

22 MR. CUMMINGS: Your Honor, the requestor
23 would be in possession of the knowledge necessary to
24 make those trustworthiness determinations. So in
25 seeking access from the Board, they would need to

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1 demonstrate to the Board why they should have access
2 and meet the requirements for trustworthiness and
3 reliability.

4 JUDGE ROSENTHAL: How do you meet the
5 requirements? How do you demonstrate your
6 trustworthiness? Usually it comes up, the issue of
7 trustworthiness, in the context of somebody pointing
8 to something that individual did or something
9 respecting that individual's context that raises
10 questions as to that individual's trustworthiness.

11 I don't know how an individual beyond
12 saying "I am trustworthy." Does he have to go through
13 his life history and show that in no occasion during
14 his 25, 35, 50 years of life has he ever done anything
15 that might have raised a question as to his
16 trustworthiness? It seems to me that's an entirely
17 different category than the matters of need-to-know or
18 technical competence where you can call upon the
19 individual to demonstrate what his need-to-know is and
20 what is the technical competence that undergirds his
21 entitlement to the document.

22 MR. CUMMINGS: Yes Your Honor, but I think
23 in order to make that determination of
24 trustworthiness, there has to be essentially a
25 background investigation of some type to look into

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1 attributes of the requestor and the requestor would
2 need to provide information that first allow the NRC
3 Staff --

4 JUDGE ROSENTHAL: That's a different
5 question as to whether in order to facilitate an
6 inquiry into trustworthiness the individual would have
7 to supply certain background information. But that
8 doesn't go to the question as to who has the ultimate
9 burden on the question of trustworthiness. I'm not
10 going to pursue it any further. I just see personally
11 speaking only for myself a difference between that
12 particular criteria and the others that were listed in
13 five.

14 MR. MALSCH: Judge Rosenthal, I did have
15 a little thing to contribute on that. We had
16 discussed this in the course of developing the
17 protective order and I thought it had been resolved.
18 I'm not sure any longer it has been.

19 But here was my understanding. For
20 safeguards information, it is not classified
21 information. There is no statutory basis for someone
22 to do the kind of background investigation to a
23 person's associations and loyalties that one
24 associates with a security clearance program.

25 We had thought the process would run as

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1 follows. We would have an obligation to supply
2 certain very simple fundamental information about
3 citizenship and educational background and the like a
4 very simply provision.

5 JUDGE MOORE: Mr. Malsch, speaking as the
6 representative of the State of Nevada, the
7 Commission's regulations effectively give the governor
8 of the state an exemption or it's a presumption of
9 trustworthiness and wouldn't you and your entire
10 litigation team fall within that purview?

11 MR. MALSCH: Yes, that was our ultimate
12 understanding.

13 JUDGE MOORE: Okay. So now you're out of
14 the picture.

15 MR. MALSCH: Right.

16 JUDGE MOORE: How about the potential
17 parties that don't have that regulatory exemption?

18 MR. MALSCH: That's correct. We had
19 thought for other parties they would supply the basic
20 information. Our concept was at that point it was the
21 obligation of the Staff to come up with reasons why
22 they were not trustworthy and then carry the ball from
23 there. But there was no obligation to make any kind
24 of a general showing beyond some -- They have very
25 basic requirements.

1 JUDGE MOORE: Staff, what is Staff's
2 regulatory and/or statutory authority for requiring or
3 doing such a background check on someone?

4 MR. CUMMINGS: Your Honor, I think you
5 actually already alluded to the element of
6 trustworthiness that it's embodied in 7321(c) what is
7 often termed the occupational groups which includes
8 six dealing with individuals granted access pursuant
9 to a board order in an adjudicatory proceeding. In
10 that situation, the Board needs to be able to make
11 that trustworthiness determination and that is why
12 we're advocating for that there is some element of a
13 background check, some inquiry, into this individuals,
14 the requestor's trustworthiness and reliability.

15 JUDGE MOORE: But in the first instance
16 you are the one that wishes to do that, the Staff for
17 SGI.

18 MR. CUMMINGS: We believe that is required
19 following Commission precedence set forth in the
20 Catawba case already alluded to.

21 JUDGE KARLIN: I think some of the --

22 JUDGE MOORE: If putting the Catawaba case
23 aside, it only said that there had to be a
24 demonstration. It didn't deal with what's the
25 agency's statutory and regulatory authority in light

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1 of things like the Privacy Act for requiring that
2 information.

3 MR. CUMMINGS: Your Honor, at this time,
4 the Commission is currently evaluating implementation
5 of recent legislation in the Energy Bill Section 652.
6 So we don't think it's appropriate for us to comment
7 at this time as to what exactly the process will be
8 for conducting this trustworthiness determination.

9 JUDGE MOORE: Is this covered in the
10 proposed regulation that is currently outstanding that
11 we were led to believe previously in a case management
12 conference we would see the final regulation I believe
13 this month?

14 MR. CUMMINGS: I cannot speak to the
15 status of that at this time since it still is in
16 process.

17 JUDGE MOORE: Is it covered?

18 MR. CUMMINGS: I am not aware. I'm not
19 possible if we know how the Commission intends to
20 implement it, whether through regulation or order or
21 how it intends to address this. I don't believe it
22 was covered in the proposed order if you're
23 referencing that.

24 JUDGE MOORE: The proposed rule.

25 MR. CUMMINGS: The proposed rule, no.

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1 JUDGE KARLIN: I think some of the
2 questions about exactly what is meant by trustworthy,
3 reliable. We have a question about that further
4 towards the end and I think the idea was to elicit
5 some objective criteria or standards that might be
6 articulated and against which you would evaluate
7 individuals and this would be the same presumably for
8 UCNI and for NNPI and this sort of thing to the extent
9 that trustworthiness is a factor. If it's not a
10 factor, okay, fine. There may be other factors that
11 are relevant for UCNI or NNPI.

12 JUDGE MOORE: Doesn't seem to be a factor
13 for NNPI.

14 JUDGE KARLIN: But that said, we have
15 questions about that and perhaps we can get to that.
16 I would like to ask. I understand Catawba, one of the
17 earlier decisions, 04 or 06, gives this guidance about
18 how the boards might appropriately handle these sort
19 of things and that was in the context I think of need-
20 to-know decisions more specifically. Do you agree
21 that that general guidance would apply to the decision
22 of whether something really SGI?

23 MR. CUMMINGS: If you're talking about
24 classification of the document.

25 JUDGE KARLIN: Yes.

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1 MR. CUMMINGS: Maybe. Could you ask the
2 question again? I'm not sure if I quite understand
3 it.

4 JUDGE KARLIN: The Commission's decision
5 in Catawba 0406, I think, was the first one in 2004
6 gave guidance at the end of the decision, three
7 principles, and one of them was for example that the
8 boards would give deference to the staff's
9 determination, "considerable deference," were the
10 words used. But that was in the context of need-to-
11 know decisions. My question is do you think that
12 guidance is pretty good for all of the criteria here
13 in 5(a) through (f)?

14 MR. CUMMINGS: I think it's certainly
15 applicable to all the criteria which would include
16 need-to-know, trustworthiness and reliability
17 determinations as far as classification of a document.
18 We are given deference as well as you've already
19 alluded of seeing it through FOIA case law.

20 JUDGE KARLIN: So perhaps that guidance
21 can apply throughout SGI and not just a need-to-know
22 determination.

23 MR. CUMMINGS: Yes Your Honor.

24 JUDGE KARLIN: That's one reading that
25 seems to make some sense. But next question is we

1 have been appointed or the Commission has appointed
2 Mr. Baxter to be our expert at the disposal of the
3 Board for helping resolve these issues both in SGI,
4 classified and all other sensitive information I might
5 add. He's not just appointed for SGI purposes.

6 If the Staff tells us or responds to a
7 request in one way and Mr. Baxter suggests to us
8 something else, what are we supposed to do with that?
9 We have an expert at our disposal who's trying to give
10 us some advice and it may not jive with what the Staff
11 says.

12 MR. CUMMINGS: Your Honor --

13 JUDGE KARLIN: Where does considerable
14 deference lie at that point?

15 MR. CUMMINGS: I believe that would have
16 to lie with us in the determining process as to access
17 requirements. The Commission has stated that the
18 expertise lies with the NRC Staff who has expertise
19 with regards to that particular information and that
20 particular determination and in making that judgment,
21 there will be responsible individuals who make those
22 determinations and their analysis should be given
23 considerable deference in accordance with Catawba.

24 JUDGE KARLIN: Okay. Just one last
25 question if I may. This deference approach, we've

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1 been talking with DOE about UCNI, about NNPI and I
2 think as I take it they are saying we make the
3 determination. You really are not involved, but don't
4 worry about it. Trust us. Everything will be fine.
5 Everyone will get all the material. Their approach
6 then is that they make that determination, total
7 deference as opposed to considerable.

8 Now what's the Staff's position on that?
9 I know you say that's not our information. We don't
10 care. But if this was ever litigated or appealed the
11 Staff might pop up and have a position and I wonder if
12 you have one now.

13 MR. CUMMINGS: On the NNPI and UCNI and
14 the OUO they're claiming?

15 JUDGE KARLIN: Yes.

16 MR. CUMMINGS: We do not have a position
17 as to whether -- The total deference idea does not
18 apply to SGI. As you stated, the stand would be
19 considerable deference. I would have to look further
20 again into the authority they're claiming for this
21 authority.

22 JUDGE KARLIN: Okay. Thank you.

23 JUDGE MOORE: As part of the Staff's view
24 of trustworthiness and reliability, where does
25 citizenship play?

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1 MR. CUMMINGS: Citizenship is not an
2 element for access. It is not a requirement for
3 access.

4 JUDGE MOORE: We heard and one might say
5 somewhat surprisingly that for UCNI and NNPI it's not
6 a question of access as in the case of safeguards.
7 It's just a question of protection of the information
8 once access is given. In light of that, why has the
9 Staff advocated treating in the proposed joint order
10 the other categories of information on par or in
11 parallel with SGI?

12 MR. CUMMINGS: Your Honor, in the proposed
13 protective order, we tried to set out that there's
14 essentially a distinction made between as you stated
15 the access requirement and the handling requirement,
16 the protection. In working with the other parties, we
17 separated out very clearly what the access
18 requirements are because SGI does carry with it
19 different access requirements such as a
20 trustworthiness and reliability determination that the
21 other documents do not.

22 As far as protection of the documents, we
23 were in the discussions between the parties, the State
24 of Nevada and the DOE, we came up with what process
25 would be acceptable to handle the information in

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1 question and the process I think that was used is in
2 large part some of the guidance for SGI handling. If
3 the Board chose to set up a different regime for
4 handling different information, I don't think that
5 would be a problem just so long as SGI since it does
6 seem to be handled to the highest level of protection
7 of these types of documents to my understanding, we
8 would just need to keep those protections in place.

9 JUDGE KARLIN: DOE has indicated that it
10 has a different standard in terms of they don't have
11 a need-to-know requirement, they don't have a
12 trustworthiness and reliability requirement, they
13 don't have a technical competence requirement. Why
14 does SGI have all these things? Has the NRC encrusted
15 upon things more than the minimum restrictions
16 required as specified in the statute?

17 MR. CUMMINGS: No Your Honor. The statute
18 set forth the information to be protected and gave
19 into the agency the responsibility to set forth the
20 regulations after notice and comment for the adequate
21 protection of this information. The protection
22 requirements including access for SGI are higher than
23 these other documents but it's my understanding that
24 is commensurate with the type of information in
25 talking to security experts.

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1 JUDGE KARLIN: You mean the criticality
2 information about Naval nuclear propulsion and the DOE
3 facilities information at UCNI? It sounds like pretty
4 heavy stuff to me too.

5 MR. CUMMINGS: I can't speak to the
6 specifics of the information in question but what I
7 can speak to are the requirements in place in the
8 regulations and the requirements set forth by the
9 Commission as far as the protection that is necessary
10 for SGI.

11 JUDGE KARLIN: Right. Okay. I think we
12 ought to be very careful if we go any past that.

13 MR. CUMMINGS: Yes Your Honor.

14 JUDGE KARLIN: We have to meet our regs
15 but any more than that. I think that the proposed
16 protective order seemed to have some elements that are
17 more than regulatorily required.

18 MR. MALSCH: Judge Karlin, let me add one
19 little interesting statutory piece to this mix. If
20 you look at Section 181 which is the original of the
21 requirement to have procedures that minimally impair
22 procedural rights, you will see that the Commission
23 itself is expressively given the power in that respect
24 over both Section 147 information and Section 148
25 information.

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1 JUDGE KARLIN: Right.

2 MR. MALSCH: And that was added after the
3 Organization Act was passed. So clearly the Congress
4 had in mind Commission meaning Commission, not the
5 elite.

6 JUDGE KARLIN: Yes. And this whole
7 rhubarb about whether counsel have to have an expert
8 and the expertise and all of that is on SGI. I'm not
9 sure whether I see anything in the regs or in the case
10 law that require the position that you have taken.
11 But we'll get to that later.

12 JUDGE MOORE: Mr. Malsch, before we break
13 for lunch, you mentioned, and this problem may as a
14 practical matter go away in light of the information
15 that we've learned that citizenship for NNPI
16 information is waiveable. But would you be so kind as
17 to explain in more detail the problem that Nevada has
18 had in hiring and assembling a team of experts and why
19 foreign nationals has been your source as opposed to
20 U.S. citizens?

21 Now I recognize having been on the various
22 commission adjudicatory blatees for some time that
23 this is a very closed and insular industry and that
24 there have been over time complaints and noises made
25 that it's very difficult for one challenging an

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1 application to hire an expert because that expert
2 likely never will work again in the business if they
3 are to oppose something. That we are familiar with.
4 But for Yucca Mountain, it being such a unique
5 situation, would you be so kind as to highlight to us
6 what the real problems are and why they exist?

7 MR. MALSCH: There are two problems. One
8 is just the practical problem of (1) it's a small
9 universe of experts especially experts in doing
10 performance assessment and (2) ---

11 JUDGE MOORE: And so that's a conflict of
12 interest problem basically.

13 MR. MALSCH: Well, there's that. I'll get
14 to that in a second and there just are not that many
15 people with the kind of expertise we're really
16 interested in. So the universe is by nature small and
17 complicated by the fact that putting conflicts of
18 interests aside for the moment, most of the people
19 just would prefer to look forward to working with DOE
20 and other agencies rather than the state as a
21 practical matter.

22 But there is a serious conflicts of
23 interests issue because under the statutes it turns
24 out in the way they're drafted. Let's say a
25 performance expert who worked for NRC and Yucca

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1 Mountain is perfectly free to switch sides and work
2 for DOE. That person cannot switch sides and work for
3 anybody else like the state. So as a practical
4 matter, post employment conflicts operate to greatly
5 restrict the opportunities Nevada would have to get
6 experts who have actually worked on Yucca Mountain.

7 JUDGE MOORE: We'll break. It's now 12:05
8 p.m. We'll break until 1:00 p.m. for lunch and
9 reconvene. Thank you very much. Off the record.

10 (Whereupon, at 12:05 p.m., the above-
11 entitled matter recessed to reconvene at 1:01 p.m. the
12 same day.)

13 JUDGE KARLIN: During the lunch recess, I
14 think we estimated that we are at question - what
15 question are we on - ten. And perhaps we've answered
16 that to some extent, and at this point we might go to
17 the Staff first.

18 The question was, if we treat this like,
19 as we have done with regard to the second case
20 management order, would it be possible for the Staff
21 to suggest to the parties, to suggest jointly the
22 minimum elements needed for a prima facie case that
23 something is, indeed, safeguards information?

24 MR. CUMMINGS: Well, I think that would be
25 the demonstration that falls within the Withholding

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1 Statute 1-47 in this case for SGI.

2 JUDGE KARLIN: Exactly. But what are the
3 elements of meeting the Statute 1-47 SGI?

4 MR. CUMMINGS: If we were to go through --

5
6 JUDGE KARLIN: I mean, just like we did
7 with Appendix A, B, C on the second case management
8 order.

9 MR. CUMMINGS: I don't know if we want to
10 go through setting out those elements.

11 JUDGE KARLIN: Well, that was the
12 question.

13 MR. CUMMINGS: Right.

14 JUDGE KARLIN: Have you thought about
15 that? I mean, that's our question that we asked.
16 What would be the elements of a prima facie case for
17 SGI that we could articulate and put as an attachment
18 to a case management order, which would be a basis
19 upon which we could all evaluate, and which you could
20 then list it as a header only with a privilege log.
21 The privilege log might articulate well, we meet the
22 following 13 elements, so you could put a privilege
23 log together for SGI. We would have to have the
24 elements.

25 MR. CUMMINGS: We had not been

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1 contemplating putting that kind of prima facie
2 elements together in a privilege log for privilege log
3 purpose.

4 JUDGE KARLIN: So you didn't read the
5 question?

6 MR. CUMMINGS: No, Your Honor. I'm sorry.
7 I assumed that you were asking what would be the
8 elements against which the privilege would be
9 examined, and that would be a demonstration or a
10 determination that it fell within the definition of 1-
11 47 for safeguards information.

12 JUDGE KARLIN: Well, that's kind of a
13 totalogy that doesn't help very much. Okay. But then
14 you've answered the question, which is we don't have
15 an answer. DOE, we have the same question with regard
16 to UCNI NNPI, is it possible for -- I know what the
17 answer will be, but what would the criteria be for a
18 prima facie case of each of those? Even if you posit
19 that we have no authority to deal with it, presumably
20 you have some criteria that must be met.

21 MR. EDWARDS: Yes, UCNI and OUO, and NNPI
22 - all three are defined in the underlying orders and
23 regulations, and we've given you copies of those
24 today. And each one of those elements would have to
25 be satisfied in order to make out a prima facie case.

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1 JUDGE KARLIN: Right. And what are they?
2 I mean, could you suggest for me just -- because you
3 cited for NNPI, for example, three different parts of
4 the Code of Federal Regulation, a lot of material I
5 wasn't able to digest at all. You also cited the
6 NAVSEA documents which you won't show us unless we
7 agree to certain conditions.

8 Anyway, what are the prima facie elements
9 of in NNPI? I mean, just give us an example. I'm not
10 asking you to 4B.

11 MR. PUTZU: I'm not quite sure I'm fully
12 following the question. The criteria would be in the
13 NAVSEA instruction that we've cited.

14 JUDGE KARLIN: Okay. Well, I guess I got
15 the answer I wanted. But our contemplation was, if
16 you look at the second case management order, there
17 are Appendices A through whatever, that lay out prima
18 facie elements so that when a document is header only,
19 there might be a privilege log provided which would
20 say - and it meets the criteria of NNPI, and here is
21 why. And we have a counsel who certifies that it
22 meets the criteria of NNPI, or UCNI, or SGI, or
23 attorney/client, or whatever else.

24 MR. EDWARDS: Right. If a document --
25 there would be a reason that something has been

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1 designated as UCNI or OOU, and so those definitions
2 are set out in the order and the manual so it wouldn't
3 meet those requirements.

4 JUDGE MOORE: Assuming for the moment that
5 we do not accept that the regulations for UCNI and
6 NNPI, which it's been agreed to here today were not
7 written with this contemplating at all, the
8 adjudicatory context in which we find ourselves.
9 Rather, they're dealing with an employer or DOE/DOD
10 contractor and employee situation.

11 Assume for the moment that we conclude
12 that those regulations are not binding on us, what are
13 the prima facie elements of NNPI in the same way in
14 which they're laid out for attorney/client privilege,
15 litigation work product privilege, delivery process
16 privilege in the second case management order.

17 MR. EDWARDS: For UCNI I would refer you
18 to 1017.7 and 8. The criteria are in Section A-B.

19 JUDGE MOORE: That's 10 CFR 1017 point?

20 MR. EDWARDS: Seven.

21 JUDGE MOORE: Point seven.

22 MR. EDWARDS: So the criteria are set out
23 there, and in 1017.8, gives you the different
24 classifications of UCNI.

25 JUDGE KARLIN: And would it be possible

1 for you to submit an appendix, a document a la
2 Appendices A, B, C that would have your articulation
3 of those criteria? Some summary of them. I mean, we
4 don't want to be cross-referenced to a reg or a
5 statute. We just want a statement, just like we have
6 for the other appendices. We might ask for that.

7 MR. EDWARDS: I think the answer is no,
8 without some protection. It's the same issue we run
9 into with respect to the NAVSEA instruction document,
10 the joint agreement between DOE and NRC on
11 classification, because the process itself gives hints
12 or actually may disclose the information that is being
13 protected.

14 JUDGE MOORE: Okay. While you bring that
15 up, let's go to that subject for a moment, which we
16 were saving for the very end, but we had requested a
17 copy of a document which you cited in the proposed
18 order, and which in that proposed joint order would
19 purport to hold people accountable to. And you gave
20 us notice per our instruction in advance that you
21 wished to file that, and then requested that we, the
22 Board, confirm to you that we would protect it in
23 accordance with NRC procedures and the procedures
24 that are set forth in NNPI regulations.

25 My question is, first and foremost, if you

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1 will look, I believe it's the first footnote, first or
2 second footnote of your proposed order, the first
3 footnote, which indicates that this proposed order
4 does not apply to the NRC Staff and the consultants,
5 et cetera, et cetera. And the latter part of it
6 similarly exempts DOE. Why is not the first part of
7 that fully applicable to this panel and cover the
8 situation so that any and all of that information can
9 be provided to us in the same way that it can be
10 provided to the Staff?

11 MR. PUTZU: The answer I think is that we
12 know that the Staff has in place adequate protection
13 measures. What we don't know is how the information
14 once submitted to this Board is handled.

15 JUDGE MOORE: Now we are the delegate of
16 the Commission. Would you propose that the Commission
17 reveal that same thing to you, the five Commissioners?

18 MR. PUTZU: The document we're talking
19 about is a NAVSEA instruction document. I think the
20 answer to that is yes. Some affirmation -- I mean,
21 I'm told by the people who have the authority with the
22 Navy Nuclear Propulsion Program that they need some
23 affirmation that, in fact, the protection procedures
24 will be followed.

25 MR. EDWARDS: Your Honor --

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1 JUDGE MOORE: But if you turn that
2 information over to the Staff as the footnote one says
3 they're entitled and the provisions of this joint
4 protective order don't apply to the Staff, because
5 it's already covered by --

6 MR. EDWARDS: By their own internal
7 protection requirements.

8 JUDGE MOORE: Why is that adequate for the
9 Staff and not adequate for us?

10 MR. EDWARDS: Here's the practical
11 situation. When the folks from the Navy asked me and
12 said, "Jeff, if we give a document to the PAPO Board,
13 will it be maintained as is required in a secure
14 location? Is the door locked", or whatever the
15 requirements are. I couldn't answer that question,
16 and there's no place I can go and look, and say what
17 are the protection requirements for the documents that
18 we give to the Board? That's the --

19 JUDGE MOORE: And where might you have
20 looked to find them for the Staff?

21 MR. EDWARDS: We know that they have their
22 own internal processes in their own documents that
23 cover how SGI documents, for example, are handled and
24 stored.

25 JUDGE MOORE: The thing that was

1 interesting was that it was not -- what you asked of
2 us was not just that it would be handled in accordance
3 with the way the NRC handles sensitive information,
4 but it was also in addition to these regulations
5 and/or internal orders for NNPI, which we had never
6 seen. And so we thought that -- and your proposed
7 order asked people to agree to something they've never
8 seen. And there's a certain element of a rubber
9 sandwich there, and we would have thought, very
10 frankly, that you would have seen that, and not have
11 proposed such a problem.

12 You want us to agree to something that we
13 haven't seen, and yet you won't give us the document
14 until we agree to do that. And so that's, very
15 frankly, why we said we'd take it up today.

16 MR. EDWARDS: Right. Now with respect to
17 the comment that we're asking parties to agree to
18 something they've never seen; in fact, we had a fair
19 amount of discussion as we were doing the protective
20 order about the underlying support, and Mr. Moss made
21 the request for the documents that underlie the
22 protections that are in the draft protective order,
23 and they were provided.

24 With respect to the NAVSEA at the time we
25 were doing this, it was a previous version of the

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1 NAVSEA Revision B that was provided in a redacted
2 form, and that, at that time, seemed to be acceptable.

3 JUDGE KARLIN: But you submitted a
4 proposed protective order to us for our signature;
5 and, therefore, we take that seriously if we're going
6 to issue an order, that we want to know what we're
7 ordering and what the basis of it is. And three
8 occasions in that protective order you cited this
9 NAVSEA document B, now C, I don't care - C, B. Three
10 occasions in the non-disclosure agreement you cited
11 the NAVSEA document, and it seems to me that DOE has
12 the burden as the applicant coming forward, and has
13 the burden as the privilege claim in coming forward to
14 support what it is asserting. And so when we ask for
15 the document that you claim supports it, you say you
16 won't give it to us unless we agree to the conditions
17 that we're trying to evaluate, whether the conditions
18 are appropriate or not, so it's kind of a looking-
19 glass -- you've asked us to sign something. Just
20 because the three of you agree to it and saw the
21 document, we need to see the document, too. And
22 that's why we asked for it. We didn't ask for it
23 because we had some great -- we asked for it because
24 you cited it in support of your position. And if you
25 want to withdraw that position, then we don't need it.

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1 MR. PUTZU: If I may, Your Honor, I think
2 just to follow-up on Jeff's comment. The reason we
3 had done that, as Jeff had alluded to, we worked with
4 the NRC Staff over many, many years on these security
5 issues, and thoroughly familiar their's, they're
6 thoroughly familiar with our's. And, of course, at
7 the NRC level itself, where there was an issue that
8 was a little bit confusing and troubling to my client,
9 was we couldn't put our thumb on any specific
10 procedures from the PAPO Board. And didn't even know,
11 frankly, whether you were going to try to create your
12 own process or not, or just follow along, or latch-on,
13 as you said this morning, to other processes.

14 With all that said, that was the
15 inherency. We just needed to be certain under our
16 executive orders of what the process itself is going
17 to be, and what you were going to follow. With all
18 that said, Judge Moore, your comment about -- your
19 affirmation a few moments ago is more than sufficient
20 to warrant turning over the document in its entirety
21 today, if you'd like.

22 JUDGE MOORE: Well, we are bound by the
23 Commission's regulations and procedures in dealing
24 with safeguards information and classified information
25 in this panel in its entirety. This Board, as part of

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1 that panel, does so. But we cannot and will not agree
2 to any procedures that we haven't seen in advance, and
3 so that was why we said no, we're very sorry. And
4 very frankly, we were somewhat surprised that you
5 would present such a rubber sandwich to us, and why we
6 deferred it until today, because we are an entity of
7 the NRC and the Commission's trial delegate, and
8 whatever applies to the Commission applies to us.

9 MR. PUTZU: Thank you, Your Honor.
10 Certainly, we didn't mean to imply anything untoward
11 or anything like that. It was again, from a security
12 perspective, they just wanted to be confident that
13 there was, in fact, a process in place, but that was
14 the extent of it.

15 JUDGE MOORE: But the same problem arises
16 in your approach that you want others not before you
17 today or negotiating with you to agree to something,
18 specifically that document and its terms, without
19 being able to see it. And that's -- if you will look
20 at the proposed affidavit of non-disclosure on page
21 20, 19 is Paragraph 10 and it's E in Paragraph 10,
22 that that is one of the documents that they agreed to
23 comply with access and control provisions, and
24 internal DOE orders. And E is listed, and it's
25 Formula B, not Formula C, which is the amended form.

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1 And they agree compliance with requirements, et
2 cetera, et cetera, and list that document. And yet,
3 they don't get to see it before they agree to it. And
4 that is something, that as you surmise, is going to
5 present great difficulties, not only to this Board but
6 to those who are asked to comply and sign such an
7 affidavit of non-disclosure.

8 MR. EDWARDS: We talked about that, Your
9 Honor, during the course of our discussion, and
10 looking back at page 20, the last sentence of
11 Subparagraph E says, "Compliance with the requirements
12 of the non-disclosure affidavit and accompanying
13 protective order constitute compliance with the NAVSEA
14 instruction." And we had specific discussion with the
15 State about that, because they asked that question;
16 how can we comply with something we don't see?

17 The answer that I was provided, and that
18 we gave and satisfied the State is that if you comply
19 with the specific procedures that are set out on their
20 face in the protective order, that is deemed to be
21 compliance with the NAVSEA instructions.

22 JUDGE KARLIN: Well, if we go to the
23 protective order, I mean, footnote five, footnote
24 seven, and paragraph -- let's see, page 4, "Access
25 control to NNPI, must conform to NAVSEA", blah, blah,

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1 blah. And you don't have NAVSEA blah, blah, blah.

2 MR. EDWARDS: You don't need it.

3 JUDGE KARLIN: But if I'm committed -- if
4 the order says you -- the non-disclosure affidavit
5 says I will do whatever is said in the protective
6 order. The protective order says you must comply with
7 NAVSEA, whatever, but you can't see NAVSEA.

8 MR. EDWARDS: The intent is whatever you
9 had to comply with is set out on its face in the
10 order.

11 JUDGE KARLIN: Well, then we should delete
12 all references to NAVSEA and the protective order
13 because that's not necessary?

14 MR. EDWARDS: I will admit it could be
15 drafted better. I'm not sure you would want to delete
16 all the references to NAVSEA.

17 JUDGE KARLIN: Okay. But you're just
18 saying the four --

19 MR. EDWARDS: It could be drafted better.

20 JUDGE KARLIN: Then the four corners of
21 the protective order will tell you what you need to
22 do, with no reference to this document you can't see
23 until you agree to it.

24 MR. EDWARDS: Whatever you had to do will
25 be stated in the four corners of the document. That's

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1 right.

2 JUDGE KARLIN: Okay. Well, just not the
3 way it's written now.

4 MR. MALSCH: JUDGE Karlin, just to
5 clarify.

6 JUDGE KARLIN: Turn now to the --

7 MR. MALSCH: Oh, excuse me.

8 JUDGE KARLIN: I'm sorry. Mr. Malsch.

9 MR. MALSCH: I was provided with what
10 looks to be, with one exception of an enclosure, an
11 unclassified, but nevertheless complete version of the
12 NAVSEA document, and that's what I was assuming was
13 incorporated by reference. I have not seen anything
14 else. I've never seen any classified document.

15 JUDGE KARLIN: Let's ask that question.
16 It's not classified, I don't think, but is it -- the
17 Egan decision, the Navy versus Egan, I haven't had a
18 chance to read it, but I do understand that it deals
19 with national security information and clearances,
20 national security clearances.

21 MR. PUTZU: That's are the specific facts
22 of that case.

23 JUDGE KARLIN: Are you suggesting that
24 NNPI is national security information?

25 MR. PUTZU: No, no, no. No, of course

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1 not.

2 JUDGE KARLIN: Okay.

3 MR. PUTZU: I was just citing that case
4 for the proposition, and there are dozens of cases
5 after Egan, in which the management of national
6 security information is committed exclusively to the
7 Executive Branch.

8 JUDGE KARLIN: Right. But this is not
9 national security information, NNPI.

10 MR. PUTZU: I think NNPI is considered
11 national security.

12 JUDGE KARLIN: That's what I was asking,
13 are you claiming that NNPI is national security
14 information? I think it is not, but maybe I'm wrong,
15 if you could give me a cite. It's not national
16 security information.

17 MR. PUTZU: Your Honor, my security expert
18 tells me no, it is not.

19 JUDGE KARLIN: So the applicability of
20 Egan and its progeny?

21 MR. PUTZU: I'd have to look at all the
22 specific cases, but I've -- all my research I've never
23 found a court that's ever sustained a tribunal
24 article, whether Article 2 or Article 3, second-
25 guessing or getting involved in the decision-making

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1 designation of information.

2 JUDGE KARLIN: Okay. But you were citing
3 it as authority for the proposition that we have no
4 jurisdiction. And, in fact, it's in a different area.
5 It might be analogous in some ways, just like SGI.

6 MR. PUTZU: Your Honor, again with that,
7 we'd have to brief this issue. It's another very
8 complicated area of law. With due respect, I think
9 that's splitting hairs.

10 JUDGE MOORE: Let's move on to --

11 MR. CUMMINGS: Your Honors, if I could
12 interrupt just to expand on my answer to JUDGE
13 Karlin's question with regards to the prima facie
14 elements that could be set forth in a protective
15 order. While we want to limit the amount of
16 information to avoid potential disclosure of
17 information, and trying to describe what that
18 information is, that would be considered safeguards.
19 There could be additional elements that could be used,
20 that could be found in 10 CFR 73.21(b) which details
21 information to be protected, and it lists categories
22 and examples. And perhaps that type of information,
23 that level of detail could be used to further --

24 JUDGE MOORE: That question always arises
25 because both in the UCNI regulations and the SGI

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1 regulations, how does Yucca Mountain fall within a
2 production or utilization facility, which is -- and as
3 long as we're talking about that, let's find out are
4 we talking about is it source material, byproduct
5 material, or special nuclear material that's going in
6 there, or all three?

7 MR. CUMMINGS: I believe it's special
8 nuclear material.

9 JUDGE MOORE: And so no byproduct and no
10 source?

11 MR. CUMMINGS: I can't state that with
12 surety.

13 JUDGE MOORE: These regulations are all
14 premised on that question, as well as whether it's a
15 utilization or production facility.

16 MR. MALSCH: Judge Moore, it's clear --
17 well, first of all, the repository will include both
18 special nuclear material in the form of say plutonium
19 and spent fuel, but also byproduct material, because
20 the fission products and the spent fuel are byproduct
21 material. But the facility itself is clearly neither
22 a production facility, nor a utilization facility.

23 JUDGE MOORE: If that's the case, how do
24 those SGI regulations apply to Yucca Mountain and
25 Yucca Mountain documents? Well, let's start with the

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1 Staff.

2 MR. CUMMINGS: Yes, Your Honor. Going
3 back to 10.10(b)6, it states that the information will
4 be protected in accordance with the provisions in
5 73.21, so I believe that would be a means to bring in
6 these protective measures for SGI.

7 JUDGE MOORE: Mr. Malsch.

8 MR. MALSCH: I think 147 is broad enough
9 to cover, for example, security measures for SMM.

10 JUDGE MOORE: DOE, do the UCNI or NNPI, or
11 OOU regulations and/or underlying statute as statutory
12 authority have a similar way to avoid the production
13 utilization problem, or aren't they premised on such
14 a factor?

15 MR. IRWIN: I don't think they're premised
16 on it, but frankly, that's not an issue that I am
17 prepared to answer. Those provisions stand alone. I
18 don't think they're premise.

19 MR. MALSCH: Judge Moore, actually there's
20 a problem with 148. It's much more narrowly drafted
21 than 147.

22 JUDGE MOORE: Yes, I think 148 talks about
23 unclassified information pertaining to the design of
24 production facilities or utilization facilities; (B)
25 security measures for the physical protection of

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1 production or utilization facilities, nuclear material
2 contained in such facilities or that in transit, which
3 is parallel sort of to 147, and the design,
4 manufacture, utilization of any atomic weapons or
5 component. So I'm certainly not an expert in that,
6 but I'm trying to -- I think there are statutory
7 elements of interest in terms of if you were trying to
8 articulate or give us a prima facie what are the basic
9 elements. That could be helpful to us.

10 MR. EDWARDS: I guess the other point I'm
11 making, and I don't know that this is determinative
12 either, but the documents -- the information that has
13 been classified, for example, or designated as perhaps
14 UCNI, very well could have been generated information
15 from production or utilization facilities, not at RW
16 themselves.

17 JUDGE MOORE: Is this a matter that is
18 going to have to be wrestled with fortunately only 10
19 times for UCNI, if someone wishes to see it and
20 challenges how it can be so designated if it's not
21 production or utilization information dealing with a
22 production or utilization facility?

23 MR. EDWARDS: That is not a question I had
24 thought about before today.

25 JUDGE MOORE: Then let's move on to the

1 question you were cogitating on over the lunch break.
2 In the same way that we sought to have documents
3 redacted in the belief that for the secondary
4 privileges in the second case management order, likely
5 make the problem go away in all probability, or
6 certainly diminish it, if the documents were redacted
7 and placed on the LSN. Is that a feasible option
8 here, so that it's done, and in all probability any
9 disputes would be minimal because the basic
10 information could be seen, and it's no longer UCNI or
11 OOU, or NNPI if that part of it's been redacted?

12 MR. EDWARDS: The answer is redaction is
13 certainly possible with respect to all of these
14 documents.

15 JUDGE MOORE: Is it practical, and does it
16 make sense?

17 MR. EDWARDS: Yes, it's practical. I
18 mean, it's not a super human task. It's not something
19 that would take forever to do. We're talking in the
20 great scheme of things about still a relatively small
21 number of documents; so yes, it can be done. It can
22 be done practically. I can't tell you that there
23 won't be some documents that will end up like the ones
24 you were talking about before lunch. I can't tell you
25 that. And I can't tell you that a decision will be

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1 made with respect to some documents that redaction is
2 not possible because the information is all bound up.
3 But with those caveats, yes.

4 JUDGE MOORE: Is it a course that you
5 think would be worthwhile to pursue to avoid a great
6 number of disputes that are likely to otherwise arise?

7 MR. EDWARDS: The answer is yes, because
8 for the reasons that I've talked about earlier this
9 morning, once everything is sort of boiled down and
10 you look at exactly what the requirements are, I don't
11 think that there are going to be a whole lot of
12 disputes. But as you said, I could be wrong about
13 that, and redaction is certainly a method to take care
14 of what would remain of possible disputes.

15 MR. EDWARDS: Now if we don't do it in
16 advance and put them up on the LSN, but rather wait
17 for each dispute to arise, how quickly can DOE and DOD
18 turn them around on a case-by-case basis, because that
19 then might become a critical path item.

20 MR. PUTZU: Your Honor, let me speak just
21 the NNPP question, because we did discuss this in the
22 last few days.

23 MR. EDWARDS: And that's the lion's share
24 of the material.

25 MR. PUTZU: Yes, it is. It was -- head of

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1 security has informed me, and Naval Reactors informed
2 me that that process would be -- to do all 4,600 would
3 be measured in weeks, eight to twenty week time frame.
4 We can't really make a promise, but that would be the
5 general time frame in which all 4,600 could be
6 redacted.

7 JUDGE MOORE: On a case-by-case basis,
8 assume that some handful of -- just take a round
9 number, 300. There were 300 disputes, could you turn
10 those around in 10 days, redact them in 10 days?

11 MR. PUTZU: If we had to, I think we could
12 meet that.

13 JUDGE MOORE: You're shaking your head
14 yes, and behind you there's heads going in the
15 opposite direction, so you might want to either get a
16 rearview mirror or turn around.

17 MR. PUTZU: Well, my people are shaking
18 their head yes, so I don't know who's shaking their
19 head no. It could be for other reasons. I don't
20 know. The 300 documents, again - I'm a little bit
21 cautious about this, because this is fairly rank
22 speculation, and I don't know what 300 documents they
23 are, and how long they are. But just based upon what
24 I know about the documents and my conversations, 300
25 documents in 10 days would be achievable.

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1 MR. SHEBELSKIE: Judge Moore.

2 JUDGE MOORE: I'm sorry.

3 MR. SHEBELSKIE: Judge Moore, I think in
4 fairness to the Counsel for the Navy, he's thinking in
5 time frames of his security personnel doing the
6 redaction. And I think implicit in your question
7 also, though, is rolling them out to the LSN. On our
8 LSN projects, we have to get the documents redacted,
9 the Navy has to satisfy themselves, then they get the
10 images to us, so a 10-day period from someone makes
11 the request to its being on the LSN is less than 10
12 days for the Navy.

13 JUDGE MOORE: Oh, no, no. But what kind
14 of add-on do you need?

15 MR. SHEBELSKIE: A week. If they come to
16 us in electronic form -- again, we may have a process
17 sort of like we had with the ECP files, maybe you put
18 out a PDF of it to the requesting party quickly once
19 the redaction is done while the document is then being
20 crawled and indexed on the LSN. There are probably
21 ways to skin that cat. I just wanted to alert that
22 there's that tail-end processing side to it.

23 JUDGE MOORE: Mr. Malsch, do you think
24 there's any advantage to having them redacted and get
25 them out there now, because it appears, and I'm sure

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1 that Mr. Shebelskie will correct me if I'm wrong, that
2 there's an adequate amount of time now before there's
3 going to be a certification of the document collection
4 by DOD.

5 MR. MALSCH: No, I think that would be a
6 very good idea. Also, it would have an additional
7 advantage, because as DOE is presumably going forward
8 and looking to putting together the license
9 application, they could in the first instance go with
10 the redacted versions to see whether it's possible to
11 support an application of just redacted versions.

12 JUDGE MOORE: Staff, do you have any view
13 on this?

14 MR. CUMMINGS: Yes, Your Honor. Yes, we
15 do. We're dealing in our purview the SGI. We do not
16 believe that --

17 JUDGE MOORE: No, no, view on --

18 MR. CUMMINGS: Oh, view on DOE's --

19 JUDGE MOORE: The utility of OOU, UCNI,
20 and NNPI.

21 MR. CUMMINGS: We don't have a position on
22 the utility of redaction of their documents.

23 JUDGE MOORE: I'm sorry?

24 MR. CUMMINGS: We don't have a position on
25 the utility of redaction of their documents.

1 JUDGE MOORE: Okay. Same question for
2 safeguards.

3 MR. CUMMINGS: Yes, Your Honor.

4 JUDGE MOORE: At this point, you don't
5 have any, so you're not facing much of a work load.

6 MR. CUMMINGS: Not much of a burden right
7 now, but due to the sensitive nature of the documents,
8 Your Honor, and the strong interest, and the duty in
9 the Commission to protect this information from
10 inadvertent disclosure, and the fact that through the
11 redaction process it can only but increase the
12 opportunity and the chance that there will be
13 inadvertent disclosure, we believe there's a strong
14 interest in not taking the redaction route.

15 JUDGE MOORE: We deal all the time in
16 opinions and go through a process so safeguard
17 information is deleted, and indeed, the Commission has
18 demanded that they be published sans the safeguard
19 information.

20 MR. CUMMINGS: Yes, Your Honor. But in
21 this case, since we don't know how many documents we
22 may be dealing with, we're not sure of the time frames
23 involved, we believe that the risk of inadvertent
24 disclosure outweighs maybe the utility and the benefit
25 from the redaction since they can gain access to all

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1 of the information that they're seeking to use through
2 the protective order process.

3 JUDGE ROSENTHAL: And you're raising
4 questions as to the competence of your redactors?

5 MR. CUMMINGS: No, Your Honor.

6 JUDGE ROSENTHAL: Well, that's what it
7 sounds like to me.

8 MR. CUMMINGS: No, Your Honor. However,
9 Your Honor, inherent in redaction is the potential for
10 inadvertent disclosure.

11 JUDGE ROSENTHAL: Well, I suppose there's
12 always that potential, but how great the potential is
13 hinges, I would think, upon the quality of the people
14 doing the redacting.

15 MR. CUMMINGS: Yes, Your Honor, but I
16 think in this case, we have the protective order
17 avenue to gain access to the documents, so we believe
18 that is a sufficient --

19 JUDGE KARLIN: Well, that's not
20 necessarily an assumption we're making. I think as we
21 go through how material is treated under the secondary
22 privileges in the second case management order, so it
23 seems anomalous for you to say -- I mean, redaction is
24 the norm. There's an obligation to put all
25 documentary material that is not privileged in full-

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1 text out on the LSN. Right? And if you -- and I
2 think there's a general rule that if you can redact
3 the material out and put it on the LSN, you should do
4 so.

5 MR. CUMMINGS: I don't believe there is a
6 rule in the LSN with regards to --

7 JUDGE KARLIN: Well, not in the LSN, but
8 I think under the FOIA regulations, 2.390, there's
9 inextricably intertwined language, and otherwise I
10 think redacted versions need to be made available. In
11 any event, there are those select few who may agree to
12 sign the protective order and see these documents in
13 the secrecy of the protective order, but there is also
14 a public process that is going on here, and the LSN is
15 out there for a public process for the public to see
16 and to understand what this process is all about. So
17 I think putting redacted versions out there that the
18 public could see is a valuable element that the
19 Commission probably would endorse, if asked that
20 question, over and above just allowing the signors of
21 the protective order to see the secret information.

22 JUDGE ROSENTHAL: Well, beyond that,
23 aren't there limits on who might be given in
24 particular a document under a protective order? Isn't
25 there an element of trustworthiness and all that? I

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1 mean, it's not just anybody that comes off the street
2 that you're going to be prepared to give the document
3 to, so long as they are prepared to put their John or
4 Jane Henry on a protective order.

5 MR. CUMMINGS: That is correct, Your
6 Honor, but that is commensurate with the sensitivity
7 of the information that we're dealing with.

8 JUDGE ROSENTHAL: Well, I understand that,
9 but you are suggesting that there was no need to go
10 the redaction route because people would get this
11 information under a protective order. And I'm
12 suggesting to you that may or may not be the case,
13 depending upon who it is that is seeking the document,
14 and whether or not the staff is prepared to provide it
15 to that individual.

16 MR. CUMMINGS: Well, Your Honor, I don't
17 mean to imply that there's no burden at all. I don't
18 mean to imply that. However, we believe that that
19 burden of going through the protective order is the
20 best route to ensure that inadvertent disclosure of
21 this information does not happen.

22 JUDGE MOORE: Well, this is inadvertence
23 on the Staff.

24 MR. CUMMINGS: In the redaction process,
25 or this could be documents within the purview of

1 another --

2 JUDGE ROSENTHAL: May I suggest to you
3 that the redaction process may avoid some very thorny
4 questions as to whether X or Y is sufficiently
5 trustworthy to see the document under a protective
6 order. I mean, that's, frankly, one of the problems
7 that I have, is in this proceeding all of these
8 potential parties, and all of these questions about
9 reliability, trustworthiness, questions that are not
10 presented in your customary proceeding where you've
11 got some defined parties and you can make a judgment
12 with respect to their reliability; that being so, it
13 seems to me that even with this risk of inadvertent
14 disclosure, the redaction process has certain decided
15 benefits, because it avoid this, or may avoid this
16 very thorny issue as to whether a particular
17 individual is deemed sufficiently reliable to be given
18 the information under a protective order.

19 MR. CUMMINGS: I understand your point,
20 Your Honor, but dealing with a small universe of
21 information, we believe that the protective order
22 mechanism is probably the best way to gain access to
23 the sensitive information.

24 JUDGE ROSENTHAL: And we just have to deal
25 with this trustworthiness.

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1 MR. CUMMINGS: Yes, Your Honor.
2 Absolutely.

3 JUDGE MOORE: DOE, you have 40 SGI
4 documents. I'm sorry you haven't been sequestered, so
5 you would not have had to listen to the Staff's
6 speech, but do you see that your redactors are not
7 sufficiently reliable, that they can't do their job so
8 that redaction of those 40 documents is not a feasible
9 option?

10 MR. EDWARDS: The framing of your question
11 frames my answer. I would certainly not agree with
12 that. They know what the requirements are. There's
13 a classification guide that exists that gives you what
14 the criteria is, and they can identify the
15 information, I would presume. I don't know of any
16 reason why they couldn't do that.

17 JUDGE MOORE: And as a practical matter,
18 you always err on the side of caution or conservatism,
19 and then it would have to be fought out. So I guess
20 just personally, I'm somewhat reticent to think that
21 those who are entrusted with the obligation won't do
22 it, and do it properly.

23 MR. EDWARDS: I think that's fair.

24 JUDGE MOORE: Under that thinking, you all
25 might wish I'd be hit by a bus tonight, but I hate to

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1 tell you, the odds are long, it probably won't happen,
2 so I think that that may be something we want to very
3 carefully consider.

4 MR. EDWARDS: The folks back here that
5 actually have to do the work, it certainly would not
6 be their answer. But given the issues that the Board
7 is wrestling with, they certainly understand why that
8 would be an approach you might want to take.

9 JUDGE MOORE: Let's turn to Question 12.
10 Staff, for SGI information, Question 12-A says, "For
11 SGI, need-to-know is defined as necessary in the
12 performance of official contractual or licensee duties
13 of employment." That's the direct language from 10
14 CFR, Section 73.2.

15 Would you please explain how a party, or
16 in this case a potential party can have "official
17 duties of employment" to formulate or raise
18 contentions?

19 MR. CUMMINGS: Yes, Your Honor. I believe
20 the Commission specifically spoke to this issue in
21 Catawba, in CLI 04-6.

22 JUDGE MOORE: And the Commission in an
23 off-hand way said in this case, without looking at the
24 language and specifically duties of employment
25 language, tossed it off in this case, filing

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1 contentions. That's neither a holding, and it's tenth
2 degree dicta if you wanted to look at it that way.

3 MR. CUMMINGS: But I believe participation
4 in the NRC hearing would be --

5 JUDGE MOORE: How is that for someone
6 other than Mr. Malsch and the governor of the State of
7 Nevada an official duty of employment for a potential
8 party?

9 MR. CUMMINGS: Well, if we're dealing with
10 potential parties, I believe that there's still
11 participation in the proceeding. At this point, we're
12 in a pre-licensing phase, so --

13 JUDGE MOORE: The statutory language is
14 "necessary in the performance of official contractual
15 or licensee duties of employment." Well, you've got
16 to get rid of official, and you've got to get rid of
17 contractual, so that leaves you down to -- I'm sorry.
18 You've got to get rid of official, contractual, and
19 licensee duties of employment, because if pro se, or
20 even someone who's an attorney representing an
21 individual who's a potential party out there, I'm
22 having a lot of trouble seeing how that language,
23 which is the definition of need-to-know, can ever
24 apply.

25 MR. CUMMINGS: Well, Your Honor, I believe

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1 that if we looked at 73.21(c) section where you're
2 dealing with the occupational groups that gain access
3 to SGI through first a need-to-know, and by virtue of
4 being what have been called the occupational groups,
5 one of those occupational groups the Commission listed
6 out were individuals who are granted access pursuant
7 to the Board order in a judicatory process. And I
8 believe it's that participation in that process that
9 is your --

10 JUDGE MOORE: Okay. So you would get
11 there not through this language, but through that
12 anybody we order can have need-to-know.

13 MR. CUMMINGS: No, Your Honor. I believe
14 they have to have the need-to-know and fall within
15 that category.

16 JUDGE MOORE: Well, then the problem
17 doesn't go away. You faced your tail, and you may
18 have caught it, but you haven't answered the question.
19 Now keep in mind, go back to the Court of Appeals
20 decision in San Luis Obispo Mothers of Peace versus
21 NRC, which was the case in which the agency's
22 regulations required for an operator to be licensed,
23 "actual operating experience" I believe was the
24 regulatory language, and the Commission said that
25 simulator was close enough, and that's the way they

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1 did it. And it was challenged, and the Court of
2 Appeals said that you cannot take the word black and
3 make it white. And if language means anything, they
4 were confident that "actual operating experience" did
5 not mean experience on the simulator.

6 Now in light of that decision, how can you
7 take that language in 73.2 and tell me how anybody
8 other than in the class that I said of a potential
9 party who seeks to intervene has a duty of employment,
10 who's not in a contractual relationship with the NRC.
11 I'll give you Mr. Malsch falling under official, and
12 we might be able to stretch a little bit and get
13 there, because he's representing the State of Nevada,
14 and the State of Nevada has an interest here. But I
15 want to know all the other people, and how this
16 language -- aren't they by this regulation precluded
17 from ever being able to see this information?

18 MR. CUMMINGS: No, Your Honor. I don't
19 believe that the Commission has taken that approach,
20 and how it has granted access in adjudications. It's
21 been determined that with a showing of need-to-know,
22 which it has laid out standards --

23 JUDGE MOORE: Well, can you tell me how I
24 can, consistent with the San Luis Obispo Mothers of
25 Peace versus NRC case get there, because you're asking

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1 me, as I see it, to take the word white and make it
2 black, or vice versa.

3 MR. CUMMINGS: Well, I believe it's more
4 an interpretation. In 73.2 --

5 JUDGE MOORE: Well, that's pretty much
6 what "actual operator experience" was.

7 JUDGE ROSENTHAL: Let's take it in the
8 context of rancher out in the Nevada desert who wants
9 this information. Is he performing an official, a
10 contractual, or licensee duties of employment? Which
11 one of those categories - he has to fit in one of them
12 - and which one is it?

13 MR. CUMMINGS: We believe that the rancher
14 who would be seeking to participate in this
15 proceeding --

16 JUDGE ROSENTHAL: We're looking at the
17 definition "necessary in the performance of official,
18 contractual, or licensee duties of employment." Now
19 I'm asking you which of those three categories does my
20 rancher in the desert fall into? He has to fall into
21 one of them, because that's the definition.

22 MR. CUMMINGS: Well, not necessarily.
23 Another way to look at this would be in 73.21 --

24 JUDGE ROSENTHAL: This is the definition
25 of need-to-know.

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1 MR. CUMMINGS: I understand, Your Honor,
2 but I was going -- in 73.21(c)1, it does state that
3 "access to safeguards, and for access to safeguards
4 information, except as the Commission may otherwise
5 authorize", so --

6 JUDGE KARLIN: So we can dispense with the
7 need-to-know requirement?

8 JUDGE ROSENTHAL: So it's not need-to-
9 know, it's something else. Because if it's need-to-
10 know, then my rancher has to fall into one of those
11 three categories. If you're telling me that it's
12 something else, then what you're telling me is need-
13 to-know isn't a requirement.

14 MR. CUMMINGS: Well, I think through
15 1010(b)6, where the Board should set forth the
16 protective measures to ensure protection of this
17 information, ensure that only those the Board thinks
18 should have this information are granted access, I
19 think one of the elements that the Board would look
20 to, certainly looking at Commission precedent and
21 practice, would be an element of need-to-know. Why is
22 this individual seeking this information? What use
23 does this individual --

24 JUDGE KARLIN: But we have the regulatory
25 language, and we can either dispense with the

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1 regulatory language - I mean, the Commission seems to
2 have dispensed with the regulatory language in the
3 Catawba decision when it says in their parenthetical
4 that "To participate in an NRC hearing, an intervener
5 has an official duty to participate in an NRC
6 hearing." This sounds like turning water into wine.
7 They may be able to do that, but I'm not sure whether
8 we can.

9 What official duty does the rancher have?
10 He has no duty. He has an opportunity, he may have a
11 right. He has no duty to participate in this
12 proceeding. He certainly has no official duty, and he
13 certainly is not employed, so I guess by citing these
14 other regs you're saying we can dispense with that
15 entire regulatory requirement, and make a decision on
16 our own as to whether he has a need to know. Is that
17 the position?

18 MR. CUMMINGS: Well, I believe the Board
19 should be guided by how the Commission has treated
20 access.

21 JUDGE KARLIN: So we --

22 MR. CUMMINGS: And I believe they should
23 be guided by the Commission's determination that need-
24 to-know and trustworthiness are the elements for
25 granting access, as it's set forth in Catawba.

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1 JUDGE KARLIN: Well, let's posit that
2 there is a need-to-know requirement, and Catawba tries
3 to interpret the need-to-know requirement. They
4 interpret this very provision in a way that is turning
5 water into wine, is it not? I mean, they're saying
6 this intervener has a need to know, and distinguished
7 that was an intervener. That was already granted
8 party status and had contentions filed, and they were
9 seeking a need-to-know for some additional
10 information, for which they weren't given -- I don't
11 think they got it. That might be a different official
12 responsibility. I can't even see it there, but the
13 rancher who is a potential party here - I mean, are we
14 faced, and I think we have to ask, perhaps, the State
15 if they have some interest in this issue, are we faced
16 with a regulation that just does not compute here, and
17 the result is no one can possibly get access to SGI,
18 because no one can have a need to know unless they're
19 an official of the state, or an official of a county.

20 JUDGE ROSENTHAL: Or, alternatively --

21 JUDGE KARLIN: Because I think Staff's got
22 to answer that question.

23 MR. CUMMINGS: Well, I believe that
24 73.21(c) says "except as the Commission otherwise
25 grants access would need a need-to-know."

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1 JUDGE ROSENTHAL: So we are free under
2 that section to grant access regardless of what the
3 definition of need-to-know is.

4 MR. CUMMINGS: I think the Board is
5 charged in 210.10(b) 6 in granting access, and it can
6 grant access pursuant to the protective order.

7 JUDGE KARLIN: I don't understand this.
8 When we have this rancher that comes in, are we to say
9 to him okay, don't worry about 73.2. It simply
10 doesn't apply to you; that we're going to make a
11 judgment as to your need-to-know without regard to
12 73.2, because you obviously don't qualify under 73.2.
13 But because we don't want to exclude all ranchers as
14 a class, we're going to find some other basis for
15 judging whether you get in or not. I mean, that may
16 be the way it comes out. It seems to me that that is
17 calling upon us to violate our obligation to apply
18 Commission regulations by their terms.

19 MR. CUMMINGS: I'm sorry to keep falling
20 back to this, but I believe the Commission, Catawba
21 dicta or not, seems to be interpreting this
22 occupational --

23 JUDGE MOORE: And you point to 73.21(c)1,
24 and the "except as the Commission may otherwise
25 authorize", and the otherwise authorize is your view

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1 of Catawba that interveners qualify regardless of the
2 definition of need-to-know.

3 MR. CUMMINGS: I believe they qualify if
4 the meet the standard of need-to-know, the traditional
5 standard of how you interpret need-to-know which the
6 Commission stated was indispensability, the
7 information is necessary.

8 JUDGE KARLIN: We'll get to
9 indispensability later.

10 MR. CUMMINGS: But I believe they've set
11 forth a threshold as to how to interpret, essentially,
12 how that individual is demonstrating they need this
13 information. And that that is an element of access.

14 JUDGE MOORE: Distinct from the definition
15 of the three classes of people that can get it.

16 MR. CUMMINGS: If you don't want to abide
17 by the idea that the Commission was trying to equate
18 an intervener as an official duty, that may be a means
19 to -- it still requires a need-to-know threshold.

20 JUDGE KARLIN: And when you cite the other
21 provision of 73 as giving the Commission authority,
22 you're suggesting that this Board also has that
23 authority, or do we have to wait for the Commission to
24 speak on this?

25 MR. CUMMINGS: Well, I believe in

1 210.10(b)6, there are regulations that have charged
2 the Board, that in cases where safeguards information
3 is going to be received, that they prescribe
4 additional procedures that will effectively safeguard
5 and prevent disclosure. And I think the Board can be
6 guided by the Commission's past practice in this in
7 controlling access.

8 JUDGE KARLIN: So would you suggest that
9 a potential party who is a rancher, who is not
10 employed, not an official, doesn't have a contract,
11 and he's concerned - he or she is concerned about the
12 storage of material, and there might be safeguards-
13 related issues, that person would meet the need-to-
14 know criteria, and wouldn't have to worry about the
15 language of 73.2.

16 MR. CUMMINGS: I think they would need to
17 demonstrate to the Board, if they were asking for the
18 information from, in this case, let's say the NRC,
19 they would need to demonstrate to us that they had a
20 need for this information, that it was more than just
21 idle curiosity, or that they were looking for some
22 kind of context of background.

23 JUDGE KARLIN: They're trying to decide
24 whether they want to form a contention. They don't
25 know whether it's a problem, but they're concerned,

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1 and they say well, gee, there might be a problem here,
2 and I want to -- the whole purpose of this pre-license
3 application phase is for us to formulate contentions,
4 so I need to see this information to decide whether
5 I'm concerned, and decide whether I want to file a
6 contention.

7 MR. CUMMINGS: Yes, Your Honor. But at
8 this pre-licensing stage, I believe that the threshold
9 --

10 JUDGE KARLIN: Isn't that a good enough
11 need? I mean, that's the whole purpose of the pre-
12 license application phase, is to formulate
13 contentions. And this person wants to decide whether
14 or not they need to formulate a contention.

15 MR. CUMMINGS: But I believe by saying
16 that at the pre-licensing stage, that the need to know
17 threshold - and I am seeking to apply the need-to-know
18 threshold that the Commission has articulated and
19 followed in past practice, I believe, as far as saying
20 that someone must have a need for that information.
21 That does not get less. That standard should not be
22 lessened because we are at a pre-licensing --

23 JUDGE ROSENTHAL: To say need for the
24 information doesn't say anything. The question is
25 what constitutes the need. Now JUDGE Karlin asked you

1 specifically whether an individual who's not made up
2 his or her mind as to whether there's a problem, that
3 is interested, lives close by the facility, is
4 interested in determining whether there is a basis for
5 filing a contention; JUDGE Karlin asked you whether
6 that person under your standard would meet the need-
7 to-know requirement.

8 MR. CUMMINGS: And, Your Honor, if there
9 was no other means, if there was no other information
10 available, if there were not other avenues for them to
11 be able to evaluate, then that may qualify.

12 JUDGE ROSENTHAL: May or would?

13 MR. CUMMINGS: It would be factually,
14 contextually specific. I cannot --

15 JUDGE ROSENTHAL: Well, just by saying --

16 MR. CUMMINGS: I hesitate to go into a
17 general hypothetical, Your Honor.

18 JUDGE MOORE: Mr. Malsch, do you have any
19 light to shed?

20 MR. MALSCH: Well, let me try at least a
21 little bit, maybe it'll be just a small amount of
22 light. It seems to me if you look at Sections 147 and
23 148, the Commission and DOE are given the power to
24 prescribe regulations to protect the two respective
25 classes of information by either regulation or order.

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1 If you look at 2.1010(e)6, there's a reference in
2 terms of authority of this Board not only to providing
3 for protective orders that comply with 73.21, but also
4 this Board is given additional authority to prescribe
5 orders that will implement Section 181 of the Atomic
6 Energy Act. So it seems to me, frankly, that none of
7 these regulations, none of these DOE orders, none of
8 these instructions and the like were drafted with a
9 proceeding like this in mind, and so I think we should
10 begin with basic principles, and perhaps recognize
11 that the rules will be set by order. And that the
12 regulations are suggestive of what makes sense, but
13 not absolutely determinative. I'm not sure that's
14 exactly consistent with the comment, but at least it
15 makes sense out of it.

16 JUDGE MOORE: Does the Board have the
17 authority to issue the order, or does it have to go
18 with the Commission?

19 MR. MALSCH: Well, 2.1010(e)6 suggests
20 that the Board has the authority, although you could
21 certainly ask for Commission guidance.

22 JUDGE MOORE: Isn't that specific to a
23 protective order?

24 MR. MALSCH: I think they are talking
25 about protective orders.

1 JUDGE KARLIN: Well, if this rancher comes
2 forward and says please dispense with the definition
3 of need-to-know over there, please ignore that, and
4 you have authority to do that, I mean, wouldn't the
5 Staff be quick to cite the regulation that says you
6 cannot challenge a regulation in an NRC proceeding.
7 And this is a regulation, and it's a requirement - oh,
8 by God, you've got to comply.

9 MR. MALSCH: Well, that presumes the
10 regulation was drafted specifically --

11 JUDGE KARLIN: Well, I think we can posit,
12 you said it several times, I think, that none of these
13 regulations were drafted, the DOE, the UCNI, with this
14 procedure in mind, but there they are. They're out
15 there. They're black and white, but I don't think
16 they're so clearly applicable. I agree it's a
17 problem.

18 JUDGE MOORE: Mr. Shebelskie, there's not
19 a similar problem with UCNI and NNPI for us, is there?
20 Because need-to-know is a different kettle of fish
21 than the NRC's need-to-know.

22 MR. SHEBELSKIE: Yes, sir.

23 JUDGE MOORE: Can you tell us what it is
24 for NNPI?

25 MR. PUTZU: Tell what, what need-to-know

1 would --

2 JUDGE MOORE: Need-to-know.

3 MR. PUTZU: Well, as we discussed this
4 morning, our view of need-to-know in this instance
5 would be we would just ask for what --

6 JUDGE MOORE: To participate.

7 MR. PUTZU: It really has to be somewhat
8 related to the proceeding. The issue for us would be
9 how that would be then made available. Would we make
10 copies and Fed Ex it, or would we make it available at
11 all.

12 JUDGE ROSENTHAL: You wouldn't have a
13 problem with that hypothetical rancher who's trying to
14 determine whether there's warrant to get into the
15 proceeding?

16 MR. PUTZU: No, we do not.

17 JUDGE KARLIN: I mean, in your reading,
18 we're talking, of course, about potential parties
19 here, not parties, so there might be a difference.

20 MR. PUTZU: You're still left with the
21 threshold question -- oh, forgive me, Your Honor.

22 JUDGE KARLIN: No, that's fine.

23 MR. PUTZU: You're still left with the
24 threshold question of citizenship, the basic questions
25 you have to ask.

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1 JUDGE KARLIN: Right. All the other
2 things.

3 MR. PUTZU: But certainly, need-to-know,
4 if someone comes in and says the rancher says I'm
5 thinking about becoming a party. I'd like to look at
6 these documents. I think the need-to-know, we're past
7 that already, and we're into other questions.

8 JUDGE MOORE: Let's turn now to O.U.O.

9 JUDGE KARLIN: Sorry. I'd like to go back
10 to 12-C. We have some language, and this is directed
11 more to Staff, but others could comment. I would
12 appreciate their comment. There's language in the
13 case law that talks about at different stages of the
14 proceeding, and the need to know might be different.
15 We're at the pre-license application stage right now,
16 where the purpose of this stage, once LSN is
17 certified, is for the public to be able to see this
18 material and be assured, and for people who might want
19 to raise concerns or file contentions to formulate
20 those contentions.

21 It seems to me that the need-to-know, this
22 might be analogized to a funnel, and at this point the
23 need-to-know is very broad because a great many people
24 may have concerns and interest to this, and some of
25 them may actually want to file contentions or

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1 formulate contentions. And once those contentions are
2 formulated and admitted, and standing is achieved and
3 that sort of thing, then we have a smaller universe of
4 need-to-know, so that we're at the front end of the
5 funnel, and there's a greater, perhaps shallower, but
6 broader need-to-know that might be out there. Not
7 lesser, at this stage. Your thoughts.

8 MR. CUMMINGS: Your Honor, I think that
9 runs contrary, however, to the Commission's strong
10 interest and its practice in limiting access.

11 JUDGE KARLIN: No, set that aside for a
12 moment. I'm not looking at limiting access. If you
13 limit access, then you could say zero is the
14 perfection. Right now we're talking about what the
15 purpose of this part of the proceeding is. Let's
16 posit that we want to limit access to the minimum
17 number who need-to-know. I'm talking about who does
18 need-to-know at this stage. I think it's a very broad
19 universe.

20 MR. CUMMINGS: But as the Commission uses
21 need-to-know as an element to ensure that only
22 individuals who have an actual need for the
23 information --

24 JUDGE KARLIN: Yes, and we asked about the
25 rancher - does he have an actual need? And he said he

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1 may.

2 MR. CUMMINGS: And without details in the
3 hypothetical, I would ask things, such as,
4 specifically, what information and to what exact
5 purpose is he using it for? If there's no --

6 JUDGE KARLIN: Well, the purpose is I'm
7 concerned about this issue. I want to have my
8 concerns allayed, and I may end up filing a contention
9 if my concerns are not allayed. That's the reason.
10 Is that good enough?

11 MR. CUMMINGS: No, Your Honor, I don't
12 believe so.

13 JUDGE KARLIN: Why not?

14 MR. CUMMINGS: I believe the Commission
15 stated that need-to-know, which it equates with
16 necessity and indispensability, goes beyond --

17 JUDGE KARLIN: I can't get it any other
18 way.

19 MR. CUMMINGS: Other than need-to-know?

20 JUDGE KARLIN: I can't get it any other
21 way. It's not out there in any other forum. I need
22 to see this information.

23 MR. CUMMINGS: Well, then that would go,
24 in large part, towards demonstrating that there are
25 not -- that is an element of a need-to-know

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1 calculation. But I think it still has to be
2 demonstrated why the individual needs that document at
3 this time. As the Commission noted, the need-to-know
4 can change at stages. And I think what they were more
5 envisioning is the need-to-know at a later stage.
6 It's the more tangible. At this stage where we do not
7 have, for instance, an application - if someone is
8 seeking a random SGI document on some topic of
9 interest, but they don't even know how that is going
10 to be addressed in a license application, it's hard to
11 demonstrate why that document is indispensable to
12 essentially formulating or seeking to formulate a
13 contention. They're not sure how they intend to use
14 that document.

15 JUDGE KARLIN: Well, isn't that the nature
16 of formulating contentions, you don't know before you
17 see the document whether or not it's going to be
18 critical, or helpful, or maybe it'll allay your
19 concerns and you won't file a contention because
20 you'll be satisfied that oh, yes, this looks fine.
21 Everything's been taken care of.

22 MR. CUMMINGS: Yes, Your Honor, but I
23 believe there has to be some direction, there has to
24 be --

25 JUDGE MOORE: Counsel, doesn't that argue

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1 very strongly for redaction?

2 JUDGE KARLIN: Well, I'm not sure whether
3 it does, actually, because redaction may end up
4 eliminating all the heart of the material that the
5 person needs to know, but perhaps the State could
6 address the funnel model of need-to-know.

7 MR. MALSCH: Frankly, I have a hard time
8 understanding the logic of the Catawba decision. If
9 we're only talking about documentary material, then it
10 is information that's in a report or study that's
11 relevant to Yucca Mountain, and it's either going to
12 be relied upon or is contrary to a position, then it's
13 hard to argue with the proposition that if someone
14 says I'm concerned about Yucca Mountain, and are
15 interested according to this area that the person
16 doesn't have a need-to-know, and shouldn't be given
17 access to formulate a contention.

18 Now I think that's just simple logic. I
19 mean, as we pointed out in our little filing, in
20 particular, if the information is relied upon, the
21 Commission can hardly in the same breath say we have
22 an ironclad obligation to examine the application.
23 And then in the same breath say but we have no right
24 to get it. Ditto for anybody else, so I can't make
25 any sense out of this Staff construction at Catawba.

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1 It seems to me, as you say, in the pre-application
2 phase, there's a very broad breath defined pretty much
3 by the definition of documentary material, in terms of
4 what someone has a need-to-know to formulate a
5 contention. That was the whole purpose of the LSN.

6 Now afterwards, then it gets narrowed
7 down. It may be the need is greater once contentions
8 are defined, but we're in the pre-application phase,
9 and the whole purpose of this was to give people
10 information to file adequate contentions.

11 JUDGE KARLIN: Mr. Irwin wants to, I
12 think, speak, as well. Mr. Irwin had raised his hand.

13 MR. IRWIN: I'm finding myself
14 uncharacteristically verging toward agreement with Mr.
15 Malsch on this. It seems to me that you've got really
16 two different issues here that get conflated in the
17 Commission's language in the Catawba case. The
18 definition of need-to-know starting out in 73.2 seems,
19 to me, to go more toward the concept of standing, a
20 zone of eligibility to actually obtain a kind of
21 information, performance of official duties,
22 contractual obligations, et cetera, et cetera.

23 The Commission has construed that in CLI
24 0406. The problem is that what you then get into very
25 quickly is the discussion of need-to-know, the

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1 information in specific documents, and I don't think
2 that the discussion really tears those two quite
3 distinct issues apart. And I think that's why we're
4 having so much fun today.

5 In the early part of this case in the PAPO
6 LSN scenario alone, my problem is that you have a
7 potentially limitless universe of people who are
8 interested, and that's where I, frankly, have a real
9 world problem. In the real world, my experience has
10 been with security and related issues, that it's
11 actually governmental organizations that tend to have
12 the going in knowledge, the staying power, the
13 legitimate interest apart from being sort of generally
14 titillated by an issue.

15 There are a couple of private sector
16 organizations which sometimes participate and
17 sometimes don't, so I think to use an argument that
18 doesn't please much of anybody today, in the real
19 world it doesn't prove to be a terrible problem. But
20 conceptually, when you've got potentially a million
21 people wanting to see SGI information, that is a very
22 real problem. That is a different issue, it seems to
23 me, than the question of actually need to have access
24 to a specific document, or a specific different
25 document to formulate a specific kind of contention.

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1 I'm not sure I'm helping you fellows, but
2 I just think analytically, we've got to tear those two
3 issues apart. And I'm not sure how you tear them
4 apart except with respect to SGI information, where
5 you bring in criteria of knowledge, competence,
6 loyalty, trustworthiness at the very start, before you
7 even start talking about specific documents.

8 Now that's SGI, and the other stuff is
9 very different. But on SGI, I think that's where you
10 have to --

11 JUDGE MOORE: Mr. Irwin, are you telling
12 me that the problem is definitionally, the definition
13 puts the cart before the horse?

14 MR. IRWIN: I think it may have had that
15 effect. I mean, I think really the kind of peculiar
16 notion of standing or eligibility to actually see
17 documents in a given area, as distinguished from
18 whether a given document is pertinent to the inquiry
19 which the person or entity wishes to get information,
20 those two issues have been smashed together in CLI
21 0406, I think, and that's part of our problem. It
22 started with the definition in 73.2, which defines a
23 need-to-know really in standing terms rather than in
24 terms of relevance to an inquiry, if you follow my
25 distinction. That's our problem, I think.

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1 JUDGE MOORE: Let's turn to OOU. Let's
2 start with the Staff. Can you tell us what the
3 statutory or regulatory basis for need-to-know
4 requirement for OOU is that appears in the joint
5 protective order?

6 MR. CUMMINGS: Your Honor, we believe that
7 the information that would - and not calling to OOU,
8 but that we would be claiming a privilege under 2390,
9 which is typically labeled OOU --

10 JUDGE MOORE: So as far as the Staff is
11 concerned --

12 MR. CUMMINGS: That was covered by the
13 previous protective order.

14 JUDGE MOORE: Not putting words in your
15 mouth, secondary privilege, and that'll take care of
16 it, and we should treat it the same way.

17 MR. CUMMINGS: The same way. I believe
18 DOE --

19 JUDGE MOORE: So in this case, you're not
20 hesitant to see redaction.

21 MR. CUMMINGS: For that 2390-type
22 material.

23 JUDGE MOORE: For OOU material, which
24 you're telling me is only regulatory or statutory
25 basis, is the Freedom of Information Act,

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1 essentially, as incorporated in the regulations.

2 MR. CUMMINGS: Yes, Your Honor.

3 JUDGE MOORE: DOE.

4 MR. EDWARDS: The answer is very similar.
5 There are a DOE order, a DOE manual, and a DOE guide
6 that all address --

7 JUDGE MOORE: And are any of those
8 regulations or statutes?

9 MR. EDWARDS: No.

10 JUDGE MOORE: Okay.

11 MR. EDWARDS: And your question was
12 statutory/regulatory, and they're not statutes,
13 they're not regulations, they're DOE order, guide, and
14 manual. And we've provided those that define how OOU
15 is to be identified and addressed. And they define
16 OOU in the context of information that has the
17 potential to damage governmental, commercial, or
18 private interests if disseminated and fall under one
19 of eight FOIA exemptions.

20 JUDGE MOORE: So the only basis is the
21 FOIA, as the Staff has said.

22 MR. EDWARDS: For all intents and
23 purposes, eight of the nine. Not exemption one,
24 because then it would be classified, and it has to be
25 unclassified, so it would be two through nine.

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1 JUDGE MOORE: Is there any reason why OOU
2 shouldn't be treated exactly the way we treated it as
3 a secondary privilege in the second case management
4 order?

5 MR. EDWARDS: Dealing with OOU -- there
6 are two other documents at least to let me make you
7 aware of; one of which is the Homeland Security
8 memorandum from the White House that came out on March
9 19th, 2002, which refers to the October 15, 2001
10 Attorney General FOIA memorandum. Both of those
11 documents do, in fact, but a heightened sense of
12 urgency, sensitivity with respect to the information
13 that does qualify as OOU, and support treatment --

14 JUDGE MOORE: Okay. Do either of those
15 documents - are they a regulation or a statute, or are
16 they an Executive Order?

17 MR. EDWARDS: No, they are what they are.

18 JUDGE MOORE: What is their status in the
19 law?

20 MR. EDWARDS: One of them is the
21 memorandum, the White House Homeland Security
22 memorandum from Mr. Card, and one of hem is Attorney
23 General memorandum.

24 JUDGE MOORE: That said, can we treat OOU
25 material as a secondary privilege in the same fashion

1 we've treated the secondary privileges in the second
2 case management order?

3 MR. SHEBELSKIE: Your Honor, if I may
4 comment on that. One distinction I would draw is the
5 treatment of the secondary privileges under the second
6 case management order call for a privilege log --

7 JUDGE MOORE: Redaction first.

8 MR. SHEBELSKIE: Well, redaction I think
9 we discussed earlier. We thought a redaction was
10 practical and made sense here, so I think we're passed
11 that, or to the extent that's an issue, then I think
12 we're in agreement there.

13 I think the concept of a privilege log
14 sitting up front for every such document with the
15 possibility of waiver --

16 JUDGE MOORE: No, no, it's not required
17 for secondary privileges. It's redaction only if
18 there's a request and exchange. Only if it's going to
19 go to contest is there a privilege log to establish
20 first, two things. One, is it what it claims to be,
21 OOU, at all? That would be is it something entitled
22 to one of the exemptions under the Freedom of
23 Information Act. Or two, is it over or under -- over
24 redacted? Those are the only challenges.

25 MR. SHEBELSKIE: I think the question on

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1 authority Mr. Edwards would address.

2 MR. EDWARDS: Yes. This over-redaction is
3 a different issue, but with respect to the authority,
4 it puts you exactly in the same position again of
5 questioning the designation about whether or not it's
6 exempt under the FOIA. Every agency has its own
7 procedures for designating, and if you look at the
8 NRC's regs, I guess in 10 CFR 9.25(i) they actually
9 contemplate deference to the agency that makes the
10 FOIA --

11 JUDGE KARLIN: Well, let me just stop you
12 there. You're then saying the second case management
13 order is invalid, because we have the final say as to
14 whether what DOE claims is a secondary privilege
15 document under FOIA.

16 MR. EDWARDS: That gets me back to the
17 same distinction I made this morning between the
18 privileges that --

19 JUDGE KARLIN: But we were just talking --
20 we're not talking about NNPI, we're not talking about
21 UCNI. They both have separate statutory basis, and,
22 therefore, it seems to me under FOIA Exemption 3, you
23 can claim well, here's FOIA and there's a separate
24 statute I can cite you to, Your Honor, that says this
25 is exempt. And then we have to deal with that, and

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1 what authority we have or don't have. But this OOU is
2 not that, as far as I understand it. We're talking
3 about something other than NNPI, other than UCNI,
4 other than SGI, and is OOU; which, as I understand it,
5 and if you're citing the order 470.1(a) and (b), and
6 (c), and some of those are on the web that you can
7 get, and I've taken a look at them. And they're
8 talking about proprietary, they're talking about
9 business information, they're talking about stuff that
10 is just privacy, just your basic sort of privilege
11 material that we've already covered in the second case
12 management order.

13 MR. EDWARDS: The last point, the vast
14 majority of the OOU information, I understand, is High
15 Exemption 2 information.

16 JUDGE KARLIN: High Exemption 2, FOIA
17 Exemption 2?

18 MR. EDWARDS: Yes. High 2.

19 JUDGE KARLIN: Which is, let me see, I
20 don't have them memorized that well. "Related solely
21 to internal personnel rules"?

22 JUDGE MOORE: And practices.

23 JUDGE KARLIN: That's 2.390, Exemption 2.

24 MR. EDWARDS: Yes, when you look at the
25 guides and the orders, they rely for the most part,

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1 they tend to be most that fall under Exemption 2. In
2 addition, they have the potential to damage
3 governmental, commercial, or private interests if
4 disseminated.

5 JUDGE KARLIN: Well, Exemption 2 is
6 related solely to the internal personnel rules and
7 practices of the Commission. And maybe our regs do
8 not parallel the FOIA Exemption 2. I thought they
9 did.

10 MR. EDWARDS: To establish in Exemption 2
11 the Judicial Watch case, they talked about Exemption
12 2, and this is in the guide, also. High 2
13 information, must show that the withheld information
14 is predominantly internal, one, and its disclosure
15 significantly risks circumvention of agency
16 regulations or statutes.

17 JUDGE KARLIN: Internal personnel rules.
18 What does the statute say? What does FOIA Exemption
19 2 say? I don't know. I mean, I don't have it now.

20 MR. EDWARDS: What's there are examples of
21 information that may fall underneath that category.---

22 JUDGE KARLIN: Okay. Well --

23 MR. EDWARDS: But stepping back for a
24 minute, virtually - well, not virtually - all
25 documents that were talked about today fall under one

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1 of the nine exemptions.

2 JUDGE KARLIN: Right.

3 MR. EDWARDS: I mean, they do.

4 JUDGE KARLIN: That's how we get to them.

5 MR. EDWARDS: Right. And the question is,
6 in addition, are there procedures and processes that
7 have been set up by the agencies that have
8 responsibility for that information in addition to
9 that?

10 JUDGE MOORE: What's the premise of the
11 Freedom of Information Act, though, that it's full
12 disclosure, and then you exempt it down.

13 MR. EDWARDS: Right.

14 JUDGE MOORE: Well, if you don't have an
15 exemption, first a statute, then a regulation that
16 calls for such an exemption, it's full disclosure.
17 Now you have cited me an Attorney General memorandum,
18 a White House memorandum - I think that was your term
19 - which is neither a statute, nor regulation. It's
20 not an Executive Order, so it has no statutory or
21 regulatory basis, and it's the same with the internal
22 orders and procedures that you're now relying on. I
23 don't know how we can get there to keep this
24 information treated differently than just a secondary
25 privilege, and it'll be disclosed if it doesn't have

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1 a specific statutory/regulatory exemption.

2 MR. EDWARDS: The issue is that it is a
3 decision that is internal to the DOE that has been
4 made with respect to that language, and the question
5 is whether this Board gives deference to that
6 decision.

7 JUDGE KARLIN: Well, let me follow-up on
8 that. I mean, there's a separate regulatory process
9 that DOE that deal with FOIA requests. Right? And
10 let's say you have a document in your possession, and
11 you put it on the LSN as a header only, and you say
12 it's business proprietary, one of the FOIA exemption,
13 number four, I guess. And so you put it on the LSN.
14 Mr. Malsch or anyone else can request that document of
15 DOE under FOIA, and you all make a decision under FOIA
16 that oh, this is business proprietary, you can't have
17 it. I'm sorry, or you can only have it under the
18 following conditions, and so you made that decision.

19 Meanwhile, Mr. Malsch, being persistent,
20 he asks for it in this proceeding, and under the
21 second case management order he asks for that
22 document. We are then grappling with the issue of
23 whether it's truly proprietary. Are you going to say
24 well, we have a separate process over there at DOE,
25 and you have no jurisdiction within which to try to

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1 overrule that. That's what your argument says;
2 because DOE has a separate process, somehow our
3 jurisdiction disappears. And if you argue that for
4 UCNI, you're arguing that for business proprietary, as
5 well, and the second case management order is invalid.

6 MR. SHEBELSKIE: No, Your Honor. Let me
7 just comment on that with respect to the second case
8 management order. For the secondary privileges as
9 defined in that order, DOE has not taken the position,
10 and will not take the position, and we didn't in the
11 development of that order, that disputes on those can
12 be adjudicated by this Board. I think the distinction
13 Mr. Edwards is drawing and the Department draws with
14 respect to the High 2 class of exemptions for official
15 use only information that they are fundamentally
16 different, and the Executive Branch has been
17 instructed to give them special protections as issued
18 by the White House and the Attorney General. And
19 we're not claiming that this is proprietary,
20 attorney/client, litigation work product privileges
21 fall into this very small subset of High 2 exemption
22 documents. That we think it is the position of the
23 Executive Branch deserves special protection. That's
24 ultimately what it boils down to with respect to the
25 broad class of OOU documents.

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1 I will draw one subset distinction though,
2 that sub-class that --

3 JUDGE KARLIN: But the argument is based
4 upon the fact that DOE has some separate process for
5 handling these kind of things; and, therefore, we do
6 not have jurisdiction. And I was trying to reason
7 that through and say we have a separate process for
8 FOIA business proprietary, too. And you're not
9 asserting it there, so that reasoning doesn't compute.

10 MR. SHEBELSKIE: I think it was perhaps
11 Franklin who said, "An ounce of history is worth a
12 thousand pounds of logic." I mean, the reality is
13 here in the world we live in now. The Executive
14 Departments are under strictures to give special
15 protection to the type of information we're protecting
16 here. And we might say in an academic sense, how do
17 we distinguish between that and the other FOIA
18 exemptions? I concede your point, again, as a matter
19 of real world that we're in.

20 There is one distinction, I think, on the
21 OOU of the group of 500 or so we're talking about, 150
22 approximately are export control information
23 documents, and there is a separate statutory basis for
24 those that Mr. Edwards can speak to.

25 JUDGE MOORE: I'm sorry. I thought we

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1 started this morning by saying that all those export
2 control documents fell into another category, and it
3 was either NNPI --

4 MR. SHEBELSKIE: No, they can be treated
5 as OUO. In other words, the question of what's the
6 access to them, what do you have to prove to get
7 access to them? You just have to tell us the reason,
8 agree not to disseminate them, those sorts of things.
9 But the question we were grappling with here is, is
10 there a statutory grounding to designate something as
11 an export control document and, therefore, give it
12 that kind of restricted access. The answer to that is
13 yes.

14 JUDGE MOORE: Okay. So now we're down
15 from 500 to 350, so let's just talk about the 350 that
16 don't have a statutory or regulatory basis, other than
17 the Freedom of Information Act.

18 MR. SHEBELSKIE: Right. Well, at one
19 level you can look at the DOE orders as, in a sense,
20 an internal -- in many senses in the law, those
21 internal orders do have a status as a regulation.
22 These are internal regulations that govern the
23 Department of Energy, as opposed to regulations that,
24 in a sense I think your question was posing, that deal
25 with the agency and the world at-large. So I think

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1 these orders do have a status in the law. It's not
2 just --

3 JUDGE MOORE: For DOE employees.

4 MR. SHEBELSKIE: Well, DOE is empowered by
5 statute to create internal orders, to control
6 dissemination of information, create orders, and this
7 order 471.1 is one of those, so I think there is a
8 status that should be accorded to those orders.

9 JUDGE MOORE: Excuse me for being
10 impertinent enough to ask, but what is that status?
11 It's not a regulation, it's not a statute, those are
12 things that have general applicability, and we're
13 dealing here with a public procedure, not people who
14 are employees of DOE or DOD, and I'm reminded of the
15 argument that was made many years ago in the Third
16 Circuit in the Limerick case, I believe, by the agency
17 about a Commission policy. And if I'm not terribly
18 misquoting or mis-paraphrasing what the Third Circuit
19 had to say about a Commission policy was, "That's not
20 worth a bucket of spit. It's not a statute, and it's
21 not a regulation." And it might not be a bucket, but
22 I'm having trouble with what this is for how we can
23 deal with it, other than under the Freedom of
24 Information Act, the same way all the secondary
25 privileges are dealt with.

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1 MR. SHEBELSKIE: I defer to Your Honor's
2 superior knowledge of the Third Circuit decision. I'm
3 not familiar with that. Again, I will boil it down to
4 we are dealing with 350 documents. The Board has,
5 even under the regulations --

6 JUDGE MOORE: Let me interrupt a minute.
7 Isn't it highly likely as this proceeding goes on,
8 that number is going to multiply many fold for OUO?

9 MR. SHEBELSKIE: I can't say that, Your
10 Honor. I mean, I can see that as the license
11 proceeding unfolds, now we're talking over the course
12 of years, there will be increasing detail provided on
13 security protections plans and the like. I think
14 those probably would be protected maybe under SGI
15 instead of OUO, so sitting here today, I don't really
16 perceive any sort of exponential growth in this
17 category based on what I know now, Your Honor.

18 JUDGE KARLIN: Let me ask; I think one of
19 my concerns is that I don't know that the label OUO
20 helps at all. I think it hurts. If we could just
21 dispense with the -- I mean, I understand that's a
22 label that's used at DOE among its contractors, and
23 it's used at NRC, but it's sort of an umbrella
24 characterization, it seems to me. And it covers a lot
25 of ground, and doesn't know that it means a whole lot

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1 to us, if we've already dealt with the FOIA exemptions
2 in the secondary privilege area for business,
3 proprietary and this sort of thing, law enforcement.
4 And if you've got a High 2 category that's based upon
5 some Homeland Security issue, call it FOIA Exemption
6 High 2 category. Don't call it OOU, and then we can
7 deal with it on the merits of whether or not it's
8 truly protected or not, as opposed to throwing some
9 blanket vague terminology OOU that covers a lot of
10 ground, that is just not founded in any statute.
11 There's no statute or regulation that says this is
12 what OOU is. So if we could take that label away and
13 just get below that to the documents that you're
14 dealing with, I think some of the issues, a lot of the
15 issues might go away.

16 MR. SHEBELSKIE: That's a valid point,
17 Your Honor, because, for example, a prime example of
18 High 2-type classification or designation, as I
19 understand it, for example, are documents that would
20 enable persons to circumvent safeguard systems. That
21 might be an example, and it probably does make more
22 sense to give the Board the requisite perhaps real-
23 world comfort it needs and deserves to have a better
24 sense of these 350 documents. Really, what are we
25 talking about here? That we have some security

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1 officials here who might be able to shed some general
2 light on a specific document-by-document basis, but
3 some more concrete context to the class of documents
4 we're talking about, or we can submit that to you
5 later.

6 JUDGE MOORE: This started with why can't
7 we treat them. Redaction has essentially agreed that
8 we can do that, and then if there's a further
9 challenge, there has to be in the same way with any of
10 the documents on why it's law enforcement, why it's
11 privacy, why it's proprietary. There has to be a
12 description in a privilege log as to why the
13 information can't be redacted further, or why the
14 information is entitled to that protection if it's a
15 challenge to the fact that it's protected at all, in
16 the same way we've already dealt with that, and
17 wrestled with it in the second case management order
18 for what we call the secondary privileges. I'm at a
19 loss to know why this group is any different since the
20 footing is all the Freedom of Information Act.

21 MR. EDWARDS: It's a good question. When
22 the documents are marked O.U.O., in fact, at that time,
23 the specific exemption is identified when they're
24 marked. And, frankly, when we were doing the
25 protective order, we were grouping these all -- we

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1 were trying to do this and put in all these as, I
2 think as Mr. Cummings was talking about earlier, try
3 to deal with all of these issues in one protective
4 order. And as time has gone on and we've looked at
5 some of these questions, perhaps that's not the right
6 way to do it.

7 What I would suggest with respect to this
8 specific question is that we would take that back to
9 our security people and spend some time looking at
10 that. Your question is a good one.

11 JUDGE MOORE: MR. Malsch, do you have
12 anything to add to this?

13 MR. MALSCH: Well, from my standpoint OOU
14 doesn't mean anything. My experience is that it's a
15 designation that covers other exemptions or most
16 particularly documents that are covered by the
17 deliberative process privilege, or of more concern to
18 us, documents that are simply embarrassing to the
19 Agency. And the potential for a broad categorization
20 of documents as OOU is one reason why we were so upset
21 with DOE's assertion that it had the unilateral
22 unusual power to withhold these kinds of documents.

23 MR. EDWARDS: That didn't turn out to be
24 true. We're talking 500 documents. I mean, there's
25 no basis for that kind of statement.

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1 MR. MALSCH: I don't know what's in those
2 500 documents.

3 JUDGE MOORE: So do you have a problem
4 with treating OUO documents in the same manner and
5 with the same process that we laid out for what we
6 call the secondary privileges in the second case
7 management order?

8 MR. EDWARDS: No problem.

9 JUDGE KARLIN: In that regard, I mean, the
10 secondary privileges in the second case management
11 order did not cover Exemption 2, I think, so we would
12 need, perhaps, an appendix that would give us the
13 elements of Exemption 2, and that sort of thing. But
14 the parallel is there, that might work.

15 JUDGE MOORE: Let's move on then to
16 Question 13 and the staff's view of reliability and
17 trustworthiness for SGI. First, DOE, if I understood
18 correctly this morning, for UCNI and NNPI, this is not
19 an issue, so we're done with it as far as those two
20 classifications.

21 MR. EDWARDS: That's correct.

22 JUDGE MOORE: Staff, SGI - what objective
23 standards are used to make a determination of
24 trustworthiness and reliability?

25 MR. CUMMINGS: Your Honor, as we stated

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1 before, we do believe that the trustworthiness and
2 reliability is an element that needs to be taken into
3 account in granting access. At this time, the
4 Commission is evaluating the implementation, as I
5 mentioned, of Section 652 of the recent Energy Bill.
6 Pending the Commission's determination of how it
7 intends --

8 JUDGE ROSENTHAL: Do you have any idea of
9 when that is likely to be, this century?

10 MR. CUMMINGS: Your Honor, I do not know
11 what the time schedule will be.

12 JUDGE MOORE: Will it be before or after
13 the DOE certifies?

14 MR. CUMMINGS: WE cannot say, Your Honor.

15 JUDGE ROSENTHAL: What are supposed to do
16 in the interim?

17 MR. CUMMINGS: Well, Your Honor, we would
18 suggest that in the interim, since certification has
19 not happened yet, that we can go ahead and hopefully
20 wait and see if the Commission will address this
21 specifically.

22 JUDGE KARLIN: Well, what are you doing?
23 I mean, must be -- is this the only instance in all
24 the agency that anyone is asking for SGI information
25 at the current time? I mean, there must be some

1 pending --

2 MR. CUMMINGS: In this type of situation?

3 JUDGE KARLIN: No, no, no. Just anybody
4 is asking for SGI.

5 MR. CUMMINGS: I'm not aware of that.

6 JUDGE KARLIN: I mean, people are issued
7 clearances for classified information. There's
8 trustworthiness there determinations. There must be
9 some process currently being applied by the Agency, by
10 NRC as to whether someone gets SGI. This isn't the
11 only forum where that could be coming up.

12 MR. CUMMINGS: Yes, Your Honor. And
13 there's a clearance process, if you're talking about
14 classified access.

15 JUDGE KARLIN: No, forget about
16 classified, just what is being used now for SGI
17 currently today if someone asks for it. Are you just
18 saying forget it, you can't have it until we figure
19 out what we're doing?

20 MR. CUMMINGS: I'm not sure exactly what
21 the process would be at this moment since we are
22 awaiting determination what the Commission will do.
23 Now in past practice, which may be what applies in an
24 adjudicatory setting, what was requested was voluntary
25 submission of fingerprints, and then a criminal

1 history background check, and that was the process.

2 JUDGE KARLIN: Okay. Well, that helps
3 answer our question.

4 MR. CUMMINGS: Yes.

5 JUDGE MOORE: Well, you have a footnote
6 that suggests educational history, and then in the
7 text you say whatever other information is necessary
8 to demonstrate trustworthiness and reliability. Well,
9 you've told us this morning that citizenship isn't
10 part of it, and so are you opting for Plan A that says
11 do nothing, and wait and see if the Commission gets
12 around to it? But if we opt for Plan B that says no,
13 let's go ahead and wrestle with it, and then we have
14 to change the standards, we'll change the standards -
15 is the Staff prepared to give us what those objective
16 criteria are, so this is not just subjective on the
17 part of the Staff, so it's a uniform across the board
18 standard?

19 MR. CUMMINGS: If the board feels we have
20 to move on, if circumstances dictate, of course, we
21 certainly advocate A. If B, then we can provide
22 standards. What we would advocate is that the Board
23 request submission of fingerprints, and then that
24 would lead to the criminal history background check.

25 JUDGE MOORE: And so because it would be

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1 presumably voluntary, there are no Privacy Act
2 concerns or anything else involved with that approach?

3 MR. CUMMINGS: As we are seeking voluntary
4 submission; no, Your Honor.

5 JUDGE KARLIN: When we look at the statute
6 that talks about the minimum restrictions necessary,
7 and we have Section 148 of UCNI that also says the
8 minimum restrictions necessary, and they have no such
9 requirement. And they have, it sounds to me like,
10 very serious information that needs protection of
11 equal seriousness. Why do we need fingerprints and
12 criminal background checks? I mean, is that what the
13 staff normally does?

14 MR. CUMMINGS: Yes, Your Honor, that is
15 what the Staff normally does.

16 JUDGE KARLIN: And is that something that
17 is written in the regs? I mean, if it's in the regs,
18 then we can have something to cite, and say well, we
19 have to do this.

20 MR. CUMMINGS: Is there a requirement for
21 the submission of a fingerprint in the --

22 JUDGE KARLIN: Yes.

23 MR. CUMMINGS: No, Your Honor. For a
24 determination of trustworthiness, that is what the
25 Staff believes is the best --

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1 JUDGE KARLIN: Well, if I go to Part 73,
2 what does it say? I mean, I haven't studied it
3 closely enough to say what does it say, does it have
4 objective criteria, or any criteria as to what you
5 have to show to be trustworthy and reliable?

6 MR. CUMMINGS: No, Your Honor.

7 JUDGE KARLIN: It doesn't have that?

8 MR. CUMMINGS: No. We're drawing that
9 from Commission precedent, Your Honor.

10 JUDGE KARLIN: Cases?

11 MR. CUMMINGS: In Catawba, in CLI 04-6,
12 where the Commission determined that in order to gain
13 access, you first had to demonstrate both a need-to-
14 know and a determination of trustworthiness. And in
15 that case what was used --

16 JUDGE KARLIN: Was that the qualifications
17 issue, we're going to get into witness qualifications?

18 MR. CUMMINGS: No, but it's related to
19 that.

20 JUDGE KARLIN: 06.

21 MR. CUMMINGS: It raised a number of those
22 issues, Your Honor.

23 JUDGE KARLIN: Okay.

24 MR. CUMMINGS: Yes.

25 JUDGE MOORE: All right. Now why does a

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1 criminal background check indicate trustworthiness and
2 reliability? All that really tells me is they haven't
3 been caught, doesn't it?

4 MR. CUMMINGS: Well, Your Honor, in
5 talking with our security experts, they have
6 determined that that would be the best means to run a
7 check into an individual's past, and determine whether
8 there are elements that would raise questions as to
9 their trustworthiness.

10 JUDGE MOORE: Does the Staff have a form
11 or anything one can fill out for this purpose?

12 MR. CUMMINGS: Absolutely, Your Honor.
13 Yes, they do.

14 JUDGE MOORE: Is that the same one that
15 you would use for a security clearance?

16 MR. CUMMINGS: I believe the individual
17 form is the same. It's just a card.

18 JUDGE MOORE: Now is there a fee
19 associated with any of this?

20 MR. CUMMINGS: Yes, Your Honor. It's a
21 \$28 processing fee.

22 JUDGE MOORE: And what is your authority,
23 regulatory or statutory authority, for charging a fee
24 to determine whether someone is trustworthy or
25 reliable?

1 MR. CUMMINGS: Well, they've submitting
2 this card to us to run this background check, so the
3 cost would be more by the requestor.

4 JUDGE ROSENTHAL: Now when you get
5 fingerprints and you conduct a background check, I
6 assume that determines whether the individual has a
7 criminal record. Now I would have thought that the
8 element of trustworthiness, reliability would go to
9 the matter of how likely is it that this individual
10 will not disclose this information improperly. I
11 would think that has zero to do with whether this
12 individual has a criminal record. And, frankly, I
13 haven't got the foggiest notion as to how one passes
14 judgment on that, unless there happens to be a track
15 record of this individual being a blabbermouth, or
16 paying no attention to restrictions that have been
17 placed on his or her use and dissemination of
18 information. I mean, this, to me, is nonsense. I
19 mean, if you're really looking at the likelihood that
20 the individual is going to respect a protective order,
21 or respect some other kind of strictures - I mean, I
22 didn't see how background checks, fingerprints, or any
23 of this has any possible -- provides any possible
24 indication of reliability and trustworthiness in the
25 sense in which it's important in this context.

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1 MR. CUMMINGS: Well, Your Honor, the
2 criminal history background check will generate a
3 report that is then submitted to the NRC. The NRC
4 will review that report, and what it raises, to see if
5 there are elements, if there is anything that does
6 raise this question that would speak to --

7 JUDGE ROSENTHAL: Who writes the report?

8 MR. CUMMINGS: I believe that comes from
9 the FBI. I believe the report is generated from the
10 FBI.

11 JUDGE ROSENTHAL: And that report is going
12 to provide a basis for -- assuming that the individual
13 is shown to have no criminal record at all, there's
14 nothing in his record that discloses unlawful or
15 unsocial conduct, how, I ask you again, is that an
16 indicia of the likelihood that this individual will
17 respect a protective order, or some other agreed upon
18 restriction upon improper dissemination? I just think
19 it's a farce myself, but I'm --

20 MR. CUMMINGS: Well, the Staff's position
21 is that if nothing is flagged in that report that
22 would raise questions, and if questions were raised,
23 they could talk to the individual and try to get any
24 explanations or any of the like.

25 JUDGE KARLIN: May I?

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1 MR. CUMMINGS: Yes, Your Honor.

2 JUDGE KARLIN: On that point, I mean, we
3 have asked in this Question 13, I think you're
4 addressing (B), which is what clearance procedures
5 exist? And I guess there's a procedure that have your
6 fingerprints taken and you get a criminal background
7 check done. I guess that you're proposing that. I'm
8 not sure whether that's an existing procedure that is
9 normally used when anyone requests SGI. Is it
10 existing protocol or standard operating procedure?

11 MR. CUMMINGS: It is the procedure that
12 the Agency has followed when seeking access to SGI
13 through an adjudication. Yes, Your Honor.

14 JUDGE KARLIN: Okay. So that's got some
15 precedent to it and experience.

16 MR. CUMMINGS: Yes, Your Honor.

17 JUDGE MOORE: Is that a written procedure?

18 MR. CUMMINGS: I don't know if it's a
19 written procedure, no.

20 JUDGE KARLIN: But then going on, so there
21 is a procedure that is background check, that really
22 doesn't necessarily answer A, which is what are the
23 criteria. So you do a background check and you find
24 this fellow is a felon. Okay, that's fine. You've
25 gone through the process, but now what are the

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1 criteria? And perhaps we would need, and as you can
2 see, the structure of these questions would ask for
3 submission, if we follow through, of the criteria that
4 would apply, that you would apply, and then on appeal
5 that we would have to apply if there was a challenge
6 to the Staff's determination this person wasn't
7 trustworthy or something.

8 MR. CUMMINGS: Absolutely, Your Honor.
9 Yes, I was speaking first to dealing with the overall
10 process before going into the individual procedures.

11 JUDGE KARLIN: Okay.

12 MR. CUMMINGS: Yes, there would be, and we
13 could provide to the Board a set of procedures.

14 JUDGE KARLIN: Procedures and objective
15 criteria against which --

16 MR. CUMMINGS: And objective criteria --
17 I'm sorry. The objective criteria that would be used
18 to analyze that information so that the Board could
19 make its own judgment.

20 JUDGE KARLIN: All right.

21 JUDGE MOORE: You've told us that the
22 Commission has under consideration pursuant to new
23 legislation consideration of just many of these
24 matters. Is that going to come to fruition in a
25 regulation, or an order? Do you know?

1 MR. CUMMINGS: We do not know, Your Honor.

2 JUDGE MOORE: Are you in a position to be
3 able to find out the time line on any of this?

4 MR. CUMMINGS: I'm not sure if we can seek
5 out the time line. We would, of course, notify the
6 Board as soon as we had any information to this.

7 JUDGE MOORE: How does your approach
8 comport with Section 181, Minimal Necessary
9 Procedures, when there's no regulatory basis at this
10 point for any of this, and yet you want to charge fees
11 and do those things in running it, and saying well, if
12 you want the information, you'll have to voluntarily
13 do these things or you don't get it. That seems to be
14 in the teeth of 181.

15 MR. CUMMINGS: Your Honor, we believe that
16 these are the -- 181 talks to the minimum requirements
17 necessary. We believe this is a necessary
18 requirement, the determination of trustworthiness.
19 Now we believe that we should await the Commission's
20 determination as to the exact procedures and criteria
21 that would be used. Pending that, we believe that
22 fingerprinting, which we have done in the past, would
23 be the best, most efficient means to do this
24 background check.

25 Now you seem to be raising the question is

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1 this beyond the scope of our -- we believe this is
2 what is necessary. This is what we're advocating to
3 the Board to put into the --

4 JUDGE MOORE: Do you have any provisions
5 for those that are unable to pay?

6 MR. CUMMINGS: No, Your Honor. I'm
7 unaware of any provisions for anyone who's unable to
8 pay the \$28.

9 JUDGE ROSENTHAL: No informa pauperus
10 petitions allowed in the NRC.

11 MR. CUMMINGS: Your Honor, since one of
12 our other elements for need-to-know would be the
13 hiring of a technical expert, hopefully they could
14 afford the \$28.

15 JUDGE MOORE: We'll get to that one. MR.
16 Malsch, do you have a view on all of this?

17 MR. MALSCH: Well, this was discussed in
18 some detail in connection with negotiation of the
19 protective order, and I had thought, based on footnote
20 12, that all that was necessary was to submit personal
21 references and sufficient information for the NRC to
22 verify employment history and education. I had
23 thought that that in almost all cases would be
24 sufficient, and that once we submitted that
25 information, fingerprints were not mentioned at all

1 here, that in the ordinary course, the person would be
2 considered reliable and trustworthy, unless the Staff
3 came up with some reason to believe to the contrary.

4 Frankly, I think the Staff is off here
5 sort of inventing things as they go along. I mean,
6 none of these things are in regulations hardly at all,
7 and in the beginning of the discussion, Staff kept
8 thinking and informing me that SG was treated like
9 classified information, and I kept saying no. The one
10 thing you know about safeguards information is it is
11 not classified information. There is no authority to
12 conduct the kind of intrusive background
13 investigations about someone's character,
14 associations, and loyalty, the one that associates
15 with classified information.

16 Now it's not a big deal to submit
17 fingerprints. I don't know as though the State can
18 object to that, and I'm hopeful that from the State's
19 perspective this is simply not going to be an issue.
20 I mean, it's not an issue for DOE. I don't see why it
21 should be an issue for the NRC. And also, though, I
22 have to say that it's hard to see how some of these
23 requirements are the minimum necessary, when DOE in
24 protecting similar, if not more sensitive information,
25 doesn't consider them necessary at all.

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1 JUDGE MOORE: Now you cited Homeland
2 Security regulations that also don't require this. Is
3 that correct?

4 MR. MALSCH: That's correct.

5 JUDGE MOORE: Is there a danger by the
6 Staff's proposal to discourage participation in this
7 proceeding. Indeed, is that the point of the Staff's
8 exercise?

9 MR. MALSCH: Well, I don't know whether
10 that's the point. We were concerned about the
11 possibility, that's why we negotiated footnote 12, so
12 as to involve -- kind of a reasonable submission of
13 personal references and background information about
14 employment and education. I thought that was a
15 reasonable thing to do. I'll admit the process is
16 open to abuse. I'm hopeful in the case of the State
17 the Staff will not abuse it.

18 MR. CUMMINGS: Your Honor, if I may.
19 There was certainly no intent for a chilling effect to
20 the use of this trustworthiness standard. This is a
21 standard that the Commission believes is necessary for
22 gaining access, and the Staff believes that the best
23 means to do this, the most efficient means to do this
24 would be through the use of fingerprinting.

25 JUDGE KARLIN: Well, it sounds like you've

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1 reneged on what's in footnote 12, though. It's not
2 required in footnote 12, and you agreed to that.

3 MR. CUMMINGS: Yes, Your Honor. And if we
4 were to --

5 JUDGE KARLIN: So why are you ratcheting
6 it up here?

7 MR. CUMMINGS: Your Honor, we don't
8 believe it's ratcheting up at all.

9 JUDGE KARLIN: Well, you didn't require
10 fingerprints there, and now you're requiring them.

11 MR. CUMMINGS: Well, what we're saying is
12 as an alternative, we believe that fingerprints would
13 actually be a more efficient and reliable form to do
14 a background check.

15 JUDGE KARLIN: But footnote 12 would be
16 acceptable, as well.

17 MR. CUMMINGS: We could come up with a --
18 which we would need to provide you with the specific
19 criteria as to how these --

20 JUDGE KARLIN: Well, it's to verify
21 employment history and education. That's what the
22 information is, so it wasn't criminality or criminal
23 record. It was to make sure you're employed and you
24 got an education or something.

25 MR. CUMMINGS: Yes, sir. We looked

1 basically to Agency practice in trying to determine
2 the best means to make this trustworthiness
3 determination.

4 JUDGE MOORE: I guess I'm troubled by that
5 DOD, DOE, and Homeland Security have no such
6 requirement, yet information that is of at least equal
7 sensitivity, if not greater, and under 181, Minimum
8 Standards Necessary, if those three don't require it,
9 why should the Board impose it here?

10 MR. CUMMINGS: Because the Commission has
11 determined that this information requires this level
12 of protection, that it needs this --

13 JUDGE MOORE: No, the Commission has
14 determined that trustworthiness is one factor.

15 MR. CUMMINGS: Yes, Your Honor.

16 JUDGE MOORE: The minimum requirement is
17 trustworthiness now. What you're doing to determine
18 trustworthiness is requiring something of others.
19 You're not coming forth, as Judge Rosenthal talked to
20 you, discussed with you earlier today, coming forth
21 with information to suggest that the person isn't, and
22 you want them to demonstrate that they are.

23 MR. CUMMINGS: Well, Your Honor, they're
24 in possession of all the -- in order to make a
25 determination on trustworthiness, we would need to be

1 able to look into the individual's background. And we
2 believe one way, an easy way to do that in an
3 efficient way, a reliable way to do that would be
4 through the simple use of fingerprint analysis, and
5 just do a criminal history background check.

6 JUDGE MOORE: Can't you do that with name,
7 address, and other publicly available information that
8 they provide, they would necessarily in the course of
9 this proceeding provide?

10 MR. CUMMINGS: Your Honor, if they were to
11 -- if the fingerprinting option was not the means that
12 this Board wished to make the trustworthiness
13 determination which the Staff believes should be used,
14 a voluntary submission process, then submission of
15 information that would allow for name and information
16 that could lead to basically looking at such elements
17 as credit history, employment, and unemployment
18 history, and information that could lead to a
19 basically local criminal history check by running the
20 name through the local law enforcement. That could
21 also lead to -- that could be used to make a
22 determination as to trustworthiness, in the
23 alternative.

24 JUDGE MOORE: Now let's move on. Question
25 14 in the proposed protective order, it talks in terms

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1 of having an adequate information protection system,
2 a concept that has been put forth. Now what are the
3 objective standards that you're proposing to use to
4 determine the adequacy of the information protection
5 system? What criteria must be satisfied, start with
6 that.

7 MR. CUMMINGS: Specific criteria that
8 could be found in Management Directive 12.6, which we
9 have just provided the Board this morning. In
10 addition to the criteria that are laid out there,
11 which involve things such as the storage detailing,
12 what type of security locking container needs to be
13 used, the combination lock that would be required. It
14 sets out specific criteria.

15 JUDGE MOORE: Okay. Now in that regard,
16 the UCNI regulations, and presumably the NNPI
17 regulations have lesser standards than what you're
18 proposing for SGI, and I believe the SGI regulations
19 require. Is that consistent with 181, the Minimum
20 Standards Necessary? Does that require us or counsel
21 us to have a different system for each level of
22 information?

23 For example, SGI has to be, when not in
24 use, kept in a certain kind of container with a
25 combination and/or key requirements. It has to be in

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1 a certain kind of facility. That's not a requirement
2 for UCNI. It just has to be in a locked desk drawer
3 when not in use. That's the example that is used, and
4 differences like that. Well, that's far less
5 intrusive, and a much more minimalist standard under
6 181 than what the Commission is requiring for SGI. So
7 do we have to have procedures for each level to be
8 consistent with 181?

9 MR. CUMMINGS: If the Board determines
10 that that is necessary. We would maintain that
11 safeguards information needs to be protected to this
12 level in accordance with the regulations in 73.21. As
13 for the other information, in the consultation process
14 when we were working out what was the best means to
15 protect this information, I believe one of the
16 analyses we went through was the idea that rather than
17 having multiple protection schemes for multiple types
18 of documents, it might be better to have one cohesive
19 scheme.

20 JUDGE MOORE: Well, that certainly from a
21 practical standpoint makes sense, but is that
22 consistent with 181?

23 MR. CUMMINGS: There would be an argument
24 that that may go beyond the minimal restrictions for
25 UCNI and NNPI, but I believe DOE would need to speak

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1 to their specific requirements as to what elements
2 they would need to meet.

3 JUDGE KARLIN: Rather than raise it to the
4 highest common denominator, wouldn't it be easier to
5 drop it to the lowest common denominator, and have SGI
6 be handled in the same way as UCNI and NNPI?

7 MR. CUMMINGS: Except that would be in
8 violation of 73.21(d), Protection of the Safeguards
9 Information.

10 JUDGE KARLIN: Okay. Well, let's look at
11 that. I'm sorry. What does that say? It has to be
12 protected? Does it say what you just said about how
13 it must be protected? Does it include all the
14 provisions that you have in the protective order?
15 7121(d)?

16 MR. CUMMINGS: 73.21(d), Your Honor.

17 JUDGE KARLIN: I'm sorry, 73.21(d),
18 Protection While in Use or Storage. So maybe we just
19 tell people rather than spelling it out, we just say
20 you have to protect the stuff in accordance with
21 73.21(d).

22 MR. CUMMINGS: Yes, Your Honor, and that
23 defines in 73.2 what a security storage container
24 would be. And these are all criterion elements that
25 are laid out very clearly.

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1 JUDGE KARLIN: A locked security storage
2 container.

3 MR. CUMMINGS: And if you look to 73.2
4 where it defines what a security storage container is.

5 JUDGE KARLIN: Okay.

6 MR. CUMMINGS: 12.6 is the implementation
7 of these elements.

8 JUDGE KARLIN: So all you've got is as
9 long as we meet the regulatory requirements of
10 73.21(d), then you're okay.

11 MR. CUMMINGS: Yes. And you've asked for
12 criteria that can be used to meet the regulations for
13 protection of safeguards information, and that is why
14 we're pointing you to the criteria in 12.6.

15 JUDGE KARLIN: Management Directive 12.6?

16 MR. CUMMINGS: Management Directive 12.6.
17 It was provided to the Board. It's entitled, "NRC
18 Sensitive Unclassified Information Security Program."

19 JUDGE MOORE: Now does that go beyond the
20 regulations?

21 MR. CUMMINGS: I do not believe so.

22 JUDGE MOORE: Well, it certainly wouldn't
23 be the first time, if it did.

24 MR. CUMMINGS: There may be some internal
25 designations in the management directive as to

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1 consultation with internal agency.

2 JUDGE MOORE: Is that management directive
3 a public document?

4 MR. CUMMINGS: Yes, it is, Your Honor.

5 JUDGE MOORE: Okay.

6 MR. CUMMINGS: And it is on the public
7 website, as well, Your Honor.

8 JUDGE MOORE: In the designation of the
9 kind of facility, it has to be a controlled facility
10 or locked when not in use.

11 MR. CUMMINGS: Yes, Your Honor.

12 JUDGE MOORE: Does that go to an entire
13 building, or an office in a building, for example?

14 MR. CUMMINGS: Your Honor, it would be on
15 a case-by-case basis, but there could be a situation
16 where it could be an office within a building, which
17 you could keep as a secure facility, essentially. And
18 what we would advocate is since the Board has the,
19 under 10.10(b)6 to set the measures for protection in
20 addition to those required in Part 73, one of the
21 elements we would be seeking, in order to verify the
22 information protection system which would follow the
23 criteria in 12.6 as the easiest means to evaluate,
24 that we would inspect that facility to ensure that the
25 information protection system would be adequate before

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1 granting access. And then --

2 JUDGE MOORE: Now is there a fee and a
3 charge for that?

4 MR. CUMMINGS: We would bear the cost of
5 the inspection, Your Honor.

6 JUDGE MOORE: And is there a form that one
7 wants to initiate the process use?

8 MR. CUMMINGS: I don't believe there's a
9 current form in existence. What we could do is
10 through the use of these criteria create something
11 that would allow someone to submit a plan.

12 JUDGE MOORE: In the joint protective
13 order there's a provision that allows stipulation to
14 the adequacy of the information protection system.
15 Does that still require that all of the criteria we've
16 just been talking about be met, or is that essentially
17 a waiver provision?

18 MR. CUMMINGS: I believe that the
19 stipulation would be that the program meets the
20 necessary requirements under Part 73 for protection.

21 JUDGE MOORE: Is it the Staff's preference
22 that all of these criteria be spelled out, so it's
23 very clear what standards have to be met, or to just
24 refer to the regulation in a management order?

25 MR. CUMMINGS: I believe the management

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1 directive actually does very clearly lay it out, if
2 the Board felt some further clarification was
3 necessary to assist someone in creating a plan.

4 JUDGE MOORE: In your view, there's no
5 room for arbitrariness under that management
6 directive.

7 MR. CUMMINGS: I believe the management
8 directive is pretty specific as to the sort of types
9 of storage containers that would be used, the type of
10 combination locks that would be necessary, and the
11 facility. And we do provide an alternative in the
12 protective order which is this alternate site, a site
13 already approved, DOE facility, or the NRC facility.

14 JUDGE MOORE: DOE, do you have a view on
15 how the Board can comply with 181 by imposing
16 standards greater than what you, yourself, would
17 require for UCNI and NNPI information?

18 MR. EDWARDS: No, Your Honor.

19 JUDGE MOORE: MR. Shebelskie.

20 MR. SHEBELSKIE: One difference I would
21 point out, for example, is unlike UCNI, the Commission
22 has decided for SGI, and I understand it, that there
23 has to be reliability, trustworthiness.

24 JUDGE MOORE: No, no. We're just talking
25 about UCNI and NNPI.

1 MR. SHEBELSKIE: No, but I don't think
2 that the two classes are on all fours. And because
3 the Commission in its judgment has added some
4 additional elements to the protection of SGI
5 information, I can see why there might be different
6 levels of protection, or different treatments in
7 things like background checks or information
8 protection systems, because they're governed by two
9 different regimes.

10 JUDGE MOORE: My question went to may we,
11 consistent with Section 181 of the Atomic Energy Act,
12 to impose the minimum requirements necessary, or the
13 minimum procedures necessary, impose requirements
14 greater for NNPI and UCNI than you, yourself apply?

15 MR. SHEBELSKIE: Oh, I agree with Mr.
16 Edwards on that. No. I mean, I think DOE could not
17 fairly insist on greater protections than its own
18 regulations provide.

19 JUDGE MOORE: MR. Malsch, do you have
20 anything in this arena?

21 MR. MALSCH: I just think we're confronted
22 with a crazy quilt pattern of regulations that were
23 put together by people who weren't thinking very
24 clearly about Section 181. We've made that point in
25 our submission about qualifications of lawyers, for

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1 example.

2 I'm hopeful, as far as the State is
3 concerned, that it will amount to nothing, because we
4 will be granted access, and our people will be
5 considered trustworthy and reliable. In that regard,
6 in footnote 12, we signed up to the proposition that
7 the background investigation would be confined to
8 verifying employment history and education. That's
9 what the footnote says.

10 JUDGE MOORE: Okay. Let's move on.
11 Actually, it's a good time to take a very brief
12 recess. We'll recess --

13 MR. CUMMINGS: I'm sorry, Your Honor.
14 Before we recess, if I could just briefly respond to
15 what MR. Malsch stated. In looking at this as there
16 has been additional time following the proposed
17 protective order and speaking with additional security
18 experts, we determined that the best means to make
19 this trustworthiness determination would be through
20 the fingerprinting. And we would also note that it is
21 less expensive, actually. It's a quicker process, and
22 it would be less expensive to conduct a fingerprint
23 background check than it would be to do an
24 investigation into an individual's background looking
25 at employment, education, local --

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1 JUDGE KARLIN: You changed your mind.
2 That's what you're saying, and the whole purpose of
3 the first one was education and employment, not
4 criminal history. It seems like the whole function of
5 the inquiry has changed on its axis from employment
6 and education to criminal background. That's a
7 fundamental change, and I think you've reneged on what
8 you presented to us, and asked us to sign.

9 JUDGE MOORE: Well, putting that aside,
10 less expensive for whom?

11 MR. CUMMINGS: Less expensive for the
12 individual seeking the determination.

13 JUDGE MOORE: Okay. It's now 10 after 3.
14 Let's take a 10 minute recess, and we'll reconvene and
15 finish this up.

16 (Whereupon, the proceedings went off the
17 record at 3:09:59 p.m. and went back on the record at
18 3:23:02 p.m.)

19 JUDGE MOORE: You've all addressed in your
20 separate filings with the proposed joint order, the
21 basis of our questions about technical competence, and
22 we'd like to just turn to Question 20, and address
23 that question. JUDGE Karlin. I think we'll start
24 with the Staff, if that's all right.

25 JUDGE KARLIN: No. I think the question,

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1 you can read it yourself. Hopefully you have, and you
2 have an answer for us, but I think it is a real
3 potential situation, and we'd like to see how the
4 Staff would interpret that.

5 MR. CUMMINGS: Yes, Your Honor. First, if
6 I may be allowed a moment. The need-to-know
7 requirement, we believe, carries with it, in addition
8 to some other elements, this technical competence
9 element. It's the indispensability argument. We
10 believe, particularly at this preliminary stage, a
11 need-to-know determination needs to carry with it a
12 connection to the proceeding, so an individual living
13 in Amargosa Valley versus someone living in Hawaii,
14 there needs to be a nexus, a cognizable interest in
15 the proceeding, as opposed to just a mere curiosity.
16 It follows, in part, with the indispensability
17 argument; that it's not just mere interest, or a
18 desire to see the information. There needs to be an
19 ability to actually use that information.

20 JUDGE KARLIN: Well, wait a second. You
21 just combined two elements; one was having a
22 cognizable interest, i.e., some sort of standing-type
23 of argument, and the other is having technical
24 competence to understand it. Now the standing issue
25 has already been thrown out, in a sense, because in

1 the regs of Subpart J, there was a standing
2 requirement for potential parties which was
3 eliminated. Right?

4 MR. CUMMINGS: Yes, Your Honor. I'm not
5 arguing that a standing determination needs to be
6 made. And I'm not trying to combine technical
7 competency with this argument that there needs to be
8 this connection with the case. It's more connected to
9 the idea of indispensability, I believe. Because
10 we're at a pre-licensing phase, I believe there needs
11 to be some connection, as opposed to -- anybody can
12 essentially with the very low threshold become a
13 potential party, essentially.

14 JUDGE ROSENTHAL: Is a connection enough
15 that my hypothetical rancher who doesn't have much
16 technical expertise, he just simply ropes cows, is
17 located 15, 20 miles from Yucca Mountain, and is
18 understandably concerned about the impact that that
19 plant might have upon him?

20 MR. CUMMINGS: That is not so much a
21 problem for this idea of a cognizable interest, as
22 opposed to the rancher who is living in Hawaii, and is
23 roping cows.

24 JUDGE ROSENTHAL: I thought I heard you
25 talk about technical competence. When I heard that,

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1 I was thinking of my rancher, and I didn't know what
2 his technical competence might be from your statement.

3 MR. CUMMINGS: I apologize, Your Honor.
4 Let me clarify, that we're saying that there are a
5 couple of elements that need to be analyzed in making
6 a need-to-know determination; the last of which that
7 I will address, and I'll go very quickly here, is the
8 technical competence element.

9 In addition to technical competence, we
10 believe there needs to be an indispensability showing
11 which follows from the Catawba decision, that the
12 information is necessary. Related to --

13 JUDGE MOORE: Stop right there.

14 MR. CUMMINGS: Yes, Your Honor.

15 JUDGE MOORE: You keep referring to
16 Catawba ad nauseam. Now Catawba dealt with the
17 witness. A witness is somebody who is called in a
18 proceeding. You finessed that in your joint proposed
19 order by including consultant and assistants. No
20 mention of witnesses, because we're in a pre-
21 application stage.

22 MR. CUMMINGS: Yes, Your Honor.

23 JUDGE MOORE: So you're not arguing that
24 a consultant, obviously, can't get this material.

25 MR. CUMMINGS: Absolutely not, Your Honor.

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1 JUDGE MOORE: And you concede that.

2 MR. CUMMINGS: Yes, Your Honor.

3 JUDGE MOORE: All right.

4 MR. CUMMINGS: A consultant could gain
5 access to the --

6 JUDGE MOORE: Who is the assistant in your
7 proposed joint order?

8 MR. CUMMINGS: Well, it's, I believe, as
9 MR. Malsch's own -- his alternative language refers
10 to, I believe, a consulting expert, maybe. Anyone who
11 is able to meet the elements of --

12 JUDGE MOORE: Well, now --

13 MR. CUMMINGS: I'm sorry.

14 JUDGE MOORE: A secretary who is involved
15 in the legal process gets to see privileged
16 information without the waiver of the privilege,
17 because he or she is integral to the process.

18 MR. CUMMINGS: She would still --

19 JUDGE MOORE: Is that what you mean by an
20 assistant?

21 MR. CUMMINGS: That could be an assistant,
22 a technical expert who is there to assist the legal
23 counsel could be an assistant.

24 JUDGE MOORE: We were curious because you
25 used consultant and assistant, and we --

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1 MR. CUMMINGS: I'm sorry. In that sense
2 I believe, yes, I'm sorry; consultants and assistants,
3 I believe there we are talking about -- I think
4 support staff probably, maybe. I apologize.

5 JUDGE MOORE: Go ahead.

6 MR. CUMMINGS: I'm sorry, Your Honors. So
7 as I was saying, the need-to-know would need this
8 indispensability element, we believe, and also this
9 interest in the proceeding, which we are not arguing
10 is a standing determination, but it is a demonstration
11 that there is some --

12 JUDGE KARLIN: Wait a second. I'm on
13 Question 20. We're not talking about -- we're talking
14 about in these circumstances, what degree of technical
15 competence must a potential party have in order to
16 have access? Let's assume that all the other
17 requirements are met.

18 MR. CUMMINGS: Yes, Your Honor.

19 JUDGE KARLIN: And all we're dealing with
20 is technical competence now.

21 MR. CUMMINGS: Then in that case, Your
22 Honor, we believe the technical competence at the pre-
23 licensing stage would be the same technical competence
24 that would be necessary after certification, after the
25 application was submitted.

1 JUDGE KARLIN: All right. Now what is
2 that?

3 MR. CUMMINGS: Well, the technical
4 competence is that ability to use the information that
5 is being sought.

6 JUDGE KARLIN: And what's the basis for
7 that? I mean, I understand when we cite the regs in
8 the previous question that there's a basis for a
9 qualified witness. And, in fact, the Catawba decision
10 talked about qualified expert witnesses. And we
11 understand that an expert witness has to have certain
12 qualifications. But what about here, what is the
13 basis for your statement that there is a requirement
14 for technical competence before an attorney or a
15 consultant hired by a party can look at that? I mean,
16 let's just say they have enough information to kind of
17 know there is a problem here, and if they want to have
18 an expert witness testify, they'll go hire one. And
19 that person will have to be qualified.

20 MR. CUMMINGS: Yes, Your Honor. Based on
21 --

22 JUDGE KARLIN: What's the basis,
23 statutory/regulatory?

24 MR. CUMMINGS: It's the Commission
25 precedent.

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1 JUDGE KARLIN: All right.

2 MR. CUMMINGS: There's a string of
3 Commission precedent that can be found starting with,
4 in a logical progression, if we were to look at CLI
5 046, Catawba, which we've discussed previously.

6 JUDGE KARLIN: Witness only. Witness
7 only.

8 MR. CUMMINGS: Yes. In that case, it was
9 dealing with -- the facts were dealing with a witness.

10 JUDGE ROSENTHAL: Isn't this case --

11 MR. CUMMINGS: But they talk about
12 qualified representatives. That's the language they
13 use.

14 JUDGE ROSENTHAL: Isn't this case sui
15 generous? And aren't we talking here, again, about
16 potential parties, potential parties that can include
17 - I hate to come back to my rancher, but here he is.
18 Now are you going to require that he display his
19 California Institute of Technology degree, or just
20 what is --

21 MR. CUMMINGS: The technical competence
22 can be imputed to your rancher through association
23 with someone else, who individually meets that
24 technical competence.

25 JUDGE ROSENTHAL: What do you imputed? I

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1 mean, here he is --

2 MR. CUMMINGS: Through association with
3 another technical expert.

4 JUDGE ROSENTHAL: Well, no. At this
5 point, he has not retained a Cal Tech expert. Here he
6 is, he's a rancher. He is concerned about this
7 facility which is in his backyard. He clearly has
8 standing, if it came to that. And who's judging
9 whether he has enough, as you put it, technical
10 competence, to utilize the information that he is
11 seeking? I mean, this, to me, is a very, very
12 slippery slope, and I would not want to be the one to
13 pass judgment upon the technical competence or
14 qualifications of a potential party.

15 Now when you're dealing with experts,
16 sure. You see what his background is, where he went
17 to school, what kind of vocational experience he had,
18 but I'm now talking about the potential party. And if
19 I'm hearing you correctly, unless my rancher can
20 demonstrate that he has this Cal Tech degree, his
21 chances of meeting this requirement that you're
22 imposing are somewhere between zero and nil.

23 MR. CUMMINGS: No, Your Honor, not at all.
24 Your rancher without the technical expertise
25 individually can gain access to the information

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1 himself through the use, and working in association
2 with someone who does have --

3 JUDGE ROSENTHAL: Okay. So in other
4 words, in order -- his ticket of admission to this
5 document is he has to first hire an expert that has
6 the Cal Tech degree. Is that it?

7 MR. CUMMINGS: Who has the ability to use
8 that information.

9 JUDGE ROSENTHAL: And where do you find
10 this in the regulations?

11 MR. CUMMINGS: We believe that there is a
12 prerequisite for --

13 JUDGE ROSENTHAL: What is the regulatory
14 foundation for the imposition of that requirement?

15 MR. CUMMINGS: We believe the regulatory
16 imposition is in the need-to-know determination, Your
17 Honor, as interpreted and laid out in a string of
18 Commission precedent, in licensing board cases, appeal
19 board cases.

20 JUDGE KARLIN: So there's no regs, there's
21 no statute you're going to cite us.

22 MR. CUMMINGS: No, the regulation would be
23 73.21, the requirements for access which require a
24 need-to-know.

25 JUDGE KARLIN: So a need-to-know. All

1 right. Take us to that. Where does it say technical
2 competence? It doesn't.

3 MR. CUMMINGS: It's in the interpretation.

4 JUDGE KARLIN: So you're talking about
5 case law.

6 MR. CUMMINGS: We are talking about case
7 law as far as the specific technical competence.

8 JUDGE KARLIN: What case law, Catawba?

9 MR. CUMMINGS: Beginning with Catawba.

10 JUDGE KARLIN: 0406?

11 MR. CUMMINGS: 0406, as well as --

12 JUDGE KARLIN: That doesn't do it, so what
13 else have you got?

14 MR. CUMMINGS: Well, that leads you to the
15 need for a qualified representative.

16 JUDGE KARLIN: All right.

17 MR. CUMMINGS: If you were to look at
18 Catawba, CLI 0421, which is 60 NRC 21.

19 JUDGE KARLIN: Okay.

20 MR. CUMMINGS: There, again, dealing with
21 a witness in that case, they talk about the witness
22 being required to have the technical expertise to
23 evaluate the information.

24 JUDGE KARLIN: So it's not for --

25 MR. CUMMINGS: Well, the purpose of that -

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JUDGE KARLIN: It's not the counsel, and it's not non-witnesses. In fact, 1010 I think it is, which is the reg we cited in the prior question, talks about the qualified witness, but it doesn't say party or participant, potential party. Neither one of them need to be qualified, nor does that adjective apply to the counsel. None of those cases apply that criteria to the counsel. Can you cite me one that does?

MR. CUMMINGS: That applies it to the other -- most individuals have --

JUDGE KARLIN: It says --

MR. CUMMINGS: But the Commission stated that the purpose of this technical expertise was to prevent what they - "fishing expeditions by untutored lay persons."

JUDGE KARLIN: Well, wait a second. I want to stay on that.

JUDGE MOORE: Untutored lay persons can have fishing expeditions?

MR. CUMMINGS: No, Your Honor, but the danger would be someone having access and use of a document that they do not know how to use, because they do not understand it.

JUDGE MOORE: But how do they determine --

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1 your requirement, as I see it, requires a potential
2 party, or a party with counsel, to hire an expert in
3 the -- because this is only SGI information, and
4 presumably definitionally we're into physical
5 security. That's pretty much it. And although this
6 might come as a rude shock to you, this is not rocket
7 science. It does require specialization, but
8 certainly not at some preliminary stages. Physical
9 security is not rocket science. It's not like
10 determining K effective. That said, you're requiring
11 someone to hire an expert to tell them what kind of
12 expert they need to hire to see the information.

13 MR. CUMMINGS: No, Your Honor.

14 JUDGE MOORE: The first expert gets to
15 look at it before anybody else gets to look at it, and
16 his expertise may not be specific enough.

17 MR. CUMMINGS: If it were determined later
18 that the individual who gained access to the
19 information determined that the expert, who would have
20 an area of expertise in that topical area of the
21 document they're seeking, talking about physical
22 security, they would find an individual with expertise
23 in physical security - if it was determined that there
24 was some specific element for which their expert was
25 not necessarily skilled, then they may have to go out

1 and seek another expert, but that would not be
2 necessary. They could gain access --

3 JUDGE MOORE: But it is your position that
4 an expert has to be hired before even counsel can see
5 the information to determine whether experts should be
6 hired.

7 MR. CUMMINGS: Yes, Your Honor. And no
8 offense to counsel, but I don't know of any individual
9 expertise, technical expertise, or in this case if we
10 were talking physical security, knowledge of things
11 such as armaments and protective strategies and the
12 like that counsel, by their very nature, have. They
13 still would not have the ability to analyze and use
14 that specific information for which they are seeking
15 access.

16 JUDGE MOORE: Now I don't know how the
17 Staff litigates a case, and I wouldn't want to pretend
18 to guess, but is it your position that counsel does
19 not need to know all aspects of the case that's going
20 to be presented?

21 MR. CUMMINGS: In some cases, Your Honor,
22 counsel will not necessarily know aspects of
23 safeguards information that they are not, in fact,
24 using themselves. And if they are using it, they are
25 using it in conjunction with experts who know how to

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1 use this information.

2 JUDGE MOORE: But they have access to the
3 information.

4 MR. CUMMINGS: Just as counsel and the
5 potential parties can gain access to it through the
6 use of experts, as well.

7 JUDGE MOORE: But you want the cart to
8 come before the horse. You want to put counsel out
9 to pasture, while an expert tells the counsel what he
10 needs to do. That's kind of counter-intuitive to the
11 way lawyers work.

12 MR. CUMMINGS: Well, Your Honor, I believe
13 that counsel, in order to properly frame how they need
14 to -- what they are analyzing, in order to understand
15 what they are analyzing, unless they individually have
16 the ability to do so, which they are free to
17 demonstrate.

18 JUDGE MOORE: Well, how about just being
19 a competent lawyer?

20 MR. CUMMINGS: I don't know how that
21 speaks to such things as protective strategies, and
22 armaments, if you're talking about physical security.

23 JUDGE KARLIN: I think we understand your
24 position. I'm not sure that we think it's very
25 tenable. I think what I was asking for, and we've

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1 asked for, is some authority. You've really given us
2 none, as far as I can tell, except Catawba.

3 MR. CUMMINGS: And, Your Honor, the line
4 of reasoning that went through Catawba was the need
5 for expertise, that the desire to prevent lay persons
6 who do not know how to use this information from using
7 it, and in that Catawba 0421, they pointed back to
8 Diablo.

9 JUDGE KARLIN: Yes, and Diablo, which I
10 have right here, deals exclusively with witnesses.

11 MR. CUMMINGS: Yes, Your Honor.

12 JUDGE MOORE: And most fascinatingly about
13 that case, counsel was given the information with no
14 such requirement. And the holding of that case in the
15 very first paragraph was giving the information to
16 counsel and the expert, and then the Appeal Board case
17 only discussed --

18 JUDGE KARLIN: Expert witness.

19 JUDGE MOORE: -- the expert witness.

20 MR. CUMMINGS: Yes, sir.

21 JUDGE MOORE: That seems strange that the
22 Commission should rely so heavily on a case.

23 MR. CUMMINGS: It was relying on it for
24 the expertise elements, which they referenced federal
25 --

1 JUDGE MOORE: And just ignored the fact
2 that counsel had the information in their position as
3 counsel, because that's what I have to conclude if
4 that's your position and that authority.

5 MR. CUMMINGS: But, Your Honor, counsel
6 had an expert with whom to work in analyzing the
7 information. And there have been licensing boards in
8 a separate Catawba decision --

9 JUDGE MOORE: You might remember that
10 Diablo Canyon case that you're relying on, that
11 counsel was found not competent to testify by the
12 licensing board.

13 MR. CUMMINGS: The expert or the --

14 JUDGE MOORE: The expert. Okay. I think
15 we've heard your position. DOE, you were more or less
16 going along as we read your statement and supplemental
17 position to support the Staff. You weren't
18 independently pushing that point. Do you wish to
19 continue to push it?

20 MR. EDWARDS: I don't have anything in
21 addition to say to what Mr. Cummings just said.

22 JUDGE MOORE: MR. Malsch, we have your
23 written position. Anything further you wish to add?

24 MR. MALSCH: No. I mean, I think as our
25 position says, this is one of the most made-up,

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1 bizarre, insupportable positions I've ever heard the
2 Staff take.

3 In that regard, I should point out that in
4 the protective order, we only signed on to the
5 proposition as far as experts and consultants are
6 concerned. They only had to demonstrate sufficient
7 qualifications to evaluate the information. We never
8 signed on to the proposition that they have to qualify
9 as an expert witness. The order does not say that.

10 JUDGE MOORE: Let's turn now to --

11 MR. CUMMINGS: Your Honor, if I may just
12 briefly. I apologize. Trying to lay out the --

13 JUDGE MOORE: Are you sure you don't want
14 to listen to the admonition of Will Rogers, that when
15 you find yourself in a hole, quit digging?

16 MR. CUMMINGS: Yes, Your Honor.

17 JUDGE MOORE: You've seen from the
18 questions we posed to you in the order of September
19 19th, and the discussion and exchanges we've had
20 today, the difficulties that are presented by all of
21 this, and how do we fashion an efficient process and
22 procedure to deal with this in a timely fashion? We
23 are open to suggestions on how you think we should
24 best proceed.

25 There appears to be agreement on OUO can

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1 be treated the way the secondary privileges are
2 treated in the second case management order. Other
3 than --

4 MR. EDWARDS: I would not -- I think where
5 we are on that is certainly to consider it. I need to
6 go back and talk to my security folks about that.

7 JUDGE MOORE: Okay.

8 MR. EDWARDS: But we're certainly willing
9 to look at that.

10 JUDGE MOORE: How do you propose that we
11 proceed? The floor is open.

12 JUDGE ROSENTHAL: Don't all speak at once.

13 MR. EDWARDS: Well, let me make a couple
14 of suggestions. I think that the discussion today
15 has, perhaps, convinced me that one protective order
16 may not fit, or one set of processes may not fit the
17 four categories of protected sensitive information
18 we've been talking about. There are different
19 statutory and regulatory bases with respect to each,
20 and the requirements are different, so perhaps we
21 ought to break them down. And instead of one
22 protective order, perhaps a protective order that
23 addresses each one individually.

24 I think the Board, as I just said, has
25 raised a very valid point with respect to OOU. I

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1 think we need to take that back. I think with respect
2 to UCNI, this is the first opportunity we've had to
3 articulate a position with respect to UCNI. We
4 haven't made any filings on it. We just filed a
5 protective order. I think it came as some surprise to
6 the Board today when we started talking about the fact
7 that special access for UCNI doesn't have a need-to-
8 know requirement. It only has the four criteria we
9 talked about, and that we're talking about 10
10 documents max at the moment. And it's just not an
11 issue. I mean, I don't think it's going to be an
12 issue.

13 JUDGE MOORE: Now one thing we didn't get
14 to today was, as I tried to work my way through the
15 UCNI regulations, it appeared to me that the criteria
16 definitionally for what is UCNI, required multiple
17 elements. It wasn't one or the other, or the other.
18 Is it -- am I correct that it's an and that joins one,
19 two, and three, and maybe there's even four of them.

20 MR. EDWARDS: Right. It sorts of breaks
21 down one and two, three, or four, so it's two - it's
22 a requirement of two, the first one, and then one of
23 the next three, I think is the way it set itself out.

24 JUDGE MOORE: Just idle curiosity, if
25 these are closely examined in light of all of these

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1 discussions, and you said this was the first time
2 you've even wrestled with it. And, indeed, I think
3 you suggested that when they get put under the
4 microscope, they may go away. Is that a realistic
5 possibility, that we're not going to have to deal with
6 UCNI information here?

7 MR. EDWARDS: Yes, sir.

8 JUDGE MOORE: Please, continue.

9 MR. EDWARDS: I'm not sure I have anything
10 else to offer beyond that. Trying to lump, I think,
11 the UCNI - from my perspective, or DOE's perspective,
12 trying to lump UCNI, OUO, and NNPI together I think
13 has created some issues and some problems that perhaps
14 we can alleviate if we deal with them separately.
15 It's one of the reasons that I asked MR. Putzu to be
16 here specifically, because his knowledge with respect
17 to NNPI and his authority to make certain
18 representations about it is much more extensive than
19 my own. And I think he has helped clarify some things
20 today with respect to how he has answered some of the
21 questions, so where do we go from here? I think we
22 need to go back a little bit to the drawing board and
23 see if we can deal with these individually, perhaps
24 more simply with respect to UCNI, perhaps more clearly
25 with respect to NNPI. And then the Board's suggestion

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1 that we, perhaps, alleviate some of the problems
2 through the redaction effort is something, as we have
3 indicated, we're certainly willing to pursue.

4 One final thought. There's been a lot of
5 discussion back and forth about regulations and
6 orders, and processes with respect to designations
7 were drafted without this process in mind. That's
8 true, but that's not necessarily unique to a lot of
9 different processes. The question is whether you can
10 make established processes that deal with the
11 designation of these documents and the people in the
12 trenches that actually have to do this and their
13 respective agencies, and they do it every day, they
14 make these designations. Whether you can make those
15 processes fit this process hand-and-glove. And sure,
16 there's going to be some tension, and sure there's
17 going to be some conflict, but what we've tried to do
18 is come up with a process that gets you to the
19 practical point where the issue goes away.

20 JUDGE MOORE: Okay. Now how much time do
21 we have to deal with this?

22 MR. EDWARDS: I understand that. I
23 understand that. But I will tell you that right now,
24 our position is, right now coming up with a blanket
25 proposal like we've talked about, perhaps is not going

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1 to save us a whole lot of time later on. Perhaps
2 we're better off at the moment trying to deal with
3 this on a piecemeal basis, as we've talked about.

4 MR. SHEBELSKIE: Judge Moore. We won't
5 have an LSN certification in the next couple of weeks,
6 for sure, and so Mr. Irwin and I were just conferring,
7 that I think with respect to the areas of UCNI, and
8 NNPI, and OUO, along the lines Mr. Edwards was just
9 speaking, we could certainly submit something to the
10 Board in 10 days from today.

11 JUDGE MOORE: Would it be helpful for all
12 the parties to confer and see if using, we would hope,
13 the model that we bled over in the second case
14 management order, if that is appropriate as the guide
15 to try to see if you can then, in light of what took
16 place today, your concerns, our concerns, some of the
17 matters that have been answered. I think you can tell
18 where we have very serious reservations about what's
19 been proposed and what hasn't been proposed, to try
20 and put something back together in that mold. Would
21 that be a fruitful approach?

22 MR. SHEBELSKIE: Well, I think it would,
23 Your Honor. Obviously, there is, with respect to the
24 DOE classes of information, the fundamental issue that
25 Mr. Edwards discussed with the Board this morning,

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1 which does affect how such a revised order would read.
2 But I think what I would propose is that we, at the
3 DOE, take a stab at doing a revised order for the
4 UCNI, the NNPI, High-2 classifications that tries to
5 come up with a schema that hopefully will obviate any
6 issue, the need for the Board to even grapple with
7 that underlying question, and see how that looks.

8 JUDGE MOORE: Staff, what do you propose?

9 MR. CUMMINGS: Your Honor, I believe
10 there's a number of key issues regarding how
11 safeguards information, access should be controlled
12 with the rest of the need-to-know, trustworthiness
13 determination that we would need some determination
14 from the Board as to how we would need to proceed in
15 crafting a protective order that could be used to
16 govern access.

17 JUDGE MOORE: Are you of the view that a
18 protective order distinct to SGI is in line?

19 MR. CUMMINGS: I certainly see no problem
20 with that, Your Honor.

21 JUDGE MOORE: And DOE, you certainly imply
22 from your remarks that a separate protective order, at
23 least as to SGI, distinct from NNPI and UCNI, would be
24 appropriate.

25 MR. EDWARDS: Yes, sir.

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1 JUDGE MOORE: MR. Malsch.

2 MR. MALSCH: I wouldn't say it's
3 inappropriate, but I still do not see why we can't put
4 together in one protective order something that covers
5 all these categories of sensitive information, with
6 the possible exception of OUO, which I think really
7 probably belongs more properly along with the other
8 ones in the previous protective order, and the case
9 management order. But I'm open to discussions.

10 In addition, I think we would like to
11 discuss with DOE the possibility of a citizenship
12 waiver for the information that would be of concern to
13 us.

14 JUDGE MOORE: I'm sorry, what issue?

15 MR. MALSCH: A citizenship waiver that we
16 discussed earlier.

17 JUDGE MOORE: Oh.

18 MR. MALSCH: That might obviate some of
19 the difficulties here that we would have. I think we
20 want to discuss --

21 JUDGE MOORE: And in that regard, I would
22 suggest that although, obviously, you're looking at it
23 from the standpoint of the State of Nevada, that that
24 -- although it may not come up, but that should be
25 broad enough, should it come up for some other party,

1 to set forth a criteria or process that would be
2 looked at, so that it's not a shot in the dark.

3 MR. MALSCH: That's a possibility. We'd
4 also like to discuss the possibility of privilege
5 logs, what they might contain, criteria for
6 withholding all these categories of information. And
7 I think we need to go back and have some discussions
8 with the Staff, because it looks like Staff's thinking
9 about this is, shall we say, evolving as we speak.
10 And I would hope that the next order we draft, the
11 Staff would have sufficiently staffed out so they
12 could actually say yes, this is what we agree to and
13 nothing more.

14 JUDGE MOORE: One of the matters that I
15 know that we have considered in light of today is
16 should we have briefed these fundamental questions
17 that we touched upon today, and maybe the best
18 approach is to wait and see how you all proceed
19 before we wrestle with these issues of, at least
20 concerning our authority and jurisdiction, questions
21 of first impression, and perhaps uniquely questions of
22 first impression across the board in this context.

23 MR. MALSCH: Yes. We're ready, willing,
24 and able to brief this issue. But, frankly, we're not
25 interested in raising legal issues for the sense of

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1 raising legal issues, if we can resolve this question.

2 JUDGE MOORE: Well, we don't take great
3 delight in wrestling with them for the sake of
4 wrestling with them, MR. Malsch.

5 MR. EDWARDS: That was the approach we
6 certainly came in here with today, is these are tough
7 issues, and there are not easy answers. And I'm not
8 sure they're correct answers that we could resolve
9 here today. And the best thing is to try to find a
10 practical way to resolve it.

11 JUDGE KARLIN: Well, may I ask; I think
12 I'm hearing something different. DOE, I think you're
13 thinking that maybe it would be a good idea to go back
14 and talk, and see if you can come up with something.
15 But the Staff, I thought I heard you say well, we
16 think we need some instruction from the Board.

17 MR. CUMMINGS: As far as some of the
18 access requirements, such as --

19 JUDGE KARLIN: So are you then saying it's
20 probably not worthwhile to have consultation with the
21 other parties until you receive rulings from the
22 Board?

23 MR. CUMMINGS: Well, with regards to some
24 of these fundamental issues, I'm not sure what
25 additional discussion with the parties will raise with

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1 regards to the legal requirements.

2 JUDGE KARLIN: Okay. That's what I
3 thought I heard you saying, it's probably not
4 productive to have a discussion with the other
5 parties, or discuss some mutually agreeable settlement
6 proposal.

7 JUDGE MOORE: I take it then your position
8 is set in stone, and discussions with MR. Malsch would
9 not be fruitful, if they point out errors in your
10 thinking?

11 MR. CUMMINGS: I'm never above people
12 pointing out errors in my thinking, Your Honor, but I
13 think in some elements, maybe such things as providing
14 the specific criteria and assisting MR. Malsch on how
15 an information protection system could be devised,
16 those may be things that additional discussion could
17 help. But on elements, such as the access issues of
18 need-to-know and trustworthiness, and reliability, I'm
19 not sure what MR. Malsch or the Department of Energy
20 will be able to assist us in that matter.

21 JUDGE MOORE: That's a troublesome area
22 for us, because under Plan A, which you propose, we do
23 nothing. And if all the stars align, the Commission
24 may do something some day. Under Plan B, we have to
25 move forward and not wait for the stars to align. And

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1 yet, you can't tell us what the likelihood of the
2 stars aligning is, so it seems to me that Plan A is
3 probably not an approach that is very fruitful for us
4 to take the ball across the goal line.

5 MR. CUMMINGS: Well, Plan A may be in the
6 immediate future, at least, as far as there is no --
7 I'm not sure the urgency to -- particularly, if we're
8 going to divide out the protective orders, and SGI
9 will be of itself. I think we're dealing with a
10 limited universe of information right now. There may
11 be some time that we could allow the Commission to see
12 how and when they will address this issue.

13 JUDGE MOORE: Would it make sense to go
14 ahead and map it all out, and if the process and the
15 procedures were established, then we're just changing
16 elements if the Commission speaks.

17 MR. CUMMINGS: Yes, Your Honor.

18 JUDGE MOORE: Unless they do something
19 that's totally unexpected, and I would presume that
20 you would be proposing something that would eliminate
21 largely that possibility.

22 MR. CUMMINGS: No, Your Honor. I believe
23 a draft protective order could be devised with the
24 understanding that the elements of trustworthiness and
25 reliability may need to change, based upon what the

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1 Commission may do. But the other elements --

2 JUDGE MOORE: All right. Let's take a
3 five minute recess for the Board to confer, and then
4 we'll tell you how we think we should proceed. Thank
5 you.

6 (Whereupon, the proceedings went off the
7 record at 3:57:02 p.m. and went back on the record at
8 4:06:30 p.m.)

9 JUDGE MOORE: We think in light of your
10 suggestions, the best way to proceed is we'll have a
11 telephone conference in about a week, and that will
12 give you all time to confer both amongst and between
13 yourselves. And propose at that time to us, both a
14 schedule for how we'll proceed as to when things can
15 be completed, as well as approach. Is next Wednesday
16 at 9:00, the 19th of October, available to all of you
17 for a telephone conference?

18 MR. CUMMINGS: The Staff's --

19 mR. SHEBELSKIE: MR. Irwin and I are
20 available. Mr. Edwards would not be.

21 JUDGE MOORE: Okay. Without pre-empting
22 you, Mr. Edwards, MR. Shebelskie, is MR. Edwards'
23 presence something that would be most beneficial?

24 MR. SHEBELSKIE: I think --

25 JUDGE MOORE: We can go to an alternate

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1 date if, Mr. Edwards, you think it's something that --

2

3 MR. SHEBELSKIE: We can accommodate your
4 proposed time.

5 JUDGE MOORE: Okay. Then we will -- MR.
6 Malsch, I'm sorry. You were objecting. I --

7 MR. MALSCH: No, I think it's okay, but I
8 -- frankly, later in the week would be better, like
9 Friday.

10 JUDGE MOORE: Well, let's try the next
11 week on the 26th at 9:00 in the morning. Is that one
12 good for everyone?

13 MR. SHEBELSKIE: That's fine with DOE.

14 MR. MALSCH: That works much better.

15 JUDGE MOORE: Staff?

16 MR. CUMMINGS: Your Honor, I will be out
17 of the country.

18 JUDGE KARLIN: No, but I'm wondering if
19 anyone else could handle this issue.

20 MR. CUMMINGS: If we could have it next
21 week, that would be best.

22 MS. MOORE: Your Honor, Mr. Cummings is
23 the attorney who has had the most experience with this
24 issue, and it would be best if he could be involved in
25 the conference call.

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1 JUDGE MOORE: Okay.

2 JUDGE KARLIN: Did we talk about the 25th,
3 the possibility of the 25th?

4 JUDGE MOORE: I take it anything after the
5 26th is bad for the Staff then.

6 MR. CUMMINGS: Technically, my travel
7 plans were starting the 24th, but I can move those, as
8 need be.

9 JUDGE MOORE: Well, in light of that, and
10 the Board's conflicts, let's go back to Plan A, and do
11 it on the 19th. Would a different time during the day
12 be more suitable on the 19th, Mr. Edwards?

13 MR. EDWARDS: I'll make it work. I can
14 make it work.

15 JUDGE MOORE: Then 9:00 in the morning
16 we'll have a conference call. At that point, we would
17 appreciate one, you giving us a schedule for
18 proceeding. And two, plan for proceeding. In that
19 regard, we would like to point out, after your
20 consultations if you can't all agree, and we suspect
21 that you won't in light of what the Staff has told us,
22 that if the State of Nevada and DOE can reach
23 agreement as the best approach for NNPI, OUO, and
24 UCNI, that would be an approach. And if the Staff
25 then, we have to deal with SGI separately, so be it,

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1 recognizing that the SGI documents that DOE has would
2 then have to probably fall into that mold. We would
3 hope that the model in the second case management
4 order would be carefully scrutinized by you in your
5 approach. And in that regard, we're talking about a
6 case management order, a protective order, and an
7 affidavit of non-disclosure. And most especially with
8 regard to that affidavit of non-disclosure, the
9 protective order, in our view, is where all of the
10 elements that one has to abide the requirements, by
11 which one has to live belong incorporated into the
12 affidavit of non-disclosure, not vice versa.

13 We think that that's a much better
14 approach than perhaps the one that has been proposed,
15 where everything is in the affidavit of non-
16 disclosure, not in the protective order. We think it
17 belongs in the protective order, to be ordered by us,
18 and then agreed to in the affidavit of non-disclosure
19 incorporated by reference.

20 JUDGE KARLIN: In that same vein, I mean,
21 if this was characterized as the third case management
22 order, it might have the processes for the various
23 types of privilege, shall I say. And there might be
24 primary privilege, and secondary privileges, and this
25 sort of thing, and might even have multiple protective

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1 orders if you think different ones are needed, and
2 that sort of thing. So one case management order with
3 one or more protective orders - I know we've used the
4 word "protective order" here, and that's what you
5 submitted before, but I think that's only part of the
6 game, and only the middle part of the game, I think.

7 JUDGE MOORE: Finally, Staff, we would
8 hope that you would fully engage DOE and the State of
9 Nevada, and examine your position in light of what's
10 taken place here today. And if you strike out on your
11 own, you will then propose to us a case management
12 order, protective order, and affidavit of non-
13 disclosure for SGI. And after we hear your proposals
14 next week, it may be that we wish you, Staff, to
15 brief, giving us chapter and verse statutory,
16 regulatory, and any case authority down to dotting
17 every I and crossing every T, for your position that
18 you're proposing.

19 Do any of you have any other matters that
20 you would like to bring before us today before we
21 adjourn?

22 MR. PUTZU: Your Honor, during the break,
23 I just wanted to hand to you a copy of the NAVSEA
24 instruction in accordance with our discussions earlier
25 today, and the affirmations that we discussed.

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1 JUDGE MOORE: We will treat that
2 information with the way that you expect it to be
3 treated. And essentially, the way we treat safeguards
4 information, which in this agency is, as a practical
5 matter, treated like classified information, at great
6 inconvenience to those of us who have to lock it up
7 every time we turn around.

8 MR. PUTZU: Thank you, Your Honor. If I
9 may just hand this to your law clerk.

10 JUDGE MOORE: Fine.

11 MR. MALSCH: Judge Moore, in that regard,
12 we've not seen this. We don't have access to it. I
13 would hope it would not play any important part in the
14 Board's decisions, because we can't comment on
15 something we haven't seen.

16 JUDGE MOORE: We understand that and, MR.
17 Malsch, we will be doing nothing with it other than
18 educating ourselves in the fashion that it is cited so
19 we know what it is. And you have a redacted version,
20 as I understand it.

21 MR. MALSCH: The version I have I think is
22 not redacted, except that it's missing Enclosure 1.
23 But I don't know what Enclosure 1 is, or what role it
24 plays. I think that's correct.

25 MR. PUTZU: Your Honor, I'm not sure of

1 the confusion, but we do have a redacted version we
2 can hand to counsel right now.

3 MR. MALSCH: Okay.

4 JUDGE MOORE: Do you object to us doing
5 other than have a redacted version, MR. Malsch?

6 MR. MALSCH: Not if the Board is just
7 using it to educate itself about the process.

8 JUDGE MOORE: Staff?

9 MR. CUMMINGS: Your Honor, just one
10 housekeeping matter for us. In connection with the
11 documents we provided the Board this morning, there
12 was a transmittal letter that was attached to the
13 folders, and would the Board like us to file that on
14 the HD, that transmittal letter with the document, the
15 publicly available documents?

16 JUDGE MOORE: These documents are all
17 publicly available somewhere?

18 MR. CUMMINGS: All of the documents are
19 publicly available on our public website, except for
20 one document, which is a DOE/NRC joint classification
21 guide, and that's the document that is separately
22 contained in a manila envelope. It's in the folder
23 that you have there, but it's separated out, but that
24 document is not publicly available.

25 JUDGE KARLIN: And that's OUO, right?

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1 MR. CUMMINGS: It's OOU designated by the
2 DOE under Exemption 2 and 5.

3 JUDGE KARLIN: 2 and 5, okay.

4 MR. CUMMINGS: They list 2 and 5 on the
5 document.

6 MR. MALSCH: Now is this something we
7 have, also?

8 JUDGE MOORE: Yes, we think that is the
9 best approach through the EIE. File it and detail the
10 documents, including the one that is OOU, that is not
11 publicly available and being filed as part of the
12 filing. I'm sorry. Listing the document, but noting
13 that it is not publicly available.

14 DOE, you gave us a collection of
15 documents. Now these, as I understand it, are also
16 all publicly available or no?

17 MR. EDWARDS: They are.

18 JUDGE MOORE: It probably would be
19 prudent, since you have this index, to similarly file
20 exactly what the Staff is filing, noting the one
21 document, which is the Version C of whatever precedes
22 the C, NAVSEA --

23 MR. EDWARDS: NAVSEA Instruction C.

24 JUDGE MOORE: Yes. That that document is
25 not made publicly available.

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1 JUDGE ROSENTHAL: I would just like to,
2 before we close, make this observation; that is,
3 obviously, the Staff has to decide what position in
4 the final analysis it proposes to take on these
5 various issues. As I think has become quite apparent
6 this afternoon, some of the members of this Board, if
7 not the entire Board, are somewhat skeptical about the
8 basis for some of the positions that the Staff has
9 taken.

10 Now having said that, the Staff is
11 obviously free to continue to maintain those
12 positions. As Judge Moore indicated, it may be at
13 some point called upon to file a brief in support of
14 every one of the positions its taken.

15 Now from my standpoint, this is a sui
16 generous proceeding. I think that the purpose, or one
17 of the purpose is to put everything on the table that
18 can be possibly put on the table. I would be hopeful
19 that the Staff might exhibit a degree of flexibility,
20 perhaps reconsider some of the entrenched positions
21 that it took today with a view to, perhaps, reaching
22 some kind of accommodation with the objectives of on
23 the one hand ensuring the safeguards information does
24 not get into the possession of persons whom should not
25 have that information, but at the same time,

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1 recognizing that there is a very definite public
2 purpose to be served in as broad availability of
3 information relevant to this proceeding as is
4 possible, consistent with Commission regulations. So
5 I got the impression that Mr. Cummings felt that there
6 was no useful purpose to be served in any kind of
7 further consultation and negotiation with counsel for
8 other parties. If I understood him correctly in that
9 regard, all I can say is that I would hope that he
10 might reconsider it.

11 Once again, I'm not suggesting to the
12 Staff that it is required to abandon positions that it
13 feels one, are required, and/or two, are clearly in
14 the public interest, which it's supposed to be
15 furthering. But at the same time, I think that a re-
16 evaluation, some flexibility in consulting with other
17 parties to this proceeding is warranted. So ends my
18 sermon for the day.

19 JUDGE MOORE: Judge Karlin.

20 JUDGE KARLIN: I'm not sure whether it's
21 a sermon or not, but I just wanted to note, next week
22 on the 19th we'll be getting together, and I think the
23 idea is to ask you to consider and discuss among
24 yourselves, to the extent you can, it's less than a
25 week away, the path forward, a best path forward on

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1 some of these various issues. And suggest if you have
2 them, some proposals and some schedules either for
3 working on a third case management order that might
4 deal with some or all of the issues we've addressed
5 today. Some of them may be excluded, we may not be
6 able to cover SGI, and you'll proceed on something
7 else. But next week you would, hopefully, have some
8 idea whether it is worth negotiating further on
9 various issues, or whether, perhaps, you would suggest
10 briefing of certain issues, or postponement of certain
11 issues.

12 All that said, if you do come up with
13 ideas and suggestions on schedules, please incorporate
14 on a going forward basis some time and opportunity for
15 people who aren't in this room here today, the public
16 if they so choose, to come and have an opportunity to
17 participate in the negotiations, as well. I'd
18 appreciate if you -- I know that you will do that, and
19 have tried to do that in the past. And whether they
20 participate or not, you can't control, but at least
21 you can give them the opportunity. Thank you.

22 JUDGE MOORE: We will stand adjourned. We
23 are now off the record.

24 (Whereupon, the proceedings went off the
25 record at 4:23:41 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: U.S. DOE High-Level Waste
Repository

Pre-Application Matters

Docket Number: PAPO-00;

ASLBP No.: 04-829-01-PAPO

Location: Rockville, MD

were held as herein appears, and that this is the
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