

NUCLEAR REGULATORY COMMISSION

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Docket Number: PAPO-00

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SECY-02

1 UNITED STATES NUCLEAR REGULATORY COMMISSION

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3 ATOMIC SAFETY AND LICENSING BOARD

4 + + + +

5 HEARING

6 + + + +

7 =====

8 IN THE MATTER OF: ||

9 U.S. DEPARTMENT OF ENERGY || Docket No.

10 (High-Level Waste Repository:|| PAPO-00

11 Pre-Application Matters) ||

12 =====

13 Third Floor Hearing Room

14 Two White Flint North

15 11555 Rockville Pike

16 Rockville, MD 20852-2738

17

18 Wednesday,

19 May 23, 2007

20 The above-entitled matter came on for

21 hearing, pursuant to notice at 1:00 a.m.

22 BEFORE:

23 Administrative Judge Thomas Moore, Chairman

24 Administrative Judge Alex Karlin

25 Administrative Judge Alan Rosenthal

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P R O C E E D I N G S

2 12:59 P.M.

3 CHAIRMAN MOORE: Good afternoon. I'm
4 Judge Thomas Moore. On my left is Alan Rosenthal. On
5 my right is Judge Alex Karlin. The Pre-license
6 Application Presiding Officer Board has convened this
7 case management conference this afternoon to address
8 the questions set forth in our order of April 19,
9 2007.

10 The conference this afternoon is being
11 recorded and it is also being broadcast on the NRC
12 broadband network.

13 We also have a video conference linked
14 with the Las Vegas Hearing Room so that counsel or
15 representatives of record in Las Vegas will be able to
16 participate from that location and the public may also
17 observe the conference from that site.

18 As always, we will begin with those
19 participants here in the Hearing Room, identifying
20 themselves for the Court Reporter by stating their
21 name, affiliation and who they represent. That will
22 be followed then by similar recitation from those
23 participating in Las Vegas.

24 We'll start here on my left.

25 MR. ROTH: For the Staff, David Roth, R-O-

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1 T-H.

2 CHAIRMAN MOORE: You're going to have to
3 speak up. Did you say Roth?

4 MR. ROTH: Roth. And to my right is
5 Andrea Curatola.

6 MS. CURATOLA: C-U-R-A-T-O-L-A.

7 MR. ROTH: And with me also is Marian
8 Zobler.

9 MR. SHEBELSKIE: Your Honors, Michael
10 Shebelskie from the law firm of Hunton and Williams,
11 representing the Department of Energy.

12 MR. BAUSER: Michael Bauser, representing
13 the Nuclear Energy Institute.

14 MR. MALSCH: Marty Malsch, with Egan,
15 Fitzpatrick & Malsch, representing the State of
16 Nevada. I also have with me today from Ross Dixon and
17 Bell, Merril Hirsch.

18 MR. NEUMAN: Barry Newman, N-E-U-M-A-N
19 with the law firm of Carter, Ledyard & Milburn,
20 representing Lincoln County, Nevada.

21 MS. CURRAN: Diane Curran, Harmon, Curran,
22 Spielberg & Eisenberg, and I'm representing Eureka
23 County and Lander County.

24 CHAIRMAN MOORE: Thank you. Would those
25 in Las Vegas, please identify yourself and state your

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1 affiliation and who you represent, please?

2 MS. TREICHEL: Judy Treichel, the Nevada
3 Nuclear Waste Task Force.

4 CHAIRMAN MOORE: Could you please speak up?

5 MS. TREICHEL: This is Judy Treichel, with
6 the Nevada Nuclear Waste Task Force.

7 CHAIRMAN MOORE: Thank you.

8 MS. TREICHEL: That's the only one here.

9 CHAIRMAN MOORE: We have one announcement
10 before we turn to our questions from participants
11 today. On June 19th and 20th of next month, the
12 Office of Nuclear Material Safety and Safeguards will
13 be holding a meeting with the affected units of local
14 government in the Las Vegas hearing facility. If any
15 of the participants at today's conference would like
16 a tour of that facility so that you can see the
17 conference rooms that will be made available to the
18 parties and participants of the proceeding, you should
19 contact Dan Grazer, the LSN Administrator, to make
20 arrangements to do that.

21 You have not identified yourself?

22 MR. KAMPS: I'm Kevin Kamps with Nuclear
23 Information and Resource Service.

24 CHAIRMAN MOORE: Thank you. As the first
25 order of business, we have a number of questions on

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1 the written questions that were in our April 19th
2 order and we'll start with those. We'll then work our
3 way through the questions that we're only looking for
4 oral responses.

5 ADMINISTRATIVE JUDGE ROSENTHAL: I have a
6 question with regard to the second written question.
7 Alan, let me back us up. I have one question on the
8 first -- for the Staff.

9 In your response, Staff, to the first
10 written question, you state on page 3, and I quote,
11 "Also, the process can be shortened if challenges to
12 the categorization of a document as SGI are
13 entertained even if the challenger has separately
14 applied for access to the SGI."

15 Is the Staff conceding the propriety of
16 bringing such challenges by that statement?

17 MR. ROTH: My propriety, sir, the Staff is
18 willing to entertain such challenges if you speed
19 along the process.

20 CHAIRMAN MOORE: Could you speak up? I
21 can't hear you.

22 MR. ROTH: By conceding the propriety,
23 sir, I'm a little uncertain of your question. What
24 the Staff is willing to do is --

25 CHAIRMAN MOORE: Well, if you're saying

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1 that potential parties can bring challenges to the
2 categorization, my question was simply is the Staff
3 conceding that such challenges are appropriate?

4 MR. ROTH: Within the context of this
5 answer, the intention was for theorizing as to ways it
6 could speed it up. I'm not certain the Staff is
7 willing at this point to say that we're conceding
8 that.

9 MS. ZOBLER: Your Honor, if I may just
10 address the question. If you're asking whether the
11 Staff is conceding that challenges can be brought on
12 the classification of SGI, the answer is yes.

13 CHAIRMAN MOORE: Thank you.

14 ADMINISTRATIVE JUDGE ROSENTHAL: With
15 respect to the second question which dealt with --

16 ADMINISTRATIVE JUDGE KARLIN: Still on
17 question 1. And this is just a quick note for the
18 Staff also. I see on that same page 3 you have
19 indicated in several places a second line, "although
20 pre-screening would not address need to know, it could
21 still result in time savings. The NRC Office of
22 Administration may be able to pre-screen individuals."

23 You indicate several other places in your
24 answer that the Office of Administration may be able
25 to pre-screen. We are going to reserve for the

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1 specific oral questions, I guess, exactly probing
2 exactly what that will mean. But that's an important
3 issue, not just may, but will and exactly how long it
4 would take.

5 MR. ROTH: Your Honor, if I could specify
6 right now, that is a will, rather than a may.

7 ADMINISTRATIVE JUDGE KARLIN: Good, good.
8 Great. We'll have to work on the details of how long
9 that will take, but that's good to know.

10 I'm done with question 1.

11 ADMINISTRATIVE JUDGE KARLIN: On question
12 2, the question addressed the definition of naval
13 nuclear propulsion information, in other words, NNPI.

14 CHAIRMAN MOORE: That's 3.

15 ADMINISTRATIVE JUDGE KARLIN: It looks to
16 be 2. In any event, I'm dealing now with the --

17 CHAIRMAN MOORE: Skip to question 3 and if
18 I could interrupt Judge Rosenthal for a minute, there
19 will be less confusion today if everyone would number,
20 starting with page 1, DOE's filing, because the pages
21 are unnumbered. And it would be very helpful if
22 everyone would take DOE's filing and starting on the
23 outside page number them 1 through I believe 13.

24 ADMINISTRATIVE JUDGE KARLIN: What this
25 was was actual DOE's second answer which appears on

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1 page 2 addressed to the definition of NNPI. DOE
2 supplied the definition that had been provided in a
3 Naval Sea Systems Command instruction.

4 Now in order for exemption of 3 to apply,
5 I would have thought that that definition would have
6 been quite irrelevant. And what would have been
7 important would the definition contained in 10 U.S.C.
8 Section 130 which authorized the Department of Defense
9 to withhold from the public the information that was
10 set forth specifically therein. That appears at the
11 bottom of page 3 and the top of page 4 of the DOE
12 response.

13 And it seems to me that that definition is
14 quite different from that which was contained in the
15 Naval Sea Systems Command instruction which was quoted
16 actually at the top of page 3.

17 Now my question for DOE is one, does it
18 acknowledge that there is a difference between those -
19 - substantive difference between those two
20 definitions, and if so, insofar as their claim of an
21 FOIA exemption 3 is concerned, does not the definition
22 that is contained in Section 130 govern, rather than
23 that which was contained in the Naval Sea Systems
24 Command instruction which is quoted at the top of page
25 3?

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20 ADMINISTRATIVE JUDGE ROSENTHAL: It seems
21 to me offhand that the instruction is considerably
22 broader than the statutory definition. I mean it
23 covers all information concerning the design,
24 etcetera, etcetera. And that seems to me to be a very
25 broad classification, whereas the Section 130 talks

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1 about technical data with military or space
2 application and possession over, under the control of
3 the Department of Defense.

4 Now you're telling me that in actuality
5 that the definition in the instruction is restricted
6 to technical data as defined in Section 130?

7 Or am I missing something?

8 MR. SHEBELSKIE: Yes, and no. Yes, I'm
9 telling you as a general matter it is restricted to
10 that kind of information that would fall within
11 Section 130. I think understandably where the Court
12 -- the reason for your reaction, Judge Rosenthal, is
13 that the quoted language that appears on page 3 which
14 is verbatim from the Naval Sea instruction, if you
15 look at it in isolation I understand your reaction
16 exactly. But really, for information to qualify as
17 the NNPI, it's more than the words that appear here on
18 page 3.

19 You need to incorporate into the analysis
20 the attachment that's referenced to the Naval Sea
21 instruction which was provided as an exhibit to our
22 filing that provides a flow chart for the decision
23 process that the naval nuclear reactor security
24 officials go through and in that decision flow chart
25 there are steps where information has to be

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1 specifically related to the nuclear propulsion plants
2 and has to meet certain criteria. Those criteria are
3 not delineated in this publicly available version of
4 the Naval Sea instruction. But they are set forth in
5 control documents in the joint classification guides
6 and it's the information that meets all of those
7 standards, meets the classification guides, and the
8 criteria of the complete Naval Sea instruction that is
9 the narrow type of NNPI that falls within the statute.

10 CHAIRMAN MOORE: Well, Mr. Shebelskie,
11 then you would agree that this definition can be no
12 broader than the definition contained in 10 U.S.C.
13 Section 130(c) which defines technical data which is
14 the term used in the 10 U.S.C. Section 130(a).

15 MR. SHEBELSKIE: Yes, but I think that is
16 true. And that's why in our answer to perhaps address
17 the Court's concern with the language that the parties
18 had thought was sufficient in the case management
19 order was to define the NNPI with specific reference
20 to the information that meets the criteria of the
21 NAVSEA instruction --

22 CHAIRMAN MOORE: But there's a huge
23 difference just right off the bat between all
24 information concerning, just the language of the
25 definition that you have propounded, and the statutory

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1 definition requirement of any technical data and then
2 technical data is defined specifically as any
3 blueprints, drawings, plans, instructions, computer
4 software, and documentation or other technical
5 information that can be used or be adapted for use to
6 design, engineer, produce, manufacture, operate,
7 repair, overhaul or reproduce any military or space
8 equipment or technology concerning such equipment.
9 That strikes me as being very much different from all
10 information concerning.

11 MR. SHEBELSKIE: Well, what I'm telling
12 you, Your Honor, is that the definition of NNPI is not
13 so broadly as all information concerning.

14 The parties, when we met and conferred
15 over this, we all agreed that information that
16 compiled with -- that qualified as NNPI was
17 appropriately restricted security information that
18 couldn't be exported, was covered by Section 130 under
19 FOIA. And the question was how do you define NNPI for
20 purposes of the order, recognizing that it meets the
21 definition.

22 Well, the parties had the publicly
23 available version of NAVSEA instruction and we lifted
24 the language that appears in the current draft and
25 that you're reacting to. That's why, as we were

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1 thinking about it, responding to this answer as on
2 page 3, we said that if you defined NNPI for purposes
3 of the protective order, as information that qualifies
4 as unclassified NNPI pursuant to NAVSEA instruction
5 551 --

6 ADMINISTRATIVE JUDGE KARLIN: Wait a
7 second, let me just stop you there. You're reading --
8 where are we? Read that again.

9 MR. SHEBELSKIE: On page 3 of DOE's
10 answer.

11 ADMINISTRATIVE JUDGE KARLIN: Okay.

12 MR. SHEBELSKIE: About halfway down --

13 ADMINISTRATIVE JUDGE KARLIN: Yes, I see.
14 It could define NNPI as information that qualifies as
15 unclassified NNPI. Now that doesn't get us very far
16 when you define a term by its own term.

17 MR. SHEBELSKIE: No, Your Honor.
18 Understandably --

19 ADMINISTRATIVE JUDGE KARLIN: NNPI is
20 NNPI.

21 MR. SHEBELSKIE: But it's information --

22 ADMINISTRATIVE JUDGE KARLIN: Pursuant to
23 NAVSEA instruction 5511.32(c) which I read and which
24 has that same definition up there that is quoted at
25 the beginning of the page.

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1 Now are you saying that the definition of
2 NNPI should be by reference to a secret document that
3 the public can't see? Or is it the public document?
4 If it's a public document, let's just have the
5 definition.

6 MR. SHEBELSKIE: The publicly-available
7 version of NAVSEA instruction, after providing the
8 language that we now see, also says further
9 delineation provided in the exhibit 1.

10 ADMINISTRATIVE JUDGE KARLIN: Exhibit A,
11 you're talking about Exhibit A on page 3? At the top
12 of page 3, you have a definition of NNPI that you lift
13 from NAVSEA 5511.32(a) and then you cite 5511.32(c) as
14 Exhibit A which I read, which has that exact
15 definition in it. That's fine.

16 MR. SHEBELSKIE: And it goes on, Judge
17 Karlin, and in that definition to that say enclosure
18 1 provides a more detailed definition of NNPI
19 including a system by system breakdown.

20 ADMINISTRATIVE JUDGE KARLIN: Right. But
21 what we want here and let me just back up. NNPI is
22 sensitive, unclassified information, right?

23 MR. SHEBELSKIE: Correct.

24 ADMINISTRATIVE JUDGE KARLIN: And if it's
25 NNPI, it's privileged and it's not going to be made

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1 public, right?

2 MR. SHEBELSKIE: Correct. It's access-
3 restricted.

4 ADMINISTRATIVE JUDGE KARLIN: All right,
5 it's access-restricted.

6 So the definition of NNPI, the way we got
7 started, we had a third case management order. You
8 all had a definition of NNPI in there. We thought
9 that was defective and problematic. We asked you some
10 questions about it. The question was could you give
11 us a definition of NNPI that would be better. You
12 gave us this definition at the top of the page, all
13 right. Naval nuclear propulsion information is all
14 information concerning operation, training,
15 maintenance and repairs of propulsion plans including
16 associated shipboard and shore base nuclear support
17 facilities.

18 Now if it meets that definition, it's
19 NNPI, that's what you're telling us, and therefore it
20 is exempt from being disclosed.

21 Now we want a definition that sort of
22 tells us -- I sort of got on a webpage and I tried
23 naval nuclear propulsion information and I got a, for
24 example, hundreds and hundreds of hits. Immediate
25 release, Senator Larry Craig, Idaho. He talks about

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1 Idaho facility has naval nuclear reactors, naval
2 nuclear propulsion, up near Arco, Idaho, etcetera,
3 etcetera. This press release meets the definition
4 that you gave us, so this must be NNPI, therefore,
5 this must be restricted data and something would have
6 to be unavailable.

7 ADMINISTRATIVE JUDGE ROSENTHAL: And yet,
8 certainly the definition doesn't come within the ambit
9 of Section 130 and that brings me to the question as
10 to why since you have to rely, I would think on
11 Section 130, if you're claiming the applicability of
12 exemption 3, why the case management order shouldn't
13 just focus on the dimensions of 130?

14 In other words, it should have that
15 definition and make no reference to the definition
16 contained in the instruction which, as Judge Karlin
17 has just observed, would seem to cover this press
18 release in circumstances where I think one would have
19 to agree that press release would not fall within the
20 confines of 130.

21 It seems to me that by focusing on 130
22 which is the foundation of any exemption 3 claim here,
23 we avoid the problems that we have just been
24 discussing about the relative coverage of the
25 instruction and 130.

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1 MR. SHEBELSKIE: A couple of points, Your
2 Honor, no one's intent in this proceeding that a press
3 release that makes reference to the existence of NNPI
4 is in itself NNPI. It mentions propulsion.

5 ADMINISTRATIVE JUDGE KARLIN: But it meets
6 the definition you propounded to us. It is
7 information concerning training and operation of naval
8 nuclear propulsion activities on shore-based nuclear
9 support facilities.

10 MR. SHEBELSKIE: It meets that definition

11 --

12 ADMINISTRATIVE JUDGE KARLIN: If it meets
13 that definition, then it's NNPI and then it's exempt,
14 according to your position.

15 MR. SHEBELSKIE: What I wanted to clarify
16 is that there's -- as we were referencing in our
17 answer, you have look at the NAVSEA instruction that
18 refers you to the appendix 1 to the NAVSEA instruction
19 and it's attachment 1 to enclosure 1 as provided in
20 the publicly-released information and there's a flow
21 chart for component level information --

22 ADMINISTRATIVE JUDGE KARLIN: We looked at
23 that. What I'm suggesting is we want a narrative
24 definition sort of like you might see in one of the
25 Socratic dialogues of what this word means. And NNPI

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1 means and we have a genus and we have a species in
2 what it is.

3 Now maybe the answer is let's go to the
4 bottom of page -- and this is what the other -- my
5 colleagues have been suggesting, maybe the definition
6 of NNPI should be go to the bottom of page 3, "any
7 technical data with military or space application in
8 the possession of or under the control of the
9 Department of Defense if such data may not be exported
10 lawfully outside the United States without approval of
11 license."

12 So it would be technical data, not just
13 any information, military or space applications,
14 possession of DOD, not exported lawfully without a
15 license. Those give us some elements which would have
16 some meat to them and we might be able to get
17 somewhere.

18 MR. SHEBELSKIE: Judge Karlin, I have with
19 me Frank Putzu who is counsel for the Naval Reactors
20 Command System. And he would like to comment on this.

21 ADMINISTRATIVE JUDGE KARLIN: Has he made
22 an appearance here?

23 MR. SHEBELSKIE: No. Sir. He did at a
24 prior security conference -- case management
25 conference dealing with security issues addressed

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1 these issues.

2 MR. PUTZU: Your Honor, I just want to
3 clarify. I think your point under 10 U.S.C. 130 is
4 well taken. The definition of NNPI flows within the
5 confines of 10 U.S.C. Section 130. If we want to use
6 that definition, frankly we can do that. It doesn't
7 really matter because in the end what the Department
8 of Defense is taking that definition of 10 U.S. 130
9 and said yeah, verily NNPI is a creature of 10 U.S.C.
10 Section 130, and the NAVSEA instruction puts the meat
11 on what that means.

12 ADMINISTRATIVE JUDGE KARLIN: I would
13 think it would be more the reverse that that the
14 NAVSEA instruction is a very broad and poor definition
15 that doesn't tell us when -- because what I want is a
16 definition that when I see a specific piece of paper
17 and I read it, I say does that meet the four corners
18 of that definition or not? Senator Craig's press
19 release meets the NAVSEA definition, if you want to
20 call it that. But it does not meet the 10 U.S.C.
21 Section 130. So we need something more concrete, I
22 guess, so you can take a given document and classify
23 as an NNPI or not an NNPI.

24 MR. PUTZU: Your Honor, I would
25 respectfully submit if you stopped right there under

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1 that instruction and I guess any reference in the
2 whole wide world you could look at it as meeting NNPI.

3 ADMINISTRATIVE JUDGE KARLIN: That's why
4 the definition is so poor. We were asked for a better
5 definition and we didn't get one.

6 MR. PUTZU: Well, we used that definition
7 which has been accepted in the Federal Courts and the
8 Bordell case adopted that definition.

9 ADMINISTRATIVE JUDGE KARLIN: Well, I have
10 not read the Bordell case. I see your desk discussion
11 of it. You know, they recognize that you use that.
12 But I see -- I will have to look at that. But I mean,
13 this definition is useless as far as being able to
14 take any given document and tell whether it is an NNPI
15 or not unless you want to include this as NNPI.

16 MR. PUTZU: Your Honor, we have security
17 experts that have been doing this for a very long
18 time.

19 ADMINISTRATIVE JUDGE KARLIN: Well, then
20 they must be using some criteria other than the words
21 in that NAVSEA 1155, whatever. There must be
22 something else.

23 MR. PUTZU: They use the words the
24 criteria that are spelled out in the flow chart that
25 is attached in the definitions contained in the --

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1 it's a very comprehensive instruction.

2 ADMINISTRATIVE JUDGE KARLIN: There are
3 other criteria that do not appear in that definition.
4 Let's go to the bottom of page three, which is
5 technical data. Why can't we use that as a definition
6 of an NNPI here?

7 MR. PUTZU: Well, Your Honor, really we
8 have no objection per se to using 10 U.S.C. Section
9 130, but I don't think it gets us anywhere. In
10 particular, because we're still -- when a document
11 comes across and the security experts for the
12 Department of the Navy and --

13 ADMINISTRATIVE JUDGE KARLIN: Well, is
14 that an argument that just simply says that it is
15 whatever we say it is?

16 MR. PUTZU: No, sir. The argument --

17 ADMINISTRATIVE JUDGE KARLIN: Then do we
18 have a role in deciding whether it is an NNPI?

19 MR. PUTZU: Well, we had this discussion.
20 We don't believe --

21 ADMINISTRATIVE JUDGE KARLIN: The Courts
22 have a role?

23 MR. PUTZU: No --

24 ADMINISTRATIVE JUDGE KARLIN: Courts don't
25 have a role either. So it's just whatever you say it

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1 is.

2 MR. PUTZU: Not in a specific question of
3 whether it is properly classified or not.

4 ADMINISTRATIVE JUDGE KARLIN: So this is
5 not classified information in the sense of classified
6 versus -- but classified as an NNPI, it's just
7 whatever the Navy says it is?

8 MR. PUTZU: Your Honor, you're really not
9 that whimsical about it.

10 ADMINISTRATIVE JUDGE KARLIN: Well, if we
11 could have some criteria that would be something more
12 than a broad shotgun. Plus, we have experts who will
13 -- don't worry your heads about it, because we have an
14 expert who will figure it out.

15 MR. SHEBELSKIE: Yes, Judge Karlin, and
16 that's just right. As the flow chart references,
17 there are at least two places where specific standards
18 and criteria are referenced that are embodied in the
19 joint classification guide and in the controlled
20 version of NAVSEA instruction. If Your Honor has in
21 front of him the attachment 1 to enclosure 1.

22 ADMINISTRATIVE JUDGE KARLIN: I have the
23 attachment A. Exhibit A, which is NAVSEA 5511.32(c).

24 MR. SHEBELSKIE: Yes, sir.

25 ADMINISTRATIVE JUDGE KARLIN: And that has

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1 attached to it a couple of other things.

2 MR. SHEBELSKIE: Right.

3 ADMINISTRATIVE JUDGE KARLIN: Let's see.

4 page 10, page 11, page 12, and I see enclosure one.

5 Yes, I see a flow chart. We looked at that before.

6 MR. SHEBELSKIE: All right. And what
7 would not perhaps be obvious to you, for sure, because
8 it wasn't obvious to me when you just read it cold is
9 if you look at the two diamonds at the top and there's
10 a second one on the right references identifies
11 problem CGRN-1.

12 ADMINISTRATIVE JUDGE KARLIN: Right, I see
13 that.

14 MR. SHEBELSKIE: That's the classification
15 guide. There are standards and criteria set forth in
16 the classification guide that the information has to
17 meet. And then going beyond that it has to be
18 unclassified NNPI, it's basically all those diamonds
19 on the right, the flow chart. And you get to the very
20 bottom one that says the 08 Special Criteria. As I
21 understand it, and Mr. Putzu can elaborate on it, that
22 the Naval Security System has very defined, precise
23 standards and criteria that the information has to be
24 related to a particular ship, a particular system on
25 the ship, and meet this military criteria.

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1 So it's not just -- I want to make sure
2 that this is clear -- some boundless discretion that
3 any classifier can just dream up what he wants to
4 classify. There are prescribed, specific standards in
5 the classification guide and in these special criteria
6 the Navy has developed.

7 ADMINISTRATIVE JUDGE ROSENTHAL: It seems
8 to me still that may be true, but it would be cleaner
9 for present purposes if the 130 definition was used in
10 lieu of the instruction, given that the 130 definition
11 is going to be what will be controlling if exemption
12 three is invoked. And it's then up to DOE, of course,
13 to come in and say that this particular document falls
14 within that Section 130 definition, and therefore is
15 entitled to protection under Exemption 3. Because the
16 facts still remains that the instruction would cover
17 the Senator Craig press release, whether or not if the
18 issue came up the Navy would treat it as being an
19 NNPI..

20 It just seems to me a lot cleaner to use
21 the definition in the statute which is the definition,
22 after all, is going to control.

23 MR. PUTZU: Your Honor, we certainly don't
24 have a problem passing it in terms of 10 U.S.C.
25 Section 130. It's just going to get us right back in

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1 the instruction and that's fine.

2 ADMINISTRATIVE JUDGE ROSENTHAL: Maybe --

3 ADMINISTRATIVE JUDGE KARLIN: Well, it
4 doesn't get us back to instruction definition. It
5 gets us back to your chart, your flow chart. You
6 know, I think we need -- you wrote the third case
7 management order. It had a definition of an NNPI in
8 it. That definition we found difficult and
9 problematic. We asked for another definition. You
10 gave us another definition which we find problematic.
11 It was too broad. It doesn't tell us anything. It
12 categorizes way too many things, and you say well,
13 that's not really what we mean. We have people who do
14 this for a living and, you know, just follow their
15 chart.

16 Well, what we wanted was words, a
17 definition, which would tell us what's in and what's
18 in and what's out of this category. That definition
19 doesn't meet it. I think 130 may help this 10 C.F.R.,
20 may help us as lawyers, other than just simply saying
21 NNPI is whatever we say it is, which would be another
22 way to do it. Whatever DOE says it is, or the Navy
23 says it is -- other than that, we would like some
24 words with some statutory and regulatory citations.

25 You see, our next question was please

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1 provide us statutory, regulatory, or other authority.
2 You didn't give us any statutory or regulatory. You
3 gave us other authority which was NAVSEA and some
4 other things. But okay, we just have a problem. I
5 think the bottom line is we have a serious problem
6 with this definition and it needs re-writing to be
7 meaningful. It either is whatever Navy says it is or
8 it is something which is supported by law and regs and
9 citations.

10 CHAIRMAN MOORE: Mr. Shebelskie, does NNPI
11 that meets the definition of 10 U.S.C. 130 also have
12 to be or is definitionally all such material not
13 exportable without license?

14 MR. SHEBELSKIE: Information that
15 qualifies as unclassified NNPI meets the definition of
16 information that can't be exported.

17 CHAIRMAN MOORE: So we don't need to
18 define NNPI in terms of anything more than 130. We
19 don't have to add all the export requirements on it as
20 well. Because if I understood your answer, everything
21 that falls within 130 also is export controlled.

22 MR. SHEBELSKIE: Yes, that's my
23 understanding. 130 is broader than unclassified NNPI.

24 CHAIRMAN MOORE: But it is not narrower?

25 MR. SHEBELSKIE: But it's not narrower.

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1 ADMINISTRATIVE JUDGE KARLIN: Well, let me
2 pursue that a little bit. Let's go to the bottom of
3 page three, and the 10 U.S.C. 130, I think you're
4 citing there. Any technical data then I think Judge
5 Moore cited us a definition of technical data
6 involving maps and diagrams and schematics and other
7 things. So there's a definition of technical data,
8 which we could find somewhere in a statute. Military
9 or space application, that's a second element it seems
10 to be in this definition that we could probably deal
11 with.

12 Possession of DOD. Okay, we could deal
13 with that. Now it seems like the crux is if it may
14 not be exported lawfully without a license. So
15 that's, I think, the critical element in the
16 definition, this definition of NNPI. Now that's sort
17 of the big hole. What does -- what can be exported
18 lawfully, what can't be exported lawfully. I think we
19 need that.

20 Later at the bottom of page four,
21 unclassified NNPI qualifies as technical data with
22 military application, possession that may not be
23 exported from the United States without an appropriate
24 license, export control. So it may not be exported.
25 What can be exported without a license and what can

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1 be? That's where we then have to go to and say what
2 does that mean? It can't be exported? Please give us
3 an idea of what could be exported without a license
4 and what can't be exported without a license.

5 MR. SHEBELSKIE: Right, and as it relates
6 here there are a variety of regulations from the
7 Department of State as well as the Department of
8 Commerce and DOE that define information that can't be
9 exported without a license.

10 ADMINISTRATIVE JUDGE KARLIN: Can you show
11 me that? Do you have anything in what you wrote and
12 gave us, is there anything that helps us with that?

13 MR. SHEBELSKIE: On the bottom of page
14 four there is the reference to the International
15 Traffic and Arms Regulations and the munitions list of
16 the Department of State.

17 ADMINISTRATIVE JUDGE KARLIN: Okay.

18 MR. SHEBELSKIE: In 22 CFR Part 120 and
19 those regulations apply beyond naval nuclear
20 propulsion information, but to a variety -- of
21 information on a variety of military equipment, but it
22 encompasses information concerning naval nuclear
23 propulsion plans. And other regulations cited there
24 and pursuant to that, and furtherance of that, the
25 Navy has in both the NAVSEA instruction that we have

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1 been talking about, 55.11, but also in the OPNAV
2 instruction 55.10 provided that naval nuclear
3 propulsion information that meets the definitions and
4 standards and criteria that we mentioned that the
5 classifiers follow, cannot be exported without a
6 license.

ADMINISTRATIVE JUDGE KARLIN: All right.

I'm just suggesting that central to the definition of NNPI is I see it is technical data, military space, possession of DOD can't be exported. So I need to know what can't be exported. That would be part of the definition. That is, what can be exported and what can't be exported? And I'm not asking you to do that here, but if we are to rework this third case management order and have a competent definition of NNPI, such that if it is NNPI it's privileged.

17 We need a definition that includes those
18 four elements plus an explanation what can't be
19 exported. That's I guess what we will have to do if
20 we want to rewrite that thing.

21 MR. SHEBELSKIE: Well, why cannot the
22 Board just reference Section 130, maybe not call the
23 subject category NNPI. We can come up with section
24 130 information.

ADMINISTRATIVE JUDGE KARLIN: Because we

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1 try to avoid definitions with simply cross-reference
2 to a whole set of regs which leads you to a wilderness
3 of materials. We would like to have words there in
4 the page that tells us whether it's UCNI, whether it
5 is NNPI, whether it's --

6 MR. SHEBELSKIE: But Judge Karlin, it
7 seems to me that oftentimes in areas with very
8 complicated inter-working statutes that are quite
9 expansive, sometimes the standards that have to be
10 referenced in a protective order, case management
11 order, would simply be references to information that
12 qualifies within meets the standards of the referenced
13 statutes, because the descriptions may be multi-
14 faceted and not capable of a simple distillation.

15 ADMINISTRATIVE JUDGE KARLIN: Well, okay.
16 I understand that point.

17 CHAIRMAN MOORE: With regard to your
18 answer number two, which is we are skipping ahead to
19 the written question three in reality. On page five,
20 you --

21 ADMINISTRATIVE JUDGE KARLIN: So you are
22 on PTCMO definitions, question 3?

23 CHAIRMAN MOORE: You indicate that the
24 question that asked you for all the information that
25 would be necessary to establish a *prima facie* case for

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1 an NNPI document, instead of answering that you said
2 you shouldn't -- we shouldn't be providing for a prima
3 facie case in a privileged log because you're going to
4 provide a redacted document which will be self-
5 explanatory and more or less it's a trust-me
6 situation.

Later on, in response to another one of
the questions you expand upon that by saying that
there is an implication if you use prima facie, that
if by error you don't meet it in the privileged log it
is automatically going to be turned over. I don't
think that follows at all when you are dealing with
sensitive information. But is it not possible to list
the elements for each NNPI document that would
establish prima facie that it is entitled to be
withheld?

17 MR. SHEBELSKIE: Two points, Judge Moore.
18 One, in developing the case management order and I
19 think this is reflected in the three parties answers,
20 we all understood and appreciated the sensitivities
21 that would have to be brought into any kind of SUI law
22 with reference to a document. Both given the nature
23 of information, the variety of the documents that
24 might be brought into play.

25 And so all three at the time, we were all

1 in agreement that there should be maximum flexibility
2 reserved in terms of what an SUI log would look like
3 for a specific document. Especially since in many
4 cases there would obviously be a redacted document
5 that we think would be rather self-explanatory, what
6 the redacted information is.

7 Second point is one could, for example,
8 look at the flow-chart. That's the attachment one to
9 the NAVSEA instruction. There are all those that
10 become unclassified NNPI, for example, you would have
11 to satisfy -- go through all those boxes. One could
12 easily satisfy that, yes. The information relates.
13 It gives identification of a particular hull of a
14 ship. So you would know what ship this plant is in.
15 You could say that that yes, we made that good faith
16 determination. We couldn't tell you what the ship
17 was.

18 Another box, does the information identify
19 a particular nuclear propulsion system in this
20 particular ship. Well yes, we have to satisfy
21 ourselves that it does. We could vouch that that is
22 the case, but we can't tell you what that system is.
23 And then there are those, for example, the special
24 criteria that are in controlled standards.

25 CHAIRMAN MOORE: But for all privileges in

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1 the log you never reveal the privileged information in
2 its description.

3 MR. SHEBELSKIE: No, but we were --

4 CHAIRMAN MOORE: Nearly what you're saying
5 would seem to me to establish the very elements that
6 are necessary to show on its face that it is what it
7 purports to be NNPI.

8 CHAIRMAN MOORE: Yes, but all that
9 ultimately telling you, Your Honor, when we thought
10 what your reaction to that might be, which is all
11 you're telling us is does the information relate to a
12 particular hull so you can identify the specific ship.
13 Yes or no? If we said yes, you would say well, how
14 does that prove to us on a prima facie basis that it
15 in fact does, that your determination is right.

16 ADMINISTRATIVE JUDGE KARLIN: Well, why
17 would we need that? Why don't we just need on a
18 privileged log or a log this is technical data. It is
19 a map. It is in a military or space application.
20 It's in the possession of DOD and it can't be exported
21 lawfully without a license. Now would probably have
22 to break that one day. We don't need which hull it is
23 or that it is a hull. If those are the elements of an
24 NNPI, which statute seems to say they are, those might
25 be the elements of a log, without giving us specifics.

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1 MR. SHEBELSKIE: But Judge Karlin, I think
2 where we would get quickly in that analysis on that
3 last prong -- I mean, if we told you yes, this relates
4 to a nuclear propulsion plant on a Navy ship, I would
5 assume that would pretty establish that it is
6 information on a military application.

7 ADMINISTRATIVE JUDGE KARLIN: Well, I
8 guess. I mean, you know if air craft carrier
9 Enterprise has a --

10 MR. SHEBELSKIE: I can probably --

11 ADMINISTRATIVE JUDGE KARLIN: That doesn't
12 get us very far.

13 MR. SHEBELSKIE: I could posit that we
14 would give a generic discussion of what the particular
15 document and information that would show that is a
16 Naval application. But to get to that last prong is
17 there something that is export controlled, restricted
18 export. Well, what would we point to? We would say
19 well, this is information that meets the standards of
20 the reasons export controlled, citing this statute,
21 this reg, this NAVSEA instruction is because the
22 information has been reviewed and has met the
23 standards of NAVSEA instruction and we'd be right back
24 to your point --

25 ADMINISTRATIVE JUDGE KARLIN: Yes, of we

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1 say so, because we say so.

2 MR. SHEBELSKIE: Of engaging in that
3 dialogue. Now another point I want to make and the
4 parties again discussed this and explicitly reserved
5 this, Your Honor, and it's an important question which
6 we're sort of touching around the edges on is the
7 authority of the Commission, itself, and then by
8 delegation to the Board to overturn a determination by
9 the Navy that information constitutes NNPI.

10 Again, I want to be perfectly clear about
11 this.

12 ADMINISTRATIVE JUDGE KARLIN: It's
13 specifically reserved.

14 MR. SHEBELSKIE: That's right.

15 ADMINISTRATIVE JUDGE KARLIN: I understand
16 that. Okay.

17 Do you know how many, at this point, Mr.
18 Shebelskie, how many NNPI documents are in your LSN
19 collection?

20 MR. SHEBELSKIE: Currently, in our
21 collection under process, there are 744, as of
22 yesterday.

23 ADMINISTRATIVE JUDGE KARLIN: Seven
24 hundred forty-four?

25 MR. SHEBELSKIE: Yes, sir.

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ADMINISTRATIVE JUDGE KARLIN: So we're looking potentially at 744 disputes?

MR. SHEBELSKIE: Well, honestly, we think not for two reasons. One is these documents will be redacted. Mr. Putzu, with whom I've conferred about this assures me that the -- when you follow the standards and the classification guide, the information is very focused as to what is redacted and you'll be able to see in context the document, the information that's redacted. And we think anybody operating in good faith will understand why this information is appropriate for protection by looking at the document.

Second, the access --

ADMINISTRATIVE JUDGE KARLIN: Be willing
to turn it over to anyone under reasonable
restriction?

MR. SHEBELSKIE: For U.S. citizens, there will be a pretty easy access, as long as you agree to the protective order --

ADMINISTRATIVE JUDGE KARLIN: No, no, no.
The citizenship is waivable, but we never learned what
the criteria for having it waived

MR. SHEBELSKIE: I know that there are special programs to facilitate access to citizens of

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1 the United Kingdom which I think encompasses many of
2 Nevada's experts, but otherwise, maybe Mr. Putzu can
3 address that more fully.

4 MR. PUTZU: By statute and regulation,
5 normally, it's U.S. citizens that apply. Foreign
6 citizens, I hesitate to give you a definitive answer
7 because it really depends on which country they're
8 from. Certain obviously a Chinese National may have
9 a great deal of difficulty getting access to this.
10 Now a U.K. National, it's certainly plausible that the
11 Admiral, the Director of Naval Reactors will grant
12 them access. It's within his discretion to do if he
13 believes it's necessary or a required thing to do. He
14 has the discretion to do that.

15 I want to be cautious about that though
16 because that's very much case by case and it depends
17 on the individual who comes forward and their
18 background.

19 CHAIRMAN MOORE: Do we have any idea what
20 kind of case has to be made to get that waiver?

21 MR. PUTZU: You know, Your Honor, I really
22 hesitate to speculate on that. I think that's going
23 to come down to the experts that are proffered, what
24 areas that they want to look at, what kind of
25 documents that the information that may be contained

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1 within those documents and the sensitivity, how that
2 relates to the prospective witness. So I'm very
3 reluctant to speculate on that.

4 ADMINISTRATIVE JUDGE KARLIN: Can I ask
5 Mr. Shebelskie, 700? Last time we met you said 340
6 was the total number of sensitive documents that DOE
7 had in its universe on page 981 of the transcript; 340
8 for one or more of the security privileges. So is
9 there some -- was that wrong or is there a doubling?
10 Why is it suddenly doubled just for NNPI?

11 MR. SHEBELSKIE: I was under the
12 assumption we were talking about a pretty small
13 universe. It's still pretty small --

14 ADMINISTRATIVE JUDGE KARLIN: It's still
15 pretty small, isn't it, but it's twice as many as you
16 mentioned last time.

17 MR. SHEBELSKIE: Right.

18 ADMINISTRATIVE JUDGE KARLIN: Maybe you
19 found some more?

20 MR. SHEBELSKIE: Judge Karlin, I don't
21 have the transcript in front of me, but is it possible
22 that the reference you're mentioning does not include
23 the update, I mean the NNPI, because Mr. Putzu recalls
24 our estimates previously for NNPI were up to 4,000.

25 ADMINISTRATIVE JUDGE KARLIN: Well, that's

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1 correct. Back in 2005, you had 4600, I think as the
2 NNPI estimate. On page 981, you were asked the number
3 of privileged documents and you said "my numbers as of
4 March 1, the total document collection of
5 approximately 3.4 million documents.. Right now, still
6 in play, we have approximately 6800 that are subject
7 to primary privilege; 340 for one or more of the
8 security privileges, approximately 1500 on
9 archeological privileges, a little over 2000 on
10 privacy, 3500 on business proprietary; 350 on employee
11 concerns." So it was 340. And maybe a digit was off
12 or something.

13 MR. SHEBELSKIE: I mean, Your Honor, you
14 can imagine over the years, new documents come in;
15 documents are continually reviewed. All I can say is
16 that the Navy continues to give us documents over the
17 years. The Navy reviews their documents. They tell
18 us the ones that meet the standards of the NAVSEA
19 instruction for NNPI and engage it in the redaction.

20 ADMINISTRATIVE JUDGE KARLIN: Okay. It is
21 what it is.

22 MR. SHEBELSKIE: There's not been a change
23 in the definition. I wasn't thinking that there had.
24 I mean one of my concerns is whether or not we're
25 dealing with a pretty small universe and how many

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1 disputes we're really going to see. Is this third
2 case management order really worth the candle that
3 we're spending on it? Should we wait until specific
4 disputes arise or try to grapple with it now? This is
5 something I've got -- my perspective.

6 CHAIRMAN MOORE: Recognizing your
7 reservation of the question as to who has the
8 authority to determine whether or not a particular
9 piece of information in a document is properly
10 categorized as NNPI, you still can't avoid, can you,
11 the necessity of developing procedures right up
12 through a privilege log because that's then going to
13 be the basis for a contest regardless of where that
14 contest ultimately is held.

15 And whether it's here or somebody goes to
16 Federal District Court under the Freedom of
17 Information Act and tries to get it --

18 MR. SHEBELSKIE: We have to have a process
19 for someone to make the request, general time periods
20 to respond to the request, that sort of thing.

21 CHAIRMAN MOORE: But you still have to
22 have all the procedures for turning this redaction,
23 turning it over. The citizenship requirement and then
24 the way in which they can avoid it and it's likely to
25 come up in the context when you say the experts can't

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1 see this and then there's not the incentive to
2 challenge it that it really isn't NNPI.

3 MR. SHEBELSKIE: Yes, and we think we have
4 -- our intent was to have the procedures that bring
5 you up to that point, could be recognized, so if we
6 took on the responsibility to provide redactions, the
7 Staff would process for requests. We were taking
8 issue with the usefulness of that.

9 Mr. Putzu would like to add something on
10 that.

11 MR. PUTZU: Judge Karlin, you asked a very
12 good question which is, if I understood it, what's the
13 real risk here of this issue getting engaged?

14 I can tell you this in my experience and
15 I've done NNPI in Federal Court any number of times.
16 This has never become a source of dispute about
17 whether it was properly classified as NNPI or the
18 Courts had some role to play in it or that we
19 overstretched it.

20 Just the nature of unclassified NNPI and
21 let's focus just on that because there is a classified
22 version. But we'll put that to the side for the
23 moment.

24 In the unclassified version, we've always
25 been able to work it out with the parties to get them

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1 whatever access is needed. The only case which is why
2 we cited it in here where that issue ever got joined
3 was the Bordell case. It's listed on page five where
4 they go into the Federal Court revisited what is NNPI
5 and what is the definition? It's the only case I'm
6 really aware of where it became an issue.

7 CHAIRMAN MOORE: I'm guess. I've
8 absolutely no knowledge about any of this because
9 we've seen none of the documents, but these fights are
10 all going to be over fuel and what's going in through
11 the waste package, would be my guess. Because the
12 mountain under current arrangements is supposed to
13 accept fuel from the Navy program. That leads me to
14 believe that if you have 700 documents that there are
15 going to be documents that if you can't work it out,
16 there's going to be a lot of contest over it. And
17 because of what the State of Nevada has told us
18 previously about their inability to corral experts
19 that are U.S. citizens that they're using a number of
20 foreign experts, I suspect that that has the making of
21 a contest.

22 MR. PUTZU: It's certainly conceivable,
23 Your Honor. Again, I have seen at least some of the
24 redacted documents that have gone on to the LSN of
25 those 744. I'm comfortable referring to that as a

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1 pretty darn near solution.

2 CHAIRMAN MOORE: Okay, I'd like to turn
3 back to written question 2. I jump ahead to some
4 questions to the State of Nevada.

5 In reading your answers I get the distinct
6 impression that Nevada is of the opinion that 10 CFR
7 Section 73.59(b)(4) exception or exemption is a
8 proposed rule. That was promulgated and made final
9 some many, many, many months ago. Does that change
10 your view of what you said to us in your writing?

11 MR. MALSCH: No, and I apologize for any
12 confusion. We knew that, but we also knew that the
13 same language was in both the June '06 direct final
14 rule and the October '06 proposed rule. We had been
15 referencing the October rule because it's a little
16 more comprehensive. The June '06 final rule just
17 addressed exceptions from fingerprinting and those
18 related background checks whereas the October proposed
19 rule which uses the same language from the June rule
20 about background checks also addresses exemptions and
21 exceptions from the so-called fuller background
22 investigations and Staff's trustworthiness and
23 reliability determinations.

24 But we do believe, as we said in our
25 filing, that Staff's interpretation of the June '06

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1 rule and then necessarily what it meant by the later
2 rule, cannot possibly be correct for a number of
3 reasons. Not only the reasons given by the Board, but
4 also if you look at the rule, it was a direct final
5 rule that was justified on the basis of a number of
6 APA exemptions from APA Section 4, notice and comment
7 rulemaking. And there's a big discussion in the rule
8 about how this is necessary to add additional
9 exemptions and in addition it cited the exemption in
10 the APA for rules from notice and comment rulemaking
11 for rules which grant an exemption or relief a
12 restriction. If the staff's interpretation were
13 correct, that rulemaking would be a flat out violation
14 of the Administrative Procedures Act.

15 I also recently looked into --

16 CHAIRMAN MOORE: But you haven't
17 challenged it.

18 MR. MALSCH: We're challenging it here,
19 but frankly, until the Staff's filing that was the
20 first we had learned that that was the Staff's
21 interpretation of the rule. To give you a poor
22 example, when the Staff briefed the Commission on the
23 June '06 rule, it specifically represented to the
24 Commission that the rule was only about granting an
25 exception. So this was news to us.

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1 In fact, I think at the last case
2 management conference, when this issue was discussed,
3 there was no indication from Staff that any of the
4 rule or for that matter the Energy Policy Act of 2005
5 required any change in this respect in the proposed
6 third case management orders. So this was a complete
7 surprise to us.

8 CHAIRMAN MOORE: Staff, in your response
9 to the second written question, you conveniently
10 ignored in answering the question. The rather
11 explicit statement from the Commission's statement of
12 considerations that said and I quote, "the current
13 regulations in Section 73.21 and 73.57 relieve
14 governors and their designated representatives from
15 fingerprinting and criminal history records checks if
16 those individuals seek access to SGI as defined in
17 73.2. This final rule continues that relief."

18 It's hard to find a statement that is more
19 specific in any regulatory history than this. It
20 identifies specifically what they're talking about and
21 then they say this rule continues that relief. Yet,
22 you have interpreted that rule to ignore that
23 statement and say that the change by adding the word
24 "state employee" to this exemption will require the
25 governor's designated lawyers to undergo

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1 fingerprinting and background checks because they're
2 not state employees.

3 How do you reconcile your interpretation
4 with that specific language from the legislative or
5 regulatory history?

6 MS. CURATOLA: The statement of
7 consideration, are you referring to the part that says
8 the category of individuals released by the final
9 rule? I'm sorry, I missed -- where is the part that
10 you're quoting from. Where is that?

11 CHAIRMAN MOORE: Well, I made it real easy
12 for you. We put it right in the written question.

13 MS. CURATOLA: Right, and that's along the
14 same lines. That's right together with the part that
15 quotes the new section 73.59(b)(4) amended, the
16 exemption language so that it currently refers to that
17 -- is that what you're referring to? Correct?

18 CHAIRMAN MOORE: I am having difficulty
19 hearing you, but I'm referring to the portion that I
20 just quoted to you that is prominently set forth --

21 MS. CURATOLA: In the question --

22 CHAIRMAN MOORE: -- in the first paragraph
23 of the question.

24 MS. CURATOLA: Right, and Staff
25 understands the rule to generally broaden the

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1 exemptions of the categories, but leave the exemption
2 in (b) (4) the same -- it broadens the categories by
3 adding additional categories, but the one, the
4 exemption for the state governor and the
5 representative has not been broadened.

6 CHAIRMAN MOORE: Okay. That would leave
7 it the same, but you've narrowed it in your
8 interpretation.

9 MS. ZOBLER: Your Honor, I think the
10 Staff's written response was written in response to
11 your overall question. If we didn't directly address
12 the question that you raise about the statement, the
13 statement of considerations, the Staff's
14 interpretation is that the plain language of the rule
15 itself speaks for itself. And therefore that's the
16 basis for our interpretation that the final rule that
17 was issued in June and then was also subject to
18 comment in the October 31st proposed rulemaking, that
19 was the -- sort of the opportunity for any entity,
20 public entity that had a concern about that -- had
21 that very question that Mr. Malsch is raising today,
22 really have the opportunity to point that out to the
23 Commission during the proposed rulemaking.

24 CHAIRMAN MOORE: Was it put out for notice
25 and comment?

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1 MS. ZOBLER: Not the final rule that was
2 issued in June, but as noted in the final language we
3 said that there would be an opportunity to comment on
4 these exceptions during the proposed rulemaking.

5 CHAIRMAN MOORE: Is it the Staff's
6 interpretation of 73.59(b)(4) that private counsel
7 designated by the governor is a special state employee
8 to represent the state in an NRC proceeding and
9 qualifies for the exemption?

10 MS. CURATOLA: As a special state
11 employee?

12 CHAIRMAN MOORE: If the governor
13 designates Mr. Malsch as a special state employee,
14 does he qualify for the exemption?

15 MS. CURATOLA: I think that would probably
16 depend on the laws. Under Nevada laws, how Nevada
17 defines employment and how Nevada defines a state
18 employee.

19 CHAIRMAN MOORE: So the way the Staff
20 interprets the regulation is the determination of who
21 is a state employee or a special state employee is a
22 question obviously then of state law?

23 MS. CURATOLA: Yes.

24 CHAIRMAN MOORE: And so if I understand
25 you correctly, if the State of Nevada recognizes

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1 something by Executive Order or any other such way by
2 regulation, that a category of employees called
3 special state employees, that would qualify for the
4 exemption?

5 MS. CURATOLA: If Nevada classifies
6 special state employees as state employees, I believe
7 we would consider it.

8 CHAIRMAN MOORE: So the answer is yes,
9 they would qualify?

10 MS. CURATOLA: Yes, I believe so.

11 ADMINISTRATIVE JUDGE KARLIN: I have a
12 question on this -- not on question 2, but question 3
13 which we were dealing with before.

14 Question 3 focused on the proposed third
15 case management order definitional structure and we
16 talked about the definition of NNPI before. Now I
17 want to turn to the question that appears at the top
18 of page 7 of our order of April 19th which is the
19 definition of export controlled information. We
20 thought that was important. It seemed to be important
21 in the proposed case management order that you all put
22 on the table.

23 And so I'd like to turn to DOE's answer to
24 what is the definition of export controlled
25 information on page 8, unnumbered page 8 of DOE's

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1 answer. And this definition seems to be an important
2 definition of NNPI as our prior discussion reflected.
3 I think this definition is likewise problematic, that
4 you've given us, Mr. Shebelskie, your page 8 in the
5 middle, "DOE, provide the definition of export
6 controlled information."

7 Response: "Export controlled information
8 is any technical information whose export requires an
9 export license." That doesn't get us very far.
10 Export controlled information is information whose
11 export is controlled. Can we get anything more
12 specific than that? Can you give us a little more
13 detail so if we saw a piece of paper and looked at it,
14 we could say yeah, verily, this is in or this is out?

15 MR. SHEBELSKIE: DOE has promulgated an
16 order that is applied within DOE that is cited in the
17 next paragraph and that's what DOE follows when they -
18 - broadly follow when they mark documents, internal
19 documents as export controlled information. And that
20 encompasses, could encompass information restricted
21 from export under a variety of statutes and it's
22 intended to --

23 ADMINISTRATIVE JUDGE KARLIN: Okay,
24 there's an order there and we've got to look at that
25 order. Is that what you're saying?

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1 MR. SHEBELSKIE: That's right.

2 ADMINISTRATIVE JUDGE KARLIN: Let me just
3 continue.

4 The second question was "provide a
5 specific citation to statute, regulation, or other
6 authority supporting that definition."

7 Now the second part of the paragraph you
8 cite us to 15 CFR part 73 to 774. That must be
9 hundreds of pages. It's not just a second. That's a
10 part, part 730, part 731, 732, 737; the Department of
11 State International Traffic -- 22 CFR Parts 120 to
12 130; 10 CFR Parts 110; DOE Part 810. I mean are you
13 -- did you really read the question where it says
14 provide -- underlined specific citation to statutes,
15 regulations, directly supporting -- and you give us a
16 huge, hundreds of pages reference. What good is that?

17 Isn't there something in there that gives
18 us that definition?

19 MR. SHEBELSKIE: Judge Karlin, the
20 definition that DOE uses that's meant internally at
21 DOE, export controlled information is the definition
22 that is cited in the order, quoted from the order in
23 the second paragraph.

24 ADMINISTRATIVE JUDGE KARLIN: And where
25 does the order come from? The order is not a statute.

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1 It's not a regulation. So the order must reference
2 something. All I want is some specific cite.

3 MR. SHEBELSKIE: Let me -- Judge, there's
4 two more steps to the answer. That definition, as I
5 said, is intentionally broad because it covers a wide
6 variety of information protected by a wide variety of
7 statutes and regulation, principally, the wide ranging
8 regulations and statutes that you just referred to
9 because DOE within the Department as a whole, has
10 information in its possession covered by a bunch of
11 those different statutes and regulations.

12 Going on to the next answer, however, to
13 be more specific which is number 6 in the answer --

14 ADMINISTRATIVE JUDGE KARLIN: Fifty-seven,
15 Atomic Energy Act. We've read that.

16 MR. SHEBELSKIE: All right.

17 ADMINISTRATIVE JUDGE KARLIN: That's the
18 definition of export controlled information? Section
19 57 of the Atomic Energy Act?

20 MR. SHEBELSKIE: And then it goes on to
21 information that qualifies under -- the bulk of the
22 information that we have in our collection that
23 qualifies as export controlled information and we're
24 talking upwards of 146 documents. We're not talking
25 about a large number of documents is information that

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1 the security personnel at the Department of Energy
2 have determined are export controlled restricted
3 information meeting the standards going on to page 9
4 of 15 CFR 744.1 and 744.2 and information that meets
5 those standards DOE has the authority to protect, a
6 requirement to protect under the Atomic Energy Act.

7 ADMINISTRATIVE JUDGE KARLIN: Well, okay.
8 We're basically getting back to the definition is
9 pretty useless and what basically it's what somebody
10 says it is after they've read the regs and the orders.
11 I mean, I would just look for in this document a
12 definition, and you're not giving us a definition that
13 means anything.

14 MR. SHEBELSKIE: Well, what we're trying
15 to convey here, Judge Karlin, is that the majority,
16 maybe all, I just don't have that specific
17 information, of the 146 documents. Certainly the vast
18 majority are documents that qualify, meet the
19 standards of export controlled information under 15
20 CFR 744.1.2, and the authority for DoE to protect that
21 -- requirement for it to protect it.

22 ADMINISTRATIVE JUDGE KARLIN: Okay, and
23 then the 146 or so -- are they part of the 744 NNPI?

24 MR. SHEBELSKIE: No, those are --

25 ADMINISTRATIVE JUDGE KARLIN: Okay, but

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1 the NNPI definition, if we go back to page three, is
2 technical data, military space application, possession
3 of DOD, may not be exported lawfully without Export
4 Administration Act. So again, export control becomes
5 the criterion by which NNPI is judged. So if we could
6 have a definition of what export control means, we
7 might actually kill two birds with one stone.

8 MR. SHEBELSKIE: Well, if you have --
9 there are a variety of sources that impose export
10 restrictions on data and the source for the export
11 restriction on information that meets the Navy
12 standards NNPI can be different from those that meet
13 the Department's definitions.

14 ADMINISTRATIVE JUDGE KARLIN: I will just
15 say that on this definition like the other one, I
16 mean, you really didn't answer our question. I don't
17 know whether you didn't do it on purpose or
18 inadvertently, but we tried to emphasize specific
19 citation. You didn't give us a specific citation any
20 way, shape, or form. Definition -- you gave us a
21 tautology. Export controlled information means
22 information whose export is controlled.

23 MR. SHEBELSKIE: I'll tell you, Judge
24 Karlin, we certainly didn't intentionally avoid trying
25 to answer your question. We understood the question

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1 as what is the definition of -- when the parties were
2 drafting this case management order, we all recognized
3 that DOE has within its bureaucracy a classification
4 called export controlled information. The parties
5 recognized that information that met that standard of
6 the DOE order would be restricted, because it is
7 subject to FOIA exemption three.

8 CHAIRMAN MOORE: May I stop you right
9 there?

10 MR. SHEBELSKIE: Yes.

11 CHAIRMAN MOORE: And the specific statute
12 that puts you under exemption three under FOIA is
13 Section 57(b) of the Atomic Energy Act. Is that
14 correct?

15 MR. SHEBELSKIE: Yes, sir.

16 CHAIRMAN MOORE: So all this information
17 is trade secret or proprietary, because that's what --
18 isn't that 57(b) deals with? Special nuclear material
19 that -- and material, it says, any trade secrets or
20 proprietary information is submitted to any person
21 seeking an authorization under this subsection shall
22 be afforded the maximum degree of protection allowable
23 by law. So there is only two categories. It has got
24 to be proprietary or trade secrets dealing with
25 special nuclear material.

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1 MR. SHEBELSKIE: Special nuclear material.

2 That's what this --

3 CHAIRMAN MOORE: Well, if that's the case
4 then why don't we just define it that way?

5 MR. SHEBELSKIE: Well. because the export
6 controlled information, as I've said, the majority of
7 the information -- what I'm advised by the security
8 personnel who have received these 146 documents, that
9 was the majority of the information of these 146. But
10 we were trying to come up with a definition of export
11 controlled information, because there could be the
12 odd-man-out document that qualifies as documentary
13 material that meets the definition of export
14 controlled information as set forth in DOE orders,
15 that's outside the confines of the section of the
16 Atomic Energy Act which you've cited there.

17 CHAIRMAN MOORE: But currently all known
18 documents can be justified that you're calling expert
19 control? Information that fall within the exemption
20 three specific statute of 57(b) of the Atomic Energy
21 Act.

22 MR. SHEBELSKIE: Subject to check, because
23 I was told that virtually all the vast majority,
24 whatever the phrase was, so of 146 -- we can go back
25 and confirm of the 146 whether there is currently one

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1 that's beyond that scope.

2 CHAIRMAN MOORE: Well, if it is not
3 Section 57 of the Atomic Energy Act, what is your
4 exemption three statute -- specific statute that
5 you're relying on?

6 MR. SHEBELSKIE: Well, items that could
7 qualify as export controlled under Section 130 and
8 regulations that implement that.

9 CHAIRMAN MOORE: So it's either 130 or
10 57(b), that's it?

11 MR. SHEBELSKIE: That's what I'm advised
12 is the --

13 CHAIRMAN MOORE: I'm sure -- typical
14 definition where I'm not sure what we have falls into
15 at least my abridged dictionary's definition of a
16 definition.

17 MR. SHEBELSKIE: I'm sorry, Your Honor.
18 If you mean to say well, these 146 documents, if they
19 just fall into one of those two, should we put in the
20 case management order references to just those two
21 specific categories and wait to see if there even is
22 a third one?

23 CHAIRMAN MOORE: The thing that I am
24 troubled by that because you are using exemption two
25 and exemption three for all of these classifications,

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1 and isn't it just easier to define them in terms of
2 information that falls within exemption three of the
3 Freedom of Information Act or information that falls
4 within exemption two or low two or high two in the
5 Freedom of Information Act?

6 MR. SHEBELSKIE: You could do that in the
7 case management order, for sure.

8 CHAIRMAN MOORE: If there is a contest, it
9 would be over whether or not that was it. For
10 purposes of how we wrestle with it, why do we really
11 need to go further than that?

12 MR. SHEBELSKIE: You could proceed that
13 way and wait to see if there is a specific controversy
14 on a specific document.

15 CHAIRMAN MOORE: You possibly have NNPI or
16 export controlled information that you have some other
17 basis other than exemption two or exemption three?

18 MR. SHEBELSKIE: I think for NNPI, we
19 unclassified NNPI, that we were claiming exemption
20 three.

21 CHAIRMAN MOORE: And for export control?

22 MR. SHEBELSKIE: Export control as well.

23 CHAIRMAN MOORE: And for OOU you were
24 claiming exemption two.

25 MR. SHEBELSKIE: Two. Yes, sir. You

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1 could just reference that -- I can't tell you the
2 exact origin. I believe there was some desire on
3 parties' part to try to be more precise as to the
4 categories of information under exemption two or
5 exemption three. But you could refer generically.

6 ADMINISTRATIVE JUDGE ROSENTHAL: You avoid
7 precisely the kind of questions that we've been
8 considering for the last hour and a half. I mean, it
9 seems to me that following Judge Moore's suggestion
10 would simplify matters and I don't think it would make
11 it any more difficult to deal with concrete issues
12 when as and if they arose.

13 MR. SHEBELSKIE: Yes, Judge Rosenthal,
14 that strikes me as fine if that's how the Court wanted
15 to proceed -- craft the pretrial order reference to
16 the four-year exemptions.

17 CHAIRMAN MOORE: I apologize for not
18 asking that question 90 minutes ago.

19 (Off the record comments.)

20 Let's move on to written question five.

21 ADMINISTRATIVE JUDGE ROSENTHAL: I just
22 would say that the Staff that I treat with some degree
23 of skepticism the first sentence on page nine, their
24 answer to question five. Namely "the requirement to
25 make a *prima facie* case in the SUI privileged log

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1 would reveal the underlying SGI".

2 I don't understand why that would be
3 necessarily the case. It does seem to me that it
4 would be possible to put enough in the privileged log
5 to establish a prima facie case that would not at one
6 of the same time reveal necessarily the underlying
7 SGI.

8 MR. ROTH: I think, Your Honor, that the
9 Staff is concerned that if we did indeed have enough
10 information present so one could look at the
11 privileged log by itself and make the prima facie
12 case, that for individual items, certainly we want to
13 assure that there is not any safeguards information
14 revealed. But even over all the individual items put
15 together could inadvertently reveal safeguards
16 information.

17 ADMINISTRATIVE JUDGE ROSENTHAL: You think
18 it would not be possible to establish a prima facie
19 case without perforce, producing or revealing the
20 safeguards information? Maybe you're right about
21 that. I just think that that's very unlikely.

22 MR. ROTH: But Your Honor, indeed there
23 would be situations when we could but we couldn't
24 always. And so if in some instances we had to make a
25 prima facie case for every item, then it is the

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1 Staff's assertion --

2 ADMINISTRATIVE JUDGE ROSENTHAL: You would
3 agree that in some instances it would possible. And
4 I would suppose that in circumstances where it could
5 not be possible, you could then state that with giving
6 some reason why that's the case.

7 MR. ROTH: Certainly so, Your Honor.

8 CHAIRMAN MOORE: But with SGI, in which we
9 -- it is unlike UCNI and NNPI and OUO, Staff earlier
10 today, and I think they've done it previously as well,
11 conceded that we can entertain challenges to whether
12 or not some specific information is SGI and then, of
13 course, there can be an appeal to the Commission. If
14 that's the case, then if there is a contest, you will
15 have to establish in pleadings a prima facie case that
16 it is what it purports to be, what you claim it to be.

17 So what difference does it make if you put
18 that in a privileged log right up front to save that
19 step and save time, so that we don't have to go
20 through the exercise after motion to compel has been
21 filed?

22 MR. ROTH: Well, Your Honor, I believe
23 that if the pleadings themselves to establish the
24 prima facie case also would wind up revealing SGI,
25 then perhaps he would have to be under a protective

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1 order themselves and the item would not be out in the
2 public, unlike the SUI --

3 CHAIRMAN MOORE: Well, it's a given that
4 in any privileged log you don't reveal the information
5 that is protected. And if it can't be done, you so
6 indicate. But just a blanket statement that it can't
7 be done strikes me as interjecting a huge inefficiency
8 when if it is done now that we have some ability to
9 deal with this in a less rushed fashion, that doing it
10 in a privileged log makes imminent good sense from an
11 efficiency standpoint.

12 ADMINISTRATIVE JUDGE ROSENTHAL: Let me
13 see if I understand you correctly. You're suggesting
14 that if there is a motion to compel, Staff can simply
15 say well, we don't have to defend the motion to compel
16 on the merits, you'll just have to take our word for
17 it that this information is what we say it is because
18 we can't defend our classification because to defend
19 the classification would reveal the underlying
20 information which we are claiming is SGI.

21 So in fact, you were saying that whatever
22 the Staff's determination is carries the day -- not
23 only carries the day before this Board, but will carry
24 the day in any subsequent review levels. Am I missing
25 something or is that basically what you're talking

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1 about?

2 MR. ROTH: I'm not attempting to say that,
3 Your Honor. What we're attempting to say is that if
4 we had to make the case in the privileged log each
5 time that that would reveal the underlying SGI.

6 ADMINISTRATIVE JUDGE ROSENTHAL: All
7 right, I understand that. But I think that Judge
8 Moore was asking you all right, you don't make your
9 prima facie case in the privileged log. But now what
10 happens if somebody challenges the Staff's
11 classification through the vehicle of a motion to
12 compel?

13 Now you're at that stage and what is --
14 you can then come in once again and say well, sorry,
15 we can't produce any justification for our
16 classification because if we did we would be revealing
17 the underlying alleged, at least, SGI material.

18 MR. ROTH: Your Honor, I believe that such
19 material would be made available for an in camera
20 review.

21 CHAIRMAN MOORE: Okay, let's --

22 ADMINISTRATIVE JUDGE KARLIN: I have
23 another question of this follows on to the discussion
24 that you were just having about the case. But I would
25 address this to both DOE, Mr. Shebelskie and NRC. DOE

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1 has UCNI. NRC has Safeguards Information, SGI,
2 section 147 and 148 of the Atomic Energy Act. I would
3 like to focus you on those statutory provisions. Both
4 of them have the same clause. 147 safeguards C and
5 148 UCNI(d). I'll just read the one for the Secretary
6 for DOE and ask Mr. Shebelskie first.

7 It says any determination by the Secretary
8 assuming the applicability of this section shall be
9 subject to judicial review pursuant to and then it
10 mentions FOIA, which is a direct judicial review to
11 the District Court.

12 So one question we have here is that
13 normally when this Board issues a ruling on a
14 discovery matter, it goes to the Commission. The
15 Commission rules and that is not subject to judicial
16 review except into the Courts of Appeals after the
17 Commission has issued its final agency action.

18 However, it would seem to be that if it
19 was an UCNI ruling that we ruled on or the Commission
20 ruled on SGI ruling that we ruled on and the
21 Commission ruled on, that you wouldn't have to wait to
22 go to the finished for the entire high-level waste
23 proceeding to be completed. You could take it
24 directly to the District Court under FOIA. Do you
25 agree with that?

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1 MR. SHEBELSKIE: Addressing just the UCNI?
2 ADMINISTRATIVE JUDGE KARLIN: Yes, of
3 course.

4 MR. SHEBELSKIE: Because I think SGI --
5 ADMINISTRATIVE JUDGE KARLIN: Of course.
6 MR. SHEBELSKIE: -- is different. It is
7 the Department's position right now that in light of
8 the language you just quoted, Judge Karlin, that the
9 Commission couldn't overturn the determination of
10 DOE's categorization of UCNI, and that that
11 information would have to be pursued by a requester
12 through a FOIA challenge in Article 3 Court.
13 Practical issue here, Judge. Right now, we have a
14 maximum of potentially eight UCNI documents.

15 ADMINISTRATIVE JUDGE KARLIN: That's
16 eight?

17 MR. SHEBELSKIE: Eight.

18 ADMINISTRATIVE JUDGE KARLIN: As between
19 seven and nine?

20 MR. SHEBELSKIE: Yes, and they will
21 undergo a further high-level review by Council to
22 ascertain are they really documentary material,
23 because we would rather just have this issue off the
24 table. But we're dealing even in worse case scenario
25 with something in that range.

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1 ADMINISTRATIVE JUDGE KARLIN: Well, okay.
2 So you have a very few number and this may be what
3 brings into question why we're all here today. But
4 setting that aside, it would appear that if someone --
5 if you claim something to be UCNI, someone challenged
6 that claim in this tribunal, we then turn to you and
7 you say, sirs, we have made a determination here over
8 at DOE that it is UCNI. That person who is seeking
9 that information could either directly or through this
10 tribunal go to a District Court and try to challenge
11 it.

12 MR. SHEBELSKIE: It would have to be in
13 the District Court, yes. And we're willing as set
14 forth in the order, obviously, to have the good faith
15 meeting, confer, put out the redacted version.
16 Because really our goal is to avoid controversy.

17 ADMINISTRATIVE JUDGE KARLIN: Absolutely,
18 and that's what we're all trying to do here too. I
19 guess it may not be apparent. Alright, but no --

20 MR. SHEBELSKIE: All right, no, no, but
21 that may not be apparent, but that is our goal. We
22 want to minimize any controversy over these documents.
23 So we're not going to claim these things willy-nilly.
24 We're going to provide redacted documents. We want to
25 make clear to requesters why we've made these

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1 determinations if they have a question so they can see
2 --

3 ADMINISTRATIVE JUDGE KARLIN: Let me just
4 make clear, when you say provide redacted -- the
5 redacted documents go to everyone. Anyone.

6 MR. SHEBELSKIE: Yes, sir.

7 ADMINISTRATIVE JUDGE KARLIN: The
8 unredacted documents would be available to people who
9 would sign a protective order and meet the criteria of
10 the protective order.

11 MR. SHEBELSKIE: That's right.

12 ADMINISTRATIVE JUDGE KARLIN: And the only
13 remainder would be people who either didn't want to
14 sign the protective order or somehow thought there was
15 a problem here and wanted to raise a challenge. So
16 that's a decreasing universe, perhaps, of the eight.
17 SGI? Perhaps Staff could address that?

18 CHAIRMAN MOORE: Is eight a small enough
19 number that we can ignore having to work out
20 procedures for dealing with it?

21 MR. SHEBELSKIE: I would delete it. If
22 the Court is willing to do it, I think we can take a
23 wait-and-see attitude on those eight.

24 ADMINISTRATIVE JUDGE KARLIN: So we still
25 have the 147 issue and the Staff to address. The same

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1 answer basically?

2 MR. ROTH: I believe essentially so, Your
3 Honor.

4 ADMINISTRATIVE JUDGE KARLIN: So direct an
5 appeal to the District Court would be available?

6 MR. ROTH: If they wished to make an
7 appeal under FOIA, yes.

8 ADMINISTRATIVE JUDGE KARLIN: For an SGI?
9 Okay, thank you.

10 CHAIRMAN MOORE: Let's then take a ten
11 minute break. It is now 2:31 and so we'll come back
12 into session at 2:41 and finish quickly going through
13 and other questions that we've posed and we posed them
14 in this fashion because we thought we could quickly
15 get through them and get the information. We needed
16 and you wouldn't all work diligently to avoid
17 answering the questions in writing. So we'll try to
18 go forward to get some quick oral answers from you on
19 the remaining questions and work our way through those
20 So we'll now be in recess for ten minutes.

21 (Off the record.)

22 CHAIRMAN MOORE: On the record. Please be
23 seated. We'll get started. Mr. Shebelskie, you
24 kindly answer the first questions, but I do have one
25 additional question. UCNI does not require

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1 citizenship. Is that correct?

2 MR. SHEBELSKIE: It's hard to keep them
3 all straight, Your Honor.

4 CHAIRMAN MOORE: A U.S. citizenship.

5 MR. SHEBELSKIE: I believe not.

6 CHAIRMAN MOORE: Then I'm just curious why
7 in the third case management order --

8 (Off the record comment.)

9 CHAIRMAN MOORE: Why does the proposed
10 third case management order require that in seeking
11 access to UCNI the requester must give their
12 birthplace and country of citizenship if citizenship
13 is not a requirement, U.S. citizenship is not a
14 requirement?

15 MR. SHEBELSKIE: I believe, Your Honor,
16 that those elements, the requirements, they are taken
17 out of the regulation 10.1716 for the for the special
18 access provisions. That's what the regulations
19 provide and so that's what we adopted.

20 CHAIRMAN MOORE: Okay. Let's turn to
21 question 2.A the NRC staff, 2.A.1 for NRC created and
22 possessed SGI documents. What entity or entities
23 within or without NRC conducts the fingerprint check?

24 MR. ROTH: Your Honor, in addressing these
25 questions, the fingerprint check and the background

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1 check combined are going to be performed by OPM.

2 CHAIRMAN MOORE: By OPM and this is under
3 the proposed third case management order that that's
4 how it will be done.

5 MR. ROTH: Yes Your Honor.

6 ADMINISTRATIVE JUDGE KARLIN: Within NRC,
7 does the office -- What office contacts OPM?

8 MR. ROTH: Our personnel security office
9 will be the contact for OPM.

10 ADMINISTRATIVE JUDGE KARLIN: So the NRC
11 personnel security office is the locus of the initial
12 inquiry on this.

13 MR. ROTH: Yes sir.

14 ADMINISTRATIVE JUDGE KARLIN: If an
15 individual wanted to contact NRC and initiate this
16 process, they would -- Who would they contact?

17 MR. ROTH: The current name of the person?

18 ADMINISTRATIVE JUDGE KARLIN: No, just the
19 office.

20 MR. ROTH: The Office of Admin.

21 ADMINISTRATIVE JUDGE KARLIN: Office of
22 Admin.?

23 MR. ROTH: Of Administration.

24 ADMINISTRATIVE JUDGE KARLIN: And anything
25 within the Office of Administration or Office of

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1 Security within Administration?

2 MR. ROTH: The details as to which one
3 person would contact, we would make available at --
4 I'm hesitating to give the name of the person.

5 ADMINISTRATIVE JUDGE KARLIN: Yes.

6 MR. ROTH: The person was present earlier,
7 however, I don't recall the person's exact title, Your
8 Honor.

9 ADMINISTRATIVE JUDGE KARLIN: We're just
10 trying -- I'm just trying to think through concretely
11 what an individual might need to do if they were to
12 want to trigger or begin this process and OPM is kind
13 of a vague, not very concrete answer, but if you say
14 some office within the NRC, that's what we're looking
15 for and it's Office of --

16 MR. ROTH: Well, for the initial contact,
17 it would be our point of contact. As in if they were
18 to participate in the hearing process, they need to
19 contact the designated point of contact for such
20 requests.

21 ADMINISTRATIVE JUDGE KARLIN: Okay, but
22 there's no -- They would have a designated point of
23 contact under second case management order. We don't
24 have one under the third yet. You're suggesting
25 that's who they would contact if the third is issued.

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1 MR. ROTH: Yes, Your Honor.

2 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank
3 you.

4 CHAIRMAN MOORE: You've already answered
5 2.A.2. Question 2.A.3, will the NRC or the outside
6 entity conducting such checks accept an expeditiously
7 process request for fingerprint checks and background
8 checks by a potential party prior to the potential
9 party requesting a specific SGI document or
10 establishing a need-to-know for such document?

11 MR. ROTH: Yes Your Honor. We will be
12 willing to prescreen people.

13 CHAIRMAN MOORE: How long will it take OPM
14 to do a background check and a fingerprint check?

15 MR. ROTH: It will take between four to
16 six months.

17 CHAIRMAN MOORE: Four to six months?

18 MR. ROTH: Yes, Your Honor.

19 ADMINISTRATIVE JUDGE KARLIN: Doesn't that
20 vitiate the entire process if the six months PAPO is
21 how long we exist?

22 MR. ROTH: The time --

23 ADMINISTRATIVE JUDGE KARLIN: Is this any
24 way this can -- That's ridiculous. It vitiates the
25 entire PAPO process. PAPO exists for six months prior

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1 to the LSN. How can that be --

2 MR. ROTH: Precisely what's involved --

3 ADMINISTRATIVE JUDGE KARLIN: So please
4 explain why does it take four to six months.

5 ADMINISTRATIVE JUDGE ROSENTHAL: Precisely
6 what's involved in fingerprint check and background
7 check because as Judge Karlin, I'm amazed that it takes
8 that period of time and it seems to me that that is
9 certainly going to impact adversely the process.

10 MR. ROTH: And the time is why we are
11 willing to do the prescreening. The exact content of
12 it as I understand the process, what's called a
13 National Agency Check with Inquiries, at approximately
14 a month into the inquiry process, NRC will receive
15 back preliminary information, criminal history if
16 there is and the NRC is willing at that point if there
17 are issues with the criminal history background to
18 contact the individual and if they have a concern with
19 the criminal history part, NRC then can start working
20 out that path. The final determination though and the
21 person's trustworthiness and reliability is an overall
22 picture. It's not just going to hinge just on the
23 fingerprints and the current time that we're told for
24 the process is four to six months before that
25 investigation is complete.

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1 CHAIRMAN MOORE: With what you tell us
2 then if you turn to Question 2.A.6 --

3 ADMINISTRATIVE JUDGE KARLIN: No. May I
4 continue on that one a little bit? Let's go to the
5 proposed third case management order, page 16. On
6 page 16, the staff is telling us that it will take 20
7 business days upon receiving a request for you to
8 decide whether to grant that or not and then maybe 40
9 days for further information. So that's 60 days.

10 Now how could you represent that kind of
11 time frame if you're telling me it takes four to six
12 months to even get to the starting gate on this thing?
13 Is this kind of -- I'm stunned that you would write a
14 proposed case management order that would say 20 days
15 and now you tell us four to six months. Could you
16 explain that?

17 MR. ROTH: The Commission's current
18 process as compared to when the case management order
19 was written is to require both the background check
20 and the fingerprint check and that as I understand it
21 is --

22 ADMINISTRATIVE JUDGE KARLIN: Has the
23 process changed since you wrote this?

24 MR. ROTH: At the time this was written,
25 this was a fingerprint or background check.

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1 ADMINISTRATIVE JUDGE KARLIN: Okay. Well,
2 wait a second. It's still a fingerprint or background
3 check. The reg. hasn't changed yet, has it? It's
4 proposed but hasn't changed yet.

5 MR. ROTH: If the regulation doesn't
6 change, then our times may be different.

7 ADMINISTRATIVE JUDGE KARLIN: So the
8 current -- We're speaking the current time frame, you
9 know, our question, how long would it take current
10 time frame. Four to six months?

11 MR. ROTH: With the current time frame for
12 just to get a SGI access, the current guidance is four
13 to six months.

14 ADMINISTRATIVE JUDGE KARLIN: Okay, and so
15 that was the same time frame it would have taken when
16 you wrote this and yet you told us 20 to 40 days.

17 MR. ROTH: Well, I believe, Your Honor,
18 this also notes that in Item 3 in the middle, in the
19 bottom, on the top of page --

20 ADMINISTRATIVE JUDGE KARLIN: Right.

21 MR. ROTH: Pardon me, Your Honor. The
22 third item says that we can indicate to the originator
23 that the processing of the request continues.

24 ADMINISTRATIVE JUDGE KARLIN: Continues so
25 that's really what -- Is this sort of misleading? Why

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1 don't you just say in the first place four to six
2 months than to just automating know you would have to
3 continue this every time?

4 MS. ZOBLER: Your Honor.

5 ADMINISTRATIVE JUDGE KARLIN:
6 Reinforcements have arrived.

7 MS. ZOBLER: I was conferring with some of
8 our Office of Administration people. At the time the
9 joint case management order was written where we had
10 the either/or option, the fingerprinting could have
11 been done within that 40 day time period. It's the
12 background check that would take longer.

13 ADMINISTRATIVE JUDGE KARLIN: The regs.
14 haven't changed since then.

15 MS. ZOBLER: That's correct, Your Honor.

16 ADMINISTRATIVE JUDGE KARLIN: So at the
17 time you wrote this the regs. are the same as they are
18 now.

19 MS. ZOBLER: That's correct.

20 ADMINISTRATIVE JUDGE KARLIN: So there's
21 nothing different. So why do you say four to six
22 months now?

23 MS. ZOBLER: We are addressing -- We were
24 trying to answer the question in the context of what
25 -- in the case that the current rule, I mean, the

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1 current proposed rule requirement becomes final.

2 ADMINISTRATIVE JUDGE KARLIN: Right.

3 Okay.

4 CHAIRMAN MOORE: Skipping ahead to
5 Question 2.A.6, probably it's futile to ask this but
6 what time limits, if any, can we impose on the NRC to
7 impose these actions in a more expeditious fashion?

8 MR. ROTH: Your Honor, since we're using
9 OPM, there are no particular time limits that could be
10 imposed.

11 ADMINISTRATIVE JUDGE KARLIN: Is there any
12 -- Do you have to use OPM?

13 MR. ROTH: I understand if we attempted to
14 contract it out separately I'm told the time would
15 actually be longer to put a contract in place and get
16 a different organization.

17 ADMINISTRATIVE JUDGE KARLIN: And what can
18 be done to expedite the four to six months?

19 MR. ROTH: The expediting that we're doing
20 is the early return on the National Agency check which
21 would avoid having at the end having somebody come
22 back and say preliminal histories come and that these
23 aren't my fingerprints. Instead at the end of about
24 40 days that should arrive and give the person an
25 earlier opportunity to say, "Hey, there's a mistake

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1 here in the record."

2 ADMINISTRATIVE JUDGE KARLIN: Yes, barring
3 mistakes in the record, I'm just curious if there's
4 anything that can be done to expedite that and what if
5 they get to the end of the six months and somebody
6 picks up the phone, calls OPM and says it isn't ready
7 yet? What happens then?

8 MR. ROTH: Then, unfortunately, the
9 investigation continues.

10 ADMINISTRATIVE JUDGE KARLIN: Okay.

11 MR. MALSCH: Judge Karlin, I just wanted
12 to add a point to this and that is that this to us
13 illustrates the wisdom of the language in the proposed
14 order which would have exempted every representative
15 of the Governor from this background check and
16 criminal history check. We discussed how the June
17 2006 rule must be read, but as we indicated in our
18 filing, we had hoped the whole issue of how that could
19 be, should be, read could be avoided if the staff
20 simply was willing to support an exemption from those
21 requirements under other provisions of Part 73, or
22 even proposed Part 73.

23 I should tell you that the discussion
24 about the definition of state employee is probably not
25 going to work for us. I've already discussed that

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1 with the Office of the Attorney General and they were
2 reluctant to start classifying a whole bunch of
3 people, persons, as state employees.

4 On the other hand, it seems to me that
5 it's well within the authority of the Commission,
6 including this Board, to grant exemptions from these
7 requirements. But I should tell you that in
8 discussions with the staff over the last several days,
9 they have told me that they would not support such an
10 exemption. So --

11 CHAIRMAN MOORE: And the exemption would
12 be under what provision?

13 MR. MALSCH: It would be under 73.5 which
14 is a general exemption authority or 73, I forget,
15 73.21 or so of the current regulations or a number of
16 provisions we cited in the proposed rule. So, in
17 addition for fingerprint checks, there's actually a
18 statutory provision for an exemption in the Atomic
19 Energy Act. So I just wanted to say that all this
20 illustrates unless we're going to avoid really large
21 time delays and perhaps vitiate the whole idea of a
22 pre-application phase for sensitive documents, since
23 we're going to be the ones most interested in
24 obtaining these documents, this all illustrates the
25 wisdom of simply sticking with the language in the

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1 proposed order and exempting the Governor's
2 representative from all of this stuff.

3 ADMINISTRATIVE JUDGE KARLIN: I thought we
4 had a discussion last time which was something to the
5 effect, and I raised this, if we issue a proposed
6 order and the Commission issues regulations
7 subsequently which change the law on the subject that
8 the regulations govern, is that what everyone told me?
9 Okay. So the regulations say it has to be a state
10 employee, Mr. Malsch, you seem to have been caught on
11 that one by a change that the staff slipped in and I'm
12 not sure what we can do about it.

13 MR. MALSCH: Well, but the -- You mean in
14 the -- First of all, we had not read the June '06
15 regulation as doing any such thing. But more
16 importantly, regardless how you read the language of
17 the exemption, there is other authority in 73 that
18 would give the authority to this Board and the
19 Commission to give us what we want in terms of an
20 exemption. So in a way, we didn't care how you got
21 there because no matter how you -- because there was
22 a way to get there. You could either interpret the
23 regulation the way --

24 ADMINISTRATIVE JUDGE KARLIN: Let me break
25 there. Was that -- If it's a consensual deal that the

1 staff agrees to that you all three submitted this to
2 us and said, "Here's a proposed third case management
3 order. We agree to it." And if we sign that proposed
4 case management order with that language and it
5 doesn't have state employee, I suppose the staff is
6 happy with that and won't object when the regs.
7 change.

8 MR. BAUSER: Excuse me.

9 ADMINISTRATIVE JUDGE KARLIN: No. Let's
10 get an answer first from the staff.

11 MS. ZOBLER: Your Honor, when we
12 negotiated that joint case management order, we were
13 negotiating at the current -- the rules as they
14 currently were.

15 ADMINISTRATIVE JUDGE KARLIN: Right.

16 MS. ZOBLER: We would be -- We would state
17 that if the rules do change that the case management
18 order would have to be modified to be in conformance
19 with the rules.

20 ADMINISTRATIVE JUDGE KARLIN: Okay. So
21 the way we have to unilaterally sort of make a ruling
22 is per Mr. Malsch's asking for that would be something
23 different than the deal you all presented to us.

24 MS. ZOBLER: In light of the changing
25 regulation.

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1 ADMINISTRATIVE JUDGE KARLIN: Yes.

2 MS. ZOBLER: I want to make one point.

3 The question of whether this PAPO board has the
4 authority to rule on exemptions we would argue the
5 Commission -- it would have to go to the Commission.

6 ADMINISTRATIVE JUDGE KARLIN: Right.

7 MR. BAUSER: Excuse me.

8 ADMINISTRATIVE JUDGE KARLIN: Mr. Bauser,
9 yes.

10 MR. BAUSER: Judge Karlin, Mr. Chairman,
11 there are more people involved here than just the
12 State of Nevada and what might apply to them. Another
13 way of proceeding might be to, in adopting the final
14 regulation, for the staff to adjust effective dates of
15 the regulation such that the prescreening could be
16 conducted in a fashion such that the rule would not
17 become effective until the staff's offer of doing --
18 the prescreening was done.

19 CHAIRMAN MOORE: Wouldn't it be a more
20 sensible approach if the Commission in its statement
21 of considerations made it clear that the old language
22 that merely said governor's representatives was to
23 remain, was to still apply, that since you only have
24 a proposed rule, that the staff support going back to
25 the old language and take the words "state employee"

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1 out?

2 MR. BAUSER: But, Mr. Chairman, there are
3 others involved who are not potentially subject to
4 that exemption such as NEI, such as other parties or
5 potential parties.

6 CHAIRMAN MOORE: Well, it would appear
7 that the better part of discretion for all concerned
8 would be next week to put in your fingerprint cards
9 and your request for background and get started as a
10 safety precaution because bureaucracy being what it is
11 I suspect that this will be a difficult issue to work
12 through.

13 ADMINISTRATIVE JUDGE KARLIN: Yes, and let
14 me ask the staff. Let's just say that the DoE
15 certifies its license LSN collection in December of
16 '07 and it submits its application six months later
17 and it's docketed two months later and let's say in
18 December of '07 someone starts the fingerprint check
19 and six months later that's not done and the time
20 comes for filing contentions and they haven't gotten
21 clearance yet. I suppose under those circumstances
22 the staff would agree that they would be entitled to
23 file late contentions and you won't object to late
24 contentions because of dependency of the fingerprint
25 check that hadn't been processed?

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1 MS. ZOBLER: Your Honor, that could be a
2 factor for good cause for a late filed contention if,
3 in fact, there was a showing that they could not have
4 submitted contentions without the information that's
5 being withheld.

6 ADMINISTRATIVE JUDGE KARLIN: All right.

7 CHAIRMAN MOORE: Not to be the eternal
8 pessimist, but why don't -- why do I think that the
9 staff's argument would be something like they could
10 have applied six months sooner with their fingerprint
11 check and background analysis. So it's not good
12 cause.

13 MS. ZOBLER: I -- Your Honor, it would be
14 good cause under the circumstances. Clearly speaking
15 hypothetically, if a person submits their fingerprint
16 cards the day before contentions are due, I can't say
17 that we would not --

18 CHAIRMAN MOORE: No. Under Judge Karlin's
19 hypothetical that it's certified in December,
20 applications filed in Jun, contentions are then due X
21 number of days thereafter and notice for opportunity
22 for hearing, that because of the delay in processing
23 the background check and fingerprint history, they
24 would want to file contentions dealing with safeguards
25 material they're not permitted access to because they

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1 haven't completed the process. I was just musing on
2 the fact that I can't imagine that the argument
3 wouldn't be they should have applied six months sooner
4 than they did to begin the process. But it's not
5 particularly relevant.

6 Let's move onto Question 2.A.7 for DoE
7 with DoE created and possessed SGI documents, what
8 entity or entities within or without DoE will conduct
9 the fingerprint check?

10 MR. SHEBELSKIE: We understand the law
11 require DoE to follow the same process that the
12 Commission mandates for access to SGI and therefore,
13 the FBI would conduct the fingerprint checks and OPM
14 would conduct the background checks. With respect to
15 -- And so those are matters out of DoE's control in
16 that respect.

17 I am given to understand that the
18 background check or the fingerprint check is a much
19 more expedited process, measured in a couple of weeks
20 than the background checks. Also I'm further given to
21 understand that OPM perhaps has a dual track where you
22 can -- because there's a fee associated with the
23 background checks and it's basically a first-in/first-
24 out type of process. But at least, currently, it
25 could change in the future, I don't know, I think they

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1 have the dual track where you can pay more and you'll
2 be on an expedited track.

3 ADMINISTRATIVE JUDGE ROSENTHAL: And so it
4 takes six months rather than 18 months. I mean I'm
5 like the unduly pessimistic but I wouldn't count on
6 four to six months unless there is some kind of
7 guarantee which I'm sure there is not. My own
8 experience with OPM is that they make a snail look
9 like a racehorse.

10 ADMINISTRATIVE JUDGE KARLIN: Let me ask
11 Mr. Shebelskie. You referenced that you would need to
12 do that same thing, I think you were saying, as the
13 NRC and that would require OPM and FBI. Now let me
14 ask. I guess I was -- Maybe it's implicit, but the
15 staff is also using the FBI for this.

16 MR. ROTH: The way the staff is doing it
17 is the whole product would be provided to OPM and then
18 OPM would actually provide the cards to the FBI.
19 Rather than the staff individually running it and
20 contacting the FBI, the staff would give the product
21 to OPM and it gets back one package.

22 ADMINISTRATIVE JUDGE KARLIN: Okay. So
23 you have multiple entities working for you, too.

24 ADMINISTRATIVE JUDGE ROSENTHAL: And
25 there's no assurance that the OPM is necessarily going

1 to contact the FBI within minutes, hours, days or
2 weeks of the time that you present the matter to the
3 OPM. It's entirely out of your hands I take it.

4 MR. ROTH: I'm unaware of any OPM and FBI
5 communication on that, but what we know is that in
6 about 40 days after we submit the product that's when
7 we should get back an early return on the agency check
8 which will include then fingerprints.

9 ADMINISTRATIVE JUDGE KARLIN: So there was
10 no way that you could possibly have complied with the
11 provision on page 16 of the proposed third case
12 management order 40 days except that you have a right
13 to continue it later which is what would have to
14 happen every time. So when we suggested in our first
15 question, our first written question, that the process
16 would take 90 days out of 180 days of PAPO, we're
17 actually talking that the first step would take six
18 months. It's much worse than what we proposed. Is
19 that right?

20 MR. ROTH: The time period is long. Yes,
21 sir.

22 ADMINISTRATIVE JUDGE KARLIN: All right.

23 CHAIRMAN MOORE: Mr. Shebelskie, will DoE
24 process fingerprint checks and background checks
25 immediately upon receiving without waiting a specific

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1 request for an SGI document or a need-to-know
2 determination?

3 MR. SHEBELSKIE: The preclearing aspect?

4 CHAIRMAN MOORE: Yes.

5 MR. SHEBELSKIE: I believe if the -- since
6 the staff has said that that can occur, then, yes, we
7 have no impediment to that.

8 CHAIRMAN MOORE: But if it's your
9 information and it's not theirs.

10 MR. SHEBELSKIE: I believe the process
11 would come --

12 CHAIRMAN MOORE: You guys would --
13 yourselves. They don't do it for you, do they? It's
14 only if it's shared do they get involved, they being
15 the staff.

16 MR. SHEBELSKIE: Well, if it's shared the
17 staff does consult with DoE. DoE hasn't had the
18 occasion in the real world to address access to SGI in
19 this proceeding that are solely in its possession and
20 we're talking here about a universe currently of 21
21 documents in our collection. The Office of Security
22 at DoE security personnel tell at DoE that they are
23 required to use the same forms, the standard forms.
24 They'll get the forms. They'll be sent on to OPM and
25 FBI. So, sure, if someone submits it now, we'll

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1 process it without a request for a specific document.

2 CHAIRMAN MOORE: Now may I assume at this
3 point that if there are only 21 such documents in your
4 collection that you will not be submitting any
5 security plan documents with your application?

6 MR. SHEBELSKIE: I believe that the
7 license application will have SGI portions in it that
8 will have to be exempt from production.

9 CHAIRMAN MOORE: So that number will climb
10 considerably.

11 MR. SHEBELSKIE: Yes, the 21 of the
12 documents that are in our collection today obviously
13 doesn't include the license application.

14 CHAIRMAN MOORE: And I assume that the
15 answer to 2.A.12 is the same that what if any time
16 limits can we impose. The answer is we can impose
17 until the cows come home, but nothing is going to
18 change.

19 MR. SHEBELSKIE: That may be the de facto
20 meaning, yes.

21 CHAIRMAN MOORE: Turning to question 2.B,
22 first the NRC, the proposed third case management
23 order states that the information required to be
24 provided for the background check shall be submitted
25 on Standard Form SF-85. Under the proposed rule, will

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1 SF-85 be used to gather the information for the
2 background check?

3 MR. ROTH: Yes, Your Honor. The SF-85
4 will be one of the forms.

5 CHAIRMAN MOORE: And you will be following
6 then, Mr. Shebelskie --

7 MR. SHEBELSKIE: Same procedure.

8 CHAIRMAN MOORE: -- in the same form that
9 NRC uses.

10 MR. SHEBELSKIE: Yes sir.

11 CHAIRMAN MOORE: And that is the
12 information that is submitted then to OPM --

13 MR. ROTH: There will also be a --

14 CHAIRMAN MOORE: -- for the background
15 check.

16 MR. ROTH: Your Honor, there will also be
17 a fingerprint form and a credit history release form.

18 CHAIRMAN MOORE: And the --

19 MR. ROTH: Credit release form.

20 CHAIRMAN MOORE: Then we can skip down to
21 2.B.3. Does the time change under the proposed rule
22 from what it would take under the proposed third case
23 management order to do any of these actions?

24 MR. ROTH: It's the four to six months to
25 complete these actions, Your Honor.

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1 CHAIRMAN MOORE: Question 2.B.4, NRC, what
2 will the NRC background check cost?

3 MR. ROTH: \$172.50.

4 CHAIRMAN MOORE: That works out to be less
5 than one S&H green stamp a minute. Question 2.B.5 --
6 We'll skip that one.

7 ADMINISTRATIVE JUDGE KARLIN: Does that
8 include -- May I ask on the \$172.50? Is that all the
9 costs or is there a separate one for the credit check
10 or for FBI?

11 MR. ROTH: That is all the cost, Your
12 Honor.

13 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank
14 you. Sorry.

15 CHAIRMAN MOORE: Mr. Shebelskie, 2.B.6
16 dealing with non-dual possession DoE SGI, under the
17 proposed rule, our reading of it suggests that you're
18 on your own divorced from the staff in dealing with
19 that information. But from what you've said earlier,
20 you just will be following in NRC's footsteps in all
21 of this.

22 MR. SHEBELSKIE: Yes, and we believe the
23 current rules and the proposed rules require us to do
24 that.

25 CHAIRMAN MOORE: You read the proposed

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1 rule for non-dual possession that the staff will
2 perform these checks?

3 MR. SHEBELSKIE: No. If I recall, the
4 proposed rule requires other agencies that possess SGI
5 to put forward the same protections and follow the
6 same procedures.

7 CHAIRMAN MOORE: If it's dually possessed,
8 jointly possessed.

9 MR. SHEBELSKIE: I thought --

10 CHAIRMAN MOORE: The question was to non-
11 dual possessed DoE SGI.

12 MR. SHEBELSKIE: It's my recollection that
13 even for sole possessed that we're required to put
14 forward the same procedures and protections to the
15 information.

16 CHAIRMAN MOORE: Let's skip then to
17 Questions 3. 3.A.1, NRC, is the submission of
18 fingerprints the only step necessary for an individual
19 seeking access to SGI to initiate the process under
20 the proposed rule?

21 MS. CURATOLA: No, the requestor may fill
22 out the SF-85, the fingerprint cards, the credit check
23 release and also provide two types of ID.

24 CHAIRMAN MOORE: It's done altogether or
25 the way the rule reads it suggests that it's done

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1 serially?

2 MS. CURATOLA: Right. It should be
3 submitted altogether. The Office of Administration
4 won't process the request until all those documents
5 are obtained.

6 CHAIRMAN MOORE: And would you go through
7 that, the SF-85, the fingerprints, the credit check -
8 -

9 MS. CURATOLA: The safety card, the credit
10 check release and two forms of ID which --

11 CHAIRMAN MOORE: All right. So someone
12 who wanted to do this would have to show up at some
13 place where a police department or somebody could do
14 the fingerprints on them.

15 MS. CURATOLA: Correct.

16 CHAIRMAN MOORE: Okay. Question 3.A.2,
17 what information from a criminal history check is
18 provided to the Office of Administration upon which
19 the determination is made?

20 MS. CURATOLA: Criminal history record is
21 provided. If the person's fingerprints are associated
22 with an arrest, the record will include the name of
23 the agency that submitted the fingerprints to the FBI,
24 the date of arrest, the arrest charge and the
25 disposition of the arrest if known to the FBI.

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1 CHAIRMAN MOORE: So it's strictly X number
2 of arrests for Y offenses.

3 MS. CURATOLA: As I understand it.

4 CHAIRMAN MOORE: What criteria -- Question
5 3.A.3, what criteria or standards are applied by
6 Office of Administration to reach a determination?

7 MS. CURATOLA: A determination is made by
8 looking at the whole person. The Office of
9 Administration does not make determinations based
10 solely upon criminal history alone. The Office of
11 Administration had not created any specific criteria
12 or standards yet, but staff anticipates that the
13 criteria will be a modified version of the
14 adjudicative guidelines used for access to classified
15 national security information.

16 ADMINISTRATIVE JUDGE KARLIN: So the
17 answer is you don't have any criteria yet or
18 standards.

19 MS. CURATOLA: Not specific ones, correct.

20 ADMINISTRATIVE JUDGE KARLIN: Tell me what
21 criteria you do have.

22 MS. CURATOLA: The adjudicative guidelines
23 that are --

24 ADMINISTRATIVE JUDGE KARLIN: Adjudicative
25 guidelines, what are they?

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1 MS. CURATOLA: Guidelines for access to --
2 ADMINISTRATIVE JUDGE KARLIN: To
3 classified information. So you're going to make this
4 equivalent to classified information.

5 MS. CURATOLA: No, and in the memo that
6 distributes those guidelines to the agency, it states
7 that they can be used in analogous situations for
8 access to other types of information. So the
9 standards wouldn't be as high as for access to
10 security, classified security information.

11 ADMINISTRATIVE JUDGE KARLIN: So it's not
12 going to be the criteria for that.

13 MS. CURATOLA: Not this --

14 ADMINISTRATIVE JUDGE KARLIN: Something
15 less.

16 MS. CURATOLA: Right.

17 ADMINISTRATIVE JUDGE KARLIN: But we don't
18 know what it is.

19 MS. CURATOLA: Correct.

20 CHAIRMAN MOORE: Do you have a schedule
21 for when that will happen?

22 MS. CURATOLA: Before the proposed rule
23 becomes -- If the proposed rule becomes final before
24 it becomes effective.

25 CHAIRMAN MOORE: All right now, but you

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1 said that you're willing to prescreen people. But
2 then there's a narrowing neck fo the bottle, maybe
3 you, because they could file forms tomorrow, four to
4 six months is over the rule, still won't have issued
5 and you can't yet prescreen them because you won't
6 have any standards to apply. Is that correct?

7 MS. CURATOLA: I expect that staff would
8 make the effort to get the standards in place as soon
9 as practicable.

10 MR. MALSCH: Judge Moore, I really think
11 if we're going to have any meaningful prescreening
12 process, we need to have the criteria in place.
13 Otherwise, I'm telling my consultants to submit
14 fingerprint cards and information to be judged based
15 upon criteria that no one knows even exists.

16 ADMINISTRATIVE JUDGE KARLIN: And I
17 understand. If you look the proposed reg. which we
18 tried to study and understand, there is a requirement
19 in, what is it, 2.1010(b)(6)(c) which has a
20 requirement to make a trustworthy and reliable
21 determination which we'll get to next, I guess. But
22 2.1010(b)(6)(b) simply says you have to make a
23 determination on an individual's criminal history.
24 Well, you could say "Yes, this person has a criminal
25 history." That's a determination. We have -- So

1 we're looking for aren't you just looking at
2 trustworthy and reliable? Isn't that the same thing?
3 What's different? Isn't the criminal history check
4 just simply a part of 2.1010(b)(6)(c) which is
5 trustworthy and reliable or is it something different
6 and if it's different, how is it different?

7 MS. CURATOLA: The criminal history check
8 is part of the background check.

13 MS. CURATOLA: But the overall
14 determination --

15 ADMINISTRATIVE JUDGE KARLIN: And if they
16 have a criminal history, they probably aren't and if
17 they don't, maybe they are. I don't know.

18 MS. CURATOLA: There might be mitigating
19 information that an individual submits about something
20 that will show up in the criminal history and
21 therefore, the determination might still be that they
22 are trustworthy and reliable depending on --

23 ADMINISTRATIVE JUDGE KARLIN: What if you
24 found them to be trustworthy and reliable, but you
25 found that they had a criminal history?

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1 MS. CURATOLA: That could happen.

2 ADMINISTRATIVE JUDGE KARLIN: Would that
3 be throw them out? They would be out. You'd make a
4 determination "Oh, I'm sorry. You have a criminal
5 history, but you are trustworthy and reliable." Does
6 that mean they can't see the documents?

7 MS. CURATOLA: Just because a person has
8 something that would show up on the criminal history
9 does not mean that they are automatically not
10 trustworthy and reliable.

11 ADMINISTRATIVE JUDGE ROSENTHAL: Wouldn't
12 that depend upon what constituted their criminal
13 history?

14 MS. CURATOLA: Right.

15 ADMINISTRATIVE JUDGE ROSENTHAL: I mean it
16 seems to me that there are many criminal offenses that
17 would not impact a determination that they were
18 trustworthy in the context of what they're seeking to
19 obtain in this instance.

20 MS. CURATOLA: Right.

21 ADMINISTRATIVE JUDGE KARLIN: I'm just
22 suggesting that (b) is superfluous because the real
23 decision is (c), are they trustworthy and reliable.
24 I mean you do a criminal background check and then you
25 make a determination on the criminal background check,

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1 not to be confused with a determination of trustworthy
2 and reliable.

3 So what determination do you make on the
4 criminal background check that's anything different
5 than trustworthy and reliability? It's superfluous.
6 I mean so you say well the criteria are going to be
7 developed later. That's our curiosity and question.
8 Isn't it just trustworthiness and reliability which is
9 at issue?

10 MS. CURATOLA: Yes, but determination is
11 made based on the trustworthiness and reliability.

12 ADMINISTRATIVE JUDGE KARLIN: Okay.

13 CHAIRMAN MOORE: Let's so that we're clear
14 look at Question 3.A.4. With regard to the
15 determination on an individual's criminal history, is
16 this a distinct determination separate from an overall
17 determination regarding the individual's
18 trustworthiness and reliability?

19 MS. CURATOLA: No, it's not a separate
20 determination. It's part of the overall
21 trustworthiness and reliability.

22 CHAIRMAN MOORE: Question 3.A.5, if the
23 Office of Administration makes an initial
24 determination on criminal history alone, is this
25 determination subject to challenge?

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1 MS. CURATOLA: The Office of
2 Administration will not make an initial determination
3 based on criminal history alone.

4 CHAIRMAN MOORE: 3.A --

5 ADMINISTRATIVE JUDGE KARLIN: Well, now
6 wait a second. Isn't that what the reg. says it will
7 do, the proposed reg. (b)? The Office of
8 Administration on an individual's criminal -- However,
9 before an adverse determination by the Office of
10 Administration on a individual's criminal history the
11 individual shall be afforded the protections of 73.57.
12 So it sounds to me like OA is going to make a
13 determination on criminal history whatever that means
14 and it's subject to appeal.

15 MS. CURATOLA: If OA receives information
16 back from the fingerprints checked that an arrest or
17 something has shown up, OA will make that information
18 available to the individual and give the individual an
19 opportunity to supplement the information and those
20 are the protections referred to in 73.57. So even
21 though it's not a final determination based on the
22 individual's trustworthiness and reliability, OA will
23 give an individual an opportunity to correct or
24 supplement the criminal record portion.

25 CHAIRMAN MOORE: Question 3.A.6, just

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1 going to the -- without the premise, are the
2 protections, because Judge Karlin just read that
3 section, cited in the proposed section of the
4 protections found in Section 73.57(e)(1) and (2):?

5 MS. CURATOLA: Yes You Honor.

6 CHAIRMAN MOORE: That's a yes?

7 MS. CURATOLA: Yes.

8 CHAIRMAN MOORE: Okay. Question 3.A.7, is
9 completion of a criminal history check and any
10 determination relating to such check required before
11 the NRC initiates a background check and I assume from
12 what you've said that it can work that way, but it can
13 be done all simultaneously.

14 MS. CURATOLA: Right.

15 CHAIRMAN MOORE: Let's go to Question 3.B.
16 3.B.1, what information must an individual seeking SGI
17 provide for the OA, Office of Administration, to make
18 its determination? Now you said you're using SF-85.

19 MS. CURATOLA: Eighty-five, right.

20 CHAIRMAN MOORE: Quickly cap what's on
21 that.

22 ADMINISTRATIVE JUDGE KARLIN: This is the
23 trustworthy and reliable determination.

24 MS. CURATOLA: It goes through employment
25 history, where your residence is for the past five

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1 years, where you went to school, Selective Service
2 record, military history and references, people who've
3 known you.

4 CHAIRMAN MOORE: Isn't there a provision
5 on that form that asks you "have you used drugs" or
6 something like that within some period of time and
7 then there's a footnote that you have to get a
8 magnifying glass out to read that says, "Oh, and by
9 the by, this information will never be used against
10 you"?

11 MS. CURATOLA: It does ask about illegal
12 drugs, if you've used in the past year. The note says
13 "Neither your truthful response nor information
14 derived from your response will be used as evidence
15 against you in any subsequent criminal proceeding."

16 CHAIRMAN MOORE: But that information can
17 be used against you in the determination of
18 trustworthiness and reliability.

19 MS. CURATOLA: Yes.

20 CHAIRMAN MOORE: Okay. Question 3.B.2,
21 will the individual seeking SGI be required to submit
22 this information to OA as the same time the individual
23 submits fingerprints? You said yes.

24 MS. CURATOLA: Right.

25 CHAIRMAN MOORE: 3.B.3, before when I

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1 asked you the question, we were talking about the way
2 we were reading the proposed rule. It was the
3 determination on the basis of the criminal background
4 check, but you essentially said there is not separate
5 determination on that.

6 MS. CURATOLA: Right.

7 CHAIRMAN MOORE: So that means that the
8 whole package is looked at then for determining
9 trustworthiness and reliability and what standards are
10 you applying for your trustworthiness and reliability
11 standard and that's the one that you don't have any.

12 MS. CURATOLA: Correct.

13 CHAIRMAN MOORE: Okay.

14 ADMINISTRATIVE JUDGE KARLIN: No, I think
15 that as I understood her to say they had no standards
16 yet for the background check determination.

17 MS. CURATOLA: For the overall -- It's
18 going to be --

19 ADMINISTRATIVE JUDGE KARLIN: Maybe I was
20 confused.

21 MS. CURATOLA: There's going to be one
22 determination. The background check and the criminal
23 history record check go to determining whether or not
24 the whole person is considered trustworthy and
25 reliable.

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1 ADMINISTRATIVE JUDGE KARLIN: That's the
2 ultimate important --

3 MS. CURATOLA: Right.

4 ADMINISTRATIVE JUDGE KARLIN: But there
5 are multiple determinations contemplated in the reg.
6 and that's what we were reading and trying to follow.
7 Okay.

8 CHAIRMAN MOORE: Question 3.B.4, the
9 proposed rules defined trustworthiness and reliability
10 as dependable and judgment character and performance.
11 What specific guidelines will the Office of
12 Administration use when making this determination?

13 MS. CURATOLA: The same answer that they
14 haven't been developed. It's the same determination.
15 That's just a specific --

16 ADMINISTRATIVE JUDGE KARLIN: So if
17 someone comes into us and is concerned that the staff
18 or someone has made an inappropriate rejection of them
19 because they're not trustworthy or reliable, what
20 standard are you using that we should be using or a
21 tribunal use in evaluating whether you have been
22 abusive, discretion or somehow arbitrary or
23 inappropriate call on that?

24 MS. CURATOLA: Before the Office of the
25 Administration makes any of these determinations they

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1 are going to have the standards in place.

2 ADMINISTRATIVE JUDGE KARLIN: Well, if
3 someone submits an application tomorrow and it gets to
4 you in four months, you're telling us we're going to
5 have the standards in place by then. How do you know
6 that?

7 MS. CURATOLA: I'm getting confirmation
8 from the Office of Administration's representative.

9 ADMINISTRATIVE JUDGE KARLIN: Somebody is
10 nodding in the audience.

11 MS. CURATOLA: Yes.

12 ADMINISTRATIVE JUDGE KARLIN: And that
13 sets your basis. You're not even sure you're going to
14 get the proposed rule finalized in December.

15 MS. CURATOLA: I expect that before we
16 make any determinations under the case management
17 order or the rule that we will have the standards in
18 place.

19 ADMINISTRATIVE JUDGE KARLIN: Are you
20 saying you will postpone all determinations until OA
21 decides to come up with some standards or are you
22 saying they will be in place in the next two or three
23 months?

24 MS. CURATOLA: Hopefully, there will not
25 need to be any postponement.

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1 ADMINISTRATIVE JUDGE KARLIN: What if we
2 set -- Can this Board set a deadline and say OA has to
3 come up with those standards in the next three months?

4 MS. CURATOLA: I don't believe so.

5 ADMINISTRATIVE JUDGE KARLIN: I don't.
6 think so. I don't think you'd like that. Okay.

7 CHAIRMAN MOORE: Let's skip to Question 4,
8 4.A. Under proposed Section 2.1010(b)(6)(i)(d), how
9 much time may the NRC take to issue its written
10 adverse determination on trustworthiness and
11 reliability?

12 MS. CURATOLA: There is no explicit time
13 on that for NRC's issuance of a written adverse
14 determination, however staff expects a determination
15 whether favorable or adverse to be issued within four
16 to six months of the request.

17 ADMINISTRATIVE JUDGE KARLIN: Now is that
18 the same four to six months it takes OPM to process
19 it?

20 MS. CURATOLA: Right, that four to six
21 months will include OPM processing time plus our
22 adjudication time.

23 ADMINISTRATIVE JUDGE KARLIN: Well, wait
24 a second. You know if OPM takes four to six months,
25 then the staff is going to do it instantaneously as

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1 soon as OPM is done. Is that what you're saying?
2 There must be -- We're trying to add increments
3 together. OPM takes X amount and the staff takes Y
4 amount. Which one is it? How much is the staff going
5 to take? Once you get the results from OPM, how many
6 days? Twenty? Let's look at the proposed case
7 management order. Forty? How many days is it going
8 to take for the staff to make a determination? Don't
9 give us the same four to six months of OPM because
10 you're saying that you're going to do it identically,
11 the same moments you get something back? How many
12 days?

13 ADMINISTRATIVE JUDGE ROSENTHAL: Moreover,
14 OPM might not make it within the four to six months.
15 It might be eight months.

16 ADMINISTRATIVE JUDGE KARLIN: Yes. So we
17 want to know how much the staff is going take once it
18 gets the OPM results.

19 MS. CURATOLA: Our current estimate is
20 based on what the Office of Administration said for
21 the whole package including --

22 ADMINISTRATIVE JUDGE KARLIN: No. You're
23 not answering our question there. You understand our
24 question. How much is the staff going to take?

25 MS. CURATOLA: Right. I don't have an

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1 answer for that prepared.

2 CHAIRMAN MOORE: You don't have an answer?

3 MS. CURATOLA: The --

4 MR. ROTH: Your Honors, I think it is too
5 much individual determination specific. The overall
6 four to six months represents the amount of time from
7 application until we say yes or no. OPM may come back
8 immediately on somebody and say this person has lived
9 in one spot forever, they're a model citizen, they're
10 absolutely perfect or they might have somebody who
11 moved around a lot, it may take them longer.

12 ADMINISTRATIVE JUDGE KARLIN: So OPM may
13 not take four to six months.

14 MR. ROTH: That's right. They may have it
15 faster.

16 ADMINISTRATIVE JUDGE KARLIN: Well, we
17 asked how it would take. See, we want to break it
18 into pieces so that we can understand just like the
19 proposed case management order. We broke it into
20 pieces, 20 days, 40 days, 10 days and you're just
21 giving us one final number without how long -- Because
22 the only thing you can control maybe is how long it
23 takes you. OPM may be out of your control. FBI may
24 be out of our control. But you, you could say we're
25 going to do it expedited. We're going to do it in two

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1 weeks or we're going to do it in ten days or we're
2 going to do it in four months.

3 MR. ROTH: And, Your Honor, while staff
4 may attempt to do it quickly, it's too person
5 specific. We can't commit to an individual time
6 because somebody may come back with multiple issues --

7 ADMINISTRATIVE JUDGE KARLIN: Well, let's
8 look at the reg. Let me look at the reg. The reg.
9 says 2.1010 and then it says -- Let's go to the -- Do
10 you have the reg. in front of you? Please pull the
11 reg. out. The (d), the trustworthiness determination,
12 okay? Do you have it? *Federal Register* page 64056 of
13 the October 31, 2006 *Federal Register*, center column,
14 2.1010(b)(6)(i)(d) and it deals with the
15 trustworthiness and reliability determination and it
16 says the staff will make this determination. It then
17 says if someone wants to challenge that they have 15
18 days to challenge an adverse determination and within
19 10 days of that, the staff will respond and within 15
20 days, the presiding officer will rule. So we have
21 some time frames there. I was just hoping the staff
22 could tell us how many days they're going to take to
23 do their part.

24 MR. ROTH: Your Honor, the staff would
25 very much like to be able to provide specific times

1 but --

2 ADMINISTRATIVE JUDGE KARLIN: Well, there
3 are specific times here on other things.

4 MR. ROTH: That's after the adverse
5 determination is done.

6 ADMINISTRATIVE JUDGE KARLIN: After you've
7 done your thing.

8 MR. ROTH: The person making their
9 request, their background is the controlling factor
10 for it.

11 ADMINISTRATIVE JUDGE KARLIN: So everyone
12 is subject to short time frames except the staff has
13 four to six months and you can't break it down anymore
14 than that.

15 MS. ZOBLER: Your Honor, if I may just
16 clarify some statements because I did have an
17 opportunity to speak to our Office of Administration
18 person. First of all, when we prepared our response,
19 we thought that the PAPO Board wanted the full, from
20 start to finish, and that's why we had the four to six
21 month time frame. The staff believes depending on the
22 nature of the information that we get back from OPM we
23 could make a determination between 20 days to 30 days,
24 again keeping in mind that as Mr. Roth was saying
25 there are specific circumstances of the information

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1 that may make things longer or shorter.

2 ADMINISTRATIVE JUDGE ROSENTHAL: But the
3 four to six months assumes that the Office Of
4 Personnel Management will complete its task in no more
5 than four to six months and even less if there's going
6 to be a window available for the staff to act upon
7 whatever is disclosed by OPM. Now I don't understand.
8 We were told to begin with that one could expect four
9 to six months and it might be shorter than that, but
10 this seemed to be the period and I offered the cynical
11 observation that it could likely be much longer. So
12 what I'm getting at is it seems to me that the four to
13 six month period for the staff to act is illusory.

14 I mean what you're really talking about is
15 what period of time on average is the staff going to
16 take once it gets the OPM report whether that report
17 comes in one month or comes in eight months. And even
18 though this may be case-specific as I think Mr. Roth
19 suggested there must be some kind of window for the
20 average case so we have some feeling whether we're
21 talking about after the OPM report comes in, whenever
22 it comes in, two weeks, three weeks, four weeks or six
23 weeks recognizing that there may be instances in which
24 it will take considerably longer than that period and
25 instances when it would come in short of that period

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1 because I think I'm speaking for myself now and I
2 think for my colleagues as well that we're trying to
3 get some handle as to what is the likely period of
4 time between the institution of the OPM/FBI
5 investigation and the end product, the end product
6 either being yea or nay with respect to whether this
7 individual is thought to be trustworthy and reliable.
8 I mean that's why I think where we're really coming
9 from. That's certainly where I'm coming from.

10 MS. ZOBLER: Your Honor, that's why when
11 we first gave you the answer four to six months we
12 were including everything. Clearly, if the staff
13 takes 20 to 30 days on a fairly routine background
14 check, then that anticipates OPM would complete its
15 investigation in somewhat less than six months.

16 ADMINISTRATIVE JUDGE KARLIN: So that
17 converts to three to five months for OPM and one month
18 for the staff.

19 MS. ZOBLER: On average yes, Your Honor.

20 ADMINISTRATIVE JUDGE KARLIN: Right.

21 MR. MALSCH: Your Honor, I wonder if we
22 could ask the staff whether their four to six month
23 estimate included foreign nationals who will be giving
24 foreign addresses and foreign references and foreign
25 employment histories as well as foreign education

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1 probably.

2 ADMINISTRATIVE JUDGE KARLIN: That's a
3 good question. Does it, Ms. Zobler?

4 MS. ZOBLER: If I may confer with the
5 staff, I could ask them. We did not -- In preparing
6 the answers, we didn't specifically talk about the
7 foreign national applicant.

8 ADMINISTRATIVE JUDGE ROSENTHAL: You'd
9 think, wouldn't you not, that if it involves foreign
10 education, foreign addresses, that it would likely to
11 take longer than it would be if all of the
12 investigation involved domestic sources?

13 ADMINISTRATIVE JUDGE KARLIN: Well, why
14 don't you, if you could, confer -- Maybe you could
15 confer with the staff for a moment and give us the
16 answer. Does the four to six months include foreign?

17 MS. ZOBLER: Okay, Your Honor. We will do
18 that right now.

19 ADMINISTRATIVE JUDGE KARLIN: Thank you.

20 CHAIRMAN MOORE: While that's going on,
21 I'm curious. The staff can't determine from the time
22 it gets a report from OPM how many days it's going to
23 take them to determine whether an individual is
24 trustworthy and reliable and issue a written decision.
25 Yet that same staff doesn't have a bit of problem

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1 telling anyone that wants to appeal it they have 15
2 days to do it and telling the Board that they have 15
3 days to write a decision.

4 Why doesn't that same 15 days apply to the
5 staff? I'm just absolutely non-plussed by this.
6 You're sitting there telling me that the staff can't
7 even determine how long it's going to make to make a
8 determination but they willy-nilly will tell everybody
9 else how long they can take to do the same thing.

10 MS. ZOBLER: Your Honor, all I can say is
11 that because it's so fact-specific and there's a lot
12 of factors involve in making that determination that
13 it would be difficult to set a specific time frame.

14 CHAIRMAN MOORE: What factors are
15 different in making the decision than on up the chain
16 the factors that have to be made because on abusive
17 discretion standard we have to know the standards
18 you're applying to know whether you applied them
19 correctly to how whether you abused your discretion.
20 So in effect, we're taking a look at much the same
21 thing you're looking at. If we can make a decision in
22 15 days, why can't you?

23 MS. ZOBLER: Because as you noted, the
24 standard is abuse of discretion, but the staff has to
25 make the initial determination de novo and that is why

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1 it takes possibly more time.

2 MR. ROTH: Your Honors, with regard to
3 foreign nationals, foreign citizens, in conferring
4 with the staff, it again is too person-specific. A
5 country that we're close with, that we share
6 information with, the processes will go much more
7 quickly than a country that U.S. doesn't have good
8 relations.

9 ADMINISTRATIVE JUDGE KARLIN: Does the
10 four to six months include foreign nationals then was
11 the question.

12 MR. ROTH: The ball park estimate was not
13 specific to the foreign nationals and again the answer
14 would go back to depending on which country are and
15 how cooperative, what sort of cooperation we have in
16 place with the other country.

17 CHAIRMAN MOORE: Let's take NATO ally
18 countries.

19 ADMINISTRATIVE JUDGE KARLIN: Say,
20 England? Do these investigations involve someone
21 going out in the field sometimes and asking questions
22 and interviewing references? I don't know and if you
23 had to do that over in the U.K., does somebody get a
24 nice trip over here? I mean, it seems like it would
25 take a little bit longer.

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1 (Laughter.)

2 MR. ROTH: With regard specifically to
3 such things in foreign countries, would Your Honors
4 allow us to confer with our staff?

5 ADMINISTRATIVE JUDGE KARLIN: Sure.

MS. ZOBLER: Your Honor, with respect to
the question about whether it would require personal
interviews and foreign travel, what I've been informed
is that it's not necessarily. It would depend on if
there's information and the investigator felt it
needed to be followed up upon it's possible that they
would need to do personal interviews.

13 || ADMINISTRATIVE JUDGE KARLIN: Okay.

14 ADMINISTRATIVE JUDGE ROSENTHAL: Actually,
15 what this means to come down to is that there is a
16 very broad envelope in the amount of time that to
17 begin with OPM is going to take. It's going to depend
18 upon circumstances, whether there are foreign sources
19 that have to be interrogated or not and at your end at
20 least what we're being told is that there similarly is
21 a case-specific, fairly broad envelope. So it's
22 difficult to tell, is it not, how long it's going to
23 take in any individual case for a combined OPM and NRC
24 action on the basis of the OPM report. It could be
25 two months or it could be a year and two months.

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1 Isn't that the reality of this?

2 MR. ROTH: Yes, Your Honor.

3 CHAIRMAN MOORE: Let's move to question
4 .B.

5 ADMINISTRATIVE JUDGE KARLIN: Can I just
6 on one other question? I'm trying to see how we can
7 accelerate this, how we could expedite this and it
8 seems to me that one opportunity is for people to
9 apply now and that's good and I'm glad that you all
10 will process those applications now. What we're
11 hearing is they're going to take a long time, four to
12 six months, and then maybe the staff will have some
13 time to make a determination and let's say somebody
14 turned around tomorrow and applied and four to six
15 months from now, a determination was made by the staff
16 and they wanted a particular document, a particular
17 SGI document that, I guess, is out on the LSN now. I
18 don't know whether you have any on the LSN header-only
19 and they came in and they said we want to get this
20 Board to rule.

21 We wouldn't be able to rule, not until DoE
22 certifies the LSN or do we have jurisdiction to issue
23 rulings before that? I mean, I'm not sure how
24 expedited we're really going to get here even if they
25 process early. I don't know. Until the DoE

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1 certifies, I'm not sure we are prepared to entertain
2 discovery disputes over particular documents. It
3 seems to me that's a little premature even if the
4 applications, the background checks and the money and
5 \$172 and that sort of thing can be done now.

6 MR. MALSCH: Judge Karlin, I just want to
7 add from our standpoint another complication and that
8 is that when DoE certifies, it's not clear to us that
9 the certification will include all of the relevant
10 documents that will support its license application
11 because the license application will be filed six
12 months in advance. So there is some uncertainty as to
13 whether what will be available at the time of
14 certification and also since we won't have the license
15 application, we have to make a judgment as to which
16 experts we will submit this information about without
17 knowledge as to what areas of the application we might
18 have a problem with.

19 ADMINISTRATIVE JUDGE ROSENTHAL: I hear
20 you on that. I think you have a decided problem in
21 that regard. I don't know whether there's a solution
22 to it. I mean, I think that to the extent possible
23 given what we've been told this afternoon that out of
24 abundance caution you'd better be getting -- your
25 consultants or whatever had better be getting in their

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1 applications promptly.

2 ADMINISTRATIVE JUDGE KARLIN: And you'd
3 better get your own in.

4 ADMINISTRATIVE JUDGE ROSENTHAL: You just
5 have to make a judgment in that regard. I think
6 you're right. I think there's a problem that you're
7 confronted with but I'm frank to state that I don't
8 see a solution. I don't think we're in a position to
9 do very much to expedite that clearance process as
10 much as we would like to.

11 MR. MALSCH: Well, I think the Board could
12 refer this particular exemption aspect of the proposed
13 order to the Commission for its decision as to whether
14 how it wants to interpret its rules and if it goes the
15 other way whether it wishes to grant the state an
16 exemption and resolve it one way or the other.

17 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.
18 That's one thing that is a possible obvious out. I
19 mean, if the --

20 ADMINISTRATIVE JUDGE KARLIN: Well, and
21 that certainly helps the state, but doesn't help Mr.
22 Bauser or the other entities who might be out there.
23 I think the state has a special status and there are
24 a lot of laws and regulatory provisions that provide
25 the State of Nevada particular status here. But the

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1 problem exists for everyone else too.

2 MR. MALSCH: That's true.

3 PARTICIPANT: We'd be glad to be exempted.

4 (Laughter.)

5 ADMINISTRATIVE JUDGE KARLIN: Give us the
6 statutory basis and ask the Commission.

7 CHAIRMAN MOORE: Staff, turning to
8 Question 4.B, what time limits, if any, can we impose
9 upon the staff to issue its written determination, its
10 written adverse determination?

11 MS. CURATOLA: Licensing boards do not
12 have the authority to oversee in its administrative
13 functions.

14 CHAIRMAN MOORE: It sounds to me like you
15 need supervision though.

16 (Laughter.)

17 CHAIRMAN MOORE: Do we have the authority
18 to take sanctions if the staff does not comply with
19 the procedures we have in here, if there's a
20 requirement to do something within 10 days or 15 days
21 and the staff fails to do that under the regs.? We're
22 not trying to tell you -- We can't order you to do
23 things, but we can take sanctions if you don't do
24 things that are required.

25 MS. ZOBLER: Your Honor, I guess the first

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1 answer would be whether the Board has the authority to
2 order the staff to complete its background checks
3 within a certain time frame.

4 ADMINISTRATIVE JUDGE KARLIN: Let's just
5 look at the reg. that you all have promulgated and
6 proposed. It says "Within 10 days of receipt of the
7 request, the staff will file a response in 10 days."
8 If you don't file a response in 10 days, can we just
9 by default grant the application that the person wants
10 to document or is that ordering the staff what to do
11 which we can't do?

12 MS. ZOBLER: I don't believe in the
13 absence of a finding of need-to-know and trustworthy
14 and reliability the documents, the SGI, could not
15 be released. So in terms of that kind of sanction, I
16 would argue that the PAPO Board could not order the
17 release of safeguard information until some finding is
18 made on those two criteria for access.

19 ADMINISTRATIVE JUDGE ROSENTHAL: Then what
20 sanction could be impose? Are you telling us in
21 effect that even though there's a specific requirement
22 imposed upon the staff that if the staff chooses to
23 ignore it that that's just too bad and in short that
24 the staff has the decision as to whether to comply
25 with time limits imposed upon it? I would think not.

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1 MS. ZOBLER: No, I'm not saying that, Your
2 Honor. I guess my concern is in terms of what the
3 sanctions, what kind of sanctions, it could be because
4 I think we would argue that you cannot order the
5 release of safeguard information until a determination
6 of trustworthiness and reliability and need-to-know is
7 made.

8 ADMINISTRATIVE JUDGE ROSENTHAL: So we can
9 heat up a pot of oil and -- I mean.

10 ADMINISTRATIVE JUDGE KARLIN: Can we rule
11 that the staff has failed to substantially comply with
12 the requirements of the PAPO, therefore, I disqualify
13 you from participating in the rest of the proceeding
14 like we could to any other party?

15 MS. ZOBLER: I would argue you could not,
16 Your Honor.

17 ADMINISTRATIVE JUDGE ROSENTHAL: Anyway,
18 what you're telling us is is that we could not simply
19 order a determination that the individual should
20 obtain access.

21 MS. ZOBLER: That's correct, Your Honor.

22 ADMINISTRATIVE JUDGE ROSENTHAL: That
23 sanction we don't have.

24 MS. ZOBLER: That's correct, Your Honor.
25 I think it was Judge Karlin who mentioned this notion

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1 that in terms of late filed contentions, certainly
2 that would be one method of ensuring that at least the
3 fairness of all the participants given the access
4 requirements we have here.

5 MR. MALSCH: Judge Rosenthal, I guess I'm
6 confused by the staff's response. I mean, normally
7 the failure of a party to respond on a timely basis
8 doesn't bring the proceeding to a halt. We still
9 would have under those circumstances a motion to
10 compel. I can see why the Board wouldn't take the
11 staff's default into account and rule itself on
12 trustworthiness and reliability in the absence of a
13 staff filing in which the finding would have been and
14 the document could be disclosed.

15 ADMINISTRATIVE JUDGE ROSENTHAL: Your
16 suggestion is that if they don't make the
17 determination within the prescribed period that that
18 opens the door to a motion to compel. Is that it?

19 MR. MALSCH: Well, let's assume there's a
20 motion to compel. The staff doesn't provide an
21 adequate response. If we make a decent case in the
22 motion to compel, the Board itself could make its
23 trustworthiness and reliability determination and
24 order the release of the document.

ADMINISTRATIVE JUDGE ROSENTHAL: That's

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1 possibly the case. It seems to me at this juncture
2 we'll proceed on the basis that the staff will make
3 its determinations within the period of time provided
4 by the rules. There is, I think, a presumption of
5 regularity which even applies to the staff.

6 MS. ZOBLER: Your Honor, I want to be
7 clear. With respect to any time limits that are in
8 the regulations, the staff will clearly comply with
9 them. I want to make that clear in case that was --

10 CHAIRMAN MOORE: Do you think it would be
11 prudent for the staff to include in its final rule a
12 time limit for the staff to make its determination of
13 trustworthiness after receiving its report from OPM?

14 MS. ZOBLER: Based on the information that
15 we've been given from our staff, time limits may not
16 be appropriate given the fact that there are so many
17 circumstances that would affect the ability of the
18 staff to make a decision within a particular time
19 frame.

20 ADMINISTRATIVE JUDGE KARLIN: So could you
21 change the --

22 CHAIRMAN MOORE: You've told us you're
23 going to develop criteria to apply and yet the staff
24 is incapable of applying the criteria that they're yet
25 to develop to a myriad of circumstances within a fixed

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1 period of time.

2 MS. ZOBLER: In a very specific fixed
3 period of time, that's correct, Your Honor.

4 CHAIRMAN MOORE: Generally, a fixed period
5 of time is a specific period of time.

6 MS. ZOBLER: That's correct.

7 CHAIRMAN MOORE: Okay. Let's move on to
8 Question 4.C. Is the formal adverse determination of
9 the first sentence of proposed 10 CFR Section
10 73.57(e)(3) referring to the same written final
11 adverse determination on trustworthiness and
12 reliability in proposed 10 CFR Section
13 2.1010(b)(6)(i)(d)?

14 MS. CURATOLA: Yes, your Honor.

15 CHAIRMAN MOORE: Let's turn quickly to
16 question 5.A. Does the staff interpret the meaning of
17 SGI in recently promulgated 10 CFR Section 73.59(a)
18 definitionally to preclude SGI during the prelicense
19 application phase of the proceeding before DoE files
20 its application?

21 MS. ZOBLER: Your Honor, the staff does
22 not believe it definitionally precludes the existence
23 of SGI during the prelicense application phase.

24 CHAIRMAN MOORE: Do you answer Question
25 5.B. the same way?

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1 MS. ZOBLER: Yes sir.

2 CHAIRMAN MOORE: I think from the answers
3 we have received you can see why we asked the
4 questions to try to get a handle on it. I think it is
5 obvious that getting a handle on it is an illusive
6 task. I think it would be helpful if the parties --
7 and let's start with the State and then we'll go right
8 around, how do you think it would be best for the
9 Board to proceed with regard to unclassified sensitive
10 information at this point?

11 MR. MALSCH: I think it would be still
12 worthwhile for the Board to review and issue the third
13 proposed case management order, although I do think as
14 I mentioned in connection with the exemption question
15 if the Board has any question about this we prefer it
16 to refer that matter to the Commission so the
17 Commission itself can make the judgment about
18 exemptions for state representatives.

19 MR. BAUSER: I would just suggest again
20 that one way of handling most, if not, all of the
21 issues we've been discussing during this portion of
22 the hearing would be to reflect the practicalities of
23 situations within the context of the effective date of
24 the final regulation and suggest further that perhaps
25 the Board could bring that to the Commission's

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1 attention.

2 CHAIRMAN MOORE: Mr. Shebelskie.

3 MR. SHEBELSKIE: Judge Moore, I think it
4 would be helpful to have a case management order in
5 place that would perhaps have two modifications,
6 something that would address the topic of preclearance
7 so participants could have some notice that the
8 Board's expectations are they should initiate the
9 process now to try to get the clearance going to help
10 expedite and resolve trustworthiness and reliability
11 determinations in the prelicense phase and if the
12 court were inclined to instead of using definitions of
13 NNPI, OUO and export controlled information would
14 prefer to have definitions that just adopted FOIA
15 exemptions 2 and 3 and then in the context of the
16 specific dispute under exemption 3, we could establish
17 what is the precise regulatory or statutory basis for
18 the exemption for that specific document or
19 information in the document that is exempt.

20 CHAIRMAN MOORE: Staff.

21 MR. ROTH: Your Honors, with regards to
22 the modifications to the order, certainly the
23 discussions we have here today regarding the length of
24 time should be reflected in the order. Regarding
25 prehearing --

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1 ADMINISTRATIVE JUDGE KARLIN: Could you
2 repeat that? I'm sorry. I didn't --

3 MR. ROTH: That the order should reflect
4 the discussion we had on time.

5 ADMINISTRATIVE JUDGE KARLIN: Okay.

6 MR. ROTH: So it clearly shows and is
7 telling the world this is how long it takes. So there
8 are no misunderstandings about it. So people
9 recognize if the new regulation goes into effect that
10 this is how long it's going to take.

11 CHAIRMAN MOORE: In that regard, is there
12 any disagreement amongst the participants today that
13 this process could literally start tomorrow because
14 the information that's out that you need the
15 fingerprint card, an SF --

16 MS. CURATOLA: Eighty-five.

17 CHAIRMAN MOORE: Eighty five or 185?

18 MS. CURATOLA: Eighty-five.

19 CHAIRMAN MOORE: Eighty-five and a waiver,
20 all of which are available from the staff that they
21 could without waiting a third case management order,
22 that process could start. Is there any reason that
23 can't happen?

24 MR. ROTH: No, there is not reason that
25 can't happen, Your Honor.

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1 MR. MALSCH: I have two issues with that.
2 One is that I'm a bit reluctant to ask our people to
3 submit information to the staff for a determination
4 based on criteria which not yet exists. The other
5 problem is for foreign nationals, how do they process
6 fingerprint cards? They have to come to the United
7 States and go to a U.S. police station and get
8 fingerprint cards and what constitutes a criminal
9 history check of U.S. data.

10 CHAIRMAN MOORE: Interestingly, in the
11 proposed rule, if I'm remembering the statement of
12 considerations correctly, that specific question with
13 regard to another exemption category is set forth and
14 said that you don't need it and you can't do it.

15 MR. MALSCH: That's why I asked the
16 question.

17 CHAIRMAN MOORE: So I guess I would turn
18 to the staff to respond to Mr. Malsch. How is that
19 going to be handled? It's your rule.

20 MR. ROTH: Your Honors, I would have to
21 consult with staff to know the specifics regarding
22 what fingerprinting requirements we would have, what
23 agreements with whatever the country was.

24 ADMINISTRATIVE JUDGE KARLIN: But we were
25 -- If we may, were you done in terms of, Mr. Roth, the

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1 staff's position on this that we should proceed with
2 the third case management order?

3 MR. ROTH: The other item that staff would
4 like to have in the third case management order would
5 be very definitely an interest in the actual
6 application because there is some concern that if
7 somebody is coming in for prescreening that there must
8 be some threshold that they actually want to be
9 involved in this hearing, not just screenings they can
10 put on the résumé. That was cleared for SGI.

11 ADMINISTRATIVE JUDGE KARLIN: We have a
12 definition of potential party in these regs. That's
13 the one I think we have to use. There was a proposed
14 regulation that dealt with standing for potential
15 parties which has been eliminated from the regs. How
16 are we to judge whether or not someone has an interest
17 if they walk in off the street and say, "Man, I'm
18 concerned about that Yucca Mountain application and I
19 want you to process this"? What criteria -- I mean,
20 talk about lack of criteria. We are not here. We
21 can't have standing requirements for potential
22 parties. That was specifically deleted.

23 MS. ZOBLER: The current proposed case
24 management order did as part of the need-to-know
25 determination indicate that the requesting party would

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1 indicate some kind of interest in the proceeding.

2 CHAIRMAN MOORE: But without an
3 application yet. We don't have a certified drawn
4 document --

5 ADMINISTRATIVE JUDGE KARLIN: So they say
6 I'm interested in --

7 CHAIRMAN MOORE: -- a need-to-know
8 requirement.

9 ADMINISTRATIVE JUDGE KARLIN: They say I'm
10 interested in the proceeding. That's all they say.
11 I'm a concerned citizen. I'm interested. What else?
12 Is that enough and what basis would we have to exclude
13 them if it's not? I mean, you say no.

14 ADMINISTRATIVE JUDGE ROSENTHAL: I just
15 think as a practical matter that that's --

16 ADMINISTRATIVE JUDGE KARLIN: \$172 will
17 give them enough interest.

18 ADMINISTRATIVE JUDGE ROSENTHAL: And I
19 think anybody who comes in and indicates that he, she
20 or it has an interest in either the construction or
21 the non-construction of this facility or has an
22 interest in some aspect of construction, I don't see
23 how this Board is in a position to pass judgment upon
24 whether that interest is sufficient to permit the
25 individual to go through the process. I mean that's

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1 a --

2 ADMINISTRATIVE JUDGE KARLIN: Look at the
3 regs., 10 CFR, the Subpart J, Section 2.1008. That
4 says "reserved." Do you know why it says reserved?
5 Because the regulation about standing has been
6 deleted. There is no standing requirement. There is
7 no such requirement. It was deleted from the Subpart
8 J.

9 MS. ZOBLER: Your Honor, what we were --
10 We wouldn't assert that an individual have to
11 establish standing in the traditional sense that we
12 would require for participation or as an intervenor,
13 but some minimal statement or a verum of facts that
14 would at least lead the person who's determining
15 whether this individual has a need to know has some
16 kind of --

17 ADMINISTRATIVE JUDGE KARLIN: Well, are
18 you suggesting something different? You put the third
19 case management order on the table, the proposed third
20 case management on the table. We didn't. Is there
21 something in there that satisfies you or are you now
22 unhappy with what you proposed?

23 MS. ZOBLER: We had the interest
24 requirement. I believe that some of the aspects might
25 be things like geographical proximity to the location.

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1 ADMINISTRATIVE JUDGE ROSENTHAL: So the
2 individual lives within a 100 miles, let's say, of the
3 facility.

4 ADMINISTRATIVE JUDGE KARLIN: Or any
5 transportation route.

6 ADMINISTRATIVE JUDGE ROSENTHAL: Or a
7 transportation route and comes in and says, "I live
8 within a hundred miles" or I live within two
9 miles/three miles of a transportation route, just that
10 veerment standing alone would be enough.

11 MS. ZOBLER: I would submit that, yes, for
12 purpose of getting at --

13 CHAIRMAN MOORE: Not to be -- but you
14 could tell me what the transportation routes are?

15 MS. ZOBLER: Your Honor.

16 (Several speaking at once.)

17 CHAIRMAN MOORE: So what's the point?

18 MS. ZOBLER: I guess the concern with
19 where we stated we will do prescreening and then the
20 staff will do that, the concern is the potential for
21 individuals seeking prescreening for reasons other
22 than participation in the Yucca Mountain proceeding.

23 ADMINISTRATIVE JUDGE ROSENTHAL: I just
24 think -- I understand where you're coming from. At
25 the same time, I think in the real world it's going to

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1 be very difficult to preclude and prescreening any
2 individual who says "I'm interested" and who has a
3 geographic proximity of some distance to the facility
4 or to any of the potential transportation routes and
5 my guess is that there is virtually no limit to the
6 number of those rules. As a practical matter, you're
7 just going to have to accept for prescreening anybody
8 who is prepared at least to say "I'm interested."

9 ADMINISTRATIVE JUDGE KARLIN: Yes. You
10 said you would process them early, promptly,
11 immediately, whatever, expeditiously I think the
12 question was and you said yes. I now worry that I'm
13 hearing "Well, we'll process some of them
14 expeditiously, but if we don't like the particular
15 person because we don't think they meet some criteria
16 we're not going to process that one. It's a waste of
17 time." If they paid their \$172 bucks and have come in
18 and said, "I'm interested" and you don't process it,
19 I would love to see them come forward to us and to
20 make a decision whether you should process it or not.
21 Again, we'll be stuck with we can't order you what to
22 do. But if that person then wants to make a
23 contention of being late, boy, they would have some
24 basis for that.

25 MS. ZOBLER: And, Your Honor, again I

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1 don't want to leave you with the impression that we
2 would sit on some applications and not others. If
3 we're requesting the interest requirements if the
4 Board feels that that's not necessary and appropriate,
5 we will process the applications as they come in.

6 ADMINISTRATIVE JUDGE KARLIN: Yes. I
7 don't even think we could if we wanted to. The reg.
8 was deleted that required that.

9 MR. SHEBELSKIE: Judge Karlin, if I could
10 offer a few comments.

11 CHAIRMAN MOORE: I would like if I may
12 hear from Ms. Curran and then we'll come back to you.

13 ADMINISTRATIVE JUDGE KARLIN: And Ms.
14 Treichel out in Las Vegas and NIRs.

15 MS. CURRAN: I wouldn't have a problem
16 applying for the clearance early, but one of my
17 concerns is how do I know what kind of expert I need
18 to get a clearance with me, you know, what are the
19 issues. I want to urge that there be some index, a
20 privilege log, of these documents offered as soon as
21 possible so that one could have an idea what is the
22 nature of the information.

23 CHAIRMAN MOORE: At this point, all we
24 have is a bibliographic header for all these documents
25 in DoE's collection.

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1 ADMINISTRATIVE JUDGE KARLIN: We don't
2 even have that. We have an LSN that hasn't been
3 certified yet. There have been three points, some
4 million documents on there. There may some that are
5 header-only SGI. I don't know. But may I ask the
6 question which as we were going around the table which
7 is what do you think we should do now vis-a-vis the
8 proposed third case management order. Should we issue
9 it? Should we modify it? Should we decide not to
10 bother with it because there's not enough -- What do
11 you think we should do on that? Do you have a
12 position of your client? Is it worth proceeding with
13 the third case management order or not?

14 MS. CURRAN: It certainly seems like this
15 issue raises a major hitch in going forward in any
16 kind of timely way.

17 ADMINISTRATIVE JUDGE KARLIN: And
18 therefore, we should?

19 MS. CURRAN: Notify the Commission of a
20 potential major delay.

21 ADMINISTRATIVE JUDGE KARLIN: Yes.

22 CHAIRMAN MOORE: NIRS?

23 MR. KAMPS: Well, I agree with the
24 previous point that without the license application
25 and without the routing, it's difficult for us to even

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1 know if our members and our affiliates across the
2 country are implicated.

3 CHAIRMAN MOORE: I appreciate this is a
4 classic catch-22 because if you wait until you have
5 the kind of information and answers that you need to
6 act sensibly and reasonably and certainly efficiently
7 and economically you then are faced with the real
8 potential because of the enormous amount of time it
9 will take the staff to deal with processing under this
10 very stringent regulation that's proposed. You will
11 then be late. It can't happen in a timely fashion as
12 a practical matter and that's what we're facing.

13 ADMINISTRATIVE JUDGE KARLIN: But what I
14 hear Mr. Kamps saying and I have some empathy with
15 that is that in a real world perspective people who
16 are trying to decide whether to become involved in
17 this process may want to put their \$172 up and start
18 getting processed now or they may want to wait and see
19 what happens when the LSN is certified and what
20 documents they think they need and if they wait until
21 then to begin the process and then file their
22 fingerprint application and do all these sort of
23 things and it takes six months and the pre-license
24 application phase is over with, I don't think we
25 should have the staff or DoE perhaps say "Oh, you

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1 should have applied back on May 24 of 2007. You were
2 warned." I'm not sure whether that's going to cut it.
3 We'll hear it, but we're going to have to decide that
4 when it comes and I'm not sure there's sort of
5 automatic. We're going to be put and the staff has
6 asked us to advertise the fact that it's a four to six
7 month problem. I don't know whether we should be
8 advertising that.

9 ADMINISTRATIVE JUDGE ROSENTHAL: I would
10 like to ask the --

11 CHAIRMAN MOORE: Wait a minute. Let me
12 see if Ms. Treichel.

13 ADMINISTRATIVE JUDGE ROSENTHAL:
14 Certainly.

15 CHAIRMAN MOORE: Ms. Treichel in Las
16 Vegas.

17 MR. KAMPS: Could I add just one more
18 point before we move on, Judge Moore? Could I add
19 just one more point?

20 CHAIRMAN MOORE: Yes. Let me go ahead and
21 hear from Ms. Treichel.

22 MS. TREICHEL: Yes. Thank you very much.
23 The people in Nevada and probably the public in many
24 places -- Can you hear?

25 ADMINISTRATIVE JUDGE KARLIN: Barely. But

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1 please speak up.

2 MS. TREICHEL: The general public -- Is
3 this coming through now?

4 ADMINISTRATIVE JUDGE KARLIN: Yes.

5 MS. TREICHEL: Have worried that this is
6 such a huge thing and sort of ambush and I was
7 delighted to hear you talking about the Department of
8 Energy or NRC staff can't just say that this is what
9 it is because we say it's what it is. That's good
10 news for us because we've worried about that such of
11 thing. But we also worry that the Yucca Mountain
12 project becomes such a black box and those of us who
13 have been opposed to it are sort under suspicion
14 anyway and when you hear about the need for the
15 clearances and this huge process that in fact there
16 are people that have been very concerned and have been
17 very involved who probably have criminal records
18 because of their involvement if they've been involved
19 in a demonstration opposed to any of these sorts of
20 activities. They would then have a criminal problem
21 and yet they are very reliable and trustworthy and
22 probably very knowledgeable about the whole thing. So
23 it would seem to me that any effort you can take to
24 reduce the number of SGIs or privileged material is
25 really in the public interest and helps a lot that

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1 some of this, a lot of this, can be done without this
2 onerous process. Thank you.

3 CHAIRMAN MOORE: Thank you, Ms. Treichel.
4 NIRS.

5 MR. KAMPS: Yes, the two points I had were
6 if waivers could be put in place for certain
7 organizations and individuals I think \$172.50 itself
8 is going to be cost prohibitive for some persons who
9 want to be involved in this proceeding to begin with.
10 And the other waiver that we would like to see would
11 be for a solid late-filed contention policy if there's
12 going to be all this uncertainty instead of really
13 trusting in the NRC staff or Commission in the end to
14 grant such late-filed status.

15 CHAIRMAN MOORE: Mr. Shebelskie, you
16 wanted a further point.

17 MR. SHEBELSKIE: Yes, I wanted to offer a
18 couple observations just listening to all the comments
19 here because I think everybody recognizes there's this
20 practical problem with respect to this background
21 check and it's easy to sort of hypothecate nightmare
22 scenarios. But I think that in the real world context
23 with respect to the question of how do we know now
24 which experts we should submit applications for, it's
25 not a completely blind platform we're working on here.

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1 SGI information has a pretty well defined meaning and
2 you're not going to need an expert whose only subject
3 matter hydrology to address safeguards information.
4 I suspect the state has a pretty good idea of who its
5 safeguards experts are going to be. Those names could
6 be advanced for preclearance.

7 Secondly, I think it's very unlikely that
8 we're going to face a scenario where we're going to
9 have a large mass of people. I think Judge Rosenthal
10 once referred to it as the Yankee Stadium scenario
11 where tens of thousands of people are submitting these
12 requests because we're talking about the background of
13 trustworthiness and reliability preclearance. But
14 ultimately, there will also have to be a need-to-know
15 that has a technical competence component to it and it
16 may well be that John Q. Public says I'm interested
17 and I'm trustworthy and reliable and could get that
18 clearance. But he or she would have to think even if
19 I got that clearance would I ultimately as just an
20 individual satisfy the technical need-to-know prong
21 and therefore even though I got a clean bill of
22 health.

23 ADMINISTRATIVE JUDGE ROSENTHAL: I think
24 you're right, Mr. Shebelskie, that it's unlikely that
25 there are going to be many different players in this

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1 particular sphere which leads me to this question
2 which I will also ask of the staff which is whether
3 you would endorse the suggestion that Nevada made that
4 the Board go to the Commission and seek an exemption
5 at least for the folks that Nevada wishes to serve up.
6 Now granted, that would not of itself be of assistance
7 to other participants, but I think in the real world
8 Nevada is going to be the major player and I don't
9 think that we could really realistically seek a
10 similar waiver for people being served up by other
11 than a sovereign state.

12 So there was Nevada's suggestion. If the
13 Commission were to grant such a waiver, that would at
14 least to a major player relieve a lot of the problems
15 that are clearly associated with the length of time
16 that OPM is going to take, etc., the thing that we've
17 been discussing at some length. So I'm interested to
18 know whether you would endorse the Nevada proposal and
19 after I get your answer, I will ask the same question
20 of Mr. Roth.

21 MR. SHEBELSKIE: From DoE?

22 ADMINISTRATIVE JUDGE ROSENTHAL: Yes, DoE
23 first.

24 MR. SHEBELSKIE: I've not discussed it
25 with DoE, but I can't imagine that we would have any

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1 objection to it.

2 ADMINISTRATIVE JUDGE ROSENTHAL: What
3 possible basis could there be for objection?

4 MR. SHEBELSKIE: That's why I said sitting
5 here today I can't think of it. If the Commission
6 ordered the exemption, we have no basis for
7 complaining about it.

8 CHAIR RYAN: Mr. Roth or Ms. Zobler,
9 whoever it is, that is --

10 CHAIRMAN MOORE: Prove Mr. Shebelskie
11 incorrect.

12 MS. ZOBLER: If the -- We wouldn't oppose
13 the Board seeking guidance from the Commission.
14 However, we would actually oppose the granting of an
15 exemption for any representative of Nevada.

16 CHAIR RYAN: On what basis?

17 MS. ZOBLER: The basis being that state
18 employees have a certain level of either background
19 check on their own or some kind of oversight by high
20 level officials and that an individual designated by
21 the governor would not necessarily have that same kind
22 of oversight.

23 ADMINISTRATIVE JUDGE ROSENTHAL: And you
24 think that that consideration outweighs the very
25 serious practical problems that this delay in

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1 obtaining the results of the background checks is
2 going to present. I mean, it seems to me that we have
3 a serious practical problem here. There is an
4 interest obviously in this proceeding once the
5 application is filed moving forward with some degree
6 of dispatch.

7 It seems to me there's an interest of
8 avoiding soundly-based applications for or extension,
9 rather, of time to file contentions or filing of late
10 contentions, call it what you will, and it seems to me
11 that there has to be some kind of accommodation to
12 that fact. Now it might be that there's something to
13 be said for your point that they may not have the same
14 degree of reliability that the genuine, bona fide,
15 24-karat gold statement employees have. But I'm not
16 so certain that there is such a likely difference in
17 degree of reliability that outweighs the very serious,
18 at least for me, practical problems that this
19 afternoon's discussion has revealed.

20 But in any case, you're obviously -- We
21 can't tell what to argue before the Commission anymore
22 than we can tell you anything else what to do and you
23 would be free to do that. But I take it at the least
24 you would have no problem with our, at least,
25 presenting this to the Commission with the

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1 considerations that we might wish to set forth as
2 calling for such action and then let the chips fall
3 where they may.

4 MS. ZOBLER: That's correct, Your Honor.
5 I'm certainly getting -- Raising these issues to the
6 Commission is something the staff would not opposed.
7 I just want to remark that we are concerned about also
8 protecting the dissemination of what is safeguards
9 information. We're concerned about giving access to
10 individuals who have not established trustworthiness
11 and reliability and I think that to the extent that
12 this is problem if it does actually become a problem
13 and delay, there are ways that we can deal with that
14 issue if, in fact, it actually becomes a problem.

15 CHAIRMAN MOORE: I think to quote Ross
16 Perot from those presidential debates years ago,
17 "We're all ears." How are you going to make those
18 accommodations?

19 MS. ZOBLER: Some of the procedures we
20 discussed earlier today, prescreening of individuals,
21 the access to redacted documents that we've all
22 committed to put on the LSN, the expeditious -- I said
23 the prescreening, the access to the redacted documents
24 and keeping in mind that issues related to safeguards
25 is just a small part of the overall Yucca Mountain

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1 project and that there are other areas of which there
2 will be complete and full access of information.

3 ADMINISTRATIVE JUDGE ROSENTHAL: I would
4 just conclude my remarks by saying I'm sure the
5 Governor of Nevada will be happy to know that the
6 staff has utter confidence in the trustworthiness of
7 everybody in the State's employ.

8 ADMINISTRATIVE JUDGE KARLIN: Let me ask.
9 Does the staff -- Maybe this came out. As I
10 understand the DoE, Mr. Shebelskie, said you have
11 eight SGI documents approximately.

12 MR. SHEBELSKIE: It was eight UCNI.

13 ADMINISTRATIVE JUDGE KARLIN: I'm sorry.

14 MR. SHEBELSKIE: Twenty-one SGI.

15 ADMINISTRATIVE JUDGE KARLIN: Twenty-one
16 SGI and the staff, how many SGI documents do you have?
17 Zero?

18 MS. ZOBLER: Right now, we have zero.

19 ADMINISTRATIVE JUDGE KARLIN: So we're
20 talking about a total of 21 documents, right?

21 MS. CURRAN: That wasn't including the
22 license application, right?

23 ADMINISTRATIVE JUDGE KARLIN: Well, that
24 would be 22. Right. Good point. That's a big
25 document and important one and that won't be out for

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1 a long time, you know, months, but there are only 21
2 documents. Should we be certifying a question to the
3 Commission on this issue with only those number of
4 documents available? If we were to do that, wouldn't
5 it be better if there was some sort of motion from the
6 state that said we would request an advanced waiver
7 for these particular individuals rather sort of
8 abstract. Then the staff could look at those
9 individuals and say, "Hey for those people we're on
10 board" in the abstract problem, but if it gets more
11 concrete, we might have something that the staff could
12 go with. Even then, we're only talking about 21
13 documents.

14 I mean at the end of the day here today,
15 where do we go? We have a proposed third case
16 management order. I don't think anyone here at the
17 table, a participant, thinks that we can sign that
18 proposed third case management order of December 19,
19 2005. We have change it. There are things that you
20 want changed such as the proposed reg. that's coming
21 out. There are things that we want changed. We asked
22 you some questions about some of those issues and we
23 didn't get quite frankly adequate answers on some of
24 them.

25 So at the end of the day, what do we do?

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1 Do we go out and issue the third case management order
2 as is? No. Do we modify it? I don't know and it's
3 going to take some work and is it worth it at the end
4 of the day given the small number of documents that
5 seem to be in controversy? Should we wait until a
6 specific controversy arises? That's what we are
7 agonizing and trying to deal with and that's why we
8 ask what do you think we should do and I think you've
9 answered as best you can.

10 MR. MALSCH: Judge Karlin, we would be
11 more than happy to submit to the staff a list of
12 individuals if that would make it easier for them to
13 rule favorably on an exemption.

14 ADMINISTRATIVE JUDGE KARLIN: And I might
15 want to say for everyone else's listening the reason
16 we're helping or picking on or whatever the state is
17 because there are statutory provisions in the Nuclear
18 Waste Policy Act and elsewhere that give the state
19 special status in the Yucca Mountain proceeding. They
20 are automatically a party. They have certain other
21 automatic rights. We're not trying to dist all the
22 other entities that might want to participate, but
23 they just need to understand. When they ask for an
24 exemption, they won't because they have statutory
25 basis to try to seek that and everyone else unless you

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1 can give us some statutory basis we don't see how we
2 could even get there.

3 CHAIRMAN MOORE: There's a whole host of
4 minor additional problems that we haven't raised that
5 we have with the proposed third case management order.
6 Just one glaring example, if you will look at the
7 proposed protective orders, on something as simple as
8 the destruction of documents, believe it or not, there
9 are different provisions on how you shred documents
10 for NNPI and for OUO and for UCNI.

11 Now I recognize that bureaucracies have a
12 habit of doing these kinds of things and you may in
13 putting it together have all just been dutifully
14 falling in line and you were faced with the problem
15 that you couldn't make the least difficult or least --

16 ADMINISTRATIVE JUDGE KARLIN: Lowest
17 common denominator.

18 CHAIRMAN MOORE: Yes, you couldn't use the
19 lowest common denominator because it would afoul with
20 some regulation and if you use the highest point, it
21 would equally have some problems. For example, in
22 that regard, on OUO, you can talk about it over the
23 telephone, but for NNPI, you can't unless it's
24 encrypted, for example. I may have gotten those
25 incorrect.

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1 It would seem to me that if there's any
2 hope of this thing being followed and not bogged down
3 in frankly ridiculous mistakes that people made not
4 with an malevolent intent but are going to be make and
5 cause future problems, the KISS principle has to apply
6 to this that on some of these things like shredding,
7 forget shredding if you have all of these regulations
8 that can't be reconciled and have them just returned
9 from whence they came.

10 On encryption for telephone lines, for
11 example, some of this can be sent over a fax if it's
12 a laser fax and some can be sent over a regular fax
13 machine. I would dare say that I could Mr. Shebelskie
14 and I will. Do you have a laser fax?

15 MR. SHEBELSKIE: I don't know, but I do
16 know I receive no NNPI or OUO in my office.

17 CHAIRMAN MOORE: It just seems to us that
18 there are so many things in this third case management
19 order that are traps for the unwary and are
20 needlessly complicating and difficult.

21 MR. SHEBELSKIE: Judge Moore, I would make
22 comment on that because that was something we wrestled
23 with. Here's the flip side of it. You could say, for
24 example, with the NNPI there are these very specific
25 and detailed requirements that you have to follow.

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1 You might say "Well, then let's just apply that across
2 the board to all the other categories."

3 CHAIRMAN MOORE: Right.

4 MR. SHEBELSKIE: Then the state and others
5 are going to say "Wait a minute. We don't want" --

6 CHAIRMAN MOORE: We understand that, but,
7 Mr. Shebelskie, seriously, let's be reasonable. Can
8 there really whether the shredding has to be at one-
9 quarter inch or in some instances, it just says it has
10 to be shredded? Now is that necessary?

11 MR. SHEBELSKIE: I'll tell you. We
12 tracked in each of the protective orders the
13 specifications that the respective security offices
14 have promulgated for that data. I can't tell you
15 whether it's wise or not. I'll just tell you we
16 tracked what the Office --

17 ADMINISTRATIVE JUDGE KARLIN: So if what
18 we ended with a single protective order that tried to
19 combine all of it what you would urge and what the
20 state and others might oppose is something which would
21 be the most restrictive on every element that had to
22 be under your particular sets of regs. So you would
23 want the most restrictive possible and this would be
24 something that would be problematic. So we're faced
25 with either four separate protective orders or one

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1 that is most restrictive of all.

2 MR. SHEBELSKIE: Right, and that's
3 actually Counsel's why perhaps, Judge, we really do
4 need a case management order even if it has to have
5 four different protective orders because if we didn't
6 have anything in place now and someone in the license
7 application phase makes the request, we say, "Great.
8 You're reliable, whatever and the need-to-know. Do
9 you have the encryption device?"

10 ADMINISTRATIVE JUDGE KARLIN: Why don't we
11 just have a case management order that says you will
12 provide all this material in a redacted form, people
13 can start applying for all their fingerprint and
14 background checks immediately and the parties will
15 process them expeditiously and all other disputes if
16 they arise come to us later and maybe there never will
17 be any?

18 MR. SHEBELSKIE: Yes sir. Your Honor, if
19 people, participants, who perceive that they would
20 want access to the unredacted versions under that
21 scenario would, and we would be glad to confer with
22 them and it's laid out in these orders in any event as
23 drafts, tell them these are the types of security
24 protections you have to have in place at your premises
25 if you want to talk away a copy.

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1 ADMINISTRATIVE JUDGE ROSENTHAL: I
2 understand what you're saying about certain categories
3 require these more stringent limitations and there's
4 the matter of whether it should be applied across the
5 board and there's an objection to that. At the same
6 time, my concern is that an individual who is
7 confronted with four different ways in which shredding
8 must take place is almost certainly going to end up if
9 he or she gets documents in all of these categories to
10 violate one or another of those orders. I think in
11 the real world again it's going to be very difficult
12 for somebody to bear in mind "Now let's see. This
13 document is of this type and therefore it requires
14 this shredding as opposed to another."

15 Now to me, I would think that even though
16 it imposes unnecessary restrictions with regard to the
17 disposition of some of the categories of matter that
18 in the real world it makes best sense to have one
19 uniform requirement even if it's the most stringent
20 and would otherwise not be applicable to some other
21 categories. I mean, that's just my own particular
22 judgment because I am concerned. I think it's
23 important that people observe their obligations under
24 protective orders and I think there is mischief
25 possible where you have different requirements for

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1 different categories of materials.

2 MR. SHEBELSKIE: Judge, I think --

3 CHAIRMAN MOORE: What all of this is
4 leading to, now 18 months have passed since this was
5 proposed, does it make sense for you to, in light of
6 all the water that's passed over the dam since
7 December 19, 2005, to take this back, seriously look
8 at it in light of, as I said, all that's happened in
9 this proposed rule, get a fresh look at it and
10 simplify where it can be simplified such as the things
11 we talked about with definitions for NNPI and UCNI and
12 perhaps even OUO and see if you can all get on board
13 to something and then we will be in a better position
14 to issue something. Because right now as you can
15 probably guess, the Board is not of one mind on how to
16 proceed or certainly how to proceed with this proposed
17 third case management order and it seems to, I think,
18 all of us to make the best sense to have the parties
19 try to at least minimize the areas of problems in
20 light of those things that we've tried to bring out
21 are troubling us.

22 ADMINISTRATIVE JUDGE KARLIN: I'm not sure
23 I can agreed with that.

24 CHAIRMAN MOORE: Well, see. I said we
25 weren't all of one mind.

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1 ADMINISTRATIVE JUDGE KARLIN: I'm not sure
2 it's worth asking the parties to go off and do another
3 crack at it. If the Board, the majority, so decides,
4 I'm not sure it's something we should decide
5 impromptu. We might want to hear from the parties if
6 they would be willing to do that. I'm not sure if you
7 did it would come out any better than the last time or
8 the answers we got the last time and we might ask for
9 specific cites and specific definitions and we weren't
10 happy with what we got and I don't think we'd be a
11 whole lot happier after today.

12 So I'm not sanguine that there would be a
13 whole lot of progress made. But that is a possible
14 route to ask you all to go at it again. Is it worth
15 the candle to do that? I don't know.

16 CHAIRMAN MOORE: Well, that's the question
17 on the table. Is it? Start with the staff.

18 MR. ROTH: The staff is certainly willing
19 to rediscuss the order with the other parties. As to
20 the benefits of it, in the process we can make sure
21 that the times are understood, that the proposed rule
22 language is in there appropriately. So it could be
23 beneficial.

24 CHAIRMAN MOORE: and include such things
25 as the time periods it's going to take to get this

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1 done so that it, as all these things do, are published
2 to a significant service list and people then will
3 certainly have the opportunity to see what kind of
4 time periods they're going to faced with. DoE, Mr.
5 Shebelskie.

6 MR. SHEBELSKIE: Obviously, DoE will do
7 and proceed however the Board wishes us to proceed.
8 But in light of the kinds of discussions we've had, I
9 wonder if whether it would be more helpful for the
10 Board perhaps to delineate after deliberation its
11 preferences on certain high concepts. For example, do
12 you want a protective order that is the one-size-fits-
13 all with the maximum protection for the highest level?
14 If we have that instruction and guidance, then we can
15 go off and draft. Do you want instead of export
16 control information or OUO high level, whatever, for
17 us to craft the definitions of the categories by
18 exemptions 3 and 2? If we have that kind of high
19 level guidance on these big points, I think that would
20 really advance our ability to meet your expectations
21 and requirements.

22 CHAIRMAN MOORE: Mr. Neuman.

23 MR. NEUMAN: Yes, on behalf of Lincoln
24 County, I think there probably would be some benefit
25 in having even a stripped down case management order

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1 which if nothing else advised the parties and guided
2 the parties on what to do, how to handle the documents
3 once they're released. I don't know having heard the
4 discussion today how much value we would really obtain
5 from a case management order that tries to redo a lot
6 of these time frames and some of the broader issues
7 that addressed in the draft case management order.
8 But if other parties felt that it's worth taking
9 another crack at that, we would certainly be willing
10 to participate in that as well.

11 CHAIRMAN MOORE: Mr. Malsch.

12 MR. MALSCH: I think that certain issues
13 the Board has raised could be handled by a joint
14 redrafting effort, for example, some clarification in
15 honing down the definitions of NNPI and the like. But
16 there are some problems that arise from staff,
17 administrative difficulties and positions that are
18 really intractable, for example, the time required to
19 process applications, difficulties about fingerprint
20 cards, the state exemption question.

21 CHAIRMAN MOORE: In that regard, I was
22 wondering though by going through that process would
23 it not crystallize just what those problems are so
24 that they could be presented to us as these are things
25 that the state still has major problems with. Maybe

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1 none of this can be resolved amicably between all of
2 you and reach common ground. But there would then be
3 things that would be isolated and identified as
4 problems.

5 MR. MALSCH: I think that we could do.

6 CHAIRMAN MOORE: And if everybody did it
7 that way that there may be some utility in that. Mr.
8 Bauser.

9 MR. BAUSER: I have nothing to add.

10 CHAIRMAN MOORE: Ms. Curran.

11 MS. CURRAN: We would be willing to
12 participate. I do think it would be helpful to have
13 a little guidance from the Board as to the issues that
14 you would like the order to address and that it would
15 be good for us to see what we can agree on and what we
16 don't agree on.

17 CHAIRMAN MOORE: And Mr. Kamps.

18 MR. KAMPS: We haven't really been
19 notified of the past meetings. So we'd have to
20 certainly be have more notification and involvement
21 than we've had in the past. But we would be
22 interested. It's been some time since we've been
23 invited to those.

24 ADMINISTRATIVE JUDGE KARLIN: Well, the
25 past meetings occurred in the fall of '05 and they

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1 did, I think, inform everyone. At least, they filed
2 certifications that they informed everyone on the
3 service list of those meetings. Those are the last
4 ones I think.

5 MR. KAMPS: I think there is a number of
6 folks who took part in those earlier meetings that
7 were not added to the service list.

8 CHAIRMAN MOORE: Ms. Treichel.

9 MS. TREICHEL: I would say that that this
10 is more in the job of the attorneys. The task force
11 and other grassroots groups would certainly like to
12 see what comes out of it and see a lot of
13 simplification if that's possible.

14 CHAIRMAN MOORE: Does anyone else have
15 anything they would like to add at this point or bring
16 to our attention?

17 MR. SHEBELSKIE: No sir.

18 CHAIRMAN MOORE: We thank you for your
19 participation and your input. If there are no other
20 matters, then we will stand adjourned and we will take
21 all of this under advisement and deal with it and you
22 will be informed when we can figure out how to
23 proceed. Thank you. Off the record.

24 (Whereupon, at 4:39 p.m., the above-
25 entitled matter was concluded.)

CERTIFICATE

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