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United States of America
Nuclear Regulatory Commission

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Yucca Mountain DOE Certification Hearing

+ + + + +

Wednesday,

December 05, 2007

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Las Vegas, Nevada

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The trial commenced in the Pacific Enterprise Plaza
Building 1 of 3250 Pepper Lane, Las Vegas, Nevada, at 9:00am.

BEFORE:

Thomas S. Moore, Chairman

Alex S. Karlin, Administrative Judge

Alan S. Rosenthal, Administrative Judge

1 APPEARANCES:

2 On behalf of the State of Nevada:

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10 On behalf of the United States Nuclear Regulatory

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4 On behalf of the Nuclear Waste Task Force:

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9 Also present:

10 Marta Adams, Deputy Attorney General, State of

11 Nevada

12 Dr. Mike Thorne, RTSP Expert

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

9:00 a.m.

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3 >> JUDGE MOORE: Good morning, ladies and
4 gentlemen. I'm Judge Thomas Moore. On my left is Judge Alan
5 Rosenthal. On my right is Judge Alex Karlin. We would like to
6 welcome all of you this morning to the Nuclear Regulatory
7 Commission's new Las Vegas hearing facility. To the extent the Pre-
8 license Application Presiding Officer Board will be hearing further
9 hearings in the pre-license application phase of the proceeding,
10 some of them will be held in this new facility. Should the
11 Department of Energy file an application to construct a high-level
12 waste repository at Yucca Mountain, nearly all of the proceedings
13 challenging that application will be held in this facility.

14 And it should be obvious to you there is a new
15 electronic hearing system in the facility. We will be using some
16 features of that facility this morning. As with most electronic
17 technology, there may be some minor glitches, and as is more likely,
18 there will be some missteps by those of us using that technology.
19 So I would ask all of you to please be patient and bear with us as
20 we work through it.

21 Judge Rosenthal, Judge Karlin and I have been
22 designated to serve as the Pre-license Application Presiding Officer
23 Board that is hearing argument this morning on the State of Nevada's
24 motion to strike the Department of Energy's October 19th, 2007,
25 certification of its licensing support network document collection.

1 The certification at issue is DOE's representation
2 that it has made available on the NRC's LSN electronic document
3 systems all documentary material required by the Commission's
4 regulations.

5 Under the NRC's regulations, DOE certification is
6 a mandatory first step before it can file a license application.
7 The Pre-License Application Presiding Officer Board, known by the
8 acronym PAPO, is merely the name given to the Atomic Safety and
9 Licensing Board designated to hear disputes in the pre-license
10 application phase of the proceeding, including challenges to the
11 certification.

12 This is the second time that we have entertained a
13 challenge by the State of Nevada to a DOE certification. DOE's
14 first certification in June 2004 was challenged by the State. In an
15 August 2004, ruling we granted the State's motion to strike the
16 certification.

17 Today's oral argument on the State of Nevada's
18 motion to strike DOE's certification is governed by the terms of our
19 November 16th order. As stated in that order, each side, that is of
20 the proponents and the opponents of the State's motion, will have 60
21 minutes for argument. The NRC staff shall have 15 minutes for
22 argument.

23 I should note that the NRC staff, in effect,
24 states that they are neither a proponent or an opponent of the
25 motion; rather, they wish to present us with their views on the

1 Commission's regulations and requirements for certification.

2 At this point, I would like to have each of you
3 introduce yourself for the record. I will start with the motion
4 proponents on my right.

5 And I would caution you, you need to press the
6 button on the bottom of the microphone to turn it on. When you are
7 through speaking, each of you will need to press the button on the
8 bottom of the microphone again to turn the microphone off.
9 Otherwise, it will stay live. Please proceed.

10 >> MS. TREICHEL: Judy Treichel for the Nevada
11 Nuclear Waste Task Force.

12 >> MR. FITZPATRICK: Charles Fitzpatrick. I'll
13 present argument for the State of Nevada.

14 >> MR. SHEBELSKIE: Michael Shebelskie, counsel
15 for the Department of Energy.

16 >> MS. GINSBERG: Ellen Ginsberg, Nuclear Energy
17 Institute.

18 >> MS. YOUNG: Mitzi Young, counsel for NRC staff.

19 >> JUDGE MOORE: As the movant, Mr. Fitzpatrick,
20 you may come to the podium and begin. How much time have you
21 allotted of your 60 minutes to Ms. Treichel?

22 >> MR. FITZPATRICK: Five minutes, Your Honor, at
23 the end of our direct.

24 >> JUDGE MOORE: And how much time would like to
25 reserve for rebuttal?

1 >> MR. FITZPATRICK: 20 minutes.

2 >> JUDGE MOORE: I would remind counsel that
3 rebuttal is strictly that. You should confine your rebuttal remarks
4 to responding to the arguments presented today by opposing counsel.

5 >> MR. FITZPATRICK: I will try and do that, Your
6 Honor, and I'm sure you'll help me if I fail.

7 May it please the Court? Good morning, Your
8 Honors. Before I proceed, I would just like to introduce -- here is
9 Marta Adams, who is the senior Deputy Attorney General for the State
10 of Nevada present.

11 Mr. -- Dr. Mike Thorne, who is RTSP expert. He's
12 the coordinator of our expert team and he's here to observe from the
13 UK. He's not here to testify, but he's available for any questions
14 you may have. And my partner Marty Malsch is at the table, counsel
15 table.

16 We are here today for the same reason we met in
17 2004. The DOE has again certified an LSN database that's not
18 complete. It isn't just a little bit incomplete. It is far from
19 complete. DOE is still spending over \$1 million a day of taxpayer
20 money preparing information for its license application. These are
21 not trivial documents that are missing. These documents are
22 prerequisite to the Preclosure Safety Analysis and the Post Closure
23 Safety Analysis, which are the heart and soul of the license
24 application.

25 Now, why did DOE certify its LSN database knowing

1 it was incomplete? Let me ask my able secretary, Susan Montese, if
2 you would, put up Page 271 of our exhibits. Do I need them clicked
3 on by the clerk? You can zoom a little.

4 On September 19th at a technical -- Nuclear
5 Technical Waste Review Board meeting, DOE's OCRWM director stated,
6 "What I'll say about the license application is I've been very
7 clear, very public about putting out front that we're going to get
8 that license application into the NRC by Monday, June 30, 2008. And
9 I'm telling you we are ahead of schedule in doing that. How ahead
10 of schedule we'll be come March or April remains to be seen, but we
11 are ahead of schedule to meet that date and we will meet that date."

12 The director has made the same statement more than
13 25 times in public forums. So, because of that, DOE has again
14 backed itself into a corner, choosing a license application date and
15 committing to it so publicly that it's forced itself to, in order to
16 meet the prerequisites for filing that application, certify an LSN
17 database whether it's complete or not. And as it happens, it's not.

18 For the purposes of this hearing, there is no LA
19 target date. It doesn't matter to this panel. The PAPO Board has
20 no obligation to accommodate an arbitrary LA date selected by a
21 license applicant.

22 The sole issue before the panel here today is the
23 completeness of the LSN database which DOE certified on October
24 19th.

25 Now, it would be easy to pick apart the database

1 and say it wasn't ready when it was certified for a myriad of
2 reasons. For instance, DOE has already filed 400 pages of changes
3 to their privilege logs that they filed at the same time. They have
4 stated a plan to revise and correct the titles to more than 160,000
5 of the documents that are on the LSN. And there are rampant
6 inconsistencies on the LSN. Just one example --

7 >> JUDGE MOORE: You just used the number 160,000
8 changes to bibliographic headers of documents. Are you speaking
9 since certification?

10 >> MR. FITZPATRICK: Am I speaking --?

11 >> JUDGE MOORE: Since October 19th, when they
12 certified.

13 >> MR. FITZPATRICK: Since certification.

14 >> JUDGE MOORE: Since certification?

15 >> MR. FITZPATRICK: Yes, sir. An example of the
16 inconsistencies, there's a very important report called a Conceptual
17 Design Report.

18 >> MR. SHEBELSKIE: Your Honor.

19 >> JUDGE MOORE: Yes, Mr. Shebelskie.

20 >> MR. SHEBELSKIE: On behalf of the Department of
21 Energy, I object to this type of argument. The rules of NRC require
22 that the grounds for a motion be stated with particularity in the
23 motion. The motion filed by Nevada to strike did not challenge the
24 sufficiency or substantiality of our production of existing
25 documentary material. It didn't challenge anything about our

1 headers. It didn't challenge anything about consistent treatment,
2 et cetera, et cetera. It all went to the sole issue --

3 >> JUDGE MOORE: I believe, Mr. Shebelskie, that
4 his preface was that the State of Nevada could have challenged and
5 he was giving the laundry list of the things he could have
6 challenged and that they are not challenged. I believe with that
7 understanding, which is how he prefaced his remarks, if you will let
8 him get to the meat of his argument, I'm sure he'll get there.

9 >> MR. FITZPATRICK: And I will clarify that the
10 issue of this particular document, the CDRs, will be, along with a
11 myriad other issues if this LSN certification stands, the subject of
12 subsequent motions. It is not the subject of this motion.

13 But to finish the example, there are five
14 identical CDs for different areas of the repository: surface,
15 subsurface, preclosure, post closure, programmatic. Two of them are
16 on the LSN. Two of them are not on the LSN. One of them was on the
17 LSN, but it's been removed. These are supposedly all under the same
18 criteria for inclusion of documents. And incidentally, the two that
19 are on, probably if DOE could find them, they wouldn't be on one of
20 the two. The only way to find it is to search under the word, not
21 "CDR", not "surface", but "Gonzales". And then you'd find the
22 document and probably it would be deleted.

23 >> JUDGE ROSENTHAL: Mr. Fitzpatrick, I'm somewhat
24 confused. I thought that the issue that you were presenting to us
25 was whether or not, as a matter of regulatory requirement, all of

1 the documents that would be used in support of the licensing
2 application had to be on the LSN before certification. I thought
3 that was the issue that we had before us.

4 Now, do I understand that you're claiming that
5 there are documents that are in existence, complete, that have not
6 been placed on the LSN, and for that reason the certification is
7 invalid? I would like to get precisely what it is that we're being
8 called upon to consider and decide.

9 >> MR. FITZPATRICK: That example was for future
10 reference and a general comment. You are correct that the essence
11 of the motion and the focus of the motion is the legal standard for
12 what documents must be on at the time of certification.

13 >> JUDGE ROSENTHAL: Speaking for myself at least,
14 I'm hopeful that you'll get to that question rather quickly because
15 it seems to me that that's the focus of what's before us today.

16 And in that connection, I am personally going to
17 be very interested in what you have to say in support of your
18 position that -- apparent position that under Section 2.1003, the
19 DOE was required to have on the LSN prior to certification all of
20 the licensing support documents, not just the documents that are in
21 existence at the time of certification.

22 >> MR. FITZPATRICK: Yes, Your Honor, that's the
23 focus of the motion, and I'm getting right to it.

24 A different way to say it was they simply should
25 have waited until they had those documents in hand before they

1 certified them.

2 >> JUDGE ROSENTHAL: DOE's argument is that there's
3 nothing in Section 2.003 that imposes that requirement. And I would
4 be interested in your response to that.

5 >> MR. FITZPATRICK: Do you want me to do that now
6 rather than continue?

7 >> JUDGE ROSENTHAL: Well, you can do at your
8 leisure, but from my standpoint -- and I don't -- I'm not speaking
9 for my brethren, but from my standpoint, that's the critical issue
10 here, is what does the regulation -- and in this instance it's
11 2.003A, I guess, and E. How do they support your insistence that all
12 licensing support documents have to be on the LSN before
13 certification?

14 >> MR. FITZPATRICK: Okay. And I will get to that
15 shortly, Your Honor. Those instances that I mentioned shrink in
16 importance to the fact which is more pertinent to this hearing, the
17 requirement that the core technical documents that DOE knows and
18 expects it will rely on for licensing must be on the LSN at the time
19 of certification.

20 The Board has asked DOE to respond to the question
21 of how many documents meeting that description - incomplete, known
22 and expected to be relied upon, licensing proceeding - remain
23 incomplete. And the answer was 79.

24 And I guess, you know, hindsight is great, but
25 different people, reasonable people can count documents in different

1 ways. And I guess the more important question was, what are they
2 and what's the content of them.

3 >> JUDGE KARLIN: May I ask, Mr. Fitzpatrick, if
4 you would look at page 18 of your brief, your motion, is it my
5 understanding that you concede that DOE has made all existing
6 documentary material available on the LSN?

7 >> MR. FITZPATRICK: That's not correct, Your
8 Honor.

9 >> JUDGE KARLIN: In Footnote 14, I guess you say,
10 "We concede for the sake of argument" and I guess this is an oral
11 argument, "that they have made all their material available as of a
12 reasonable cutoff date."

13 >> MR. FITZPATRICK: Two points. One, the focus
14 of the motion was documents that they had not completed and they had
15 certified incomplete --

16 >> JUDGE KARLIN: I understand.

17 >> MR. FITZPATRICK: The point --

18 >> JUDGE KARLIN: Wait a second. Let me ask, is
19 that in -- if the document is incomplete, as I understand it under
20 the regulations, draft documents except for circulated drafts do not
21 need to be made available.

22 >> MR. FITZPATRICK: Correct.

23 >> JUDGE KARLIN: So if it's incomplete or, i.e., a
24 draft, then it is not documentary material.

25 >> MR. FITZPATRICK: Correct.

1 >> JUDGE KARLIN: Therefore, its failure to make
2 it available is not a regulatory defect.

3 >> MR. FITZPATRICK: Correct.

4 >> JUDGE KARLIN: And so you have conceded in that
5 footnote, have you not, that they have made all documents that are
6 in existence available? You're just arguing about documents that
7 aren't in existence yet.

8 >> MR. FITZPATRICK: Your Honor, we had 10 days
9 from the time they certified to file a motion and to try to look at
10 a large number of documents. The focus of the motion is the
11 documents that are not complete yet need to be complete, need to be
12 on the LSN.

13 For the sake of argument, we didn't go into the
14 issue, the separate issue at that time of documents that have been
15 completed, the CDRs. There are documents. Sure, there are
16 documents. That's not the focus of the brief.

17 >> JUDGE KARLIN: Well, as I understand it on page
18 17, you indicate the crux of Nevada's complaint is that DOE's
19 certification on the LSN is incomplete because key documents are in
20 development or not yet prepared. That's where you're saying, right?

21 >> MR. FITZPATRICK: That's the key focus, Your
22 Honor, yes.

23 >> JUDGE KARLIN: And by definition, those
24 documents are not documentary material? Is that correct? Because
25 the definition of "documentary material" does not include documents

1 that are in draft.

2 >> MR. FITZPATRICK: Right. We're not complaining
3 that they need to put the drafts on, Your Honor. We're complaining
4 that they need to finish the documents --

5 >> JUDGE KARLIN: Are you suggesting --

6 >> MR. FITZPATRICK: -- and put the completed
7 documents on the LSN.

8 >> JUDGE KARLIN: So you're saying they need to
9 postpone their certification until they complete these documents?

10 >> MR. FITZPATRICK: Yes, you could say it that
11 way. But it's not a matter postponing; it's a matter of not
12 undertaking until they're ready to undertake.

13 >> JUDGE KARLIN: And where is it written in the
14 regulations or the law that they have to postpone in order to deal
15 with these documents?

16 >> MR. FITZPATRICK: The law doesn't deal with the
17 postponement. The law specifies what needs to be done at the time
18 that they certify it.

19 >> JUDGE KARLIN: Right. They need to make all
20 documentary material available, and this not documentary material.
21 So haven't they complied?

22 >> MR. FITZPATRICK: No, because the law requires
23 that they populate the LSN with all documentary material which they
24 know and expect to rely upon at the time of certification.

25 >> JUDGE ROSENTHAL: Where is that written? Where

1 in 2.03 --

2 >> MR. FITZPATRICK: 2.1003 requires that all
3 documentary material be made publicly available at least six months
4 before the license application is filed.

5 Section 2.1001 defines documentary material and it
6 defines the first type of documentary material, in the case of DOE,
7 as that which DOE knows and expects it will rely on in support of
8 its position in the licensing.

9 So it isn't a matter of postponing an LSN
10 certification; it's a matter of undertaking an LSN certification
11 when compliance with 2.1003 is possible.

12 >> JUDGE ROSENTHAL: What you do with .21003E
13 (sic), which allows supplementation? Now, I understand that you
14 suggested in your motion that that only implies to nonsupporting
15 material. But I don't see anything in my reading of it that draws
16 that distinction.

17 >> MR. FITZPATRICK: We didn't suggest that it only
18 applies to nonsupporting material. That was an example of
19 additional material, documentary material that may crop up. There
20 can be other types of documentary material that crop up after the
21 time of initial certification.

22 As a matter of fact, may I give an illustration?
23 Go to 223. Can you blow it up some?

24 Okay. Mr. John Arthur, who at the time was an
25 official of DOE --

1 >> JUDGE KARLIN: Could you tell us what this
2 document is we're looking at?

3 >> MR. FITZPATRICK: I'm sorry. This document is a
4 page from a summary of a Nuclear Regulatory Commission/Department of
5 Energy Technical Exchange Meeting which took place on November 22,
6 2004. And NRC puts out a summary of those meetings, and this is an
7 excerpt from the summary mentioning what Mr. Arthur said about this
8 gap or this period of time.

9 >> JUDGE KARLIN: And it is exhibit number?

10 >> MR. FITZPATRICK: It's Exhibit 54.

11 >> JUDGE KARLIN: Thank you.

12 >> MR. FITZPATRICK: What Mr. Arthur said -- and
13 this -- this answers Judge Rosenthal's question, I believe, about
14 the type of information that would become useful for supplementation
15 of one's LSN after initial certification.

16 He's talking about -- Mr. Arthur's talking about
17 what would DOE do after initial certification. He says, "DOE needs
18 to refine the presentation of this technical work for the licensing.
19 DOE needs to assure the transparency, traceability and self-
20 sufficiency of the LA." And I've just -- parenthetically. During
21 the six-month period between LSN certification and LA, a good part
22 of DOE's effort would be in reviewing the draft chapters of the
23 license application and packaging them for final delivery to the
24 NRC.

25 He goes on, "If necessary, clarify the

1 presentation of technical, analytical and compliance information;
2 improve the readability of the document to provide more details,
3 particularly in distinguishing structures, systems and components
4 important to safety or important to waste isolation; verify
5 document-to-document consistency between the LA and underlying
6 technical documents that were in revision during the development of
7 the draft LA."

8 So in other words, that and there's a performance
9 confirmation program that began in the past and will continue
10 uninterrupted in the future.

11 >> JUDGE KARLIN: If I may ask a question on this.
12 This is Mr. Arthur speaking?

13 >> MR. FITZPATRICK: Yes, sir.

14 >> JUDGE KARLIN: Is that the best legal citation
15 you have for your proposition? I mean, Mr. Arthur, I mean, may be
16 an important gentleman, but we're trying to interpret the law.

17 What is the legal status of Mr. Arthur's statement
18 in terms of the regulations?

19 >> MR. FITZPATRICK: Well, the regulation --

20 >> JUDGE KARLIN: An estoppel against the
21 government or is this -- is he the legal authority on this?

22 >> MR. FITZPATRICK: The regulation doesn't
23 specify what documents may be the component parts of the
24 supplementation. It permits -- the regulation permits
25 supplementation. I guess this is DOE's view, to which we agree, as

1 to what a typical supplementation would take place.

2 What the regulation specifies is that after the
3 initial certification, documents or information meeting the
4 definition of documentary material may be developed, may come into
5 the possession of a party, because you don't have to develop it
6 yourself, and if that's the case, then that party would have the
7 duty -- and we know the PAPO Board has provided for a monthly
8 supplementation.

9 But in any event, that is the type of information
10 that DOE believes, and we believe, would crop up and become the
11 fodder for supplementation.

12 Now, where we disagree with DOE, apparently, is
13 that -- hypothetically, let's just pick a number that we can use
14 here. If there's 100 critical documents, documents that are either
15 called out by 10CFR63 as being requirements by the NRC or by NUREG
16 1804 as things that the staff of NRC will look for when they check
17 the license, AMRs, the TSPA, a variety of documents that DOE has,
18 for a decade, placed on its critical path calendars to complete
19 prior to license application and which it coined the phrase
20 technical -- "core technical basis documents."

21 Now, if there's 100, I think to crystallize the
22 difference in our positions, DOE suggests that if it has 80 of the
23 100 done by the time it gets initial certification or, frankly, if
24 it has one done at the time of its initial certification, since it
25 says there's no specific limit or definition of what must be on it,

1 that it's perfectly okay to certify the LSN and that then the
2 supplementation provisions allow DOE to complete the other 20 of
3 these core technical documents and put them on the LSN when it's
4 ready, as long as it's done in time for the license application.

5 We disagree. This might be called an absolutist
6 position by some, but we believe out of the 100 documents that meet
7 that description, 100 need to be on the LSN at the time of its
8 certification.

9 >> JUDGE KARLIN: My problem is what regulation
10 supports that? If you can give me some law that says that, that
11 they must complete all core technical documentation before they can
12 certify, then we can get somewhere.

13 >> MR. FITZPATRICK: Okay.

14 >> JUDGE KARLIN: But I don't see -- if I may, is
15 there anything -- these regs have been in development since 1989 or
16 before. There was a negotiated rule making, REGNEG, I would call
17 it, that developed these rules. Is there anyplace you can cite in
18 all those 20 years, almost, where the State of Nevada articulated
19 this position and said they have to have all core technical
20 documents done before they can certify? Anyplace you can cite me
21 for that?

22 >> MR. FITZPATRICK: 10CFR2.1003 and CFR2.1001.

23 >> JUDGE KARLIN: They don't say that. We just
24 discussed that they say you make documentary material available, and
25 this is not documentary material, by definition.

1 >> MR. FITZPATRICK: I didn't understand you to
2 mean literally.

3 >> JUDGE KARLIN: No, I mean literally.

4 >> MR. FITZPATRICK: Okay. No, I don't know of
5 anywhere that that phrase core document -- "core technical
6 documentation" appears.

7 >> JUDGE KARLIN: Anywhere where you articulated
8 the position that it has to be frozen in the six months, that it has
9 to be complete? Just whatever word you want to say. If you can
10 give me a cite that Nevada said this in a comment in the regulatory
11 development. I guess you would have had it in your brief if you had
12 such one. So there isn't any.

13 >> MR. FITZPATRICK: I mean, frankly -- and when
14 the 2001 regulations were adopted, the updated rulemaking by NRC,
15 all of the commentators who commented made the same comment that the
16 -- in the past, the requirement to certify an LSN had been tied to
17 the site recommendation so much after that, and all the commenters
18 in 2001 agreed, and then NRC agreed and adopted the regulation that
19 the certification of the LSN should be changed radically.

20 It should become more predictable and it should
21 adopt a method that would probably eliminate millions of obsolete
22 documents by instead -- the NRC did a balancing test and they said
23 we want to pick a date -- and this was ratified by all of the
24 commenters including NEI, NRC, Nevada and DOE.

25 The NRC did a balancing test and they said we have

1 to select a date sometime before the LSN certification by which --
2 started with DOE. DOE will be required to have all its documentary
3 material on the LSN. Documentary material meaning what it intends
4 to cite and rely on. That's DM 1.

5 And so, the balancing test went like this. They
6 said after weighing it, the conclusion was we've picked six months.
7 The reason we've picked six months is because to have all of DOE's
8 documentation available to the other parties for a full six months
9 is deemed by us to be a sufficient amount of time for them to
10 analyze the information, assimilate it, make contentions if there
11 are parties who are making contentions. If it's the NRC, prepare
12 for their program of licensing.

13 The other half of the balancing test is before
14 that, to make the requirement that DOE have all its documents on a
15 year or two years, that would be both burdensome for DOE, but it
16 would also probably call into play obsolete, irrelevant documents
17 being put on that aren't going to have anything to do with it.

18 So in balancing those two interests, we come out
19 with a period of six months before LA for all documentary material.

20 >> JUDGE KARLIN: This is not documentary material.

21 >> MR. FITZPATRICK: But you can't certify until
22 all documented material is --

23 >> JUDGE KARLIN: And where is that written?

24 >> MR. FITZPATRICK: 2.1003.

25 >> JUDGE KARLIN: It doesn't say "until." In fact,

1 our ruling in 2004 required DOE to make available all extant
2 documentary material; that is, documentary material that existed at
3 that time.

4 If you can see that DOE has made all extant
5 documentary material available as of 2007, isn't that a problem for
6 you?

7 >> MR. FITZPATRICK: I disagree with your
8 statement of the 2004 rule. The 2004 rule doesn't say that. It
9 says "the Commission still expects all participants to make a good-
10 faith effort to have made available all of the documentary material
11 that they may eventually designate as Class 1 or Class 2 documentary
12 material by the date specified for initial compliance in 2.1003",
13 which means --

14 >> JUDGE KARLIN: Well, in our ruling on page 232 -
15 - 325 and 326, we use the word "extant" three times. In our initial
16 questions on July 14th, 2004, when we asked DOE what documents they
17 had made available, we repeatedly said to them, what extant
18 documents have you made available. And our decision did focus on
19 that. And that word was used many times. And I just don't see why
20 you didn't cite that when you were citing that ruling that we issued
21 in '04.

22 >> MR. FITZPATRICK: The issue in the 2004 hearing
23 was all about existing documentation; millions of emails that we
24 knew were in existence that had not even been looked at by DOE. So
25 that was the focus of that hearing. We also -- for us to take issue

1 --

2 >> JUDGE KARLIN: But we also focused on the gap
3 documents and the after-created documents and the after-discovered
4 documents, and you were complaining about that two-and-a-half-month
5 gap. So we did deal with the issue of whether they were in
6 existence or not.

7 >> MR. FITZPATRICK: What we didn't deal with was
8 key technical documents such as AMRs and TSPA that must be on the
9 LSN because they're going to be relied upon by --

10 >> JUDGE KARLIN: Is there any requirement to
11 generate a key technical document? Is there a Reg that says you
12 must issue a KTI or whatever?

13 >> MR. FITZPATRICK: You misunderstood. I wasn't
14 saying it in the formal sense of KTI.

15 >> JUDGE KARLIN: Oh, okay.

16 >> MR. FITZPATRICK: Critical technical documents.

17 >> JUDGE KARLIN: And if they don't have those
18 documents, doesn't it go to the merits and their application will
19 fail because they failed to have the right documents in the
20 application?

21 >> MR. FITZPATRICK: By DOE's theory, they could
22 have all of the critical technical documents delivered to the NRC,
23 to the LSN, to the other parties the day before they filed a license
24 application.

25 >> JUDGE KARLIN: All right. Let's look at the

1 facts here. As I understand it, DOE has in their brief, it says
2 there's 150 things called AMRs, which you said are critical
3 documents; 150, and you're complaining about three?

4 >> MR. FITZPATRICK: No, Your Honor.

5 >> JUDGE KARLIN: Well, that's what they have
6 posited. Are there more than three that are in nonexistence?

7 >> MR. FITZPATRICK: We can't -- Your Honor, we
8 sent Mr. Shebelskie a list of nine and he responded on some of them
9 and admitted some of them weren't done yet.

10 >> JUDGE KARLIN: Okay.

11 >> MR. FITZPATRICK: We had exchanged -- they sent
12 us a list of 58, many, many, many times. And we tried and tried to
13 find all of them. We couldn't find nine, and we asked Mr.
14 Shebelskie about the nine. He's made an exhibit out of his
15 response. And, incidentally, it admits that the critical ones
16 aren't going to be done until 2008 in that response.

17 But the point is that there were 58 documents on
18 each of these lists of AMRs that they sent us. There were 58.
19 Their brief is the first we've ever heard of 150. No, we can't find
20 150 or anything close to it. And I've requested in multiple emails
21 since the brief came out to give us a road map to these 150, because
22 we don't think there are 150. So --

23 >> JUDGE ROSENTHAL: Mr. Fitzpatrick, if the
24 Commission had intended that every licensing support document be on
25 the LSN before certification, isn't it likely that it would have so

1 stated that in clear and precise terms? Because I don't find that.
2 I mean, you can interpret that section 2.1003A as having that
3 impact, but it certainly doesn't state it explicitly. And I would
4 have thought that that would have been such a fundamental
5 requirement, if intended, that it would have been so stated
6 specifically.

7 >> MR. FITZPATRICK: Well, we believe what the
8 regulation states, all documentary material on which a party intends
9 to rely should be on the LSN, that that assumed that the party would
10 realize that it would have to prepare those documents and put them
11 on the LSN before it certified, because to certify the LSN as
12 containing all documentary material that you intend to rely on when
13 you sit there and you know and intend there's a lengthy laundry list
14 of documents that you are working on right now that are going to
15 take hundreds of people thousands of hours and millions of dollars
16 to complete, then in good faith, you cannot state that you have
17 certified an LSN database that's complete.

18 A learned authority on this stated, "On the date
19 it chose to certify its document production, DOE must have made in
20 good faith every reasonable effort to make all of its documentary
21 material available." The whole system of LSN --

22 >> JUDGE KARLIN: That's us. That was our 2004
23 decision I think you're citing.

24 Let me ask this as sort of a common sense
25 question. Let's say you were preparing a very large and complicated

1 submission to a regulatory entity or a body, and it had many
2 documents and it was very complicated and it was very important.
3 Wouldn't you work until the very end to make sure all of those
4 documents were just right, and maybe the most important ones you
5 would continue to work on right up until the date you submitted that
6 application? Isn't that logical and reasonable? Most people do it
7 that way.

8 >> MR. FITZPATRICK: I submit that Mr. Arthur was
9 talking about that type of packaging and fine-tuning.

10 >> JUDGE KARLIN: So, they didn't have to complete
11 their documents until they submit their license application. That's
12 the normal approach. Now, if there's something that mandates
13 otherwise, we need to find a reg that says that.

14 >> MR. FITZPATRICK: The whole system created by
15 the LSS in 1989 and continued through the LSN subsequently to the
16 present day contemplated a wholly different procedure for discovery
17 than that which has been used in every single other NRC licensing
18 proceeding.

19 And the NRC, in its discussion of its backup of
20 what it meant by 2.1003 and why it was adopting it explained that
21 under the traditional discovery of an applicant for a license to the
22 NRC, the applicant continues to work on their documents until just
23 before they file the LA. Because why? Because discovery commences
24 right after they file that LA and not before.

25 And so it's perfectly okay and anticipated, as you

1 said, that with such an important document that the parties would
2 work on it until the last minute just before they file their license
3 application.

4 But the NRC made a stark red line between the
5 traditional discovery in NRC licensing proceedings and the discovery
6 in this proceeding, which is even more unique and special than that
7 of a nuclear reactor. And they said that the purpose of the LSN is
8 to supplant the normal, the traditional discovery mode which is to
9 have your documents ready at the time of the license application and
10 commence discovery.

11 Instead, we are substituting what they called pre-
12 license application discovery, and so that meant in the time before
13 pre-license application and the time before the license application,
14 there would be this discovery.

15 Discovery of what? Well, that's what 2.1003 goes
16 into, and that's what is meant by pre-license application discovery.
17 The parties will have -- should have access to the documentary
18 material known and expected by DOE to be relied upon in its license
19 application six months prior to that time so that -- for the many
20 reasons that the NRC says, so they can do better contentions, so
21 that the NRC itself is better able to accomplish its licensing
22 proceeding in the three-year period. I mean, those were the reasons
23 given.

24 But the point was, this is a whole different ball
25 game from the traditional discovery. This is going to take place in

1 the pre-LA time. And if -- I mean --

2 >> JUDGE KARLIN: Let me address that. I mean,
3 first, I don't think this is a supplanting. This is a supplementing
4 of the discovery because there will be 608 days by the schedule, at
5 least, during which discovery will occur after the Federal Register
6 notice comes out. So there's going to be regular discovery as well,
7 is there not?

8 >> MR. FITZPATRICK: There will be, but --

9 >> JUDGE KARLIN: Even with regular discovery,
10 isn't it true that a normal applicant often modifies its documents
11 after the initial docketing and requests for additional information
12 occur and documents are changed and then added and amended even
13 after that supplementation occurs?

14 >> MR. FITZPATRICK: Changes in calculations,
15 responses to NRC requests for additional information, all those are
16 examples of occurrences that could require supplementation of
17 someone's LSN.

18 >> JUDGE KARLIN: And as those supplementation or
19 changes occur, 2.309F2 allows the intervener, the State for example,
20 to file new contentions within their -- if they're timely after that
21 new information becomes available.

22 So let me just ask. Let's posit. I think it is
23 posited here that some critical documents are still in the works,
24 not complete yet. Let us posit also that they are not documentary
25 material until they are complete. They've not been made available.

1 Let's posit that it's made available on the day
2 the license application is submitted. Doesn't 2.309F give the state
3 additional time within which to file new contentions if it's needed
4 based on that new information?

5 >> MR. FITZPATRICK: The State has -- well, those
6 rights have always existed where after-acquired information may lead
7 to new contentions. That's a totally separate issue from what is
8 the requirement and what are the requirements for someone to certify
9 their LSN as complete six months before they filed their license
10 application. I mean, it's like -- it's just like the suggestion
11 that's been made, I think, in NEI's brief that, well, you're going
12 to have a 90-day acceptance review by DOE -- I'm sorry, by the
13 Nuclear Regulatory Commission after the LA is filed. And so there's
14 90 more days that you can work on contentions. And so you don't
15 really need six months.

16 The fallacy there is that everybody knew. The
17 framers of 2.1003 well knew that there was going to be acceptance
18 review and that if it was 90 more days, so be it. Then you get six
19 months and 90 more days.

20 In fact, in our brief, an attached exhibit is an
21 excerpt from a public presentation by NRC, I think in New Mexico or
22 Nevada, to an audience explaining these rules. And a person in the
23 audience said, "Well, this looks like a very short time period
24 because after you give this notice, I'll only have like 30 days to
25 act or something." And the speaker said, "No, no, no" -- oh, only

1 30 days to review the documents that have been put up. And he said,
2 "No, no, you will have, at that point when NRC gives notice of a
3 hearing upcoming, you'll have had six months from the time of LSN
4 certification to the time of the LA filing where you can see all of
5 DOE's relevant documents, and you'll have 90 more days during the
6 time that acceptance review is being conducted by the NRC, and then
7 you may have 30 more days to do a contention. So, no, you have like
8 nine or 10 months. You don't have just a little time."

9 So the point is that those things were taken into
10 account and understood by the framers of this rule that those times
11 were in place. So you can't say, well, this rule should be modified
12 because you have those times.

13 >> JUDGE ROSENTHAL: I don't see it as a
14 modification. As I read this rule, it says in effect that at the
15 time of certification, you have to have on the LSN all documentary
16 material in existence.

17 >> MR. FITZPATRICK: It doesn't say that, Your
18 Honor.

19 >> JUDGE ROSENTHAL: Well, it certainly doesn't say
20 that all documentary material must be in existence before
21 certification. Because you have, again, a supplement. You have
22 Subsection E, which certainly talks in terms of supplementing
23 documentary material following certification.

24 It seems to me offhand that that contemplates that
25 post certification, there will be additional documentary material

1 coming into existence which then must be put in the LSN, and there
2 must be then the compliance with the provisions of Subsection E.

3 I still get back to the point that if there had
4 been the intention to require all documentary material that might
5 support a license amendment application be on the LSN at the time of
6 the certification, that would have been specifically provided and
7 that would have been a very, very significant requirement. And I'm
8 frank to state I don't see -- yes, documentary material, but I don't
9 see the word that would indicate or phrase that would indicate that
10 all documentary material must be in existence prior to
11 certification.

12 >> MR. FITZPATRICK: May I respond specifically to
13 that? All documentary material, as defined in the definitions of
14 documentary material, the definition of documentary material type
15 one is documents DOE intends to cite and rely on in its license
16 application.

17 So, going back to 2.1003, yes, the requirement is
18 an absolute one that all documentary material has to be on the LSN
19 at the time of certification with the understanding that documentary
20 material number one has this qualification that it has to be
21 something that DOE at that time knows and intends it's going to rely
22 on.

23 Now, that's where the distinction comes in, Your
24 Honor, that troubles you with the supplementation. Mr. Arthur
25 talked about what he would do in that interim. Other discussions

1 have been had about performance confirmation and other things.

2 We can just state as a fact that additional
3 documents that are relevant to the licensing will come up, will come
4 into existence, or will be discovered.

5 And here's the critical point. They were not
6 documents that at the time of the certification were known to DOE as
7 documents that they intended to rely upon in the licensing
8 proceeding. They are documents that cropped up subsequently.

9 And when they learned that, oh, here's something
10 new or we've corrected a calculation, we've added corrected
11 references, whatever the change has been, or created a new document,
12 whatever it is, it is a document that now may be documentary
13 material because it's going to be cited and relied upon by DOE.
14 They know they are. And so it can be used as a supplement.

15 The critical part is those documents were not
16 known at the time of the initial certification to be intended to be
17 cited and relied upon in the LA by DOE. They cropped up later.

18 >> JUDGE MOORE: So as I understand your argument,
19 the word in the definition of documentary material in 10CFR2.1001 --
20 the key word is "intends," and that distinguishes the other
21 categories of documentary material that are defined in 2.1001?

22 >> MR. FITZPATRICK: That's correct, Your Honor,
23 because a party must certify its LSN with the documents it intends -
24 - it knows and intends at the time it certifies. Those must be on.
25 There may be myriad other documents which it learns of later or

1 creates later or makes calculational changes or adjustments to
2 later.

3 >> JUDGE MOORE: Now, turn to the language of the
4 second category of documentary material in 2.1001.

5 >> MR. FITZPATRICK: Documentary material that
6 does not support a party's position --

7 >> JUDGE MOORE: "Any information that is known to
8 and in possession of or developed by the party that is relevant to,
9 but does not support that information or that party's position."
10 You have not mentioned that section in your brief. Why is that not
11 a category of information that must also be included at the time of
12 certification?

13 >> MR. FITZPATRICK: Two-part answer. It is a
14 category of information which must be included, assuming that you
15 know of its existence. In other words, if you know of a document
16 that contradicted your position and it's in your files at the time
17 of initial certification, you should be putting it in your initial
18 certification. If you discover it later or it's created later and
19 you come to know of it later, then you can supplement later.

20 Why didn't we put it in our brief? Because our
21 brief is mainly focused on the most important thing to the State of
22 Nevada, which is to try to equip itself in some way to prepare for
23 this licensing proceeding and to deal with the issues that will be
24 on the table in that proceeding.

25 Now, a documentary material two, that you know,

1 that is some snotty remark counter to DOE by some person and some
2 document, may or may not be critically important for that pursuit,
3 but the documents that we know are critically important for that
4 pursuit are the documents that are called out by 10CFR63, by the
5 license application review plan, by myriad critical path calendars
6 of DOE as the documents that -- the technical documents that are
7 going to be relied upon in the licensing proceeding. Because it is
8 mostly those that we need that six-month full and fair access in
9 order for our expert team to have an opportunity to review those
10 documents.

11 >> JUDGE MOORE: Mr. Fitzpatrick, then go to the
12 third category of all reports and studies of the definition of
13 documentary material in Section 2.1001. "Reports and studies
14 prepared by or on behalf of a potential party," etc.

15 Now, you've conceded, I believe, earlier that
16 we're talking about finished documents.

17 Is, in your view under your interpretation of the
18 regulations as you're arguing today, Category 1 reliance documents
19 or in those that are intended to be relied upon, override the third
20 category of documents of reports and the studies that aren't yet
21 completed?

22 >> MR. FITZPATRICK: Well, I don't think your
23 definition of the third category -- I don't understand. It's
24 reports or studies. It isn't that are not completed. It's reports
25 or studies that one has in its files, whether they do or not support

1 its position or not, whether they intend to use them or not. I
2 think it assumes completed documents, but it has the caveat there, I
3 believe, in subsection three that circulated drafts may also --

4 >> JUDGE MOORE: If they're uncomplete -- or
5 incomplete documents, reports and studies, the third category, if
6 you're intending to rely upon them even though they're incomplete,
7 you can't certify until they're complete? Is that your point?

8 >> MR. FITZPATRICK: Well, our point -- we don't
9 address section -- category two or three in our motion, our brief,
10 but if you're asking, I think that --

11 >> JUDGE MOORE: Isn't that it fatal flaw for not
12 addressing categories two and three?

13 >> MR. FITZPATRICK: Your Honor, the focus of our
14 motion is aimed at, and the examples given and so on, relate to
15 category number one.

16 Category 2, as I've said, it's required that if
17 you know of the documents -- if you know of documents meeting that
18 description, you know, not supportive of your position, you must put
19 them on at certification. If you learn of them later, you can
20 supplement.

21 Category 3 are reports and studies that may or may
22 not support your position and you may or may not want to use them,
23 but you are required, if they're in your possession, to put them on
24 the LSN. If you --

25 >> JUDGE MOORE: What if they are incomplete?

1 >> MR. FITZPATRICK: I mean, I -- I don't
2 understand -- from the description, I always envisioned something
3 you've picked up out of a law -- a journal somewhere or something
4 like that.

5 >> JUDGE MOORE: I would be the last one to claim I
6 know what's going to be in the Total System Performance Assessment -
7 LA.

8 >> MR. FITZPATRICK: To directly answer the
9 question --

10 >> JUDGE MOORE: Is that not technically going to
11 be a report and study?

12 >> MR. FITZPATRICK: To answer your -- is a partial
13 report or study a report or study nonetheless? I think the answer
14 to whether it need to be on the LSN is addressed later on in the
15 things, past all this 103 -- in 2.1018 or 19, there's a specific
16 provision that says draft documents need not be placed on the LSN.

17 And so I think if a document was in your
18 possession and it was a draft report that someone had done, then it
19 would not need to be included because it wouldn't meet the
20 definition of any of one, two or three.

21 >> JUDGE MOORE: Well, it would be if its something
22 you intend to rely on.

23 >> MR. FITZPATRICK: Well --

24 >> JUDGE MOORE: You meet the definition of
25 category one.

1 >> MR. FITZPATRICK: If you intend to rely on it,
2 Your Honor, then it's not category three we're talking about placing
3 in the LSN at that point. If you intend to rely on it, then it is -
4 - not a document, we talk in terms of information -- it is
5 information a party intends to rely on and that's documentary
6 material one and it would be required to be on there.

7 >> JUDGE MOORE: One final question. In light of
8 the 2001 and the 2003 proposed rule and then adopted as final in
9 2004 dealing with supplementation, I find that in light of your
10 argument today passing strange that the State of Nevada would have
11 sat silent in commenting on the rules so that your position was made
12 very, very clear and yet, there's not a hint of the position that
13 you're advocating today in any of your comments on amendments to the
14 Subpart J rules.

15 >> MR. FITZPATRICK: I think we're satisfied with
16 both the rules on what must be in the LSN and we're satisfied with
17 the rules on supplementation because they make a dichotomy between
18 documents that a party knows and intends to rely on at the time of
19 certification, which must be in its LSN, and then the other half is
20 documents created later on which must be added and supplemented
21 later if they meet that description.

22 >> JUDGE MOORE: You're way past your time, but it
23 was our questions that put us there. Would you just take a minute
24 to wrap up, and then we'll move on.

25 >> MR. FITZPATRICK: Well, I'll go to just one

1 example. I mean, I would have talked about -- I think in my
2 outline, I got to the bottom of page one of 75 pages or so, but what
3 I was getting to was going to be some examples of -- I think the
4 point was DOE answered your question, there's 79 documents that need
5 to be completed, and I think I commented that, well, reasonable
6 people can count numbers different ways. And so what's important is
7 what's the content.

8 Just one example. The Preclosure Safety Analysis,
9 it's required by 10CFR63, 10CFR63.21 -- 10CFR63.112 sets out the
10 specifics of what must be contained in the Preclosure Safety
11 Analysis. DOE procedures and technical work plans set out further
12 detail of what must be in it.

13 I think the scope of it, the gigantic scope of the
14 Preclosure Safety Analysis -- and parenthetically, what that is,
15 preclosure; this means in a period of from 100 to 300 years, if a
16 repository were built before it's sealed up, where it's most
17 dangerous, where the population of Nevada is most exposed, where our
18 children are most exposed because it's the people living in the next
19 100 years as opposed to some million-year thing, so it's very
20 important. And these are the analyses that are supposed to be made
21 to determine if it will be safe in the preclosure.

22 Mr. -- Dr. Michael Frank made a presentation to
23 the TRB in September where he explained all these things and how
24 there would be something like 200 event sequences analyzed, all the
25 different things that could -- a tornado, a plane crashing into the

1 facilities, all the different things that could happen, and he went
2 through the process of what an event sequence -- the triggering
3 event right down to the potential release of radionuclides. Each
4 one of those analyses is a major document.

5 There are 200 event sequence analyses that Mr.
6 Frank said would be done between then and the end of February '08
7 and then they'll go into the DOE pipeline for approval, and then six
8 weeks later, around tax time, then that would be ready, provided
9 everyone stays on calendar.

10 But the impressive thing was as far as the scope
11 and trying to think about dealing with it and assimilating the
12 information and responding to it or analyzing it, he said he had a
13 team of 75 people working full time. I did the arithmetic from
14 September 19th to February 29th. It's over 70,000 man-hours.

15 >> JUDGE MOORE: Thank you, Mr. Fitzpatrick.

16 >> MR. FITZPATRICK: Thank you, Your Honor.

17 >> JUDGE MOORE: Ms. Treichel, you have five
18 minutes of time that's been allotted to you.

19 >> MS. TREICHEL: My name is Judy Treichel. I'm
20 the Executive Director of the Nevada Nuclear Waste Task Force. We
21 are the only non-governmental organization that's working full time
22 on Yucca Mountain issues. And for more than 20 years, we've been
23 providing a public voice in government and industry meetings, and we
24 are a source of information about Yucca Mountain for other
25 organizations and individuals. We're supported by grants and

1 contributions.

2 I began to become familiar with the LSN in 2004
3 when the Department of Energy attempted its first certification, and
4 have realized from that time on that it's possible to find general
5 information in there. If you just want to throw something in and
6 see what pops up, you can sort of get a flavor for some of the
7 stuff, but if you're looking for a particular document in the LSN,
8 it's very, very difficult. And the Department's document
9 collection, as far as I'm concerned, does not meet searchability
10 standards that I remember we discussed for a very long time, because
11 I was part of the advisory committee to the LSN and LSS when it was
12 all being put together about how this could be used.

13 And this was sort of the public's library for this
14 sort of thing because it's really hard for people to even get
15 through on the phone to the people involved with Yucca Mountain on
16 the bureaucratic side. And we decided how this would work and what
17 would happen.

18 And much of what I've heard here is very true.
19 They didn't have to put in drafts. They were -- everybody was
20 discouraged from having duplicates because the thing would just get
21 bigger and bigger.

22 Well, of course, it has a lot of duplicates. And
23 in the LSN, you'll find all kinds of things that say preliminary,
24 pre-decisional, draft material, stuff with writing all over it,
25 partial things. So they are in there, but they just sort of muddy

1 it up.

2 It seems clear, certainly to me and maybe to
3 others, that DOE really never intended to use the LSN themselves
4 because it's so difficult to use with the way that they've done
5 these things. The listings and the titles in many cases bear
6 absolutely no relation to the material that's referenced. And it
7 appears to be a prevalent problem.

8 I have one of countless examples, and I was going
9 to just zip through it with pictures of what I did. I have eight
10 slides. And I don't know if you want to see those or if you would
11 like me to talk through what was going on.

12 >> JUDGE MOORE: You have filed and we all have
13 copies of them. If you wish to use them, you may, within your
14 allotted time.

15 >> MR. SHEBELSKIE: I'm sorry, Your Honor. DOE
16 would like to renew its objection that the task force did not file
17 any motion to strike on the basis of header coding. It's not part
18 of Nevada's motion either.

19 >> JUDGE MOORE: Mr. Shebelskie, you used the word
20 "renew" your motion.

21 >> MR. SHEBELSKIE: Objection, I'm sorry. I had
22 objected to Nevada going on grounds outside the motion.

23 >> JUDGE MOORE: Ms. Treichel, did you -- you did
24 not file your own motion to strike; is that correct?

25 >> MS. TREICHEL: I filed a support for the State

1 and specifically mentioned this problem.

2 >> JUDGE MOORE: Yes, you did. But should that not
3 have been in your own motion to strike?

4 >> MS. TREICHEL: I was supporting the State in
5 that they had stated that the LSN was very difficult and was
6 inscrutable and very hard to use. And I was supporting it from
7 personal experience with that.

8 >> JUDGE MOORE: Why don't you continue with your
9 time and then we will consider the matter.

10 >> MS. TREICHEL: All right. On October 12th, the
11 Department of Energy put out two draft supplemental EISs. And I was
12 in the process of going through the one for the repository on
13 October 19 when the LSN was certified. So, in my efforts to analyze
14 the SEISs, I came across references in there that I wanted to find
15 one to look at further, and one of them was an emergency management
16 plan. That's something that's very important to the counties here
17 in Nevada and to people who would have to deal with emergencies who
18 live here. And it's also a required part of the license application
19 in Part 63.21.

20 So, if you have that -- it just shows the
21 document, the SEIS. There it is.

22 >> JUDGE MOORE: Which document do you want
23 brought up? Continue, please.

24 >> MS. TREICHEL: So, in trying to find more about
25 this Emergency Management Plan, there's a reference at the end of

1 the -- Chapter 3 that shows everything that's -- well, I'll just go
2 ahead. And if they catch up, fine.

3 There was a reference to an emergency management
4 plan. So I put in to the LSN "Emergency Management Plan" and I
5 limited the dates from January of '03 to November '07, because it
6 was an '03 document. I didn't want anything that came up with that.
7 So, what I got back were 18 hits, 18 possible documents. And I went
8 through those. And none of them was the one that had been
9 referenced in the SEIS.

10 So, I went back and I put in the Emergency
11 Management Plan and I added a bunch of numbers and letters that were
12 all part of the title of that document, on its face. And I looked
13 again from '03 to '07. Here's the document I'm talking about right
14 here, the last one on the page. And -- I'm down to Number 6.

15 And what I got, when I got more specific in what I
16 was looking for was a message that said there are no documents
17 corresponding to the search criteria.

18 So, I then had seen, while I was going through
19 this, lots of documents that only had a title that was a number.
20 So, in the page where I was, I saw a number that was an internal
21 number to DOE, and I put that in and didn't get anything, but I put
22 it in as I had seen other numbers that said a six-digit number dot
23 PDF. And I had the thing search -- and I'm now on eight -- and it
24 came up with one hit. The title of the document is 167254.PDF, and
25 that's exactly what I was looking for. But in order to find that, I

1 really had to crack the code and do that to find it. And I can't
2 imagine that anyone who has not used this at all before would even
3 think to try and look that way.

4 So, in my opinion, it may be in there -- there's
5 3.7 -- 8 million documents -- and this thing and every other thing I
6 want to see might be in there, but if I can't find them with a
7 reasonable search, it's my contention or opinion that they really
8 just aren't there.

9 And I'd like to conclude --

10 >> JUDGE MOORE: Thank you. Please wrap up.
11 You're past your time.

12 >> MS. TREICHEL: Yes. With just an e-mail that
13 was sent that's on the LSN between two DOE people. And one says to
14 the other, "I went to the new LSN website and I couldn't locate
15 several BSC DOE documents that I would have thought would have been
16 present." And then they reference the numbers.

17 How can a person indicate that they believe the
18 LSN addresses an appropriate documentation if you cannot locate
19 documents in a random search?

20 >> JUDGE MOORE: Thank you, Ms. Treichel. I just
21 received a message that the technical support people need a recess
22 to fix a problem. We will take a 15-minute recess. And this is one
23 of the glitches that I thought might happen. We will stand in
24 recess until 10:21 a.m. Thank you.

25 >> NARRATOR: Call to order. The Pre-License

1 Application Presiding Officer Board is now ready to come back into
2 session.

3 >> JUDGE MOORE: Please come to order. Please be
4 seated. Mr. Shebelskie, the floor is yours.

5 >> MR. SHEBELSKIE: Thank you, Your Honor. And we
6 have allocated ten minutes of our argument time to the Nuclear
7 Energy Institute.

8 >> JUDGE MOORE: I'm sorry?

9 >> MR. SHEBELSKIE: Ten minutes of our time to NEI.

10 >> JUDGE MOORE: I understand. Please proceed.

11 >> MR. SHEBELSKIE: Thank you, Your Honors. If it
12 please the Court, Nevada's motion presents a focused question of a
13 regulatory interpretation. It is: what is the requirement for our
14 initial certification? And like any question of regulatory
15 interpretation, the plain language of the regulations govern the
16 question. The plain language is dispositive.

17 All these extraneous considerations that Nevada
18 throws in its brief, that they allude to in our oral argument here
19 today, such as a stray comment by Mr. John Arthur in 2004, does not
20 bear on what the claiming of the regulations are or what the
21 Commission's intent was because it obviously is the Commission's
22 intent that is dispositive here. Their intent is expressed in the
23 plain language of the regulations and, if appropriate, their
24 statements of consideration.

25 >> JUDGE MOORE: Seems to be a difference of

1 opinion between DOE and Nevada as to what the plain meaning of
2 2.1003 is.

3 >> MR. SHEBELSKIE: Well, we obviously have a
4 disagreement, but our view is the correct one, and here's why, Your
5 Honor.

6 >> JUDGE MOORE: Well, I'm not surprised that you
7 stated it that way.

8 >> MR. SHEBELSKIE: Well, the obligation for DOE
9 and any party to make a certification is grounded in Section 2.1009.
10 And in that regulation, the text provides that what a party must
11 certify to is that it has made available, according to the good
12 faith standards, the documentary material specified in Section
13 2.1003.

14 So we have to look then to 2.1003 to measure what
15 is the documentary material that we must have in order to make our
16 certification.

17 You go then to 2.1003, and this is in Subsection
18 A. And here's where the little trick of Nevada's is. They
19 emphasize the beginning language of 2.1003-A1. They emphasize here
20 that a party must make available electronic files for all
21 documentary material, and they stop.

22 But the regulation doesn't stop at that point. It
23 goes on and reads, "for all documentary material generated by or at
24 the direction of or acquired by."

25 In logic, in the plain text of the regulation

1 here, the certification, then, that you must make can only be and is
2 only required to be co-extensive with the documentary material --

3 >> JUDGE MOORE: Excuse me, Mr. Shebelskie, but all
4 documentary material, and especially the words "documentary
5 material" is -- "documentary material" is defined in 10CFR2.1001,
6 and the definition in one of the categories, as Mr. Fitzpatrick
7 points out, uses the words "intends to rely." And "intends" is a
8 future-looking word definitionally.

9 And so how do you reconcile the past tense that
10 you rely on by the words "acquired" and "generated" with the
11 definition of "documentary material," which is "intends to rely",
12 which is a future looking? So you have a past tense put up against
13 a future-looking word.

14 >> MR. SHEBELSKIE: Yes. I think it is actually
15 perfectly reconcilable, Your Honor, because you would say -- if you
16 read -- if you incorporate the definition of 2.1001 into 2.1003-A,
17 it would be all documentary material that you intend to cite and
18 rely on that you have generated or acquired. And so it has to be
19 directed to the documentary material that is finished, that you
20 intend to recite and rely on, that is in existence, that you've
21 acquired or developed at the time of your certification.

22 And if you just -- what Nevada wants to do is just
23 look at the definitional section of the regulation which, of course,
24 violates a fundamental principle of regulatory interpretation if you
25 have to read regulations as a whole. And here, read as a whole, the

1 requirements of 2.1003 dictate the scope of the initial
2 certification.

3 I would also add with Nevada's argument, Your
4 Honor, if you -- there are not separate certification requirements
5 for DOE versus other parties. 2.1003 and the definitions of 2.1001
6 apply to everybody, including Nevada, the counties, et cetera, et
7 cetera.

8 If you were to accept Nevada's interpretation of
9 these regulations, then when Nevada certifies 90 days after us, they
10 have to have completed and on the LSN everything their experts
11 intend to cite and rely on in opposition to our license application.
12 That would mean they would have to complete all of their analyses,
13 all of their work product because these regulations apply across the
14 board, not to us.

15 That was never intended in the LSN regulations.
16 Nevada certainly doesn't suggest that rule should be applied to
17 them, but the rules cannot be applied differently to us and to them,
18 since we are all subject to the same regulations. Were you about to
19 ask a question? Okay, Your Honor.

20 And further to that, and I believe Judge Rosenthal
21 made mention of this this morning, what Nevada says its position
22 that it's advocating is so fundamental to its rights as a
23 participant here, but if that's the case, it is truly remarkable
24 that over the 20 years of history in the development of these
25 regulations, the Commission itself and all of its detailed

1 rulemaking procedures -- statements of consideration in the various
2 rulemakings never specified in these regulations that at the time
3 DOE makes its initial certification, all of its intended -- whatever
4 you want to call it, core technical document, supporting references
5 for the LA, et cetera, must be complete. If that was the
6 Commission's intent, it would have had -- it would have been
7 expressed in 2.1003.

8 >> JUDGE ROSENTHAL: Under your interpretation of
9 2.1003-A1, would it be possible -- I'm not saying that that happened
10 here, but I just want to see where your interpretation of this
11 section carries us. Would it be possible for DOE to put into final
12 form maybe what would turn out to be one ten-thousandth of the total
13 number of license support documents, certify on that basis and say,
14 well, we could certify because we're applying past tense, or we're
15 looking at the past tenses generated, and this is all that we have
16 generated up to this point, and during the next six months before we
17 file the license application, we will get all of our other documents
18 in final form and file them?

19 I mean, it seems to me that your rather absolute
20 interpretation of that provision could lead to a rather undesirable
21 result.

22 >> MR. SHEBELSKIE: Well, of course, Your Honor,
23 that is not what is happening here.

24 >> JUDGE ROSENTHAL: I understand that. But we're
25 now trying to interpret this regulation, and you have given it an

1 interpretation that I would suggest would allow the hypothetical
2 which I offered you, which I recognize is not, in fact, this
3 situation.

4 >> MR. SHEBELSKIE: But here's why I don't think
5 that hypothetical comes to bear, Your Honor, because under the
6 definition of "circulated draft", a circulated draft consists not
7 only of a document that has received the nonconcurrence as intended
8 in that rule, but it also includes a document that -- either to a
9 decision not to finalize the document or the passage of a
10 substantial period of time in which no action has been taken on the
11 document.

12 So, Your Honor, if there were -- and, again,
13 believe me, this is not the situation -- an abusive situation where
14 some participant in the proceeding had, in substance, really
15 finalized all of its documentary material, but had just avoided
16 putting its signature on the final document, but in substance, it
17 had been finalized, then, recognize under the definition of
18 "circulated draft" it would rise to that level and have to be
19 produced. You could not evade the regulations through that sort of
20 gamesmanship.

21 >> JUDGE ROSENTHAL: Well, couldn't you evade it by
22 not making up your mind what you intend to rely upon until just
23 matter of weeks before you file the license application?

24 >> MR. SHEBELSKIE: As a practical matter, Your
25 Honor, that's really not feasible here because, obviously, the work

1 product that goes into creating the license application is not
2 something that just comes into being in just a couple of months.

3 This work product that will be culminated in the license
4 application is really the capstone of 20 years' worth of effort.
5 All the work product up to this point of our certification and plus
6 our supplements thereafter is laid bare by the necessity of the
7 calendar with our certification being just six months before license
8 application submittal. Obviously, a lot of our -- much of our work
9 product is virtually done, has to be done because you don't have
10 time in the interval to do all the substantial work and wait until
11 the last minute.

12 And, indeed, the type of documents -- the two
13 principle analyses that Nevada emphasizes in its motion, the TSPA
14 analysis model report and the final Preclosure Safety Analyses and
15 their associated report are, in fact, the types of documents that
16 come at the end of the process because they build on a vast pyramid
17 of data, prior models, further abstraction of models and then roll
18 up into this high level of abstraction.

19 And so that's why I posit to you they're not
20 suggesting in any way there's been some bad faith effort on DOE to
21 delay completion of these documents. Believe me; on the public
22 exchanges and meetings, DOE is very desirous of getting this work
23 done as quickly as possible.

24 >> JUDGE ROSENTHAL: Can I come back a moment to
25 your interpretation of 2.1003-A1. You emphasize the words

1 "generated" and "acquired." Now, why couldn't that provision be
2 read to mean that all of the documents had to be generated or
3 acquired prior to the certification?

4 >> MR. SHEBELSKIE: Because that wouldn't be the
5 plain reading of that language, Your Honor. If the Commission had
6 said -- intended that all documentary material that a participant --
7 because not just DOE this applies to, but all participants, must be
8 generated that they intend to cite or rely on by the time of their
9 certification as required by 2.1009, it would have said that in
10 plain English. That's just not what that says. I don't know if I
11 can say it any more -- any differently than that.

12 What I would point out, Your Honor, is not only
13 that language is not --there is no such language in that regulation,
14 but when you look at the entirety of Subpart J, what you don't see
15 is any other provision that would only make sense if Nevada's view
16 of 2.1003 --

17 >> JUDGE MOORE: Be careful what you ask for.
18 Three years ago or so, the DOE I believe, was putting forth the view
19 that "all" in "all documentary material" didn't mean "all"; that it
20 meant there had to be a lag time in an organization as large as DOE,
21 that "all" had to say and include the notion of 30, 60, 90 days
22 period in which DOE could process its documents and get them into
23 the LSN.

24 Now, "all" in any dictionary I ever could find
25 didn't say anything about lag time or the need to put in a period of

1 time because some animals are created more equal than other animals.
2 And so, the trouble with the plain English approach is that it
3 sometimes defies common sense.

4 >> MR. SHEBELSKIE: Well, you can look at the
5 broader perspective, too, Your Honor, then, and there are actually
6 provisions in Subpart J that I think actually affirmatively
7 contradict Nevada's position.

8 I'll give you two examples. One is not all of
9 DOE's documentary -- Class 1 documentary material that we intend to
10 cite or rely on in the license application, or the license
11 proceeding, more broadly, is required to be in the LSN at all at any
12 time.

13 There are exclusions, any number of exclusions
14 that apply to publicly available references, textbooks, et cetera,
15 et cetera. All those kinds of -- and those exclusions don't have
16 any limitations on their scope because they happen to be materials
17 we are going to cite and rely on. So at our initial certification -
18 -

19 >> JUDGE MOORE: But they are all named in the
20 regulation, are they not?

21 >> MR. SHEBELSKIE: They are identified -- I mean,
22 the exclusions, yes.

23 But the point is here, the Commission, by having
24 these exclusions and not limiting the scope of the exclusion to
25 sweep in Class 1 documentary material to say Class 1 overrides the

1 exclusion, that's a pretty clear indication that the Commission was
2 not intending and does not intend that all Class 1 documentary
3 material intended to be cited and relied on must be complete or made
4 available in the LSN at initial certification.

5 But more importantly, I think if the sanction
6 provisions of 2.1012, where the Commission addressed the scenario as
7 to what would happen if DOE submitted the license application less
8 than six months after its initial certification or even if we made
9 our certification coincidental with submittal of the license
10 application, and in that provision, the Commission did not direct
11 that there had to be a hiatus on acceptance of the license
12 application or the commencement of the acceptance review by the NRC
13 staff. Instead, the only sanction specified in that regulation is a
14 delay in docketing for six months.

15 Well, in that regulation, that is contrary to
16 Nevada's view that what the Commission's intent was, was to give
17 Nevada six months of review of all of our intended cites and
18 reliance materials of the license application before the license
19 application is submitted.

20 >> JUDGE KARLIN: May I focus on that a little bit?
21 Yes, 2.1012 says -- it seems to say the remedy for DOE for that
22 situation would be that the docketing would be postponed for six
23 months. Is that what you're saying?

24 >> MR. SHEBELSKIE: Yes, sir.

25 >> JUDGE KARLIN: If, for example, DOE certified

1 its license collection was complete on October 19th of '07 and then
2 you decide to submit your license application three months later
3 rather than six months later and 2.1012 kicks in, is there any --
4 but we've also heard that -- and I think Mr. Fitzpatrick points out
5 that we are not to consider the additional time frame that the staff
6 is going to use to review the document; it may be three months, it
7 may be six months, it may be one month. We are not to consider
8 that. The six months is six months from certification to docketing;
9 is that correct? I'm sorry. Six months is six months from
10 certification to your filing the license application.

11 >> MR. SHEBELSKIE: There is that provision, but I
12 think you do consider, Your Honor --

13 >> JUDGE KARLIN: Well, let me just ask. My point
14 is, is there any contemplation by DOE at this point to file the
15 license application before the expiration of the six months?

16 >> MR. SHEBELSKIE: No sir.

17 >> JUDGE KARLIN: Do you reserve the right to do so
18 if you feel it's timely? You could do it?

19 >> MR. SHEBELSKIE: I think the regulations permit
20 it. It's not contemplated.

21 >> JUDGE KARLIN: So if the regulations permit it,
22 you're saying you could submit it in three months and staff could
23 spend three months, and it could be docketed in a total of six
24 months from October 19th legally?

25 >> MR. SHEBELSKIE: The regulations permit that,

1 yes, but that goes to the point then --

2 >> JUDGE KARLIN: And wouldn't that vitiate some of
3 the argument we hear, which is don't worry about it because there's
4 going to be this long review time by the staff and everything's
5 fine?

6 >> MR. SHEBELSKIE: Well, I'm not saying we're
7 going to do that. My point in talking about 2012 is that is an
8 indication into the Commission's intent that they were not writing
9 these regulations to, in every circumstance, guarantee six months of
10 pre license application submittal review of all materials that might
11 be intended or cited in or -- relied on or cited in the license
12 application.

13 And, indeed, we cited all this in the brief, I
14 don't mean to belabor it here, but throughout -- whenever the
15 Commission on those occasions did discuss the certification -- the
16 initial certification requirements in the 2001 period and again in
17 the 2003/'04 period, its statements affirmatively suggest that they
18 at least understood that at the time of initial certification, all
19 of our Class 1 documentary material would not be complete.

20 And they did not say that that was contrary to the
21 regulations. And as you discussed with Mr. Fitzpatrick this
22 morning, at no time in any of that rulemaking history did Nevada
23 ever express the view that DOE should be required to complete its
24 Class 1 documentary material before we certified.

25 And indeed, in the commentary that Nevada did give

1 on the rulemaking in 2004, its comments when it was discussing the
2 supplementation requirements, it never suggested that there should
3 be a carve-out for DOE's documentary material -- Class 1 documentary
4 material. This is all a brand-new argument by Nevada.

5 >> JUDGE KARLIN: Let me continue. The key purpose
6 of the six-month period is to allow interveners such as the State of
7 Nevada to formulate contentions, if they choose to file them and to
8 formulate good contentions. Do you posit and acknowledge that in
9 your initial certification there are some core technical documents
10 that are not complete yet and therefore not in the certification?

11 >> MR. SHEBELSKIE: The TSPA is not --

12 >> JUDGE KARLIN: Right. The TSPA is not in there.
13 It's a critical document. And it's not in there because you argue
14 it's not finished yet. It's not documentary material. It does not
15 have to be provided because it has not been generated yet, right?

16 >> MR. SHEBELSKIE: Correct.

17 >> JUDGE KARLIN: So it's not in there. The key
18 technical document, it's not in there.

19 You wait until the last minute, let's say, and
20 turn -- supplement in six months when you file your license
21 application, say here is the TSPA now, and it's by all reputes to
22 some massively important and massively complex modeling system.
23 Isn't the State of Nevada's opportunity to generate contentions
24 vitiated if you throw it in at the very last minute?

25 >> MR. SHEBELSKIE: In these circumstances, no,

1 sir. Here's why. Take the TSPA as an example, and this is
2 explained in their motion and our responses and I'll elaborate on
3 it. The TSPA AMR that is now being -- in the process of its final
4 stages for preparation for license application is not some document
5 that comes out of whole cloth with no existing history.

6 The TSPA has been a analytical model approach
7 under development since at least 1991, when the first runs were
8 created. And there have been iterations of that available since
9 then. The most -- for this October, the most recent construction of
10 the TSPA was that that was provided in conjunction with the site
11 recommendation back in 2001/2002. That's been made publicly
12 available, that's on the LSN. Nevada admits in its motion there was
13 exhibits -- it was affidavits and exhibits we put in, that they had
14 purchased the GoldSim software to analyze that site recommendation
15 TSPA to understand it and dissect it.

16 Since 2002 up to now, as our exhibits demonstrate,
17 that they and their experts have been following along on the
18 development of the TSPA. Last October in 2006, there was technical
19 meetings with the NRC where the changes in the TSPA had -- were
20 elaborated upon, it was laid out what differences have occurred.

21 And then, in October, in conjunction with the
22 release of the draft supplemental environmental impact statement for
23 the geological repository, there was the TSPA analysis prepared to
24 support that analysis made available on the LSN as well.

25 That's all the material that Nevada's expert, Mr.

1 Thorne --

2 >> JUDGE KARLIN: Mr. Shebelskie, would you --

3 JUDGE KARLIN: I still have not gotten an answer
4 to my question --

5 >> MR. SHEBELSKIE: Well, I'm going to get there.

6 >> JUDGE KARLIN: -- which is -- your answer is,
7 no, it's not -- the State of Nevada's opportunity to file
8 contentions is not vitiated because you've already made pieces of
9 this thing available?

10 >> MR. SHEBELSKIE: We have made available the TSPA
11 analysis as it existed in the beginning of October. What was
12 provided in conjunction with the SEIS and made available on the LSN
13 as well is the TSPA as it existed at that time.

14 We have also produced on the LSN tens of
15 thousands, several tens of thousands of documents about the
16 development of the TSPA that shows the internal analysis and debate
17 and development of the TSPA model.

18 >> JUDGE KARLIN: Okay. I --

19 >> MR. SHEBELSKIE: So that we get the final
20 version -- we are talking about what has occurred between October
21 and January.

22 >> JUDGE MOORE: Mr. Shebelskie, I'm sure you are
23 familiar with Mr. Thorne's declaration attached to Mr. Fitzpatrick's
24 motion. Paragraph 10 of that, which is page 3 of his declaration,
25 would you take just a second to read -- it is a short paragraph.

1 And that is their expert's essential response to the argument you
2 just made.

3 Can you tell me what's wrong specifically with
4 what Mr. Thorne, who is the one who obviously has tried to put the
5 pieces of your TSPA jigsaw puzzle together, with -- what's wrong
6 with his analogy?

7 >> MR. SHEBELSKIE: Yes, several fold, Your Honor.
8 First of all, let's keep in mind that the LSN production is a
9 document discovery. It is the production of our extant documents.
10 There is nothing in the LSN regulations that provides that DOE must
11 create some sort of architecture within the LSN to explain how all
12 the pieces link together. That's the first point.

13 >> JUDGE MOORE: He's just talking about the SEIS -
14 - the TSPA, SEIS.

15 >> MR. SHEBELSKIE: No, Your Honor, because in the
16 earlier paragraphs of his affidavit, he talks about -- like
17 paragraph five, he says, "an indication of the types of TSPA
18 information that could be supplied." And he talks about all the --

19 >> JUDGE MOORE: Assume for the sake of my
20 question, because paragraph nine, eight and seven all are specific
21 to the TSPA SEIS, that he says -- and he's been following this.
22 He's got all the iterations that are available to him at this point,
23 that it's still like trying to put a jigsaw puzzle together from a
24 box of several million pieces.

25 >> MR. SHEBELSKIE: Well, that is a nice sound

1 byte, but it doesn't have any actual substance to it because he says
2 -- he acknowledges the information that was provided on the TSPA
3 with the SEIS is, in fact, the kind of information he wants to
4 analyze the TSPA.

5 >> JUDGE MOORE: I would like to ask a few
6 questions, if I may, about the TSPA and LA.

7 >> MR. SHEBELSKIE: Yes, sir.

8 >> JUDGE MOORE: Has that been, in any form other
9 than what's been provided to the State of Nevada, been provided to
10 the NRC staff?

11 >> MR. SHEBELSKIE: Not to my knowledge, no, sir.

12 >> JUDGE MOORE: Would you have knowledge of it if
13 that had happened?

14 >> MR. SHEBELSKIE: I believe I would have been
15 told that, yes, sir.

16 >> JUDGE MOORE: What is the projected time that
17 DOE expects it will take its contractor, which I believe is one of
18 the national labs --

19 >> MR. SHEBELSKIE: Sandia.

20 >> JUDGE MOORE: -- to review the TSPA-LA before
21 they provide it to you, DOE, for your final approval of it?

22 >> MR. SHEBELSKIE: I believe the projected date
23 for Sandia's delivery of the final version of the TSPA AMR is
24 projected for in January, possibly rolling out to the first week in
25 February. But at that point, I would like to note and clarify for

1 the record that under our internal procedures that we have for
2 production of documents on the LSN, when a contractor delivers an
3 AMR for acceptance review at DOE, we grab the document at that point
4 for production on the LSN. We do not wait for DOE's acceptance
5 review to be complete. So this pipeline process that --

6 >> JUDGE MOORE: Do you know the total amount of
7 time that your contractor has been essentially doing its acceptance
8 review of the TSPA-LA --

9 >> MR. SHEBELSKIE: No. I only know the schedule.

10 >> JUDGE MOORE: -- that would essentially be
11 pieces to the puzzle, if I understood what you told me earlier,
12 since the TSPA SEIS?

13 >> MR. SHEBELSKIE: The TSPA AMR is a high-level
14 final-level abstraction built on many underlying models of AMRs
15 themselves or AMR-like type documents.

16 Sandia National Laboratory has been building a
17 series of these various reports. We track those -- those, as they
18 are prepared and completed, they get out and are on the LSN. And we
19 track all of those and that's largely done, but they may be the --
20 one or two of those three that -- AMRs that we talked about still in
21 completion -- in the pipeline for completion.

22 The metric that I'm familiar with that we track is
23 when ultimately the final AMR going to be delivered by Sandia and
24 that's the dates --

25 >> JUDGE MOORE: That's not quite my question, but

1 it will suffice. What I'm looking at is this kind of time period
2 that your contractor is taking to do this with the TSPA/LA, the kind
3 of benchmark time periods we should be looking at that the State of
4 Nevada can legitimately claim that it needs to assimilate and
5 understand this for filing new or amended contentions.

6 >> MR. SHEBELSKIE: I don't think you can make that
7 leap, and Nevada hasn't argued that it needs that.

8 >> JUDGE MOORE: Why? They're smarter than your
9 national lab?

10 >> MR. SHEBELSKIE: No, because we go through a --
11 amongst other reasons, the national lab goes through a series of QA
12 procedures and checks and backgrounds to validate information and
13 data. They have internal review cycles. It really -- their
14 processes that they have go through really don't in any way, to my
15 thinking, correlate to how much time someone needs to review the
16 final version of AMR.

17 And indeed, let me posit, I have high confidence
18 that the final version of the TSPA AMR that supports the license
19 application will not, in fact, be a source of contentions for
20 Nevada. Because Nevada -- that AMR is going to be supportive of the
21 license application.

22 Where Nevada wants to go to challenge that TSPA
23 AMR is not in the report that we write, but in the underlying data
24 that was collected, that that report was based on; on the
25 calculations that were made from that data; from those interim

1 models that were created from those calculations that -- or the
2 first level of models, the second level of models. That information
3 is out there. That's where they want to go for the development of
4 the contentions in the weeds in the software, not in the report that
5 we ultimately --

6 >> JUDGE MOORE: Let's turn to, once again, what --
7 if I'm recalling it correctly, in Mr. Thorne's declaration
8 concerning the material admittedly not on the LSN, but which you
9 provided the State of Nevada on the TSPA SEIS which was issued in
10 support of the draft SEIS, as I understand it.

11 >> MR. SHEBELSKIE: That information is on the LSN
12 as well.

13 >> JUDGE MOORE: All right. But you provided it in
14 a usable form. And I presume you also provided that to the staff?

15 >> MR. SHEBELSKIE: Yes. And I believe --

16 >> JUDGE MOORE: In that, he points out that there
17 are certain computer codes that were not made available on it that,
18 to analyze it, are necessary. Are those -- and you, I'm sure, are
19 familiar with his declaration. Are those codes that are necessary
20 to fully analyze the material you gave him the kinds of things that
21 he can file a request to DOE specifically requesting those and they
22 will be provided or, if denied, he can file a motion to compel to
23 seek those materials?

24 >> MR. SHEBELSKIE: Yes.

25 >> JUDGE MOORE: So that will hold true, then,

1 throughout the TSPA process in that they can request this
2 information?

3 >> MR. SHEBELSKIE: Yes, I believe the provisions
4 in Subpart J that define general powers of this Board actually has
5 an express sub provision that addresses ruling on disputes about the
6 omission of specific documents.

7 >> JUDGE MOORE: What are the benchmarks, Mr.
8 Shebelskie, that we might wish to look to on what kind of reasonable
9 time it takes to assimilate and understand this problem that is
10 presented in all of the underlying sub-models compiled to make a
11 large model called your TSPA-LA?

12 >> MR. SHEBELSKIE: If I understand the question, I
13 don't think that is actually a consideration that the regulations
14 contemplate --

15 >> JUDGE MOORE: Well, they don't. I'm asking you
16 because perhaps this will not arise, but I suspect it will, that
17 what is the kind of time period one would need to look at and
18 assimilate. I would like to hear this from DOE.

19 >> MR. SHEBELSKIE: I can't -- I couldn't even
20 begin to speculate because I think any kind of argument Nevada would
21 want to make on that point is not one that can be made up front as
22 an abstract matter; it would have to be made at the tail end of the
23 process when you can say, well, how much time did he actually have?
24 What did they actually do? Were they actually prejudiced? How did
25 they use the materials that they had in October? What were the

1 number of changes between October and January, if any? All those
2 kinds of questions would have to be in hand, I think, before you can
3 even begin to address that.

4 >> JUDGE MOORE: Now, I've tried to look at some of
5 the materials on the LSN. And when you are looking at a computer
6 code, for example, you get a bibliographic header and then you often
7 get reams of vertical line of what may be parameters of the code and
8 then you often get what I would call gibberish or -- that may well
9 be --

10 >> MR. SHEBELSKIE: Well, it's technical computer
11 code the person needs to know. That is the data file.

12 >> JUDGE MOORE: If one during document discovery
13 asks DOE for that in an electronic format as opposed to an image
14 format, because that's what you're looking at on -- of that kind of
15 thing on the LSN, is that something that DOE is prepared to turn
16 over to potential parties?

17 >> MR. SHEBELSKIE: I believe the rules permit
18 those types of requests. They have to be individually assessed
19 because some of the codes may be subject to proprietary software
20 restrictions, et cetera, et cetera.

21 >> JUDGE MOORE: But those will be available if
22 properly requested?

23 >> MR. SHEBELSKIE: Yes, in the way you asked the
24 question.

25 >> JUDGE ROSENTHAL: Could I come back a moment to

1 the provisions of 2.1003-A? Again, you relied on the "generated"
2 and "acquired" wording. But couldn't that simply mean that at the
3 end of the day when the certification occurs, that the material that
4 is to be supplied is the material that were generated or acquired by
5 X party or Y party and it has nothing to do with the timing of all
6 of this?

7 In other words, consistent with Mr. Fitzpatrick's
8 reading, one could say, okay, all of your license support material
9 have -- documentary material must be available on the LSN, and what
10 these provisions just mean is the material is to be made available,
11 other material generated or acquired by DOE?

12 If that's the case, doesn't your case really turn
13 upon the other point you made, which is what's source for the goose
14 is source for the gander? In other words, under that reading,
15 within 90 days after you certified everybody else would have to have
16 completed their own investigation and have all of their documentary
17 material relevant to the matter at hand available, and that puts
18 upon these other parties an unwarranted obligation or burden.

19 Isn't it really that which is more impressive in
20 terms of your interpretation than your reliance on the fact that --
21 acquired and generated are past tense?

22 >> MR. SHEBELSKIE: Your Honor, I think it's both.
23 I mean, certainly "what's good for the goose is good for the gander"
24 argument, I think, is very compelling and shows that the regulation
25 can't mean what Nevada says.

1 But Nevada's argument on the first point, not even
2 they say that all of our documentary material has to be generated
3 and acquired or completed by certification. They read this to say,
4 well, it's not all; it's all your core technical documents. So it's
5 some, but not all.

6 >> JUDGE ROSENTHAL: I thought it was everything
7 that was going to be offered in support of the application.

8 >> MR. SHEBELSKIE: Well, they change from motion
9 to motion and every time they express what their standard is. But,
10 they had the quote from Mr. Arthur early this morning where he was
11 saying, well, there's going to be some more documentary material
12 created even up to the day of certification.

13 Well, so Nevada doesn't even argue before this Board that
14 all of our documentary material must be generated and acquired.
15 They say some special class has to be completed by the time we
16 certify. And there is no qualitative or quantitative subset that
17 this regulation has on its face. And that's why it can't mean
18 literally what Nevada's arguing.

19 >> JUDGE KARLIN: May I ask a question on that
20 point? Nevada says -- yes, I agree. It seems to me that Nevada is
21 arguing that all core technical documents need to be made available
22 at the time of the initial certification.

23 And the question arose, well, what -- how do you
24 define that term? And Nevada says that that's DOE's term. DOE came
25 up with that term. Let's just use that definition.

1 So apparently, you -- do you have -- let me back
2 up. When we did the motion for declaratory judgment by the State of
3 Nevada earlier this year in the summer, it seemed to me that there
4 was a particular document featured in that and there was this list
5 of 1,500 documents, if I remember, that was brought forward --

6 >> MR. SHEBELSKIE: You're referring to the LA
7 product baseline.

8 >> JUDGE KARLIN: LA product -- license application
9 product baseline which seemed to be a DOE document and it had 1,500
10 documents on it, and some were complete and some were not, and it
11 sort of kept track of all of those.

12 Are those -- A) does DOE use -- did you have the
13 term "core technical documents" and, B) is that 1,500 documents of
14 the definition of core technical documents?

15 >> MR. SHEBELSKIE: DOE does not use development of
16 the license application, as I understand it and know it now, a term
17 of "core technical documents". There are some documents given to
18 understand, created by the M and O contractor from time to time have
19 used that terminology, but it's not something grounded in the
20 regulations. Several years, you can always find a document --

21 >> JUDGE KARLIN: So what is this 1,500 documents?

22 >> MR. SHEBELSKIE: The 15- -- the LA product
23 baseline schedule was a management document tool started about a
24 year ago or so to help DOE track certain documents that were under
25 development that DOE perceived needed special management attention

1 from a process point of view. It is not coincidental -- I mean, it
2 doesn't overlap, it doesn't equal our intended cites and references,
3 and everything in the product baseline is not going to be cited in
4 the license application.

5 >> JUDGE KARLIN: And when you say -- I think in
6 your brief, you indicated something about everything except 79
7 documents were made available. Are you saying that every -- of the
8 1,500 documents, everything except 79 of those are on the LSN?

9 >> MR. SHEBELSKIE: No. The --

10 >> JUDGE KARLIN: Well, what percentage of the
11 1,500 are on the LSN? How many are not?

12 >> MR. SHEBELSKIE: I don't want to give you a
13 specific number because I wasn't asked to prepare for that, but
14 virtually all of them were there.

15 What the question was asked from the Board was, by
16 our intended materials that we intend to cite and rely in the
17 license application, how many are still in development or underway.

18 We have a separate database that we use as a
19 management tool to track intended references and changes that we can
20 change on a daily basis --

21 >> JUDGE KARLIN: So the 79 is -- in answer to our
22 question, you say that 79 are not yet on the LSN out of how many
23 that you say are on the LSN?

24 >> MR. SHEBELSKIE: Oh.

25 >> JUDGE KARLIN: 79 out of 500? 79 out of 100?

1 >> MR. SHEBELSKIE: I think the way to answer that
2 -- I think the answer, Your Honor, is the expected number of
3 citations and references in the license application would be in the
4 order of several thousands; it could be 2,000, it could be 3,000.

5 >> JUDGE KARLIN: Okay. So you say out of several
6 thousand, only 79 are not available.

7 >> MR. SHEBELSKIE: Yes, sir.

8 >> JUDGE KARLIN: Okay. Now, let me ask this --

9 >> MR. SHEBELSKIE: Well, 79 are still in
10 completion.

11 >> JUDGE KARLIN: Incomplete?

12 >> MR. SHEBELSKIE: I mean in progress.

13 >> JUDGE KARLIN: Well, under our regulations,
14 motions have to be filed within ten days of the event which triggers
15 or is of concern to the moving party, ten days. And so the State of
16 Nevada was kind of forced here to file a motion very quickly, ten
17 days after your certification on October 19th. That's the way it
18 works.

19 Let us say, at this point we concluded that, well,
20 no, that motion to strike hasn't been shown to be valid at this
21 point, and we denied it.

22 But let us then posit that six months elapse and
23 you file supplements every month and you file your license
24 application and suddenly that 79 that are missing turns out to be
25 790. Could Nevada file a motion to strike the initial certification

1 at that point based upon the information and not be untimely?

2 >> MR. SHEBELSKIE: I don't think they can file a
3 motion to strike, no, Your Honor, because -- first of all, let me
4 make clear, I have no reason to believe that's going to happen. I
5 made inquiry because I knew the board was going to ask, could there
6 be --

7 >> JUDGE KARLIN: Well, it may not be --

8 >> MR. SHEBELSKIE: -- suddenly balloon to a lot --

9 >> JUDGE KARLIN: The point is if we deny this
10 motion to strike the certification, is it forever valid or if new
11 information would evolve, something like this and subsequently, and
12 it was important enough, that would be a enough to trigger and they
13 could file a motion within ten days?

14 >> MR. SHEBELSKIE: No, because our initial
15 certification, even under that hypothetical, which is contrary to
16 the facts as I understand them, even under that hypothetical, our
17 initial certification on October 19th would have been in compliance
18 with the regulations.

19 Nevada's relief in that scenario, if it's entitled
20 to any or deems it necessary to seek relief, would be under the
21 types of provisions, I believe, Judge Karlin, you alluded to earlier
22 this morning where they could seek extensions of time, perhaps to
23 file certain contentions, it would be addressed at that end of the
24 process. It would not be a basis for retroactively striking our
25 certification on October 19th, which would have still remained

1 legally valid and that we would produce all documentary material --

2 >> JUDGE KARLIN: Well, if we deny the motion to
3 strike, it won't be because necessarily -- we might just say, well,
4 they haven't proven their case, so it's denied. We're not
5 certifying that your certification was fine. We're just saying that
6 the motion to strike was not --

7 >> MR. SHEBELSKIE: Well, in that scenario, you
8 might say that the ruling -- the denial of the motion to strike is
9 not law of the case or res judicata -- or estoppel on the issue. It
10 would still be DOE's position that those developments would not
11 invalidate retroactively on certification.

12 >> JUDGE MOORE: So you disagree with the NRC
13 staff's position that they put forth in their filing in response to
14 the State's motion.

15 >> MR. SHEBELSKIE: I don't agree with the aspect
16 of it that says at this point, there should be some balancing done
17 of the relative --

18 >> JUDGE MOORE: They say at the time of filing the
19 application, it could still be determined at that point that your
20 certification was invalid and the time clock runs again.

21 >> MR. SHEBELSKIE: I don't agree with that
22 proposition.

23 >> JUDGE ROSENTHAL: You don't agree that there are
24 currently, as the NRC staff's filing suggests, factual disputes that
25 this Board must resolve?

1 >> MR. SHEBELSKIE: I don't think that there are
2 factual disputes presented by Nevada's motion because Nevada's
3 motion raises a legal question about the interpretation of the
4 regulation as to whether at the time of our certification all of
5 documentary material must be complete. That does not require
6 adjudication or resolution of any facts.

7 To the extent they want to argue that they're
8 somehow materially prejudiced in their ability to prepare
9 contentions or whatever, they certainly haven't met their burden of
10 proof on that in their motion, nor do I think that it's an inquiry
11 properly directed to the validity of the motion to strike and
12 something they could raise later if there were facts and
13 circumstances under the types of provisions Judge Karlin was
14 mentioning this morning.

15 >> JUDGE MOORE: The answer of DOE to three
16 questions we asked, you did mention that there were approximately
17 239 expected references that are in the process and will be in the
18 LSN shortly?

19 >> MR. SHEBELSKIE: Yes, sir.

20 >> JUDGE MOORE: When is shortly?

21 >> MR. SHEBELSKIE: Yesterday, I was advised that
22 of the 239, 188 are already on the LSN; the 51 are still in process.

23 >> JUDGE MOORE: And that leads me to what is your
24 process time or your time for what we would call three years ago, we
25 are talking in terms of gap documents. What is DOE doing? And that

1 would also hold over to your monthly supplementation.

2 >> MR. SHEBELSKIE: Yes, sir. With respect to LA
3 tended references or citations in particular that may be an AMR or
4 anything like that, anything that's in the database; we have
5 implemented special procedures to expedite their production on the
6 LSN.

7 As I mentioned first, we don't wait for acceptance
8 review by DOE to be completed. When the contractor delivers it, we
9 grab it for production on the LSN.

10 We have processes set up so as they are completed,
11 they are identified in the record processing center on the project
12 so electronic copies can be transmitted over to our automated
13 litigation support contractor, Kathy, for formatting in the LSN
14 required format, creation of bibliographic headers, bypassing all
15 internal legal reviews for privilege and privacy because these
16 documents need those kinds of reviews.

17 Sometimes that process, we have observed in the
18 last couple of months, results in a production of the document on
19 the LSN within a week or two, but we would certainly expect
20 something in that fast track process to be on that track in maybe
21 another week or so, just depending upon how congested the --

22 >> JUDGE MOORE: For more run-of-the-mill things,
23 we're in a 30-day period --

24 >> MR. SHEBELSKIE: I think, generally speaking, I
25 would say we believe we are 100% compliant, 90 days out. We're like

1 98% compliant 60 days out. We are very high percentages even 30
2 days out.

3 >> JUDGE MOORE: As you may be aware, under the
4 LSN, there are no allowed links or hot links or --

5 >> MR. SHEBELSKIE: Correct.

6 >> JUDGE MOORE: And under the NRC's document
7 records system, links are also prohibited. I do not know, but I
8 suspect that DOE's records system may have similar prohibitions.

9 In any event, one of the difficulties would when a
10 fossil in an agency is -- when the LSN training was given, there
11 seemed to be an underground railroad or a -- what I guess is
12 referred to by those that aren't fossils is sneaker mail, that would
13 be as in tennis shoe mail, because the LSN doesn't have these
14 things, that the NRC staff apparently can bypass the LSN, because
15 it's not always convenient and get documents with links and
16 everything they need in a nice package and is getting it in a nice
17 package from DOE.

18 If that is occurring, are those same nice packages
19 going to be made available if requested by potential parties in a
20 document request?

21 >> MR. SHEBELSKIE: I have to honestly plead
22 ignorance on the subject matter that you're discussing. I'm glad to
23 inquire and reply back to the Board on it.

24 I would also add, though, that in the pre license
25 application phase, the regulations do permit informal requests for

1 information --

2 >> JUDGE MOORE: It's essentially not that it's not
3 on the LSN; it might be ten hours to use it on the LSN or a hundred,
4 but whereas it is all neatly packaged, apparently, in your shop. If
5 that were true -- if that were true, would that be available under
6 document request?

7 >> MR. SHEBELSKIE: That would -- I think that
8 would have to fall under the informal request, not -- it doesn't
9 relate to our -- validity of our certification, obviously.

10 >> JUDGE MOORE: It was news to me, too.

11 >> MR. SHEBELSKIE: It's news to me if it's
12 happening.

13 In conclusion, I think -- unless the Court has
14 other questions, I'll sum up with the following observation --

15 >> JUDGE KARLIN: Well, I do have one more one of
16 these technical questions, I guess. I believe Mr. Fitzpatrick or
17 maybe it was Ms. Treichel raised a concern that -- of the changing
18 of the headers on the documents and I'd like you to address that.

19 There is this LSN. Our case management orders
20 have said you cannot remove a document from the LSN without going
21 through some hoops, if at all. Once you've put it on the LSN,
22 whether it's on the public page of the LSN, you can't remove the
23 document.

24 But, as I understand it, the headers to the
25 documentary material are being corrected or changed or whatever very

1 often. And a hundred thousand times in the last month or something,
2 headers have changed. And if you are searching for something by a
3 header, the title; I want to look for the title or the date and
4 those things are being changed dramatically or actively, you are
5 going to have some problems.

6 I know you can search by the full text. That's
7 usually the way I would do that kind of thing, but some people look
8 for a specific document and they look for the title, and that title
9 isn't in there or it changed since last week.

10 So how many header changes are going on and what's
11 going on there?

12 >> MR. SHEBELSKIE: Yes, sir. I'm glad you brought
13 that up. I did make a note to respond to that. And let me address
14 both specifically the issue, the group of documents the task force
15 raised and then I will speak generally on the topic, Your Honor.

16 The task force submission discussed having
17 difficulty searching by title for the documents that were the
18 references for the draft geological repository SEIS. When we
19 received the paper, we reviewed it, and we investigated what was
20 behind that, what was going on. And what we found out is that we
21 are talking about a group of 800 documents. They were submitted to
22 Kathy from the project on a CD-ROM, electronic file format. The
23 document titles on the headers are the document titles for those
24 documents on the CD-ROM for those 800 documents, those file path
25 numbers.

1 We looked at it and said, I see what the issue is
2 here. And so, on our own, we went back and we added a title to the
3 title field. We kept the original electronic file path name, but
4 added a title that was an English title, if you looked at the face
5 of the document.

6 Those 800 updates for those 800 documents has been
7 done, the scan file has been provided to the LSN administrator, as I
8 understand it. So, I believe the specific issue that the task force
9 raised has been addressed.

10 Now more broadly on the top topic of these
11 headers. This really isn't news, Your Honor. In fact, the
12 semiannual report that the LSN Administrator filed with the
13 Commission last July made reference to the fact we were doing some
14 updates to headers.

15 This is something we were doing on our own
16 initiative. We have made available documents, 1.3 million documents
17 since 2004. We made another 2.1 million starting in April or May of
18 this year. We have been coding documents and the headers the same
19 way throughout all that period. And Nevada never came to us and
20 complained about the title fields. It was never brought up by any
21 party at a case management conference, despite invitations from this
22 board for suggested topics.

23 But on our own we looked at it and said
24 now are there some group of documents where you might be
25 able to improve the title? And typically it arises, Your

1 Honor, with respect to attachments to emails in other
2 electronic files because those files as they are created
3 and stored by the authors of some of the email system have
4 electronic titles. Sometimes the title that the author
5 gives the file is a shorthand reference that's meaningful
6 to the author, perhaps, but not to someone else.

7 >> JUDGE KARLIN: The titles come across
8 as gobbledygook. You can't get anything out of the title.

9 >> MR. SHEBELSKIE: Sometimes that's the
10 case, but we, on our own, went back and identified a group
11 of documents for titles; about 160,000, I believe. It is
12 my understanding that we have now updated all those titles
13 with the exception of, I think, there were about 20,000,
14 28,000 in that range that we had given scan files for that
15 were in the pipeline to be updated.

16 We're not changing the document. We are
17 not altering the document in any way. We are adding for
18 this group of older documents these titles.

19 And as, Your Honor, all it points out.
20 You can search for the title of the document in the
21 content field to find the document as well, but on our own
22 we thought this would be a way to make the system more
23 helpful to the public even though no one had ever
24 complained to us about in the past.

25 >> JUDGE MOORE: It's not always true

1 that you can search on a text search when it brings up
2 essentially gibberish because its computer code and there
3 is no bibliographic header with the title telling you what
4 it is. So, I just think you should be careful.

5 >> MR. SHEBELSKIE: I understand. There
6 are files. There are certainly data files.

7 >> JUDGE MOORE: I have one here that I
8 tried to look at --.

9 >> MR. SHEBELSKIE: Yes, Sir, Your
10 Honor.

11 >> JUDGE MOORE: That said, you are
12 taking steps to ensure that the placeholder titles which
13 are essentially machine generated are being replaced with
14 legitimate titles in a lot of those documents.

15 >> MR. SHEBELSKIE: Yes.

16 >> JUDGE MOORE: Similar, the place --
17 I'm assuming also that the placeholder dates that were put
18 in that had no relevance to the date of the document, but
19 was merely a placeholder are now being corrected as well?

20 >> MR. SHEBELSKIE: Yes, although there
21 are still going to be scenarios where we can't tell older
22 documents.

23 >> JUDGE MOORE: I understand that, but
24 there are lots of them that they were just placeholders
25 and that this apparently is problems that has arisen just

1 prior to and just after certification.

2 >> JUDGE KARLIN: Can I continue on that
3 point? In one of our case management orders, four or
4 five, we established a rule with regard to corrections or
5 changes to privilege logs, if you'll remember and I'm
6 trying to use an analogy here to the corrections to the
7 headers. We said, look, your headers are supposed to be
8 right. The privilege logs are supposed to be right from
9 the get go, but DOE we see is correcting some of those
10 privilege log entries and headers, let's call it the
11 information.

12 And we then said, well, we'll allow
13 correction -- once you submit your monthly privilege log,
14 you've got X amount of time to get your corrections in and
15 after that no more corrections unless you come and file a
16 specific request to us and file a motion.

17 Now, what seems to be going on is that
18 DOE is certified and then it will update monthly
19 certifications and there's a lag time; 90 days, it's 100%
20 complete; 60 days, it's 98 -- whatever. Should we be
21 setting up? Do we need to address on some perhaps other
22 forum a deadline for those corrections to be made so that
23 we're not consummately floating and correcting and leaving
24 it loosy-goosey indefinitely?

25 >> MR. SHEBELSKIE: Your Honor, I think

1 this is a different situation. I understand the Board's
2 concerns with privilege and law.

3 >> JUDGE KARLIN: You understand the
4 analogy?

5 >> MR. SHEBELSKIE: Well, to a degree,
6 but only to a degree because the privilege laws are
7 documents that are being withheld and that people might
8 want to make challenges on. I understand they need to
9 look at the privilege log and they need to be stabilized
10 so they can make decisions on that.

11 What we're talking about on updating
12 enhancing the header -- the titles and headers. These are
13 documents that are available on the LSN. The titles that
14 we gave them, the headers, are in fact the actual titles
15 from the documents in our records system. We are going
16 the extra mile to provide an additional title to make the
17 searchability of the system better for people.

18 And so, I don't think we ought to impose
19 some deadline after 60 days or 30 days or whatever; you
20 can no longer improve the functionality of the headers.
21 If someone like the task force brought to our attention
22 there was a group of 800 documents where the headers
23 didn't seem right. We'll investigate it and we make these
24 commitments to update the headers when we identify these
25 problems.

1 >> JUDGE MOORE: Your time is up.

2 >> MR. SHEBELSKIE: I have one final
3 comment in summation. The Commission's intent in
4 establishing the LSN made clear throughout the rulemaking
5 was to get out of the way document production in the
6 pre-license application phase so it wouldn't occur in the
7 contention phase. By DOE's production of 3.7 or 6 million
8 documents and our ongoing production that objective has
9 been achieved. Thank you, Your Honor.

10 >> JUDGE MOORE: NEI.

11 >> MS. GINSBERG: Good morning -- is the
12 microphone on? Good morning, Mr. Chairman and members of
13 the Board. I am Ellen Ginsberg and I represent the
14 Nuclear Energy Institute. As stated in our November 8th
15 answer, NEI's position is that the State's motion is
16 without merit. Nothing in the NRC's regulations compels
17 production of the particular documents sought by the State
18 at this point.

19 NEI urges the Board not to adopt the
20 State's extreme reading of subsections 2.1003A and E as
21 the State's approach would in effect impermissibly impose
22 requirements in addition to the requirements the
23 Commission has established. The State urges an approach
24 that not only is not compelled by the governing
25 regulations; it is fundamentally at odds with them.

1 One need look only at the State's motion
2 at page four to find that the State contends that 2.1003A,
3 this so-called six month rule, requires that the DOE place
4 on the LSN as we've been talking about this morning all
5 core technical documents and modeling basis documentary
6 material to be relied on in the licensing proceeding at
7 the time of initial certification.

8 As an aside, I would note it's been
9 pointed out before that the term "core technical
10 documents" is nowhere found in subpart J. The effect of
11 granting the State's motion on these grounds would be to
12 add to subsection 1003A a requirement for these documents
13 and to do so would be to fundamentally alter that
14 subsection by injecting into the plain language of the
15 regulation specific requirements that the Commission
16 itself could have, but did not, incorporate.

17 We think that the motion could be
18 rejected on that ground alone, but it's not necessary for
19 this Board to reach that issue because the language as
20 written provides a sufficient basis on which to reject the
21 State's instant motion.

22 The definition of documentary material
23 supplements -- I'm sorry, supports our view because it
24 speaks in categorical terms and not of specific documents.
25 And while the term "any" as its used in subsection 2.1003A

1 may be capacious enough to include, for example, core
2 technical documents, nothing in the regulations provides
3 that the State has the right to dictate which specific
4 core technical documents DOE should have provided and
5 when, if not already, generated or acquired.

6 To put a fine point on it, this goes to
7 the point of being extant at the time of initial
8 certification.

9 In that regard, I would point out that
10 2.1003A1 only directs DOE to make available no later than
11 six months before submitting its LA all documentary
12 material exclusive of preliminary drafts generated by, or
13 at the direction of, or acquired by DOE.

14 As has been discussed extensively this
15 morning, the past use -- the use of the past tense
16 "generated" and "acquired" defines the universe of
17 documents subject to 1003A1. Going beyond this delving
18 into the legislative history as Nevada has suggested
19 simply isn't necessary as the Commissions' plain language
20 prescribes the documentary material that's included must
21 be in existence.

22 Relatedly, we focus on and we turn the
23 Board's attention to the requirement for DOE and other
24 participants to supplement their documentary material
25 collections after initial certification. Our position is

1 that even if stretched, the State's construction of the
2 six month rule cannot be squared with the clear
3 recognition by the Commission in 2.1003E that additional
4 documentary material will be generated after initial
5 certification.

6 And further, no interpretation of
7 2.1009B, 2.1003A and E is necessary to conclude that the
8 regulations call for initial certification to encompass
9 only documentary material in existence at that time with
10 any material created thereafter to be supplemented.

11 With respect to supplementation it's
12 noteworthy that the State, again, at page four of its
13 motion, argues and I quote, "DOE adopted a strained and
14 undisciplined interpretation of the NRC's supplementation
15 requirements for LSN that eviscerates the six-month rule."

16 By contrast, it would be our position
17 and we would contend that there's no sound basis to
18 conclude -- that there is a sound basis to conclude that
19 the State's efforts to read it into the six-month rule or
20 requirement for these core technical documents in fact
21 eviscerates the supplementation requirement by limiting
22 the universe of documents eligible for supplementation in
23 a way that the regulations simply don't prescribe.

24 >> JUDGE KARLIN: Ms. Ginsburg, let me
25 stop you there and ask a question if I may about page four

1 of your brief, the NEI brief. The regulations lay out
2 that the DOE has to certify six months in advance of its -
3 - certify that's its made all of its documentary material
4 that is has generated available six months in advance of
5 filing its license application.

6 You, on that page, indicate that we
7 should not worry about that six month period because you
8 can tack on the staff review time. Isn't that
9 illegitimate? I mean, if the Reg wanted to say let's talk
10 about the staff review time, they would have talked about
11 the staff review time. It said the time frame between
12 certification and license application.

13 >> MS. GINSBERG: Our position is not
14 that the Regs ought to be read in a particular way because
15 of this additional time. That goes to the practical issue
16 of prejudice. With respect to prejudice what the
17 submission said, what we said in our filing, is simply
18 that for Nevada to be heard that they don't have
19 sufficient time because there isn't a "full six months"
20 for each and every document that they seek is --

21 >> JUDGE KARLIN: How do we know that DOE
22 will wait six months to file its license application? How
23 do we know that the staff won't certify in one month? How
24 do we know they're going to be six months in there? I
25 guess they have to wait the six months, but let us posit

1 that the DOE puts together some critical documents at the
2 very last minute and these are massive and complicated
3 documents. How much time do the interveners need to file
4 contentions? Isn't six months the time frame they need?

5 >> MS. GINSBERG: No, I think what the
6 intent of the regulations is is to provide remedies in
7 addition to the document discovery and those were
8 discussed this morning with late filed contentions.

9 >> JUDGE KARLIN: Okay. Well, let me
10 focus on that. In your brief, you referred to "moreover,
11 a late contention may always be filed for good cause; see
12 10CFR2.309C." I note that the word "late contentions" is
13 not used in the regulations and probably not appropriate,
14 but what about 2.309F2? You don't need to show good cause
15 to file a new contention under 2.309F2, do you?

16 >> MS. GINSBERG: I think the Board would
17 take that into consideration given the date at which
18 whatever the subject of the concern was.

19 >> JUDGE KARLIN: So, if DOE makes
20 documents available or anyone makes documents available at
21 some late juncture then as long as Nevada acts quickly and
22 files its new contention in a prompt way, they don't have
23 to show good cause.

24 >> MS. GINSBERG: No, I'm not sure I
25 would agree with that, Your Honor. I think that what we

1 need to do is --

2 >> JUDGE KARLIN: Well, let's look at
3 the regulation, 2.309 --

4 >> MS. GINSBERG: Can you excuse me for
5 just a second?

6 >> JUDGE KARLIN: I would commend all of
7 you to bring your copy of the Regs with you when you go to
8 the podium. 2.309F2; let's see. 2.309C, let's go back to
9 that. That's the one you said -- that deals with non-
10 timely filings. Let's go to 2.309F2. It says
11 "contentions must be based on documents or other
12 information available at the time the petition is to be
13 filed."

14 Then if we jump down towards the bottom,
15 it says, "contentions may be amended or new contentions
16 filed after the initial filing only with the lead of the
17 presiding officer upon a showing of three things: One,
18 the information wasn't previously available; two, the
19 information is materially different; and three, that the
20 contention is timely." There's no requirement to show
21 good cause. It says those are the three criteria that
22 need to be met for a new contention.

23 So, in my hypothetical, if DOE indeed
24 makes documents available at a very late juncture, it
25 would seem to me that sets all the State has to satisfy in

1 order to get a new contention in. And 2.309C is not --

2 >> MS. GINSBERG: Not if its -- I would
3 suggest that's not true if it's beyond the time by which
4 you need to submit the contentions. My reading of this
5 language is that if the new information -- if the
6 information was not previously available, then that at
7 that time would become a late filed contention because in
8 effect either the information wasn't available or --

9 >> JUDGE KARLIN: NUREGs don't use the
10 term "late file". This is a timely contention. Look at
11 the very bottom of page 47 of the Regs. "The amended or
12 new contention has been submitted in a timely fashion" and
13 if it's timely -- and sometimes that's 10 days or 30 days
14 or maybe it's even six months, but if it's timely, then
15 you don't have to meet 2.309C.

16 The staff will probably have something
17 to say about this as well, but -- I just think you're
18 citing only one of the relevant regulations in 2.309C and
19 2.309F2. In fact, for NEPA contentions if you look at
20 2.309F2, you don't even have to be timely under the
21 accordance of the Reg.

22 >> MS. GINSBERG: May I continue?

23 >> JUDGE KARLIN: Yes, please do.

24 >> MS. GINSBERG: Thank you. Moving on
25 to the second point, it is precisely the point that we

1 were just talking about with respect to prejudice that I'd
2 like to address. In this regard, I think that we think
3 that the State's claim that it should have a full six
4 months is going to be not just met, but when all is said
5 and done the State will have had much more than a full six
6 months to analyze the 3.4 million documents already
7 available on the LSN. Notably, there have been a million
8 documents on the LSN since 2004 and thereafter.

9 Since May of this year, the additional
10 2.1 million dollars -- documents have been made available.
11 Thus, there's more than a year for that second traunch of
12 documents and more than four for the first.

13 Accordingly, we think that everyone in
14 addition to the State will have a minimum of six months,
15 if not longer, to develop contentions following submittal
16 of the LA. In conclusion --

17 >> JUDGE MOORE: Your time is up. Please
18 conclude.

19 >> MS. GINSBERG: In conclusion, NEI's
20 view is that the staff got it exactly right on page 11 of
21 their answer where they said that the mere fact that DOE
22 plans to complete certain material after its certification
23 does not violate the applicable regulations. Thank you.

24 >> JUDGE MOORE: Thank you. NRC staff;
25 Ms. Young?

1 >> MS. YOUNG: Good morning, Judge Moore
2 and members of the panel, Judges Karlin and Rosenthal.
3 The staff is here today to present its position on
4 Nevada's motion to strike DOE's October 19th certification
5 of compliance with LSN requirements. That motion
6 indicated that there were numerous core technical
7 documents and modeling basis information that was not
8 available at the time DOE certified.

9 >> JUDGE MOORE: Ms. Young, I just have
10 one question on your filing. Is there a substantive
11 difference between the standard you propose that we should
12 be applying in this case "whether the DOE, LSN collection
13 is materially or substantially incomplete." And the
14 standard that would question whether the DOE collection is
15 substantially or materially complete.

16 >> MS. YOUNG: Not really, but it was
17 posed in the staff's pleading from the context of Nevada
18 alleging certain things were omitted.

19 >> JUDGE MOORE: There is no difference
20 in approach and between whether it's substantially
21 materially complete or substantially and materially
22 incomplete?

23 >> MS. YOUNG: Right. It was only
24 phrased in terms of the way Nevada had raised that certain
25 things were missing; so therefore, were those things so

1 important that somehow the certification by DOE should
2 fail?

3 >> JUDGE KARLIN: Isn't a difference in
4 burden of proof, if that's what your point is. Do you
5 think the State has the burden of proof that it's
6 substantially incomplete?

7 >> MS. YOUNG: Yes, that's the basis for
8 Nevada's motion, but obviously DOE as the applicant must
9 also indicate that its certification meets requirements.

10 >> JUDGE MOORE: This is in large measure
11 especially determination of good faith, largely a factual
12 matter, how is the state of Nevada to be able to
13 demonstrate that? Are you suggesting that they're
14 entitled to depositions of certain key DOE officials? How
15 could they ever demonstrate bad faith?

16 >> MS. YOUNG: Nevada, obviously, has the
17 burden to show this. They have raised statements and
18 indicated in their motion that they believe that there are
19 documents that DOE knowingly plans on using for a license
20 application; that they basically imply that DOE somehow
21 has postponed in order to make it difficult for Nevada to
22 have a meaningful opportunity to prepare contentions. The
23 staff's assertion with respect to a factual showing had to
24 do with that. It wasn't any suggestion that DOE should --

25 >> JUDGE ROSENTHAL: Ms. Young, as I read

1 their motion, it was strictly raising legal issues. I
2 didn't see the factual dispute that they raised at all.
3 Again, they were claiming and as I understood it, that
4 under the provisions of the Commission regulations all of
5 the license support documents had to be on the LSN as a
6 precursor to certification.

7 Now, for the life of me, I don't
8 understand your first point that their factual disputes
9 were raised. I didn't see them as I read their paper, but
10 I perhaps was missing something.

11 >> MS. YOUNG: What the staff was
12 referring to is the phrase "core technical documents" to
13 the extent that Nevada claims that certain core
14 information is missing from DOE certification. That is a
15 factual issue.

16 And you've heard an argument this
17 morning that DOE doesn't necessarily adopt that definition
18 that's implied by Nevada's filings. So, there is a
19 factual dispute, but the staff also agrees with you there
20 is a legal dispute in terms of document material.

21 >> JUDGE ROSENTHAL: You say there's a
22 factual dispute. How should the Board proceed at this
23 point in resolving it? We're hearing this morning oral
24 arguments. This is not an evidentiary proceeding in any
25 respect. I thought we were hearing argument on

1 essentially legal issues, namely the interpretation,
2 again, of a Commission regulation.

3 Now, you're telling me that the motion
4 raises factual disputes and I'm asking you what should the
5 Board do at this juncture to resolve it. Certainly, we're
6 not resolving in the context of this oral argument that
7 we're having this morning. What should we be doing to
8 resolve what you say are factual disputes that are raised
9 by this motion?

10 >> MS. YOUNG: I think the Board in part
11 has already done what it can do to address the factual
12 issues. We pose questions to DOE with respect to the
13 completeness of its LSN collection, the number of
14 documents that it plans on completing for both processing
15 in LSN and to support its license application.

16 So in terms of factual questions, you've
17 already done that through your order to DOE. And DOE has
18 provided you that information and actually expanded that
19 information during the argument this morning.

20 >> JUDGE ROSENTHAL: Based on what you've
21 heard this morning, what is your conclusion as to how the
22 Board should resolve these factual disputes? You say
23 we've elicited all that we need to elicit in order to
24 resolve it.

25 What's the staff's position as to the

1 appropriate resolution of these factual disputes that you
2 say are raised by the motion?

3 >> MS. YOUNG: As indicated by our
4 filings, we didn't take a position on all the facts.

5 >> JUDGE ROSENTHAL: I'm asking you --
6 you've been here and presumably you've heard the argument
7 this morning. You've told me, I thought, that we've now
8 elicited all that we need to elicit in order to resolve
9 these factual disputes that your filing said were raised.
10 Now, you've heard what's been said. How, in your staff's
11 view on the basis of what's transpired this morning, how
12 should we resolve these factions?

13 >> MS. YOUNG: Well, unfortunately, I
14 haven't heard Nevada's rebuttal which may or may not agree
15 with everything DOE said in terms of the percentage of
16 completion of LSN document processing.

17 For example, I do believe Mr. Shebelskie
18 indicated that they were somewhere between 60% to 98%
19 complete in some activities. I don't know if Nevada has a
20 retort to that, but if you were to accept that as a
21 statement of fact with respect to the completeness of
22 DOE's LSN collection then the staff would not -- would be
23 of the view that there is no basis to conclude that the
24 LSN certification by DOE would be incomplete based on
25 those facts.

1 >> JUDGE KARLIN: If I may follow up on
2 that. On page six of your brief, you characterize
3 Nevada's argument; I think accurately. It says, "Nevada
4 asserts that under sub part J supplementation requirements
5 do not allow DOE to defer completion of many key technical
6 documents until after its initial certification." And you
7 say Nevada's position is not correct. So, if that's true,
8 legally you're saying, "Nevada, you're wrong." DOE can
9 supplement and it doesn't have to finish all of its key
10 documents at the outset.

11 If that's true, isn't that dispositive?
12 We don't have to listen to anything here today. We don't
13 have to argue about how many documents it hasn't
14 completed. If the law is they don't have to complete
15 them, then that's the end of the game and the staff has
16 taken the position that DOE wins.

17 >> MS. YOUNG: Well, the staff's view was
18 twofold. One, there is the intent of the LSN rule and the
19 Commission statements then promulgate the rule clearly
20 indicated that there was expectation that the parties
21 would extend good faith efforts to do what they could to
22 make documents available and that six months would be
23 generally a reasonable period to make such information
24 available.

25 But as the rulings of the Commission and

1 ruling on whether the draft license application from the
2 DOE should be required to be included in the LSN indicates
3 and those statements and rulemaking also indicate that
4 there was an expectation that DOE's efforts toward
5 preparing this license application would be ongoing and
6 there would be additional information created.

7 There's also no expectation that a draft
8 license application or information that constitutes a
9 draft license application would necessarily be required to
10 be included in the LSN at the time of certification.

11 >> JUDGE KARLIN: Right, but it seems to
12 me if you have legal position as such, then you're
13 slam-dunk; DOE wins because everyone agrees or you agree
14 that they don't have to make these documents available, so
15 they don't have to worry about how many of them. If
16 they're incomplete documents, they don't have to make them
17 available.

18 >> MS. YOUNG: But the question remains
19 has DOE engaged in good-faith efforts?

20 >> JUDGE KARLIN: What do we use for good
21 faith? They knowingly did not make these documents
22 available. They knew that they weren't complete. They
23 said ahead of time -- Nevada asked this question ahead of
24 time, "Oh, do you have to complete them? They're frozen."
25 They said, "No, we don't take that position at all." So,

1 it was a knowing position taken. How does the good faith
2 come in there?

3 >> MS. YOUNG: The question is whether
4 DOE knowingly withheld information or postponed completion
5 of documents.

6 >> JUDGE KARLIN: Okay. So, we would
7 focus on knowingly postponing. That's not bad, but how do
8 we apply --?

9 >> MS. YOUNG: Nevada hasn't provided
10 any information along those lines.

11 >> JUDGE KARLIN: How would we apply
12 that? That they knowingly refused to complete a bunch of
13 documents that were on the verge of completion, but they
14 intentionally just held off so that they could -- I mean,
15 they intentionally have not filed these documents. I know
16 they're not filed, because they're not complete, they say.
17 How do we know their motives? How are we going to
18 evaluate their motives for them being incomplete?

19 >> MS. YOUNG: Well, in terms of good
20 faith, it's not so much DOE's motives, but an objective
21 showing of whether information about DOE's plans for the
22 repository has been made available via LSN. Only DOE can
23 tell you; the staff cannot.

24 The number of documents they've made
25 available, when they hit the LSN, what the nature of the

1 information contained in those documents; vis-a-vie the
2 nature of the information to be included in additional
3 documents.

4 >> JUDGE KARLIN: Let's follow that one
5 along. I know that you all took the position in your
6 brief that we might -- it's not quite what was
7 characterized before, but we might hold an abeyance of
8 ruling on this motion to strike until six months from now
9 when the license application is submitted and then
10 evaluate whether there was -- whether they played "gotcha"
11 at the end of the game. Isn't that what you were kind of
12 --?

13 As opposed to the alternative, which I was
14 asking questions about which is what if we deny this
15 motion to strike today or tomorrow or whatever and at the
16 license application stage -- this is the question I asked
17 Mr. Shebelskie, I think. New information, 790 documents
18 suddenly come out and can State then file a motion to
19 strike the original certification at that point based on
20 that information?

21 >> MS. YOUNG: I think it depends on how
22 the Board rules on the motion at this juncture.

23 >> JUDGE KARLIN: But legally, you would
24 say we could rule that way?

25 >> MS. YOUNG: For example, if the Board

1 were to rule that you're denying or not ruling on Nevada's
2 motion or somehow holding in abeyance as a ruling that
3 would determine to do it at a later date. If you're
4 saying that they denied the motion at this time without
5 prejudice to Nevada raising it again, should circumstances
6 be presented that indicate there was somehow deficiency in
7 Nevada cert -- excuse me, DOE certification.

8 Basically, it's very difficult for the
9 staff to speculate on all these conditions because again
10 these parties really are in a much better position to
11 understand what information they need to write a
12 contention on one hand and what DOE plans on using with
13 this license application.

14 Just to clarify, I don't think the
15 regulations require DOE to include everything that they
16 might anticipate using at this point. I think the
17 Commission rulings are clear that --

18 >> JUDGE KARLIN: If I may ask my question. I
19 think that's not my point. My point is that staff is
20 acknowledging that if we -- depending on how it's written,
21 it could be that the State could file a motion to strike
22 the original certification later if new information came
23 out that the initial certification was somehow not done in
24 good faith. And the staff would not take an absolutist
25 position that that's impossible. It's been done.

1 >> MS. YOUNG: It's extremely difficult
2 to speculate what circumstances and facts may present
3 themselves in the future.

4 >> JUDGE KARLIN: Okay.

5 >> MS. YOUNG: Getting back in terms of
6 the position the staff has taken in this proceeding, the
7 elicitation of the requirement to make documented material
8 available presented by Nevada is problematic from the
9 extent that they rely on the assumption that everything a
10 party intends on relying in a proceeding should
11 automatically be included at the time of LSN
12 certification.

13 And as I was trying to interject in
14 answering your question before, I think the Commission has
15 made it clear it both in statements of consideration and
16 in ruling on protecting Nevada's request that DOE make the
17 draft license application available; that it is clear that
18 Class 1 and Class 2 documents that so-called "reliance
19 information" those things you intend to rely on or cite
20 and those things that may be non supporting of your
21 position don't necessarily have to be identified at
22 certification. That you may find that information is not
23 even clearly understood or circumscribed until the time
24 contentions are filed.

25 So, it's difficult to say everything

1 that a party projects in the future that they might use in
2 a proceeding necessarily should be made available in LSN
3 prior to certification. I think that the staff would
4 suggest that that's a reasonable interpretation of these
5 rules because, again, this is discovery which only has
6 with respect to LSN and the high level waste repository
7 that time period where information is made available in
8 the front end of the process, but should not necessarily
9 usurp the traditional discovery practice of you really
10 only make available what's created at the time. You don't
11 necessarily write a reservation for things that you might
12 produce in the future.

13 >> JUDGE KARLIN: Can I ask the staff,
14 you mean one remedy, perhaps, is the filing of new or
15 amended contentions when new information becomes
16 available; 2.309C, 2.309F2. You acknowledge that that
17 would be a way for the State or any other intervener to
18 deal with information that only becomes available late in
19 the game?

20 >> MS. YOUNG: Certainly. I think the
21 provisions are clear in Part 2 with respect to more
22 information that those state a deadline for filing a
23 contention to intervene. I believe the sections you were
24 discussing with Ms. Ginsberg earlier indicated that once
25 you get to a position where the deadline for submitting a

1 contention has expired; i.e. the contention would be late,
2 although the words are not used in the Reg, there would be
3 circumstances which would justify submitting that.

4 But the staff is a little reluctant to
5 go too far into the late contention field because the
6 jurisdiction in this ward with respect to ruling on
7 disputes and the discovery phase and it could be that if
8 you were to fashion a remedy that relies heavily on the
9 late filing provisions that currently is not part of this
10 Board's jurisdiction in this case.

11 You're not pointing panel to rule on
12 contentions, but there's no reason you can cite that
13 that's something that might give Nevada an appropriate
14 remedy down the road.

15 >> JUDGE KARLIN: Well, I think if we're
16 faced with a problematic -- a serious problem that
17 interveners would be seriously disadvantaged by denial of
18 this motion. It would not have an opportunity to file
19 contentions later if new information becomes available.

20 It might give us pause about what to do
21 about the motion, but that the existence of the ability to
22 file new and amended contentions later is that we are not
23 going to necessarily rule on that.

24 The later Boards would have to rule
25 what's timely and what isn't. But I think timeliness is

1 going to have to be a pretty broad category in those days.

2 >> MS. YOUNG: Certainly, but the rules
3 themselves that the staff's mentioned in the filings both
4 this summer and most recently on this motion have that
5 self executing remedy for failure to certify
6 appropriately. That is the six month delay in docketing
7 the application by the staff.

8 >> JUDGE MOORE: Ms. Young, your time is
9 up. Please wrap up.

10 >> MS. YOUNG: Basically, the staff's
11 position is that DOE's certification should be judged on
12 the standards of the regulations, which do not require
13 that their efforts with respect to preparation of the
14 license application be frozen at this point. That DOE
15 must demonstrate that they have in good faith complied
16 with the regulations in Nevada; on the other hand must
17 indicate facts that demonstrate that somehow this
18 certification is invalid. Thank you for your time.

19 >> JUDGE MOORE: Thank you. I think
20 before we get to Mr. Fitzpatrick's brief rebuttal, we will
21 take a very brief recess; 10 minutes. We will reconvene
22 at 11:05. Thank you very much. 12:05, I'm sorry.
23 Wishful thinking.

24 >> JUDGE MOORE: Mr. Fitzpatrick, we'll
25 now hear your rebuttal. You reserved 20 minutes. I'm

1 sure you won't need all of it, but please proceed.

2 >> MR. FITZPATRICK: Hopefully, I'll get
3 some of it this time. Let me start with the last thing
4 first. As far as Judge Karlin's discussion -- I think it
5 was the most frequent discussion -- was that of Judge
6 Karlin regarding the concept of a series of filings of
7 documents over time henceforth and maybe parties could
8 avoid being prejudiced by that if they were in accordance
9 with the rules allowed to file late contentions and, of
10 course, then there'd be discovery of contentions.

11 I guess my thought is that that would
12 almost guarantee that the NRC could never make the three
13 year allocated time frame and the second part of the
14 observation is -- and that's precisely why the LSN was
15 adopted starting in 1989; was to get the discovery up
16 front to supplant, not supplement. It doesn't say
17 supplement and it doesn't mean supplement. It says
18 supplant the traditional discovery post-LA with discovery
19 pre-LA. And that's why in order to allow contentions and
20 allow NRC to get its three year deal done --

21 >> JUDGE KARLIN: Are you saying that the
22 state of Nevada can't file contentions after the 30th day
23 after docketing? New contentions can't be filed? You're
24 not going to use that?

25 >> MR. FITZPATRICK: That would depend on

1 the circumstances at the time. Okay. I'll come back to
2 the rule because there's a couple things I need to talk
3 about, but let me just touch on the documents that exist.

4 First of all, I think it's fair to say
5 that the Board has to force itself to make a black or
6 white decision. Either the rule means one thing or the
7 rule means something else. What it does not mean is that
8 there's a sliding scale and that it's a subjective
9 decision and if there's lots of documents up, then maybe
10 it's good certification. If there's lots of documents
11 missing, maybe it's not a good certification.

12 There's no basis -- I mean, we can argue
13 about what the Reg means, but no one argues that it's a
14 sliding scale. And the problem with that -- Judge
15 Rosenthal posed an excellent hypothetical and that's sort
16 of a classic Socratic way to test the meaning of a
17 regulation. I think it was sort of make believe you have
18 one document out of 10,000 that you know and intend you're
19 going to rely on, could you certify? And could you then
20 use the supplementation provisions to put the other
21 999,000 in later on?

22 Well, there's a yes or no answer to that.
23 DOE's counsel didn't answer it, but went into, "Well,
24 that's not the situation we're in." Of course, it's
25 nowhere near whatever that would be; a tenth of 1%. It's

1 closer to 80% or 90%, so that's not a valid hypothetical.

2 It is a valid hypothetical because the hypothetical is
3 used to test what the law is and what the law says.

4 And so, the law either requires that DOE
5 as Nevada's position -- that DOE is required to have all
6 documents it intends -- it knows and intends to rely on at
7 that time, done and on the LSN before it certifies. We've
8 already discussed how it can supplement later with
9 documents it did not know about at that time. But for
10 Judge Rosenthal's hypothetical to be accepted as the
11 interpretation, that there is no -- and DOE's
12 interpretation -- there is no particular level of
13 documentation that's required at all. We can certify
14 whenever we want with as much or as little --

15 >> JUDGE ROSENTHAL: Mr. Fitzpatrick,
16 about the DOE's source -- the goose is source for the
17 gander. They say that if you're right, it would mean that
18 within 90 days after their certification every other
19 potential party including Nevada would have to have
20 concluded all of its preparation and got all of its
21 documentary material on the LSN and they say that that's
22 in effect.

23 They say they can't have been the
24 intention of the Commission because that would have
25 imposed an enormous and unwarranted burden both upon

1 Nevada and upon any other potential party.

2 So, I think I would be interested in
3 your response to that because, frankly, from my standpoint
4 that is a little more persuasive than simply their
5 reference to "generated and acquired". I didn't think
6 that that necessarily answered your position, but I am
7 troubled by their second point.

8 >> MR. FITZPATRICK: The regulations do
9 apply equally to everyone. No question about it. There's
10 no exception for the others and, of course, the critical
11 point again, as is the critical point of what must be on
12 the LSN at certification and what must be or was allowed
13 to be supplemented is your knowledge that you intend to
14 rely on. So, it is likewise true for the other parties
15 that they must certify in 90 days after --

16 >> JUDGE ROSENTHAL: They decide when
17 they are going to certify. In your view, they have to
18 have all of their documents on the LSN; all of their
19 documentary material, all of the things that support their
20 license application. Okay. So they have a date.

21 That means that everybody else within 90
22 days from that time they have had nothing to do with what
23 date DOE selected. They're all in a position where 90
24 days later they have to, in order to certify under your
25 thing since it applies to everybody the same rule, they

1 have to have completed all of their preparation, have all
2 their documentary material available. And that seems to
3 me to have DOE setting the deadline for everybody else in
4 that way.

5 >> MR. FITZPATRICK: Well, if you
6 interpret it that way and probably DOE would, that's what
7 would be required. That shows the idiocy of the proposed
8 interpretation where DOE can certify with one document
9 done and then it could trigger the others'
10 responsibilities 90 days hence to put up all their
11 documentary material.

12 >> JUDGE ROSENTHAL: No, no. They would
13 be required to put up all of their documents only under
14 your interpretation. Under their interpretation, the only
15 documents that have to be made available -- the only
16 documents that have to be on the LSN at the time of
17 certification are the documents that are extant. So that
18 the other parties after certification can continue to
19 their preparation, continue to generate documents.

20 Under your interpretation as I
21 understand it, once DOE certifies -- now they couldn't
22 certify until all of their documentary material that they
23 are going to rely on was on the LSN, but once they did
24 that, everybody else at the end of 90 days would have to
25 have completed their preparations, have all their

1 documentary material on the LSN because that would be the
2 same precondition to their certification as it was to
3 DOE's.

4 >> MR. FITZPATRICK: That's not a correct
5 interpretation because there wasn't a requirement in the
6 first place for DOE to have every document on. It was the
7 documents they know and that they will rely on. The same
8 requirement would be placed on the others in 90 days. The
9 documents they know they will rely on.

10 Now, we can obviously observe that in 90
11 days after certification there isn't even a license
12 application filed. This is a great illustration. I'm
13 glad you brought this up. We can agree that the TSPA
14 won't be done in 90 days after their certification nor
15 will the pre-closure safety analysis.

16 And so, yes, there is a requirement on
17 the other parties to act in the 90 days, but the action of
18 those parties is, as it was for DOE, to certify that which
19 they know they expect to rely on in the licensing
20 proceeding.

21 >> JUDGE ROSENTHAL: They may not have
22 completed their investigation at that point of the matter
23 that's already on the LSN and yet they're supposed to have
24 everything that they are going to rely upon in opposing --

25 >> MR. FITZPATRICK: Everything they

1 know they're going to rely on, Your Honor. And that's why
2 it's so impossible to admit an interpretation of the rule
3 that allows DOE to submit major documents after the
4 deadline for the other parties' LSN certifications. That
5 doesn't make sense.

6 The problem is that the basic rule
7 requires that DOE place on the LSN that which it knows
8 it's going to rely on. There's a good faith test that's
9 been agreed by all parties in the PAPO Board. There is a
10 common sense test referred to Judge Moore before and so if
11 you utilize Judge Rosenthal's hypothetical as an
12 interpretation of the statute that's not good faith and
13 that's not common sense to suggest that a party could put
14 one document up and then 9,000 more could be done later on
15 by supplementation.

16 That would defeat the entire purpose of
17 the LSN to create six months of pre-LA discovery where all
18 the documents of DOE are available to all the parties.

19 Now, the other parties do have a
20 requirement to certify their LSN databases 90 after DOE
21 does. The content of those databases is quite simply
22 determined by the rule 2.1003 and 2.1001. In other words,
23 those other parties have to put up that which they know
24 and intend to rely on in the licensing proceeding.

25 They may be in a tough position to

1 the declaration of Dr. Thorne as to what's missing. He
2 was very specific. He addressed the SEIS that was offered
3 in October and what's missing as far as vis-a-vie the
4 final TSPA. But, argument of counsel that we gave him
5 lots of stuff is unavailing. That's not evidence, but
6 it's also not correct.

7 Would you punch up number 96, please?

8 Document 96 is a March 12th of this year 2007 summary of
9 the TSPA by Peter Swift, who is one of the high-ranking
10 science people on the DOE team. About two-thirds of the
11 way down the page he has in this chronology of TSPA: "TSPA
12 works since 2002. All TSPA work since 2002 is unpublished
13 and all is categorized by the DOE General Counsel is
14 privileged in anticipation of future litigation. No
15 results have been presented in public since 2002. All
16 TSPA related material provided to this panel post dates
17 the FEIS which was in the docket in 2002 must be treated
18 as privilege." So, okay.

19 This is done March this year and
20 basically says for the last five years we have had a cover
21 on the TSPA.

22 >> JUDGE KARLIN: Let me ask you on that.

23 We've looked at that. If you're -- if there is extant
24 documents that are being referred to that are being
25 claimed for privilege that you think is an illegitimate

1 privilege, I assume your motion to strike could be based
2 upon this document production as inadequate because they
3 have over claimed privilege on documents that don't
4 classify for that. And you can move to strike on that
5 basis, but you didn't.

6 >> MR. FITZPATRICK: We'll be making lots
7 of motions with respect to privilege claims. The point
8 I'm rebutting --

9 >> JUDGE KARLIN: But my point is that
10 you're arguing that this is a problem. If it is a
11 problem, then that goes to you to raise it; just a move to
12 strike because documents which should have been made
13 available have been claimed to be privileged and they're
14 not. You can also file a motion to compel later, but
15 that's not what I hear you arguing today. You're filing a
16 motion to strike and you didn't use this ground.

17 >> MR. FITZPATRICK: Your Honor, I know
18 my remedies for documents withheld false claims of
19 privilege and we'll follow those. That was not the point.
20 As I said the point was rebutting Mr. Shebelskie's unsworn
21 testimony that DOE has been forthcoming throughout with
22 TSPA information.

23 >> JUDGE KARLIN: Well, maybe those
24 documents warrant the privilege and maybe they don't. I
25 don't know. I think DOE and everyone recognizes here that

1 some of those documents have not been made available.

2 >> MR. FITZPATRICK: Five years worth of
3 documents have not been made available and --

4 >> JUDGE KARLIN: Some core critical
5 documents have not been made available; the TSPA and pre-
6 closure safety analysis. Those are critical, you say, and
7 they haven't been made available. That's a factual -- we
8 don't need to dispute that.

9 >> MR. FITZPATRICK: No dispute except
10 with respect to the statement that they have been
11 forthcoming and that all this information is in Nevada's
12 hands and they should be doing their contentions right
13 now. It's rebuttal to that.

14 A second rebuttal to that is Document
15 99. The other big document that's missing right now is
16 that the TSPA.

17 >> JUDGE MOORE: I'm sorry. What exhibit
18 number is that please?

19 >> MR. FITZPATRICK: 99. It's exhibit -
20 - it's a memo --

21 >> JUDGE MOORE: Before you go on to that
22 one, are the documents in your prior exhibit in which you
23 referred to in your motion, are those matters that there
24 is a bibliographic header only for all that documentation?

25 >> MR. FITZPATRICK: I believe so.

1 >> JUDGE MOORE: Okay. Thank you.

2 >> MR. FITZPATRICK: The second point
3 with respect to this document number 99, this is a
4 response to an inquiry from Sandia, the contractor in May
5 of this year. It says at the top, "The lead has asked
6 whether the draft TSPA-LA AMR, which is the compendium of
7 all the AMR's, the TSPA-LA cannot be done without this
8 AMR. It is one of the most critical documents. Whether
9 the AMR and technical input documents for the TSPA are
10 privileged."

11 You can scroll down halfway through the
12 next paragraph to the answer. "The draft TSPA-LA AMR and
13 drafts of any technical input documents not required or
14 released under FOIA, not required to be made available in
15 the LSN. Withholding these documents from non Yucca
16 Mountain personnel be consistent with the protective
17 status of these documents."

18 So again, this is in response to the
19 openhanded, forthcoming. It's very subjective that Nevada
20 doesn't need more time, but the real point of interest as
21 far as going back to the interpretation of the Reg, the
22 second paragraph here when they're not in the courtroom
23 and stating what their litigation view is of a Reg and
24 what they say what the Reg is, that's when we saw those
25 documents, reams of them, that said we have to have all

1 our technical documents done eight months prior to LA
2 because we have to have them on the LSN six months prior.
3 We have reams of them attached to our motion.

4 Well, this is a brand new '07 document
5 and the rest of the answer about this AMR and so on. Once
6 the technical document, such as an AMR or TDW, is
7 finalized we no longer draft and therefore no longer
8 exempt from disclosure on FOIA.

9 It goes on to say "similarly if the
10 document meets the criteria for documentary material in
11 10CFR 2.1001, the final version of the document must be
12 included on the LSN at the time of DOE certification."
13 That's our point. That's one of our points; that the
14 TSPA-LA AMR is a critical mammoth document, a road map to
15 the TSPA, a compendium of all the other AMR's.

16 It must have been -- they knew they had
17 to do it. They knew they had to rely on it. They
18 themselves outside the courthouse say that when it's done,
19 the final version of the document must be included on the
20 LSN at time of DOE's certification. That's come and gone.
21 It wasn't on there. It isn't done. It's not going to be
22 done for a while.

23 So, Doctor Thorne has given a laundry
24 list of reasons in his affidavit as to why. What they
25 finally came out with after hiding the TSPA for five

1 years, why they came out with a TSPA SEIS. And as Judge
2 Moore observed, he goes through things about the
3 inadequacy of the SEIS to be a predictor of what will be
4 the final TSPA.

5 But the point is that those points are
6 unrebutted by any testimony except argument. I think
7 something was brought up about the past tense by several
8 people. We need to talk for a minute about the past
9 tense. That discussion is in 2.1003A.

10 The point being made by the proponents
11 of the point is that when the rule goes on to say that
12 "all documentary material must be made publicly available"
13 and then it has the qualifier that says "all documentary
14 material generated or acquired by DOE" -- by the party --
15 let's say DOE in this instance.

16 They say the use of the past tense
17 "generated" or "acquired" absolutely proves that what was
18 up in the air and what was decided at that point was are
19 we talking about only documents that already exist. I
20 submit that's not a common sense interpretation.

21 It's unimaginable that the framers of a
22 regulation would sit in a room and say it's probably going
23 to be a big dispute over whether DOE has to put up
24 documents that exist and documents that don't exist or
25 whether they only have to put up documents that exist.

1 So, we'll say make it clear that they
2 only have to put up documents that exist already. And so
3 we'll put it in the past tense. The real meaning, the
4 obvious meaning of why they put that was because there
5 would predictably be tension between --

6 >> JUDGE MOORE: Please close up. Your
7 time has expired.

8 >> MR. FITZPATRICK: There would be
9 predictably tension between whether a party had to put up
10 just documents it generated or all documents in its
11 possession. That's why it adopted "you have to put up all
12 documents generated or acquired". That's buttressed by
13 the NRC Fed Reg in June 2004 that has 2.103 which said
14 "the definition of documentary material includes material
15 prepared by an individual participant. It also includes
16 other material in the possession of the participant. This
17 provision can be read to obligated party who possesses a
18 document prepared by another to make that document
19 available on the LSN even though it is already available
20 on the LSN document server the party who prepared the
21 document."

22 For example, the document prepared by
23 DOE would not only need to be available through the
24 website from DOE LSN, but also from LSN document
25 collection server of the other participant. So, in other

1 words, they were saying and they went on from that point
2 -- in other words, they drew the conclusion that the rule
3 as worded requiring documents generated by or acquired by
4 a person would result in multiple sets of the same
5 document especially ones staged from the parties.

6 That's the vice that they discovered
7 with that and they went on to say therefore, we're going
8 to make a rule that if it's already up on the LSN, you
9 don't have to put a second or duplicate copy up. So, that
10 makes it clear that the purpose of the acquired or
11 generated language there was simply to make it clear that
12 a party had to put up -- actually it would be a duplicate
13 the party had to put up, all the documents in its
14 possession, whether it was generated or required by that
15 party. Thank you.

16 >> JUDGE MOORE: Your original exhibit 27
17 which you put on the screen under a different exhibit
18 number, I believe, because I believe it was in the
19 supplementary materials you filed in regard to the point
20 you were just making that it appears to be essentially a
21 legal opinion. Who is the author of that document?

22 >> MR. FITZPATRICK: The document that --
23 that second paragraph that I read? That is the entire
24 document. The header doesn't tell an author. It has a
25 date. The search result when you find that, it identifies

1 the document as a 5-22-07 memo, but it doesn't give more
2 detail.

3 >> JUDGE MOORE: Thank you. The Board
4 will take the matter under advisement. I would like to
5 remind all participants, all potential parties that
6 dependency of the challenge of DOE certification does not
7 stay any other potential party's time for complying the
8 requirements of 10CFR Sections 2.1003A and 2.1009.

9 We have stated that previously in case
10 management orders. I wanted to make sure that I called it
11 to your attention again.

12 And with that, we will stand adjourned.

13 Thank you all very much.

14 (Whereupon, the foregoing matter was
15 concluded at 12:30 p.m.)

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

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