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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the Matter of :  
 : Docket No. PAPO-00  
U.S. DEPARTMENT OF ENERGY :  
 : ASLBP No. 04-829-01-PAPO  
(High Level Waste Repository: :  
Pre-Application Matters) : February 28, 2008  
 :  
----- X

Two White Flint North  
ASLBP Hearing Room  
T-3B45  
11545 Rockville Pike  
Rockville, Maryland

BEFORE:

- THOMAS S. MOORE, Chairman
- ALEX S. KARLIN, Administrative Judge
- ALAN S. ROSENTHAL, Administrative Judge

## 1 APPEARANCES:

2 On behalf of U.S. Department of Energy:

3 MICHAEL SHEBELSKIE, Esquire

4 DONALD P. IRWIN, Esquire

5 Hunton &amp; Williams

6

7 On behalf of State of Nevada:

8 CHARLES FITZPATRICK, Esquire

9 JOE EGAN, Esquire

10 Egan, Fitzpatrick, Malsch &amp; Cynkar

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

2 (9:00 a.m.)

3 JUDGE MOORE: Please be seated.

4 Good morning. I'm Judge Thomas Moore.

5 On my left is Judge Alan Rosenthal. On my right is

6 Judge Alex Karlin.

7 The Pre-License Application Presiding  
8 Officer Board is hearing argument this morning on  
9 the Department of Energy's January 28th motion to  
10 strike the State of Nevada's January 17th  
11 certification that it had made available on the LSN  
12 and all of its documentary material.

13 The argument this morning is being  
14 recorded on the DDMS system. The terms for the  
15 oral argument were set forth in our February 19th  
16 order. Pursuant to that order, the Department of  
17 Energy shall have one hour for argument and may  
18 reserve up to fifteen minutes for rebuttal; to be  
19 followed by the State of Nevada that will have one  
20 hour of argument.

21 Would counsel now please identify  
22 themselves for the Court Reporter?

23 MR. SHEBELSKIE: Your Honors, on behalf  
24 of the Department of Energy, I'm Michael Shebelskie

1 with Hunton and Williams, counsel for the  
2 Department of Energy.

3 MS. CROSSLAND: And I'm Martha Crossland  
4 with the Department of Energy's Office of General  
5 Counsel.

6 MR. FITZPATRICK: I'm Charles Fitzpatrick  
7 representing the State of Nevada with the firm  
8 Egan, Fitzpatrick, and Malsch.

9 MR. HERSH: And I'm Merrill Hersh, also  
10 representing the State of Nevada for the law firm  
11 of Ross, Dixon and Bell. Also present is my  
12 paralegal, Ms. Laurie Borsky.

13 JUDGE MOORE: Mr. Shebelskie, you may  
14 proceed.

15 MR. SHEBELSKIE: Thank you, Your Honor.

16 JUDGE MOORE: How much time do you wish  
17 to reserve for rebuttal?

18 MR. SHEBELSKIE: I would like to reserve  
19 fifteen minutes.

20 JUDGE MOORE: And I would remind counsel  
21 that rebuttal is for that purpose only, to respond  
22 to arguments made this morning by your opponent.

23 MR. SHEBELSKIE: Yes, sir.

24 JUDGE MOORE: Please proceed.

1 MR. SHEBELSKIE: Yes, sir.

2 Your Honors, the Department of Energy  
3 moves to strike Nevada's -- has moved to strike  
4 Nevada's certification because upon our review of  
5 the documents they have made available on the LSN,  
6 it is quite apparent to us that they have not made  
7 a substantial good faith effort to make available  
8 all their existing documentary material.

9 In order to under -- to be the frame --  
10 in order to elucidate for the Court the nature of  
11 their production, I would like to refer the Court  
12 to exhibit, DOE Exhibit Z, which starts on PDF page  
13 38.

14 What that will show when you pull it up  
15 is we went to Nevada's LSN collection and we sort  
16 of did a search on their document collection for  
17 the documents that predate the retention of  
18 Nevada's outside licensing counsel. We know from  
19 the materials already in the record that the  
20 outside counsel was hired on September 11th, 2001.

21 In their pleadings, Nevada said, well,  
22 their experts really were not brought on board  
23 until starting in 2003. But nonetheless, to be  
24 conservative, we said let's do a search for all

1 documents that predate September 11th, 2001. And  
2 there's the screen shot of the LSN search engine  
3 looking for Nevada's collection for everything  
4 predating September 2001.

5           If will you go forward two pages in that  
6 exhibit, please, will you see the -- back -- the  
7 first screen shot of the hit, you get 3,172  
8 documents. What that means, then, of the  
9 approximately, 47 or 4,800 documents Nevada has  
10 made available, almost 3,200 of those actually were  
11 documents before the retention of their counsel,  
12 before the retention of their team of experts to  
13 prepare for the licensing procedure. Many of those  
14 documents, by the way, of the approximately 3,200  
15 actually predate even 1900.

16           And if you go to Exhibit Y, please, which  
17 starts on PDF page 31, this is a screen shot of our  
18 search where we -- you can see from the date range,  
19 we picked up all documents prior to December 31st,  
20 1989. And if you go forward to pages in that, on  
21 the top line, will you see that you get 963 hits.  
22 And many of those documents, when you look at the  
23 results, there you will see documents from the  
24 1970s, '60s, and even '50s.

1           So contrary to Nevada's representation  
2 that unlike us they didn't have any old documents  
3 that predated really their licensing preparation  
4 efforts, really three quarters of their collection  
5 does.

6           JUDGE ROSENTHAL: If I may interrupt. I  
7 speak for myself only. Seems to me that you have  
8 made a prima fascia case or arguably at least, have  
9 made a prima fascia case that there are documentary  
10 materials that Nevada should have had on the LSN  
11 but have not placed them on the LSN.

12           Nevada has come back and said, no, all of  
13 the documents that should be on the LSN are on the  
14 LSN.

15           Now, that presents, it seems to me, a  
16 factual issue. You are claiming, based upon what I  
17 think, I least for me is largely speculation, maybe  
18 just a fiber of speculation, that there are  
19 documents that should have been on the LSN that are  
20 not. And we have Nevada saying, no, all of our  
21 stamped documentary material is on the LSN.

22           Now, my question for you is, how do you  
23 think that the Board should address this factual  
24 issue? Do you think we should be having a trial or

1 what, because as far as I can see, the basis of  
2 what is before us, what you have presented and what  
3 Nevada has presented, there is a factual issue that  
4 simply cannot be resolved on the basis of this oral  
5 argument this morning?

6 MR. SHEBELSKIE: Well, Your Honor, I have  
7 two general responses. First, I think the Board  
8 can, based on the present record and materials  
9 before it, make the determination that Nevada has  
10 not, in fact, produced all its documentary  
11 material, because they have misapplied the  
12 governing legal standard.

13 JUDGE MOORE: Where did you raise that in  
14 your motion?

15 MR. SHEBELSKIE: As we said in our brief  
16 on the second half of the legal argument section,  
17 we pointed to the fact what Nevada had said in its  
18 briefing to the Commission on its appeal to -- on  
19 the denial of its motion to strike that it was not  
20 going to be able to make documents available,  
21 because it would not know what its positions are in  
22 the proceeding because it has not made available --  
23 it has not had access to the TSPA final version or  
24 to the LA. And until that point, it could not

1 possibly know what its positions are.

2           Now, contrast that statement, that  
3 position that they have put forth in pleadings with  
4 what we know that the head of the Nevada agency has  
5 said on numerous occasions, and that is Nevada's  
6 experts have been working for the past several  
7 years doing two major activities. One is reviewing  
8 and critiquing our work --

9           JUDGE MOORE: And that, for whatever it  
10 is worth, is basically putting it most  
11 diplomatically puffery. I mean, we have to be very  
12 careful here about those who live in glass houses  
13 throwing stones. I mean, if we are going to go  
14 back and look at all of DOE statements about when  
15 they were going to file an application, we can get  
16 into this. I don't think it gets us anywhere.

17           My point is simply that on page 31 of  
18 your motion, the closest you come to challenging  
19 what Nevada has said as to the propriety of -- your  
20 challenge to the propriety of their putting --  
21 their misconstruing what documentary material is,  
22 is on page 31 of your motion, wherein a listing of  
23 five items you refer to your Exhibit H, which is  
24 your exhibit, that they have seemingly been

1 underinclusive in some documents, which seems to  
2 point at their call memo and the examples in that  
3 call memo.

4           You didn't analyze it. You didn't say  
5 what the rule of law was. You gave us nothing to  
6 go on. You certainly can't tell me that you have  
7 properly raised that issue with that brief  
8 reference of less than a sentence in your motion.  
9 That's where I'm having trouble with this. Had you  
10 raised that, you might then have at least put it  
11 into the context of a legal issue. But now it's  
12 strictly a factual issue, as I see it; and I, for  
13 the life of me, absent a trial, don't see how we  
14 can decide what are, perhaps, disputed issues of  
15 fact.

16           MR. SHEBELSKIE: Your Honor, on that,  
17 take two examples that we -- that we noted,  
18 certainly discussed in the briefs.

19           We noted, for example, the number of  
20 progress reports from two geoscience consulting  
21 firms, Geoscience Management and Geoscience  
22 Consultants. And they showed that what they had  
23 made available showed a paper trail of their work  
24 product up until April 2005, and then the

1 production stops. Yet, the last documentation  
2 shows that their work was, in fact, continuing.  
3 They were still doing experiments, they were still  
4 doing calculations. So there should be documentary  
5 material created in the course of that future work.  
6 It has not been available.

7           We can't tell you, because it does not  
8 ultimately matter, where the breakdown was in  
9 Nevada's system. It does not matter to us whether  
10 the experts misconstrued the guidance and just  
11 forgot to turn it in --

12           JUDGE MOORE: You said "should."

13           MR. SHEBELSKIE: Not should. It is.

14           JUDGE MOORE: Well, you said "should."

15 Your whole brief is premised on speculation that in  
16 your view, under your assumptions these documents  
17 should be there. They have come back and rebutted  
18 your prima fascia case and said, we have looked at  
19 every document, we have applied our standards, and  
20 everything that should be there is there; and they  
21 have taken you to task on some of your searches, et  
22 cetera, et cetera, and showed that some of the  
23 things that you have claimed are supposed to -- are  
24 not there are, in fact, there.

1           That is a classic example of a motion  
2 where you have the burden, and you made arguably a  
3 prima fascia case. That prima fascia case was  
4 rebutted. Now we have disputed issues of fact.

5           Judge Rosenthal's question was, how do we  
6 decide this motion when we have before us  
7 distributed issues of fact without some kind of a  
8 fact trial?

9           MR. SHEBELSKIE: Well, obviously, under  
10 the Subpart J regulations we have no means  
11 available to us to conduct discovery attain access  
12 to their documentary production. All we can do as  
13 a movant then, is look at their production on its  
14 face, juxtapose it against their statements that  
15 they have prepared so far, 2,000 contentions. We  
16 can look at the fact that they have made available  
17 e-mails of one expert. We mention that in the  
18 brief, and I put in as Exhibit AA, collection of  
19 that expert's e-mails. And I would like to pull  
20 that exhibit up for you. That's PDF page 45.

21           Because what that shows you here is these  
22 are the group of e-mails from Aaron Barkatt, this  
23 was the only e-mails from whatever experts that  
24 they produced, and we mentioned there were 50-some

1 e-mails under one heading. And these emails span a  
2 period of 2001 to 2004.

3 Now, it is -- we can look through  
4 examples here -- I want to set the stage, it is  
5 inconceivable -- Nevada already agreed that these  
6 are documentary material, and that we can go  
7 through them with e-mails and look at them later  
8 also to see that these are substantive e-mails  
9 discussing substantive topics, discussing potential  
10 contentions and the grounds for contentions.

11 JUDGE ROSENTHAL: This again,  
12 Mr. Shebelskie, as Judge Moore has indicated,  
13 establishes a prima fascia case. But you are  
14 confronted again with the fact that Nevada has  
15 explicitedly denied that there is any documentary  
16 material that should be on the LSN that is not.  
17 They put forth a denial.

18 Now, for the life of me, I can't  
19 understand how you can suggest that there's  
20 anything but a factual issue before this Board.  
21 You make a claim, you have made a prima fascia case  
22 and you have had --

23 MR. SHEBELSKIE: Your Honor, to that  
24 point, I would agree with you, that if you credit

1 Nevada's denial on its face, that creates a dispute  
2 of fact and would require factual resolution.

3           My point is using these e-mails as just  
4 an example, it can't be with their team of 30 or 45  
5 experts that these are the only e-mails created  
6 over an eight-year period with all that personnel,  
7 the development of 2,000 contentions, given all the  
8 work they don't deny that they have done, that  
9 qualify as documentary material.

10           JUDGE ROSENTHAL: That is a  
11 circumstantial case. But it certainly, it seems to  
12 me, cannot be said that that is dispositive against  
13 the denial. It seems to me that in these  
14 circumstances, given that your case is  
15 circumstantial, that there is an issue of fact that  
16 in order to sustain your motion would have to be  
17 adjudicated in some form. And what I'm getting at  
18 is how, assuming that we conclude contrary to your  
19 view that your circumstantial case does not carry  
20 the day, how do we go forward?

21           MR. SHEBELSKIE: Well, what Nevada has  
22 not told us -- well, then we would need to develop  
23 a factual record to respond to those issues or  
24 concerns or to their purported denials of our prima

1    *facia* case, which obviously, before filing the  
2 motion we have no means available for us to do  
3 that.

4                   For example, with the e-mails, they say  
5 they been telling their experts since 2003 to save  
6 everything, save all their e-mails, not just the  
7 people who got the call memo, but anybody else down  
8 in the chain that they dealt with. What we don't  
9 know is how many e-mails did they collect? Because  
10 they said that --

11                   JUDGE MOORE: Mr. Shelbelskie, you might  
12 have made it a little easier had you asked for  
13 discovery. But you didn't book for discovery, did  
14 you?

15                   MR. SHEBELSKIE: We did not ask for anyh  
16 discovery, Your Honor, but we believe that on it --  
17 what we know from the absence of their production  
18 that they have -- they said they were going to  
19 apply improper standard and then, in fact, -- shows  
20 that --

21                   JUDGE MOORE: Let's take it a step back.  
22 On footnote 117 of your January 28th motion, you  
23 state that, and I quote: "Counsel for DOE  
24 conferred with counsel for the State of Nevada

1 prior to filing the motion. In accordance with 10  
2 CFR section 2.323B DOE certifies that it made a  
3 sincere effort to resolve the issues raised in this  
4 motion but still seeks the relief discussed above."

5           On what date -- now as I see it, that  
6 provision is in the rules in part to alleviate the  
7 very problem which we find ourselves in today.  
8 That if in such circumstances, counsel sit down and  
9 make a sincere effort to resolve these matters  
10 before they bring it to the Board, certainly some  
11 and in this instance, Nevada has pointed in the  
12 three documents that you claim, specifically  
13 claimed were not there, all of them are there,  
14 which demonstrates that maybe there is some wisdom  
15 behind 323B in the regulations. That it will at  
16 least narrow the field, if not eliminate these  
17 disputes.

18           On what date and at what time did DOE  
19 counsel meet with counsel for the State of Nevada  
20 under the 10 CFR 2.323B requirement in your  
21 certification that you comply?

22           MR. SHEBELSKIE: We met on the -- we  
23 conferred for two hours on the morning of the date  
24 we filed the motion. We e-mailed them -- that was

1 a Monday, if I recall. We e-mailed them over the  
2 weekend and said, we have now reviewed your  
3 production; we have questions; we need to confer --

4 JUDGE MOORE: So on the same day you  
5 filed the motion, earlier that day, you met with  
6 DOE. So your motion -- with Nevada. So your  
7 motion was ready to go?

8 MR. SHEBELSKIE: By the way, Your Honor,  
9 when they filed their motion against us in 2004,  
10 they called us within the hour and said they were  
11 filing it. So let's not be too sanctimonious about  
12 this.

13 JUDGE MOORE: Today I only have yours in  
14 front of me.

15 MR. SHEBELSKIE: But what we discussed,  
16 Your Honor, in that conference --

17 JUDGE MOORE: That's what I would like to  
18 get to, what did you discuss.

19 MR. SHEBELSKIE: Right. We discussed --

20 JUDGE MOORE: Well, let me run through  
21 some of the things. I would like to know very  
22 specifically how you complied with 323B.

23 First of all, on page 20 and 21 of your  
24 motion, DOE claims that Nevada did not produce on

1 the LSN three things: A memorandum by Michael  
2 Thorne on volcanic probability calculations; two, a  
3 report on the first phase of something called  
4 cheese ball experiments; and three, a white paper  
5 by Dr. Thorne on corrosion issues.

6 Nevada then on its answer on page 12 says  
7 that had you merely asked for those documents,  
8 which you did not, according to them, they would  
9 have produced them; and in point of fact, they  
10 point out over the next pages of their answer that  
11 all three of those are, in fact, in the LSN  
12 collection, and that your search queries left a lot  
13 to be desired which is why you did not find them.

14 Now, is it accurate what Nevada says in  
15 its answer, that did you not raise with Nevada on  
16 that January 28th meeting those three specific  
17 documents that are, about which you make an issue  
18 of in your motion?

19 MR. SHEBELSKIE: I know we discussed Mike  
20 Thorne documents. We discussed the cheese ball  
21 experiments. Those specific documents I don't  
22 recall, Your Honor. And certainly I would agree,  
23 we did not sit down and go over specifically the --  
24 necessarily any of the specific session numbers or

1 documents in here. So -- let me.

2 JUDGE MOORE: I have gone through your  
3 motion and I have a list of approximately 26 claims  
4 of documents and types of documents. And in the  
5 exhibits you cite, certain inferentially, that that  
6 document is not or class of documents or types of  
7 documents are not there.

8 Now, you may quibble with my listing of  
9 26, but I think it is a fairly accurate number.  
10 Now, I can go through that from one to 26, if you  
11 would like this morning, but let's start by saying  
12 did each of those 26 clearly factual issues that  
13 you were raising in your motion, did you discuss  
14 those specifically with Nevada counsel and in a  
15 sincere attempt to resolve those? Yes or no?

16 MR. SHEBELSKIE: Well, I will say yes.  
17 Now, the exact 26 that you have in mind -- I will  
18 explain the general terms. First we talked about  
19 what were your procedures, the procedures did you  
20 follow. We have gotten three documents from the  
21 City of Las Vegas, they have given to us saying  
22 these were procedures they had got.

23 When we inquired about them, whether they  
24 were authentic, whether there were other copies,

1 Nevada's response was we are not here to provide  
2 you with any discovery, we don't have to answer  
3 those questions. So that was shut down.

4           The whole topic of e-mails, we discussed  
5 very extensively: How come there were only the few  
6 e-mails that are --

7           JUDGE MOORE: What were their answers?

8           MR. SHEBELSKIE: Their answers were  
9 invariably, e-mails are not documentary material,  
10 we are not citing or relying on e-mails, and we  
11 don't have to give you any further information. We  
12 are not here for you to conduct discovery.

13           We discussed the number of documents that  
14 they had, why there were only that number. We  
15 discussed why they were only limited numbers from  
16 the various experts, why the documents from the --  
17 like 2005, '6, '7 were absent. Their general  
18 response was we have applied our standard. We  
19 conducted our review. We are not conducting  
20 discovery.

21           JUDGE ROSENTHAL: If I may interrupt you  
22 a second.

23           On page 15 of its response, Nevada says  
24 the following: "Nevada's counsel entered the

1 conference with the resolution that any documentary  
2 material specifically identified by DOE as lacking  
3 in Nevada's LSN database would be properly  
4 provided. Nevada purposely stated this position at  
5 least five times during the conference so there  
6 would be no ground for the assertion that any  
7 specific document was being refused or that an  
8 impasse would ever be reached."

9 Now is that true?

10 MR. SHEBELSKIE: They said and I'm sure  
11 they said -- and they said multiple times give us  
12 any specific example you can identify of a document  
13 we didn't can make available, we will make it  
14 available.

15 JUDGE KARLIN: Can I then ask a question?  
16 Lacking any discovery, how could you ask for an  
17 e-mail which you didn't know the specific existence  
18 of?

19 MR. SHEBELSKIE: That's our point, Your  
20 Honor. All we could say is there effectively is no  
21 production of e-mails, so we can't tell you there  
22 should be 10,000 or 15,000 or 20,000.

23 JUDGE KARLIN: Did you have any specific  
24 e-mails in your possession of Nevada's that you

1 thought were documentary material but they had  
2 failed to put on the LSN?

3 MR. SHEBELSKIE: We had the 54 or so  
4 e-mails --

5 JUDGE KARLIN: No, no. Not the ones --

6 MR. SHEBELSKIE: What we did with that,  
7 because that's all we had.

8 JUDGE KARLIN: Okay, the only ones you  
9 had were the ones they put on. So you could not  
10 identify a specific document and say you failed to  
11 put this document on, this e-mail on, because you  
12 didn't have it?

13 MR. SHEBELSKIE: Right. What we said,  
14 Your Honor, was how could these e-mails from  
15 Professor Barkatt be the only ones that qualify as  
16 documentary material and everybody else is not, how  
17 could that be? What is the standard? What is the  
18 rationale?

19 And they said we are not going to answer.  
20 We sent our call memo. We got what we got, and  
21 that's the standard.

22 JUDGE ROSENTHAL: Did you ask them for  
23 the three documents that you cited in your motion,  
24 which turns out happened to be on the LSN? Those

1 documents were ones that you were specifically  
2 aware of. Did you request them during the  
3 conference?

4 MR. SHEBELSKIE: As I said, I'm confident  
5 that we did not ask specifically for all of them,  
6 of those three. I know we did talk about Mike  
7 Thorne documents and the cheese ball experiments,  
8 because we said we saw reference to these and there  
9 are documents referenced in the Thorne memos that  
10 we had available that refer to like a Victor  
11 Gilinsky e-mail.

12 I don't believe those three -- I don't  
13 want to say we discussed specifically those  
14 three -- numbers or documents. We talked generally  
15 about the topic that was the laboratory -- for  
16 example, the laboratory in China that was doing  
17 these corrosion experiments called the cheese ball  
18 experiments, did they get the call memo, did they  
19 produce documents because we don't see their work  
20 product.

21 Now, what Nevada pointed out to is here  
22 is a published article. Okay, that's fine. But  
23 what we were talking about is where are the  
24 laboratory notebooks of that laboratory in China?

1 Where are their e-mails? Where are their  
2 electronic files for documentary material, not just  
3 the published article? We weren't asking about  
4 that. We were asking about a broader scope of  
5 production from that laboratory.

6 JUDGE MOORE: Well, let's look at the  
7 other on my list of 26. You specifically in  
8 several places in your motion, on pages 14 and 15  
9 and 33, you specifically raise the issue that there  
10 are no contentions included in any of the LSN  
11 document collection.

12 In your meeting on January 28th, did you  
13 specifically raise the issue with Nevada's counsel  
14 and did you request any documents that contain  
15 contentions?

16 MR. SHEBELSKIE: Yes. We discussed that  
17 quite at length. And we talked about the  
18 contentions, and their discussion that they had not  
19 prepared contentions. We had a lot of debate  
20 about -- alloted Mr. Loux then just that month  
21 about a committee, they had prepared 2,000  
22 contentions. And Nevada's response to that was,  
23 well, it is because we have nothing finalized, we  
24 don't know what our positions are until we have the

1 license application.

2           We had a very extensive discussion about  
3 that, and not just is draft contentions, Your  
4 Honor, but we were also --

5           JUDGE MOORE: But you would concede that  
6 a draft contention is a draft and does not have to  
7 be filed in their LSN collection, would you not?

8           MR. SHEBELSKIE: A draft contention, yes.  
9 But here is your point. In order for them to  
10 develop at this point and time this working  
11 presumptive list of their 2,000 draft contentions,  
12 that has to be based on something. It has to be  
13 based on quite substantial work, we would posit, of  
14 internal analyses, of their review and critique of  
15 our work product, their independent research, their  
16 commentary and discussion back and forth, and their  
17 examples of those and very limited examples in  
18 Professor Barkhart's e-mail that we made an  
19 exhibit.

20           Our point to Nevada was there has to be  
21 embodied in what would be considered final  
22 documents information that underlies and supports  
23 and that relates to those draft contentions you  
24 have established. And that becomes the benchmark,

1 then, for you in this point in time to identify  
2 what is your Class I documentary material, your  
3 supporting information, what are you --

4 JUDGE MOORE: So you are claiming that  
5 all that material be reliance material?

6 MR. SHEBELSKIE: Absolutely. In this  
7 pre-license --

8 JUDGE MOORE: So if I have ten  
9 hypothetical contentions, all of them admittedly,  
10 very rough, very draft and they can't possibly be  
11 finalized because I have not seen your application  
12 yet, nor have I seen your draft application,  
13 that -- and I don't know whether I'm going to file  
14 these because I have not seen a draft or a final  
15 application, that that's reliance material?  
16 Reliance on what?

17 MR. SHEBELSKIE: Yes, Your Honor. Let me  
18 address that, because that really does go to the  
19 heart of their position.

20 This argument that until they get the  
21 final LA and until they get the TSPA they don't  
22 have any idea what their position are --

23 JUDGE MOORE: And also fill in for me  
24 where you raise this argument in your motion.

1 MR. SHEBELSKIE: Yes. Well --

2 JUDGE MOORE: Chapter and verse.

3 MR. SHEBELSKIE: The second half of the  
4 legal argument, Section B, where we address this  
5 was their position, and we addressed it chapter and  
6 verse, I believe, Your Honor. Because what we have  
7 said is there are a number of topics that Nevada is  
8 planning to file contentions on. That's in that  
9 petition for funds that appears as Exhibit D to our  
10 brief.

11 And starting on page 10 of that exhibit,  
12 and it goes on for some 15 or so pages, there is a  
13 listing of subject matters, wide ranging subject  
14 matters. Under each of those there's a series of  
15 bullet points of all kind of topics. None of that  
16 deals with the TSPA. I mean TSPA is one of them,  
17 but there are many, many, many other topics:  
18 Corrosion, biosphere, QA issues, et cetera, et  
19 cetra.

20 Nevada has been looking at our  
21 documents -- and this petition for funds, we go to  
22 page 10 of that, which is PDF page 72, going on and  
23 on they have been analyzing our work product,  
24 developing contentions and analyzing our

1 assumptions. That is what Mr. Loux has said time  
2 and time that they are doing, and developing their  
3 own independent research.

4           They have a body of information that they  
5 are presumptively relying on for these working  
6 lists of 2,000 contentions or topics, call them  
7 what you will. And the Commission had this in mind  
8 back in the summer of 2004 in its rulemaking, its  
9 final rulemaking on the LSN when it talks about  
10 that the production obligation for the good faith  
11 effort requires that the parties make available at  
12 the time of their certifications required under  
13 Subpart J, all of the documentary material that may  
14 eventually be designated as Class I and Class II.

15           Now, what does that really mean? In the  
16 real world -- Nevada has not been sitting idle --

17           JUDGE MOORE: -- say that that should be  
18 brought up not in front of PAPO but on a  
19 document-by-document basis?

20           MR. SHEBELSKIE: If it were a document, a  
21 isolated document-by-document issue. This is a  
22 categorial issue.

23           The reality is the Nevada uniquely, among  
24 other potential in intervenors, has not been

1 sitting there passively for the past several years.  
2 They have been organizing what they call a world  
3 class opposition to the license application. They  
4 are not waiting until they get to LA to begin their  
5 analysis in the governing of contentions.

6           They have been working feverishly at the  
7 cost of several tens of millions of dollars to --

8           JUDGE MOORE: How is it for the moment  
9 that my ten hypothetical contentions, and they have  
10 been doing just what you sure surmise they have  
11 been doing, and in doing that they conclude that  
12 you are right and they just aren't going to file  
13 those contentions. Now, is that reliance material?

14           MR. SHEBELSKIE: Yes at this point in  
15 time --

16           JUDGE MOORE: Pretell how?

17           MR. SHEBELSKIE: Well, first of all, they  
18 have much of our work product on the 90 to 150,  
19 however you want to look at it, analysis model  
20 reports, have been made available not only on the  
21 LSN but through public means, over websites for  
22 years. They have been tracking along. It's not  
23 like when LA comes out, there are going to be brand  
24 new different signs in it that they have not been

1 tracking and following along.

2           And at this point in time, they have a  
3 very reasonable understanding and expectation on  
4 many different topics and issues what the science  
5 is, what our technology is. They have a pretty  
6 good working assumption.

7           Now, will they have other contentions  
8 they may develop when they get the final LA? Sure.  
9 May they modify some? Sure. May they ultimately  
10 decide not to advance certain contentions that they  
11 have developed at this point? Possibly.

12           JUDGE MOORE: So you are telling me that  
13 reliance today is different from the reliance  
14 tomorrow?

15           MR. SHEBELSKIE: No. Reliance today  
16 means -- in good faith, reliance today has to mean  
17 what you reasonably expect to rely on now. Because  
18 if that were true, Your Honor, then DOE's view  
19 could have been, well, until we file the LA, then  
20 everybody --

21           JUDGE MOORE: Hold tight. Correct me if  
22 I'm wrong, but do you not have an obligation in  
23 filing an application to meet each and every  
24 requirement in Part 60 and Part 63?

1           MR. SHEBELSKIE: We have that obligation,  
2 our supporting documentations are always subject to  
3 change until we actually file the license  
4 application. We have not sat on our reports and  
5 studies to make them available, even though they  
6 rely --

7           JUDGE MOORE: The fact that you did not  
8 in no way, shape or form say that that was  
9 documentary material -- I mean you did play  
10 somewhat of a needle in a haystack game here with  
11 35 million pages of documents of which, by any  
12 estimation, some considerable portion of that is  
13 probably not documentary material. It is  
14 extraneous at best. So, what you did really does  
15 not help us answer the question of what should be  
16 done.

17           MR. SHEBELSKIE: Your Honor, when the  
18 Commission created the LSN production regime as the  
19 substitute for document production post docketing  
20 where we don't have even document requests, obvious  
21 knew that Nevada would have to make its LSN  
22 certification before we filed the LA. If  
23 someone -- if Nevada could take the expedient of  
24 saying it ain't final, our contentions ain't final

1 until they are final, until we file them, then they  
2 would have, in effect, no obligation to produce any  
3 documents in the pre-license period.

4           That position can't be what was intended  
5 in good faith by the Commission when they talked  
6 about a good-faith production. The reality here,  
7 the practical fact is Nevada, obviously, has been  
8 working and has prepared a body of information that  
9 they anticipate they relied on and they are going  
10 to challenge on these grounds.

11           JUDGE MOORE: To this point, I have a  
12 factual distribute, indeed I even have a factual  
13 dispute over whether the certification that you  
14 have filed and they dispute is legitimate is to be  
15 accepted at face value. So I have a factual  
16 dispute and I have a situation where it appears to  
17 me it is not a question of what at some point will  
18 have to be put in the LSN, it is a question of when  
19 it has to be put in. Because they said they have  
20 collected everything. They were very explicit,  
21 throw nothing out and we have made the documentary  
22 material determination.

23           MR. SHEBELSKIE: What Nevada has not said  
24 in their brief is that amongst this body of

1 documents that they collected and preserved, that  
2 there is this large group or any group, however you  
3 want to characterize it, sitting sort of in limbo  
4 that they are going to come back to and revisit and  
5 produce later.

6           Their procedures don't call for them to  
7 go back and re-review that information. In their  
8 brief, they didn't say there was a substantive  
9 production of this information.

10           What they said is we told our experts to  
11 give us everything we have developed that you are  
12 going to cite -- petition, cite and rely on in the  
13 proceeding. We have made it all available. That  
14 is not -- possible.

15           JUDGE MOORE: Don't their call memos say  
16 save everything in your Yucca file, save all your  
17 e-mails, don't throw any of it out because it may  
18 be subject to discovery?

19           MR. SHEBELSKIE: It says that. The  
20 examples say --

21           JUDGE MOORE: You just said they don't  
22 say anything like that in their brief.

23           MR. SHEBELSKIE: Well, they don't say  
24 they are going back to re-review all of their

1 documents at some point in time, because they will  
2 wipe it into documentary material. They are  
3 talking about potential derivative discovery in  
4 connection with depositions. That's what that --

5 JUDGE MOORE: Certainly if the collection  
6 is there, they have the capability of doing that.

7 MR. SHEBELSKIE: But the point is we are  
8 not -- we, the staff, other intervenors are not --  
9 the burden is not on to us to go to pull out this  
10 documentary material from the State sometime down  
11 the road after docketing and try to get it all  
12 through subpoenas.

13 There is an obligation on Nevada now, in  
14 the pre-license period, to be forthcoming in it and  
15 produce that information now that they in good  
16 faith have a reasonable expectation may eventually  
17 become their supporting documentary material, and  
18 cannot rely on the expedient legalism that until we  
19 file our contentions nothing is final.

20 In addition, if you look at the call  
21 memo, the example in this 2007 call memo, their  
22 examples that they give is this Exhibit C to that  
23 call memo, where they talk about e-mails among  
24 their experts discussing their draft contentions,

1 they say none of that can be category one  
2 information. Yet, we know from the Professor  
3 Barkatt's e-mails, the few examples that they have  
4 given us, that in that discussion you can see  
5 substantive discussion that contains information,  
6 where it is talking about their contentions.

7           Those e-mails are final documents and can  
8 contain information that embodies what they are  
9 going to support and rely on. To categorically  
10 exclude all of their e-mails, all Professor  
11 Barkatt's on this notion they -- because they are  
12 not going to cite an e-mail, whatever they say in  
13 the e-mails is not going to be documentary material  
14 is an improper legal standard. Certainly not the  
15 standard that they said DOE had to apply to the  
16 production of its e-mails.

17           JUDGE ROSENTHAL: Once again,  
18 Mr. Shebelskie, and I speak only for myself, I  
19 think you make out a prima fascia case. But still  
20 seems to me that what we have here is a factual  
21 issue, and I'm still interested in knowing how,  
22 assuming that that is the case, we should go about  
23 at this point dealing with it. I mean, you have  
24 set forth the reasons why you believe that there is

1 material that Nevada has not produced that should  
2 have been produced. And for the sake of argument,  
3 maybe you make a persuasive case in that regard.

4           We are still faced with the fact that  
5 Nevada said it has made its search, every piece of  
6 documentary material that is stamped has been put  
7 on the LSN. To me, that presents a factual issue,  
8 and I'm still uncertain as to just how we proceed  
9 to deal with that.

10           In dealing with the prior motions to  
11 strike, we had clear legal issues, and we were able  
12 to dispose of those motions -- once against you and  
13 once in your favor -- without having to make any  
14 kind of factual inquiry. But to me -- my  
15 colleagues might differ -- but to me, there is a  
16 factual issue here and I don't see how we can  
17 decide the motion to strike on the basis of the  
18 papers that we now have before us.

19           MR. SHEBELSKIE: I think one way you can  
20 address that, Your Honor, is to inquire of Nevada,  
21 who will come right after me, as to what standard  
22 did they apply in deciding what was documentary  
23 material Class I, their reliance material or did  
24 they take the position as they said in the briefs

1 to the Commission they would, that they could not  
2 identify their supporting material at this time  
3 because they have not done final contention, quote,  
4 unquote, final contentions.

5           If that was the standard they applied, I  
6 would posit to you that that is a legal question  
7 and it poses the legal issue that they have implied  
8 an improper legal standard, and they would have to  
9 re-review their collection against -- those e-mails  
10 and other documents according to the proper  
11 standard.

12           JUDGE MOORE: Didn't you have every  
13 opportunity in your Exhibit H where you have their  
14 call memo and their examples and instructions --  
15 admittedly, there were lots of other materials they  
16 put out with it -- but to specifically bring that  
17 up in your brief explaining how that  
18 underrepresents, overrepresents, analyze it and  
19 present it as a legal issue? You didn't do that.

20           MR. SHEBELSKIE: Your Honor, we believe  
21 we did. In our brief discussed that they had --

22           JUDGE MOORE: Putting in an exhibit does  
23 not get it, at least where I come from.

24           JUDGE KARLIN: May I ask a question on

1 some of these points? On the call memo, let's talk  
2 about the call memo, could pull your brief up. Do  
3 you have your brief in front of you?

4 I'd ask you to go to page 31 of your  
5 brief. This is the passage that Judge Moore, I  
6 think, alluded to earlier. And in the middle of  
7 the page, you have a paragraph that starts:  
8 "Nevada call memos show the following," and then  
9 you discuss several things.

10 And I think it is the fourth point that  
11 the latter call memo, and I think that is your DOE  
12 Exhibit H -- do you have the page, page 31 of your  
13 brief --

14 MR. SHEBELSKIE: Yes.

15 JUDGE KARLIN: -- of your motion to  
16 strike?

17 The latter call memo seemingly advise  
18 recipients to omit critical commentary about  
19 Nevada's work product and favorable commentary  
20 about DOE's.

21 Is that where you raise the defects with  
22 regard to Exhibit H?

23 MR. SHEBELSKIE: Yes. We could have been  
24 more explicit.

1           JUDGE KARLIN:  Let's go to page 32.  On  
2 page 32 I think you have further discussion under  
3 paragraph B, that is justification for its  
4 incomplete production is erroneous.  And I think  
5 here you raise what I understand your argument here  
6 to be today, which is that Nevada has taken the  
7 position, at least in its appeal brief to the  
8 Commission that it can't possibly know what its  
9 positions are -- I think you quote -- Nevada,  
10 quote, cannot possibly know, for the most part,  
11 what it will cite or intend to rely upon.

12                   Now, is that reliance material?

13           MR. SHEBELSKIE:  Yes.  Starting in the  
14 sections where we made this legal argument.

15           JUDGE KARLIN:  And then you say later at  
16 the end of that, left unsaid, presumably, is the  
17 corollary that Nevada also cannot identify  
18 nonsupporting information at this time.  That is  
19 DM2 as we called it.

20                   And then you go on to discuss that, as  
21 you have today, on page 33 with regard to the  
22 thousands of contentions that have been prepared,  
23 albeit draft, and that necessarily in preparing  
24 those contentions they would have developed

1 supporting information and nonsupporting  
2 information.

3 Is that right?

4 MR. SHEBELSKIE: Yes, sir.

5 JUDGE KARLIN: And then you go on to say,  
6 I guess somewhere at the end -- on page 34, were  
7 Nevada's position accepted, the LSN regulations  
8 would be essentially meaningless as applied to  
9 everyone except DOE. And I think that's what I  
10 hearing you saying today.

11 MR. SHEBELSKIE: Yes.

12 JUDGE KARLIN: Okay. So let me then turn  
13 to another subject, which is of concern to my  
14 colleagues, we think is worthy of discussion, which  
15 is whether there is a factual issue here and what  
16 are we to do, what are we to do? It is a very  
17 difficult problem.

18 Let me ask, I think, were there not  
19 factual issues raised with regard to Nevada's in  
20 its motion the strike in 2004?

21 MR. SHEBELSKIE: There were.

22 JUDGE KARLIN: And at that time did we  
23 not ask -- put together a series of interrogatories  
24 requiring factual responses by DOE?

1 MR. SHEBELSKIE: You did.

2 JUDGE KARLIN: Is that one mechanism we  
3 could use vis-a-vis Nevada to resolve some of these  
4 factual issues?

5 MR. SHEBELSKIE: Absolutely. Yes, sir.

6 JUDGE KARLIN: Would it be possible --  
7 were there not factual issues raised with regard to  
8 Nevada's motion for declaratory judgment, which we  
9 declined to grant because of the factual issues?

10 MR. SHEBELSKIE: Yes.

11 JUDGE KARLIN: But there were factual  
12 issues there and we were concerned about that?

13 MR. SHEBELSKIE: Yes. That particular  
14 motion was forward looking.

15 JUDGE KARLIN: Right. And we would wait  
16 until an actual certification before we could  
17 figure out what the facts are vis-a-vis what you  
18 did.

19 MR. SHEBELSKIE: And then once we  
20 certified, they filed a motion that raised just a  
21 legal issue as they described it.

22 JUDGE KARLIN: Right, their motion raised  
23 at the time, we all thought they were both factual  
24 and legal issues raised in Nevada's second motion

1 to strike, although we ended up resolving it simply  
2 on the legal issues. Would you agree with that?

3 MR. SHEBELSKIE: You resolved it on the  
4 legal issue. I had always understood it as a legal  
5 issue, their motion -- their second motion to  
6 strike.

7 JUDGE KARLIN: If we are trying to  
8 resolve whether or not a party has in good faith  
9 substantially complied with its duty to produce all  
10 its documentary material, some of those cases might  
11 be resolved on strictly legal basis, but I would  
12 think most of them would also involve a factual  
13 component.

14 MR. SHEBELSKIE: Yes, sir.

15 JUDGE KARLIN: So what's the surprising  
16 difficulty here that we have a factual component  
17 here? Now, is it possible that this Board has the  
18 authority to authorize DOE to conduct some limited  
19 discovery, several depositions, a limited number of  
20 interrogatories with Nevada -- and we will ask  
21 Nevada this as well -- to try to resolve some of  
22 these factual issues?

23 MR. SHEBELSKIE: I believe you have that  
24 authority in addition to the authority --

1 JUDGE KARLIN: -- just asking our own  
2 series of questions. Do we have the authority to  
3 ask certain witnesses to come up and testify like  
4 Mr. Loux?

5 MR. SHEBELSKIE: Yes. And in fact, in  
6 2004 I believe Mr. Graser, the LSN administrator,  
7 was called upon to testify.

8 JUDGE KARLIN: And those were factual  
9 issues that he spoke to, were they not, not legal?

10 MR. SHEBELSKIE: Yes.

11 JUDGE KARLIN: Okay, so I --

12 MR. SHEBELSKIE: We never disagreed that  
13 you have the legal authority, the authority  
14 authorize us or to conduct your own inquiry into  
15 any factual issues posed. My point was, I don't  
16 think Nevada's brief on its face actually rebuts  
17 our case, prima facia or otherwise.

18 JUDGE KARLIN: I understand. You first  
19 assert that you think you have won on the facts and  
20 the law; and secondly, if there are factual issues,  
21 there are ways to address them?.

22 MR. SHEBELSKIE: Absolutely, Your Honor.  
23 I believe this argument and our brief illuminates  
24 several topics, inquiry on those.

1           JUDGE KARLIN:  And the main part of your  
2 position with regard to DOE Exhibit H is their  
3 failure to provide supporting and nonsupporting  
4 information?

5           MR. SHEBELSKIE:  Correct.

6           JUDGE KARLIN:  Okay.

7           MR. SHEBELSKIE:  Unless there are some  
8 other questions --

9           JUDGE MOORE:  Would you agree that the  
10 situation with which this Board faced in 2004 on  
11 June 30th, when Nevada -- when you certified and  
12 Nevada filed a motion to strike was a world apart  
13 from the situation we face now?

14          MR. SHEBELSKIE:  A world apart?

15          JUDGE MOORE:  Yes.  Let me recall to you  
16 what that situation was.

17                 One, you certified on June 30th, with no  
18 prior notice that were about to do it.  At that  
19 time you had few, if any, documents on the LSM  
20 available via the LSN.  You had a parallel system  
21 on which you had all the documents that was on a  
22 public website that was immediately taken down on  
23 June 30th for some four, five, six days thereafter,  
24 so it was not available publicly.

1           We didn't even know and had no way of  
2 knowing in those circumstances how many documents  
3 DOE even had certified to, because there was no LSN  
4 to turn to and even turn on the switch and look.  
5 My recollection was we were faced with an entirely  
6 different situation than we are faced with today,  
7 four years later, with the certifications that have  
8 come in and the motion to strike.

9           What am I missing in my recollection?

10           MR. SHEBELSKIE: The issues, the  
11 immediate issues before the Board in the 2004  
12 motion to strike are different from the issues  
13 here, in certain respects for sure. But, actually  
14 when you look at the Board's opinion that the issue  
15 on 2004, a lot of that was predicated on  
16 information developed as a result of the  
17 Interrogatories the Board asked us.

18           Then Nevada's -- I had occasion to review  
19 Nevada's motion to strike from 2004 when we were  
20 putting this together, and it was pretty plain  
21 vanilla and simply saying that DOE had represented  
22 there was going to be 3.5 million documents in its  
23 collection, now there is only -- depending on how  
24 you look at it -- only 1 million.

1           Now, they were claiming that there were a  
2 lot of privileged documents -- the privileged issue  
3 was appearing on its face. But many of the items  
4 and the record that was developed and that the  
5 Board then cited and relied on came as a result of  
6 the queries to us and not presented in Nevada's  
7 motion.

8           JUDGE MOORE: When you raised the  
9 privilege, my recollection is there was information  
10 that you were claiming 150,000 documents were  
11 privileged or -- yet there is not one bibliographic  
12 header on a system that no one had any availability  
13 to, because your parallel system was not available  
14 on the day that you filed the motion, and there was  
15 not anything on the LSN.

16           MR. SHEBELSKIE: For the documents that  
17 had been filed on the LSN a high percentage,  
18 upwards of 50 percent, I believe the number was,  
19 were bibliographic header only, subject to a claim  
20 of privilege.

21           There was the second issue that there  
22 were additional documents not yet called that were  
23 on our separate server. Yes, those are not the  
24 issues with -- we are not claiming they had

1 privileged documents, too many privileged documents  
2 or that they had not crawled over the documents  
3 they tend to make available. So that is a sort of  
4 apples and oranges.

5           But fundamentally, I think, if we are  
6 looking at a situation, what you have with their  
7 motion was they had -- all they knew about our  
8 production was from what they could see what was on  
9 the LSN or not on the LSN and what we had publicly  
10 said we might be doing. To that extent, it is a  
11 parallel situation.

12           All we can do is to say here is what they  
13 have said, they were going to have 100,000  
14 documents, here is what think put on the LSN, less  
15 than five percent of that, with major voids in  
16 terms of categories of documents where they have  
17 said already, taking the position before the  
18 Commission that they are not going to be able to  
19 know what their reliance material is, and it raises  
20 the scenario that they have not made a good-faith  
21 effort.

22           JUDGE MOORE: That's to say really, if we  
23 granted --

24           MR. SHEBELSKIE: 2004.

1           JUDGE MOORE: I think -- been made for  
2 discovery, assume hypothetically you had asked us  
3 for discovery, and we say we have a factual  
4 dispute, we have no way to get to the root of it,  
5 what would you do factually and how long would it  
6 take you to do it with discovery to be able to make  
7 a factual case?

8           MR. SHEBELSKIE: Well, I can answer the  
9 second question.

10          JUDGE MOORE: I'm sorry?

11          MR. SHEBELSKIE: I can answer the second  
12 question very immediately, because we can move at  
13 immediately, as long as the Board enjoins both  
14 sides to put them on a short leash to complete the,  
15 any kind of factual development. I mean, we can do  
16 it within 30 days, as long as Nevada provides time  
17 to respond.

18          JUDGE MOORE: You said earlier, I  
19 believe, that you didn't think there was any  
20 authority to have discovery or --

21          MR. SHEBELSKIE: No. We did not have any  
22 means prior to Nevada's certification to  
23 independently conduct discovery --

24          JUDGE MOORE: Immediately upon

1 certification, did you?

2 MR. SHEBELSKIE: No. I don't think  
3 without leave --

4 JUDGE MOORE: That's 2.004.

5 MR. SHEBELSKIE: 2.1 --

6 JUDGE MOORE: I'm sorry, 2.1004?

7 MR. SHEBELSKIE: Let me grab the  
8 regulation.

9 In the pre-license application, 2.1004,  
10 amendments and additions?

11 JUDGE MOORE: Isn't that exactly the  
12 situation? If there is not something there that  
13 you think should be there, you make a request for  
14 it?

15 MR. SHEBELSKIE: We move to strike saying  
16 they had not made documentary material available.

17 JUDGE MOORE: But if you had predicated  
18 that motion to strike with request under 2.1004,  
19 would that not have put you in a much better  
20 position?

21 MR. SHEBELSKIE: No, because I think this  
22 regulation deals with -- specific documents that  
23 you want to ask for, you can move to compel for.

24 JUDGE MOORE: You could have said every

1 document in the collection that contains a  
2 contention.

3 MR. SHEBELSKIE: No, no; because the only  
4 obligation to -- Nevada's obligation in the  
5 pre-license phase is to make their documentary  
6 material available. We don't have any means under  
7 this regulation or any other regulation to say in  
8 addition to your documentary material, we want to  
9 you put on the LSN the following other kinds of  
10 documents.

11 And so, since their obligation, and their  
12 only obligation is to make documentary material  
13 available, we don't have to ask for them to make  
14 their documentary material available. They are  
15 required to have done it 90 days after our  
16 certification. And if they didn't come forward  
17 with all their documentary material based on what  
18 we think is an improper legal standard, then we  
19 don't have to make specific requests for what's  
20 missing, because how would we know, Judge Karlin's  
21 point.

22 Our relief appropriately is to say, since  
23 you have programmatically or categorically  
24 underproduced your documents, you have not met your

1 standard, and you need to go back and redo it.

2 JUDGE MOORE: 2.1018 is inapplicable  
3 under the pre-license application phase?

4 MR. SHEBELSKIE: Parts of it, I believe,  
5 are. Certainly, for example, depositions. I don't  
6 believe we can conduct depositions as a matter of  
7 light, unilaterally as it were. I think the means  
8 available to us are requests for informal discovery  
9 a form of request for information. And again, we  
10 had our meeting --

11 JUDGE MOORE: Request for admissions.

12 MR. SHEBELSKIE: Request for admissions  
13 potentially.

14 JUDGE MOORE: So there are discovery  
15 available to you that you didn't pursue?

16 MR. SHEBELSKIE: Even if we had served a  
17 request for admission, we would not have had a  
18 response in time to file our motion to strike. And  
19 even our motion to strike --

20 JUDGE MOORE: Could you have filed for  
21 relief and sought an extension of time so that you  
22 could have done this?

23 MR. SHEBELSKIE: Well, theoretically.  
24 But we believe we actually had a basis now to

1 strike.

2 JUDGE KARLIN: Let me see if this analogy  
3 works. It seems to me that back in 2004 when  
4 Nevada was complaining that you had not made all  
5 your documentary material available, the tables  
6 were turned, and I think DOE suggested, well, if  
7 they want some specific information, they can move  
8 to compel, they can file a request, they can do all  
9 these sort of things, and that will supplement, we  
10 will answer them.

11 And we said in our decision that's not  
12 sufficient because that will undermine the  
13 timeframe that's set forth, and later  
14 supplementation or later disputes does not obviate  
15 the initial failure to make documentary material  
16 available.

17 MR. SHEBELSKIE: Absolutely. Absolutely.

18 JUDGE KARLIN: You had ten days to file  
19 your motion to strike and you did so. You did the  
20 same thing they did, and I think the response is  
21 the same, well, your time frame is not going to be  
22 bogged down by you having to make a request for  
23 every one of the thousands of documents that don't  
24 seem to be there.

1           But let me switch to another subject.  
2 What do you need those documents for? The purpose  
3 of producing documentary material is so the  
4 intervenors can formulate contentions. You are not  
5 going to formulate contentions. So what do you  
6 need these documents for?

7           MR. SHEBELSKIE: No, Your Honor. The  
8 document production obligations under Subpart J in  
9 the pre-license phase are the substitute for all  
10 the parties document discovery and that includes  
11 DOE's document discovery rights. And we certainly  
12 have the right to know in order to defend our  
13 application what information, supporting  
14 information Nevada intends to rely on against us as  
15 well as what nonsupporting information they have  
16 acquired, developed or in their possession that  
17 undermines what they intend to suddenly rely on.  
18 Just like if they are going to have experts testify  
19 or their experts have developed work product, we  
20 are entitled to know it.

21           JUDGE KARLIN: Let me ask another  
22 question. Are you asking for a motion to strike.  
23 What if we granted the motion to strike, what  
24 relief are you asking for? What consequence would

1 it occur?

2 For example, can a party who has failed  
3 to make its own documentary material available  
4 attack a party who has made its documentary  
5 material? Can any Nevada file motions to compel?  
6 Can Nevada file other motions if we have stricken  
7 Nevada's motion -- initial certification?

8 MR. SHEBELSKIE: Until they recertify?

9 JUDGE KARLIN: Until they recertify.  
10 What's the consequence? What would the consequence  
11 be if we granted this? Nothing?

12 MR. SHEBELSKIE: No, I think the  
13 consequence is they could not file motions to  
14 compel against us, as an example, until they  
15 recertify.

16 JUDGE KARLIN: How much time do you have  
17 to recertify?

18 MR. SHEBELSKIE: I think that they can  
19 certify even during the contention phase. I mean,  
20 2.1012B, I think, even contemplates that scenario.  
21 And it is up to them when they recertified, because  
22 they would be in control of that in terms of making  
23 their production. Presumably they could --

24 JUDGE MOORE: Would it preclude them from

1 filing contentions?

2 MR. SHEBELSKIE: If they never  
3 recertified?

4 JUDGE MOORE: Let's, just for the sake of  
5 argument, say that -- say that your certification  
6 was stricken roughly August of 2004, and you  
7 recertified in October of 2007, two and-a-half  
8 years, if they took two and-a-half years to  
9 recertify their document collection, would that be  
10 seasonably done?

11 MR. SHEBELSKIE: I don't think that there  
12 is any time limit. They could take 30 days, they  
13 could take two years as they saw appropriate. But  
14 1012B would provide that until they recertify, they  
15 couldn't file contentions.

16 JUDGE MOORE: So you say there's a  
17 penalty, they couldn't file --

18 MR. SHEBELSKIE: I think the regulations  
19 said something to the effect, a party has to take  
20 the proceeding as they find it when they  
21 recertified. So it would be up to them.

22 Again, as a practical matter, is it going  
23 to take them that long? They say they have  
24 preserved everything, they have collected

1 everything. I don't think they will come up here  
2 and tell you it will take them two and-a-half years  
3 to do this --

4 JUDGE MOORE: Now, let's assume one final  
5 question: That it's stricken, they do exactly what  
6 you just said, they go relook through it, they  
7 apply their standards, and they come back with the  
8 same thing. And this time, they have six  
9 affidavits from all of their area managers or  
10 whatever they call them that we have they done it  
11 all and this is -- what you see is what you get;  
12 that's all there is. What happens?

13 MR. SHEBELSKIE: That can't be the case,  
14 because -- or you would say, then, Nevada if you're  
15 representing --

16 JUDGE MOORE: -- a dog chasing its tail.

17 MR. SHEBELSKIE: If their position then  
18 would be we have relooked under the right legal  
19 standard, this is everything, then they would have  
20 to be held to that representation later in the  
21 proceeding. And they can't come forth -- and their  
22 experts can't come forward and use in the  
23 proceeding later information analyses that they  
24 have developed prior to 2008, if it had not been

1 made available on their certification.

2           It seems to us what they are trying to  
3 gain now, is they are saying, we have done all of  
4 this work, yes, we have been able to develop 2,000  
5 contentions, but we don't have to produce it,  
6 because they are not final contentions, as opposed  
7 to saying -- but if they come and say we have now  
8 produced everything our experts have ever done,  
9 including -- et cetera --

10           JUDGE MOORE: As far as the filing of  
11 contentions and answers to contentions, that this  
12 LSN document production has nothing to do with your  
13 ability to file answers?

14           MR. SHEBELSKIE: No.

15           JUDGE MOORE: How will it in any way,  
16 shape or form any of this material affect your  
17 ability to answer contentions?

18           MR. SHEBELSKIE: Well, they need to  
19 provide support to file contentions.

20           JUDGE MOORE: There is no such  
21 requirement for -- in your answer challenging that  
22 contention.

23           MR. SHEBELSKIE: Until we see their  
24 nonsupporting information, even their supporting

1 information, I don't know if I can answer that --

2 JUDGE MOORE: All that will do is present  
3 a factual dispute which can't be taken into account  
4 on the admission of contentions.

5 MR. SHEBELSKIE: No, Your Honor. We are  
6 entitled to conduct discovery. This is our  
7 opportunity -- allowed to that's for document  
8 discovery for both supporting and nonsupporting  
9 information. We may use that information,  
10 depending upon what it is, to help oppose their  
11 contentions.

12 Sometimes there is a matter of fact,  
13 sometime as a matter of law. I don't know what it  
14 is until we see the information.

15 JUDGE MOORE: If it is a matter -- I  
16 can't possibly see what they need to put up there  
17 under the definition of documentary material that  
18 would be -- present a matter of law that would  
19 allow you to oppose a contention, so it is strictly  
20 factual.

21 MR. SHEBELSKIE: All right. Fair enough.

22 JUDGE MOORE: And you have indicated  
23 nonsupporting, but as long as their affidavit --  
24 their contentions are supported, the fact that

1 there is other outstanding nonsupporting  
2 information, we can't resolve that in the admission  
3 of contentions.

4 MR. SHEBELSKIE: Well, at some time in  
5 the proceeding if there is a factual dispute --

6 JUDGE MOORE: Downstream you have access  
7 to all of this information under 1018, do you not?

8 MR. SHEBELSKIE: Well, it means --  
9 unclear, because 1018 does not provide for request  
10 for production of documents. Moreover, the  
11 Commission has specified --

12 JUDGE MOORE: How many depositions have  
13 you taken, Mr. Shebelskie, and how many requests --  
14 in setting up that deposition you told them to  
15 bring, they had better bring all these documents?

16 MR. SHEBELSKIE: The point, Your Honor,  
17 under the regulations we are not bound to have to  
18 wait until that late date in the proceedings.

19 JUDGE MOORE: One other question. I  
20 re-read a lot of the legislative, regulatory  
21 history going back to '89. I found three things in  
22 the regulatory history and the purpose for the LSN  
23 and its predecessor the LSS.

24 One was to permit, as Judge Carlin just

1 mentioned, the early and formulation of contentions  
2 that would speed the process; two, that there are  
3 other, under the Waste Policy Act, requirements for  
4 the involvement of affected units of local  
5 government of interacting with DOE, and it would be  
6 a mechanism by which they would be kept up to  
7 speed, in theory, on what DOE was doing; and third,  
8 it would allow the staff with all this material on  
9 the LSS and LSN to keep track of what DOE was  
10 doing.

11           Now, I recognize that was the projection  
12 of what the fond hope was that all this would do,  
13 but those are the only three things I could  
14 identify in all that legislative history that was  
15 the purpose to be served by the LSN and the LSS,  
16 its predecessor.

17           If that is the case, the question of  
18 where is your prejudice comes to the fore?

19           MR. SHEBELSKIE: Well, there are also  
20 statements, if I recall, in that regulatory history  
21 that talk about the preapplication certification  
22 process and the production on the LSN as the  
23 substitute for traditional discovery. And that  
24 cuts both ways, not only for Nevada against DOE,

1 but DOE against Nevada, as well as staff against  
2 Nevada or other parties against Nevada.

3           So it is a document production for the  
4 benefit not only of DOE but for all other  
5 participants. And if that were true what you are  
6 positing, Your Honor, then the Commission would not  
7 put in an obligation in Subpart J for Nevada and  
8 all other potential participants to make their own  
9 certifications and make their own document  
10 production of documentary material in 90 days.

11           I think on the face of the regulation as  
12 a substitute for traditional discovery and intent,  
13 it is mutual, it was intended to be mutual and must  
14 be applied mutually in good faith.

15           I know I have exceeded my 45 minutes.

16           JUDGE MOORE: Mr. Fitzpatrick, I believe  
17 you're up. Before you start, why don't we take a  
18 ten-minute recess. We will reconvene at 10:20.

19                           (Short break taken)

20           JUDGE MOORE: Please be seated.

21           Mr. Shebelskie, you may be in luck.  
22 There may be a waiver involved here.

23           Mr. Fitzpatrick, I didn't think you would  
24 allow us off that easily.

1           MR. FITZPATRICK: May it please the  
2 Court: What I would like to do is first state that  
3 Nevada acted in total good faith in creating its  
4 LSN database. I intend to tell you what the  
5 Commission anticipated we should do, and then I'm  
6 going to tell you what Nevada did. And I would  
7 like to throw in just as an aside something that  
8 Judge Rosenthal, I think, brought up first.

9           We aren't simply faced with a factual  
10 issue where DOE came in no evidence, no  
11 declaration, and just speculation about what was or  
12 wasn't in Nevada's database. We responded with  
13 proof and declarations which set up what we did,  
14 what we have and have not on our LSN database, and  
15 a lengthy deposition of Mr. Thorne explaining the  
16 why exactly.

17           He started out that he spent hundreds of  
18 hours as the head of the coordinator of the Nevada  
19 team attempting to review, analyze and understand  
20 what DOE has placed on the LSN, and said, what is  
21 available now has not enabled me or the other  
22 experts with who I worked to frame focus or  
23 meaningful contentions in this proceedings.

24           That's just the beginning. He goes page

1 after page of explaining exactly why. But -- and  
2 we saw an e-mail thrown up on the screen from  
3 Professor Barkatt. It was a 2001 e-mail.

4 Now, it referred in there to some test he  
5 did. And let's make believe he did some test.  
6 Professor Barkatt did not include, apparently -- I  
7 mean, I don't know, this stuff was put up  
8 yesterday, talk about ten days notice. But make  
9 believe there was a test and make believe the test  
10 results are not on our LSN.

11 Well, he is writing about it in 2001,  
12 seven years ago. And so that will tell me that he  
13 concluded that the information in the test result  
14 is something that he had concluded there is no way  
15 he's going to rely upon it in forming opinions in  
16 this proceeding. There is nothing vicious or  
17 malicious about -- if the document referred to  
18 seven years ago is not on the LSN, there is nothing  
19 unusual about why it's not. If it's not --

20 JUDGE ROSENTHAL: Mr. Fitzpatrick, do you  
21 dispute that there is an issue of fact that has  
22 been raised by the DOE motion? And if there is an  
23 issue of fact, I would ask you, as I asked Mr.  
24 Shebelskie, as to how we should address it?

1           And Judge Karlin has suggested one  
2 procedure. I don't know whether that's -- what you  
3 would find acceptable. But it does seem to me that  
4 when we get to the bottom here, that DOE has  
5 presented a prima facia case. You have rebutted  
6 it. And that is a traditional situation where  
7 there is a factual issue that requires resolution  
8 before a motion such as this is finally acted upon.

9           MR. FITZPATRICK: There are two things  
10 wrong with that formulation, Your Honor.

11           Number one, there is not a fact issue  
12 created by simple, arguments of counsel are not  
13 evidence. There is no evidence supporting a  
14 motion. And when they say things in their motion  
15 such as Nevada has had a world class team of  
16 experts, 25 experts working for a quarter of a  
17 century, spending several tens of millions of  
18 dollars and so they should have these documents,  
19 those are arguments of counsel. And they may not  
20 be intentionally untrue, but they are untrue.

21           And our proof and our evidence shows that  
22 we started engaging the licensing experts in 2003,  
23 and that the most busy one, Dr. Thorne, is in our  
24 proof, spent 17 hours a month between then and now

1 working on this proceeding.

2           We have not had access to the DOE  
3 documents. DOE certified in 2004 and from 2004  
4 until March of 2007, they sent documents over and  
5 over and over to Mr. Graser under an agreement that  
6 they could not be made public, they could not be  
7 shown to Nevada. And so, yes, it is disingenuous  
8 for them to said we had a world class team of  
9 experts working and working when they hid the  
10 documents until last summer when they finally  
11 released them and issued a self-serving statement  
12 that we doing this to help the parties --

13           JUDGE MOORE: Mr. Fitzpatrick, let's  
14 again observe the glass house admonition. There is  
15 a lot of us in this proceeding that appear to be  
16 living in glass houses, and there is an awful lot  
17 of hard objects being thrown around. So, let's try  
18 to steer clear of motives. Let's try to keep it to  
19 fact.

20           MR. FITZPATRICK: Yes, sir. And the only  
21 facts of record in this case are the facts that  
22 Nevada has made of record by competent evidence.

23           JUDGE KARLIN: Let me ask you a factual  
24 question. I think you were saying that Dr. Thorne

1 has indicated that he has not been able to  
2 formulate meaningful contentions or something like  
3 that.

4 Let me just go to your brief, if you  
5 would, look at it on page 18. Do you have that?

6 MR. FITZPATRICK: Yes, Your Honor.

7 JUDGE KARLIN: Now, there's a section  
8 that's entitled "Estimate About Contentions; right,  
9 you with me? Okay. And if you will remember, and  
10 I think you recite here in your brief that DOE in  
11 its motion to strike made reference to a statement  
12 by Mr. Loux -- is that how you pronounce his --

13 MR. FITZPATRICK: Loux.

14 JUDGE KARLIN: Loux. I'm sorry. A  
15 statement by Mr. Loux before the Nevada legislature  
16 that was quoted in some newspaper that was provided  
17 as an exhibit that the Nevada team had drafted  
18 thousands of contentions. All right.

19 Now, here's the statement you made in  
20 your brief, page 18 in about the middle of the  
21 page, quote: Assuming DOE's reported quotation of  
22 Mr. Loux in its motion was accurate, which Nevada  
23 does not concede."

24 Now, did you ask Mr. Loux whether he had

1 said before the legislature we have formulated and  
2 drafted thousands of contentions?

3 MR. FITZPATRICK: Yes, sir.

4 JUDGE KARLIN: And what did Mr. Loux say?

5 MR. FITZPATRICK: He said he -- it was  
6 unsworn testimony, not prepared. He did not  
7 remember exactly what he said, but that his  
8 recollection was that he said we are working on  
9 contention and we have already drafted a large  
10 number.

11 JUDGE KARLIN: So he denied that he had  
12 said he had formulated thousands of contentions,  
13 drafted thousands of contentions?

14 MR. FITZPATRICK: No, he didn't deny  
15 that.

16 JUDGE KARLIN: So, you say you don't  
17 concede, but why don't you tell us what the facts  
18 you have --

19 MR. FITZPATRICK: We don't concede it  
20 because DOE dropped the footnote below that where  
21 it said that and said we don't have the transcript  
22 of what he claimed he said. I guess that had a  
23 witness there. The newspaper said something  
24 different and here's what the newspaper said.

1 JUDGE KARLIN: So there --

2 MR. FITZPATRICK: There was not an  
3 accurate record until two days ago of what he said.

4 JUDGE KARLIN: Were you there when he  
5 said this?

6 MR. FITZPATRICK: No, I was not.

7 JUDGE KARLIN: Did Mr. Loux deny saying  
8 he had said something about thousands of  
9 contentions?

10 MR. FITZPATRICK: No, he didn't.

11 JUDGE KARLIN: So, I'm asking you, he  
12 didn't deny that --

13 MR. FITZPATRICK: He didn't deny it -- he  
14 said something about 2,000 contentions.

15 JUDGE KARLIN: I'm just trying to get the  
16 facts. Let's go to the Exhibit X of DOE's, which  
17 is the transcript by this court reporter -- I don't  
18 know if it is the official transcript, but on page  
19 7 -- pull that up, please.

20 And the highlighted section shown on the  
21 screen is line, I guess, 11 of this transcript and  
22 where Mr. Loux transcribed as saying we currently  
23 probably have in the neighborhood drafted a couple  
24 thousand contentions, if you will, many more to

1 come.

2 Do you concede that that is what he said?

3 MR. FITZPATRICK: Apparently. It's in  
4 the record that was produced yesterday. Yes.

5 JUDGE KARLIN: So Mr. Loux is accurately  
6 quoted as saying that you have drafted thousands of  
7 contentions?

8 MR. FITZPATRICK: Yes.

9 JUDGE KARLIN: Okay, thank you.

10 MR. FITZPATRICK: Mr. Loux is a layman.  
11 Mr. Loux was not speaking under oath. Mr. Loux  
12 apparently apparently spoke --

13 JUDGE KARLIN: Isn't Mr. Loux a member of  
14 your team?

15 MR. FITZPATRICK: Pardon me?

16 JUDGE KARLIN: Isn't Mr. Loux a member of  
17 Nevada's team?

18 MR. FITZPATRICK: Yes, Your Honor.

19 JUDGE KARLIN: What is his position on  
20 Nevada's team?

21 MR. FITZPATRICK: He is an official with  
22 the State. He does not have an official title with  
23 our team.

24 JUDGE KARLIN: Is he speaking to the

1 legislature of Nevada?

2 MR. FITZPATRICK: Yes.

3 JUDGE KARLIN: So he probably is trying  
4 to be accurate?

5 MR. FITZPATRICK: Yes, no question about  
6 it.

7 JUDGE KARLIN: So, Nevada --

8 MR. FITZPATRICK: Mr. Loux has probably  
9 never seen an official contention as they end up  
10 being filed with the NRC. And without question  
11 about it, I'm quite sure when he used that in an  
12 imprecise way, he didn't even imply that there were  
13 somehow thousands of full blown contentions in --

14 JUDGE KARLIN: No, he didn't say -- it  
15 said in your declaration, I think, he said he -- do  
16 not have a single final contention.

17 MR. FITZPATRICK: Or a single  
18 circulated --

19 JUDGE KARLIN: Or a single circulated  
20 draft contention. But all Mr. Loux is saying is  
21 you had thousands of draft contentions?.

22 MR. FITZPATRICK: We are talking about  
23 two different things. Yes.

24 JUDGE KARLIN: Okay. If I may, could --

1           JUDGE ROSENTHAL: Well, I would like you  
2 to get back to the point, assume for the sake of  
3 our discussion that this Board or the majority of  
4 this Board were to conclude that at bottom here are  
5 factual issues, that what DOE has presented makes  
6 out a prima facia case, which you have adequately  
7 challenged, how then, in your view, should this  
8 Board proceed in the consideration of the DOE  
9 motion?

10           I grant you that you may think that DOE  
11 has not made out a prima facia case, but I'm asking  
12 you to assume for discussion that we can conclude  
13 otherwise. How then should we proceed, the way  
14 that Judge Karlin suggested or some other way?

15           MR. FITZPATRICK: My view of how you  
16 should proceed is that a party has a duty to  
17 prepare and file a motion, if it chooses to do so,  
18 and take those actions it deems necessary to secure  
19 the necessary support for its motion. That's what  
20 a party has to do.

21           DOE had a period of ten days after our  
22 certification in January, until January 27th, to  
23 prepare a motion and to take whatever steps it  
24 chose to ask for discovery, to seek a delay of the

1 requirement to file its motion or to supplement  
2 this motion for discovery, perhaps, but it had the  
3 ability and the means, as any attorneys do, to take  
4 steps to make sure that when it filed a motion, it  
5 was a motion that compelling and should succeed.

6           And so the answer is, the motion should  
7 be denied because the motion does not contain --

8           JUDGE ROSENTHAL: Let's assume that we  
9 don't accept that position. That we decide that  
10 there is indeed a factual issue that is  
11 appropriately before us. How then do we deal with  
12 it?

13           MR. FITZPATRICK: If you decide there is  
14 factual issue before you, but one side has not  
15 presented the facts in a forum, I guess you could  
16 take steps that were discussed before, such as  
17 posing queries to be answered either under oath or  
18 not by Nevada or other steps to allow the facts to  
19 be obtained which should have been obtained  
20 earlier.

21           JUDGE MOORE: How does that comport with  
22 the regulations that place on the Movant the  
23 burden?

24           MR. FITZPATRICK: As I said, the Movant

1 had the requirement, if it was going to make a  
2 motion, to take the steps necessary to support its  
3 motion.

4 We were in the same boat with this a few  
5 months ago. We had exactly ten days to challenge a  
6 DOE motion. And we forwent different grounds that  
7 may well have been raised.

8 Ms. Trical, speaking for another party,  
9 brought one up, and it was back of the hand because  
10 she didn't have statements where she reviewed the  
11 3.5 million documents and could make  
12 generalizations about it and so on. She was  
13 unskilled but -- in other words, a party assesses  
14 the time available to it to make a motion and takes  
15 the steps necessary.

16 We chose to focus on this and not that.  
17 DOE chose to do what it chose to do.

18 JUDGE MOORE: Is the scheme of the  
19 regulation self-policing in the sense that if there  
20 is documentary material that is not placed on by a  
21 party or potential party but should have been, that  
22 that material cannot subsequently be relied upon by  
23 that party for any purpose downstream?

24 MR. FITZPATRICK: I think that's

1 certainly within the discretion of the PAPO Board  
2 here and the ASLB later. As with any party in  
3 civil litigation where there is any sort of a  
4 deadline for producing expert reports and exhibit  
5 lists and that's not met, I think this would be an  
6 equivalent.

7 JUDGE MOORE: If that's the case, then  
8 there's never -- and assume that's the scheme,  
9 there would not be any prejudice to any other  
10 party; is that correct, that can't later be used?

11 MR. FITZPATRICK: I think in fairness, it  
12 is a little more complicated question, because it  
13 might be different for the different parties.

14 If DOE certified in the LSN database with  
15 nothing on it, arguably, there would be a problem.  
16 But we would be hard pressed to say later on that  
17 they couldn't use anything. But --

18 JUDGE KARLIN: Let me follow up on that.  
19 If, for example, a potential party had developed  
20 information that was, significantly undermined some  
21 of their contentions, and they decided, well, we  
22 are just not going to make it available because we  
23 are not going to rely on it, would the  
24 self-policing mechanism that Judge Moore just

1   posited work?

2                   I think not, because the other parties  
3 would be deprived of the opportunity to see that  
4 material and to probe and challenge the Intervenor  
5 who had presented a position that -- which that  
6 Intervenor had undermining nonsupporting  
7 information.   Would you agree?

8                   MR. FITZPATRICK:   I agree that it is true  
9 of this case and in every civil suit that -- I  
10 mean, where parties ask Interrogatories or request  
11 for production if people deep six the damaging  
12 documents.   I mean, there is no way a party may  
13 learn that, it's true.   And it is a terrible thing,  
14 because you are depending -- I mean, it is not a  
15 terrible thing to depend on the integrity of  
16 attorneys representing the parties.   You certainly  
17 should be able to do that.

18                   But it is nothing to prevent a party  
19 from, in civil litigation or elsewhere, from just  
20 shorting something that's damaging to them.

21                   JUDGE KARLIN:   If I may, I would like to  
22 ask you some questions about your call memos at  
23 this point.

24                   MR. FITZPATRICK:   Your Honor, I led in by

1 saying I would like to tell you what the NRC asked  
2 us to do and what we did. And in what we did we  
3 will go into that. Can I do that?

4 JUDGE KARLIN: I think this would be more  
5 helpful to us, certainly to me. And it sort of  
6 goes to the point you were just making.

7 No one, I think, is suggesting that  
8 anyone attempted to deep six anything. And I don't  
9 see that in DOE's motion. Nor do I even see them  
10 alleging that you did anything in bad faith, or  
11 that anyone who was administering this necessarily  
12 acted in bad faith. Those words were not used.

13 MR. FITZPATRICK: Your Honor, those words  
14 specifically were used 24 times in their motion,  
15 "bad faith."

16 JUDGE KARLIN: All right. Can you cite  
17 some of those?

18 MR. FITZPATRICK: Sure.

19 JUDGE KARLIN: I see where there was a  
20 lack -- there might have been a failure to  
21 provide -- to meet the good faith, the substantial  
22 compliance standard, but -- where they accused you  
23 of bad faith or Nevada?

24 MR. FITZPATRICK: Nevada.

1 JUDGE KARLIN: Okay.

2 MR. FITZPATRICK: Page 1: "Nevada has  
3 not made a good faith effort to make available its  
4 documentary material."

5 JUDGE KARLIN: Okay. Let's stop right  
6 there. To say someone has not made a good faith  
7 effort to produce all documentary material is not  
8 the same as to say they acted in bad faith. Any  
9 lawyer would know that.

10 Let me ask you to to find the words, the  
11 literal words "bad faith"?

12 Maybe we could move on and your  
13 co-counsel could review the brief -- if you think  
14 your paralegal can find that later, great. But  
15 those word were not used in any of DOE's motion to  
16 strike, "bad faith".

17 MR. FITZPATRICK: I believe they were,  
18 Your Honor.

19 JUDGE KARLIN: Okay. I would ask you to  
20 ask your colleague to find those words before your  
21 presentation is over with. So let's move on. I  
22 don't think DOE has said that.

23 But let's just go to your call memo. I  
24 would refer you to DOE Exhibit H.

1 Can we pull that up, Mr. Wielkie.

2 Can we get it any bigger in the screen  
3 and eliminate the side bar material?

4 Now, can you identify that document for  
5 us, Mr. Fitzpatrick?

6 MR. FITZPATRICK: Yes. Mr. Egan's  
7 June 5th, 2007 memorandum to the Nevada licensing  
8 team regarding LSN compliance.

9 JUDGE KARLIN: Okay. And is that the  
10 same as your Exhibit 18?

11 MR. FITZPATRICK: Yes, Your Honor.

12 JUDGE KARLIN: And do you agree that that  
13 is a fair and accurate copy of your memorandum?

14 MR. FITZPATRICK: Yes.

15 JUDGE KARLIN: What's the title of that  
16 memorandum? Could you read the re?

17 MR. FITZPATRICK: Paul, memo, important  
18 instructions for your compliance with LSN  
19 regulations.

20 JUDGE KARLIN: Okay. Great.

21 Now, if you can go to the second page of  
22 that memorandum, please.

23 Can we eliminate the side bar on that,  
24 Mr. Ketchin? Why don't we go back to a full page

1 as best we can see it. Okay. I guess that's part  
2 of the page, but that would be adequate.

3 I would refer you to the second numbered  
4 paragraph. There the guideline indicates that  
5 there are three practical tests of LSN worthiness,  
6 and all three of which must apply or the document  
7 in question may be omitted from the LSN.

8 So is that correct that if it doesn't  
9 meet all three tests, you omitted it, it was  
10 omitted?

11 MR. FITZPATRICK: Correct, Your Honor.

12 JUDGE KARLIN: And again in the following  
13 full paragraph unnumbered, you again say,  
14 production will, quote, only -- only is  
15 highlighted -- be required to be sent to Susan  
16 Lynch for inconclusion in the LSN if they first  
17 pass all three -- and that's underlined or  
18 highlighted -- of the tests, closed quote.

19 So those 3 tests you posit as important  
20 instructions to all of your people?

21 MR. FITZPATRICK: Yes, sir.

22 JUDGE KARLIN: Let's go to page 4 of that  
23 memorandum, please, and the bottom of that page.

24 Now, this indicates that you -- the

1 distribution, can you tell me this, those are the  
2 people to whom those important instructions were  
3 distributed; right?

4 MR. FITZPATRICK: Apparently so.

5 JUDGE KARLIN: Well, were they or were  
6 they not?

7 MR. FITZPATRICK: That's the purpose of  
8 the distribution of this.

9 JUDGE KARLIN: And did all of the people  
10 in that distribution list submit a certification,  
11 as it is shown in the Appendix D of your memo  
12 regarding their documentary material or lack  
13 thereof?

14 MR. FITZPATRICK: I know an awful lot  
15 came that did not come to me. It came to  
16 Ms. Lynch, and I kept monitoring whether the people  
17 were responding and urged her to keep it --

18 JUDGE KARLIN: So you don't know?

19 MR. FITZPATRICK: I can't swear whether  
20 100 percent of them --

21 JUDGE KARLIN: If someone didn't respond,  
22 did anybody follow-up?

23 MR. FITZPATRICK: Ms. Lynch followed up  
24 either first by e-mail and then by telephone call.

1 JUDGE KARLIN: So would it be possible  
2 for us to file some factual questions that Ms.  
3 Lynch could then answer?

4 MR. FITZPATRICK: Certainly.

5 JUDGE KARLIN: If you could then go to  
6 Attachment B, your Exhibit B to Exhibit H, I guess  
7 that's page 128, Mr. Ketchin. It starts with --  
8 let me back up.

9 Let's confirm for the record here, this  
10 memo has four attachments to it does it not,  
11 Mr. Fitzpatrick?

12 MR. FITZPATRICK: That's correct, Your  
13 Honor.

14 JUDGE KARLIN: And the first is Reg Guide  
15 3.69, and the second is Exhibit B, which is the  
16 guidelines, which we are going to be focusing on  
17 now. Exhibit C is a group of examples. Is this  
18 correct?

19 MR. FITZPATRICK: Yes.

20 JUDGE KARLIN: And Exhibit D is the  
21 certification that you required and asked all of  
22 the distributees to send in to you?

23 MR. FITZPATRICK: Yes, Your Honor.

24 JUDGE KARLIN: So let's focus on the

1 guidelines, which is Exhibit B to Exhibit H of  
2 DOE's exhibits, page 129 now.

3 And in the guidelines, you posit the  
4 three tests, do you not?

5 MR. FITZPATRICK: Yes, Your Honor.

6 JUDGE KARLIN: And the second test, what  
7 is that test?

8 MR. FITZPATRICK: I think it's whether  
9 it's documentary material versus relevance.

10 JUDGE KARLIN: And the third test is?

11 MR. FITZPATRICK: Whether it's a final  
12 document or preliminary --

13 JUDGE KARLIN: Now, the first test, which  
14 one is that? This says, quote, test number one, is  
15 the document or information relevant? What is the  
16 regulatory statutory or whatever citations to  
17 support that test?

18 MR. FITZPATRICK: The NRC regulation in  
19 10 CFR 2 suggests that, in the definitions, I  
20 believe, Section 2.101 suggests that Reg Guide 3.69  
21 sets out a helpful outline of what are relevant  
22 licensing topics. I think it might also mention  
23 the license application review claim.

24 JUDGE KARLIN: Let's pull out that

1 regulation. Do you have your regulations?

2           Where do you find that relevance test in  
3 2.1001? The definition of documentary material, I  
4 presume you're talking about, right?

5           MR. FITZPATRICK: Yes, Your Honor. I  
6 think it's in Section 3.

7           JUDGE KARLIN: Okay. And it says in  
8 Section 3 -- let's go back. Regulation 10 CFR  
9 2.1001, documentary material, Subpart 3: All  
10 reports and studies prepared, et cetera, et cetra,  
11 quote, relevant to both the licensed application  
12 and the issues set forth in topical guidelines in  
13 Reg Guide 3.69, close quote.

14           That's what you're referring to?

15           MR. FITZPATRICK: Yes, Your Honor.

16           JUDGE KARLIN: I see that's a criterion  
17 for DM2 -- documentary material category number 3,  
18 but how is it a test for all of LSn worthy  
19 materials?

20           MR. FITZPATRICK: I think we concluded  
21 that the license application review plan and the  
22 topical guidelines of 3.69 captured the subjects  
23 that were going to be dealt with by DOE in its  
24 license application. And so they were the topics

1 that individuals looking for relevant materials  
2 should be looking for.

3 JUDGE KARLIN: So your memo says on page  
4 1 of the guidelines, quote, NRC's Regulatory Guides  
5 3.69 sets out a list of specific subjects that  
6 effectively define a universal of what is relevant  
7 to the Yucca Mountain license proceeding, close  
8 quote. Right?

9 MR. FITZPATRICK: That's what it says,  
10 yes, Your Honor.

11 JUDGE KARLIN: But where is that relevant  
12 standard with regard to DM1?

13 MR. FITZPATRICK: I don't think there is  
14 a relevant standard set out in either DM1 or 2.  
15 So, we had to --

16 JUDGE KARLIN: There is one in 2. We  
17 will get to that. But there is -- but beyond the  
18 existence of that regulatory requirement in DM3,  
19 that's your only citation for where that relevance  
20 test, your initial relevance test came from?

21 MR. FITZPATRICK: In this particular  
22 memo, yes.

23 JUDGE KARLIN: So the relevance test  
24 comes from the definition of DM3?

1 MR. FITZPATRICK: Right. It is a broad  
2 definition of licensing topics.

3 JUDGE KARLIN: Not all DM? Not all DM,  
4 just DM3.

5 MR. FITZPATRICK: The definition in the  
6 book applies to DM3. We believe that it was a fair  
7 definition, a broad definition of licensing topic  
8 that our experts should be on the lookout for.

9 JUDGE KARLIN: So you expanded this  
10 relevance criterion to apply to all documentary  
11 material, not just DM3?

12 MR. FITZPATRICK: Right. We had to give  
13 them some guidance as to what was relevant,  
14 otherwise they might be bringing in documents from  
15 other lawsuits or something, and so we had to  
16 formulate a description of what was relevant  
17 material for their purposes of selecting documents.  
18 And that's what we came up with.

19 JUDGE KARLIN: And so by adding an  
20 additional test, test number one that is not in the  
21 regulations, you might have narrowed the universe  
22 of material that the people who got this memo would  
23 give you?

24 MR. FITZPATRICK: We didn't think -- in

1 our exercise of good faith trying to come up with a  
2 definition of what was relevant to put in the LSN,  
3 no, we didn't think that we would be narrowing the  
4 definition if we narrowed it to what was the  
5 subject of the licensing proceeding.

6 JUDGE KARLIN: All right. Let's go to  
7 the next test, test number two in your guidelines  
8 at the bottom of the page.

9 Test number 2, at first, you have a  
10 category DM1. Is it documentary material? Let me  
11 back up for a minute to -- let's continue. DM1,  
12 information that Nevada intends to cite or rely in  
13 support of its position in the licensing procedure.  
14 Right, that's your DM1, right?

15 MR. FITZPATRICK: Yes, Your Honor.

16 JUDGE KARLIN: And that does not contain  
17 any reference to, relevant to 3.6, Reg Guide 3.69?

18 MR. FITZPATRICK: No, Your Honor.

19 JUDGE KARLIN: And is it necessary to  
20 reference to Reg Guide 3.69 to get the point across  
21 that's in the definition of DM1, which is  
22 information you intend to cite or rely upon?

23 MR. FITZPATRICK: Well, probably what  
24 would be guidance for them is information that they

1 intend to cite or rely upon in the licensing  
2 proceeding. So, that would be guidance.

3 JUDGE KARLIN: But that's not when the  
4 Reg said.

5 MR. FITZPATRICK: That's what the Reg  
6 said.

7 JUDGE KARLIN: That's what -- in support  
8 of its position -- any information upon which a  
9 party intends to rely and/or cite in support of its  
10 position in the proceeding. So you're not saying  
11 you don't have a position. You're just saying this  
12 is the standard, it's anything that you intend to  
13 cite or rely on in support of your position?.

14 MR. FITZPATRICK: We are not saying  
15 whether you have a position or not. We are saying  
16 the regulation requires exactly those words. They  
17 are included, Your Honor.

18 JUDGE KARLIN: Right. Let's go to the  
19 next page, page 130 of your guidance document. And  
20 this is your discussion of what documentary  
21 material number 2 is. And it is, this is the  
22 information you say is criterion -- quote,  
23 information that is relevant under Reg Guide 3.69  
24 but which does not support Nevada's position.

1 Right?

2 MR. FITZPATRICK: Yes, Your Honor.

3 JUDGE KARLIN: This is the guidance  
4 people are supposed to read.

5 Now, would you read me what the Reg says  
6 about DM2.

7 MR. FITZPATRICK: Any information that is  
8 known to or in possession or developed by a --  
9 either is relevant to but does not support the  
10 information or that party's position.

11 JUDGE KARLIN: So DM2 does not use the  
12 standard relevant under Reg Guide 3.69 as in your  
13 guidance memo. It is a very different standard.

14 MR. FITZPATRICK: No, it doesn't.

15 JUDGE KARLIN: Well, what does the reg  
16 say? It says, quote, what is relevant to but does  
17 not support that information or that party's  
18 position. It doesn't say Reg Guide 3.69.

19 MR. FITZPATRICK: That information refers  
20 to number one. And number one refers to  
21 information we relied on in the licensing  
22 proceeding. So the broad character of the  
23 licensing proceeding pervades these.

24 JUDGE KARLIN: Meaning there might be

1 information relevant to your contentions, your  
2 several thousand contentions?

3 MR. FITZPATRICK: Certainly so.

4 JUDGE KARLIN: So, information that is  
5 relevant under Reg Guide 3.69, which is what the  
6 guidance says, does not correctly follow the  
7 language of the regulation? Is that correct?

8 MR. FITZPATRICK: I don't understand the  
9 question.

10 JUDGE KARLIN: Does not use the language  
11 of the regulation, of DM2, changes what is in the  
12 regulation DM2?

13 MR. FITZPATRICK: It omitted a few words.  
14 It didn't change the sense whatsoever.

15 JUDGE KARLIN: All right.

16 Let's go on to the second part of your  
17 definition of DM2, which is does not support  
18 Nevada's position. Are you looking at page 2 of  
19 the guidance? Information does not support  
20 Nevada's position.

21 Is that what the regulation says for DM2?

22 MR. FITZPATRICK: I think I just read you  
23 the regulation.

24 JUDGE KARLIN: Yes. Is that what the

1 regulation says?

2 MR. FITZPATRICK: It says that and some  
3 additional words.

4 JUDGE KARLIN: Some additional words. So  
5 the additional words may make a difference. Let's  
6 go to what it says. It says that the information  
7 that does not support that information or that  
8 party's position. Is that a difference there?

9 MR. FITZPATRICK: That's the difference.

10 JUDGE KARLIN: Would there be a broader  
11 coverage if it was, does not support A or B or does  
12 not support only A?

13 MR. FITZPATRICK: I don't think it's any  
14 broader. It's -- A and B are reliance criteria. A  
15 refers to what you intend to rely on, and B refers  
16 to what does not support your position.

17 So, I don't think that the added verbiage  
18 referring back to A changes the intent or the  
19 meaning.

20 Can I point out something, Your Honor,  
21 while you're looking?

22 JUDGE KARLIN: Yes, sure.

23 MR. FITZPATRICK: That's our Exhibit 17  
24 -- or 18, which was in July '04, which is -- I will

1 concede, let's say it contains some shorthand  
2 renditions which I don't believe change the meaning  
3 of the writ. But if you look back through Exhibit  
4 17 immediately before that, that's a document that  
5 was sent to our licensing team just about a year  
6 before that, and it includes the actual regulations  
7 themselves.

8           And so all the language that we have been  
9 reading as only partially captured in this memo  
10 were all in perfect detail from the words of the  
11 regs applied to the team.

12           JUDGE KARLIN: So you gave them a copy of  
13 the regs?

14           MR. FITZPATRICK: Gave them the regs.

15           JUDGE KARLIN: Okay. I understand that.  
16 But this is an important instruction memo that you  
17 sent out, one of two, as I understand it. You sent  
18 one out in '04, and you sent one out in '07. Did  
19 you send out any other important instructions --

20           MR. FITZPATRICK: Yes, Your Honor, the  
21 one I just mentioned, Exhibit 17, which was sent a  
22 year before that.

23           JUDGE KARLIN: I thought that was -- so  
24 that's a different call memo?

1           MR. FITZPATRICK:  It's not called a call  
2 memo, Your Honor.  It an e-mail containing  
3 instructions for the Nevada licensing team.  It  
4 provides copies of the regulations.

5           It indicates in the text that those are  
6 the regulations which we discussed yesterday at our  
7 meeting, and it points out specifically -- one that  
8 I have highlighted, because it was brought up by  
9 DOE, the broad data caliber, the underlying stuff  
10 -- particularly the e-mail 17, besides providing  
11 the exact precise language of the reg for one --  
12 definition of material, 1, 2, and 3 -- says with  
13 respect to 2.103, the laundry list which we  
14 discussed yesterday in Section A-2.

15           Well, Section A-2, the calibration  
16 procedures, probe, log and data log is those  
17 detailed raw materials.  So, I'm reminded by this  
18 memo.  This came the day after completion of one of  
19 our expert summit meetings, there had been a  
20 presentation on the requirements, the regulations  
21 had been discussed in detail and specifically the  
22 requirements for this underlying raw data had been  
23 discussed.

24           So this e-mail the next day is providing

1 them that -- drawing their attention to that raw  
2 data one, which is a particular interest to expert  
3 witnesses, perhaps, and not lay witnesses because  
4 it involves raw data and things like that.

5 JUDGE KARLIN: Okay. I'm not getting at  
6 whether it's raw data or graphic-oriented material  
7 or memos or work product. I am getting at whether  
8 it's information that does not support Nevada's  
9 position or Nevada's supporting information.

10 And I am concerned that your guidance  
11 memo, which was an important instruction, seriously  
12 understated the class of information that's  
13 necessary under DM2.

14 But let's go on to the examples in  
15 Exhibit C attached to Exhibit H, DOE's Exhibit H.  
16 And there is your set of ten examples; right?

17 MR. FITZPATRICK: Right.

18 JUDGE KARLIN: Let's go to that page, I  
19 believe it's 132. And as I understand your  
20 approach on this one was to give a fact pattern  
21 to -- and then, to discuss how the three tests that  
22 you articulated would apply to that fact pattern?

23 MR. FITZPATRICK: The fact patterns are  
24 very simplistic. And it was done to illustrate the

1 use of the, what was called the decision three, in  
2 other words, the three-step process: See if it's  
3 relevant; see if it's documentary material; and see  
4 if it's in final form.

5 JUDGE KARLIN: So the first screen is if  
6 it was relevant. And if it wasn't, it would be  
7 knocked out right there, no further analysis?

8 MR. FITZPATRICK: If it is not  
9 relevant --

10 JUDGE KARLIN: So it's not relevant to  
11 Reg Guide 3.69, it's knocked out, no further  
12 analysis?

13 MR. FITZPATRICK: Not necessarily Reg  
14 Guide 3.69 but all the information the experts had  
15 been given, including complete copies of all the  
16 regulations.

17 JUDGE KARLIN: But isn't that what the  
18 guidance memo just said, that the criterion for  
19 test number one relevance was relevant to Reg Guide  
20 3.69? Do we need to go back to that page?

21 MR. FITZPATRICK: No. Test number one  
22 said relevant to our position in the licensing  
23 proceeding too.

24 JUDGE KARLIN: Let's go back to

1 guideline. Where does it say that? Go back to  
2 page 129. Where does it say relevant to your  
3 position in licensing proceeding as part of the  
4 relevance test, the initial relevance test? Does  
5 it say that? I don't see that.

6 MR. FITZPATRICK: That's not part of the  
7 relevance test.

8 JUDGE KARLIN: Okay. So it's not part of  
9 the relevance test. So let's go back to the  
10 Exhibit C, ten examples. In each one you give a  
11 fact pattern -- the memo says that factual  
12 situation under your test.

13 Let's go to page 133, which is example D.

14 I will read the facts. They are up there  
15 on the board. Quote, Mike Thorne was asked to give  
16 his opinion regarding the likely criticality  
17 factors involved with the nuclear waste rail car  
18 which falls off a bridge and is submerged in the  
19 Mississippi river, close quote.

20 Now, I would like to focus on your  
21 analysis of documentary material number 2, DM2.  
22 Now, we have just read the facts, and your analysis  
23 of whether it's DM2 says there is nothing  
24 substantive in the document which does not support

1 Nevada's position.

2           How do we know that? It is not in -- you  
3 are presuming a fact that's not in evidence?

4           MR. FITZPATRICK: Yes, Your Honor. There  
5 is no such document.

6           JUDGE KARLIN: There is no such document?

7           MR. FITZPATRICK: There are none of these  
8 documents in this instance. These were all  
9 hypothetical documents.

10           JUDGE KARLIN: Okay. So you're saying  
11 there can be no DM2 at all?

12           MR. FITZPATRICK: No. The scope of  
13 documents to be assumed by the person reading this  
14 was simply the narrow scope listed.

15           JUDGE KARLIN: Okay. Then let's go  
16 back --

17           MR. FITZPATRICK: So there is no  
18 indication that there is anything --

19           JUDGE KARLIN: Let's go back -- Mike  
20 Thorne is asked to give his opinion regarding the  
21 likely criticality factors, blah, blah, blah. We  
22 don't know what his opinion is. It could be  
23 positive. It could be negative. It could support.  
24 It could not support. We don't know that. And

1 yet, in your analysis, in your application of the  
2 standard, you just posit as a given that there is  
3 nothing in there that the document was does not  
4 support. How do you know that?

5 MR. FITZPATRICK: Because Nevada does not  
6 have a position on criticality factors involving  
7 the rail cast falling off a bridge in the  
8 Mississippi River.

9 JUDGE KARLIN: So, you're suggesting that  
10 the answer is Nevada has no position?

11 MR. FITZPATRICK: On this --

12 JUDGE KARLIN: You didn't say that. You  
13 just said it does not support the -- why didn't you  
14 just say Nevada has no position, and therefore,  
15 there can be no DM2? Is that a more accurate way  
16 of expressing this?

17 MR. FITZPATRICK: Could be.

18 JUDGE KARLIN: Well, I'm not asking could  
19 be. I don't understand the application of that  
20 standard.

21 MR. FITZPATRICK: There is nothing in the  
22 hypothetical -- all the information they had was  
23 that which was provided in the hypothetical.

24 JUDGE KARLIN: So if you were in a law

1 school exam and someone said, well, here's the fact  
2 pattern, does it meet this test or not, you would  
3 say I can't answer that question because you have  
4 not given me enough facts? Not I would assume that  
5 there is nothing in there -- I will assume these  
6 facts and reach the conclusion that I like?

7 MR. FITZPATRICK: No, Your Honor.

8 JUDGE KARLIN: No.

9 MR. FITZPATRICK: If they were to assume  
10 the facts given, if there was another sentence that  
11 said it is Nevada's position that rail casts will  
12 take out half of Mississippi. If this happens, it  
13 is DOE's position that nothing happen, then you  
14 will have more information.

15 Unless you were given more information in  
16 the hypothetical, you are not to assume something.

17 JUDGE KARLIN: Well, right. And you have  
18 assumed that there is nothing in there.

19 MR. FITZPATRICK: The expert is not to  
20 assume something in making this judgment.

21 JUDGE KARLIN: Let's go to DM1, the fact  
22 pattern is given an opinion. We don't know what  
23 that opinion is, don't know the contents of that  
24 opinion or anything about it, and now you are going

1 to apply the test, DM1 test, of whether or not it's  
2 information that supports and that is being relied  
3 upon.

4           You just simply posit the fact that  
5 Nevada will rely on it. How do we know that from  
6 the example given? How do we know that?

7           MR. FITZPATRICK: If it says will not  
8 rely on it.

9           JUDGE KARLIN: No, DM1. We are going  
10 back to DM1. Nevada will not rely on --

11           MR. FITZPATRICK: Final reports but not  
12 this document.

13           JUDGE KARLIN: Yes. So you know what  
14 your position is then. Let's go on --

15           MR. FITZPATRICK: No, Your Honor. We  
16 don't know what our position is.

17           JUDGE KARLIN: Let's go on to example G  
18 on the next page, page 134 of the exhibit.

19           And Exhibit A and example in full reads:  
20 "Bob Loux states ask Steve Frishman to comment on  
21 Mike Thorne's criticality report, and he does so by  
22 e-mail, the status of Steve's e-mail."

23           Let's go to DM2 again. And again, you  
24 say, there is nothing likely -- there is likely

1 nothing substantive in Steve's e-mail which is not  
2 supportive of Nevada's position. How do we know  
3 that from the facts that you gave us? Are you just  
4 not making categorical conclusions without the  
5 facts?

6 MR. FITZPATRICK: Exactly. We are asking  
7 to assume nothing but the limited amount of  
8 information that is given because these are only  
9 illustrations of how to apply the three-step test.  
10 The substance of it is not really important. It is  
11 not intended --

12 JUDGE KARLIN: I'm not sure I can  
13 understand that. It seems to me that if you want  
14 to have -- evaluate whether something is DM1 or  
15 DM2, you need to know what's in the documents so  
16 you can know whether it is supportive or  
17 nonsupportive of Nevada's position.

18 MR. FITZPATRICK: In order to do that,  
19 each hypothetical would have had a lengthy  
20 hypothetical --

21 JUDGE KARLIN: No, it just --

22 MR. FITZPATRICK: -- another document  
23 contained, maybe even attach a document. There are  
24 no documents. This is a fabrication.

1           JUDGE KARLIN: I beg to differ. I think  
2 the example could simply say as Dr. Steve  
3 Frishman -- a report and he has raised a number of  
4 issues that support it and a number of issues that  
5 question it.

6           MR. FITZPATRICK: I could have said that.

7           JUDGE KARLIN: Yes. And that would not  
8 have been a difficult and long example. And then  
9 you could decide whether it's supporting, whether  
10 it's nonsupporting, whether it's reporting a study  
11 which is relevant to 3.69.

12           So again, and in the example G, you have  
13 sort of a statement -- nothing substantive in  
14 Steve's e-mail which is not supportive of Nevada's  
15 position.

16           Let's go to example H.

17           JUDGE MOORE: Were you looking for a  
18 response to your last statement?

19           JUDGE KARLIN: No.

20           Example H, on page 135. I will read it:

21           Quote -- in 1985 submitted today -- the  
22 results of a six-month long experiment done at  
23 Catholic University where an example of C22 alloy  
24 was exposed to waters similar to the chemical

1 content in the waters likely to be encountered in a  
2 Yucca Mountain storage tunnel.

3           DM2, again, the same bold categorical  
4 statement, there is nothing in the document which  
5 is not supportive of Nevada's position or likely to  
6 be used by another party. How do we know that from  
7 the facts given?

8           MR. FITZPATRICK: Because there is no  
9 such document, and because the only trace of the  
10 document is the example that's given. And the  
11 hypothetical does not state one way or the other  
12 that there is information that --

13           JUDGE KARLIN: Right. So the correct  
14 answer to DM2 would be we can't answer that  
15 question from the facts given. Not that you have  
16 an answer.

17           MR. FITZPATRICK: Or there is no  
18 indication that there is any unsupporting  
19 information.

20           JUDGE KARLIN: No. The correct answer is  
21 we can't answer DM2 because we don't know what's in  
22 it.

23           Now, let's go to.

24           MR. FITZPATRICK: It doesn't exist, Your

1 Honor. You have to get that straight. It is a  
2 hypothetical. There is no document. These are  
3 hypotheticals to illustrate the application --  
4 tests that nobody else in this proceeding sent to  
5 their parties.

6           It's a little strange that you won't let  
7 me tell you what Nevada did, but you will pick  
8 apart one simple sample of what Nevada did as  
9 perhaps an illustration of, what, lack of good  
10 faith on the part of Nevada. I think you have to  
11 view the entire picture of what Nevada provided to  
12 its troops, including the entire regulations and an  
13 explanation of them.

14           JUDGE KARLIN: Okay. Well, I think as I  
15 understood it, this was important instructions that  
16 you gave to all of your team, and that they would,  
17 presumably, take very seriously.

18           So let me just ask with regard to each of  
19 the three examples we have probed for DM2, there is  
20 a statement, there is nothing in the document which  
21 is not supportive of Nevada's position likely to be  
22 used by another party.

23           Would you look at all ten examples and  
24 tell me if that is not virtually the same thing you

1 staid for all DM2's?

2 MR. FITZPATRICK: Unless a hypothetical  
3 created situation where there is --

4 JUDGE KARLIN: Would you please look and  
5 see. Isn't that virtually the same statement you  
6 made for DM2 in all kinds of examples given?

7 MR. FITZPATRICK: That's correct.  
8 There's nothing in any of those hypotheticals that  
9 states anything contrary to Nevada's position.

10 And if I may insert, that is not a  
11 mystery, Your Honor, because if DOE has 5,000  
12 things to establish under 10 CFR 63, they have no  
13 choice but to address each one of them. Nevada  
14 does not have an obligation to address each one of  
15 them. Nevada can analyze those which it chooses,  
16 and in some of them it may find that DOE's work was  
17 impressive and -- Nevada will presumably not make  
18 a contention about those issues.

19 JUDGE KARLIN: I understand.

20 MR. FITZPATRICK: So if Nevada sends a  
21 letter to somebody or an e-mail and says I have  
22 examined the issue A as you requested, and I find  
23 that DOE did a great job for the following reasons,  
24 that's not the DM1 because we are not going to rely

1 on it in the proceeding. And it's not DM2,  
2 nonsupportive of our position, because anytime we  
3 say something good of about DOE, that's not  
4 nonsupportive of our position.

5 JUDGE KARLIN: I'm not suggesting that.  
6 I understand your argument on that point. I just  
7 was trying to understand whether any of your ten  
8 examples dealt with, addressed DM2 other than that  
9 bold statement there is just no DM2 in here, and  
10 apparently not.

11 MR. FITZPATRICK: Had the hypotheticals  
12 been more lengthy, they could have hypothesized the  
13 situation with something --

14 JUDGE KARLIN: Half a sentence would not  
15 take -- let's go to another question. It does  
16 appear none of your answers are based on well,  
17 Nevada does not have a position. You're saying  
18 they just don't -- there is nothing in there that  
19 does not support Nevada's position. So are you  
20 positing that you do have positions?

21 MR. FITZPATRICK: No, Your Honor, not at  
22 all.

23 JUDGE KARLIN: Do you not have positions?

24 MR. FITZPATRICK: These are instructions

1 to people about how to interpret criteria for  
2 bidding documents.

3           And incidentally, you kept emphasizing  
4 this was a serious, well-read, dah, dah, dah memo.  
5 There must have been many, many of those. I mean,  
6 you selected this one. There are many other  
7 examples, many other exhibits that were just as  
8 serious, just as intended to be relied upon.

9           JUDGE KARLIN: Well, this memo, if I  
10 understand it, starts with the proposition, quote,  
11 first page, this is an update of my July, 29, 2004  
12 call memo. So there has only been to call memos in  
13 this time frame; right, in three years?

14           MR. FITZPATRICK: Apparently. There were  
15 other battles of --

16           JUDGE KARLIN: I would like to continue.  
17 So, in none of these examples you say, well, Nevada  
18 has not taken a position, therefore, there can be  
19 no DM2?

20           MR. FITZPATRICK: We haven't don't that,  
21 Your Honor, no. We did not because that was not  
22 the subject of this, whether we had taken any  
23 positions was not a --

24           JUDGE KARLIN: Wouldn't that be a good

1 example, while we have got some -- here's  
2 information, and you say, well, is it DM2? Well,  
3 no it's not, because we have not taken a position  
4 on that issue. You did not say that. You said  
5 there is no DM2 because it doesn't support your  
6 position.

7           Is there anything in any of your  
8 instructions, any of them you can cite me to that  
9 require people to provide nonsupporting  
10 information, any information, documents that  
11 contain any information that does not support  
12 Nevada's contentions or positions?

13           MR. FITZPATRICK: Yes, Your Honor.

14           JUDGE KARLIN: Cite me to something in  
15 the memos that says, other than providing the copy  
16 of the regs.

17           MR. FITZPATRICK: Well, in the same call  
18 memo that you were just reading from, in Exhibit B  
19 at the bottom of the first page --

20           JUDGE KARLIN: I'm sorry. Top of the  
21 second page, is that what you said?

22           MR. FITZPATRICK: Top of the second page,  
23 I'm sorry.

24           JUDGE KARLIN: So that's the only place

1 in all this material that you discuss --

2 MR. FITZPATRICK: Did you say except for  
3 providing regulations?

4 JUDGE KARLIN: Yes, except for providing.  
5 You are giving guidance. You are talking with  
6 these people, you are giving important  
7 instructions. Now, the regulation says DM2 is any  
8 information that is relevant to but does not  
9 support that information or Nevada's position.

10 Now, is there anywhere there where you  
11 give guidance or instruction other than what you  
12 just cited to me on how to apply DM2, nonsupporting  
13 information?

14 Seems to me that nonsupporting  
15 information is very critical. We demanded that DOE  
16 provide nonsupporting information. We demanded  
17 that DOE go through 4 million e-mails to look for  
18 the unvarnished truth of nonsupporting information  
19 that might be found in those e-mails.

20 I'm trying to find out whether you gave  
21 any encouragement or instruction in writing -- and  
22 you can cite to me -- to encourage your people to  
23 bring forth any information that does not support  
24 Nevada's supporting information or Nevada's

1 position other than that cite?

2 MR. FITZPATRICK: At present, that cite  
3 and the documents which transmits the regulations  
4 themselves would say that are the two sources.

5 JUDGE KARLIN: Okay. Let me go back to  
6 example D.

7 That's on page 133, Mr. Kutchin.

8 Now, let's focus on this one. I'm  
9 concerned about your assessment of DM1. Again, the  
10 example is Mike Thorne is asked to give his opinion  
11 regarding likely criticality factors, et cetera.  
12 Your analysis of the applicability or not of DM1  
13 is, quote, Nevada will rely on Dr. Thorne's final  
14 report or contentions but not in the licensing  
15 proceeding -- Nevada will rely on Dr. Thorne's  
16 final report or contentions in the licensing  
17 proceeding as well as his oral testimony but not  
18 this document.

19 Later down on test number three, you say  
20 that Dr. Thorne report is a final report. Is that  
21 not correct?

22 MR. FITZPATRICK: I say it's a report  
23 requested -- by Dr. Thorne's client.

24 JUDGE KARLIN: And you say test number

1 three in example D, it is a final bold report. All  
2 right.

3 MR. FITZPATRICK: Right.

4 JUDGE KARLIN: So Dr. Thorne's report is  
5 a final report. Dr. Thorne's report contains  
6 information which Nevada will rely upon, but you  
7 are not going to rely upon this document, but you  
8 are going to rely upon that information.

9 Doesn't the definition of documentary  
10 material in number one say any document that  
11 contains information that you will rely upon? And  
12 this is information, you are going to rely on, and  
13 it is a final report. Haven't you misconstrued --  
14 when you say it's not DM1, isn't that wrong?

15 MR. FITZPATRICK: I think the conclusion  
16 to number three was that it was going to be  
17 included as DM3 because DM3 refers to whether you  
18 been relying on it or not.

19 JUDGE KARLIN: I understand that's DM3,  
20 but I think it's DM1 as well. If you give the  
21 wrong answer for example, could people not be  
22 confused.

23 MR. FITZPATRICK: Why do you think it's  
24 DM1?

1           JUDGE KARLIN:  Let's just go through it  
2 again, and let's look at the definition of DM1.  
3 Any information that you intend to rely upon or  
4 cite in support of its position.

5           Now, you say here that Nevada will rely  
6 on Dr. Thorne's report or contentions in the  
7 license proceeding but not this document.

8           Now, the definition does not say any  
9 documents you rely upon.  It says any document that  
10 contains information.  And this document does  
11 contain information that you will rely upon.  You  
12 will not rely upon that document, but you rely upon  
13 the information in that document.

14          MR. FITZPATRICK:  I don't know we will  
15 rely upon the information in the document.  I don't  
16 think it says that.

17          Dr. Thorne has been asked to do many and  
18 sundry different things.

19          JUDGE KARLIN:  It says Nevada will rely  
20 on Dr. Thorne's final report and contentions.

21          MR. FITZPATRICK:  That's contentions.

22          JUDGE KARLIN:  But not this document?

23          MR. FITZPATRICK:  Right.  This document  
24 pertains to something that is not likely to be a

1 contention in this proceeding.

2 JUDGE KARLIN: Let's go to example again.  
3 Quote, Bob Loux asked Steve Frishman to comment on  
4 Mike Thorne's criticality report, and does so by  
5 e-mail, the status of Steve's email, DM1.

6 Quote, Nevada will not rely on Steve's  
7 e-mail in a licensing proceeding.

8 What about information in the e-mail?

9 MR. FITZPATRICK: There is nothing  
10 stated --

11 JUDGE KARLIN: This document is specific  
12 information.

13 MR. FITZPATRICK: There is nothing stated  
14 here that indicates one way or the other about the  
15 content of the e-mail.

16 JUDGE MOORE: Mr. Fitzpatrick, before we  
17 take a break, just so I know what some of your oral  
18 argument exhibits are, your oral argument  
19 Exhibit 121, is this another collection of  
20 materials that you sent out to your team?

21 MR. FITZPATRICK: Yes, Your Honor.

22 JUDGE MOORE: And is one of those  
23 materials that you sent out to all of these people  
24 which is listed as number 5 on something called

1 Final Training for Nevada's Initial LSN  
2 Certification, DOE's November 3rd, 2006 LSN  
3 instructions to its staff and contractors?

4 MR. FITZPATRICK: Yes, Your Honor.

5 JUDGE MOORE: Is that guidance document  
6 entitled Guidance Concerning Ongoing LSN  
7 Obligations?

8 MR. FITZPATRICK: Yes, Your Honor.

9 JUDGE MOORE: And is the third page of  
10 that Item 3 part of the matter that you sent out  
11 that's part of part of that DOE guidance that says  
12 submit potential nonsupporting and supporting  
13 e-mail?

14 MR. FITZPATRICK: Yes, Your Honor.

15 JUDGE MOORE: So that was all the  
16 material that was sent out by you.

17 MR. FITZPATRICK: There is another  
18 example because in addition to this particular  
19 mailing, as you can see from the list of six items  
20 under final training, there was six different items  
21 sent or re-sent to the team, including Mr. Egan's  
22 call memos and other information, but this time  
23 including DOE's information, including its  
24 description of the Class I and II, its description

1 of Class II.

2           If you are going to analyze, I think you  
3 would find this to be far too narrow a description  
4 of nonsupporting. DOE says Class II simply if it  
5 contains information that is adverse to,  
6 contradictory of or inconsistent with information  
7 in the first category.

8           JUDGE KARLIN: You are suggesting that is  
9 narrower than your definition, which is DM2 is  
10 information that is relevant -- your suggestion is  
11 that that is narrower?

12           MR. FITZPATRICK: It is more narrower  
13 than nonsupporting generally. Nonsupporting can be  
14 sort of pablum, nonsupporting. This says adverse  
15 to, contradictory to or inconsistent with.  
16 Otherwise it doesn't get --

17           JUDGE MOORE: It is time to take a break.  
18 We will resume this at 11:35. And at that time,  
19 when Judge Karlin finishes up his question that he  
20 is on, you will be given an opportunity to tell us  
21 what you did, which I believe you wanted to do.

22           We will be adjourned until 11:35.

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MR. SHEBELSKIE: Were you around talk with your colleagues and find any references to bad faith and DOE's motion to strike.

MR. FITZPATRICK: What he came up with one place where DOE said that we had accused them of bad faith at some point and this is much worse other than that, letter maybe 7 or 8 examples where they accused us of not acting in good faith.

JUDGE KARLIN: So there was no reference where he accused you of acting in bad faith.

MR. FITZPATRICK: That we were worse, whatever that means.

JUDGE KARLIN: We are almost done with this memo or topic. What I would like to refer you to is your exhibit, your declaration you filed in association with this. I'm trying to find it. Bear with me a moment.

Okay, Nevada's response, I believe the first attachment, page 47 was your declaration.

MR. FITZPATRICK: Yes, Your Honor.

JUDGE KARLIN: And as you know, I was concerned about DM2 which is concerned about whether you were called accurately or properly

1 called for any information that did not support  
2 Nevada's position or Nevada's information. We go  
3 to paragraph number 12 of your declaration. You  
4 have that in front of you?

5 MR. FITZPATRICK: Yes, Your Honor.

6 JUDGE KARLIN: There you say " The expert  
7 consultant on Nevada's licensing team were  
8 repeatedly cautioned that they had no reason to  
9 assure that anything they might possibly rely upon  
10 in forming opinions or testifying in the current  
11 connection with the licensing proceeding needs to  
12 on the LSN at the time of Nevada certification."  
13 Closed quote. I'm struck by the fact that your  
14 declaration only focuses on urging your experts to  
15 provide information that they might rely upon.  
16 Where do you say in your affidavit declaration that  
17 you urge them to provide information that might not  
18 support Nevada's position to which you might  
19 undermine what they are saying?

20 MR. FITZPATRICK: I don't think that is  
21 in there. This was not the point of the affidavit.

22 JUDGE KARLIN: The point of the affidavit  
23 you filed was to help us conclude that you had  
24 fully made all your documentary material available

1 and this only covers DM1.

2 MR. FITZPATRICK: The point was  
3 specifically to respond to DOE's motion and  
4 specifically to DOE's accusation that in some  
5 global way, there must be documentary material  
6 these experts have generated and tend to rely on  
7 for their contentions and it's all missing. So  
8 that was the focus of the motion. That was the  
9 focus of the response and the focus of this  
10 paragraph and this affidavit. A lot of things I  
11 didn't address --

12 JUDGE KARLIN: Did not the motion raise  
13 the absence of information would be critical of or  
14 undermine your motion?

15 MR. FITZPATRICK: I don't recall that  
16 Your Honor.

17 JUDGE KARLIN: Let's go to page 31 that I  
18 cited earlier. I think it does.

19 MR. FITZPATRICK: I'm willing to surmise  
20 it does.

21 JUDGE KARLIN: Says recipient to omit  
22 critical commentary So you emphasized that you  
23 encourage people to provide information they would  
24 rely upon. What is missing significantly is my

1 statement that you encourage people to provide  
2 information that might be critical or undermine  
3 Nevada's position. Maybe did you?

4 MR. FITZPATRICK: Where is that that you  
5 say that it appears that exist?

6 JUDGE KARLIN: Well, I read your  
7 declaration and your declaration says strongly that  
8 you urge people to provide any information that you  
9 might rely upon. Where is the corollary that you  
10 urge people to provide information that might  
11 undermine or not support your motion? Where is the  
12 corollary in that?

13 MR. FITZPATRICK: We discuss that here  
14 and discussed that with the experts at length that  
15 if an analysis they made establishes something was  
16 done properly, it will not be a contention.

17 JUDGE KARLIN: But there might be  
18 contentions which were drafted, thousands of  
19 contentions which might include -- in your material  
20 might have some information that's not supportive  
21 of that contention?

22 MR. FITZPATRICK: We only have  
23 preliminary contentions and so --

24 JUDGE KARLIN: Have you provided in your

1 document production, have you provided any  
2 information that is not supportive of Nevada's  
3 position or draft contentions?

4 MR. FITZPATRICK: I assume we have  
5 because --

6 JUDGE KARLIN: No, did you?

7 JUDGE KARLIN:

8 MR. FITZPATRICK: I don't have  
9 comprehensive knowledge of every document in the  
10 system, no. I can't answer that question. Not  
11 every document.

12 JUDGE KARLIN: Okay. That's fine.

13 JUDGE MOORE: Did DOE's counsel in their  
14 meeting with you on January 28th who sincerely  
15 resolved your differences, bring up specifically  
16 the issue that there were no materials in your LSN  
17 collection that were non-supportive?

18 MR. FITZPATRICK: No, Your Honor. That  
19 was not brought up and nothing that's been  
20 discussed in the last hour was brought up at that  
21 meeting.

22 JUDGE MOORE: You are going to I believe  
23 explain to us what you -- Nevada did.

24 MR. FITZPATRICK: A shortened version.

1 First of all from what we were expected to do and  
2 the NRC spoke in Federal Register Notice in 2004  
3 Volume 69 at 3343 and they are talking about the  
4 difficulty and this is the whole actual that this  
5 motion is about, had to do with whether or not  
6 Nevada has not made a good faith effort to gather  
7 the documentary material, put it on its LSN,  
8 whether they had made that effort.

9           And the basis of the proof was simply an  
10 analysis of size of document collections for the  
11 800 equals incomplete. And that presumes that -- I  
12 might add before I read this -- that presumes that  
13 Nevada somehow has an obligation to rush to  
14 complete a bunch of documents to get them on the  
15 LSN to give them to DOE. That's its mission in  
16 life.

17           Well, it really is primary mission in  
18 this context at this time is to work toward the  
19 development of contentions for submission in the  
20 licensing proceeding which contentions will not be  
21 due for a year based on an LA which will not be  
22 filed for at least, 6 months, which will be  
23 predicated on documents like preclosure safety  
24 analysis, TSPA and and other documents which are

1 not even done yet.

2           So that's the scenario we find ourselves  
3 in not with an obligation to rush to completion and  
4 throw on LSN until they are done. We do however,  
5 have a duty and we certainly recognize it of  
6 putting those things on the LSN as they are  
7 completed. As far as the difficulty of doing that  
8 up front at this time, the NRC said at 32842, the  
9 first two classes of documentary material are tied  
10 to reliance criteria. Reliance is fundamentally,  
11 related to the position of the party will take in  
12 regard to compliance with regulations on issues of  
13 construction and license.

14           These compliance issues take the form of  
15 contentions of law or fact that the party has  
16 successfully had for litigation and under the laws  
17 of practice.

18           The Commission is clarifying that because  
19 the full scope of coverage of the reliance concept  
20 will only become apparent after proffered  
21 contentions are admitted by the presiding officer  
22 in the proceedings and LSN the participant would  
23 not be expected to identify specifically documents  
24 that fall within either Class I or Class II

1 documentary materials as a consequence. While it  
2 is not possible to say that there are no special  
3 circumstances.

4 JUDGE KARLIN: I think you're skipping on  
5 the paragraphs.

6 MR. FITZPATRICK: I'm skipping large  
7 sections, Your Honor.

8 JUDGE KARLIN: I would like to -- I'll  
9 read it for you. In this regard, the Commission  
10 still expects all participants to make a good faith  
11 effort to have made available, all of their  
12 documentary material that may eventually be  
13 designated Class I and Class II document material  
14 by the date specified for initial compliance. And  
15 in section 2.1A of the Commission's regulation.  
16 That is an omission and still expected to make a  
17 good faith effort.

18 MR. FITZPATRICK: It is not an omission.  
19 I was reading the sections that had not been  
20 already quoted by DOE in its brief and they are  
21 already quoted by Nevada which the Board said it  
22 was going to read. I was reading sections that  
23 were embellishing on that. There is no question  
24 and we don't duck or avoid the fact that the Board

1 said that a good faith attempt would be made to  
2 include documents that may eventually -- I think  
3 your words almost verbatim to that effect, So we  
4 are not hiding from that.

5 JUDGE KARLIN: I was almost confused when  
6 I was trying to follow along and you kept reading  
7 and that didn't say that. It jumped somewhere so  
8 every time you jumped, I wanted to sort of  
9 understand what you left out.

10 JUDGE MOORE: Mr. Fitzpatrick, as I  
11 understand, DOE has issued EIS and a number of  
12 supplemental EISs and a number of draft  
13 supplementals EIS, is that correct?

14 MR. FITZPATRICK: I think that's correct,  
15 Your Honor.

16 JUDGE MOORE: Now, with regard to any  
17 contentions that DOE may wish to raise -- I'm  
18 sorry -- Nevada wishes to raise with regard to that  
19 those EISs, recognize that staff has not yet  
20 determined, whether the staff will do a  
21 supplementation. Is Nevada's position the same,  
22 that it can't take a position?

23 MR. FITZPATRICK: I think that if I'm not  
24 mistaken on the SEIS, there is a comment period on

1 that right now.

2 JUDGE MOORE: That those are not  
3 supplement. There's one been out for at least two  
4 years.

5 MR. FITZPATRICK: Right. And then, there  
6 is one that is a supplement that is I think in a  
7 comment period and when that becomes a final rule,  
8 final SES, I think that it's likely at that time  
9 Nevada will certainly analyze it and undertake to  
10 determine it --

11 JUDGE MOORE: But the DOE, EIS documents,  
12 let's call them legal documents that are now final;  
13 aren't you in the position to have to produce and  
14 know what your position will be on those and put it  
15 forth at this time?

16 MR. FITZPATRICK: I don't think we have  
17 drafted any documents. We do not have any  
18 individuals assigned on the team yet with any  
19 responsibility to do those contentions that may be  
20 directed to the EIS. I think that is something  
21 that will be done probably after the final version  
22 of the supplement. We commented on the SEIS years  
23 and years ago, on the SEIS years and years ago.  
24 But as far as I'm aware, the last work product that

1 was generated on that subject --

2 JUDGE KARLIN: Is that material in either  
3 your collection or DOE's collection?

4 MR. FITZPATRICK: I'm not sure, Your  
5 Honor. The finish of that quote from the NRC was  
6 consequence while it is not possible to say that  
7 there are no special circumstances that will  
8 necessitate a ruling by the PAPO on the  
9 availability of particular documents in the  
10 pre-license application stage, based on Class I or  
11 Class II status, disputes over Class I or Class II  
12 documents are generally of the type more  
13 appropriately raised before the presiding officer  
14 designated during the time following the admission  
15 of contentions when the NRC staff were present to  
16 complete the report in its entirety.

17 In any event, we were well aware of the  
18 accepted portion which I did not read and that was  
19 the course of action we followed. We believe that  
20 there were 3 requirements to be met in order to do  
21 the LSN correctly. And I would quote from DOE what  
22 it said in response to our motion to strike theirs  
23 because I think this is a correct statement.

24 JUDGE KARLIN: This is back in 2004?

1           MR. FITZPATRICK: No sir, this is the one  
2 a few months ago. Three requirements. One, a  
3 certification required by 10 CFR 2.109B

4           MR. FITZPATRICK: Participants  
5 attestation has implemented procedures to enable  
6 to it to -- not just in the present but in going  
7 forward as well, procedures.

8           Number two: It is an attestation that  
9 the participant element the training of its  
10 personnel to enable the participants to continue to  
11 meet its obligations. And three, it is an  
12 accusation that participant has made available to  
13 existing documentary material and even DOE said,  
14 parenthetically, to the extent it can reasonably be  
15 identified in the pre-license application phase  
16 (before contentions), and that it will continue to  
17 supplement its production with additional  
18 documentary material to create or identify.

19           That is actually what we have undertaken  
20 to do. The training, establishment of procedures,  
21 the gathering of a database that meets the LSN and  
22 CFR2 requirement. We begin in 2003 which is more  
23 than four years ago with the first expert universal  
24 summit meeting we call them and in late 2003 and

1 begin there with the session regarding training  
2 procedures and the definitions and what was to be  
3 included in the LSN.

4           In June of 2004, was when -- and I will  
5 not go to the exhibits because it will take too  
6 much time and we have looked at some of them any  
7 way. When we circulated this specific regulations,  
8 we just had another expert summit in June, '04. We  
9 discussed those issues again and one specific issue  
10 that drew a lot of attention from the experts was  
11 that requirement to provide calibration, all those  
12 things in A-2 and those were all discussed at the  
13 meeting and the day following, the REGs were sent  
14 to them to bring their attention to that A-2 as one  
15 of those things they needed to watch for.

16           JUDGE MOORE: In your oral argument  
17 exhibits and I don't have the one in front of me,  
18 but the exhibit, what appear to be graphic oriented  
19 material. Is that correct?

20           MR. FITZPATRICK: I think the one we just  
21 spoke of.

22           JUDGE MOORE: In your oral argument  
23 exhibit?

24           MR. FITZPATRICK: Correct.

1           JUDGE MOORE: Is that illustrative that  
2 such material is in the LSN or is that exclusive.  
3 That's all there is?

4           MR. FITZPATRICK: Oh, no, Your Honor. We  
5 have examples and actually we put some examples in  
6 the oral argument exhibit. Exhibit 26 is about  
7 five exemplars of laboratory notebooks all from --

8           JUDGE KARLIN: During your January 28th  
9 meeting with counsel for DOE, did they specifically  
10 raise the issue that there were no graphics  
11 oriented materials in your LSN collection?

12          MR. FITZPATRICK: I think they raised the  
13 issue that they thought there was a scarcity of  
14 them.

15          JUDGE KARLIN: And what was your  
16 response?

17          MR. FITZPATRICK: My response during that  
18 conversation and my response today has always been  
19 the same. We believe that we have in good faith  
20 created a complete database, LSN database. We  
21 believe that -- I can go through the list but all  
22 of the sessions we have conducted large and small  
23 and documentary and oral, have inculcated these  
24 definitions and steps and we have done a good job.

1 Certainly, we have put forth a good faith effort.

2           If we have missed anything as I said in  
3 the meeting and I said in our brief and I say  
4 today, if we have missed something, we're human  
5 just like anybody else. DOE missed some things and  
6 we told them and they could put them in. If that  
7 happens, we will be happy to do it.

8           JUDGE KARLIN: DOE makes in their motion  
9 the assertion had there are no privileged--you  
10 found no privilege, no graphic headers for  
11 privileged documents. Did they raise that on in  
12 the January 28th meeting?

13           MR. FITZPATRICK: I don't think that is  
14 an objection that they have to our database. I  
15 don't think they raised it but I don't think that  
16 is an objection.

17           JUDGE KARLIN: I noticed that there are  
18 no privilege logs and there don't appear to be any.

19           MR. FITZPATRICK: And if you look, you  
20 might find some documents that you think have been  
21 claimed.

22           JUDGE MOORE: And why is that?

23           MR. FITZPATRICK: Because we determined  
24 we would not assert the privilege that we might

1 have asserted as to some documents that we had  
2 segregated and analyzed for that purpose. We  
3 decided we are a state organization, paid by  
4 taxpayer and unless there is some justification,  
5 there is no reason they should see what we do.

6 JUDGE KARLIN: Did they raise the absence  
7 of work product in consultation?

8 MR. FITZPATRICK: I don't believe so.

9 JUDGE KARLIN: Because the work  
10 product --

11 JUDGE MOORE: So no inference should be  
12 drawn, certainly, no negative inferences should be  
13 drawn that there are no claimed privileged  
14 documents?

15 MR. FITZPATRICK: No. As a matter of  
16 fact, we cited in our certification that we had  
17 made the determination not to assert the privilege  
18 to those documents that we might have in the  
19 interest of an open proceeding.

20 JUDGE MOORE: Now, you have in your oral  
21 arguments, exhibits, -- never mind, go ahead,  
22 proceed.

23 MR. FITZPATRICK: Finishing up about --  
24 in the end, what the criticism is not our

1 procedures because certainly, our training  
2 procedures if anything, they exceed DOE's and I  
3 think are more broad and catch more things than the  
4 definition that I have seen for DOE.

5           But I don't believe that there was one  
6 exception about the distribution and that was fixed  
7 by steps taken by Ms. Lynch followed by the  
8 declaration to reinforce it. But they are not  
9 criticizing that we went about it the wrong way.

10 And although they seem to say to me because of the  
11 attachments, we attached calibration log, raw data,  
12 laboratory notebooks, samples of those things.

13 They can assert that we have excluded any category  
14 of documents like has category that we have told  
15 people don't do this. There is something with  
16 everything and so what's left, DOE's second  
17 guessing the judgments of the Nevada team as to  
18 what they are going to rely on and not rely on in  
19 the proceeding. And as I said, our goal or our  
20 contentions are a year away and they are based upon  
21 documents which largely don't exist yet.

22           JUDGE MOORE: Without belittling in any  
23 way Nevada's interest to date, is it Nevada's view  
24 that DOE has perhaps overestimated what Nevada has

1 done to date that would seem to be the gist of what  
2 you are saying in that it took a while to gather a  
3 team of experts and only 17 hours have been billed  
4 a month by Dr. Thorne and you give quite a litany.  
5 Is this an Iraq/Iranian situation where the weapons  
6 of mass destruction were smoke and mirrors from the  
7 perspective of DOE?

8           MR. FITZPATRICK: If DOE believes what it  
9 wrote in its motion, they far overestimated the  
10 content of Nevada's effort. I will give you an  
11 example. During -- they quote grandiose numbers of  
12 dollars in 25 years and so many experts. The point  
13 is my expert team was essentially put on whatever  
14 you put a computer on screen to sleep, almost in  
15 its entirety from June '04 or that summer until the  
16 summer of '07 when two and a half million documents  
17 were finally released.

18           It was known to all of us that there were  
19 documents that were relevant to the LSA that had  
20 been segregated by DOE sent to Mr. Graser for that  
21 purpose but under agreement, it would not be  
22 released to the public. I'm not here to attack  
23 that decision or that's besides the point today.  
24 What is relevant today is the false assumption that

1 somehow, Nevada had a team of experts pouring over  
2 those documents. We did not.

3           The only documents that were available on  
4 the LSN until last summer were ones that had been  
5 put up in June '04 which means they predated that.  
6 So for 2008 or so, LA filing, one can speculate  
7 that pre 2004 documents which have been replaced  
8 and reiterated are not of great value.

9           JUDGE KARLIN: Didn't we already cover  
10 that Nevada has indeed as Mr. Loux stated, drafted  
11 thousands of contentions?

12           MR. FITZPATRICK: That's what Mr. Loux  
13 said. We agreed.

14           JUDGE KARLIN: So you agreed that Nevada  
15 has drafted thousands contentions, preliminary  
16 draft of thousands of contentions --

17           MR. FITZPATRICK: We gone over there but  
18 different from what you or me mean by a contention.

19           JUDGE KARLIN: I think you are quite  
20 modest. Certainly I understand contentions need to  
21 be drafted carefully, but if you have thousands of  
22 contentions that would seem to tell me that people  
23 have given a lot of thought to these issues and  
24 developed positions and contentions. They may not

1 be finalized. They have not cited the application  
2 that is deficient because they don't have the  
3 application. But you are very modest to say that  
4 represents a very little amount of work.

5           It sounds like a lot of thinking that  
6 must have gone into thousands of contentions.

7           MR. FITZPATRICK: Now, that's pure  
8 speculation.

9           JUDGE KARLIN: But there are thousands of  
10 contentions. I'll give you an example because  
11 there is an example in the record. In Exhibit P of  
12 DOE's -- attached to DOE's motion, there is various  
13 exhibits from one of the experts and it was not put  
14 in the LSN because it has contentions in it. But  
15 in spite of the fact that --

16           JUDGE KARLIN: It has 37 contentions?

17           MR. FITZPATRICK: Something like that.

18 And if you read them, you will see. Number one,  
19 you see there are a couple of sentences. Number  
20 two, you will see in 35 out of 37 instances the  
21 statement begins DOE assumes this and I don't know  
22 if that is correct.

23           DOE has failed to assess that and I think  
24 they should. DOE has failed to assess this and I

1 think they should. And that is an exit clause of  
2 Mr. Loux's contentions. That's not in my view a  
3 contention nor does it establish a position. It  
4 points out a lack of something.

5 JUDGE KARLIN: I think that's quite  
6 common in at we did in contentions is an allegation  
7 that the applicant or the application fails to  
8 address a certain issue or inadequately addresses  
9 an important issue and -- let's move on.

10 MR. FITZPATRICK: Using it as an example,  
11 I would say that this is pure off the hip shot. I  
12 would say that Mr. Morganstein who wrote this may  
13 have done so in a day. I don't know. No other  
14 member of the team participated in that effort  
15 whatsoever.

16 So, if are you counting contentions and  
17 this wonderful global mass of efforts that we are  
18 being too modest about, there is an example. You  
19 seen 37 of them. They took one person, one  
20 afternoon's work. So let's put it in context if we  
21 are going to.

22 JUDGE KARLIN: Can I ask some questions  
23 about your brief, page 30. There is under the  
24 subjects of duplication. Can we bring that up?

1 Page 30 in this area, you are going over a number  
2 of DOE assertions and your response to them. One  
3 at the bottom of the page, DOE omission and there  
4 is a discussion about a Dr. Barkatt -- I'll wait  
5 for you to get that page.

6 MR. FITZPATRICK: Page 30.

7 JUDGE KARLIN: And you were addressing  
8 DOE allegation that they did a search on the author  
9 file of Dr. Barkatt and for your Nevada's LSN  
10 collection and they only got 34 hits. You with me?

11 MR. FITZPATRICK: Yes sir.

12 JUDGE KARLIN: And you say -- well, it's  
13 actually 37. But then you go on to give a  
14 response -- more importantly, what DOE failed to do  
15 is note the report of all of LSN databases using  
16 Dr. Barkatt in the author field and this would have  
17 yielded 107.

18 MR. FITZPATRICK: Okay.

19 JUDGE KARLIN: And then, you make the  
20 statement that I'm concerned about, the next  
21 statement. Since Nevada was not expected to put  
22 claimants LSN, database duplicates of documents  
23 already on the LSN, there is no reason Nevada would  
24 have felt it necessary for -- I don't know whether

1 that is a air assessment of the Regs. Could we go  
2 to the REGs, ask you to pull out, 2.103.A-1? It's  
3 on page 25.

4 JUDGE KARLIN: Now, the facts as I  
5 understand it from your brief, are that Nevada  
6 put -- Dr. Barkatt is one of your experts?

7 MR. FITZPATRICK: Yes, Your Honor.

8 JUDGE KARLIN: Nevada put 37 documents  
9 authored by Dr. Barkatt on the LSN, right?

10 MR. FITZPATRICK: So DOE found during the  
11 search --

12 JUDGE KARLIN: They found 34 and you said  
13 it was 37 on Nevada's database. And you said yeah,  
14 well, actually, other people already put Dr.  
15 Barkatt and you got 107 hits if you look under  
16 other people's submissions, right?

17 Let's go to the REG. 2.10003-A1 talks  
18 about requirement to produce documents. If you go  
19 to the middle of that regulation, it says this is I  
20 think the only portion in the REGs that deals with  
21 the sort of exception that you don't want to put  
22 duplicates on. And it says, provided -- says  
23 "provided however that an electronic file need not  
24 be provide for acquired documentary material that

1 is already been made available by the potential  
2 party interested Government participate or that  
3 originally created the documentary material,  
4 period."

5 Now does that "except for duplicates"  
6 apply to your own experts generating documents?

7 MR. FITZPATRICK: My reading was it did.

8 JUDGE KARLIN: Tell me how it doesn't?  
9 Is this a document that acquired Dr. Barkatt  
10 generated. He is your expert. So presumably,  
11 there is not-- you originally generated it or your  
12 expert. So it does not fit this regulatory.

13 MR. FITZPATRICK: If you're reading this  
14 correct, my reading is mistaken, if a document is  
15 already on the LSN, you don't have to duplicate it.  
16 If that document is on the LSN ten times over. If  
17 your expert generated it, you need to put it on  
18 the --

19 JUDGE ROSENTHAL: How is DOE prejudiced  
20 even assuming that Judge Karlin's reading of the  
21 regulation is correct? As long as the document is  
22 on the LSN, is this not simply a most technical  
23 violation that is not prejudicial at all?

24 MR. FITZPATRICK: If the document is on,

1 I don't see a problem at all.

2 JUDGE KARLIN: Perhaps the only exception  
3 is the documents that someone else is generating.  
4 What is the value in having the person who  
5 generated the documents put all of them on their  
6 LSN even if other people put some of them on?

7 MR. FITZPATRICK: Well, the value is to  
8 have some assurance that Nevada or the party in  
9 question has provided all of their documentary  
10 material that they and their experts generated. It  
11 seems to be based on yes, you exhausted the  
12 universe of documentary material that you  
13 generated.

14 JUDGE KARLIN: I just didn't understand  
15 that putting it on a second or 11th time would  
16 create that reassurance. The problem is you they  
17 may have missed it, relying on DOE to put your  
18 material on for you?

19 MR. FITZPATRICK: No, of course not.

20 JUDGE KARLIN: The recording of the  
21 regulation, you misconstrued the duplication  
22 requirement.

23 MR. FITZPATRICK: So I made a mistake in  
24 my brief?

1           JUDGE KARLIN: Legally, yes and you made  
2 a mistake in your instructions to your experts in  
3 terms of what documents they need to make or  
4 provide.

5           JUDGE MOORE: Mr. Fitzpatrick, can you  
6 point to me where in DOE's motion they are  
7 complaining about any duplication of document  
8 problems with regard to your collection?

9           MR. FITZPATRICK: I don't recall their  
10 complaining about that.

11          JUDGE MOORE: Would you wrap it up.

12          MR. FITZPATRICK: I guess -- go ahead  
13 before I wrap it up.

14          JUDGE KARLIN: I would like you to refer  
15 to DOE's brief page 26 and 27 with regard to Mr.  
16 Frishman. Do you have that?

17          MR. FITZPATRICK: I don't have the piece.  
18 I would be happy to have you read the sentence you  
19 are talking about.

20          JUDGE KARLIN: Okay. In DOE's brief, they  
21 have this chart, you may remember of various of  
22 your expert time. I'm not sure and one of them is  
23 Mr. Frishman. I don't know whether it's Dr.  
24 Frishman or Mr. Frishman. It is shown in the chart

1 under -- he authored. His name under authors shows  
2 two documents and search for his name and address  
3 shows two documents, total of four documents.  
4 Authored or addressee by Mr. Steve Frishman.

5           It then goes on to say on page 27 that  
6 Mr. Frishman has been a full-time consultant to or  
7 employee of Nevada since 1988. I guess that's 20  
8 years and then, raises the concern, alleges  
9 speculation that Mr. Frishman has created and  
10 received hundreds of technical and scientific  
11 documents on Yucca Mountain.

12           You didn't answer that in your response.  
13 Can you tell me what your reaction is to that?

14           MR. FITZPATRICK: Sure. Mr. Frishman is  
15 an employee of the state, not a member of the  
16 consulting team. He has not been given any  
17 particular assignment or discipline to review  
18 information or to even attempt in the future to  
19 form opinions or to sponsor contentions. He's an  
20 employee of the state. Much like Susan Lynch who  
21 signed an affidavit here.

22           JUDGE KARLIN: They say he is a geologist  
23 and he is quote, technical policy coordinator to  
24 Nevada's Nuclear Project 's Agency a position he

1 held for over a decade. What is his position? Is  
2 that is his position?

3 MR. FITZPATRICK: That's his position.

4 JUDGE KARLIN: So he's a technical policy  
5 coordinator for nuclear agency. Sounds like an  
6 important position.

7 MR. FITZPATRICK: It is an important  
8 position.

9 JUDGE KARLIN: And he probably sends and  
10 receives many documents every single day.

11 MR. FITZPATRICK: Only four of them are  
12 documentary material.

13 JUDGE KARLIN: And only four of them are  
14 documentary material. I will give you an example.  
15 Mr. Shebelskie has been working on this case  
16 full-time for years. If you do a search, you will  
17 get a goose egg. He is an attorney and could claim  
18 attorney client privilege. There are a number of  
19 documents in privilege law which are.

20 MR. FITZPATRICK: And if he did, if he  
21 authored them, he would be in the author index with  
22 a privileged document and he's not. It's a goose  
23 egg. And the point is, I'm not bent out of shape  
24 about that. I have very few myself. The point is,

1 even though Mr. Shebelskie and I each generate, I'm  
2 sure a dozen e-mails a day, easily, regarding some  
3 aspect of this proceeding.

4 JUDGE KARLIN: Is this one of these  
5 factuations where we might let DOE take Mr.  
6 Frishman's deposition to see what kind of documents  
7 he generated?

8 MR. FITZPATRICK: I don't see the basis  
9 you suggest that, Your Honor.

10 MR. FITZPATRICK: The gentleman has been  
11 employed for 20 years.

12 JUDGE KARLIN: A prima facia case has  
13 only had four documents, to and from him that  
14 qualify as documentary material and is a factual  
15 question and maybe you can issue some years for Mr.  
16 Frishman or maybe DOE can take his deposition.

17 MR. FITZPATRICK: You can do any of those  
18 things, Your Honor but I could do exactly the same  
19 thing, starting with Mr. Ward and going all down  
20 through ranks through Russ Dyer to everyone there,  
21 the 2500 or however many employees they have and  
22 Bechtel has and everyone else has and question how  
23 many documents show up when you do an author search  
24 and I will tell you right now as we said in our

1 brief, DOE left the author block vacant in many,  
2 many, many -- I don't know if most -- but many of  
3 its headers.

4           And so if we did an author search under  
5 Russ Dyer, chief engineer, if you came up with 2  
6 and 2, whatever that was, you would say that  
7 creates a prima facia issue of will Mr. Dyer put  
8 his documents in or not and that could be  
9 replicated for 2,500 DOE employees for the simple  
10 reason that even if they tried to put all the  
11 documents in, they didn't put their author name in  
12 the header? And so, if Joe Smith had a hundred  
13 documents and they were all in, if you do an author  
14 search for Joe Smith, you're likely to come up with  
15 ten and Mr. Smith was on the project for years and  
16 only has 10 documents, you better get a deposition.

17           JUDGE KARLIN: We granted your motion to  
18 strike certifications in 2004. The consequence was  
19 DOE could not file its application. It was  
20 delayed, but barred from filing an application. If  
21 we were to grant the motion to strike Nevada's  
22 certification or as we have already done, granted a  
23 motion to strike the City of Las Vegas's  
24 certification, would you be barred from filing

1 motions to compel or otherwise presenting arguments  
2 here until you cured that defect?

3 MR. FITZPATRICK: I would have to  
4 research to determine exactly what restrictions  
5 would exist on us in the interim.

6 JUDGE KARLIN: Could we impose that  
7 responsibility?

8 MR. FITZPATRICK: To do the research?

9 JUDGE KARLIN: No. It seems a logical  
10 thing to think about. They filed a motion to  
11 strike. What would happen to Nevada if it were  
12 granted? Anything? Have you thought about that?

13 MR. FITZPATRICK: Well, certainly, the  
14 initial effect would be that upon whatever basis --  
15 that would be the important thing -- the action was  
16 taken, apparently, some remedial action would need  
17 to be taken quickly because of course, Nevada does  
18 not want any level of participation in this  
19 proceeding limited for any duration of time.

20 So, it would take those steps necessary  
21 to remedy. Having been involved in the creation of  
22 the LSN, I'm at a loss if you were to say, go back  
23 tomorrow and do it better. We made a good faith  
24 effort to apply three regulations of 10CFR 2, the

1 definitions of 10CFR2, we were required to and did  
2 in our best faith effort, trained individuals for  
3 over four years, put out procedures as to how the  
4 documents would become be collected, follow up,  
5 follow up and met in person on the phone, by email  
6 and so I frankly don't know exactly other than  
7 changing the regulations or changing the  
8 definition, what difference we could --

9 JUDGE KARLIN: If you are claiming your  
10 guidance document among, this would create an under  
11 reporting of your documentary material.

12 MR. FITZPATRICK: If that were correct  
13 and in that report, if the Board chooses to as a  
14 result to scrutinize, I suggest that this  
15 definition of documentary material begin by DOE  
16 needs to be scrutinized because that would likely  
17 be in these monthly updates.

18 JUDGE KARLIN: File a motion to strike if  
19 you can pass the basis for it.

20 JUDGE MOORE: Thank you, Mr. Fitzpatrick.  
21 Rebuttal, Mr. Shebelskie?

22 MR. SHEBELSKIE: Just a few points.

23 JUDGE ROSENTHAL: I got a question at the  
24 outset and it's in the context of your 323B

1 certification. And that is with respect to all of  
2 these matters that Judge Karlin has raised with Mr.  
3 Fitzpatrick about the possibly inadequacy of the  
4 instructions given by Nevada to its individuals,  
5 working on this project. Was this something that  
6 you specifically raised during the conference or I  
7 think that Mr. Fitzpatrick's answer to that  
8 question was no though I'm not certain about that.  
9 I'm asking you whether this is something that was  
10 addressed in your conference with Nevada?

11 MR. SHEBELSKIE: We did not to my  
12 recollection, review examples from those -- what we  
13 discussed over the course of the two hours was that  
14 we did not see supporting and non-supporting  
15 information, the volume that would be appropriate  
16 and necessary to support the 2000 contention.

17 Likewise, we did not see -- in essence we  
18 saw no e-mail given the discussions back and forth  
19 that the was positive on draft contentions. And  
20 the response from Nevada was because they had no  
21 positions finalized, therefore, they had supporting  
22 information and on supporting information.

23 We then went on further and discussed  
24 that even if you want to have a final contention,

1 you still have created documents in the course of  
2 doing the work that the experts had been doing,  
3 both reviewing our work product and doing their  
4 independent work products. Those documents under  
5 the definition of documents and regulation, I  
6 remember discussing this specifically. And the  
7 document is defined as any electronic file and that  
8 they would have created electronic files or  
9 documents with information in them that could take  
10 the form of email, excel spread sheets, et cetera,  
11 et cetera. So they have not produced that and with  
12 respect to graphics.

13 JUDGE MOORE: Don't they have to be  
14 document material DM1, DM-2 --

15 MR. SHEBELSKIE: Oh yes, yes. If you  
16 don't have any positions at lesst in order to  
17 identify 2000 contentions, draft contentions, you  
18 would have had discussions. What shall we say, what  
19 are the grounds?

20 JUDGE ROSENTHAL: Again, what you're  
21 building is I think you built in your brief is a  
22 circumstantial case. What I'm getting at is  
23 whether or not you raised with them, the issue as  
24 to whether the instructions that they were giving

1 to their employees, to the people working on this  
2 project were inadequate? In other words, whether  
3 you were raising in effect a legal issue as opposed  
4 to simply saying, gee, we think that in the  
5 totality of circumstances, there should have been  
6 more documents of a particular character than in  
7 fact you were placed on the LSN.

8 MR. SHEBELSKIE: We said we didn't know  
9 whether it was their experts who had not submitted  
10 documents, probably a narrow standard or whether  
11 the experts had submitted fast volume documents and  
12 it was certifying official stamp, who had done the  
13 filtering. So we could not say no where the broke  
14 down occurred but we said at some point, you  
15 applied in the process, with these memos, with what  
16 you followed, you adopted a narrow standard.

17 JUDGE ROSENTHAL: What I'm trying to get  
18 at is whether you raised during that conference, an  
19 issue as to the legal sufficiency of that call  
20 memo? And I take it the answer to that is, no.

21 MR. SHEBELSKIE: I think not in the terms  
22 you're positing, Judge. Not in answer to your  
23 question. But what we discussed continuing for  
24 example.

1           Judge Moore, you asked about the graphic  
2 oriented material. We discussed that specifically  
3 and I already mentioned but we went on because in  
4 our brief, we had cited and say the LSN, those  
5 various progress reports from those two outfits,  
6 the two geoscience firms and that the progress  
7 reports stopped in 2005. And we said, looks like  
8 the work continued.

9           Did they continue to do work for  
10 documentary material. The electronic files have  
11 information. We discussed that and the bottom  
12 response was they did continue their work. We told  
13 them to stop generating those monthly progress  
14 reports, but they did their work. And we came back  
15 and said, well, whatever analysis they are giving,  
16 work product they are doing, continues up to 2006  
17 or 7, that creates documentary material that need  
18 to be available.

19           JUDGE MOORE: What classification of  
20 documentary material?

21           MR. SHEBELSKIE: It can be either  
22 Category I or Category II or even Category III if  
23 you submit a gas sample or rock sample, create a  
24 electronic file, that is a report from that. So it

1 could be all three. Their point was, they didn't  
2 have to produce any materials related to that  
3 ongoing work because they had no final positions.

4           They had no final report and they had  
5 just been given a pass on whether or not the email,  
6 other electronic files created including graphic  
7 oriented material could qualify under documentary  
8 material classes.

9           That is how this discussion went back and  
10 forth and actually embraces these conditions here  
11 because again, we can't say these two geoscience  
12 firms, Morganstein and and I think Smith have  
13 created X number of additional documents they have  
14 not been made available to us.

15           What we know for a fact, in this  
16 particular instance is that those experts work  
17 continued, is not a matter of speculation and they  
18 have simply not produced any documents from them  
19 after 2005.

20           JUDGE MOORE: There is something else at  
21 issue here. You have in your motion given some  
22 examples of how you did a search on the LSN; is  
23 that correct?

24           MR. SHEBELSKIE: Correct.

1           JUDGE MOORE: Now, the way the LSN works  
2 as I understand it, it is only as good as the  
3 search query. If your search query were -- was not  
4 perfect or faulty, then, you would get less than  
5 anticipated results.

6           MR. SHEBELSKIE: As a general  
7 hypothetical.

8           JUDGE MOORE: On the basis of what you  
9 have given us, you are asking me to credit the  
10 expertise of your search query and discount or  
11 discredit the responses to that. Nevada has said  
12 they reviewed all this, they put it into their  
13 screening process and they don't have the  
14 documentary material to produce. The only way that  
15 I can see from what you presented is and maybe you  
16 did, when you got something that said there were  
17 3,000 hits, did you go through all 3,000 documents  
18 to see what those 3,000 were?

19           MR. SHEBELSKIE: We did it. We searched  
20 by author name and we reviewed every single hit  
21 that came up.

22           JUDGE MOORE: Did you bring up 3,000  
23 documents and look at the documents?

24           MR. SHEBELSKIE: But what we did Your

1 Honor in response to their brief where they said,  
2 oh, your research was wrong. First of all, they  
3 only give one example, for Dr. Barkatt, is 37  
4 instead of four.

5 JUDGE MOORE: You only gave 3 and all  
6 three were in there.

7 MR. SHEBELSKIE: But it turned out the  
8 search results, the number of documents presented  
9 by author. What we did was attached this as our  
10 supplemental Exhibit C and downloaded his entire  
11 collection and sorted by date and showed you  
12 earlier at the beginning of the argument from  
13 exhibits, the research we had done and excluded all  
14 of the documents that predated their contention of  
15 the law firm. They said they hired those experts  
16 later.

17 So we got all the September 10th, 2001  
18 and later documents. We removed the documents that  
19 had attributed and authorship by DOE, DOE  
20 contractors, NRC, that were transcripts of  
21 proceeding and that were by other federal agencies  
22 and we sorted them by author here and 700 documents  
23 total and you can look by author name and it  
24 confirms what we did in general terms here.

1           There is no dispute. Nevada has not  
2           disputed the material point made by our  
3           representation on that score.

4           A couple of other miscellaneous points,  
5           Your Honor. First, Mr. Loux is not some casual  
6           Nevada employee. He is a long standing, two  
7           decades at least, head of the Nevada agency for  
8           nuclear projects with responsibility for dealing  
9           with Yucca Mountain and also, Nevada certifying  
10          official.

11          JUDGE MOORE: All well and good. I'm  
12          curious why you don't have any declarations by  
13          those with knowledge of the facts that could so  
14          swear to support of your motion to the very  
15          argument that you just made? That Mr. Loux --  
16          whoever Mr. Loux is and he has done and that you  
17          have knowledge of the facts that he written X  
18          number of documents and that but you have not done  
19          any of that. What is the response to Mr.  
20          Fitzpatrick's argument that all I have is lawyers  
21          argument. I don't have any facts.

22          MR. SHEBELSKIE: No. You have facts that  
23          are now in the record, two transcriptions of  
24          testimony from Mr. Loux he gave on the federal

1 lawsuit and his testimony before the Nevada  
2 Commission last month. Identifies who he is and  
3 what his position is in that testimony, from this  
4 last month. He testified about the work that  
5 Nevada's experts have been doing, the preparation  
6 of contentions. We provided the sworn testimony of  
7 Mr. Fitzpatrick's partner, Mr. Egan where he  
8 describes the work.

9 JUDGE MOORE: Look at 35 of those 37  
10 contentions that are in here as exhibits. Now, we  
11 are playing fast and loose with the word  
12 "contention," aren't we? You don't know.

13 MR. SHEBELSKIE: Of course I don't know.  
14 But just like Nevada didn't know what DOE's  
15 production and standards were internally, the point  
16 is all we can say is look at the objective evidence  
17 available to us on the face of LSN, juxtapose  
18 against the sworn testimony of both the Nevada  
19 official and the Nevada counsel has provided about  
20 the work they are doing and there is a gross  
21 mismatch.

22 Now, there is no joinder by Nevada that  
23 somehow, they all have on the LSN, a lot more work  
24 brought about by all these documents. And that our

1 chart was inaccurate. What they simply say is  
2 well, we have not finalized our contentions and we  
3 need to do more and gets back to that point is  
4 inadequate.

5 JUDGE MOORE: Didn't they put in  
6 illustrative exhibits on --

7 MR. SHEBELSKIE: They put in 2 or 3  
8 examples. We didn't contend in our brief that they  
9 had no graphics oriented material. We did say --  
10 we did point out with respect to the two geoscience  
11 firms that we knew firms none over their examples  
12 were graphics oriented material from those  
13 organizations from the post 2005 time period,  
14 completely silent about that. The point we made  
15 more broadly though about graphics oriented  
16 material is that even if you don't have a finalized  
17 version of your contentions with all the bells and  
18 whistles, that would satisfy 209, for example.

19 You still have generated the information,  
20 document with information in them including  
21 graphics oriented material that you have to  
22 consider for production now as class I documentary  
23 material and in class II and potentially, Class  
24 III. so it is not your final contention but

1 supported by all this material.

2           And on that respect, Judge Karlin went on  
3 at great detail about those examples, guidance  
4 examples but I do want you to go back and  
5 deliberate, also look at Example C from that and  
6 I'll just read it here. The example reads as  
7 follows, "Jean Smith preliminary draft Vogtle  
8 report was circulated and then on numerous emails  
9 sent back and forth among the experts chatting  
10 about Dr. Smith."

11           A preliminary draft confession. And as  
12 Judge Karlin already would have noted that they  
13 have categorically said that none of those emails  
14 are going to have anything nonsupported and  
15 therefore, not documentary material too but even go  
16 on to say those things are not by DM2 because  
17 although the emails are final, they are not going  
18 to be emails themselves will not be silent. This  
19 goes to our point here.

20           JUDGE MOORE: This is just another  
21 example of something that was not discussed.

22           MR. SHEBELSKIE: And then, with respect  
23 to Mr. Frishman, I would note however the  
24 hypothetical, example given there is that Bob Loux

1 asked Steve Frishman to comment on Mike THorne's  
2 criticality report.

3           That is a pretty good insight that Mr.  
4 Frishman is not just some casual bystander in the  
5 process here. And finally with respect to the  
6 presence of emails by me in the LSN, I just want to  
7 comment on something on this that briefly.

8           JUDGE MOORE: I'm struck by what you are  
9 presenting today by what the contrast to what you  
10 said in 2004 in your response to your motion to  
11 strike. And what has made your response in 2004  
12 invalid? Now, I will quote it to you and and I  
13 will also point out to you that in your argument  
14 are raising the legislative history in the context  
15 that we don't have jurisdiction to impose the  
16 remedy that Nevada was seeking. And we found that  
17 we did have jurisdiction.

18           But you said and I quote: And this is  
19 from page 2 of your answer back in 2004, "Disputes  
20 about document production are routine in this  
21 litigation. In this proceeding, such disputes are  
22 especially likely in the pre-license application  
23 phase before the license application has been  
24 completed, before intervention of petitions have

1 been filed, contentions formulated and ruled on and  
2 thus before the ultimate scope and documents are  
3 legitimately needed by participants have been  
4 established.

5           Under these circumstances, no road or  
6 formalistic process can identify documents as  
7 documentary materials, especially documents that  
8 might contain nonsupporting information in the  
9 absence of concrete contentions. Judgment calls  
10 have to be made. In any multiple years production  
11 effort involving millions of documents and  
12 complicated information systems, also system  
13 failures. Nor will those situations be limited to  
14 DOE's production. All right. Misstating because  
15 we were using DEN at that point for DOE.

16           No participants production will obtain  
17 the unreachable goal of perfection and no  
18 participant judgment call will be free from good  
19 faith disagreements. Such disputes, however do not  
20 make a certification unlawful or invalid, nor do  
21 they provide any basis to strike DOE's  
22 certification or delay the other production of  
23 documentary material."

24           In 2004, and I think we had a markedly,

1 different situation than we are faced with now but  
2 aren't those words ringing true? They do to me and  
3 I see that you are taking the completely opposite  
4 position today than in defense of your activities  
5 in 2004.

6 MR. SHEBELSKIE: Your Honor, suppose I  
7 could say well, what is different is the law ruled  
8 against us pretty decisively on everything. But,  
9 Your Honor, as we said in the beginning of our  
10 brief, we are not trying to keep Nevada out of view  
11 for all time.

12 And we are not quivering about a few  
13 document materials. They have made available a  
14 hundred thousand emails and someone responded to  
15 that email and didn't produce it. That is a  
16 judgment call and that's the situation that relates  
17 to.

18 This is not a judgment call where some  
19 people have made a fewer reports on what is  
20 supporting or nonsupporting. What we see here is a  
21 broad based programmatic or categorical exclusion  
22 as to what's based on false premises that they  
23 cannot identify category I information and that  
24 Category information II either. A missed

1 application that resulted not in just an  
2 inadvertent or mistakes here on the margins, but a  
3 fundamental failure to produce the documents that  
4 we are entitled to.

5           Finally, let me if there were no other  
6 questions, I did want to respond to  
7 Mr. Fitzpatrick's comments that were sent to me.  
8 The answer to that is my involvement from day one  
9 as counsel for DOE has more responsibility for  
10 document production. On the LSN compliance  
11 activity, not work product, I'm not a technical  
12 expert.

13           You see LSN collection for the other  
14 attorneys name, both the Department of Energy and  
15 Hunton & Williams. And you will see several tens  
16 of thousands of documents where they are on the  
17 documents of all authors and recipients. Contrast  
18 that in my closing remarks, the Nevada's production  
19 where there is basically no e-mails from all these  
20 technical experts corresponding and copying  
21 Nevada's counsel.

22           Have they been doing all this work,  
23 developing all this technical work product, and  
24 contentions without keeping the lawyers in the

1 loop? I don't think that's the case.

2 Thank you, Your Honor.

3 JUDGE MOORE: The Board will take the  
4 matter under advisement and I will just  
5 editorialize by saying you have not made our job  
6 easy. We stand adjourned.

7 (Whereupon, the foregoing  
8 matter was concluded at 1:00  
9 p.m.)

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

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"This is to certify that the attached proceedings  
before the United States Nuclear Regulatory  
Commission in the matter of:  
Oral Argument for PAPO proceeding  
PAPO-00  
Rockville, MD

were held as herein appears, and that this is  
the original transcript thereof for the file of  
the United States Nuclear Regulatory  
Commission taken and, transcribed by me  
or under the direction of the court reporting  
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and accurate record of the foregoing  
proceedings.

/S/  
(Lorraine Carter)  
Official Reporter  
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