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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
:
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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 MARTHA CROSLAND, Esquire

5 Hunton & Williams

6

7 On behalf of State of Nevada:

8 CHARLES FITZPATRICK, Esquire

9 MERRIL HIRSCH, Esquire

10 Egan, Fitzpatrick, Malsch & 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. CROSLAND: And I'm Martha Crosland
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. HIRSCH: And I'm Merril Hirsch, 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 elucidate for the Court the
10 nature of their production, I would like to refer
11 the Court to exhibit, DOE Exhibit Z, which starts
12 on PDF page 38.

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

20 In their pleadings, Nevada said, well,
21 their experts really were not brought on board
22 until starting in 2003. But nonetheless, to be
23 conservative, we said let's do a search for all
24 documents that predate September 11th, 2001. And

1 there's the screen shot of the LSN search engine
2 looking for Nevada's collection for everything
3 predating September 2001.

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

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

23 So contrary to Nevada's representation
24 that unlike us they didn't have any old documents

1 that predated really their licensing preparation
2 efforts, really three quarters of their collection
3 does.

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

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

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

20 Now, my question for you is, how do you
21 think that the Board should address this factual
22 issue? Do you think we should be having a trial or
23 what, because as far as I can see, the basis of
24 what is before us, what you have presented and what

1 Nevada has presented, there is a factual issue that
2 simply cannot be resolved on the basis of this oral
3 argument this morning?

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

11 JUDGE MOORE: Now, where did you raise
12 that in your motion?

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

24 Now, contrast that statement, that

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

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

15 My point is simply that on page 31 of
16 your motion, the closest you come to challenging
17 what Nevada has said as to the propriety of -- your
18 challenge to the propriety of their misconstruing
19 what documentary material is, is on page 31 of your
20 motion, wherein a listing of five items you refer
21 to your Exhibit H, which is your exhibit, that they
22 have seemingly been under inclusive in some
23 documents, which seems to point at their call memo
24 and the examples in that call memo.

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

13 MR. SHEBELSKIE: Your Honor, on that,
14 take two examples that we -- that we noted,
15 certainly discussed in the briefs.

16 We noted, for example, the number of
17 progress reports from two geosciences consulting
18 firms, Geoscience Management and Geoscience
19 Consultants. And they showed that what they had
20 made available showed a paper trail of their work
21 product up until April 2005, and then the
22 production stops. Yet, the last documentation
23 shows that their work was, in fact, continuing.
24 They were still doing experiments. They were still

1 doing calculations. So there should be documentary
2 material created in the course of that future work.
3 It's not been available.

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

9 JUDGE MOORE: You said "should."

10 MR. SHEBELSKIE: Not "should." It is.

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

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

22 That is a classic example of a motion
23 where you have the burden, and you made arguably a
24 prima fascia case. That prima fascia case was

1 rebutted. Now we have disputed issues of fact.

2 Judge Rosenthal's question was: How do we
3 decide this motion when we have before us disputed
4 issues of fact without some kind of a fact trial?

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

17 Because what that shows you here is these
18 are the group of e-mails from Aaron Barkatt, this
19 was the only e-mails from many of their experts
20 that they produced, and we mentioned there were 50
21 some e-mails under one heading. And these emails
22 span a period of 2001 to 2004.

23 Now, it is -- we can look through
24 examples here -- I want to set the stage, it is

1 inconceivable -- Nevada already agreed that these
2 are documentary material, and that we can go
3 through them with e-mails and look at them later
4 also to see that these are substantive e-mails
5 discussing substantive topics, discussing potential
6 contentions and the grounds for contentions.

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

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

19 MR. SHEBELSKIE: Your Honor, to that
20 point, I would agree with you, that if you credit
21 Nevada's denial on its face that creates a dispute
22 of fact and would require factual resolution.

23 My point is using these e-mails as just
24 an example, it can't be with their team of 30 or 45

1 experts that these are the only e-mails created
2 over an eight-year period with all that personnel,
3 the development of 2,000 contentions, given all the
4 work they don't deny that they have done, that
5 qualify as documentary material.

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

17 MR. SHEBELSKIE: Well, what Nevada has
18 not told us -- well, then we would need to develop
19 a factual record to respond to those issues or
20 concerns or to their purported denials of our prima
21 fascia case, which obviously, before filing the
22 motion we have no means available for us to do
23 that.

24 For example, with the e-mails, they say

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

7 JUDGE MOORE: Mr. Shelbelskie, you might
8 have made it a little easier had you asked for
9 discovery. But you didn't ask for discovery, did
10 you?

11 MR. SHEBELSKIE: We did not ask for any
12 discovery, Your Honor, because we believe that on
13 it -- what we know from the absence of their
14 production that they have -- they said they were
15 going to apply improper standard and then, in fact,
16 -- shows it --

17 JUDGE MOORE: Let's take it a step back.
18 On footnote 117 of your January 28th motion, you
19 state that, and I quote: "Counsel for DOE
20 conferred with counsel for the State of Nevada
21 prior to filing the motion. In accordance with 10
22 CFR section 2.323B DOE certifies that it made a
23 sincere effort to resolve the issues raised in this
24 motion but still seeks the relief discussed above."

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

13 On what date and at what time did DOE
14 counsel meet with counsel for the State of Nevada
15 under the 10 CFR 2.323B requirement in your
16 certification that you comply?

17 MR. SHEBELSKIE: We met on the -- we
18 conferred for two hours on the morning of the date
19 we filed the motion. We e-mailed them -- that was
20 a Monday, if I recall. We e-mailed them over the
21 weekend and said, we have now reviewed your
22 production; we have questions; we need to confer --

23 JUDGE MOORE: So on the same day you
24 filed the motion, earlier in that day, you met with

1 DOE. So your motion -- with Nevada. So your
2 motion was ready to go?

3 MR. SHEBELSKIE: By the way, Your Honor,
4 when they filed their motion against us in 2004,
5 they called us within the hour and said they were
6 filing it. So let's not be too sanctimonious about
7 this.

8 JUDGE MOORE: Today I only have yours in
9 front of me.

10 MR. SHEBELSKIE: But what we discussed,
11 Your Honor, in that conference --

12 JUDGE MOORE: That's what I would like to
13 get to, what did you discuss?

14 MR. SHEBELSKIE: Right. We discussed --

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

18 First of all, on page 20 and 21 of your
19 motion, DOE claims that Nevada did not produce on
20 the LSN three things: A memorandum by Michael
21 Thorne on volcanic probability calculations; two, a
22 report on the first phase of something called
23 cheeseball experiments; and three, a white paper by
24 Dr. Thorne on corrosion issues.

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

9 Now, is it accurate what Nevada says in
10 its Answer that did you not raise with Nevada on
11 that January 28th meeting, those three specific
12 documents about which you make an issue of in your
13 motion?

14 MR. SHEBELSKIE: I know we discussed Mike
15 Thorne documents. We discussed the cheeseball
16 experiments. Those specific documents I don't
17 recall, Your Honor. And certainly I would agree,
18 we did not sit down and go over specifically the --
19 necessarily any of the specific session numbers or
20 documents in here. So -- let me --

21 JUDGE MOORE: I have gone through your
22 motion and I have a list of approximately 26 claims
23 of documents and types of documents. And in the
24 exhibits you cite, certain inferentially, that that

1 document is not or class of documents or types of
2 documents are not there.

3 Now, you may quibble with my listing of
4 26, but I think it is a fairly accurate number.
5 Now, I can go through that from one to 26, if you
6 would like this morning, but let's start by saying,
7 did each of those 26 clearly factual issues that
8 you were raising in your motion, did you discuss
9 those specifically with Nevada counsel and in a
10 sincere attempt to resolve those? Yes or no?

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

18 When we inquired about them, whether they
19 were authentic, whether there were other copies,
20 Nevada's response was we are not here to provide
21 you with any discovery, we don't have to answer
22 those questions. So that was shut down.

23 The whole topic of e-mails, we discussed
24 very extensively: How come there were only the few

1 e-mails that are --

2 JUDGE MOORE: What were their answers?

3 MR. SHEBELSKIE: Their answers were
4 invariably, e-mails are not documentary material,
5 we are not citing or relying on e-mails, and we
6 don't have to give you any further information. We
7 are not here for you to conduct discovery.

8 We discussed the number of documents that
9 they had, why there were only that number. We
10 discussed why there were only limited numbers from
11 the various experts, why the documents from the --
12 like 2005, '6, '7 were absent. Their general
13 response was we have applied our standard. We
14 conducted our review. We are not conducting
15 discovery for you.

16 JUDGE ROSENTHAL: If I may interrupt you
17 a second.

18 On page 15 of its response, Nevada says
19 the following: "Nevada's counsel entered the
20 conference with the resolution that any documentary
21 material specifically identified by DOE as lacking
22 in Nevada's LSN database would be properly
23 provided. Nevada purposely stated this position at
24 least five times during the conference so there

1 would be no ground for the assertion that any
2 specific document was being refused or that an
3 impasse would ever be reached."

4 Now is that true?

5 MR. SHEBELSKIE: They said and I'm sure
6 they said -- and they said multiple times, give us
7 any specific example you can identify of a document
8 we didn't make available, we will make it
9 available.

10 JUDGE KARLIN: Can I then ask a question?
11 Lacking any discovery, how could you ask for a
12 e-mail which you didn't know the specific existence
13 of?

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

18 JUDGE KARLIN: Did you have any specific
19 e-mails in your possession of Nevada's that you
20 thought were documentary material but they had
21 failed to put on the LSN?

22 MR. SHEBELSKIE: We had the 54 or so
23 e-mails --

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

1 MR. SHEBELSKIE: What we did with that,
2 because that's all we had.

3 JUDGE KARLIN: Okay, the only ones you
4 had were the ones they put on. So you could not
5 identify a specific document and say you failed to
6 put this document on, this e-mail on, because you
7 didn't have it?

8 MR. SHEBELSKIE: Right. What we said,
9 Your Honor, was how could these e-mails from
10 Professor Barkatt be the only ones that qualify as
11 documentary material and everybody else is not, how
12 could that be? What is the standard? What is the
13 rationale?

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

17 JUDGE ROSENTHAL: Did you ask them for
18 the three documents that you cited in your motion,
19 which turns out happened to be on the LSN? Those
20 documents were ones that you were specifically
21 aware of. Did you request them during the
22 conference?

23 MR. SHEBELSKIE: As I said, I'm confident
24 that we did not ask specifically for all of them,

1 of those three. I know we did talk about Mike
2 Thorne documents and the cheeseball experiments,
3 because we said we saw reference to these and there
4 are documents referenced in the Thorne memos that
5 we had available that refer to like a Victor
6 Gilinsky e-mail.

7 I don't believe those three -- I don't
8 want to say we discussed specifically those
9 three via session numbers or documents. We talked
10 generally about the topic that was the
11 laboratory -- for example, the laboratory in China
12 that was doing these corrosion experiments called
13 the cheeseball project, did they get the call memo,
14 did they produce documents because we don't see
15 their work product.

16 Now, what Nevada pointed out too is here
17 is a published article. Okay, that's fine. But
18 what we were talking about is where are the
19 laboratory notebooks of that laboratory in China?
20 Where are their e-mails? Where are their
21 electronic files for documentary material, not just
22 the published article? We weren't asking about
23 that. We were asking about a broader scope of
24 production from that laboratory.

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

7 In your meeting on January 28th, did you
8 specifically raise the issue with Nevada's counsel
9 and did you request any documents that contain
10 contentions?

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

21 We had a very extensive discussion about
22 that, and not just the draft contentions, Your
23 Honor, but we were also --

24 JUDGE MOORE: But you would concede that

1 a draft contention is a draft and does not have to
2 be filed in their LSN collection, would you not?

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

15 Our point to Nevada was there has to be
16 embodied in what would be considered final
17 documents, information that underlies and supports
18 and that relates to those draft contentions you
19 have established. And that becomes the benchmark,
20 then, for you in this point in time to identify
21 what is your Class I documentary material, your
22 supporting information, what are you --

23 JUDGE MOORE: So you are claiming that
24 all that material would be reliance material?

1 MR. SHEBELSKIE: Absolutely. In this
2 pre-license --

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

12 MR. SHEBELSKIE: Yes, Your Honor. Let me
13 address that, because that really does go to the
14 heart of their position.

15 This argument that until they get the
16 final LA and until they get the TSPA they don't
17 have any idea what their positions are --

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

20 MR. SHEBELSKIE: Yes. Well --

21 JUDGE MOORE: Chapter and verse.

22 MR. SHEBELSKIE: The second half of the
23 legal argument, Section B, where we address this
24 was their position, and we addressed it chapter and

1 verse, I believe, Your Honor. Because what we have
2 said is there are a number of topics that Nevada is
3 planning to file contentions on. That's in that
4 petition for funds that appears as Exhibit D to our
5 brief.

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

15 Nevada has been looking at our
16 documents -- and this petition for funds, we go to
17 page 10 of that, which is PDF page 72, going on and
18 on, they have been analyzing our work product,
19 developing contentions, analyzing our assumptions.
20 That is what Mr. Loux has said time and time again
21 that they are doing, and developing their own
22 independent research.

23 They have a body of information that they
24 are presumptively relying on for these working

1 lists of 2,000 contentions or topics, call them
2 what you will. And the Commission had this in mind
3 back in the summer of 2004 in its rulemaking, its
4 final rulemaking on the LSN when it talks about
5 that the production obligation for the good faith
6 effort requires that the parties make available at
7 the time of their certifications required under
8 Subpart J, all of the documentary material that may
9 eventually be designated as Class I and Class II.

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

12 JUDGE MOORE: -- say that that should be
13 brought up not in front of PAPO but on a
14 document-by-document basis?

15 MR. SHEBELSKIE: If it were a document, a
16 isolated document-by-document issue. This is a
17 categorical issue.

18 The reality is Nevada uniquely, among
19 other potential interveners, has not been really
20 sort of sitting there passively for the past seven
21 years. They have been organizing what they call a
22 world class opposition to the license application.
23 They are not waiting until they get to LA to begin
24 their analysis in the development of contentions.

1 They have been working feverishly at the
2 cost of several tens of millions of dollars to --

3 JUDGE MOORE: Posit for the moment that
4 my ten hypothetical contentions, and they have been
5 doing just what you surmise they have been doing.
6 And in doing that, they conclude that you are right
7 and they just aren't going to file those
8 contentions. Now, is that reliance material?

9 MR. SHEBELSKIE: Yes, at this point in
10 time --

11 JUDGE MOORE: Pre tell how?

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

21 And at this point in time, they have a
22 very reasonable understanding and expectation on
23 many different topics and issues what the science
24 is, what our technology is. They have a pretty

1 good working assumption.

2 Now, will they have other contentions
3 they may develop when they get the final LA? Sure.
4 May they modify some? Sure. May they ultimately
5 decide not to advance certain contentions that they
6 have developed at this point? Possibly.

7 JUDGE MOORE: So you are telling me that
8 reliance today is different from the reliance
9 tomorrow?

10 MR. SHEBELSKIE: No. Reliance today
11 means -- in good faith, reliance today has to mean
12 what you reasonably expect to rely on now. Because
13 if that were true, Your Honor, then DOE's view
14 could have been, well, until we file the LA, then
15 everything --

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

20 MR. SHEBELSKIE: We have those
21 obligations, but our supporting documentations are
22 always subject to change until we actually file the
23 license application. We have not sat on our
24 reports and studies to make them available, even

1 though they rely --

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

11 MR. SHEBELSKIE: Your Honor, when the
12 Commission created the LSN production regime as the
13 substitute for document production, post docketing
14 where we don't have even document requests,
15 obviously knew that Nevada would have to make its
16 LSN certification before we filed the LA. If
17 someone -- if Nevada could just take the expedient
18 of saying it ain't final, our contentions ain't
19 final until they are final, until we file them,
20 then they would have, in effect, no obligation to
21 produce any documents in the pre-license period.

22 That position can't be what was intended
23 in good faith by the Commission when they talked
24 about a good-faith production. The reality here,

1 the practical fact is Nevada, obviously, has been
2 working and has prepared a body of information that
3 they anticipate DOE will rely on and that they are
4 going to challenge on these grounds.

5 JUDGE MOORE: To this point, I have a
6 factual dispute, indeed I even have a factual
7 dispute over whether the certification that you
8 have filed and they dispute is legitimate is to be
9 accepted at face value.

10 So I have a factual dispute and I have a
11 situation where it appears to me it is not a
12 question of what at some point will have to be put
13 in the LSN; it is a question of when it has to be
14 put in. Because they said they have collected
15 everything. They were very explicit, throw nothing
16 out and we have made the documentary material
17 determination.

18 MR. SHEBELSKIE: What Nevada has not said
19 in their brief is that amongst this body of
20 documents that they collected and preserved, that
21 there is this large group or any group, however you
22 want to characterize it, sitting sort of in limbo
23 that they are going to come back to and revisit and
24 produce later.

1 Their procedures don't call for them to
2 go back and re-review that information. In their
3 brief, they didn't say there was going to be a
4 substantive production of this information.

5 What they said is we told our experts to
6 give us everything you have developed that you are
7 going to cite -- petition, cite and rely on in the
8 proceeding. We have made it all available. That
9 is not --

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

14 MR. SHEBELSKIE: It says that. Their
15 examples say --

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

18 MR. SHEBELSKIE: Well, they don't say
19 they are going back to re-review all of their
20 documents at some point in time, because they will
21 write it into documentary material. They are
22 talking about potential derivative discovery in
23 connection with depositions. That's what that --

24 JUDGE MOORE: Certainly if the collection

1 is there, they have the capability of doing that.

2 MR. SHEBELSKIE: But the point is we are
3 not -- we, the staff, other interveners are not --
4 the burden is not on us to go to pull out this
5 documentary material from the State sometime down
6 the road after docketing it and try to get it all
7 through subpoenas.

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

15 In addition, if you look at the call
16 memo, the example in this 2007 call memo, their
17 examples that they give is this Exhibit C to that
18 call memo, where they talk about e-mails among
19 their experts discussing their draft contentions,
20 they say none of that can be category one
21 information. Yet, we know from the Professor
22 Barkatt's e-mails, the few examples that they have
23 given us, that in that discussion you can see
24 substantive discussion that contains information,

1 where it is talking about their contentions.

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

12 JUDGE ROSENTHAL: Once again,
13 Mr. Shebelskie, and I speak only for myself, I
14 think you make out a prima fascia case. But it
15 still seems to me that what we have here is a
16 factual issue, and I'm still interested in knowing
17 how, assuming that that is the case, we should go
18 about at this point dealing with it. I mean, you
19 have set forth the reasons why you believe that
20 there is material that Nevada has not produced that
21 should have been produced. And for the sake of
22 argument, maybe you make a persuasive case in that
23 regard.

24 We are still faced with the fact that

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

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

15 MR. SHEBELSKIE: I think one way you can
16 address that, Your Honor, is to inquire of Nevada,
17 who will come right after me, as to what standard
18 did they apply in deciding what was documentary
19 material Class I, their reliance material or did
20 they take the position as they said in the briefs
21 to the Commission they would, that they could not
22 identify their supporting material at this time
23 because they have not done final contention, quote,
24 unquote, final contentions.

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

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

16 MR. SHEBELSKIE: Well, Your Honor, we
17 believe we did. In our brief discussed that they
18 had --

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

21 JUDGE KARLIN: May I ask a question or
22 two on some of these points? On the call memo,
23 let's talk about the call memo, could pull your
24 brief up. Do you have your brief in front of you?

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

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

11 MR. SHEBELSKIE: Yes.

12 JUDGE KARLIN: -- of your motion to
13 strike?

14 The latter call memo seemingly advises
15 recipients to omit critical commentary about
16 Nevada's work product and favorable commentary
17 about DOE's.

18 Is that where you raise the defects with
19 regard to Exhibit H?

20 MR. SHEBELSKIE: Yes. We could have been
21 more explicit.

22 JUDGE KARLIN: Let's go to page 32. On
23 page 32 I think you have further discussion under
24 paragraph B, that is justification for its

1 incomplete production is erroneous. And I think
2 here you raise what I understand your argument here
3 to be today, which is that Nevada has taken the
4 position, at least in its appeal brief to the
5 Commission that it can't possibly know what its
6 positions are -- I think you quote -- Nevada,
7 quote, cannot possibly know, for the most part,
8 what it will cite or intend to rely upon.

9 Now, is that reliance material?

10 MR. SHEBELSKIE: Yes. Starting in the
11 sections where we made this legal argument.

12 JUDGE KARLIN: And then you say later at
13 the end of that, left unsaid, presumably, are the
14 corollary that Nevada also cannot identify non-
15 supporting information at this time. That is DM2
16 as we called it.

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

24 Is that right?

1 MR. SHEBELSKIE: Yes, sir.

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

8 MR. SHEBELSKIE: Yes.

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

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

18 MR. SHEBELSKIE: There were.

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

22 MR. SHEBELSKIE: You did.

23 JUDGE KARLIN: Is that one mechanism we
24 could use vis-à-vis Nevada to resolve some of these

1 factual issues?

2 MR. SHEBELSKIE: Absolutely. Yes, sir.

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

8 MR. SHEBELSKIE: Yes.

9 JUDGE KARLIN: But there were factual
10 issues there and we were concerned about that?

11 MR. SHEBELSKIE: Yes. That particular
12 motion was forward looking.

13 JUDGE KARLIN: Right. And we would wait
14 until an actual certification before we could
15 figure out what the facts is vis-à-vis what you
16 did.

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

20 JUDGE KARLIN: Right, their motion raised
21 -- at the time, we all thought there were both
22 factual and legal issues raised in Nevada's second
23 motion to strike, although we ended up resolving it
24 simply on the legal issues. Would you agree with

1 that?

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

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

13 MR. SHEBELSKIE: Yes, sir.

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

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

24 JUDGE KARLIN: -- just asking our own

1 series of questions. Do we have the authority to
2 ask certain witnesses to come up and testify like
3 Mr. Loux?

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

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

9 MR. SHEBELSKIE: Yes.

10 JUDGE KARLIN: Okay, so I --

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

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

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

24 JUDGE KARLIN: And the main part of your

1 position with regard to DOE Exhibit H is their
2 failure to provide supporting and non-supporting
3 information?

4 MR. SHEBELSKIE: Correct.

5 JUDGE KARLIN: Okay.

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

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

13 MR. SHEBELSKIE: A world apart?

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

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

24 We didn't even know and had no way of

1 knowing in those circumstances how many documents
2 DOE even had certified to, because there was no LSN
3 to turn to and even turn on the switch and look.
4 My recollection was we were faced with an entirely
5 different situation than we are faced with today,
6 four years later, with the certifications that have
7 come in and the motion to strike.

8 What am I missing in my recollection?

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

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

24 Now, they were claiming that there were a

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

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

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

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

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

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

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

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

23 MR. SHEBELSKIE: 2004.

24 JUDGE MOORE: I think that's been made

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

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

9 JUDGE MOORE: I'm sorry?

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

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

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

23 JUDGE MOORE: Immediately upon
24 certification, did you?

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

3 JUDGE MOORE: That's 2.004.

4 MR. SHEBELSKIE: 2.1 --

5 JUDGE MOORE: I'm sorry, 2.1004?

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

8 In the pre-license application, 2.1004,
9 Amendments and Additions?

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

14 MR. SHEBELSKIE: Well, we move to strike
15 saying they had not made documentary material
16 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 - if you know a specific
23 documents that you want to ask for, you can move to
24 compel for.

1 JUDGE MOORE: You could have said every
2 document in the collection that contains a
3 contention.

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

12 And so, since their obligation, and their
13 only obligation is to make documentary material
14 available, we don't have to ask for them to make
15 their documentary material available. They are
16 required to have done it 90 days after our
17 certification.

18 And if they didn't come forward with all
19 their documentary material based on what we think
20 is an improper legal standard, then we don't have
21 to make specific requests for what's missing,
22 because how would we know, Judge Karlin's point.

23 Our relief appropriately is to say, since
24 you have programmatically or categorically under

1 produced your documents, you have not met your
2 standard, and you need to go back and redo it.

3 JUDGE MOORE: 2.1018 are inapplicable
4 under the pre-license application phase?

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

12 JUDGE MOORE: Request for admissions.

13 MR. SHEBELSKIE: Request for admissions
14 potentially.

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

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

21 JUDGE MOORE: Could you not have filed
22 for relief and sought an extension of time so that
23 you could have done this?

24 MR. SHEBELSKIE: Well, theoretically.

1 But we believe we actually have a basis now to
2 strike.

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

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

3 The purpose of producing documentary material
4 is so the interveners can formulate
5 contentions. You are not going to formulate
6 contentions. So what do you need these
7 documents for?

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

22 JUDGE KARLIN: Let me ask another
23 question. You're asking for a motion to strike.
24 What if we granted the motion to strike, what

1 relief are you asking for? What consequence would
2 it occur?

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

9 MR. SHEBELSKIE: Until they recertify?

10 JUDGE KARLIN: Until they recertify.

11 What's the consequence? What would the consequence
12 be if we granted this? Nothing?

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

17 JUDGE KARLIN: How much time do they have
18 to recertify?

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

1 JUDGE MOORE: Would it preclude them from
2 filing contentions?

3 MR. SHEBELSKIE: If they never
4 recertified?

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

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

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

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

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

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

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

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

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

18 MR. SHEBELSKIE: If their position then
19 would be we have re-looked under the right legal
20 standard, this is everything, then they would have
21 to be held to that representation later in the
22 proceeding. And they can't come forward -- and
23 their experts can't come forward and use in the
24 proceeding later information analyses that they

1 have developed prior to 2008, if it had not been
2 made available on their certification.

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

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

15 MR. SHEBELSKIE: No.

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

19 MR. SHEBELSKIE: Well --

20 JUDGE MOORE: They need to provide support
21 to file contentions. There is no such requirement
22 in your answer challenging that contention.

23 MR. SHEBELSKIE: Until we see their non-
24 supporting 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 us for document discovery
8 for both supporting and non-supporting information.
9 We may use that information, depending upon what it
10 is, to help oppose their contentions.

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

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

20 MR. SHEBELSKIE: All right. Fair enough.

21 JUDGE MOORE: And you have indicated non-
22 supporting, but as long as their affidavit -- their
23 contentions are supported, the fact that there is
24 other outstanding non-supporting information, we

1 can't resolve that in the admission of contentions.

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

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

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

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

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

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

22 One was to permit, as Judge Karlin just
23 mentioned, the early and formulation of contentions
24 that would speed the process; two, that there are

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

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

15 If that is the case, the question of
16 where is your prejudice comes to the fore?

17 MR. SHEBELSKIE: Well, there are also
18 statements, if I recall, in that regulatory history
19 that talk about the pre-application certification
20 process and the production on the LSN as the
21 substitute for traditional discovery. And that
22 cuts both ways, not only for Nevada against DOE,
23 but DOE against Nevada, as well as the staff
24 against Nevada or other parties against Nevada.

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

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

13 I know I have exceeded my 45 minutes.

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

17 (Short break taken)

18 JUDGE MOORE: Please be seated.

19 Mr. Shebelskie, you may be in luck.
20 There may be a waiver involved here.

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

23 MR. FITZPATRICK: May it please the
24 Court: What I would like to do is first state that

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

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

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

22 That's just the beginning. He goes page
23 after page of explaining exactly why. But -- and
24 we saw an e-mail thrown up on the screen from

1 Professor Barkatt. It was a 2001 e-mail.

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

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

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

23 And Judge Karlin has suggested one
24 procedure. I don't know whether that's -- what you

1 would find acceptable. But it does seem to me that
2 when we get to the bottom here, that DOE has
3 presented a prima fascia case. You have rebutted
4 it. And that is a traditional situation where
5 there is a factual issue that requires resolution
6 before a motion such as this is finally acted upon.

7 MR. FITZPATRICK: There are two things
8 wrong with that formulation, Your Honor.

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

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

24 We have not had access to the DOE

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

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

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

21 JUDGE KARLIN: Let me ask you a factual
22 question. I think you were saying that Dr. Thorne
23 has indicated that he has not been able to
24 formulate meaningful contentions or something like

1 that.

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

4 MR. FITZPATRICK: Yes, Your Honor.

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

12 MR. FITZPATRICK: Loux.

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

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

23 Now, did you ask Mr. Loux whether he had
24 said before the legislature we have formulated and

1 drafted thousands of contentions?

2 MR. FITZPATRICK: Yes, sir.

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

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

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

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

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

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

24 JUDGE KARLIN: So there --

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

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

5 MR. FITZPATRICK: No, I was not.

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

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

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

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

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

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

1 Do you concede that that is what he said?

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

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

7 MR. FITZPATRICK: Yes.

8 JUDGE KARLIN: Okay, thank you.

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

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

14 MR. FITZPATRICK: Pardon me?

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

17 MR. FITZPATRICK: Yes, Your Honor.

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

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

23 JUDGE KARLIN: Is he speaking to the
24 legislature of Nevada?

1 MR. FITZPATRICK: Yes.

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

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

6 JUDGE KARLIN: So, Nevada --

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

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

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

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

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

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

24 JUDGE ROSENTHAL: Well, I would like you

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

9 I grant you that you may think that DOE
10 has not made out a prima fascia case, but I'm
11 asking you to assume for discussion that we can
12 conclude otherwise. How then should we proceed,
13 the way that Judge Karlin suggested or some other
14 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
21 some of their contentions, and they decided, well,
22 we are just not going to make it available because
23 we 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 Intervener
5 who had presented a position that -- which that
6 Intervener had undermining non-supporting
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 the
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 me 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 -- specifically where they
23 accused you of bad faith or Nevada?

24 MR. FITZPATRICK: Nevada.

1 JUDGE KARLIN: Okay.

2 MR. FITZPATRICK: Page one: "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 worth a salt would know that.

10 Let me ask you 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 I
15 posit those word were not used in any of DOE's
16 motion to 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 on 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. Cutchin? 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 else the
7 document 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 inclusion in the LSN if they first pass
17 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 list, can you tell me this, those are
2 the people to whom those important instructions
3 were 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 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 after them.

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: Right, Ms. Lynch
24 followed up either first by e-mail and then by

1 telephone call.

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

5 MR. FITZPATRICK: Certainly, Your Honor.

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

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

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

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

20 MR. FITZPATRICK: Yes.

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

24 MR. FITZPATRICK: Yes, Your Honor.

1 JUDGE KARLIN: So let's focus on the
2 guidelines, which is Exhibit B to Exhibit H of
3 DOE's exhibits, page 129 now.

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

6 MR. FITZPATRICK: Yes, Your Honor.

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

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

11 JUDGE KARLIN: And the third test is?

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

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

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

1 JUDGE KARLIN: Let's pull out that
2 regulation. Do you have your regulations?

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

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

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

15 That's what you're referring to?

16 MR. FITZPATRICK: Yes, Your Honor.

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

21 MR. FITZPATRICK: I think we concluded
22 that the License Application Review Plan and the
23 topical guidelines of 3.69 captured the subjects
24 that were going to be dealt with by DOE in its

1 license application. And so they were the topics
2 that individuals looking for relevant materials
3 should be looking for.

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

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

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

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

17 JUDGE KARLIN: There is 1 and 2. We will
18 get to that. But there is -- but beyond the
19 existence of that regulatory requirement in DM3,
20 that's your only citation for where that relevance
21 test, your initial relevance test came from?

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

24 JUDGE KARLIN: So the relevance test

1 comes from the definition of DM3?

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

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

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

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

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

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

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

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

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

16 MR. FITZPATRICK: Yes, Your Honor.

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

19 MR. FITZPATRICK: No, Your Honor.

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

24 MR. FITZPATRICK: Well, probably what

1 would be good guidance for them is information that
2 they intend to cite or rely upon in the licensing
3 proceeding. So, that would be guidance.

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

6 MR. FITZPATRICK: That's what the Reg
7 said, yes.

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

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

19 JUDGE KARLIN: Right. Let's go to the
20 next page, page 130 of your guidance document. And
21 this is your discussion of what documentary
22 material number 2 is. And it is, this is the
23 information you say is the criterion -- quote,
24 information that is relevant under Reg Guide 3.69

1 but which does not support Nevada's position.

2 Right?

3 MR. FITZPATRICK: Yes, Your Honor.

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

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

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

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

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

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

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

1 licensing proceeding pervades these.

2 JUDGE KARLIN: Meaning there might be
3 information relevant to your contentions, your
4 several thousand contentions?

5 MR. FITZPATRICK: Certainly so.

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

10 MR. FITZPATRICK: I don't understand the
11 question.

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

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

17 JUDGE KARLIN: All right.

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

23 Is that what the regulation says for DM2?

24 MR. FITZPATRICK: I think I just read you

1 the regulation.

2 JUDGE KARLIN: Yes. Is that what the
3 regulation says?

4 MR. FITZPATRICK: It says that and some
5 additional words.

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

12 MR. FITZPATRICK: That's the difference.

13 JUDGE KARLIN: Would there be a broader
14 coverage if it was, does not support A or B or does
15 not support only A?

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

20 So, I don't think that the added verbiage
21 referring back to A changes the intent or the
22 meaning.

23 Can I point out something, Your Honor,
24 while you're looking?

1 JUDGE KARLIN: Yes, sure.

2 MR. FITZPATRICK: That's our Exhibit 17
3 -- or 18, which was in July '04, which is -- I will
4 concede, let's say it contains some shorthand
5 renditions which I don't believe change the meaning
6 of the writ. But if you look back through Exhibit
7 17 immediately before that, that's a document that
8 was sent to our licensing team just about a year
9 before that, and it includes the actual regulations
10 themselves.

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

15 JUDGE KARLIN: So you gave them a copy of
16 the regs?

17 MR. FITZPATRICK: Gave them the regs.

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

23 MR. FITZPATRICK: Yes, Your Honor, the
24 one I just mentioned, Exhibit 17, which was sent a

1 year before that.

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

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

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

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

1 requirements for this underlying raw data had been
2 discussed.

3 So this e-mail the next day is providing
4 them that -- drawing their attention to that raw
5 data one, which is a particular interest to expert
6 witnesses, perhaps, and not lay witnesses because
7 it involves raw data and things like that.

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

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

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

20 MR. FITZPATRICK: Right.

21 JUDGE KARLIN: Let's go to that page, I
22 believe it's 132. And as I understand your
23 approach on this one was to give a fact pattern
24 to -- and then, to discuss how the three tests that

1 you articulated would apply to that fact pattern?

2 MR. FITZPATRICK: The fact patterns are
3 very simplistic. And it was done to illustrate the
4 use of the, what was called the decision three, in
5 other words, the three-step process: See if it's
6 relevant; see if it's documentary material; and see
7 if it's in final form.

8 JUDGE KARLIN: So the first screen was if
9 it was relevant. And if it wasn't, it would be
10 knocked out right there, no further analysis?

11 MR. FITZPATRICK: If it is not
12 relevant --

13 JUDGE KARLIN: So it's not relevant to
14 Reg Guide 3.69, it's knocked out, no further
15 analysis?

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

20 JUDGE KARLIN: But isn't that what the
21 guidance memo just said, that the criterion for
22 test number one relevance was relevant to Reg Guide
23 3.69? Do we need to go back to that page?

24 MR. FITZPATRICK: No. Test number one

1 said relevant to our position in the licensing
2 proceeding too.

3 JUDGE KARLIN: Well, let's go back to
4 guideline. Where does it say that? Go back to
5 page 129. Where does it say relevant to your
6 position in licensing proceeding as part of the
7 relevance test, the initial relevance test? Does
8 it say that? I don't see that.

9 MR. FITZPATRICK: That's not part of the
10 relevance test. It's at the bottom of the page.

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

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

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

23 Now, I would like to focus on your
24 analysis of documentary material number 2, DM2.

1 Now, we have just read the facts, and your analysis
2 of whether it's DM2 says there is nothing
3 substantive in the document which does not support
4 Nevada's position.

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

7 MR. FITZPATRICK: Yes, Your Honor. There
8 is no such document.

9 JUDGE KARLIN: There is no such document?

10 MR. FITZPATRICK: There are none of these
11 documents in this instance. These were all
12 hypothetical documents.

13 JUDGE KARLIN: Okay. So you're saying
14 that there can be no DM2 at all?

15 MR. FITZPATRICK: No. The scope of
16 documents to be assumed by the person reading this
17 was simply the narrow scope listed.

18 JUDGE KARLIN: Okay. Then let's go
19 back --

20 MR. FITZPATRICK: So there is no
21 indication that there is anything --

22 JUDGE KARLIN: Let's go back -- Mike
23 Thorne is asked to give his opinion regarding the
24 likely criticality factors, blah, blah, blah. We

1 don't know what his opinion is. It could be
2 positive. It could be negative. It could support.
3 It could not support. We don't know that. And
4 yet, in your analysis, in your application of the
5 standard, you just posit as a given that there is
6 nothing in there that the document does not
7 support. How do you know that?

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

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

14 MR. FITZPATRICK: On this --

15 JUDGE KARLIN: You didn't say that. You
16 just said it does not support Nevada's position.
17 Why didn't you just say Nevada has no position, and
18 therefore, there can be no DM2? Is that a more
19 accurate way you're expressing this?

20 MR. FITZPATRICK: Could be.

21 JUDGE KARLIN: Well, I'm not asking could
22 be. I don't understand the application of that
23 standard.

24 MR. FITZPATRICK: There is nothing in the

1 hypothetical -- all the information they had was
2 that which was provided in the hypothetical.

3 JUDGE KARLIN: So if you were in a law
4 school exam and someone said, well, here's the fact
5 pattern, does it meet this test or not, you would
6 say I can't answer that question because you
7 haven't given me enough facts? Not, I would assume
8 that there is nothing in there -- I will assume
9 these facts and therefore I will reach a conclusion
10 that I like?

11 MR. FITZPATRICK: No, Your Honor.

12 JUDGE KARLIN: No?

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

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

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

23 MR. FITZPATRICK: The expert is not to
24 assume something in making this judgment.

1 JUDGE KARLIN: Let's go to DM1; the fact
2 pattern is given an opinion. We don't know what
3 that opinion is, don't know the contents of that
4 opinion or anything about it, and now you are going
5 to apply the test, DM1 test, of whether or not it's
6 information that supports and that is being relied
7 upon.

8 You just simply posit the fact that
9 Nevada will rely on it. How do we know that from
10 the example given? How do we know that?

11 MR. FITZPATRICK: I think it says it will
12 not rely on it.

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

15 MR. FITZPATRICK: Final reports but not
16 this document.

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

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

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

23 And Exhibit A -- example in full reads:
24 "Bob Loux states, ask Steve Frishman to comment on

1 Mike Thorne's Criticality Report, and he does so by
2 e-mail, the status of Steve's e-mail."

3 Let's go to DM2 again. And again, you
4 say, there is nothing likely -- there is likely
5 nothing substantive in Steve's e-mail which is not
6 supportive of the position. How do we know that
7 from the facts that you gave us? Are you just not
8 making categorical conclusions without the facts?

9 MR. FITZPATRICK: Exactly, Your Honor.
10 We are asking to assume nothing but the limited
11 amount of information that is given because these
12 are only illustrations of how to apply the
13 three-step test. The substance of them is not
14 really important. It is not intended --

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

21 MR. FITZPATRICK: In order to do that,
22 each hypothetical would have had a lengthy
23 hypothetical --

24 JUDGE KARLIN: No, it just --

1 MR. FITZPATRICK: -- another document
2 contained, maybe even attach a document. There are
3 no documents. This is a fabrication.

4 JUDGE KARLIN: I beg to differ. I think
5 the example could simply say as Dr. Steve
6 Frishman has commented on the Criticality Report
7 and he has raised a number of issues that support
8 it and a number of issues that question it.

9 MR. FITZPATRICK: I could have said that.

10 JUDGE KARLIN: Yes. And that would not
11 have been a difficult and long example. And then
12 you could decide whether it's supporting, whether
13 it's non-supporting, whether it's reporting a study
14 which is relevant to 3.69.

15 So again, and in the example G, you have
16 sort of a statement - there's nothing likely
17 substantive in Steve's e-mail which is not
18 supportive of Nevada's position.

19 Let's go to example H.

20 JUDGE MOORE: Were you looking for a
21 response to your last statement?

22 JUDGE KARLIN: No.

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

24 Quote, Maury Morganstein in 1985

1 submitted today -- the results of a six-month long
2 experiment done at Catholic University where an
3 example of C22 alloy was exposed to waters similar
4 to the chemical content in the waters likely to be
5 encountered in a Yucca Mountain storage tunnel.

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

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

16 JUDGE KARLIN: Right. So the correct
17 answer to DM2 would be, we can't answer that
18 question from the facts given. Not that you have
19 an answer.

20 MR. FITZPATRICK: Or there is no
21 indication that there is any un-supporting
22 information.

23 JUDGE KARLIN: No. The correct answer is
24 we can't answer DM2 because we don't know what's in

1 it.

2 Now, let's go to --

3 MR. FITZPATRICK: It doesn't exist, Your
4 Honor. You have to get that straight. It is a
5 hypothetical. There is no document. These are
6 hypotheticals to illustrate the application --
7 tests that nobody else in this proceeding sent to
8 their parties.

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

17 JUDGE KARLIN: Okay. Well, I think as I
18 understood it, this was an important instruction
19 that you gave to all of your team and that they
20 would, presumably, take very seriously.

21 So let me just ask with regard to each of
22 the three examples we have probed for DM2, there is
23 a statement, there is nothing in the document which
24 is not supportive of Nevada's position likely to be

1 used by another party.

2 Would you look at all ten examples and
3 tell me if that is not virtually the same thing you
4 staid for all DM2's?

5 MR. FITZPATRICK: Unless a hypothetical
6 created a situation where there is --

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

10 MR. FITZPATRICK: That's correct.
11 There's nothing in any of those hypotheticals that
12 states anything contrary to Nevada's position.

13 And if I may insert, that is not a
14 mystery, Your Honor, because if DOE has 5,000
15 things to establish under 10 CFR 1063, they have no
16 choice but to address each one of them. Nevada
17 does not have an obligation to address each one of
18 them. Nevada can analyze those which it chooses,
19 and in some of them, it may find that DOE's work
20 was impressive and -- Nevada will presumably not a
21 make a contention about those issues.

22 JUDGE KARLIN: I understand.

23 MR. FITZPATRICK: So if Nevada sends a
24 letter to somebody or an e-mail and says I have

1 examined issue A as you requested, and I find that
2 DOE did a great job for the following reasons,
3 that's not the DM1 because we are not going to rely
4 on it in the proceeding. And it's not DM2, non-
5 supportive of our position, because every time we
6 say something good of about DOE, that's not non-
7 supportive of our position.

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

14 MR. FITZPATRICK: Had the hypotheticals
15 been more lengthy, they could have hypothesized the
16 situation with something --

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

24 MR. FITZPATRICK: No, Your Honor, not at

1 all.

2 JUDGE KARLIN: Do you not have positions?

3 MR. FITZPATRICK: These are instructions
4 to people about how to interpret criteria for
5 bidding documents.

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

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

17 MR. FITZPATRICK: Apparently. There were
18 other battles of --

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

23 MR. FITZPATRICK: We haven't don't that,
24 Your Honor, no. We did not because that was not

1 the subject of this, whether we had taken any
2 positions was not a --

3 JUDGE KARLIN: Wouldn't that be a good
4 example, while we have got some -- here's
5 information, and you say, well, is it DM2? Well,
6 no it's not, because we have not taken a position
7 on that issue. You did not say that. You said
8 there is no DM2 because it doesn't support your
9 position.

10 Is there anything in any of your
11 instructions, any of them you can cite me to that
12 require people to provide non-supporting
13 information, any information, documents that
14 contain any information that does not support
15 Nevada's contentions or positions?

16 MR. FITZPATRICK: Yes, Your Honor.

17 JUDGE KARLIN: Cite me to something in
18 the memos that says, other than providing the copy
19 of the regs.

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

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

1 MR. FITZPATRICK: Top of the second page,
2 I'm sorry.

3 JUDGE KARLIN: So that's the only place
4 in all this material that you discuss --

5 MR. FITZPATRICK: No, Your Honor. Did you
6 say except for providing regulations?

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

13 Now, is there anywhere there where you
14 give guidance or instruction other than what you
15 just cited to me on how to apply DM2, non-
16 supporting information?

17 Seems to me that non-supporting
18 information is very critical. We demanded that DOE
19 provide non--supporting information. We demanded
20 that DOE go through 4 million e-mails to look for
21 the unvarnished truth of non-supporting information
22 that might be found in those e-mails.

23 I'm trying to find out whether you gave
24 any encouragement or instruction in writing -- and

1 you can cite to me -- to encourage your people to
2 bring forth any information that does not support
3 Nevada's supporting information or Nevada's
4 position other than that cite?

5 MR. FITZPATRICK: At present, that cite
6 and the documents which transmit the regulations
7 themselves would say that, are the two sources.

8 JUDGE KARLIN: Okay. Let me go back to
9 example D.

10 That's on page 133, Mr. Cutchin.

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

22 Later down on test number three, you say
23 that Dr. Thorne's report is a final report. Is
24 that not correct?

1 MR. FITZPATRICK: I say it's a report
2 requested by Dr. Thorne's client.

3 JUDGE KARLIN: And you say test number
4 three in example D, it is a final bold report. All
5 right.

6 MR. FITZPATRICK: Right.

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

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

19 MR. FITZPATRICK: I think the conclusion
20 to number three was that it was going to be
21 included as DM3 because DM3 refers to whether you
22 been relying on it or not.

23 JUDGE KARLIN: I understand DM3, but I
24 think it's DM1 as well. If you give the wrong

1 answer for example, could people not be confused.

2 MR. FITZPATRICK: Why do you think it's
3 DM1?

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

8 Now, you say here that Nevada will rely
9 on Dr. Thorne's final report or contentions in the
10 license proceeding, but not this document.

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

17 MR. FITZPATRICK: I don't think we are
18 relying upon the information in the document. I
19 don't think it says that.

20 Dr. Thorne has been asked to do many
21 sundry different things.

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

24 MR. FITZPATRICK: That's contentions.

1 JUDGE KARLIN: But not this document?

2 MR. FITZPATRICK: Right. This document
3 pertains to something that is not likely to be a
4 contention in this proceeding.

5 JUDGE KARLIN: Let's go to example G
6 again. Quote, Bob Loux asked Steve Frishman to
7 comment on Mike Thorne's Criticality Report, and he
8 does so by e-mail, the status of Steve's email,
9 DM1.

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

12 What about information in the e-mail?

13 MR. FITZPATRICK: There is nothing
14 stated --

15 JUDGE KARLIN: This document is specific
16 information.

17 MR. FITZPATRICK: There is nothing stated
18 here that indicates one way or the other about the
19 content of the e-mail.

20 JUDGE MOORE: Mr. Fitzpatrick, before we
21 take a break, just so I know what some of your oral
22 argument exhibits are, your oral argument
23 Exhibit 21, is this another collection of materials
24 that you sent out to your team?

1 MR. FITZPATRICK: Yes, Your Honor.

2 JUDGE MOORE: And is one of those
3 materials that you sent out to all of these people
4 which is listed as number 5 on something called
5 Final Training for Nevada's Initial LSN
6 Certification, DOE's November 3rd, 2006 LSN
7 instructions to its staff and contractors?

8 MR. FITZPATRICK: Yes, Your Honor.

9 JUDGE MOORE: And is that guidance
10 document entitled Guidance Concerning Ongoing LSN
11 Obligations?

12 MR. FITZPATRICK: Yes, Your Honor.

13 JUDGE MOORE: And is the third page of
14 that Item 3 part of the matter that you sent out
15 that's part of part of that DOE guidance that says
16 submit potential non-supporting and supporting
17 e-mail?

18 MR. FITZPATRICK: Yes, Your Honor.

19 JUDGE MOORE: So that was all the
20 material that was sent out by you?

21 MR. FITZPATRICK: There is another
22 example because in addition to this particular
23 mailing, as you can see from the list of six items
24 under final training, there was six different items

1 sent or re-sent to the team, including Mr. Egan's
2 call memos and other information, but this time
3 including DOE's information, including its
4 description of the Class I and II, its description
5 of Class II.

6 If you are going to analyze, I think you
7 would find this to be far too narrow a description
8 of non-supporting. DOE says Class II simply, if it
9 contains information that is adverse to,
10 contradictory of or inconsistent with information
11 in the first category.

12 JUDGE KARLIN: You are suggesting that is
13 narrower than your definition, which is DM2
14 information that is relevant -- your suggestion is
15 that that is narrower?

16 MR. FITZPATRICK: It is more narrower
17 than non-supporting generally. Non-supporting can
18 be sort of pabulum, non-supporting. This says
19 adverse to, contradictory to or inconsistent with.
20 Otherwise it doesn't get --

21 JUDGE MOORE: It is time to take a break.
22 We will resume this at 11:35. And at that time,
23 when Judge Karlin finishes up his question that he
24 is on, you will be given an opportunity to tell us

1 what you did, which I believe you wanted to do.

2 We will be adjourned until 11:35.

3

4 (Whereupon, a short break was taken)

5

6 MR. SHEBELSKIE: Were you able to talk
7 with your colleagues to find any references to bad
8 faith in DOE's motion to strike?

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

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

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

18 JUDGE KARLIN: We are almost done with
19 this memo or topic. What I would like to refer you
20 to is your exhibit, your declaration that you filed
21 in association with this. Let's see if I can find
22 it. Bear with me a moment.

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

1 MR. FITZPATRICK: Yes, Your Honor.

2 JUDGE KARLIN: And as you know, I was
3 concerned about DM2 which is concerned about
4 whether you were called accurately or properly
5 called for any information that did not support
6 Nevada's position or Nevada's information. We go
7 to paragraph number 12 of your declaration. You
8 have that in front of you?

9 MR. FITZPATRICK: Yes, Your Honor.

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

24 MR. FITZPATRICK: I don't think that is

1 in there. This was not the point of the affidavit.

2 JUDGE KARLIN: The point of the affidavit
3 you filed was to help us conclude that you had
4 fully made all your documentary material available
5 and this only covers DM1.

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

16 JUDGE KARLIN: Did not the motion raise
17 the absence of information would be critical of or
18 undermine your motion?

19 MR. FITZPATRICK: I don't recall that
20 Your Honor.

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

23 MR. FITZPATRICK: I'm willing to surmise
24 it does.

1 JUDGE KARLIN: Says recipient to omit
2 critical commentary So you emphasized that you
3 encourage people to provide information they would
4 rely upon. What is missing significantly is my
5 statement that you encourage people to provide
6 information that might be critical or undermine
7 Nevada's position. Maybe did you?

8 MR. FITZPATRICK: Where is that that you
9 say that it appears that exist?

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

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

21 JUDGE KARLIN: But there might be
22 contentions which were drafted, thousands of
23 contentions which might include -- in your material
24 might have some information that's not supportive

1 of that contention?

2 MR. FITZPATRICK: We only have
3 preliminary contentions and so --

4 JUDGE KARLIN: Have you provided in your
5 document production, have you provided any
6 information that is not supportive of Nevada's
7 position or draft contentions?

8 MR. FITZPATRICK: I assume we have
9 because --

10 JUDGE KARLIN: No, did you?

11 JUDGE KARLIN:

12 MR. FITZPATRICK: I don't have
13 comprehensive knowledge of every document in the
14 system, no. I can't answer that question. Not
15 every document.

16 JUDGE KARLIN: Okay. That's fine.

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

22 MR. FITZPATRICK: No, Your Honor. That
23 was not brought up and nothing that's been
24 discussed in the last hour was brought up at that

1 meeting.

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

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

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

21 Well, it really is primary mission in
22 this context at this time is to work toward the
23 development of contentions for submission in the
24 licensing proceeding which contentions will not be

1 due for a year based on an LA which will not be
2 filed for at least 6 months, which will be
3 predicated on documents like preclosure safety
4 analysis, TSPA and other documents which are not
5 even done yet.

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

18 These compliance issues take the form of
19 contentions of law or fact that the party has
20 successfully admitted to litigation and under the
21 laws of practice.

22 The Commission is clarifying that because
23 the full scope of coverage of the reliance concept
24 will only become apparent after proffered

1 contentions are admitted by the presiding officer
2 in the proceedings and LSN participant would not be
3 expected to identify specifically documents that
4 fall within either Class I or Class II documentary
5 materials as a consequence. While it is not
6 possible to say that there are no special
7 circumstances --

8 JUDGE KARLIN: I think you're skipping on
9 the paragraphs.

10 MR. FITZPATRICK: I'm skipping large
11 sections, Your Honor.

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

22 MR. FITZPATRICK: Your Honor, it is not an
23 omission. I was reading the sections that had not
24 been already quoted by DOE in its brief. They are

1 already quoted by Nevada which the Board said it
2 was going to read. I was reading sections that
3 were embellishing on that. There is no question
4 and we don't duck or avoid the fact that the Board
5 said that a good faith attempt would be made to
6 include documents that may eventually -- I think
7 your words are almost verbatim to that effect, so
8 we are not hiding from that.

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

14 JUDGE MOORE: Mr. Fitzpatrick, as I
15 understand it, DOE has issued EIS and a number of
16 supplemental EISSs and a number of draft
17 supplemental EISSs, is that correct?

18 MR. FITZPATRICK: I think that's correct,
19 Your Honor.

20 JUDGE MOORE: Now, with regard to any
21 contentions that DOE may wish to raise -- I'm
22 sorry -- Nevada wishes to raise with regard to that
23 those EISSs, recognize that staff has not yet
24 determined, whether the staff will do a

1 supplementation; is Nevada's position the same,
2 that it can't take a position?

3 MR. FITZPATRICK: I think that if I'm not
4 mistaken on the EIS, there is a comment period on
5 that right now.

6 JUDGE MOORE: That those are not
7 supplement. There's one been out for at least two
8 years.

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

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

20 MR. FITZPATRICK: I don't think that we
21 have drafted any documents. We do not have any
22 individuals assigned on the team yet with any
23 responsibility to do those contentions that may be
24 directed to the EIS. I think that is something

1 that will be done probably after the final version
2 of the supplement. We commented on the EIS years
3 and years ago, on the SEIS years and years ago.
4 But as far as I'm aware, the last work product that
5 was generated on that subject --

6 JUDGE KARLIN: Is that material in either
7 your collection or DOE's collection?

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

21 In any event, we were well aware of the
22 accepted portion which I did not read and that was
23 the course of action we followed. We believe that
24 there were three requirements to be met in order to

1 do the LSN correctly. And I would quote from DOE
2 what it said in response to our motion to strike
3 theirs because I think this is a correct statement.

4 JUDGE KARLIN: This is back in 2004?

5 MR. FITZPATRICK: No sir, this is the one
6 a few months ago. They had three requirements.

7 One, a certification required by 10 CFR 2.109B

8 Participants' attestation has implemented
9 procedures to enable to it to meet its obligations,
10 not just in the present but in going forward as
11 well, procedures.

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

24 That is exactly what we have undertaken

1 to do. The training, establishment of procedures,
2 the gathering of a database that meets the LSN and
3 CFR2 requirement. We begin in 2003 which is more
4 than four years ago with the first expert universal
5 summit meeting we call them in late 2003 and begin
6 there with the session regarding training
7 procedures and the definitions and what was to be
8 included in the LSN.

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

22 JUDGE MOORE: In your oral argument
23 exhibits and I don't have the one in front of me,
24 but the exhibit, what appear to be graphic-oriented

1 material, Is that correct?

2 MR. FITZPATRICK: I think the one we just
3 spoke of.

4 JUDGE MOORE: In your oral argument
5 exhibit?

6 MR. FITZPATRICK: Correct.

7 JUDGE MOORE: Is that illustrative that
8 such material is in the LSN or is that exclusive.
9 That's all there is?

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

14 JUDGE KARLIN: During your January 28th
15 meeting with counsel for DOE, did they specifically
16 raise the issue that there were no graphic-oriented
17 materials in your LSN collection?

18 MR. FITZPATRICK: I think they raised the
19 issue that they thought there was a scarcity of
20 them.

21 JUDGE KARLIN: And what was your
22 response?

23 MR. FITZPATRICK: My response during that
24 conversation and my response today has always been

1 the same. We believe that we have in good faith
2 created a complete database, LSN database. We
3 believe that -- I can go through the list but all
4 of the sessions we have conducted large and small
5 and documentary and oral, have inculcated these
6 definitions and steps and we have done a good job.
7 Certainly, we have put forth a good faith effort.

8 If we have missed anything as I said in
9 the meeting, and I said in our brief and I say
10 today, if we have missed something, we're human
11 just like anybody else. DOE missed some things and
12 we told them and they could put them in. If that
13 happens, we will be happy to do it.

14 JUDGE KARLIN: DOE makes in their motion
15 the assertion there are no privileged--you found no
16 privilege, no graphic headers for privileged
17 documents. One, did they raise that on in the
18 January 28th meeting?

19 MR. FITZPATRICK: I don't think that is
20 an objection that they have to our database. I
21 don't think they raised it but I don't think that
22 is an objection.

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

1 MR. FITZPATRICK: And if you look, you
2 might find some documents that you think have been
3 claimed.

4 JUDGE MOORE: And why is that?

5 MR. FITZPATRICK: Because we determined
6 that we would not assert the privilege that we
7 might have asserted as to some documents that we
8 had segregated and analyzed for that purpose. We
9 decided we are a state organization, we are paid by
10 taxpayer and unless there is some justification,
11 there is no reason that they should see what we do.

12 JUDGE KARLIN: Can I just clarify that
13 they raised the absence of work product in
14 consultation?

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

16 JUDGE KARLIN: Because the work
17 product --

18 JUDGE MOORE: So no inference should be
19 drawn, certainly, no negative inferences should be
20 drawn that there are no claimed privileged
21 documents?

22 MR. FITZPATRICK: No. As a matter of
23 fact, we cited in our certification that we had
24 made the determination not to assert the privilege

1 to those documents that we might have in the
2 interest of an open proceeding.

3 JUDGE MOORE: Now, you have in your oral
4 argument exhibits,-- never mind, go ahead, proceed.

5 MR. FITZPATRICK: Finishing up about --
6 in the end, what the criticism is, it is not our
7 procedures because certainly, our training
8 procedures, if anything, they exceed DOE's and I
9 think are more broad and catch more things than the
10 definitions that I have seen for DOE.

11 But I don't believe that -- there was one
12 exception about the distribution and that was fixed
13 by steps taken by Ms. Lynch and followed by the
14 declaration to reinforce it. But they are not
15 criticizing that we went about it the wrong way.
16 And although they seem to say to me, because of the
17 attachments, we attached calibration logs, raw
18 data, laboratory notebooks, samples of those
19 things, they can assert that we have excluded any
20 category of documents like as a category that we
21 have told people don't do this.

22 There is something with everything and so
23 what's left, DOE's second guessing the judgments of
24 the Nevada team as to what they are going to rely

1 on and not rely on in the proceeding. And as I
2 said, our goal or our contentions are a year away
3 and they are based upon documents which largely
4 don't exist yet.

5 JUDGE MOORE: Without in any way
6 belittling Nevada's interest to date; is it
7 Nevada's view that DOE has perhaps overestimated
8 what Nevada has done to date? That would seem to
9 be the gist of what you are saying in that it took
10 a while to gather a team of experts, only 17 hours
11 have been billed a month by Dr. Thorne and you give
12 quite a litany. Is this an Iraq/Iranian situation
13 where the weapons of mass destruction were smoke
14 and mirrors from the perspective of DOE?

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

1 It was known to all of us that there were
2 documents that were relevant to the LSA that had
3 been segregated by DOE sent to Mr. Graser for that
4 purpose but under agreement, it would not be
5 released to the public. Now, I'm not here to
6 attack that decision or that's besides the point
7 today. What is relevant today is the false
8 assumption that somehow, Nevada had a team of
9 experts pouring over those documents. We did not.

10 The only documents that were available on
11 the LSN until last summer were ones that had been
12 put up in June '04 which means they predated that.
13 So for 2008 or so, LA filing, one can speculate
14 that pre 2004 documents which have been replaced
15 revised and reiterated are not of great value.

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

19 MR. FITZPATRICK: That's what Mr. Loux
20 said. We agreed.

21 JUDGE KARLIN: So you agreed that Nevada
22 has drafted thousands contentions, preliminary
23 draft of thousands of contentions --

24 MR. FITZPATRICK: We gone over there but

1 different from what you or me mean by a contention.

2 JUDGE KARLIN: I think you are quite
3 modest. Certainly I understand contentions need to
4 be drafted carefully, but if you have thousands of
5 contentions, that would seem to tell me that people
6 have given a lot of thought to these issues and
7 developed positions and contentions. They may not
8 be finalized. They have not cited the application
9 that is deficient because they don't have the
10 application. But you are very modest to say that
11 represents a very little amount of work.

12 It sounds like a lot of thinking that
13 must have gone into thousands of contentions.

14 MR. FITZPATRICK: Now, that's pure
15 speculation.

16 JUDGE KARLIN: But there are thousands of
17 contentions. I'll give you an example because
18 there is an example in the record. In Exhibit P of
19 DOE's -- attached to DOE's motion, there is various
20 reports from one of the experts and it was not put
21 in the LSN because it has contentions in it. But
22 in spite of the fact that --

23 JUDGE KARLIN: It has 37 contentions?

24 MR. FITZPATRICK: Something like that.

1 And if you read them, you will see. Number one,
2 you see there are a couple of sentences. Number
3 two, you will see in 35 out of 37 instances the
4 statement begins, DOE assumes this and I don't know
5 if that is correct.

6 DOE has failed to assess that and I think
7 they should. DOE has failed to assess this and I
8 think they should. And that is an exit clause of
9 Mr. Loux's contentions. That's not in my view a
10 contention nor does it establish a position. It
11 points out a lack of something.

12 JUDGE KARLIN: I think that's quite
13 common in what we did in contentions is an
14 allegation that the applicant or the application
15 fails to address a certain issue or inadequately
16 addresses an important issue and -- let's move on.

17 MR. FITZPATRICK: Using it as an example,
18 I would say that this is pure off the hip shot, I
19 would say that Mr. Morganstein who wrote those
20 contentions may have done so in a day. I don't
21 know. No other member of the team participated in
22 that effort whatsoever.

23 So, if are you counting contentions and
24 this wonderful global mass of effort that we are

1 being too modest about, there is an example. You
2 seen 37 of them. They took one person, one
3 afternoon's work. So let's put it in context if we
4 are going to.

5 JUDGE KARLIN: Can I ask some questions
6 about your brief, page 30. There is under the
7 subject of Duplication. Can we bring that up?
8 Page 30 in this area, you are going over a number
9 of DOE assertions and your response to them. At
10 the bottom of the page, DOE omission and there is a
11 discussion about a Dr. Barkatt -- I'll wait for you
12 to get that page.

13 MR. FITZPATRICK: Page 30.

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

18 MR. FITZPATRICK: Yes, sir.

19 JUDGE KARLIN: And you say -- well, it's
20 actually 37. But then you go on to give a
21 response, -- "more importantly, what DOE failed to
22 do is note the report of all of LSN databases using
23 Dr. Barkatt in the author field and this would have
24 yielded 107 hits," okay.

1 MR. FITZPATRICK: Okay.

2 JUDGE KARLIN: And then, you make the
3 statement that I'm concerned about, the next
4 statement. "Since Nevada is not expected to put
5 claimants LSN, database duplicates of documents
6 already on the LSN, there is no reason Nevada would
7 have felt it necessary to put any of those 107 hits
8 on. for -- I don't know whether that is an
9 assessment of the Regs. Could we go to the REGs,
10 ask you to pull out, 2.103.A-1? It's on page 25.

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

14 MR. FITZPATRICK: Yes, Your Honor.

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

17 MR. FITZPATRICK: So DOE found during the
18 search --

19 JUDGE KARLIN: They found 34 and you said
20 it was 37 on Nevada's database. And you said,
21 yeah, well, actually, other people already put Dr.
22 Barkatt and you got 107 hits if you look under
23 other people's submissions, right?

24 Let's go to the REG. 2.10003-A1 talks

1 about a requirement to produce documents. If you
2 go to the middle of that regulation, it says this
3 is I think the only portion in the REGs that deals
4 with the sort of exception that you don't want to
5 put duplicates on. And it says, provided -- says
6 "provided however that an electronic file need not
7 be provided for acquired documentary material that
8 is already been made available by the potential
9 party interested Government participate or that
10 originally created the documentary material,
11 period."

12 Now does that "except for duplicates"
13 apply to your own experts generating documents?

14 MR. FITZPATRICK: My reading was it did.

15 JUDGE KARLIN: Tell me how it doesn't?

16 Is this a document that you acquired? Dr. Barkatt
17 generated it. He is the author of it. He is your
18 expert. So presumably, this is not -- you
19 originally generated it or your expert. So it does
20 not fit this regulatory exclusion.

21 MR. FITZPATRICK: If you're reading this
22 correct, my reading is mistaken. If a document is
23 already on the LSN, you don't have to duplicate it.
24 Even if the document is on the LSN ten times over,

1 if your expert generated it, you need to put it on
2 the --

3 JUDGE ROSENTHAL: How is DOE prejudiced
4 even assuming that Judge Karlin's reading of the
5 regulation is correct? As long as the document is
6 on the LSN, this is not simply a most technical
7 violation that is not prejudicial at all?

8 MR. FITZPATRICK: If the document is on,
9 I don't see a problem at all.

10 JUDGE KARLIN: Perhaps the only exception
11 is the documents that someone else is generating.
12 What is the value in having the person who
13 generated the documents put all of them on their
14 LSN even if other people put some of them on?

15 MR. FITZPATRICK: Well, the value is to
16 have some assurance that Nevada or the party in
17 question has provided all of their documentary
18 material that their experts generated. It seems to
19 be based on yes, you exhausted the universe of
20 documentary material that you generated.

21 JUDGE KARLIN: I just didn't understand
22 that putting it on a second or 11th time would
23 create that reassurance. The problem is you they
24 may have missed it, relying on DOE to put your

1 material on for you?

2 MR. FITZPATRICK: No, of course not.

3 JUDGE KARLIN: The recording of the
4 regulation, I think you misconstrued the
5 duplication requirement.

6 MR. FITZPATRICK: So I made a mistake in
7 my brief?

8 JUDGE KARLIN: Legally, yes and you made
9 a mistake in your instructions to your experts in
10 terms of what documents they need to make or
11 provide.

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

16 MR. FITZPATRICK: I don't recall their
17 complaining about that.

18 JUDGE MOORE: Would you wrap it up.

19 MR. FITZPATRICK: I guess -- go ahead
20 before I wrap it up.

21 JUDGE KARLIN: Okay. I would like you to
22 refer to DOE's brief page 26 and 27 with regard to
23 Mr. Frishman. Do you have that?

24 MR. FITZPATRICK: I don't have the piece.

1 I would be happy to have you read the sentence you
2 are talking about.

3 JUDGE KARLIN: Okay. In DOE's brief, they
4 have this chart, you may remember of various of
5 your expert's team, I'm not sure and one of them is
6 Mr. Frishman. I don't know whether it's Dr.
7 Frishman or Mr. Frishman. It is shown in the chart
8 under -- he authored it. His name under authors
9 shows two documents and search for his name and
10 address shows two documents, total of four
11 documents, authored or addressee by Mr. Steve
12 Frishman.

13 It then goes on to say on page 27 that
14 Mr. Frishman has been a full-time consultant to or
15 employee of Nevada since 1988. I guess that's 20
16 years and then, raises the concern, alleges
17 speculatively, that Mr. Frishman has created and
18 received hundreds of technical and scientific
19 documents concerning Yucca Mountain.

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

22 MR. FITZPATRICK: Sure. Mr. Frishman is
23 an employee of the state; he is not a member of the
24 consulting team. He has not been given any

1 particular assignment or discipline to review
2 information or to even attempt in the future to
3 form opinions or to sponsor contentions. He's an
4 employee of the state, much like Susan Lynch who
5 signed an affidavit here.

6 JUDGE KARLIN: They say he is a geologist
7 and he is quote, technical policy coordinator to
8 Nevada's Nuclear Project's Agency, a position he
9 held for over a decade. What is his position? Is
10 that is his position?

11 MR. FITZPATRICK: That's his position.

12 JUDGE KARLIN: So he's a technical policy
13 coordinator for nuclear agency. Sounds like an
14 important position.

15 MR. FITZPATRICK: It is an important
16 position.

17 JUDGE KARLIN: And he probably sends and
18 receives many documents every single day.

19 MR. FITZPATRICK: Only four of them are
20 documentary material.

21 JUDGE KARLIN: And only four of them are
22 documentary material. I will give you an example.
23 Mr. Shebelskie has been working on this case
24 full-time for years. If you do a search for Mr.

1 Shebelskie, you will get a goose egg. He is an
2 attorney and could claim attorney client privilege.
3 There are a number of documents in privilege law
4 which are.

5 MR. FITZPATRICK: And if he did, if he
6 authored them, he would be in the author index with
7 a privileged document and he's not. It's a goose
8 egg. And the point is, I'm not bent out of shape
9 about that. I have very few myself. The point is,
10 even though Mr. Shebelskie and I each generate, I'm
11 sure a dozen e-mails a day, easily, regarding some
12 aspect of this proceeding --

13 JUDGE KARLIN: Is this one of these
14 factuations where we might let DOE take Mr.
15 Frishman's deposition to see what kind of documents
16 he may have generated?

17 MR. FITZPATRICK: I don't see what basis
18 you suggest that, Your Honor.

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

21 JUDGE KARLIN: A prima fascia case on
22 Nevada's team that has only had four documents, to
23 and from him that qualify as documentary material
24 and is a factual question maybe you can issue some

1 questions for Mr. Frishman and get a answer or
2 maybe DOE can take his deposition.

3 MR. FITZPATRICK: You can do any of those
4 things, Your Honor but I could do exactly the same
5 thing, starting with Mr. Ward and going all down
6 through ranks through Russ Dyer to everyone there,
7 the 2500 or however many employees they have and
8 Bechtel has and everyone else has and question how
9 many documents show up when you do an author search
10 and I will tell you right now as we said in our
11 brief, DOE left the author block vacant in many,
12 many, many -- I don't know if most -- but many of
13 those headers.

14 And so if we did an author search under
15 Russ Dyer, chief engineer, if you came up with 2
16 and 2, whatever that was, I guess you would say
17 that that creates a prima fascia issue of whether
18 Mr. Dyer put his documents in or not and that could
19 be replicated for 2500 DOE employees for the simple
20 reason that even if they tried to put all the
21 documents in, they didn't put their author name in
22 the header. And so, if Joe Smith had a hundred
23 documents and they were all in, if you do an author
24 search for Joe Smith, you're likely to come up with

1 ten and Mr. Smith was on the project for years and
2 only has 10 documents, you better get a deposition.

3 JUDGE KARLIN: We granted your motion to
4 strike certifications in 2004. The consequence was
5 DOE could not file its application. It was
6 delayed, but barred from filing an application. If
7 we were to grant the motion to strike Nevada's
8 certification or as we have already done, granted a
9 motion to strike the City of Las Vegas'
10 certification, would you be barred from filing
11 motions to compel or otherwise presenting arguments
12 here until you cured that defect?

13 MR. FITZPATRICK: I would have to
14 research to determine exactly what restrictions
15 would exist on us in the interim.

16 JUDGE KARLIN: Could we impose that
17 responsibility? Could we impose that?

18 MR. FITZPATRICK: To do the research?

19 JUDGE KARLIN: No. It seems a logical
20 thing to think about. They filed a motion to
21 strike. What would happen to Nevada if it were
22 granted? Anything? Have you thought about that?

23 MR. FITZPATRICK: Well, I mean certainly,
24 the initial effect would be that upon whatever

1 basis -- that would be the important thing -- the
2 action was taken, apparently, some remedial action
3 would need to be taken and taken quickly because of
4 course, Nevada does not want any level of
5 participation in this proceeding limited for any
6 duration of time.

7 So, it would take those steps necessary
8 to remedy. Having been involved in the creation of
9 the LSN, I'm at a loss if you were to say, go back
10 tomorrow and do it better, we made a good faith
11 effort to apply three regulations of 10 CFR 2, the
12 definitions of 10 CFR2, we were required to and did
13 in our best faith effort, trained individuals for
14 over four years, put out procedures as to how the
15 documents would become be collected, follow up,
16 follow up and met in person on the phone, by email
17 and so I frankly don't know exactly other than
18 changing the regulations or changing the
19 definition, what different we could --

20 JUDGE KARLIN: If you are claiming your
21 guidance documents were wrong, then obviously this
22 would create an under reporting of your documentary
23 material.

24 MR. FITZPATRICK: If that were correct

1 and in that regard, if the Board chooses to
2 scrutinize the definitions given by the parties, I
3 suggest that the definition of documentary material
4 by DOE needs to be scrutinized because otherwise
5 that would likely be in these monthly updates --

6 JUDGE KARLIN: File a motion to strike if
7 you think there is a basis for it.

8 JUDGE MOORE: Thank you, Mr. Fitzpatrick.
9 Rebuttal, Mr. Shebelskie?

10 MR. SHEBELSKIE: Yes, sir, just a few
11 points.

12 JUDGE ROSENTHAL: I got a question at the
13 outset and it's in the context of your 323B
14 certification. And that is, with respect to all of
15 these matters that Judge Karlin has raised with Mr.
16 Fitzpatrick about the possibly inadequacy of the
17 instructions given by Nevada to its individuals
18 that are working on this project, was this
19 something that you specifically raised during the
20 conference or -- I think that Mr. Fitzpatrick's
21 answer to that question was no, though I'm not
22 certain about that. I'm asking you whether this is
23 something that was addressed in your conference
24 with Nevada?

1 MR. SHEBELSKIE: We did not to my
2 recollection, review examples from those -- what we
3 discussed over the course of the two hours was that
4 we did not see supporting and non-supporting
5 information, the volume that would be appropriate
6 and necessary to support the 2000 contention.

7 Likewise, we did not see -- in essence we
8 saw no e-mail which could be the case given the
9 discussions back and forth about the draft
10 contentions and the response from Nevada was
11 because they had no positions finalized, therefore,
12 they had no supporting information and non-
13 supporting information.

14 We then went on further and discussed
15 that even if you want to have a final contention,
16 you still have created documents in the course of
17 doing the work that the experts had been doing,
18 both reviewing our work product and doing their
19 independent work products. Those documents under
20 the definition of documents in the regulations, I
21 remember discussing this specifically. And
22 document is defined as any electronic file and that
23 they would have created electronic files or
24 documents with information in them. They could

1 take the form of emails, they could take the form
2 of excel spread sheets, et cetera, et cetera. So
3 they have not produced that. And with respect to
4 graphics --

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

7 MR. SHEBELSKIE: Oh yes, yes. If you
8 don't have any positions at least in order to
9 identify 2000 contentions, draft contentions, you
10 would have discussions. What shall we say, what are
11 the grounds?

12 JUDGE ROSENTHAL: Again, what you're
13 building is I think you built in your brief is a
14 circumstantial case. What I'm getting at is
15 whether or not you raised with them, the issue as
16 to whether the instructions that they were giving
17 to their employees, to the people working on this
18 project were inadequate? In other words, whether
19 you were raising in effect a legal issue as opposed
20 to simply saying, gee, we think that in the
21 totality of circumstances, there should have been
22 more documents of a particular character than in
23 fact you were placed on the LSN.

24 MR. SHEBELSKIE: We said we didn't know

1 whether it was their experts who had not submitted
2 documents, probably a narrow standard or whether
3 the experts had submitted fast volume documents and
4 it was certifying official stamp, who had done the
5 filtering. So we could not say we don't know where
6 the breakdown occurred but we said at some point,
7 you applied in the process, with these memos, with
8 what you followed, you adopted a narrow standard.

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

13 MR. SHEBELSKIE: I think not in the terms
14 you're positing, Judge. In answer to your question.
15 But what we discussed continuing, for example.

16 Judge Moore, you asked about the graphic
17 oriented material. We discussed that specifically
18 and I already mentioned but we went on because in
19 our brief, we had cited and say the LSN, those
20 various progress reports from those two outfits,
21 the two geoscience firms and the progress reports
22 stopped in 2005. And we said, looks like the work
23 continued.

24 Did they continue to do work for

1 documentary material? The electronic files have
2 information. We discussed that and the bottom
3 response was they did continue their work. We told
4 them to stop generating those monthly progress
5 reports, but they did their work. And we came back
6 and said, well, whatever analysis they are giving,
7 work product they are doing, continues up to 2006
8 or 7, that creates documentary material that need
9 to be available.

10 JUDGE MOORE: What classification of
11 documentary material?

12 MR. SHEBELSKIE: It can be either
13 Category I or Category II or even Category III if
14 you submit a gas sample or rock sample, create a
15 electronic file that is a report from that. So it
16 could be all three. Their point was they didn't
17 have to produce any materials related to that
18 ongoing work because they had no final positions.

19 They had no final report and they had
20 just been given a pass on whether or not the email,
21 other electronic files created including graphic-
22 oriented material could qualify under documentary
23 material classes.

24 That is how the discussion went back and

1 forth and actually embraces these conditions here
2 because again, we can't say these two geoscience
3 firms, Morganstein and I think it's Smith have
4 created X number of additional documents they have
5 not been made available to us.

6 What we know for a fact, in this
7 particular instance is that those experts' work
8 continued, is not a matter of speculation and they
9 have simply not produced any documents from them
10 after 2005.

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

15 MR. SHEBELSKIE: Correct.

16 JUDGE MOORE: Now, the way the LSN works
17 as I understand it, it is only as good as the
18 search query. If your search query was not perfect
19 or faulty, then, you would get less than
20 anticipated results.

21 MR. SHEBELSKIE: As a general
22 hypothetical.

23 JUDGE MOORE: On the basis of what you
24 have given us, you are asking me to credit the

1 expertise of your search query and discount or
2 discredit the responses to that. Nevada has said
3 they reviewed all this, they put it into their
4 screening process and they don't have the
5 documentary material to produce. The only way that
6 I can see from what you presented is and maybe you
7 did, when you got something that said there were
8 3,000 hits, did you go through all 3,000 documents
9 to see what those 3,000 were?

10 MR. SHEBELSKIE: We did. We searched by
11 author name and we reviewed every single hit that
12 came up.

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

15 MR. SHEBELSKIE: Well, no author resulted
16 in 3000 hits but what we did, Your Honor in
17 response to their brief where they said, oh, your
18 research was wrong. First of all, they only give
19 one example, don't they for Dr. Barkatt, --

20 JUDGE MOORE: You only gave 3 examples of
21 documents and all three were in there.

22 MR. SHEBELSKIE: It resulted in 300 hits -
23 -- but it turned out the search results, the number
24 of documents presented by author. What we did was

1 attached this as our supplemental Exhibit C and
2 downloaded his entire collection and sorted by date
3 and showed you earlier at the beginning of the
4 argument from exhibits, the research we had done
5 and excluded all of the documents that predated
6 their contention of the law firm. They said they
7 hired those experts later.

8 So we got all the September 10th, 2001
9 and later documents. We removed the documents that
10 had attributed and authorship by DOE, DOE
11 contractors, NRC, that were transcripts of
12 proceedings and other federal agencies and we
13 sorted them by author here. And there were 700
14 documents total and you can look by author name and
15 it confirms what we did in general terms here.

16 There is no dispute. Nevada has not
17 disputed the material point made by our
18 representation on that score.

19 A couple of other miscellaneous points,
20 Your Honor. First, Mr. Loux is not some casual
21 Nevada employee. He is a long-standing, two
22 decades at least, head of the Nevada agency for
23 Nuclear Projects with responsibility for dealing
24 with Yucca Mountain and he is also, Nevada

1 certifying official.

2 JUDGE MOORE: All well and good. I'm
3 curious, why you don't have any declarations by
4 those with knowledge of the facts that could so
5 swear to in support of your motion to the very
6 argument that you just made, that Mr. Loux --
7 whoever Mr. Loux is and that you have knowledge of
8 the fact that he has written X number of documents
9 and that -- but you have not done any of that.
10 What is the response to Mr. Fitzpatrick's argument
11 that all I have is lawyer's argument. I don't have
12 any facts.

13 MR. SHEBELSKIE: No. You have facts that
14 are now in the record, two transcriptions of
15 testimony from Mr. Loux, an affidavit that he gave
16 on a federal lawsuit and his testimony before the
17 Nevada Commission last month, identifies who he is
18 and what his position is. In that testimony from
19 last month he testified about the work that
20 Nevada's experts have been doing, the preparation
21 of contentions. We provided the sworn testimony of
22 Mr. Fitzpatrick's partner, Mr. Egan where he
23 describes the work --

24 JUDGE MOORE: Look at 35 of those 37

1 contentions that are in here as exhibits. Now, we
2 are playing fast and loose with the word
3 "contention," aren't we? You don't know.

4 MR. SHEBELSKIE: Of course I don't know.
5 But just like Nevada didn't know what DOE's
6 production and standards were internally, the point
7 is all we can say is look at the objective evidence
8 available to us on the face of LSN, juxtapose
9 against the sworn testimony of both the Nevada
10 official and the Nevada counsel has provided about
11 the work they are doing and there is a gross
12 mismatch.

13 Now, there is no joinder by Nevada that
14 somehow, they all have on the LSN, a lot more work
15 brought about by all these documents and that our
16 chart was inaccurate. What they simply say is
17 well, we have not finalized our contentions and we
18 need to do more and get back to that point is
19 inadequate.

20 JUDGE MOORE: Didn't they put some
21 illustrative exhibits in their oral argument
22 exhibit --

23 MR. SHEBELSKIE: They put in 2 or 3
24 examples. We didn't contend in our brief that they

1 had no graphic-oriented material. We did say -- we
2 did point out with respect to the two geoscience
3 firms that we knew there was several years' worth
4 of work that was absent.

5 Many of their illustrative examples by
6 the way were graphic-oriented material from those
7 organizations from the post 2005 time period, they
8 were completely silent about that. The point we
9 made more broadly though about graphic-oriented
10 material is that even if you don't have a finalized
11 version of your contentions with all the bells and
12 whistles that would satisfy 2.309 for example, you
13 still have generated the information, document with
14 information in them including graphic-oriented
15 material that you have to consider for production
16 now as class I documentary material and in class II
17 and potentially, Class III.

18 So it is not your final contention but
19 supported by all this material.

20 And in that respect, Judge Karlin went in
21 at great detail about those examples, guidance
22 examples but I do want you to go back and
23 deliberate, also look at Example C from that and
24 I'll just read it here. The example reads as

1 follows, "June Smith's preliminary draft Volcanism
2 Report was circulated and there were numerous
3 emails sent back and forth among Nevada experts
4 chatting about Dr. Smith's preliminary draft
5 contention."

6 And as Judge Karlin already would have
7 noted that they have categorically said that none
8 of those emails are going to have anything non-
9 supported and therefore, not documentary material
10 DM2 but they even goes on to say those things are
11 not going to be DM2 because although the emails are
12 final, they are not going to be -- emails
13 themselves are not going to be silent. This goes
14 to our point here.

15 JUDGE MOORE: Mr. Fitzpatrick is about to
16 object that this isn't rebuttal, is that correct?

17 MR. FITZPATRICK: Exactly. It is just
18 another example of something that was not
19 discussed.

20 MR. SHEBELSKIE And then, with respect to
21 Mr. Frishman, I would note however the
22 hypothetical, example given there is that Bob Loux
23 asked Steve Frishman to comment on Mike Thorne's
24 Criticality Report.

1 That is a pretty good insight that Mr.
2 Frishman is not just some casual bystander in the
3 process here. And finally with respect to the
4 presence of emails by me in the LSN, I just want to
5 comment on something on that briefly.

6 JUDGE MOORE: I'm struck by what you are
7 presenting today in contrast to what you said in
8 2004 in your response to your motion to strike. And
9 what has made your response in 2004 invalid? Now,
10 I will quote it to you and I will also point out to
11 you that you in your argument are raising the
12 legislative history in the context that we don't
13 have jurisdiction to impose the remedy that Nevada
14 was seeking. And we found that we did have
15 jurisdiction.

16 But you said and I quote: And this is
17 from page 2 of your Answer back in 2004, "Disputes
18 about document production are routine in any
19 litigation. In this proceeding, such disputes are
20 especially likely in the pre-license application
21 phase before the license application has been
22 completed, before intervention of petitions have
23 been filed, or contentions formulated and ruled on
24 and thus before the ultimate scope of the documents

1 are legitimately needed by participants have been
2 established.

3 Under these circumstances, no road or
4 formalistic process can identify documents as
5 documentary materials, especially documents that
6 might contain non-supporting information in the
7 absence of concrete contentions and judgment calls
8 have to be made. In any multi year production
9 effort involving millions of documents, thousands
10 of purchases and complicated information systems,
11 also human mistakes system failures. Nor will
12 those situations be limited to DOE's production."
13 All right. Misstating because we were using DEN at
14 that point for DOE.

15 "No participant's production will obtain
16 the unreachable goal of perfection and no
17 participant judgment call will be free from good
18 faith disagreements. Such disputes, however do not
19 make a participant certification unlawful or
20 invalid, nor do they provide any basis to strike
21 DOE's certification or delay the other production
22 of documentary material."

23 In 2004, and I think we had a markedly,
24 different situation than we are faced with now but

1 aren't those words ringing true? They do to me and
2 I see that you are taking the completely opposite
3 position today than in defense of your activities
4 in 2004.

5 MR. SHEBELSKIE: Your Honor, I suppose I
6 could say well, what is different is the law ruled
7 against us pretty decisively on everything. But,
8 Your Honor, as we said in the beginning of our
9 brief, we are not trying to keep Nevada out of view
10 for all time.

11 And we are not quivering about a few
12 document materials. They have made available a
13 hundred thousand emails and someone responded to
14 that email and didn't produce it. That is a
15 judgment call and that's the situation that relates
16 to it.

17 This is not a judgment call where some
18 people have made a fewer reports on what is
19 supporting or non-supporting. What we see here is
20 a broad based programmatic or categorical exclusion
21 as to what's based on false premises that they
22 cannot identify Category I information and that
23 Category information II either. A missed
24 application that resulted not in just an

1 inadvertent or mistakes here on the margins, but a
2 fundamental failure to produce the documents that
3 we are entitled to.

4 Finally, let me if there were no other
5 questions, I did want to respond to
6 Mr. Fitzpatrick's comments that were are a few
7 emails sent to me. The answer to that is my
8 involvement from day one as counsel for DOE has
9 involved responsibility for document production on
10 the LSN compliance activities, not substantive work
11 product. I'm not a substantive technical expert.

12 You see LSN collection for the other
13 attorney's name, both the Department of Energy and
14 at Hunton & Williams. And you are going to see I
15 know several tens of thousands of documents of the
16 DOE counsel, hundreds of thousands of documents
17 where they are on the documents of authors and
18 recipients.

19 Contrast that in my closing remarks, the
20 Nevada's production where there is basically no
21 emails from all these technical experts
22 corresponding and copying Nevada's counsel.

23 Have they been doing all this work,
24 developing all this technical work product,

1 developing these positions and contentions without
2 keeping the lawyers in the loop? I don't think
3 that's the case.

4 Thank you, Your Honor.

5 JUDGE MOORE: The Board will take the
6 matter under advisement and I will just
7 editorialize by saying that you have not made our
8 job easy. We stand adjourned.

9 (Whereupon, the foregoing

10 matter was concluded at 1:00

11 p.m.)

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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
company, and that the transcript is a true
and accurate record of the foregoing
proceedings.

/S/
(Lorraine Carter)
Official Reporter
Caption Reporters Inc.