

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of U.S. Department)
of Energy (High Level Waste)
Repository) Pre-License)
Application)
Presiding Officer (PAPO) Board) Docket No. PAPO-00
Case Management Conference) ASLBP No. 04-829-01-PAPO
December 2, 2008

"Draft Official Transcript"

ROCKVILLE, MARYLAND

BEFORE:

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

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

1
2 >>JUDGE MOORE: Please be seated. Good afternoon.
3 I'm Judge Thomas Moore. On my left is Judge Alan Rosenthal.
4 On my right is Judge Alex Karlin. The Pre-license
5 Application Presiding Officer Board has convened this case
6 management conference this afternoon to address the matters
7 the Commission in CLI-08-21 and CLI-08-25 referred to us.
8 Among other things we must deal with the protection of
9 classified information, access to classified information,
10 and the status of Nevada's security clearance applications.
11 In an earlier order we directed the Department of
12 Energy to draft and circulate a proposed case management
13 order, protective order and declaration of nondisclosure.
14 And in an order, I believe, last week we set forth some
15 questions about that order that the parties and participants
16 should be prepared to answer today.
17 So that you're all aware, this conference is being
18 broadcast on the agency's broadband network. It is also
19 being web streamed on the Internet system.
20 In our earlier order we had asked that any parties
21 wishing to participate from Las Vegas notify us by last
22 week. None so notified us, so there will be no potential
23 parties participating from Las Vegas, although that facility
24 is open for the public to view this proceeding through the
25 video link.

1 I would appreciate at this time if the parties to my
2 left would identify themselves for the court reporter and as
3 we go around the well.

4 >>MS. BUPP: My name is Margaret Bupp. I'm
5 counsel for the NRC staff. I'm joined at the table by Bern
6 Stapleton on my immediate right who's the staff security
7 expert and Kien Chang on my far right, who is the staff's
8 Project Manager overseeing all security requests.

9 >>MR. POLONSKY: Alex Polonsky with Morgan Lewis
10 for the U.S. Department of Energy. To my right is Mike
11 Shebelskie with Hunton & Williams, also for the Department.
12 We have brought with us numerous experts who can answer some
13 of the questions posed by the Board both from the DOE and
14 from the Naval Nuclear Propulsion Program. They are sitting
15 behind us.

16 >>MR. MALSCH: I'm Marty Malsch of Egan,
17 Fitzpatrick and Malsch for the State of Nevada.

18 >>MR. WALSH: Tim Walsh with Pillsbury, Winthrop,
19 Shaw, Pittman representing the Nuclear Energy Institute.

20 >>JUDGE MOORE: Let's get right started with the
21 matters that are of concern to us. Mr. Malsch, would you
22 turn to the first question of our November 26th order and
23 please give us the current status of your security clearance
24 application that you filed with the NRC. We have the
25 materials that you all filed, but there were some

1 outstanding steps. What's the status of those and when will
2 they be completed?

3 >>MR. MALSCH: All of the steps for me have been
4 completed. The last step was sending in my nondisclosure
5 agreement. That was done yesterday. So, I think that's the
6 last step.

7 >>JUDGE MOORE: Ms. Bupp, is that your
8 understanding so that Mr. Malsch will now have a security
9 clearance?

10 >>MS. BUPP: Yes, as soon as we receive it.

11 >>JUDGE MOORE: How long will it actually take for
12 the staff to issue him the security clearance?

13 >>MS. BUPP: It's not a badge that's issued, but
14 once we've received it and filed it, he will have a security
15 clearance.

16 >>JUDGE MOORE: All right. Mr. Malsch, you filed
17 a number of other applications, one of which was for
18 Dr. Bell. What's the current status of the security
19 clearance application for Mr. Bell, Dr. Bell?

20 >>MR. MALSCH: I emailed Dr. Bell a few days ago
21 and asked him for information about his status and was told
22 that he believes he submitted all that needs to be
23 submitted.

24 >>MS. BUPP: With regard to Dr. Bell's application
25 it appears that Dr. Bell had a previous NRC clearance.

1 We're doing the final check on that. As of yesterday we
2 expect to have those checks completed.

3 >>JUDGE MOORE: Then he has to file the same final
4 --?

5 >>MS. BUPP: The same Form 312.

6 >>JUDGE MOORE: And has that been placed in his
7 possession and he has been made aware of that?

8 >>MS. BUPP: The process is that he will be sent
9 that form after we've confirmed that he does in fact have an
10 NRC security clearance.

11 >>JUDGE MOORE: We had the distinct impression
12 from reading the materials that you filed that there seem to
13 be some hesitancy with regard to the security clearances to
14 pick up the telephone and talk to one another. Please,
15 Ms. Bupp and Mr. Malsch make sure that whatever needs to be
16 done so that Dr. Bell has it and all pieces of paper flow
17 properly. If you'd take care of that immediately we'd
18 appreciate it.

19 >>MS. BUPP: We will, Your Honor.

20 >>JUDGE KARLIN: Can I just ask -- is it correct
21 to say that at this moment no one from Nevada has a security
22 clearance in hand as yet?

23 >>MS. BUPP: No, but would expect that Mr. Malsch
24 assuming the mail takes the regular amount of time should
25 have it very, very soon -- within a couple days.

1 >>JUDGE KARLIN: Okay. Thank you.

2 >>JUDGE MOORE: Mr. Malsch, could you briefly fill
3 us in on what areas of expertise and technical competence
4 Dr. Bell has?

5 >>MR. MALSCH: Sure, Your Honor. We chose
6 Dr. Bell with knowledge of what -- at least general
7 knowledge of what the applications seem to contain by way of
8 classified information. Dr. Bell has a Ph.D. in physical
9 chemistry. For years he worked for Oak Ridge National
10 Laboratories. For most of that time he was head of the
11 chemical development section in the chemical technology
12 division. He is an expert on reprocessing, separations
13 technology, nuclear waste, nuclear waste forms and the like.
14 This was exactly his area of expertise.

15 >>JUDGE ROSENTHAL: Has his credentials been made
16 available to the staff of DOE for their appraisal?

17 >>MR. MALSCH: Not yet, although that would be the
18 first the first step in any request for access. It has to
19 show that he has the expertise to review the documents in
20 question. We would do that promptly upon his obtained
21 required clearance and our identifying what documents we
22 need him to review.

23 >>JUDGE ROSENTHAL: At this point there's no way
24 of knowing the reactions of either the DOE or the staff?

25 >>MR. MALSCH: No, although if I thought that it

1 would expedite things if I gave them his CV now or within a
2 few days, I'd be more than willing to do that.

3 >>JUDGE MOORE: We'll probably be touching upon
4 that as we go along today. As you know, in the matters that
5 you've put before us, the need to know determination will
6 surface.

7 So that we're clear at this point, Mr. Malsch, you had
8 previously applied for security clearances for several
9 additional individuals, but those have all for various and
10 sundry reasons not gone forward. Is that accurate?

11 >>MR. MALSCH: That's correct, Judge Moore. We
12 would only revive Dr. Thorn's clearance or apply for some
13 additional clearances if DOE actually amended the license
14 application and added some whole new category or type of
15 classified information. It since now stands we're with the
16 two applications that have been filed now and that's all.

17 >>JUDGE MOORE: Staff, are you aware of anyone
18 else other than the State of Nevada that has applied for
19 security clearances in relation to the Yucca Mountain
20 proceeding?

21 >>MS. BUPP: Yes. Your Honor, we received several
22 applications for representatives of Nye County and within
23 the last week, representatives of Clark County have
24 indicated their interest in obtaining security clearance.

25 >>JUDGE MOORE: And that process, if I remember

1 all the papers you filed correctly, is assuming they get all
2 their ducks in a row and all the papers filed will take
3 about a year?

4 >>MS. BUPP: Yes. One of the representatives of
5 Nye County had a previous DOE clearance. We've confirmed
6 that he had that clearance and we're still awaiting the Form
7 312 that Mr. Malsch just submitted yesterday. As soon as he
8 does that, he will be cleared and completed.

9 The other individuals from Nye County -- they have not
10 had all their information sent to OPM. We're either waiting
11 for results of their fingerprint checks to come back to us,
12 which means that they'll go to OPM relatively soon. And in
13 one individual's case in addition to his fingerprint
14 results, he has not yet paid for his security clearance.
15 Once both of those steps are completed we can send the
16 clearance to OPM.

17 The representatives of Clark County are at the very
18 start of the process and so that will take about a year.

19 >>JUDGE KARLIN: Can I follow up on that? With
20 regard to Clark County have they actually submitted any
21 application for security clearance?

22 >>MS. BUPP: They've inquired and the project
23 manager --

24 >>JUDGE KARLIN: They've called?

25 >>MS. BUPP: They've called and e-mailed and the

1 project manager has responded and asked for information
2 necessary for them to be entered into the filing process
3 that will allow them to fill out the necessary forms online.

4 >>JUDGE KARLIN: So, they've inquired about it and
5 they have yet to submit any of the information needed to
6 initiate the process?

7 >>MS. BUPP: Yes.

8 >>JUDGE KARLIN: All right, so that's Clark
9 County. How many individuals are we talking about with
10 regard to Clark County?

11 >>MS. BUPP: Because they haven't provided any of
12 the information yet, I can't give a firm number. But in
13 their e-mail it seems like they have received a number of
14 individuals, probably -- let me look at the e-mail.

15 >>JUDGE KARLIN: Well, if they cc'd --

16 >>MS. BUPP: It was probably -- there are people
17 that I recognize as either counsel for Clark County or other
18 individuals who've been involved in the process. So, maybe
19 five or six people at the most.

20 >>JUDGE KARLIN: We just don't know at this point?

21 >>MS. BUPP: We don't know because they haven't
22 submitted --

23 >>JUDGE KARLIN: And with regard to Nye County how
24 many individuals have submitted?

25 >>MS. BUPP: Five individuals have submitted. The

1 one has had his clearance granted and we're waiting for him
2 to fill out the last Form 312?

3 >>JUDGE MOORE: Did you say five?

4 >>MS. BUPP: Five individuals, yes.

5 >>JUDGE KARLIN: And one has had his clearance
6 granted?

7 >>MS. BUPP: He had a previous clearance.

8 >>JUDGE KARLIN: Have you confirmed that?

9 >>MS. BUPP: No, we've confirmed it. We're
10 waiting for the Form 312, the non-disclosure part, to be
11 signed.

12 >>JUDGE KARLIN: Okay, so one of them has -- just
13 simply need to fill out the Form 312?

14 >>MS. BUPP: And then he'll be ready to go.

15 >>JUDGE KARLIN: And the other four?

16 >>MS. BUPP: Three of them are on the cusp of
17 being sent to OPM assuming that nothing comes up with regard
18 to their fingerprints. That would cause us to halt the
19 process from there. The third one we're also waiting on his
20 fingerprint results. He also hasn't paid yet and we won't
21 send it.

22 >>JUDGE KARLIN: So, are any of the people we're
23 talking about likely to get their security clearance in the
24 next 14 days?

25 >>MS. BUPP: Only the one individual who only

1 needs to return the one form.

2 >>JUDGE KARLIN: Okay. Thank you.

3 >>JUDGE MOORE: Let's turn to some of the
4 provisions of the proposed case.

5 >>JUDGE KARLIN: I think we skipped over Number 4,
6 Additional Hurdles. Did we ask that? I'm not sure.

7 I would like to perhaps -- maybe I don't understand,
8 but on Number 4, Question Number 4, if the security
9 clearances are granted for Mr. Malsch and Dr. Bell are there
10 any other actions or approval that are necessary before they
11 can actually start looking at or obtaining copies of the
12 documents, such as getting a facility clearance, et cetera,
13 et cetera? Ms. Bupp?

14 >>MS. BUPP: At this point in time its the staff's
15 understanding that the State of Nevada is not requesting to
16 possess the classified information but only to view it;
17 therefore, there aren't any additional steps other than
18 setting up an appropriate time to actually view the
19 documents. If they were to try to possess the documents
20 there would then be a facility process.

21 >>JUDGE MOORE: Now, in the situation where
22 parties come to either you or to DOE to view the material
23 have you taken -- first, has the staff taken arrangements so
24 that notes and things that they take can be locked up there
25 and only they have access to those materials?

1 >>MS. BUPP: As far as I know we do not have a
2 separate space set up for them.

3 >>JUDGE MOORE: Isn't that standard protocol?

4 >>MS. BUPP: I honestly don't know, Your Honor.

5 >>JUDGE MOORE: DOE?

6 >>MR. POLONSKY: Your Honor, we do have a location
7 where an intervenor or petitioner could come to have a
8 separate space, where they could store their documents, not
9 necessarily in a separate safe, but could seal their
10 envelopes in a way that only they would be viewing them.
11 And for purposes of preparing --

12 >>JUDGE MOORE: They will be taking notes
13 presumably. They will presumably have attorney/client
14 privilege information, work product information among others
15 that has to be segregated, but because it contains
16 classified information has to remain. Are you both prepared
17 to take those steps immediately so that they don't become a
18 hurdle in getting access to security?

19 >>MS. BUPP: We can start to take steps to do
20 that. I can't promise what those steps will be. It may be
21 storing it elsewhere at the NRC where it wouldn't be usual
22 for the staff working on Yucca Mountain or for the General
23 Counsel's Office to be going down to the safe. I can't
24 promise that we'll buy a separate safe to sit next to the
25 one --

1 >>JUDGE MOORE: How much of this information is in
2 the staff's hands as opposed to it being in NRC's hands? We
3 here, the PAPO Board and ASLBP, have received one volume of
4 classified material that was filed as part of the
5 application.

6 >>MS. BUPP: That's what's in the staff's hands
7 right now.

8 >>JUDGE MOORE: To our knowledge that's all the
9 classified information that exists at this point in time
10 that is at issue?

11 >>MR. POLONSKY: That's our understanding, Your
12 Honor, for DOE that in order to prepare contentions that a
13 petitioner would only need access at this stage in the
14 proceeding for a technical support document, which is that
15 portion of the LA that is classified and those supporting
16 references that were filed along with it. And those are in
17 the possession of the NRC.

18 >>JUDGE MOORE: Since Nye and Clark County are
19 still very much in the wings on this, Mr. Malsch, is it your
20 intention to use a DOE facility or an NRC facility once
21 assuming you have access to this material?

22 >>MR. MALSCH: Yes, that was our intention.

23 >>JUDGE MOORE: That was a compound question. Yes
24 to DOE or yes to NRC?

25 >>MR. MALSCH: Well, very early on I had some

1 discussions with DOE people about using their facility, but
2 frankly from our standpoint, whichever is more convenient
3 would be fine with us.

4 >>JUDGE KARLIN: But it is correct that you're not
5 intending to take possession of the classified information
6 and store them on your own premises or facility?

7 >>MR. MALSCH: That's correct. As I said, we are
8 going to be moving offices. We do have a very large safe
9 that I'm quite confident would pass muster in the facility
10 clearance. At this point we just haven't seen a need to go
11 through that process.

12 >>JUDGE KARLIN: Do you agree then -- we're trying
13 to get at -- I think this question is what are the
14 additional hurdles, if any, to Nevada your team taking a
15 look at the classified information and it sounds like the
16 answer is there aren't any additional hurdles that you're
17 aware of. Would you agree with that?

18 >>MR. MALSCH: Well, I hope not. We'll have to go
19 through the need to know review. I believe it would not be
20 a problem. Then we'll need to arrange for access with
21 either NRC staff or DOE which I don't think will be a
22 problem. I'm confident we can also work out arrangements
23 segregating our materials from other materials.

24 >>JUDGE KARLIN: Well, you'll have to go through
25 the need to know and we'll get into this a bit later, but

1 that's part of the question. The protective order seems to
2 say that in order to show a need to know you also need to
3 show the legal or technical competence and expertise to
4 understand what you're asking for. And at this point does
5 DOE have any doubt that there is a need to know and that
6 they would meet the technical competency requirements?
7 Mr. Polonsky?

8 >>MR. POLONSKY: Judge Karlin, as for Mr. Malsch,
9 DOE has taken the position that it will not challenge his
10 need to know. For Mr. Bell, it's a little premature, but
11 assuming he has a particular area of expertise DOE would
12 likely find that he has a need to know in that area of
13 particular expertise.

14 >>JUDGE ROSENTHAL: You're reserving judgment on
15 that, I take it, until you get the particulars on his areas
16 of expertise?

17 >>MR. POLONSKY: Yes, and I thought we had all
18 built into the CMO a process whereby there were a number of
19 steps and a number of information prerequisites that would
20 be provided and I think they're spelled out.

21 I would also like to address something Judge Moore
22 seems to be concerned about this segregation of work product
23 notes. We had worked out a provision in the protective
24 order itself, not the CMO, in Paragraph 9 where we outlined
25 how an intervenor can come in, take notes and assuming they

1 are classified -- well, assuming they're not classified, a
2 derivative classifier from, in this case, the Department of
3 Energy to a DOE facility would look at those notes and
4 determine whether they are classified.

5 If they were not classified, they could be released to
6 the petitioner. If they were classified, they would be
7 retained, but in no way would that review for classified
8 information waive any privilege or in any way jeopardize the
9 privileges or work product of the Commission.

10 >>JUDGE MOORE: We'll be touching on that as we go
11 along. So, we'll move on now. Let's move on to some of the
12 provisions in the proposed joint case management order.

13 Let's start with DOE.

14 The proposed case management order states and I quote:
15 "Any party who wishes to apply to the NRC for security
16 clearance to access classified information in this
17 proceeding must submit it's application within 14 days of
18 the issuance of this order."

19 Assume the Board issues the proposed case management
20 order this week on Wednesday, December 3rd. I'm sorry; I
21 guess that would be tomorrow. Does the provision exclude
22 everyone except the State of Nevada, affected units of local
23 government and affected Indian tribes from being eligible to
24 apply for security? DOE?

25 >>MR. POLONSKY: I'd like to answer your question

1 by saying we all recognize that there is a problem with
2 having a 14 day time line that is figured to the entry of
3 this order. Originally when we were negotiating this we had
4 thrown around hard dates like November 22nd.

5 We thought a hard date wouldn't work, so we proposed
6 and mutually agreed to 14 days after some date certain, some
7 event, but clearly upon reflection 14 days from the issuance
8 of this order. If it was issued on December 3rd it may be
9 too soon. So, we're certainly willing to move that out to
10 whether it's 14 days or 30 days from a future event, whether
11 its filing --

12 >>JUDGE ROSENTHAL: Who are the parties for such
13 time as contentions are filed and the licensing boards act
14 on the particular hearing request?

15 I would think that the way this is drafted it excludes
16 the populous because we won't know beyond a few -- I'll call
17 them statutory parties -- who will end up as parties in this
18 proceeding.

19 Today, we have essentially potential parties. We know
20 a couple of entities that will be parties, but beyond that
21 it remains to be seen.

22 >>MR. POLONSKY: Perhaps there was some confusion
23 in not using the term "potential party", but defining the
24 term "party". We did so in the case management order, so
25 the term "party" as defined in the CMO was not intended to

1 be used broadly outside of the context of the CMO.

2 In the definitions under Paragraph L we have five
3 separate groups that could meet the definition of the party.
4 The Board is correct that if we stick to 14 days from the
5 issuance of the protective order and the CMO and that CMO is
6 issued on the third, then it effectively excludes the fifth
7 definition of "people", which is a person who's admitted to
8 the proceeding in accordance with 2309.

9 >>JUDGE KARLIN: Doesn't it also exclude -- it
10 seems to me the definition of "party" has five sub parts.
11 Right? We're looking at that. The last two, four and five,
12 are by definition excluded from having any access to
13 classified information by this clause. That is to say,
14 neither one of four or five could possibly qualify
15 definitionally.

16 >>MR. POLONSKY: Definitionally, if it were
17 submitted -- if this Board entered this on December 3rd,
18 yes.

19 >>JUDGE KARLIN: Did you expect us to wait several
20 months to issue the order?

21 >>MR. POLONSKY: No, I think it was an oversight
22 on all of our parts.

23 >>JUDGE KARLIN: Well, let's say we wait a month
24 and issue it on January 1st. Now, isn't Category 5 still
25 excluded?

1 >>MR. POLONSKY: Yes, it is.

2 >>JUDGE KARLIN: Is that intentional?

3 >>MR. POLONSKY: It was not intentional to exclude
4 them entirely. The thought among the parties or at least
5 among the counsel who conferred was we wanted some cut off
6 date. We didn't want this to go on forever. We wanted some
7 cut off date by which people would be applying for
8 appearances.

9 We also recognized at least through Subpart I that
10 there is a justification for a Board to use it's discretion
11 to not allow a general member of the public to access
12 classified information until they've been admitted as a
13 party under 2309.

14 >>JUDGE KARLIN: Well, could we ask Ms. Bupp of
15 the staff. Was staff aware -- intent to exclude categories
16 four and five by this provision that you wanted us to sign?

17 >>MS. BUPP: The staff did not intend to exclude
18 categories four and five from applying for security
19 clearances by this provision, but I think Mr. Polonsky is
20 correct that Subpart I does define "party" as including a
21 person admitted as a party under 2309 or an interested state
22 admitted under 2.315(c).

23 And so, Subpart I, which defines in general access to
24 classified information in an adjudicatory proceeding does
25 limit access to people who have been admitted as a party.

1 We didn't intend to limit people from applying for security.

2 >>JUDGE MOORE: How should it be fixed, DOE?

3 >>MR. POLONSKY: It could be fixed by having if
4 tied to basic petitions to intervene are filed and in
5 somehow modifying the definition of a person.

6 >>JUDGE MOORE: All right. As to A, we've just
7 heard -- we gave two reasons. I described A to the first
8 one and B to the second. We've heard the staff say that I
9 believe Nye County may have five people that are seeking a
10 security clearance and Clark County has more than one.

11 They're in the process -- and if I understood it
12 properly, only one of which -- one of whom is close because
13 they had a prior security clearance. That means if they
14 pass this prologue that these people won't have security
15 clearance for a year.

16 And so, one of these parties -- one of these potential
17 parties assuming that point already would become a party,
18 that would be the earliest that they could have access to
19 challenge anything having to do with that?

20 >>MR. POLONSKY: Your Honor, our understanding --
21 and maybe it's incorrect -- but our understanding is that
22 only Nevada was interested in getting access to classified
23 information for purposes of preparing contentions and that
24 Clark County and Nye County were interested in seeing the
25 information, but were not expecting to prepare contentions

1 on that information. So, we were bifurcating our analysis
2 of the fact that they were asking at the same time.

3 >>JUDGE MOORE: But there can be new and amended
4 contentions after a period that has identified in the notice
5 of hearing filing a contention?

6 >>MR. POLONSKY: Yes.

7 >>JUDGE MOORE: Including Nye County and Clark
8 County from exercising that regulatory prerogative By This
9 definition and your proposed correction or fix?

10 >>MR. POLONSKY: Well, the provision we're talking
11 about -- and maybe I'm getting confused. I thought we were
12 talking about 14 days to request a security clearance
13 application. I think that's going to be done. If it
14 appears that they cannot get into EQIP and file their
15 application within 14 days, maybe the provision needs to be
16 made 30 days.

17 But for purposes of this provision that we've been
18 discussing I have to admit I am a little confused as to what
19 the Board's concern is.

20 >>JUDGE KARLIN: Let's go back. I'd like to
21 address this question to Ms. Bupp actually. This specific
22 question we ask, B1A exclusion. Does this provision exclude
23 everyone except the State of Nevada, affected units of local
24 government and the affected Indian tribes from being able --
25 eligible to apply for security clearances?

1 >>MS. BUPP: I think that you're right. It may on
2 more careful reading, but that wasn't the staff's intent and
3 I don't think that DOE or the State of Nevada's intent.

4 >>JUDGE KARLIN: All right. Nevada -- may I ask
5 Nevada? Is that the way you read it?

6 >>MR. MALSCH: I agree that there's a glitch with
7 the language and how "party" is defined in L4 and 5, that I
8 frankly have not focused on. It's not our intention.

9 >>JUDGE KARLIN: I wasn't sure. We were asked to
10 sign this thing. We look at it and we try to see what it's
11 impact is and how it applies. And if you read this
12 definition straight up it basically excludes everyone except
13 AULG's and the State of Nevada from applying for a security
14 clearance. I think we need to correct that. That would
15 need to be fixed. So, everyone's agreeing that that needs
16 to be fixed. Okay.

17 Well, I think we've vetted a little bit how you propose
18 to fix it. What do you propose to extend -- Mr. Malsch,
19 maybe we can ask him. How would you fix this? Would you
20 change the definition of party in the case management order;
21 extend the amount of time; wait until contentions are filed;
22 wait until contentions are admitted?

23 >>MR. MALSCH: Well, I think we either have to
24 amend the definitions so that the qualifications don't
25 appear or if we want them in there. I think the affect is

1 you're going to have to set a date that's a reasonable
2 period of time after parties are admitted because under
3 L5 you're going to insist that the party be admitted to the
4 proceeding then it follows that you can't set a deadline,
5 for example, requesting documents until after they've been
6 admitted.

7 >>JUDGE KARLIN: Mr. Polonsky, there's a nuance
8 between sub paragraph 4 and 5 that seems to be intentional,
9 like someone was thinking about it. Under 4, any
10 governmental entity which simply files a petition to
11 intervene is entitled to file as a party, whereas with
12 anybody else they not only have a petition to intervene, but
13 they actually have get a contention admitted.

14 >>MR. POLONSKY: The rationale was that a -- first
15 of all, Paragraph 4 we think covers the State of California
16 where none of 1, 2 or 3 covers the State of California. So,
17 we had to have a provision for another state.

18 We also recognize that this is classified information
19 and that the states that would be participating and the
20 counties that would be participating are governmental
21 entities that are representing their constituents.

22 And so, the fact that the State of California and the
23 State of Nevada is already actively participating in the
24 proceeding should be used by the Board in it's discretion to
25 determine whether someone else ought to get access or at

1 least the timing of that person's access to the extent they
2 are already represented.

3 >>JUDGE KARLIN: So, there's an interested state
4 provision in our Regs, as you know. Is this intended to
5 cover interested states or does the state also -- or the
6 entity also have to file a contention?

7 >>MR. POLONSKY: I think 2315(c) is the interested
8 state provision that would be covered under Part 5.

9 >>JUDGE KARLIN: Would it be preferable to have
10 sub paragraph 4 in this definition deal with interested
11 states and interested local governments?

12 >>MR. POLONSKY: That would be reasonable.

13 >>JUDGE KARLIN: That's one way to deal with it.

14 >>MR. POLONSKY: That's one way. The other way
15 is, frankly, just skip all the way to the end of the Board's
16 question which is to limit the scope of this particular
17 effective order and case management order, not just in
18 Nevada, but for those parties who have already entered a
19 notice of appearance and who've at least been on notice of
20 these negotiations.

21 So, Nye county and Clark County and Lincoln County and
22 the other counties, AULG's, who have all essentially
23 participated, whether saying they have no comments or not
24 commenting at all. We could limit this CMO and PO to them
25 and to the extent hypothetically we do get an individual or

1 an environmental who has not come forward yet, who was not
2 participated in the LSN and somehow files a petition to
3 intervene and is admitted as a party, then some time in 2009
4 we could revisit whether those people could apply for
5 security clearances and get access.

6 >>JUDGE KARLIN: Right, because I think several of
7 the provisions here -- I'm not sure. Do you think that the
8 AULGs and the rest of the universe to the extent they're
9 paying any attention to this proceeding realize that this
10 case management order would by definition exclude them from
11 ever seeking a security clearance or obtaining classified
12 information? That doesn't appear to be your intent, was it,
13 Ms. Bupp.

14 >>MS. BUPP: No, it wasn't. And the fact that the
15 three of us didn't realize it until the Board pointed it out
16 would also argue that even if they had been paying close
17 attention, they might not realize it.

18 However, I think the staff's main interest is
19 encouraging people to apply for security clearances as soon
20 as possible. And so, any reasonable time period after
21 another reasonable event would be acceptable to the staff.

22 I would suggest that we actually tie it to the filing
23 of petitions to intervene. By the time someone is serious
24 enough about participating to file a petition to intervene
25 they also should have a good idea as to whether or not they

1 would like security clearance.

2 We would have to either amend the definition of party
3 or add a provision to this specific provision related to the
4 14 day time frame stating that any party or potential party
5 who has filed a petition to intervene should file for
6 security clearance within 14, 30 days after filing that
7 petition to intervene.

8 >>JUDGE MOORE: In that regard would it be
9 practical for the PAPO Board to issue an order and pick a
10 date some time in the future and tell people that
11 essentially a drop dead date -- do it by this date or
12 whatever?

13 >>MS. BUPP: I would agree with that.

14 >>JUDGE MOORE: January 1 or January 15th,
15 February. We just pick an arbitrary date, issue an order,
16 it will be served. We can even publish it in the Federal
17 Register and that's it.

18 The problem is what happens in the future if you take
19 that approach when DOE amends it's application and there's
20 more classified information that comes in to play as
21 people -- potential parties at that point become parties at
22 that point perceive affects them and they wish to challenge?
23 How do you deal with that?

24 >>MS. BUPP: I think as a first step the Board
25 issuing an order and giving a date is an excellent idea. As

1 the second step, you could work into the Board that -- work
2 into the order a provision by which they would have to file
3 a motion seeking relief of some sort to file asking for
4 permission to request a security clearance.

5 Unless DOE makes massive changes to not only the
6 information in a license application, but the scope of the
7 information in the license application, somebody should know
8 whether or not they have some interest in viewing classified
9 information.

10 >>JUDGE ROSENTHAL: But you would leave it open to
11 someone to come to the Board in the event that there were
12 significant changes that you believe will not occur? Come
13 to the Board with a motion seeking appropriate relief in the
14 circumstance. Isn't the board, I take it, would be
15 empowered to grant such relief in the totality of
16 circumstances that thought it was warranted?

17 >>MS. BUPP: As with any Board order if fairness
18 in future events intervenes they can amend their own order.

19 >>JUDGE KARLIN: I think you probably already
20 answered this, but perhaps Ms. Bupp you can help us with
21 this question B1B, applications within 14 days. The
22 provision that we're talking about says if you want to get a
23 security clearance you have to be a party, which we've
24 already addressed and are going to fix that and you have to
25 submit your application for security clearance within 14

1 days.

2 Now, we know -- I think you've informed us that Nye
3 County has submitted some applications for security
4 clearance and Clark County has indicated that it's
5 interested in doing so, maybe doing so. Are there any other
6 -- no other applications have been filed at this point for
7 security clearance; is that correct?

8 >>MS. BUPP: No, Your Honor. There is correct,
9 Your Honor. There have been none.

10 >>JUDGE KARLIN: Okay. Do you have any other
11 inkling or head's up that any others are coming in other
12 than the Clark County ones?

13 >>MS. BUPP: No parties other than Clark County
14 have inquired about security clearance.

15 >>JUDGE KARLIN: Okay, so that answers that
16 question B1B. I think we've answered most of these
17 questions. Unless it's D, the post contention order -- we
18 were grappling with the 14 days and the party status and
19 saying if we issued the order after contentions are filed,
20 after December 22nd -- let's assume that's when contentions
21 need to be filed -- would it make a difference? I guess
22 that's inevitable that this is going to be finished sometime
23 after that point.

24 Do you have any thoughts on whether there's a need to
25 issue this order before contentions are filed? Perhaps

1 Mr. Polonsky could address that or Mr. Shebelskie.

2 >>MR. POLONSKY: The sooner the better, Your
3 Honor. We don't see any need to delay entering it and still
4 have provisions in it that say you now have 14 days or you
5 now have 30 days or 45 days to file for security clearance.

6 But clearly we would like to get this information to
7 those who have security clearances so that if they want to
8 begin preparing contentions that they can. We're no longer
9 going to be expecting them to submit those proposed
10 contentions on the same schedule.

11 >>JUDGE KARLIN: DOE to its credit submitted this
12 request on May 30th to get this protective order for
13 classified information to prevent, I think, this problem of
14 having contentions being filed on December 22nd or whatever
15 and then having another wave of contentions having to come
16 in because of some delay. Unfortunately, because of the way
17 it evolved it only got to us a little bit later in the game.

18 Do you recognize and acknowledge, Mr. Polonsky, that
19 there will need to be a second wave or there may be a second
20 wave of contentions dealing with classified information?
21 Will you be asserting on December 22nd if you didn't get
22 your contentions on classified information in on that date
23 then you're dead in the water?

24 >>MR. POLONSKY: We will not likely be taking that
25 position, Your Honor. We're reasonable. We obviously tried

1 to get this entered earlier so that there wouldn't be
2 bifurcated contentions on classified and non-classified.
3 That wasn't the intent. But clearly, events have passed and
4 that's water under the bridge. We have to move forward.
5 But still we would urge the PAPO board to issue a CMO sooner
6 rather than later.

7 >>JUDGE KARLIN: All right. We just need to get
8 right. And there's some problems with this one that does
9 need to be corrected.

10 >>JUDGE MOORE: Let's then move on to questions
11 about redaction. As you all know, the Commission in the
12 Notice of Hearing suggested that perhaps redaction would
13 resolve some of these problems. I'm assuming that is why
14 provisions of redaction are in the proposed order you have
15 drafted and put in front of us.

16 Under the proposed case management access to redacted
17 documents is limited to "a party whose council or
18 representative has an application for security clearance
19 pending before the NRC and it wishes to formulate
20 contentions based on the classified information. Such a
21 party must within 14 days of the issuance of this order
22 identify in writing to the PSO the specific documents that
23 it wants to review in redacted form."

24 Assume that we issue case management order on
25 December 3rd. The questions then become: Is Nevada the only

1 entity party that has requested a security clearance able to
2 request a redacted document? Mr. Polonsky?

3 >>MR. POLONSKY: We frankly have viewed
4 Mr. Malsch's application as having been granted. Under
5 those provisions he would have access to the classified
6 information and have no need to the redacted documents.

7 Frankly, the reason why this provision was added was
8 because the Commission had in front of it a concern by
9 Nevada and was trying to address that concern while Nevada's
10 security clearance applications were pending. That was the
11 language that the Commission used.

12 So, once a party has the clearances already granted
13 there's no need to look at redacted documents was our view.

14 >>JUDGE MOORE: We have the potential now of Nye
15 County and Clark County being in a situation where they may
16 be in process. Realistically, do any of you think that
17 redaction is the answer to solve any of these problems?

18 >>MR. POLONSKY: No, Your Honor, for a number of
19 reasons.

20 >>JUDGE MOORE: Please state them.

21 >>MR. POLONSKY: From a substantive perspective --

22 >>JUDGE MOORE: And I made the mistake of pulling
23 out the classified information and looking at it. And so, I
24 am as familiar as a lawyer dealing with highly technical
25 matter, so we have some notion of what you're dealing with.

1 >>MR. POLONSKY: From a very high level initially
2 and then I'll go into some detail, the technical support
3 document which is the classified portion of the license
4 application itself was segregated specifically so that we
5 could have -- make a material conclusion based on classified
6 facts. Once you remove those classified facts which you
7 would have to do in a redaction you are left merely with a
8 potentially unclassified conclusion.

9 And anyone trying to prepare contentions based on that
10 redacted document wouldn't necessarily need to invoke --
11 first of all, they'd get it wrong. They would think that
12 there would be a genuine dispute, frankly, when there
13 wouldn't be because the information would prove there wasn't
14 a genuine dispute was redacted.

15 But in the answer, we would have to introduce
16 classified information in order to refute the contention.
17 So, that's the high level substantive problem with
18 redaction. It just doesn't give the information or it
19 doesn't give it in a complete and accurate way, which is the
20 purpose of preparing the contentions in the first place.

21 >>JUDGE MOORE: Did you perchance deal with one of
22 your classifiers who would be involved in doing the
23 redaction? And just to give you an offhand example, many
24 years ago when I was in the Department of Justice we used
25 get information from the FBI that had been redacted and it

1 would be a black page with one word on it.

2 >>JUDGE ROSENTHAL: Usually "the" or "an".

3 >>MR. POLONSKY: We think redacting would be
4 highly disruptive to the Naval Nuclear Propulsion Program.

5 >>JUDGE MOORE: And so, other than articles of
6 "the" and "and" and "a" because it is chock full of
7 formulas, graphs, charts, pictures, tables as well as text,
8 that all of that would be gone. And so what you're stating
9 is that it's highly unlikely that it would be of any use to
10 anyone?

11 >>MR. POLONSKY: A material portion of the
12 technical support document sections would have to be blacked
13 out.

14 >>JUDGE ROSENTHAL: But as you noted there's no
15 problem with respect to Nevada -- or shouldn't be a problem
16 with respect to Nevada. But assuming that this order were
17 to apply also at least to these counties redaction isn't the
18 answer. What is?

19 >>MR. POLONSKY: Well, Nye County appears to have
20 an individual who is in the same position as Marty,
21 essentially just has to complete -- or is one step behind
22 Marty.

23 >>JUDGE ROSENTHAL: To the extent that we're
24 dealing with experts who assume would not be able to obtain
25 the clearance for another six months or a year, how do we

1 deal with them if redaction is not a viable option?

2 >>MR. POLONSKY: They would have to wait.

3 >>JUDGE ROSENTHAL: With what consequence?

4 >>MR. POLONSKY: DOE's position is that it's been
5 parties -- potential parties have been on notice for years
6 that classified information would be introduced into this
7 proceeding and would be part of the license application.
8 And some potential parties have in fact years ago filed for
9 clearances. Why other potential parties are just waiting
10 until recently, we don't know.

11 But the informal conversations that we have had
12 suggested they are not interested in preparing contentions
13 on that information. They just, as part of their AULG
14 responsibilities, would like to be in the know, and would
15 like to view that information.

16 I wish they were here to speak for themselves, but
17 there's clearly no rush to get those individuals a redacted
18 form both from a practical perspective. We don't think they
19 could file meaningful contentions on that information.

20 And the fact that it would just be highly disruptive
21 for the Naval Nuclear Propulsion Program to redact all that
22 information to a high detriment to them and low benefit to
23 potential receiving it.

24 >>JUDGE ROSENTHAL: So, if I understand you
25 correctly, you have two prongs. The answer to the first one

1 is sort of latches that should have been seeking clearance
2 some time ago. And the second one is probably is a
3 practical matter and it doesn't make any difference because
4 they're not seeking this information -- would not be seeking
5 this information in order to facilitate the filing of
6 contentions and therefore the fact that they would not get
7 this access any time soon would not disadvantage them. Is
8 that basically what you're telling us?

9 >>MR. POLONSKY: Everything you said is correct,
10 but there's a third prong. That third prong is that we
11 don't think that we could redact the information in a
12 schedule and that would likely have the redacted -- the full
13 suite of redacted documents before they got their clearance.
14 We don't have the Naval Nuclear Propulsion Program have
15 dedicated redactors.

16 >>JUDGE KARLIN: Wait a second. I thought the
17 documents we were talking about is just one section of the
18 application that's not very long? How long would it take to
19 redact the material we're talking about?

20 >>MR. POLONSKY: The suite of documents is larger
21 than a small set. What has been docketed is the technical
22 support document which is that classified portion of the LA
23 and supporting references. There are 12 supporting
24 references. My understanding is all of those documents
25 together are approximately 2,200 pages.

1 >>JUDGE KARLIN: All right. May I go back to the
2 question we have here? I'd like to see if we can get the
3 answer Question 2A. Is Nevada the only entity eligible to
4 request a redacted document? I hear your answer
5 Mr. Polonsky is no, Nevada is not eligible to request a
6 redacted document because they've got their security
7 clearance.

8 >>MR. POLONSKY: That's right. They can look at
9 the classified information --

10 >>JUDGE KARLIN: So, by getting a security
11 clearance they're immediately disqualified from ever
12 requesting a redacted document?

13 >>MR. POLONSKY: Not ever. There is a provision.

14 >>JUDGE KARLIN: I understand there is a provision
15 for more clarity, but this general provision about
16 requesting it once you've got your security clearance you
17 can't request a redacted document. That's a precursor
18 principle.

19 >>MR. POLONSKY: It comes directly from CLI08.

20 >>JUDGE KARLIN: Do you agree with that,
21 Mr. Malsch?

22 >>MR. MALSCHE: We never imagined that we could
23 decide whether or not to file a contention based upon giving
24 a redacted document. We always assumed we had to review
25 this whole document.

1 >>JUDGE KARLIN: Let me ask -- as I read it then
2 from the facts that Ms. Bupp has presented to us, Nye County
3 is the only eligible entity to request a redacted document.
4 Is this correct?

5 >>MS. BUPP: At the moment, yes.

6 >>JUDGE KARLIN: It's a party and its applied for
7 a security clearance, but it hasn't gotten a security
8 clearance. As soon as it gets the security clearance it's
9 disqualified from requesting a redacted document because it
10 can request the full document. Is that right?

11 >>MS. BUPP: I think so, yes, with the provision
12 that the only person who is very, very close to having a
13 security clearance from Nye County is their technical
14 expert. Assuming that he does not write the contentions by
15 himself, none of their attorneys have clearance. So, that
16 could throw a wrench in their filing based on classified
17 information.

18 >>JUDGE ROSENTHAL: I think it would definitely
19 would.

20 >>JUDGE KARLIN: Well, that answers my question
21 that Nevada is not qualified to request a redacted document
22 at this moment and Nye County is the only one who might even
23 be possible under this provision to request a redacted
24 document ever.

25 >>MR. POLONSKY: Can we clarify? I think it's

1 Clark County. Nye County is on right on the verge of having
2 someone with a clearance.

3 >>JUDGE KARLIN: No, no, no. It's Nye County
4 because Nye County has got an application pending. Clark
5 County has no applications pending. If we issued that order
6 tomorrow there would be no applications pending from any
7 entity. This thing says a party who has an application for
8 security clearance pending. December 3rd, nobody's got an
9 application pending except, well, Nye County.

10 >>JUDGE MOORE: That's for an individual who's
11 technically qualified, but doesn't tell us whether they can
12 write a contention.

13 >>JUDGE KARLIN: So, anyway, this provision --
14 would you agree Mr. Polonsky -- needs to be revisited?

15 >>MR. POLONSKY: Yes, we would like it excised in
16 it's entirety.

17 >>JUDGE MOORE: Mr. Polonsky, while we're on the
18 subject of the exception, which is in -- if you will turn to
19 Page 8, Part 3, Paragraph 6 on page 8, which is your
20 exception to when a party such as Nevada could then request
21 something to be redacted so that it can be part of a
22 nonclassified version of a contention.

23 What happens downstream under 10 CFR 2.906 and all the
24 other notice provisions that there's an obligation not to
25 use classified information if there's any feasible way

1 around it and someone wants to avoid in the proceeding using
2 classified information by using a redacted version instead?
3 That's not covered by this because it's specifically limited
4 to contentions.

5 >>MR. POLONSKY: I'm just looking in the
6 protective order itself to see if there's a provision about
7 filing and requesting that the originating agency would
8 redact the pleading at that time.

9 Subpart I clearly contemplates that we try to avoid the
10 introduction of classified information into the proceeding,
11 which is why we wrote those provisions in there. If I could
12 have a moment, Your Honor? 2.910 entitled "Unclassified
13 statements required" --

14 >>JUDGE MOORE: Is that of the protective order or
15 of the proposed case management order?

16 >>MR. POLONSKY: Neither. It's in Subpart I, 10
17 CFR Part 2, Subpart I, which is in no way changed by this
18 protective order. It states that whenever RD or NSI is
19 introduced into a proceeding the party offering it shall
20 submit to the presiding officer and all parties to the
21 proceeding an unclassified statement setting forth the
22 information in the classified matter as accurately and
23 completely as possible.

24 And then B and C go forth where the presiding officer
25 looks at the document that's unclassified, looks at the

1 classified document and says does this truly capture the
2 nature of the classified information?

3 And in that way without redaction it allows the parties
4 to continue in the proceeding to deal with this unclassified
5 summary of the classified information.

6 >>JUDGE MOORE: How can the summary be any
7 different than the redacted version? It certainly can't
8 have more in it than the redacted version.

9 >>MR. POLONSKY: I think the rules contemplate a
10 summary. I could envision how someone who knows the
11 classified information could create an unclassified summary
12 and of a page or two pages that would be useful for purposes
13 of litigating a very specific intention or subpart of a
14 contention. That's a very different task than redaction.

15 On the other hand I think all the parties using Subpart
16 I as a lens would be amenable if there is no provision in
17 the protective order right now to have some small portion
18 that might want to be introduced in the proceeding to have
19 that small portion redacted. Everyone would rather have an
20 open proceeding and not be under the classified information
21 protective order during an actual hearing.

22 >>JUDGE MOORE: And the problem with just going
23 ahead as we did in other phases of the pre-license
24 application proceeding and having things redacted is a
25 volume of material -- classified material that's involved

1 here that would have to be redacted.

2 >>MR. POLONSKY: We are not envisioning -- I'm
3 sorry; we're not envisioning full redaction of the TSD and
4 the BEARs in order to have a hearing on an admitted
5 contention on a single five pages of the technical support
6 document. I just think it's a difference in scope.

7 >>JUDGE KARLIN: We might ask Mr. Malsch -- DOE's
8 council is suggesting that redaction sounds like it's not a
9 particularly productive way to go. I suspect you are not in
10 a position to be able to agree to that at this point or are
11 you?

12 >>MR. MALSCH: Well, I obviously haven't seen the
13 document, so I can't be sure. My guess would be that he's
14 correct. The contentions that we are working on are very
15 specific. I just can't imagine -- not that it would be
16 impossible, but it's hard to imagine that we would be able
17 to be comfortable with an amount of redaction that would
18 allow us to file an adequate contention.

19 Now, I was interested in including the paragraph on
20 page 8 whereby once we have reviewed the document we might
21 work with DOE or others and see whether we can agree on an
22 unclassified contention filing and then take it on from
23 there.

24 Obviously, we have no interest in having very
25 complicated classified hearings if we can avoid them,

1 although frankly, I think while it might be possible to file
2 an unclassified contention I'm somewhat doubtful we can
3 actually proceed and litigate the unclassified contention on
4 a completely unclassified basis. We thought we would take
5 it from there.

6 >>JUDGE KARLIN: Do you agree that -- let's posit
7 for a moment that you have obtained your security clearance
8 and that Dr. Bell obtains his security clearance. At that
9 point do you agree that under this case management order you
10 are no longer eligible to request redacted versions of the
11 documents except as for the clause you just mentioned?

12 >>MR. MALSCH: That's correct.

13 >>JUDGE KARLIN: You wouldn't be interested in
14 doing so because you could see the unredacted version
15 presumably? But if Dr. Bell has expertise in Area A and the
16 classified document deals with Area B, do you get the
17 unredacted version or the redacted version?

18 >>MR. MALSCH: I guess that's not clear from the
19 order.

20 >>JUDGE KARLIN: I'm wondering. That's why we're
21 concerned about his expertise and area of competency. DOE
22 may say, "Well, Dr. Bell is only competent in this area and
23 therefore we're only going to give you this classified
24 information related to that area."

25 We have some other information in Areas B, C and D

1 which Dr. Bell is not competent in and therefore we're not
2 going to give you that information. We're left in the lurch
3 and you either have to get an expert in B, C, and D or you
4 have to ask for a redacted version of the material in B, C
5 and D. Would you agree with that?

6 >>MR. MALSCH: I agree. I think, frankly, our
7 preference would we have to hunt around for an additional
8 expert, but I'm very hopeful that Dr. Bell will pass muster.

9 >>JUDGE ROSENTHAL: Would Mr. Malsch get it? In
10 that circumstance where the expert, the technical expert is
11 not entitled to the documents because it does not relate to
12 an area in which he has established expertise. What about
13 the counsel? Does the counsel have to establish his
14 technical expertise in that area or does he get that
15 document on the basis of his being counsel? What's the
16 contemplation?

17 >>JUDGE MOORE: Let's start with DOE and you might
18 want to turn to page 9 of the post case management order
19 under Part 4. It would be D under your need to know in
20 answering that question.

21 >>MR. POLONSKY: Your Honor, we specifically wrote
22 in technical "or" legal competency contemplating that
23 individuals who are counsel for a petitioner, such as
24 Mr. Malsch, would have -- that we would not challenge, at
25 least for Mr. Malsch, his need to know the classified

1 information. So, even without an expert who has clearance
2 he would have technical competency to prepare a classified
3 contention.

4 >>JUDGE ROSENTHAL: So, he would have access to
5 it, but he could not share the information he obtained with
6 his expert?

7 >>MR. POLONSKY: If you went, for example, next
8 week assuming we had an order and Bell does not have a
9 clearance, that's correct. He could not share it with
10 anybody who does not have a clearance.

11 >>JUDGE ROSENTHAL: I'm assuming that his expert
12 has clearance, but the particular document does not relate
13 to an area in which that expert has expertise. That was the
14 hypothetical, I think, that was presented by Judge Karlin.

15 Now, I take it that in that circumstance Mr. Malsch
16 gets the document and gets access to the document, but he
17 cannot impart the information that he obtains from his
18 examination of the document to this expert because the
19 expert is not qualified in that particular area. Is that
20 the way it plays out?

21 >>MR. POLONSKY: Yes, that's the way it would play
22 out, Your Honor, and it's no different for any other
23 individual who has a limited need to know.

24 >>JUDGE MOORE: So, in your writing of Part 4,
25 Second Paragraph D, the definition of "need to know" that

1 demonstrates technical or legal competency, legal competency
2 is competency to draft a contention and know what
3 information would be necessary in drafting a contention? Is
4 that what legal competency means there?

5 >>MR. POLONSKY: I guess so, Your Honor. Our view
6 was simply that if you are a lawyer or a counsel -- I'm
7 sorry counsel for a potential party or in this case a party
8 and you have a clearance and a need to know that you could
9 get access to the TST and its supporting references.

10 >>JUDGE MOORE: I think I'd be very interested in
11 knowing what the NRC staff would have to say on this
12 subject.

13 >>MS. BUPP: The NRC staff's position is that an
14 attorney does not need to be a technical expert in and of
15 his or herself, but they need a technical expert in order to
16 interpret this type of information so that they can file a
17 contention.

18 >>JUDGE MOORE: Now, you have a different view of
19 what Part 4D in the second paragraph means than DOE?

20 >>MS. BUPP: Yes, that it would be almost a
21 two-person team; that you would need to have technical or
22 legal competency, but one alone is likely not enough,
23 although technical competency might be enough if you were
24 proceeding pro se.

25 >>JUDGE KARLIN: So, you're saying that the lawyer

1 doesn't get to look at it unless and until he or she has a
2 technical expert in that field at his side? Are you
3 disagreeing with DOE?

4 >>MS. BUPP: I don't understand how an attorney
5 would look at it and be able to really do anything with it.
6 If I were to receive a classified contention on the subject
7 matter related to this classified information I couldn't
8 respond to the contention. I would have to ask --

9 >>JUDGE KARLIN: You're not responding to a
10 contention. You're trying to file a contention and the
11 counsel might say, "I don't need to look at this material to
12 see whether I want to hire an expert or whether I need to
13 hire an expert and therefore I want to look at this
14 classified information." You say, "You can't look at it
15 until you have an expert hired up front." A lawyer alone is
16 not enough.

17 What happens if DOE says you can look at it and NRC
18 says you can't look at it? Who wins? DOE says, "The lawyer
19 Mr. Malsch wants to look at it. He doesn't have an expert.
20 He can look at it." And NRC says, "Oh, no, he can't look
21 at." What do we do with this provision?

22 >>MS. BUPP: If it's a document that originated
23 with DOE pursuant to Subpart I we would defer to DOE.

24 >>JUDGE KARLIN: Has any of this information
25 originated with NRC.

1 >>MS. BUPP: No, not yet.

2 >>JUDGE ROSENTHAL: Your position is that the
3 lawyer is not entitled to see the document unless the lawyer
4 that's counsel for the party has already lined up and obtain
5 the security clearance for somebody who's an expert in that
6 area?

7 >>MS. BUPP: They wouldn't necessarily have to
8 have an expert, but they would have to show some independent
9 expertise of their own to be able to use --

10 >>JUDGE ROSENTHAL: You're suggesting that that
11 would be difficult?

12 >>MS. BUPP: Difficult, but not impossible. There
13 are many attorneys who are also engineers or who might have
14 technical expertise due to their experience, but it might be
15 easier to have two people who each have an expertise in
16 their own area.

17 >>JUDGE MOORE: So that I'm clear because this
18 information that's currently part of the application all
19 originates with DOE? DOE's view of this provision, which
20 you submitted as a joint submission controls not the NRC
21 view of this provision?

22 >>MS. BUPP: Yes. As the case management order is
23 written it is the originating agency who makes the need to
24 know notification.

25 >>JUDGE MOORE: What sense does it have to have a

1 proposed case management order in which the proposers have
2 different views of the second provision that you put in
3 front of it?

4 >>MS. BUPP: Because all the information --

5 >>JUDGE MOORE: Shouldn't you have ironed that out
6 before you put it in front of us?

7 >>MS. BUPP: All of the information at this point
8 was originated by DOE. Any information in the staff's
9 evaluation report would be based on DOE information;
10 therefore, it originates with DOE.

11 For this proceeding it appears that now and for the
12 foreseeable future all of the information will be with the
13 DOE as the originator.

14 >>JUDGE MOORE: In your opinion, does Mr. Malsch
15 in light of the NRC's different position run any risks in
16 not being able to see this information?

17 >>MS. BUPP: Not being familiar with Mr. Malsch's
18 entire CV I don't know whether he would have the independent
19 knowledge to view it if it were the staff making that call.
20 But assuming that he has engaged Mr. Bell, Mr. Bell is very
21 close to having a security clearance granted and so I don't
22 think he runs any risk.

23 >>JUDGE KARLIN: Let me ask this question.
24 Mr. Polonsky pointed out the clause that we're reviewing
25 says "demonstrates technical or legal competency" and

1 Mr. Polonsky pointed out that the "or" in there is
2 intentional and it means one or the other; therefore,
3 despite what you say here and now you've signed up to a
4 provision that says "or", so that doesn't require technical
5 competency, legal or technical. Do you want it to be both
6 legal and technical competency? You didn't say that.

7 >>MS. BUPP: Well, it doesn't have to be both in
8 the same person.

9 >>JUDGE KARLIN: I don't care whether it's the
10 same person or different persons. I think this says
11 "technical or legal competency". If we've got legal
12 competency that sounds like that's sufficient to access the
13 classified information as Mr. Polonsky has correctly, I
14 think, read this clause.

15 >>JUDGE ROSENTHAL: In any event given the fact
16 that staff council has conceded that this information is
17 coming from DOE it's DOE's call. I don't see that the
18 different approach that the staff takes will have any
19 practical effect as long as DOE continues to maintain the
20 position that it's taken this afternoon.

21 >>JUDGE MOORE: Before we move on, one other
22 question. In regard to the application of Part 4, the need
23 to know provision. Who decides? The material goes to --
24 does it go to DOE from Nevada and Nevada decides who the
25 need to know question? Is that the way it works?

1 >>MR. POLONSKY: Your Honor, I believe that the
2 CMO already addresses the protocol for how that flows.
3 Nevada would request from --

4 >>JUDGE MOORE: That's the next page on
5 page 10 starting with Paragraph 1 that you submit?

6 >>MR. POLONSKY: Yes. At the bottom of the page
7 going on to the next page --

8 >>JUDGE KARLIN: What are the numbers?

9 >>MR. POLONSKY: I'm sorry, page 10, Paragraph 4.
10 It segues to the next page. DSO will verify clearances to
11 the originating agency and the originating agency shall have
12 10 days after receipt to make a need to know.

13 >>JUDGE MOORE: Does that need to know
14 determination include then the legal or technical competency
15 element?

16 >>MR. POLONSKY: Yes. We put that in quotes for
17 need to know as defined within the CMO.

18 >>JUDGE MOORE: The PSO then is the one who farms
19 it out and presumably knows who the originating agency is?

20 >>MR. POLONSKY: Yes.

21 >>JUDGE KARLIN: And presumably if someone
22 disagreed with that determination they could challenge it
23 and bring it before this Board at which point DOE might very
24 well challenge whether this Board has the jurisdiction and
25 authority to look at that issue or to overrule that issue.

1 Those would be part of the questions that the
2 Commission has specifically said we're going to set aside
3 for litigation if and when they arise. Would you agree with
4 that Mr. Polonsky?

5 >>MR. POLONSKY: Yes, I would. We did write that
6 into the CMO for that reason.

7 >>JUDGE KARLIN: Mr. Malsch, do you agree with
8 that approach?

9 >>MR. MALSCH: Yes, that's precisely correct. Our
10 idea was the initial determination we made by the
11 originating agency if there was a problem then we'd be
12 raising it some appropriate motion before the Board.

13 >>JUDGE MOORE: I take it there's never a dispute
14 on who the originating agency is? That's black and white
15 and doesn't create a problem?

16 >>MR. POLONSKY: For now and I think as Ms. Bupp
17 said into the foreseeable future it will all be applicant
18 generated originating information.

19 >>JUDGE MOORE: How does the material that deals
20 with the Navy and Navy nuclear fuel, which is generally just
21 to a layperson they might say isn't that the Department of
22 Defense not DOE? How does that originate an agency problem
23 work itself out between DOD and DOE?

24 >>MR. POLONSKY: My understanding is that the
25 Naval Nuclear Propulsion Program wears two hats and sits

1 within two agencies, the Department of Defense and the
2 Department of Energy. For purposes of being an applicant
3 before the NRC it is the Department of Energy.

4 >>JUDGE MOORE: You said "applicant". How about
5 for purposes of originating agencies for classified
6 information?

7 >>MR. POLONSKY: I believe it's the Department of
8 Energy. It may be the Naval Nuclear Propulsion Program
9 wearing it's hat within the Department of Energy, but it's
10 the Department of Energy that is the originating agency.

11 >>JUDGE KARLIN: We had this question 2B, party
12 status prerequisite. That's what I called sort of the
13 chicken and egg question, which is if you have to be a party
14 before you can request a redacted document and you want the
15 redacted document in order to file a contention so you can
16 become a party, then isn't that a chicken and egg and you're
17 automatically excluded?

18 If and when we call upon you or whoever to rework this
19 that problem I think has to be solved and it sounds like
20 there is a solution that it doesn't have to be a party. You
21 want to be a party by filing a contention and the contention
22 is a classified contention. So, how can you access the
23 document if you're not a party yet? Do you see that
24 problem, Ms. Bupp?

25 >>MS. BUPP: I do see that problem, but with

1 regard to giving actual access to safeguarded information
2 there's the parallel problem that Subpart I limits access to
3 classified information in adjudicatory proceedings to
4 parties.

5 >>JUDGE KARLIN: Isn't that after -- we're talking
6 about in the adjudicatory proceeding when people are filing,
7 having hearings and that sort thing. How do you get to be a
8 party in the first place?

9 If you're only contention is going to be based upon
10 classified information and you can't be a party unless you
11 file a contention based on classified information and you
12 can't get that classified information because you're not a
13 party, then you've just definitionally excluded that person
14 from ever filing that contention. How do we deal with that?

15 Let's say a party comes in and says, "My only
16 contention deals with this classified information problem
17 and I need to get that classified information." You say,
18 "Oh, you can't ask for it because you're not a party yet."
19 I'm not a party yet? Why not? Because you haven't filed a
20 contention. Well, I can't file my contention until I can
21 get the information to file. How do we deal with that?

22 Are you saying per se, a person is automatically
23 excluded from filing a contention because they're not a
24 party in the first place?

25 >>MS. BUPP: It may appear to be so from reading

1 Subpart I, but assuming that wasn't the Commission's
2 intention we would have to write around that. I was just
3 phrasing that the Commission's regulations currently only
4 speak to parties having access to classified information.

5 >>JUDGE KARLIN: I think in a normal course of
6 events there are a limited number of parties in the case,
7 but this is one where having the information is a
8 prerequisite to being a party. We'll have to deal with
9 that. I think we might. Well, maybe we don't have to deal
10 with that. Maybe that's an abstract matter that's never
11 going to come up.

12 Maybe we should stick to what's actually in controversy
13 here, the State of Nevada and Clark County and Nye County.
14 I think there's a definitional problem, a chicken and egg
15 problem there.

16 >>MR. POLONSKY: Your Honor, we could solve that
17 by taking up the proposal again as the Board proposed in its
18 last paragraph of limiting this CMO and PO to not just
19 Nevada, but the AULGs and anyone who has already entered a
20 notice of hearing. Then we can save this hypothetical
21 question, but real concern of yours if it ever materializes.

22 >>JUDGE KARLIN: Right. I think that might be an
23 approach.

24 >>JUDGE MOORE: The classified material that was
25 filed with the application as opposed to the several

1 thousands of pages of documents behind that classified
2 information. It only refers to sections and the classified
3 information that is filed with the application there are
4 just four sections. They are not broken down into
5 subsections.

6 >>MR. POLONSKY: Your Honor, the classified
7 information that was docketed that was submitted with the LA
8 contains what we will consider parts of the LA itself, which
9 is the technical support document. That I believe
10 corresponds to the four sections you're talking about and
11 somewhat mirror those sections that are unclassified in the
12 license application and the safety analysis report.

13 There are, however, 12 supporting documents that were
14 submitted along with and I believe were docketed with the
15 technical support document. All of that information is
16 approximately 2,200 pages. That's the information that's
17 currently on the docket and we would expect if the party
18 wanted to come in they would look at that to prepare
19 contentions.

20 We believe the public or the parties at least know that
21 those documents are there based on transmittal letters.

22 >>JUDGE MOORE: When you look at the nonclassified
23 portions of the application that refer to the classified
24 portions there are descriptive terms that get you through
25 the section. For example, in the application 1.5.1.4.1.1,

1 which is nothing new, but it's entitled "Physical
2 Characteristics of Naval SNF (Spent Nuclear Fuel)".

3 In the second paragraph under entitlement under a
4 heading "Enrichment Chemical Composition" this is all in the
5 application. This is not the classified. It goes on and
6 gives some very general information and then it ends by
7 saying "for additional information on the chemical
8 composition the materials present enable spent nuclear fuel
9 see Section 1.5.4.1 of the Naval Nuclear Propulsion Program
10 technical support document. That's the classified portion.

11 >>MR. POLONSKY: Correct. The reference to the
12 TST is the classified.

13 >>JUDGE KARLIN: That's not the 2,200 pages
14 though, is it? That's just a short section?

15 >>MR. POLONSKY: The transmittal letter that
16 submitted this application on the docket says that the Naval
17 Nuclear Propulsion Program technical support document that
18 the DOE is transmitting under separate cover. It is 214
19 pages. The classified portion of the license application is
20 214 pages and then there's approximately 2,000 pages in the
21 12 supporting documents.

22 >>JUDGE MOORE: Now, because the title of this is
23 "Enrichment in Chemical Composition" and from what it
24 generally states here under the scheme you have for going
25 back to redaction, I could say I want to see the redacted

1 version of the documents that deal with enrichment and
2 chemical composition.

3 And then presumably, you would ferret that out and have
4 it redacted and turn it over to someone if there is such a
5 person that could ask for it. But how do you get to the
6 2,000 pages behind the only description that's here, which
7 is the only thing you can ask for because that's the only in
8 thing that gives you any idea of what's in the classified
9 information?

10 >>MR. POLONSKY: There is a June 3rd, 2008
11 transmittal letter to the Document Control Desk that is
12 stamped "confidential restricted data", but is not when
13 separated from certain enclosures. This document was
14 transmitted to the State of Nevada and others, AULGs, and
15 it's attachment lists those 12 documents. I brought enough
16 copies to give everybody if you would like a copy.

17 >>JUDGE MOORE: Okay. So, the transmittal letter
18 has characterization of what's in those 2,000 pages? Thank
19 you.

20 Mr. Polonsky, that may give a new definition to
21 skeletal. It's so cryptic as to be impossible to know
22 what's in those -- in any one of the 12 documents to know
23 how you could ask for that for a redaction.

24 >>MR. POLONSKY: One moment, Your Honor. Your
25 Honor, we think the list provides those 12 base background

1 evaluation and analysis reports that are supporting those
2 sections. If the Board wanted us to lay out Section 1.5.1.4
3 of the DSD references the following BEARs, we could provide
4 that as unclassified information.

5 >>JUDGE MOORE: I was just wondering because I was
6 trying to -- we're looking ahead how if subsequently we
7 had -- a little bit ago we had a discussion about who could
8 ask for redacted document. If Mr. Malsch would be in a
9 position to need a redacted document so that he could file a
10 nonclassified version of a contention.

11 It struck me and I believe I at least alluded to this,
12 that if I were involved in this proceeding and was trying to
13 structure the summary that the regulations in Subpart I deal
14 with in dealing with nonclassified information, I would want
15 it because Mr. Malsch is not a classifier. He would not
16 have a classifier or declassifier on his staff.

17 I would want the comfort of seeing what a redacted
18 version that doesn't contain any classified information has
19 in it so that I could write my summary safely. Or is the
20 way the system is set up that Mr. Malsch writes such a
21 summary, provides it to you as if it were classified. You
22 run it through the classified process and then give it back
23 to him with certain things excised out of it and then he
24 knows it's okay to use that; that that is now a
25 nonclassified summary? Is that the way the process has to

1 work?

2 >>JUDGE KARLIN: Is that a multiple choice
3 question?

4 >>MR. POLONSKY: That's for question one through
5 eight.

6 >>JUDGE MOORE: While you're thinking of that why
7 don't we take a brief 10 minute break and we'll reconvene.
8 It's now 2:27. We'll reconvene at 2:40 p.m.

9 (Whereupon, a break was taken)

10 >>JUDGE MOORE: Mr. Polonsky, you have a very
11 short answer.

12 >>MR. POLONSKY: Yes.

13 >>JUDGE MOORE: Well, if that's the answer you'll
14 have to repeat the question.

15 >>MR. POLONSKY: You had asked whether or not it
16 would be possible to have some cooperation among the parties
17 and how Subpart I would work for that unclassified summary
18 that's required to be submitted under Subpart I. Once you
19 get into a proceeding assuming you have an admitted
20 contention that's classified.

21 The answer is yes, we will work together with any party
22 that has such a contention. I'd like to answer it in two
23 phases. The first is we have an initial phase where we
24 would have a petitioner coming in to prepare a contention.
25 And clearly as we've written in the CMO there's a provision

1 where they can identify a short number of pages that they
2 want to hone in on.

3 An example I would use would be really they think a
4 calculation is in error; it's missing some component or some
5 aspect of the formula. We could work with them to see if
6 that formula or that calculation is indeed classified.

7 If it's not then that potential party could clearly
8 prepare an unclassified contention on that and that would be
9 an example of using the provision in the CMO where at the
10 initial stages of preparing contentions we'd be happy to
11 look at small numbers of pages to redact.

12 Later on, however, once we have an admitted contention
13 that's classified we may have a similar predicament where a
14 party wants to introduce a certain number of pages. We're
15 not talking about documents, but a certain number of pages
16 from a document to support its position and we would in the
17 first instance look at those and say, "Look, can we redact
18 that information such that we could have this in an
19 unclassified open to the public hearing?" And I think we
20 would just try and work together to do that. It would be in
21 all of our interests and it's consistent with 10 CFR Subpart
22 I's requirements.

23 If you cannot do that then you end up with this
24 classified summary or an attempt to prepare an unclassified
25 summary of the classified information. And again, and we

1 would work reasonably to assist a party to do that.

2 As the protective order outlines, again, there wouldn't
3 be any waiver of privilege. We would have individuals who
4 would do this with them and would not share that information
5 with counsel for the applicant or the NRC or any other party
6 for that matter without the consent of that party.

7 I would like to come back and I can't emphasize enough
8 the issue of redaction and timing of redaction and that it
9 is very likely that if a party asks for -- who did not have
10 a security clearance -- who asked for a redaction of large
11 numbers of documents that those documents would not be
12 redacted before they actually got their security clearance.

13 So, from a practical perspective, we don't see
14 redaction of the BEARs and all of those documents as being
15 practical in order to meet a contention submission
16 requirement.

17 >>JUDGE KARLIN: Let me probe that. Are you
18 saying security clearance takes one year? It's going to
19 take you more than one year to redact the documents?

20 >>MR. POLONSKY: Yes, Your Honor.

21 >>JUDGE KARLIN: Why should that be so? We've
22 already gone through several case management orders in this
23 proceeding for DOE and others, but DOE mainly was required
24 to redact hundreds if not thousands of pages of documents
25 and provide them. Have you not done so? Why should

1 redaction of this stuff -- 2,000 pages doesn't sound like
2 very much.

3 >>MR. POLONSKY: We don't --

4 >>JUDGE KARLIN: You've already redacted thousands
5 of pages and presumably provided them under case management
6 order number 2 and number 3; number 2, in particular.

7 >>MR. SHEBELSKIE: Your Honor, on that point it
8 took DOE through the Naval Nuclear Propulsion Program
9 something on the order of magnitude of 18 months or more to
10 complete the redactions and have them go through the
11 required legal reviews mandated by law for redaction process
12 of documents of that kind.

13 So, there we were dealing with the NMP documents; order
14 of magnitude comparable numbers of pages of information that
15 BEARs represent and that took us 18 months.

16 >>JUDGE KARLIN: I remember on case management
17 order number 2 we provided a period something like 45 days
18 within which DOE after it's certification was duty bound to
19 provide redacted copies of all the relevant documents and
20 then when we revised the second case management order we
21 reduced that period down to zero because there had been -- a
22 year or so of time had elapsed. But the original period was
23 like 45 days. Now that's not NNPI. That's not classified
24 information, but that is a redaction process that you signed
25 up to before. It was much shorter than 18 months.

1 >>MR. SHEBELSKIE: And we, in the development of
2 that process, disagreed with and shaped against those
3 deadlines, but as you repeat in the chronology there because
4 really we were developing those case management process and
5 had really almost a four year period between our initial
6 certification in 2004 which was stricken and then our
7 recertification in October -- I guess three years -- 2007,
8 that we didn't wait to do our redactions on the security
9 documents when we certified in October of 2007.

10 We started years earlier when the Board had already
11 indicated to us that you will need to redact. And so,
12 that's where I referenced the 18 month period.

13 >>JUDGE KARLIN: I just find it very difficult to
14 believe that if it takes 12 months for a security clearance
15 to go through it's going to take more than 12 months to
16 redact 2,000? I find that hard to believe that if you
17 expedited and paid attention that that couldn't be done
18 fast.

19 >>MR. SHEBELSKIE: Well, Your Honor, I would make
20 comment on that based on our experience with the other
21 documents. The Naval program does not have a cadre of
22 dedicated personnel whose only job is to sit there and
23 redact classified or other security documents.

24 >>JUDGE KARLIN: That's what they hired you for.

25 >>MR. SHEBELSKIE: The counsel can't do it either.

1 It has to be done by authorized derivative classifiers and
2 they're hard to come by and their normal jobs are in other
3 critical mission tasks for the naval program. And so, for
4 them to do redaction they have to have time either diverted
5 from those other tasks or when they have down time and
6 that's --

7 >>JUDGE KARLIN: So, they do this in their spare
8 time? They're just going to do this in their spare time
9 while there are other important tasks that are going on?
10 Isn't Yucca Mountain a pretty important task, too?

11 >>MR. SHEBELSKIE: There are many competing
12 important tasks that have to be accommodated in the
13 mission's budget.

14 >>JUDGE ROSENTHAL: So, the upshot of all this is
15 somebody without a security clearance comes to DOE and asks
16 to see a particular document in redacted form. The answer
17 is you're just out of luck. This is just too time consuming
18 a process and we're not about to embark upon it.

19 Where does that leave the individual or organization
20 that's seeking at least a redacted version of the document
21 in question? They're just out of luck?

22 >>MR. POLONSKY: The individual is seeking the
23 redacted information while they are waiting for their
24 security clearance. That's how we viewed this as posed by
25 the Commission. That was the dilemma the Commission was

1 grappling with and we thought delegated down to the PAPO
2 Board to resolve.

3 >>JUDGE ROSENTHAL: So, you're going to tell them,
4 well, you're going to be able to get -- assuming you're
5 going to get it all -- a security clearance. You'll get
6 that security clearance before we would be able to provide
7 you with a redacted document? And it might be a year, it
8 might be 15 months, but so be it. That's what it comes down
9 to as a practical matter?

10 >>MR. POLONSKY: Yes, as a practical matter that's
11 what it comes down to.

12 >>JUDGE KARLIN: Let me probe that a little more.
13 I'm not sure whether that even you're saying that. It
14 sounds like if I'm an intervenor attempting to intervene and
15 I ask for a specific document that contains classified
16 information I have requested a redacted version of that
17 document. Let's say I've applied for security clearance,
18 but I asked for specific acts. You're not saying it's going
19 to take you 18 months to do a redacted version of that one
20 document, are you?

21 >>MR. POLONSKY: That's correct.

22 >>JUDGE KARLIN: You're not saying? It is correct
23 that it's not going to take 18 months, right?

24 >>MR. POLONSKY: I'm agreeing with you.

25 >>JUDGE KARLIN: Yes, okay. You were suggesting

1 that if you were to redact all 2,000 pages that task would
2 take 18 months? Correct?

3 >>MR. POLONSKY: We have not done a human
4 resources loading to figure out how long it would take, but
5 we know it would be longer than a year to do all of that.

6 >>JUDGE ROSENTHAL: Do I understand then correctly
7 that if you get a targeted request, the request is not for
8 redacted versions of every classified document, but if it
9 zeros in on a handful of documents that you'd be able to
10 accommodate the individual? Is that right?

11 >>MR. POLONSKY: The smaller the number of pages,
12 clearly the faster the redaction could take place. But
13 there's a practicality of looking at the information and we
14 would take the position that you have to formulate
15 contentions on those redacted documents.

16 I think what I've heard from Mr. Malsch, at least, is
17 that he would not feel comfortable doing that and in fact
18 we've suggested that it is impracticable to do that. And
19 with very little benefit and a large burden on the redaction
20 process we --

21 >>JUDGE MOORE: Plus, there's the added problem is
22 they're not being able to zero in on those documents. It's
23 almost a chicken and egg because of the way the application
24 doesn't zero in. It just gives broad sections and then
25 there's underlying documents that have a very skeletal

1 title. It would be almost impossible.

2 There is no public information that would allow you to
3 make a focused request for specific documents to be
4 redacted. That would be something that DOE would have to do
5 and that creates a whole nother set of problems that the
6 originator of the documents is deciding which documents to
7 redact to give to the requestor and say these will be
8 sufficient for you to file your contention. That's a whole
9 nother layer that would have to be dealt with.

10 >>MR. POLONSKY: We agree that it has great
11 practical implementation problems.

12 >>JUDGE KARLIN: Let me just focus -- we have been
13 focusing or we were looking at the redaction provision of
14 our set of questions. Question 2, redaction. There's a
15 number of sub questions about that. It sounds to me that
16 Nevada, assuming you're getting the security clearances that
17 you and Dr. Bell seem to have or on the cusp of getting, are
18 you worried or interested in the redaction issue at all
19 except with regard to the reference?

20 I guess it's on page 8 where you say you may -- a party
21 may request originating to redact a small portion in order
22 to allow the party to submit a contention. That's the only
23 redaction clause you're concerned about at this point. Is
24 this correct?

25 >>MR. MALSCH: That is correct.

1 >>JUDGE KARLIN: So all the other redaction
2 provisions are irrelevant to you essentially; is that
3 correct?

4 >>MR. MALSCH: That's correct because our
5 assumption has been that since redactions are based upon the
6 need to protect national security as a priority, not
7 necessarily providing a basis for contentions. Why should
8 we assume that a redacted document could possibly be the
9 basis whether to decide to file contentions?

10 >>JUDGE KARLIN: Right. Therefore, if this case
11 management order and protective order were to be limited to
12 the three parties, the Ultra Big Three, Nevada, DOE and the
13 staff, all the redaction provisions except that one could be
14 eliminated?

15 >>MR. MALSCH: I guess that's correct.

16 >>JUDGE KARLIN: Because I have to say I have some
17 concern and I think our questions identify some of these
18 concerns with regard to the precursor assumption or
19 presumption that you make and that someone cannot be
20 entitled to get a redacted version of the document unless
21 they are pursuing a security clearance. This seems to be a
22 significant leap.

23 It's obviously an assumption you made, but it works for
24 Nevada because of Nevada is in fact in that boat and has
25 already overcome that hurdle. But for everyone else in the

1 world it may be a serious problem.

2 The same thing with question 2E. Security clearance is
3 a bar. We've just established that Nevada is the only
4 entity that meets the criteria, but they're simultaneously
5 not eligible to request a redacted version because they've
6 already got the clearance.

7 So, I think we can probably -- we've already discussed
8 sub question 2 and 3 and privilege logs. Are you
9 interested, Mr. Malsch, in privilege logs associated with
10 the classified information?

11 >>MR. MALSCH: Well, we would be, but our thought
12 was that's down the road a bit. It seems to me that if we
13 have a disagreement over granting access to classified
14 documents and we file a motion with the Board there will
15 need to be some discussions about what the basis for our
16 motion would be and it could very well be the provision of a
17 privilege log for that particular docketed question. We
18 thought we'd put that issue off until a live controversy
19 arose.

20 >>JUDGE KARLIN: If you've got a security
21 clearance and if you've got everything else, what
22 disagreement could occur with regard -- you'd get the
23 document, wouldn't you?

24 >>MR. MALSCH: Presumably the only disagreement we
25 can imagine would be over the need to know, which would be

1 over hypothetically whether Mr. Bell can see all of the
2 technical support document or just part of it. We're
3 hopeful that issue will not arise.

4 >>JUDGE KARLIN: Since Mr. Polonsky has agreed
5 that as far as DOE documents are concerned you get to see
6 all of them as their counsel if you have the clearance. You
7 don't have to have an expert beside you in that field, then
8 you would be accessing the unredacted version of all the
9 documents you want to look at.

10 >>MR. MALSCH: That's correct.

11 >>JUDGE KARLIN: Is that basically right,
12 Mr. Polonsky?

13 >>MR. POLONSKY: That's correct.

14 >>JUDGE MOORE: Okay. Let's then move on to
15 questions about need to know under the proposed case
16 management and this would be Question 7. Under the proposed
17 case management who decides whether a requestor has a need
18 to know classified information? You've already told us the
19 originator will be making that decision abinitio and that
20 the PSO will be the one that upon the receipt of the
21 things that are spelled out on page 10 or 11 of the proposed
22 case management order. It gets shuttled to the originator,
23 which in every instance will be DOE and they will decide the
24 need to know.

25 What is the authority of the Presiding Officer Board or

1 the Commission in such matters? DOE?

2 >>MR. POLONSKY: We had thought that the
3 Commission had in CLI0821 basically said to punt on this
4 issue on any disputes over providing access or granting
5 access. So, frankly, we were a little surprised to see the
6 question from the Board because we thought we had agreed to
7 punt it.

8 >>JUDGE MOORE: The need to know falls into the
9 umbrella of the two areas that the Commission that don't
10 need to be decided until there's a real controversy.

11 >>MR. POLONSKY: Yes and no. Yes, because need to
12 know isn't necessarily a precursor to access and the
13 question of denial of access was one of those questions that
14 the Commission said you want to not address in this case
15 management order.

16 But we have provided some provisions in here for a
17 party to bring to the Board a dispute if one arises. I
18 thought we had that in here. This is B1 on page 11. If a
19 requestor has been denied access to classified information,
20 believes that a decision on whether to grant access has been
21 unreasonably delayed or believes that information claimed to
22 be classified or incapable of redaction is not so they can
23 file a motion. So, --

24 >>JUDGE MOORE: I just want to understand DOEs
25 position is that an NRC adjudication when they're the

1 originator of classified information, the question of need
2 to know is solely and uniquely and exclusively a decision of
3 DOEs until that is appealed and the Commission or the Board
4 and then the Commission decides such an issue?

5 >>MR. POLONSKY: I think we briefed this
6 previously, but Subpart I 2.905(h)(2) we believe
7 specifically addresses everything you've said. We are on
8 record as having a dispute with Nevada on that issue.

9 >>JUDGE MOORE: So, it's an academic question with
10 this initial set of information?

11 >>MR. POLONSKY: Yes, hypothetical. We do
12 endeavor to work reasonably with Nevada or any other
13 petitioner and we hope that this would not arise.

14 >>JUDGE KARLIN: That may be right. Mr. Malsch,
15 do you agree with Mr. Polonsky?

16 >>MR. MALSCH: I agree with that. Just to be
17 specific we had always thought that reserving on the
18 question of access included reserving on the question of
19 need to know because we thought that was always part of the
20 access determination.

21 >>JUDGE KARLIN: It just wasn't clear from the
22 decision, CLI-08-21. I think this makes it a little more
23 clear that everyone is seeing that that's a reserved, as it
24 were, question.

25 >>JUDGE MOORE: Staff, that purports with your

1 view?

2 >>MS. BUPP: Of the proposed case management
3 order? Yes.

4 >>JUDGE MOORE: Is the way that this -- if it ever
5 is to be tested, it would come in a dispute over not turning
6 over a document. The Board presumably would rule. There'd
7 be an appeal to the Commission and that's the way that the
8 Commission would get its ore in the pond?

9 >>MS. BUPP: That's my understanding.

10 >>JUDGE MOORE: Or we would refer to the
11 Commission?

12 >>MS. BUPP: From both CLI and then the way the
13 case management order presumes the process would work. Is
14 that the Commission wouldn't come into it until there was a
15 live dispute.

16 >>JUDGE MOORE: DOE, is that your view? Or is
17 your view that the Commission can't touch this issue?

18 >>MR. POLONSKY: We wrote this in a way that would
19 preserve the right of the Department of Energy to raise the
20 issue that this Board, if a motion were brought to it,
21 didn't have jurisdiction to rule on the issue. If it were
22 then appealed to the Commission we could take a similar
23 position there.

24 >>JUDGE KARLIN: I think I agree with that. Take
25 a look at the Regs, H2 -- 2.905(h)(2). We've been focusing

1 on that a lot and it basically says, "Access to restricted
2 data which has been received by the Commission from another
3 government agency will not be granted by the Commission if
4 the originating agency determines", et cetera, et cetera.
5 That's the question we're talking about.

6 If, however, the originating agency is NRC, then H2
7 doesn't apply. H1, I believe, is the more applicable
8 provision. So, we need to -- if we write it up this way in
9 a case management order, NRC is in a different status if
10 it's the originating agency because then H1 applies, I
11 believe.

12 So, just for purposes NRC is in a different status when
13 we are talking about originating agency because that clause
14 only deals with agencies other than the NRC.

15 >>MS. BUPP: Yes, as long as we're all clear of
16 what the definition of "originating agency" is.

17 >>JUDGE KARLIN: Right. And when you're writing
18 it please make note that you have "originator" and
19 "originating agency"; two different terms in that case
20 management order and their usage is garbled. I'm not sure I
21 understand why you use one sometimes and the other some
22 other times.

23 >>JUDGE MOORE: Let's then turn to where we go
24 from here. How do we do it? I think that there may be
25 merit in writing a case management order and protective

1 order and obviously a declaration of nondisclosure that
2 deals exclusively as Judge Karlin mentioned before, Nevada,
3 DOE and NRC. And whatever else happens it will happen in
4 due course and we'll deal with it then.

5 But for immediate purposes, if there's a very narrow
6 case management order, protective order and declaration of
7 nondisclosure that deals with just those three parties and
8 since we know or have been assured that Mr. Malsch and
9 Dr. Bell will have security clearances, then we can do away
10 with the redaction problem in it's entirety with the
11 exception of the one provision should Mr. Malsch seek
12 assistance in getting a redaction so that there can be a
13 nonclassified version of a contention or an attempt to have
14 a nonclassified version of a contention.

15 And since he will have seen the documents there should
16 be no problem at all with the specificity of precisely what
17 needs to be redacted or attempted to be redacted.

18 I think it makes sense since you're the interested
19 parties that you draft one and give it back to us and it
20 should be very short because now most of this goes by the
21 Boards. We're not worried about anybody and you can name
22 them: DOE, State of Nevada, and the NRC staff. It applies
23 to nobody else.

24 >>JUDGE ROSENTHAL: It seems to me that that has a
25 considerable virtue in that at this juncture we have no idea

1 what problems, if any, will actually arise with respect to
2 either the counties or any other prospective party.

3 It seems to me, as I think it seems to my colleagues,
4 that at this juncture there really isn't a need to address
5 anything other than the matters that impact the three
6 parties that Judge Moore has suggested this be limited to.

7 When, as in if, problems arise in the context of Nye
8 County or any other entity, it seems to me that there will
9 be time enough to deal with those problems in the context,
10 the concrete setting in which they're presented.

11 So, I know there was some earlier suggestion that
12 possibly the order or to embrace Nye and perhaps Clark
13 County in addition to Nevada, DOE and the staff, but it
14 seems to me at this juncture that as Judge Moore has
15 suggested it can be appropriately limited to the three
16 parties mentioned.

17 >>JUDGE MOORE: Since the only information that we
18 know of is originating with DOE, it should be written
19 accordingly that that's the only information involved. DOE
20 is the originating agency so DOE will be making those need
21 to know decisions. It should be written accordingly.

22 Then the dispute over what competence and how many
23 people have to have the competence that the staff has goes
24 away for purposes of this information and can be left for
25 another day.

1 Further, I think it should be recognized that we can't
2 solve the problem of classified information for all time
3 downstream or what we're going to do with this. So, looking
4 to it basically for contentions. Forget the timing. That's
5 going to be a problem, but it doesn't have to involve how
6 this information is turned over.

7 It's an independent question of the timing of when
8 contentions will be filed, answers will be filed, replies
9 filed on contentions dealing with classified information.

10 Now, we do have somewhat of a concern that in 20 days,
11 Mr. Malsch, I believe, contentions are due. We suspect, but
12 we would like to have you inform us that you're burning the
13 midnight oil and exceedingly busy wrestling with that and it
14 makes no real sense since it would still be a matter of
15 weeks before this material would get into Mr. Malsch's hands
16 to not even attempt to finalize this until after the 22nd of
17 December when Mr. Malsch presumably can give more undivided
18 attention to it.

19 >>JUDGE KARLIN: And then Mr. Polonsky will be
20 burning the midnight oil on the answer.

21 >>MR. POLONSKY: Thank you for speaking up for me,
22 Your Honor.

23 >>JUDGE MOORE: There's more of you, I think, Mr.
24 Polonsky. How do we want to deal with that?

25 >>MR. POLONSKY: The department would be happy to

1 take the crack at the first draft of a rewrite as we offered
2 before and circulate it. And since it will be much shorter,
3 as you suggested, we would hope to just circulate a copy to
4 the staff and to Nevada counsel and hopefully reach
5 agreement on that. And hopefully, we won't have a two day
6 turnaround on that and Mr. Malsch will be able to fit it
7 into his schedule.

8 >>JUDGE MOORE: Not only shorter, Mr. Polonsky,
9 but much simpler because it doesn't strike us that we need
10 to have complicated anything. If we've limited it to this
11 information and you three parties and Nevada will have
12 security clearance.

13 >>MR. POLONSKY: Clarifying question for you,
14 then. In the protective order itself there is discussion
15 about how depositions could be taken, et cetera, et cetera.
16 Shall we scrap all of that and save that for some later --?

17 >>JUDGE MOORE: Why do we need that at this point?

18 >>MR. POLONSKY: Based on the guidance you've just
19 provided to us, we don't need that.

20 >>JUDGE MOORE: Well, tell me if we're wrong. Do
21 we need it at this point? Do you anticipate that the first
22 depositions are going to be filed -- someone's going to want
23 to be taking depositions on involving classified information
24 prior to replies being filed on contentions?

25 >>MR. POLONSKY: No, but to the extent that it's

1 already in the document and has language that we've agreed
2 upon it would seem useful to leave it in rather than rehash
3 it at a later point.

4 >>JUDGE KARLIN: I think there's merit in that.
5 The depositions and those sort of things interrogatories
6 would not be available until after the first case management
7 order issued by the merits or the contention admissibility
8 boards any way. So, that will be 200 days down the road
9 after December 22nd anyway.

10 But still, you've got it in there. Why should we
11 reinvent that wheel 200 days from now? I would moderate the
12 simplicity. I think we want it clean and limited to the
13 three parties, but in a sense I would say we ask you to do a
14 case management order and a protective order and a
15 nondisclosure agreement. And so you went off and tried to
16 do that.

17 I think you did a decent crack at it, but as we read it
18 I came away with the impression that this really -- Nevada
19 is the only entity which actually qualifies to get anything
20 under this structure and this case management order as
21 written. So, why not just write it that way and make that
22 clear and make it also clear that it does not apply and does
23 not bind or prohibit any other entity from seeking
24 classified information in some separate way.

25 But this order only deals with the immediate concrete

1 dispute before the parties now, which is Nevada's request to
2 get access to classified information and DOEs concerns to
3 protect it in an appropriate way.

4 So, I guess I'm saying we asked for a large case
5 management order that was global in nature. You gave one to
6 us de facto. It seems only limited to Nevada; therefore,
7 we're saying we're changing our direction a little bit. Why
8 don't you just limit it to Nevada, then?

9 >>JUDGE MOORE: DO any of you have any more
10 questions about how to proceed? Mr. Malsch?

11 >>MR. MALSCH: I just have a question of when we
12 should have the proposal and turnaround on the redraft of
13 the case management order. I just say that because we are
14 burning the midnight oil here.

15 >>JUDGE MOORE: We will, I think, instead of
16 giving you a firm date because we know what's on your
17 platters. Why don't you all just try to work it out and
18 what you can do reasonably and we will accept. If you have
19 a problem and you can't agree on that please come back to us
20 and we'll give you an arbitrary date.

21 >>MR. MALSCH: That's fine.

22 >>JUDGE KARLIN: We're probably not expecting it
23 before December 22nd. If possible and you can do it, great,
24 but more like a month from now.

25 >>JUDGE MOORE: Let them work it out. I have a

1 couple questions that have nothing to do with timing. I've
2 not been able from my research to get a satisfactory answer.
3 In your definition of classified information you use more
4 formerly restricted data. Now, restricted data is a form of
5 classified information. Formerly, if it has any meaning, it
6 was and has been declassified and no longer is, but there's
7 a provision in Section 2162 that's tacked on of 42 USC that
8 if it's defense related, it still shouldn't be released.

9 Could someone explain to me how you can have classified
10 information that's been declassified in this formerly
11 restricted data and yet it's still called classified
12 information?

13 >>MR. MALSCH: My understanding is that it's
14 classified under the Executive Order, but not restricted
15 data under the Atomic Energy Act.

16 >>JUDGE MOORE: It's classified as --?

17 >>MR. MALSCH: As national security information.

18 >>JUDGE MOORE: So, it's merely changed it's form?
19 Whereas it was restricted data it's now national security?

20 >>MS. BUPP: Your Honor, I think Mr. Stapleton if
21 he could actually address you might be able to answer this
22 question as well.

23 >>MR. STAPLETON: Your Honor, you have levels of
24 classified information: top secret, secret and confidential
25 and then you have categories of information, such as NSI and

1 RD. So, I agree with Mr. Malsch that the restricted data
2 and then you see it termed to formerly restricted data. It
3 does not mean that it's necessarily declassified or that it
4 is unclassified at this point.

5 A good example is nuclear weapons were considered RD
6 information. But it created a problem because we had
7 soldiers who were actually guarding those weapons and it was
8 extremely time restrictive to have those soldiers held to
9 the highest standard of clearance for RD.

10 So, there were classification decisions that made it
11 FRD so they could have a lower level of clearance in order
12 to protect it. So, it does not mean that it's no longer
13 classified. The FRD and RD are categories of
14 classification.

15 >>JUDGE KARLIN: So, the definition on page 2 of
16 classified information refers to any information that
17 qualifies as NSI, RD or FRD and then there's a clause which
18 has not been declassified. So, the way I read that that
19 final clause applies to formerly restricted data. So it's
20 formerly restricted data, but it still hasn't been
21 declassified yet?

22 >>MR. STAPLETON: That's correct, sir.

23 >>JUDGE KARLIN: Okay.

24 >>JUDGE MOORE: Well, the logic of it would be
25 given -- I'm often the last to catch on to these things. I

1 thank you for that explanation because it wasn't clear.

2 It's a bit clearer now.

3 >>MS. BUPP: I have a question. A couple hours
4 ago you mentioned the possibility of issuing a separate
5 order that would establish a final deadline by which time
6 potential parties would need to file a request for security
7 clearances.

8 Is that something the Board is still considering in
9 order to avoid delay say two years down the road when
10 somebody starts the clearance process which as we all know
11 is a long process?

12 >>JUDGE MOORE: If we're going to wrestle with the
13 problem at hand because it probably is something we can just
14 leave alone and handle on a case by case basis because I'm
15 sure the Department of Defense is fully capable of saying
16 these people have waited, they've sat on their hands. They
17 should have been in here a long time ago and they're out of
18 time.

19 Because one of the criteria, as you all know, for a new
20 or amended contention -- one that is filed outside the time
21 period originally set in the Notice of Hearing there are
22 other criteria that have to be met. One of those is good
23 cause for failing to file within the time and the day's
24 arguments could be raised at that time.

25 >>JUDGE KARLIN: Well, I think that I agree with

1 the proposition that let's work on it on a case by case
2 basis. If someone comes in and requests a security
3 clearance a year or a month or two years from now, the
4 parties, the DOE can challenge that. Whether we set a
5 deadline today or tomorrow for that is probably not very
6 helpful.

7 >>JUDGE MOORE: It's going to come up in exactly
8 the same context. You'll just merely be pointing you said
9 such and such an order, so it's out of time.

10 >>JUDGE KARLIN: I think it's correct to say that
11 if new classified information arose after December 22nd and
12 then under 2.309(F (2), one would not need to show good
13 cause in order to file a new or amended contention based
14 upon that new and material information.

15 So, I would put a footnote on that. Good cause is not
16 necessarily required. That's 2.309(c) requirement. It's
17 not applicable in newer material information arises under
18 2.309(f (2)).

19 >>JUDGE ROSENTHAL: I would agree with that. It
20 seems to me in all circumstances it's going to depend upon
21 the circumstances of the particular case, and even if we
22 fixed a deadline, that wouldn't preclude I wouldn't think
23 somebody coming in and saying that they ought to be relieved
24 in the particular case of that deadline because of the
25 circumstances of that case.

1 So, it seems to me it's best to leave it open and a
2 determination can be made on a case by case basis as to
3 whether the particular entity had justification for waiting
4 until a particular time in which to seek the clearance.

5 >>MR. POLONSKY: Your Honor, there is a practical
6 implication to this, though. And that is did the department
7 would not know if someone came to the NRC to request a
8 clearance. The NRC could process that application, require
9 that individual to pay the sum of money required to process
10 that application, wait the nine months or 10 months or 12
11 months and then only after that time would they then come
12 forward and say we want to look at the information.

13 And we would then not be in a position to say you don't
14 have a need to know potentially. You have a clearance. You
15 have a need to know. You are U.S. citizens, et cetera.

16 >>JUDGE ROSENTHAL: No communication between the
17 NRC staff and DOE that would enable DOE to request of the
18 NRC staff that it be advised when such an application was
19 filed?

20 >>MS. BUPP: We haven't been advising DOE
21 separately that any applications have been filed, but we do
22 have correspondence back and forth with the parties who've
23 requested applications and DOE and other parties are copied
24 on those.

25 >>JUDGE ROSENTHAL: So, DOE would know or should

1 know?

2 >>MS. BUPP: They should know, but at this point
3 in time because a lot of it is personal information, so we
4 don't copy DOE on everything because DOE is not entitled to
5 know people's places of birth and dates of birth. But we
6 could put something in place to let everyone know that an
7 application comes in.

8 >>JUDGE ROSENTHAL: The fact that somebody has
9 applied for a clearance, that isn't personal information, is
10 it?

11 >>MS. BUPP: No, but due to the personal nature --
12 due to the nature of the information that is sometimes
13 needed to process a clearance, some of the correspondence
14 does include personal information that is not appropriately
15 shared with everybody.

16 >>JUDGE ROSENTHAL: I understand they might not
17 want DOE to have access to some of the personal information
18 supplied by the applicant. But the fact that an application
19 has been filed by a particular entity, that's not something
20 that -- well, I gathered that's something that point of fact
21 that DOE becomes aware of by being copied by some
22 correspondence?

23 >>MS. BUPP: It's something they have become aware
24 of over time. It seems that they have become aware of these
25 requests as we've been processing them, but there is no

1 formal step where we say, "Okay, we've got a security
2 clearance request. Now let's notify DOE." Or in another
3 proceeding where we'd say let's notify the applicant.

4 >>JUDGE ROSENTHAL: If Mr. Polonsky suggests
5 there's a possible problem with there not knowing that a
6 particular entity has filed an application for clearance is
7 there anything that stands in the way of NRC formally
8 advising DOE when an application is filed?

9 >>MS. BUPP: I don't think so.

10 >>JUDGE MOORE: Mr. Polonsky, was the situation
11 you posit a party or a new entity?

12 >>MR. POLONSKY: I think it might be either, Your
13 Honor. The issue I would envision is there is no procedure
14 right now for DOE within a proceeding to raise a concern
15 until the PSO forwards the request for a need to know.

16 At that point then there is the opportunity for us to
17 say, "No, you don't have a need to know" or "Yes, you have a
18 need to know." But why waste that individual's time if the
19 outcome is going to be for us to say --

20 >>JUDGE KARLIN: Isn't that the point? We're
21 trying to restrict this case management order and protective
22 order to the three parties who are sitting in front of us
23 now and are concerned in a concrete way. I think we should
24 not be issuing an order that says everyone else in the world
25 has that 10 days to file a security application or they're

1 forever barred. Or 100 days.

2 I think this order should deal just with the concrete
3 controversy of the parties in front of us and if someone
4 else comes in some other time and asks for it then the chips
5 fall where they may and they may make a motion for access to
6 classified information or you make a motion to protect
7 classified information and you present it to the Board or
8 whatever and they deal with it on the merits at that time
9 and we don't try to prescribe now globally forever more
10 everyone else outside of this room you're barred at a
11 certain date.

12 >>JUDGE MOORE: And we have the additional problem
13 that we would have to make and provide for exceptions for
14 the eventualities if there is new classified information
15 because of license amendments that comes into the system.
16 That may trigger for the first time someone wanting to be
17 involved on that aspect. And you can't anticipate that.

18 If we put an order out that says by the first of the
19 year you need to apply for an application whether you're
20 going to need one or not. That is troubling because that's
21 the only way that you can cover the situation where
22 something new arises that was unforeseen and someone who had
23 not previously intended to be involved with such an issue
24 became involved.

25 So, for the time being let's leave it. We'll deal with

1 this problem and you all know how to file motions and reach
2 us should a problem arise. And we'll deal with other
3 problems as they arise.

4 >>JUDGE ROSENTHAL: Beyond that, it seems to me,
5 Mr. Polonsky, that your concern would be abated if the NRC
6 staff were to inform you of receipt of an application for a
7 clearance. Apparently, staff is prepared to do that.

8 >>MS. BUPP: It does create a problem for the
9 staff if we were to receive an application in say three
10 years someone comes to us and says, "We want a security
11 clearance."

12 The proceeding has been ongoing for three years. I'm
13 not sure that we're empowered to say, "No, we won't do that
14 clearance for you. You've been sitting on your hands for so
15 long." Do we file a motion before the Board?

16 >>JUDGE KARLIN: Sure, file a motion before the
17 Board if you think it's a problem.

18 >>JUDGE ROSENTHAL: I don't think anything that
19 we've indicated precludes you from seeking relief from the
20 Board. At this point it was simply the only thing I was
21 addressing was the matter of DOE being informed when an
22 application for a security clearance is received. It would
23 then seem to me if there's any problem with that and I
24 thought you had indicated that was something that could be
25 done.

1 >>JUDGE MOORE: If there are no other matters you
2 wish to bring -- Mr. Polonsky? No other matters you wish to
3 bring before us, we will adjourn. I thank you all for your
4 participation.

5 As you can see from our questions, we had some
6 difficulties with the draft and didn't have satisfactory
7 answers and that's why we asked you to be here and I think
8 we've moved the matter to a reasonable conclusion. So, we
9 stand adjourned. Thank you.

10 (Whereupon, the foregoing matter was
11 concluded at 3:32 p.m.)

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1 This is to certify that the attached proceedings before the
2 United States Nuclear Regulatory Commission in the matter
3 of:

4 U.S. Department of Energy Pre-License Application
5 Presiding Officer (PAPO) Board Case Management Conference

6 PAPO-00

7 NRC Two White Flint North, 11545 Rockville Pike,
8 Room T-3B45, Rockville, MD

9 were held as herein appears, and that this is the original
10 transcript thereof for the file of the United States Nuclear
11 Regulatory Commission take and transcribed by me or under
12 the direction of the court reporting company, and that the
13 transcript is a true and accurate record of the foregoing
14 proceedings.

15
16 Lorraine Carter, RPR

17 Official Reporter

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