

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 (PAP0) Board) Docket No. PAP0-00
Case Management Conference) ASLBP No. 04-829-01-PAP0
December 2, 2008

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, so the next step is to hear back from NRC.

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 checks 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 likes
14 of it. 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 step in any request for access. It has to show that
19 he has the expertise to review the documents in question
20 that's being requested. We would do that promptly upon his
21 obtained required clearance and our identifying what
22 documents we 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 might be in the matter of his credentials?

1 >>MR. MALSCH: No, although if I thought that it
2 would expedite things if I gave them his CV now or within a
3 few days, I'd be more than willing to do that.

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

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

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

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

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

1 >>JUDGE MOORE: And that process, if I remember
2 all the papers you filed correctly, is assuming they get all
3 their ducks in a row and all the papers filed will take
4 about a year?

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

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

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

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

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

25 >>JUDGE KARLIN: They've called?

1 >>MS. BUPP: They've called and e-mailed and the
2 project manager has responded and asked for information
3 necessary for them to be entered into the filing process
4 that will allow them to fill out the necessary forms online.

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

8 >>MS. BUPP: Yes.

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

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

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

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

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

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

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

1 >>MS. BUPP: Five individuals have submitted. The
2 one has had his clearance granted and we're waiting for him
3 to fill out the last Form 312?

4 >>JUDGE MOORE: Did you say five?

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

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

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

9 >>JUDGE KARLIN: Have you confirmed that?

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

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

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

16 >>JUDGE KARLIN: And the other four?

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

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

1 >>MS. BUPP: Only the one individual who only
2 needs to return the one form.

3 >>JUDGE KARLIN: Okay. Thank you.

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

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

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

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

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

1 and only they have access to those materials?

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

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

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

6 >>JUDGE MOORE: DOE?

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

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

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

1 promise that we'll buy a separate safe to sit next to the
2 one --

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

8 >>MS. BUPP: That's what's in the staff's hands
9 right now.

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

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

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

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

25 >>JUDGE MOORE: That was a compound question. Yes

1 to DOE or yes to NRC?

2 >>MR. MALSCH: Well, very early on I had some
3 discussions with DOE people about using their facility, but
4 frankly from our standpoint, whichever is more convenient
5 would be fine with us.

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

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

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

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

1 >>JUDGE KARLIN: Well, you'll have to go through
2 the need to know and we'll get into this a bit later, but
3 that's part of the question. The protective order seems to
4 say that in order to show a need to know you also need to
5 show the legal or technical competence and expertise to
6 understand what you're asking for. And at this point does
7 DOE have any doubt that there is a need to know and that
8 they would meet the technical competency requirements?
9 Mr. Polonsky?

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

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

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

23 I would also like to address something Judge Moore
24 seems to be concerned about this segregation of work product
25 notes. We had worked out a provision in the protective

1 order itself, not the CMO, in Paragraph 9 where we outlined
2 how an intervenor can come in, take notes and assuming they
3 are classified -- well, assuming they're not classified, a
4 derivative classifier from, in this case, the Department of
5 Energy to a DOE facility would look at those notes and
6 determine whether they are classified.

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

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

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

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

1 apply for security clearances? DOE?

2 >>MR. POLONSKY: I'd like to answer your question
3 by saying we all recognize that there is a problem with
4 having a 14 day time line that is triggered to the entry of
5 this order. Originally when we were negotiating this we had
6 thrown around hard dates like November 22nd.

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

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

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

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

24 >>MR. POLONSKY: Perhaps there was some confusion
25 in not using the term "potential party", but defining the

1 term "party". We did so in the case management order, so
2 the term "party" as defined in the CMO was not intended to
3 be used broadly outside of the context of the CMO.

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

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

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

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

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

25 >>JUDGE KARLIN: Well, let's say we wait a month

1 and issue it on January 1st. Now, isn't Category 5 still
2 excluded?

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

4 >>JUDGE KARLIN: Is that intentional?

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

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

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

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

25 And so, Subpart I, which defines in general access to

1 classified information in an adjudicatory proceeding does
2 limit access to people who have been admitted as a parties.
3 We didn't intend to limit people from applying for security
4 clearances.

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

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

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

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

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

23 >>MR. POLONSKY: Your Honor, our understanding --
24 and maybe it's incorrect -- but our understanding is that
25 only Nevada was interested in getting access to classified

1 information for purposes of preparing contentions and that
2 Clark County and Nye County were interested in seeing the
3 information, but were not expecting to prepare contentions
4 on that information. So, we were bifurcating our analysis
5 of the fact that they were asking at the same time.

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

9 >>MR. POLONSKY: Yes.

10 >>JUDGE MOORE: Including Nye County and Clark
11 County from exercising that regulatory prerogative By This
12 definition and your proposed correction or fix?

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

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

23 >>JUDGE KARLIN: Let's go back. I'd like to
24 address this question to Ms. Bupp actually. This specific
25 question we ask, B1A exclusion. Does this provision exclude

1 everyone except the State of Nevada, affected units of local
2 government and the affected Indian tribes from being able --
3 eligible to apply for security clearances?

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

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

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

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

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

1 >>MR. MALSCH: Well, I think we either have to
2 amend the definitions so that the qualifications don't
3 appear or if we want them in there. I think the affect is
4 you're going to have to set a date that's a reasonable
5 period of time after parties are admitted because under
6 L5 you're going to insist that the party be admitted to the
7 proceeding then it follows that you can't set a deadline,
8 for example, requesting documents until after they've been
9 admitted.

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

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

21 We also recognize that this is classified information
22 and that the states that would be participating and the
23 counties that would be participating are governmental
24 entities that are representing their constituents.

25 And so, the fact that the State of California and the

1 State of Nevada is already actively participating in the
2 proceeding should be used by the Board in it's discretion to
3 determine whether someone else ought to get access or at
4 least the timing of that person's access to the extent they
5 are already represented.

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

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

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

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

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

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

24 So, Nye county and Clark County and Lincoln County and
25 the other counties, AULG's, who have all essentially

1 participated, whether saying they have no comments or not
2 commenting at all. We could limit this CMO and PO to them
3 and to the extent hypothetically we do get an individual or
4 an environmental who has not come forward yet, who was not
5 participated in the LSN and somehow files a petition to
6 intervene and is admitted as a party, then some time in 2009
7 we could revisit whether those people could apply for
8 security clearances and get access to the TST.

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

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

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

25 I would suggest that we actually tie it to the filing

1 of petitions to intervene. By the time someone is serious
2 enough about participating to file a petition to intervene
3 they also should have a good idea as to whether or not they
4 would like security clearance.

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

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

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

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

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

1 How do you deal with that?

2 >>MS. BUPP: I think as a first step the Board
3 issuing an order and giving a date is an excellent idea. As
4 the second step, you could work into the Board that -- work
5 into the order a provision by which they would have to file
6 a motion seeking relief of some sort to file asking for
7 permission to request a security clearance.

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

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

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

22 >>JUDGE KARLIN: I think you probably already
23 answered this, but perhaps Ms. Bupp you can help us with
24 this question B1B, applications within 14 days. The
25 provision that we're talking about says if you want to get a

1 security clearance you have to be a party, which we've
2 already addressed and are going to fix that and you have to
3 submit your application for security clearance within 14
4 days.

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

11 >>MS. BUPP: No, Your Honor. There is correct,
12 Your Honor. There have been none.

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

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

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

1 after that point.

2 Do you have any thoughts on whether there's a need to
3 issue this order before contentions are filed? Perhaps
4 Mr. Polonsky could address that or Mr. Shebelskie.

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

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

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

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

1 then you're dead in the water?

2 >>MR. POLONSKY: We will not likely be taking that
3 position, Your Honor. We're reasonable. We obviously tried
4 to get this entered earlier so that there wouldn't be
5 bifurcated contentions on classified and non-classified.
6 That wasn't the intent. But clearly, events have passed and
7 that's water under the bridge. We have to move forward.
8 But still we would urge the PAPO board to issue a CMO sooner
9 rather than later.

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

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

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

1 it wants to review in redacted form."

2 Assume that we issue case management order on
3 December 3rd. The questions then become: Is Nevada the only
4 entity party that has requested a security clearance able to
5 request a redacted document? Mr. Polonsky?

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

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

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

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

21 >>MR. POLONSKY: No, Your Honor, for a number of
22 reasons.

23 >>JUDGE MOORE: Please state them.

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

25 >>JUDGE MOORE: And I made the mistake of pulling

1 out the classified information and looking at it. And so, I
2 am as familiar as a lawyer dealing with highly technical
3 matter, so we have some notion of what you're dealing with.

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

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

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

24 >>JUDGE MOORE: Did you perchance deal with one of
25 your classifiers who would be involved in doing the

1 redaction? And just to give you an offhand example, many
2 years ago when I was in the Department of Justice we used
3 get information from the FBI that had been redacted and it
4 would be a black page with one word on it.

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

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

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

14 >>MR. POLONSKY: A material portion of the
15 technical support document sections would have to be blacked
16 out.

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

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

1 >>JUDGE ROSENTHAL: To the extent that we're
2 dealing with experts who assume would not be able to obtain
3 the clearance for another six months or a year, how do we
4 deal with them if redaction is not a viable option?

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

6 >>JUDGE ROSENTHAL: With what consequence?

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

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

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

23 And the fact that it would just be highly disruptive
24 for the Naval Nuclear Propulsion Program to redact all that
25 information to a high detriment to them and low benefit to

1 potential receiving it.

2 >>JUDGE ROSENTHAL: So, if I understand you
3 correctly, you have two prongs. The answer to the first one
4 is sort of latches that should have been seeking clearance
5 some time ago. And the second one is probably is a
6 practical matter and it doesn't make any difference because
7 they're not seeking this information -- would not be seeking
8 this information in order to facilitate the filing of
9 contentions and therefore the fact that they would not get
10 this access any time soon would not disadvantage them. Is
11 that basically what you're telling us?

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

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

23 >>MR. POLONSKY: The suite of documents is larger
24 than a small set. What has been docketed is the technical
25 support document which is that classified portion of the LA

1 and supporting references. There are 12 supporting
2 references. My understanding is all of those documents
3 together are approximately 2,200 pages.

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

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

13 >>JUDGE KARLIN: So, by getting a security
14 clearance they're immediately disqualified from ever
15 requesting a redacted document?

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

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

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

23 >>JUDGE KARLIN: Do you agree with that,
24 Mr. Malsch?

25 >>MR. MALSCHE: We never imagined that we could

1 decide whether or not to file a contention based upon giving
2 a redacted document. We always assumed we had to review
3 this whole document.

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

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

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

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

21 >>JUDGE ROSENTHAL: I think it would definitely
22 would.

23 >>JUDGE KARLIN: Well, that answers my question
24 that Nevada is not qualified to request a redacted document
25 at this moment and Nye County is the only one who might even

1 be possible under this provision to request a redacted
2 document ever.

3 >>MR. POLONSKY: Can we clarify? I think it's
4 Clark County. Nye County is on right on the verge of having
5 someone with a clearance.

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

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

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

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

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

1 What happens downstream under 10 CFR 2.906 and all the
2 other notice provisions that there's an obligation not to
3 use classified information if there's any feasible way
4 around it and someone wants to avoid in the proceeding using
5 classified information by using a redacted version instead?
6 That's not covered by this because it's specifically limited
7 to contentions.

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

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

17 >>JUDGE MOORE: Is that of the protective order or
18 of the proposed case management order?

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

1 completely as possible.

2 And then B and C go forth where the presiding officer
3 looks at the document that's unclassified, looks at the
4 classified document and says does this truly capture the
5 nature of the classified information?

6 And in that way without redaction allows the parties to
7 continue in the proceeding to deal with this unclassified
8 summary of the classified information.

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

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

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

25 >>JUDGE MOORE: And the problem with just going

1 ahead as we did in other phases of the pre-license
2 application proceeding and having things redacted is a
3 volume of material -- classified material that's involved
4 here that would have to be redacted.

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

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

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

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

1 there.

2 Obviously, we have no interest in having very
3 complicated classified hearings if we can avoid them,
4 although frankly, I think while it might be possible to file
5 an unclassified contention I'm somewhat doubtful we can
6 actually proceed and litigate the unclassified contention on
7 a completely unclassified basis. We thought we would just
8 have take it from there.

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

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

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

21 >>MR. MALSCH: I guess that's not clear from the
22 text of the order.

23 >>JUDGE KARLIN: I'm wondering. That's why we're
24 concerned about his expertise and area of competency. DOE
25 may say, "Well, Dr. Bell is only competent in this area and

1 therefore we're only going to give you this classified
2 information related to that area."

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

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

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

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

24 >>MR. POLONSKY: Your Honor, we specifically wrote
25 in technical "or" legal competency contemplating that

1 individuals who are counsel for a petitioner, such as
2 Mr. Malsch, would have -- that we would not challenge, at
3 least for Mr. Malsch, his need to know the classified
4 information. So, even without an expert who has clearance
5 he would have technical competency to prepare a classified
6 contention.

7 >>JUDGE ROSENTHAL: So, he would have access to
8 it, but he could not share the information he obtained with
9 his expert?

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

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

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

24 >>MR. POLONSKY: Yes, that's the way it would play
25 out, Your Honor, and it's no different for any other

1 individual who has a limited need to know.

2 >>JUDGE MOORE: So, in your writing of Part 4,
3 Second Paragraph D, the definition of "need to know" that
4 demonstrates technical or legal competency, legal competency
5 is competency to draft a contention and know what
6 information would be necessary in drafting a contention? Is
7 that what legal competency means there?

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

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

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

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

23 >>MS. BUPP: Yes, that it would be almost a
24 two-person team; that you would need to have technical or
25 legal competency, but one alone is likely not enough,

1 although technical competency might be enough if you were
2 proceeding pro se.

3 >>JUDGE KARLIN: So, you're saying that the lawyer
4 doesn't get to look at it unless and until he or she has a
5 technical expert in that field at his side? Are you
6 disagreeing with DOE?

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

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

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

25 >>MS. BUPP: If it's a document that originated

1 with DOE pursuant to Subpart I we would defer to DOE.

2 >>JUDGE KARLIN: Has any of this information
3 originated with NRC.

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

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

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

13 >>JUDGE ROSENTHAL: You're suggesting that that
14 would be difficult?

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

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

25 >>MS. BUPP: Yes. As the case management order is

1 written it is the originating agency who makes the need to
2 know notification.

3 >>JUDGE MOORE: What sense does it have to have a
4 proposed case management order in which the proposers have
5 different views of the second provision that you put in
6 front of it?

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

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

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

14 For this proceeding it appears that now and for the
15 foreseeable future all of the information will be with the
16 DOE as the originating agency.

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

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

1 >>JUDGE KARLIN: Let me ask this question.
2 Mr. Polonsky pointed out the clause that we're reviewing
3 says "demonstrates technical or legal competency" and
4 Mr. Polonsky pointed out that the "or" in there is
5 intentional and it means one or the other; therefore,
6 despite what you say here and now you've signed up to a
7 provision that says "or", so that doesn't require technical
8 competency, legal or technical. Do you want it to be both
9 legal and technical competency? You didn't say that.

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

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

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

24 >>JUDGE MOORE: Before we move on, one other
25 question. In regard to the application of Part 4, the need

1 to know provision. Who decides? The material goes to --
2 does it go to DOE from Nevada and Nevada decides who the
3 need to know question? Is that the way it works?

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

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

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

11 >>JUDGE KARLIN: What are the numbers?

12 >>MR. POLONSKY: I'm sorry, page 10, Paragraph 4.
13 It segues to the next page. DSO will verify clearances to
14 the originating agency and the originating agency shall have
15 10 days after receipt to make a need to know.

16 >>JUDGE MOORE: Does that need to know
17 determination include then the legal or technical competency
18 element?

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

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

23 >>MR. POLONSKY: Yes.

24 >>JUDGE KARLIN: And presumably if someone
25 disagreed with that determination they could challenge it

1 and bring it before this Board at which point DOE might very
2 well challenge whether this Board has the jurisdiction and
3 authority to look at that issue or to overrule that issue.

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

8 >>MR. POLONSKY: Yes, I would. We did write those
9 provisions into the CMO for that reason.

10 >>JUDGE KARLIN: Mr. Malsch, do you agree with
11 that approach?

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

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

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

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

1 work itself out between DOD and DOE?

2 >>MR. POLONSKY: My understanding is that the
3 Naval Nuclear Propulsion Program wears two hats and sits
4 within two agencies, the Department of Defense and the
5 Department of Energy. For purposes of being an applicant
6 before the NRC it is the Department of Energy.

7 >>JUDGE MOORE: You said "applicant". How about
8 for purposes of originating agencies for classified
9 information?

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

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

21 If and when we call upon you or whoever to rework this
22 that problem I think has to be solved and it sounds like
23 there is a solution that it doesn't have to be a party. You
24 want to be a party by filing a contention and the contention
25 is a classified contention. So, how can you access the

1 document if you're not a party yet? Do you see that
2 problem, Ms. Bupp?

3 >>MS. BUPP: I do see that problem, but with
4 regard to giving actual access to safeguarded information
5 there's the parallel problem that Subpart I limits access to
6 classified information in adjudicatory proceedings to
7 parties.

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

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

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

25 Are you saying per se, a person is automatically

1 excluded from filing a contention because they're not a
2 party in the first place?

3 >>MS. BUPP: It may appear to be so from reading
4 Subpart I, but assuming that wasn't the Commission's
5 intention we would have to write around that. I was just
6 phrasing that the Commission's regulations currently only
7 speak to parties having access to classified information.

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

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

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

25 >>JUDGE KARLIN: Right. I think that might be an

1 approach.

2 >>JUDGE MOORE: The classified material that was
3 filed with the application as opposed to the several
4 thousands of pages of documents behind that classified
5 information. It only refers to sections and the classified
6 information that is filed with the application there are
7 just four sections. They are not broken down into
8 subsections.

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

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

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

25 >>JUDGE MOORE: When you look at the nonclassified

1 portions of the application that refer to the classified
2 portions there are descriptive terms that get you through
3 the section. For example, in the application 1.5.1.4.1.1,
4 which is nothing new, but it's entitled "Physical
5 Characteristics of Naval SNF (Spent Nuclear Fuel)".

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

14 >>MR. POLONSKY: Correct. The reference to the
15 TST is the classified.

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

18 >>MR. POLONSKY: The transmittal letter that
19 submitted this application on the docket says that the Naval
20 Nuclear Propulsion Program technical support document that
21 the DOE is transmitting under separate cover. It is 214
22 pages. The classified portion of the license application is
23 214 pages and then there's approximately 2,000 pages in the
24 12 supporting documents.

25 >>JUDGE MOORE: Now, because the title of this is

1 "Enrichment in Chemical Composition" and from what it
2 generally states here under the scheme you have for going
3 back to redaction, I could say I want to see the redacted
4 version of the documents that deal with enrichment and
5 chemical composition.

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

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

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

23 Mr. Polonsky, that may give a new definition to
24 skeletal. It's so cryptic as to be impossible to know
25 what's in those -- in any one of the 12 documents to know

1 how you could ask for that for a redaction.

2 >>MR. POLONSKY: One moment, Your Honor. Your
3 Honor, we think the list provides those 12 base background
4 evaluation and analysis reports that are supporting those
5 sections. If the Board wanted us to lay out Section 1.5.1.4
6 of the DSD references the following BEARs, we could provide
7 that as unclassified information.

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

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

20 I would want the comfort of seeing what a redacted
21 version that doesn't contain any classified information has
22 in it so that I could write my summary safely. Or is the
23 way the system is set up that Mr. Malsch writes such a
24 summary, provides it to you as if it were classified. You
25 run it through the classified process and then give it back

1 to him with certain things excised out of it and then he
2 knows it's okay to use that; that that is now a
3 nonclassified summary? Is that the way the process has to
4 work?

5 >>JUDGE KARLIN: Is that a multiple choice
6 question?

7 >>MR. POLONSKY: That's for question one through
8 eight.

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

12 (Whereupon, a break was taken)

13 >>JUDGE MOORE: Mr. Polonsky, you have a very
14 short answer for me.

15 >>MR. POLONSKY: Yes.

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

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

24 The answer is yes, we will work together with any party
25 that has such a contention. I'd like to answer it in two

1 phases. The first is we have an initial phase where we
2 would have a petitioner coming in to prepare a contention.
3 And clearly as we've written in the CMO there's a provision
4 where they can identify a short number of pages that they
5 want to hone in on.

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

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

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

1 If you cannot do that then you end up with this
2 unclassified summary or an attempt to prepare an
3 unclassified summary of the classified information. And
4 again, and we would work reasonably to assist a party to do
5 that.

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

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

17 So, from a practical perspective, we don't see
18 redaction of the BEARs and all of those documents as being
19 practical in order to meet a contention submission
20 requirement.

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

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

25 >>JUDGE KARLIN: Why should that be so? We've

1 already gone through several case management orders in this
2 proceeding for DOE and others, but DOE mainly was required
3 to redact hundreds if not thousands of pages of documents
4 and provide them. Have you not done so? Why should
5 redaction of this stuff -- 2,000 pages doesn't sound like
6 very much.

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

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

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

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

20 >>JUDGE KARLIN: I remember on case management
21 order number 2 we provided a period something like 45 days
22 within which DOE after it's certification was duty bound to
23 provide redacted copies of all the relevant documents and
24 then when we revised the second case management order we
25 reduced that period down to zero because there had been -- a

1 year or so of time had elapsed. But the original period was
2 like 45 days. Now that's not NNPI. That's not classified
3 information, but that is a redaction process that you signed
4 up to before. It was much shorter than 18 months.

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

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

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

23 >>MR. SHEBELSKIE: Well, Your Honor, I would make
24 comment on that based on our experience with the other
25 documents. The Naval program does not have a cadre of

1 dedicated personnel whose only job is to sit there and
2 redact classified or other security documents.

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

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

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

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

15 >>MR. SHEBELSKIE: There are many competing
16 important tasks that have to be accommodated in the
17 mission's budget.

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

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

1 >>MR. POLONSKY: The individual is seeking the
2 redacted information while they are waiting for their
3 security clearance. That's how we viewed this as posed by
4 the Commission. That was the dilemma the Commission was
5 grappling with and we thought delegated down to the PAPO
6 Board to resolve.

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

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

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

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

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

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

4 >>JUDGE KARLIN: Yes, okay. You were suggesting
5 that if you were to redact all 2,000 pages that task would
6 take 18 months? Correct?

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

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

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

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

25 >>JUDGE MOORE: Plus, there's the added problem is

1 they're not being able to zero in on those documents. It's
2 almost a chicken and egg because of the way the application
3 doesn't zero in. It just gives broad sections and then
4 there's underlying documents that have a very skeletal
5 title. It would be almost impossible.

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

14 >>MR. POLONSKY: We agree that it has great
15 practical implementation problems.

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

24 I guess it's on page 8 where you say you may -- a party
25 may request originating to redact a small portion in order

1 to allow the party to submit a contention. That's the only
2 redaction clause you're concerned about at this point. Is
3 this correct?

4 >>MR. MALSCH: That is correct.

5 >>JUDGE KARLIN: So all the other redaction
6 provisions are irrelevant to you essentially; is that
7 correct?

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

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

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

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

1 significant leap.

2 It's obviously an assumption you made, but it works for
3 Nevada because of Nevada is in fact in that boat and has
4 already overcome that hurdle. But for everyone else in the
5 world it may be a serious problem.

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

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

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

24 >>JUDGE KARLIN: If you've got a security
25 clearance and if you've got everything else, what

1 disagreement could occur with regard -- you'd get the
2 document, wouldn't you?

3 >>MR. MALSCH: Presumably the only disagreement we
4 can imagine would be over the need to know, which would be
5 over hypothetically whether Mr. Bell can see all of the
6 technical support document Dr. Bell, or just part of it.
7 We're hopeful that issue will not arise.

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

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

15 >>JUDGE KARLIN: Is that basically right,
16 Mr. Polonsky?

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

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

1 case management order. It gets shuttled to the originator,
2 which in every instance will be DOE and they will decide the
3 need to know.

4 What is the authority of the Presiding Officer Board or
5 the Commission in such matters? DOE?

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

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

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

20 But we have provided some provisions in here for a
21 party to bring to the Board a dispute if one arises. I
22 thought we had that in here. This is B1 on page 11. If a
23 requestor has been denied access to classified information,
24 believes that a decision on whether to grant access has been
25 unreasonably delayed or believes that information claimed to

1 be classified or incapable of redaction is not so they can
2 file a motion. So, --

3 >>JUDGE MOORE: I just want to understand DOEs
4 position is that an NRC adjudication when they're the
5 originator of classified information, the question of need
6 to know is solely and uniquely and exclusively a decision of
7 DOEs until that is appealed and the Commission or the Board
8 and then the Commission decides such an issue?

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

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

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

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

20 >>MR. MALSCH: I agree with that. Just to be
21 specific we had always thought that reserving on the
22 question of access included reserving on the question of
23 need to know because we thought that was always part of the
24 access determination.

25 >>JUDGE KARLIN: It just wasn't clear from the

1 decision, CLI-08-21. I think this makes it a little more
2 clear that everyone is seeing that that's a reserved, as it
3 were, question.

4 >>JUDGE MOORE: Staff, that purports with your
5 view?

6 >>MS. BUPP: Of the proposed case management
7 order? Yes.

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

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

14 >>JUDGE MOORE: Or we would refer to the
15 Commission?

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

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

22 >>MR. POLONSKY: We wrote this in a way that would
23 preserve the right of the Department of Energy to raise the
24 issue that this Board, if a motion were brought to it,
25 didn't have jurisdiction to rule on the issue. If it were

1 then appealed to the Commission we could take a similar
2 position there.

3 >>JUDGE KARLIN: I think I agree with that. Take
4 a look at the Regs, H2 -- 2.905(h)(2). We've been focusing
5 on that a lot and it basically says, "Access to restricted
6 data which has been received by the Commission from another
7 government agency will not be granted by the Commission if
8 the originating agency determines", et cetera, et cetera.
9 That's the question we're talking about.

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

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

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

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

1 other times.

2 >>JUDGE MOORE: Let's then turn to where we go
3 from here. How do we do it? I think that there may be
4 merit in writing a case management order and protective
5 order and obviously a declaration of nondisclosure that
6 deals exclusively as Judge Karlin mentioned before, Nevada,
7 DOE and NRC. And whatever else happens it will happen in
8 due course and we'll deal with it then.

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

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

22 I think it makes sense since you're the interested
23 parties that you draft one and give it back to us and it
24 should be very short because now most of this goes by the
25 Boards. We're not worried about anybody and you can name

1 them: DOE, State of Nevada, and the NRC staff. It applies
2 to nobody else.

3 >>JUDGE ROSENTHAL: It seems to me that that has a
4 considerable virtue in that at this juncture we have no idea
5 what problems, if any, will actually arise with respect to
6 either the counties or any other prospective party.

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

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

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

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

1 Then the dispute over what competence and how many
2 people have to have the competence that the staff has goes
3 away for purposes of this information and can be left for
4 another day.

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

11 It's an independent question of the timing of when
12 contentions will be filed, answers will be filed, replies
13 filed on contentions dealing with classified information.

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

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

25 >>MR. POLONSKY: Thank you for speaking up for me,

1 Your Honor.

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

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

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

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

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

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

24 >>JUDGE MOORE: Well, tell me if we're wrong. Do
25 we need it at this point? Do you anticipate that the first

1 depositions are going to be filed -- someone's going to want
2 to be taking depositions on involving classified information
3 prior to replies being filed on contentions?

4 >>MR. POLONSKY: No, but to the extent that it's
5 already in the document and has language that we've agreed
6 upon it would seem useful to leave it in rather than rehash
7 it at a later point.

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

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

21 I think you did a decent crack at it, but as we read it
22 I came away with the impression that this really -- Nevada
23 is the only entity which actually qualifies to get anything
24 under this structure and this case management order as
25 written. So, why not just write it that way and make that

1 clear and make it also clear that it does not apply and does
2 not bind or prohibit any other entity from seeking
3 classified information in some separate way.

4 But this order only deals with the immediate concrete
5 dispute before the parties now, which is Nevada's request to
6 get access to classified information and DOE's concerns to
7 protect it in an appropriate way.

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

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

15 >>MR. MALSCH: I just have a question of when we
16 should have the proposal and turnaround on the redraft of
17 the case management order. I just say that because we are
18 burning the midnight oil here.

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

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

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

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

13 Could someone explain to me how you can have classified
14 information that's been declassified in this formerly
15 restricted data and yet it's still called classified
16 information?

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

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

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

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

24 >>MS. BUPP: Your Honor, I think Mr. Stapleton if
25 he could actually address you might be able to answer this

1 question as well.

2 >>MR. STAPLETON: Your Honor, you have levels of
3 classified information: top secret, secret and confidential
4 and then you have categories of information, such as NSI and
5 RD. So, I agree with Mr. Malsch that the restricted data
6 and then you see it termed to formerly restricted data. It
7 does not mean that it's necessarily declassified or that it
8 is unclassified at this point.

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

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

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

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

2 >>JUDGE KARLIN: Okay.

3 >>JUDGE MOORE: Well, the logic of it would be
4 given -- I'm often the last to catch on to these things. I
5 thank you for that explanation because it wasn't clear.
6 It's a bit clearer now.

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

12 Is that something the Board is still considering in
13 order to avoid delay say two years down the road when
14 somebody starts the clearance process which as we all know
15 is a long process?

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

23 Because one of the criteria, as you all know, for a new
24 or amended contention -- one that is filed outside the time
25 period originally set in the Notice of Hearing there are

1 other criteria that have to be met. One of those is good
2 cause for failing to file within the time and the day's
3 arguments could be raised at that time.

4 >>JUDGE KARLIN: Well, I think that I agree with
5 the proposition that let's work on it on a case by case
6 basis. If someone comes in and requests a security
7 clearance a year or a month or two years from now, the
8 parties, the DOE can challenge that. Whether we set a
9 deadline today or tomorrow for that is probably not very
10 helpful.

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

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

19 So, I would put a footnote on that. Good cause is not
20 necessarily required. That's 2.309(c) requirement. It's
21 not applicable in newer material information arises under
22 2.309(f (2)).

23 >>JUDGE ROSENTHAL: I would agree with that. It
24 seems to me in all circumstances it's going to depend upon
25 the circumstances of the particular case, and even if we

1 fixed a deadline, that wouldn't preclude I wouldn't think
2 somebody coming in and saying that they ought to be relieved
3 in the particular case of that deadline because of the
4 circumstances of that case.

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

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

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

20 >>JUDGE ROSENTHAL: No communication between the
21 NRC staff and DOE that would enable DOE to request of the
22 NRC staff that it be advised when such an application was
23 filed?

24 >>MS. BUPP: We haven't been advising DOE
25 separately that any applications have been filed, but we do

1 have correspondence back and forth with the parties who've
2 requested applications and DOE and other parties are copied
3 on those.

4 >>JUDGE ROSENTHAL: So, DOE would know or should
5 know?

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

12 >>JUDGE ROSENTHAL: The fact that somebody has
13 applied for a clearance, that isn't personal information, is
14 it?

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

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

1 correspondence?

2 >>MS. BUPP: It's something they have become aware
3 of over time. It seems that they have become aware of these
4 requests as we've been processing them, but there is no
5 formal step where we say, "Okay, we've got a security
6 clearance request. Now let's notify DOE." Or in another
7 proceeding where we'd say let's notify the applicant.

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

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

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

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

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

24 >>JUDGE KARLIN: Isn't that the point? We're
25 trying to restrict this case management order and protective

1 order to the three parties who are sitting in front of us
2 now and are concerned in a concrete way. I think we should
3 not be issuing an order that says everyone else in the world
4 has that 10 days to file a security application or they're
5 forever barred. Or 100 days.

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

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

22 If we put an order out that says by the first of the
23 year you need to apply for an application whether you're
24 going to need one or not. That is troubling because that's
25 the only way that you can cover the situation where

1 something new arises that was unforeseen and someone who had
2 not previously intended to be involved with such an issue
3 became involved.

4 So, for the time being let's leave it. We'll deal with
5 this problem and you all know how to file motions and reach
6 us should a problem arise. And we'll deal with other
7 problems as they arise.

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

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

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

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

22 >>JUDGE ROSENTHAL: I don't think anything that
23 we've indicated precludes you from seeking relief from the
24 Board. At this point it was simply the only thing I was
25 addressing was the matter of DOE being informed when an

1 application for a security clearance is received. It would
2 then seem to me if there's any problem with that and I
3 thought you had indicated that was something that could be
4 done.

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

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

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

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CERTIFICATE OF REPORTER

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of: U.S. Department of Energy Pre-License Application Presiding Officer (PAPO) Board, Case Management Conference PAPO-00 NRC Two White Flint North, 11545 Rockville Pike, Room T-3B45, Rockville, MD were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission reported and transcribed by Brenda Jamerson and under the direction of Caption Reporters Inc. and that the transcript is a true and accurate record of the foregoing proceedings.

Lorraine Carter, RPR
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