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In the Matter of:

Horse Heaven Wind Farm

VS

VOL 1 HORSE HEAVEN WIND FARM

March 10, 2023

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ENERGY FACILITY SITE EVALUATION COUNCIL

Horse Heaven Wind Farm

Pre-Hearing Conference

March 10, 2023

held via Teams Video Conferencing

Reported by: ANN MARIE G. ALLISON, CCR
Certified Court Reporter #3375

A P P E A R A N C E S

TIM MCMAHAN, Stoel Rives

CRYSTAL CHASE, Stoel Rives

EMILY SCHIMELPFENIG, Stoel Rives

KENNETH HARPER, Benton County

AZIZA FOSTER, Benton County

JEFF ALTMAN, Benton County DPA

JON THOMPSON, Assistant Attorney General

SARAH REYNEVELD, Counsel for the Environment

ETHAN JONES, Yakama Nation

SHONA VOELCKERS, Yakama Nation

RICHARD ARAMBURU, Tri-Cities C.A.R.E.S.

ANDREA GRANTHAM, EFSEC

LISA MASENGALE, EFSEC

JOAN OWENS, EFSEC

SONJA SKAVLAND, EFSEC

SARA RANDOLF, EFSEC

1 BE IT REMEMBERED that on Friday, March 10,
2 2023, 9:00 a.m., the following proceedings were held before
3 Ann Marie Allison, Certified Court Reporter residing in
4 Pierce County, Washington.

5 (All parties present via Teams)
6

7 >>>>> <<<<<<
8

9 JUDGE TOREM: Good morning, everyone. This
10 is Judge Adam Torem. I'm an administrative law judge
11 appointed by the Energy Facility Site Evaluation Council of
12 Washington, or EFSEC, to preside over the application filed
13 by Scout Clean Energy LLC on behalf of the Horse Heaven Wind
14 Farm LLC and the adjudication that's going to go forward in
15 the months ahead on this matter.

16 Today we are doing our first pre-hearing
17 conference since we issued the order commencing adjudication
18 back on December 15th of 2022. We've also had a chance for
19 people to file their petitions for intervention and
20 yesterday issued a preliminary order on intervention that
21 will cover as the second agenda item for today.

22 Again, for the record, today's date is Friday,
23 March 10th, 2023. It's now 9:02 a.m. We were scheduled to
24 begin at 9:00, and I hope all parties were online as I was
25 talking with the court reporter during that opening minute

1 of the hour. We'll plan, per the court reporter, to take
2 breaks every 45 to 50 minutes and take a five- to ten-minute
3 break as needed for comfort. So plan for that at about 9:50
4 today and during the second hour, if we go that long, again
5 at about 10:50.

6 We have a number of parties that I want to take a
7 roll call on, but again, I want to state for the record, if
8 you're a member of the public or the press or just an
9 interested person wondering what does EFSEC do, today's
10 matter with the Horse Heaven Wind Farm Project, as proposed,
11 is simply to get scheduling done and talk about disputed
12 issues. It's really an organizational meeting.

13 So if you will, understand that this is not an
14 opportunity for public comment. It's not the sort of
15 meeting where we invite people that were not parties to the
16 upcoming trial or hearing -- formally known as an
17 adjudication -- to participate, so please don't expect for a
18 public comment opportunity. That opportunity will come at a
19 later date, and we'll be giving well advance notice about
20 when that will be.

21 Let me start with the roll calls for the
22 applicant. Mr. McMahan, are you on the line?

23 SPEAKER MCMAHAN: Yes, I am, Your Honor. Can
24 you hear me?

25 JUDGE TOREM: I can hear you, Mr. McMahan,

1 good morning. Who else from your team at Stoel Rives is on
2 the line?

3 SPEAKER MCMAHAN: Again, Tim McMahan with
4 Stoel Rives, and with me is Crystal Chase. She is the
5 natural resource litigator who will be working on the
6 proceedings, along with Emily Schimelpfenig -- tough one for
7 me still. Emily will be assisting us throughout the
8 proceedings as well.

9 JUDGE TOREM: All right. And are both of
10 those colleagues on the line with you today?

11 SPEAKER MCMAHAN: Crystal -- Ms. Chase is,
12 and I believe Emily is on the line from afar.

13 JUDGE TOREM: All right. And will you be
14 taking a speaking role today on behalf of the applicant?

15 SPEAKER MCMAHAN: Your Honor, thank you for
16 that. I believe Ms. Chase will take the lead for the
17 morning. I may jump in here and there, as you will
18 tolerate, perhaps, particularly if there's any history
19 relating to land use issues and the like, but I will
20 certainly take your guidance on whether or not I should be
21 participating.

22 JUDGE TOREM: It's fine. I don't think we
23 need to have a one-lawyer/one-witness type of rule for
24 today, but I'm just looking for who I should call on for
25 each party. Thank you very much, McMahan.

1 SPEAKER MCMAHAN: And that will be Ms. Chase.
2 Thank you, Your Honor.

3 JUDGE TOREM: Ms. Chase, let's test your
4 microphone and see if we can hear you.

5 SPEAKER CHASE: Good morning, Judge Torem.
6 This is Crystal Chase.

7 JUDGE TOREM: We can hear you loud and clear.
8 For Benton County, the law firm of Menke Jackson
9 Beyer LLP is representing them. Do we have Kenneth Harper?

10 SPEAKER HARPER: You do, Your Honor. Good
11 morning.

12 JUDGE TOREM: Thank you, Mr. Harper.
13 And is it Aziza Foster, or did I butcher the name?

14 SPEAKER FOSTER: No. You got that perfect,
15 Your Honor.

16 JUDGE TOREM: Which of you will take the lead
17 for Benton County?

18 SPEAKER HARPER: I will.

19 JUDGE TOREM: And that's Kenneth Harper?

20 SPEAKER HARPER: Yes.

21 JUDGE TOREM: And the court reporter's going
22 to have a hard time knowing who is speaking if we don't
23 identify ourselves. So it's a little bit burdensome, but
24 when you first start jumping back in, if there's a back and
25 forth, it will be helpful if you identify yourself. That

1 will make a cleaner record of today's proceeding when we go
2 back.

3 Mr. Harper, I note that Ryan Brown was the Benton
4 County prosecuting attorney who participated in previous
5 proceedings prior to your notice of appearance. Is
6 Mr. Brown on the line or participating today?

7 SPEAKER HARPER: Mr. Brown will not be
8 participating. I think we may have Deputy Prosecuting
9 Attorney Jeff Altman on the line for Benton County as well
10 though, Your Honor.

11 SPEAKER ALTMAN: Good morning, Your Honor.
12 This is Jeff Altman. I'm going to be attending this. I
13 don't think I'll have any substantive participation in this.

14 Mr. Brown had a family emergency, so he,
15 unfortunately, can't be here.

16 JUDGE TOREM: Thank you, Mr. Altman. I'm
17 sorry to hear that on behalf of Mr. Brown, but appreciate
18 that someone from your office is monitoring what's going on,
19 and I'll defer to Mr. Harper when I call on Benton County.

20 Our next statutory party is the Counsel for the
21 Environment. Assistant Attorney General Sarah Reyneveld
22 should be on the line, I hope.

23 SPEAKER REYNEVELD: Yes. Good morning, Judge
24 Torem. This is Sarah Reyneveld.

25 JUDGE TOREM: Good to hear your voice,

1 Ms. Reyneveld. Anybody else from your office participating
2 today?

3 SPEAKER REYNEVELD: No, it's just me.
4 Thank you.

5 JUDGE TOREM: All right. Turning now to our
6 interveners, the Confederated Tribes and Band of the Yakama
7 Nation, there are three attorneys from the Yakama Nation
8 Office of Legal Counsel, who filed their notice of
9 appearance. Do we have Ethan Jones?

10 SPEAKER JONES: Yes, Your Honor, good
11 morning. Ethan Jones on behalf of the Yakama Nation.

12 JUDGE TOREM: And I don't know if it's Shona
13 or Shauna Voelckers.

14 SPEAKER VOELCKERS: Good morning, Your Honor.
15 Shona Voelckers on behalf of Yakama Nation, and I will be
16 taking point for our team this morning. My colleague,
17 Jessica Houston, is also joining us today.

18 JUDGE TOREM: All right. Ms. Voelckers,
19 thanks for the help on the pronunciation. I appreciate it.
20 Please correct me if I defer back to my initial error.

21 And, Ms. Houston, I take it you don't have a
22 speaking role, but let's check your mic to make sure, in
23 case there's something you need to pipe in on.

24 SPEAKER HOUSTON: Good morning, Your Honor.

25 JUDGE TOREM: All right. Good morning,

1 Ms. Houston. Thank you.

2 Our final intervening party is Tri-Cities
3 C.A.R.E.S. It's an acronym C.A.R.E.S. And for the record,
4 I understand it to mean Community Action for Responsible
5 Environmental Stewardship. Their attorney is Jay Richard
6 Aramburu.

7 Mr. Aramburu, are you on the line?

8 SPEAKER ARAMBURU: Yes. Good morning,
9 Your Honor and parties. Richard Aramburu representing
10 Tri-Cities C.A.R.E.S.

11 JUDGE TOREM: All right. Thank you, sir.

12 Were there any other attorneys or parties on the
13 line whom did I not call?

14 Hearing none, I wanted to identify what other
15 EFSEC staff are on the line, and then perhaps, just so
16 everybody's aware, if there are members of the EFSEC
17 council, I'll ask them to identify themselves as well.

18 Do we have John Thompson, our Assistant Attorney
19 General?

20 SPEAKER THOMPSON: Yes, I'm present.

21 JUDGE TOREM: Excellent. Thank you.

22 And a couple of key members who are monitoring
23 things, Lisa Masengale.

24 SPEAKER MASENGALE: Good morning, Your Honor.

25 JUDGE TOREM: Good morning.

1 Andrea Grantham?

2 SPEAKER GRANTHAM: Andrea Grantham is
3 present.

4 JUDGE TOREM: And Andrea and Lisa are busy
5 monitoring the microphones here on Microsoft Teams this
6 morning. They're going to be muting folks that they might
7 see active microphones when it's not appropriate. So if
8 your dog starts barking, or as the hazard in my home is,
9 cats start rioting, they'll do their best to minimize the
10 background noise so Ms. Allison, our court reporter, can
11 keep a clean record here.

12 Do we have any EFSEC council members?

13 Excuse me. Ed Brost?

14 SPEAKER BROST: Yes.

15 JUDGE TOREM: And, Mr. Brost, you're
16 representing Benton County. Right?

17 SPEAKER BROST: Yes, sir.

18 JUDGE TOREM: All right. Welcome. If you
19 have any questions along the way or afterwards, feel free to
20 reach out to me, and we can clarify anything you need to
21 take back to your folks there at Benton County on behalf of
22 your time at the council.

23 Any other council members?

24 All right. Hearing none, any other staff members
25 from EFSEC who want to identify themselves? I know I don't

1 have any responsibilities assigned to any of you, but is
2 anybody else listening?

3 SPEAKER OWENS: Joan Owens.

4 SPEAKER MOON: And, Judge Torem, this is Amy
5 Moon.

6 JUDGE TOREM: All right. Thank you both for
7 being here.

8 SPEAKER SKAVLAND: And Sonja Skavland.

9 JUDGE TOREM: Sonja, welcome.

10 SPEAKER RANDOLF: Sara Randolph.

11 JUDGE TOREM: I'm sorry?

12 SPEAKER RANDOLF: Sara Randolph.

13 JUDGE TOREM: Sarah Randolph. All right.
14 Sara, you're new to me. I'm sure I'll find out what you do
15 at the council soon.

16 SPEAKER RANDOLF: Thank you.

17 JUDGE TOREM: Any other staff members?
18 All right. That takes care of the roll call,
19 unless there's anybody else who wants to speak up now and
20 tell me they need to be counted in our attendance today.

21 All right. Ms. Masengale, I'll ask that you
22 advance the agenda to page two. The second agenda item on
23 your screen now is our preliminary order on intervention.

24 (No audio)

25 SPEAKER CHASE: Good morning, this is Crystal

1 Chase for applicant. I'm not able to hear Judge Torem.

2 SPEAKER REYNEVELD: I'm not either. This is
3 Sarah Reyneveld from Counsel for the Environment.

4 SPEAKER MASENGALE: This is Lisa Masengale of
5 EFSEC. Judge Torem, it appears we have lost your audio.
6 And I will go ahead and send Judge Torem a message letting
7 him know we have lost his audio as well, in case he's having
8 trouble hearing us.

9 JUDGE TOREM: This is Judge Torem. Am I back
10 in the meeting by phone now?

11 SPEAKER MASENGALE: This is Lisa Masengale of
12 EFSEC. Yes, we can hear you Judge Torem.

13 JUDGE TOREM: I don't know. Mid-sentence,
14 Teams just dropped off my screen, went blank when I asked
15 you to switch to page two of the agenda. So I apologize to
16 everybody for doing a quick disappearance there.

17 We will pick up with that Agenda Item No. 2. I
18 have my own copy of the agenda on my computer screen here,
19 so I will follow along with you. I think I was about to say
20 that we issued our preliminary order on intervention last
21 night. Unfortunately, came out after 5:00, so I apologize
22 for the late breaking news on that. My intention,
23 originally, was that it would come out earlier in the week
24 and things got ahead of me. So I'm human, too. There's
25 only 24 hours in a day, but you have the decision

1 preliminary order on intervention granting the petition
2 filed by the Yakama Nation.

3 There was no objection to the Yakama Nation's
4 petition or its requested scope of intervention. Tri-Cities
5 C.A.R.E.S., also, their petition is granted.

6 There is the matter of the applicant's indication
7 that they had some limited objections regarding the scope.
8 I held a reservation in that order that we would deal with
9 any scope of intervention questions following today's
10 proceeding and perhaps after another pre-hearing conference,
11 if necessary. Really was dependent on how the discussion
12 went today and how I can see, Mr. Aramburu, on behalf of
13 your client, how to best figure out exactly what issues
14 you'll be focusing on and other issues you might not be
15 participating in.

16 So we'll address those things later, perhaps in
17 today's conference and perhaps in an additional one.

18 Mr. Aramburu, did you have any questions, because
19 I know you responded to the applicant's opposition as well?

20 SPEAKER ARAMBURU: Judge Torem, we have
21 responded. I believe you have a copy of that response, and
22 it's been provided to the applicant.

23 Just this morning we sent to you and the parties a
24 bit of an update with some more information concerning our
25 issues, and so we're prepared, when you're ready, to discuss

1 additional intervention issues. As you know, we're
2 requesting full party status, yeah, in these proceedings.

3 JUDGE TOREM: Thank you, Mr. Aramburu. I'll
4 confirm, I did get the email this morning, and frankly, I
5 wanted to give you props for actually listing issues that
6 were specific to some things raised in the application and
7 the environmental studies so far.

8 I want to assure you that Tri-Cities C.A.R.E.S. is
9 a full party intervener status. It will just be a real
10 question as to what topics you might or might not be
11 participating in.

12 For all parties, there may be some focuses that
13 you say, Oh, that's an issue that I won't be presenting
14 testimony on or our clients just is -- simply, that's not
15 what they are worried about or concerned about as we process
16 this application.

17 If those items come up when we get to that part of
18 the agenda, in my experience with these wind farm hearings
19 or generally with complex litigation, knowing which parties
20 don't want to comment is helpful for scheduling, as,
21 Mr. Aramburu, you have some dates of unavailability. It
22 might be that the hearing proceeds on a topic that's not of
23 concern to your client on days when you're not available if
24 we feel that time constraints require us to keep going
25 without all the parties present.

1 But again, that would be by agreement and
2 hopefully not by anything just dictated by Judge Torem out
3 of what he thinks is the right thing to do. But we'll have
4 a full discussion before we do anything like that.

5 Mr. Aramburu, any questions about what I said
6 about full party status in dealing with those things?

7 SPEAKER ARAMBURU: No, Your Honor. We're
8 prepared to participate in further discussions about scope
9 of intervention at your convenience.

10 JUDGE TOREM: Perfect. We may get to some of
11 that today.

12 All right. The next item on the agenda is the
13 venue for this adjudication. When I asked the parties --
14 before intervention was granted and when I asked the parties
15 through Mr.-- Mr. McMahan at Stoel Rives -- to round up
16 everybody while petitions for intervention were pending and
17 have some collaborative discussions with the county and with
18 Counsel for the Environment, I got a letter on March 1st
19 that's posted on the EFSEC website, and I think it's input
20 on procedural considerations for our adjudication.

21 There's a number of things addressed in there
22 regarding prefiled testimony and some of the items for
23 exhibits and briefing schedules. What I wanted to start
24 with was the venue. Our chair of the EFSEC council had
25 indicated that this was going to be a virtual proceeding.

1 Personally, I'm not a fan.

2 As you can see, with my interaction with Microsoft
3 Teams, technology can be, through no fault of your own,
4 tweaky, depending on your equipment, your broadband
5 connection or what the weather might be doing that day. So
6 I wanted to at least survey everybody today, and I'll call
7 on each of you to tell me your preference for your client on
8 how we go about conducting this proceeding.

9 I'm the presiding officer and not the deciding
10 officer on this matter, but I can take your inputs back to
11 Chair Drew and let her know what our clients at EFSEC really
12 want to do on this matter.

13 So, Ms. Chase, let me turn to the applicants. How
14 would the applicant prefer this adjudication be held? And
15 the options that I put on there were in-person, virtual or
16 some kind of hybrid.

17 SPEAKER CHASE: Thank you, Judge Torem.
18 This is Ms. Chase on behalf of applicant. Applicant would
19 prefer to stay with EFSEC's preliminary determination of a
20 virtual hearing, with our second preference being a hybrid
21 hearing for flexibility of witnesses and parties.

22 Thank you.

23 JUDGE TOREM: All right. And for the county,
24 Mr. Harper.

25 SPEAKER HARPER: Ken Harper for Yakima --

1 excuse me, for Benton County. Your Honor, I share some of
2 the concerns you've raised. I, frankly, would prefer an
3 in-person hearing. There's some appeal to perhaps splitting
4 the difference and saying hybrid. I don't feel strongly
5 about that, but the county does have an interest in a
6 significant in-person component.

7 JUDGE TOREM: If I heard you correctly,
8 Mr. Harper, the county would prefer in-person, but perhaps
9 some blend of a hybrid could also be worked in.

10 SPEAKER HARPER: That's correct, Your Honor.

11 JUDGE TOREM: All right. Ms. Reyneveld, how
12 would the Counsel for the Environment think it best
13 conducted?

14 SPEAKER REYNEVELD: The Counsel for the
15 Environment would prefer a virtual hearing, but we are open
16 to a hybrid hearing to accommodate the preference of Yakama
17 Nation and other parties that would like to present
18 testimony in person.

19 It was our understanding that this was going to be
20 a virtual hearing, and so therefore, you know, I live in
21 Seattle and I'm not prepared to travel back and forth to the
22 Tri-Cities. And I just wanted to state that it would be
23 burdensome for many of our team to do so, but we also would
24 be in favor of a hybrid model to accommodate the preferences
25 for in-person testimony.

1 JUDGE TOREM: All right. Thank you,
2 Ms. Reyneveld.

3 Ms. Voelckers, on behalf of the Yakama Nation, let
4 me hear from you.

5 SPEAKER VOELCKERS: Thank you, Your Honor.
6 Shona Voelckers, Counsel for Yakama Nation, strongly
7 advocates for an in-person hearing, due to the nature of the
8 issues that are -- we have already identified, as well as
9 others, the sensitivity of the information that we hope to
10 share with the full council and the need to have that
11 happen, if at all possible, while we're all sitting in a
12 room and while -- so that our witnesses can -- can bring the
13 information that they have in a way that is sensitive to
14 what they have to share.

15 If the --

16 JUDGE TOREM: Thank you, Ms. Voelckers. Go
17 ahead.

18 SPEAKER VOELCKERS: Your Honor, if the
19 decision is to have a hybrid proceeding, as I'm hearing
20 others advocate for, the Yakama Nation would still intend to
21 participate fully in person, to the extent that you allow.

22 JUDGE TOREM: Ms. Voelckers, I'm looking at
23 page two of the letter that came from Stoel Rives on
24 March 1st and signed by Ms. Chase and Mr. McMahan. There's
25 a paragraph there where they represented the following:

1 Concerning live testimony, the Yakama Nation is
2 requesting the ability to bring direct oral testimony by
3 Yakama Nation members during the hearing, and the testimony
4 would be limited to cultural resource impacts of the
5 proposed project.

6 Can you share with me just a little bit more what
7 you see, in your mind, of how that would occur?

8 SPEAKER VOELCKERS: Yes, Your Honor.
9 Thank you. This is Shona Voelckers again on behalf of the
10 Yakama Nation.

11 So first, during that conversation with counsel
12 and as captured above that paragraph in Ms. Chase's letter,
13 the Yakama Nation does intend to participate fully through
14 the written testimony process when we can, and it's just
15 asking to have the ability to bring direct oral testimony by
16 Yakama Nation members, like elders, during the hearing,
17 rather than being limited to the oral testimony or the live
18 portion of the hearing, rather than being limited to just
19 rebuttal or supplemental testimony. So that the request is
20 that the Yakama Nation members, elders with knowledge of the
21 oral traditions of the nation that are not comfortable
22 engaging in written testimony, still be able to bring that
23 direct testimony in the hearing itself.

24 And outside of that -- outside of that scope, we
25 would -- we would be -- you know, for any other witnesses,

1 certainly, we're prepared to engage in the written testimony
2 process outlined in Ms. Chase's letter.

3 JUDGE TOREM: Thank you, Ms. Voelckers. If
4 I'm understanding you correctly -- and again, please correct
5 me if I'm wrong -- you have members of your client, Yakama
6 Nation, who are elders, feel that it's best for them to
7 avoid any written format or technological means to transmit
8 their feelings, opinions and knowledge to the energy siting
9 council, and they would like to do it by standing,
10 personally, in front of someone, to hear what they have to
11 say using the oral tradition of transmitting that knowledge.
12 Is that correct?

13 SPEAKER VOELCKERS: Yes. That is, I think, a
14 fair summary, and I would say the knowledge, that the
15 knowledge is carried orally.

16 And we understand that there are -- that this is
17 still a public proceeding, and we are just asking for the
18 most protections possible and the most sensitivity to the
19 sacredness of information that may be shared.

20 JUDGE TOREM: Yes. And I have great respect
21 for that and want to make sure that I'm understanding what
22 you're asking for. So if I can provide that type of venue
23 for those elders to give their testimony and transmit that
24 knowledge for the council's consideration, we can.

25 Would there be a need, in that presentation, for

1 an interpreter, or would the Yakama elders be speaking in a
2 language that the council could understand?

3 SPEAKER VOELCKERS: Your Honor, Shona
4 Voelckers again. I would anticipate that our witnesses
5 would speak both in English and in their own language, but
6 that we would not be requesting an interpreter.

7 JUDGE TOREM: In my experience as a judge and
8 working with court reporters over the years, the record
9 that's created would only be in English. So that portion of
10 the oral history and knowledge that's given in any language
11 other than English, particularly if not using an
12 interpreter, would be lost to the record for appeal in this
13 matter, unless you can come up with some other way and
14 recommendation for it to be captured.

15 In my creative mind, I could see a video being
16 made; however, I understand that capturing live images of
17 some first nations or tribal members might be seen as
18 offensive. I don't know the traditions of the Yakama tribe,
19 and I can't pretend to guess what they might be, so I will
20 need your help in trying to determine if in-person testimony
21 is permitted and if an oral presentation from a Yakama elder
22 is permitted, how that can be captured for all that may not
23 be present for the original talk and may not be able to
24 review a video or a transcript of it if it's done in a
25 language other than English.

1 Ms. Voelckers, do you understand the dilemma that
2 an ALJ trying to put together a record has with this sort of
3 request?

4 SPEAKER VOELCKERS: Thank you, Your Honor.
5 Shona Voelckers again. I do understand the dilemma. I
6 think if it's helpful to explain it a little more, I think
7 that where a witness wants their words translated onto the
8 record, they will do so in English as well, and where they
9 do not, they will choose not to translate it for us.

10 I am not currently working with any witnesses that
11 cannot translate their own testimony into English if they
12 choose to do so and would need additional time, in as we are
13 working with folks to follow up on your question about a
14 video recording, because each member has a different level
15 of comfort with this process.

16 JUDGE TOREM: All right. Thank you. I think
17 that's all the questions I have about the Yakama Nation's
18 request for the reason behind the in-person testimony.

19 Was there anything else you think you needed to
20 tell me and to be captured on today's record?

21 SPEAKER VOELCKERS: Thank you, Your Honor.
22 Shona Voelckers again. We also anticipate that the use of
23 exhibits will be, if not significantly, at least measurably
24 impacted by having a remote hearing. And that's based upon
25 our experience with these types of proceedings over the last

1 number of years before the pollution control hearings board
2 and the growth management hearings board.

3 JUDGE TOREM: Okay. Understood. Fair
4 enough. Thank you, ma'am.

5 I'm going to turn now to Mr. Aramburu on behalf of
6 Tri-Cities C.A.R.E.S. and come back to the original
7 question. We're still on Item No. 3 on our agenda.

8 Mr. Aramburu, how would your client like to see
9 this proceeding and adjudication go forward?

10 SPEAKER ARAMBURU: Thank you, Your Honor.
11 Richard Aramburu for Tri-Cities C.A.R.E.S.

12 We strongly support an in-person hearing for
13 several reasons. First of all, this gives the opportunity
14 for the public who are interested in this matter to attend
15 without having to use all of the electronic materials and
16 see the council in action as they are reviewing this.

17 The second issue, which is equally important is --
18 is the ability to understand drawings, maps, diagrams and
19 other things on a limited screen. We're all, this morning,
20 looking at a small screen and, Judge Torem, I can read your
21 material, but this is a very, very large project. There
22 will be multiple maps. There will be multiple pictures.
23 There will be multiple drawings. And it is very hard to
24 address those issues if it is done on the small screen.

25 And in addition, it will be difficult for council

1 members to pose questions of witnesses, which they are
2 entitled to do and often do, based upon this kind of format.
3 In prior experience in the Whistling Ridge matter, we had a
4 large room. We had, oh, probably a 12-by-12 screen that we
5 could put up maps, photos, even some text, pictures. And
6 everyone could see them at the same time and the parties
7 could ask questions about them, can use a pointer to use
8 these materials.

9 So in something that is as visual as a hearing
10 like this -- and this is a really, really big project, so
11 just trying to portray the whole project on the screen
12 presents its problems.

13 So for those reasons, we think that the in-person
14 hearing, somewhere in the project vicinity, is appropriate
15 and, I think, useful to the council members.

16 I know there's concern about travel, there's
17 concern about time of individuals, but I think the parties
18 would be able to get together and finely tune a schedule --
19 and this will be principally cross-examination -- a schedule
20 so that time can be used efficiently during that
21 cross-examination period.

22 So I've gone on a bit longer than I should, but we
23 very much strongly support the in-person hearing.

24 And we also want to reserve the possibilities that
25 maybe one or more witnesses might be able to give, on an

1 in-person hearing, kind of a brief statement. We are --
2 we're talking here about pre-filed direct testimony and
3 we're in support of that, but on certain issues -- and
4 there's no question that visual issues are important to
5 us -- it might be good -- we might ask that a witness be
6 allowed a presentation during the course of the hearing to
7 show the photographs and other visual materials as a
8 supplement to the testimony. So that -- that's kind of a
9 second reason to have an in-person hearing.

10 So, sorry I went on so long, but these are
11 important concerns.

12 JUDGE TOREM: Thank you, Mr. Aramburu. I
13 thought about interjecting when you got to the testimony
14 question, but I see how you tied it in to the overall answer
15 on venue and what's appropriate. I do understand that for
16 some witnesses the pictures really are worth a thousand more
17 words, so I will take that under consideration.

18 So I have a tally voting of three parties wanting
19 in person, two wanting virtual, but open to hybrid. Again,
20 it's above my pay grade here as what's delegated authority
21 to me to choose the venue. I know what I will lobby for is
22 to be in person and/or have a hybrid for those that choose
23 or are not able to travel. I want this to be as open as
24 possible.

25 I personally made a promise that I hope I can

1 follow through on, to the people of Benton County to bring
2 the council to the county where this project is proposed,
3 back at the informational meeting and land use hearings
4 that, believe it or not, were at least two years ago or --
5 well, at the end of the month it will be two years since we
6 held those proceedings. But if you check the transcript,
7 you'll find me having some words I may have to eat about
8 promising to be next in Benton County.

9 I will talk to the chair. I will see what Chair
10 Drew wants to do, and her decision will be final. I don't
11 know that there is any interlocutory review once the chair
12 of the council makes the decision, so we've created a record
13 today. I've given all parties an opportunity. I will ask
14 the chair to review the transcript, and then I will lobby
15 accordingly and we'll see what we get. I'll report back
16 when I can.

17 Are there any questions? I'll go around the table
18 again about the venue question. Ms. Chase.

19 SPEAKER CHASE: Good morning. This is
20 Ms. Chase. The only comment that I would offer, Judge
21 Torem, is that there may also be an opportunity, and as we
22 discuss the different issues later today, to have some of
23 the testimony held in person; for example, the items that
24 Ms. Voelckers was discussing, in order to accommodate those
25 concerns and schedule other portions of the proceeding

1 virtual or hybrid.

2 So I'm just flagging that we may have an option
3 for some -- depending on if we stagger -- end up with
4 staggered portions of proceedings, as to how this is venued.
5 Thank you.

6 JUDGE TOREM: Thank you, Ms. Chase.

7 And I do believe that some days of hearing will
8 better be suited for a different type of venue. Some may be
9 suited simply for virtual; if we have, like, opening
10 statements or some kind of arguments or a motion practice, I
11 think we've all gotten used to, over the last two or three
12 years, doing things by phone, by Zoom or even by Microsoft
13 Teams when I can make it work.

14 For the county, Mr. Harper, any last comments on
15 the venue question?

16 SPEAKER HARPER: Ken Harper for the county.
17 No. Thank you, Your Honor.

18 JUDGE TOREM: Ms. Reyneveld.

19 SPEAKER REYNEVELD: I don't have anything
20 further. I agree with Ms. Chase's comments though.
21 Thank you.

22 JUDGE TOREM: Ms. Voelckers, anything else
23 from the Yakama Nation?

24 SPEAKER VOELCKERS: Thank you, Your Honor.
25 Nothing else at this time.

1 JUDGE TOREM: Mr. Aramburu, a last bite.

2 SPEAKER ARAMBURU: I think there are certain
3 witnesses in certain parts of the proceeding that could
4 be -- that could be virtual, but we think most of the
5 hearing should be in person. Thank you.

6 JUDGE TOREM: All right. Thank you. You've
7 been clear on that.

8 Let me give staff a chance, if they want to, to
9 chime in on anything that I may not be aware of.

10 Mr. Thompson, anything from your perspective that
11 I didn't cover on the venue question?

12 SPEAKER THOMPSON: No, nothing I can think
13 of.

14 JUDGE TOREM: All right. Anybody else from
15 staff for EFSEC that wants to jump in with a consideration
16 that I may not have brought up to the parties?

17 All right. You're going to let me go before the
18 chair myself. I appreciate that, EFSEC staff.

19 Let's move on to No. 4. We have about 15 minutes
20 before our first break.

21 If you had a chance to get today's agenda -- and
22 I'll read it for those who may not have it on the screen or
23 have received it:

24 Back on September 27th, the applicant for this
25 project filed what was a second extension request. And they

1 obtained EFSEC's agreement that the processing time for
2 their project for the Horse Heaven Wind Farm be extended out
3 to July 8th, 2023.

4 That date is important, and it's important because
5 EFSEC, under RCW 80.50, particularly section 100 -- and I'm
6 going to say this is a notional deadline. It's when we are
7 supposed to complete all of the review and make a
8 recommendation to the governor within a 12-month time
9 period, and if that doesn't occur, applicants can ask for an
10 extension.

11 I'm not certain that in the history of EFSEC, any
12 project has ever gotten through in the 12 months if it
13 required an adjudication. Some that got expedited
14 processing and some that had very easy-to-determine
15 environmental impacts that had, maybe, a mitigated
16 determination of non-significance in the SEPA review may
17 have. But in my experience, if there's an environmental
18 impact statement, a full EIS required under SEPA, the
19 12-month statutory deadline is, frankly, a legal fiction.

20 Nevertheless, it's important that an applicant
21 should be able to expect EFSEC to act vigorously and
22 promptly to get the review done. So with that in mind, once
23 we saw that the Draft Environmental Impact statement was
24 getting ready to be finalized and published at the end of
25 2022, I asked that staff survey the council members,

1 including Mr. Brost, who is on the line today, to provide us
2 their calendars and when they were absolutely unavailable,
3 for the spring of this year.

4 Once we figured out the timeline about when this
5 pre-hearing conference would be held, we figured the rest of
6 March we wouldn't be holding a hearing. We asked them for
7 April, May and June and all the way up to that July 8th
8 notional deadline that exists now, for the application to be
9 considered and a recommendation made to the governor.

10 I can't say whether July 8th is the absolute
11 deadline. The applicant has a lot of say in that and so
12 does the council, but that's why I have presented No. 4 in
13 the fashion it is on your agenda.

14 If you look at the bullet points listing out five
15 separate weeks, you'll see, starting in the middle of May,
16 we have a full week and we have the following several weeks,
17 except for the holidays of Memorial Day and Juneteenth,
18 which fall on Monday, May 29th, for Memorial Day and Monday,
19 June 19th, for Juneteenth, those weeks were available for
20 most of the EFSEC council members. If an EFSEC council
21 member is not able to attend a hearing session, we require
22 them to read the transcript of that proceeding so that they
23 can get the full record before we get to the part of the
24 adjudication where the council will deliberate on all the
25 evidence they've heard, make their evaluations and then,

1 ultimately, that recommendation to the governor.

2 So the scheduling that's here, I want to have --
3 Ms. Chase, can you speak a little bit to what we'll be
4 talking about more in Item No. 6 about the schedule for
5 pre-filed testimony and just to know what the applicant has
6 been thinking about gathering its evidence in support of the
7 application and when you think, realistically, the first
8 possible date, after today, that pre-filed testimony could
9 come in from the applicant, which would trigger some of the
10 other -- I think 28 days later, the other parties might file
11 responsive testimony?

12 So a starting point, if it's -- if it's past
13 May 15th for filing the testimony, clearly, the hearings
14 couldn't occur on or before that date.

15 Ms. Chase, is that clear what I'm asking, if you
16 know?

17 SPEAKER CHASE: Good morning, Judge Torem.
18 Thank you for that framing of the issues. This is Crystal
19 Chase for applicant.

20 I think it would be -- I'm happy to answer those
21 questions, but I think one clarification that would be
22 helpful would be to understand the expectation of the scope
23 of the initial round of written testimony to be presented by
24 applicants; in other words, if that pre-filed direct
25 testimony would be limited to sponsoring relevant sections

1 of the application and qualifying witnesses or if you intend
2 a greater scope.

3 And I ask that question only because it will help
4 inform the answer that I give you in terms of a realistic
5 deadline.

6 JUDGE TOREM: Well, Ms. Chase, as you might
7 expect someone with a legal background: It depends. I'd
8 like to say that the scope of what I'm asking you is at
9 least what you said, the sponsoring various portions of the
10 application and having the relevant witnesses. Once we
11 really get to the end of today or maybe an additional
12 pre-hearing conference and we've got the list of disputed
13 issues established and either agreed to or at least ordered
14 by me, when those are done, then we'll know what the scope
15 of testimony supporting all of the list of disputed issues
16 is.

17 So I won't hold you to your answer today, but at
18 least as a starting point, as you said, the applicant should
19 be prepared to sponsor testimony explaining various portions
20 of the application and as updated, what the currently
21 proposed project will be and all of those other
22 environmental issues that we are pretty certain are going to
23 be disputed or need some further testimony.

24 Perhaps there are some portions of the application
25 that will stand on their own, without any testimony, and can

1 come in by some sort of stipulation, but for all of the
2 statutory and regulatory rules requirements on how the
3 record is created on which the council makes their
4 recommendation to the governor, I'd expect the applicant to
5 be ready to put some sort of testimony forward.

6 And I know Mr. McMahan has done that when I've
7 been the judge in the Kittitas County -- two different wind
8 farms here, and I've watched him do it in other proceedings
9 in other parts of the state.

10 So with that in mind, Ms. Chase, I think you know
11 at least a minimum of what you're going to be putting
12 forward; when would that be ready?

13 SPEAKER CHASE: Sure, Judge Torem. So I
14 would say the week of April 3rd we could certainly have that
15 ready. I was thinking about the prior week, but I know that
16 it is spring break for some folks and I want to be cognizant
17 of witness availability and not imposing on pre-scheduled
18 vacations for others.

19 JUDGE TOREM: Well, I'm gratified to hear
20 that the month, at least, of April, and you gave me an early
21 time in April for that. Thank you.

22 Do you think that anybody else will be filing
23 materials in support of the application along with the
24 applicant? Are there any other parties, Ms. Chase, that
25 you're aware of that you'll be having, or is the applicant

1 essentially carrying the water on this and it would be all
2 of their witnesses and the other four parties will be in
3 response to varying issues per their own interests?

4 SPEAKER CHASE: So, Judge Torem, this is
5 Ms. Chase, and I anticipate that applicant would likely be
6 the only party that needs that category. I don't want to
7 preclude any other party that may have a different view from
8 speaking for themselves, but that's what I would anticipate,
9 given our discussions today.

10 JUDGE TOREM: All right. And when I come
11 around to each party, when they have an issue they're
12 proponent of, I'm sure they'll let me know. But I'm
13 certainly not expecting necessarily, given what I've read in
14 the petitions for intervention and the notices of party
15 participation.

16 All right. April 3rd. If we look at that --
17 Ms. Chase, can you call my attention back to where the time
18 intervals were in the letter? I think it's on the top of
19 page two of the March 1st letter from your office.

20 SPEAKER CHASE: Yes, that's correct. So the
21 proposed intervals were 28 days for reply testimony and 21
22 days for rebuttal testimony. And I'll just add that I think
23 the parties -- I know that, um -- and be included in the
24 March 9th letter, as well, that I think the parties would
25 appreciate clarification on when a party who is a proponent

1 of a specific issue, but perhaps not in support of an
2 application, at what point in time in that three-tiered
3 process they would be expected to submit their testimony.

4 JUDGE TOREM: All right. Thank you,
5 Ms. Chase.

6 So for the other parties that are keeping score at
7 home here, as I look at my calendar, if April 3rd is a
8 Monday and notionally, if we set that as a deadline for
9 submission of pre-hearing and pre-filed testimony from the
10 applicant, based on whatever list of disputed issues we can
11 get done, 28 days later would be May the 1st and 21 days
12 following that would be May the 22nd.

13 So we go back to our agenda and the time period,
14 the May 1st deadline, I think -- Mr. Aramburu, I'm looking
15 at your notice of unavailability. Yours would have started
16 on May 8th to 18th, and you requested that -- not having to
17 respond to anything during that period.

18 If I can keep the reply testimony deadline on or
19 before May 8th, then perhaps we won't have to worry about
20 that first block of time when you can't respond to things,
21 Mr. Aramburu. Is that correct?

22 SPEAKER ARAMBURU: Yes. We have some other
23 concerns about the schedule, but yes. And I apologize; we
24 have preset times to be out of the office here on the dates
25 we have, so if something came in before my schedule --

1 scheduled time out of the office, then I think the problem I
2 have with that is that if something comes in -- so
3 April 3rd -- so May 1st would be the time schedule then for
4 reply?

5 JUDGE TOREM: Yes, Mr. Aramburu. I'm just
6 doing the math on the 28 days that was set out in that
7 letter from Stoel Rives dated March 1st.

8 What I'm frankly thinking, sir, is that the
9 April 3rd date, early as it is, may not be realistic. That
10 might even slide by seven days or thereabouts. Maybe it
11 only slides by four days, to the end of the week. If we
12 have to conduct another pre-hearing conference in this
13 matter, which I fully expect, depending on the timing of
14 that and the finalizing of the disputed issues list, the
15 applicant's filing of the testimony would then trigger
16 response or reply need from all the other parties, including
17 Tri-Cities C.A.R.E.S.

18 So I'm just thinking about all those issues out
19 loud here; always dangerous. But it gives us something to
20 work with today. Understood?

21 SPEAKER ARAMBURU: If you're still speaking
22 with me, Mr. Torem, yes, that timing is understood. We have
23 some very serious concerns about the schedule though.

24 JUDGE TOREM: Correct. I'm just getting the
25 notional things out there, so then we have, probably after

1 the break, Mr. Aramburu, all those other issues can be aired
2 out. And I'm not pretending those are going to be simple,
3 whatsoever.

4 All right. So, Ms. Chase, on my notepad here I've
5 got April 3rd to May 1st, to May 22nd interval, and in more
6 full answer to your other question, what does that mean for
7 the other parties, my thought is if the applicant were to
8 file first on whatever interval date we choose, then 28 days
9 later, if it's acceptable to all, on this calendar, May 1st,
10 reply testimony would come in on the issues for each party
11 on which they want to respond to any or all of the
12 applicant's testimony. And then in the next interval, 21
13 days later, it would simply be the applicant responding to
14 all of the reply testimony and, perhaps, other parties
15 responding to each other if they differ.

16 For instance, Tri-Cities C.A.R.E.S. may take a
17 different position on something than Benton County and they
18 only see each other's testimony on that second filing date.
19 Perhaps the Yakama Nation files their testimony, knowing
20 also that it's going to be supplemented, if allowed, by oral
21 testimony and oral history, and they may be able to give us
22 a preview of what that is, but when they see other parties'
23 reply testimony, they may also wish to file the rebuttal
24 testimony to other parties.

25 So it gets a little bit convoluted, but for a full

1 due process in this kind of complex litigation, that's the
2 kind of thing that may happen once we open this can of worms
3 and let the first round of testimony come in. We know who
4 is expected in the second, but the third round can typically
5 be a little unpredictable. Sometimes that results in motion
6 practice to strike things that may not be seen as relevant
7 by another party, and that's where my job gets a little bit
8 more difficult. But that's why I love this stuff.

9 So it is now 9:51. I promised to break. Hold all
10 the thoughts you have, please, on scheduling and the
11 intervals, and I'll ask, Ms. Allison, if we come back at
12 10:00 on the nose and do a quick roll call, will that be
13 satisfactory to you?

14 COURT REPORTER: That's fine.

15 JUDGE TOREM: All right. So we're going to
16 take a brief recess. Please mute your phones so that no
17 undue noise comes through, and we'll come back on; I'll make
18 sure everybody's back at 10:00. Thank you.

19 (Recess 9:51-10:00 a.m.)

20 JUDGE TOREM: I'm now going to do a quick
21 roll call as we come back from the second hour of our first
22 pre-hearing conference and just put those that identified
23 for the parties as a speaking role; see if they're still
24 here.

25 Crystal Chase.

1 SPEAKER CHASE: Good morning. This is
2 Ms. Chase. I'm still here.

3 JUDGE TOREM: Kenneth Harper for Benton
4 County.

5 SPEAKER HARPER: Ken Harper for Benton County
6 is present. Thank you.

7 JUDGE TOREM: Sarah Reyneveld, Counsel for
8 the Environment.

9 SPEAKER REYNEVELD: Sara Reyneveld, Counsel
10 for the Environment present. Thank you.

11 JUDGE TOREM: Shona Voelckers for the Yakama
12 Nation.

13 SPEAKER VOELCKERS: Shona Voelckers for the
14 Yakama Nation present, as well as my colleagues.

15 JUDGE TOREM: Thank you. And for Tri-Cities
16 C.A.R.E.S. is Mr. Richard Aramburu.

17 SPEAKER ARAMBURU: Your Honor, Richard
18 Aramburu here for Tri-Cities C.A.R.E.S.

19 JUDGE TOREM: All right. And I'm not going
20 to call all of the staff members again for EFSEC. I've been
21 kind of communicating with them offline.

22 Let's pick up where we were on the scheduling
23 questions. I think where we left off was just trying to
24 sort out what would have to be built in before we could
25 possibly do the adjudication, and that would be the filing

1 of testimony, maybe some motion practice and some other
2 things, and at a minimum, it looked like that could be done
3 by May 22nd. That would be the earliest possible date,
4 maybe by May 30th, if we shifted the testimony filing dates
5 out or expanded them some. But it sounds like no hearing
6 time could possibly be scheduled until, at least, the week
7 of May 22nd, more likely after Memorial Day.

8 And, Mr. Aramburu, I do note that you have a
9 conflict immediately of that Memorial Day week, so not
10 saying anything will be scheduled, just saying those are the
11 notional things and there are many more factors to take into
12 account before we pick any more hearing dates.

13 I want to go, at this point then, and talk,
14 Ms. Chase, with the applicant on its thoughts and concerns,
15 other issues that I should be taking into account as we set
16 up the hearing dates, and then I'll do the same for all
17 other four parties.

18 So, Ms. Chase, what are the applicant's thoughts
19 on scheduling, given what we've just talked about for the
20 other requirements?

21 SPEAKER CHASE: Sure. Thank you, Judge.
22 This is Ms. Chase.

23 I think, first -- I think Mr. McMahan and I were
24 conferring during the break, and we realized we had
25 inadvertently lined up all the potential deadlines to be on

1 Mondays and that it may be more humane for everybody
2 involved to have those in the middle of the week or at the
3 end of the week. So I'll just flag that, and I think that
4 was reflected maybe in some of your comments about how those
5 were the earliest possible dates, but it may be that we
6 adjust them by a few days here and there.

7 JUDGE TOREM: Okay.

8 SPEAKER CHASE: So with that, I think for
9 applicant, we would like to make sure that there is a
10 deadline built in by which parties would need to file
11 motions, strike any testimony to which we objected and time
12 for resolution of that prior to the pre-hearing
13 conference -- or, I'm sorry, prior to the hearing itself. I
14 think that's similar -- or I was looking at the Kittitas
15 order that you cited in your agenda for that -- that
16 concept, and that's where I'm drawing that from. So I think
17 that's one consideration.

18 And then another consideration that the applicant
19 would like to discuss is whether it makes sense to tier
20 consideration of some of the issues in terms of the hearing
21 date or the filing deadlines; specifically, whether it makes
22 sense to have a separate set of deadlines for a land use
23 adjudication, as opposed to the other issues that the
24 parties may raise.

25 JUDGE TOREM: Okay. So I think I understand

1 fully the second portion about maybe separating the land use
2 and then the conditional use permit issues from the other
3 items.

4 Restate for me that first concern again and you
5 referenced the Kittitas Valley order.

6 I'm going to ask the staff to see if they can
7 solve that echo.

8 Ms. Chase, let's see if we can get you unmuted and
9 answer about that first item that the applicant was raising.

10 SPEAKER GRANTHAM: Judge Torem, this is
11 Andrea Grantham with EFSEC staff. I went ahead and muted
12 both of the phone numbers that called in, but I believe
13 Ms. Chase was one of those. If they want to, they can
14 unmute using star 6 or pound 6.

15 JUDGE TOREM: Thank you, Ms. Grantham. Maybe
16 we'll hear Ms. Chase's voice here shortly.

17 SPEAKER CHASE: Are you able to hear me now?

18 SPEAKER GRANTHAM: Yes.

19 JUDGE TOREM: Yes.

20 SPEAKER CHASE: Great. Thank you.

21 So, Judge Torem, I apologize for any confusion
22 there. I can answer your question about that first concern.

23 JUDGE TOREM: Okay. Go ahead.

24 SPEAKER CHASE: It is -- it's simply that the
25 case schedule should include a deadline by which parties who

1 wish to file a motion to strike any pre-filed testimony
2 would have the opportunity to do so and an opportunity for a
3 response. And so what I'm proposing is similar to what's
4 laid out on page nine of the Kittitas scheduling order.

5 JUDGE TOREM: Thank you. I think, honestly,
6 in my multi-tasking, my ears just didn't pick up some of
7 what you were putting down there.

8 SPEAKER CHASE: No problem. I think I
9 explained it more clearly the second time.

10 JUDGE TOREM: Thank you. Mr. Harper, let me
11 come around to you at Benton County and see, just generally,
12 where you are, having heard my comments and discussion with
13 Mr. Aramburu to some extent and now from Ms. Chase, on
14 scheduling for the county's needs.

15 SPEAKER HARPER: Right. Thank you,
16 Your Honor. Ken Harper for Benton County.

17 On scheduling issues, Your Honor, I guess I want
18 to split my comments into two categories. One, I think the
19 county is likely to share what you're probably going to be
20 hearing from Mr. Aramburu when we turn to sort of more of a
21 date-setting range sort of concept, because we do have some
22 serious concerns about the viability of a set date right
23 now.

24 Setting that aside, not trying to go too much
25 further afield into that area, the other concern I've got

1 with the proposal from the applicant is that when we were
2 coordinating earlier on these topics in our letter, I think
3 the expectation of the county, at least, was that it would
4 be likely that the sort of sequence of events would be
5 worked backward from the actual set date of the hearing.

6 That isn't to say that it isn't perfectly viable
7 to do it this way, but what it does lead to is just simply
8 the reality of a set of materials coming in possibly as soon
9 as April 3rd.

10 And to Ms. Chase's point regarding availability, I
11 can tell you that at least in some parts of the state, the
12 first week of April is spring break and so that makes it
13 very difficult to imagine coordinating what could be a very
14 intensive effort in a very short period of time and, in
15 fact, perhaps even shorter than the 28 days might nominally
16 suggest.

17 And I'm very concerned about that, Your Honor,
18 because it wouldn't just be a matter of spring break on the
19 calendar. It would be a matter of the existing workflow
20 obligations of witnesses and counsel and party
21 representatives, which can be much more easily managed and
22 kind of integrated with new expectations if those things are
23 all set somewhat out.

24 But if these things are likely to be occurring as
25 soon as the first week of April, I can just foresee that

1 that 28-day period is not -- is not functionally usable as a
2 28-day period. It may actually turn out to be a 20-day
3 period or 15-day period, and that starts to seem like it's
4 not necessarily consistent with what the parties were
5 thinking with the 28-day interval when we collaborated in
6 our earlier letter to you. And certainly, it does start to
7 raise questions about the fairness and the ability, at least
8 of my client, to respond. That being said, if that April
9 3rd date shifts, then I think some of those concerns are
10 significantly ameliorated.

11 So, Your Honor, I'd like to speak to, sort of, the
12 setting date in general terms. So I'm going to hold that,
13 because that's not what you're asking about right now, and
14 if you have any further questions about our concern about
15 the specific April 3rd date, I'd be happy to take those.

16 As to Ms. Chase's point regarding potential
17 interim events within that initial period, motions to
18 strike, possibly tiered presentations, I think I'm agnostic
19 on that. I understand some benefit to that. I don't think
20 I have a strong position one way or the other there,
21 Your Honor.

22 JUDGE TOREM: All right. Thank you,
23 Mr. Harper, and I appreciate all that you said.

24 I wonder if somewhat, you know, many of the
25 concerns would persist even if we had April 10th be the date

1 and then a 28-day period from there. So we'll see what we
2 can do about the start date.

3 As far as working backwards from a set hearing
4 date and working the calendar from there, in my experience,
5 not only in scheduling matters like this, but just 20-some
6 years of being an administrative judge, I like to know what
7 I'm trying to fit into the five-pound bag, and if I have ten
8 pounds' worth to put in it, picking a set date and then
9 putting two bags in front doesn't seem to help.

10 So right now I'm just trying to figure out what
11 kind of interval has to occur before the hearing date and
12 today's date, and it sounds like, at the very least, I've
13 got nearly two months for testimony to -- once it's -- the
14 first round comes in, for the last round to come in. And I
15 need time ahead of that for the first round to be filed.

16 That may be a month from now, so we're talking
17 about a 90-day period or so for evidence development and
18 then a round of motions. So that's where my complication
19 is. Before I pick a date, I've got to pick it far enough
20 out.

21 And as I mentioned earlier, the concern where
22 Scout Clean Energy has the application extended for
23 consideration only to July 8th. As we sit here today, if we
24 count back from July 8th three months, that gets us to about
25 April 8th and these are the dates we're talking about

1 starting the filing of pre-hearing testimony.

2 So once again it looks as though the July 8th
3 date, if that's the end date, if we were going to stick with
4 that -- and Ms. Chase and Mr. McMahan are certainly gritting
5 their teeth wondering what they have to tell their client
6 about EFSEC's ability to meet this 12-month schedule which
7 is now already at, I think, probably 24 to 36 months, that
8 July 8th date, if it has to move, they only want to move it
9 the smallest possible amount out to the right on the
10 calendar.

11 And that's why, Mr. Harper, I'm trying to get a
12 realistic discussion of all of the things that need to be
13 packed into that five-pound bag I mentioned before I pick a
14 date for the hearing, that tries to comply with the July 8th
15 deadline for -- imagine this -- even after a hearing, having
16 deliberations and writing an order that has to be reviewable
17 by the Supreme Court of this state; so to give this a
18 quality and thorough evaluation, all the things I'm trying
19 to consider and recognize today for all the parties as we
20 just talk about the scheduling, let alone everybody's
21 sincere concerns about the issues presented by the proposed
22 project.

23 Mr. Harper, anything further, having heard that
24 little spiel?

25 SPEAKER HARPER: No. No, Your Honor. In

1 fact, what you just said is exactly what I was sort of
2 thinking as I was making my comments, because I appreciate
3 what you're trying to accomplish and the way you're going
4 about it.

5 And I don't mean to throw us in a different
6 direction, and that's why I said, if it -- if it is
7 important, as obviously you've indicated, to work forward
8 from essentially present day, we'll make it work. I would
9 just appreciate some consideration for trying to manage
10 this -- again, this fairly intense series of events on a
11 very short time frame, far shorter than at least I was
12 anticipating.

13 JUDGE TOREM: I think it was the lyrics in a
14 song from Smokey and the Bandit back in the day about a long
15 way to go and a short time to get there. So we're going to
16 do what needs to get done with all due respect to those
17 things.

18 All right. Mr. Harper, you can tell, as I moved
19 to Ellensburg five years ago, in this town we say, It's not
20 my first rodeo.

21 Ms. Reyneveld, what does CFE think about all the
22 scheduling?

23 SPEAKER REYNEVELD: I think we're generally
24 agreeable to the scheduling outlined. I think we would
25 share Mr. Harper's concerns with coordinating expert

1 testimony or potential expert testimony and response to the
2 applicant's testimony in such a short window of time without
3 sufficient notice to coordinate if the clock kind of starts
4 ticking on April 3rd. And that's particularly true if we
5 have another pre-hearing or multiple pre-hearing conferences
6 in which we're still working on finalizing the disputed
7 issues, because I think it's important to establish those
8 sufficiently kind of before we start the schedule, and it is
9 March 10th.

10 So that being said, in terms of the specific
11 hearing dates that were proposed, I am not available on
12 May 15th or on June 20th, so that's just something to note
13 for the record on those weeks.

14 And then I would also agree with the affirmation
15 in regards to -- I believe it was the Yakama Nation that
16 expressed, kind of, a preference for maybe separate
17 adjudication of land use and conditional use and then other
18 issues -- or no, I'm sorry. That was Ms. Chase for the
19 applicant.

20 So I guess those were -- those are generally our
21 thoughts.

22 JUDGE TOREM: All right. Well,
23 Ms. Reyneveld, I was hoping, as Counsel for the Environment,
24 you would use your statutory powers to select experts who
25 didn't have any other personal life and could just be at the

1 beck and call of the council.

2 SPEAKER REYNEVELD: Unfortunately, that is
3 not the case. I do not have that sort of power. I wish I
4 did.

5 JUDGE TOREM: All right. I will pull my
6 tongue back from the cheek and we will continue with the
7 realities that we're faced with in scheduling.

8 Let me come around to the Yakama Nation and
9 Ms. Voelckers. Speaking to what you've already heard and,
10 kind of, the outline of dates we have, what are the Yakama
11 Nation's thoughts on scheduling?

12 SPEAKER VOELCKERS: Thank you, Your Honor.
13 Shona Voelckers for Yakama Nation.

14 **A couple thoughts. First, with fully**
15 **understanding the timing constraints that you are working**
16 **with and -- candidly, I do not believe we can give this**
17 **project its full due by scheduling a hearing on such a tight**
18 **schedule.**

19 I would say that we, I think as a group, discussed
20 in our first meeting last week, and I think it still, to me,
21 is a live question and would appreciate direction. I hear
22 the discussion with what sounds like an assumption that the
23 direct testimony that Ms. Chase says that she will be
24 prepared to file in just three weeks would all be on the
25 applicant to bring that direct testimony. And that was a

1 question that we raised, as a group, in the letter on
2 whether the other parties who are bringing specific disputed
3 issues, whether they would be the ones to bring direct
4 testimony with regard to those specific issues.

5 And so it's a little hard for me to speak on
6 the -- on that proposed schedule without that clarification.
7 And if it is the applicant that's only responsible for
8 bringing their testimony in three weeks, then that would be
9 helpful to know. It feels hard to fully respond without
10 having the issues in front of us, and I understand that that
11 is something that we're going to work through, but
12 especially if we may be having a second hearing to do that,
13 again, I just respectfully -- this seems really ambitious.

14 The last thing I would say, and we raised this and
15 I know -- I'm sure that Your Honor is planning to address
16 this, but we raised this with Benton County in our joint
17 issue statement that we filed yesterday, and I think that
18 the question of the schedule is tied to the special
19 procedural question on whether this adjudication can really
20 proceed without further progress on the SEPA process.

21 So I will just mention that for now, since I know
22 that that's not the direct question to me at this time.

23 JUDGE TOREM: Okay. Thank you,
24 Ms. Voelckers.

25 First off, again, I want to say I wasn't a part of

1 the collaboration, obviously, between the parties. I
2 appreciate that they followed my direction and everybody did
3 get together and hash things out as far as was done before
4 today's pre-hearing conference. That helps to crystalize
5 everybody's mind around just how ambitious this project is
6 and just how complex an EFSEC adjudication can be when there
7 are so many, at least as I anticipate, disputed issues.

8 As to the filing schedule, the reason I've taken
9 it today from applicant and everybody else responding is
10 maybe just from my personal experience with this in the past
11 and my looking at this as a burden of proof and a burden of
12 production question, it's the applicant that is making this
13 proposal to the council to have a recommendation made to the
14 governor. And I would think -- again, I'm open to other
15 ideas -- that the applicant carries the water first, and
16 then everybody knows what they need to respond to.

17 The Yakama Nation will raise its own issues and be
18 treated as though it's direct testimony, not necessarily all
19 having to be responsive to the applicant, but you'll see
20 what issues the applicant raises. And certainly,
21 independently, you'll set your own scope, based on the scope
22 of your intervention, to file direct testimony that can just
23 be on behalf of the Yakama Nation, and that would apply to
24 any of the other three parties that are not the applicant.

25 I hope that clarifies a little bit what's going on

1 there. Everybody has independent, full-party status, but
2 the burden of proving that the applicant -- application
3 should get favorable recommendation and that all of the
4 appropriate mitigation that might be recommended through the
5 course of SEPA and other adjudicative processes really falls
6 on the applicant. They're the reason we're here, and
7 frankly, they're the ones that are funding most of this. So
8 they don't get any extra points because they're in that
9 position, but it's just another factor I and the council
10 need to take into consideration as we go forward.

11 Ms. Voelckers, does that help on that point?

12 SPEAKER VOELCKERS: Your Honor, this is Shona
13 Voelckers. Thank you. That's very helpful, and I would --
14 I appreciate the clarification.

15 I would add then that our request is that this be
16 framed in the same way that it was framed in Order 790 so
17 that it's clear the applicant's pre-filed testimony is the
18 first one due.

19 I would also just again, given that our group's
20 discussion on the 28 deadline was last week, before we knew
21 when the project applicant was going to propose bringing
22 their testimony. I would advocate for more time as is
23 reflected in that Order 790, which was a smaller project
24 than this one and has a -- more than a month between the
25 applicant's pre-filed testimony and other parties' pre-filed

1 testimony deadlines in that case.

2 JUDGE TOREM: All subject to discussion and
3 consideration. Thank you.

4 On the question you raised about SEPA -- and I
5 want to invite a full discussion with the other parties on
6 this, so I'm not asking for anybody that speaks after you to
7 come back on the SEPA question. I will say that WAC
8 463-47-060 addresses some of the typical concerns where
9 folks don't understand, typically, or are not familiar with
10 because it happens so infrequently. EFSEC adjudications are
11 not about SEPA questions. The adjudication is a separate
12 parallel track to what's going on with the Draft
13 Environmental Impact Statement and the comment period on
14 that that recently closed.

15 I'll admit that starting the adjudication, in my
16 mind, would be premature if not informed by at least a Draft
17 Environmental Impact Statement, and that's why I pushed in
18 the background to wait for this day and the petitions for
19 intervention until there was something more in the public
20 sphere than just the application for site certification.
21 Having a Draft Environmental Impact Statement out after a
22 full comment period and investigation by the contractor
23 hired by EFSEC to do that work helps flesh out a number of
24 issues that weren't immediately obvious in the original
25 application for site certification.

1 That said, SEPA's a separate track, and if you
2 look at 46-347-060 (2), the administrative code that's been
3 adopted and been essentially the law, for lack of a better
4 word, for years says the council may initiate an
5 adjudicative proceeding required by 80.50.090 prior to
6 completion of even the draft EIS. Environmental Impact
7 Statement, quite frankly, is not going to happen in this
8 case and it has not happened in past adjudications,
9 including the Kittitas Valley case. That horse has left the
10 barn and I think that the Supreme Court has already ruled on
11 that.

12 If there's motion practice to be had on that to
13 create a record for purposes of preserving that issue for
14 further appeal, I have no problem with that. I understand
15 that clients have legal interests that need to be raised at
16 the trial level if they're to be preserved for appeal, but I
17 want you to expect that given what the law is and EFSEC's
18 previous experience and what the Supreme Court has said the
19 law at 80.50 is, we're not going to spend an undue amount of
20 time on that creating a record. It may simply be by written
21 brief and a brief order that tells you again, in writing,
22 what the law is.

23 But as you'll see, on Item -- I think it's No. 7
24 on our list, under Civil Rule 11 you've got to have a really
25 good reason to file something and a good explanation if you

1 think you're going to move to change existing law. And I
2 will hold you to that, even if the civil rules don't
3 directly apply in an administrative procedures act
4 adjudication, as this will be held under RCW 34.05. I'll
5 give you some -- some slack, some leeway on raising issues
6 even if they're not currently permitted under the current
7 state of the law of the State of Washington, but we'll raise
8 them and we'll dispense with them quickly.

9 I'm not empowered, as an ALJ, to change the law
10 and counsel's bound by the law. The governor, up to you on
11 what you want to raise for Governor Inslee to consider. So
12 take a look at that and also take a look at 80.50.090(4),
13 paragraph A, which lays out that the purpose of this
14 adjudication is to hear from persons in support or
15 opposition to the application on specific issues. And then
16 again, we'll have a public hearing for those members of the
17 public that want to comment outside of what we're going to
18 adjudicate as parties.

19 So, Ms. Voelckers, I hope that answers the mail a
20 little bit on the question of where we are with the SEPA
21 process. And I'm sure you will have opinion that I will let
22 the tribe and the Yakama Nation get those in writing in more
23 detail. Today's not the day for us to litigate it, but I
24 did just want to tee up where I'm coming from as the
25 presiding officer from this. And I'm sure there will be

1 disagreements, perhaps, with the substance of what I said
2 and maybe the tenor of it, but for today, that's where I'm
3 coming from and I just wanted to be fully transparent and
4 clear with you and your client and all of the parties that
5 might have SEPA concerns, that the adjudication is a
6 separate process, outside of SEPA.

7 Ms. Voelckers, I guess it's only fair after that
8 rant to give you a chance to respond.

9 SPEAKER VOELCKERS: Thank you, Your Honor.

10 Shona Voelckers with a brief response. We really
11 appreciate that the adjudication is moving forward
12 separately from the SEPA. Given WAC 463-47-020's express
13 incorporation of the SEPA regulations that we put in our
14 letters, as well as others, we request that there be a
15 briefing schedule set on this issue. Thank you.

16 JUDGE TOREM: Thank you. And again, a
17 briefing schedule is probably what's going to be
18 appropriate, as I said, to raise all these issues at the
19 hearing adjudication or trial level, however you want to
20 look at it. Thank you, ma'am.

21 Mr. Aramburu, on the scheduling question that we
22 started here at the top of the hour and ended at the last
23 session, what does Tri-Cities C.A.R.E.S. want to bring to my
24 attention?

25 SPEAKER ARAMBURU: Judge Torem, Rick Aramburu

1 for Tri-Cities C.A.R.E.S.

2 Three issues here; first, the question of whether
3 the adjudication can proceed in the absence of a final
4 Environmental Impact Statement. That's an issue we're
5 concerned with as well.

6 JUDGE TOREM: Yes, Mr. Aramburu. I'll just
7 ask you to be brief on that.

8 SPEAKER ARAMBURU: We will follow the -- we
9 will follow the briefing schedule as it's set, but we
10 believe that's a motion that needs to be heard.

11 JUDGE TOREM: All right. You had two other
12 points.

13 SPEAKER ARAMBURU: So secondly, this question
14 about who submits testimony and when, there may be
15 circumstances in which a party who seeks to carry a burden
16 of proof on an issue needs to present testimony, original
17 direct testimony, not in rebuttal, and I will just give you
18 a brief example which will probably play out here.

19 Tri-Cities C.A.R.E.S., as the applicant knows, is
20 very concerned with esthetic issues here and believes that
21 conditions should be set regarding the esthetic impact of
22 this project. And we will argue that certain things should
23 happen with regard to this project as a result of that
24 testimony.

25 So the testimony coming in would really be kind of

1 direct testimony from us, not necessarily in rebuttal to the
2 testimony from the applicant. And so it may be appropriate
3 in certain circumstances that direct testimony be submitted
4 on those issues, because the testimony on visual issues, we
5 don't know what they're going to say, but it may not be
6 strictly rebuttal testimony. It may be testimony that is
7 original testimony not going to rebuttal, and that may be
8 true for other issues as well. So I think we need to kind
9 of address that issue as well in terms of the scheduling.

10 We also have a concern, and I just want to express
11 it now, as well, that the draft impact statement did not
12 consider the amended ASE that came in -- it's a little
13 unclear when it came in. Counsel seems to think it came in
14 on January 3rd. So that is another SEPA issue probably
15 subject to a briefing schedule. So I guess my suggestion on
16 that score would be that you set up a briefing schedule for
17 the SEPA issues, and we can get those aired out at this
18 point.

19 The third question is whether there would be a
20 separate proceeding on the land use issues. I know that's
21 occurred in other cases. I don't necessarily have a strong
22 feeling about that, but that has occurred in other matters.

23 So those would be our three comments.

24 JUDGE TOREM: Thank you, Mr. Aramburu. I am
25 definitely open -- maybe not to calling it a separate

1 proceeding, but on having topic-specific dates scheduled for
2 the various issues that are going to be raised so that
3 perhaps -- I wouldn't call it bifurcating the hearing in any
4 way, shape or form because it will all be going under the
5 umbrella of the adjudication, but having topic-specific or
6 issue-specific dates or perhaps a series of dates makes
7 sense to me for segregating out those witnesses that have
8 nothing to do with environmental impacts, but are simply
9 there for the land use aspects or some other example that's
10 bound to come up.

11 And again, as I think I said to Benton County on
12 the scheduling issue, as well as the Yakama Nation, I share
13 your view that as much as the applicant has the burden of
14 proof and persuasion on getting the project to a favorable
15 recommendation to the governor, it can be direct testimony
16 that comes in from the other parties. Just because we've
17 talked about direct reply and rebuttal, I think again, as
18 lawyers, we appreciate the technical meaning of those terms
19 and it's -- in this context, I'm not trying to imply any
20 granular meaning on those, other than everybody gets the
21 chance to present their case and, as parties, has a chance
22 to present their full case. And that's how I'm going to
23 approach it, Mr. Aramburu, regardless of, kind of, the
24 labels we've kicked around informally this morning.

25 I hope that addresses at least some of the

1 concerns on that topic. What do you think?

2 SPEAKER ARAMBURU: I think that would be
3 perhaps a good idea. Certain issue would be considered at
4 certain times and witnesses and all the witnesses who
5 presented on that subject would be heard at one time. That
6 might help focus the council in its deliberations and not
7 have an extended time between subject matter for the
8 council's review.

9 JUDGE TOREM: All right. Sounds good.

10 Ms. Chase, I think it was you -- maybe it was
11 somebody else -- that referenced Order 790 and a particular
12 part of that order that you found potentially transferable
13 to this case. And I thought someone said page 11, but
14 I'm -- maybe I do have 11 pages.

15 Call my attention back to where we were looking at
16 that.

17 SPEAKER CHASE: Sure. Judge Torem, I was
18 looking at page nine -- I apologize if I misspoke -- and
19 paragraph 4, motions to strike pre-filed testimony.

20 JUDGE TOREM: Thank you. I have that in
21 front of me now.

22 SPEAKER CHASE: And then I also think that
23 paragraph 2 is helpful in terms of the schedule for
24 pre-filed testimony, in the sense of addressing some of the
25 issues that Ms. Voelckers and Mr. Aramburu raised of having

1 other parties who want to submit pre-filed direct testimony
2 have a deadline by which they are required to do that.

3 JUDGE TOREM: Thank you. See, my memory of
4 what happened many years ago in Ellensburg was right, but I
5 had not been able to find that page with all the other
6 multi-tasking going on. Thank you for helping me with that.

7 So for all the other parties that haven't had a
8 chance, having just got the agenda this morning and my
9 reference of Order 790 somewhere -- I think it was on page
10 three of the agenda for -- under item 7. That order gives
11 you an idea, at least, of how I've done this in the past.
12 I'm open to suggestions for improvement always.

13 But that should also, Mr. Aramburu, answer some of
14 the mail that you and other parties that are not the
15 applicant have raised this morning.

16 So let me sum up where we're at. We're at 10:35.
17 We've talked a little bit about the challenges of trying to
18 get things scheduled with an existing July 8th deadline for
19 the extension of the application at this point to that date.
20 As well as your calendars, we've also talked a little bit
21 about the desire for pre-filed testimony and how long it
22 takes to get things to work and to have a good, substantive
23 presentation ready for the council members to review, to
24 hear and otherwise. And we've talked a lot about how that
25 should be done, whether in-person, hybrid or the preferences

1 for virtual as currently stands with the direction from our
2 chair.

3 Let's -- I can't tell you -- I don't want to set a
4 date today, but I do want to, at this point, do what I think
5 is maybe some low-hanging fruit. Our filing requirements,
6 as I shift to No. 5 -- and we're not done with No. 4; we're
7 going to circle back when we're under No. 6 and 7. On Item
8 5 about filing requirement, the EFSEC procedural rules, as
9 they still stand from pre-Covid, require a lot of things to
10 be filed and copies made in paper.

11 And I know that helps for some. I've resisted
12 printing out a lot of things today, for lack of printer ink
13 and also environmental sensitivity, I'm not sure in which
14 order. As an old-school lawyer, paper's still great, but
15 only to a certain extent, and the burden of filing pre-filed
16 testimony with 12 or 14 copies would clear forests, I think,
17 in a case like this.

18 Do any of the parties feel strongly that we must
19 require service with paper copies from you to all of the
20 other parties, knowing that if I do, the burden will be
21 equal on all of you if you have to file multiple copies with
22 the council and multiple copies with the parties?

23 I'm going to start with the applicant and just ask
24 about the question about electronic versus paper. And
25 before I do, I want to see if Ms. Masengale is available to

1 talk a little bit about the electronic filing and the
2 requirement for using the specific EFSEC email box that we
3 set up for this and, frankly, her experience that not
4 everybody has been doing that so far in the process.

5 Ms. Masengale, are you available?

6 SPEAKER MASENGALE: I am. Thank you, Judge
7 Torem.

8 So again, this is Lisa Masengale for EFSEC. I
9 would just remind everyone and respectfully request that any
10 email communications, whether it's filings, letters to
11 Judge Torem, et cetera, that they please copy the
12 adjudication email that was laid out in the order commencing
13 agency adjudication.

14 We are having instances where copies are maybe
15 going to other EFSEC staff, but are not actually -- or going
16 just directly to Jon Thompson and the judge, but are not
17 actually going to the adjudication email. And in order for
18 us to officially receive and process those as records, it's
19 really important that you please copy that adjudication
20 email.

21 So thank you very much.

22 JUDGE TOREM: All right. Thank you,
23 Ms. Masengale. And I think you actually sent me an email on
24 the call here. I'm wondering where one of the letters is,
25 one of the parties we've been talking about today.

1 So I'll send that over to you as soon as I can
2 identify it, and that way you'll have a copy. But again,
3 formally, parties sending it to everybody else on an
4 all-party email and sending it to me, I certainly
5 appreciate, but please put this EFSEC -- or
6 adjudication@EFSEC.law.gov email together, and that will
7 guarantee that Ms. Masengale knows what's going on, as well,
8 and we go from there.

9 All right. Let me come to you, Ms. Chase, and see
10 if there is input on that as well as the electronic versus
11 paper copies.

12 SPEAKER CHASE: Thank you, Judge, and
13 thank you, Ms. Masengale, for that clarification on how the
14 parties are to address correspondence. We'll be sure to do
15 that going forward, to use that adjudication email box.
16 That was really helpful for us to hear that from you.

17 In terms of your question, Judge Torem, about
18 email copies, we're fine with dispensing with paper filing
19 requirements and using email copies. I think what we would
20 propose is if the parties confer and settle on a firm list
21 serve of whose emails for each firm should receive those,
22 including if there's, for example, a designated support
23 staff person who should be included and --

24 JUDGE TOREM: Pardon me just a second,
25 Ms. Chase. Whatever you said after that "firm list serve,"

1 at least on my end, came out garbled. I want you to repeat
2 that, if possible, so the court reporter has it fully clear.
3 I'm not sure if her audio had the same problem as mine.

4 SPEAKER CHASE: Happy to do so.

5 So we're happy to dispense with paper filing
6 requirements on behalf of the applicant. In terms of
7 electronic requirements, our proposal would be that the
8 parties confer and applicant is happy to leave these
9 discussions to generate an agreed upon list serve of who all
10 the lawyers at the firm and any support staff at the
11 relevant firms may be who should be copied on any particular
12 filing. And then we'll have one uniform set of addresses
13 that everyone can work from for all filings, which will, of
14 course, include the adjudication filing address.

15 JUDGE TOREM: I'm going to ask if Joan Owens
16 from EFSEC staff is still on the line. Ms. Owens?

17 She might be on mute. She might not have been
18 able to stay for the whole conference.

19 The reason I called for Joan just now, because in
20 the lead-up today, Ms. Chase, we were trying do the same
21 sort of question about, where are we sending out, like,
22 today's pre-hearing conference agenda, what kind of list did
23 we need. So she had developed a listing, as well, for the
24 applicant for Benton County for Counsel for the Environment,
25 for the Yakama Nation and for Tri-Cities C.A.R.E.S.

1 And so, like, Mr. Aramburu has two different email
2 addresses that she has listed, and Counsel for the
3 Environment has not only Ms. Reyneveld's address, but also a
4 Julie Stoloff (phonetic) and a couple of other -- well, one
5 other email address there.

6 I think working with Ms. Owens as the parties
7 develop their own agreed list of who gets served if we go
8 with electronic service will help make sure who else on
9 EFSEC's staff should get served those documents in addition
10 to the copy that's going to be required for the adjudication
11 address. So I will let Ms. Owens know, if she's not
12 listening now, that I'm dragging her into the midst of this
13 establishing the filing list. And if she's not the correct
14 point person, we'll establish who is to work with the
15 parties.

16 SPEAKER MASENGALE: Judge Torem, this is Lisa
17 Masengale at EFSEC. I actually compiled that list, so --
18 and that was based on the email addresses that were provided
19 by the parties in their initial filings.

20 JUDGE TOREM: All right. Thank you,
21 Ms. Masengale. I wasn't sure -- I think I got that from
22 Joan last night when we were getting ready to send out the
23 pre-hearing conference -- or the preliminary order on
24 intervention. So thank you for the clarification. You may
25 very well be the person monitoring those things, so if you

1 are, excellent.

2 All right. Turning to the next party, Mr. Harper,
3 you're up on this question of paper and electronic copies.

4 SPEAKER HARPER: Your Honor, Ken Harper for
5 the county. We would be happy to facilitate and coordinate
6 in any way electronic filing and service and dispense with
7 paper.

8 JUDGE TOREM: All right. Thank you.

9 Ms. Reyneveld on behalf of the Environment.

10 SPEAKER REYNEVELD: Yes. So we are in
11 agreement. Counsel for the Environment has a preference for
12 electronic, both because it is less burdensome and also
13 because it is more environmentally friendly. And as Counsel
14 for the Environment, we are particularly concerned with the
15 adverse environmental impacts of an in-person hearing that
16 would require the parties to produce written copies and also
17 to travel long distances just because of the climate impact.

18 So I'm definitely in favor of establishing an
19 agreed list.

20 JUDGE TOREM: Okay. For the Yakama Nation,
21 Ms. Voelckers.

22 SPEAKER VOELCKERS: Thank you, Your Honor.
23 Yakama Nation strongly supports electronic service and
24 filing.

25 JUDGE TOREM: Okay. Mr. Aramburu for

1 Tri-Cities C.A.R.E.S.

2 SPEAKER ARAMBURU: Electronic service and
3 filing is fine with us.

4 JUDGE TOREM: All right. Well, let me call
5 on Mr. Thompson, as our assistant attorney general and the
6 one that I conferred with about this last night. I think,
7 Jonathon, that we are going to have to take a look at what
8 the EFSEC rules are and maybe get a stipulation to the
9 parties to differ from what the written WAC might be. So we
10 probably just need to make sure if all parties agree -- as a
11 judge, I'm just thinking about getting burned later if we
12 deviate from the established WAC and some party then
13 criticizes EFSEC for doing so, even though we might have all
14 agreed to do so; I don't want to be accused of ultra vires
15 activities later. But I do want to make sure that we have
16 some mechanism, without having a formal APA rule-making, to
17 deviate from the rules we have.

18 Mr. Thompson, any ideas on how we can move toward
19 an electronic service and filing requirement and minimize or
20 dispense with paper altogether? And if I'm putting you on
21 the spot too much, Mr. Thompson, we can take this discussion
22 outside the pre-hearing conference, but I'd just like your
23 initial thoughts on the mechanism.

24 SPEAKER THOMPSON: Yes. Thanks, Judge Torem.

25 I don't think there's anything that would be

1 required, other than what you've already heard today, which
2 was the parties' agreement on the record of this pre-hearing
3 conference that electronic filing is sufficient for their
4 needs and service.

5 So there may be more details that would need to be
6 worked out, I'm not sure, but I wouldn't have any concerns
7 from deviating from the procedural rules just based on the
8 discussion you've had today.

9 JUDGE TOREM: All right. As you've told me,
10 I have to think a little bit more inside the box from time
11 to time so I want to make sure I'm not too far outside the
12 lines when I'm trying to be creative and do what I think is
13 right, despite what the rules might say.

14 With that in mind then, I think we'll work with
15 Masengale and EFSEC staff to develop that list that
16 Ms. Chase first referenced, and maybe I'll have
17 Ms. Masengale send a copy of that list to all of you today.
18 And by the time we get around to our next pre-hearing
19 conference, which I'm sure is going to be necessary, we can
20 formalize that. And I might still draw up -- being a little
21 old-school on the cover your -- well, "Cover your six" as we
22 said in the military. I think that's acceptable in this
23 conversation. Make sure that we have a stipulation and that
24 representatives from each party can formally sign off on it.

25 So those are the ground rules for going forward in

1 this adjudication. They may differ in another adjudication,
2 so I just want to be specific.

3 We'll have the transcript from today, but if I
4 summarize it into a quick, one-page stipulation on filing
5 rules, I think that will give everybody a quick reference to
6 make sure that they know what they're doing. We can append
7 the approved service list to that stipulation and everybody
8 will be on the same page or pages, literally, even if
9 they're electronic.

10 All right. I see we are coming up on our second
11 break. We still have a little bit of work to do, and
12 frankly, it's the hardest part is going to be this
13 development of disputed issues. But it may not take a lot
14 of time today because I've read what the parties have
15 submitted and we're nowhere near the degree of specificity
16 and we're nowhere near the neutral tone that I'm hoping for
17 that might be set out in orders like No. 790.

18 So with that in mind, I just want everybody to
19 refresh what their thoughts on disputed issues lists are and
20 how we're going to come up with one by agreement, between
21 now and the next pre-hearing conference. And we'll come
22 back at the top of the hour, at 11:00. I'm going to try to
23 have us wrapped up by 11:30. If we need to run longer -- I
24 know I put this on my calendar to run up until noon, but I'd
25 prefer if we didn't. I'd rather give you the other

1 half-hour back, before the lunch hour, so that those of you
2 on the line can call and confer with each other about how it
3 went today.

4 But we'll also be selecting another date for a
5 second pre-hearing conference. I think I have time the
6 afternoon of Monday, March 20th in the afternoon, and I may
7 also have some time coming Tuesday morning, the 21st, in
8 that week. And it's possible I can also make time on
9 Friday, March 24th, depending on how I juggle some other
10 parts of my schedule.

11 So take a look at those dates. I may also be able
12 to give you March 22nd. I'm just, frankly, juggling another
13 case there that I'm not sure how it's going to go on my
14 other job.

15 So here we are, 10:49. Ms. Allison, if we take a
16 break until 11:00, is that good for you?

17 COURT REPORTER: Yes, that's fine. Thank
18 you.

19 JUDGE TOREM: All right. With that preview
20 of issues, we'll go off the record and take a recess until
21 11:00.

22 (Recess 10:50-11:00 a.m.)

23 JUDGE TOREM: It is now 11:00. We're back
24 for a third hour -- hopefully, not the full hour -- with our
25 Horse Heaven Wind application before EFSEC.

1 Do we have Crystal Chase back?

2 SPEAKER CHASE: Good morning, Judge Torem.
3 Yes, this is Crystal Chase.

4 JUDGE TOREM: And Kenneth Harper?

5 SPEAKER HARPER: Ken Harper for Benton County
6 is present.

7 JUDGE TOREM: Sarah Reyneveld.

8 SPEAKER REYNEVELD: Sarah Reyneveld for
9 Counsel for the Environment is present.

10 JUDGE TOREM: Shona Voelckers.

11 SPEAKER VOELCKERS: Shona Voelckers on behalf
12 of Yakama Nation is present.

13 JUDGE TOREM: And Richard Aramburu.

14 SPEAKER ARAMBURU: Rick Aramburu present for
15 Tri-Cities C.A.R.E.S.

16 JUDGE TOREM: All right. I'm hoping that one
17 of my cats is not going to make a noticeable appearance as
18 well, but she's looking like it.

19 Let's proceed with a question we've got here about
20 the disputed issues. All right. Well, this is where Judge
21 Torem puts on a little bit of a scold disappointed hat. I
22 was really, really hoping for a better set of disputed
23 issues by the parties today by agreement.

24 As you can tell by the way the agenda reads, I
25 don't think we really got that. We got some fairly vague

1 ones. We got some very, very biased towards the interest of
2 the parties' presentations. I'd love to save that kind of
3 argument for briefing with our oral argument or written
4 briefing. And I know everybody's passionately involved in
5 their perspectives and the issues for which they're going to
6 spend a lot of money and a lot of time adjudicating these
7 issues, but when we're developing an issues list, the
8 council has yet to form their impressions and they need to
9 be given a clean set of issues and then evidence on which to
10 base their opinions.

11 So I'm just going to ask, when you go back to
12 collaborate further, that you keep that in mind and find
13 those common points of agreement or just the basics of a
14 topic so we can say, as Mr. Aramburu pointed out -- and
15 frankly, if you look at his email -- I'm not sure,
16 Mr. Aramburu, who all you sent it to. I think it was all
17 parties -- that identified environmental impact issues that
18 Tri-Cities C.A.R.E.S. is concerned with. That's the kind of
19 issues we need to -- at least as a nugget to start with, and
20 not some of these tilted questions that only have one
21 answer. That's for a legal brief. That's not for a set of
22 disputed issues.

23 So most of what I read in the submissions that
24 came in on March 9th didn't meet the standard that I want to
25 set out here in No. 7 on our agenda and sort of what you've

1 already seen in Order 790 from the Kittitas Valley case from
2 a long time ago. I still think that case carries some
3 lessons and that the parties here will get some insight if
4 they don't have the experience with EFSEC on how to present
5 the issues at this stage of the proceeding.

6 Plenty of time for opinions and strong feelings
7 later; I'll deal with that. But right now, as we
8 collaborate and try to frame the issues, we need a little
9 bit more neutrality and a little bit more common ground on
10 just what the council needs to consider.

11 And I know all five parties have different
12 approaches, different interests, and will be advocating
13 strongly. Put off your advocacy hats for the moment, take a
14 look at what I've recommended here, and go back to the
15 drawing board. And hopefully, on the next round I'll get
16 from you what I need, and we'll be able to work on the
17 substance of them at the next pre-hearing conference.

18 If I don't get what I need from the parties, then
19 I'll consult with EFSEC staff, based on your inputs, and
20 I'll draw up a list of disputed issues and I will present it
21 for your review. But after I take your comments on what I
22 would draw up, that will become the ordered list of issues
23 and subject to your interlocutory review to Chair Drew, that
24 will be the list of issues.

25 So I'd much rather have the parties control the

1 procedures than me as the judge. I want to be much like a
2 sports referee, where maybe I'm throwing the flag, but I
3 don't want to influence the outcome of the game. I just
4 want to be the gatekeeper of the evidence that comes in, and
5 I want to make sure we all play with the agreed set of
6 rules, and I'll call the penalties accordingly.

7 So I'm sure I've mixed up about 12 different
8 analogies, but I think I've told you where I'm coming from.
9 Let me now see what the parties think about that.

10 Ms. Chase, from the applicant's development of
11 this list of issues, is there something that you want to
12 draw my attention to that the applicant wants to present
13 today as, yes, this is -- clearly, although you have the
14 application, everything might be at issue. Is there
15 something, specifically, the applicant sees and knows is
16 going to be in dispute that should be on the issues list?

17 SPEAKER CHASE: Thank you. This is
18 Ms. Chase.

19 No, Judge Torem. Applicant is prepared to meet
20 its initial burden as to the application itself, but really
21 sees this as a process by which the other parties to the
22 proceeding identify what specific issues might be disputed.
23 So I don't have anything specific to draw your attention to
24 today.

25 JUDGE TOREM: All right. Fair enough.

1 Mr. Harper, on behalf of Benton County.

2 SPEAKER HARPER: Ken Harper on behalf of
3 Benton County.

4 Yeah, it's been helpful to hear your remarks,
5 certainly, Your Honor, because I did not perceive the issues
6 list in Order 790 to be, frankly, particularly specific or
7 targeted in a way that, I guess, seemed to track what the
8 county thinks the actual disputed issues in this case will
9 be.

10 JUDGE TOREM: I will defer to you,
11 Mr. Harper. That list is not as specific -- at least
12 identifies which portions of the environmental impacts by
13 name, but it doesn't have the degree of specificity the
14 county was filing with the tribe in its letter yesterday.
15 We could have more detail than 790 as long as the tones are
16 neutral.

17 So I don't mean to say you can only go as far as
18 790 on detail. Like I said, I've learned some things since
19 then, and a little more specificity up front on that
20 proceeding would have helped. So let's build on that, but
21 it's a good starting point.

22 SPEAKER HARPER: Thank you, Your Honor. Ken
23 Harper again.

24 I guess what I was getting at, Your Honor, is
25 we're just trying to calibrate this as we were going, and we

1 didn't find a WAC that specifically identified how to
2 formulate issues. And our concern was that if issues are
3 not expressed in a way that we think captures what we want
4 to demonstrate, then we might have boxed ourselves out in
5 some respect.

6 But again, Your Honor, I appreciate your comments,
7 and we can certainly collaborate and go back and try to
8 refine the statement further.

9 JUDGE TOREM: All right. Well, thank you,
10 Mr. Harper, and that's really all they are is my comments.
11 And I don't believe there is an EFSEC rule that develops,
12 kind of, a model standard. This is all Judge Torem flying
13 by the seat of his pants and prior experience, so take it in
14 the manner it's intended, just to help the parties come to
15 some kind of agreement on what's there. I appreciate that.

16 Ms. Reyneveld is next for CFE.

17 SPEAKER REYNEVELD: Yes. So as an initial
18 matter, the parties, when we conferred, did request,
19 Judge Torem, that you provide additional direction as to the
20 scope, specificity and neutrality of the --

21 (No audio)

22 JUDGE TOREM: Did we lose your audio?

23 SPEAKER REYNEVELD: Oh, can you hear me?

24 JUDGE TOREM: Yeah. Start again. You said
25 specificity and neutrality, and then at least on my end it

1 dropped.

2 SPEAKER REYNEVELD: Okay. I'm sorry. So
3 yes, I can continue.

4 So I think we did request additional direction as
5 to the scope, specificity and neutrality of the disputed
6 issues. And from Counsel for the Environment's perspective,
7 it would be very helpful for you to provide some additional
8 direction as to how to formulate issues, maybe a couple
9 examples of issue statements outside of the order that
10 you've referenced, from our perspective.

11 So we have not yet submitted issues because we
12 were waiting for that guidance, but I'm happy to speak
13 generally if it's helpful to, kind of, the general nature of
14 the issues that we see as disputed, if that's helpful.

15 JUDGE TOREM: It is in its own way.

16 Let me digest that, and in the meantime, I'd ask
17 Ms. Voelckers on behalf of Yakama Nation.

18 SPEAKER VOELCKERS: Thank you, Your Honor,
19 Shona Voelckers.

20 We were coming at this with a similar perspective
21 to Mr. Harper, and so this is all very helpful discussion.
22 And I would also echo what Ms. Reyneveld had said. Our goal
23 is that we are clear in what the questions are so that we
24 can be preparing the right scope of evidence and witness
25 testimony, and that's our goal.

1 So that was the goal in getting thoughts on paper
2 and, certainly, we can take this feedback back with us and
3 look forward to working with the group. But I would also
4 appreciate any further guidance on how you see this, kind
5 of, more general list that's in Order 790, how, as you said,
6 improving upon what's (inaudible) so that we can identify,
7 with more specificity, the issues and still present that in
8 a neutral fashion.

9 JUDGE TOREM: Okay. Ms. Voelckers, I think
10 I'm hearing from everybody that if I would draft a couple of
11 issues that I would think would be suitable for the counsel,
12 based on just one topic, maybe that would be helpful.

13 Is that sort of what you're asking for as well?

14 SPEAKER VOELCKERS: I think that would be
15 helpful. I mean, we're certainly committed to workshopping
16 this as a group, and so -- and not, you know, putting this
17 on you. So we are -- we're dedicated to workshop this as a
18 group, but yes, if that's something you were able to
19 provide, that would, I think, be helpful for those of us
20 that are speaking up on the need for clarity.

21 JUDGE TOREM: Okay. Well, I'm happy to take
22 that on, because I think if I can give you better direction
23 on what I'm asking for, I think we were all in law school
24 where it was the bring me another rock school or hide the
25 ball. I'm not about that, particularly. I don't want to

1 waste anybody's time.

2 So I'll give some more thought as to what it is
3 I'm really asking the other parties to do. I'll sit down
4 maybe with Mr. Thompson and some of the other staff that are
5 interested and draft up a sample issue.

6 What I'm afraid of is I don't want anybody to read
7 too far into Judge Torem's personal styling of an issue and
8 think, Oh, they have to all be modeled like that or, Oh,
9 that shows -- I'm afraid it might show a bias or prejudice
10 that could be used against me. And I'm not trying to
11 express any bias. I want you all to know I get no vote on
12 this Horse Heaven Wind Project or anything else. I'm simply
13 a presiding officer making rulings on the evidence that the
14 council has to consider.

15 So if I style an issue, I'm going to try to keep
16 it as neutral and in the middle as I can, but if you pick it
17 apart, I'm sure somebody will find a word choice or
18 something else to say, Well, look at Judge Torem; he's
19 leaning this way or that. I'm not. I'm really not. I
20 don't get a vote. My opinion doesn't count, except on
21 evidentiary rulings.

22 So it's a little bit of a hazard if I wade into
23 this, Ms. Voelckers. I hope the parties appreciate that,
24 but if that's what's going to help you and make this process
25 easier and better and more efficient, I'll do it with those

1 caveats, understood by the parties, to not take any opinions
2 or micro aggressions or whatever you can read into it too
3 seriously. They're not intended. Maybe they're revelatory
4 in other ways, but I just try to be of help to the parties
5 in that regard.

6 Let me turn to Mr. Aramburu at Tri-Cities
7 C.A.R.E.S. to see -- on the issues and the statements. And
8 again, I've given Mr. Aramburu props already for going a
9 little bit a step behind -- or beyond what the other parties
10 submitted. Maybe you're more along the lines of the
11 Order 790 level of issue statement, Mr. Aramburu, but I'll
12 let you tell me what more you think.

13 SPEAKER ARAMBURU: Well, I think as we do
14 issues -- this is a suggestion of mine -- that we want to
15 make sure the parties understand, as they hear testimony,
16 that -- what the issues in the case are.

17 And so, for example, no one is going to ask EFSEC
18 to consider whether or not -- the impacts of the Chinese
19 balloon falling on this project are going to be. That's not
20 going to be an issue.

21 JUDGE TOREM: I certainly hope not.

22 SPEAKER ARAMBURU: Well, I'm sorry for being
23 facetious, but it's getting towards the lunch hour.

24 But I think it's really a matter of notice to the
25 other parties to make sure that we know what the subject

1 matter is. Tri-Cities C.A.R.E.S. filed 110 pages of
2 comments on the draft impact statement, so our views on
3 these issues are well known to the parties.

4 So I do think that looking at 790, that that's the
5 kind of thing that gives us notice. And we can also use
6 that set of issues to do the kind of thing that we were
7 talking about before, which is maybe taking a day and
8 saying, okay, this is going to be agriculture day. This is
9 going to be wildlife day. This is going to be esthetics day
10 or whatever day it's going to be that we have the witnesses
11 on subject matter present.

12 So I think 790 or some version of that is fine,
13 but again, I think it's notice to the council, to the other
14 parties, of the issues that we're concerned with; and being
15 too tight, as the growth board is and some of the people
16 are, with the issues, I don't think that's appropriate here,
17 given all the background, particularly from my client, as to
18 what their concerns are about the project. The applicant
19 knows perfectly well what we're worried about.

20 So that's my thought, and I think helpful to have
21 some example, or if there's another pre-hearing order,
22 Your Honor, that you could direct us to, that would be
23 helpful as well. So that's my thoughts.

24 JUDGE TOREM: Thank you, sir. I appreciate
25 that. And I will look for other pre-hearing conference

1 orders that might be a good demonstration.

2 Again, I did what I could with the time I had
3 budgeted, left for this, but I think I'm going to ask the
4 assistant attorney general, Jon Thompson, maybe one of our
5 siting specialists, like Amy Hafkemeyer and Amy Moon, who is
6 handling a lot of issues on the SEPA side, to sit down with
7 me and maybe others that are interested in EFSEC staff and
8 craft a bit of a list that I could send to all of you and go
9 ahead and share that in the next week or so. And if I can
10 provide it to you ahead of your next collaboration, I'm
11 sure, chronologically, that's best. So I can get to work on
12 that as soon as possible.

13 Was there anybody else that wanted to say anything
14 more on the issues we haven't resolved today? I think if I
15 go back over the agenda, clearly, No. 1 was easy. No. 2
16 was easy.

17 No. 3, I have your opinions and my homework to go
18 to Chair Drew.

19 No. 4, on the scheduling, we know sort of where
20 the boundaries might be now.

21 No. 5, I think we set up. We just needed a
22 stipulation that I want.

23 No. 6, the pre-filed testimony timing, I think,
24 got wrapped up in our discussion of No. 4 and now we're on
25 No. 7. We're going to have to come back at a second

1 pre-hearing conference to handle, I guess, numbers --
2 whatever the response is to No. 3, and that will inform how
3 we wrap up 4, 6 and 7.

4 So that's what I'm thinking the agenda for next
5 time will be. What I find out from Chair Drew, we might
6 even get that announced or discussed at next week's EFSEC
7 meeting, depending on when I might have time to speak with
8 her. If not, it will be at our next pre-hearing conference,
9 and then we can handle the other issues that are fallout on
10 4, 6 and 7 on today's agenda.

11 Ms. Chase, was there anything else you think we
12 needed to address today or to put on the agenda for next
13 pre-hearing conference?

14 SPEAKER CHASE: No, Judge Torem. I think it
15 would be helpful at the next pre-hearing conference maybe if
16 you came with -- if you're able to come with a set of ideas
17 about proposed dates that the parties can further react to
18 in terms of really pushing us to get our schedule in place
19 once we get our issues list in place.

20 JUDGE TOREM: All right. And I may be able
21 to get that, Ms. Chase, as part of when I send out the list
22 of specific issues, I may be able to include a separate
23 attachment with some more realistic ideas on dates, given
24 what I've learned from all of you today.

25 And on that note, for all of you on the line today

1 that haven't filed notices of unavailability, as
2 Mr. Aramburu took the liberty to do, which prompted me to
3 start thinking about, Gee, I wonder what the lawyers' needs
4 are, I'd invite you to take a look at your calendars, it
5 sounds like from my notes earlier, late May. And why don't
6 you go ahead, despite the July 8th deadline, and tell me
7 your availability all the way out to Labor Day and early
8 September, maybe through the end of September. If you have
9 any unavailability from late May, say Memorial Day, through
10 the end of September, let's get it filed so that at least I
11 know what your preferences are.

12 I am sure that when I lay all of these on a
13 calendar together and the council's availability, we'll
14 never be able to have a hearing that suits everybody and the
15 dates, but I'll work to do that, my best, if you get me
16 those dates, sooner rather than later. Today's March 10th.
17 If I can get your notices of unavailability, at least your
18 preliminary ones, by next Friday, that will help me to start
19 cobbling together a schedule.

20 All right. Back to the original question.
21 Mr. Harper, I'm up to Benton County.

22 SPEAKER HARPER: Thank you, Your Honor. Ken
23 Harper for Benton County.

24 Your Honor, I would benefit, I think, from hearing
25 just a little bit more on issues, and I just want to ask for

1 clarification. I'm looking at Mr. Aramburu's statement
2 right now, and if, in fact, the level of, sort of,
3 specificity that Mr. Aramburu submitted earlier this morning
4 is consistent with Your Honor's expectations for formulating
5 issues, then I certainly get it, and I can tailor the
6 county's position accordingly.

7 Is that a fair read, Your Honor, on where you're
8 coming from?

9 JUDGE TOREM: I'll say again, I think it's a
10 good starting point. I'm pulling up his email again here
11 again, Mr. Harper, to say, he says he wants to particularly
12 emphasize certain things, like visual and esthetic
13 resources, the impact of wildlife species and habitat. For
14 that particular one -- again, speaking off the cuff -- if
15 there are particular species, as opposed to just the general
16 habitat and species question, that would be helpful.

17 I understand, from the environmental statements,
18 that the Ferruginous hawk is a species of great concern for
19 many and may be impacted by this project, as well as other
20 raptors. But, you know, that kind of a listing or a
21 grouping, whether it's a specific species of concern and a
22 specific impact that might occur to that species, that would
23 be a better granular detail so we'll know upfront what the
24 parties are expecting.

25 I think in the spirit of what Mr. Aramburu said,

1 of the parties all knowing what the issues are, that's the
2 ultimate goal, if that helps, Mr. Harper.

3 SPEAKER HARPER: It -- it does. Ken Harper
4 again for the county, Your Honor. It does. I'm just -- I
5 think, on behalf of the county, we felt compelled to respect
6 your request to get issues together, but obviously, we do
7 have an outcome that we would like and we do have a
8 preference for a result.

9 So I think in formulating those issues, we were
10 trying to be candid about the way we think those issues will
11 be developed, but what I'm getting is that we can still do
12 that. We just need to be a little more, I guess, as you put
13 it, neutral or generic in how we express it.

14 So I think that's helpful. I'm just trying to
15 get -- I'm trying to draw out some comments, Your Honor, so
16 when we go to a conference of council, we'll be able to
17 channel what you're asking for a little more precisely.

18 JUDGE TOREM: Always dangerous to channel the
19 mind of Judge Torem, but I appreciate that, Mr. Harper. I
20 think I can just ask you to put yourself in the seats of
21 this council and say, What? How do we tee it up? And from
22 your perspective, to get the results you want, but how do we
23 tee up the issues in a way so that those people that have a
24 vote on the outcomes that all of you want -- and they're
25 disparate outcomes; let's admit it. How do we tee it up in

1 a way that all of the evidence will get considered and
2 they'll see it our way later?

3 Let me depend on your advocacy for that, but this
4 is not the time for advocacy, so much as just getting the
5 scope of the issues, with enough so that the council says,
6 ah-ha. These issues, the issue statement are a good opening
7 statement of what the evidence will show at hearing.

8 That's the spirit that I want you to work on the
9 next round of collaboration, to be inclusive about the
10 issues, flesh out things that -- by doing so you're going to
11 find some areas where you agree. There's no way a project
12 goes forward without a particular mitigation. Now, the
13 degree of mitigation is something to argue about, but when
14 you're developing the issues you'll say, On this issue, as
15 the application stands, even the applicant might be saying,
16 Yeah, on second thought, we want a different layout of the
17 solar array, or we want a different spot for the battery
18 storage, or whatever the granular detail might be, that
19 might result in a stipulation on a particular issue because
20 you've talked about it at this level upfront. And it will
21 save you from having to present a witness or present
22 briefing.

23 This is the time to look for those areas of
24 agreement. I hope there will be some, minor as they might
25 be, but something will come out of the counsel of council,

1 as you put it, to result in some meeting of the minds on
2 just what the council for EFSEC needs to hear and what they
3 need to really cover to be fair to all of you, and the
4 public, on what the recommendation to the governor consists
5 of when this is all said and done some months down the road.

6 Mr. Harper, anything further on channeling my mind
7 there?

8 SPEAKER HARPER: No, Your Honor. Actually --
9 Ken Harper again for the county -- it's very helpful to hear
10 you on that. I think that will guide the attorneys quite a
11 bit. Thank you.

12 JUDGE TOREM: All right. Ms. Reyneveld, CFE,
13 anything else that we need to carry over to the next one or
14 thoughts you have?

15 SPEAKER REYNEVELD: No, nothing further from
16 Ms. Reyneveld. Thank you.

17 JUDGE TOREM: Ms. Voelckers, on behalf of
18 Yakama Nation.

19 SPEAKER VOELCKERS: Thank you, Your Honor.
20 Shona Voelckers.

21 First, I wanted to note that counsel for Yakama
22 Nation is available the week of March 20th, all the dates
23 that you mentioned as a potential second pre-hearing
24 conference.

25 Second, we will submit notice of unavailability,

1 but I want to note now that I am unavailable the last week
2 of June.

3 And third, if not today -- and I understand I'm
4 asking for something outside of your agenda, but if not
5 today, we'd ask that the next pre-hearing conference for a
6 discussion for any procedure that you could share about how
7 you would like to handle discovery and subpoena practice.

8 JUDGE TOREM: Okay. Fair enough. We'll pick
9 up discovery next time. I think -- I think Order 790, one
10 of its topic lines was an order on discovery. That should
11 give you some insight into what past practice has been, but
12 no guarantee of a future performance, if you will. But I'll
13 add that to the agenda for next time, gladly.

14 SPEAKER VOELCKERS: Thank you, Your Honor. I
15 did see that in the order and look forward to discussing
16 further.

17 JUDGE TOREM: Okay. If nothing else, that
18 will be food for thought and discussion next time,
19 Ms. Voelckers. Thank you.

20 Mr. Aramburu, any last thoughts on agenda items
21 for next time or anything else we need to cover today,
22 besides picking a new -- next date for another pre-hearing
23 conference?

24 SPEAKER ARAMBURU: So on the next pre-hearing
25 conference, March 20 is open for us. March 21 is not.

1 There may be some depositions that land in that week, but
2 right now I'm available on the 20th and not the 21st.

3 So I think that there is an issue that I think the
4 parties ought to consider here is -- I'm looking at the
5 processes and procedures found in Order 790, and quite
6 frankly, I'm not sure we can do this and get a council
7 decision by July 9. That just seems very difficult, given
8 the circumstances here.

9 Can we schedule and look at things to take us out
10 some period of time after this? I just don't think we can
11 get all of this stuff done and get a council decision by
12 July 9th. Just seems impossible.

13 JUDGE TOREM: Well, Mr. Aramburu, sometimes
14 we don't all call out the elephant in the room, and my
15 military time, I was Captain Obvious for some period of time
16 before promotion.

17 It's really up to the applicant to see whether
18 they think that the July 8th extension they've applied for
19 and been granted will allow the council to do what's legally
20 necessary in this amount of time.

21 I know I'm giving a really strong hint here, and
22 you can guess what it is, and I know that Mr. McMahan is
23 gritting his teeth because he has to go back to his client
24 and say maybe we need to file a third extension. But I
25 can't direct that. That's, again, above my paygrade.

1 But I appreciate what you're saying. The
2 applicant has clearly heard this today. They now have
3 something substantive to take back to their client, to ask
4 or not. Whether Chair Drew or the rest of the council will
5 make the same realization that you've stated on the record
6 today, again, I think it could occur and I think we may get
7 some movement on that, but I also am respectful that the
8 applicant's been waiting a long time and so have the people
9 of Benton County. And any further extension we go out to
10 compromises those interests above getting an administrative
11 process that the governor of this state still believes is
12 the best way to site these projects and have them evaluated.

13 That 12-month statutory period, as I said, turns
14 into a legal fiction, but it is the law. And reality is
15 different than the law. I'll say that, Mr. Aramburu. I
16 hope that captures what you're saying.

17 SPEAKER ARAMBURU: Your Honor, it does. Yes,
18 indeed.

19 JUDGE TOREM: All right. Well, we're both
20 smiling then. Remember this day, because who knows if we'll
21 be frowning at each other later.

22 Let's go ahead and see if we can pick a reasonable
23 time. I hope that next week, given that it's already
24 March 10th and next week involves at least some festivities
25 on Friday for St. Patrick's Day, if you'll have enough time

1 to collaborate next week and if I work hard to get you
2 something maybe Monday or Tuesday -- I'm just looking at my
3 schedule for Monday. It's already overburdened, but I'm
4 going to try to draw together EFSEC staff, if I can, for a
5 meeting early Tuesday to work on or comment on anything I
6 can pull together between now and Tuesday morning to submit
7 to you for your collaboration.

8 So if you're going to want to collaborate again,
9 hopefully, I'll have something to you by midday on Tuesday
10 the 14th of March with my items, and you can find some time
11 between that point and the Monday afternoon that I have
12 available for a pre-hearing conference, I would suggest
13 maybe 1:30 to 4:30 as a hold. But let me go around the room
14 and see if that's available for everybody.

15 Ms. Chase, for the applicant, would our next
16 pre-hearing conference March 20th, on a Monday, starting at
17 1:00 or 1:30 work for the applicant?

18 SPEAKER CHASE: Yes, it does. This is
19 Ms. Chase for the applicant.

20 JUDGE TOREM: All right. Same question,
21 Mr. Harper?

22 SPEAKER HARPER: Ken Harper for Benton
23 County. That's fine, Your Honor.

24 JUDGE TOREM: Two for two. Okay.

25 Ms. Reyneveld, keep the streak going?

1 SPEAKER REYNEVELD: That is fine for Counsel
2 for the Environment. Thank you.

3 JUDGE TOREM: And, Ms. Voelckers, I don't
4 think that you said you were unavailable the 20th. It was
5 the 21st. Right?

6 SPEAKER VOELCKERS: Thank you, Your Honor.
7 Shona Voelckers. We are available all the days you propose,
8 and so, certainly, 1:30 on the 20th works for Yakama
9 Nation's counsel.

10 JUDGE TOREM: Excellent.
11 Mr. Aramburu.

12 SPEAKER ARAMBURU: We're available at the
13 March 20, from 1:30 to 4:30.

14 JUDGE TOREM: It is my lucky day.
15 That will be it. I will have EFSEC send out a
16 similar notice that you got from -- for today's conference,
17 and with whatever the call in information will be. I'm not
18 sure if I'll bother with the Microsoft Teams next time,
19 wasting time waiting for my computer to fail me again. But
20 we'll meet again March 20th.

21 I'm going to make a note to try -- again, I'll
22 send an email to our staff, after we hang up today, to not
23 only send out the notice formally, but you've got it on the
24 record today. And we'll also try to get you a couple of
25 example issues fleshed out, and perhaps, also, the other

1 homework you wanted from me besides issues -- will somebody
2 speak up and remind me, besides examples of issues, what
3 else you wanted?

4 SPEAKER CHASE: It was Ms. Chase, who is
5 speaking now, and our request was if you were able to sketch
6 out intended proposed schedule that would give the parties
7 something to react to at the next prehearing conference.

8 JUDGE TOREM: Thank you.

9 SPEAKER CHASE: Yes.

10 JUDGE TOREM: Okay. Thank you. I will see
11 what I can do with that, subject to the limitations that
12 exist for the July 8th piece.

13 Right now, as it stands, if the applicant,
14 Ms. Chase, chooses to come back and somehow let the parties
15 know that that might be a flexible date and to what extent,
16 who knows? But again, I'm asking all of you, by next
17 Friday, on St. Patrick's Day, to get in the notices of
18 unavailability and just for -- just in case, have them run
19 out until September 30th.

20 Mr. Thompson, let me ask you if I've left anything
21 off that you think I needed to raise today with the parties,
22 if you're still on, Jon.

23 SPEAKER THOMPSON: Again, yes, I am, and
24 nothing that I can think of that can't be taken up at the
25 next pre-hearing conference. Thank you.

1 JUDGE TOREM: All right. And, Counsel, I'll
2 do my best to crystalize this agenda a little bit more and
3 send it out next week with kind of what we've agreed on and
4 worked through -- workshopped today so you'll have it more
5 than five minutes before you get on the line.

6 Again, I apologize for doing the just-in-time,
7 supply chain approach to this work, but I'll try to catch up
8 a little bit in the days ahead.

9 I'm going to go around the horn one more time and
10 see if there's anything else. And then if parties would
11 stay on the line, simply for the court reporter to ask for
12 spellings of anything we've pitched at her today so the
13 record can be a little cleaner.

14 Anything else for the applicant, Ms. Chase?

15 SPEAKER CHASE: No. Thank you, Judge Torem.
16 This is Ms. Chase.

17 JUDGE TOREM: And for Benton County,
18 Mr. Harper, anything else for the record today?

19 SPEAKER HARPER: Nothing further. Thank you,
20 Your Honor.

21 JUDGE TOREM: All right. Ms. Reyneveld.

22 SPEAKER REYNEVELD: Nothing further.
23 Thank you, Judge.

24 JUDGE TOREM: Ms. Voelckers.

25 SPEAKER VOELCKERS: Thank you, Your Honor.

1 Nothing further for Yakama Nation.

2 JUDGE TOREM: And Mr. Aramburu.

3 SPEAKER ARAMBURU: Good to go. Thank you.

4 JUDGE TOREM: All right. EFSEC staff,
5 anything else for the record today? And you don't have to
6 speak up if there's nothing.

7 Hearing nothing, then this pre-hearing conference
8 is adjourned at 11:35.

9 (Proceeding concluded 11:35 a.m.)

C E R T I F I C A T E

STATE OF WASHINGTON) I, Ann Marie G. Allison, CCR,
) certified court reporter, State of
COUNTY OF PIERCE) Washington, do hereby certify:

That the foregoing meeting was taken before me, via
Teams video conference, completed on March 10, 2023, and
thereafter transcribed by me;

That the transcript contains a full, true and complete
reporting and transcription of the proceedings;

That I am not a relative, employee, attorney or counsel
of any party to this action, or relative or employee of any
such attorney or counsel, and that I am not financially
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IN WITNESS WHEREOF, I have hereunto set my signature on
the 24th day of March, 2023.



Ann Marie G. Allison, CCR
Certified Court Reporter #3375

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