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March 20, 2023

Energy Facility Site Evaluation Council v.

EF-210011

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Energy Facility Site Evaluation Council
Pre-Hearing Conference, Horse Heaven Wind Farm - March 20, 2023

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application)
of:) Docket No. EF-210011
)
SCOUT CLEAN ENERGY, LLC, for) Prehearing
Horse Heaven Wind Farm, LLC,) Conference #2
Applicant)

VIDEOCONFERENCE PREHEARING CONFERENCE

March 20, 2023

Taken Remotely Via Zoom

Reporter: Christy Sheppard, CCR, RPR

APPEARANCES

Judge Adam Torem

Andrea Grantham

Lisa Masengale

Jonathan Thompson, Assistant Attorney General

For Horse Heaven Wind Farm, LLC, Applicant

Ms. Crystal Chase, Stoel Rives

For Benton County - Statutory Party of Right

Kenneth Harper, Menke Jackson Byer, LLP

Counsel for the Environment (CFE) - Statutory Party
of Right

Sarah Reyneveld, Assistant Attorney General

The Confederated Tribes and Bands of the Yakama
Nation (Yakama Nation)

Shona Voelckers

Tri Cities CARES (Community Action for Responsible
Environmental Stewardship)

J. Richard Aramburu

1 BE IT REMEMBERED that on Monday, March
2 20, 2023, via Zoom, at 1:32 p.m., before Christy
3 Sheppard, Certified Court Reporter, CCR, RPR;

4 WHEREUPON, the following proceedings
5 were had, to wit:

6
7 <<<<<< >>>>>>

8
9
10
11 JUDGE TOREM: This is Judge Torem
12 calling our prehearing conference, the second one, for
13 March 20th, 2023. It was supposed to start at 1:30 today
14 and it's now 1:34.

15 This is in the matter of the application of Scout
16 Clean Energy, LLC, and better known as the Horse Heaven
17 Wind Farm project in Benton County.

18 I am going to do a roll call now for the Applicant.
19 Do we have Crystal Chase?

20 MS. CHASE: We do, Judge Torem. This
21 is Crystal Chase and with me in the same conference room
22 is Ms. Schimelpfenig and Mr. McMahan.

23 JUDGE TOREM: All right. Ms. Chase, I
24 am going to ask you to spell the last names of all of the
25 parties that you just mentioned and we will take it the

1 first names the court reporter will pick up.

2 MS. CHASE: Great. Happy to do that.
3 This is Crystal Chase, last name C-H-A-S-E. With me in
4 the room is Tim McMahan, M-C-M-A-H-A-N. Also with me in
5 the room is Emily Schimelpfenig,
6 S-C-H-I-M-E-L-P-F-E-N-I-G.

7 JUDGE TOREM: All right. Thank you.
8 Counsel for the Environment, do we have Ms. Reyneveld?

9 MS. REYNEVELD: Ms. Reyneveld is
10 present. Sarah Reyneveld, and Reyneveld is spelled
11 R-E-Y-N-E-V-E-L-D. Thank you.

12 JUDGE TOREM: Thank you. God
13 afternoon. And for Benton Country, do we have Mr.
14 Harper?

15 MR. HARPER: This is Ken Harper for
16 Benton County, H-A-R-P-E-R.

17 JUDGE TOREM: Anybody else with you
18 today, Mr. Harper?

19 MR. HARPER: My colleague, Zi Foster
20 is also with us today.

21 JUDGE TOREM: And, Ms. Sheppard, if
22 you need any of these other names spelled again later
23 just be in touch with me. Staff will make sure you have
24 my phone number and email contact.

25 All right. Our intervening parties, the

1 Confederated Tribes and Band of the Yakama Nation.
2 Shona Voelckers, are you with us today?

3 MS. VOELCKERS: Yes, Your Honor. I'm
4 Shona Voelckers on behalf of the Yakama Nation. My last
5 name is V-O-E-L-C-K-E-R-S. My colleague Ethan Jones is
6 not present today, but my colleague Jessica Houston is
7 also on the line.

8 JUDGE TOREM: Excellent. Welcome all.
9 And, finally, Tri-Cities CARES, and that's an acronym
10 CARES and it stands for Community Action for Responsible
11 Environmental Stewardship. Do we have Mr. Richard
12 Aramburu?

13 MR. ARAMBURU: Present, Your Honor.
14 The last name is spelled A-R-A-M-B-U-R-U.

15 JUDGE TOREM: All right. Thank you
16 very much. We have got all of our parties accounted for
17 today, and I wanted to see who else is on the line for
18 EFSEC staff. I believe we have Jonathan Thompson, our
19 assistant attorney general. Mr. Thompson, if you could
20 just acknowledge?

21 MR. THOMPSON: Yes, I'm present.

22 JUDGE TOREM: And we also have Lisa
23 Masengale, M-A-S-E-N-G-A-L-E, and Andrea Grantham
24 indicate they could hear me on the voice check earlier.
25 Is there any other EFSEC staff present that wants to be

1 acknowledged?

2 All right. Not hearing anybody come off mute right
3 away, we will move on to the next agenda item.

4 (Unidentified speaker.)

5

6 MS. GRANTHAM: Judge Torem, this is
7 Andrea, you might have been muted if you could unmute
8 yourself. Try star six or pound six. Try star six or
9 pound six since you are calling in.

10 JUDGE TOREM: Okay. It sounds like
11 I'm no longer muted.

12 MS. GRANTHAM: There you go.

13 JUDGE TOREM: Thank you staff for
14 helping me. I heard some other lines so maybe you just
15 muted all the other lines. If there's other folks
16 listening in today, that's great. This is a procedural
17 prehearing conference to go over details about scheduling
18 the upcoming adjudication and a number of other rules
19 that we are working on. If you are listening in, please
20 keep your microphone muted so we don't have to do that
21 all mute again and result in actual people that are
22 having a speaking role get cut back. There is no public
23 comments opportunity today, but there will be at the
24 adjudication. Contact EFSEC staff if you are worried
25 about or want to know what the procedures will be.

1 And, finally, just to be sure, there is no evidence
2 being taken today. These are just planning discussions
3 with the parties.

4 All right. Our prehearing conference order got out
5 to the parties quite later than I thought it would, but
6 it's been a busy week since we last talked on March 10th,
7 and the agenda hopefully went out with it.

8 For those that are following along, I believe the
9 agenda got posted on the EFSEC website, but I will walk
10 everybody through it so if you don't have it in front of
11 you it's obvious what we are doing.

12 We have a total of seven listed items, the first of
13 which is the roll call I have already gone through. And
14 the second one we are going to get to now is an update on
15 the venue for the adjudication.

16 I, after our call on March 10th, reached out and
17 talked to the EFSEC manager and relayed the parties'
18 feelings about wanting to have this either virtual,
19 hybrid, or in person in the county, in Benton County. As
20 I said in the agenda, it has been raised with Sonia
21 Bumpus and she was going to meet with Chair Drew sometime
22 after last week's Wednesday regular monthly meeting of
23 the EFSEC Council. I haven't heard anything back from
24 Ms. Bumpus upon that. We last talked by email at least
25 on Thursday, and I don't have any updates on decisions.

1 There's some question as to whether or not having some
2 portion of the adjudication in Benton County might be
3 approved so that at least the parties and the judge and
4 whatever staff we need might be present in the county.
5 And perhaps the Council members would not be imposed upon
6 to travel to each and every session, but might be able to
7 make it to some if not all of them. For some council
8 members it may prove too much of a burden to do the
9 travel, and I know that Chair Drew is considering those
10 kinds of things.

11 What I would like to do is, as it says in the
12 agenda, ask for those parties that would like to, write a
13 letter to Chair Drew and to me with the reasons, in your
14 own words rather than the ones I might have relayed to
15 the manager last week, stating why you believe it should
16 be held however you want. Today being the 20th, I would
17 hope that those could be -- if by next Monday, March
18 27th, all the parties that are interested in filing their
19 request for inperson, hybrid, virtual you could file
20 those -- they are totally optional, but if we could get
21 that in by next Monday the 27th, that would help, I
22 think, Chair Drew understand where everybody is coming
23 from and be able to make a more informed discussion.

24 Ms. Voelckers, I did relay, and I think you heard a
25 little bit of that at the council meeting, the importance

1 that -- of the special request you made on behalf of the
2 Yakama Tribe for your elders to testify, and you might
3 want to have an additional portion of your letter
4 explaining essentially the logistics that might be
5 necessary, and any support on how to record the voices
6 that they might speak in. Again, you said they would
7 speak in perhaps native tongue as well as in English to
8 express their positions. And my only concern as we
9 talked about ten days ago is if there would be any
10 gesturing or other things that couldn't be captured in a
11 written transcript of words in English, whether we need
12 an interpreter or some other way to capture that for the
13 record. I leave that for you to describe if there be any
14 necessary additional support to capture the testimony and
15 presentation of your elders.

16 Does any party, and I will survey one at a time,
17 have any concerns about filing a letter by next Monday
18 the 27th, and, Ms. Voelckers, when I get to you any other
19 special requests.

20 Let me start with the Applicant, Ms. Chase.

21 MS. CHASE: This is Ms. Chase, and no
22 concern about the deadline.

23 JUDGE TOREM: All right. Ms.
24 Reyneveld for CFE?

25 MS. REYNEVELD: This is Ms. Reyneveld,

1 and I have no concerns about the deadline either. Thank
2 you, Judge.

3 JUDGE TOREM: You're welcome. Mr.
4 Harper?

5 MR. HARPER: Ken Harper for Benton
6 County, no, Your Honor, that's fine.

7 JUDGE TOREM: All right. Ms.
8 Voelckers for the Tribe?

9 MS. VOELCKERS: Thank you, Your Honor.
10 No concerns. Just to confirm you would like this letter
11 addressed to Chair Drew or to yourself?

12 JUDGE TOREM: To both of us, please,
13 that way she and I may have cause to talk about all of
14 the inputs once they are all in.

15 MS. VOELCKERS: Understood. Thank
16 you.

17 JUDGE TOREM: Mr. Aramburu?

18 MR. ARAMBURU: For Tri-Cities CARES,
19 no concerns with that schedule.

20 JUDGE TOREM: All right. I hope all
21 of you will take advantage of that opportunity to
22 communicate directly with me and the Chair with regard to
23 your preferences for venue, and it will, again, just give
24 you all a forum to get that out in your words.

25 All right. Let's turn to the third item on the

1 agenda for today, the actual scheduling of the
2 adjudication itself. We are still working with the
3 deadline of July 8th, 2023. I think a number of you
4 heard what I had to say about that at the monthly meeting
5 last week. Let's take a look on the agenda. What I have
6 stated is that the approved second extension request from
7 the Applicant does require us to get a recommendation to
8 the governor no later than July 8th of this year. We
9 have had at least 25 months that have elapsed since the
10 application came in, and the current statutory deadline
11 has certainly been passed. That 12-month processing time
12 for 80.50.100 is well past, and we are projecting a total
13 of 29 months at this time to get a full vote and
14 consideration on the application.

15 Based on our discussions ten days ago, you can see
16 the proposed dates that would have started perhaps as
17 early as Monday, May 15th for the hearing, are now based
18 on prefiled testimony coming in no earlier than April 3rd
19 or maybe April 10th. The earliest hearing dates, Ms.
20 Chase, that I can offer the Applicant and the other
21 parties look to be Monday June 5th for that entire week,
22 and the remainder of the week after Juneteenth, on that
23 holiday from June 20th to the 23rd.

24 I'm wondering, for the parties, just how many days
25 of hearing you would each estimate this case might take.

1 And I realize it's a little bit of a shot in the dark
2 because you don't know -- we haven't agreed on what
3 issues will be adjudicated or what witnesses, but based
4 on your prior experience, and I know many of you on the
5 line have been in complex litigation like this, including
6 before this council, so I want to ask you, I can't hold
7 you to it, but just your today estimate of how many days
8 of hearing time you each think it might take.

9 Let me start with the Applicant, again, and see, Ms.
10 Chase, between you and Mr. McMahan and Ms. Schimelpfenig
11 what you are thinking for the number of days?

12 MS. CHASE: Thank you, Judge Torem.
13 This is Ms. Chase. We -- I think based on information we
14 have now, we would anticipate a couple weeks, so two
15 weeks total. I'm recognizing that that will depend on
16 large part on how the issues get finalized.

17 And then also for the scheduling discussion, I did
18 want to share that Applicant will be submitting a third
19 extension request shortly, if it hasn't already been
20 submitted, that will extend the time to complete the
21 adjudication through the timeline that you have been
22 discussing at the last prehearing conference, which was
23 September 2023. I wanted to share that now as it may
24 inform the parties' scheduling discussions.

25 JUDGE TOREM: I appreciate that if the

1 application extension request is actually being filed
2 today, it won't be acted upon until the Council can
3 receive it, but it notionally will release a lot of
4 pressure on everybody on the line today. I do appreciate
5 that very much, and I will thank the Applicant for
6 allowing the Council to be able to do a thorough job, and
7 all the other parties, frankly, to prepare testimony less
8 under the gun and really get a thorough adjudication on
9 the issues they would like to present. So your estimate
10 for the amount of time is going to be approximately two
11 weeks.

12 Let me turn next to the Counsel for the Environment
13 and see, Ms. Reyneveld, your thoughts on how many days of
14 adjudication this might take.

15 MS. REYNEVELD: I would be in
16 agreement with the Applicant, although I do think that
17 there are a lot of unknowns to this litigation, including
18 just the number of witnesses that are going to be called
19 so it's difficult to determine without that. I would say
20 at most we will likely be calling one to two witnesses,
21 and so I just don't know the number of witnesses from the
22 other parties. But I think, you know, probably one and a
23 half to two weeks would be a good estimate.

24 JUDGE TOREM: Okay. Mr. Harper, for
25 the County?

1 MR. HARPER: Ken Harper for Benton
2 County. Yeah, I think Ms. Chase has a pretty good best
3 estimate there. I don't think I can really add to that.
4 Two weeks sounds about right with all the disclaimers,
5 but it does sound about appropriate.

6 JUDGE TOREM: All right. Thank you,
7 Mr. Harper.

8 Ms. Voelckers, how does the Tribe feel about
9 predicting how long this might take?

10 MS. VOELCKERS: Thank you, Your Honor.
11 I don't have any better ability to predict and would
12 agree with the statements that have already been made by
13 other counsel.

14 JUDGE TOREM: All right. Mr.
15 Aramburu?

16 MR. ARAMBURU: My understanding is
17 that the hearing time that we are going to take is going
18 to be principally cross-examination with some exceptions.
19 So if that's the understanding, then I think two weeks
20 would probably be fine, although these dates that you
21 have here probably are not the appropriate two weeks in
22 our view. So we think two weeks is fine, closely
23 coordinating cross-examination time and those kinds of
24 things.

25 JUDGE TOREM: All right. Thank you.

1 When you say these two weeks I have here, you are
2 referring to the weeks in June that I mentioned and that
3 are listed on the agenda?

4 MR. ARAMBURU: That's correct, Your
5 Honor.

6 THE JUDGE: And as Ms. Chase
7 indicated, if the Council approves an extension to the
8 end of September, which is what I understood, Ms. Chase,
9 it would be through September 30th?

10 MS. CHASE: This is Ms. Chase, yes.
11 That's correct.

12 JUDGE TOREM: So, Mr. Aramburu, that's
13 going to give us the month of July, the month of August,
14 and the month of September to process the application,
15 and the hearing time would certainly not have to start as
16 of June 5th if that extension is approved at the April
17 council meeting.

18 All right. Thank you all for validating what I told
19 the EFSEC manager last week on Wednesday afternoon or
20 Thursday, whenever it was Ms. Bumpus and I spoke, I
21 estimated two weeks. I think she was a little bit
22 surprised that we would have two weeks' worth of hearing
23 time. I hope we can knock it down to less as we sort out
24 the issues and the number of witnesses. And particularly
25 knowing, as Mr. Aramburu pointed out, that the prefiled

1 written testimony comes in then we will be able to have
2 mainly an adoption of that on the record and a
3 cross-examination. And, Mr. Aramburu, as you pointed out
4 previously we will be working with exhibits and a number
5 of other things, if we do our prehearing housekeeping
6 correctly everybody will have exhibits and know exactly
7 where we are going with them. For each witness, we will
8 be doing exams, discussion, and preparation so that the
9 hearing time itself can be used efficiently and everybody
10 won't have to pause to get exhibits and things like that.

11 I'm not sure today that I can tell you what weeks
12 are available. I received in an email earlier today a
13 listing of council unavailability out through September
14 30th, so notionally we could talk about that if I'd
15 actually read that email yet, and I will confess I have
16 not. I have that information, and I believe all parties
17 have also filed their notices of unavailability. If
18 there's any party who has not done so as of today, I
19 won't have you self-identify on the line, but I think all
20 five parties have submitted their requests for
21 unavailability, and if not, if you can get it in by close
22 of business today that will give me time tomorrow to
23 start doing some cross comparison of council availability
24 and party availability and see what we have notionally
25 beyond the July 8th current deadline.

1 If I make an assumption that the Council might act
2 at their next meeting to approve it then we can start to
3 sketch out a schedule.

4 So let me turn then to the prefiled testimony piece
5 of our agenda, item number four. I think last time we
6 talked about having three rounds of testimony. And I
7 initially, based on discussions with staff, had proposed
8 the Applicant file first and then a bunch of other
9 testimony come in in response and then reply.

10 I can't remember which of you wisely pointed out
11 that in past practice we allowed all testimony to come in
12 in the first round from all parties, based on their
13 issues, and then all parties have a chance to respond,
14 and if necessary, rebuttal on the third round.

15 I don't know, but I want to survey again if parties
16 have a preference on ordering and the type of three
17 rounds of testimony and the intervals in between. I
18 think we talked about potentially 28 days after the first
19 filing for the next round, and then 21 days for the third
20 round to come in.

21 So I am going to ask counsel for all of the parties,
22 and I will go in the same order as usual, to comment on
23 that if they have thoughts and I will take notes as we
24 go.

25 Let me start with the Applicant, Ms. Chase?

1 MS. CHASE: The Applicant has no
2 preference between the two approaches. And it's fine
3 with the allotted 28, 21 intervals, acknowledging that
4 based on parties' different availability those dates may
5 end up needing to shift a few days as we plot out the
6 schedule.

7 I think it would be helpful to have -- I think
8 I'm -- it would be -- it would make more sense for all
9 parties to file simultaneously because then Applicant, at
10 least from our perspective, would have the ability to
11 respond to the issues that were presented by the parties
12 on the issues that they are wishing to present in this
13 proceeding.

14 And then I think the last comment would be as to
15 timing. Given that we still need to finalize the issues,
16 the initial discussions of April 3rd and April 10th may
17 be slightly ambitious, but we do want to make sure that
18 we are getting an initial deadline as soon as possible.

19 Thank you, Judge Torem. I'm happy to answer any
20 questions.

21 JUDGE TOREM: Okay. Given that the
22 Council may not act on the extension request until the
23 third week in April, which would put us at the April 19th
24 meeting, would the Applicant and all parties, I guess, if
25 we are going to do it simultaneously, be comfortable with

1 the first round of testimony coming in not knowing quite
2 what the hearing dates are, but notionally knowing that
3 they won't be in June, what are your thoughts on filing a
4 first round of testimony ahead of next month's council
5 meeting so we can get things rolling? And, again, that's
6 subject to identifying all the disputed issues, if not
7 today, then shortly after today.

8 MS. CHASE: As Applicant we have no
9 objection, and agree that we should start with our first
10 round of filings before the Council has the opportunity
11 to act on that request. Understanding that everybody
12 seems to acknowledge that the June dates are not
13 practically realistic. We have no objection to that as
14 long as there is adequate time between when the issues
15 are finalized for the parties to have a couple of weeks
16 to get their third round of testimony together.

17 JUDGE TOREM: All right. Anything
18 else from the Applicant on the scheduling of prefiled
19 testimony or the topics we are covering before I shift to
20 Counsel for the Environment?

21 Okay. All right. Hearing none, let me shift to Ms.
22 Reyneveld, and ask for your input on the round of
23 testimony, the intervals, and potentially starting the
24 filing if we do it simultaneously then that would apply
25 to CFE and all the other parties to be ready sometime

1 between now and April, middle of the month, when the
2 Council has their meeting.

3 MS. REYNEVELD: Thank you, Judge. The
4 Counsel for the Environment has a slight preference for
5 the Applicant filing first and then other parties
6 responding and then reply or rebuttal. I don't have a
7 preference on the intervals other than that they be
8 sufficiently spaced out. And I would prefer to have the
9 hearing scheduled and then to work from there in terms of
10 the filing schedule. I don't think it necessarily makes
11 sense to establish an arbitrary filing schedule in April
12 and then have the hearing potentially be in July. It's
13 just -- from a kind of litigation perspective I think we
14 should schedule the hearing and then schedule kind of
15 those filing deadlines accordingly.

16 JUDGE TOREM: And, Ms. Reyneveld, I
17 think in a perfect world I would agree a hundred percent.
18 There's a certain part of me that remembers somebody in
19 our federal government talking about unknown unknowns,
20 and we are dealing with those right now, but I don't want
21 to waste the time between now and the next counsel
22 meeting because every day is valuable. I think as of
23 last week we had 115 days to go to the July 8th
24 extension, and if we do get an approved extension to
25 September 30th, today might be the first day of Spring

1 but the first day of Fall may be the date that the
2 council members are deliberating and we are trying to get
3 an order out, so that September time I don't want to be
4 holding a hearing in September. I want to be evaluating
5 what's going on with the filings and post hearing briefs
6 by then. I just want the parties to think that the judge
7 and the council need time to after the adjudication read
8 your post hearing briefs, make decisions, draft the
9 recommendation, and work accordingly to get everything
10 ready to announce and deliver to the governor.

11 One other piece that's come to my attention in
12 looking past the SEPA questions is that the final EIS has
13 to be part of the recommendation. That has to be
14 finalized, I believe, seven days according to law before
15 the recommendation goes to the governor, so that's
16 another week of backing up time for many to grant an
17 extension to have to be considered.

18 But that said, Ms. Reyneveld, I want to know when
19 the hearing is too so that we get -- we don't
20 artificially put pressure to file that first round of
21 testimony. So my thought is we may get a feel and a
22 decision today on the intervals and the soon as possible
23 date. We may yet schedule a shorter prehearing
24 conference to announce dates and then work through those
25 and then set the schedule depending on how far we get

1 today.

2 Ms. Reyneveld, anything else?

3 MS. REYNEVELD: That makes sense,
4 Judge. I just want to make sure that there's ample time
5 to be able to, you know, actually submit testimony and
6 call witnesses, and so I think that's my concern about
7 just the -- to expediting the process for filing prior to
8 knowing the hearing date. I appreciate that.

9 JUDGE TOREM: A hundred percent
10 understood. I don't want to rush anybody further. And
11 if we do have ample time, and thanks to the Applicant's
12 intention or already filed extension request, we probably
13 should, but I have to look at all those notices of
14 unavailability and see where the jigsaw puzzle lines up.

15 All right. That's my problem to deal with. Let's
16 shift to the County now. Mr. Harper, thoughts on
17 prefiled testimony?

18 MR. HARPER: Ken Harper for Benton
19 County, Your Honor. I have strong concerns about the
20 concept of simultaneous filing with a target date of mid
21 April. I just, you know, I'm very concerned about the
22 definition of the issues. I'm concerned about the status
23 of SEPA. I share Ms. Reyneveld's concern, and we don't
24 need to go over that again regarding the sequence here
25 from hearing date forward. But, Your Honor, I don't know

1 what really is going to be sort of the focal point of the
2 hearing of the Applicant's position. I don't really know
3 how the respondents/interveners may be able to work
4 between themselves and streamline testimony with having
5 to simultaneously hit that date as part of our own
6 prefiled testimony due date. So, Your Honor, from the
7 County's perspective we would strongly request at least a
8 staggered series of filings and/or -- I know this isn't
9 really what you want to know, but and/or an initial
10 prefiled testimony due date somewhat later than April.

11 JUDGE TOREM: And I was going to ask
12 you if the nature of your concern is more of the timing
13 of a mid April filing date without the full fleshing out
14 of issues and other things, or is it the you don't want
15 to file simultaneously with the Applicant with the
16 County's issues? Is it both or is it weighted more
17 toward the timing?

18 MR. HARPER: Thanks, Your Honor, for
19 the chance to clarify. It's a combination of the two. I
20 don't know that I have a strong reservation about the
21 idea of simultaneous filing, but that clearly puts more
22 onus on the County, possibly the other responding party
23 and interveners to really, you know, very carefully
24 structure what their prefiled testimony will be, which
25 takes time.

1 JUDGE TOREM: Agreed. And I know the
2 Applicant knows what it's applying for. And the
3 Applicant knows what it thinks its disputed issues are
4 going to be may be in a better position, but I do think
5 each of the parties know why they are here in the case.
6 They filed petitions for intervention, or as the County
7 has been involved in the beginning as well, Mr. Harper,
8 before your firm filed its appearance so everybody knows
9 why they are here.

10 I'm a little bit honestly less concerned with the
11 question of what are we going to do. You are going to
12 identify your witnesses at the same rate, if you haven't
13 already. So you will have a full period of time to
14 respond. It looks like the 28-day interval to respond to
15 the Applicant's witnesses that they file.

16 Again, if we need to extend it from 28 days if we
17 have a little more grace time longer to perhaps allow for
18 some informal discovery, or formal if necessary. That
19 may be some way to accommodate the concern you are
20 expressing, and I hope we can do that fairly so you don't
21 feel that there's any trial by ambush or any other
22 concern of any party surprising the others, anymore than
23 any other filing that comes into court might do.

24 Mr. Harper, I will give you a chance to respond on
25 how I'm evaluating your concerns.

1 MR. HARPER: No. I think you have
2 stated it, Your Honor. Thank you.

3 JUDGE TOREM: All right. Let's move
4 on then to Ms. Voelckers working with prefiled testimony
5 questions and about intervals as well.

6 MS. VOELCKERS: Thank you, Your Honor.
7 We are not opposed to filing simultaneously, although I
8 would note that we have been operating on the last
9 discussion, the last hearing conference in preparation
10 to -- we anticipate that we would not be asked to file
11 that direct testimony in the same time line that
12 Applicant is comfortable with, but depending on when the
13 date is that we are not opposed to filing testimony
14 simultaneously.

15 I will say that I also have very strong concerns
16 about the timing and especially knowing that Applicant
17 has submitted an application to extend the deadline.
18 That is still, frankly, quite ambitious. I think that
19 walking back from the date of the hearing being set is
20 what makes the most sense here and sets everyone up for
21 the best possible process, even though we are under this
22 timeline or time crunch.

23 And I would just respectfully also push back a
24 little bit on the language about wasting time. I think
25 we are all working really hard to get caught up on a lot

1 of materials the Applicant has had years to put together,
2 including the amended site verification application that
3 was filed just months ago. So we, you know, do need that
4 time to have a fair process here. So those are my
5 comments on the timing. I think that we should wait
6 until the hearing is set and walk back from the hearing,
7 and do so in a way that is fair, regardless of whether or
8 not we are filing simultaneously.

9 And lastly I would just note that those 28 days were
10 agreed before the Applicant went on the record and said
11 that they were prepared to file in just a few weeks. So
12 when we had that the discussion about the 28-day timeline
13 there were no dates that were being proposed or agreed to
14 by the Applicant to inform that discussion. Again, I
15 would submit that that should be as much time as possible
16 given that the hearing date -- once the hearing date is
17 put on the calendar.

18 JUDGE TOREM: And, Ms. Voelckers, I
19 just want to validate for you that when I said there was
20 going to be any wasting of time, that would be from my
21 perspective of my time and the Council's time to elapsing
22 towards that perhaps now September 30th deadline. I
23 didn't mean any implication or offense that parties are
24 wasting time. From a procedural standpoint, though,
25 every day to me is precious and I don't want to sit on my

1 hands until the council meeting on April 19th. You know,
2 that's a full month away from today, and we can make good
3 use of that time even if it doesn't include a filing
4 deadline. It can involve a lot of other procedural
5 progress to get to the first filing round. So, again,
6 that's what I meant there.

7 I do see that my notes reflect that these other
8 filing deadlines of being ready as soon -- April 3rd or
9 April 10th were not offered by anybody that I recall
10 other than Ms. Chase as to when the Applicant might be
11 ready to file. You are correct to bring that up and make
12 a clarification. Thank you.

13 MS. VOELCKERS: Thank you, Your Honor.

14 JUDGE TOREM: With those comments, Ms.
15 Voelckers, did you have anything else to add?

16 MS. VOELCKERS: Thank you, Your Honor.
17 I would add one other thing, which is that I did listen
18 to the discussion during the EFSEC meeting last week, and
19 I also heard that the staff team is working really hard
20 on the SEPA side and did not have a schedule to commit to
21 on issuance of the SEIS, and so it seemed like that would
22 also be something that we would want to avoid setting,
23 arbitrarily limiting deadlines when the SEIS might also
24 not be ready as early as the Applicant would like it. So
25 that's my only other comment in terms of timelines is

1 that I don't know that we would need to have the
2 adjudication be done any earlier than -- given reasonable
3 time to review, but if the SEIS is going to be months
4 away as well, I would hate to have all of us working
5 under really hard deadlines on the adjudication side that
6 are months ahead of an SEIS.

7 JUDGE TOREM: And that's a fine point
8 to make. I have no reason to believe that the staff
9 would need an exorbitant amount of time to respond. I
10 know there's a lot of comments on the draft EIS, but
11 unless there's going to be requests from staff based on
12 comments for a supplemental environmental review, I
13 haven't been given any such indication yet, but that may
14 be premature. I will bring that up with the staff that
15 is handling the parallel SEPA evaluation that will be
16 going alongside but separate from the adjudication and
17 make sure that that's a valid concern. If they think
18 that they can't get things done within the times frames
19 that are currently set or might be approved for September
20 30th, I will count on Ms. Lune (phonetic) and the rest of
21 the SEPA staff to make sure the adjudication team is
22 aware so the right hand and the left hand of the EFSEC
23 Council and staff know what's going on here. Thank you,
24 Ms. Voelckers.

25 MS. VOELCKERS: Thank you, Your Honor.

1 Nothing else at this time.

2 JUDGE TOREM: Thank you. Mr.
3 Aramburu?

4 MR. ARAMBURU: Richard Aramburu for
5 Tri-Cities CARES. A couple of issues. Number one, I
6 appreciate that the EFSEC Council does meet once a month,
7 but with no objections to the Applicant's request, I
8 don't know why we necessarily need to wait for that
9 period of time. Isn't there some process available so
10 that we can have a more rapid decision about that? That
11 would be the request that's coming from me so we know
12 where we are.

13 JUDGE TOREM: Let me address that
14 right away, Mr. Aramburu, and just say it's possible that
15 there would be a special meeting, but Mr. Thompson would
16 have to work with the Chair and indicate whether or not
17 we can waive notice periods or give special notice
18 periods, so there are still laws to comply with to get
19 things done ahead of April 19th and clarify the dates for
20 us. I'm sure Mr. Thompson hearing that concern, if he
21 hasn't already, had that motion as making notes and will
22 be reaching out to the Chair shortly after we hang up
23 today. So that's in the cards as well if it can be
24 accelerated. And if there truly is no objection, the
25 Applicant is just getting that filed today. We do need

1 to give all the other parties an opportunity to respond
2 and see. I don't want to assume that anybody on the line
3 here today that's a party to this matter won't have a
4 concern or objection. There may be one that we haven't
5 thought about or hasn't been voiced yet.

6 All right. So on to the other pieces of prefiled
7 testimony, Mr. Aramburu.

8 MR. ARAMBURU: I agree with some of
9 the other parties that the agenda for prefiled testimony
10 is aggressive. I think we should be looking at dates for
11 testimony in -- testimony submission, in perhaps mid to
12 late June.

13 One of the other concerns that we have had has to do
14 with the preparation of the final environmental impact
15 statement. We believe that the final impact statement
16 should be available during the time the testimony is
17 prepared, not after. So we would like to see if a
18 schedule can be worked out to have that testimony -- or
19 have that document ready at the time we go into our
20 filing of testimony. That would be another request.

21 Regarding the timing, and I appreciate, Judge Torem,
22 us being active during this interim time, additional time
23 we may have. I do think there are some motions that
24 perhaps will be filed. I also think there may be some
25 discovery that some of the parties would like. I think

1 some of that can take place in the next month or so. It
2 might be having some productive time available to us at
3 that point.

4 Regarding the testimony, I think I am an advocate of
5 all of the parties filing at the same time and responses
6 and replies for -- there may be some issues that will
7 come up that a party will be filing on the subject matter
8 and that the Applicant is not filing on at all. So from
9 that standpoint, getting the direct testimony in at one
10 time, and having responses and replies, I think, is the
11 preferable way to proceed. So those are my thoughts.
12 The 28/21 day agenda or schedule for submission of
13 testimony is probably fine. So those are my thoughts.
14 Thank you.

15 JUDGE TOREM: Thank you, Mr. Aramburu.
16 And I know you have been through this before, so it's not
17 that I'm giving it any additional weight, but I know you
18 are commenting from a position of been there and done
19 that, and I appreciate that the insight is there.

20 I think I do agree with all the parties' concerns
21 about being ready to file next month. The applicant has
22 said that, and may have a better idea of a list of
23 witnesses, but I do hope everybody on the line is getting
24 ready and identifying witnesses now. And as Mr. Aramburu
25 stated, starting to do the drafting of any motions you

1 think might be necessary on a sooner rather than later
2 basis, and, frankly, any informal discovery that can be
3 done until we establish the actual rules that will apply
4 beyond those that are in the law and the Administrative
5 Procedures Act of RCW 34.05, and those that are already
6 adopted for EFSEC practice I think within WAC 463. I
7 don't have the exact citation off the top of my head.
8 It's been a few years. Look at those rules. That's what
9 applies now if you are going to ask for formal discovery
10 until we adopt specific procedures for this adjudication,
11 that WAC will govern and hopefully all parties will
12 adhere to those deadlines that are set in the WAC until
13 we can figure out any special accommodations for this
14 Horse Heaven adjudication.

15 I wish I could tell you we could resolve everything
16 about the prefiled testimony today under Item No. 4, but
17 I don't think we should or will given the breathing room
18 that we are being offered by the Applicant's extension
19 request that's announced to all of us today.

20 I want to skip over the disputed issues list until
21 we have our first break because I don't think it does us
22 any favors to start on that and then have to stop for a
23 ten minute comfort and court reporter rest break.

24 I think if we go for another 15 or 20 minutes and
25 talk a little bit more about discovery, and maybe even

1 the schedule for our next prehearing conference that that
2 would be productive use of our time in the next 15 to 20
3 minutes.

4 So let's turn to Item No. 6, the discovery. As I
5 have already covered, there's informal discovery
6 available under the Administrative Procedures Act. And I
7 have listed three different adjudications from past
8 experience. The Kittitas Valley wind power project,
9 which I presided over. The Whispering Ridge project that
10 I believe that Bob Wallace was the ALJ on that one. And
11 then Cassandra Noble, I believe, presided over the Tesoro
12 Vancouver Energy project. Each of us probably issued
13 different prehearing conference orders with slightly
14 different discovery practices.

15 I wish I could tell you that I had time to read all
16 three of those orders before today's proceeding, but I
17 have not. I just know notionally how it went the last
18 time I had been in complex adjudication before this
19 Council, as well as other proceedings I have been
20 involved in.

21 I wanted to hear from all five parties on what your
22 thoughts are for any special needs for discovery that
23 aren't addressed in one of those three orders, or if
24 there's something in one of those three orders and you
25 have had a chance to look at it and I haven't that you

1 want to call my attention to, or just out of the WAC 463
2 provision if there's any need to tailor those for this
3 adjudication. So, Ms. Chase, I am going to come back to
4 you to start us off.

5 MS. CHASE: Sure. Thank you, Judge
6 Torem. I think Applicant's view is that informal -- or
7 discovery is likely not particularly necessary here, but
8 we understand that the current WAC and other provisions
9 apply to operate informal discovery, and we will
10 cooperate as contemplated by those items. I think our
11 view is that the procedure in the Kittitas Valley, and
12 I'm looking at the order on discovery procedures,
13 prehearing order number eight that you provided the
14 parties, or referred the parties to in connection with
15 your -- your agenda last week. I think that makes sense
16 to encourage the parties to cooperate informally if we
17 are going to have informal discovery, and you serve as
18 the presiding officer if there are formal discovery
19 issues that need to be resolved.

20 And I think the other note that we would make is
21 that, in our view, the use of the prefiled testimony
22 largely supplants some of the other items that you might
23 need discovery for, so that's just a comment about how
24 the parties will be working together in advance of the
25 adjudication to narrow the issues and the scope of items

1 to be discussed with the prefiled written testimony.

2 JUDGE TOREM: Ms. Chase, let me ask, I
3 think all the parties may have a concern with wanting to
4 do maybe some formal discovery, such as the discovery
5 deposition of some witnesses. I know it's an incredible
6 expense, and trying to get people together to do those
7 kind of things, particularly when you have prefiled
8 testimony that allows for the preparation of any
9 cross-exam, but I believe there have been some limited
10 discovery depositions authorized in the past, or at least
11 agreed to by parties in these types of matters. I don't
12 remember them necessarily in the Kittitas Valley case.

13 Has the Applicant had any experience where their
14 witnesses have been subjected to a pre-adjudication
15 discovery deposition on or before the prefiled testimony
16 came in?

17 MR. MCMAHON: Your Honor, Tim McMahan,
18 here for the record. Having been involved in Wild Horse,
19 Kittitas Valley, Whistling Ridge, in none of those cases
20 have pre -- have the parties been allowed or have even
21 requested really, there was some request for discovery in
22 the Kittitas Valley case with depositions, but that did
23 not end up being as necessary or allowed. You know, if
24 you are asking about experience in prior EFSEC
25 proceedings, I don't recall that ever occurring. And it

1 was considered to be a successful process to engage in
2 informal discovery. And as Ms. Chase indicates, the
3 prefiled testimony largely, I believe, supplants the need
4 for much of that.

5 The only use of the depositions that I can recall
6 was after the Kittitas Valley case was actually
7 completed, and there were pre -- there were depositions
8 taken prior to submittal of the record to the Washington
9 State Supreme Court. And those depositions had a lot to
10 do with accusations of ex parte contact and inappropriate
11 behaviors which were pretty soundly rejected by the
12 Washington State Supreme Court.

13 Again, I have not participated in actual cases where
14 depositions were taken in lieu of informal discovery.

15 JUDGE TOREM: Mr. McMahan, did you
16 participate in the Whispering Ridge matter?

17 MR. MCMAHAN: I did.

18 JUDGE TOREM: Okay. I had a notion
19 from staff or other things that I had heard about that
20 case that maybe there had been formal discovery and
21 depositions taken, but it's been many years ago so maybe
22 memories are a little foggy.

23 MR. MCMAHAN: Well, I don't recall
24 that happening with Whispering Ridge.

25 JUDGE TOREM: I was referring to --

1 it's my recollection that I wasn't directly involved so
2 who knows. I don't know for sure what happened, but
3 there are other parties, and Mr. Aramburu I will come to
4 you shortly, but I don't want you to -- I don't mean to
5 encourage that parties should be seeking this kind of
6 discovery simply because it will eat up more time and
7 cause more expense. And I do believe this practice of
8 having everybody put their cards on their table up front
9 avoids the need to prefile testimony for most, if not
10 all, depositions of parties until you at least read what
11 they are going to be saying, if you think that there's
12 more that you need to get, then we can talk about a
13 motion for additional inquiry or essentially voir dire a
14 witness in an efficient manner that allows for the
15 information for all parties to prepare for the
16 adjudication.

17 Mr. Aramburu, you were going to maybe enlighten us
18 on your experience?

19 MR. ARAMBURU: Yes. Mr. McMahan and I
20 were involved in the Whispering Ridge case. There were
21 some discovery issues there but there were not
22 depositions that were taken in that case. I will just
23 wait until I'm called on for other issues.

24 JUDGE TOREM: I will tell you what, I
25 will call on you now since you are already thinking about

1 it. Go ahead, Mr. Aramburu.

2 MR. ARAMBURU: Well, I don't want to
3 cut in line here. So for the issue of discovery, again,
4 I think opportunity for depositions should be given, but
5 I think they are of limited use here. More often we have
6 witnesses that are preparing and need information from
7 the Applicant or perhaps from another party. And there
8 would be requests for documents, data requests, those
9 kinds of things. That's what's more likely here as our
10 witnesses prepare. So on the subject of discovery I
11 think we should have an opportunity for that kind of
12 discovery formal or informal. And perhaps we start with
13 informal discovery where you make documents available et
14 cetera, et cetera, and then if we ran into problems we
15 can go into more detail procedures connected with
16 discovery, including motions. So that's my thought on
17 that.

18 JUDGE TOREM: All right. And I
19 appreciate, Mr. Aramburu, the insights there because I
20 know in my day job as Board of Industrial Insurance
21 Appeals industrial appeals judge, if that's not a
22 mouthful, I typically rely on perpetuation depositions
23 for the expert testimony, and that is the testimony that
24 comes in. So sometimes counsel perform discovery
25 depositions before they are ready to cross-examine a

1 witness they haven't seen before, but I -- in this
2 context, I don't think so that same practice adds the
3 value that it does in the Labor & Industries practice.

4 So I would -- at risk of wondering what the other
5 parties are going to say, concur with what you have
6 indicated so far. I think the parties can get most of it
7 done, especially on a more relaxed schedule we are
8 anticipating informally.

9 Let me turn to Ms. Reyneveld and see if in your
10 experience, Ms. Reyneveld, if you are anticipating any
11 formal discovery or any special needs?

12 MS. REYNEVELD: Counsel for the
13 Environment agrees with the informal discovery procedures
14 under the APA and proceeding with more formal discovery
15 only if necessary.

16 I also practiced before the Board of Industrial
17 Insurance Appeals for about nine years representing L&I
18 so I did take many discovery depositions in that context,
19 but I don't anticipate taking pre-adjudication discovery
20 depositions in this context just because of the prefilled
21 testimony requirement and the nature of prefilled
22 testimony. And the Counsel for the Environment doesn't
23 anticipate any special discovery needs or preferences for
24 this adjudication at this time.

25 JUDGE TOREM: All right. Thank you,

1 Ms. Reyneveld.

2 Mr. Harper, for the County?

3 MR. HARPER: Ken Harper for Benton
4 County. Your Honor, I think it seems like kind of a
5 consensus is emerging, and I am not going to dissent. We
6 don't see a great likelihood of any special needs for
7 discovery, any special preferences for discovery. I
8 can't foreclose the possibility of some pre-adjudication
9 deposition, but it doesn't seem like that's going to be
10 the direction that the County goes. So, Your Honor, I
11 think we are pretty comfortable with relying on good
12 faith and APA-based discovery concepts. I will just
13 leave it at that unless you have any questions, Judge.

14 JUDGE TOREM: I don't. Let me hear
15 from Ms. Voelckers and then we will kind of -- I will
16 give you my thoughts on how we might handle any disputes
17 in discovery, which I will say up front judges hate. Ms.
18 Voelckers?

19 MS. VOELCKERS: Thank you, Your Honor.
20 I would like to share a few thoughts and just acknowledge
21 that a few of the terms being used are not ones I'm as
22 familiar with, so I might be imprecise in my language
23 here in terms of formal or informal. We agree with the
24 statement that was made earlier that there's likely not a
25 need to depose witnesses before they file their written

1 testimony, but we would like to reserve the right to file
2 pre-adjudication depositions of witnesses that have
3 submitted testimony and we would like to see that
4 testimony before we make that decision. There might be
5 an instance where we would be asking to depose a witness
6 after they have filed their direct testimony.

7 The other areas of discovery we are interested in
8 are data requests, as Mr. Aramburu mentioned, more so
9 than depositions, but we do think we might need to depose
10 one or two third party witnesses, given the lack of a
11 final EIS to have as part of the record. So likely to be
12 technical staff on impacts of the project. The technical
13 staff that carry knowledge that's important to this case,
14 such as WDFW.

15 JUDGE TOREM: All right. So if I
16 understand you correctly, the Yakama Tribe would concur
17 that informal discovery will likely work for most things,
18 but once you see the first round of prefiled testimony
19 you might want to file a data request before you file
20 your responsive testimony to flesh something out; is that
21 an understanding, first?

22 MS. VOELCKERS: I think, Your Honor,
23 need to, I think, clarify my statement further. So the
24 two types of discovery we anticipate would be data
25 requests or some limited number of depositions. And as

1 for depositions of witnesses of other parties, we would
2 not request those until their direct, you know,
3 prewritten, direct written testimony has been submitted.
4 In the meantime, though, we would potentially be
5 requesting data in depositions of third parties,
6 specifically technical staff with expertise on the impact
7 of the project.

8 JUDGE TOREM: I wanted to ask you
9 about that second point separately. When you say third
10 parties that may imply to me, at least, that we are not
11 talking about a witness being sponsored or called by any
12 of the other four parties that might have interests
13 different from or adverse to the Tribe. You mentioned
14 the Washington Department of Fish and Wildlife, WDFW, as
15 a potential party that you might want to seek a
16 deposition from. And I would have to, I think, tell you
17 I may not have the jurisdiction to, you know, force them
18 to testify in this matter, or, you know, be in a position
19 to exclude testimony as a penalty for failing to respond
20 to a request or a deposition discovery request.

21 So I'm also trying to think from the perspective of
22 who is really at the table here to present evidence, and
23 what do you really need for the adjudication issues, and
24 then what are other issues that the Tribe may think need
25 to be covered through either its independent consultation

1 rights or through the SEPA process, which are separate
2 and apart from what we are doing here in the
3 adjudication. So I don't say that to prejudge. It's not
4 a no by any means, but it's tell me more if and when that
5 comes up so that I can decide is it something within the
6 gambit of an administrative law judge for EFSEC with an
7 adjudication, or is that a decision that I have to defer
8 and essentially say no, I don't have the power to grant
9 what you are questioning, and figure out what other
10 alternate relief would allow the Tribe to feel that they
11 have had their day in court, not only in the
12 adjudication, but before the Council makes its ultimate
13 recommendation, which includes some other moving parts
14 that are not part of the adjudication. Fair enough?

15 MS. VOELCKERS: Yes. Thank you, Your
16 Honor.

17 JUDGE TOREM: All right. So when we
18 get to that portion of any more formal discovery, and,
19 again, when I use that term, Ms. Voelckers, I'm thinking
20 in my mind about things that would happen under the Civil
21 Rules, such as formal interrogatories, requests for
22 production, requests for admission, or the actual
23 discovery depositions we have been talking about this
24 morning, or this afternoon. I forgot, it's 2:30.

25 All right. So, Counsel, it sounds like a discovery

1 process can be adapted from what I have done previously
2 in the Kittitas Valley process. I remember there were
3 motion practice in that case that I had to discover
4 some -- or make some decisions. They were motions to
5 strike testimony. There were motions to disqualify
6 council members. There were a variety of things that
7 happened. It wasn't quite everything under the sun, but
8 it was an expansive and thorough, you know, weighing of
9 issue before we even go to the adjudication. So we will
10 talk a little bit more about the timelines at another
11 prehearing conference, I think, once -- and maybe like
12 Mr. Aramburu said, maybe we will have a decision or at
13 least a pending council meeting before April 19th to
14 specially decide once we all see the extension request
15 filed by the Applicant today.

16 Before we take our break, I want to ask everybody to
17 look at their calendar and see if next week a shorter
18 period of time on Monday afternoon might be available to
19 meet again and wrap up these issues and maybe by then I
20 will have had a moment to come back with new timelines
21 when the Council might be available and have a chance to
22 look at your notices of unavailability, and, frankly, to
23 see how many of those requests can be accommodated and
24 fit into the notional new schedule of getting a
25 recommendation out by September 30th. My schedule next

1 Monday doesn't really allow any time before the noon
2 hour, and I have a 1:30 hearing that would have had me in
3 Moses Lake but the parties have agreed to do it by Zoom.
4 I doubt very much it's going to take more than 60 minutes
5 to take one witness' testimony, so I think I could
6 available at 2:30 or 2:45 to have a much shorter
7 prehearing conference and nail down dates.

8 I hope that's not too optimistic, but if we nailed a
9 schedule down next Monday afternoon for the hearing, with
10 the contingency of knowing that the Council is going to
11 meet to approve this extension request, if we go on that
12 assumption, who is available Monday afternoon the 27th of
13 March at 2:45? Would the Applicant be available?

14 MS. CHASE: This is Ms. Chase, yes,
15 Applicant would be available.

16 JUDGE TOREM: And let me put a bumper
17 on the end time of that of 4:30, so that when you are
18 saying yes you would be available, you know, I'm hoping
19 that we will be done by four, but if I go to 4:30 is that
20 still a yes, Ms. Chase?

21 MS. CHASE: It is a still a yes for
22 Applicant. Thank you.

23 JUDGE TOREM: Ms. Reyneveld, would
24 your schedule accommodate that?

25 MS. REYNEVELD: Yes, my schedule would

1 accommodate that. Thank you, Judge.

2 JUDGE TOREM: All right. Mr.
3 Aramburu?

4 MR. ARAMBURU: That would -- 2:30 to
5 4:00, that would work with my schedule. Thank you.

6 JUDGE TOREM: Specifically I'm looking
7 at 2:45 to 4:30.

8 MR. ARAMBURU: 2:45 to 4:30, I will be
9 available.

10 JUDGE TOREM: All right. Thank you,
11 sir. Ms. Voelckers?

12 MS. VOELCKERS: Yes, Your Honor, that
13 time works for me.

14 JUDGE TOREM: All right. And, Mr.
15 Harper?

16 MR. HARPER: Unfortunately, Your
17 Honor, I have a problem. Your Honor, that's the date
18 that we secured many months ago for a significant
19 mediation involving a number of attorneys. If we could
20 revisit this perhaps after the break I may be able to
21 make some accommodations so that we could handle that on
22 the 27th.

23 JUDGE TOREM: All right. What I will
24 offer you since there's a potential problem, if all the
25 parties would take a look at either the morning hours of

1 the next day, the 28th, the hearing that I have in the
2 Tri-Cities is scheduled to go from ten a.m. until three
3 p.m., so I have no objections to my old military hours as
4 early as 7:30, but I think the court reporter contract is
5 probably no earlier than eight. We could do things from
6 eight to ten or somewhere in that range, or possibly I
7 would delay my return travel and we could do this between
8 three and five on the 28th.

9 My schedule after that gets a little more difficult,
10 but I think I have time also on the 30th between ten a.m.
11 and one p.m. that I could chew on two hours of time in.
12 Wednesday is out, and I have got another couple of things
13 cooking on the 31st. Maybe we could do it on the morning
14 of the 31st as well. So if other parties could check
15 their calendars again for a morning block of time, a
16 couple of hours in the afternoon on March 28th, Thursday
17 midday from ten to one on the 30th, and maybe eight to
18 10:30'ish on the 31st. I will ask staff for our normal
19 check-in on this to maybe move it to 10:30 to accommodate
20 a prehearing conference if that's what we need to do.

21 Counsel, it's now 2:40. I want to take break until
22 2:50 and give the court reporter a rest. We will come
23 back at 2:50 and pick up with our discussion of the
24 disputed issues. I know some emails came in earlier
25 today from several parties. I think Ms. Voelckers and

1 and I think Counsel for the Environment submitted their
2 disputed issues this morning that I saw come in, so if
3 you haven't received those maybe reach out to other
4 counsel by email or pick up the phone while we are on
5 break, but I think it went out to everybody.

6 All right. Will the court reporter show us off the
7 record.

8 (Recess from 2:39 p.m.
9 to 2:50 p.m.)

10
11 JUDGE TOREM: I will do a quick roll
12 call. Is Ms. Chase here for the Applicant?

13 MS. CHASE: Yes, Judge, this is Ms.
14 Chase.

15 JUDGE TOREM: Thank you. Mr. Harper
16 for the County?

17 MR. HARPER: Ken Harper for Benton
18 County present.

19 JUDGE TOREM: Ms. Reyneveld?

20 MS. REYNEVELD: I am present. Thank
21 you, Your Honor.

22 JUDGE TOREM: Ms. Voelckers for the
23 Tribe?

24 MS. VOELCKERS: Shona Voelckers
25 present on behalf of Yakama Nation.

1 JUDGE TOREM: All right. And Mr.
2 Aramburu for TCC?

3 MR. ARAMBURU: Present on behalf of
4 Tri-Cities CARES.

5 JUDGE TOREM: All right. Thank you.
6 Mr. Harper, what did you find out about that schedule on
7 Monday the 27th? Do you think that will that work or do
8 we need to look at an alternate date that week?

9 MR. HARPER: We can make it work, Your
10 Honor.

11 JUDGE TOREM: Okay. So Monday. I
12 appreciate the accommodation. It sounded like it might
13 have been a big lift, but I'm glad you got it done.
14 Let's count on then having a notice issued and I will
15 work with staff but tell you now on the record, at 2:45
16 p.m. we will get together next Monday and we will hope to
17 be done by four but will schedule it to end no later than
18 4:30 on March 27th. And by then I hope to have feedback
19 from the Chair on potential venue concerns and, again,
20 have sorted out all of the unavailability orders as well.

21 Let's turn to the disputed issues list. And, Ms.
22 Chase, did the Applicant submit anything since the last
23 prehearing conference?

24 MS. CHASE: No, Judge Torem, Applicant
25 has not submitted a disputed issues lists or anything on

1 this point since the last prehearing conference. I think
2 Applicant's view is that the -- we have submitted the
3 application or prepared to defend the application and so
4 the specific issues in terms of the concerns about the
5 applications are for the other parties to identify. And
6 just on that point that you just wrapped up, I wonder if
7 we have a prehearing conference on the 27th if it makes
8 sense for folks to submit their venue items on a shorter
9 timeline so that you can receive and consider those
10 before the prehearing conference?

11 JUDGE TOREM: Thank you. That is a
12 good point. So let's circle back to that first. How
13 soon do you think the Applicant would be ready to submit
14 their letter.

15 MS. CHASE: We can submit it by
16 Wednesday of this week or any other time this week that
17 works for the other parties.

18 JUDGE TOREM: Okay. And if we are
19 going to have feedback on that matter next Monday, and I
20 would hope to so we can decide maybe all of the
21 scheduling issues, that might be overly optimistic. If
22 we give folks to the close of business today when we are
23 done, or close to, until say Thursday morning, that would
24 give two full days, tomorrow and Wednesday. Does any
25 party have an objection to me having you turn in your

1 venue discussion that we talked about earlier, that
2 letter by the morning of say 9:30 in the morning on
3 Thursday the 23rd of this month? It sounds like the
4 Applicant is okay with that.

5 Would the County be okay with that, Mr. Harper?

6 MR. HARPER: Yes. Ken Harper for the
7 County.

8 JUDGE TOREM: Ms. Voelckers for the
9 Tribe, would that be sufficient time to get your venue
10 request, the concerns stated in a letter to me and to the
11 Chair?

12 MS. VOELCKERS: Thank you, Your Honor.
13 We can do that by Thursday morning.

14 JUDGE TOREM: Okay. Ms. Reyneveld,
15 does that work for you?

16 MS. REYNEVELD: That will work for me.
17 Thank you, Judge.

18 JUDGE TOREM: All right. Mr.
19 Aramburu, will that work for you as well?

20 MR. ARAMBURU: Fine with us.

21 JUDGE TOREM: Okay. So we are
22 accelerating that deadline to March 23rd, that's Thursday
23 at 9:30 a.m. Thank you all for that.

24 On to the other point Ms. Chase raised. I do
25 appreciate the approach of, hey, we filed the application

1 so we already know what issues we think are necessary for
2 the Council to consider. I think that is just fine. I
3 just wanted to make sure I hadn't missed any
4 correspondence from the Applicant in that regard, so
5 thank you for clarifying that's the approach the
6 Applicant is taking.

7 Let me turn to the County then and see, Mr. Harper,
8 you had filed a disputed issues list last week and some
9 of that in conjunction with other parties. Was there any
10 new filing since then that the County submitted?

11 MR. HARPER: There has not been a new
12 filing to date.

13 JUDGE TOREM: Okay. All right. Thank
14 you.

15 Ms. Reyneveld, let me come to you because your email
16 came in mid-morning today if I'm correct in the timing.

17 MS. REYNEVELD: It came in just right
18 prior to this meeting, or this prehearing conference,
19 Judge.

20 JUDGE TOREM: And I'm pulling that up.
21 I see it at 12:28 p.m. so you are operating on the same
22 just in time production as I am on some of these things.
23 I appreciate that very much. And hopefully with time I
24 will get caught up where I'm several days in advance and
25 thinking ahead of all of you.

1 All right. I am looking at Counsel for the
2 Environment's preliminary list of disputed issues, and as
3 I would expect they are mainly focused on environmental
4 impact issues. All right. I am going to ask the
5 Applicant to respond if they have had a chance first to
6 review these five enumerated issues, and if there's any
7 objection or concern with how Counsel for the Environment
8 has phrased this list of disputed issues with the limited
9 additional guidance I was able to provide last week?

10 MS. CHASE: This is Ms. Chase for the
11 Applicant, and we have had an opportunity to review these
12 issues, including -- because Counsel for the Environment
13 shared these with us, and I think in essentially the same
14 form last week, which we appreciated, and so we don't
15 have any objections or concerns with these issues.

16 JUDGE TOREM: All right. Did any of
17 the other parties have any concerns they wanted to speak
18 to on the five issues that Counsel for the Environment
19 listed? I will ask the County first.

20 MR. HARPER: No, Ken Harber for the
21 County. Thank you.

22 JUDGE TOREM: All right. Ms.
23 Voelckers, from the tribal perspective?

24 MS. VOELCKERS: No. Thank you, Your
25 Honor.

1 JUDGE TOREM: Okay. Mr. Aramburu?

2 MR. ARAMBURU: No objections.

3 JUDGE TOREM: Well, Ms. Reyneveld, you
4 have got the first unanimous grouping on something of
5 substance from this group so that may bode well for how
6 the other ones look. Thank you. I will close that email
7 and see if I can find Ms. Voelckers' email.

8 Your email came in this morning, I think, a couple
9 hours ahead of Counsel for the Environment, but I have
10 got to find it. It's 10:14 a.m. on my receipt. Let me
11 open that up and do the same process here to review what
12 you have submitted.

13 You have some procedural issues, some environmental
14 impact issues, and then some location specific issues.
15 Let me start with the procedural issues, and the first
16 one I see is looking at a SEPA question, and the second
17 is a timing issue under 80.50.100. My thought initially
18 on those is that they are not adjudicative issues that
19 we'll pull out of the application and the specific items
20 there. Would you be willing to file a motion regarding
21 these items? And, you know, I spoke on the record of
22 this counsel prehearing conference like ten days ago
23 about the position of the SEPA questions, so I think my
24 statement should be challenged in a formal motion as to
25 whether or not we are going to take up SEPA issues during

1 the adjudication.

2 Do you have any concern about styling those
3 procedural issues into a motion that you would file at
4 some point that we agree on the timing?

5 MS. VOELCKERS: Thank you, Your Honor.
6 I don't. I do think that these should be handled through
7 motions practice. I know that during the last prehearing
8 conference I asked for a briefing schedule to that point,
9 given the different discussions we spent on timing I
10 think it makes sense that the overall schedule worked
11 out. There was a comment made earlier by Mr. Aramburu
12 that these procedural type issues could be handled
13 through motions practice on the earlier rather than the
14 later end of the schedule.

15 JUDGE TOREM: I would concur because
16 some of these look like they are jurisdictional. I don't
17 know that they would be dispositive motions, but they are
18 things that parties want to know what the ruling is right
19 away so that if they are ruled out of the adjudication
20 you can preserve those issues for appeal and maybe save
21 yourself finding a witness on those matters that I might
22 rule against you. So, again, I don't want to prejudge
23 any of these issues, but we are creatures of statutes in
24 this administrative law under the APA, and I will make
25 sure that for you, and I would imagine that Mr. Aramburu

1 might join you, and perhaps Mr. Harper and the County you
2 might all consider whether a joint motion on some of
3 these procedural issues once we establish a schedule with
4 the most efficient use of pleadings so you are not all
5 recreating the same wheel. I can see already from the
6 limited discussions we have had and the filings that some
7 of these procedural issues seem to cross interests of at
8 least three of the parties we have at the table.

9 Ms. Voelckers, anything else on those two issues?

10 MS. VOELCKERS: Your Honor, nothing
11 else on the specific issues, but if I could, though, I
12 would like to just confirm that we still -- that this is
13 not -- our filing of these preliminary issues this
14 morning does not negate the joint letter that we filed
15 with the County, and so we are still joining with the
16 County in the identification of issues that we identified
17 together, including this procedural issue. This was our
18 best case effort to try to incorporate the feedback that
19 you provided, and our review of the orders that you
20 directed us to, so this list is, I think, consistent with
21 the letter that we submitted along with the County
22 previously, and this is meant to further clarify the
23 issues themselves.

24 JUDGE TOREM: Thank you for that
25 clarification. I fully agree this is a cumulative process

1 where all that has been submitted before. It's going to
2 be in consideration as I help with other parts of the
3 staff come up with my proposed issues list that will be
4 more comprehensive than the samples I sent you, but it
5 takes all of this into consideration, and maybe by next
6 Monday afternoon I will have something to present in
7 advance of that, so that everybody can say okay, this is
8 what Judge Torem is thinking all of the issues that have
9 been raised so far might be that are in dispute based on
10 the filing of the application and whatever else might
11 have been informed by the draft EIS; is that fair, Ms.
12 Voelckers?

13 MS. VOELCKERS: Yes, Your Honor.

14 JUDGE TOREM: Okay. Perfect. Let's
15 move on to the environmental impact issues that you have.
16 Some of these, I think, are pretty self explanatory, and
17 I'm just going through them honestly for maybe the second
18 time today, but I'm on the record here thinking out loud.
19 When you -- your issue number five about whether the
20 project might negatively impact plants, wildlife, and
21 habitat, and, again, you reference threatened,
22 endangered, and sensitive species, is that an overlap of
23 the Tribe's gathering concern of other plants and other
24 species that are important culturally, or is that more of
25 a general environmental statement?

1 MS. VOELCKERS: I think, Your Honor,
2 there is some overlap but that is more of a general
3 environmental statement.

4 JUDGE TOREM: Okay. Because I see
5 that in your location specific issues you focus more on
6 cultural properties and potential impacts. I
7 appreciate -- I won't go through all of the other
8 preliminary issues, but I will ask the Applicant if they
9 have any questions or concerns about the filing that came
10 in this morning from Ms. Voelckers. Ms. Chase, any
11 comments or other items I should consider as I review
12 these?

13 MS. CHASE: Thank you, Judge Torem.
14 So we agree that the first two procedural issues should
15 be resolved via motion. I think that that process could
16 occur on an earlier rather than later to agree with
17 everything, I think, that's been discussed there.

18 And since the substantive issue is labeled
19 environmental impact issues and location specific issues,
20 I will acknowledge that I don't think we have had the
21 opportunity to review them in as great a detail as to
22 provide sort of full reactions on these, and I especially
23 am a little -- I didn't understand until this afternoon
24 that they were cumulative of the issues that had been
25 offered in conjunction with the County, and so I want to

1 have the opportunity to look at that overlap. We are
2 happy to provide some written comments on the issues if
3 that would be helpful to you this week in advance of the
4 prehearing conference. I am not fully prepared to react
5 to this issue that was submitted this morning.

6 JUDGE TOREM: So unlike me reading
7 these for the first or second time today you don't have
8 some special power to divine these things faster?

9 MS. CHASE: Unfortunately, no, Judge
10 Torem. My apologies for that.

11 JUDGE TOREM: All right. Well, we are
12 all in the same boat here. And, again, I say it partly
13 in jest because I am working on this just in time
14 schedule as well. And I want to be transparent about
15 maybe sounding more prepared at times than I might
16 actually be. Today I totally confess I was on the bench
17 until ten after one and rushed home and was on time to
18 connect with the call, but that's about as much prep as I
19 got today, at least for those email that came in this
20 morning.

21 Let me turn to other parties then and see if they
22 have had any further time to digest these, or maybe they
23 have discussed them with Ms. Voelckers before she filed
24 them.

25 Mr. Harper, did the County have any further

1 collaboration with Ms. Voelckers or comments on what she
2 submitted today?

3 MR. HARPER: Ms. Voelckers and I spoke
4 after those were submitted, but what she filed on behalf
5 of the Yakama Nation today is not -- it doesn't need to
6 be collaborated on, so I really -- it really doesn't
7 speak for the County's position from our earlier issue
8 statement.

9 JUDGE TOREM: Okay. Any thoughts from
10 the County on the short amount of time you have had to
11 review and discuss them with Ms. Voelckers.

12 MR. HARPER: Your Honor, they
13 generally strike me as appropriate issue statements. I
14 am going to join the chorus, though, and I think some
15 early motion practice would be helpful. And really I'm
16 just sort of interested in hearing more collective
17 thoughts on how issues are being defined.

18 It may be possible for the County to follow up after
19 today with the revised set of issues of our own. I think
20 that was something that the court was seeking, but I
21 wasn't sure exactly how or when that would be required.
22 And I think right now from the County's point of view, we
23 are just trying to get that level of sort of resolution
24 dialed in so it's most helpful.

25 JUDGE TOREM: Yep, I'm definitely

1 hearing what the chorus is saying, and we have a little
2 bit more breathing room to establish and get that done.

3 All right. Let me ask then, Ms. Reyneveld, any
4 thoughts on the tribal issues that were submitted today,
5 or comments that would guide me between now and our next
6 prehearing conference?

7 MS. REYNEVELD: I haven't had
8 sufficient time to review these to be able to provide any
9 sort of comprehensive thoughts or analysis, but from an
10 initial reading they look okay, but I would like some
11 additional time to review them.

12 JUDGE TOREM: All right. And we are
13 all going to have some additional time to flesh out the
14 disputed issues.

15 Mr. Aramburu, any thoughts on the list that came in
16 this morning from Ms. Voelckers?

17 MR. ARAMBURU: I certainly have no
18 objections to it. Of course we have similar issues that
19 we have raised. We are in agreement with the procedural
20 issues certainly, and we raised issues of wildlife and
21 other things as well. I think it does kind of raise the
22 question of what we are going to do with this issues
23 list. Are we going to have a list that reflects -- is
24 there some consolidation that you have in mind, Judge
25 Torem? Are we going to list the issues that have been

1 brought up, sort of what happened, I guess, in Tesoro. I
2 don't have any objection, but I kind of am wondering what
3 our exercise is here as we go through this.

4 JUDGE TOREM: Mr. Aramburu, it's a
5 good question. I am trying to decide which rocks I want
6 counsel to bring me, but, frankly, what I want to do is,
7 as you hinted, something that might have occurred in
8 previous adjudications where the judge sits down with
9 staff and tries to figure out where there might be
10 overlap, trying to figure out where there might be some
11 opportunity for simplification, and creating a way for
12 parties that have the same issue to maybe decide who
13 amongst them is taking the lead so that only one witness
14 is called jointly.

15 It may be that there's a need for somebody that --
16 let's take this Ferruginous hawk issue. Maybe there are
17 competing experts, Tri-Cities CARES, the Yakama Nation,
18 and Counsel for the Environment all see that Ferruginous
19 hawk issue slightly different and we really need three
20 witnesses. I may come back and say on that issue, for
21 instance, I see that all three parties are raising this.
22 It's been covered in the application. We will find out
23 who the Applicant's witness is, and not to say that
24 there's not a fourth party that might also join in that,
25 but that's what I'm looking at doing, Mr. Aramburu, is

1 trying to take these issues lists that have come in for
2 the first prehearing conference, and those in the
3 interval between March 10th and today, and see if I can
4 comb through this and come up with hey, this is what I
5 have heard so far, and put them into one comprehensive
6 list and send it back to the parties. And it may be a
7 little ambitious to get it by next Monday afternoon, but
8 I do have some holes in the schedule this week that might
9 allow it. If I can get those to you by close of the
10 week's business on Friday then you have will at least
11 Monday morning to look at that comprehensive list and we
12 will have further discussion about it, and you can tell
13 me if I'm missing anything. You can tell me which issues
14 people might be aligned with to collaborate on a single
15 witness as opposed to two and three witnesses on a
16 similar topic.

17 Again, I don't want to portend I'm going to limit
18 anybody if their particular expert and we can agree you
19 want to hire the same one, or you think that two or three
20 experts on a topic will add to the record and help the
21 Council decide the issue. I do think what I'm trying to
22 do is head off some motion practice from the Applicant or
23 other parties that might be moving to strike witnesses as
24 cumulative or duplicative. By doing the work up front,
25 it may save me and all of you some work down the road.

1 So I hope, Mr. Aramburu, those random thoughts from
2 the judge give you a little bit more guidance on what I'm
3 thinking.

4 MR. ARAMBURU: They do. Thank you.

5 JUDGE TOREM: All right. I think we
6 have covered everybody's response to both the Counsel for
7 the Environment and the Tribe's issues, so Mr. Aramburu
8 that brings us back to the email you filed, I think, on
9 Friday afternoon and then filed a supplemental correction
10 to on Saturday morning; is that right?

11 MR. ARAMBURU: Yes, spell check caught
12 me.

13 JUDGE TOREM: Fair enough. I am going
14 to see if I can find your motion. I think I know where I
15 filed that one. Yes. And yours was not an attachment
16 but a listing of Roman numeral one through twelve, and
17 then you highlighted that word "amenities" in Roman
18 numeral eight as the change. And I think your issues
19 again speak, as you have sent in previous filings, and
20 again I have considered these as cumulative to the
21 thought process, so I will look at your initial filings
22 from last week from that time and these as well.

23 Did you want to say anything further about the
24 issues before I go around the horn again to see what
25 other comments there might be?

1 MR. ARAMBURU: No. I think my issues
2 are -- I think Tri-Cities CARES' issues are
3 self-explanatory.

4 JUDGE TOREM: All right. Let me push
5 Mr. Aramburu's issues off the Council's table for this
6 time.

7 Let's turn then to the Applicant and see if the
8 Applicant had a chance to review the email that came in
9 last Friday and the change on amenities on Saturday
10 morning. Ms. Chase?

11 MS. CHASE: Thank you, Judge Torem.
12 This is Ms. Chase. We have had a chance to look at this
13 on a preliminary basis. I think -- and this really goes
14 to both the issues submitted by the Yakama Nation and
15 issues to be submitted by the County, as well as this
16 one, we would like the opportunity to provide some more
17 detailed comments before -- for considering these issues.
18 I think our overarching concern is that many of those
19 seem a bit overbroad and don't quite define the issues
20 with enough specificity that the other parties can,
21 including the Applicant, can reasonably respond. And I
22 will just highlight a couple of those here. I think
23 issue seven, which raises general concerns about natural
24 assets of our national heritage, for example. And nine,
25 which talks about the adverse impacts generally that have

1 not been mitigated.

2 So I do think we have some concerns about the
3 breadth of these issues and those are just a couple of
4 examples.

5 I'm happy to answer any questions you might have
6 about those comments.

7 JUDGE TOREM: The only question I
8 would like to pose to the Applicant, and if you can
9 answer it to today, fantastic. If you can't answer
10 today, I know I will get something further in writing
11 once you and your colleagues have had a little bit more
12 time.

13 But as we talked about with the Tribe's procedural
14 issues number one and two that were labeled that way in
15 Ms. Voelckers' filing, are there any of these 12 issues
16 that you see are procedural in nature and would be
17 subject to pre-adjudication motion practice to either
18 clarify them as jurisdictional or otherwise?

19 MS. CHASE: I will think on that. I
20 don't see them as being procedural in quite the same way
21 that I think the issues that Ms. Voelckers identified in
22 her submittal are procedural, although, I do think some
23 of them are -- so this is one example, we need to place
24 this hearing in the context of the existing land use
25 decision that's already been issued. And so, for

1 example, the Applicant has some concerns about
2 relitigating, and I will let Mr. McMahan speak in more
3 detail to this if you have further questions today, but
4 relitigating what's already been decided in that language
5 consistency order. And so when I look at issue number
6 three I think that's one place where we think maybe some
7 motion practice potentially could be useful, depending on
8 how everyone wants to frame issues to make clear what's
9 been decided in that order already and what remains live
10 for the adjudication.

11 I'm looking at Mr. McMahan in case he has anything to
12 add and he's telling me he does not at this time.

13 JUDGE TOREM: All right. Frankly, I
14 was expecting the Applicant to also raise the questions
15 of whether the scope of the adjudication could possibly
16 take on number one and number two. I'm not saying that
17 it can't, but as far as meaningful reductions of
18 omissions to justify any adverse impacts caused by the
19 wind farm as proposed and Washington policy legislative
20 priorities, I'm going to need some further explanation,
21 Mr. Aramburu, for TCC's position on whether or not the
22 question of abundant useful power at reasonable cost is
23 something that's before EFSEC or more likely before the
24 Utilities and Transportation Commission. And as much as
25 these two agencies used to be co-housed, I don't think

1 their missions are continuous. They might be adjacent in
2 the big scheme of things with Governor Inslee and the
3 policies he's signed into law during his terms in office,
4 but I have some concerns. And if no one else asks for
5 briefing on those, I want you to, Mr. Aramburu, as I
6 consider these think that I might be asking you for
7 briefing to see if they come within the scope of 80.50.
8 I just want to tee that up if the Applicant wasn't ready
9 to have those thoughts today, I am, and just a question
10 mark that I want to put over those.

11 All right. Let me move to the County and see, Mr.
12 Harper, if you have looked at Tri-Cities CARES' issues as
13 submitted by Mr. Aramburu. Do you have any comments?

14 MR. HARPER: Ken Harper, Your Honor.
15 I have looked at those. No particular item by item
16 comments, Your Honor. I think one of the things I want
17 to comment on, though, and this is really just to elicit
18 further comment from you, if I understand correctly, what
19 we are doing here is really just kind of engaged in a
20 focusing process?

21 And so if an issue statement is inartfully
22 expressed, or heaven forbid some sub issue is omitted in
23 this process, it's Your Honor's expectation that there
24 will be sort of a -- sort of a funneling down to or
25 sifting down to a final sort of set of issues that will

1 then define the case? Am I channelling you correctly
2 there, Your Honor?

3 JUDGE TOREM: Yes, your crystal ball
4 is correct. The sorting and sifting, I don't have a hat
5 like the Harry Potter school did but we will do the
6 sorting.

7 MR. HARPER: Your Honor, with that in
8 mind, I don't have anything further to add to our
9 discussion so far on Mr. Aramburu's comments. I think
10 his issues, I don't have anything else on that.

11 JUDGE TOREM: All right. Ms.
12 Voelckers, let me come next to you on what Tri-Cities
13 CARES submitted. Do you have any anything you want to
14 add today as I kind of do this sifting and sorting?

15 MS. VOELCKERS: Thank you, Your Honor.
16 I don't have anything else to add specific to this list,
17 but I do appreciate the question as I have been better
18 understanding the goal here of this discussion. And so I
19 would, as things are sifted and sorted, and I think
20 preserved this in what I filed this morning, but we would
21 anticipate that parties would be able to argue any
22 dispute issue even if they are not the ones initially
23 listing it, so we didn't want to create duplication, and
24 so therefore didn't list certain things that were part of
25 Mr. Aramburu's list, or Ms. Reyneveld's list, but did

1 preserve the ability to still join in the discussion of
2 those issues throughout the adjudication. I just wanted
3 to raise that as another potential point of clarification
4 if that causes any concern.

5 JUDGE TOREM: No, not whatsoever. I
6 think that's the general spirit, Ms. Voelckers, of where
7 we are going with this. There may be a party that
8 decides they are the lead and other parties are in
9 support, ask similar issues in cross-examination but
10 essentially adopt the previous questions, if you will,
11 once we get to that stage. And when it comes to
12 testimony, parties that have issues that are aligned.
13 Like let's say I list a party issue as Mr. Aramburu has
14 listed, does the project have unacceptable impact on
15 wildlife and heir habitat. Well, once we get more
16 specifics on his issue number five, which habitats and
17 which wildlife, and it may be that a number of parties
18 have similar concerns, maybe all parties, and choose
19 amongst themselves as to who is going to file the issue
20 on this species and which biologist will be called on
21 another, but all parties might have those similar
22 concerns. I hope that helps.

23 Through the sifting and sorting and narrowing
24 process, it may reduce some of the filing burden from one
25 party and it can be shared amongst two or three. It

1 might be that, you know, two or three parties sponsor the
2 testimony of one witness because it speaks to all of
3 their issues, and then I just need to know who the lead
4 party is that will be sponsoring the witness and go from
5 there on further examination. I hope that helps.

6 MS. VOELCKERS: It does. Thank you,
7 Your Honor.

8 JUDGE TOREM: Mr. Aramburu, you have
9 your mic opened right now. I can hear you in the
10 background. I am about to turn to Ms. Reyneveld and talk
11 about your issue there. So if you all can make sure we
12 have the microphone discipline continue. We've been
13 pretty good today.

14 Ms. Reyneveld, anything else on the issues filed
15 last week by Mr. Aramburu on behalf TCC?

16 MS. REYNEVELD: I agree with the
17 Applicant that some of these issues appear to be a little
18 broad, and so it would be great to add a little more
19 specificity to understand what is being at issue
20 specifically. There's also some redundancy in all of
21 the -- some of these issues, both the Counsel for the
22 Environment and also Yakima Nation and these issues, so
23 I'm assuming that the sifting and sorting process as you
24 say that we are going to be narrowing these down to kind
25 of come up with kind of what -- the question on each of

1 these issues. And then I agree with their comments
2 regarding some following up on the scope of this
3 adjudication. Generally, you know, they look fine.

4 I'm kind of interested in what are the next steps in
5 terms of combining of the issues and narrowing the issues
6 here.

7 JUDGE TOREM: And as we had at the end
8 of the last prehearing conference when you asked for next
9 steps, and I'm developing what do you really want, Judge,
10 I think we have covered a lot of progress in the last ten
11 days to get these issue statements and to work on the
12 neutral tone and the more specifics to the topics we are
13 looking at, so we will continue to make some more steps.

14 I want to reiterate what I said last time about
15 these proposed issues having a basis in existing law.
16 And, you know, there is a good faith argument for some of
17 what I'm indicating might not be within the expected
18 scope of the adjudication. When the motions come in to
19 say, Judge, here's why we think you are wrong, or at
20 least based on comments you've made at prehearing
21 conferences, here's why we think this is a legitimate
22 issue under 80.50 and other applicable laws. That's the
23 kind of motion practice I expect to see if the issues are
24 essentially flagged for a need for prehearing motions
25 before they are added to the list.

1 From here, Ms. Reyneveld, and to all the other
2 parties, what I hope to do is take everything you talked
3 about today, the filings that came in by email last
4 Friday and this morning, and all the previous letters
5 that came in based on the parties collaboration before
6 the first prehearing conference, sift and sort, come up
7 with that comprehensive list and get it back to you. I
8 am going to see if I can work independently and then with
9 EFSEC staff, including Mr. Thomson, to refine that so
10 it's not just my thoughts, that I have the benefit of the
11 AG's office opinion as servicing the Council, and any
12 other staff members that might want to help me to comment
13 on that. Some of those may be more substantive in citing
14 staff. We might have some of the SEPA staff involved,
15 and definitely just the good minds of the rest of the
16 ladies and gentlemen that are supporting this
17 adjudication in the background. They have had some great
18 insight along the way and I want to continue to take
19 advantage of what they are hearing from their
20 perspective.

21 So I think that's really all we can get through on
22 issue number five on my agenda today. And once again I
23 have some homework to turn around for you.

24 I think on discovery, on item number six, we have
25 covered as much as we needed to before the break, so

1 let's turn to the last item on today's agenda, prehearing
2 motion practice and briefing. We need to have a better
3 look at the schedule, and I look at all of the other
4 things about when testimony might due and have a proposal
5 for you on that next time around.

6 The deadline for nondispositive motions will
7 probably be set in the timing after prefiled testimony
8 comes in, so I don't know how long we will have in
9 between. Maybe my questions on this are premature, but I
10 think it's good practice to have all the motions decided
11 with time for parties to file a motion for
12 reconsideration before the first day of the adjudication.

13 That's the thought process that I'm looking at, and,
14 again, a good reason why we maybe settle on the
15 adjudication dates and then roll backwards as far as we
16 need to to get this motion practice in between, testimony
17 filing, and then back to what's realistic for that first
18 round of prefiled testimony.

19 Ms. Chase, any thoughts on that?

20 MS. CHASE: Judge Torem, this is Ms.
21 Chase, and I'm thinking -- and I don't think that we
22 have -- I don't have any particular thoughts on that
23 other than I agree with that general comment about the
24 importance of having the issues resolved prior to the
25 actual adjudication, but I think we are flexible on how

1 you would like to set those deadlines. If I think of
2 anything else I will let I know, but that's my initial
3 thought on that point.

4 JUDGE TOREM: There are a couple of
5 issues -- well, before I let you go back, some of the
6 ones that the Tribe has flagged as those procedural
7 issues that I don't think we really need to wait for the
8 filing of testimony. This may be a simultaneous or even
9 before the testimony comes in motion practice, and we can
10 talk about a schedule for that next week. I hope that
11 all the parties will kind of collaborate and say these
12 are some issues that we are prepared to file a motion
13 sooner rather than later that are not dependent on the
14 filing of testimony as proposed for prefiled and
15 responsive or rebuttal testimony, but some of these scope
16 of adjudication issues, I think, could be handled well in
17 advance or simultaneously with the parties filing their
18 actual testimony. That's what I'm thinking about kind of
19 two different timelines or time periods for motions to
20 come in an be decided.

21 Does the Applicant have any thoughts on two periods
22 of time or should we put it all off until after testimony
23 is filed?

24 MS. CHASE: Thank you, Judge Torem.
25 That clarification was helpful to me in terms of what you

1 are thinking and asking. And yes, it's Applicant's
2 preference that we do set an initial motion deadline. I
3 think it would be a motion deadline that would include,
4 among other things as you noted, motions on the
5 procedural issues that the Yakima Nation and others have
6 indicated they may wish to raise, as well as to the
7 extent that it's not resolved as part of the issues
8 shaping and sorting process. Motions on some of the
9 issues such as TCC issues one and two are issues that may
10 be redundant of the existing land use approval process
11 that's already taken place.

12 So I agree with that. I agree we can do that sooner
13 rather than later. I think we can set that deadline
14 pretty soon after the prehearing conference on the 27th,
15 and that that could run in parallel with the parties
16 preparation of the prefiled testimony. In other words,
17 we could get those motions resolved hopefully either
18 before or while prefiled testimony was still being
19 submitted so that we can keep the process moving.

20 JUDGE TOREM: All right. Thank you.
21 That's kind of what I'm thinking as well, but I'm open to
22 other parties telling me we should wait even longer on
23 some of those because if they are dependent on the
24 testimony, or at least a finalization of the issues list,
25 which, again, that would hopefully be sooner rather than

1 later.

2 Let me turn to Mr. Harper for Benton County and get
3 your thoughts on those same questions.

4 MR. HARPER: Your Honor, Ken harper
5 for the County. My concern is that I generally think
6 that it would be helpful to get some motions filed sooner
7 rather than later. I think that almost seems like just
8 should certainly be allowed. My reservation, Your Honor,
9 is that it's not necessarily clear to me how we will
10 decide what is a procedural issue that might be subject
11 to some kind of early cutoff or deadline compared to what
12 may not be a procedural issue. It may be that a
13 procedural issue seems substantive or vice versa only at
14 some later date, so I think my suggestion would be if you
15 could indicate to the parties that motion practice is
16 open and encourage early motions on procedural issues
17 that may help streamline matters, I think that might
18 prove to be more manageable. I'm just not totally
19 convinced that it's going to be helpful to have a hard
20 cutoff on something that is, you know, sort of perceived
21 to be procedural at this early stage of the adjudication.

22 Other than that, Your Honor, I do support the idea
23 of getting motions filed. And I think most of the
24 parties that think they have a motion would probably like
25 to file those soon, so maybe that is a sort of self

1 correcting thing to allow motions and then not
2 necessarily worry too much about deadlines over
3 procedural versus substantive categorizations.

4 JUDGE TOREM: All right. I think
5 that's fair. Some issues you kind of -- I think the
6 Supreme Court has said, you know it when you see it, and
7 others they say develop over the course of litigation. I
8 like the idea of having kind of an open filing for that
9 the judge says this is the time to file your initial
10 motions, and have another round after testimony. Again,
11 I don't think I can preclude and just, you know, tell you
12 don't file a motion if you think you have one at any
13 given time now that the adjudication has been commenced.

14 I would appreciate parties following some guidelines
15 if we can agree on windows of time, but I also say if you
16 file something that I think should be for later, I may
17 issues a preliminary ruling just deferring any further
18 action on it until another date certain or milestone in
19 the process.

20 So I like what Mr. Harper is suggesting, and if I
21 see something that I think is just not right for action,
22 I imagine either with responsive pleading or on my own
23 sua sponte if I read it fast enough getting an order out
24 telling parties hold off, don't put your energy into this
25 until later and we will tell you what the response

1 deadline is. That's the kind of thing I'm thinking, Mr.
2 Harper, based on your comments might be helpful for all
3 the parties. Is that fair enough?

4 MR. HARPER: Ken Harper again for the
5 County. I think what you just said, if I understand
6 correctly, is maybe a transition from the sort of
7 distinguishing procedural from substantive and instead
8 thinking of initial motions as the parties may perceive
9 them, and then Your Honor sort of picking up, you know,
10 the motion as filed and then responding to it. If it's
11 an initial motion that's procedural, then great. If it's
12 an initial motion that's substantive and premature, then
13 you can make a ruling accordingly.

14 And if somebody holds back on what is perceived to
15 be an initial motion and they hold it back and hold it
16 back, then I suppose it may not be very well received,
17 but I think that's the kind of idea, you know, initial
18 motion opportunities that the County would like to see,
19 and, frankly, what we would like to take advantage of.

20 JUDGE TOREM: All right. Thank you.
21 That's helping to guide the discussion quite well.

22 Let me turn to Mr. Aramburu and Tri-Cities CARES and
23 see, Mr. Aramburu, you have been in these motion battles
24 before, what are your thoughts?

25 MR. ARAMBURU: Well, I kind of have a

1 general thought about how we proceed here. I looked at
2 dozens of prehearing orders and many of them are pretty
3 specific as to deadlines, events, those kinds of things.

4 Judge Torem, are we in a position now that perhaps
5 you can put together what would be a prehearing order for
6 draft consideration by everyone, and include within that
7 to set some deadlines we know we are going to have to
8 deal with, and testimony is certainly one. There may be
9 objections, motions to strike, that would be another one.
10 There would be opportunities for discovery, motion
11 practice that would be included. And I think it would be
12 good for -- at least in my opinion, for us to take a look
13 at this comprehensive list of things and start to -- and
14 leaving dates blank. Again, this is my suggestion, so
15 that we can start to fill in these issues.

16 Now more specifically to the motions, obviously
17 there may be procedural motions that are being discussed.
18 **A dispositive motion would be one that would seek to get**
19 **rid of an issue, if that's something that the parties**
20 **have in mind. And then there may be motion practice**
21 **following the submission of testimony. And, again, the**
22 **prehearing order would set times and dates and responses**
23 **and reconsiderations and all those kinds of things. I**
24 **hope I haven't gone on too long, but I think we are**
25 **probably at the point where we really need to start to**

1 look at that in a comprehensive order. And deadlines for
2 motions are certainly one of those things that we would
3 need the fill in. I kind of think that -- I think Ms.
4 Voelckers and Mr. Harper pointed out that we kind of need
5 to work backwards on these issues to kind of see where we
6 are instead of trying to do it forward. That's my
7 suggestion.

8 JUDGE TOREM: And I appreciate that,
9 Mr. Aramburu. I like the idea of -- and I will have a
10 skeleton order laying out all of these things and I will
11 be filling in the dates I know I can, or a date range,
12 and maybe sets of intervals. Once I have a chance when
13 we hang up today to review the Applicant's extension
14 request and see what Mr. Thompson and I can work with
15 getting a more expedited review and decision on that from
16 the Council, then we will have a better time frame on
17 picking a date to work backwards from.

18 You are right. I have some homework to do as I look
19 at the nonavailability and what the rest of the calendar
20 holds through September 30th to start giving you the hard
21 and fast dates or date ranges and then figuring this
22 whole thing out as you suggest.

23 And that would include, it sounds like, a
24 preliminary round of motions followed by a post filing of
25 testimony round of motions, exactly as you suggest for

1 motions to strike, or maybe a dispositive motion to
2 strike an issue altogether. I do hope that in that time
3 frame that I'm referring to now the parties will also see
4 where there might be agreement, and if there are
5 litigation measures that can be agreed upon for a
6 particular issue, settlements of certain issues that
7 might obviate the need for testimony, or disputed
8 cross-examination of a witness, or maybe just limit it
9 for things that the Council might still have questions on
10 where the parties have a meeting of all five minds, the
11 Council may still have its own concerns that they want to
12 ask. Those are some other thoughts that I will add to
13 your skeleton order and overall comprehensive timeframe
14 and chronology. I hope that's responsive, Mr. Aramburu.

15 MR. ARAMBURU: I think so. There's a
16 question about one of the issues that perhaps we could
17 seek some guidance on. There is an issue that's been
18 discussed about the need to have the final impact
19 statement available for the adjudication, but that, given
20 some extension in time here, it may be that if the final
21 impact statement is going to be out in advance of us
22 getting in the adjudication that's not really an issue.

23 And I wonder if we might get some guidance from
24 staff as to dates that we might expect to see that
25 document.

1 JUDGE TOREM: All right. Mr. Thompson
2 and I will talk to the appropriate staff to see if they
3 have any news that can be shared with everybody, but,
4 again, without putting any undue pressure on them to
5 finish early. And as I said, maybe there's still need
6 for the legal briefing on that so I can make a formal
7 ruling on the suggestions and comments I made last
8 prehearing conference, Mr. Aramburu. I don't want to
9 make you do work just for -- if you think that the FEIS
10 would somehow be done sooner and obviate the need for the
11 motion, but if I can give you a date certain if it's
12 available to me, I'm happy to pass it along.

13 All right. Let me turn to Ms. Voelckers and the
14 Tribe and see on this discussion of the overall schedule
15 and the motions timeframe as we wrap up today's
16 conference, I will come to Ms. Reyneveld last.

17 Ms. Voelckers any thoughts from the Tribe on this
18 matter?

19 MS. VOELCKERS: Thank you, Your Honor.
20 I think I'm most aligned with counsel for Benton County
21 here, although I do support the requests for stretching
22 this out. And I certainly would reiterate, and I think I
23 already said this, that we think the hearing should be
24 set and we should walk back from that. I think that the
25 proposal that Mr. Harper made makes a lot of sense. And

1 rather than having a cutoff for motions necessary next
2 week, as I think I heard from Ms. Chase, but to have a
3 period of time where those procedural issues can be dealt
4 with. Certainly, also finalization issue statements I
5 think is a really good idea.

6 The only thing I would add to that is an
7 understanding of what you just said about the work that
8 staff is doing, the FEIS or Supplemental EIS, I'm not
9 sure, but it did sound like the discussion last week was
10 about a proposed schedule, and so if there was any
11 finalization of a schedule for the next EFSEC meeting
12 that would be helpful to inform what we are talking
13 about. I don't know if that was a moot or not moot
14 procedural issue without knowing more about the schedule,
15 but that would helpfully help inform a deadline for
16 procedural motions.

17 JUDGE TOREM: Okay. I think I
18 understood all of that. Let me turn to Ms. Reyneveld and
19 see if she has anything else on the motion practice as it
20 fits into the overall timeframe, and thoughts on any
21 issues that that might be keyed up earlier rather than
22 later.

23 MS. REYNEVELD: I don't have much to
24 add. I agree with what the parties have stated,
25 including Ms. Voelckers and the other parties, we should

1 set a hearing and then walk back from there. And I
2 agree, Judge, that the procedural issue motion that might
3 be one percent, and we can absolutely start having that
4 motion practice as kind of the first part of this
5 adjudication.

6 JUDGE TOREM: All right. Those are
7 all the things I had for today. The comments that I have
8 got on item number seven, let's talk about prehearing
9 opening statements and any supporting briefing, and, of
10 course, posthearing closing arguments and briefing.

11 I just want the parties to anticipate there will be
12 an opportunity to file those in writing. There's going
13 to be a lot, just a lot of reading for this Council and I
14 don't know that any of our council members have
15 participated in an adjudication before, or in any complex
16 litigation where they have got to be decision makers and
17 digest all the information.

18 So as you think about between now and next week, the
19 witnesses you are going to be calling in the months
20 ahead, and the position you want to put in front of the
21 council members, any opening statements or opening
22 briefing that you present, consider the audience. I'm
23 not hinting at all that they are unrefined in any way,
24 but just their inexperience at these matters, and a
25 precise opening statement that you want the members to

1 read essentially on the morning of the first adjudication
2 date. I'm thinking they could read three to five pages
3 and capture what each of the five parties is going to say
4 as an overall perspective, and then they will be ready
5 witness by witness, topic by topic however we schedule
6 the dates up to maybe as you said two weeks of
7 adjudication. I just want you to think about, as you
8 structure things, what that opening statement filed in
9 writing might be so that at my insistence they will have
10 read that before they hear the first witness and be keyed
11 up to hear what each party is going to have based on
12 whatever order we present it.

13 Now when the adjudication is all done, that, in my
14 experience, is when you really want to have a chance to
15 file that posthearing brief so that I can digest with Mr.
16 Thompson's help all the legal issues you might be raising
17 and answer questions of the Council accordingly during
18 their deliberations, and that they can hear, based on
19 what the testimony showed or perhaps didn't through
20 cross-examination, have a better view of here is what we
21 heard and here is what the parties really think this is
22 why he should do X or Y with particular impacts for
23 mitigation, or perhaps with the overall project and its
24 recommendation for approval or denial to the governor.

25 So the opening statements I just think you don't

1 want to be too much time on your positions, but more
2 again about what you want them to pay attention to over
3 the course of the adjudication. Save that super advocacy
4 role for the posthearing brief, and then the Council will
5 be in a better position to understand how and why you are
6 taking the positions you do.

7 I hope that's helpful just in this sort of practice
8 as it's not a criminal proceeding. It is an explanatory
9 proceeding and an evaluative proceeding. It's truly an
10 adjudication of all the issues that we are going to
11 settle on, and I hope that sets a tone for when I put
12 that in there for prehearing opening statements what that
13 means, an posthearing closing arguments.

14 I know those are words that we all learned in law
15 school and sometimes statements and arguments get
16 confused, and I just invite you to, as you develop your
17 cases, keep that in mind. I don't think anybody is going
18 to move to strike an opening argument as too -- an
19 opening statement as too argumentative in this position,
20 but if we all keep that in mind no one will even think
21 to.

22 Let me go around the horn to see if there were any
23 other issues that were left unaddressed. Ms. Chase,
24 anything for the Applicant you wanted to bring up before
25 we close out today's conference?

1 MS. CHASE: Thank you, Judge Torem.
2 This is Ms. Chase, nothing further for the Applicant.
3 Thank you.

4 JUDGE TOREM: Mr. Harper, how about
5 for the County?

6 MR. HARPER: Ken Harper for the
7 County, nothing further. Thank you, Your Honor.

8 JUDGE TOREM: Ms. Reyneveld, Counsel
9 for the Environment?

10 MS. REYNEVELD: Sarah Reyneveld,
11 Counsel for the Environment, nothing further. Thank you,
12 Judge.

13 JUDGE TOREM: Ms. Voelckers, anything
14 on behalf of the Yakama Nation?

15 MS. VOELCKERS: Shona Voelckers on
16 behalf of the Yakama Nation, we have nothing else.

17 JUDGE TOREM: All right. And for
18 Tri-Cities CARES, Mr. Aramburu?

19 MR. ARAMBURU: Nothing further at this
20 time, Your Honor.

21 JUDGE TOREM: All right. Well our
22 conference then is adjourned at 3:47 p.m. We are off the
23 record.

24 (Proceedings concluded
25 at 3:47 p.m.)

1 STATE OF WASHINGTON) I, Christy Sheppard, CCR, RPR,
2) ss a certified court reporter
3 County of Pierce) in the State of Washington, do
4 hereby certify:

5 That the foregoing Prehearing Conference was taken
6 before me and completed on March 20, 2023, and thereafter
7 was transcribed under my direction; that the transcript is a
8 full, true and complete transcript of the proceedings;

9 That I am not a relative, employee, attorney or counsel
10 of any party to this action or relative or employee of any
11 such attorney or counsel and that I am not financially
12 interested in the said action or the outcome thereof;

13 That I am herewith securely sealing the said deposition
14 and promptly delivering the same to EFSEC.

15 IN WITNESS WHEREOF, I have hereunto set my signature on
16 April 3, 2023.

17 

18 _____
19 Christy Sheppard, CCR, RPR
20 Certified Court Reporter No. 1932
21 (Certification expires 05/06/24.)
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