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May 02, 2023

Energy Facility Site Evaluation Council v.

EF-210011

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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application)	
of:)	
)	
)	
Scout Clean Energy, LLC, for Horse)	Docket No. EF-210011
Heaven Wind Farm, LLC,)	
)	
Applicant.)	
)	
)	

PREHEARING CONFERENCE NO. 3
VERBATIM RECORD OF PROCEEDINGS

May 2, 2023

Conducted Remotely via Microsoft Teams

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1 BE IT REMEMBERED that on Tuesday,
2 May 2, 2023, at 10:02 a.m. Pacific time, before JUDGE
3 ADAM TOREM, the following proceedings were had, via
4 remote videoconference, to wit:

5
6 <<<<<< >>>>>>

7
8 JUDGE TOREM: Good morning,
9 everybody. This is Judge Torem on behalf of the
10 Energy Facility Site Evaluation Council.

11 This is the third prehearing conference in the
12 matter of Scout Clean Energy and Horse Heaven Wind
13 Farm project. We have an agenda that has been
14 circulated. I hope everybody on the line has that.

15 Again, for members of the public who might be
16 listening in today, this prehearing conference is for
17 procedural and other prehearing, pre-adjudication
18 discussions, and we're not going to have an
19 opportunity for public comment today.

20 With that, we have seven items to go through, the
21 first of which are the appearances of the parties.
22 And I'll just call the name of the party and let you
23 speak to who all is on the line today and who will be
24 representing and speaking on behalf of that party.

25 Let me start with the applicants.

1 MR. McMAHAN: Good morning, Judge
2 Torem. Tim McMahan here. And I'm here with my
3 colleagues Emily Schimelpfenig, who's calling in from
4 D.C., and -- and Ariel Stavitsky, who will be stepping
5 in to assist us. I think you have the spelling of her
6 name. If not, Ariel can do that herself here orally.

7 JUDGE TOREM: Ms. Stavitsky, can you
8 confirm it's S-t-a-v, as in "Victor," i-t-s-k-y?

9 MS. STAVITSKY: That's right, Judge
10 Torem.

11 JUDGE TOREM: Perfect.
12 All right. Thank you, Mr. McMahan.
13 For Benton County today.

14 MR. HARPER: Good morning, Your
15 Honor. You have Ken Harper and Z. Foster.

16 JUDGE TOREM: Mr. Harper, your sound
17 level is pretty low. Can you repeat, please?

18 MR. HARPER: I'll try to speak up.
19 This is Ken Harper for Benton County, Your Honor.

20 JUDGE TOREM: All right. And you
21 have Aziza Foster with you as well?

22 MR. HARPER: That is correct.

23 JUDGE TOREM: All right. And we
24 don't expect Ryan Brown from the prosecuting attorney's
25 office to participate today?

1 MR. HARPER: No, I don't think so.

2 JUDGE TOREM: All right. Perfect.

3 For counsel for the environment.

4 MS. REYNEVELD: This is Sarah
5 Reyneveld for counsel for the environment.

6 JUDGE TOREM: Thank you,
7 Ms. Reyneveld.

8 For the Yakama Nation.

9 MS. VOELCKERS: Thank you, Your
10 Honor. Shona Voelckers for the Yakama Nation. I also
11 have my colleagues Ethan Jones and Jessica Houston on
12 the line.

13 I just want to note that the sound is breaking up
14 a bit on my end. Thank you.

15 JUDGE TOREM: All right. Hopefully
16 that's not being caused by my connection. But you are
17 coming through loud and clear on this end.

18 Finally, Tri-Cities C.A.R.E.S.

19 MR. ARAMBURU: Good morning, Your
20 Honor. Richard Aramburu representing Tri-Cities
21 C.A.R.E.S. There is also on the line numerous members
22 of Tri-Cities C.A.R.E.S. However, they will not be
23 participating in the hearing this morning per your
24 direction. Thank you.

25 JUDGE TOREM: All right. Thank you.

1 I'm going to now ask if we have from the attorney
2 general's office Jon Thompson or anybody else with him.

3 MR. THOMPSON: Yes. This is Jon
4 Thompson, Judge Torem.

5 JUDGE TOREM: Anybody else
6 participating from the AG's office today?

7 MR. THOMPSON: Yes. Actually, I
8 think my colleague Jenna Slocum is on as well.

9 MS. SLOCUM: Yes. Good morning,
10 Judge.

11 JUDGE TOREM: All right. Thank you.
12 Good morning, Ms. Slocum.

13 Any EFSEC staff other than Joan Owens, who I've
14 already identified?

15 Do we have Lisa Masengale listening in?

16 MS. MASENGALE: This is Lisa
17 Masengale, present. Thank you.

18 JUDGE TOREM: And do we have Andrea
19 Grantham?

20 MS. GRANTHAM: Andrea Grantham is
21 present.

22 JUDGE TOREM: And I know I don't
23 have it listed on the agenda, but do we have Ami
24 Hafkemeyer?

25 I thought maybe she'd be on today, but she may

1 have other issues for siting to go on.

2 Do we have Alex Shiley?

3 MS. SHILEY: Yes. Alex Shiley,
4 present.

5 JUDGE TOREM: Excellent.

6 Anybody else that I need to acknowledge as present
7 from EFSEC staff, this is your time to speak up.

8 All right. Hearing none, let's move on to Item
9 No. 2.

10 When we were last scheduling this Prehearing
11 Conference No. 3, we had asked the parties or I had
12 asked the parties to submit their letters regarding
13 preferences for the type of adjudication. And you-all
14 have to know that your letters were read, considered,
15 discussed between myself, the EFSEC director, Ms. Sonia
16 Bumpus, and Chair Kathleen Drew.

17 And you-all received a response as to the venue,
18 and Chair Drew explained why it's going to be held
19 virtually. And we're going to be using the platform of
20 Microsoft Teams with an option for call-in, if you'd
21 like, as I'm using it today, just calling in without
22 using Teams.

23 At the last EFSEC meeting in April, I attended
24 in-person at the UTC offices in Lacey to see kind of
25 the magic behind how the virtual proceeding will occur.

1 And I'm satisfied that, with the assistance of EFSEC
2 staff, we'll be able to have a smooth virtual
3 proceeding. There are still some challenges, and we'll
4 work those out a little bit later, particularly those
5 raised by the Yakama Nation on testimony and
6 participation from tribal elders. There will also be
7 some questions on how we're going to work with
8 exhibits. Those matters will have to be taken up as we
9 get closer to the hearing, itself, and we'll go from
10 there once we get to that point.

11 Did any party have a question about the choice by
12 the chair that we're going to be doing this virtually?

13 Let me ask first for the applicant. Any further
14 clarifications on the venue?

15 MR. McMAHAN: Thank you, Your Honor.
16 The venue is clear to us. Appreciate it.

17 JUDGE TOREM: All right. For the
18 County?

19 MR. HARPER: Ken Harper for the
20 County. No questions, Your Honor.

21 JUDGE TOREM: All right.
22 Ms. Reyneveld on behalf of counsel for the environment.

23 MS. REYNEVELD: No questions. Thank
24 you, Your Honor.

25 JUDGE TOREM: Ms. Voelckers for the

1 Yakama Nation.

2 MS. VOELCKERS: Thank you, Your
3 Honor. We do have concerns. And I do tell you we'll
4 be addressing those later. I do not have any
5 questions, just concerns and a general objection.
6 Thank you.

7 JUDGE TOREM: All right. And I'm
8 happy for any party that has a formal objection to make
9 that at the appropriate time, and I'd ask that it be
10 done in writing so as to preserve it for the record
11 going forward, not only for this adjudication but any
12 appeals taken from any recommendation made to the
13 governor.

14 There will be transcripts of this, Ms. Voelckers,
15 but I think it'll be best, when it's appropriate, to
16 either note that in a formal motion or just a written
17 objection for the record.

18 Is that okay with the Yakama Nation?

19 MS. VOELCKERS: Yes. Thank you,
20 Your Honor. We do plan to do that.

21 JUDGE TOREM: All right.

22 Mr. Aramburu on behalf of Tri-Cities C.A.R.E.S.

23 MR. ARAMBURU: We continue our
24 request for some portion of the hearing to be in
25 person. We are also going to submit a request for an

1 additional site visit to the property and the site of
2 the facility. We think the original site visit, which
3 was conducted with -- outside of the adjudication, was
4 not sufficient, so we are going to request an
5 additional site visit, which might be held in
6 conjunction with some hearings in the project vicinity.

7 And so I guess that would be formally an objection
8 to all of these hearings being held virtually.

9 JUDGE TOREM: All right. And I
10 appreciate your additional comment about it being
11 perhaps styled best as an objection. I think the
12 additional site visit request might be outside the
13 scope of an objection, Mr. Aramburu, but I leave that
14 to you on how you'd like to submit those, whether it's
15 one objection for the record with that request or a
16 separate request formally to the council and the chair
17 to explain why an additional site visit might be best
18 for purposes of creating the record for the
19 adjudication in the matter.

20 MR. ARAMBURU: I'll make a
21 independent request for a subsequent and second site
22 visit, and that will be forthcoming soon. I just want
23 to alert that -- you, the council staff, and the
24 parties of our request.

25 JUDGE TOREM: All right. I do

1 appreciate that. It will help build in later
2 discussion today as for the timing of that request and
3 when you would file it but also the timing of when
4 you're requesting the additional site visit based on us
5 shifting now to Item No. 3 and the scheduling of the
6 adjudication.

7 I was glad to not get you this prehearing
8 conference agenda ten minutes before the prehearing
9 conference this morning, so I'm trying to keep my
10 promise to you to be a little bit more ahead of my
11 schedule than 15 minutes.

12 So you've got these proposed dates and the
13 explanations of what's going on. I'll let Mr. McMahan
14 update us on any discussions about the second -- the
15 third extension request that's still being negotiated
16 with EFSEC staff, and then we can talk a little bit
17 more about the dates for the hearing.

18 Mr. McMahan, do you have any updates on the
19 current applicant's proposed extension that's with the
20 council?

21 MR. McMAHAN: Thank you, Your Honor.
22 We did have a good conversation with EFSEC staff last
23 week, I believe it was. And we are in discussion. And
24 we understand the issue, and we're working on resolving
25 it. So that's about all I can say at the moment. But

1 do trust that we are taking it seriously and it's in
2 consideration.

3 JUDGE TOREM: When you say, "We
4 understand the issue," can you just elaborate a little
5 bit more? Because I'm not privy to those discussions
6 necessarily, and neither are, I don't think, any of the
7 other parties. I don't want to -- you to disclose
8 anything that's, you know, just between the applicant
9 and the council that you think is not disclosable yet
10 or not ripe for talking about, but I do want everybody
11 to be on as much of the same page as possible as to
12 scheduling.

13 MR. McMAHAN: Sure, Judge Torem. I
14 don't know that I have too much more to offer. We do
15 understand the pressing nature of concluding the
16 adjudication and time for the council to fully
17 deliberate and to complete all aspects of the project,
18 including the environmental impact statement.

19 So we -- and we -- we did -- EFSEC staff did share
20 with us timing for the -- the actual deliberation that
21 follows up on the schedule that you have here. And we
22 are -- we have committed to work with staff to flesh
23 out and expand, hopefully, that time frame after August
24 25th with the conclusion of the adjudication. And it
25 is not our desire at all to leave the siting council in

1 a position of having to really, really rapidly
2 deliberate to a conclusion here.

3 So I guess that's really all I have to add at the
4 moment. This was a very -- you know, a conversation
5 that we just started, you know, at the end of last week
6 and then early this week.

7 JUDGE TOREM: All right. Thank you,
8 Mr. McMahan. I think that's a good point for me to
9 point out that we canceled the third prehearing
10 conference that was scheduled to go forward, I think it
11 was March 27th. And we did that so that the chair
12 could respond regarding the virtual venue as well as to
13 have some discussions between me and EFSEC staff and
14 the chair and the director as to my push for this and a
15 strong suggestion in the past from Mr. McMahan and
16 Ms. Chase, at the time, to submit a further extension
17 beyond July 8th. And my suggestion of the September
18 30th date, that was, I think, captured in what
19 Ms. Chase announced during the second prehearing
20 conference.

21 There was some indigestion at the council as to
22 whether my assumption, that would be enough time, would
23 allow for all the things that Mr. McMahan just stated.
24 So based on that, we struck the prehearing conference
25 until some of those issues could be better worked out

1 and a better mutual understanding of how the two-track
2 process between this adjudication and the separate SEPA
3 process for the final environmental impact statement to
4 come out, if September 30th would be a sufficient
5 amount of time for that. And, again, those discussions
6 are ongoing. And I just wanted everybody to kind of
7 see a little bit behind the curtain why procedurally
8 we're having Prehearing Conference No. 3 over a month
9 after the momentum we initially established in March.
10 So I'm still pushing that the adjudication stay on
11 track and we use the dates that are now discussed
12 there.

13 What we've laid out based on your filings of
14 unavailability and other inputs from council members
15 and council staff are the dates you see in bullet
16 format on Page 2 of the agenda.

17 Two days in a row will be held August 10th and
18 11th. The next week will have another two days and a
19 half: Monday, August 14th, 15th, and 16th. And given
20 the monthly council meeting is scheduled regularly on
21 August 16th at 1:30 in the afternoon, my discussions
22 with the chair and staff indicate that one morning
23 session -- it might even be a longer session than
24 suggested in the day-to-day schedule a little bit below
25 that on the page -- would it be sufficient for

1 everybody to be able to concentrate and focus and turn
2 their attention to the monthly council business in the
3 afternoon. And then we'll have a full week, Monday
4 through Friday, August 21st to August 25th.

5 A lot of the scheduling of who is going to testify
6 for cross-examination on any given day and what topics
7 are going to be discussed on any given day, I have some
8 ideas of how long each topic may take, but they're not
9 going to be any better informed than anybody else on
10 the line until we see the prefiled testimony and any
11 stipulations that may occur.

12 So we'll do some formal scheduling of how to best
13 use those nine and a half days of hearing time by
14 assigning topics and witnesses a little bit later.
15 We'll have another prehearing conference to sort out
16 your witnesses' availability and what dates might be
17 best for grouping topics.

18 Let me go around and room and see if anybody has
19 any concerns just about the dates, themselves. And
20 then we'll shift to kind of my suggested daily
21 schedules and timing and take your inputs on that as
22 well.

23 So let me go back to the applicant and see if
24 there's any questions about the dates or comments that
25 might be applicable for scheduling.

1 MR. McMAHAN: Your Honor, Tim
2 McMahan here. No, we don't have any questions or
3 comments, and we believe the schedule appears to make
4 sense.

5 JUDGE TOREM: All right. For the
6 County.

7 MR. HARPER: Well, Your Honor, I
8 think it's difficult to comment on the acceptability of
9 the dates, because there's a lot of other issues
10 that -- that we think have to be sorted out before this
11 is appropriate to commence. I think you understand
12 that. I'm sure you understand that. And there's no
13 reason to inject that kind of discussion. I think what
14 you're just looking for right now.

15 As to the dates, per se, I have no objection to
16 those. And I'd just like to, you know, express that
17 our other positions we would like a chance to discuss
18 at some point as well.

19 JUDGE TOREM: All right. Thank you,
20 Mr. Harper. I appreciate focusing on the dates only
21 right now, and you let me know when you think which
22 part of the agenda you want to bring up those other
23 issues and questions.

24 MR. HARPER: Sure. I will. Thank
25 you, Judge.

1 JUDGE TOREM: All right. Thank you.

2 Counsel for the environment, any comments or
3 thoughts on the dates, themselves?

4 MS. REYNEVELD: Yes. Unfortunately,
5 I'm going to be on vacation on August 10th and 11th.
6 My schedule is in flux, and we recently confirmed that
7 trip, so I had not yet had a chance to submit my
8 unavailability. I mean, it's possible I could
9 participate from Hawaii, but I did want to bring that
10 to Your Honor's attention.

11 JUDGE TOREM: All right. I'm making
12 a note of that, Ms. Reyneveld. And it's possible that
13 CFE may not be a lead participant on a particular set
14 of topics. I'm not sure exactly what those might be,
15 but you may find that you're willing to defer to
16 another party that has overlapping or exactly the same
17 interests.

18 My only concern is that counsel for the
19 environment may be a mandatory party by statute,
20 particularly on any environmental topics, which
21 depending on your interpretation, could be every topic
22 at the hearing. So I want to make sure that, by
23 statute, your office is represented at this hearing. I
24 don't want you necessarily to be forced into an
25 appearance with the two-hour or three-hour, as it may

1 be, time difference and what you've planned for
2 personal time, taking away from family.

3 With that said, unless we find that we don't need
4 hearing dates as all planned out, this may be a
5 discussion for you to have with your supervisors
6 through the AGs office or your colleagues who are also
7 counsel for the environment on other matters so that at
8 least one CFE is present on August 10th and 11th.

9 And if it has to be you calling in from afar,
10 that's something we can talk about as we get closer and
11 sort out the issues I just, at first blush, see in your
12 potential conflict dates.

13 Does that make sense? Or anything else you want
14 to add to that?

15 MS. REYNEVELD: That makes sense. I
16 just wanted to notify the Court. And I am available
17 for the rest of the days. I don't know if another
18 counsel for the environment could participate, just
19 because of my unique knowledge of the matter. But if
20 absolutely necessary, I could participate via Teams.

21 JUDGE TOREM: All right. Thank you.
22 And since we're doing this virtually, at least that
23 allows this platform to have a virtual appearance even
24 from afar. I appreciate the heads-up on that, and I've
25 made a note.

1 MS. REYNEVELD: Thank you.

2 JUDGE TOREM: Ms. Voelckers on
3 behalf of the tribe, any concerns about any or all of
4 the hearing dates?

5 MS. VOELCKERS: Thank you, Your
6 Honor. Few thoughts. I know that we talked previously
7 about a two-week hearing, and I think that, like
8 Mr. Harper, it's hard to speak too much about the
9 hearing logistics without having some of these other
10 issues resolved and clarity on, you know, how many
11 witnesses we're going to have. But we're now taking up
12 most of August for a two-week hearing because of the
13 way it's split up, so I'm just a little concerned that
14 that's cutting further into the schedule before it, and
15 I don't know if that is necessary or not.

16 I do think it's important that counsel for the
17 environment attend all the witness testimony by my
18 client, as those are important issues. And I know that
19 Sarah takes it very seriously. I just wanted to make
20 sure to note that that is -- that those are issues that
21 we consider important for the counsel for environment
22 to include in their assessment and position.

23 And I want to just appreciate the clarification
24 regarding the last month's silence, but I would say
25 that it's unclear to me what would not be appropriate

1 for Tim to share from his conversations between him and
2 EFSEC staff. I think, you know, we're all very
3 interested in how this is progressing, and I don't know
4 that there's any real confidentiality around the
5 applicant's conversations with staff on things that are
6 impacting our schedule. So I just want to note that I
7 do have a concern that conversations are happening that
8 are not including all the parties on the topic and
9 likely are including discussion about the SEPA
10 timeline, which we've asked for separate from the
11 adjudication. We've asked for that timeline a couple
12 of times. Thank you.

13 JUDGE TOREM: Thank you,
14 Ms. Voelckers.

15 At the end, once I've asked Mr. Aramburu about his
16 items on the dates, I'll come back to what you said
17 about the discussions with the applicant and then go
18 back to Mr. McMahan to make any further clarifications
19 as needed.

20 Mr. Aramburu, any comments for TCC on the dates?
21 MR. ARAMBURU: Thank you, Your
22 Honor. Several comments.

23 First of all, we think that discussions between
24 staff and the applicant should be fully disclosed and
25 available to the parties so we understand what's going

1 on, Issue 1.

2 Issue 2: August -- Your Honor can take judicial
3 notice of August being a time for vacations in the
4 Northwest. I would not want to delay identification of
5 when individual witnesses might be asked to be
6 available for cross-examination to some date a month
7 and a half or two months from now. I think that needs
8 to be resolved early.

9 Number 3: We have a strong objection based upon
10 what we've heard so far that the final impact statement
11 will apparently not be available during any part of the
12 adjudication, any part of the direct testimony or
13 cross-examination testimony. We think it's very clear
14 that the council needs to work around having the final
15 impact statement available for the parties to use in
16 these proceedings, so -- and we have inquired, as
17 you're aware, about the timing of the final impact
18 statement, and we received no substantive information
19 regarding that.

20 Fourthly, the -- to the extent that our dates for
21 cross-examination -- and that's what I think the
22 hearing dates will be, although we haven't finally
23 decided that -- I think those need to be set by the
24 scheduling for testimony and other procedural matters
25 rather than backing into those matters based upon these

1 dates.

2 So we have -- we have strong concerns about the
3 filing deadlines in your Paragraph No. 4 of the agenda
4 that we're going to express at the appropriate time,
5 but we do think hearing dates need to be set following
6 a reasonable schedule for filing deadlines in Item 4.

7 So those are -- those are our concerns.

8 And we have a -- to the extent staff is on this
9 call, we have a continuing request for some indication
10 of when the final environmental impact statement is
11 going to be available so that we can do some planning
12 around that.

13 So those are my comments. Thank you.

14 JUDGE TOREM: All right. And I want
15 to give Mr. Thompson a heads-up that I'm going to ask
16 him to address the nature of the ongoing discussions
17 between the council and the applicant and how those fit
18 into the overall application review process and what
19 the nature of those conversations might or might not be
20 for public disclosure. So I'm going to give
21 Mr. Thompson a chance to think about that before I come
22 back to him.

23 As far as the vacations for witnesses, my advice
24 to all the parties is to give your potential witnesses,
25 who I'm pretty sure you-all know who you might be

1 calling, these hearing dates and get their
2 unavailability, so that once we know exactly what
3 topics might be scheduled on what dates, we can take
4 that information into account and make sure that
5 parties are able to best present the witnesses that
6 they'd like within the confines of this schedule.

7 If you look at the top of that Item No. 3, it says
8 that these hearing dates are firm. And I want to keep
9 to this schedule, and I may be forced to keep to this
10 schedule without exception, simply because of your
11 availability as a group and the availability of council
12 members as a group.

13 So scheduling is a tough decision for a lot of
14 court cases. And it's no different from EFSEC, and it
15 may be even that much more difficult because of the
16 varied parties included at all of these issues, dates,
17 calendaring, and then of course the statutory
18 restraints on trying to get everything done in the
19 legal fiction, as we know, of a 12-month period from
20 application to recommendation to the governor.

21 All of those things create conflicting pressures
22 for scheduling. And, frankly, this is the best that
23 staff and I could come up with. And that's why those
24 dates are going to be firm. Unless, again, if there's
25 good cause and availability, maybe there can be some

1 exceptions or accommodations made for a particular
2 witness on a date outside of these, but these are the
3 dates we have, and we're going to be going through the
4 adjudicative process with the best dates we have
5 available.

6 Now, as for the scheduling below, we're going to
7 talk about the day-to-day housekeeping schedule in a
8 moment. But I do want to also address the final
9 environmental impact statement that I know TCC and
10 perhaps the County and the tribe and maybe even counsel
11 for the environment are asking to be completed prior to
12 the adjudication hearing being held and/or before the
13 adjudication is completed and council staff -- council
14 and staff begin their deliberations on all of the
15 evidence and the SEPA process before the recommendation
16 is made to the governor.

17 My suggestion to you, Mr. Aramburu, I know you've
18 had correspondence with staff to seek out the best
19 available information on when the SEPA process will be
20 complete and how that will be interwoven with the
21 adjudicative process.

22 As necessary, we talked about previously filing
23 objections and preserving issues for appeal. And I
24 think I hinted later on in the discussion of disputed
25 issues. Any concern you have about the timing on that

1 is probably best preserved in a motion or a stipulation
2 that there's a standing objection without me having to
3 rule on a motion. There are some other precedents out
4 there. Whether they're still good law is something for
5 you and your similarly situated parties to consider and
6 either jointly or separately file the motions you deem
7 fit so that I can get responses from the applicant and
8 then issue an appropriate ruling.

9 Some of those things are outside the adjudication,
10 in my opinion. But, again, a formal briefing or a
11 motion with briefing in support will let me know if
12 there's something I'm, in my experience, overlooking so
13 that I can hear from the applicant and hear from all
14 the other parties on those issues, depending on who's
15 filing the motions and who's responding in opposition.

16 So that's my suggestion on the final environmental
17 impact statement questions that you've raised and, I
18 expect, will continue to raise throughout our
19 discussions. And so with all due respect to that,
20 let's put that in a place where a formal ruling can be
21 made and that council and -- and all of us as parties
22 can move on toward what the adjudication holds. And,
23 again, whether it's delayed or held on behalf of the
24 final environmental impact statement, no final decision
25 on that until I get a formal motion.

1 Mr. Thompson, let me ask you to come on, if you
2 would, and just state your best understanding of the
3 nature of the ongoing discussions between the applicant
4 and EFSEC staff and how those fit into the overall
5 application review process.

6 MR. THOMPSON: Yes. So -- so the
7 discussions we've had are sort of just in the context
8 of regular check-ins with the applicant in regards to,
9 you know, the ongoing SEPA process and the data
10 requests, which I believe are posted on the EFSEC
11 website so that folks can see what the -- what the kind
12 of ongoing issues are in terms of developing adequate
13 information for the final environmental impact
14 statement.

15 So -- so there's that discussion, and then
16 there's, because as -- as people know, under RCW
17 80.50.100, Sub (1)(a), there's this requirement that
18 the council shall report to the governor its
19 recommendation as to approval or rejection of an
20 application for certification within 12 months of
21 receipt, or at such later time as mutually agreed to by
22 the council and the applicant.

23 So the conversations have just been limited to us
24 laying out the -- how we see these dates, which are now
25 set forth in the -- in the agenda for this prehearing

1 conference, and basically thinking through, you know,
2 what we would need after completion of the
3 cross-examination hearings in terms of time for, you
4 know, getting back transcripts; parties, you know,
5 preparing post-hearing briefs; and then -- and then
6 just a realistic time frame of maybe, you know, a
7 couple, maybe between one or two months thereafter for
8 the -- for the council to be able to have time to
9 deliberate and develop the -- the adjudicative order
10 and then recommendation to the -- to the governor with
11 a -- with the input from the -- also from the SEPA
12 process.

13 So just thinking of -- thinking through, like,
14 how -- realistically how long is that all going to take
15 and what would be a realistic date to try to come to
16 agreement on for the -- under the statutory deadline
17 for completion of the recommendation to the governor.

18 So there's not much -- there's no additional
19 detail other than that, other than us just presenting
20 those considerations and, I guess, the applicant
21 thinking about what they're, you know, willing to put
22 forth as an agreed extension.

23 JUDGE TOREM: All right. Thank you,
24 Mr. Thompson. I think, again, what I'm hearing and
25 what you're clarifying for me is that these are

1 procedural discussions and substantive only in the
2 matter of what data requests might be out there and
3 when studies might be completed to supplement what was
4 in the application and the draft EIS, but there's
5 nothing going on about the adjudication, necessarily,
6 other than how everything fits together for that
7 ultimate recommendation to the governor.

8 Is that correct?

9 MR. THOMPSON: Yeah. That's --
10 that's a hundred percent accurate. Yes.

11 JUDGE TOREM: All right. Let me ask
12 Mr. McMahan on behalf of the applicant if there's
13 anything else to say about those discussions and the
14 nature of them. And perhaps as Mr. Aramburu is
15 implying, you're giving a cryptic response about
16 things. But based on what Mr. Thompson said and my
17 summary of it in two sentences, did the applicant have
18 anything else to add?

19 MR. MCMAHAN: Thank you, Your Honor.
20 Tim McMahan here. Mr. Thompson accurately described
21 the ongoing process, which is fundamentally procedural,
22 between the applicant and EFSEC staff.

23 I do, though, want to make one clarification, if I
24 may, about the status of the final impact statement and
25 your -- if I got my notes correct here, you indicated

1 that it would be necessary to, quote, hear from the
2 applicant, end quote, regarding FEIS timing. I want
3 just, you know, the parties to understand that we are
4 in no greater control over, you know, or guiding in any
5 way over the timing of the final environmental impact
6 statement. That is entirely a State process and a
7 State document, and we are not driving that boat. So I
8 want to make that very clear.

9 To the extent there are objections about how the
10 FEIS interplays with these other processes, the timing
11 issues, that is fundamentally a State issue. It is not
12 the applicant's issue. So I want just to make that
13 very, very clear to the parties.

14 JUDGE TOREM: All right. Thank you,
15 Mr. McMahan. I appreciate that clarification. I
16 wasn't implying anybody else's control over that than
17 the council and their contractor handling the creation
18 of the environmental impact statement documents.

19 What I meant -- or what I meant by saying I'd like
20 to hear from applicant simply was, if there's a motion
21 to stay the proceeding or any other such thing
22 regarding the EIS process and the SEPA process, that of
23 course the applicant would be another party entitled to
24 file a response, including one that might just say
25 that's up to the State. But I would want all parties

1 that are opposing a motion to have an opportunity to be
2 heard within whatever schedule we have, probably a few
3 business days after anything is filed, depending how it
4 fits the rest of our schedule.

5 All right. I'd like to move on here -- now it's
6 almost 10:40 -- and plan in advance for a break at the
7 top of the hour for about eight to ten minutes for
8 comfort, or discomfort as one might see, and to give
9 the court reporter a break as well.

10 But I think we can move into the second part of
11 Item 3: My proposed schedule -- and this is notional
12 only -- for breaking up testimony sessions into
13 two-hour blocks at the lengthiest and having at least a
14 15-minute break between each block of time.

15 My thought is 8:30 as a start time for just having
16 an optional pre-adjudication but on-the-record
17 discussion of any preliminary motions seems to be a
18 day-to-day thing. We could talk about making sure
19 everybody has exhibits that might be used that day. We
20 can talk about any minor adjustments to the schedule
21 for the day or known problems that are coming for a
22 later date and then be ready for testimony that we
23 would schedule, again, from 9 to 11, with a long-enough
24 lunch break for folks to get away from the screen and
25 then starting up again after a lunch break and then

1 leaving a little bit of time for folks to caucus
2 between their witnesses coming up or witnesses that
3 might have ongoing testimony and for the parties that
4 are aligned with each other to, off the record, have
5 whatever caucusing they need, as like you can see
6 between 1:45 in the afternoon and 2:30, and then having
7 that last session so we're not fully exhausted by doing
8 the virtual process for too long, so eyestrain and just
9 brain strain from litigating for three sessions a day.

10 Maybe as needed to finish a witness, we would
11 stretch past 4:15 to 4:30. But that's my suggestions
12 on timing.

13 And the experience I've seen and from other folks
14 being in long virtual hearings that go for, you know,
15 almost eight hours a day and the physical and mental
16 impact of exhaustion on that, that's why I'm selecting
17 this kind of a notional schedule.

18 Some of you may have more experience in these
19 virtual hearings than I, so I now want to kind of go
20 around and room. And you can see the italicized
21 language I have about breaks within those timing
22 suggestions. And I'll ask each of you for your inputs
23 on the length of those sessions and whether you think
24 that's too much or too little, and then I can adjust
25 accordingly based on your inputs.

1 So, Mr. McMahan, on behalf of the applicant, any
2 inputs on the day-to-day scheduling as suggested?

3 MR. McMAHAN: Thank you, Your Honor.
4 I find that to be a very humane-looking schedule. And
5 I'm a big fan of bio breaks. So I think that's -- I
6 think it's a fine schedule.

7 JUDGE TOREM: All right.
8 Mr. Harper.

9 MR. HARPER: Ken Harper for Benton
10 County. I have no concerns about the proposed daily
11 schedule.

12 JUDGE TOREM: Ms. Reyneveld.

13 MS. REYNEVELD: Yeah, I appreciate
14 the breaks in here as well. I guess I just had some
15 questions.

16 Is the Witness Exam 1, is that supposed to be one
17 witness, and they're supposed to be done in that
18 prescribed period of time, and then you're calling
19 additional witnesses, or is that just the exam period
20 that will go on as long as we need to for a particular
21 witness?

22 JUDGE TOREM: Those are good
23 questions.

24 The numbers on there are just Session 1,
25 Session 2, Session 3. Some witnesses might only take

1 30 minutes for everybody to be done with their
2 cross-exam. Some may take four hours. I just don't
3 know quite yet, Ms. Reyneveld. So those suggestions
4 are just bumpers on, as Mr. McMahan said, kind of a
5 humane amount of time to go in a virtual hearing
6 session. So somebody may carry over or not. It just
7 will depend on the needs and the estimates we get once
8 we identify the witnesses.

9 Does that answer your questions?

10 MS. REYNEVELD: Yes, it does. I
11 think "Witness Exam 1," "2," and "3" might be slightly
12 misleading, because at least it implies to me that
13 they're different witnesses. But as long as it's
14 clarification that the witnesses will be scheduled and
15 cross-examination will continue to the length it needs
16 to be for that individual witness, I think that's fine.

17 Thank you for the clarification.

18 JUDGE TOREM: Yes. Sometimes words
19 carry different connotations, and I could see how you
20 could read that either way. So I'm glad we got that
21 clarified today on our prehearing conference record.

22 MS. REYNEVELD: Thank you.

23 JUDGE TOREM: Ms. Voelckers, any
24 additional concerns or otherwise that haven't already
25 been stated?

1 MS. VOELCKERS: Thank you, Your
2 Honor. No, I -- I agree with the approach of having
3 the time of the witness be dependent on their
4 testimony.

5 If I could, I just had one more thought on 3,
6 above, and I didn't want to interject and interrupt
7 anyone earlier.

8 JUDGE TOREM: Okay. Just go ahead.

9 MS. VOELCKERS: I guess what I was
10 trying to get at earlier was -- and I appreciate all
11 the explanations. And certainly I'm not concerned that
12 the applicant, in general, needs to talk to EFSEC about
13 their application.

14 My concern is that if we don't -- -- if the FEIS
15 isn't actually going to be done for another six to
16 eight months, you know, putting aside the procedural
17 SEPA discussions or motions that might happen, and with
18 understanding that EFSEC is still going to need time to
19 review everything, I'm concerned that there's maybe a
20 missed opportunity here to give as much time as
21 possible to create the best record as possible and also
22 to avoid summer vacations and all that.

23 And so that was what I was trying to get at with
24 concern that we don't have an FEIS schedule. Staff
25 might have, you know, a better idea of that, and -- but

1 if the idea is this is going to take time, a
2 significant amount of time, then my concern is that
3 we're not having that timing worked out in a way that
4 informs the scheduling of the hearing.

5 So thank you for letting me articulate that. I
6 don't have any other concerns about the daily schedule.

7 JUDGE TOREM: All right. Thank you.

8 Mr. Aramburu, anything else on this daily schedule
9 or in response or addition to what Ms. Voelckers said
10 about the FEIS?

11 MR. ARAMBURU: I guess my
12 observation would be that you're intending to start
13 evidence or testimony, cross-examination, at 9 a.m.
14 Because a number of us have other things that we'd like
15 to take care of in the morning, I'd request that we
16 start at 9:30 a.m. instead of 9 a.m.

17 I think we have sufficient time set aside. We
18 have ten full days of testimony. And I don't think
19 we're going to need all of those. Also will observe
20 that Ms. Reyneveld, if she's in Hawaii, that will be
21 6 a.m. in Hawaii. So I would request that we start at
22 9:30 a.m.

23 And this does kind of make for a long afternoon if
24 we're breaking at 11. So because we're going to go
25 from 12:15 to 4:15, four hours, but only a shorter time

1 in the -- in the morning.

2 So -- so two requests or suggestions, Your Honor.
3 No. 1, start at 9:30 to accommodate other things in
4 people's lives, and No. 2, move our lunch break so that
5 the afternoon session is not quite as long.

6 So those would be my suggestions, Your Honor.
7 Thank you.

8 JUDGE TOREM: Mr. Aramburu, can you
9 clarify when you say shift the lunch break? Does that
10 mean at the expense of time in the afternoon? Tell me
11 what you mean by that.

12 MR. ARAMBURU: Having the lunch
13 break from 11 to 12 means the afternoon session is
14 going to be pretty long. And -- and people get -- tend
15 to be more tired in the afternoon than in the morning.
16 So moving the lunch break to 11:30 or 12:00 would
17 shorten the afternoon session a bit and give us a bit
18 more time in the morning. So that's my request.

19 JUDGE TOREM: Okay. That helps me
20 understand that.

21 I do agree with you that people are a little bit
22 more bright-eyed and bushy-tailed after a few cups of
23 coffee in the morning, whether that's at 9 or 9:30. I
24 can take that into consideration.

25 And I do appreciate that the afternoon may be

1 challenging to run things from 12:15 to 4:15 or 4:30.
2 And I tried to figure out shorter periods of time, as
3 you can see the number of minutes set out
4 parenthetically for exactly that reason. And it was
5 difficult to figure out how to build in three sessions
6 and a lunch break and not run up to 5 p.m. But that's
7 still an option to rebalance that but still fit in a
8 sufficient lunch break.

9 But I do appreciate those inputs. And those were
10 some of the things I had discussed with Mr. Thompson
11 and other EFSEC staff as we kicked around this notional
12 schedule. So I'm going to take those things into
13 concern and consideration as we get to the point of
14 actually setting the exact daily schedule on the dates
15 noted above in No. -- further up in No. 3.

16 All right. We're getting close to a good point to
17 take that bio or comfort/discomfort break, as we might
18 call it. I do want to kind of preview that we'll go
19 over the filing milestones in No. 4 when we come back
20 on the record. And I want some inputs a little bit on
21 when that first evidentiary data drop will occur for
22 prefiled testimony later this month, whether that be on
23 May 24th or if we want to go to May 31st.

24 I'll also be asking for your inputs and thoughts
25 on the time interval between the rounds of prefiled

1 testimony. If all parties agree that they can be
2 compressed in response from the 21 days allocated, then
3 maybe we can delay filing of the initial prefiled
4 testimony into June. But I think that having it all
5 filed by mid July is something that will allow parties
6 to have a time for motion practice in the latter half
7 of July and up until early August to make this happen.

8 So there will be some rapid-fire filing going on
9 and rapid-fire responses based on how many motions we
10 get. And there may also be some procedural motions
11 that parties want to file without regard to the
12 schedule for prefiled testimony, including,
13 Mr. Aramburu and Ms. Voelckers, anything to do with the
14 SEPA process. It doesn't appear that that issue needs
15 to wait until prefiled testimony is in the way of being
16 filed and responded to.

17 So those are the things I expect we'll talk about
18 a little bit when we come back from the break.

19 My clocks say it's 10:49, so I'm going to ask that
20 people be back on the line for another roll call to
21 make sure everybody's here at -- let's go with 10:58.
22 And we'll be back on the record with everybody and
23 rolling substantively hopefully by 11. So I'll see you
24 in nine minutes.

25 And, Mr. Botelho, we can show us off here at

1 10:50, and we'll see you in eight minutes.

2 (Pause in proceedings from
3 10:50 a.m. to 10:58 a.m.)

4
5 JUDGE TOREM: Mr. McMahan, can you
6 acknowledge the applicant is back, ready to go?

7 MR. McMAHAN: Applicant is here and
8 ready to go. Thank you, Your Honor.

9 JUDGE TOREM: Mr. Harper, is the
10 County ready to go back to our Prehearing Conference
11 No. 3?

12 MR. HARPER: County is ready.

13 JUDGE TOREM: All right.

14 Ms. Reyneveld.

15 MS. REYNEVELD: I am. Thank you.

16 JUDGE TOREM: All right. And

17 Ms. Voelckers.

18 MS. VOELCKERS: Thank you, Your
19 Honor. Ms. Voelckers on behalf of the Yakama Nation.

20 JUDGE TOREM: And do we have
21 Mr. Aramburu as well?

22 MR. ARAMBURU: We're ready to
23 rumble, Your Honor. Thank you.

24 JUDGE TOREM: Okay. Well, let's
25 rumble about when is a reasonable date for filing the

1 first round of prefiled testimony that we've talked
2 about a little bit in previous conferences.

3 Mr. McMahan, you may be in the best position to
4 know what's being filed perhaps based on our disputed
5 issues list that we'll get to in a little bit. When
6 would the applicant be ready to file?

7 MR. McMAHAN: Yeah, Your Honor,
8 thank you. And this does, to me, echo considerably
9 with prior EFSEC proceedings and the experience that's
10 been derived by the council having and Your Honor
11 actually also having some experience with doing that.
12 So I -- the timing, the sequence looks fine and
13 familiar to me, and it does reflect what I think has
14 been accomplished in prior proceedings.

15 I guess my only concern is, of course, we're
16 the -- we're probably the first party filing. There
17 may be -- I expect that TC C.A.R.E.S. may be filing
18 some additional testimony. I don't know. We'll have
19 to hear from Mr. Aramburu.

20 So that being the case, you know, as of tomorrow,
21 we're going to start calling witnesses and make sure
22 that everybody understands this. And I only bring that
23 to your attention because we may need to slip and slide
24 just a little bit as we're finding people. That's
25 probably going to be the experience of other parties as

1 well. So I think we probably just need to be a little
2 bit patient with one another and you, Your Honor, as we
3 nail this down. Some of the information or testimony
4 may come in at different times, and we may need to have
5 that little extra flexibility to May 31st.

6 JUDGE TOREM: All right. Thank you.
7 I appreciate that.

8 My experience is, when there's a range of dates
9 set, that I have -- won't say never, but rarely see
10 anybody file or play their cards and put them on the
11 table before the actual deadline. It's just a matter
12 of trial strategy. And so I -- I was thinking, as you
13 said that, Mr. McMahan, maybe a range of dates for the
14 first round. But my quick thought is, no, set an end
15 date, whether it's May 24th or May 31st or into June as
16 the case may be, to allow all parties to get their
17 initial witnesses to at least file the basic testimony
18 maybe perhaps subject to supplementation. I just don't
19 want it to affect any other party's ability to respond
20 or reply. So that's the balance I'm trying to get
21 here.

22 Mr. McMahan, anything else based on what I've just
23 said?

24 MR. McMAHAN: No, Your Honor. I
25 agree with that. And you are right. You know, parties

1 are likely to hold off to the last day. So that's just
2 kind of the way it happens. So with that, you know, we
3 are -- we support the schedule with the understanding
4 that, you know, there's going to need to be a little
5 bit of flexibility here.

6 JUDGE TOREM: And I think I picked
7 Wednesdays all the way through here just to avoid the
8 Friday afternoon 4:00 filing issue. But if parties
9 would prefer another day of the week than Wednesday for
10 this sort of thing, I'm open to that as well.

11 Let me turn to the County and Mr. Harper and get
12 your feedback on the schedule.

13 MR. HARPER: Well, Your Honor, I do
14 have concerns about the schedule. They -- they relate
15 to this underlying issue, though, of how the SEPA
16 review is being postured relative to the adjudication.
17 And, you know, that's just going to continue to be a
18 concern of the County, I think, until that issue gets
19 addressed head-on.

20 In particular, it seems like it's unfair and just
21 not appropriate to have testimony deadlines when the
22 SEPA document is still incomplete. I don't want to be
23 argumentative about it, but that gives us -- that gives
24 us a real problem. And yet we see these deadlines
25 coming up here very, very quickly.

1 If -- you know, if Your Honor has the intent that
2 these or approximately these will be the deadlines
3 pending some decision on a motion perhaps or some other
4 change, with that caveat, I have no other concerns.
5 We'll have to make them work.

6 And as between the 24th or the 31st, I really
7 don't have a strong view one way or the other. We
8 could make the 24th work, if that's the -- the general
9 consensus of the rest of the parties.

10 JUDGE TOREM: Okay. I appreciate
11 that, again, Mr. Harper, about the FEIS issues. And as
12 I suggested to Ms. Voelckers and to Mr. Aramburu, if
13 you're all of a like mind on that and you can find any
14 other party of a like mind on that, I would suggest as
15 soon as possible a well-thought-out, well-briefed joint
16 motion, maybe with separate subcategories with each of
17 your individual concerns as parties.

18 But we do need to dispense with that as a legal
19 issue sooner rather than later. So if there is a
20 motion to stay, which is how I've seen it styled in the
21 past, based on statute, based on WAC, based on any
22 other controlling opinions out there, let's get that in
23 front of me and the council sooner rather than later so
24 that any other parties wishing to respond can do so.

25 Once I receive a motion and I give an appropriate

1 time for response, I may or may not schedule oral
2 argument on the matter, but I don't think statutorily
3 under the Administrative Procedure Act there's an
4 automatic obligation to grant oral argument. So please
5 file your pleadings with -- if you need oral argument,
6 make a request on the face of it. If you think there's
7 a statutory entitlement to it or a WAC entitlement to
8 it, call that to my attention so I can make sure not to
9 unintentionally abridge any procedural due process
10 rights.

11 But I would hope to be, upon receipt of a motion,
12 immediately sending or posting a letter saying, This is
13 the date for responses and the anticipated date for a
14 ruling with or without oral argument. So on that
15 issue, if we're going to get the schedule going, you're
16 right that I'm telegraphing we're going to do the
17 prefiled testimony May or June and into July, and then
18 those procedural motions, if there's any formal
19 preservation of issues or objections that need to be
20 substantively considered, let's get that going sooner
21 rather than later.

22 Mr. Harper, anything else on that topic?

23 MR. HARPER: No. Thank you, Your
24 Honor.

25 JUDGE TOREM: All right.

1 Ms. Reyneveld for counsel for the environment on these
2 filing milestones and timing.

3 MS. REYNEVELD: Yes. Counsel for
4 the environment doesn't object to the filing milestones
5 and timing.

6 I would just say that May 24th does seem to be a
7 very expedited timeline for initial filing and could be
8 perhaps insufficient time to file or serve direct
9 testimony, I mean, particularly if we're going to have
10 other parties other than the applicant file direct
11 testimony at that time.

12 So, I mean, counsel for the environment would
13 prefer that we delay the initial filing probably into
14 late May, the May 31st deadline, or early June, and
15 shrink the timeline between filings, just to kind of
16 avoid that expedited timeline for that initial filing.

17 JUDGE TOREM: All right. Thank you.
18 I appreciate that.

19 And, again, if all the parties think that less
20 than three weeks of time between rounds of filing --
21 particularly maybe the reply testimony briefing --
22 could be shrunk, I'm thinking to maybe two weeks.

23 I think the reason we started with this three-week
24 intervals was, I think, some prior discussion we may
25 have had about intervals in Prehearing Conference

1 No. 2, my prior experience with other adjudications,
2 and the thought that some witnesses, their availability
3 may be hard to get a short-term reply testimony or
4 response testimony. So those are the reasons for the
5 21-day intervals. But there is room for compression,
6 and hopefully we'll quickly be able to get to that once
7 I hear from the other two parties.

8 Ms. Voelckers, for the tribe, concerns on the
9 intervals or suggestions on when the tribe might be
10 ready to file their first round of testimony?

11 MS. VOELCKERS: Thank you, Your
12 Honor. Yeah, a few concerns, but mostly in the hope of
13 trying to have a dialogue here that sets up the best
14 schedule for the group.

15 So do object to having testimony due the initial
16 deadline, because it's contrary to the previous verbal
17 direction when we first asked about this in the first
18 prehearing conference. And would really just
19 appreciate some clarification, because I'm still
20 hearing some discussion that suggests that that's an
21 open question, but I'm reading this as the initial
22 deadline for all parties. And we do have concerns, and
23 I object to that being so soon.

24 So -- so that's my first question, is how that
25 would exactly work.

1 So second is whether or not the response testimony
2 is in response to -- I think this is -- is a hard thing
3 to respond to now that the issues that we had
4 previously identified have been changed. So the
5 question is: Are we really responding on certain
6 topics, or are we just responding to other parties'
7 witnesses in terms of response and reply? I'd
8 appreciate clarification on that.

9 Also, we are engaging in additional discovery that
10 is going to push back our ability to respond by the end
11 of May on any documentary evidence or testimony from
12 Washington Department of Fish and Wildlife. And we're
13 going to talk about discovery later, but I wanted to
14 note that and suggest that that could be filed as a
15 responsive testimony, given that we are -- you know,
16 that -- that is dealing with the third-party schedule.

17 And I also just -- I -- I think that, you know, if
18 the approach is the one that I heard from Mr. McMahan,
19 of, quote, slipping and sliding, then maybe we could
20 make this work. But that's not how I read it. And
21 certainly we would really appreciate a lot of clarity
22 on that. Because I read this as pretty firm deadlines.

23 And, lastly, I'd say we're amenable to shrinking
24 the reply testimony as was just suggested in order to
25 provide more time for initial and responsive testimony.

1 JUDGE TOREM: Okay. Thank you for
2 that.

3 Let me -- the too soon for the initial date of May
4 24th, I'm appreciating it could go into May 31st or
5 early June, particularly with your last comment about
6 shrinking intervals. As far as the meaning of
7 responsive testimony, after rolling it around with
8 staff and with Mr. Thompson, it would appear that
9 allowing each party to file their opening testimony
10 essentially on any of the disputed issues they want to
11 present witnesses on appear to us to be the best way to
12 accommodate every party knowing what case the others
13 are bringing and presenting issues that they want to
14 advocate at the hearing.

15 By doing that, it allows every other party to
16 respond as needed to those other witnesses that are
17 being presented in prefiled testimony and then finally
18 for the sponsoring parties to reply as necessary.

19 So for each topic that a party wishes to
20 participate on formally at the adjudication, that's
21 what the meaning of the initial deadline would be. And
22 then the response would be any other party that says,
23 "Oh, that's -- that's an issue you're filing on? I
24 have a response to that," and so on.

25 I decided to make it that way instead of having

1 the applicant simply file all their testimony and then
2 all the other parties respond and then reply to each
3 other as the third round, simply because the applicant
4 has the application on file and has laid out what it
5 thinks are the issues regarding the Horse Heaven wind
6 project, and that has put the parties on notice as well
7 as the council as a whole as to the environmental
8 issues the applicant has seen and all of the other
9 varied and sundry issues that come up in the course of
10 their application.

11 Council's response to that was essentially the
12 draft environmental impact statement to delve further
13 into any of the suggested impacts but from the
14 applicant. So in my opinion and that of staff, now
15 allowing for the purposes of adjudication, a separate
16 track from the SEPA track, selection of issues,
17 selection of testimony, this was the best way for
18 everybody to have enough time and responsive rounds to
19 best flesh that out ahead of the adjudication, subject
20 to cross-examination on the various adjudication dates.

21 So I hope that helps lay it out, Ms. Voelckers, of
22 what the intention of initial deadlines, response, and
23 reply testimony might be made up of.

24 Does that help?

25 MS. VOELCKERS: Thank you, Your

1 Honor. That's really helpful. And I just want to
2 acknowledge that we're all -- we're all human and
3 responding to changes here and that my objection was
4 not to that overall plan. The objection is to being
5 required to file all of our direct testimony by the end
6 of May, given that this is a new change of course that
7 we learned of Friday, so -- but that -- that sequencing
8 makes sense to me.

9 We're also -- if that is the approach that is
10 agreed on today -- and, again, I don't know that I've
11 heard that from the applicant exactly. But if that is
12 the approach agreed on, we're also amenable to -- I
13 think at that point, reply is really about the
14 opportunity for the initial testimony, those giving
15 those initial testimony to respond to their responsive
16 testimony, and that we would be, you know, open to
17 discussion about how to shorten that even more or to
18 deal with that through supplemental and
19 cross-examination in the hearing, if that's what --

20 JUDGE TOREM: Okay. Thank you.

21 MS. VOELCKERS: -- Judge Torem
22 thinks is necessary.

23 JUDGE TOREM: Yeah, my only
24 concerns, we use the word agreed by the applicant. I
25 think at this point for -- this is for the presiding

1 officer, for me, to set some deadlines that work for
2 the overall schedule we've talked about today and the
3 constraints of the statute on when to complete these
4 things so Mr. McMahan doesn't have any greater sway on
5 setting the dates than any other party. So I just want
6 to clarify that for you. I'm not consulting with
7 Mr. McMahan to get permission to set these dates, but
8 he has the same input on behalf of the applicant that
9 you do or any of the other parties.

10 Let me turn to Mr. Aramburu for any other concerns
11 as to the timing of particularly the initial deadline
12 for testimony and the intervals.

13 MR. ARAMBURU: I want to say in the
14 strongest possible terms, we think this schedule is
15 inappropriate, particularly given the initial deadline
16 for filing and serving direct testimony.

17 I will note this matter has been at EFSEC for
18 two -- two or more years and that we get three or four
19 weeks to file testimony. It seems to be inappropriate
20 given the circumstances. And particularly, we've had a
21 whole change in what the issues seem to be.

22 We submitted on March 17 our issues to the parties
23 and to you. We had ten issues. I don't know what
24 happened to those ten issues. We now have some other
25 separate and distinct issues that have been brought up

1 in the next section of the -- of your agenda.

2 So we think that these dates should be pushed back
3 at least 30 days, if not more, and given the
4 circumstances, given the fact we haven't known what --
5 what the issues are, and we really do have some
6 questions over -- under No. 5 as to some of the things
7 that are going to happen here with regard to testimony.

8 And so under your double apostrophe on Page 4, you
9 said that a person -- a party wishing to present
10 witnesses on local concerns, attitudes, and opinions
11 should justify significance as a representative of the
12 local area.

13 We don't know what that means. We don't know what
14 that means for -- for testimony. That's something
15 that's -- that's really brand-new in these proceedings.

16 Secondly, under "Site Restoration and
17 Decommissioning," there's an indication here that
18 certain issues, including SEPA and greenhouse gas
19 emissions, which is a very important issue, will not be
20 taken up with the adjudication unless we make a
21 satisfactory offer of proof.

22 Well, I don't know what that means. Is that a
23 motion? I'm familiar with offers of proof in an
24 evidentiary sense in -- under the civil rules in
25 superior court, but I don't know what's -- what's meant

1 here, nor do I mean -- do I understand the greenhouse
2 gas emissions are outside the scope of EFSEC / might be
3 addressed as part of the FEIS. Where does that --
4 where does that leave that issue for purposes of
5 testimony due on May 24 or May 31?

6 And I'm also going to note that in usual course of
7 prehearing conferences and prehearing orders, we have
8 some time set aside for discovery. We have some
9 discovery issues that we're going to want to pursue.
10 We have the motion practice, which seems to be
11 indefinite at this point. We don't have in these
12 filing milestones motions to strike other similar
13 things for objections to testimony.

14 So I think -- I think this schedule we have here
15 is unrealistic. It should be moved back for a month,
16 at least, to give all the parties adequate opportunity
17 to prepare their testimony. I can put my objections
18 into a letter, if you like, but I want them to be on
19 record now, so -- and as I indicated, some
20 clarification down the way of what we've got to do in
21 testimony also, I think, needs to be made here too.

22 JUDGE TOREM: All right. Well,
23 Mr. Aramburu, I appreciate all of that. You've
24 covered, I think, it sounds like TCC's concerns on all
25 of the remaining agenda items as well as suggesting the

1 overall concern for the May 24th deadline.

2 Let me speak to all of you, then. And,
3 Ms. Voelckers, I want to come back to the discovery
4 piece that you mentioned later, so I'm going to set
5 that aside for now.

6 As I'm listening to your concerns, it sounds as
7 though parties want as much time as possible before the
8 initial deadline. And these dates, as I said up above
9 in the hearing dates, those hearing dates are firm.
10 The filing milestones for all of this in the Item
11 No. 4, I purposely didn't put the word "firm" anywhere
12 in that, because I knew that inputs today on this
13 suggested schedule would be informing the best way to
14 alter the intervals and make everybody's life a little
15 easier and more humane.

16 I think, Mr. Aramburu, just responding overall to
17 your suggestion about pushing things back a full month
18 means that we won't have time for all the necessary
19 motion practice and preparation for the hearing,
20 itself. I have to set a deadline, and I'm trying to
21 make these as realistic as I can.

22 And I've learned over years, two decades now as a
23 judge, that sometimes the parties are equally unhappy
24 but all faced with the same milestones and deadlines.
25 And just given the overall compression of time between

1 now and the firm hearing dates of August 10th for the
2 first one and the last one, August 25th, I have to make
3 some difficult choices. And I recognize the parties
4 might object, but that's what I have to do is the best
5 possible job as a presiding officer and set deadlines
6 and hold everybody to them.

7 So let me come back to what my thoughts for a
8 modified filing schedule might be. I think if the
9 parties are willing to go only 20 days between initial
10 testimony and response and only 15 days between
11 response and reply, that I can adjust the schedule to
12 allow the first deadline to be June 7th; the response
13 deadline to be Tuesday, June 27th; and stay with that
14 deadline for reply testimony of July 12th.

15 If the parties want to shrink the interval
16 further, then June 7th can become a later date, and a
17 15-day interval could be shrunken further to move June
18 27th out a little bit further -- probably no further
19 than June 30th -- to shrink the time between then and a
20 July 12 deadline. So the June 7th date could move to
21 as far out as June 12th with a compression to say June
22 30th for the response testimony. But I don't think we
23 can compress the intervals any further than that.

24 So I'm just calculating in my head the June 12th
25 to June 30 would be 20 -- that's not right. Pardon me.

1 Public math is difficult, particularly with a court
2 reporter. So that would be essentially 18 days between
3 June 12th and June 30th and then only 12 days between
4 June 30th and July 12th, and that includes a July 4th
5 holiday weekend, which is an additional problem to
6 accommodate.

7 Mr. McMahan, based on the June 7th, June 27th,
8 July 12th versus a June 12th, June 30th, July 12th,
9 what's the applicant's preference?

10 MR. McMAHAN: Your Honor, we have
11 been pretty careful scheduling our vacations and
12 looking out over the fact that our summer is just going
13 to be not a normal summer in terms of family
14 recreation, the like, which is to say we can meet the
15 schedule that you have outlined. It's not comfortable,
16 but we can meet those deadlines.

17 JUDGE TOREM: Did you have a
18 preference for that first date and the longer intervals
19 or the June 12th and the shorter intervals?

20 MR. McMAHAN: Yeah, I'm sorry. I
21 haven't really digested this adequately to answer your
22 question. All I would say is we will accommodate
23 whatever -- whatever you set.

24 JUDGE TOREM: I appreciate that.
25 Thank you.

1 Mr. Harper for the County.

2 MR. HARPER: Ken Harper for Benton
3 County. I don't have a particular view one way or the
4 other, Your Honor, on this topic.

5 JUDGE TOREM: All right.
6 Ms. Reyneveld.

7 MS. REYNEVELD: I would prefer the
8 June 7th or the latter date.

9 And I also just wanted to say that looking at the
10 schedule again, I do share Mr. Aramburu's concerns just
11 regarding the fact that there are absolutely no
12 deadlines for discovery. And so, in my understanding
13 in these matters, you know, the deadlines should be set
14 prior to filing and serving direct testimony. So, you
15 know, the compressed schedule is -- is a concern. Not
16 necessarily the intervals between, you know, the filing
17 deadlines, but just the fact that, you know, it's so
18 soon and we don't have any time for discovery or a
19 motion practice.

20 JUDGE TOREM: Okay. I'm making a
21 note here as to some thoughts on that.

22 Ms. Voelckers, anything to add or preference on
23 the June 7 versus June 12th and associated intervals?

24 MS. VOELCKERS: Thank you, Your
25 Honor. We do appreciate the move to June 7th or 12th.

1 I don't -- at this point, I don't think we can speak on
2 a strong preference between the two of those. And I
3 again would join in the concern about getting discovery
4 set. I think that would help inform our ultimate
5 response, but certainly prefer June 7th over May.

6 JUDGE TOREM: Okay. Mr. Aramburu.

7 MR. ARAMBURU: I stated my concerns
8 for the record. June 12th is certainly better than May
9 24. But we need as much time as possible. And, again,
10 setting typical prehearing conference orders and based
11 upon motion practice and discovery practice is -- is
12 appropriate.

13 I may make a suggestion: WUCT, which I know,
14 Judge Torem, you're familiar with, sets deadlines for
15 responses to discovery or requests for information for
16 ten days.

17 And the other concern that I have -- there may be
18 some -- there may be debate: Objections to certain
19 discovery items that might be -- might be submitted.
20 And, again, the schedule needs to take account of those
21 possible objections. I hope there aren't any, because
22 we think our discovery is going to be reasonable and
23 appropriate to the proceedings, but that does need to
24 be -- to be built in, in the event we do receive
25 objections.

1 And so in terms of your suggestion or idea that we
2 might shorten the time between the filing and service
3 of response testimony, reply testimony, we think
4 that's -- we don't find the schedule to be enough time,
5 but if we shorten those times, that would be a help to
6 us in -- in the final analysis.

7 And as I said before, I'm somewhat in the dark as
8 to what's going to happen when we get over to Page --
9 Page 4 of the order regarding the content of testimony
10 and these offers of proof. So I don't know where that
11 fits into your scheduling.

12 JUDGE TOREM: All right. Well, I
13 appreciate that. And it's been a constant theme of how
14 does discovery fit into all this.

15 My intention was to get some basic deadlines on
16 the schedule and then fit discovery in. I think other
17 people might be setting a discovery deadline and then
18 the hearing dates as the better way to do this. But,
19 again, as I've articulated, I think, strongly, we have
20 these hearing dates that had to be scheduled based on
21 unavailability and working backwards from them. It
22 made more sense to me in this EFSEC proceeding to look
23 at the timing on intervals of when parties could file
24 their testimony, and then, as I've indicated in the
25 numbering of the prehearing conference agenda, turn to

1 the discovery questions.

2 So I hear what you're all saying. And maybe in a
3 superior court trial or some other administrative
4 agencies that don't use prefiled testimony, it might
5 have been better to take up the discovery schedule
6 first. But I want to turn to that now and skip over
7 the disputed issues list and come back to disputed
8 issues in a short amount of time.

9 But let's go to No. 6 on Page 4, Mr. Aramburu, as
10 you're suggesting and I think several other parties
11 have thought about.

12 MR. ARAMBURU: May I just go back to
13 your schedule again, please --

14 JUDGE TOREM: Yes, please. Go
15 ahead.

16 MR. ARAMBURU: -- on Page 2? And I
17 don't mean to interrupt and take up everyone's time.

18 I do see that your schedule includes a deadline
19 for the parties to file and serve prehearing briefs
20 that would come in after the last round of testimony.
21 And I don't know what -- I guess I understand what
22 cross-exhibits are. But is it more appropriate to have
23 a prehearing brief in advance of the submission of
24 testimony so that the council has kind of a road map of
25 what they're going to receive and change that deadline

1 around? We can certainly have cross-exhibits that
2 would be a part of the schedule there, but is the
3 council better served by having prehearing briefs
4 before they start to receive all this testimony?

5 JUDGE TOREM: Well, I'll simply
6 answer you: I don't think so. I don't know that
7 parties can brief issues that are simply listed on
8 Page 3 and 4 of my prehearing agenda without having a
9 substantive area to brief from and to. I don't know
10 how the parties would have any idea, Mr. Aramburu, of
11 how to characterize their case as different from
12 somebody else's that they have not done any discovery
13 on and haven't seen any prefiled testimony.

14 So, in my experience, having a substantive record
15 starting to be created in this nature in an EFSEC
16 proceeding and everybody starting to put their cards on
17 the table of what the council's going to see, only
18 after that does it make sense to me to then have a
19 prehearing briefing to the council of what all this
20 evidence is going to show through the course of them
21 reading it and through the course of them hearing
22 cross-examination about it.

23 It's unique to EFSEC to have this prefiled
24 testimony that lays out parties' cases mostly in
25 advance and leaves the adjudicative hearing sessions to

1 be for cross-examination and interaction. And those
2 prehearing briefs for me are thought to help tee up how
3 that interaction at the hearing should best be used and
4 what the council members might be expected to see and
5 hear.

6 Having you file prehearing briefs before any
7 evidence is submitted, sometimes that works in a trial
8 setting where there's a burden of proof and there's a
9 back-and-forth and the witnesses come out. But because
10 of the prefiled nature, to me in this particular
11 setting, briefing with more information means those
12 briefs are going to be a better quality and information
13 for the council. And that's the decision I've made on
14 why they come in this regard.

15 As to the other deadlines that are there, the
16 final prehearing conference will be a chance before
17 that August 10th first hearing session to get all of
18 our ducks in a row on exhibits, questions, last-minute
19 arrangements for August 10th, 11th, and the other
20 dates. And the post-hearing briefing is to allow time
21 for transcripts to be processed after the August 25th
22 date in an expedited fashion and any other briefing on
23 what happened at the hearing to occur.

24 So that's why those dates are set as they are.
25 They might be adjusted a few dates here or there. The

1 August 8th prehearing conference probably won't move.
2 The August 2nd deadline for parties to serve those
3 additional briefs might shift to August 4th. But it's
4 a kind of thing where people need time to read and
5 digest before the hearing takes off that August 10th
6 beginning date that was firm.

7 So with that said, let's shift over to Page 4 and
8 Item No. 6 and talk a little bit about how discovery is
9 going to fit. I think based on all of your discussion
10 from Item No. 4 that shifting to a hearing date -- or
11 not a hearing date, but a filing deadline of June 12th,
12 on that Monday, for the first round of prefiled
13 testimony with an 18-day interval to June 30th for a
14 second round, and then a final reply date with the 12
15 days only to July 12th, is going to best allow the
16 motion practice and the discovery that parties have
17 been feeling a little bit uneasy about.

18 So June 12th, June 30th, and July 12th will be the
19 dates that we work with. So make a note of those. And
20 when I write the prehearing conference order later this
21 week, those are the dates that will be reflected.

22 With that in mind, today is May 2nd. With hearing
23 testimony due May 12th -- sorry -- June 12th, you have
24 about 40 days to get that first round of testimony
25 done. Discovery may or may not affect your first round

1 of testimony filing, but it probably might, probably
2 will influence the June 30th deadline. Typically under
3 the civil rules, there's a 30-day response period. And
4 under some UTC practice, that response period on
5 discovery requests can be shortened. I'd like to see
6 it shortened and expedited here, but I'm not sure
7 what's realistic for the parties. We can have a short
8 discussion about is it 14 days to respond, is it 21
9 days to respond, or is it, you know, 10 days to respond
10 with ongoing supplementation required.

11 Those are the thoughts I'm having. But, again, I
12 have not been a civil litigator for a couple of
13 decades, and my experience with that, frankly, was
14 short. My criminal litigations, the ongoing discovery
15 was much more just a data dump up front. Everybody
16 knew what you were going to get. But I defer to some
17 of your experiences on what might be done, and again,
18 within all of the limitations that we're stuck with,
19 given the August 10th beginning of the hearing.

20 Informal discovery is authorized under the APA
21 when the proceeding officer says so. So let me be
22 formal today on the record and say informal discovery
23 can begin now, if it hasn't already.

24 As far as formal discovery, the APA doesn't give a
25 whole lot of guidance, but I will include issues from

1 the UTC, Utilities and Transportation Commission, to
2 inform whatever I'm going to do with that in the
3 prehearing conference order. But I think today is a
4 good day to flesh out some of those concerns.

5 Past practices as indicated from the KV, the
6 Kittitas Valley Wind Project, and more recently not
7 where I was the presiding officer, but in the Whistling
8 Ridge and the Tesoro proceedings, and I want to limit
9 our time on this for about another ten minutes, so
10 every party will get about a minute and a half or two
11 to address their preferences.

12 And if there's anything you want to supplement
13 that you don't get a chance to say today, send me a
14 letter. Today's Tuesday. Let me have it by Thursday.
15 So Friday, when the prehearing conference order comes
16 out, I can include any other concerns or respond to
17 them that aren't voiced today that I can take into
18 effect when I write the discovery part of this
19 prehearing conference order.

20 So I think that tees it up. Mr. McMahan, let me
21 start with you on discovery, and we'll go from there.

22 MR. McMAHAN: Well, Your Honor,
23 thank you. I would -- having participated in several
24 of these EFSEC adjudications, one thing I would observe
25 is we often spend a lot of time talking about

1 discovery, and then it hasn't actually ended up
2 amounting to a whole lot as we've proceeded through the
3 process, which isn't to say that we won't have a more
4 robust process here.

5 As Mr. Aramburu correctly recalls, I think at the
6 last prehearing conference, we have not seen and in
7 Whistling Ridge there was not depositions taken, so I
8 think it's just really much more in -- in line with
9 informal discovery requests as you've outlined it, Your
10 Honor. And we -- you know, we are contemplating
11 discrete discovery requests, ourselves, which if the
12 parties are all cooperating, ought to be a reasonably
13 noncontroversial process. But to the extent that there
14 is controversy about it, I would imagine the parties
15 would ask Your Honor to come in and call balls and
16 strikes to move the process forward.

17 So I do think this is a tight schedule, but I --
18 you know, fitting it around everything else, I think
19 that it is, the way you've laid it out commencing
20 essentially now, is appropriate. And, you know, there
21 is, as I say, some probability that we may need a
22 process to have the ALJ, you know, police the discovery
23 process, if necessary.

24 So is that -- do you need any more from me on
25 that, Your Honor?

1 JUDGE TOREM: Only if there's going
2 to be formal response times shorter than what the civil
3 rules suggest of 30 days and --

4 MR. McMAHAN: Yes.

5 JUDGE TOREM: -- ongoing
6 supplementation.

7 MR. McMAHAN: I think there do need
8 to be shorter response times than 30 days. And what
9 that timing is, I'm not sure. It somewhat depends upon
10 the nature and the volume and the characteristics of
11 the -- of the discovery requests, I suppose. And there
12 may or may not be issues relating to confidentiality of
13 information/data. Probably will be some issues raised,
14 I'm guessing, by the Yakama Nation. I'll let
15 Ms. Voelckers speak for herself on that.

16 So, you know, this -- this could get bumpy. I'm
17 hoping it doesn't get too bumpy. And these
18 professionals have done this before, and hopefully we
19 can be professionals and handle this without a whole
20 lot of hassle.

21 JUDGE TOREM: All right. Thank you.
22 And I do want to speak to the fact that there will be
23 some data that will need to be protective. And
24 Mr. Thompson and I have talked about the appropriate
25 nature and language of a protective order. That will

1 be issued probably separately from a prehearing
2 conference order, but a protective order regarding some
3 of the wildlife, culture, and other interests that
4 might be substantively considered by the council in
5 reviewing this application but not subject to public
6 disclosure and working out how that's been done. And
7 that's been done in the past as well, so we'll be
8 drawing from that experience.

9 Mr. Harper, on discovery response times or
10 intervals and other thoughts about discovery in
11 addition to the informal.

12 MR. HARPER: Well, I'll take your
13 last question first: Other thoughts about discovery.
14 Your Honor, with all due respect, I just don't see how
15 this is workable. I -- I really don't. I don't -- I
16 don't see how we can reasonably expect any discovery
17 process to sync up with the prefiled testimony
18 expectations that Your Honor's already set and the --
19 and the firm hearing dates.

20 Without elaborating, which is probably not
21 something that you're really asking me to do at this
22 time, I'll just add further that, as to the intervals,
23 I -- I don't have any specific objection to the
24 sequence of intervals, but I don't think it's going to
25 be manageable. Despite Mr. McMahan's sort of guarded

1 assurances, I think I'd emphasize the "bumpy" part of
2 his comments. I think it is going to be very difficult
3 to make this work even if all parties are trying to
4 proceed in complete good faith, which I'm sure we will.

5 JUDGE TOREM: Okay. I appreciate
6 the difficulties of this. Again, said it many times
7 today, and I've said it many times to staff as we've
8 tried to plan the best humane schedule possible and
9 adjust on the fly as we're doing today. It is going to
10 be difficult. There are going to be bumps. And I'm
11 going to have to rule on some discovery motions that
12 get filed and do the best we can.

13 That's all I can say, Mr. Harper. It's not --
14 this is not a pleasant thing to try to schedule within
15 the confines of the statute and some of the -- I
16 apologize for losing the time we did between March 27th
17 and today, but it is what it is. That's all I can say.

18 MR. HARPER: I understand, Your
19 Honor. And I don't mean to be disagreeable other than
20 just to the extent that I'm stating I disagree. Other
21 than that, I get exactly where you're coming from,
22 Judge, and I'll leave it at that.

23 JUDGE TOREM: I appreciate that,
24 Mr. Harper. I'm not taking it personally. And there
25 are days I'd love to switch places with any of the lead

1 litigators and let you try to be the judge. But here
2 you go.

3 Ms. Reyneveld, thoughts.

4 MS. REYNEVELD: Yes. Thank you,
5 Judge. I do think we should adhere to standard civil
6 discovery rules for response times to discovery in this
7 matter, considering the complexity of the matter and
8 the issues at stake. And I agree that if we are going
9 to adhere to those, then the schedule doesn't seem to
10 be reasonable.

11 I mean, June 12th still seems to be insufficient
12 time, assuming that the parties are going to be
13 participating in discovery. It would require the
14 parties to serve, you know, interrogatories this week
15 if we're going to adhere to that deadline. And there
16 would be insufficient time for motions to compel much
17 less to actually receive the responses and to consider
18 them prior to being able to present our direct
19 testimony.

20 It just seems too compressed. And I'm concerned
21 about, you know, just the ability of the parties to
22 fully present their case. I've never seen a schedule
23 like this before, and it just seems to be incredibly
24 condensed. And so I have concerns. And I'm just
25 wondering if we can consider pushing the hearing, you

1 know, back to mid August or late August or something
2 and adjust accordingly, just because I do think the
3 parties have that right to fully participate in
4 discovery and to consider their responses in calling
5 direct testimony. So that's my comment.

6 JUDGE TOREM: All right. Thank you.

7 Ms. Voelckers.

8 MS. VOELCKERS: Thank you, Your
9 Honor. I do share the concerns of counsel for Benton
10 County and counsel for the environment. I wanted to
11 just ask a really specific question, though, because
12 I'd like to leave this hearing with more clarity than
13 when I left the last on what the reference to informal
14 discovery is versus -- informal versus formal.

15 So what I understand from what you said a moment
16 ago is that the parties are able to utilize all
17 discovery authorized under RCW 34.05.446, which I read
18 to include the taking of depositions, requesting
19 admissions, and all other procedures authorized by
20 Rules 26 through 36.

21 And so if that is correct, if I am correct in my
22 understanding, I just want to confirm that that is what
23 you were approving a moment ago when you said that
24 informal discovery is available to all parties. Thank
25 you.

1 JUDGE TOREM: Yes, 34.05.446 is the
2 governing statute, and anything authorized under that
3 is authorized here. And, again, the subpoena power
4 that's there, if a party makes a motion to quash a
5 subpoena, that's something I'll have to rule upon.

6 As far as the agency rules in Sub 3, the presiding
7 officer may decide whether to permit the taking of
8 depositions, requesting of admissions, and all the
9 other things. So that's within my discretion to open
10 up Rules 26 through 36 and for other parties to move if
11 they'd like for a limitation.

12 So that's what I meant by that comment earlier,
13 Ms. Voelckers. And so certainly the protective orders
14 under Sub 1 and discovery being available under Sub 2
15 is what -- exactly what I meant. So discovery is open
16 as of today formally to go forward under 34.05.446.
17 And I'm encouraging the use of informal discovery.
18 Just ask a party for what you want, whether by phone or
19 by e-mail. That's probably the best way to expedite
20 this.

21 And, finally, if there are to be formal items
22 used, I want to take your inputs by letter between now
23 and close of business on Thursday, with a target for me
24 to publish the prehearing conference order with any
25 further details on the time limit for responses. But I

1 do think it would be less than the 30 days that
2 Ms. Reyneveld referred to under the civil rules cited
3 here in 34.05.446, Sub 3.

4 And, again, I want to reiterate: This is a
5 difficult schedule, but I have a firm start date of
6 August 10th and a wish for the recommendation to go to
7 the governor soon after the closing briefs are in, in
8 September and the deliberations that occur.

9 So we're already stretching. As Mr. Aramburu
10 noted, this has been at the council for more than two
11 years. There has to be an end date. And simply put,
12 this is going to be a tough schedule.

13 Mr. Aramburu, I'm going to turn to you on that
14 note and ask for a very, very brief two-minute
15 response.

16 Ms. Voelckers, we have 14 minutes left in the
17 schedule here, and I know I'm going to run it over to
18 12:15. But I can't take any further comment from you
19 at this time. I want to give Mr. Aramburu his two
20 minutes.

21 MR. ARAMBURU: Thank you. We
22 anticipate discovery. We anticipate requesting
23 documents, information, and reports, which should
24 already be in existence. We think the response to
25 discovery should be between 10 and 14 days as it

1 relates to documents at least. Otherwise, I'm not
2 going to be able to use the discovery in our testimony.

3 JUDGE TOREM: And, Mr. Aramburu, I
4 just want to take a look and say, based on the schedule
5 I set of June 12th for initial round of testimony, my
6 thoughts are that parties know what they're going to
7 file. Discovery won't affect what you're preparing for
8 June 12th. It will affect what you're filing on June
9 30th. So discovery should certainly continue up until
10 at least June 29th for people to get a response and for
11 any tweaks to that and perhaps be covering in the reply
12 testimony as well what's happening there.

13 I appreciate the 10- to 14-day response time. 10
14 days would have to be the minimum to give parties a
15 chance to digest, produce, locate, and give things over
16 on any formal discovery.

17 But I want to take your written input, all of the
18 parties', on when should discovery be cut off. Should
19 discovery ongoing be allowed beyond June 30th so that
20 reply testimony can be influenced, or is that even
21 meaningful at that point? Is there any reason for
22 having ongoing discovery up until the big filing of
23 prehearing briefs, or does that become a distraction at
24 some point and we have to have a cutoff somewhere?

25 So I'm interested in your answers to all of those

1 questions in any letters you want to file to supplement
2 what I've given you an opportunity to say today. I'm
3 going to take a look again at some of the other
4 experienced orders from discovery in the KV Wind case,
5 the Whistling Ridge case, and the Tesoro matter. If
6 there's some extract from those orders you find help
7 make your point, just include it as an attachment or an
8 addendum to your letter that will be due on Thursday at
9 close of business on May 4th.

10 In the interest of time, I want to turn back to
11 the disputed issues list, because Mr. Aramburu, in
12 particular, has asked what happened to the things that
13 you filed to help me develop this disputed issues list.

14 Well, they were all read. They were all
15 considered. Everything that you've submitted to this
16 point about how to develop the disputed issues has been
17 considered to get us to where I am on the top of Page 3
18 and the disputed issues list Item 5 for this prehearing
19 conference agenda.

20 These things were also consulted with staff both
21 on the SEPA side of the house as well as the chair to
22 make sure we were addressing everything that the
23 council expects to hear in the course of the
24 adjudication and, again, at the end of this, the items
25 that we just simply didn't think the statute, the

1 application, and the WAC really gives the council a
2 reason to evaluate as part of its siting. And this is
3 an Energy Facility Site Evaluation Council. The SEPA
4 process is handling a number of other things, but for
5 site evaluation, the recommendation to the governor,
6 some issues were appropriate, we determined, and some
7 not.

8 On the land-use consistency matter, I want to
9 address that the reason this is as short as it is, is
10 because council's already made a land-use consistency
11 decision. That topic has left. Now it's a question of
12 how to handle, if the facility is to be sited within
13 its proposed footprint, what conditional use criteria
14 apply. This is different than other -- other matters
15 that would have been applied for after February 8th of
16 2021 because the County changed its code. Those issues
17 are not relevant to this. It's anything that was in
18 existence as of February 8th of 2021, and that's why
19 the bullet points state what they do with regard to
20 land-use consistency.

21 On the environmental and physical impacts, we
22 looked at all of the inputs that came in from the
23 parties and looked generally on what bullets and
24 sub-bullets would be appropriate.

25 Wildlife is a very broad issue simply because

1 there are so many different species, other wildlife
2 concerns that are raised both in the application and
3 within the bounds of the DEIS. But there are a variety
4 of topics that each party may wish to take up, but we
5 didn't want to list a specific number of species or
6 other wildlife/habitat continuity issues. Those are up
7 to the parties to come up with and raise as specific
8 issues.

9 We didn't want to give a list and feel that
10 parties had to file specific testimony on every bird,
11 bat, or animal otherwise that the council might list.
12 So we gave an example, like under threatened and
13 endangered species. The ferruginous hawk has come up a
14 number of times. Just an example. Parties may wish to
15 raise many, many more, raptors or other potential
16 impacts that they see. You may want to talk about the
17 sage-grouse. These are all choices for the parties to
18 make.

19 On the air quality matter, Mr. Aramburu, we
20 weren't sure necessarily, again, given this solar and
21 wind non-emitting energy generation that's contemplated
22 by the application, where air quality might come in.
23 Can you in one or two sentences let me know what you
24 were thinking? 'Cause I think you were the only party
25 that listed air quality as an issue.

1 MR. ARAMBURU: The Tri-Cities
2 C.A.R.E.S. is concerned about air quality both during
3 construction and long-term operation. We'll be
4 focusing on issues of fugitive dust, PM2.5 and PM10
5 emissions from the site. There is a reference to a
6 batch plant that's found in the application. We don't
7 know where that's going to be. And we don't know what
8 those -- those impacts might be.

9 So that would be generally the issues that we
10 would be discussing during our air quality testimony.

11 JUDGE TOREM: Okay. That's
12 essentially what I anticipated, but I wanted to ask to
13 make sure whether the air quality topic needed to be
14 narrowed or not. But it sounds like it's construction
15 and ongoing operations. So that at least gives me and
16 other people listening today a better idea.

17 Ms. Voelckers is going to have probably the
18 biggest part of the testimony, I anticipate, on the
19 cultural and archaeological resource impacts. There
20 may be some historic property impacts as well.

21 But, Ms. Voelckers, these will be also subject to
22 the protective order. If you have any specific input
23 you'd like me to address in the protective order,
24 please include that in any submission you have by May
25 4th at close of business so I can incorporate that

1 accordingly. I'm guessing that the protective order
2 won't come out on Friday but sometime next week once I
3 have a chance to digest it and speak to Mr. Thompson
4 and possibly Chair Drew about how I'm crafting it to
5 fit this particular project.

6 Turning to the societal and economic impact and
7 particularity the asterisks that are on local concerns,
8 attitudes, and opinions, Mr. Harper, I think, and
9 Mr. Aramburu raised this question about what does that
10 really mean, and how do I distinguish this from what
11 might come up at the public comment session that will
12 be scheduled as part of the adjudication probably on
13 the evening of one of the dates that we have listed as
14 adjudication hearing dates, possibly separate from
15 that, because the council has to hear that testimony
16 but may also be able to review it. That's still to be
17 determined and scheduled.

18 What I wanted to do, Mr. Aramburu, in particular,
19 is if you're going to have members of Tri-Cities
20 C.A.R.E.S. give prefiled testimony, that would be
21 helpful, because then they'll be subject to
22 cross-examination, and that's appropriate to do during
23 the adjudication. If members of Tri-Cities C.A.R.E.S.
24 or other local organizations, perhaps say The Audubon
25 Society or some other recognized organization they're

1 speaking on behalf of -- the Sierra Club, for
2 instance -- if they want to give testimony, they're not
3 a party to this adjudication. They didn't move to
4 intervene. So they are left with a public comment and
5 any restrictions that RCW 80.50.090, Sub 4, places upon
6 them based on their prior filing of written comments.

7 All I'm asking, and I wanted to highlight here, is
8 that if you're going to have somebody testify at
9 greater extent than the two or three minutes allocated
10 at a public comment hearing, they need to have prefiled
11 testimony or be subject to the cross-examination of
12 every other witness testifying on every other topic.

13 So that's my explanation beyond what's written in
14 the agenda, Mr. Aramburu, on those items.

15 Finally, turning to the other asterisked item on
16 Page -- I guess we're on Page 4 now. Yes, Page 4,
17 before Item 6, where it says, "The below issues are not
18 expected to be taken up during the adjudication." I
19 had some good discussions with the chair and with our
20 attorney general, Mr. Thompson, and decided that these
21 issues are not applicable to this application.

22 There's not really a specific preemption. There's
23 no petition to preempt local land-use laws, because
24 there's land-use consistency. There is a general
25 preemption, but I'm not expecting briefing on that.

1 That's just -- that's what the statute says. There's
2 nothing more to say.

3 The Growth Management Act is only applicable as
4 covered in the land-use consistency topic. SEPA --
5 subject to your motions and any other subsequent ruling
6 to the -- to the difference, SEPA is a separate tract,
7 and it's going to be completed when the EIS comes out,
8 and that's a separate department from the adjudication.
9 And that would go for the next bullet as well about
10 whether we stay this proceeding is up to a motion and a
11 decision.

12 As to the greenhouse gas emissions reductions, I
13 had a lengthy conversation with EFSEC staff, the chair,
14 and the AG. And that's not something the adjudication
15 will take up. It may not be covered by anything that
16 EFSEC does per the statute. Part of its scope of the
17 statute, this may be more likely something for
18 Department of Ecology to take up and any comments that
19 came in during the SEPA process.

20 But those -- those statements that I just made
21 aside explaining why those bullets are there as
22 unanticipated, don't-think-we're-going-to-cover-it,
23 not-relevant topics, again, in an attempt to make sure
24 that I'm not unintentionally abridging anybody's due
25 process, I stand to be corrected on any of those with

1 appropriate briefs and a motion to have a witness on
2 those topics. That can be filed. And I suggest, if
3 you think any of your witnesses were going to testify
4 to any of those five subject matter areas that I said
5 are off limits, file your brief as soon as possible.
6 Let me hear from the other parties on a short response
7 schedule that I'll state. And based on what you brief,
8 I'll rule whether this concept of what's allowed and
9 not allowed stands.

10 But I don't know that any of you wish to put these
11 topics on until you tell me you do. And when you make
12 an appropriate motion based on the prehearing
13 conference order that will come out, putting this from
14 a suggested agenda into a rule and the order of the day
15 for the adjudication, if you convince me and persuade
16 me that I'm wrong in this and that the discussions I've
17 had with the chair and our legal counsel are wrong, I'm
18 subject to being corrected. But I have to set some
19 bumpers. That's what I'm going to do based on these
20 topics.

21 It's now noon. I'm going to allow that we extend
22 for another 15 minutes. And I hope you'll indulge me
23 with that. Because I want to get basic short responses
24 so I can anticipate what you might be filing. And then
25 I also, before I do that, because I don't want to run

1 out of time, I did want to give Lisa Masengale a couple
2 of moments here to address some filing conventions that
3 we anticipate will be published well ahead of time for
4 your prefiled testimony due on June 12th so you'll know
5 how to format that.

6 So, Ms. Masengale, if you're ready, take a couple
7 of minutes to preview what we'll be asking the parties
8 and requiring them to do.

9 MS. MASENGALE: Judge, did you want
10 me to do that now?

11 JUDGE TOREM: Please do. And then
12 I'm going to --

13 MS. MASENGALE: Okay.

14 JUDGE TOREM: -- go back to the
15 parties about -- about disputed issues. I want to make
16 sure that you get your say, and then we'll come back to
17 the parties.

18 MS. MASENGALE: Okay. Thank you
19 very much for that.

20 All right. So as you hopefully saw attached to
21 today's agenda was the e-mail list. I have received an
22 update from the applicant's counsel, and I will be
23 updating that and sending out that corrected e-mail
24 list this week. If you have any corrections or
25 revisions to this list, please let me know as soon as

1 possible.

2 And please do use this list when you are filing
3 throughout this adjudication. And as you go along, if
4 you do have corrections or revisions, please let me
5 know so that we can keep everyone up-to-date and
6 working off of the same list. I want to just make sure
7 that everyone really is filing to all the exact same
8 e-mail addresses and parties at the same time so we
9 don't miss anything.

10 I have been working on some prefiled testimony and
11 exhibit numbering protocols and naming conventions with
12 Judge Torem and with EFSEC staff, which I anticipate
13 will be shared with you soon. I know it had been
14 mentioned previously you saying UTC protocols.

15 I was hoping personally that we could use a
16 simplified version of that because -- and it seemed to
17 be in previous adjudications, there was a lot of
18 confusion over using capitalized versus lowercase
19 letters to indicate very important things, like
20 confidentiality, exempt data, and things like that.

21 So I am working with EFSEC staff and the Judge on
22 coming up with suggestions but would love feedback once
23 Judge Torem feels it's appropriate to share those with
24 you.

25 And I didn't know if anyone had strong opinions on

1 things like including Bates numbers on exhibits and
2 testimony.

3 JUDGE TOREM: All right. Thank you,
4 Ms. Masengale. I would suggest that the parties,
5 because the filing convention piece won't necessarily
6 come out -- it won't come out this week, but there'll
7 be some further refinements. But I'm going to look,
8 based on the June 12th filing deadline and today being
9 May 2nd, to have something out no later than May 12th
10 on filing conventions for all that prefiled testimony
11 and exhibits.

12 Motions: File them in any format that's familiar
13 to motion practice, and make sure they're served. But
14 for the e-mail list that Ms. Masengale is sending out,
15 including the filing to the EFSEC adjudication-specific
16 e-mail, but we will target that filing protocol list to
17 come out the end of next week and hope that gives
18 everybody 30 days to format their testimony accordingly
19 for all rounds of testimony going forward.

20 Ms. Masengale, anything else on filing protocols
21 or concerns?

22 MS. MASENGALE: No. Thank you,
23 Judge Torem. I think we'll discuss internally, and
24 then the parties can have their feedback. Thank you.

25 JUDGE TOREM: All right. So let me

1 turn back for what we have now 11 minutes left and get
2 the applicant's feedback on the disputed issues list
3 and my little narration there and soliloquy on why it
4 is what it is. And then I'll come back, and I need to
5 limit parties to about two minutes apiece so we can
6 wrap up by 12:15.

7 Mr. McMahan.

8 MR. McMAHAN: Thank you, Your Honor.
9 The issues list makes sense to me.

10 I do have a question, though, about bullet
11 protocols.

12 You have kind of a combination of circles and then
13 empty circles and then squares. And so just looking
14 through this, it's not quite clear if some of that is,
15 like, subcategories or, you know, kind of what that is.
16 If you wouldn't mind helping us a little bit with
17 your -- with your personal bulleting protocols, it
18 might be helpful.

19 Other than that, this is a lot to digest, but
20 we're -- you know, we'll digest, and it makes sense to
21 us. Thank you.

22 JUDGE TOREM: Mr. McMahan, I saw
23 that the formatting got -- everything got lined up and
24 doesn't look like the outline bulleting. But let me
25 clarify that dark black circles are the main bullets

1 and the not-filled-in little circles are the
2 sub-bullets for each of those ones where they may occur
3 to the main bullet above.

4 Down under "Cultural / Historic / Archaeological
5 Resource Impacts," it looks like that formatting
6 carried. So you can see the bullet, sub-bullet there.
7 It looks like it also happens correctly on the "Local
8 Concerns, Attitudes and Opinions." So please interpret
9 the light-circled bullets like "Bird and Bat Mortality"
10 or "Habitat Fragmentation" to be sub-bullets of the
11 bullet above them. And I appreciate the clarification
12 just because the formatting got lost somewhere in the
13 translation between my initial version of it and what
14 got published.

15 Does that help, Mr. McMahan?

16 MR. McMAHAN: Yes. Thank you. That
17 helps a great deal. Appreciate it.

18 JUDGE TOREM: All right.
19 Mr. Harper.

20 MR. HARPER: Ken Harper for Benton
21 County. Your Honor, I studied the disputed issues list
22 closely, and I tried to understand the categorization.
23 And I was able to match that up to some extent with
24 463.30.300. But I came away from it with a really
25 strong sense that the issues statement of the County

1 really is not adequately reflected in these topics
2 here. And that's even giving full credit to the --
3 the -- sort of the excluded issues, if you will.

4 I recognize that the County's position on a couple
5 of topics probably will be categorized as ones of law
6 that can be addressed through motions and probably will
7 not be expected as topics in which we offer testimony.
8 But other issues that the County feels very strongly
9 about -- in fact, some of our key issues, as stated in
10 our March 9 issues list -- I just can't -- I just can't
11 find on this disputed issues list, even if I read these
12 fairly generously.

13 To give an example, Your Honor, one of the
14 County's chief concerns is that the proposal represents
15 a landscape-wide change in planning policies and,
16 frankly, commitments the County makes regarding
17 preservation of agricultural land for agricultural
18 purposes. That's not a land-use consistency topic.
19 That's not an agricultural industry interest under
20 "Societal and Economic Impacts." It's not simply a
21 matter of cumulative impacts, and it really isn't just
22 a question of site restoration and decommissioning.
23 So, I guess, Your Honor, I don't want to -- I don't
24 want -- I'm sure Your Honor doesn't want to debate sort
25 of, you know, the ins and outs of all these, but my

1 question would be this.

2 Is there a mechanism that you would allow for a
3 party to supplement or further comment on the disputed
4 issues list to the extent that it's not already settled
5 in this list?

6 JUDGE TOREM: I think that's a fair
7 question, Mr. Harper. And I'm looking at your March
8 9th letter now in the five bullet points that came in
9 for the County item. My styling of the exhibit -- or
10 the disputed issues list, I think, was designed to
11 allow you to elaborate on those specific issues that
12 you stated but give broader -- broader latitude,
13 frankly, and having a vaguer --

14 MR. HARPER: Okay. Okay.

15 JUDGE TOREM: -- one- or two-word
16 item.

17 My only caveat is, I'm trying by using this
18 disputed issues list not to overly limit but also not
19 overly broaden the subject matter for the adjudication.
20 Any party that files initial round of testimony that's
21 well outside the scope of what I've listed in the
22 disputed issues list and will write up in the
23 prehearing conference order so that it's official might
24 be subject to a motion to strike.

25 MR. HARPER: Okay.

1 JUDGE TOREM: But if another party
2 doesn't move to strike this in some aggressive
3 fashion -- I've seen it both ways in adjudications
4 where the testimony is what it is and other parties
5 just say, Okay, we'll respond in cross-examination to
6 narrow things down for what's appropriate rather than
7 motion practice.

8 I encourage you to submit what you think goes
9 within the bounds of the disputed issues list. And if
10 you think I've unfairly limited it, submit your
11 testimony subject to a possible motion to strike. I'm
12 not saying that I won't sua sponte say, Whoa, that's
13 way outside the bounds of what we expected, and I
14 might -- I might send out a bench request saying, Can
15 you show me where this fits in the disputed issues?
16 But I don't intend to ignore any of the issues that
17 were stated by the parties.

18 MR. HARPER: Okay.

19 JUDGE TOREM: Subject to the caveat
20 of what I've said are not in the realm of EFSEC's scope
21 of review.

22 Does that help, Mr. Harper?

23 MR. HARPER: It does, Your Honor.

24 And, again, Your Honor, I can understand how you
25 have carved out the -- the asterisked below issues as

1 really just sort of categorically different from the
2 EFSEC adjudicative mission. I totally understand that.

3 My anxiety was just when I couldn't slot sort of
4 our key substantive issues in another area. But if we
5 can understand that this is meant to be broadly
6 construed and if we don't run afoul of the asterisked
7 issues and we're otherwise somewhere on the list in
8 some guise, then we'll be allowed to proceed subject to
9 a motion to strike, I think that's probably fine,
10 particularly with the colloquy that -- that we're
11 having right now. So I'll leave it at that, Your
12 Honor. Thank you.

13 JUDGE TOREM: It's a difficult thing
14 to say, Please broadly construe the issues list, but
15 narrowly tailor your testimony. And the cognitive
16 dissonance I have just by saying that back out loud is
17 going to require some Excedrin moments later this
18 afternoon, but I feel your pain, and I'm just trying to
19 do the best I can, Mr. Harper.

20 All right. Let me shift to counsel for the
21 environment.

22 MS. REYNEVELD: Generally, the
23 counsel for the environment's issues specifically
24 related to habitat and wildlife are reflected in this
25 list. So thank you.

1 We also raised just a point in regards to
2 greenhouse gas emissions and the reductions analysis,
3 and, you know, the EFSEC statute seems to generally
4 contemplate that EFSEC should recognize the need for
5 increased clean energy facilities that could
6 potentially reduce emissions and balance that with
7 other environmental impacts of the project. So as
8 counsel for the environment noted in our comments,
9 there wasn't any analysis in the DEIS regarding kind of
10 the need for the project in light of meeting these
11 clean energy goals or, you know, how that project would
12 fit into the needs, the pressing needs for increased
13 energy facilities and just the emissions reductions
14 resulting from the project.

15 And we think that would be important for the
16 council, you know, to consider in making their
17 recommendation to the governor. So I think it would be
18 helpful to know whether or not this analysis is going
19 to be part of the FEIS before we file a motion or
20 advocate on this issue. It says might be addressed as
21 part of the FEIS, but this again, it would be helpful
22 to know if this is going to be addressed.

23 JUDGE TOREM: I appreciate that
24 discussion of that topic, particularly because you
25 reference the policy goals set out in the statute and

1 other things that EFSEC is designed to do. The
2 discussion we had on pushing that out from the scope of
3 testimony for the adjudication was based a lot on the
4 fact that it's statutory policy, not something to be
5 testified to. That was taken care of at the
6 legislature's level and as their statutory direction to
7 the scope of EFSEC.

8 The better place for those items might not be in
9 the development of evidence, Ms. Reyneveld, but in the
10 post-hearing briefs at some level pointing out how this
11 application and proposed project does or doesn't
12 forward those policy goals that are set out very well
13 in the statute. So the adjudication, itself, shouldn't
14 have any evidence presented on that. It should simply
15 be arguments based on what evidence is submitted to the
16 council and how it does or doesn't meet policy goals.

17 I'm simply trying to avoid cross-examination on
18 whether or not there's a need. Cross-examination or
19 not on the greenhouse gas impacts. Because that's
20 outside the siting issues. There are policy subjects
21 in the overall EFSEC statutory scheme that are just
22 outside the scope of an adjudication.

23 As to the question of whether it might be
24 addressed in the FEIS, I simply don't know. And I
25 think some of my comments in March were taken as a

1 point where I was trying to be -- I wasn't trying to,
2 but I was interpreted as trying to influence the pace
3 of the SEPA process. So backing out from those
4 comments from March and staying in my lane of the
5 adjudication means that's not -- it's above my pay
6 grade or at least outside my scope of what I'm doing in
7 the scheme of the adjudication.

8 So I hope that's helpful as to where things fit
9 into the overall application review process but
10 distinguished from the scope of the adjudication.

11 MS. REYNEVELD: Yeah, I appreciate
12 that.

13 JUDGE TOREM: Go ahead,
14 Ms. Reyneveld.

15 MS. REYNEVELD: No, I just said I'll
16 appreciate that and then consider it and then follow up
17 if necessary.

18 JUDGE TOREM: All right. Thank you.
19 Ms. Voelckers and Mr. Aramburu, I want to come to
20 you before we close. But respecting that, I'm already
21 at 12:15 and stretching the parties' allocated time
22 today.

23 Ms. Voelckers, let me hear from you on the
24 disputed issues list.

25 MS. VOELCKERS: Thank you, Your

1 Honor. And it sounds like we'll need to follow up
2 further by the letter that you requested. But I do
3 want to say on the record that we strongly object to
4 the way that the disputed issues list has been
5 published, because it's contrary to Your Honor's
6 previous verbal direction and the fact that the parties
7 spent considerable time trying to meet the Court's
8 direction, submitted issue statements and revised issue
9 statements in response to the direction to look at
10 certain examples, which we did, and mirrored if not
11 identical issue statements that have been used in other
12 adjudications.

13 The applicant had six weeks and did not object at
14 all to the issues that were submitted by any of the
15 parties, and including counsel for the environment's
16 issues, which were actually agreed by -- agreed to by
17 all parties in the last prehearing conference. I'm
18 also concerned about the exclusion of greenhouse gas
19 emissions or any taking of evidence around that given
20 that RCW 80.50.010 requires EFSEC to act in accordance
21 with certain premises, including the need to preserve
22 and protect quality of environment. So I'm concerned
23 that we would be limited on the ability to bring
24 evidence about that and unclear on how we'd be able to
25 argue about that in briefs.

1 And, frankly, just, you know, the fact that the
2 outcome of this is meant to lead to findings of fact
3 and conclusions of law, that was the goal certainly by
4 our team representing the Yakama Nation and, I believe,
5 by others in making good-faith efforts to put issue
6 statements clearly in a way that can be argued
7 succinctly. And I'm concerned that this new list is a
8 step back from clarity in favor of the applicant
9 without any objections or advocacy on their part to do
10 so.

11 JUDGE TOREM: All right. All of
12 those items are noted. I'll simply say that I'm not
13 attempting to deviate from previous guidance but take
14 all of the inputs and work with them. And there's
15 certainly been no -- no quarter given to any other
16 party that's not being given to everybody else. And
17 there's no intent to treat any party -- particularly
18 the applicant -- with any better favor than any
19 other -- any other party, Ms. Voelckers. I'll just say
20 that for the record.

21 All right. Mr. Aramburu, your thoughts on the
22 disputed issues list. And please, I appreciate if
23 you'll keep it at least as short as Ms. Voelckers did.

24 MR. ARAMBURU: Okay. I will
25 associate my -- myself with the comments of

1 Ms. Voelckers and Mr. Harper.

2 In particular, on March 17, we submitted a list of
3 ten disputed issues following your direction. We did
4 not hear objections to those. That's what we've been
5 operating from. And now we're very confused as to
6 whether these issues will be permitted or not. In
7 particular, we are concerned that the issue of the
8 overall scope and scale of this project is now a sub
9 under "Local Attitudes and Opinions."

10 We intend to present testimony on that issue as
11 we've identified in our previous issues submitted on
12 March 17. So I do not see that what you're saying here
13 is going to prohibit that, but -- but that is -- is a
14 matter of concern.

15 And then regarding site restoration,
16 decommissioning, you said a satisfactory offer of
17 proof. I understand that to be, as we've discussed it
18 here, and it's not really an offer of proof, but it is
19 a -- it is a motion before we would be permitted to
20 submit testimony on that issue, particularly the
21 greenhouse gas emissions. So -- so those are my
22 particular concerns that we have now.

23 So I want to -- I want to be brief on that.

24 JUDGE TOREM: Thank you.

25 I want to do -- I want to clarify one thing. You

1 mention the site restoration and decommissioning as
2 limited. You listed that as an issue, and that is
3 above the line of the asterisks. So I want to be
4 clear. Even though there's no sub-bullets underneath
5 that -- I think the formatting compressed things and
6 may have, as Mr. McMahan said earlier with the
7 bulleting, be confusing. But the below issues,
8 anything below those asterisks -- those are the five
9 that I went over from preemption through greenhouse gas
10 emissions -- that would need the offer of proof. Site
11 restoration and decommissioning is definitely in play,
12 and you can offer testimony on that, Mr. Aramburu,
13 without any need to further justify.

14 Does that help?

15 MR. ARAMBURU: Say that once more,
16 please.

17 JUDGE TOREM: The site restoration
18 and decommissioning topic is fully in bounds.

19 MR. ARAMBURU: Okay. I understand
20 that. But the issues that I'm talking about are not
21 site restoration and decommissioning. The SEPA issues,
22 the issue of the scope and scale of the project are not
23 related to site restoration and decommissioning.

24 JUDGE TOREM: I may -- I may have
25 misunderstood what you just said. I thought you

1 mentioned site restoration and decommissioning in the
2 same breadth as to those, but I wanted to be clear.
3 You don't need to justify the relevance of that
4 particular topic. The other ones, I stand by what I
5 said earlier and what's listed in those five bullet
6 points, that those are subject to demonstrations of
7 relevance and the scope of the EFSEC adjudication that
8 any party that wants to prove that I'm wrong on that,
9 file the motion to include it. If necessary, other
10 parties can respond. And then I can, based on your
11 briefing and your justification, make an appropriate
12 ruling.

13 And, again, it may be different than what I've
14 said today, but it stands to be the burden of
15 persuasion if not production as to why that would be
16 relevant and why the council should consider that
17 within the scope of an adjudication.

18 So --

19 MR. ARAMBURU: Okay.

20 JUDGE TOREM: -- I intend to issue
21 a -- I intend to issue a prehearing conference order on
22 Friday, in the late afternoon, likely after I have a
23 conversation with the rest of staff based on how things
24 went today and what I hear from all of you by close of
25 business on May 4th.

1 At this time, I'm not setting another prehearing
2 conference order or Prehearing Conference No. 4. If
3 there are motions to be filed, as I said, elsewhere in
4 the agenda, please move on those quickly and promptly.
5 If there are procedural motions that you know you're
6 going to file, send them in as soon as and file them as
7 soon as possible. We'll set again -- I'll remind you,
8 the June 12th date for initial round of prefiled
9 testimony to give you as much time as possible with the
10 compressed 18-day interval to June 30th for the
11 responses and then the 12-day interval on July 12th for
12 the reply testimony, that will all be captured in
13 writing in the prehearing conference order. I thank
14 you-all for the input today.

15 I want to touch briefly on Item No. 7 and just go
16 quickly around the table and say, if there's something
17 that you thought we were going to cover today that
18 wasn't covered, I want to just note it and then, as
19 needed, schedule that fourth prehearing conference to
20 address those. We just don't have time to address
21 anything else today.

22 Mr. McMahan, was there anything else that the
23 applicant needed addressed in the next little bit of
24 time?

25 MR. McMAHAN: No, Your Honor. Thank

1 you.

2 JUDGE TOREM: Mr. Harper.

3 MR. HARPER: Yes, Your Honor. I
4 listened to the further dialogue about disputed issues.
5 And, Your Honor, I just remain uneasy about the way
6 it's expressed. I wonder if Your Honor would consider
7 adding a clause under Paragraph 5 where you're
8 characterizing the disputed issues list. If you might
9 be willing to state in your next prehearing order
10 that -- that, you know, this list is -- is not intended
11 to be exclusionary and, just as you've explained to me
12 and to the other counsel, that a party may nevertheless
13 seek to introduce testimony that clearly is within the
14 realm of the topics subject to potentially proving up
15 its relevance, it would just make me feel a little bit
16 better, Your Honor, if I understood that this is not
17 meant to be and won't be construed to be an actual bar
18 to the submission of potentially very important
19 evidence.

20 I'll just leave with that, Your Honor. If you
21 would consider that, the County would very much
22 appreciate it.

23 JUDGE TOREM: I have got a
24 three-asterisk note to think about that, Mr. Harper. I
25 appreciate it.

1 MR. HARPER: Thank you, Your Honor.
2 Nothing else.

3 JUDGE TOREM: Ms. Reyneveld. All
4 right.

5 Ms. Reyneveld, anything else that you think we
6 didn't cover today that needs a coverage at a future
7 prehearing conference?

8 MS. REYNEVELD: Well, I think there
9 are some unresolved issues. But nothing further at
10 this time. I think those have been stated on the
11 record. So thank you, Judge.

12 JUDGE TOREM: All right. Thank you.

13 Ms. Voelckers.

14 MS. VOELCKERS: Nothing further
15 today, Your Honor. Thank you.

16 JUDGE TOREM: All right. And,
17 Ms. Voelckers, any -- any timely input from you and the
18 Yakama Nation on the scope of the protected --
19 protective order, I'm happy to take those as you have
20 time after the May 4th close of business for these
21 other issues that we mention on discovery.

22 Turning to you, Mr. Aramburu. Any other topics --
23 Go ahead, Ms. Voelckers.

24 MS. VOELCKERS: So you would not
25 like that addressed in the letter that we're going to

1 need to now submit by Thursday, but you would like --

2 JUDGE TOREM: I'm telling you
3 that --

4 MS. VOELCKERS: -- to address that
5 separately?

6 JUDGE TOREM: -- that protective
7 order is targeted to come out by May 12th. So I don't
8 need it necessarily on May 4th. But some timely -- as
9 you choose to file it and you have time early next week
10 would be more than helpful.

11 MS. VOELCKERS: And you would like
12 that in a motion, not in a letter form?

13 JUDGE TOREM: Oh, no, no, no. Your
14 description on what the protective order should contain
15 doesn't need to be in a motion. It could be. But I
16 think at this point until the order comes out, if you
17 had a motion to amend it, that might be good for motion
18 practice. I'm trying to keep this as informal and
19 unburdensome as possible, if you believe that. But
20 that's why I want to give you more time to think about
21 the protective order item than just essentially 48
22 hours.

23 MS. VOELCKERS: Thank you, Your
24 Honor. We will do as much as we can by Thursday. And
25 appreciate the opportunity to follow up as necessary

1 afterwards.

2 JUDGE TOREM: All right. Thank you.

3 And, Mr. Aramburu, any other items for a future
4 prehearing that weren't thought of or addressed today?

5 MR. ARAMBURU: I think we've had a
6 good discussion today. Thank you for your attention,
7 Mr. Torem.

8 JUDGE TOREM: All right. Thank you,
9 Mr. Aramburu.

10 It is 12:26. I'm going to adjourn the prehearing
11 conference at this time. I want to thank the court
12 reporter for the indulgence of running past what he
13 might have been told this was going to go to 12 and ask
14 if he has any inputs, Mr. Botelho, that you need
15 questions on spelling or otherwise.

16 (Reporter responds to Judge
17 Torem's inquiry.)
18

19 JUDGE TOREM: All right. Reach out
20 to me, sir, if you need to. The staff knows how to get
21 ahold of me if you have any questions that come up when
22 you're creating the transcript.

23 Thank you, all. I appreciate the indulgence of
24 going over another -- I'll get you the prehearing --
25 I'll get you the prehearing conference order hopefully

1 close of business Friday and a protective order a week
2 after that. Thank you, all.

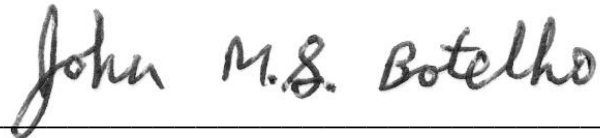
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4 12:27 p.m.)
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