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## Transcript of Proceedings

*August 04, 2023*

### Energy Facility Site Evaluation Council v.

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BEFORE THE ENERGY FACILITY SITE EVALUATION COUNCIL  
)  
In re: )  
)  
HORSE HEAVEN ADJUDICATION )  
)  
)

PREHEARING CONFERENCE

August 4, 2023

Taken Remotely Via Zoom

Reporter: Teri Simons, CCR, RMR, CRR

1 APPEARANCES

2 \*\*ALL PARTIES APPEARING VIA ZOOM\*\*

3  
4 Before Administrative Law Judge Adam Torem

5 For the Applicant:

6 Stoel Rives LLP  
7 Tim.mcmahan@stoel.com  
8 Emily.schimelpfenig@stoel.com

9 For Benton County:

10 Menke Jackson Beyer LLP  
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12 For the Environment:

13 Office of the Washington State  
14 Attorney General  
15 Sarah.reyneveld@atg.wa.gov

16 For the Confederated Tribes and Bands of the Yakama  
17 Nation:

18 Yakama Nation Office of Legal Counsel  
19 shona@yakamanation-olc.org

20 For Tri-Cities C.A.R.E.S.:

21 Law Offices of J. Richard Aramburu  
22 aramburulaw@gmail.com  
23  
24  
25

1 BE IT REMEMBERED that on Friday,  
2 August 4, 2023, before Terilynn Simons, Certified Court  
3 Reporter, CCR, RMR, CRR, CLR;

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

6 <<<<<< >>>>>>

7 HEARING EXAMINER: This is Judge Torem  
8 for the record, and we're going to call together our  
9 fourth prehearing conference order in the matter of Horse  
10 Heaven Wind Farm LLC.

11 There was a notice talked about when we were last  
12 together last week, and it went out earlier this week, if  
13 not yesterday.

14 What I wanted to do today is pick up where we left  
15 off. I think it was on July 25th was our last  
16 conference.

17 The purpose of today was really to talk a little bit  
18 more about the scheduling of evidence, particularly in  
19 light of the order I issued, I think it was Monday  
20 morning, regarding the striking of some of the witness  
21 testimony for Tri-Cities C.A.R.E.S.

22 There was a number of e-mails that came in today,  
23 and, frankly, I have not read the ones that came in  
24 today. It's been one of those days, and I'm just getting  
25 time to do this today.

1           So I'm going to turn to the applicant first, and I  
2 know, Ms. Stavitsky, one of those e-mails was yours, and  
3 it looked like it was about exactly this topic that we  
4 were going to talk about, how to schedule the witnesses,  
5 so I'm trying to find that one now.

6                           MR. MCMAHAN: Thank you, Your Honor.  
7 Tim McMahan here.

8           Ms. Stavitsky is out of office. I do have my  
9 colleague, Emily Schimelpfenig, with me today.

10                           HEARING EXAMINER: Great.

11           So I'm looking at an e-mail, I think, that went  
12 from Ms. Stavitsky back to you on August 3rd, at  
13 9:59 a.m., or thereabouts.

14           Why don't you summarize for the record what your  
15 interactions had been.

16           I think it looks like there was some e-mail  
17 exchanges that go back to Wednesday, August 2nd, that  
18 Ms. Stavitsky sent my way for suggestion, based on  
19 witness availability and how to do things.

20                           MR. MCMAHAN: Yes. So we spent a  
21 fair bit of time-- I would credit Ms. Stavitsky for  
22 this-- a fair bit of time working with all of the  
23 parties to try to identify the witnesses that we would  
24 be calling, the time that would likely be involved with  
25 each of the witnesses, both for original testimony,

1 cross-examination, rebuttal.

2 We group them into a series of groups, including  
3 the first batch was land use, and, Your Honor, I know  
4 you had intended land use to go first, so we grouped the  
5 witnesses together for land use, and then the next group  
6 on the environmental physical impacts wildlife and  
7 habitat, and that constituted most likely a two-day  
8 scenario to move through those witnesses, and then a  
9 third day for visual, a fourth day for other physical  
10 impacts, and then cultural archeological resource  
11 impacts, and that's something we are going to need to  
12 talk about because there is a scheduling availability  
13 issue for one of those witnesses.

14 In any event, we sent the schedule out, I believe  
15 we copied you, Your Honor, and all of the parties, and I  
16 would say it was an early productive exercise, but we  
17 haven't heard back since midweek on whether there were  
18 any changes to the schedule that we-- and information  
19 that we proposed.

20 HEARING EXAMINER: Okay. Let's take  
21 a look at the first acts that you talked about, August  
22 14th, 15th, and 16th.

23 So originally last time we had thought land use  
24 might take one day and then the environmental physical  
25 issues would take two.

1           Sounds like we are expanding land use by a half a  
2           day just to be sure; is that correct?

3                       MR. MCMAHAN: Well, I mean, I tend to  
4           believe we can still get through land use in one day,  
5           but I-- you know, I would be happy to hear from others.

6                       HEARING EXAMINER: Okay. So if that  
7           does happen, we would have the full two days-- well, one  
8           and a half days to get through more of the environmental  
9           and physical pieces.

10           It looks like the carryover on that would be until  
11           Thursday or Friday, the last two days that we certainly  
12           didn't have anything discussed as prearranged for  
13           those-- the end of the second week of hearing.

14           Mr. McMahan, does that sound right for those first  
15           couple of topics?

16                       MR. MCMAHAN: Yes, I believe so.

17                       HEARING EXAMINER: And the tribal  
18           testimony then from the Yakama Nation would be on  
19           Monday, the 21st.

20           From this schedule it looked like the socioeconomic  
21           would be those next two days, and then whatever we need  
22           on the last two topics, cumulative impacts, that's not  
23           already covered in socioeconomic, and then the  
24           decommissioning piece as well.

25           Okay. I'm tracking with that.

1 Anything else the applicant wants me to know on  
2 those items?

3 MR. MCMAHAN: No, Your Honor. Thank  
4 you.

5 HEARING EXAMINER: Let me turn to  
6 Ms. Voelckers next. It looks like she was the next on  
7 the e-mail chain.

8 Ms. Voelckers, anything else to comment,  
9 particularly on anything we need to do on Monday, the  
10 21st, for the Yakama Nation testimony?

11 MS. VOELCKERS: Thank you, Your  
12 Honor.

13 We can-- Shona Voelckers for Yakama Nation.

14 We can accommodate the proposal to have  
15 archaeological and cultural resources all addressed on  
16 Monday.

17 I guess my additional comment is that we'd still  
18 prefer to have the environmental impacts as close  
19 together as possible and to finish the wildlife after  
20 that, but I think given the really helpful clarification  
21 from Mr. McMahan the other day that the applicants is no  
22 longer proposing supplemental testimony from its  
23 witnesses, I would like to suggest that it might be more  
24 helpful to go back to that original list that  
25 Ms. Stavitsky had e-mailed Tuesday that has those time

1 estimates and see if we really need to totally rearrange  
2 or if we can just-- given the clarification, I would  
3 agree with Mr. McMahan that land use probably could  
4 happen in one day, so I don't know that we need to  
5 rearrange the entire schedule looking at that original  
6 comprehensive witness list.

7 We do have other thoughts on that list, but that's  
8 all I have for now in terms of the overall order.

9 HEARING EXAMINER: Okay. Thank you.

10 Ms. Reyneveld, if you're on the line, does counsel  
11 for the environment have any comment on the schedule as  
12 we're talking today?

13 MS. REYNEVELD: We don't. The  
14 schedule as proposed works for counsel for the  
15 environment.

16 HEARING EXAMINER: Okay. Let me turn  
17 back to Benton County.

18 Who is on the line for Benton County? I didn't see  
19 when I was limited on Teams.

20 MS. FOSTER: This is Aziza Foster for  
21 Benton County.

22 HEARING EXAMINER: Ms. Foster, good  
23 afternoon.

24 MS. FOSTER: Good afternoon, Your  
25 Honor.

1 HEARING EXAMINER: Did the  
2 pre-hearing deadline go okay for you?

3 MS. FOSTER: Yes.

4 HEARING EXAMINER: Perfect.

5 All right. What are the County's views on the  
6 schedule as it stands?

7 MS. FOSTER: Yeah, the County, I  
8 guess, has a clarifying question if it may, Your Honor.

9 The County just wanted to know, I guess, the  
10 procedure or what is going to be done if, you know, a  
11 party had submitted direct testimony but then just based  
12 upon the development of the issues didn't anticipate or  
13 intend to call that witness for live testimony.

14 I'll just give an example:

15 Benton County did not intend to call Ms. Cook  
16 (phonetic) for any live testimony, but it then saw  
17 through this witness list that the parties intended to  
18 cross-examine her, so Benton County was just kind of  
19 wondering the procedure on that.

20 HEARING EXAMINER: Well, I will tell  
21 you the procedure would be if that testimony is to be  
22 offered and it's sworn testimony as opposed to public  
23 comment, it's subject to cross-examination.

24 MS. FOSTER: Okay. And on that--  
25 that's what I assumed you would say, Your Honor. We

1 just wanted clarification on that.

2 On that grounds then, yeah, Benton County agrees  
3 with all the statements that have been made in regards  
4 to the order of the schedule.

5 HEARING EXAMINER: Okay. Yeah, and  
6 these hearings, for anybody but the applicant's counsel,  
7 I think, are likely fairly new.

8 There may have been some of you-- I think  
9 Mr. Aramburu has participated in EFSEC hearings before,  
10 but, again, the testimony that's pre-filed hasn't been  
11 admitted into evidence yet and typically is adopted by  
12 the witness verbally, and then after that, when the  
13 witness is sworn, and the testimony is adopted, then  
14 they're tendered for cross-examination by any of the  
15 other parties, and some of you will have  
16 cross-examination estimates of time, and the course of  
17 the questioning may also result in other parties who  
18 didn't think they had something to ask, having a need to  
19 do so or clarify something, and then the redirect.

20 So for the County's purpose, as those witnesses are  
21 produced, they will be cross-examined, and then you  
22 could have some redirect exam with them, so I encourage  
23 in the witness preparation to think about what questions  
24 you might anticipate and anything you want to go over  
25 with the witness on how to be prepared, based on their

1 personal knowledge and the scope of their testimony, to  
2 answer, and if they have questions about being  
3 cross-examined, to give them advice as to what that all  
4 comes to in an administrative hearing.

5 Does that make sense, Ms. Foster?

6 MS. FOSTER: Yes.

7 Thank you, Your Honor.

8 HEARING EXAMINER: And I imagine if  
9 the witness does not appear, it will be difficult, if  
10 not impossible, for them to adopt their testimony under  
11 oath, so then a motion to admit it as a public comment  
12 might be entertained, but otherwise that testimony--  
13 that risk of not coming into the record and being  
14 considered, even though the parties may have had the  
15 council members prepared and had them read it in  
16 advance, they will get an instruction that they can't  
17 consider it, as it won't be part of the record.

18 That's how I would plan to handle any witnesses  
19 that choose not to appear or otherwise are directed to.

20 Their testimony won't be admitted to the record  
21 unless they're there to adopt it and be subject to  
22 cross-exam.

23 All right. Anything else from the County on the  
24 schedule?

25 MS. FOSTER: No.

1 With that helpful clarification, Your Honor, the  
2 County agrees with the schedule as it's been proposed.

3 HEARING EXAMINER: Okay.

4 Mr. Aramburu, how are you today?

5 MR. ARAMBURU: I'm doing well, Your  
6 Honor. Thank you very much.

7 HEARING EXAMINER: All right. I  
8 understand you were out of the office for a few days, so  
9 I hope you got some rest and take the rest of the month  
10 just doing what we're going to be doing best for the  
11 next couple of weeks-

12 MR. ARAMBURU: Ready to go, Your  
13 Honor.

14 I have some comments on the scheduling, and I have  
15 been out of the office.

16 First of all, there seems to be a bit of confusion  
17 about witness testimony, and I understand that witness  
18 testimony will be just as you describe it, Counsel will  
19 present the witness, the witness will adopt the  
20 testimony, be available for cross-examination, and  
21 possibly redirect examination, but I do hope that the  
22 redirect examination is not bringing up new issues.

23 There has been some comment about having live  
24 witnesses presenting supplemental testimony, and as I  
25 understand the proceedings, if there is to be a request

1 for supplemental testimony, that would have to come in  
2 the form of a motion to the examiner.

3 HEARING EXAMINER: Let me stop you  
4 there for just a moment to clarify.

5 I think the only supplemental testimony I was  
6 thinking might be coming in is:

7 one, we talked about last Tuesday some  
8 demonstrative exhibits that Ms. Voelckers has brought  
9 up; and then the question of if Mr. Kobus's deposition  
10 was admitted from the discovery deposition, there was  
11 some discussion by the applicant for supplemental  
12 testimony to flush out anything that might have been  
13 discussed in the discovery deposition or they would have  
14 asked the questions, if you remember that discussion.

15 Let me just go back, before I come back to  
16 Mr. Aramburu, and ask Mr. McMahan to clarify the status  
17 of that from last week.

18 There was some representation here about one of you  
19 speaking, that "Oh, maybe there's not going to be any  
20 supplemental testimony offered."

21 Mr. McMahan, does the applicant have a position on  
22 that today.

23 MR. MCMAHAN: Yes.

24 Thank you, Your Honor, but I if could take one step  
25 back for a second because I might have clouded something

1 at the beginning of this, which is the scheduling issue  
2 for Ms. Ragsdel (phonetic), and she's only available on  
3 Monday, so-- and we talked to the parties about this.

4 We were not going to call Ms. Ragsdel, but others  
5 do plan to call her, so just put a pin in that to  
6 understand that we need to kind of find a way to slip  
7 her in on Monday and then maybe carry on with land use  
8 for part of the second day.

9 I apologize for not bringing that up right out the  
10 outset.

11 Sorry.

12 HEARING EXAMINER: She's only  
13 available Monday, the first day of hearing, August 14th?

14 MR. MCMAHAN: Sorry, the 21st. She  
15 is available the 21st.

16 I need to get my schedule fixed here.

17 HEARING EXAMINER: Okay. When you  
18 said "land use," I went back to the 14th--

19 MR. MCMAHAN: I'm sorry. She is  
20 available to testify only on the 21st. Sorry to clarify  
21 that, just so as we continue along here, I just want to  
22 make sure that that's kept in mind.

23 HEARING EXAMINER: Thank you.

24 Back to the supplemental testimony.

25 MR. MCMAHAN: Thank you, Your Honor.

1 We had proposed last week, I guess it was, that we  
2 would like to have the council have the best information  
3 before them, providing some discrete supplemental  
4 testimony on two issues:

5 One is battery energy storage facilities.

6 The technology and the safety or fire prevention  
7 issues on battery energy storage facilities is actually  
8 evolving right now, and the information in the  
9 deposition is not accurate, in terms of particularly  
10 fire control with battery energy storage facilities, so  
11 I don't want-- I would not want to provide the council  
12 with inaccurate information about how fire-- potential  
13 fire risks on-- a vanishingly small risk of battery  
14 energy storage facility fires, but how those would  
15 potentially be handled.

16 We would like the opportunity to supplement  
17 Mr. Kobus's testimony with accurate information for the  
18 council on how those issues would be resolved.

19 The second issue that was explored in the  
20 deposition related to water resources for the facility.

21 I'm working diligently with Shona on providing her  
22 with some information about the water resource on the  
23 so-called DNR land, and I'm hoping to have that pulled  
24 together to Shona by tomorrow, I hope. I am trying to  
25 get that together for you.

1           In any event, the information in the deposition  
2 needs to be supplemented to have a more accurate  
3 portrayal of water resource information, and we will be  
4 supplying that to EFSEC staff, and we think it would be  
5 best, so that the council has complete and accurate  
6 information, to have that in hand.

7                           HEARING EXAMINER: Okay. I  
8 understand the discrete nature of that.

9           I think that was a long way of saying, yes, we are  
10 going to have some supplemental testimony and exhibits,  
11 correct?

12                           MR. MCMAHAN: That was long-winded  
13 Yes, thank you.

14                           HEARING EXAMINER: It's okay. I'm  
15 usually the one that's doing that, Mr. McMahan.

16           All right. With those two areas-- those both come  
17 out of the Kobus deposition, correct?

18                           MR. MCMAHAN: That is correct.

19           As noted, we don't object to any of these  
20 depositions coming into the record.

21                           HEARING EXAMINER: And I want you to  
22 clarify one thing. When you say "provide the council  
23 accurate information," there's a potential connotation  
24 that any party might take, or I, that Mr. Kobus  
25 testifying under oath provided inaccurate information.

1 I want you to clarify if it was intentional in your  
2 thought, unintentional, or just uninformed, particularly  
3 given the suggestions early on by Mr. Aramburu that he  
4 is the guy that knows everything.

5 MR. MCMAHAN: Thank you.

6 It's that-- on the battery energy storage issue,  
7 the fire risk issues are evolving and have been  
8 evolving, and so what is described in the deposition  
9 about how to deal with fire suppression is no longer  
10 accurate, and I've been reviewing reports from New York,  
11 as of this week even, states that are dealing with new  
12 fire code recommendations for battery energy storage  
13 facilities, so I think it's best to have an accurate  
14 portrait of what those evolving standards are, and Dave  
15 Kobus is very, very much on top of it.

16 He's able to provide supplemental live testimony,  
17 if anybody wants it. I don't think it's necessary, but  
18 we need to clarify that.

19 HEARING EXAMINER: Okay. So that  
20 helps me understand.

21 So at the time of the deposition he provided,  
22 because I haven't read it, the best information he knew  
23 at the time, but now he's willing to stipulate that what  
24 he said is-- through either the evolution of things or  
25 not keeping up exactly on things, it's more accurate to

1 give the information you're suggesting?

2 MR. MCMAHAN: That's correct, Your  
3 Honor. Thank you.

4 HEARING EXAMINER: Okay. So let me  
5 come back to Mr. Aramburu and figure out where we are.

6 I know you just got back into town on the motion to  
7 have Mr. Kobus's deposition admitted.

8 Maybe the easiest way to save us all time is to get  
9 with Mr. McMahan and draft an agreed order that I can  
10 simply sign rather than having to gin up another four  
11 pages, reciting everything that you came to.

12 If there's an agreement on that, submit it with  
13 both your signatures, and if you will represent, without  
14 gathering signatures from the other parties, that they  
15 don't object, sign it, I will take your word for it as  
16 attorneys and officers of the court, and I will just  
17 say, "Great. Here is my signature on an agreed order."

18 That will shortcut that.

19 Mr. Aramburu, with that said, how would you like to  
20 proceed on that scheduling matter?

21 MR. ARAMBURU: I do want to say that  
22 I object to supplemental testimony from Mr. Kobus in the  
23 strongest possible terms.

24 HEARING EXAMINER: All right. I  
25 haven't ruled on that in any possible terms. I am just

1 telling you about the deposition.

2 Let's get the agreement on that in the easiest  
3 possible terms.

4 MR. ARAMBURU: Well, we submitted a  
5 motion just when I got back this afternoon, and  
6 Mr. McMahan indicates there's no objection to the Kobus  
7 deposition becoming a part of the record, so I think  
8 that's a nonissue.

9 It's supplemental testimony that's the issue.

10 HEARING EXAMINER: I haven't gotten  
11 through today's e-mails yet, so I am glad-- I will look  
12 for that, and it should be a pretty easy order then to  
13 note that.

14 MS. VOELCKERS: Your Honor, if I may.  
15 This is Shona Voelckers.

16 HEARING EXAMINER: Yes, ma'am.

17 MS. VOELCKERS: Are you wanting--  
18 because we have our pending motion to supplement the  
19 record as well.

20 Are you wanting just one drafted order between the  
21 parties that grants both of these motions, is that the  
22 request, or just a straightforward draft order?

23 HEARING EXAMINER: Well,  
24 Ms. Voelckers, if your order is not contested by any  
25 other party, that would be a great development at this

1 time.

2 If it is contested by any other party, I am not  
3 aware of that yet.

4 MS. VOELCKERS: Thank you, Your  
5 Honor.

6 I believe Mr. McMahan was clear that Applicant is  
7 not contesting either the Yakama Nation's motion or  
8 Tri-Cities C.A.R.E.S.

9 I am happy to work on that as well.

10 HEARING EXAMINER: If you would be so  
11 kind as to draft an order resolving both those motions  
12 as noncontested, I will sign that on Monday.

13 MR. MCMAHAN: Your Honor, Tim  
14 McMahan, if I may.

15 I appreciate what you're trying to resolve here and  
16 certainly as it relates to the Yakama Nation issues just  
17 stipulated, as far as I'm concerned.

18 I do think Mr. Aramburu and I are far apart on the  
19 content of information that we would like to supplement  
20 to Mr. Kobus's deposition.

21 HEARING EXAMINER: That comes through  
22 loud and clear, Mr. McMahan, but I hear you are not  
23 objecting to the deposition itself.

24 MR. MCMAHAN: Correct.

25 HEARING EXAMINER: I understand what

1 you're asking for supplemental testimony.

2 Once you have that together and the parties know if  
3 they're far apart or not on the substance, that may be  
4 one thing.

5 I understand on the procedure what Mr. Aramburu is  
6 referring to in his strong, strongest possible terms,  
7 opposing just any notion of supplemental testimony.

8 Again, that can't be decided out of context without  
9 exactly what it is to be supplemented and once I've seen  
10 the Kobus deposition as well.

11 If you're not objecting again, as you've said, to  
12 these other motions to add the evidence, you still  
13 preserve the right, of course, Mr. McMahan, to file your  
14 additional clarifications, and then I can make a  
15 separate ruling on those, but I have to get the  
16 underlying stuff in first, and if there's not a fight  
17 about that, I have enough other motions that I need to  
18 rule on still, and I don't want to be delivering them to  
19 everybody on the morning of the 14th.

20 MR. MCMAHAN: Thank you, Your Honor.

21 HEARING EXAMINER: All right.

22 Mr. Aramburu, we are back to you.

23 MR. ARAMBURU: I think I have said my  
24 piece on the supplemental testimony of Mr. Kobus.

25 So do I understand then that there would need to be

1 a motion that would be filed and then you would rule on  
2 the motion for the supplemental testimony?

3 I'm just looking for the procedure.

4 You've heard me on the substance.

5 Just the procedure to be followed.

6 HEARING EXAMINER: All right. I know  
7 there's a motion written and filed from the Yakama  
8 Nation to supplement the record.

9 I thought I understood you to say that just as you  
10 got back today, one such motion for the Kobus deposition  
11 or some other supplement had come in from you.

12 Did I misunderstand the purpose of today's motion?

13 MR. ARAMBURU: No, I do not have a  
14 current motion to supplement the record. I'm responding  
15 to Mr. McMahan's statements today that he intends to  
16 supplement the Kobus deposition with certain  
17 information, and as I understand, the manner of doing  
18 that would be for the applicant to submit a motion to  
19 you that would be ruled upon.

20 HEARING EXAMINER: Correct. Correct,  
21 but we have two things that are going to supplement the  
22 record:

23 One group of evidence from the Yakama Nation, which  
24 is now we've-- unless anybody speaks up, it is  
25 uncontested and there can be an agreed order that

1 Ms. Voelckers has volunteered kindly to submit.

2 I think Ms. Voelckers was also speaking to what she  
3 may have thought, and the same thought that I had, that  
4 there was a pending motion on the Kobus deposition and  
5 that could also be taken care of by her same order, but  
6 apparently you don't have a motion in yet, so my  
7 suggestion to you is you don't need one. You've made it  
8 verbally.

9 Just prepare an agreed order and indicate in it  
10 that you've talked to all the other parties and they've  
11 waived presentation on it, as you would do in any other  
12 court, and I'll sign it Monday, and the Kobus  
13 deposition, as long as it's filed, along with the agreed  
14 order, will be admitted per that order.

15 Is that clear?

16 MR. ARAMBURU: That's fine.

17 We did actually, just when I got back, file a  
18 motion to include the Kobus deposition in the record, so  
19 we just filed that a bit ago.

20 What we will do then is prepare an agreed order  
21 that included the -- will include the Kobus deposition  
22 as a part--

23 HEARING EXAMINER: Okay. Thank you.

24 As far as the other supplementation from  
25 Mr. McMahan, it's not until he files it and you have a

1 brief chance to respond-- depending on when it comes in,  
2 if you could get a quick response in, fantastic.

3 We have another conference next week. I believe  
4 it's Thursday afternoon. If we need to take it up on  
5 the record then, we will, but I'm hoping that by  
6 Thursday afternoon all pending orders will be ruled on  
7 in writing, and we go from there.

8 All right, so, Mr. Aramburu, on the schedule?

9 MR. ARAMBURU: So on the schedule, we  
10 do have testimony from Mr. Simon, and I did indicate--  
11 you're going to have to excuse me from here because the  
12 Blue Angels are now practicing over the top of my office  
13 in downtown Seattle, so excuse me for that.

14 Mr. Simon has indicated that he would be  
15 cross-examined on that part of his testimony that was  
16 not stricken, and as everyone is aware, earlier this  
17 week, Judge Torem, you've authorized us to file a motion  
18 for reconsideration, and we are working on that.

19 It is somewhat of a substantial task, but we intend  
20 to have that to you and the parties by Monday, and that  
21 motion for reconsideration will be to ask you to include  
22 portions of the Crewpensharp & Dunn (phonetic)  
23 testimony, so that will be coming in on Monday.

24 Your ruling on that, and I don't know what it is,  
25 would have some impacts on our current witness list, so

1 I just-- I make that as a note more than anything else.

2 The other thing is I think Mr. Simon and Mr. Pollis  
3 (phonetic) are listed here on the applicant's witness  
4 list as "Other physical impact." I think really both of  
5 them are dealing with the scope and scale of the  
6 project, which is under socioeconomic impacts.

7 I think that testimony really is more related to  
8 that, keeping in mind that some of these witnesses,  
9 Mr. Pollis, for example, does provide comment on visual  
10 issues as well. I expect to cross-examine him on those  
11 issues.

12 I think the principal testimony of both of those  
13 witnesses deals with scope and scale of the project.

14 HEARING EXAMINER: Okay. I would  
15 agree with that as well.

16 As far as your anticipation of how I would rule, of  
17 course the applicant will have a chance to read your  
18 motion for reconsideration and have some input as to if  
19 they think that what you're proposing now falls within  
20 the scope of their expertise and the scope of the  
21 disputed issues.

22 Again, I intend to be-- if the items fall within  
23 disputed issues, it's an easy decision.

24 If they fall more within the scope of their  
25 expertise, that's an easy decision in your favor as

1 well.

2 The remainder of that testimony, and what to do  
3 with it, may be something that we can talk about today  
4 as well, things that are better designated as public  
5 comment as opposed to sworn testimony subject to  
6 cross-examination.

7 MR. ARAMBURU: If that's a question--

8 HEARING EXAMINER: I am just telling  
9 you that's where I'm at.

10 I want to come back to that particular item once  
11 we're done talking about the schedule.

12 It will have some secondary impacts, but we can go  
13 from there.

14 MS. VOELCKERS: Your Honor, if I may  
15 ask a question about the schedule now after hearing this  
16 information?

17 HEARING EXAMINER: Yes, please.

18 MS. VOELCKERS: Shona Voelckers.

19 Apologies for interrupting.

20 So I would appreciate some clarification on two  
21 parts, one of which is directly relevant to the time  
22 estimates here, and that is about witnesses who have  
23 submitted sworn testimony and who have not been  
24 identified for cross-examination by other parties.

25 What I just heard was that they-- you know, if they

1 don't appear for cross-examination and adopt their  
2 testimony, it won't be treated in the same way as other  
3 testimony.

4 I want to make sure that that's not-- I mean, we  
5 have wildlife experts who have submitted testimony, and  
6 we're not calling them ourselves because we understand  
7 this to be for cross-examination.

8 The other parties had the opportunity to call them  
9 and have chosen not to cross-examine them, but they  
10 still need an opportunity to adopt their testimony, is  
11 what I'm hearing.

12 I wanted to clarify that, and if that's the case,  
13 then we need to add them into the schedule before we  
14 move forward because that was not my understanding, that  
15 their testimony would be disallowed simply because the  
16 other parties chose not to cross-examine them.

17 MR. ARAMBURU: That is my  
18 understanding as well.

19 HEARING EXAMINER: Well, I want you  
20 to consider that there's one other elephant in the room  
21 that might want to ask questions, and that would be your  
22 ultimate audience, the EFSEC Council.

23 This is an opportunity to adjudicate, and those  
24 that have participated in the past well know that any  
25 party that presents a witness presents it to the

1 council, and the council may also ask questions.

2 Those questions, as folks may remember from years  
3 past, are sometimes written down and handed to the  
4 judge, and the judge reads them, and some council  
5 members are not shy, and they'll ask their own  
6 questions.

7 They're subject to the same objections as someone  
8 else's questions might be in an evidentiary hearing.

9 Some people question the wisdom of objecting to a  
10 council member's question, but, again, the rules of  
11 evidence are what they are.

12 Ms. Voelckers, that's why I want every witness  
13 appearing in front of the council to adopt their  
14 testimony, and if no other party is going to  
15 cross-examine, I don't have a way of knowing in advance  
16 if a council member says, "Oh, I had a question for  
17 them," particularly for some of your wildlife folks. We  
18 may have an active council member from the Department of  
19 Fish and Wildlife or another interested council member  
20 on some of those issues.

21 I would feel very uncomfortable having to state to  
22 the council or Chair Drew (phonetic) and say, "Oh, I  
23 excused that witness because none of the other parties  
24 had a question."

25 Does that make sense, Ms. Voelckers?

1 MS. VOELCKERS: It does, Your Honor,  
2 and it's really helpful clarification, and we would  
3 certainly welcome questions from the council for our  
4 wildlife experts.

5 So I would like to, you know, state now that we  
6 would like to add them into that schedule.

7 Those are the two that are for me, but maybe other  
8 parties have others, but I would certainly would like  
9 to-- it was not our intention either to not have them  
10 available to the council. We just didn't understand  
11 that to be the way the conversation was.

12 I would like to add them back in for that purpose,  
13 Your Honor.

14 If I may just ask my other question now, even if we  
15 put a pin in it:

16 I heard discussions about motions to supplement the  
17 record or provide supplemental testimony.

18 I think I have voiced this since the very first  
19 prehearing conference, but the Yakama Nation's members  
20 who have testified on cultural impacts likely have  
21 supplemental testimony that they were not comfortable  
22 putting on paper, and so I've asked to preserve their  
23 ability to bring that verbally during the hearing, and I  
24 think I've asked that throughout, but if I need to make  
25 a formal motion now or in writing, I would appreciate

1 that clarification as well.

2 This is for the Yakama members.

3 Ms. Lally's (phonetic) testimony, as indicated in  
4 the list provided by Ms. Stavitsky, would be for the  
5 demonstrative of what's already in her report.

6 HEARING EXAMINER: Yes, and I think  
7 that that matter, the supplemental testimony that's  
8 demonstrative, that PowerPoint presentation you talked  
9 about, and any of the Yakama Nation members who wish to  
10 speak in their language as a supplement to the testimony  
11 they're adopting, I think that's a generally understood  
12 matter that doesn't require a formal motion,  
13 Ms. Voelckers, but let me poll everybody here to see if  
14 they have any concerns, and they can stipulate on the  
15 record of this prehearing conference today that you  
16 don't need to file a supplemental motion in that regard.  
17 Let me start with the applicant.

18 Mr. McMahan, any concerns based on those  
19 supplemental items coming in in native languages that we  
20 may hear in the course of the hearing or those  
21 demonstrative exhibits or maybe even limited  
22 supplemental evidence from the tribal members on their  
23 testimony?

24 Mr. McMahan?

25 MR. MCMAHAN: No, Your Honor, no

1 objection to that.

2 I would say, however, that we are likely to present  
3 some demonstrative evidence ourselves on the land use  
4 issues.

5 HEARING EXAMINER: Understood.  
6 Understood.

7 And those can probably be objected to at the time  
8 by anybody, but as long as they're circulated in advance  
9 to parties so they know what you're trying to  
10 illustrate, that would be helpful for anybody with a  
11 supplemental demonstrative exhibit.

12 Let's me turn next to Ms. Reyneveld.

13 Ms. Reyneveld, as far as the Yakama Nation I posed  
14 to Mr. McMahan, any concerns?

15 MS. REYNEVELD: I don't have any  
16 concerns or objections. Thank you.

17 HEARING EXAMINER: Ms. Foster on the  
18 County's behalf?

19 MS. FOSTER: Thank you, Your Honor.

20 Just for the record, we would reserve on the  
21 applicant presenting demonstrative exhibits, which I  
22 think you understand, but on the question posed as to  
23 the Yakama Nation, we have no objections.

24 HEARING EXAMINER: Excellent.

25 And Mr. Aramburu, any concerns from your end?

1 MR. ARAMBURU: We have no concerns  
2 with respect to Ms. Voelckers' proposal.

3 We do want to be very clear that-- excuse me, I'm  
4 getting the Blue Angels here. They went about 30 feet  
5 over my building.

6 I do want to be heard a bit more on this question  
7 though, the treatment of witnesses who have not-- whose  
8 testimony has not been stricken or not been called for  
9 cross-examination, so I would like to have more  
10 discussion about that.

11 Responding to you on Ms. Voelckers' proposal, no  
12 objection.

13 UNIDENTIFIED SPEAKER: (Inaudible)  
14 There was discussion about the Yakama Tribe may have  
15 some members that might speak in their own (inaudible).  
16 Is there a problem with that? No, there's not.

17 HEARING EXAMINER: I'm sorry, I am  
18 hearing somebody speaking up.

19 Can you identify yourself?

20 All right. The microphone suddenly went muted.

21 I am not sure who else was listening in to this,  
22 participating.

23 If you do unmute and you have something to say,  
24 please identify so I know if it's an appropriate topic  
25 for this conversation and should be on the record.

1 All right. So Ms. Voelckers, I think we have  
2 clarified that you won't need to do a motion of any sort  
3 for supplemental testimony or demonstrative exhibits of  
4 the sort that we've just discussed this afternoon.

5 Do you have anything else on that?

6 MS. VOELCKERS: I do not. Thank you,  
7 Your Honor.

8 MR. MCMAHAN: Your Honor, Tim  
9 McMahan.

10 If I could follow up actually on Ms. Voelckers'  
11 testimony.

12 Just to be very clear on this, from past  
13 experience-- so there will be maybe, I don't know, half  
14 or something of these witnesses who actually won't--  
15 haven't been called to testify yet, as Ms. Voelckers  
16 indicated. There is sworn testimony that is material to  
17 the proceedings for all of us, so I assume that you will  
18 orchestrate a most wonderful process to have them all  
19 sworn in and even if they're not being called on that  
20 date for any further testimony, if you follow what I'm  
21 saying.

22 HEARING EXAMINER: I do.

23 I am sure it will be a wonderful procedure as well,  
24 but we'll try to get as many of them on and off as  
25 quickly as possible.

1           It's virtual, so we are going to try to E-schedule  
2 them ten minutes apart, and we do that either first or  
3 last depending on where your witness availability items  
4 are.

5           If we have a refined proposed schedule, that can be  
6 generally stipulated to based on witness availability,  
7 and we just approve it.

8           If it's all agreed, maybe I could send you some  
9 correspondence saying as much, but we can talk more  
10 formally about the exact nuts and bolts next Thursday.

11           I know that's only a couple days out from hearing,  
12 but it sounds like we are getting really close to having  
13 what we need.

14           Mr. Aramburu, let me turn back to that other topic  
15 again now.

16           For those witnesses who may not be subject to  
17 cross-examination and whose testimony is perhaps better  
18 taken as a public comment, there's a number of community  
19 members whose testimony is proposed by TCC. A few of  
20 them are on the board or a few of them are, by their own  
21 testimony, stating that they represent a larger entity  
22 than just a homeowner or a personal interest in the  
23 project that's not-- you know, not just a public  
24 comment.

25           I indicated that in my order striking the other

1 testimony, that I was going to have another order coming  
2 out diverting some of the proposed testimony away from a  
3 cross-examination situation and putting it into a public  
4 comment status.

5 That's still in a draft form. I haven't identified  
6 each and every witness that I think that should impact.

7 I will get it out to you by Monday, is my goal, so  
8 you will have good notice as you continue to refine the  
9 schedule, those witnesses that TCC is proposing to  
10 sponsor, that I just don't think anybody is going to  
11 have a question of, not even a council member, based on  
12 the nature of what they've said.

13 That's what I'm looking at there.

14 All the other witnesses that are supposed to be  
15 more experts are the ones that are subject to  
16 cross-examination, that if they're not affected by the  
17 order I will issue on Monday, those are the ones that  
18 need to be there to adopt testimony and see if the  
19 council members have any questions for them.

20 Does that help refine your thoughts on  
21 understanding what I'm intending to do?

22 MR. ARAMBURU: At least some of these  
23 witnesses were responding to the footnotes in the second  
24 (inaudible).

25 Excuse me again. Blue Angels over my head.



1 state that they represented a neighborhood association  
2 or served on your board or otherwise were anything but  
3 individual witnesses who just have an opinion, a lay  
4 opinion.

5 I understand, again, that the adjudicative hearing  
6 allows for people to state support or opposition.

7 That's what the statute says, that the intent of  
8 the adjudicative hearing, which is part of adjudication,  
9 requires a public comment hearing, which we have on the  
10 night of Wednesday, August 23rd now.

11 It's not my intent, in that footnote, to say TCC  
12 can name everybody that lives on the street with a view  
13 and they all get to come and offer testimony that they  
14 have to be there to adopt.

15 Most of them, I think, are not going to have any  
16 reason to cross-examine them because it's simply stated  
17 a lay opinion that says, "I don't like it," for whatever  
18 reason.

19 That's public comment. That's not testimony and  
20 adjudicative hearing testimony.

21 Again, my order on Monday, I will read and re-read  
22 all of those-- those that are part of an organization,  
23 great, bring them in, and we can see if anybody has  
24 questions.

25 Still, people may not, but I don't need a motion to

1 strike other parties to enforce who I've put in the  
2 second prehearing conference order.

3 With all of the other items that I've been looking  
4 at, that's been lower on the priority list, but I do  
5 intend to have that order out to you on Monday so you  
6 can see what I meant clearly in that second prehearing  
7 conference order and the footnote, that what you  
8 prepared for them in the exhibits, the council will see,  
9 but I don't want it to take up time during the  
10 adjudicative hearing, even for the adopting of this  
11 witness's testimony, and have them in front of the  
12 council.

13 If they want to be in front of the council, the  
14 time to do that for them is Wednesday, August 23rd,  
15 between 5:30 and hopefully 8:00.

16 If we run later, we run later, but that's where I  
17 would be shifting some of those witnesses.

18 They still get to be evidence, but they won't be  
19 sworn testimony subject to cross-exam.

20 Does that help you understand where I'm coming  
21 from, Mr. Aramburu?

22 MR. ARAMBURU: It does, and I  
23 understand that there were a number of testimonies that  
24 were provided that were of the nature you described;  
25 that is, personal opinions and that kind of thing.

1           There are a number of other testimonies that came  
2 in, for example Benton County Association of Realtors,  
3 Economic Development Council, these other folks who  
4 provided testimony.

5           I think the City of-- Benton City provided  
6 testimony, and I think East Richland did. I don't have  
7 that list in front of me at this point.

8                               HEARING EXAMINER: Those are the  
9 people that exactly responded to what I was looking for,  
10 people that can speak for somebody as a group, and those  
11 folks, I think, just like a chamber of commerce has  
12 participated in the past as an actual party in the  
13 Kitsap Valley project, I remember that personally, they  
14 didn't have a lot of evidence, but they were there and  
15 they were subject to anything they presented being  
16 subject to cross.

17           Those witnesses, Mr. Aramburu, I hope I don't  
18 overlook something, but I don't intend to push them into  
19 a public comment status on my own order, so I think  
20 those folks should be ready to adopt their testimony and  
21 see if none of the other parties have questions, if  
22 someone on the council does.

23           Does that make sense?

24                               MR. ARAMBURU: Well, it was my  
25 understanding that as to those testimonies, for example

1 the Benton County Board of Realtors, and I think it's  
2 the Tri-Counties Board of Realtors, that that person has  
3 provided testimony, there has been no request by the  
4 applicant, or any other party, to cross-examine them, so  
5 we do not understand that they would be subject to  
6 cross-examination.

7 If, however, it is necessary for them to appear, we  
8 can make those arrangements, but there's a number of  
9 those people that fall into that category, and I just  
10 want to make sure our timing addresses that as well.

11 HEARING EXAMINER: You heard what I  
12 said to Ms. Voelckers earlier about making sure that  
13 just because a party doesn't have a listed need for  
14 cross-examination, I want you to respect every member of  
15 this council, including the chair, has a right to ask a  
16 question of any witness during the adjudicative hearing.

17 MR. ARAMBURU: That's understood.

18 HEARING EXAMINER: At a public  
19 comment hearing, we are just listening.

20 At an adjudicative hearing, we are creating  
21 evidence, and there may be questions about the evidence  
22 to make sure that the council understands it fully or  
23 can express further in-depth questions as needed.

24 Okay. Those folks that I don't say, "That's a  
25 public comment, just a personal opinion" in the order on

1 Monday, I will expect that they're put into the new  
2 joint comprehensive witness list and worked into the  
3 timing.

4 I think we should be able to do that quickly--  
5 maybe all of them as a group, as Mr. McMahan suggests,  
6 if they're on similar topics, should be put together,  
7 and maybe within 15 minutes I can swear in the group.

8 I think that will be a little bit more burdensome  
9 on a video setup, depending on where they are gathered,  
10 if they're all on individually, but we'll sort that out,  
11 and I will learn how to do that each day a little  
12 better.

13 We can talk about the schedule.

14 Go ahead, Mr. Aramburu?

15 MR. ARAMBURU: We will make  
16 arrangements for those various parties to, at a  
17 preselected time, be available on video.

18 I mean, these are not parties-- I don't want to say  
19 it's herding cats, but these are people with different  
20 interests and that sort of thing.

21 What we will do is we will contact each one of  
22 these people, attempt to arrange a time by which they  
23 would appear via the Teams video that we have today,  
24 that they would adopt their testimony and be subject to  
25 questions from council members who have questions for

1 them.

2 Is that the procedure we anticipate?

3 HEARING EXAMINER: Yes. That's  
4 perfect.

5 MR. ARAMBURU: Okay. Thank you.  
6 That's a bit of a job, but we'll get to work on it.

7 HEARING EXAMINER: I appreciate it.

8 I know this is a new procedure for everybody, and  
9 if I'm coming off at all, I don't know, in a negative  
10 connotation today, it's not intended.

11 I'm frankly just a bit exhausted after the week  
12 that I've had, and I was looking forward to this at the  
13 end of the week, and it's been great to have a good,  
14 cordial planning conversation with everybody today, so I  
15 just ask the grace to not read anything into any way  
16 that I'm saying anything today.

17 I am not frustrated with any of you, but if you had  
18 been in court today, you might understand that some of  
19 the stuff carries over.

20 With that said, I'm just looking again at  
21 Ms. Stavitsky's list here.

22 It sounds as though we need to address Ms. Ragsdel  
23 as to how that fits in on Monday the 21 st, right,  
24 Mr. McMahan?

25 MR. MCMAHAN: Yes. Thank you. That

1 is correct.

2 We have shared that with the other parties.

3 HEARING EXAMINER: So do you think,  
4 Ms. Voelckers, that with the amount of time estimates  
5 that are there for an hour and a half for Scout to put  
6 on Emily Ragsdel, you will still have all the time you  
7 need for the cultural, historic, and archeological  
8 resource impact testimony?

9 MS. VOELCKERS: I think, Your Honor,  
10 yes, we will still have the time we need to finish  
11 Yakama Nation's cultural impact testimony on the 21st.

12 I don't want to throw a further wrench into the  
13 conversation, but I do want to let you know that I asked  
14 my colleague, Ms. Houston, to step away from this  
15 hearing to see if our wildlife biologists are available  
16 the second week.

17 We had asked them to hold the first week, and so  
18 unless she's able to confirm that quickly, my request is  
19 that we still have the wildlife and habitat testimony on  
20 the 15th and 16th, have the cultural and archaeological  
21 resource impacts on the 21st, and then finish up with  
22 the rest of the impacts.

23 I know I said earlier that I didn't have further  
24 comment, but that's my further comment, is that  
25 understanding now that we need to have Mr. Anderson

1 (phonetic) and Mr. Gonzueles (phonetic) appear and adopt  
2 their testimony, and I know that they are available on  
3 the 15th and 16th, so my request is that we have the  
4 wildlife on those days and then move forward with  
5 Ms. Ragsdel and Yakama Nation's cultural, archeological  
6 impact witnesses on the 21st.

7 HEARING EXAMINER: All right. That  
8 makes sense to me, and I think the parties can work  
9 together based on what we've talked about today and a  
10 little further refinement of the understanding of what  
11 needs to be accomplished during the eight days of  
12 hearing that we have.

13 I am just doing a quick math at the bottom of the  
14 31 approximated hours and how much we just added to that  
15 by the requirement of bringing in those witnesses that  
16 weren't already listed.

17 If I do a rough math, and I hate to do it in  
18 public, but if we have eight days-- if I went with six  
19 hours on the record each day, between 9 and 4:30, which  
20 is tight, that would be 48 hours of hearing time.

21 If we went with five hours per day, we're down to  
22 40 hours, so that seems to be there's enough wiggle room  
23 between 31 hours the parties were originally estimating  
24 in total and perhaps even five hours per day on the  
25 record for eight days gives us 40.

1 Mr. McMahan, do you think we have enough time still  
2 at eight days and a low estimate of five hours, with a  
3 rough day of six hours-- and I realize we have to carve  
4 out a half day on Wednesday the 16th now too, so that  
5 would put us back down to 36 or 40 plus.

6 Mr. McMahan, with that thought, do you think that  
7 this witness list might grow beyond 36 hours?

8 MR. MCMAHAN: I'm going to trust your  
9 math.

10 I don't think so, but who knows?

11 I feel pretty secure in the list that we put  
12 together and in general estimates, so yeah, I'm  
13 comfortable with that.

14 HEARING EXAMINER: Any other party  
15 think that, based on the discussions today, we can't  
16 still accomplish what everybody intends in the hours I'm  
17 estimating of the eight-- seven and a half days we have?

18 Ms. Foster?

19 MS. FOSTER: Thank you, Your Honor.

20 No, I think the time estimate is fine.

21 I think I still would like to note though that  
22 Benton County did anticipate to cross-examine Leslie  
23 Mclain (phonetic) under-- on the days that we discuss  
24 site restoration and decommissioning, so that, in  
25 theory, could take some time out of the land use topic,

1 but that's another discussion that we have been having  
2 with Scout back and forth. I just wanted to note that.

3 HEARING EXAMINER: Okay. Understood.

4 Ms. Reyneveld, any concerns about the timing that  
5 we've got here?

6 MS. REYNEVELD: No, I don't have  
7 concerns. Thank you, Judge.

8 HEARING EXAMINER: And I know that  
9 you have some other plans next week, and we've, by  
10 splicing off the hearing days, helped out with those  
11 concerns.

12 Are you going to be available or intending to  
13 participate in the final prehearing conference when we  
14 nail down the schedule even a little further?

15 MS. REYNEVELD: Yes, I will be  
16 planning to participate.

17 Again, I appreciate the accommodations from  
18 yourself and the parties.

19 HEARING EXAMINER: It was a joint  
20 motion, was easy to approve.

21 MS. REYNEVELD: Thank you.

22 HEARING EXAMINER: By the time you  
23 get back, you'll say, "Mahalo," right?

24 MS. REYNEVELD: I will. That's how  
25 I'll start the hearing.

1 HEARING EXAMINER: Excellent.

2 All right. Let me turn then to Ms. Voelckers.

3 Any other thoughts or concerns about the timing,  
4 assuming again the adjustment on the individual witness  
5 days?

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

8 The only other concern I have or just want to state  
9 is that if-- I'm concerned that the 23rd is going to be  
10 a really long day for everyone, but especially for our  
11 council, so I propose that if things are moving along  
12 well, in terms of timing, that the group would consider  
13 whether or not we should make the 23rd a shorter day  
14 than a full day, to give everyone a chance to have that  
15 break before the public hearing.

16 I think we've all discussed, I think, as a group,  
17 that we are trying to be as conservative as possible  
18 with these estimates, and certainly there might be some  
19 overlap in questions where some of us wouldn't take the  
20 time that we had planned to take.

21 I'm just wanting to say that feels like it's going  
22 to be a really long day, even though it's a couple weeks  
23 away, and a long week, so this is my pitch that we try  
24 to build in flexibility, if we can.

25 HEARING EXAMINER: We will.

1           If I had my camera on, I would say that you were  
2 reading my notes, but that was my next thing after I was  
3 going to ask Mr. Aramburu about the timing, so thank you  
4 for thinking like a judge on that and trying to have  
5 some merciful time for not only the council but for all  
6 of us to get a break before the evening on August 23rd.

7           I appreciate that, and I think that's a great thing  
8 to try to build in, or at least if we can eliminate the  
9 afternoon session on the 23rd, everybody can get a  
10 little bit of rest and respite.

11           We'll need it by then.

12           If not, at least try to cut things off maybe at  
13 3:00 so folks can get out and have some sustenance  
14 before what could be a longer public comment hearing  
15 than is already anticipated.

16           Mr. Aramburu, anything else on the schedule on the  
17 estimate time of 31 hours and maybe cutting four hours  
18 off again on the 23rd now and still getting it all done?

19                   MR. ARAMBURU: I guess I do have some  
20 concerns principally, I think, due to the idea that a  
21 number of our witnesses, in particular, will need to  
22 appear and essentially adopt their testimony.

23           We do have, for example, I think it's three  
24 economic impact property value witnesses that were not  
25 identified for cross-examination.

1           They have substantive testimony.

2           I am more than happy to arrange for them to come,  
3 but I think as you approach the council, they should  
4 be-- I don't want to put it quite this way, but reminded  
5 that, for example, Ms. Sanders' testimony, that we  
6 provided, which is regarding economic impact, the  
7 applicant has chosen not to cross-examine on that  
8 subject matter, but the council members will need to  
9 understand that that's testimony that they will need to  
10 read, even though the witness may do nothing other than  
11 come up and testify that this is their testimony and  
12 open for any questions.

13           I think that in that regard there's also some-- the  
14 Benton County fire chief has provided testimony here,  
15 and there's no indication that he is a person that would  
16 be cross-examined.

17           There are a number of people that fall into that  
18 category that are not strictly residents.

19           I am anticipating some back and forth time issues  
20 there, so I have not thought closely about it, but I do  
21 want to kind of reserve on that as we try to fit in all  
22 these people.

23                           HEARING EXAMINER: No, those are all  
24 good concerns, and of course the council members will be  
25 expected to have read testimony ahead of each witness,

1 and, again, that letter that I have etched out to the  
2 council members, looking at-- yeah, one of the things  
3 that's on that list is to understand that process of  
4 reading all the testimony in advance and particularly  
5 reviewing the night before each of the witnesses that  
6 they will be hearing and have a chance to cross-examine  
7 the next day.

8 That's well taken, Mr. Aramburu, and certainly in  
9 the recommendation letter.

10 You should have a copy of that letter again on  
11 Monday morning to, as I promised, give me any further  
12 input in case you think I've left out for the council  
13 members that-- they should receive this like the middle  
14 of next week, I'm hoping.

15 If I get it to you Monday, we'll have your  
16 responses by Tuesday and any edits.

17 I will send it to you in the form of a Word  
18 document, so if it's easy for you to just resubmit it  
19 and say, "This is our party's edits"-- again, I don't  
20 want track changes that say I've made a grammatical  
21 error.

22 I'm looking for like comment boxes that would say,  
23 "Hey, judge, can you add this in," and we'll go from  
24 there.

25 EFSEC staff is pretty good at making sure that I

1 don't have any grammatical things, but once they take a  
2 look at it on Monday morning, we'll get it shipped out  
3 to you and look for your comments and say, "Oh, judge,  
4 what about this? This would be an important thing for a  
5 council member to know," especially if all of their  
6 first experience, like some of you, being in an  
7 adjudicative hearing of this magnitude, let alone just  
8 any EFSEC hearing-- so thanks, Mr. Aramburu, those are  
9 good points, and I would expect that they might have  
10 some questions for those members, like the fire chief,  
11 or on the economic impact, even if nobody else does.

12 Those are matters of concern that I think have come  
13 up, not in this case but just in other questions and  
14 comments I've heard council members say at monthly  
15 meetings, and so I know that they're not afraid to ask a  
16 question in general, and in this adjudication it should  
17 be a little more focused.

18 All right. What I think we'll do is ask that the  
19 parties go back and take this joint comprehensive  
20 witness list, and I appreciate all of the timing here,  
21 if we can now build it into a general schedule that has  
22 times that we might anticipate each witness on top of  
23 just their estimates for cross-exam, so we might know  
24 where a break should be taken.

25 I am looking, for instance, at just the first day

1 with Ms. Mclain, Mr. Went (phonetic), and Ms. Cook.

2 If we can give them a general time-- it looks like  
3 Ms. Mclain will take up most of the morning and some of  
4 the afternoon, depending on when the lunch break is.

5 I think we talked about an 8:30 a.m. housekeeping  
6 session that we won't need every day, but then going to  
7 9:00 a.m. to 4, and some days stretching that out to  
8 4:30.

9 If we target a lunch break somewhere in the noon  
10 hour, I would imagine that Ms. Mclain would then be 9 to  
11 noon and with the remaining one and three-quarters hours  
12 would be, say, 1 to 2:30.

13 That makes it hard to get Mr. Went and Ms. Cook in  
14 on that land use consistency. That's why you've asked  
15 for a day and a half, so it might be that Ms. Cook is  
16 scheduled on the second day, and we leave Mr. Went  
17 perhaps from 2:30 to 4 with a provision that he be  
18 available if we need him the next morning.

19 Mr. McMahan, does that make sense what I'm  
20 suggesting, that you give me basic time estimates?

21 So just in case Ms. Mclain is only available in the  
22 afternoon that day, that makes it harder, but if she's  
23 available in the morning and only on that day-- not  
24 Ms. Mclain, but the other one I am thinking of for next  
25 week.

1 But you get the general idea, Mr. McMahan, of what  
2 I'm asking to be put together for the next version of  
3 this?

4 MR. MCMAHAN: Yes, thank you, and  
5 Ms. Schimelpfenig moments ago just volunteered to do  
6 that, take first shot at it and circulate.

7 HEARING EXAMINER: Based on the other  
8 questions of where these other witnesses that weren't in  
9 the original estimates might be, I don't know if the  
10 parties want to propose a spot on the schedule, if it's  
11 not first thing in the morning or otherwise, that a  
12 group of witnesses-- maybe a half hour time slot for  
13 taking adoption of testimony of, call it, uncontested  
14 witnesses by the parties, but making them available to  
15 the council. That might be another block of time that  
16 Ms. Schimelpfenig could work on with the parties to say  
17 what day is best.

18 Even if it's kind of off topic, because folks are  
19 not available as Mr. Aramburu had said, let's have some  
20 latitude on saying, "This topic would be taken up on day  
21 four or day six," whatever it is, "But this witness, who  
22 no one else anticipated cross-examining is here today  
23 for the council to ask any questions as they adopt their  
24 testimony."

25 I think that would be fine.

1           If they don't have any questions, it's a quick on  
2 and off. If they do have questions, they'll have  
3 notice, "This was the witness on the schedule today,  
4 even though it's slightly off topic from today's topic,"  
5 but we go from there.

6           All right. I don't have a lot more for today's  
7 agenda, other than picking up where we left off last  
8 Tuesday on the scheduling question.

9           If there were other topics that I said were going  
10 to be today last Tuesday, I want to go around the room  
11 and see if there's something that I told the party I  
12 would take up that I'm overlooking today.

13           Otherwise, we may be done by 4:30.

14           Mr. McMahan, anything else the applicant wants me  
15 to cover today?

16                           MR. MCMAHAN: No, Your Honor. Thank  
17 you.

18                           HEARING EXAMINER: Ms. Foster,  
19 anything else from the County?

20                           MS. FOSTER: Not necessarily a topic,  
21 Your Honor, but I do think I want to ask one clarifying  
22 question.

23           It seems as though the applicant has acknowledged  
24 that there won't be live testimony and that it will just  
25 be cross-examination and direct testimony-- I'm sorry,

1 and redirect testimony, so I think if I'm correct, that  
2 means, for example, for Ms. Mclain, that one hour  
3 estimate from Scout, we can remove that from the time  
4 estimate.

5 I just want to clarify that point.

6 HEARING EXAMINER: Mr. McMahan, can  
7 you respond to that?

8 MR. MCMAHAN: Maybe.

9 I mean, we will-- Ms. Mclain will, of course, be  
10 sworn in and will then be open and available to any  
11 questioning from the parties.

12 We built in one hour just for redirect, frankly,  
13 just to have kind of a good time count here.

14 HEARING EXAMINER: And I'm looking at  
15 the footnote, Roman Numeral little one, that comes on a  
16 couple of those witnesses, including Ms. Mclain, and I  
17 think that's what Ms. Foster is asking about.

18 "Scout may offer additional live testimony from  
19 four of your witnesses to respond to points."

20 MR. MCMAHAN: Yeah. So first of all  
21 I want to be clear that we are not suggesting  
22 supplemental testimony on the original direct testimony  
23 for witnesses who were sworn in, you know, at the  
24 beginning of this process.

25 But the intention is just to make sure, as I say,

1 from a timing standpoint, that we're able to build into  
2 the schedule a time for us to redirect, for example, on  
3 Ms. McClain, because she's going to be facing some  
4 considerable cross-examination, and I anticipate some  
5 redirect.

6 HEARING EXAMINER: All right. And  
7 that makes sense, so long as it's within the scope of  
8 the original testimony and within the scope of cross--

9 MR. MCMAHAN: Yes.

10 HEARING EXAMINER: You have been in  
11 litigation long enough to know that rule.

12 MR. MCMAHAN: Yes.

13 HEARING EXAMINER: And I think  
14 Mr. Aramburu would quickly tell us that any of this  
15 attempt to expand the record on the day of the hearing  
16 is going to be objected to, and he can expect a  
17 favorable ruling on that. We have enough to cover.

18 I think the only other question is that  
19 supplemental testimony from Mr. Kobus based on what is  
20 there in the deposition.

21 And it's within the scope, I think, that you have  
22 mentioned today about the battery energy storage issues  
23 and the other water resources questions.

24 Is that correct, Mr. McMahan?

25 MR. MCMAHAN: Correct.

1 HEARING EXAMINER: All right. I am  
2 looking back down the list to see where--

3 MS. VOELCKERS: Your Honor, this is  
4 Shona Voelckers, if I could ask one more clarifying  
5 question about Ms. Mclain's testimony.

6 HEARING EXAMINER: Yes.

7 MS. VOELCKERS: Thank you. I have  
8 also been drafting up a new list, so I'm happy to  
9 circulate that as well from my notes.

10 To that end, I think it would be helpful to clarify  
11 if there are any concerns with Benton County's request  
12 to call Ms. Mclain later in the hearing. I think that's  
13 also going to lead to less time on that first day  
14 because Benton County, and that's under another footnote  
15 there, Footnote No. 2, intends to cross-examine her on  
16 site restoration and decommissioning, but that was not  
17 included down in the list itself.

18 We would just like to clarify that part as well, in  
19 terms of timing, if we really need 4.75 hours for  
20 Ms. Mclain that first day or if some of that should be  
21 reserved for later testimony on site restoration and  
22 decommissioning.

23 HEARING EXAMINER: I agree,  
24 Ms. Voelckers, that I only see her name listed on that  
25 comprehensive exhibit list on that land use consistency

1 topic and on that particular day that we are talking  
2 about.

3 It sounds, from Footnote, at the end, No. 2, her  
4 name should appear twice on the list, once for the land  
5 use topic and once for those other items that Benton  
6 County wants to cross-examine on.

7 Mr. McMahan, is it possible that she be available  
8 on multiple days of the hearing, given that concern?

9 MR. MCMAHAN: I will be meeting with  
10 her Monday at noon, and I will talk about that with her.

11 Yeah, I mean, we were just trying to follow the  
12 list that Your Honor had created, and there weren't  
13 witnesses that really showed up specifically as to site  
14 restoration and decommissioning, and there is some  
15 testimony from her on those topics, and I think there  
16 was some limited response from Mr. Went, but-- and it is  
17 limited, but we will make her available. I'm sure she  
18 will be happy about that.

19 HEARING EXAMINER: Well, she will get  
20 to see our bright shining faces twice, and maybe she  
21 will figure out if one of my ties is something she  
22 likes. Who knows?

23 MR. MCMAHAN: I will take it up with  
24 her.

25 HEARING EXAMINER: Okay. I just

1 think that that makes perfect sense from the County's  
2 perspective and what Ms. Voelckers is saying, so it  
3 could free up some time there, but it will shift it  
4 around to another day.

5 Again, keeping in mind that we are going to try to  
6 take Wednesday, August 23rd, as a lighter day in the  
7 afternoon, that would be perfect.

8 All right. Ms. Voelckers, let me come back to you  
9 and see if there are any other topics, besides what you  
10 just brought up, that you wanted to have addressed  
11 today.

12 MS. VOELCKERS: Thank you, Your  
13 Honor.

14 I don't have anything else that-- for the hearing  
15 today.

16 I think the rest of my follow-up can be with the  
17 rest of the parties in terms of circulating this updated  
18 list and working out the finer points on it.

19 HEARING EXAMINER: Great.

20 Ms. Reyneveld, any other topics that you needed  
21 brought up today?

22 MS. REYNEVELD: I think I mentioned  
23 at our last conference that our expert, Mr. McGyver  
24 (phonetic), might want to clarify his responses to a few  
25 questions in response to the deposition of Mr. Watson,

1 and it's my understanding that if he is going to  
2 supplement, it would be a brief supplement, but that you  
3 would like a motion for leave for that or what is the  
4 specific procedure?

5 HEARING EXAMINER: On that question,  
6 why don't you check what it is he's responding to and  
7 which parties took that deposition, because, again, I  
8 haven't seen that deposition, and check with them if  
9 they have real concerns about him, whatever it is you  
10 think he needs to supplement, and if not, we can do it  
11 one of two ways:

12 We can do it by stipulation on the record if all  
13 parties say, "We anticipate Mr. McGyver needs to clarify  
14 X or Y."

15 We can do that and talk about it next week and try  
16 to avoid you having to file a motion.

17 If it's something that we need a "He's going to be  
18 reading from a script or something that comes in," then  
19 I would anticipate that you would want to see if you can  
20 get an agreed order, just like we talked about for some  
21 of the other potential supplements.

22 MS. REYNEVELD: Okay. That makes  
23 sense.

24 I can confer with Yakama Nation and the other  
25 parties, and I'll come kind of prepared to discuss at

1 our next prehearing conference.

2 HEARING EXAMINER: And I think the  
3 other thing to build into the schedule, much as Scout  
4 Clean Energy had some time for Ms. McLain, maybe,  
5 depending on how much time you think Mr. McGyver is  
6 going to need for supplementing-- if it's ten minutes,  
7 that is one thing, if it's an hour, it's something else  
8 that should be listed on the right-hand side there with  
9 a time estimate or see if you need to do that redirect  
10 that Mr. McMahan is suggesting so he could clarify  
11 things.

12 MS. REYNEVELD: Okay.

13 It was my understanding from our last conference,  
14 Judge, that you preferred me to supplement the record  
15 through a written supplement.

16 Do you-- are you now preferring that Mr. McGyver  
17 supplement verbally?

18 HEARING EXAMINER: No. I am  
19 responding to what you said.

20 He has pre-filed testimony, but then you said he  
21 would be responding to clarifications from a deposition,  
22 and that deposition, again, is not in the record, so I  
23 guess I was interpreting that he would be responding to  
24 cross-examination questions based on his deposition, and  
25 then you would have to then supplement and clarify.

1           If he has supplemental testimony that wasn't  
2 included in what he pre-filed, then it should be in  
3 writing, and, again, depending on what it is, the Yakama  
4 Nation and the other parties may stipulate that it's  
5 agreed that that's a logical supplement so that we have  
6 the best possible record, similar to what Mr. McMahan  
7 was representing about the evolving battery energy  
8 storage, perhaps after the deposition and the pre-filed  
9 testimony, there's new and better information-- if it's  
10 in that manner, I'm guessing it will be generally  
11 agreed.

12           Ms. Voelckers, with that description, it sounds  
13 like you're the party that took the deposition, is what  
14 Ms. Reyneveld is asking for something that might be  
15 another agreed order?

16                                   MS. VOELCKERS: Thank you, Your  
17 Honor.

18           Yes, and actually our preference would be for this  
19 to happen before the prehearing briefs are due because I  
20 understand it to be a change to what's already been  
21 filed, and it shows that we're all referencing the most  
22 accurate testimony.

23           Our preference is that we would just work with  
24 Ms. Reyneveld and the other parties for a stipulated  
25 supplemental testimony that comes in writing early next

1 week so we can all have it and also so that we don't  
2 need to spend unnecessary time going over it in the  
3 hearing itself.

4 HEARING EXAMINER: All right. So  
5 Ms. Reyneveld, it sounds like you have a potential  
6 solution that's less burdensome than filing something  
7 for the judge, wait for other parties to respond, and  
8 then get an order.

9 Does that work for you?

10 MS. REYNEVELD: Yes, it does.

11 Thank you.

12 HEARING EXAMINER: All right. Sounds  
13 like with everybody so far there is no additional  
14 topics.

15 Mr. Aramburu, other than the Blue Angels, any  
16 additional topics?

17 MR. ARAMBURU: They left us alone at  
18 least for a while.

19 There are outstanding responses that we have, I  
20 think two or three motions that have been filed, and  
21 we're going to be working on those this weekend and get  
22 those to you, so there's those outstanding issues.

23 Again, with respect to the Kobus testimony or  
24 supplemental testimony, we still believe that should be  
25 a motion-by-motion, and we have a chance to respond to

1 that motion.

2 Those are our concerns.

3 I think everything else has been covered, and we  
4 are going to be supplying the parties with a list of the  
5 witnesses who submitted testimony that were not-- that  
6 was not personal opinions, a list of those people and  
7 when they would be available to testify.

8 HEARING EXAMINER: Excellent.

9 On that particular list, when you circulate it, if  
10 you will make sure I am on the e-mail list, I would love  
11 to have a look over everyone's shoulder on that  
12 particular topic.

13 MR. MCMAHAN: That would be fine.  
14 We'll circulate it to you as well.

15 HEARING EXAMINER: All right. Thank  
16 you.

17 Mr. McMahan, will you clarify for Mr. Aramburu that  
18 that's your intent, to get that supplemental testimony  
19 together on the water rights, and the battery energy  
20 storage system, and file a motion to add that to  
21 Mr. Kobus's time?

22 MR. MCMAHAN: To add it to his time?  
23 I am not sure what you mean.

24 We will be filing a motion to supplement the  
25 testimony in the deposition, and I will endeavor to have

1 that on Monday morning.

2 HEARING EXAMINER: Well, what I'm  
3 suggesting is that Mr. Kobus will, at some point, adopt  
4 that supplemental testimony or be called for  
5 cross-examination.

6 I don't see his name anywhere on the current list  
7 of witnesses.

8 MR. MCMAHAN: We will be happy to  
9 provide him as a live witness and subject to  
10 cross-examination on these narrow issues, absolutely.

11 HEARING EXAMINER: All right. And--  
12 you figure out what way works best.

13 Again, on those narrow topics, you work with  
14 Mr. Aramburu to figure out, once he adopts those, what,  
15 if any, cross-exam might occur, and once the council,  
16 again, reads his deposition, the discovery deposition,  
17 they may also have some questions, depending on what  
18 Mr. Aramburu asked and what he answered.

19 MR. MCMAHAN: Agreed. Thank you.

20 HEARING EXAMINER: Okay. I think  
21 we've gone around the room.

22 Does anybody else have anything before we adjourn  
23 today's prehearing conference?

24 (Nothing stated.)

25 HEARING EXAMINER: All right.

1 Hearing none, I think today the quick summary is just we  
2 talked about scheduling.

3 I don't know-- the administrative procedures wants  
4 me to have a preconference order for every time we have  
5 one of these.

6 All I'm intending to do is issue a one-page, "We  
7 talked about scheduling, and we are going to get  
8 together again next week on the 10th of August, as  
9 previously discussed, starting at 2:00."

10 I don't know necessarily that we need a whole lot  
11 of time, other than to confirm the refinements of the  
12 schedule.

13 Are there any other agenda items that parties would  
14 like for next Thursday at 2:00 on the 10th?

15 Mr. McMahan, do you anticipate anything but a  
16 refined schedule?

17 MR. MCMAHAN: No, Your Honor. Thank  
18 you.

19 HEARING EXAMINER: Ms. Foster, do you  
20 anticipate anything else, besides that?

21 MS. FOSTER: No, Your Honor. Thank  
22 you.

23 HEARING EXAMINER: Mr. Aramburu, I am  
24 going to go out of order.

25 Do you have any other items?

1 MR. ARAMBURU: Nothing other than  
2 what I've discussed today during the conference.

3 HEARING EXAMINER: Okay. We'll have  
4 kind of a round-robin at the end of next Thursday, but  
5 if it's just refining the schedule, it might be  
6 mercifully brief.

7 Ms. Voelckers, anything besides refining the  
8 schedule on August 10th?

9 MS. VOELCKERS: Thank you, Your  
10 Honor.

11 We have an outstanding discovery request to the  
12 applicant related to the water for the project, and so  
13 depending on how that progresses, as well as the  
14 potential that that would come in instead through new  
15 direct testimony, that may be a topic that we need to  
16 discuss on Thursday.

17 I don't know at this time if that potentially is  
18 resolved.

19 HEARING EXAMINER: Okay. I've made a  
20 note of that.

21 Ms. Reyneveld, any other topics you might think of  
22 for next Thursday?

23 I guess it would be almost morning by the time we  
24 get to you.

25 MS. REYNEVELD: No, Your Honor.

1 Thank you.

2 HEARING EXAMINER: Okay. I don't  
3 have anything else for today, and hearing that none of  
4 the other parties do, I'll be talking to you next  
5 Thursday at 2:00.

6 We'll refine the schedule, we will see where the  
7 Yakama discovery request is with the applicant on water  
8 issues, and as I say, hopefully Monday and Tuesday  
9 you'll see a lot of the other orders that are still in  
10 the queue come out to you.

11 Thank you all for your time and consideration.

12 We are going to adjourn the prehearing conference  
13 at 4:40, and I don't know if we had a court reporter or  
14 not, but we have the audio and video recordings through  
15 Teams.

16 Thank you all. Have a great weekend.

17 (Hearing adjourned at 4:40 p.m.)

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25

1 STATE OF WASHINGTON ) I, Terilynn Simons, CCR, RMR, CRR  
2 ) ss a certified court reporter  
3 County of Pierce ) in the State of Washington, do  
4 hereby certify:

5 That the foregoing transcript of the PREHEARING  
6 CONFERENCE was taken before me and completed on  
7 August 4, 2023, and thereafter was transcribed under my  
8 direction;

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

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

15 IN WITNESS WHEREOF, I have hereunto set my signature on  
16 the 6th day of August, 2023.



17 Terilynn Simons, CCR, RMR, CRR  
18 Certified Court Reporter No. 2047  
19 (Certification expires 07/07/24)  
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22  
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