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July 03, 2023

Energy Facility Site Evaluation Council v.

EF-210011

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APPEARANCES

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Judge Adam Torem

Lisa Masengale
Alex Shiley

J. Richard Aramburu, Tri Cities Cares

Applicant Horse Heaven Wind Farm, LLC, Willa Perlmutter,
Ariel Stavitsky, Dave Kobus

Benton County, Aziza Foster

Yakama Nation, Jessica Houston

Counsel for the Environment, Sarah Reyneveld

1 BE IT REMEMBERED that on
2 Monday, July 3, 2023, via Zoom, at 3:20 p.m., before
3 Christy Sheppard, Certified Court Reporter, CCR, RPR;
4 WHEREUPON, the following proceedings
5 were had, to wit:

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

8
9 JUDGE TOREM: Good afternoon everyone.
10 This is Judge Torem in the matter of the Horse Heaven
11 Wind application. Today's date is July 3rd, 2023. It's
12 now 3:20 in the afternoon, on a nice Monday afternoon.

13 We have one issue in front of us today. There's a
14 motion to compel the testimony of Scout Clean Energy's
15 Dave Kobus that was filed on June 23rd by intervenor Tri
16 Cities Cares and Mr. Aramburu is on the line to represent
17 for that purpose.

18 Also on the line for the Applicant, who are opposing
19 the motion to compel and the accompanying letter -- or
20 the request for sanctions from TCC. We have Willa
21 Perlmutter. We have established she's accompanied today
22 by Ariel Stavitsky and Dave Kobus of Scout Clean Energy.

23 We have other parties on the line that are not
24 necessarily participating in the motion itself but are
25 listening in. From Benton County we have attorney Aziza

1 Foster on the line. Counsel for the Environment Sarah
2 Reyneveld is on the line. And on behalf of the Yakama
3 Nation we have Jessica Houston, another attorney from
4 their Office of Counsel. That's all the parties that we
5 need.

6 For the public listening in today, as was indicated
7 in the notice, there's not going to be an opportunity for
8 public comment. This is strictly a procedural matter and
9 a discovery issue that's come to my attention that needs
10 to be resolved hopefully today, and whatever ruling I
11 might come to I'm hoping to reduce to a short, written
12 order that's likely to be published -- well tomorrow is a
13 holiday, July 4th, so likely on the 5th.

14 Mr. Aramburu, again, you filed your motion on June
15 23rd. I have the applicant's opposition that was filed
16 on June 28th, I believe it was, and then you filed a
17 reply shortly before this conference this afternoon.

18 Can you summarize quickly for us so we are all on
19 the same page in a few words what it is you are seeking.

20 MR. ARAMBURU: Our motion -- just a
21 second. We are having some computer difficulties here.
22 Pardon me. We are having some trouble hearing the other
23 parties.

24 So the summary of the motion, it's in front of all
25 the parties, and it does not need a lot of additional

1 work. We believe that Mr. Kobus' testimony is relevant
2 to the proceedings here; that his deposition is
3 appropriate to be taken; that due to the lengthy refusal
4 to make Mr. Kobus available for the deposition sanctions
5 should be ordered, and because of the late filed motion
6 for protective order, which should be denied, costs and
7 expenses related to that should be awarded as well.

8 And then, in addition, we have the procedural
9 aspects of the motion itself -- of the proceeding itself.
10 We have asked that Mr. Kobus be made available at a time
11 convenient to TCC counsel, which is getting to be a
12 problem because of the testimony requirements, and we
13 have some reasonable period of time to use his deposition
14 for purposes of preparing testimony during the course of
15 the hearings.

16 So everybody has read this. I don't know if you
17 want anything more.

18 JUDGE TOREM: You know what, that will
19 be fine, Mr. Aramburu. I just wanted to get us on the
20 same page as to the relief you are seeking, and then I
21 will ask the Applicant to, again, state where they are
22 willing to grant that relief without me standing in.

23 I understand there was a question of scope of the
24 deposition and then opposition to the sanctions. So, Ms.
25 Perlmutter, in the same level of detail as Mr. Aramburu

1 just provided, if you can summarize the Applicant's
2 position and where I'm not needed and perhaps where I am
3 on this.

4 MS. PERLMUTTER: Thanks so much, Your
5 Honor. At the outset I would like to note that I was not
6 served with the reply brief that Mr. Aramburu apparently
7 filed this morning. Ms. Stavitsky sent it on to me just
8 about an hour ago, so I had no ideas that there was
9 anything that I needed to respond to other than what was
10 in the motion.

11 That said, I do want to just flag very briefly a
12 couple of things. First of all we have not and have
13 never refused to make Mr. Kobus available. We would like
14 to put some limits on the scope of his deposition
15 consistent with what the Court has always said, which is
16 that the role of TCC is limited to some issues, to some
17 specific issues. I understand that those issues are to
18 be broadly construed, but at this point the only thing we
19 have gotten from TCC has been we are going to ask him
20 about everything, everywhere all at once.

21 We would also note a couple of other things. One is
22 that the Court had said that -- this is with regard to
23 the request for TCC to have an additional three weeks
24 after the signing of Mr. Kobus' deposition for them to
25 then submit additional testimony. We suggest that that's

1 not necessary.

2 First of all, the Court has already made it very
3 clear that pretrial testimony is really to be the chief
4 source of discovery for the parties' principal positions.
5 And obviously, maybe not obviously, but Scout Clean
6 Energy is, of course, filing prefiled testimony like
7 everybody else. To the extent that TCC asked for an
8 additional three weeks after Mr. Kobus signs, I just
9 wanted to point out that in Exhibit B to my opposition,
10 to our opposition to the opening motion, Mr. Aramburu
11 specifically said that he did intend to file the motion
12 to compel. That was on June 2nd. And I think the Court
13 might be mistaken or maybe there is a discrepancy, but we
14 received the motion to compel on June 25th. In other
15 words, more than three weeks after the first time that
16 Mr. Aramburu said that he intended to file a motion to
17 compel. And, also, that was the very same day that the
18 Court admonished the parties to file any motions for
19 discovery promptly.

20 We suggest that the delay here is really TCC's, to
21 the extent that they are looking for additional time in
22 which to submit testimony.

23 I would also point out that in the Court's letter
24 from June 30th, which I guess was the end of last week,
25 the Court specifically indicated that -- or reminded the

1 parties that the second prehearing conference order
2 doesn't set a deadline or cutoff, that the parties
3 continue to take discovery from each other after the
4 deadline for the prefiled testimony. And, indeed, the
5 Court opened the door, left open the door for the
6 possibility that, quote, if significant new information
7 is discovered the parties can supplement their prefiled
8 testimony.

9 So to the extent that TCC is looking for three weeks
10 sort of reopening of a window that just doesn't -- not
11 only is it inappropriate, but it also doesn't make sense.

12 I would also point out that with regard to the
13 motion for sanctions, Your Honor, I hope it's clear from
14 the materials that we provided to you that we really have
15 been trying to hard to get the parties to a place of
16 agreement, or sort of mutual respect to move forward with
17 this deposition, and we have been shut down at every
18 opportunity.

19 In fact, I feel, frankly, a little foolish about
20 having suggested alternate ways that we could get at just
21 what it is that TCC is looking for. In other areas of my
22 practice, certainly informal discovery is routine. This
23 offer to have -- to answer questions submitted in
24 writing, candidly, I mean, I thought was possibly a way
25 to break the log jam.

1 To the extent that there's any request for
2 sanctions, those are so -- I don't want to say draconian,
3 but those are so harsh and should be limited to special
4 cases, just not every case where if somebody disagrees
5 with the position being taken by a different party.

6 And then I guess the last thing that I would say,
7 this is -- I think it's a little bit problematic is with
8 regard to our request for a protective order. I do think
9 TCC is incorrect in saying we should have filed it
10 sooner. I think we could have filed it sooner, but it's
11 not as -- inasmuch as there was -- after the initial
12 request for deposition while the parties I felt were
13 still talking, there was no point to the deposition
14 notice, therefore there was no reason to file a motion
15 for a protective order.

16 As I noted in our opposition, certainly the rules
17 contemplate an either or approach, but in what I have
18 seen in the reply that we got just a few minutes ago, TCC
19 is citing to CR 30(h), but 30(h)(3) specifically carves
20 out an extension for the kind of protective order that we
21 are seeking, where there are limits put upon the extent
22 of questioning and at deposition. And I think, frankly,
23 TCC may not have been entirely forthcoming or perhaps
24 they were mistaken, but there is an opportunity within
25 CR 30(h)(3) that specifically carves out an exception for

1 30(d), 30(d) then gives a judge an opportunity to set
2 guardrails, the kind of guardrails that were limiting.

3 Candidly, I have to be upfront with you which is
4 that 30(d) does seem to imply that those motions have to
5 be made during the course of the deposition. I would
6 suggest that for judicial economy that that's something
7 certainly the Court could look at here.

8 I guess the last thing is that certainly we do not
9 concede the amounts that are being asked for by TCC. I
10 know that's one of the things that they represented in
11 the motion, they replied to our opposition, and we are
12 not by any stretch of the imagination agreeing that those
13 would be appropriate numbers for sanctions. Thanks so
14 much.

15 JUDGE TOREM: All right. Thank you,
16 Ms. Perlmutter, a little bit more detail than I
17 anticipated, but I appreciate you laying out thoroughly
18 the Applicant's position.

19 Mr. Aramburu, I'm sure that you are wanting to
20 respond to many of the details there, but, again, your
21 motion and the declaration and exhibits do speak for
22 themselves, but I do want to give you a chance, briefer
23 than Ms. Perlmutter was, if you have anything you want to
24 say in reply.

25 MR. ARAMBURU: I want to first of all

1 say that I did not understand this to be oral argument on
2 the motion. We didn't ask for oral argument and none was
3 appropriate.

4 Your Honor, I have been doing this for a long time.
5 People take depositions. They understand the scope of
6 the case, which you have set forth issues for us to be
7 broadly construed. The idea that a party -- that counsel
8 representing a deponent is entitled to some sort of list
9 of questions, or to dictate to the party seeking the
10 deposition how that deposition should be taken, whether
11 there should be written questions or not, is entirely
12 contrary to the entire scope of our discovery rules,
13 which were adopted more than 50 years ago.

14 So we have seen nothing but delays from the
15 Applicant here. The deposition of Mr. Kobus, who is Mr.
16 Know It All by his own reference and characterizations is
17 entirely appropriate to address questions that are tied
18 to the issues that we have here. There's no reason for
19 any more detail than that. And as your Your Honor knows,
20 during the course of depositions there are objections
21 made. I don't think there's going to be that many
22 objections here, but objections are made and sometimes
23 they have to be ruled on by the Court, or in this case
24 the presiding administrative law judge. That's the
25 ordinary course of depositions.

1 And there is no procedure that I have ever heard of
2 that allows a party, during the course of the deposition,
3 and this is what was requested in the protective order,
4 to tell a witness not to answer a question because that
5 lawyer thinks that somehow it's not within the scope of
6 questions to be asked. That is -- there's no authority
7 cited in the response to that, what is largely an
8 outrageous proposition. And that part of the protective
9 order shouldn't -- certainly should not be considered or
10 granted.

11 We intend to be respectful Mr. Kobus. We intend to
12 keep within the parameters of Prehearing Order No. 2. We
13 have seen no grounds by which any protective order should
14 be granted.

15 It talks about oppression, expense, embarrassment.
16 There's none of that that's involved here, nor do we
17 intend to have any questions in that regard. So we think
18 the order should be granted. There should be a
19 reasonable time to use the fruits of the deposition to
20 prepare testimony, and we think that sanctions and
21 expenses, given this long, drawn out process, should be
22 granted.

23 And I hope I didn't go on too long, Your Honor.
24 That concludes what I have to say.

25 JUDGE TOREM: Stay with me for a

1 moment, Mr. Aramburu, before you hit the mute button.
2 The one piece that I don't think I saw in anybody's
3 motion was a reference to CR 26(i) as a required counsel
4 conference before a court would entertain sanctions. Did
5 you characterize any of the discussions you have had with
6 Stoel Reeves and the Applicant's counsel to have been a
7 26(i) conference, Mr. Aramburu?

8 MR. ARAMBURU: Oh, yes. And we had --
9 all of our backs and forths about this issue have been
10 recorded by both sides. We had extensive back and forth
11 regarding this. We are fully beyond what is required
12 under Civil Rul 37 to consult. We have done that. That
13 is expressed by the record that we have here, so that has
14 been fully met. And we have been, in my view, cautious,
15 and in terms of going about this and making sure that we
16 made -- we expressed our concerns, so we fully met that
17 requirement, Your Honor.

18 JUDGE TOREM: Okay. I just hadn't
19 seen an explicit reference to 26(i) in the reading I had
20 done to this point. And, in my practice, typically
21 that's one of the first things that I see, at least in
22 the civil practice that I see as an administrative law
23 judge when someone is seeking sanctions, but I will
24 strongly imply that I wanted to make sure that we are on
25 the same page for that and getting out there.

1 Ms. Perlmutter, I want to give you a chance to
2 respond and tell me if you don't think the requirements
3 for CR(26)(i) have not been met by the back and forth
4 that both sides have documented.

5 MS. PERLMUTTER: Your Honor, I want to
6 keep this short, of course. Yeah, we absolutely -- this
7 is not a knee jerk reaction. This is a substantive
8 reaction. We absolutely do disagree with any allegation
9 that there's been meet and confer under 26(i). That is
10 what I was trying to accomplish with my communications
11 with Mr. Aramburu. And, as I said, all we -- in fact, we
12 sent in the reply in the opposition and all we received
13 was no, no, no. We would say that there was no good
14 faith attempt whatsoever to try to get this hashed out,
15 at least on the part of TCC.

16 JUDGE TOREM: Okay. Well, that's what
17 we are going to do today. At the very least we are going
18 to get a deposition scheduled, and I am going to hear
19 from TCC a little bit more and give some guidance as to
20 what's going to happen at that conference. I am going to
21 make sure I'm available, Mr. Kobus is available, and both
22 sides are available to do something sooner rather than
23 later so it's meaningful for the remaining rounds --
24 remaining round of testimony that TCC might be filing,
25 and consider any extensions needed to allow the record to

1 be created.

2 Ms. Perlmutter, would you also clarify for me, Mr.
3 Kobus a not a witness with prefiled testimony in the
4 first round filed by the Applicant; is that correct?

5 MS. PERLMUTTER: That's correct.

6 JUDGE TOREM: And do you anticipate
7 having him file testimony as due on -- I think your last
8 round would be July 12th; is that correct? Is he going
9 to be filing any testimony?

10 MS. PERLMUTTER: Your Honor, I don't
11 believe he is, but I defer to Ms. Stavitsky on that, but
12 I do not believe we intend to prefile testimony for him.

13 Can I ask Ms. Stavitsky to weigh in, please?

14 JUDGE TOREM: Yes, please.

15 MS. STAVITSKY: Yes, certainly, Your
16 Honor. At this time we don't expect to, in part for the
17 reasons we will explain. We don't believe there are
18 additional -- we believe that all the relevant issues
19 should be covered under our other witnesses.

20 JUDGE TOREM: Okay. And, Mr.
21 Aramburu, I know that prefiled testimony doesn't give you
22 an opportunity necessarily to call someone as an adverse
23 witness, was there anything that TCC planned on doing as
24 far as calling Mr. Kobus as a witness? I would imagine
25 it would be difficult to get prefiled testimony from him,

1 especially if you haven't yet been able to meet with him
2 for the deposition. What's the intent here?

3 MR. ARAMBURU: Judge, this situation
4 is very unusual because the Applicant has filed a
5 lengthy, lengthy application for site certification, and
6 has amended that site certification, but there are no
7 witnesses that have been identified to speak to the
8 contents of that site certification application.

9 And in ordinary course the Applicant brings forth
10 witnesses to describe the materials that they have
11 submitted and stand to -- stand for cross-examination
12 with respect to that application. That hasn't been done
13 here. And I think it's a major defect in the proceedings
14 here because they are essentially holding -- they are
15 trying to keep anyone from asking questions about the --
16 the site certification application.

17 So, no, there hasn't been any effort. I think that
18 the proceedings to this point have been defective. I was
19 expecting to see some witness that said I participated in
20 this and here are the witnesses and experts whoever they
21 are that were responsible for these sections in the
22 application. That has not happened. I think that's a
23 major defect.

24 But in answer -- in more of a short answer to your
25 question, yes, I intend to ask this witness who

1 identifies himself as Mr. Know It All to -- with regard
2 to questions -- with regard to contents of elements of
3 the application for site certification.

4 JUDGE TOREM: Okay. That helps
5 clarify.

6 MS. STAVITSKY: Your Honor, if I may?

7 JUDGE TOREM: Is this Ms. Stavitsky?

8 MS. STAVITSKY: Yes, Your Honor.

9 JUDGE TOREM: Go ahead.

10 MS. STAVITSKY: Just to clarify one
11 point, I'm not sure exactly what is unusual about the
12 process, and I'm speaking with respect to Applicant's
13 approach to the prefiled testimony. That's actually
14 exactly what we aim to do in our prefiled testimony is
15 provide various witnesses that each cover their
16 respective sections of the application and, you know,
17 which witness goes with which section and it's actually
18 explicitly outlined in the testimony that we have
19 submitted, so just to provide that context. That's
20 exactly the approach that we have gone through with our
21 submissions thus far.

22 JUDGE TOREM: I understand that, Ms.
23 Stavitsky. I think what I'm hearing from Mr. Aramburu is
24 that Scout Clean Energy came to the Council with Mr.
25 Kobus as the main proponent and spokesperson for this

1 application back in February of 2021. He presented all
2 of the material at the informational meeting, as well as
3 at the council meeting in which this application was
4 filed, and did come off as the spokesperson for Scout
5 until we got into further stages of things, and now the
6 litigation and adjudication he may or may not be part of
7 the Applicant's case in chief, as I understand Mr.
8 Aramburu's position, the chief spokesperson and the
9 person with the most knowledge of the application when
10 this whole thing started two plus years ago.

11 I understand the desire to speak with Mr. Kobus and
12 learn whatever Mr. Aramburu thinks is going to be the
13 differences between what's already been prefiled
14 testimony and what might be in the application that's not
15 yet addressed in TCC's mind.

16 I do think it's appropriate to make him available
17 for the deposition particularly because he's not filing
18 any testimony in this matter, and that's a choice for the
19 Applicant. I think in past practice sometimes the
20 proponent of the project that signed the application and
21 presented it to the Council has testified. I don't know
22 that that's a rule or a requirement, certainly not a
23 requirement, but it may not have happened in every
24 application, but it has in the past, at least, on
25 occasion.

1 So Mr. Aramburu will, as you are willing to product
2 Mr. Kobus, get access to him and be able to ask him a
3 reasonable range of questions as described today.
4 Discovery is intended to lead to relevant information.
5 It may not be admitted or brought forth at hearing, but
6 it can be used to help round out TCC's case in opposition
7 to this application.

8 I think today the best thing to do is figure out
9 when this can be made to happen. My understanding is the
10 original deposition notice was sent out for early this --
11 early last month and Mr. Kobus was not available, and did
12 not answer the notice of deposition, and here we are a
13 month later still trying to get that scheduled.

14 Given the amount of other things that have happened
15 between now and the original deposition notice, I'm
16 surprised this hasn't happened but I guess it's
17 understandable at some level given the other business,
18 and I hate to do this on the record but let's get our
19 calendars out and find a time that works sooner rather
20 than later.

21 I will ask Ms. Perlmutter and if you will have Mr.
22 Kobus speak for himself, what are the limitations on
23 availability coming up and whether -- we have a national
24 holiday tomorrow to observe. There's testimony due from
25 the other parties on Wednesday, and then we have a few

1 days -- another ten days perhaps for the responding
2 parties, TCC, and everybody else that's on the line to
3 file their reply, but the Applicant is going to be
4 getting ready to produce testimony on Wednesday of next
5 week. I get it. It's busy. When would Mr. Kobus be
6 available?

7 First, actually, let me ask Mr. Aramburu, are you
8 wanting him available in the days ahead or are you
9 wanting to focus on testimony first and then try to take
10 care of this before we get to hearing August 9th and 10th
11 or 10th and 11th? Mr. Aramburu, what's the desired
12 timeline other than June 5th was it and now every day
13 that goes by is another difficulty for you?

14 MR. ARAMBURU: Thank you, Your Honor.
15 Every day that goes by, yes, indeed it's a further
16 difficulty for us in terms of preparing. And one of the
17 difficulties we have at this stage of things is that, as
18 I indicated in my previous communications, we want to use
19 Mr. Kobus' deposition testimony to assist other witnesses
20 in testimony that they may have. And given the schedule
21 that we have at this point that's going to be very
22 difficult. It is simply impossible for us to try to
23 schedule because of the needs of pulling together
24 testimony due on July 14 to do it before then, and we
25 need a reasonable amount of preparation time.

1 So I would suggest that the first date for testimony
2 for Mr. Kobus' deposition should be July 20. I don't
3 want to wait too long, but we just can't do it next week,
4 Your Honor. It's just impossible with the schedule that
5 you have set. We think July 20 would be a reasonable
6 date. That will give us time to get our testimony in and
7 then focus on the deposition.

8 JUDGE TOREM: All right. Mr.
9 Aramburu, I appreciate that. Can I give you some polite
10 pushback as to maybe we could carve out a few hours
11 earlier so that you get this information in a more
12 meaningful time frame? My only polite question here
13 really is, you filed a notice of deposition for June 5th
14 which would have implied to me you were ready to go with
15 whatever questions on that date. I'm willing to push it
16 out to that -- after testimony is done, if that's what
17 the relief you are seeking, but I just was assuming that
18 you were ready to go when you noted the deposition for a
19 month ago.

20 MR. ARAMBURU: Yes, we were ready to
21 go with some general questions. We didn't finish those
22 because we have been put off ever since then by the
23 delays from the Applicant. I am out of the office a
24 couple of days next week. I think we can possibly look
25 to the 18th of July, but no sooner than then, Your Honor.

1 I mean, we tried to set up a reasonable schedule for use
2 of the testimony and doing all of these things and now we
3 are backed up against a very severe limitation for
4 testimony to be in by the 14th, and that's a major job.
5 I have to be out of the office for a couple days, and so
6 I think any -- I think July 20 is a reasonable date. We
7 could do it July 18. I believe July 19 is the EFSEC
8 Council meeting, so I would say I really think the 20th
9 is a good date that allows us to recover from the process
10 of presenting all of this testimony and get ready for Mr.
11 Kobus' deposition, so we would request that as the date.

12 JUDGE TOREM: Okay. I understand the
13 evolution of how things have gone and people's schedules
14 being what they are, including yours, so I wanted to hear
15 the answer to that, Mr. Aramburu, and then give it the
16 full consideration and respect.

17 I'm available a lot of the time on the 18th if I was
18 needed. The 19th could be made to work for my
19 availability if needed to respond to anything during the
20 deposition. The 20th is a little bit more limited, but
21 still a possibility given certain time windows.

22 Let me hear from Ms. Perlmutter as to the scheduling
23 if Mr. Kobus is available on any of those three days from
24 the 18th through the 20th of July or if not, why not.

25 MS. PERLMUTTER: I will need to

1 check -- we can ask Mr. Kobus directly. I would note two
2 things, Your Honor. One is that I'm actually going to be
3 on a flight on the 19th and it's -- it's going to pretty
4 much mess up my whole day. And then on the 20th, I'm
5 available but it looks like we already have a deposition
6 scheduled for that date in this matter, the deposition of
7 Jason Fedora is scheduled for the 20th.

8 JUDGE TOREM: And what's the timing
9 for that one?

10 MS. PERLMUTTER: Let me just take a
11 look. The notice says that it's going to be at nine a.m.
12 on the 20th.

13 JUDGE TOREM: Okay. And, Mr.
14 Aramburu, I take it that's your deposition notice or is
15 that from another party?

16 MR. ARAMBURU: That's a deposition
17 notice from the Yakama Tribe.

18 JUDGE TOREM: Okay. Let me then
19 ask --

20 MR. ARAMBURU: We may be attending
21 that as well, but that's a notice from them. I'm sorry I
22 didn't consult the deposition schedule from the Tribe.

23 JUDGE TOREM: Okay. Well, I obviously
24 don't get copies of the notices of deposition, nor should
25 I, but let me ask Ms. Houston if you anticipated how long

1 the deposition of this person would be on July 20th at
2 nine a.m.?

3 MS. HOUSTON: Good afternoon, Your
4 Honor, I think we actually noted it for all day, but
5 based on our deposition of another WDFW employee which
6 only went about half a day, I anticipate it might be
7 along those lines in terms of timing, but I can't say for
8 sure.

9 JUDGE TOREM: Okay. I'm wondering if
10 we try to get in Mr. Kobus that afternoon if that would
11 work, but I am going to come back to the July 18th date
12 as well given the deposition timing for that witness.

13 Mr. Kobus you are on the line and hearing all of
14 this. We are talking about your schedule. Can you
15 enlighten us to your availability July 18th, 19th, and
16 20th?

17 MR. KOBUS: Yes, Judge Torem, are you
18 able to hear me?

19 JUDGE TOREM: I can.

20 MR. KOBUS: Okay. I will make myself
21 available on either of those days.

22 JUDGE TOREM: Okay. So all three of
23 those days could be made to work for you?

24 MR. KOBUS: That's correct.

25 JUDGE TOREM: All right. Thank you.

1 Mr. Aramburu, given the discussion we have had and Ms.
2 Perlmutter's travel arrangements on the 19th, would you
3 prefer to schedule this for the afternoon of the 20th
4 since it's not your deposition in the morning with the
5 Fish and Wildlife employee, or would you rather it be on
6 the 18th where as far as I know there are no other
7 competing depositions?

8 MR. ARAMBURU: Well, Your Honor, I do
9 want a little opportunity to recover from our filings of
10 the prior week, so can we do it on the 21st? How is that
11 for everyone? That's open on my schedule.

12 JUDGE TOREM: I can accommodate being
13 available probably from noon onward on the 21st on
14 Friday.

15 Mr. Kobus, would that afternoon work for you?

16 MR. KOBUS: That would be acceptable
17 to me as well, Judge Torem.

18 JUDGE TOREM: Okay. It sounds like we
19 have got a date on July 21st, and if you set that for --
20 actually, I could do from 12 p.m. onward. Mr. Aramburu,
21 what would be your preference to begin your deposition
22 and how long of timing are you asking Mr. Kobus to be
23 available on that Friday afternoon?

24 MR. ARAMBURU: When one speaks of the
25 length of depositions we don't know the length of the

1 answers. Here's what I would like to do. I know you
2 want to be available to resolve any issues that may come
3 up, so I would suggest that we start the deposition at
4 eleven o'clock. You would be available at noon, and then
5 we schedule for possibly three or four hours. I don't
6 know at this point, but I think Mr. Kobus should be
7 available at least until five.

8 JUDGE TOREM: All right. Ms.
9 Perlmutter, is that available and acceptable to the
10 Applicant?

11 MS. PERLMUTTER: Yes, it is, Your
12 Honor.

13 JUDGE TOREM: Okay. Great. And, Mr.
14 Kobus, if you will carve out that afternoon from eleven
15 a.m. until five p.m. and hopefully it won't take quite
16 that long for your deposition, is that something you are
17 going to be able to do?

18 MR. KOBUS: I will do that. Thank
19 you, Judge Torem.

20 JUDGE TOREM: All right. So I am
21 going to ask Mr. Aramburu to set up a notice of
22 deposition, and for this particular one file a copy with
23 EFSEC so I get a copy and have it on my calendar. I will
24 make myself available for telephone standby. Off the
25 record I will make Mr. Aramburu -- I will send you a

1 separate email and copy Ms. Perlmutter and perhaps the
2 other attorneys with my cell phone number and make myself
3 available during that time frame. While I'm hoping the
4 phone doesn't ring on that Friday, we will see what
5 happens.

6 As for the scope of the deposition, Mr. Aramburu,
7 let's talk a little bit about that. I can put it in the
8 written order but I think today would be helpful to give
9 some guidance verbally.

10 MR. ARAMBURU: If you are going to be
11 involved in the course of the deposition this will
12 probably be via Zoom or some other format, so it would
13 probably be appropriate to figure out a way that you
14 could be involved in the Zoom hearing or otherwise be as
15 a part of the recorded testimony.

16 JUDGE TOREM: And I can certainly be
17 called by telephone, or I can use my cell phone
18 application of Zoom if need be, so whatever arrangement
19 you think is acceptable. If you want to do an off the
20 record, you know, check of that technology at some
21 agreeable time beforehand I'm willing to do that as well
22 to make sure things work. You let me know, Mr. Aramburu,
23 if -- obviously, I am not going to show up wherever it is
24 in person, but I can be available by Zoom or phone.

25 MR. ARAMBURU: My intention originally

1 and my intention now is to do this via Zoom.

2 JUDGE TOREM: Okay. Then I will make
3 sure the cell phone is charged and the Zoom app will be
4 available if a link is sent to me after a phone call to
5 find me, and we will make sure that happens.

6 MR. ARAMBURU: Let me ask the parties,
7 as I understand, Mr. Kobus is a resident of the
8 Tri-Cities area, so there's a possibility we might do the
9 deposition live at an appropriate location in Tri-Cities.
10 Does anyone have an objection to that as an alternative?

11 MS. PERLMUTTER: Yes, I do actually.
12 I know this is very rare to object and demand a Zoom
13 deposition, I but I will actually be in Salt Lake City
14 that day.

15 MR. ARAMBURU: Well, I noticed that
16 the Applicant has four lawyers that are continuously
17 involved, so I would like the option of taking the
18 deposition in person, which is the standard course.

19 MS. PERLMUTTER: Understood, and we
20 would appreciate your consideration on this. I will be
21 the one handling Mr. Kobus' deposition.

22 MR. ARAMBURU: Okay. I would be happy
23 to talk to you about that offline.

24 JUDGE TOREM: Ms. Perlmutter, this is
25 Judge Torem. I would hope if Mr. Kobus is available that

1 day in the Tri-Cities and if there was a way to get an
2 associate to be present that that could be made to work.
3 It might facilitate the handling of documents better than
4 Zoom might be, at least on his end, and we could sort out
5 if you can find a way to do that, fantastic. If it is
6 going to be all by Zoom I think it might take longer,
7 frankly, for these things to happen.

8 I think, as the parties know, my personal preference
9 is to do these things in person and we have some other
10 limitations on the adjudication in that regard already,
11 if the deposition could be done face to face that might
12 make it easier on Mr. Kobus and less stressful,
13 particularly if an associate can be there with him.

14 I'm not directing that. I'm suggesting it might
15 just smooth things along here.

16 MS. PERLMUTTER: We can make it work,
17 Your Honor. I will note that I think we all, I don't
18 want to just say me, we have all gotten accustomed to
19 Zoom depositions, but certainly we can make somebody
20 available there, most likely me. I will make other
21 arrangements for travel.

22 JUDGE TOREM: Again, I don't know what
23 your trip to Salt Lake City is about and I don't need to.
24 If it's important, do it. If it's something that can be
25 compromised and you prefer to be the one, Ms. Perlmutter,

1 then so be it. Again, I'm making a suggestion and not an
2 order in that regard.

3 MS. PERLMUTTER: We will figure it
4 out, Your Honor. It's a business conference, but I will
5 figure it out.

6 JUDGE TOREM: All right. I hope you
7 will. I appreciate the tenor today because the tenor in
8 writing has not been something that I think bodes well
9 for how litigation could go in this. I appreciate the
10 friendly, candid responses today, and I hope that we are
11 at least diffusing some of the tension that comes right
12 out of the pages that were filed and electronically
13 leaking out on my screen. I hope that every party would
14 take some of that shrillness out and just focus on what
15 the mission is here, to get the relevant information in
16 front of the requesting party and make it happen.

17 Let's turn to the scope of that relevant information
18 now. It sounds as though, Mr. Aramburu, that you are
19 seeking background on how the application was prepared.
20 It sounds as though you are seeking information on how
21 the application came to be amended. That seems like a
22 pretty general ballpark of what you are asking for; am I
23 correct?

24 MR. ARAMBURU: Yes. We haven't
25 formulated our individual questions. We have been busy

1 with testimony and other things but, yes, we will have
2 questions about the original and amended application.
3 And, yes, we will ask those questions.

4 JUDGE TOREM: And given the
5 application preparation role that Mr. Kobus had, at least
6 as to my understanding, Ms. Perlmutter, is there some
7 particular area that you are seeking to not have inquired
8 into by TCC?

9 MS. PERLMUTTER: Your Honor, first of
10 all, this is the most we have ever had articulated as the
11 basis for the questions that TCC intends to ask. In my
12 limited experience in EFSEC proceedings, it sounds to me
13 as though the issues around the preparation and amendment
14 of the application go outside the scope of what the Court
15 has already identified as TCC's role, and so it was our
16 hope and our request that the scope of the deposition be
17 limited to the things that were specifically identified
18 for this intervenor, so that would be the extent of the
19 impact on wildlife on the landscape and together with
20 Benton County the land use issues.

21 JUDGE TOREM: I'm not sure I'm willing
22 to limit it to only those issues because TCC clearly is
23 working in alignment with some other parties and they
24 have witnesses as to how the application was developed.
25 There's a number of issues that everybody knows I have

1 limited from the adjudication, and I hope that not a lot
2 of time would be spent on those, but it may be that Mr.
3 Kobus' role in preparing the whole scope of the
4 application provides the needed background and foundation
5 for him to be able to answer the further questions that
6 Mr. Aramburu will craft, specifically regarding those
7 areas that Mr. Aramburu's client has stated and has a
8 significant interest in this application that will come
9 out during the adjudication.

10 I appreciate that the Applicant is looking to the
11 orders on the scope of intervention of this particular
12 party, and I'm not saying that's wrong. I'm saying I'm
13 not going to prelimit the questions to those areas
14 because there will be some background and other things
15 that Mr. Kobus brings that are not directly potentially
16 related to only TCC's interest that I have narrowed in
17 the adjudication orders.

18 I want to give Mr. Aramburu the appropriate latitude
19 to find of what Mr. Kobus knows about the areas that TCC
20 is interested in. Some of those may not be admissible
21 evidence in the adjudication based on the scoping and the
22 orders that I have issued, but they may be relevant
23 information that allow his witnesses to comment on the
24 areas that are relevant to them.

25 I hope that makes sense a little bit. As I say it

1 out loud and listen to myself it's a bit of roundabout
2 and almost circular logic, but I do want this deposition
3 to not have a whole bunch of phone calls to me saying the
4 Applicant thinks this is the outside of what TCC's going
5 to be presenting in August of this year, but if they are
6 looking for information that might influence that, I want
7 Mr. Kobus to answer it under oath even though that he's
8 not going to be a witness and it won't be held against
9 him, it might be something that TCC cites to his
10 knowledge and somebody else's opinion during the
11 adjudication. It very well may happen that way, Ms.
12 Perlmutter, and we could spend a lot more time arguing
13 about that than actually just having the deposition, and
14 that's my goal with today, to get it scheduled, get the
15 information out there for all parties, and then we can
16 sort it out later, a lot more later as to what's
17 admissible at hearing.

18 That, to me, is where we should spend our time
19 what's going to come before the Council at the
20 adjudication, not the sort of recipe of how all that
21 information was created. That's where I'm coming from,
22 and I think the deposition would be a lot shorter if we
23 are not arguing about specific questions. I mean, I'm
24 not sure the harm that could come from Mr. Kobus
25 answering a few questions in background about areas that

1 are not specifically designated for TCC to litigate.

2 Ms. Perlmutter, any questions kind of the ALJ's view
3 on that?

4 MS. PERLMUTTER: We understand your
5 position, Your Honor, and certainly we will do our very
6 best to honor it as we move forward.

7 JUDGE TOREM: And, Mr. Aramburu, am I
8 speaking out of turn here on how I'm directing your scope
9 of the deposition, at least verbally here?

10 MR. ARAMBURU: No. No. We intend to
11 be courteous. We intend to stick to the issues that we
12 have here. We are not interested in some extensive long
13 deposition ourselves, so I think this is going to go just
14 fine, Your Honor. And if it doesn't for whatever reason,
15 I'm pleased that you will be available to help the
16 parties sort through any disagreements about questions.

17 JUDGE TOREM: And, Mr. Aramburu, just
18 for the record, you have never been anything less than
19 courteous in all the interactions we have had in
20 prehearing conferences or otherwise during the course of
21 this adjudication. I have no other expectation than
22 that's how it will go when this deposition goes forward
23 on Friday the 21st of July at eleven a.m. I'm counting
24 on that my phone is not going to start ringing off the
25 hook at twelve noon.

1 I want to take the record -- the motion and response
2 under consideration and issue something in writing over
3 the next couple of days. If you don't see it on
4 Wednesday it just means I'm still thinking about it and
5 that my outdoor hiking tomorrow on July 4th has meant
6 that I didn't do any work on the holiday. So I'm going
7 to try to get to this in the next few days. Certainly,
8 by the end of the week you will have my ruling on any
9 other specifics regarding sanctions or other things that
10 are raised in the motions.

11 So we have got a date. We have got a time. We have
12 had a general discussion of the scope and expectations
13 from the ALJ.

14 Mr. Aramburu, anything else that TCC needs today?

15 MR. ARAMBURU: No. And given our
16 schedule here, Your Honor, a few extra days to work
17 through the ruling on the motion certainly is just fine
18 with us. So, no, we will be prepared for our deposition
19 of Mr. Kobus at eleven a.m. on July 21st.

20 JUDGE TOREM: What I would invite is
21 if you have anything you think you can get out of the way
22 with interrogatories or requests for admission, and maybe
23 that's asking already too much because of what's going on
24 between now and then, but that might help set up on an
25 expedited reply from Mr. Kobus to shorten up the

1 deposition, but, again, you may not have time to do that
2 and the Applicant may not have time to respond. Again,
3 not the litigant but the judge on the other side of the
4 bench is going oh, wouldn't that be easy, so it's a
5 different thing where I'm sitting than where you are.

6 Mr. Aramburu, with that, anything else today?

7 MR. ARAMBURU: No. Thank you for
8 setting up the conference today, Your Honor.

9 JUDGE TOREM: Okay. Let me ask Ms.
10 Perlmutter if she has any questions or anything else,
11 guidance, that she needs before I issue the written order
12 on everything else later this week.

13 MS. PERLMUTTER: No, Your Honor.

14 JUDGE TOREM: All right. I hope it
15 was an hour well spent and we've moved the ball forward
16 on this.

17 Did any of the other parties, Benton County, have
18 anything, they have a question, Ms. Foster?

19 MS. FOSTER: No, we don't have any
20 questions, Your Honor. I guess would let Ms. Perlmutter
21 that Benton County would likely have questions for Mr.
22 Kobus as well during the deposition.

23 JUDGE TOREM: All right. And you have
24 heard what the scope recommendations are from me, so I
25 hope if you are going to participate that it's all

1 within, and that you will coordinate with Mr. Aramburu as
2 the lead counsel that's been asking for this.

3 MS. FOSTER: Yes, Your Honor.

4 JUDGE TOREM: Thank you, Ms. Foster.
5 Anything else, Ms. Reyneveld? Any questions?

6 MS. REYNEVELD: Nothing from me,
7 Judge. Thank you.

8 JUDGE TOREM: All right. Thank you.
9 And, Ms. Houston, any questions, concerns from the Tribe?

10 MS. HOUSTON: No questions or concerns
11 from Yakama Nation, but I would also like to note that
12 it's possible that we might have questions for Mr. Kobus
13 as well.

14 JUDGE TOREM: Understood. So, again,
15 if you are participating in the deposition please
16 coordinate with Mr. Aramburu so there's not any
17 duplication.

18 And I don't know if it's practice for all of you to
19 serve a joint notice of deposition or separate notices
20 but formalize that to the Applicant that those questions
21 might be coming.

22 And, Ms. Perlmutter, given those indications from
23 the County and from the Yakama Nation, any other
24 questions the Applicant may have?

25 MS. PERLMUTTER: No, we don't, Your

1 Honor. Thank you.

2 JUDGE TOREM: All right. I hope it
3 doesn't add too much complexity to have multiple parties,
4 but if they coordinate hopefully things are done in a
5 reasonable time on Friday the 21st.

6 Thank you all. Mr. Kobus, thank you for arranging
7 your schedule and being forthcoming today. With that,
8 it's 4:10 p.m. and this conference is adjourned.

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10 (Conference concluded
11 at 4:10 p.m.)

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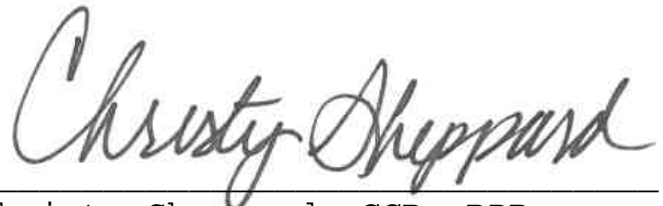
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