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1 P R O C E E D I N G S

2 JUDGE CAILLE: We are here for a prehearing
3 conference in Docket No. TG-042089. This is an
4 application by Sure-Way Systems, Inc., for a
5 certificate of public convenience and necessity to
6 operate motor vehicles in furnishing solid waste
7 collection service, specifically medical refuse.

8 Today is August 23rd and we are convened in a
9 hearing room in Olympia, Washington, and I will take
10 the appearances for the record, please, beginning with
11 the Applicant.

12 MR. HAFFNER: Would you like us to state
13 addresses and phone numbers?

14 JUDGE CAILLE: That is unnecessary.

15 MR. HAFFNER: Greg Haffner appearing for
16 Sure-Way Systems, Inc.

17 MR. JOHNSON: Stephen Johnson appearing for
18 Stericycle of Washington, Inc.

19 MR. TRAUTMAN: Greg Trautman, assistant
20 attorney general, for Commission staff.

21 JUDGE CAILLE: Let the record reflect there
22 are no other appearances. The purpose of this
23 prehearing conference is to exchange cross-exhibits,
24 and I see the parties have brought in their
25 cross-exhibits; also to go over the order of witnesses

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1 and the times for cross-examination; to attend to any
2 dispositive motions, and hopefully to stipulate to the
3 admission of as many of these exhibits, the prefiled
4 exhibits, as possible.

5 I recognize that you have just received the
6 cross-exhibits today and have not had an opportunity to
7 look at those, so what we will do is reserve some time
8 either at the beginning of the hearing next Tuesday or
9 when the witness takes the stand and those exhibits are
10 offered. We will deal with the admission of those
11 exhibits that way.

12 Having talked to the parties before going on
13 the record this morning, I understand that there is no
14 objection to any of the exhibits that have been
15 prefiled; is that correct?

16 MR. HAFFNER: Correct from Applicant's
17 standpoint, Your Honor.

18 MR. JOHNSON: Your Honor, I have questions
19 about a couple of the prefiled exhibits from the
20 Applicant, but I believe they are questions that can be
21 raised as to the weight of these materials, so I'm
22 going to stipulate to them as well.

23 JUDGE CAILLE: All the prefiled exhibits are
24 stipulated to with your caveat, Mr. Johnson.

25 I also distributed before going on the record

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1 this morning an exhibit list, and the parties have
2 agreed to -- I'm going to send it to you
3 electronically, and I understand that you will be
4 filling in the portion with the cross-exhibits.

5 Now, I have done a description of the
6 prefiled exhibit. I would appreciate you look at
7 those. I also have some questions about some of them
8 because I did not know how to describe them. I really
9 pretty much got through the Applicant's exhibits. I
10 have not looked at Stericycle's exhibits closely to
11 know whether I can describe them or not.

12 So I will do a description of those and then
13 e-mail that to you, and if you will read through those,
14 or if I have questions on those, Mr. Johnson, I will
15 put those question marks in the description area.

16 MR. JOHNSON: That would be fine. The other
17 alternative that might save you some time is for us to
18 go ahead and put descriptors in.

19 JUDGE CAILLE: I will accept that help.
20 Otherwise, I'm doing it because we don't have enough
21 support staff right now to do it.

22 So the order of witnesses, as we discussed
23 before going on the record this morning, will be Gary
24 Chilcott, Jeffrey Gibbs, David Sullivan, and Dudley
25 Chilcott. Mr. Johnson, could you just tell me how much

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1 time you expect for cross-examination on each of those?

2 MR. JOHNSON: Your Honor, my basic thought is
3 that Gary Chilcott and Dudley Chilcott would take about
4 a day, and Jeffrey Gibbs and David Sullivan would
5 probably take one day, one in the morning, and one in
6 the afternoon.

7 JUDGE CAILLE: And we were talking about
8 beginning at nine o'clock and going until five, unless
9 we finish early, of course. Commission staff, do you
10 have an estimate on your cross-examination time?

11 MR. TRAUTMAN: Yes. I believe we sent in a
12 letter yesterday, and we've asked for essentially a
13 placeholder of about 15 minutes on each witness.
14 Sometimes we use 15 or 20. Sometimes we don't have any
15 questions.

16 MR. JOHNSON: Mr. Trautman, I don't believe
17 we got a copy of your letter. Do you have one today?

18 MR. TRAUTMAN: You should have gotten it
19 electronically.

20 MR. HAFFNER: I don't recall receiving one
21 either.

22 MR. JOHNSON: You can certainly provide it to
23 us later today.

24 JUDGE CAILLE: As I recall, I think mine is
25 in my office. It was a letter just reserving the 15.

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1 MR. TRAUTMAN: I think it said 10 to 15
2 minutes.

3 JUDGE CAILLE: But you will see that the
4 parties get that letter eventually?

5 MR. TRAUTMAN: Yes.

6 JUDGE CAILLE: So then we have Robert
7 Sheridan, Michael Philpott, Christopher Stromerson, and
8 Nanette Walker. Mr. Haffner, how much time do you need
9 for each of these witnesses?

10 MR. HAFFNER: I don't anticipate taking more
11 than an hour to two hours at the most with each of
12 those witnesses, and it's probably closer to an hour or
13 less.

14 JUDGE CAILLE: My understanding is these
15 witnesses are going to be available for
16 cross-examination the week of September 20th.

17 MR. JOHNSON: That is correct, Your Honor.

18 JUDGE CAILLE: Mr. Trautman, same thing for
19 these witnesses?

20 MR. TRAUTMAN: Yes.

21 JUDGE CAILLE: 15 minutes then. I have just
22 a couple of quick questions, and then unless the
23 parties have anything further, I can get you out of
24 here quickly.

25 MR. HAFFNER: I have two things.

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1 JUDGE CAILLE: Let me just finish up with the
2 exhibits. I have a question for Mr. Johnson about
3 Jennifer Krebs. Will she been taking the stand?

4 MR. JOHNSON: It would be my hope that since
5 she's an attorney in my office that we just stipulate
6 to the admissibility of these. They reflect production
7 of documents from Mr. Haffner and some e-mails and
8 other communications from state agencies. If
9 Mr. Haffner is agreeable, she does not need to appear.

10 MR. HAFFNER: I'm agreeable.

11 JUDGE CAILLE: So these are prefiled
12 exhibits?

13 MR. HAFFNER: Yes. They are responses to
14 discovery and should be admitted as prefiled exhibits.
15 Likewise, I have submitted one prefiled testimony that
16 has an exhibit attached to it that is in a similar
17 vein.

18 MR. JOHNSON: We have no objection to that
19 either, Your Honor. We have a couple of other exhibit
20 issues that I would like to raise with you at an
21 appropriate time.

22 JUDGE CAILLE: Do you have all your exhibits
23 with you? I'm looking at --

24 MR. HAFFNER: I believe I do.

25 JUDGE CAILLE: I'm looking at what would be

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1 Gary Chilcott's Exhibit 15, and I just want to make
2 sure that -- are there two pages to this exhibit? The
3 first page says "Request for Proposal." The second
4 page says "Department of Environmental Quality,
5 Permitting and Compliance Admission Solid Waste
6 Licensing Program." Are those both part of the same
7 exhibit?

8 MR. HAFFNER: Yes.

9 JUDGE CAILLE: And on Mr. Gary Chilcott's
10 Exhibit 20, this is a photograph?

11 MR. HAFFNER: Yes. That is a photograph of a
12 stamp or embossing that goes on the Sharps containers.

13 MR. JOHNSON: Your Honor, we have received
14 from Mr. Haffner's client actual Sharps containers from
15 his client that would show this kind of thing on them.
16 I would propose to bring to the hearing both the
17 Sure-Way containers that have been provided to us by
18 Sure-Way and the Stericycle container so that when we
19 are referring to these different containers, we know
20 exactly what we are looking at, and to the extent this
21 is difficult to read, Exhibit No. 20, we will have the
22 actual container that could be looked at.

23 MR. HAFFNER: Are you proposing to bring the
24 containers that we delivered to you?

25 MR. JOHNSON: Absolutely.

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1 JUDGE CAILLE: Are they large?

2 MR. JOHNSON: They are large and somewhat
3 bulky, but I can bring them along.

4 JUDGE CAILLE: I think that would be helpful
5 to actually see those for my perspective.

6 MR. HAFFNER: I assume they will be used for
7 illustrative purposes only and not admitted as
8 exhibits?

9 MR. JOHNSON: My assumption is we would use
10 them that way. By the way, I think you would want
11 those same containers for the shipper testimony. If
12 that's the case, would you let us know if you are going
13 to have them in the Tri-Cities, because I don't plan to
14 box those things and take them on the road with me.

15 MR. HAFFNER: We will work with that when we
16 get there.

17 JUDGE CAILLE: On the rest of these, I think
18 what I will do is -- I'm just not sure what the
19 description should be, so when I e-mail the exhibit
20 list form, I will just ask for description on that, and
21 I think I can take care of the rest of these too.

22 I have one other question about -- this is
23 DS, so this is David Sullivan's Exhibit 3, and it's the
24 fourth page of that exhibit. I just wanted to make
25 sure that is also part of DS-3.

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1 MR. HAFFNER: The fourth page?

2 JUDGE CAILLE: The fourth page has the data
3 request number of 51 labor services?

4 MR. HAFFNER: Yes. The rest of these, I
5 think, I will just need descriptions, so there is no
6 problem with that.

7 Mr. Johnson, you have volunteered to put your
8 descriptions in, and I thank you very much for doing
9 that. Mr. Haffner, please just check my description of
10 what your exhibit is for accuracy, and please feel free
11 to edit it.

12 MR. HAFFNER: Yes.

13 JUDGE CAILLE: Since we are still on the
14 subject of exhibits, did you have an issue about
15 exhibits, Mr. Haffner, or is it something else?

16 MR. HAFFNER: Not about the exhibits that
17 have been presented, but I wanted to go on the record
18 that yesterday in preparing for this hearing, I found a
19 stack of documents that were responsive to
20 Mr. Johnson's discovery requests to me earlier, and I
21 just brought them to him this morning.

22 So I would recognize that he should be given
23 permission to go through those documents and add them
24 as cross-examination exhibits because it's my fault
25 they didn't get to him in time.

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1 JUDGE CAILLE: Is that correct?

2 MR. JOHNSON: Yes.

3 MR. HAFFNER: That's different than the
4 cross-examination exhibits I gave you.

5 JUDGE CAILLE: This is discovery.

6 MR. HAFFNER: This is discovery responses
7 that I anticipate Mr. Johnson will find some documents
8 in there that he will want to use on cross-examination,
9 so he should be given the opportunity to submit them.

10 JUDGE CAILLE: Mr. Johnson, can you just add
11 those into your list?

12 MR. JOHNSON: I will add them to the extent
13 they need to be. Your Honor, just so you are aware of
14 what this material is, it seems to be documents, and
15 correct me if I'm wrong, Greg, but it seems to be
16 documents that are responsive to our request for
17 documents that demonstrate compliance with the
18 requirements of the QSR Manual. We will need to look
19 at them, of course.

20 MR. HAFFNER: That's a correct
21 characterization.

22 JUDGE CAILLE: All right. So we are still on
23 the exhibit list.

24 MR. HAFFNER: The other item I had was not
25 having to do with the exhibit list. It was having to

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1 do with the hearing schedule.

2 MR. JOHNSON: I have a couple of exhibit
3 issues.

4 JUDGE CAILLE: Let's do the rest of the
5 exhibit issues.

6 MR. JOHNSON: Thank you. We had attached to
7 our prefile testimony some redacted copies of materials
8 we had received from the FDA in response to our FYA
9 requests to them. Mr. Haffner has since been able to
10 receive unredacted copies of those same documents from
11 the FDA and has provided the unredacted versions to us.

12 Those should be at some point either added as
13 a supplement or added as additional exhibits. I think
14 they should just be substituted for the redacted
15 copies.

16 JUDGE CAILLE: Are these going to be treated
17 as confidential exhibits?

18 MR. HAFFNER: No.

19 JUDGE CAILLE: I think then that perhaps just
20 substituting them.

21 MR. HAFFNER: My only comment to Mr. Johnson
22 was that some of the redacted exhibits were reviewed by
23 a witness that he is using as an expert witness, and I
24 felt that since this person is giving his opinion on
25 that particular document -- I hate to increase the

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1 record with more exhibits, but it seems to me it would
2 be maybe more appropriate to supplement the record and
3 identify this as an admitted exhibit that is the
4 unredacted version of the version that his expert
5 referred to.

6 JUDGE CAILLE: I think your point is well
7 taken, and I think that is a good idea. We will call
8 this the unredacted version of the same exhibit, so it
9 will have an exhibit number.

10 Here's what I propose to do: I am going to
11 number the exhibits, and so in my numbering -- let me
12 see.

13 MR. HAFFNER: I would propose that the
14 easiest way would be to use it as a cross-examination
15 exhibit and confirm with my witness who you are cross-
16 examining that it is, in fact, the document that we
17 believe it to be, or we can just stipulate to that,
18 because that is what it is.

19 JUDGE CAILLE: I would prefer to do it this
20 way: This is the way we handle confidential exhibits
21 is to put in the exhibit list that there is both a
22 redacted version and an unredacted version, and
23 actually, what I would probably do is give it a
24 separate number.

25 MR. HAFFNER: Actually, Your Honor,

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1 confidentiality is not the issue here. The reason it
2 was redacted in its original form that Mr. Johnson used
3 was because I believe it was a request from the FDA
4 that Mr. Johnson had made that they submitted that to
5 you, and you asked us to get the unredacted copy, and
6 so he had used the redacted version because the FDA has
7 its rules for confidentiality.

8 We reviewed the document and don't find any
9 concerns about confidentiality and so submitted that to
10 Mr. Johnson as the unredacted original version. So
11 there is not an issue of confidentiality. The only
12 issue is his expert relied on the redacted version, and
13 it just seems to me that since his opinion was based on
14 that version, we should clear it up with him
15 substituting.

16 MR. JOHNSON: I don't have any problem with
17 that, Your Honor. I will probably give the unredacted
18 copy to the expert anyway for him to review prior to
19 his testimony, but I think where these redacted
20 exhibits appear primarily is in the prefiled testimony
21 of Jennifer Krebs where we are just basically providing
22 copies of documents from public agencies to the
23 Commission, and perhaps what we can do is either just
24 substitute them there, which strikes me as just trying
25 to avoid having to have twice as much -- we've got

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1 plenty of paper here, I realize, but in this case, it
2 doesn't seem to have much value to have two sets of
3 them, and then we can leave Mr. Sheridan's prefiled
4 testimony the way it is.

5 MR. HAFFNER: That would be fine.

6 JUDGE CAILLE: So now my understanding is
7 that we would substitute --

8 MR. HAFFNER: Substituting the version
9 that --

10 MR. JOHNSON: Substituting the clean version
11 in the prefiled testimony of Jennifer Krebs.

12 MR. HAFFNER: That would be acceptable. So
13 the version attached to Mr. Sheridan's testimony would
14 remain --

15 MR. JOHNSON: Sure. Would stay the same. So
16 for example, Exhibit JAK-2 is the redacted copy of an
17 inspection report for which we now have the unredacted
18 copy and so on.

19 JUDGE CAILLE: But we don't have Exhibit
20 numbers on those.

21 MR. JOHNSON: I haven't put them on at
22 present. I can put them on and provide them to the
23 parties and yourself.

24 JUDGE CAILLE: Yes.

25 MR. JOHNSON: It would be Exhibits JAK-2,

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1 JAK-4, and JAK-5.

2 JUDGE CAILLE: I will prefer that you mark
3 those so that I don't by any chance mix those up, since
4 they are your exhibits.

5 MR. JOHNSON: Sure.

6 JUDGE CAILLE: So 2, 4, and 5 substituted
7 with the unredacted. What is the name of the gentleman
8 who is your expert?

9 MR. JOHNSON: His name is Robert Sheridan.

10 JUDGE CAILLE: Is there another exhibit
11 issue, Mr. Johnson?

12 MR. JOHNSON: Yes, Your Honor, a couple of
13 additional issues, and I don't know what the best way
14 to handle this is, so I will tell you and you can tell
15 me whether that will work.

16 In response to the analysis presented by
17 Nanette Walker in her prefiled testimony, Mr. Haffner's
18 witnesses in their reply testimony questions certain
19 assumptions related to mileage that a truck driver
20 would need to drive to serve Eastern Washington 12
21 counties that are part of the Application.

22 In response to that, Ms. Walker and
23 Mr. Philpott, looking at the transportation side of the
24 issue, Ms. Walker looking at the implications for her
25 financial analysis, went back and looked at the mileage

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1 again. Mr. Philpott and his staff have generated an
2 additional sort of route analysis that shows the
3 mileage that their trucks travel in a sample, and we
4 have generated a document that I would like to see
5 added as an exhibit to Mr. Philpott's testimony and add
6 it at the end of his testimony.

7 He will speak to it, if I may be permitted,
8 during his direct examination, and it shows in more
9 detail the routes that Stericycle's Eastern Washington
10 drivers travel with some supporting information, and
11 then based on that new route analysis, Nanette Walker
12 has factored the revised mileage numbers in her
13 economic analysis or her analysis of Sure-Way's pro
14 forma projections and has developed a revised exhibit,
15 Exhibit 3 to her testimony.

16 So what we would like to do is offer new
17 route analysis as Exhibit 20 to Mike Philpott's
18 testimony and this revised 12-month pro forma analysis
19 of Ms. Walker's as an exhibit. Either we call it 3-A,
20 because it's a modification of her Exhibit 3, or we can
21 put it at the end of her testimony.

22 JUDGE CAILLE: Do you have any response to
23 that, Mr. Haffner?

24 MR. HAFFNER: Well, I get worried about
25 allowing too many new exhibits brought into the record,

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1 but I know that this process will happen throughout
2 this hearing. I guess my concern is Mr. Philpott did
3 address miles driven for their operations in Eastern
4 Washington in his prefiled testimony, and it seems that
5 this is now granting the Protestant an opportunity to
6 submit reply testimony that wasn't considered in our
7 prehearing order.

8 So I guess I would object to it on the
9 grounds that it's not contemplated within our original
10 scheduling, and it's different information -- well, I
11 don't know how different it is, but it's additional
12 information to what they could have submitted with
13 their original prefiled testimony, because they did
14 address mileage in that prefile testimony.

15 As to the revision to the pro forma, it
16 sounds like those are based on mileage, and again, they
17 had mileage information that they were using in
18 Mr. Philpott's prefiled testimony, and as I recall in
19 Ms. Walker's initial pro forma and prefiled testimony,
20 she replied on that mileage and that Mr. Philpott
21 included it in his prefiled testimony, so now they are
22 going back and giving reply testimony, which is what we
23 had an opportunity to do but the prehearing scheduling
24 didn't provide for them to do.

25 JUDGE CAILLE: Anything further?

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1 because the folks doing the analysis thought the
2 analysis was sufficient. When they were critiqued by
3 Mr. Haffner, they looked at it again and decided they
4 had over-estimated mileage in certain respects. They
5 went back and redid the analysis in a different way and
6 came up with a different number.

7 JUDGE CAILLE: Here's the problem. Each
8 party can go on and on and revise their testimony to
9 try to reach perfection. This isn't an exact science
10 here, and I really want to try not to get into this
11 mode.

12 I really think that we need to keep control
13 over this type of adding to the record, so I'm going to
14 deny your request to do those additional exhibits and
15 bring them in because it is now putting into the record
16 a new analysis, and I do not think it's fair. The
17 Applicant would need to look at that and then reply, so
18 your motion is denied.

19 MR. JOHNSON: Your Honor, may I ask that we
20 be allowed to make a written motion and submit the
21 materials so you have an opportunity to look at it? In
22 that way, I would preserve the record of our request to
23 have these things admitted and your specific denial of
24 these particular exhibits, so we can have the exhibits
25 on the record in that fashion as a means for review, if

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1 we choose to proceed that way.

2 JUDGE CAILLE: You may do that. Have we
3 covered all your exhibit issues?

4 MR. JOHNSON: There is one additional item,
5 Your Honor, and that is I've had an exchange of e-mail
6 communications with the FDA with respect to one of the
7 issues that Mr. Haffner's folks have been arguing with
8 respect to their FDA compliance, and I received an
9 e-mail back yesterday from the FDA's medical device
10 quality systems expert, Kimberly A. Trautman, and I
11 would like to offer this as an additional exhibit with
12 respect to the issue of how the FDA regulations apply
13 to a company such as Sure-Way, and I earlier provided a
14 copy to Mr. Haffner.

15 JUDGE CAILLE: Mr. Haffner, response?

16 MR. HAFFNER: Yes, Your Honor. I would
17 oppose the admission of this exhibit also because the
18 person from the FDA who is responding admits in her
19 exhibit that she's not an expert in registration and
20 listing questions or issues, and I think those go to
21 the heart of matter as to whether QSR regulations are
22 even relevant in this proceeding, because there is a
23 dispute between the opposing parties as to whether the
24 Applicant is required to register with the FDA as a
25 manufacturer or not, and this person from the FDA that

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1 apparently is the author of this e-mail, confirming her
2 conversations with Mr. Johnson, admits that she's not
3 an expert in the area of registration and listing but
4 that her expertise is in quality system regulation.

5 MR. JOHNSON: Your Honor, may I respond
6 briefly?

7 JUDGE CAILLE: Yes, just a moment. Did you
8 say that she admits that she's not an expert in
9 regulation; that she is an expert in the QSR?

10 MR. HAFFNER: In her own words, "I defer any
11 comment on the registration and listing questions and
12 issues that you state below as I am not the
13 registration and listing expert. I am the expert in
14 quality system regulation, 21-CFR-820, and therefore
15 can only make statements to that particular
16 regulation."

17 JUDGE CAILLE: Mr. Johnson?

18 MR. JOHNSON: If you would like to review the
19 e-mail, I have a copy here. To the extent that the
20 exact text is relevant, you may want to review it. The
21 issue that Mr. Haffner raises goes to the weight that
22 should be given to the e-mail correspondence.

23 This woman's title is medical device quality
24 systems expert, so that is her title. She says she is
25 not the registration and listing expert, so she's not

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1 going to comment on these issues, but she does respond
2 and comment on the issue of whether the quality system
3 regulation applies to a company in the position of
4 Sure-Way, and for that matter, bio systems and
5 Stericycle.

6 So the issue of exactly how it cuts and on
7 exactly which issue I think is an issue that Your Honor
8 is quite capable of determining and taking into
9 account, but the issue is one of weight and
10 responsiveness rather than whether it should be
11 permitted or not, I believe. And, Your Honor, your
12 concern about not having materials, people sort of
13 amend their testimony, doesn't apply to this particular
14 case because a response came yesterday.

15 JUDGE CAILLE: I understand. That would not
16 be the reason I would exclude it. Is Ms. Trautman
17 available for cross-examination?

18 MR. JOHNSON: Your Honor, I don't think she's
19 available for cross-examination, but neither are --
20 Mr. Haffner has put in e-mail correspondence with
21 Mr. Chilcott and somebody else in the FDA with respect
22 to the same issue. This FDA fellow is not available
23 for cross-examination. This information very clearly
24 shows exactly what she's responding to in the e-mail.

25 JUDGE CAILLE: I'm not going to argue with

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1 you about this, but I will point out to you that we
2 have stipulated to those exhibits and Mr. Haffner is
3 objecting to this one, so there is a bit of difference
4 here. If he were not objecting to this, I would look
5 at it in the same way. May I see a copy of that,
6 please?

7 MR. JOHNSON: Sure. Your Honor, this goes to
8 the exact issue that was my caveat with respect to
9 Mr. Haffner's prefiled exhibit, and I believe the issue
10 goes to the weight to be given to this material rather
11 than whether it should be before the Commission so that
12 the Commission can make an informed decision.

13 JUDGE CAILLE: Could you tell me again,
14 Mr. Johnson, why this wasn't received until yesterday?

15 MR. JOHNSON: Because she didn't respond,
16 Your Honor, until yesterday.

17 JUDGE CAILLE: When did you query her?

18 MR. JOHNSON: I queried her on August 12th.
19 I had spoken to her on the telephone some weeks prior
20 to that.

21 JUDGE CAILLE: Let's take about a five-minute
22 recess so I can read this.

23 (Recess.)

24 JUDGE CAILLE: I've had an opportunity to
25 review the e-mail that is the subject of this proposed

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1 exhibit. My ruling is that I'm going to deny the
2 admission of this exhibit. Mr. Haffner has opposed it
3 and Ms. Trautman is not available for
4 cross-examination.

5 I understand your argument about the weight,
6 but I think that would be -- if I decided to admit it
7 we would weigh it, and you are offered the same
8 opportunity, Mr. Johnson, to submit this and make it a
9 part of the record.

10 MR. JOHNSON: Is the basis of your ruling
11 that Ms. Trautman is not available for
12 cross-examination?

13 JUDGE CAILLE: Yes, because what we have here
14 is you asking Ms. Trautman a question, or actually, you
15 are, in effect, testifying, and then you are saying,
16 "Is this correct, Ms. Trautman," and Ms. Trautman is
17 responding back, and I am not comfortable with the
18 value of this exhibit without having Mr. Haffner have
19 the opportunity to cross-examine. I suppose if he had
20 stipulated to the admission of this, I would have
21 allowed it in, but he hasn't, and I will not allow it
22 in.

23 MR. JOHNSON: So Your Honor, as we've
24 stipulated to allow the e-mail correspondence with
25 somebody from the FDA for Mr. Haffner, so that will be

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1 allowed in, but this e-mail correspondence with
2 somebody else from the FDA that I've offered will not
3 be allowed in; is that correct?

4 JUDGE CAILLE: It's not allowed in because
5 Mr. Haffner has not stipulated to it. The others you
6 have stipulated to. If you had raised that issue about
7 the other e-mail, I suppose I would have also thought
8 that it not be a good idea to have volumes of e-mail in
9 where the person who is the declarant is not available
10 for cross-examination. In any event, those also will
11 only go to weight.

12 MR. JOHNSON: That is my thought, Your Honor.
13 I don't mean to argue with you about it, but since
14 we've got correspondence here related to people from
15 the FDA interpreting the FDA's guideline that we should
16 put it all in front of the Commission and let the
17 Commission weigh it for what it's worth, but I guess I
18 understand your ruling.

19 JUDGE CAILLE: Thank you. And is that it for
20 your exhibit questions or issues?

21 MR. JOHNSON: I guess we had one other
22 question. The pleadings we filed yesterday
23 electronically needed to be filed with the records
24 office.

25 JUDGE CAILLE: The exhibit list no, that does

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1 not have to be filed.

2 MR. JOHNSON: So we are good with what we did
3 electronically yesterday.

4 JUDGE CAILLE: Yes. And Mr. Haffner, I
5 believe you have a remaining issue?

6 MR. HAFFNER: There is one other scheduling
7 issue that benefits me and Mr. Johnson, but Mr. Johnson
8 has an expert witness that will be testifying first
9 thing, I think, September 20. We were just going to
10 ask if Your Honor could possibly consider having my
11 cross-examination of Mr. Johnson's witnesses moved to
12 the 10th. Part of it is because of the expense of his
13 witness having to travel down here in addition to
14 already traveling from DC to the SeaTac area.

15 JUDGE CAILLE: How many witnesses do we have
16 coming? Would that affect other witnesses as well?

17 MR. JOHNSON: No, Your Honor. Kent is much
18 more convenient for all of our witnesses because the
19 Stericycle people have offices in Kent. This
20 particular fellow is coming across the country to
21 testify, so the proximity to SeaTac allows him to get
22 in and get out without, perhaps, involving another day,
23 so if Kent were available, it would be helpful.

24 JUDGE CAILLE: I will look into that and see
25 if Kent is available, and you are agreeable to that,

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1 Mr. Haffner?

2 MR. HAFFNER: Yes, Your Honor.

3 JUDGE CAILLE: How about you, Mr. Trautman?

4 MR. TRAUTMAN: This is for the September 20th
5 day?

6 JUDGE CAILLE: Is it just for that one day?

7 MR. JOHNSON: It would be more convenient for
8 our witnesses and I think for Mr. Haffner and his
9 witnesses to do it all three days there.

10 JUDGE CAILLE: I will look into it to see
11 what is available, and I don't know that we will do all
12 three days up there.

13 MR. TRAUTMAN: I'm just wondering whether we
14 are going to need three days. I'm looking at
15 Mr. Haffner's estimates and I see a total of two hours,
16 maybe four, for all the witnesses, plus whatever Staff
17 has.

18 MR. HAFFNER: I don't anticipate needing
19 three days for the cross-examination of the four
20 Stericycle witnesses. However, I understand that
21 Mr. Johnson will want to have redirect, and I
22 anticipate that what he thinks he will need in terms of
23 redirect to determine that.

24 JUDGE CAILLE: You won't be able to tell us
25 now until you hear the cross.

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1 MR. JOHNSON: The principle reason to ask
2 they be in Kent is for this one fellow traveling across
3 the country and to testify on the 20th.

4 JUDGE CAILLE: Maybe we can try to
5 accommodate the 20th.

6 MR. JOHNSON: The other folks can come to
7 Olympia.

8 MR. TRAUTMAN: Staff can accommodate whatever
9 the Bench and the parties need.

10 MR. HAFFNER: Given the concerns about
11 traffic, it would make sense we start at 9:30 in Kent
12 to accommodate Staff and Your Honor.

13 JUDGE CAILLE: Yes. We are going to be
14 driving every day.

15 MR. TRAUTMAN: Are you referring to the
16 September date as well?

17 MR. HAFFNER: Yes. My preference would be
18 nine o'clock, but to allow you time for traffic, I have
19 no problem with 9:30.

20 JUDGE CAILLE: So everybody is clear, the
21 hearings next week will be starting at nine o'clock. I
22 will look into that and I will probably tell you next
23 week. Before I kind of summarize, is there anything
24 further from the parties?

25 MR. JOHNSON: There is one other thing, which

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1 is that Mr. Haffner has requested the opportunity to
2 present his witness, Jeffrey Gibbs, by telephone, and
3 while the Administrative Procedure Act allows that in
4 certain cases, I think it does very much limit our
5 ability to cross-examine him, and I think it makes it
6 much more difficult for Your Honor to evaluate his
7 demeanor, his credibility, all the nonverbal things
8 that come out through testimony in person.

9 I also think that if we were able to see him,
10 we would be able to see whether he is reading things,
11 what he's referring to in front of him; whereas if we
12 are on the telephone, we don't know where the
13 information he's presenting to the hearing is coming
14 from, whether it's coming from some text he's looking
15 at or whether it's coming from his own knowledge and
16 expertise.

17 So for those reasons, I would like to request
18 that if he's going to testify by telephone that we
19 arrange video conferencing. I assume that the
20 Commission has that capability, but in any event, if we
21 cannot arrange video conferencing, then I would object
22 to having his testimony by telephone because it reduces
23 our ability to conduct effective cross-examination.

24 JUDGE CAILLE: Any response, Mr. Haffner?

25 MR. HAFFNER: Yes, Your Honor. I think the

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1 Administrative Procedures Act clearly provides for the
2 allowance of testimony by telephone, and all of those
3 factors that Mr. Johnson raises are raised every time
4 this issue comes up of testifying by telephone. It's
5 certainly not as observant a situation as when you have
6 a person in front of you, but the APA allows for that.
7 This witness would have to be flown out from Washington
8 DC at great expense. Mr. Johnson has a witness that is
9 doing that, but I think his client is more able to fund
10 that expense than is my client, and again, the Act
11 allows for this type of testimony.

12 JUDGE CAILLE: Anything further, Mr. Johnson?

13 MR. JOHNSON: I note that under the APA, RCW
14 34.05.449, Subparagraph 3, the presiding officer has
15 the discretion to allow all or part of a hearing to be
16 conducted by telephone but it's limited by where the
17 rights of the parties will not be prejudiced thereby.

18 It does not say prejudiced a little or not
19 prejudiced a lot. It just says no prejudice, and I
20 think we are clearly prejudiced by allowing a critical
21 witness to testify telephonically when we cannot
22 observe his demeanor and cannot determine what
23 materials he may be reviewing or looking at during the
24 course of his testimony.

25 The APA provision goes on to say that each

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1 party in the hearing must have an opportunity to
2 participate effectively in -- to hear and effectively
3 and economically feasible to see the entire proceeding
4 while it's taking place. That was the source of my
5 thought about video conferencing.

6 If we can arrange video conferences that will
7 allow us to see Mr. Gibbs while he's testifying, I
8 wouldn't have a problem. In the absence of that, I
9 believe we are prejudiced, and I do not believe that
10 the APA in that permits telephonic testimony.

11 JUDGE CAILLE: Since I don't have the APA
12 with me, I'm going down to my office and review that,
13 and also after reviewing it, I might consider or check
14 whether there is video conferencing available, so let's
15 take about a 10-minute recess.

16 (Recess.)

17 JUDGE CAILLE: I have reviewed RCW 34.05.449
18 as to the rights of the parties as to hearings with
19 witnesses testifying over the phone, and it does read
20 as Mr. Johnson states.

21 However, this is something that is commonly
22 done in our hearings at the Commission, and I also
23 checked with our chief administrative law judge, Bob
24 Wallis, and he has indicated to me that at the EFSEC
25 hearings, they often have expert witnesses testifying

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1 over the phone in those proceedings. So, Mr. Johnson,
2 your objection is overruled. Is there anything further
3 from the parties?

4 MR. HAFFNER: No, Your Honor.

5 JUDGE CAILLE: All right. Thank you, and --

6 MR. JOHNSON: Just one other thing. Just let
7 me be reminded of what Your Honor's prior ruling was on
8 this one issue. Mr. Haffner gave me, as I mentioned, a
9 stack of materials this morning. I believe it was your
10 ruling that we would be free to add these to the
11 cross-examination lists that we are going to be working
12 up.

13 JUDGE CAILLE: That is correct, Mr. Johnson,
14 and just to remind the parties, I will be sending you
15 the list of cross-examination exhibits that I have
16 provided to you in hard copy. I will send that to you
17 electronically so you can add your descriptions in and
18 add in your cross-examination exhibits under the
19 appropriate witnesses since I was not able to do that.
20 All right. Thank you everyone --

21 MR. HAFFNER: Your Honor, I guess to clarify
22 that, when we do the cross-examination exhibits, you
23 want us to list them first person only that they will
24 appear.

25 JUDGE CAILLE: Yes. They don't have to be in

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1 each, just because they will be admitted at that point

2 or not.

3 MR. HAFFNER: Thank you, Your Honor.

4 JUDGE CAILLE: Thank you.

5 (Prehearing adjourned at 11:03 a.m.)

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