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1 WASHINGTON REFUSE AND RECYCLING ASSOCIATION,
by JAMES K. SELLS, Attorney at Law, Ryan, Sells,
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4 MURREY'S DISPOSAL COMPANY, INC.; WASTE
CONNECTIONS OF WASHINGTON, INC.; ISLAND DISPOSAL, INC.;
5 LYNNWOOD DISPOSAL, d/b/a ALLIED WASTE OF LYNNWOOD;
EASTSIDE DISPOSAL, d/b/a ALLIED WASTE OF BELLEVUE, by
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1 P R O C E E D I N G S

2 JUDGE TOREM: Let's be on the record. I'm
3 Adam Torem. I'm the administrative law judge presiding
4 over this matter for the Washington Utilities and
5 Transportation Commission. It's now a little after
6 1:30 p.m. It's Thursday, January 24th, 2008. This is
7 a prehearing conference in Docket TG-072226. This is a
8 special proceeding to determine the proper
9 classification of three companies alleged to be
10 transporting solid waste without the required
11 Commission certification. The court reporter today is
12 Kathy Wilson.

13 The purpose of our prehearing is to take the
14 appearances of parties, including our petitioners for
15 intervention, clarify the issues in this hearing, and
16 then after I make rulings on the petitions for
17 intervention, we'll discuss and develop a schedule for
18 our consideration of the matter and any other
19 prehearing procedural matters we can kill off today.

20 Before we proceed any further, I want to take
21 appearances. We have a number of parties and
22 petitioners for intervention present in Olympia today.
23 If you haven't done it before, please state your full
24 name, the party you represent, your firm's full
25 address, telephone number, fax number and e-mail

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1 address, and I think sometimes it helps to read your
2 business card, so I'm going to start with the
3 Companies; I believe it's Mr. Don Anderson.

4 MR. ANDERSON: Yes. My name is Donald L.
5 Anderson. I represent Glacier Recycle, LLC; Hungry
6 Buzzard Recovery, LLC; and T&T Recovery, Inc. Our law
7 firm is Eisenhower and Carlson, PLLC, 1200 Wells Fargo
8 Plaza, 1201 Pacific Avenue, Tacoma, Washington, 98402;
9 phone, (253) 572-4500. Fax is (253) 272-5732; e-mail,
10 danderson@eisenhowerlaw.com.

11 JUDGE TOREM: Commission staff?

12 MR. THOMPSON: Jonathan Thompson, assistant
13 attorney general representing the Commission staff. My
14 street address is 1400 South Evergreen Park Drive
15 Southwest, Olympia, 98504. My telephone number is
16 (360) 664-1225. Fax is 586-5522, and my e-mail is
17 jthomps@wutc.wa.gov.

18 JUDGE TOREM: The Washington Refuse and
19 Recycling Association, WRRRA, has filed a petition for
20 intervention?

21 MR. SELLS: If Your Honor please, James
22 Sells; address, 9657 Levin Road Northwest, Suite 240,
23 Silverdale, 98383; telephone, (360) 307-8860; fax,
24 (360) 307-8865; e-mail, jimsells@rsulaw.com,
25 representing proposed intervenor Washington Refuse and

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1 Recycling Association.

2 JUDGE TOREM: Waste Management of Washington?

3 MS. MCNEILL: My name is Polly L. McNeill.

4 I'm with Summit Law Group, 315 Fifth Avenue South,
5 Suite 1000, Seattle, Washington, 98104. Phone number
6 is (206) 676-7040; fax, (206) 676-7041; e-mail,
7 pollym@summitlaw.com, and I represent proposed
8 intervenor Waste Management of Washington, Inc. Thank
9 you.

10 JUDGE TOREM: Here for five different
11 certificated companies, I believe it's Murrey's
12 Disposal Company, Incorporated; Island Disposal,
13 Incorporated; Waste Connections of Washington,
14 Incorporated; Lynnwood Disposal, doing business as
15 Allied Waste of Lynnwood, and Eastside Disposal, doing
16 business as Allied Waste of Bellevue. We were supposed
17 to have David Wiley, but we have...?

18 MR. FERESTIEN: Thank you. Dana Ferestien
19 on behalf of my partner, Mr. Wiley, who is out of town
20 this week. We are with Williams Kastner. Address is
21 601 Union Street, Suite 4100, Seattle, Washington,
22 98101; phone, (206) 628-6600, and fax is (206)
23 628-6611. My e-mail is dferestien@williamskastner.com,
24 and since Mr. Wiley is going to be the primary person,
25 I'll give you his e-mail as well;

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1 dwiley@williamskastner.com., and I can repeat all five
2 proposed intervenors into the record.

3 JUDGE TOREM: I'll make sure the court
4 reporter has those. So let's move on to the issue in
5 the case, which is review of the order instituting a
6 special proceeding contains most of what we need to
7 know, states that the companies that are represented by
8 Mr. Anderson are going to have the burden of proving
9 that they are not solid waste collection companies, or
10 more informally, solid waste haulers, as the case may
11 be. There are definitions to the effect of what is a
12 solid waste collection company that I found in RCW
13 81.77, some other relevant definitions in RCW 70.95, as
14 well as WAC 480-70.

15 In my view, the case basically boils down to
16 what these companies do, how they do it, and whether it
17 meets the definitions contained in those statutes and
18 the Commission's solid waste collection company
19 regulations. I don't think there is a whole lot more
20 to it than that. Let me just ask Mr. Anderson if
21 that's what he's here for or if he sees additional
22 issues we need to take up.

23 MR. ANDERSON: I don't think there is that
24 much to it.

25 JUDGE TOREM: Make it even simpler?

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1 MR. ANDERSON: It is whether they are solid
2 waste collection companies with respect to the
3 collection and hauling of CDL waste to the Weyerhaeuser
4 site in Longview.

5 JUDGE TOREM: For the record, can you spell
6 out the CDL so we have it today?

7 MR. ANDERSON: Construction, demolition, and
8 land clearing.

9 JUDGE TOREM: Mr. Anderson, do you see it as
10 only the CDL waste being hauled to Longview, or is
11 there any other place that the CDL waste might be being
12 moved around?

13 MR. ANDERSON: The issue that was raised by
14 the Commission in this particular docket in that there
15 is a question of whether there is a use there, whether
16 there is a process, to what extent recycling is
17 performed before it gets there that may be unique to
18 those particular companies. There are all sorts of
19 other things that these companies may do that have not
20 been raised by the Commission.

21 JUDGE TOREM: Mr. Thompson, do you agree with
22 Mr. Anderson's narrowing of what I stated?

23 MR. THOMPSON: No. I think I prefer your
24 broader statement, and that is because I think there is
25 an issue -- in our view, it is permissible for a

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1 recycler to take an accidental incidental amount of
2 solid waste material to a place to be disposed of, and
3 so even if you determine that the taking material to
4 Weyerhaeuser constitutes solid waste collection, there
5 is still a question of whether the amount is small
6 enough that it's just merely incidental or accidental
7 as compared with the total operations of the Company.
8 So I think the necessarily that we get into the whole
9 picture of what the Respondent's are collecting,
10 including things that would be what constitute
11 recyclable materials.

12 JUDGE TOREM: But your statement is not an
13 expansion of what it's in the order instituting this
14 proceeding, I think it's Paragraph 5, is it?

15 MR. THOMPSON: No. I think if you look at
16 the WAC that is referenced there where it describes the
17 things that the Commission looks into in determining
18 whether a company needs not only a common carrier
19 permit but also a solid waste certificate that those
20 are all things that are inquired into.

21 MR. ANDERSON: I don't know if we really
22 disagree. I think we look back from Weyerhaeuser to
23 see where those materials came from and what happened
24 to them and what they were mingled with before they got
25 there. That's all part of a process from the time a

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1 container is picked up to the time it gets there, but
2 this proceeding shouldn't, and we haven't had notice of
3 any instance where there is an allegation that these
4 people can't pick up these materials and haul them to
5 recycling center to perform complete source of
6 separated recycling. There are all sorts of things
7 they can do that are aren't at issue. The issue is
8 whether the materials that end up at Weyerhaeuser are
9 the end result of a process and stream that require a
10 G-permit under 81.77.

11 JUDGE TOREM: I think, Mr. Thompson, your
12 statement is in line with the four paragraphs in the
13 order instituting today's proceeding? The focus is on
14 CDL waste, and with particular specificity, where its
15 delivered to Weyerhaeuser's facility near Longview. So
16 the amounts of that waste that may or may not be mixed
17 in without need for a permit I think is taken up in
18 conjunction with these paragraphs as we will as the
19 definitions in the 480-70-016 WAC that I think we were
20 referring to. So it may be that my initial statement
21 of this can be narrowed down to the CDL focus and the
22 stream to and from the Weyerhaeuser facility.

23 MR. ANDERSON: There is no "from."

24 MR. THOMPSON: I think I generally agree, but
25 I think there may be an issue where through discovery,

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1 we are going to be seeking information about the total
2 operations of the Company to see how the portion of
3 material that ends up going to Weyerhaeuser, what
4 percentage of the total operations that constitutes,
5 because I think that's an issue that's necessary to
6 look in to.

7 In other words, the Companies may assert,
8 okay, even if this is a hauling waste for disposal
9 taking this material to Weyerhaeuser, that's okay. We
10 are entitled to do that because this is just sort of
11 leftover residual material from our recycling
12 activities, and that's not prohibited. Well, if that's
13 an assertion the Companies intend to make, we need to
14 inquire whether it's true, as a matter of fact, if this
15 is merely incidental or accidental, and that requires
16 looking at how large a percentage this constitutes of
17 the total amount of material collected by the
18 Companies.

19 MR. ANDERSON: That's really the scope of
20 discovery as to what it means at the end at
21 Weyerhaeuser. I don't think we are disagreeing about
22 the legal issue at the end. It's how broadly the
23 Companies' operations are examined.

24 We anticipate that there is going to be a
25 broad inquiry. Our problem in negotiations with the

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1 Commission staff was that absent a proceeding, they
2 were unable to provide for a protective order that
3 would keep our proprietary information safe from
4 competitors.

5 JUDGE TOREM: We will take up the protective
6 order issues and discovery matters later, but it sounds
7 as though we are all on the same page. I know I
8 haven't ruled on the petitions for intervention or
9 taken those up yet, but as a courtesy to other folks
10 that are here, Mr. Sells, did you see the issue as any
11 different than has just been discussed?

12 MR. SELLS: No. I'm not sure exactly what
13 the entire issues are going to be until the discovery
14 process gets under way. It may be narrower; it may be
15 broader.

16 JUDGE TOREM: Ms. McNeill, any comment?

17 MS. MCNEILL: No. I agree.

18 JUDGE TOREM: Mr. Ferestien?

19 MR. FERESTIEN: I agree.

20 JUDGE TOREM: Let me turn to the petitions
21 for intervention. I have three petitions that were
22 filed, one by Mr. Sells. That was on January 7th,
23 2008. As we noted, it was on behalf of the Washington
24 Refuse and Recycling Association, or WRRRA. The
25 petition indicates that the WRRRA is a trade association

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1 representing over 30 solid waste haulers in Washington
2 State. Two other petitions were filed on January 18,
3 2008, one by Ms. McNeill and another by Mr. Wiley for
4 their respective clients. I believe each of them is a
5 certificated solid waste hauler in the state.

6 Now, the Respondents or Companies filed a
7 memorandum in response to those petitions to intervene.
8 That came in on Tuesday of this week, January 22nd,
9 2008, and Mr. Anderson stated his opposition to
10 intervention by both WRRRA as well as all of the
11 individual certificate holding companies that are
12 seeking to intervene.

13 Let me ask first if there is anyone else
14 present today who is seeking an oral petition to
15 intervene? Seeing none, let me ask Ms. McNeill, do you
16 know if your client is a member of WRRRA?

17 MS. MCNEILL: My client is not a member of
18 the WRRRA.

19 MR. ANDERSON: Your Honor, with respect to
20 Ms. McNeill's client, which came in separately, we are
21 incorrect. If they are not a member of WRRRA, I would
22 concede that they have shown or at least alleged a
23 sufficient economic reason to get intervenor status.

24 MS. MCNEILL: Thank you.

25 JUDGE TOREM: Mr. Ferestien, do you know if

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1 any of your clients are members of WRRRA, and if you
2 don't, I'll defer to Mr. Sells.

3 MR. FERESTIEN: I believe at least three of
4 them are. They all are.

5 JUDGE TOREM: So all of them are. Despite
6 Mr. Anderson's concession as to the sufficient
7 independent financial interest, my look at this case
8 was a little stricter as to what the purpose of the
9 case was, and I wanted to ask all of you intervenors to
10 tell me how your clients' interests differ from that
11 being put forth and represented by Commission staff,
12 and maybe I'll just state my initial take on this,
13 which may be too conservative, but I want this hearing
14 to be focused on the important issue for Mr. Anderson's
15 companies.

16 My questions are why it would be necessary to
17 intervene here as opposed to wait and file a protest in
18 any future application if Glacier or Hungry Buzzard or
19 T&T was forced with a cease-and-desist order, as the
20 Commission is seeking, to file an application for a
21 certificate at which point protests could be filed
22 stating whether or not there was public convenience or
23 necessity for an additional hauler in that market.
24 That's one future potential way to serve your clients'
25 interests, and it may be sufficient; I don't know.

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1 And secondly, if you can address if the fact
2 of the matter is your clients have stated an interest
3 and perhaps taken it up with the Commission as to what
4 Mr. Anderson's companies and clients are doing, why has
5 it been that your complaints or issues have been risen
6 to the level of a complaint if you are authorized to
7 file under RCW 81.04.110, or through request for a
8 rules clarification, which I understand could have been
9 done under WAC 480-70-031.

10 Now, of course I just spring these citations
11 on you and maybe you haven't read them, so if you want
12 time to pause to look at those and then come back on
13 the record, fine with me. If you want to just address
14 it now as to what your clients' interests are and then
15 I'm going to turn to Commission staff and ask what
16 their position after hearing all that is on the
17 petitions for intervention, we can go straight ahead
18 with it. Anybody want to take a quick break and review
19 the cites I gave you?

20 MS. MCNEILL: I guess I would suggest, Your
21 Honor, that perhaps, at least for my client, I might
22 give you my response without looking at the citations,
23 and if you think that the response has not been
24 detailed enough or responsive to the rules that you've
25 cited, then perhaps I want to take a harder look at

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1 them.

2 But the issues that are implicated in this
3 classification proceeding raise an operationally
4 challenging distinction between recycled material on
5 the one hand and solid waste on the other hand. The
6 rules that presently exist do not invite a
7 clarification between those two distinctions. They
8 are, I think, best understood and worked out by looking
9 at actual operations that these companies do as well as
10 operations that my client does.

11 My client is a solid waste collection company
12 with certificated authority throughout the state,
13 including the territories in which these companies
14 operate, but they also perform commercial recycling
15 services, and they are very interested in understanding
16 where the operational distinctions fall between solid
17 waste collection and recycling. So we have an interest
18 in the outcome of this that really is more proactive in
19 terms of participating in this proceeding and
20 evaluating some operational and functional and
21 practical facts and as what their meaning might be
22 under the law.

23 So to wait until there is a determination
24 that these companies should need a solid waste
25 collection authority from the Commission might not

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1 actually resolve the interest that my clients have in
2 this proceeding. There may indeed be a conclusion they
3 are not required to get a solid waste certificate, and
4 if that's based on some, perhaps, flawed aspects of
5 facts or operational distinctions that come out in the
6 discovery, then we would have been foreclosed from the
7 opportunity to give our input and influence on the
8 ramifications of conclusions that are made with regard
9 to these three and then translating those to our own
10 operations.

11 With regard to a rule clarification, there
12 really isn't a rule that fits this situation, and
13 that's part of the reason that this classification
14 proceeding has come to this point, and part of the
15 reason that my clients, as well as other solid waste
16 collection companies in the state, are experiencing a
17 frustration. On one hand, there is a sense that we
18 comply with the law. We comport with the regulations,
19 and yet we are losing revenue to companies like these
20 three and including these three, and if it's okay for
21 them to do what they are doing, then we would like to
22 be able to do it too, but since we try very hard and
23 are under the radar of the regulatory scrutiny and try
24 hard to comply with those regulations, we don't have
25 quite as much leeway to be experimental.

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1 So the outcome of this proceeding is very
2 important to influencing operational decisions, and I
3 appreciate Mr. Anderson's concession. There is
4 certainly at the outset that we have an economic stake
5 in this. Right now, the Company feels that it's losing
6 revenues that it should otherwise be receiving, and if
7 that is correct, there is a public interest in that
8 because the result of that is a loss of revenues that
9 would rightfully be within the rubric of the regulatory
10 scheme results then in rates that are higher to the
11 customers that we serve.

12 And so if the entire statutory scheme is
13 based on efficiency of service and thereby regulated
14 rates to the customer, there is an impact to the public
15 interest from the direct economic interests that we
16 have. I'll take a breath there.

17 JUDGE TOREM: Ms. McNeill, your client you
18 think would be best served in a classification
19 proceeding which effects only the three companies
20 essentially subpoenaed before the Commission as opposed
21 to perhaps a rule-making to clarify and expand or
22 rewrite the rules that you were saying aren't
23 satisfactory quite yet?

24 MS. MCNEILL: That's our position, yes. We
25 believe that this classification proceeding will result

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1 in a clarification operationally of how existing rules
2 might work, but certainly if this doesn't work, maybe a
3 petition for rule-making would be the course of action
4 we would embark on by necessity. We do think, however,
5 that this proceeding will give us an opportunity.

6 These three companies, they are good at what
7 they do, and they are good sort of representatives of
8 the commercial recycling that is going on throughout
9 the state. An opportunity to understand where that
10 demarcation between regulated and nonregulated
11 operations occur I think is presented by these three
12 companies very well.

13 JUDGE TOREM: Mr. Thompson, do you know what
14 the Commission's posture is now on a future rule-making
15 in this area?

16 MR. THOMPSON: I believe there has been
17 discussion of starting a rule-making on the
18 definitional section of the solid waste rules, the
19 portions that would include defining solid waste
20 collection, I believe, and that rule-making if it's
21 initiated by the Commission could get into this subject
22 area. I'm not sure -- Mr. Eckhardt is shaking his head
23 at me, so I would be speculating to guess. So it
24 probably wouldn't answer this precise question,
25 certainly not as it applied to specific facts.

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1 JUDGE TOREM: So, Ms. McNeill, do you think
2 the specific facts presented by these three companies'
3 operations really put things in context and the
4 economic interest as well as the demarcation between
5 recycling and solid waste hauling can be -- I'll better
6 understand it as the finder of fact by having your
7 companies' participation?

8 MS. MCNEILL: That's my belief, yes, it is.
9 Again, based on what I know, and there is, of course,
10 the discovery aspect that could end up belying my
11 position, but that's my impression right now, yes,
12 because again, I think that this demarcation that I
13 refer to has so many implications to -- I should say
14 that in the reverse -- operations of the companies have
15 implications to that demarcation in a way that just
16 looking at the law and evaluating it as sort of an
17 ivory tower perspective doesn't give the same ability
18 to understand how the distinction should be played out.

19 JUDGE TOREM: Mr. Anderson, I've understood
20 your concessions earlier. Are you removing any
21 oppositions to this particular petition to intervene?

22 MR. ANDERSON: With respect to Waste
23 Management's position, we concede they have alleged
24 economic interest and a basis for intervention.

25 JUDGE TOREM: Let me ask the two other

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1 petitioners to intervene if they want to take a break
2 or go ahead with their presentations now.

3 MR. SELLS: I don't.

4 MR. FERESTIEN: Your Honor, I think to be
5 perfectly candid, I would be best served by commenting
6 now, and to the extent you are not persuaded in the
7 appropriateness of our intervention that Mr. Wiley have
8 an opportunity to embellish on my remarks on his return
9 at the end of the week.

10 JUDGE TOREM: So Mr. Ferestien, let me here
11 from you and then I'll hear from Mr. Sells.

12 MR. FERESTIEN: I don't think that there is
13 any real distinction that should be drawn between the
14 proposed intervening party we represent and
15 Ms. McNeill's client. The mere fact that our clients
16 are members of the WRRRA does not change any of the
17 facts that support the basis for Waste Management's
18 proposed intervention. Like Ms. McNeill's client, our
19 clients are on the street operating, and it's going to
20 be in the public's best interest that you have a full
21 picture of what's transpiring so that you can overcome
22 the difficulties that Ms. McNeill was alluding to, and
23 you are going to get part of the story if Ms. McNeill's
24 client is participating but our clients are not, and
25 really, there is no drawback in getting that full

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1 picture. I think it will only aid in your
2 understanding.

3 With regard to economic interest, like
4 Ms. McNeill's client, we are being impacted. We are
5 certificated haulers in the areas where the respondents
6 are operating, and their operations are impacting the
7 amount of money that is coming to us in our operations.
8 So for that reason, I believe intervention is
9 appropriate for these parties as well.

10 MR. SELLS: If Your Honor please, let me make
11 it as clear as I can that there would be at hearings no
12 duplication of effort between the Waste Connections
13 companies and the others represented by Mr. Ferestien
14 and Mr. Wiley and WRRRA, and in thinking back to the
15 probably over a hundred hearings we have done,
16 frequently WRRRA appears as a protestant, for example,
17 whereas companies that are maybe more directly or
18 larger and have their own legal staff are suffering.
19 There is no friendly cross. We don't try to get away
20 with that, and we don't duplicate efforts.

21 The Commission in its wisdom has seen fit to
22 make specific provisions with trade associations to be
23 part of these kinds of hearings as an intervenor, and
24 that, of course, is WAC 470-340 and 355, and we think
25 there is a reason for that, and that is that when you

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1 get an issue like this which affects the entire
2 industry, and what happens here is going to affect the
3 entire industry statewide, because if in fact what's
4 happening here in the haul to Weyerhaeuser is okay
5 without a permit, then something similar or identical
6 to that can happen in Spokane, or it can happen in
7 Walla Walla or anywhere else that there is a private or
8 even a publicly owned, for that matter, landfill.

9 These are the members, if you will, that the
10 Association represents at these hearings, and even
11 though there is a direct financial burden being placed
12 on the two large companies we are talking about here,
13 if that financial burden shifts over to a company with
14 two or three trucks in Northeastern Washington, it
15 could be devastating, and if it's devastating to a
16 certificated company, that means that the company has
17 to come to the Commission and seek a rate increase, so
18 it all comes back to the consumer. That's why we
19 believe the Commission allows associations to intervene
20 and that's why we proposed intervention here and every
21 other hearing there is or has been.

22 An intervention is different than a protest.
23 If we were to go through this matter and it eventually
24 ended up with these companies or companies like them
25 making application for a G-certificate, the Association

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1 has a right to protest that and would. However, we
2 would be starting a 100-meter dash here at 50 yards
3 behind because we wouldn't have known what had gone on
4 here. It all comes back to the public interest, and
5 one of the parts of public interest is to keep rates
6 down. Another part is for clean and sanitary
7 collection and disposal. Read our Web site. That's
8 what it's all about and that's why we are here.

9 JUDGE TOREM: Ms. McNeill, Mr. Sells, and
10 Mr. Ferestien, my concern about the public interest and
11 the rates of each company, and granted, we have six
12 different companies and an association representing
13 potentially 30 or more statewide asking for
14 intervention and all having their rates for the public
15 as an interest, if I let one company in, why shouldn't
16 I let in every single certificated company in the state
17 who all have the same interests?

18 I'm persuaded by these questions that you
19 raise that this is something that if they get to do it,
20 then we want to change our operations. I'm still
21 sorting out in my mind as to where the level of
22 intervention should be, and if I let one in, how do I
23 keep every other solid waste collection company in the
24 state from stepping in as well. Everybody has got that
25 same interest. Some took the trouble to file

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1 petitions, and there must be others that did not,
2 whether they are members of WRRRA or not. So I'm torn
3 on that piece. I understand the financial issues that
4 translate into that public interest as well, and while
5 the issue is novel and this may be the first cut for
6 each of your clients to come in and comment on it, if I
7 allow intervention, I'm trying to find a way that will
8 put all of you, as Mr. Sells pointed out, there is some
9 efficient participation, not only in the discovery but
10 also in the cross-examination at hearing.

11 Staff has a job to do here. They've sought
12 this order instituting this special proceeding. They
13 are going to, perhaps not from a commercial entity's
14 perspective but from a regulatory perspective, seek to,
15 I'm sure, aggressively pursue discovery, aggressively
16 cross-examine the witnesses, present it as the
17 Companies seek to carry their burden of proof, and I'll
18 ask Staff shortly for their position here, but I want
19 to avoid that duplication of effort and make sure this
20 hearing runs quickly and efficiently, and if it needs
21 to be more thorough than just Staff and the Companies,
22 so be it, but I want to make sure it doesn't become
23 such a thicket that at the end, it's unmanageable from
24 where I sit because both Staff and the Companies, who
25 are the main parties, deserve that focused attention,

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1 and I don't want it yo unnecessarily cloud the issues.
2 So it may be that intervention is appropriate but in a
3 limited fashion as to some of the issues you've said,
4 and particularly the ones that diverge from Staff's
5 point of view. Mr. Thompson, let me hear from you, and
6 then Mr. Anderson, we'll turn back to you for the
7 overall perspective.

8 MR. THOMPSON: Your Honor, I think I agree
9 with what you stated there. We do think that the named
10 companies, to the extent that the Respondent's are
11 operating within their service territories, have stated
12 a sufficient interest to intervene because really, this
13 concern for the scope of their authority, the
14 interpretation the Commission takes here, it doesn't
15 determine the scope in a territorial sense but in a
16 sense of what stuff do they have a right to pick up to
17 the exclusion of others.

18 So I think that that clearly is an interest,
19 and they may take a different interpretation of the law
20 than Commission staff does, and I think that the
21 proceeding would be enriched from that perspective. So
22 as to the WRRRA, I don't know if Mr. Sells is
23 representing through WRRRA other members of that
24 organization who may be within the part of the state
25 that's affected here. It's not clear, but it appears

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1 to me that the operations of the Respondent's are in
2 sort of the central Puget Sound area, and it appears
3 the named intervenors tend to have authority in that
4 same general area. It may not be every one of them, so
5 that would be an interest that perhaps WRRRA would be
6 representing as any carriers that are not named that
7 are in that territorial area.

8 But I agree with you that if the only
9 interest is sort of an interest in the precedent that
10 this sets for every other solid waste collection
11 company in the state, you are right. I think that then
12 where do you draw the line, and in every case we have
13 in the industry, you typically don't allow in every
14 company that's in the same industry because it might
15 have a precedential effect on them. I just make that
16 observation. We don't oppose intervention, but we just
17 make that observation.

18 MR. SELLS: If I may, Your Honor, I may be
19 able to clear a little of that up. Just thinking about
20 it here and jotting them down, there is three members
21 of WRRRA that do operate in what we believe is the
22 general area that the Respondent's are operating
23 because we don't really know where they are operating
24 because they are not regulated: Rubatino Refuse of
25 Everett, for example; Sound Disposal in Edmonds;

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1 Sanitary Service, Inc., in Bellingham, and there are
2 others.

3 Now, whether or not, Your Honor, I would call
4 representatives from those folks as witnesses is going
5 to depend upon the presentation that precedes that from
6 the Staff, but there are certainly other members, and
7 uniformly, they are much smaller members than the two
8 proposed intervenors here, smaller in revenue and size.

9 JUDGE TOREM: Mr. Anderson, having heard all
10 that and my stated waffling concerns...

11 MR. ANDERSON: We share your concerns, and
12 while there may be instances where appropriate
13 intervention should be granted, working backwards, with
14 respect to WRRRA, its position is that nobody can touch
15 anything except us because we have certificates, and
16 that's where they start out, and here, they haven't
17 shown any particular interest that's any different from
18 the named G-certificate haulers who have petitioned to
19 intervene or the Commission's position. So we would
20 advance that with respect to WRRRA, they add nothing but
21 an additional gun pointed at my clients to run up the
22 expense and complexity of the proceeding.

23 We feel that there is adequate representation
24 of WRRRA through five of its members being here, and
25 there has been no distinction shown other than they did

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1 choose to independently petition. Waste Management is
2 independent from that organization. It has also stated
3 a differing interest. We believe it to have a more
4 active recycling program. We concur that it's
5 important to draw that distinction between what is
6 recycling of these materials and what is required to be
7 hauled by G-certificate haulers and go through a
8 landfill, and there is an important public policy
9 factor because of the recycling occurring, and it's our
10 understanding that its Waste Management may be less
11 restricted in its approach to what recycling is based
12 on their ongoing operations, but that is something for
13 discovery.

14 We think that with those two, there is just a
15 question of adequacy of representation. With the two
16 petitioners' group and Waste Management, all bases are
17 really covered. There is no need to have the WRRRA's
18 additional inquiry on the same facts, potential
19 friendly cross-examination, and additional cumulative
20 witnesses.

21 JUDGE TOREM: So in other words, you've
22 already stated that for Ms. McNeill's clients you have
23 no opposition for the clients represented by Mr. Wiley
24 and Mr. Ferestien.

25 MR. ANDERSON: We don't see any public

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1 interest argument made that's different than the
2 Commission's interest.

3 JUDGE TOREM: The distinction you are drawing
4 between Ms. McNeill's clients and the other
5 certificated haulers is her client in restricted areas
6 and active.

7 MR. ANDERSON: That and they aren't a WRRRA
8 member.

9 JUDGE TOREM: Where I'm getting hung up is
10 are you saying that any member of WRRRA is adequately
11 represented by the Commission?

12 MR. ANDERSON: No. Working backwards, if the
13 WRRRA came in by itself, that's one issue, but here, we
14 have five WRRRA members plus the WRRRA and --

15 JUDGE TOREM: So it's one or the other.

16 MR. ANDERSON: It's who are you going to
17 have, and in that context, if it's who you are going to
18 have, we would rather have the individual members
19 because of discovery issues.

20 JUDGE TOREM: I'm just trying to decide if I
21 agree with your approach that the better representative
22 for a certificated hauler member of WRRRA is the
23 organization itself, which would represent all of them,
24 or a single one, which may force me to flip a coin
25 among Mr. Wiley's and Ferestien's clients as to which

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1 one might be better.

2 MR. ANDERSON: They have five represented by
3 one voice, and procedurally, I think that's a little
4 easier to handle.

5 JUDGE TOREM: And I think Mr. Sells would say
6 he has 30 or more represented by one voice which
7 includes them.

8 MR. ANDERSON: But he doesn't have a named
9 party who is at the other side of the table from us who
10 we can examine in the context of a contested hearing.

11 MR. SELLS: If that happens, then I'm not
12 going to be able to examine them either, but if I
13 examine them, he's going to have to.

14 I should add, Your Honor, if it's going to
15 make things easier for everybody here, I'll make an
16 oral petition to intervene on behalf of a specific
17 company. I have a right to do that at this hearing, or
18 companies, and if that solves this problem, I'm happy
19 to do that and withdraw my petition from WRRRA.

20 JUDGE TOREM: I don't think that's necessary.
21 I understand where Mr. Anderson is coming from as to
22 providing a specific client in which to make discovery
23 requests or otherwise and examine, but I think that can
24 be addressed as to how we structure the initial witness
25 lists and other ideas and exhibits that might come in.

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1 MR. ANDERSON: This jumps ahead to discovery,
2 but here's an issue, and I think I would agree with
3 Ms. McNeill in that there are important operational
4 concerns here. If we are just dealing with the
5 Commission and the focused event here, Commission's
6 position is that the portions may be at issue,
7 percentage.

8 What actually happens is that with respect to
9 the G-certificate haulers who are using their
10 certificated assets, the things that are built into
11 their rates, to recycle, there is an economic advantage
12 to them to haul something as a recyclable container as
13 opposed to MSW, municipal solid waste, whether it's a
14 fee, a tax, some other financial concession. Those are
15 cheaper.

16 We do need to examine what really happens in
17 the stream, not just to our people when if it's, just
18 to pick a number out of the air, 100 percent goes in
19 and 20 percent makes it to Weyerhaeuser after a
20 process. We need to look what happens at the industry,
21 and with an association at the other side of the table,
22 they can put someone up who doesn't do any recycling as
23 a witness and argue that the percentage is diminimous,
24 where with Ms. McNeill's clients or individual haulers,
25 we can look at what the quantity comes in that gains

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1 that economic advantage as recycling and what quantity
2 goes out actually recycled, and we would submit that
3 the differential in that quantity is not diminimous.

4 So it isn't just us. It's what the industry
5 practically views as recycling. It's what these
6 parties have done as recycling that should be at issue,
7 and if it's allowed to be an association where they can
8 pick and choose through their members, they can make
9 the argument that it has to be one percent or less
10 while the members are calling recycling 20 percent or
11 less. So we are going to be faced with this argument
12 down the road, and we need to have individual
13 accountable companies as opposed to more of an
14 association across the table.

15 JUDGE TOREM: Mr. Thompson, any comment on
16 what you just heard?

17 MR. THOMPSON: Well, that angle is -- that
18 type of argument I had not considered before, and I
19 don't know whether I understand it or understand its
20 implications, so no, I don't have any comments.

21 JUDGE TOREM: I appreciate your candor.
22 Anyone else want to comment on what they've heard or
23 make further case pro or con on the petitions for
24 intervention?

25 MR. FERESTIEN: I had two brief points that I

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1 wanted to share, Your Honor. First, I think
2 Mr. Anderson is unfairly stressing the notion that it
3 has to be a unique interest that an intervening party
4 has, and I don't think that's what the rule calls for.
5 It says you have to have a substantial interest, and
6 certainly whether or not the public interest is served
7 by that party intervening goes to the extent to which
8 there is redundancy, but in sitting around the table
9 here, I don't think we have gotten to the stage you are
10 concerned about where you have every hauler in the
11 state of Washington trying to intervene in the
12 proceeding.

13 I would submit that this is a nice size in
14 terms of the amount of people involved, and it's going
15 to allow you to get a full airing of the facts and the
16 issues. So your theoretical concern aside, I think
17 intervention is not unwieldy, and to the extent it ever
18 were to become that, you as the governing party here
19 have full control, but just simply foreclose the
20 parties from participating in their entirety now is, I
21 think, too swift and too severe a measure.

22 The other point I would make, and this goes
23 to the point about it being premature is Mr. Anderson
24 saying that Ms. McNeill's client does more recycling so
25 her client is appropriately intervening. Well, the

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1 fact of the matter is that my proposed intervening
2 clients do recycling as well, and for you to make a
3 snap judgement now without having any understanding of
4 how their recycling operations compare I think would be
5 premature as well.

6 JUDGE TOREM: I gladly confess my ignorance
7 of the specifics of any of your clients or what
8 Ms. McNeill's clients do, let alone any of the WRRRA
9 members.

10 After hearing everything today, and I
11 understand and I appreciate Mr. Ferestien for putting
12 it back on the table, that the basic threshold is the
13 substantial interest. My concern about this becoming
14 unwieldy or perhaps there being a better forum in an
15 application that should be protested or perhaps
16 demonstrating your clients' interests above and beyond
17 the Commission's separate interests in the
18 classification by filing your own complaint. I'm
19 satisfied as to why that didn't happen and why this may
20 be the most opportune place for all of your clients to
21 come in.

22 What I want to make sure to avoid that
23 duplication I take advantage of tools I've used in
24 previous hearings that have been reasonably complex and
25 yet where issues cross over. I think I'm prepared,

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1 Mr. Anderson, to grant the petitions for intervention,
2 but I do need to give further thought as to how to make
3 sure your company clients are not prejudiced and
4 overwhelmed by discovery by having six different
5 certificated haulers and a trade association, which may
6 present its own challenges in discovery and its own
7 approach, and then have this whole group of intervenors
8 coming from all different angles.

9 I'm trying to sort out what the scope of the
10 intervention should be in my mind, and I'm not prepared
11 to state it verbally today. I'm going to have to spend
12 a little time in the prehearing conference order
13 sorting out exactly what the initial scope may be, and
14 I may have to modify that in a future prehearing
15 conference on motion from either side. I may come out
16 too narrow, which may cause these intervenors to ask
17 for an extension of their scope, or you may find it too
18 broad and resulting in discovery issues that can only
19 be resolved by narrowing the scope of intervention.

20 I will grant the petitions for intervention
21 despite my initial hesitation. Certainly this
22 prehearing conference order will have language
23 requiring the cooperation among all these intervenors,
24 and I want to ask Mr. Sells and Ms. McNeill if they see
25 any question as to the nonmembership in WRRRA

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1 foreclosing any or limiting any cooperation in this
2 proceeding on the issues that are before the
3 Commission; Mr. Sells?

4 MR. SELLS: No, I don't see that. This is
5 not unusual at all, Your Honor, for WMI and WRRR and
6 WRRM on the same side at the same hearing.

7 JUDGE TOREM: Ms. McNeill, do you concur?

8 MS. MCNEILL: Yes, and I appreciate what you
9 are saying about managing the proceeding so it doesn't
10 become all ganged up against Mr. Anderson's clients.
11 For my part, my goal will be to try to assist
12 Mr. Thompson and Staff in terms of their discovery
13 efforts rather than embarking on my own. I wouldn't
14 want to foreclose the possibility of some discovery
15 from our part on that particular aspect of the
16 proceeding, but in my view, it's really something that
17 the Staff and Mr. Thompson will be the represented
18 parties on.

19 I can assure you that we will make effort.
20 You have my sympathies and support in trying to craft
21 something that actually says that in the order, but I
22 can give you our assurance that we will be able to
23 succeed in that.

24 JUDGE TOREM: I think when we take a break
25 off the record shortly, I'll listen to a little bit

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1 more of your discussions or let the parties discuss
2 amongst themselves how to achieve what you're talking
3 about or focused discovery but also anticipating
4 Mr. Anderson's concern that if we have a protective
5 order in this docket, Staff may have items to which
6 he's not worried about submitting and exposing, but to
7 other parties and competitors, there may be issues, and
8 so I want you to give some thought to that, not only
9 for case management but also for proprietary
10 information, protection, and management and
11 dissemination, we will have two distinct challenges for
12 the proceeding as it goes along.

13 So when I granted the petitions for
14 intervention, I recognize that, but I don't what the
15 answer will be at the end of today's proceeding. It
16 may be that we have a standard protective order that
17 can be circulated, and perhaps an agreed proposed
18 protective order can come in from all of the parties so
19 that there is not too much time spent on it today, but
20 in the weeks ahead, that can be an item that is taken
21 up and hopefully something that can be agreed on, and
22 if there is competing language, I can make a decision,
23 but I don't want to make a decision today in an area
24 that I don't have a whole lot of experience in and be
25 judging for any of your clients what's important to

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1 protect and what's not. I'm not prepared to do that
2 today, but I will take it up.

3 The petitions to intervene are granted.

4 There will be some limitations that I craft in the
5 prehearing conference order, and I may direct group
6 representation or ask the noncommissioned intervenors
7 to take a position as to who will be the lead counsel
8 for particular witnesses or issues, and we can talk a
9 little bit more about that as we go. Again, if you
10 think I get it wrong, too narrow or too broad, in what
11 comes out of this proceeding in the next few days,
12 there are provisions to ask for reconsideration of that
13 order, or I would prefer that you all confer amongst
14 yourselves and see how far off the mark or on the mark
15 it might be. Then we can get a group response as to
16 what needs to be changed to accommodate the needs of
17 this proceeding as we go along.

18 It's about 2:30 now. What I would ask is
19 that we go off the record, and while we are off the
20 record, let's take a chance and discuss discovery, the
21 protective order, and then see what the calendars show
22 for a procedural schedule. Some of the issues we want
23 to talk about are whether we should have live testimony
24 of witnesses or prefiled testimony. Given the
25 petitions for intervention being granted, I'm leaning

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1 toward prefiled testimony so we have a more deliberate
2 approach when we get to hearing.

3 If you each know off the top of your head
4 approximately how many witnesses you are thinking about
5 calling or where those witnesses might be located,
6 let's take that up as well off the record. There is a
7 mention about not being stuck in an ivory tower, and I
8 can't imagine a case where that would be farther from
9 where the action happens, so I want you to consider
10 whether a site visit, particularly down to Longview,
11 would be appropriate in this case or not. It may or
12 may not, and whether there is any settlement
13 conferences or mediation, that might be appropriate
14 given the parties we have here.

15 I know the Commission staff has tried hard to
16 avoid a classification proceeding, and it got here
17 after several policy letters, changes of position, and
18 reiteration of the position, and it was several months,
19 so I can only guess that the December order came after
20 much thought and hard work by Staff to work this out
21 with Mr. Anderson's clients and it hasn't happened yet.
22 It doesn't mean that it can't happen still, that there
23 be an agreed, everybody knows, and mutually beneficial
24 outcome, what it should be without turning it over to
25 the Commission to make the ultimate decision.

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1 Finally, be ready to think if there are any
2 motions that need to be filed, to build that into the
3 schedule, and because it's come up in other issues,
4 whether you want to make an opening statement on the
5 day of hearing, file one in writing, or whether we
6 launch directly into cross-examination of the
7 witnesses. Certainly there will be a chance for
8 briefing if there needs to be, prehearing briefs as
9 well as posthearing briefs. I'll want this order to
10 cover that as well. That's my laundry list of things
11 to hash out. Any questions before we take a break?
12 Seeing none, we will be at recess.

13 (Recess.)

14 JUDGE TOREM: We are back on the record, and
15 we've had some discussions as to how to schedule the
16 hearing, whether or not to have prefiled written
17 testimony and then just hash through a schedule and how
18 to handle the protective order.

19 Let me note for the record that Mr. Anderson
20 and I had a colloquy about his preference for not using
21 prefiled written testimony, and there was a variety of
22 concerns that might be put upon his clients by having
23 their case known for a longer period of time or perhaps
24 also being allowing for the number of intervenors that
25 I've permitted in the case to gang up on him a little

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1 bit more in that preparation, and he can probably
2 better state those concerns as needed for the record
3 for clarity, but the end result is to best help to me
4 and to avoid discovery being any more onerous than it
5 needs to be through depositions of what would be live
6 witnesses, I've decided that I want to have prefiled
7 written testimony in this case. Mr. Anderson, do you
8 want to clarify any of your own contentions that I just
9 summed up?

10 MR. ANDERSON: For the record, we objected to
11 the written testimony procedure, would prefer oral.
12 Some of our concerns may be addressed by the
13 limitations that you order for intervention, and we
14 will reserve those issues until we see the order.

15 JUDGE TOREM: Excellent. As I indicated to
16 all the parties, if there is a need for any witness
17 that might be best served not through prefiled
18 testimony but through putting them on live, if you
19 could discuss it amongst yourselves first and explain
20 to each other why that witness is better that way and
21 you will have a summary in advance of what they are
22 going to talk about, I will entertain that, but my
23 suggestion is that those be for very less technical
24 witnesses that will be on and off the stand very
25 quickly but are needed to make some part of your case,

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1 essentially lay people that you don't want to put
2 through friendly depositions and then having to review
3 it and read it and be intimidated by the paper in the
4 case.

5 The discovery rules will be invoked at the
6 request of the parties, and looking at that, there are
7 also going to be motions for summary determination,
8 perhaps, and we've set some deadlines for those, if
9 they are going to be filed, Friday, April 18 will be
10 the deadline, and by Commission rule, it will be 20
11 days to respond to any such motions. That would make
12 the response day Thursday, May the 8th.

13 In the meantime while discovery is going
14 forward, the issue of a protective order has to be
15 taken up. There will be a protective order in the
16 case. How exactly it's going to read will be up to the
17 parties, and Mr. Thompson has agreed that tomorrow he
18 will circulate a proposed protective order or an
19 example of one that's been used by the Commission in
20 the past, and I think the concern will be to have
21 something that meets the Company's needs to alevate their
22 proprietary information to the extent possible out of
23 the hands of the intervenors who will have a direct
24 financial interest and are competitors with them and
25 yet give the Commission full access to everything its

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1 entitled to under the laws and our own regulations. So
2 how we make sure that the information gets where it's
3 going unredacted to the Commission and that I see in
4 the protection any filings that go on in testimony or
5 otherwise, if it's confidential, that I see both the
6 unredacted and the redacted versions so as noted
7 earlier, if I'm asking questions or writing a decision,
8 I don't unintentionally disclose that information that
9 should have been kept confidential.

10 So Mr. Thompson will circulate that by
11 tomorrow, and I've asked that by Tuesday, the 12th of
12 February that the parties can submit an agreed
13 protective order or competing drafts for me to choose
14 among, and I will issue the Commission's protective
15 order by signing what you have agreed to or making my
16 own decision after seeing short explanatory cover
17 letters as to why this provision is needed or not
18 needed. If we need to get back together and have a
19 prehearing conference about it, tell me or I'll tell
20 you.

21 As to the motions for summary determination,
22 my hope is that if they come in by May 8th, the
23 responses, that if anybody feels a need for oral
24 argument that you ask and we try to pick a date within
25 the next week following. If Thursday is May 8th, then

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1 I think that would be the week of May 12th that we try
2 to set something up, and if there are motions to be
3 filed, maybe that's the time to ask to set a conference
4 for that the week of May 12th or very early the week of
5 May 19, so keep those dates in mind. I won't put them
6 in the order, but if we do have a motion and you know
7 you are going to want to argue on it in addition to
8 what's submitted, ask for it so we can get it on the
9 calendar. In late April, we will be scheduling it for
10 that week of May 12th or early the week of May 19th,
11 and the reason for the earlier dates is so I can try to
12 get a decision on the motion out, if one is necessary,
13 before I start a three-day hearing on May 28th, so that
14 would be hopefully May 27th as a target date for me to
15 rule, but the latest I'm hoping to do that is June 6th.
16 So if there are any dispositive motions by June 6th, we
17 will know hopefully earlier.

18 The reason for those dates is because the
19 agreed filing dates for testimony will be Friday, June
20 27th for the responding companies. A little over three
21 weeks later on Tuesday, July the 22nd, for Staff and
22 Intervenors, and Friday, August the 8th, a little less
23 than three weeks, for any rebuttal testimony from the
24 respondent companies, and again, if I can get a
25 decision on those dispositive motions three weeks or

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1 more in advance of the first testimony filing date, I'm
2 hoping that will be sufficient for Mr. Anderson's
3 clients not to incur any unnecessary expenses that
4 maybe eliminated by the result of any motion ruling.

5 The hearing itself we agreed should give the
6 Commission availability and a large contested rate case
7 and a merger case going on this summer can't happen in
8 August with any degree of sanity, so we are going to
9 start for a three-day hearing on Tuesday, September the
10 9th, and continue as needed on Wednesday, the 10th, and
11 Thursday the 11th of September, and the parties have
12 asked that they be given some time for opening
13 statements on the first day of hearing, so we will
14 begin with opening statements of no more than 15
15 minutes each, and we've agreed that it will be three
16 different blocks of 15 minutes, one for the companies,
17 one for Commission staff, and one to be shared among
18 all the intervenors as needed to supplement the opening
19 statement given by Commission staff.

20 Posthearing briefs will be three weeks after
21 the hearing. We didn't pick a date for that, but three
22 weeks after, say, September 12th...

23 MS. MCNEILL: October 3rd?

24 JUDGE TOREM: Would be October 3rd. Does
25 anybody have a conflict for that first couple of days

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1 of October? That still gives you a little more than
2 three weeks after the hearing closes, and that will be
3 the final briefing date, and then we'll see how quickly
4 I can get a decision out and a classification matter
5 thereafter. I think that settles everything we wanted
6 to get on the record from our discussion.
7 Mr. Thompson, anything else from the Commission's point
8 of view.

9 MR. THOMPSON: No.

10 JUDGE TOREM: Mr. Anderson?

11 MR. ANDERSON: No.

12 JUDGE TOREM: Intervenors?

13 MR. SELLS: The location of hearings?

14 JUDGE TOREM: I presume since nobody has told
15 me they are going to be anywhere else that they be
16 here in Olympia. If there is a need once witnesses are
17 identified to hold it elsewhere, let me know, but
18 nobody spoke up about that so I'm presuming it will be
19 here at Commission headquarters in Olympia.

20 That's it today's prehearing conference.

21 Thank you for the explanations about the intervention
22 issues and also your cooperation on getting a date set.
23 I'll look forward to the protective order, but I don't
24 think I need to see the drafts as they go around, so
25 just circulate those amongst yourselves, and maybe,

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1 Mr. Thompson, you could take the lead on submitting it,
2 or Mr. Anderson. I have to have the final approved
3 version or your competing versions on February 12th.
4 It's about ten after four. We are adjourned.

5 (Prehearing adjourned at 4:10 p.m.)

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