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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

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COMMISSION

3

In the Matter of Determining the )

4 Proper Carrier Classification of )

) DOCKET NO. TG-072226

5 GLACIER RECYCLE, LLC; ) Volume IV

HUNGRY BUZZARD RECOVERY LLC; AND ) Pages 84 - 127

6 T&T RECOVERY, INC. )

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A status conference in the above matter

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was held on January 27, 2010, at 1:06 p.m., at 1300

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South Evergreen Park Drive Southwest, Olympia,

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Washington, before Administrative Law Judge ADAM E.

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TOREM.

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The parties were present as follows:

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WASHINGTON UTILITIES AND TRANSPORTATION

14 COMMISSION, by JONATHAN THOMPSON, Assistant Attorney

General, 1400 South Evergreen Park Drive Southwest,

15 Post Office Box 40128, Olympia, Washington 98504;

telephone, (360) 624-1225.

16

GLACIER RECYCLE, LLC; HUNGRY BUZZARD

17 RECOVERY, LLC; T&T RECOVERY, INC., by DONALD L.

ANDERSON (via bridge line), Attorney at Law, Eisenhower

18 & Carlson, 1201 Pacific Avenue, Suite 1200, Tacoma,

Washington 98402; telephone, (253) 572-4500.

19

WASTE MANAGEMENT OF WASHINGTON, INC., by

20 POLLY L. MCNEILL (via bridge line), Attorney at Law,

Summit Law Group, 315 Fifth Avenue South, Suite 1000,

21 Seattle, Washington 98104; telephone, (206) 676-7040.

22 WASHINGTON REFUSE AND RECYCLING ASSOCIATION,

by JAMES K. SELLS, Attorney at Law, Ryan, Sells,

23 Uptegraft, 9657 Levin Road Northwest, Suite 240,

Silverdale, Washington 98383; telephone, (360)

24 307-8860.

Kathryn T. Wilson, CCR

25 Court Reporter

0085

1 MURREY'S DISPOSAL COMPANY, INC.; WASTE

CONNECTIONS OF WASHINGTON, INC.; ISLAND DISPOSAL, INC.;

2 LYNNWOOD DISPOSAL, d/b/a ALLIED WASTE OF LYNNWOOD;

EASTSIDE DISPOSAL, d/b/a ALLIED WASTE OF BELLEVUE, by

3 DAVID W. WILEY, Attorney at Law, Williams Kastner, 601

Union Street, Suite 4100, Seattle, Washington 98101;

4 telephone, (206) 628-6600.

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1 P R O C E E D I N G

2 JUDGE TOREM: We will be on the record then

3 in the status conference scheduled for Wednesday,

4 January 27th, 2010. It's now a little after one

5 o'clock in the afternoon. This is Administrative Law

6 Judge Adam Torem. It's Docket NO. TG-072226. This is

7 the matter determining the proper carrier

8 classification of three companies, Glacier Recycle,

9 Hungry Buzzard, and T&T Recovery, and today we are

10 having a status conference per the notices that were

11 served on September 10th and December 30th of 2009.

12 A quick summary, our case is now over two

13 years old. We've really been in a holding pattern for

14 about 19 months since the order on motions for summary

15 determination out in summer of 2008. That was Order 06

16 in this case. What I'm hoping for today is an update

17 from Staff, the respondent companies, and any

18 interested intervenors that want to speak to it on how

19 this docket and the rule-making in TG-080591 might

20 still be linked, whether or not any new rule that comes

21 out of that proceeding might be contemplated to resolve

22 the remaining issue in this docket, and based on your

23 responses, whether we need to set up a date certain by

24 which that might be expected to occur or a date for a

25 hearing that might influence how fast the rate-making

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1 docket moves so folks don't have to go to hearing here.

2 Let's take appearances, and I'll call out the

3 party and you can make your short-form appearance. For

4 Staff?

5 MR. THOMPSON: Jonathan Thompson, assistant

6 attorney general for staff.

7 JUDGE TOREM: For the respondent companies?

8 MR. ANDERSON: Don Anderson for the three

9 respondent companies.

10 JUDGE TOREM: The Washington Refuse and

11 Recycling Association?

12 MR. SELLS: James Sells for WRRA.

13 JUDGE TOREM: Waste Management of Washington?

14 MS. MCNEILL: Polly McNeill for Waste

15 Management of Washington, Inc.

16 JUDGE TOREM: Another group of five

17 intervenors, Murrey's, Island, Lynnwood, East Side, and

18 Waste Connections?

19 MR. WILEY: Dave Wiley for those intervenor

20 companies.

21 JUDGE TOREM: Were there any other parties or

22 other folks that needed to make an appearance today?

23 Hearing none, Mr. Thompson, I know you are eager to

24 tell me all about the input from the comments that came

25 in January 8th. What's happening with the rule-making?

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1 MR. THOMPSON: I don't know that I'm prepared

2 to discuss the rule-making. The draft rule did go out

3 and at least in Staff's view was an attempt team to

4 resolve issues across the industry like those that

5 remain to be resolved, at least in Staff's mind, in

6 this docket. We have had comments back as of, I think,

7 January 8th, and some favorable, some not.

8 I'm not sure where Staff is, and the

9 Commission, actually, because it's the Commission that

10 conducts rule-makings. There is no division between

11 Staff and the Commission, but what the Commission will

12 decide to do, whether it will go forward with the

13 modified rule or just publish the prior published rule

14 for a CR-102 for official comment, something along

15 those lines. But I think if the issues are going to be

16 resolved, they should be resolved in a rule-making

17 where all stakeholders have an opportunity to have

18 input.

19 So our proposal in this case, because we

20 perceive that our options are either dismiss or set for

21 hearing, we propose, and we discussed with the

22 respondent companies the following. I'll hand out a

23 piece of paper that just contains what I circulated

24 earlier to the parties by e-mail, and I think I'll

25 probably just read it in the record, but our proposal

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1 is this: We propose dismissal of the Complaint as

2 against the three respondent companies subject to some

3 additional stipulations. The first is that the initial

4 order on the motions for summary determination would

5 become a final order of the Commission, and the second

6 is that the respondent companies agree they are

7 restricted against transporting construction and

8 demolition debris from customer locations to the

9 Weyerhaeuser facility in Longview without first

10 petitioning for and obtaining a G-certificate.

11 And there is a couple of clarifications to

12 that second point, the first of which this would not

13 apply to debris that is generated by the Companies' own

14 demolition activities. In other words, if they are

15 involved in the business of knocking down buildings

16 themselves and they take away the resulting debris,

17 that's private carriage and we don't have any interest

18 in regulating that.

19 The second refinement on the second point is

20 that this would not apply to residual debris that is

21 left over after sorting out recyclable materials at the

22 Companies' material recovery facilities, or MRF's, as

23 long as the amount remains small in relation to the

24 overall amount collected. I guess it's purposely vague

25 on the point of small in relation to the overall amount

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1 collected because that's precisely one of the questions

2 that the Commission is proposing to address in rule,

3 and that's the proposal.

4 I understand that the Companies are agreeable

5 to this approach. I think what from what I understand

6 the Intervenors may not be, so that's where we stand.

7 Procedurally how we would put this in motion, I'm not

8 sure. I kind of leave that to your guidance, but

9 that's Staff's proposal.

10 JUDGE TOREM: Mr. Anderson, do you want to

11 speak to it first?

12 MR. ANDERSON: Yes. He's correct that the

13 respondent companies would stipulate to that proposal.

14 The call at the initial relief requested in this

15 proceeding was particularly aimed at transporting C and

16 D rate to the Weyerhaeuser facility. The Companies

17 aren't doing that or willing to stipulate to the final,

18 the nature of where this has been entered preliminarily

19 in your summary determination, and we believe this

20 would resolve the issues that are before doing this

21 proceeding leaving the issue of how much is small to

22 the appropriate authority, which is the Commission in a

23 rule-making process or ultimately the legislature.

24 Recall that when we started this proceeding,

25 it was precipitated by a change in position of Staff

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1 where the precise activity of hauling to the

2 Weyerhaeuser facility had been addressed and condoned.

3 Staff reissued an opinion and had a change of heart or

4 change of personnel, and this proceeding came about.

5 There has been an attempt to broaden it that we think

6 is unwarranted, and we believe it should focus in on

7 its original purpose, which was to determine whether

8 this is an allowed activity hauling directly to

9 Weyerhaeuser from a customer location. We are willing

10 to agree that that isn't appropriate and move on and

11 let the rule-making process or possible legislation

12 down the road address where that fine line is with

13 respect to how much is too much and with respect to

14 residual from a MRF.

15 JUDGE TOREM: Thank you, Mr. Anderson. I'll

16 hear from the Intervenors in just a moment, but I want

17 to make sure I understand the joint proposal coming

18 from Commission staff and from your three companies is

19 that the Commission would essentially have an

20 opportunity to make this order final, Order 6. There

21 may be some questions how to do that. The time for

22 seeking petition for review of that has passed so there

23 may be some argument. It's already a final order but

24 was only granted partial summary disposition.

25 Whether that order would be considered

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1 precedential by your proposal is something I want to

2 inquire of Mr. Thompson. Right now as an ALJ-entered

3 order it is not. Whether the commissioners would want

4 to review this on their own, I can't say. I haven't

5 raised that with them, so when No. 1 on the proposal

6 says, allowed by order to become final, in many ways it

7 already has just by passage of time, but it's not a

8 final order of the Commission, so if that's what's

9 intended, then we have to seek out the approval of

10 essentially a settlement agreement by which the

11 Commission, we waive the initial order on the

12 settlement, and the commissioners as a whole would

13 adopt or not that order as their own, and they may

14 choose to modify it as well somewhat so that it becomes

15 a precedential order.

16 Given that they are also involved in the

17 rule-making, they may see some consequences after they

18 give it some thought as to how a precedential order

19 influences the rule-making or is immediately undone by

20 the rule-making we are about to engage in, so that may

21 require some additional analysis before the

22 commissioners can approve a settlement that asks them

23 to do that.

24 Second, it looks like No. 2, the general idea

25 of restriction is the position of the respondent

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1 companies for some time now that they have ceased and

2 desisted from this activity even before this

3 classification proceeding was brought. Mr. Anderson,

4 is that correct; there has been no ongoing activity

5 with the Weyerhaeuser activity?

6 MR. ANDERSON: No direct hauls of customer

7 materials.

8 JUDGE TOREM: So that's been your position

9 all along as an appropriate belief, and then we have

10 these subparagraphs A and B that deal with private

11 carriage, and I think the remaining issue in this

12 docket was under the existing rule, WAC 480-70-016,

13 about whether that carrier, I think it's sub "f" if I'm

14 reading the original order correctly, what business

15 your carriers were primarily engaged in and the

16 quantification of that business. We still have that

17 same purposely vague language here about it's small in

18 relation to the overall amount collected, so whether

19 that's a ten percent threshold, a 25 percent threshold,

20 as the current rule might be tossing about, or some

21 other number in between or even outside of that range.

22 Do I understand it well enough, Mr. Thompson

23 and Mr. Anderson?

24 MR. THOMPSON: I think that's correct.

25 That's exactly right, and I do think that that

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1 provision of the existing rule you point out would

2 govern, and this just makes it somewhat more specific

3 to the situation with the MRF's operated by these

4 particular companies.

5 JUDGE TOREM: Mr. Anderson, was there

6 anything else that you wanted to add?

7 MR. ANDERSON: No.

8 JUDGE TOREM: Mr. Thompson, what was your

9 intent with the final order issue? A precedential

10 order, or just that's the rule of this case?

11 MR. THOMPSON: I can tell you what my intent

12 was, and that was to have an order that essentially has

13 the status of a cease and desist order, an order that

14 basically directs future conduct so that if the

15 Companies were to operate in a way that is not in

16 compliance with that, then we would have something to

17 rely on for enforcement action.

18 JUDGE TOREM: So not necessarily a

19 commissioner final order that's precedential, but one

20 that's not been challenged and become final by

21 operational law that the ALJ ordered as much.

22 So essentially, I think I would have to issue

23 an additional order based on the analysis contained in

24 Order 06, and then having some action that it should be

25 a cease and desist order probably by agreement of the

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1 parties dated back to Order 06 because nothing else

2 direct haul has occurred since then.

3 Let me hear from the Intervenors.

4 Ms. McNeill, you weren't here to observe, but there was

5 some finger-pointing between Mr. Wiley and Mr. Sells as

6 to who might have the duty of expressing their party's

7 interest first.

8 MR. SELLS: On behalf of WRRA, I noticed

9 while we were talking earlier, I looked back at what we

10 call the "blue sheet" in my office as to when we open

11 files, and this file was opened in November of 2005,

12 and here we still are, but I think there is some very

13 good reasons for that and some very good reasons why it

14 would be premature at this point to shut this docket

15 down essentially, and I'll leave the procedural aspects

16 of that to others, but what troubles us the most, Your

17 Honor, is that we have no record to go on here. We

18 have never had an evidentiary hearing in this matter.

19 We have an allegation from counsel that these

20 hauls are not going on. We don't know whether that's

21 correct or not because we don't have anybody under oath

22 saying so and we haven't had a chance to cross-examine

23 the respondent companies or their representatives at

24 all. The hiatus of this was because of an entirely, I

25 guess, different rule-making than what we are looking

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1 at now.

2 The first set of rule-makings involved a

3 pretty global sort of reach. That has now been set

4 aside in favor of a much more focused shorter, smaller

5 rule. We don't have any idea at this point what's

6 going to happen to that proposed rule, just as we had

7 no idea what was going to happen to the previous rule.

8 Not only have there been staff changes, as I think

9 Mr. Anderson mentioned, there has been a change in the

10 chair of the Commission itself. We've commented on the

11 rules, but there haven't been any hearings on the rules

12 yet.

13 So if this docket has been held in abeyance

14 waiting for rules, then it should continue to be so

15 until we have the rule or we don't have the rule, and

16 during that time, however, I think unless we know

17 exactly when these rules are going to come down and

18 exactly what they are going to say, we probably should

19 proceed with a hearing schedule, and let's get a record

20 going here so that when the rules come down, we can

21 tell for certain whether or not those rules are going

22 to affect this docket number or not. I don't know that

23 they are.

24 As far as the proposed agreement is

25 concerned, of course only the Commission can make an

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1 ultimate decision in a complaint case, and I think

2 Mr. Wiley will be citing a precedent to that effect.

3 If, in fact, the Commission finds that this was illegal

4 activity, then we want it to be precedential. We don't

5 want to fight this battle again with another private

6 landfill down the road. We want to have the

7 Respondents under oath on the record swearing that they

8 are not doing the illegal activity, and the only way to

9 do that is to have a fact-finding hearing.

10 Your Honor makes a very good point, and I

11 understand exactly why Mr. Thompson uses the word

12 "small," but the word "small" has no legal significance

13 whatsoever. Small in King county is ten percent

14 residual. Small in the latest proposed order is 25

15 percent residual. The rest is garbage, so we don't

16 know whether that rule is going to say ten percent, 15

17 percent, 20 percent, 25 percent, or I don't think it's

18 going to use the word "small," so that's another reason

19 to wait and see exactly where the Commission itself is

20 going to go with this.

21 I know it sounds kind of ridiculous to say

22 it's premature after all these years to enter into an

23 order, but it's not. What we have been waiting for has

24 not yet happened, and until that does, I don't think we

25 should shut this down.

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1 JUDGE TOREM: The last part almost sounds

2 religious in nature. But let me ask you then,

3 Mr. Sells, as far as the record in this docket, I agree

4 there has been no hearing record by which testimony has

5 been cross-examined, but in Order 6, there were

6 affidavits filed, and those declarations were summed up

7 in Paragraphs 8, starting on Page 3, through Paragraph

8 16, which runs onto Page 6, supported by 24 footnotes,

9 and it was labeled "agreed facts."

10 To my recollection, there were no motions to

11 clarify, challenge, or otherwise question the facts

12 that were ordered as agreed, so at least we have a

13 minimal record of sorts there by which argument would

14 be made. Those would be the facts of the case going

15 forward. It's not quite to the level of a stipulation

16 but goes to the facts in common between the sometimes

17 competing affidavits or declarations.

18 MR. SELLS: That's true as of the time. Our

19 concern is what has gone on between then and now, and

20 there may be a whole new set of facts to be uncovered,

21 and that's the nature of a complaint case.

22 JUDGE TOREM: The last point you made was if

23 there was illegal activity or not, and Mr. Wiley, maybe

24 from experience in other cases raising the issue as to

25 whether what consequences can be sought, was it your

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1 client's position that if the remaining finding

2 necessary to support the requirement of the

3 G-certificate for these hauls is proved that as an

4 intervenor in the case, you will be asking for the

5 imposition of a penalty of any sort beyond the

6 requirement that the Company conform its future

7 behavior only with a G-certificate?

8 MR. SELLS: That would have to be determined

9 at the time. Certainly if there is an ultimate finding

10 that there is a haul of solid waste going on here, then

11 it has to immediately cease and desist unless and until

12 a G-certificate is obtained.

13 If there turns out to be evidence, for

14 example, that these kind of hauls have continued after

15 Order 6, then I think we would be asking for penalties,

16 yes, and continued enforcement.

17 JUDGE TOREM: You say that, despite what I

18 heard from Mr. Anderson earlier on behalf of his

19 clients, that no such activity that would be

20 characterized as violating what was found in Order 06

21 has gone on.

22 MR. SELLS: I don't dispute that Mr. Anderson

23 made that statement and that that's what he's been

24 advised by his client, but in a quasi-judicial

25 proceeding or anything else like that, I would like to

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1 hear it under oath and be able to cross-examine on

2 that. It's not that I believe or don't believe them.

3 It's just not enough.

4 JUDGE TOREM: So for you, it's the quality of

5 the record and the opportunity for cross-examining

6 what's been in the declarations already and advanced on

7 behalf of those clients.

8 MR. SELLS: Correct, and covering the long

9 period of time from this order to the next order or the

10 next year.

11 JUDGE TOREM: Mr. Wiley?

12 MR. WILEY: I hope I don't become redundant

13 from Mr. Sells' rather eloquent points that we concur

14 with. I do want to point out that the current posture

15 of the case is particularly problematic and unique in

16 my experience, and it may demonstrate, at least for me,

17 the foibles or risk in tying an adjudication to a

18 rule-making, particularly a rule-making that evolves,

19 that contracts and that protracts over two years of the

20 proceeding.

21 So I think while I acknowledge that many of

22 the issues are intermingled and intertwined with the

23 rule-making, I don't think that the rule-making, even

24 if it is adopted as proposed by Staff, which is highly

25 unusual, I don't think that is dispositive of the

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1 current case as I look at the revised rule-making, and

2 we can go particularly to the proposal by Mr. Thompson

3 that he provided all counsel by e-mail yesterday and

4 handed out today. I'll just tick down through some of

5 the difficulties we see posed by the proposal.

6 We've already alluded in your questions to

7 both Mr. Thompson and Mr. Sells some of the problems

8 that we see in just a sort of wholesale adoption of the

9 initial order. The initial order was on partial

10 summary adjudication. It addressed some fairly

11 narrowly-framed issues and drew some legal conclusions

12 from declarations, but it did not deal with the

13 conventional cease and desist issue. The initial order

14 finds the activity requires a G-certificate, if I may

15 summarize in an abbreviated fashion, but it doesn't say

16 what these respondents need do based on the finding.

17 Typically we would have some cease and desist

18 language. You've already raised the difficulties that

19 private parties versus Staff have in enforcement.

20 That's a huge issue to us and one we are quite familiar

21 with right now, and it's a problematic outcome with the

22 proposal just to have the initial, which some view as

23 an interlocutory order, become final. So I don't know

24 any of the meat on those bones as to how that would be

25 affected, but I do think there is a gap on the remedy

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1 in cease and desist issue.

2 As far as the condition No. 2 that

3 Mr. Thompson refers to, which for the record is the

4 agreement by the respondent companies against

5 transporting CDL, as Mr. Anderson has termed it, in a

6 direct haul I think is the term he used, to the

7 Weyerhaeuser facility, direct customer haul, our

8 concern about that kind of condition is what's the

9 enforcement mechanism, again, relating to the cease and

10 desist issue somewhat, but also on that specific

11 factor, how is that going to be enforced in some sort

12 of order?

13 I don't think the parties have contemplated

14 that issue, and one reason that I agree with Mr. Sells

15 that we need some fact-finding is that we don't have

16 any current testimony, other than an assertion by

17 counsel that I'm sure he believes is true, but we don't

18 know what's going on currently, what's gone on since

19 the initial order, what went on previously, all of

20 which are relevant points in a Commission determination

21 of a complaint. So we see a gap in the enforcement

22 mechanism for that agreement, and we don't know what

23 happens if it's breached. We just have to file new

24 complaints? We know how burdensome that process is and

25 how long that takes. That doesn't seem like a good

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1 mechanism for us.

2 Also 2(a), the debris generated, that's what

3 I'll say the demo exemption, other than T&T, I don't

4 know if the other two Respondents are involved in

5 demolition activity. I have no basis to know whether

6 or not that's a meaningful exemption, what it relates

7 to at all, because the line between private carriage

8 and common carriage in the demolition field can be

9 somewhat gray, so that's a concern.

10 2(b) is probably our largest concern right

11 now and one that we addressed in our rule-making

12 comments on January 8 on Page 4. We do not believe

13 that it is consistent with state law to allow residual

14 debris left over from a MRF process to be transported

15 by anybody but a G-certificated hauler, a city contract

16 hauler, a municipal service, all of which must be in

17 compliance with the local comprehensive solid waste

18 management plan which the Commission is required to

19 conform to in terms of its jurisdiction and which RCW

20 70.95 mandates, so that issue, as I've termed it, is

21 big enough to drive a garbage truck through, and that's

22 a huge loophole for us.

23 I wanted to say briefly, and maybe

24 Ms. McNeill will address this as well, but I wanted to

25 say briefly that we realize as intervenors we are in a

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1 somewhat unusual procedural posture in terms of

2 opposing a settlement that Staff and the Respondent

3 concur with. It's not unique though. That happens

4 quite often in utility cases, telecom cases, for

5 instance, where Public Counsel may disagree with a

6 settlement that Staff and the Company have agreed to.

7 It again remains to the Commission's complete

8 discretion as to whether to accept dismissal of a

9 complaint or not.

10 I have cited to a case in my comments that's

11 called, "Clipper Navigation, Inc., versus Puget Sound

12 Express." It's Order No. SBC 490, Docket No.

13 TS-900977, February, 1992, where the Commission said as

14 much where in a case where the respondent and the

15 complainant both sought dismissal, the Commission

16 refused to dismiss the complaint. So I don't think

17 that's an imponderable hurdle for us. I think it's one

18 that in this case consistent with the public interest

19 would be wise to accept, and I think that right now

20 with the record that we have, which you pointed out are

21 declarations but they are uncross-examined

22 declarations, we have absolutely no evidence to support

23 dismissal of the Complaint as being consistent with the

24 public interest, and we have specific objections to the

25 proposal as distributed today on the bases that I

0105

1 alluded to.

2 JUDGE TOREM: Mr. Wiley, your comments cited

3 to Clipper Navigation this time or in the January

4 comments, or were they incorporated by reference?

5 MR. WILEY: If they were not in my December

6 status letter, they've been in some recent pleadings by

7 me. Yes. It's at Page 2 of my December 22nd comments.

8 This is comments about whether I supported a status or

9 prehearing conference in this proceeding, and that is

10 Line 16 and 17 on Page 2 of my status report.

11 JUDGE TOREM: Thank you. Ms. McNeill?

12 MS. MCNEILL: Thank you Your Honor. Boy,

13 this is a tough one. First of all, one of Waste

14 Management's primary interests in this proceeding was

15 to have a legally enforceable determination that

16 hauling construction and demolition material for use at

17 a landfill as an industrial waste stabilizer

18 constituted disposal of solid waste. So one of our

19 interests has to do with the remarks that you made at

20 the beginning of this discussion about how to have

21 Order 06 become a final order.

22 We are very interested in having that happen,

23 but I don't think that that's really where, so far

24 anyway, the discussion of most of the Intervenors has

25 led us today, so we might want to come back and talk

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1 about that because that's the primary interest that we

2 have.

3 With regard to the posture of the entire

4 proceeding, I guess I sort of have to agree with one of

5 the points that Mr. Sells made. I thought he made it

6 quite well, which is we put this matter on hold pending

7 a number of developments, and those developments have

8 not occurred yet, so it seems that we ought to -- just

9 because we are all sort of tired of having this case

10 linger and that Mr. Sells' office has had a docket open

11 for five years, still if we agreed at the time that the

12 case should pend a resolution of the rules, then I

13 don't think there is anything that has occurred to

14 change that approach. We should still wait to have a

15 determination of the rules because if the rules are

16 adopted, then Mr. Sells' interest in cross-examining

17 witnesses would be framed by the ability to inquire as

18 to their present operations compliance with the

19 strictures of those rules, and until we have rules, we

20 don't have any ability to really find out whether their

21 activities would comport with the enforceable

22 regulations of the Commission.

23 I also am sympathetic to Mr. Sells' feeling

24 that we need to have some cross-examination of the

25 actual witnesses' testimony. With all due deference to

0107

1 Mr. Anderson, I too believe him when he says this, and

2 I believe his clients have told him this, and I suspect

3 his clients have, in fact, ceased hauling to the

4 Weyerhaeuser landfill. I don't know whether they have

5 ceased hauling to any other landfills because the Order

6 really was very specific to the Weyerhaeuser landfill.

7 Depending on the outcome of the rule, whether this

8 proceeding allowed cross-examination on delivery to

9 other destinations for disposal or not might be framed

10 by the rule.

11 I agree, although it seems that at this point

12 in time seems hard to swallow a characterization of

13 anything being premature, I still think it's kind of

14 premature to dismiss this case. Wait for pending the

15 rule-making, and we should wait until the rule-making

16 is finished. I know when we first embarked on that, we

17 were all assured by Staff that they were going to be --

18 I believe we were told that they were going

19 to be presenting rules within a couple of months, if

20 not weeks, of the prehearing conference where we all

21 agreed we would wait for those rules, and it didn't

22 happen. It takes awhile for Staff to do the rules, and

23 I appreciate that, and I'm not implying any blame or

24 criticism for that, but the fact that it didn't happen

25 as quickly as we expected it to happen doesn't mean

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1 that waiting for it to happen is not a legitimate

2 objective.

3 JUDGE TOREM: I think we have two competing

4 requests, and I'm not sure that we shouldn't proceed on

5 both fronts at the same time. What I'm hearing from

6 Staff, correct me if I'm wrong, Mr. Thompson, that

7 Staff having an agreement with the respondent companies

8 that they will comply with the current rule and what

9 you believe will probably be some form of the new rule

10 satisfies Staff's today present interest in this. It

11 effectively would create a cease and desist order to

12 the current situation with the current subject, the

13 Weyerhaeuser facility, and that would satisfy Staff's

14 interest without seeking in this docket penalties or

15 further analysis or enforcement. You would simply

16 enforce the new rule when it comes out along with every

17 other rule in effect and put the case to bed. Is that

18 right from Staff's perspective?

19 MR. THOMPSON: That's correct, and that's

20 consistent with what we ask the Commission to address

21 in this proceeding and what I think the Order

22 initiating the proceeding from the Commission reflects.

23 We didn't ask for penalties. As Mr. Anderson pointed

24 out earlier, Staff had even advised the companies that

25 use of waste material as industrial waste stabilizer,

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1 we regarded that as not being disposal but a form of

2 reuse or recycling, so they had acted on that, and

3 Staff changed its position.

4 And so essentially, the purpose of the

5 proceeding was to bring the matter before Commission, a

6 decision-maker, and say, "Here are our arguments.

7 Please resolve this for us," and we like the outcome of

8 the motion for summary determination. We would like it

9 to become final, and it's prospective relief that we

10 are asking for. Basically, how should these parties

11 conduct themselves with respect to hauling material to

12 Weyerhaeuser in the future, and this does that.

13 We didn't want an ongoing inquiry into

14 everything that the companies might possibly be engaged

15 in over the long course of a proceeding, and if there

16 are new allegations or something like that, I think

17 Staff would be willing to consider those, and if we

18 think there is any merit to them, then recommend

19 initiation of another proceeding.

20 Essentially, the rule-making is looking at

21 the question of how prospectively should companies

22 conduct themselves. So is this case, so it doesn't

23 seem to make sense to proceed on two tracks to the same

24 end result.

25 JUDGE TOREM: That clarifies what Staff's

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1 goal was here, but I've heard from the three

2 Intervenors that they are looking for something a

3 little bit more, and that the current posture,

4 particularly of Order 06, does not achieve everything

5 that they need, whether to this Company or for the

6 industry as a whole, particularly with its findings as

7 to what is recyclable and what is solid waste, and that

8 Intervenors sound as for the sake of their industry,

9 they wish that to become a precedent-setting decision

10 from this commission, and the only way to get there is

11 with a final order with three signatures on it.

12 And yet they also want the specific assurance

13 that Mr. Anderson's client, those three respondent

14 companies, have not violated the spirit of that order

15 by continuing to haul what would be solid waste without

16 a certificate to this landfill or any other. Whether

17 that's beyond the scope of this proceeding remains to

18 be evaluated, and would like to do that with an

19 opportunity to cross-examine under oath. Whether that

20 would be in the form of a hearing or a deposition,

21 which in my book still has equal weight and could be

22 submitted to support a settlement of some sort, that's

23 something that I think the parties haven't mentioned

24 they could consider as well. To obtain those

25 statements under oath without convening a hearing but

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1 in some other form may yet be part of the final

2 equation here.

3 I'm wondering whether or not it's worth

4 setting a hearing date because this new rule-making

5 that's come about in the last 18 months will address

6 something with a different rule than was applied to

7 this case that couldn't have been enforced in this

8 case, and it will resolve the underlying issue for

9 future behavior, but there won't be any retroactive

10 effect, and the only rule by which they can be

11 classified is the one that's currently in effect and

12 was in effect some two years ago when the Commission

13 first brought this, so changing the standard of

14 behavior now for the industry may resolve this case

15 that you can settle it, but it won't address finally

16 the behavior that was originally alleged as the basis

17 for the classification.

18 MR. ANDERSON: I think it's important that we

19 focus on exactly what you said, what the original

20 question for classification was here, and whether it is

21 something that goes to the Commission for precedential

22 order remains the law of this case. I think it's

23 highly inappropriate to presume that my clients have

24 been violating your order during these proceedings, and

25 I can assure you that if there was any evidence of

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1 this, Intervenors would have been all over it. The

2 Staff had opportunity. That is the law of the case,

3 and we respect the order of the tribunal.

4 But the original classification hearing here

5 was focused very narrowly. The Staff interpretation

6 relied on by my clients was that direct haul of CND

7 waste to Weyerhauser was not disposal and they did not

8 need a G-certificate to do that. Staff changed its

9 position. The law was uncertain as to whether that's

10 disposal or not. You made an order for partial summary

11 determination. That is something that we are allowed

12 to take up on appeal. We are choosing not to. We are

13 willing to concede that that is disposal. That's what

14 this case is about.

15 As far as being premature, for their

16 competitive reasons, the Intervenors will find one

17 issue after another to try to carry this on

18 indefinitely, but the issue that came before you for

19 classification is one essentially we are willing to

20 roll over on. The new Staff determination, which you

21 agree with, is one that can have precedential value,

22 and whether this needs to go up to the Commission, with

23 respect to us, it's the law with respect to my clients

24 one way or the other. I can't see once an order is

25 entered here that there is disposal if you take it to

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1 Weyerhaeuser that my client wouldn't be found to be in

2 violation of the requirements of the regulations if it

3 was hauling to some other disposal facility in exactly

4 the same manner, so they are willing to live with that.

5 And that's really as far as this goes, and

6 the rest is a policy decision for recycling to be made

7 by people other than those that are participating in

8 this proceeding, and that's where the rule-making

9 process is going, and it will ultimately decide whether

10 the WRRA is right and no one can take anything from a

11 MRF, but somebody can otherwise haul waste. This case

12 is essentially dead and gone, and it should be put to

13 bed now.

14 JUDGE TOREM: Mr. Anderson, I appreciate the

15 distinction you are making between the original purpose

16 of the case and where the rule-making has gone since

17 then, and I do apologize if there is any indication

18 that there is any firm belief or evidence ready to be

19 presented that your clients have potentially violated

20 Order 06 or the spirit of any other agreement you may

21 have reached with Commission staff. Nobody has

22 indicated they have such evidence or would wish to

23 bring it forward at a hearing, but simply assurance

24 that they hear it under oath subject to

25 cross-examination. I think that's all it is is a

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1 further step of reliability where the hearing record

2 might be more useful in the case that your clients did

3 have a future violation, that their own words under

4 cross-examination would be used in an enforcement

5 action, not the current state of the record. So I

6 think that's really a question of putting belts and

7 suspenders on the current status of behavior rather

8 than leaving it to lay as is.

9 So let me clarify there is no indication to

10 me on this record or outside of it that there is any

11 ongoing or question of violation.

12 MR. ANDERSON: If there is a need to put that

13 on the record, I think everyone could participate, and

14 my clients could provide affidavits and the Intervenors

15 could be required to provide affidavits as to what the

16 private investigators and trucks that they have had

17 following my clients found.

18 JUDGE TOREM: We will deal with that if we

19 need to. I want to go back to Mr. Thompson and see

20 what other suggestions can be made today as to where to

21 go with this case.

22 MR. THOMPSON: I just want to make the point,

23 I don't really think it's relevant at all what facts

24 may have arisen. I'm not sure what facts the

25 Intervenors are interested in exploring, but I don't

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1 think the facts regarding whether the Respondents have

2 or haven't complied with the Order are relevant. What

3 we are trying to come up with here, we are not asking

4 for penalties. It doesn't really matter what the

5 companies have done. We essentially went on a

6 hypothetical record, a record based on affidavits,

7 taking them as true and saying, if this is true, then

8 the use of CDL as industrial waste stabilizer is

9 disposal, if not recycling or reused. Therefore, what

10 follows from that is you can't carry that material

11 directly to the landfill without a G-certificate; the

12 end.

13 Whether the facts alleged are ultimately true

14 or not doesn't matter. What we are asking for is

15 prospective relief that if this is the case, that

16 requires a G-certificate.

17 MR. WILEY: One of the issues I see raised

18 just by the comments that I believe are still framed by

19 the original complaint, which I have in front of me

20 which are not clear and actually have been somewhat

21 less clear based on the comments on the record today,

22 is if the Respondents believe -- they use the term

23 "direct haul" -- is legally distinct from collection of

24 waste and then transloading of multiple generators'

25 waste into a shipment, I think we've kind of parsed the

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1 Statute, the Order, and the Complaint, and I'm not

2 clear whether they, based on what they've said today,

3 believe that if you don't direct haul but coload solid

4 waste into a container for multiple generators and then

5 take it to the landfill, whether that's covered or not

6 by the settlement or the Complaint.

7 That's merely one example, Your Honor, of

8 lingering legal issues that I think are very much

9 implicated by the current posture of the case, and we

10 believe that -- I can refresh folks' memories. In the

11 last 11 or 12 years, there have been three enforcement

12 actions taken by the Staff based on what I've been able

13 to identify, the Drop Boxes Are Us case, the T&T

14 Recovery case, and this case, and pronouncements out of

15 those cases, particularly Drop Boxes Are Us, are every

16 bit as clarifying as any rule could possibly be in

17 terms of the Commission's view of the law and its

18 regulations, so I think this case presents an

19 opportunity without acknowledging any broadening of it

20 for resolution of some of these issues.

21 JUDGE TOREM: Again, Mr. Wiley, I go back to

22 the December 28th, 2007, first order that instituted

23 the special proceeding, and Paragraph 5, which covers

24 Pages 2 and 3, sets out four individually-numbered

25 paragraphs that set out what the information and belief

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1 of the Commission staff was two-plus years ago, and

2 those seem to be what's fair to all the parties in here

3 by due process of what issues remain.

4 The question as to what issues remain after

5 Order 06 was the quantification and whether a

6 G-certificate would be required to continue hauling

7 this. If it was a sufficiently small quantity under

8 the rule, then it would be the minimus might be a fair

9 term to use today.

10 I think I can see following through on the

11 remaining legal issue as it was pronounced in Order 06,

12 and we thought as I've been looking at the continuance

13 approval notices that went out, the basis set for the

14 continuances and tying it to the original rule was

15 maybe we will all have a common definition, and I need

16 not make one that would be applicable only to this

17 company, but the Commission rule-making process would

18 do that for us at the time, hopefully, in a timely

19 fashion.

20 That hasn't occurred. The direction of the

21 rule-making has done a 180-degree turn, if not a 360 in

22 between there, and it's now where it is. To this date,

23 there is not a rule-making schedule adopted or

24 published by the Commission as to when that is going to

25 come out, when the commissioners are going to act on

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1 the comments, and whether or not a CR-102 will be

2 issued. I've looked at all the comments. Ms. McNeill,

3 I didn't look at yours in this case, but all the

4 parties in this case I reviewed. Yours, Ms. McNeill,

5 were for a different client and not directly involved

6 in this case so I didn't review yours, but I see where

7 the parties continued to have individual issues with

8 the rule-making docket.

9 I don't know what credence, if any, the

10 commissioners will put in any of the comments,

11 including those from Ecology, that came in, and whether

12 they will want to go forward and resolve that matter.

13 I do want to go forward and resolve this case on the

14 remaining issue and deal with it. It may be very quick

15 that we have simply time for discovery in which

16 depositions might be taken, and that discovery may

17 result in a motion to conduct a paper record as the

18 cross-examination will have taken place outside of the

19 hearing room, but I want to leave time for a hearing to

20 be preempted, if you will, by a settlement that the

21 Intervenors can either sign onto, or Mr. Thompson and

22 Mr. Anderson can present a settlement that's not a

23 global settlement but between the Company, those three

24 companies and the Commission and might be accepted over

25 the objections of the Intervenors and the case resolved

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1 in that way.

2 But you are asking for a final order, all of

3 you, as to what happened in Order 06. That seems to be

4 the one clear measure of agreement here, and I would

5 rather go to the commissioners with the more fleshed

6 out version, a true drafted settlement with the

7 supporting narrative, not with this proposal, with a

8 waiver of an initial order on the remaining parts of

9 the case and that the settlement identify exactly what

10 findings would be there.

11 If that settlement order is accompanied by a

12 narrative that's supported by sworn deposition

13 testimony that satisfies what the Intervenors want,

14 just be able to sign on, you negotiate it amongst

15 yourselves, but what I'm going to end up doing is

16 taking the matter under consideration today, deciding

17 how long it would be appropriate for that process to

18 occur, probably on the matter of months, not weeks, to

19 flesh out this settlement as it would be for the

20 Commission staff and Mr. Anderson's clients to meet and

21 consult with the Intervenors and see just how much more

22 evidence they need to support a settlement agreement of

23 that sort, if it can be done, and the time line coming

24 that you standing on the opposite sides of the line

25 will have to decide, do I want to file my witness and

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1 exhibit list by this date, or do I want to file a

2 settlement agreement and sign onto it, but we will have

3 deadlines set in the next few months. The hearing will

4 impose litigation costs on you at some time certain, or

5 you will find a way to do your discovery and have a

6 settlement that all parties can either submit and file

7 their objections or join together as a global

8 settlement, because I'm not hearing any direction that

9 tells me there will be a date certain by which this

10 case will be done, and I'm going to set one. I'm not

11 going to tell you what it is today because I don't

12 know.

13 One thing I want to take a look at is whether

14 or not we invoked the discovery rules yet. Paragraph

15 27 of Order 2 had the parties jointly request to invoke

16 that, and that was done, so if parties wish to take

17 depositions, I encourage them not to force the

18 involvement of the Commission to get involved as to

19 questions and scope but to remember what the scope of

20 Order 1 was and that paragraph I referred to earlier

21 and this not be an attempt to make an example out of

22 Mr. Anderson's companies beyond the original purpose of

23 this hearing and the scope of your individual

24 intervention.

25 There may be plenty of other ongoing behavior

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1 you have question about, but this is the behavior

2 involving this MRF and the behavior that's alleged to

3 have given the Commission the purpose to bring this

4 proceeding in the first place. That's the subject that

5 we need to complete so we can end this docket. So I

6 just encourage any Intervenors that want to depose

7 Mr. Anderson's clients to keep it within the

8 appropriate scope or a reasonable gray area outside of

9 it that would be informational and not something where

10 you become independent prosecutors of some other

11 behavior that was not contemplated or covered by any of

12 the orders issued in this case.

13 Probably in the next week or so, I will issue

14 the order, and I will try once I figure out what an

15 appropriate interval is to have Ms. Walker contact your

16 offices to ensure that the hearing date I pick is not

17 smack dab in the middle of other litigation you already

18 have, so we may not have a concurrence on what the

19 order is going to say, but at least the dates will be

20 open and folks will be available.

21 But that's what I intend to do is set a

22 hearing schedule that is several months long, and if

23 that has any influence on how quickly the rate-making

24 proceeds, I doubt --

25 MR. WILEY: You mean the rule-making?

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1 JUDGE TOREM: Yes, thank you. I think,

2 Mr. Thompson, that the proposal might satisfy the

3 commissioners as well, but it will depend on exactly

4 how that settlement agreement and the supporting

5 narrative is worded and which portions of Order 06 you

6 are asking them to adopt and making sure they are not

7 going to be in opposition to the rule-making that they

8 will also being asked to approve in the months ahead,

9 so I want to leave that for you to sort that out as to

10 what is congruent between this case and that and what

11 might be need to be separate in the rule-making and

12 address the needs of all parties in this case.

13 If there are matters that can't be agreed

14 upon, that's fine. I will issue an order, and if the

15 commissioners are being asked to weigh in as well, they

16 will. Parties that are here, anything else to add?

17 MR. ANDERSON: I don't think we can presume

18 in scheduling that there would be a global settlement,

19 so I just ask that in setting your time frame, you

20 consider that there is an existing discovery dispute,

21 that the Respondents requests to Intervenors have no

22 reply other than objection, and that will need to be

23 resolved in the course of the proceeding before we can

24 get to an adjudication.

25 JUDGE TOREM: Mr. Anderson, was I made aware

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1 of any such outstanding discovery request or dispute?

2 MR. ANDERSON: No. It was of little

3 importance because of the delay and essentially not

4 action with respect to the case, but if we are going to

5 have to adjudicate percentages, it's...

6 JUDGE TOREM: I understand. Bring to it my

7 attention if need be, what I will say is again that

8 Order 01 should form the scope of any parties'

9 discovery requests. Whether it's your clients,

10 Mr. Anderson, the Staff, or any of the Intervenors, the

11 rules are the same as to what the appropriate scope of

12 this hearing is.

13 I don't necessarily anticipate there will be

14 a global settlement, but there would perhaps be a

15 settlement that is presented with the Commission

16 staff's endorsement and perhaps your own as well saying

17 that this is the appropriate resolution for the case

18 and that the commissioners should adopt that instead of

19 any further hearing. That could go forward,

20 Mr. Anderson. I may set a deadline by which that be

21 submitted to avoid further litigation costs and then

22 set sort of a graduated -- if a settlement is not

23 sufficiently mature to come in by that date, then there

24 will be witness filing deadlines and other things

25 sufficiently thereafter that would have allowed the

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1 Commission to act on the proposed settlement agreement

2 without anyone incurring those additional litigations

3 costs.

4 In other words, there will be a procedural

5 schedule that says, Here's the date for a settlement by

6 some or all parties. An appropriate interval would

7 pass where the Commission could act on it, and

8 thereafter, if there either hasn't been a settlement or

9 the Commission rejects it, the other dates would begin

10 to have effect on your clients. Is that clear?

11 MR. ANDERSON: Yes, thank you.

12 JUDGE TOREM: Ms. McNeill, anything?

13 MS. MCNEILL: No, Your Honor.

14 JUDGE TOREM: Anybody else? Then I will try

15 to go back and craft an appropriate set of intervals,

16 and then when we get to the ones that would affect your

17 availability to be at a hearing, the hearing would only

18 be on those remaining issues in the case. I don't

19 think it would be more than a one-day hearing on the

20 remaining issues because so much was resolved in Order

21 06. Does anyone see a need for more than a one-day

22 hearing if one becomes necessary?

23 MR. ANDERSON: Yes. I think it's going to

24 take two days.

25 JUDGE TOREM: Then I will reserve two days in

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1 the procedural schedule. I think the original hearing

2 was three, so hopefully, two days will be more than

3 sufficient to handle what's left.

4 MR. THOMPSON: I think it matters whether we

5 would have prefiled written testimony for purposes of

6 whether that would be enough time. I think if we did

7 prefiled testimony, one day might be adequate, but if

8 all the direct testimony is to be presented live at the

9 hearing, I would expect at least two days.

10 JUDGE TOREM: I'll take that under

11 consideration, and I want to see as little cost

12 inflicted on the parties further from here as possible,

13 because I do presume there are some built-in costs if

14 we have prefiled testimony that accelerate things, and

15 I will have to weigh the utility of that in this

16 particular case. I don't recall what we were going to

17 do the first time around, but I will look at previous

18 procedural schedules and try to make an educated

19 decision based on what we have set in this case, and I

20 will reset a procedural schedule.

21 Our administrative staff will be in touch

22 with your office hopefully by the end of next week, and

23 you will some idea as to what the hearing date will

24 look like. I may have them circulate the entire draft

25 schedule dates, so as a courtesy, you might be able to

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1 weigh in. Whether I will honor any objections or not,

2 it depends on how many come in and how accommodating

3 it's required to be.

4 MS. MCNEILL: Your Honor, just one last

5 observation if I may. I very much appreciate your

6 attention to the cost to the parties, not just my own

7 client but also the Respondents. I can imagine that

8 they are feeling a little frustrated about this, so I

9 think your sensitivity to that is wonderful.

10 I do agree with what Mr. Thompson said. If

11 we are going to do prefiled testimony, I do think two

12 days would be enough. If it is more efficient use of

13 time to do live testimony, I do think it would need to

14 be three days. Look at how much time we've spent today

15 talking about this. I just wanted to make that one

16 last observation.

17 JUDGE TOREM: You are right. There are at

18 least a handful of lawyers, so we will see, and there

19 is always my questions. I will circulate what I hope

20 will be an appropriate schedule for some informal

21 comment, and hopefully your schedules will reasonably

22 accommodate the range of dates I have, and otherwise,

23 this case can be prioritized among other conflicts you

24 might have. We'll sort something out by a week from

25 Friday is my hope to issue a prehearing conference

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1 order based on today's discussions. Thank you all very

2 much. We will be adjourned and off the record.

3 (Status conference adjourned at 2:12 p.m.)

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