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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of Determining the)
Proper Carrier Classification of)
GLACIER RECYCLE, LLC;) DOCKET NO. TG-072226
HUNGRY BUZZARD RECOVERY LLC; AND) Volume IV
T&T RECOVERY, INC.) Pages 84 - 127

A status conference in the above matter
was held on January 27, 2010, at 1:06 p.m., at 1300
South Evergreen Park Drive Southwest, Olympia,
Washington, before Administrative Law Judge ADAM E.
TOREM.

The parties were present as follows:

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by JONATHAN THOMPSON, Assistant Attorney
General, 1400 South Evergreen Park Drive Southwest,
Post Office Box 40128, Olympia, Washington 98504;
telephone, (360) 624-1225.

GLACIER RECYCLE, LLC; HUNGRY BUZZARD
RECOVERY, LLC; T&T RECOVERY, INC., by DONALD L.
ANDERSON (via bridge line), Attorney at Law, Eisenhower
& Carlson, 1201 Pacific Avenue, Suite 1200, Tacoma,
Washington 98402; telephone, (253) 572-4500.

WASTE MANAGEMENT OF WASHINGTON, INC., by
POLLY L. MCNEILL (via bridge line), Attorney at Law,
Summit Law Group, 315 Fifth Avenue South, Suite 1000,
Seattle, Washington 98104; telephone, (206) 676-7040.

WASHINGTON REFUSE AND RECYCLING ASSOCIATION,
by JAMES K. SELLS, Attorney at Law, Ryan, Sells,
Uptegraft, 9657 Levin Road Northwest, Suite 240,
Silverdale, Washington 98383; telephone, (360)
307-8860.
Kathryn T. Wilson, CCR
Court Reporter

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1 MURREY'S DISPOSAL COMPANY, INC.; WASTE
2 CONNECTIONS OF WASHINGTON, INC.; ISLAND DISPOSAL, INC.;
3 LYNNWOOD DISPOSAL, d/b/a ALLIED WASTE OF LYNNWOOD;
4 EASTSIDE DISPOSAL, d/b/a ALLIED WASTE OF BELLEVUE, by
5 DAVID W. WILEY, Attorney at Law, Williams Kastner, 601
6 Union Street, Suite 4100, Seattle, Washington 98101;
7 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 WRRRA.

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 WRRRA, 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

0103

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

0106

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 Weyerhaeuser 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 WRRRA 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 Intervenor 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 Intervenor 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 be 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 needed 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 Intervenor 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 have 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

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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