

Fax (360) 307-8865, E-mail jimsells@rsulaw.com.

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1 KLEEN ENVIRONMENTAL TECHNOLOGIES, INC., via
2 bridge line by GREG W. HAFFNER, Attorney at Law, Curran
3 Mendoza, 555 West Smith Street, Kent, Washington 98035,
4 Telephone (253) 852-2345, Fax (253) 852-2030, E-mail
5 gwh@curranmendoza.com.

6 STERICYCLE OF WASHINGTON, INC., via bridge
7 line by STEPHEN B. JOHNSON, Attorney at Law, Garvey
8 Shubert Barer, 1191 Second Avenue, Floor 18, Seattle,
9 Washington 98101, Telephone (206) 464-3939, Fax (206)
10 464-0125, E-mail sjohnson@gsblaw.com.

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

15 JUDGE RENDAHL: Good afternoon, I'm Ann
16 Rendahl, the Administrative Law Judge presiding over
17 this proceeding. We're here before the Washington
18 Utilities and Transportation Commission Tuesday, August
19 3rd, 2004, for a prehearing conference in consolidated
20 Docket Numbers TG-040221, TG-040248, and TG-040553, the
21 applications of Harold LeMay Enterprises, Incorporated,
22 Kleen Environmental Technologies, Incorporated, and
23 Rubatino Refuse Removal, Incorporated.

24 As I stated off the record, the purpose of
25 the prehearing this afternoon is to address the issues

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1 that were raised in Mr. Sells' July 28th letter and
2 Mr. Johnson's August 3rd letter, namely whether shipper
3 generator witnesses must file prefiled written
4 testimony, and if no written testimony is required, when
5 applicants must disclose the identity of these
6 witnesses.

7 And as I stated off the record, I would also
8 like to discuss the status of Docket Numbers TG-040221
9 and 040553 given the letters that Mr. Sells recently
10 filed concerning the Rubatino and LeMay applications.

11 Before we get any farther, let's take
12 appearances from the applicants, protestants, and
13 interveners, or I guess we're all applicants and
14 protestants at this point.

15 MR. JOHNSON: Not quite, Your Honor, this is
16 Steve Johnson, we represent Stericycle of Washington,
17 Inc., and it is only a protestant.

18 JUDGE RENDAHL: Well, I don't think there's
19 any more interveners is what I meant to say.

20 MR. JOHNSON: I see.

21 JUDGE RENDAHL: But because you have all
22 stated an appearance before, if you could just state
23 your name and the party or parties you represent, that
24 will be sufficient this afternoon, so starting with
25 Mr. Sells.

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1 MR. SELLS: Thank you, Your Honor, please,
2 James Sells, attorney appearing for applicant LeMay
3 Enterprises, Inc., for the purpose of this hearing. I
4 do represent other parties, but they're not involved
5 today.

6 JUDGE RENDAHL: All right.

7 And Mr. Haffner.

8 MR. HAFFNER: Thank you, Your Honor, Greg
9 Haffner for applicant Kleen Environmental Technologies,
10 Inc.

11 JUDGE RENDAHL: And Mr. Johnson.

12 MR. JOHNSON: Thank you, Your Honor, Stephen
13 B. Johnson representing Stericycle of Washington, Inc.,
14 a protestant to the applications filed by both LeMay and
15 Kleen.

16 JUDGE RENDAHL: Thank you.

17 And Mr. Trautman.

18 MR. TRAUTMAN: Gregory J. Trautman, Assistant
19 Attorney General for Commission Staff.

20 JUDGE RENDAHL: Okay, so I would first like
21 to talk about the status of the applications. So on
22 July 12th, Mr. Sells, you notified the Commission and
23 all the parties that Rubatino had withdrawn its
24 application number GA-079266. I assume that means that
25 Rubatino is not participating in this proceeding as an

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1 applicant but only as a protestant.

2 MR. SELLS: That is correct, Your Honor.

3 JUDGE RENDAHL: Okay. So at this point we
4 can modify the caption just to include the two
5 consolidated dockets TG-040221 and TG-040248; is that
6 correct?

7 MR. SELLS: This is Jim Sells; that is
8 correct.

9 JUDGE RENDAHL: Okay.

10 MR. JOHNSON: Your Honor, this is Steve
11 Johnson, may I ask a clarifying question here? Is
12 Rubatino protesting the LeMay application?

13 MR. SELLS: No.

14 JUDGE RENDAHL: So Rubatino is only a
15 protestant as to the Kleen application?

16 MR. SELLS: You will note that the LeMay
17 application does not seek service within the Rubatino
18 territory, so I don't think they would have the right to
19 protest it.

20 JUDGE RENDAHL: That was Mr. Sells, correct?

21 MR. SELLS: Oh, I'm sorry, this is Jim Sells,
22 yes.

23 JUDGE RENDAHL: And then secondly, Mr. Sells,
24 for the LeMay application, I received this morning your
25 letter dated yesterday, August 2nd, indicating that

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1 LeMay is restricting its application now to King and
2 Kitsap Counties; is that correct?

3 MR. SELLS: This is Jim Sells, that is
4 correct.

5 JUDGE RENDAHL: So at this point, LeMay is
6 not pursuing authority in Pacific, Wahkiakum, Cowlitz,
7 Clark, and Skamania Counties?

8 MR. SELLS: That is correct.

9 JUDGE RENDAHL: So does this have any effect
10 on our procedural schedule, in particular our need for a
11 day of hearing in Vancouver and three days of hearing in
12 Kent for the shipper generator witnesses?

13 MR. SELLS: This is Jim Sells, I think
14 Mr. Haffner would probably have to answer that.

15 MR. HAFFNER: I think we probably ought to
16 stay with the same schedule. We're going to need
17 witnesses in Eastern Washington, I'm sorry, in
18 Vancouver, so I would probably foresee us going with the
19 same schedule.

20 JUDGE RENDAHL: Okay. So I just wanted to
21 know whether that had any impact on our schedule, and if
22 so, if we needed to change it.

23 Well, thank you for those clarifications, so
24 it looks like we're back down to two parties in this
25 proceeding, two applicants, excuse me.

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1 So the next issue is the prefiled testimony
2 question. And I will just say it appears from reading
3 Mr. Johnson's letter that there appears to be agreement
4 that generator shipper witnesses do not need to file
5 prefiled testimony; is that correct?

6 MR. SELLS: This is Jim Sells, that's how I
7 read the letter, yes.

8 MR. JOHNSON: Your Honor, this is Steve
9 Johnson, that's my view.

10 MR. HAFFNER: Your Honor, this is Greg
11 Haffner, I would concur also.

12 MR. TRAUTMAN: And I concur also for Staff.

13 JUDGE RENDAHL: Okay. So at this point I
14 think really the issue is what information needs to be
15 filed by a shipper generator witness and when, and so I
16 would like to hear from all of you on these issues, and
17 I will start with you, Mr. Sells.

18 MR. SELLS: Thank you, Your Honor, this is
19 Jim Sells. Our position here is that if we reach a
20 point where by August 13th we have to file the names and
21 a summary of the shippers' testimony pursuant to
22 discovery, then there's really not much difference, if
23 any, between that and filing prefiled testimony.

24 Also, a second part of that would be is if
25 that takes place on the 13th, are we then precluded from

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1 gathering more shipper generator testimony between then
2 and the time of the hearing. As Your Honor knows, at
3 best shipper generator witnesses are usually reluctant,
4 have to be somewhat cared for and pampered and convinced
5 that they're doing the right thing and sometimes change
6 their minds. Mr. Johnson could probably tell us better
7 than anybody that because he has already gone through
8 it. Our position is that the suggest -- by responding
9 to the discovery request regarding shippers, it's no
10 different than putting in the prefiled testimony, which
11 we have all agreed is not appropriate. We don't think
12 we should have to reveal our shippers until a couple of
13 days before the hearing.

14 JUDGE RENDAHL: Okay, Mr. Haffner.

15 MR. HAFFNER: Thank you, Your Honor, Greg
16 Haffner for Kleen. I guess I'm of the opinion that
17 we're now outside the scope of what I understood the
18 intent of this initial conference to be, and that is
19 that I thought we were here to clarify simply what the
20 prehearing, preconference order called for in terms of
21 what was to be included in the prefiled witness
22 statements. If we're getting into whether there is a
23 motion to compel, I think that needs to be something
24 that's addressed directly by Mr. Johnson. It's
25 certainly something that I'm not prepared today to argue

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1 for or against. But I would echo Mr. Sells' comments
2 with respect to why shipper or generator testimony
3 should not come in at any prefiled format.

4 JUDGE RENDAHL: Okay, well, I believe it was
5 addressed in some way in that Mr. Sells sought
6 clarification that information didn't need to be
7 provided until a few days prior to hearing.

8 Now I was not aware of the discovery issue
9 until Mr. Johnson's letter, but I'm just as happy to
10 address any of those issues as quickly as possible.

11 MR. HAFFNER: Well, again, Your Honor, this
12 is Greg Haffner, the way that Mr. Sells' letter reads, I
13 took that as dicta in terms of what he was commenting
14 on, it was just a comment in passing that it was his
15 understanding that these types of disclosures are not
16 made until sometime shortly before the hearing. But I
17 thought that the thrust of his letter was to clarify
18 what was to be included in the prefiled statement.

19 MR. JOHNSON: Your Honor, this is Steve
20 Johnson, it seems to me that if this is an issue we can
21 address now that perhaps it would save all the parties
22 time and effort to do so.

23 I have no problem with the point that
24 shippers, you know, can be identified, you know, late in
25 the process to the -- if they're only identified by the

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1 applicants late in the process. On the other hand, the
2 applicants have filed applications identifying a shipper
3 need, at least ones that they think they're going to be
4 able to establish. Presumably they have shipper
5 witnesses identified that they are currently intending
6 to call at the hearing. We requested that they identify
7 their witnesses. I think that there's no necessity that
8 they do so by August 13th, but we need to have them
9 identified sufficiently ahead of the hearing that we can
10 know what we're facing in terms of a hearing and what
11 the claim is on shipper need.

12 So what we have, you know, we have submitted
13 data requests asking the applicants to identify their
14 witnesses. If they have witnesses that they have --
15 that they intend to call at the hearing, if they have
16 identified them, they should disclose them. Pursuant to
17 the data requests, if they -- if at a later point in
18 time they identify witnesses that they intend to call at
19 the hearing, they should identify those promptly after
20 they have been identified.

21 I mean that's -- it seems to me that's a
22 minimum of what is required by the discovery rule.
23 We're not -- I don't think we're asking for anything
24 extraordinary to ask for a disclosure of witnesses that
25 the applicants intend to call at the hearing and a brief

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1 summary of their anticipated testimony. It's not a
2 matter of asking them to file a multipage, you know,
3 sworn statement here. We're talking about a few
4 sentences describing their position with respect to the
5 application that they're supporting if, you know, to the
6 extent they're being advanced as supporting witnesses.

7 So our position is that this disclosure of
8 the witnesses is required, that we requested it, that
9 it's proper in order to allow us to prepare for the
10 hearing, and that the witnesses ought to be disclosed as
11 soon as they can -- they have been identified by the
12 applicant.

13 JUDGE RENDAHL: Mr. Trautman.

14 MR. TRAUTMAN: Staff, at this point, Staff
15 does not have a position on the motion that's being made
16 by Stericycle for the advanced disclosure of the
17 witnesses. I believe historically it's correct that
18 typically the shipper witnesses have not been disclosed
19 until sometime close to the hearing date. And at this
20 point Staff, as I said, Staff does not take a position
21 on the motion to require the earlier discovery that's
22 being sought.

23 JUDGE RENDAHL: Thank you.

24 Mr. Sells, any response?

25 MR. SELLS: Well, I agree, this is Jim Sells,

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1 I agree with Mr. Trautman, and it's been my experience
2 that historically they aren't, the names of the shipper
3 witnesses are not revealed until usually within a week
4 of the hearing. The reason for that is, and I don't
5 care what anybody tells me and I would probably do the
6 same, is the minute you find out one of your customers
7 or potential customers is going to appear and say they
8 would like to have the opportunity to try somebody else,
9 you're going to send a salesman out there. And that's
10 the reason we have such a high turnover in shipper
11 witnesses is that they get embarrassed, they feel
12 flustered and pressured.

13 It's just not fair to the witnesses who are,
14 you know, we're asking them to give up their time to
15 voluntarily come in and testify for what they think is
16 the good of their business, and to have somebody else
17 harass, and I don't want to use the word harass, someone
18 else contacting them and doing whatever they can to keep
19 them just is not in keeping with the nature of these
20 hearings and the purpose of these hearings.

21 MR. JOHNSON: Well, Your Honor, this is Steve
22 Johnson, I think that, you know, we're dealing with --
23 first of all, talk about history, there hasn't been a
24 significant medical waste case in over ten years in this
25 state, so there really is no history on -- and there are

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1 only a handful of cases ten years ago, so there really
2 is not much in the way of history in this context.

3 Medical waste generators are sophisticated
4 and capable commercial enterprises or professional
5 offices. You're not talking about, you know,
6 individuals who are, you know, with complaints about
7 residential service. You're talking about hospitals,
8 medical labs, clinics, dental offices, doctors offices.
9 These folks are both not going to put up with harassment
10 and are quite capable of dealing with any contacts that
11 they may receive.

12 Part of the process here is to determine the
13 extent to which there really is shipper need. If, you
14 know, the notion of sort of having secret witnesses that
15 you trot out at the very end of the program I think is
16 inconsistent with determining whether there really is
17 shipper need. If you have a business organization that
18 has a, you know, their various layers and levels, it is
19 not at all inappropriate to contact that enterprise and
20 determine whether the position being taken by the guys
21 in the loading dock is the one that's being advanced by
22 the director of maintenance or the folks at the top of
23 the executive hierarchy.

24 And so, you know, I think it is not at all
25 inconsistent with determining whether there is shipper

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1 need if that's what we're trying to accomplish to allow
2 protestants to make contact with potential shipper
3 witnesses if there are corporations and organizations.
4 And I think it's really kind of bizarre to note -- to
5 suggest that people who are competing for the business
6 of these, you know, or for the support of these shippers
7 are going to mistreat them in some fashion. I just -- I
8 think that is -- lacks credibility entirely.

9 JUDGE RENDAHL: Well, having heard from all
10 of you --

11 MR. HAFFNER: Your Honor, this is Greg
12 Haffner, may I make one comment?

13 JUDGE RENDAHL: Please go ahead.

14 MR. HAFFNER: With respect to Mr. Johnson's
15 rebuttal to Mr. Sells, I again agree with Mr. Sells that
16 we need to keep in mind that this is in the context of a
17 commercial setting where these witnesses are offered
18 different financial opportunities, and we don't know
19 what could go on there. You know, in the context of a
20 civil litigation, you start offering a witness
21 incentives, and you're going to be charged with
22 tampering with a witness, and my concern is that this
23 opens the door for that possibility. I have no specific
24 examples to point to.

25 I think in the context of what the spirit of

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1 why this Commission exists is to find out what shipper
2 need is, I think the best way to find that out is to
3 bring these people onto the stand, let them testify
4 without the possibility of interference from any other
5 party, and then allow the existing carriers ample time
6 to rebut that. If we need to add additional hearing
7 dates to allow them to research what has been said
8 without any sort of interference, then, you know, I'm in
9 support of that, but I don't believe it is appropriate
10 to allow I don't think it's any length of time prior to
11 the hearing when the shippers should be disclosed. I
12 think it should be a presentation that is unable to be
13 changed in any way by any outside third party.

14 JUDGE RENDAHL: Okay, thank you, Mr. Haffner.

15 I think all of you have expressed the
16 tensions involved with the requirements in the statute
17 to allow sentiment in the community, this is in RCW
18 81.77.040, to allow sentiment in the community
19 contemplated to be served as to the necessity for such a
20 service, and that's where the shipper generator
21 witnesses derive from. And as Mr. Sells has stated, and
22 Mr. Trautman as well, historically the Commission has
23 not required the names of shipper generator witnesses to
24 be revealed until prior to the hearing to avoid any
25 potential dissuasion of any shipper generator witness to

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1 state its desire for a different type of service or any
2 concerns they might have about existing service or that,
3 you know, an interest in the service that's being
4 proposed. And so for those reasons and the fact that,
5 as Mr. Haffner proposed, this is a commercial setting,
6 and it is true that companies do offer other companies
7 incentives to take their business. It works both ways.

8 I think it's appropriate to allow some
9 advanced notice of the shipper witnesses but not at the
10 time that prefiled testimony is required. That would in
11 some cases allow more than two months of time between
12 the time the witnesses are identified and the time we
13 actually go to hearing. We have our primary hearing in
14 this case the last week of September, the first week of
15 October. The reason why I allowed prefiled testimony in
16 this case was to address the, you know, the financial
17 issues, the operating witnesses, not for the shipper
18 generator witnesses, and I don't believe I intended the
19 timing to also apply to those witnesses.

20 I think it's appropriate to require the
21 applicant to identify to the Commission and all the
22 parties a week in advance of the relevant hearing, so
23 for example on September 29th the applicants would have
24 to provide information relating to the October 6th
25 through 8th hearings in Kent and by October 5th for the

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1 October 12th hearing and by October 21st for the October
2 28th hearing, so that we don't have shipper names out
3 there for a long period of time.

4 And I'm not indicating harassment, but, you
5 know, there's a certain amount of commercial persuasion
6 that can go on in many ways on both sides. And yes,
7 Mr. Johnson, these folks are professional, but even
8 professionals sometimes become uncomfortable when
9 they're being solicited.

10 MR. JOHNSON: Your Honor, I --

11 JUDGE RENDAHL: And I'm not done,
12 Mr. Johnson.

13 So at this point I'm going to require a week
14 prior, a week before the hearing begins for the shipper
15 generator witnesses to be revealed and also require an
16 identification of whether the witness is associated or
17 speaking on behalf of an organization or a business and
18 what that organization or business is as well as a brief
19 statement summarizing what the testimony of the witness,
20 you know, the subject of the testimony of the witness.
21 And I agree with Mr. Haffner that if there is a need to
22 allow additional days for the protestants to respond to
23 any of the shipper witness testimony that we will make
24 that time available.

25 But, you know, after -- if the Commission

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1 does grant any of these, either of these applications,
2 after the grant is the time for the parties to compete
3 for the business, not at the time the hearing is going
4 on. And I'm not meaning to prevent the protestants from
5 trying to find out what problems there might be in
6 service that the shipper witnesses might be concerned
7 about, I'm not trying to prevent that. What I am trying
8 to uphold is the Commission's historical practice of not
9 allowing a great deal of time prior to testimony before
10 shipper generator witnesses are identified.

11 Mr. Johnson.

12 MR. JOHNSON: Thank you, Your Honor, I don't
13 mean to be argumentative here, so perhaps I should just
14 keep my mouth shut. But I would be curious if there is
15 Commission precedent on this issue and if that is
16 something that I could be referred to just to convince
17 or to follow along with the notion of historical
18 Commission practice as described.

19 JUDGE RENDAHL: Well, I looked through the
20 Commission's transportation digest and to be honest did
21 not find anything, but I have consulted with our senior
22 ALJ on this issue, and he has been with the Commission
23 for over 35 years, and he did say that historically the
24 Commission has taken that position, and so that's the
25 historical sense. I don't believe there has been a

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1 decision published, unless, Mr. Sells, you're aware of
2 any.

3 MR. SELLS: No, this is Jim Sells, no, I'm
4 not, Your Honor. And I think maybe some of the
5 confusion comes when Mr. Trautman and I are talking
6 about historical precedent, and I assume Your Honor,
7 we're talking about transportation cases, not just
8 limited to medical waste cases.

9 JUDGE RENDAHL: Correct, it's not just solid
10 waste, it's commercial ferries and the trucking
11 industry, which was the mainstay for many, many years.
12 So I don't believe it's been an issue that is in any
13 written precedent, but it's a decision that if you wish
14 I will write up in an order. And, Mr. Johnson, I guess
15 to your next question which I am anticipating, if you
16 did file a motion to compel, I would likely deny it on
17 this issue for the reasons that we have discussed today.

18 I think that, you know, the focus of the
19 discovery and the focus of taking a more formal process
20 in this case compared to other cases was really to,
21 given the number of parties, allow you all a forum to
22 focus on the financial and operating witnesses and
23 present it in a more organized way, but I don't believe
24 it should extend to the shipper generator witnesses.

25 I understand your concerns, I don't believe

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1 this is an intent to hide the ball. It's been a
2 historical practice to try to obtain the, in a sense,
3 the freshest information possible for hearing as to
4 sentiment in the community. As I stated, if the
5 Commission does grant an application and there is a
6 competitive, there are competing firms, then the firms
7 are able to compete with each other after that point
8 rather than prior to.

9 MR. JOHNSON: Well, Your Honor, again Steve
10 Johnson, just the only thing that concerns me here is
11 that you talk about the commercial incentive that can be
12 offered to witnesses, right now with very little
13 disclosure that seems to be operating only one way. And
14 I'm not interested in using incentives to change
15 anybody's testimony, but my interest is in testing
16 whether an organization or business is, in fact, taking
17 a position, you know, that the Commission should rely
18 upon and for no other purpose.

19 JUDGE RENDAHL: Well, and I think that kind
20 of information can be explored on cross-examination of
21 those witnesses.

22 MR. JOHNSON: It certainly can be, but in my
23 view this does substantially hamper our ability to
24 prepare for the hearing.

25 JUDGE RENDAHL: Okay, well, I don't think

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1 this process is any different than the Stericycle
2 hearings that occurred ten years ago, so to that extent
3 it's the same process with the exception of having the
4 financial and operating witnesses in prefiled testimony.

5 MR. JOHNSON: Well --

6 JUDGE RENDAHL: So to that extent, I mean
7 this has been the Commission's process, and applications
8 have been granted and applications have been denied
9 using this process. I don't think it necessarily goes
10 one way or the other, because the shipper generator
11 witnesses are one aspect of the applicant's testimony,
12 they're not the entire application.

13 MR. JOHNSON: Well, in this particular case,
14 I think they're going to be a very significant one.
15 Sorry, Your Honor, this is Steve Johnson one more time.
16 I think we have covered it, I don't mean to extend the
17 discussion.

18 JUDGE RENDAHL: Okay, well, I will enter a
19 prehearing conference order on this issue, and we can
20 take it from there.

21 So is there anything further we need to
22 address this afternoon?

23 MR. SELLS: This is Jim Sells, nothing from
24 us, Your Honor.

25 MR. HAFFNER: Greg Haffner, Your Honor,

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1 nothing that I can think of.

2 JUDGE RENDAHL: Okay, before we adjourn the
3 prehearing conference, does any party wish to order a
4 copy of the transcript of today's proceeding?

5 MR. JOHNSON: Yes, this is Steve Johnson, I
6 would like to have a copy of the transcript, please.

7 JUDGE RENDAHL: Okay, let's be off the record
8 for a moment.

9 (Discussion off the record.)

10 JUDGE RENDAHL: While we were off the record,
11 Mr. Sells and Mr. Haffner also indicated they would like
12 a copy of the transcript.

13 With that, is there anything else we need to
14 cover this afternoon?

15 MR. SELLS: No, Your Honor.

16 JUDGE RENDAHL: All right. Well, thank you
17 all for your time, this prehearing conference is
18 adjourned, and I will enter a prehearing conference
19 order later this week summarizing our discussion. Thank
20 you all, we'll be off the record.

21 (Hearing adjourned at 3:05 p.m.)

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