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

2 JUDGE CAILLE: Let's go on the record. Good
3 morning. This is a prehearing conference to mark
4 exhibits and cross-exhibits and to attend to other
5 procedural matters, including the motions that have
6 been filed, in Docket Number UW-011320. This is a
7 complaint brought by David and Janis Stevens, et al.,
8 against Rosario Utilities.

9 We are convened in a room at the Commission's
10 headquarters in Olympia, Washington. Today is July the
11 23rd, and I am the presiding administrative law judge
12 for this proceeding. May I have the appearances for
13 the record, please?

14 MR. HANIS: Patrick Hanis here on behalf of
15 Complainants.

16 MR. PORS: Thomas Pors appearing on behalf of
17 Respondent, Rosario Utilities.

18 MR. FINNIGAN: Rick Finnigan appearing on
19 behalf of Intervenor, OlyRose.

20 JUDGE CAILLE: Let the record reflect there
21 are no other appearances. As I indicated before going
22 on the record this morning, I would like to take care
23 of the motions that have been filed. Respondent and
24 Oly Rose filed a motion to dismiss Complainants Ben
25 Marcin and Ian Flavell and also a motion that objects

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1 to the testimony of Sue Perrault and Walt Torbet.

2 Has anything further been resolved with these
3 motions, because I did notice that Perrault is
4 stipulated. Does that cover the complete part that you
5 were thinking of striking? You said Question and
6 Answer 8, and I thought that the response was more
7 limited than that.

8 MR. PORS: We have agreed that --

9 JUDGE CAILLE: Hold on just a minute so I can
10 get to my testimony. I've got the place. So the
11 response was...

12 MR. HANIS: We are willing to stipulate to
13 strike the second and third sentences in Answer No. 8
14 and have the first sentence remain.

15 JUDGE CAILLE: Any objection to that?

16 MR. HANIS: No.

17 JUDGE CAILLE: This is Sue Perrault's direct
18 testimony. It's Answer No. 8, and it is the second and
19 third sentences that will be stricken according to the
20 agreement of the parties.

21 MR. PORS: That is correct.

22 JUDGE CAILLE: Anything further on the
23 rebuttal testimony of Mr. Torbet?

24 MR. PORS: I would suggest that we discuss
25 Corrigan first, rebuttal testimony of Tom Corrigan,

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1 because we have a stipulation on that.

2 JUDGE CAILLE: I thought that was off the
3 table.

4 MR. HANIS: I believe your office sent an
5 updated version because of the stipulation.

6 MR. FINNIGAN: Correct.

7 JUDGE CAILLE: So we need to make sure it's
8 in the record. Let's do that. So hold on again while
9 I get Mr. Corrigan here. So Questions and Answers 3
10 through 4.

11 MR. PORS: Questions and Answers 3 through 4
12 will be stricken. The first sentence of Answer No. 5
13 will be stricken also.

14 JUDGE CAILLE: Is that it?

15 MR. PORS: Questions and Answers 6 through 15
16 will be stricken.

17 JUDGE CAILLE: So it's 6 through 15, because
18 in the motion, it's different.

19 MR. PORS: We added 15 to what was stricken.
20 It was an omission.

21 JUDGE CAILLE: So 6 through 15. Is anything
22 happening with 16?

23 MR. PORS: 16 is still good. 16 and 17 are
24 okay.

25 MR. FINNIGAN: On that basis, we are willing

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1 to agree that Mr. Corrigan's testimony can be admitted
2 without his appearance.

3 JUDGE CAILLE: So 6 through 15, and with
4 that, as Mr. Finnigan said, his testimony will be
5 stipulated.

6 MR. PORS: That is correct.

7 JUDGE CAILLE: Now, Mr. Torbet.

8 MR. PORS: Our primary objection to the
9 rebuttal testimony of Mr. Torbet is with respect to
10 relevance. Mr. Torbet is not a complainant. He
11 testifies primarily about being in line and getting a
12 certificate. There is other testimony with respect to
13 what happens in line by nonparty witnesses, including
14 Mr. Blay and Mr. Coe, and there is also a particular
15 statement made in Mr. Torbet's testimony that we
16 believe lacks foundation.

17 So the primary objection to the entire
18 testimony is that it duplicates testimony of other
19 witnesses, and in particular, our objection with Answer
20 No. 3, there is a statement made that about 12 p.m.,
21 Ms. Vierthaler came by and said there was no point to
22 be in line and to come back on Friday at nine a.m., and
23 left.

24 There is no foundation in his testimony that
25 any of the complainants had heard his testimony or

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1 relied upon that. Any of the complainants' direct
2 testimony makes any reference to this whatsoever. So
3 we believe there is a lack of foundation for that
4 statement.

5 JUDGE CAILLE: Could you repeat what you said
6 about that one, Question No. 3?

7 MR. PORS: The statement about what
8 Ms. Vierthaler told him about waiting in line we
9 believe has no foundation because there is not a single
10 complainant has testified that they heard this or
11 relied upon it. Mr. Torbet's testimony does not
12 provide any foundation that there was any complainant
13 present or informed about this statement, so we believe
14 that it lacks relevance and foundation.

15 I would also point out that there is no
16 similar statement that was alleged to have been made by
17 Ms. Vierthaler or anyone else. None of them were
18 waiting in line on the 14th to have heard a statement
19 such as this, so it's not the type of statement that
20 one of the complainants could allege was similar to a
21 statement made to them. This was allegedly a statement
22 made to someone waiting in line the day before, so
23 dissimilar circumstances from any of the complainants.

24 JUDGE CAILLE: It's my understanding that
25 Mr. Torbet will be testifying by telephone.

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1 MR. FINNIGAN: That's an issue that we are
2 going to need to discuss before the end of this
3 prehearing conference.

4 JUDGE CAILLE: I thought everyone was
5 appearing live.

6 MR. FINNIGAN: That was our impression, Your
7 Honor.

8 JUDGE CAILLE: As far as Mr. Torbet,
9 Mr. Hanis?

10 MR. HANIS: I don't think this is a
11 foundation issue. The foundation is that Mr. Torbet
12 was at the sale expressing his experience about the
13 sale like Mr. Coe did. His testimony is in line with
14 the testimony of Mr. Coe and Mr. Marsh, who also
15 testified about their experiences at the sale.

16 Ms. Vierthaler has testified regarding a
17 conversation she had leading up to the sale, regarding
18 when the sale location was moved, regarding when people
19 could line up at the sale, regarding what she told
20 people about the process for the sale. We believe her
21 testimony has been inconsistent, and Mr. Torbet's
22 testimony demonstrates the inconsistencies that
23 occurred leading up to the day of the sale.

24 JUDGE CAILLE: I'm going to deny the motion
25 with respect to Mr. Torbet. I believe it's relevant to

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1 the process that was conducted, and as with everything,
2 the Commission will weigh and I will weigh the evidence
3 and the credibility of the witnesses, so his testimony
4 will remain in.

5 That, I believe, takes care of the motion to
6 strike. With respect to the motion to dismiss the
7 testimony of Mr. Marcin...

8 MR. FINNIGAN: Actually, there is no
9 testimony of Mr. Marcin. It's to dismiss him.

10 JUDGE CAILLE: Yes. I have a question of
11 Mr. Hanis. Mr. Hanis, is anyone representing this
12 gentleman?

13 MR. HANIS: We are. He is named as a
14 complainant in the Complaint.

15 JUDGE CAILLE: But he has not filed any
16 testimony.

17 MR. HANIS: He has filed the testimony of all
18 the other complainants as well as the general witnesses
19 we have offered.

20 JUDGE CAILLE: So he will not be testifying.

21 MR. HANIS: No. He's relying on the
22 testimony and exhibits already in.

23 JUDGE CAILLE: I don't need to hear argument
24 on this, unless you have something more you want to
25 mention other than what was in your motion.

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1 MR. FINNIGAN: No, Your Honor.

2 JUDGE CAILLE: I'm going to allow Mr. Marcin
3 to remain as a complainant for the reasons stated in
4 Mr. Hanis's response with the caveat that Mr. Marcin
5 has had an opportunity to be heard, so as you describe
6 the way he's related to this proceeding, he's more or
7 less -- I hate to use the word "adopted" -- but the
8 testimony of the other complainants is his testimony as
9 well. Is that how you characterize it?

10 MR. HANIS: That's how we would characterize
11 it.

12 MR. PORS: I would object to that
13 characterization, Your Honor, because he's not
14 providing any testimony on his own. I would
15 characterize it as he is relying on the testimony of
16 others to establish a case for him, and he has not
17 provided any evidence whatsoever to establish his own
18 case.

19 MR. HANIS: I would disagree with that
20 assumption. Mr. Lancaster is being offered as a
21 general witness. Mr. Torbet is being offered as a
22 general witness. Mr. Blay is being offered as a
23 general witness, and Mr. Corrigan -- these three
24 witness have been offered as general witnesses of which
25 Mr. Marcin has relied upon in supporting his position

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1 as a complainant regarding the process of sale.

2 MR. FINNIGAN: Your Honor, if I might. We
3 have no information in the record related to
4 Mr. Marcin's circumstances. We don't even know how
5 many certificates he was trying to obtain. We have no
6 basic information that would establish the grounds upon
7 which this commission should fashion a remedy for
8 Mr. Marcin.

9 JUDGE CAILLE: I think that's exactly my
10 point. First of all, let's back up, and I am much more
11 comfortable with Respondent's description of what
12 Mr. Marcin's relationship is to the testimony. We
13 don't have him adopting testimony, so I'm willing to
14 leave him as a complainant, but my concern is is that
15 should the Commission decide that there are
16 certificates that need to be redistributed -- this is a
17 hypothetical -- then we have really nothing for
18 Mr. Marcin to know, exactly what Mr. Finnigan said, how
19 many certificates he was in line for or...

20 MR. HANIS: Each of the complainants have
21 been willing for the purpose of this process that they
22 would only take one. There were others that wanted a
23 lot more than that. Mr. Marcin, there has been
24 evidence offered regarding a list of Ms. Vierthaler,
25 and he is listed on that list, and we think that gives

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1 as much standing as to anybody else's proof of their
2 being at the sale that day and the position they were
3 in at the conclusion of the sale.

4 JUDGE CAILLE: I agree he has standing as a
5 complainant. That if he was an applicant, just
6 consistent with the order that I entered recently,
7 that's not really my concern. The reason why I am
8 allowing him in is because I believe this whole issue
9 is about process and whether the process was fair. So
10 it's sort of as a warning that I'm not sure what the
11 Commission will do with Mr. Marcin.

12 MR. PORS: I would like to make an additional
13 objection on the record to Mr. Marcin remaining as a
14 party. You should note that not only did Mr. Marcin
15 not provide testimony, he's not listed as a witness,
16 and there is absolutely no opportunity for the
17 respondent or the intervenor to cross-examine this
18 witness or to confront this witness as to the
19 circumstances of his situation. How would we know if
20 the sale was fair to him or not without having the
21 opportunity to examine his testimony and cross-examine
22 him regarding his testimony, and there being none, we
23 felt it was fairly clear that there has been a failure
24 to prosecute his claim.

25 But if he were allowed to remain as a party,

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1 make it clear for the record that Respondent and
2 Intervenor will not be given an opportunity to confront
3 this witness to cross-examine his testimony, so there
4 would be a lack of fairness to the respondent, I think,
5 a denial of the process if he's allowed to remain as a
6 complainant without the ability to be able to
7 cross-examine his testimony.

8 JUDGE CAILLE: I have a problem because there
9 is no testimony, so there is nothing for you to
10 cross-examine, and I think that kind of levels the
11 playing field, and Mr. Pors, at the Commission we do
12 things a little differently than superior court, and we
13 often have a group of complainants who come in, and we
14 don't always expect testimony from every single person.
15 Now, I'm comfortable with my ruling and the way this is
16 proceeding. If after the hearing you wish to raise
17 this again, I will certainly entertain argument and
18 consider it, but for now, I believe he should remain.

19 Then that leaves us with Mr. Flavell. My
20 inclination also is to allow Mr. Flavell to remain as a
21 witness. From his testimony, his parents owned Sea
22 Ocean.

23 MR. FINNIGAN: Your Honor, if I might just
24 for a moment. It's not clearly articulated in the
25 material we filed, but part of the core of this problem

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1 is that the real party in interest is the corporation,
2 whatever the name of it is.

3 JUDGE CAILLE: I think it's Sea Ocean.

4 MR. FINNIGAN: They are not even named as a
5 complainant. The two individuals who have an interest
6 in that corporation -- and maybe they are the only ones
7 or maybe there are hundreds of others. We don't know
8 that -- are the ones that are listed as a complainant.
9 The real property and interest is the owner of the
10 property, Sea Ocean Limited, which is a corporation.
11 They are not even listed as a complainant.

12 So what we are really trying to get at is if
13 a complaint is to be brought, it's to be brought by Sea
14 Ocean Limited. It's not to be brought by Chris and
15 Cecily Flavell who had their son on their behalf. What
16 we are trying to articulate is that the real party and
17 the owner of the lot is not even listed as a
18 complainant, and these people may have an interest in
19 the corporation, but they can't be the complainants.
20 They don't own the property.

21 JUDGE CAILLE: Mr. Hanis?

22 MR. HANIS: They are president and secretary
23 of the corporation. That was testified to by Mr. Ian
24 Flavell. A corporation can sue and be sued, but it
25 can't do so without on intervention of people, those

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1 people being typically the presidents of the
2 corporation. Cecily and Chris Flavell, we have offered
3 testimony to show what they are.

4 I suppose that it would have been better or
5 more correct to have stated Sea Ocean Limited as a
6 complainant, but there is no harm in having the
7 president and secretary named, and if need be, now that
8 an objection has been raised, we can easily correct
9 that by placing and having Sea Ocean listed as a
10 complainant. The testimony will be the same of
11 Mr. Flavell regardless of who that person is
12 representing that piece of property.

13 JUDGE CAILLE: Do you have anything further?

14 MR. FINNIGAN: Just very briefly. I would
15 note that it is not a correct statement of corporate
16 law that a corporation sues in the name of the
17 individual officers. The corporation sues in its own
18 name or not at all, but that's the only thing I would
19 offer in addition.

20 JUDGE CAILLE: Do you have any response to
21 Mr. Hanis's offer to correct this or mitigate it with
22 stating that Sea Ocean would be the party?

23 MR. FINNIGAN: Yes, I do. I think
24 substituting a party at the prehearing conference where
25 we've not had the opportunity to conduct discovery

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1 about the corporation itself is not appropriate.

2 JUDGE CAILLE: Mr. Flavell's testimony was
3 going to be stipulated.

4 MR. PORS: We have no stipulation as yet.
5 It's just pending the outcome of your rulings. We are
6 not stipulating to its remaining as a party.

7 JUDGE CAILLE: I'm going to allow Mr. Flavell
8 to remain as a party with the same caveat that after
9 the hearing is concluded if Respondent or Intervenor
10 wish to reraise this issue, I will consider it. At
11 this point, I'm going to just allow him in. I think we
12 can go off the record.

13 (Discussion off the record.)

14 JUDGE CAILLE: We are back on the record.
15 Before we go off the record to do the order of
16 witnesses, I would like to clean up a matter. I wanted
17 to make it clear that on the motion to dismiss Ian
18 Flavell, that was denied, and before we talk about
19 witnesses, I see that there are some witnesses that
20 stated that they will be testifying by telephone, and I
21 would like to -- I know there are comments the parties
22 want to make about this or argument, so if we could
23 hear from you, Mr. Hanis, since you are proposing it.

24 MR. HANIS: Mr. Mike Hanis, following the
25 hearing we had a couple of weeks ago, he was mistaken

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1 in thinking of what was being referred to with regard
2 to telephonic testimony. So we should have probably
3 made it clear a little bit earlier than this, but we
4 have some people who are simply unable to travel to
5 Seattle. Gwyneth Burrill was scheduled to leave to
6 Canada for a wedding the day before the hearing. She's
7 postponed that for a day, but in order to get there in
8 time, she can't come to Seattle.

9 We have stipulated to Mr. Lancaster's
10 testimony. Mr. Torbet, who also is an elderly retired
11 gentleman, is unable to bear the cost and time to
12 travel down to Seattle and back for a hearing;
13 especially when I anticipate his testimony will be very
14 short-lived. Mr. Flavell's testimony we have
15 stipulated to so we won't be calling him.

16 Ms. Stover lives in Oregon. It's impossible
17 for her to arrive in Washington. Ms. Clark is actually
18 driving up as we speak to Washington. She will be in
19 town. Mr. Schulte lives in Arizona and is unable to
20 travel. Mr. Blay and Mr. Corrigan's testimony has been
21 stipulated to. So the remaining parties will be here
22 at the hearing, so we have the need for four people to
23 testify by telephone.

24 JUDGE CAILLE: I was relieved to hear that
25 there were going to be no telephonic testimony when we

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1 discussed the motion to compel. There may be a
2 technical problem with it in that I don't know whether
3 the room will accommodate.

4 MR. HANIS: I thought that was addressed
5 early on when we decided that we would have to have the
6 hearing in Seattle instead of on the site, that that
7 was one of the considered issues.

8 JUDGE CAILLE: It was consideration for not
9 having it in Olympia. I'm going to have to check into
10 this. That's part of the problem is that it wasn't
11 clear when we arranged this room exactly what we were
12 going to have to do, so why don't I hear from
13 Respondent and Intervenor about their objections.

14 MR. PORS: I would object to having the
15 testimony of these witnesses heard by telephone because
16 they have given direct testimony that controverts facts
17 about statements made concerning a priority list and
18 the conduct of the sale, when and where it would be
19 held, and it is very important that contradicted
20 testimony be held in person so that the credibility of
21 the witnesses can be examined directly by the fact
22 finder, and it is going to be difficult, if not
23 impossible, to examine the credibility of witnesses who
24 are disputing facts in a case from a remote location by
25 telephone. That is my general objection.

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1 Gwyneth Burrill does live in the area. The
2 hearing date has been known to the complainants since
3 May 14th, I would have to say about her plans to
4 travel. We have tried to stipulate to as many of the
5 testimonies as we can, and that has helped. If we have
6 additional stipulations to testimony that we are going
7 to enter here this morning, that will make it
8 unnecessary for several of the witnesses to travel, but
9 the other witnesses have testimony that is
10 controverted, and I don't believe that it would be fair
11 to have their testimony heard by telephone without the
12 ability to have their credibility judged in person.

13 JUDGE CAILLE: Mr. Finnigan, anything
14 further?

15 MR. FINNIGAN: The intervenor joins in those
16 arguments. I would make a minor addition and note that
17 in administrative law, sometimes telephonic appearances
18 are allowed, but they are more often in the case where
19 it's a person seeking unemployment benefits or welfare
20 benefit, and it's their choice to put their case on as
21 it may affect them.

22 Here, we are having a case where the
23 complainants are asking to take action against
24 Respondent and Intervenor, and we believe under the
25 circumstances we have the right to cross-examine them

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1 in person so, as Mr. Pors indicated, the credibility of
2 the witnesses can be fully revealed.

3 JUDGE CAILLE: Anything further?

4 MR. HANIS: I would add that it's not an
5 uncommon practice to have witnesses testify by phone in
6 this day and age.

7 JUDGE CAILLE: I share some of the concerns
8 about telephone testimony because I have to judge the
9 credibility of witnesses as well. I suppose an option
10 would be to have these people testify at another time
11 when they can make it, but it looks to me like two of
12 them are in Arizona and Oregon, and it's unlikely they
13 would make a trip up here to testify. Is my assumption
14 correct?

15 MR. HANIS: I think your assumption is
16 correct.

17 JUDGE CAILLE: So the two that would come
18 would be Ms. Burrill and Mr. Torbet, and I know that I
19 did say early on that we would try to accommodate
20 witnesses by telephone. I think that what we will do
21 is -- I'm going to need to check to see if we can do
22 this -- I will allow it to be done.

23 If I feel I am having trouble judging the
24 credibility of these witnesses, I will let you know.
25 I'll just entertain any motions in relation to that,

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1 but I will let them testify by telephone if it's
2 possible. Let's go off the record now, unless there is
3 anything further on this.

4 (Extended Discussion off the record.)

5 JUDGE CAILLE: We are back on the record.

6 The parties have completed an order of witnesses, and I
7 will assign the exhibit numbers and e-mail those to the
8 parties as far as the exhibits that have already been
9 prefiled and the cross exhibits.

10 I would note that while we were going through
11 the list of witnesses, Mr. Montgomery is substituting,
12 whose testimony I have previously stricken as redundant
13 or repetitive, he is going to be substituting for his
14 wife, so I will just note for the record that change
15 and that all parties are in agreement as to that.

16 MR. FINNIGAN: That's correct, Your Honor.
17 Obviously, our objection between the two of them was
18 because it was redundant, and if he wants to choose one
19 over the other, we are agreeable to that.

20 JUDGE CAILLE: So the record is clear, I will
21 note that in my prehearing conference orders, and I
22 will strike Victoria's testimony and then substitute
23 Mr. Montgomery.

24 Thank you. Is there anything more to come
25 before the Commission today? Then I will see you on

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1 Thursday.

2 (Prehearing conference concluded at 11:34 a.m.)

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