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NUCLEAR REGULATORY COMMISSION

Title: Crowe Butte Resources, Inc.
In Situ Leach Facility, Crawford, Nebraska

Docket Number: 40-8943

ASLBP Number: 08-867-02- OLA-BD01

Location: (telephone conference)

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PRE-HEARING CONFERENCE

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In the Matter of: : Docket No.
CROW BUTTE RESOURCES, INC. : 40-8943
(License Renewal for the : ASLBP No.
In Situ Leach Facility : 08-867-02- OLA-BD01
Crawford, Nebraska) :

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Thursday, January 8, 2015

Teleconference

BEFORE:
MICHAEL M. GIBSON, Chair
DR. RICHARD E. WARDWELL, Administrative Judge
BRIAN K. HAJEK, Administrative Judge

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APPEARANCES:

On Behalf of the Applicant, Crow Butte Resources, Inc.:

TYSON R. SMITH, ESQ.

Of: Winston & Strawn, LLP

101 California Street

San Francisco, CA 94111

Tel: (415) 591-6874

Email: trsmith@winston.com

MARK D. McGUIRE, ESQ.

Of: McGuire Law Firm

625 South 14th Street

Suite C

Lincoln, NE 68508

Tel: (401) 434-2390

Fax: (401) 434-2393

Email: mdmcguire46@gmail.com

1 On Behalf of the Nuclear Regulatory Commission:

2 MARCIA J. SIMON, ESQ.

3 DAVID CYLKOWSKI, ESQ.

4 of: U.S. Nuclear Regulatory Commission

5 Office of the General Counsel

6 Mail Stop O-15D21

7 Washington, DC 20555-0001

8 Tel: (301) 415-1631 (Cylkowski)

9 (301) 415-1261 (Simon)

10 Email: david.cylkowski@nrc.gov

11 marcia.simon@nrc.gov

12

13 On Behalf of Tom and Loretta Cook, and Joe

14 American Horse:

15 THOMAS BALLANCO, ESQ.

16 945 Travel Street, No. 186

17 San Francisco, CA 94116

18 Email: harmonicengineering@mac.com

19

20 On Behalf of Consolidated Intervenors:

21 BRUCE ELLISON, ESQ.

22 P.O. Box 2508

23 Rapid City, SD 57709

24 Tel: (855) 761-9934

25 Email: belli4law@aol.com

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24

DAVID FRANKEL, ESQ.

P.O. Box 3014

Pine Ridge, SD 57770

Tel: (605) 515-0956

Fax: (530) 463-9428

Email: arm.legal@gmail.com

On Behalf of Oglala Sioux Tribe:

ANDREW REID, ESQ.

1075 Waite Drive

Boulder, CO 80303

Tel: (303) 437-0280

Fax: (303) 623-2101

Email: lawyerreid@gmail.com

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

(9:08 a.m.)

1
2
3 JUDGE GIBSON: This is Judge Michael
4 Gibson. With me on the phone are Judges Richard
5 Wardwell and Brian Hajek. Also on the phone with the
6 Board is our law clerk on this matter, Nick Sciretta.

7 I would like at this time for counsel for
8 the various participants to identify themselves for
9 the record as well as the name of your client and
10 anyone else who is present with you. Let's start with
11 counsel for Crow Butte.

12 MR. SMITH: This is Tyson Smith, counsel
13 for Crow Butte and also on the line is Mark McGuire,
14 also counsel for Crow Butte.

15 JUDGE GIBSON: Okay. Thank you. Counsel
16 for the NRC staff.

17 MS. SIMON: Good morning. This is Marcia
18 Simon for the NRC staff and with me is my co-counsel,
19 David Cylkowski.

20 JUDGE GIBSON: Thank you. Okay. Counsel
21 for the tribe.

22 MR. REID: Andrew Reid for the Oglala
23 Sioux Tribe.

24 JUDGE GIBSON: Counsel for Consolidated
25 Intervenors.

1 MR. FRANKEL: David Frankel, present for
2 Consolidated Intervenors. I believe Tom Ballanco is
3 also on the call.

4 MR. BALLANCO: Yes.

5 JUDGE GIBSON: Mr. Ballanco?

6 MR. BALLANCO: This is Tom Ballanco for
7 Tom and Loretta Cook and Joe American Horse for
8 Consolidated Intervenors.

9 MR. ELLISON: Bruce Ellison, Consolidated
10 Intervenors.

11 JUDGE GIBSON: Okay, good. Thank you. Is
12 there anyone else, is there any other counsel present
13 on the call? Very well. I would ask that each time
14 any of you speak hereafter that you please identify
15 yourself for the benefit of the court reporter.

16 We are here today on a scheduling
17 conference for the evidentiary hearing on contentions
18 challenging the terms of Crow Butte's renewed license
19 and the NRC staff's environmental assessment in
20 support of the renewal of that license. Now I have
21 not been with the Atomic Safety and Licensing Board
22 Panel terribly long, but I have been here six and a
23 half years.

24 And in all that time I have never
25 encountered a situation where the parties have not

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1 been able to agree on proposed dates for a hearing and
2 on deadlines that lead to that hearing. And it's
3 usually been quite simple for the Boards so simply
4 take the parties dates and insert them in a scheduling
5 order.

6 But you guys have pretty well broken the
7 mold. And as a consequence it now falls on the Board
8 to resolve the differences among yourselves that you
9 apparently cannot overcome on your own. I would like
10 to begin with a question for counsel for Crow Butte.

11 Have you had a chance to scan the
12 contentions that were filed earlier this week, Mr.
13 Smith?

14 MR. SMITH: Yes, we have.

15 JUDGE GIBSON: And having done so, are you
16 planning on objecting to the admissibility of any of
17 those contentions?

18 MR. SMITH: Well we haven't reviewed them
19 in detail. I expect that we will object to the
20 admission of some of those contentions.

21 JUDGE GIBSON: Thank you. Counsel for the
22 NRC staff, have you had a chance to look at those
23 contentions?

24 MS. SIMON: Yes, we have, Your Honor.

25 JUDGE GIBSON: And are you planning on

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1 objecting to the admissibility of any of them?

2 MS. SIMON: This is Marcia Simon, by the
3 way. And, yes, we will be objecting to at least some
4 of them.

5 JUDGE GIBSON: Thank you. So knowing now
6 that we will have objections to the admissibility of
7 those contentions, we are going to need to hold oral
8 argument on their admissibility. If my math is right
9 the final EA was available on October 27th and because
10 of a joint extension request from all the parties the
11 new and amended contention motions were not due until
12 January 5.

13 And answers from the NRC staff and from
14 Crow Butte will be due on January 30. And replies
15 from the intervenors will be due on February 6. Does
16 anyone dispute my math on that?

17 Hearing none, we next need to determine
18 how soon after February 6th the parties will be
19 prepared to stand for oral argument on those
20 contentions. Let me begin with counsel for Crow
21 Butte. Mr. Smith, how soon after February 6th can you
22 be prepared for oral argument on those contentions?

23 MR. SMITH: Crow Butte can be prepared for
24 oral argument immediately following the submittal of
25 the replies.

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1 JUDGE GIBSON: Okay. Counsel for NRC
2 staff?

3 MS. SIMON: Your Honor, this is Marcia
4 Simon. The staff would be available in probably two
5 weeks after February 6th.

6 JUDGE GIBSON: So that would be February
7 20?

8 MS. SIMON: Yes, Your Honor.

9 JUDGE GIBSON: Okay. Counsel for the
10 tribe?

11 MR. REID: The end of February.

12 JUDGE GIBSON: The end of February.

13 MR. REID: Well February 20th would work.

14 JUDGE GIBSON: February 20th is okay for
15 you?

16 MR. REID: Yes.

17 JUDGE GIBSON: Counsel for Consolidated
18 Intervenors? February 20th okay for you guys?

19 MR. FRANKEL: David Frankel for
20 Consolidated Intervenors. Your Honor, February 20th
21 works for me.

22 MR. BALLANCO: Tom Ballanco, counsel for
23 Consolidated Intervenors. That works for me as well,
24 Your Honor.

25 JUDGE GIBSON: Okay. Can we make it

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1 February 19, no, can we make it February 23? That's
2 the Monday following that Friday. No, we can't do
3 that. Hold on one second please.

4 Okay. The Board has a bit of a scheduling
5 problem itself. The 18th is bad for one of our Board
6 members. The 19th through the 27th is bad for another
7 Board member. Can we do this on the 17th of February?

8 MR. SMITH: This is counsel for Crow
9 Butte, Tyson Smith. The 17th of February works for
10 me.

11 JUDGE GIBSON: Counsel for NRC staff?

12 MS. SIMON: This is Marcia Simon. That
13 will work for the staff.

14 JUDGE GIBSON: Counsel for the tribe?

15 MR. REID: It's not good, but I can make
16 it work.

17 JUDGE GIBSON: Thank you very much. We
18 appreciate that. Counsel for Consolidated
19 Intervenors, can you all make the 17th?

20 MR. FRANKEL: David Frankel, speaking for
21 myself the 17th works for me.

22 MR. BALLANCO: Tom Ballanco, yes, the 17th
23 works.

24 MR. ELLISON: It does for me too, Bruce
25 Ellison. Thank you.

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1 JUDGE GIBSON: Thank you so much. We
2 appreciate you all working that out. Okay. So we are
3 good to go for oral argument on Tuesday, February
4 17th. Now the Board will be able to issue a decision
5 on contention admissibility within a month of oral
6 argument.

7 And that would take us to March 16th. So
8 let's just assume for present purposes that the Board
9 can make its time commitment and get it done by March
10 16th. Now not in any way to prejudge these pleadings
11 one way or another, Mr. Smith and Ms. Simon, but just
12 solely for planning purposes, let us assume that the
13 order on contention admissibility admits at least one
14 of these contentions and issues on March 16th.

15 We next need to determine once that order
16 issues how soon thereafter you will be able to
17 complete your initial statement of position, your
18 direct narrative testimony and your affidavits and
19 exhibits in support of that direct narrative
20 testimony. Let me begin with counsel for Crow Butte.
21 How soon after March 16, knowing what contentions are
22 admitted and what are not, can you have that filed?

23 MR. SMITH: This is Tyson Smith, counsel
24 for Crow Butte. I think one month seems to be a fair
25 time not knowing the number of contentions that may,

1 you know, again not to prejudge it I understand, but
2 recognizing that there may be one or more I think a
3 month would certainly allow us to prepare for any
4 number of contentions being admitted.

5 JUDGE GIBSON: Okay. One month would be
6 from March 16th would be April 16, that's a Sunday.
7 How about, I'm sorry that's not. How about April 16
8 then?

9 MR. SMITH: That works for, this is Tyson
10 Smith, counsel for Crow Butte. That works for Crow
11 Butte.

12 JUDGE GIBSON: Okay. Counsel for NRC
13 staff, assume with me that the Board is able to make
14 its time commitment and get an order out on March 16.
15 How soon after that do you need to prepare your
16 initial statement of position, your direct narrative
17 testimony and your affidavits and exhibits in support
18 of your direct narrative testimony?

19 MS. SIMON: Yes, this is Marcia Simon. We
20 can probably do that within a month also. We have one
21 witness who is going to be out on an extended sick
22 leave and I'm not entirely sure when that's starting.
23 I only have the dates from April 20th on based on the
24 original hearing times.

25 So I would have to check that, but I think

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1 we can probably make that work.

2 JUDGE GIBSON: Okay. Counsel for the
3 tribe?

4 MR. REID: This is Andrew Reid. If I
5 could, could you skip me and check with Consolidated
6 Intervenors first? I think they're going to have the
7 information regarding most of the scientific witnesses
8 that we have.

9 JUDGE GIBSON: Sure. Okay. Counsel for
10 Consolidated Intervenors?

11 MR. FRANKEL: David Frankel, Your Honor,
12 for Consolidated Intervenors. I want to note for the
13 record we are all pro bono counsels lacking large law
14 firm resources. So my estimate without knowing which
15 of the contentions might be admitted, but based on our
16 experience in litigating the Powertech Dewey Burdock
17 case I would like until May 1st, a six week period
18 instead of a four week period.

19 And in the event that conflicts with a
20 time line that's going to get us, you know, a hearing
21 date in the summer then, you know, we can work with
22 that. But I would like to not commit to a one month
23 time table not knowing the contentions that will be at
24 issue and knowing that things go a lot slower when
25 you're asking experts and the like to work for free

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1 than when you're paying them top dollar.

2 So just to be realistic, unless it
3 conflicts with the time lines that get us a summer
4 hearing, we would like May 1st. If it does conflict
5 with those then we are willing to bend and hustle even
6 more than we are already and make it work for an
7 earlier date. But the extra two weeks would be very
8 consequential for Consolidated Intervenors.

9 MR. ELLISON: This is Bruce Ellison for
10 Consolidated Intervenors. I would also just like to
11 add with regard to the scheduling, I have a federal
12 jury trial which is going to be scheduled some time,
13 it's a criminal trial towards the end of March or the
14 very beginning of April, which would make my ability
15 as a sole practitioner without staff to do much work
16 in March because I would have to be preparing for that
17 case.

18 It's a criminal justice court appointed
19 case from the federal court.

20 JUDGE GIBSON: You would, even with those
21 strictures I take it you would be okay with May 1st?

22 MR. ELLISON: Yes, sir, I believe that Mr.
23 Frankel's argument and assessment is correct. And I
24 think we could do that, yes, sir.

25 JUDGE GIBSON: Mr. Ballanco?

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1 MR. BALLANCO: May 1st works better for
2 me, Your Honor, for the reasons that Mr. Frankel
3 articulated. And, you know, we will work around that
4 but that would be our ideal.

5 JUDGE GIBSON: Okay. Well, you know,
6 we're only talking about two weeks here. I think, you
7 know, May 1st seems like a reasonable time. Mr.
8 Tyson, Mr. Smith, May 1st?

9 MR. SMITH: Absolutely. This is Tyson
10 Smith for Crow Butte. Absolutely, we're okay with
11 that.

12 JUDGE GIBSON: Okay. And how about Ms.
13 Simon, are you okay with that?

14 MS. SIMON: Yes, Your Honor. And I think
15 that would probably overcome our previously mentioned
16 issue as well.

17 JUDGE GIBSON: Okay, perfect. Then let's
18 make May 1st be the date that direct testimony will be
19 submitted. Okay. Now three weeks after that would be
20 May 22. And on that date each party will need to file
21 its rebuttal statements of position, rebuttal
22 testimony and affidavits and exhibits in support of
23 its rebuttal testimony.

24 Is everyone okay, let me rephrase that.
25 Is there anyone not okay with May 22? Hearing no

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1 objection it will be May 22. Ten days after that will
2 be, let's see --

3 MR. REID: This is counsel for the tribe.
4 I do have a jury trial that runs from May 18th through
5 May 22nd.

6 JUDGE GIBSON: Okay. That's a serious
7 problem. That is a serious problem. I don't think
8 any of us would expect you to do that, to cut that
9 short. If we made that, let me do it. Since, if we
10 cut you slack on May, to make that May 29 instead of
11 May 22 allowing for your trial, let's go back to
12 counsel for the NRC staff and for Crow Butte.

13 Normally we would have rebuttal testimony
14 three weeks after direct testimony. In this case this
15 would be a month. My question to you is are you all
16 okay with having four weeks instead of three weeks?

17 MR. SMITH: This is Tyson Smith, counsel
18 for Crow Butte. We're okay with that. We certainly
19 have no objection to four weeks for preparing rebuttal
20 testimony.

21 I do think I'm starting to have a little
22 bit of concern about the overall time line for when we
23 might schedule a hearing. But I don't have any
24 objection to the 29th.

25 JUDGE GIBSON: Thank you. Counsel for NRC

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1 staff?

2 MS. SIMON: This is Marcia Simon. The
3 staff has no objection to that, Your Honor.

4 JUDGE GIBSON: Okay. Then we'll do that
5 and we'll make that May 29. Ten days after May 29
6 would be, what is that? The 9th of June. Is that a
7 federal holiday?

8 FEMALE PARTICIPANT: No.

9 JUDGE GIBSON: No, okay. The 9th of June
10 each party will need to file its motions in limine and
11 motions to strike by that date, okay? No objection on
12 that I hope. All right.

13 Three weeks after that which would be
14 let's see, one, two, three, June 30, each party will
15 need to file in camera with the Board any questions it
16 would like the Board to ask the witnesses along with
17 any motions to cross examine any adverse witnesses if
18 you think the Board is going to do an inadequate job
19 of that.

20 Any objection to that? Hearing none once
21 all this --

22 MR. SMITH: Pardon me, Judge Gibson. This
23 is Tyson Smith, counsel for Crow Butte. We have no
24 objection to the three weeks in general. I don't
25 believe that three weeks is necessary to prepare those

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1 questions, I don't believe given the other time and to
2 the extent it affects the potential for the overall
3 time line if we need to shorten later I would suggest
4 that is a period of time that we could perhaps reduce.
5 But I don't have any objection to it.

6 JUDGE GIBSON: How about June 23? Is that
7 okay with you?

8 MR. SMITH: Yes.

9 JUDGE GIBSON: Okay.

10 MR. SMITH: Both dates are fine with me.
11 I'm just concerned about overall time line and we
12 haven't gotten to that yet. So that is, my ultimate
13 time line and I'm flexible on the interim milestone
14 dates.

15 JUDGE GIBSON: Thank you. We appreciate
16 your flexibility, Mr. Smith. Is anybody, does anybody
17 have an objection to getting those proposed questions
18 for the Board that will be filed in camera as well as
19 any motions to cross examine any adverse witnesses to
20 us by June 23?

21 MR. REID: If I may inquire, this is
22 Andrew Reid from the tribe.

23 JUDGE GIBSON: Yes.

24 MR. REID: Do you have any idea as to when
25 we might expect a ruling on the motions in limine that

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1 are filed on the 9th of June?

2 JUDGE GIBSON: Yes, you will probably get
3 those the day of trial, possibly shortly before it.
4 But, you know, the important thing is you need to know
5 what you're looking at. You'll have an opportunity to
6 respond to those.

7 The Board will be looking at an awful lot
8 of information about that period of time trying to
9 prepare for trial and that's one of the things we'll
10 be looking at.

11 MR. REID: All right. Then the only
12 reason why I raise that is it would be helpful to have
13 that prior to the submission of questions and
14 examination. But if we're not going to have that even
15 by 30th then it won't make any difference.

16 JUDGE GIBSON: So you're okay with the
17 23rd then? Is that correct, Mr. Reid?

18 MR. REID: I believe so.

19 JUDGE GIBSON: Thank you. Mr. Frankel?

20 MR. FRANKEL: Your Honor, David Frankel
21 for Consolidated Intervenors and I can make it work
22 for the 23rd.

23 JUDGE GIBSON: Mr. Ballanco and Mr.
24 Ellison, are you okay with June 23?

25 MR. BALLANCO: This is Tom Ballanco. Yes,

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1 I'm okay with the 23rd, Your Honor.

2 JUDGE GIBSON: Okay.

3 MR. ELLISON: Bruce Ellison, that would be
4 fine, Your Honor.

5 JUDGE GIBSON: Okay. Now as I just
6 mentioned, that is a great deal of information for the
7 Board to try to review. And so I would say we're
8 going to need at least 30 days after June 23 before
9 we'll be ready to tee this up.

10 So my question is that's going to be July
11 21, say. Let's start with that week of July 20 and
12 move forward. Let's start with counsel for Crow
13 Butte. Is the week of July 20 acceptable to you?

14 MR. SMITH: Yes, Your Honor. This is
15 Tyson Smith for Crow Butte. Yes, that is acceptable
16 for us.

17 JUDGE GIBSON: Counsel for the NRC staff,
18 is that week acceptable to you?

19 MS. SIMON: This is Marcia Simon for the
20 staff. Yes, that week is acceptable.

21 JUDGE GIBSON: Okay. Mr. Reid, is that
22 acceptable to you?

23 MR. REID: No, it is not.

24 JUDGE GIBSON: Okay. All right. How
25 about the week of July 27th, is that acceptable to

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1 you, Mr. Reid?

2 MR. REID: No, it is not. As we've
3 indicated in our motions that's Sundance in the tribe
4 and most of our witnesses are engaged in religious
5 ceremonies at that time.

6 JUDGE GIBSON: Okay. The week of August
7 3, is that acceptable to you, Mr. Reid?

8 MR. REID: Yes, it is.

9 JUDGE GIBSON: Okay. That's not going to
10 work for one of our judges. The week of August 17, is
11 that acceptable to you, Mr. Reid?

12 MR. REID: Yes, it is.

13 JUDGE GIBSON: Mr. Frankel?

14 MR. FRANKEL: Yes, it is.

15 JUDGE GIBSON: Mr. Ballanco?

16 MR. BALLANCO: Yes, Your Honor, it is.

17 JUDGE GIBSON: Mr. Ellison?

18 MR. ELLISON: Yes, sir.

19 JUDGE GIBSON: Mr. Smith?

20 MR. SMITH: This is Tyson Smith. That
21 will work for Crow Butte.

22 JUDGE GIBSON: Ms. Simon?

23 MS. SIMON: This is Marcia Simon. Your
24 Honor, one of our key witnesses on hydrogeology is
25 unavailable that week.

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1 JUDGE GIBSON: Okay. So --

2 MR. FRANKEL: Sorry, David Frankel for
3 Consolidated Intervenors. I've reviewed an e-mail
4 from Dr. LaGarry and the week of August 17th is not
5 good for him due to prior commitments for Oglala
6 Lakota College. He's available the following week and
7 I apologize for not having that information a moment
8 ago.

9 JUDGE GIBSON: That's okay. Ms. Simon
10 just said her witness can't be there either. The week
11 of the 24th, Ms. Simon, is your witness available?

12 MS. SIMON: Yes, Your Honor. This is
13 Marcia Simon.

14 JUDGE GIBSON: So you're okay with that
15 week?

16 MS. SIMON: Yes, Your Honor.

17 JUDGE GIBSON: Mr. Frankel, are you okay
18 with that week?

19 MR. FRANKEL: David Frankel for
20 Consolidated Intervenors, yes, Your Honor.

21 JUDGE GIBSON: Mr. Reid?

22 MR. REID: Yes, Your Honor.

23 JUDGE GIBSON: Mr. Ellison?

24 MR. ELLISON: Yes, sir.

25 JUDGE GIBSON: And, Mr. Smith?

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1 MR. SMITH: This is Tyson Smith. As I had
2 indicated previously that is the week of a planned,
3 significant planned maintenance work at the site. We
4 are prepared to support the hearing, obviously that
5 appears to be the only week that works for other
6 parties. So we will make it work.

7 JUDGE GIBSON: Well please apologize to
8 your client for any inconvenience this may cause to
9 them. But I think you can see that, you know, it's
10 not very easy to pick a date when everybody can do
11 this.

12 MR. SMITH: Understood.

13 JUDGE GIBSON: And we apologize for that.
14 We're set, we're a go for August 24. Again, without
15 prejudging anything that there actually are some
16 admissible contentions out there. But if there are
17 which we'll let you know in the middle of March, I
18 guess the 16th. Isn't that what we committed to?

19 We will be, that will be a go for August
20 24th for our trial. Now the exact date or dates that
21 week we will let you know. But please hold that open.
22 You all can see how complicated this was to agree on
23 a date. We need to get this, we all need to make this
24 happen. So please don't let anything else happen the
25 week of the 24th.

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1 We will be issuing a scheduling order that
2 reflects these dates. And with that let me ask if
3 there is anything else that we need to address at this
4 time with the parties.

5 MR. FRANKEL: David Frankel, Your Honor,
6 for Consolidated Intervenors. One quick question on
7 that oral argument for admissibility in February are
8 you going to want to see us in person or do you want
9 to see us over the phone, so to speak?

10 JUDGE GIBSON: No, we'll be doing that
11 over the phone.

12 MR. FRANKEL: Okay. Thank you, Your
13 Honor.

14 JUDGE GIBSON: All right. We'll be doing
15 that over the phone and that's going to be the 17th of
16 February. Is that correct? Okay.

17 MR. FRANKEL: Yes, sir. David Frankel,
18 yes, sir.

19 JUDGE GIBSON: No, we'll be doing that
20 over the phone. If we tried to do this in person with
21 the weather being what it is and with all the other
22 conflicts that we seem to generate in this case, it
23 might not be possible to do it on the 17th and then
24 we'd be postponing it even further.

25 Now that we've got something in, settled

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1 we will get this done. And I do apologize and please
2 extend our apologies to your clients that we cannot do
3 this in person. But I think it's, we've already had
4 an opportunity to explore a lot of these issues
5 before.

6 Hopefully we can get all this done over
7 the phone without undue inconvenience. Is there
8 anything else, Mr. Frankel?

9 MR. FRANKEL: David Frankel for
10 Consolidated Intervenors. No, I have nothing further.
11 Thank you, Your Honor.

12 JUDGE GIBSON: Is there anything else that
13 anyone else has that needs to be brought to the
14 Board's attention at this time? Hearing none, we will
15 stand adjourned and we will be speaking with you again
16 on February 17th. Good day.

17 MR. SMITH: Thank you, Your Honor.

18 (Whereupon, the above-entitled matter went
19 off the record at 11:35 a.m.)

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