

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:)
Application No. 2003-01)
)
SAGEBRUSH POWER PARTNERS, LLC,) Prehearing Conference
)
KITTITAS VALLEY WIND POWER PROJECT) Pages 1 - 43
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_____)

A prehearing conference in the above matter was held in the presence of a court reporter on January 13, 2004, at 3:00 p.m., at the Kittitas County Fairgrounds, in Ellensburg, Washington, before Energy Facility Site Evaluation Councilmembers.

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The parties were present as follows:

SAGEBRUSH POWER PARTNERS, LLC, Darrel Peeples, Attorney at Law; 325 Washington Street N.E., Suite 440, Olympia, Washington 98501.

COUNSEL FOR THE ENVIRONMENT, John Lane, Assistant Attorney General; 1125 Washington Street S.E., P.O. Box 40100, Olympia, Washington 98504-0100.

DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT, Mark Anderson, Senior Energy Policy Specialist, P.O. Box 43173, Olympia, Washington 98504-3173.

KITTITAS COUNTY, James L. Hurson, Kittitas County Prosecutor, Kittitas County Courthouse, Room 213, Ellensburg, Washington 98926.

Reported by:

Shaun Linse, CCR

1 Appearances (cont'd):

2 RENEWABLE NORTHWEST PROJECT, Susan Elizabeth
3 Drummond, Foster Pepper & Shefelman, PLLC, 1111 Third
4 Avenue, Suite 3400, Seattle, Washington 98101-3299.

5 PHOENIX ECONOMIC DEVELOPMENT GROUP, Debbie
6 Strand, Executive Director, 1000 Prospect Street, P.O. Box
7 598, Ellensburg, Washington 98926.

8 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),
9 James C. Carmody, Velikanje, Moore & Shore, P.S., 405 East
10 Lincoln Avenue, P.O. Box 22550, Yakima, Washington 98907.

11 F. STEVEN LATHROP, Jeff Slothower, Attorney at
12 Law; Lathrop, Winbauer, Harrel, Slothower & Denison, LLP,
13 1572 Robinson Canyon Road, P.O. Box 1088, Ellensburg,
14 Washington 98926.

15 CHRIS HALL, Chris Hall, Pro Se, 106 East 10th
16 Avenue, Ellensburg, Washington 98926.

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18 JUDGE TOREM: Let's call this prehearing
19 conference to order, please. It's now a couple minutes
20 after three o'clock in the afternoon, on Tuesday, January
21 13, 2004. My name is Adam Torem. I am the new
22 Administrative Law Judge assigned to this case
23 representing the Office of Administrative Hearings
24 replacing Pete Dwell. My last name is spelled T-o-r-e-m
25 for the record, and this afternoon everybody should have a

1 ten-item agenda.

2 This afternoon we're having a prehearing
3 conference mostly focusing on procedural matters at issue
4 to see where a few things are in the process. Tonight, of
5 course, will be a separate session about the Draft
6 Environmental Impact Statement that was released to the
7 public on December 12, 2003, so anybody that's here to
8 talk about the Draft Environmental Impact Statement,
9 please hold those comments until later this evening at
10 seven o'clock, and I'm sure we will have plenty of time
11 for all of those.

12 Today at this time I want to go ahead and
13 have the Council introduce themselves. We do have one new
14 face to most of you as parties in addition to myself when
15 we get around to having everybody on the Council introduce
16 themselves and then take appearances for the record from
17 all of you.

18 Mr. Luce.

19 CHAIR LUCE: My name is James Luce. I'm
20 Chair of the Washington State Energy Siting Council and
21 seated to my immediate left is a new member of the
22 Council, Hedia Adelsman. Hedia is representing the
23 Department of Ecology. We welcome Hedia.

24 And I think we'll continue from my left, and
25 then we'll come back and begin to my right from our

1 Administrative Law Judge.

2 COUNCILMEMBER SWEENEY: I'm Tim Sweeney with
3 the Utilities and Transportation Commission.

4 COUNCILMEMBER JOHNSON: Patti Johnson,
5 Kittitas County.

6 CHAIR LUCE: Then if we could start with
7 introduction of legal counsel that would be appreciated.

8 MS. ESSKO: My name is Ann Essko. I'm the
9 Assistant Attorney General who provides legal counsel to
10 the Energy Facility Site Evaluation Council.

11 COUNCILMEMBER TOWNE: I'm Chris Smith Towne.
12 I represent the Department of Fish and Wildlife.

13 COUNCILMEMBER IFIE: I'm Tony Ifie. I
14 represent the Department of Natural Resources.

15 COUNCILMEMBER FRYHLING: I'm Richard
16 Fryhling, and I represent the Department of Community
17 Trade and Economic Development.

18 CHAIR LUCE: I believe staff should also
19 introduce themselves for the record.

20 MS. MAKAROW: Irina Makarow, EFSEC staff.

21 MR. FIKSDAL: Allen Fiksdal, EFSEC staff.

22 CHAIR LUCE: Thank you, Chair.

23 JUDGE TOREM: Why don't we start, Ms. Ling,
24 at your end of the table and work our way down.

25 MS. LING: Sonja Ling, Renewable Northwest

1 Project.

2 MR. ANDERSON: This is Alice Blado. She is
3 an Assistant Attorney General supporting the State
4 Community Trade and Economic Development department, not
5 formal appearance but advisory to me only, Mark Anderson
6 from CTED.

7 MR. SLOTHOWER: Jeff Slothower, attorney
8 representing intervenor F. Steven Lathrop.

9 MR. LANE: My name is John Lane. I'm the
10 Counsel for the Environment.

11 MR. PEEPLES: I'm Darrel Peeples. I'm the
12 attorney for the Applicant.

13 MR. TAYLOR: Chris Taylor, Zilkha Renewable
14 Energy.

15 MR. HURSON: Jim Hurson, Deputy Prosecutor
16 for Kittitas County.

17 MR. WHITE: Clay White, Kittitas County
18 Planning and Development Services.

19 MR. CARMODY: I'm James C. Carmody. I'm the
20 attorney representing Residents Opposed to Kittitas
21 Turbines.

22 MR. GARRETT: I'm Ed Garrett, spokesperson
23 for ROKT.

24 MS. HALL: Chris Hall, representing myself
25 and my husband.

1 JUDGE TOREM: And we have one other person
2 on the phone, Mr. Fiksdal.

3 MR. FIKSDAL: Ms. Drummond.

4 MS. DRUMMOND: Yes, right here.

5 JUDGE TOREM: All right. Ms. Drummond, if
6 you want to announce yourself and who you're representing
7 today.

8 MS. DRUMMOND: Yes, Susan Drummond. I'm
9 appearing on behalf of the Renewable Northwest Project.
10 And I can't hear very well what's going on. So if you
11 have specific questions, you might direct them to me over
12 the phone that I'm on.

13 JUDGE TOREM: I understand that Ms. Ling is
14 also here for that same party.

15 MS. DRUMMOND: Yes, she is there.

16 JUDGE TOREM: For the record, you're sitting
17 at a speaker directly in front of my microphone which to
18 everyone here must appear very odd, but for the record,
19 you would typically be on a more acceptable speaker phone.
20 Apparently one of the phone jacks that's closest to where
21 we've set up the prehearing conference this afternoon is
22 not working, and the other phone jack puts that speaker
23 phone much too far to the rear of the room, so I am hoping
24 that Ms. Ling will be able to adequately represent
25 Renewable Northwest Project's interests this afternoon.

1 And perhaps by tonight if you're going to participate by
2 speaker phone, we will have this issue fixed.

3 Are there any other appearances for the
4 record?

5 MS. STRAND: Debbie Strand, Phoenix Economic
6 Development Group.

7 JUDGE TOREM: Thank you, Ms. Strand.

8 We have a proposed agenda that we need to
9 adopt. Everyone should have a copy in front of them.

10 Councilmembers, any additional or further
11 suggestions for the agenda before we adopt it by
12 affirmation?

13 Seeing none, I have one other item I wanted
14 to indicate. There will be a ruling passed out on the
15 motion for reconsideration, Mr. Slothower, I believe from
16 your client, Mr. Lathrop, that will be handed out between
17 Items 4 and 5.

18 I assume through the ex-parte disclosure
19 part, I will have Ms. Makarow pass that out today. It was
20 signed by the Councilmembers today, and you will get an
21 unsigned copy passed out in just a few moments.

22 MR. SLOTHOWER: Thanks.

23 JUDGE TOREM: Are we ready to adopt the
24 agenda with that small addition?

25 CHAIR LUCE: I motion to adopt the agenda as

1 proposed.

2 COUNCILMEMBER ADELSMAN: Second.

3 JUDGE TOREM: It's been moved and seconded.

4 Is there any need for discussion?

5 All in favor?

6 COUNCILMEMBERS: Aye.

7 JUDGE TOREM: All right. The agenda is
8 adopted.

9 Ex-parte disclosures, Mr. Luce.

10 CHAIR LUCE: Nothing to disclose.

11 JUDGE TOREM: Any Councilmembers?

12 COUNCILMEMBERS FRYHLING: The last three
13 months I have had some contact with the people here in the
14 Council. I would just like to identify them.

15 JUDGE TOREM: Mr. Fryhling, go ahead.

16 COUNCILMEMBER FRYHLING: The first one is
17 Kittitas County Commissioner Perry Huston. I met him in
18 one of the local grocery stores, and our discussions there
19 were mostly on the County's adoption of the budget and
20 good wishes for the holidays.

21 I also had contact with Tom Pickerl, who is
22 a friend of about 35 years and he's a retired County
23 planner here in Kittitas County.

24 And I also contact in a social setting with
25 Fitz Glover, who I have known for the last ten years.

1 JUDGE TOREM: Mr. Fryhling, as you indicated
2 have any of those contacts had anything to do with the
3 substance of the project?

4 COUNCILMEMBER FRYHLING: Nothing at all. I
5 just wanted to have them on the record.

6 JUDGE TOREM: Thank you for putting those on
7 the record.

8 Any other Councilmembers with ex-parte
9 disclosures at this time?

10 COUNCILMEMBER JOHNSON: Yes, Patti Johnson,
11 Kittitas County. I work with Mr. Hurson and Mr. White at
12 the County, and at no time have we discussed this project.
13 We have kept it to our other business at hand.

14 JUDGE TOREM: Right. And I understand that
15 that has to be the way it is. So as long as that
16 maintains a essentially fire wall, it would be great. If
17 there are any discussions that you overhear, I'm sure you
18 will excuse yourself promptly.

19 COUNCILMEMBER JOHNSON: Yes.

20 JUDGE TOREM: Great. Any other disclosures
21 at this time?

22 All right. Moving on to the next item on
23 the agenda is essentially Item 4 1/2 that I just added.

24 Ms. Makarow, would you pass out the copies.

25 The Council has signed today a denial,

1 Mr. Slothower, of the motion for reconsideration. This
2 will be the conclusive ruling from the Council on this
3 issue, and there is a number of citations and a lot of
4 other things in this that I'm not going to try to sum up
5 now. It's a fairly detailed response to each of the
6 points raised in the motion for reconsideration itself,
7 and so this is for all intensive purposes the end of the
8 discussion on the motions to Councilmembers Ifie and
9 Fryhling to recuse themselves or otherwise remove and be
10 disqualified from this proceeding. They will not and they
11 will sit, the Council will sit in its formation as you see
12 in front of you.

13 There's opportunity TO discuss this perhaps
14 with me or legal counsel if there's questions about the
15 substance. But unless there's an immediate question now,
16 not having read it yet, Mr. Slothower, that's what the
17 Council's ruling will be.

18 MR. SLOTHOWER: Well, it's 16 pages long,
19 and I haven't even had a chance to read it. I will review
20 it and then take whatever steps we deem appropriate based
21 upon that.

22 JUDGE TOREM: Excellent.

23 Let's move onto Step 5 of the agenda which
24 is scheduling for the Applicant and the County resolution
25 for land use consistency.

1 I understand, Mr. Hurson, you're going to be
2 the primary speaker on this from the last prehearing
3 conference that was held by speaker phone. I was
4 listening in on that, although not presiding at the time.
5 I think it was back on December 15, 2003.

6 And my understanding of the issue today is
7 to hear from the County what its proposal for resolving
8 the land use consistency matter that was previously
9 determined in 2003 and perhaps being able to move on to
10 the adjudicative step and holding a hearing.

11 Mr. Hurson.

12 MR. HURSON: Thank you. Our staff planner,
13 Clay White, put together a flow chart. I think all the
14 Councilmembers have a copy and all of the parties. We
15 handed these out. This is the process we've been
16 discussing verbally. We figured if we put it down in this
17 format -- I personally hate all these arrows and boxes and
18 everything, but some people that helps them to intuitively
19 go through it, so hopefully this will help with some of
20 those issues.

21 What we're dealing with I guess in a
22 nutshell is from the County's perspective once we have an
23 adequate environmental document for us to proceed forward
24 this schedule calls for about a four and a half month
25 period from the date that that happens until we believe we

1 would have a decision on the merits. And that would
2 include also in that estimated time frame if there was a
3 challenge on the adequacy of the environmental document
4 and also assuming that the Board that held it was
5 adequate.

6 Mr. Luce said go ahead and make whatever
7 assumptions, so we are doing that assumption. That was
8 sort of the longest period of time with the challenges
9 without it having to be kicked back for further
10 environmental review.

11 What we're dealing with as I believe the
12 Council knows there's also another application for another
13 wind farm in Kittitas County, and we're basically trying
14 to process these both at the same time. They're almost on
15 dual tracks. Our Draft EIS came out either the same day
16 or next day after EFSEC's. The application to our county
17 from EnXco I think came in two weeks after you received
18 Zilkha's application, so we seem to be tracking.

19 And for the County to proceed under our
20 local land use our comprehensive plan says wind farms are
21 only allowed in areas that are designated as wind farm
22 resource overlay areas or wind farm resource areas. Then
23 our zoning only allows wind farms in areas that have a
24 wind farm resource overlay zoning designation. So we have
25 to do a comprehensive plan and a zoning amendment to

1 accomplish this.

2 We under GMA, Planning Enabling Act, SEPA,
3 open public meetings and probably a half a dozen other
4 laws we have to have all the public hearings in process in
5 an appropriate sequence, and that sequence requires that
6 we would have to have a Final EIS issued under normal
7 process. That's what we did with EnXco. Once we have the
8 Final EIS, we can go to hearings, and this same flow chart
9 is the one we would be using for EnXco. We have, however,
10 a process where under EFSEC your WAC regulations, I don't
11 think the statute requires, but the WAC regulations say
12 you won't issue what you call the final until after the
13 adjudication. So if somebody read that, they would say,
14 well, you could never accomplish both because the final as
15 you would label as lead agency won't happen until after
16 adjudication and consistency has to happen before the
17 adjudication hearing.

18 I've analyzed it. I've tried to look at the
19 two statutory structures, and what I've concluded is we
20 have to comply with SEPA and GMA which means we need what
21 I have just labeled as the functional equivalent of a
22 Final EIS, which means it's an environmental analysis
23 document that can pass legal muster as being an adequate
24 document to help a rational fact finder make those
25 decisions that are required and what an EIS is suppose to

1 help that fact finder do.

2 We realize that EFSEC won't label that
3 document a Final EIS, and it will still be called a draft,
4 but from the County's perspective we do not believe we can
5 proceed forward until we have that functional equivalent
6 of the Final EIS.

7 And I have discussed this, I've worked this
8 out. I think I've talked to Ann Essko about this a few
9 months ago. I've talked to attorneys for the proponents.
10 It's my understanding everybody understands that. I think
11 the opponents to the process insist upon it, and they may
12 even have problems with us doing it without a final word
13 on it. But from the County's perspective if it is a
14 document -- I don't care what the title says -- that is
15 adequate and a defensible environmental document, then we
16 go forward with our hearing.

17 I realize that that may put things a little
18 out of sequence to what EFSEC is used to because I think
19 the usual EFSEC process involves if somebody wants to do a
20 cogen facility, they find some land that's zoned heavy
21 industrial, and then they come to get your application and
22 do an environmental review. It doesn't require any comp.
23 plan changes or zoning changes. Because I know under
24 EFSEC you may not have the final version when you go into
25 the hearings adjudication, but that's kind of how your

1 process is set up.

2 The County process I don't see any way we
3 could legally do it without that document, without that
4 adequacy and detail, so it may be requiring a little more
5 environmental detail before we have our hearing, but
6 frankly I think that will also help the EFSEC process too.
7 Because by the time it gets to the adjudication, you will
8 have the functional equivalent to a Final EIS. You will
9 have a much better environmental document which helps the
10 fact finders make their decisions.

11 So really where we are is we think this is a
12 reasonable time frame. I'm not at all comfortable putting
13 dates on any of these because I don't know when that will
14 happen, and I don't think anybody in the room knows when
15 it's going to happen. After tonight and after the final
16 comments are made, we'll probably all be in a better
17 position hopefully when the consultant can see how much
18 more time it can take.

19 But I know from the County's review we have
20 comments, but that's what drafts are all about is you put
21 them out there for comments, and it's for the public to
22 help us all make better documents. We're having our
23 public comments on the EnXco project next week. We're
24 sure we're going to get comments from the public that are
25 going to ask us to do additional things and fine tune some

1 issues, so that's really where we are.

2 JUDGE TOREM: Thank you. It sounds like
3 there's been some benefit. The result of land use
4 consistency the County is relying on its own processes
5 that require more detailed environmental documents than
6 that process because of certain SEPA exceptions, so
7 therefore the County is trying to use and focus on its
8 application as it applies to them and take that long to do
9 the comp. plan changes and everything to resolve the
10 existing findings of inconsistency.

11 MR. HURSON: Well, I don't know if there's a
12 SEPA exception. I think that's the problem is there isn't
13 a SEPA exception for the County. And I know that the
14 EFSEC process says that applicants who seek the EFSEC
15 approval don't need to give the detailed environmental
16 checklist when there's these other changes that need to be
17 made like ours which is true for any sort of lead agency
18 status sort of an issue. You've got multiple
19 jurisdictions. You have a lead agency which is EFSEC. We
20 understand that as the lead agency status, so they
21 wouldn't have to give us a checklist. But we still need
22 to rely upon EFSEC as lead agency to give us the
23 environmental document that we can use for our process.

24 If we did anything else less, I don't
25 believe we would be complying with SEPA or the Growth

1 Management Act, and I'm not going to advise my client to
2 proceed down the path of intentional error of law by
3 proceeding with an inadequate environmental document. And
4 I just don't see any legal way to do it other than the way
5 we're proceeding.

6 JUDGE TOREM: Okay. Thank you.

7 COUNCILMEMBER TOWNE: Mr. Torem, I have a
8 clarifying question for Mr. Hurson. The last box in the
9 lower right corner says, "Hearing set, Board of County
10 Commissioners makes a permit decision."

11 MR. HURSON: Right.

12 COUNCILMEMBER TOWNE: Is this the wind
13 overlay and rezone or is it a permit?

14 MR. HURSON: What we did about two years
15 ago, we set up a process to try to streamline when people
16 wanted to site wind farms in our county, and basically
17 it's a consolidated hearing process that you get the
18 comprehensive plan amendment, and you would get the
19 rezone, and you would have the development agreement and
20 operating permit in a consolidated process. It would be a
21 single application all through one environmental process.
22 You don't have to do a comp. plan, get that done; then do
23 another application, do that. Because that would take
24 two, three times longer.

25 So, yeah, you could say permit decision, you

1 could say comprehensive plan decision, you could say
2 zoning decision because ours are all -- it's a
3 consolidated process, and I know that EFSEC does
4 permitting decisions and the County does land use
5 decisions. You know, where that line goes from land use
6 to permitting, you know, there's all sorts of gray.

7 Frankly, we've told the Applicant this, and
8 I think we have shared with Council this, is we go through
9 this. I know that applicants are always encouraged to
10 work with local jurisdictions to work out mitigation
11 packages, and we're looking at this process. You know, if
12 the County approves this, that's also our mitigation.
13 That's all the conditions. If my Board approves this
14 process, I am anticipating that the County is not involved
15 in the adjudication because that's how I would see that
16 whole process.

17 But, yes, it says permit. You could put
18 comprehensive plan change too if you want.

19 JUDGE TOREM: Councilmembers, any other
20 questions for Mr. Hurson?

21 Seeing none, Mr. Peeples.

22 MR. PEEPLES: Yes. I passed out I think to
23 all the parties and I gave to staff a request. I just
24 received this this morning, and I think the Applicant,
25 first of all, would like to request to have the Council

1 agree to an extension for 30 days for the preemptive
2 period. That runs out tomorrow. You see that we were
3 quite frankly hoping for something that was more
4 streamlined than this, and we need to take this and talk
5 amongst ourselves and decide where we go from here. The
6 EFSEC rule for preemption provides for a 90-day period.
7 It's been adopted some time ago. And to me that rule was
8 aimed at something that was more in the traditional zoning
9 type of ordinance.

10 The Kittitas County's ordinance is a siting
11 ordinance, and I think it's duplicative to the Council's
12 procedure, and I think that creates somewhat of a problem
13 for the Applicant and the County because if you add all
14 these things together, I think what the Council's being
15 asked is to not start its process until another siting
16 process is completed.

17 And, you know, I appreciate getting this
18 from the County, but to me it shows that maybe a minimum
19 of five months. If the County Commissioners want more
20 information, we go back to the beginning. It could be
21 another eight months, and we don't know what it is, and
22 that causes the Applicant to have some great concerns.

23 We don't totally agree with the County on
24 their position that they have to have what is equivalent
25 to a Final EIS. 80.51.80 exempts local government from

1 having a detailed EIS on those situations. We believe
2 that applies to this case. So I would like to have the
3 Council agree to an extension for 30 days and we're going
4 to -- my client does not take a request for preemption --
5 it takes it very seriously. It's not what we want to do,
6 but if I start looking at the time periods, we're
7 concerned about it. That's all I'll say now.

8 I think to a certain extent the Council
9 needs to, may need to in the future, not for today to
10 decide on, I'm not expecting that right now, but set its
11 own time line. And so, you know, the Council is not being
12 wagged by other issues outside of it.

13 So that's my reaction right now, and that's
14 all it is. We're going to continue to work with, you
15 know, the County. We're just after looking at this we're
16 going to have to talk to my client. We're really
17 concerned about where this could end up. It could end up
18 really getting it -- we could be sitting here another
19 eight, ten months before we finally can even start the
20 EFSEC hearing process and that concerns us.

21 JUDGE TOREM: Thank you, Mr. Peeples. It
22 seems to me that this process of preemption has never
23 been, the Council has never preempted local government for
24 issues. It's just not come up.

25 MR. PEEPLES: They've preempted, but not

1 since they have adopted the regulation. They preempted in
2 the Skagit nukes way back when.

3 JUDGE TOREM: Under the current regime.

4 MR. PEEPLES: Under the current, that's
5 correct.

6 JUDGE TOREM: That's what I'm referring to.
7 Would it be your intention then with an extension of this
8 additional 30 days to have your client make a decision on
9 whether they will be requesting preemption one way or the
10 other?

11 MR. PEEPLES: I would not want to totally
12 commit to that. I think that that's the goal. But, you
13 know, I wouldn't want to totally commit. I'm not saying
14 we're going to preempt or not preempt. I'm raising the
15 issues now that I see, and I would hope that that would be
16 resolved in the 30 days. We need to talk to the County
17 again perhaps before we go forward.

18 What I'm trying to say is I think the
19 Council has to establish what its schedule, what it would
20 deem a reasonable schedule to run its procedures.

21 JUDGE TOREM: And that's the next item on
22 the agenda. Part of working and having the Council make
23 an informed decision on that has to determine based on
24 what Mr. Hurson has presented this afternoon. It's been
25 previously discussed, so it's not an incredible surprise

1 that the four or five months projection is set depending
2 on what occurs tonight.

3 MR. PEEPLES: But it could be more than
4 that. If you look down here, it says if they find they
5 want more information, then we go back to the beginning.

6 JUDGE TOREM: I recognize that.

7 MR. PEEPLES: Okay.

8 JUDGE TOREM: But as a minimum between two,
9 three, four months, somewhere in that range before the
10 Council would, if you follow this track and allow Kittitas
11 County to go through its processes on the current document
12 on any revisions that are made following the comments,
13 would put us out toward the end of somewhere in the
14 summertime before we could even begin to think about that.

15 MR. PEEPLES: That's correct, and that's our
16 concern.

17 JUDGE TOREM: The Council has not felt that
18 preemption was potentially going to be requested if that
19 was the case. What I'm trying to do is see if I can nail
20 you down a little bit and commit to either coming back in
21 30 days at the end of the time period if the Council
22 grants the extension again today and have an idea of yes
23 or no are you going to ask for preemption.

24 MR. PEEPLES: Yes, that would be fair.

25 JUDGE TOREM: That would be excellent. If a

1 request is going to be made, I just want to indicate some
2 of the looking that Ms. Essko and I have done at the
3 preemption statute and the regulations that implement that
4 process address it seems that preemption recommendation
5 might go to the Governor all in one package along with the
6 adjudication. And there's some question as to whether or
7 not there's an interest on the Applicant's part, unspoken,
8 so that's why I anticipated having a ruling or a
9 recommendation separate and apart. If there is such a
10 desire, that you point us in the direction of where you
11 would support such a request as to how that might be yet
12 another bifurcated process and proposed time line for
13 doing it, if and when you make that request.

14 Do you understand?

15 MR. PEEPLES: I understand what you're
16 saying, yes, and I'm familiar with the issue too.

17 JUDGE TOREM: Probably more so than many of
18 the Councilmembers are at this point. That's why I'm
19 looking for if there is going to be a request for
20 preemption, it becomes a fully supported request at the
21 time it's made with exactly what you're wanting the
22 Council to do and under what time frame, if anything, and
23 what sequence.

24 MR. PEEPLES: I just want to say off the top
25 of my head that reading the preemption rule, you know, I

1 think it may be something that's going to need to be
2 determined at the hearing itself.

3 JUDGE TOREM: All right.

4 Mr. Luce, Councilmembers, questions on this
5 item of the Agenda No. 5?

6 CHAIR LUCE: I don't have any questions as
7 such of legal counsel. I think Your Honor has raised the
8 obvious issue and the the appropriate request that within
9 30 days the Council very much wants to know whether we're
10 going to have a request for preemption. I think that
11 that's important, so that we can make some decisions here
12 with respect to what our process is. This has gone on for
13 a long time.

14 The County's laid out a schedule and I
15 appreciate that. Prosecutor Hurson has done to the best
16 of his ability what he thinks he can do in terms of giving
17 us guidance, but this is as he says understandably open
18 ended and uncertain and unclear as to when exactly this
19 permit decision might be made.

20 And I'm sitting here looking both at the
21 preemption statute and also at 463-28-060, the state
22 preemption standard, and particularly the last sentence of
23 that which says the determination of preemption shall be
24 by Council order, shall be included in its recommendation
25 to the Governor pursuant to RCW 80.50.100, which to me I

1 stop. I'm not practicing law anymore. Which to me is
2 something that I will listen very closely to legal counsel
3 with respect to what their opinion is, but it is an issue
4 that I would hope that the Applicant would have considered
5 all the ramifications of it. When you come back to us in
6 30 days be prepared to address that, which fork in the
7 road and why and how, and if the statute is inconsistent
8 with the rule, why and how and what direction we should
9 go.

10 JUDGE TOREM: Mr. Hurson, did you want to
11 respond at all to the request of the extension at this
12 point? Does the County have a position?

13 MR. HURSON: Well, I have no objection to
14 them asking for an extension obviously, but I did want to
15 respond to some of the other comments.

16 JUDGE TOREM: Please.

17 MR. HURSON: There seems to be this desire
18 we'll do it quicker, but no one has shown me a statute
19 that says the County can ignore SEPA and the Growth
20 Management Act in trying to get consistency. Those
21 statutes are there. Those are very important policy
22 decisions from the legislature and the Growth Management
23 Act for the County, and we have to comply with those laws.

24 Now I know that Mr. Peebles is making
25 comments of, well, gee, you know, this could take forever.

1 The only question mark in the time frame here is when
2 we're going to get the environmental document. That's the
3 one thing this County has absolutely no control over. We
4 have no control over the environmental document. We're
5 not the lead agency. If EFSEC had issued us an EIS back
6 in June, and a couple months later had the functional
7 equivalent to a Final EIS that was fully detailed, as
8 we're sitting here today we would probably have a decision
9 from my clients. We are waiting for the documents that we
10 need, and EFSEC is the only entity that has control over
11 that document and the timing.

12 JUDGE TOREM: What occurs tonight we'll get
13 rolling on that documentation that we created and the
14 comments given tonight over the rest of the period until
15 next Tuesday. What I don't want to worry about is what
16 water is under the bridge already, but where we are today
17 in 2004. It sounds as though we have a request on the
18 table to determine this extension, and we'll hear from the
19 Councilmembers if there is need for discussion and then
20 the vote today back to Mr. Peeples' request.

21 From there, Mr. Hurson, I know that the
22 County will get the environmental documentation and see a
23 lot more clearly when that's going to occur, and then
24 there will be other requests for preemption that could go
25 ahead and make the County's process. I don't know what

1 the right word is to describe how it would be, but you're
2 doing it for other applications whether you continue to
3 look at this as a separate track. It may become a
4 separate track and EFSEC could proceed further depending
5 on what the Applicant requests.

6 So at this point really we're waiting to see
7 what the Applicant wants the Council to do and what the
8 Council's response will be. We understand where this
9 position is on the flow chart and the time frame, and
10 we'll just wait and see where things take us about a month
11 from now it sounds like.

12 Other Councilmembers have any comments or
13 discussion on the request for an extension?

14 Do any of other parties present have
15 comments at this time on the request for extension of 30
16 days?

17 MR. CARMODY: Your Honor.

18 JUDGE TOREM: Mr. Carmody.

19 MR. CARMODY: James Carmody, yes. I have a
20 couple questions because I'm a little bit confused about
21 where we're going with the 30-day extension. If I
22 understand it, you've asked the Applicant for direction or
23 indication at the end of the 30 days as to how they would
24 like to proceed with respect to preemption, and there's
25 been some discussion whether there's a bifurcated process

1 or Mr. Peeples' comment that he felt it was tied to the
2 adjudication.

3 In order for the remainder of the
4 participants to participate in 30 days what would you
5 anticipate that to be? Would you expect a statement or a
6 position taken by the Applicant and then some sort of
7 brief and hearing schedule established on that, or would
8 you be looking to us to provide input or comments on that
9 issue at 30 days?

10 JUDGE TOREM: Thirty days from now will
11 simply be, again, assuming the extension is granted and
12 Mr. Peeples comes back, and he may ask for another
13 extension. He may file a preemption request between now
14 and then on behalf of his client. At that time the issue
15 is back to the Council and the issue has formally been
16 requested.

17 If the remaining participants want to do
18 research on the preemption issue to be ready to handle
19 that if it comes up, so be it. But if there is such a
20 motion or request filed, time will be given at that time.
21 There won't be an immediate response required, but there
22 will be a scheduled time frame to do that. I don't know
23 what the Council's desire on how short or long that time
24 frame will be.

25 If you look at the statute, the

1 administrative code provisions as Chairman Luce has
2 pointed, they do call for a recommendation to the
3 Governor, and they do call for it to be part of something
4 included in the adjudicative hearing as a separate topic.
5 So when we have an adjudication, if there is one in this
6 case, then that would be a separate topic as addressed and
7 be further discussed as well as the initial responses to
8 any such request. Does that help you, Mr. Carmody?

9 MR. CARMODY: It does help me. Thank you.

10 JUDGE TOREM: Any of the other parties have
11 input at this time on any of the issues that have come up
12 so far?

13 Mr. Hurson.

14 MR. HURSON: The only other point or
15 comments I was going to add is if there is a request for
16 preemption that there's going to be any discussion or
17 consideration by the Council, we would request that any
18 such meeting be held in Kittitas County. I believe that
19 the procedures generally provide that any hearings be held
20 in the affected jurisdiction locale.

21 JUDGE TOREM: As much as possible that would
22 be the intent.

23 MR. HURSON: And if there is a request to
24 preempt local land use regulations before there's even
25 been the opportunity for the County to even make

1 consideration of the decision --

2 JUDGE TOREM: Mr. Hurson, understood. I
3 think the political concerns there would call for the
4 Council to justify any reason to hold it otherwise.

5 MR. HURSON: Thank you.

6 CHAIR LUCE: And for the record, the Council
7 has committed from the beginning to hold all meetings,
8 hearings, and otherwise in Kittitas County, and this
9 certainly would not be any exception. We have been here
10 from the beginning. We'll continue to be here throughout.

11 JUDGE TOREM: The only reason to hold a
12 prehearing or a phone conference is if it's a short
13 one-topic issue like we did back in December. It makes
14 more sense for everybody to be together for one hour on
15 the phone. But for something as an issue like that, I
16 have no problem seeing that that request be honored.

17 Councilmembers, I think now is the time to
18 entertain a motion, if any, to address the letter of
19 request of Mr. Peeples.

20 CHAIR LUCE: So moved to grant extension.

21 COUNCILMEMBER IFIE: Second.

22 JUDGE TOREM: Mr. Ifie seconds it.

23 Is there any discussion, Councilmembers?

24 Seeing none, let's move for a voice vote
25 acclamation. All those in favor of extending the deadline

1 to February 15, 2004 for the Applicant to make a request
2 for preemption under Washington Administrative Code
3 463-28-040, all those in favor say aye.

4 COUNCILMEMBERS: Aye.

5 JUDGE TOREM: The request is granted.

6 Mr. Peeples, I think you essentially have
7 your marching orders on that one.

8 MR. PEEPLES: I have a question. When is
9 the next Council meeting?

10 CHAIR LUCE: Tuesday.

11 MR. PEEPLES: How many meetings are between
12 now and March 15th? Is there one?

13 JUDGE TOREM: February 15 or March 15?

14 MR. PEEPLES: February 15.

15 MR. FIKSDAL: Your Honor, I might interject.

16 JUDGE TOREM: Mr. Fiksdal.

17 MR. FIKSDAL: The next Council meeting is
18 Tuesday, January 20, and then the regular scheduled
19 meetings are the first and the third Mondays of each
20 month.

21 MR. PEEPLES: My only concern is if I do
22 come in and ask for an extension again, just trying to
23 make sure when I would have to have that in front of the
24 Council.

25 JUDGE TOREM: February 2 would be the

1 meeting to do that.

2 MR. PEEPLES: Okay. Thank you.

3 JUDGE TOREM: Let's move on to the next
4 order of business, Item 6. This is the process and
5 tentative schedule for adjudicative proceedings, much of
6 which I know rides on our prior discussion this afternoon.
7 As you can see from the agenda, we're looking at
8 consideration of petitions for late intervention,
9 questions about issues and witness lists, discovery,
10 schedule for prefiling testimony and prehearing briefs,
11 and then the hearings themselves, the hearing itself, and
12 anything else that would have to be taken up at the
13 adjudication.

14 Mr. Luce, any guidance on this particular
15 item at this time?

16 CHAIR LUCE: None whatsoever, Your Honor.

17 JUDGE TOREM: Mr. Peeples, let me ask for
18 your input then on Item 6 on the agenda. Knowing that
19 there's an extension now granted until February 15 to
20 determine what, if anything, to do with land use
21 consistency and preemption, what is the Applicant's
22 position now and what schedule, if any, the Council should
23 do at this point?

24 MR. PEEPLES: I don't know if the Council is
25 going to be ready to schedule today, but, you know, I

1 would like to have, you know, somewhat of a schedule set
2 out as soon as possible. Do you want to talk about
3 specific dates today, time periods?

4 JUDGE TOREM: I don't think that is going to
5 be possible. I mean if Mr. Hurson had come in and told us
6 things were resolved today, we would have been ready to
7 determine that.

8 MR. PEEPLES: I agree with that. But I
9 guess what I want to do as far as schedule is urge the
10 Council to start considering its own schedule and get it
11 established as soon as possible. I believe one of the
12 first things that could be scheduled would be the filing
13 of our prefiled testimony, and without putting
14 restrictions on myself I might -- What is this, the 13th?
15 -- I might be able to get that the first week of February
16 ready to file, our prefiled testimony.

17 JUDGE TOREM: I don't think it will be
18 appropriate for the Council to set a deadline for you to
19 do that. If you're preparing it, that can be done. Once
20 an adjudication is going to be held, which again we have
21 to resolve the land use inconsistency one way or the
22 other, then it will be appropriate to go ahead and set the
23 date. If you're preparing that in anticipation of the
24 hearing, that certainly would be appropriate. I think the
25 sooner that could be filed, the sooner that the other

1 parties can determine what testimony they're going to need
2 to compliment or question that prefiled testimony on the
3 Applicant's view.

4 Ms. Makarow, have we received any additional
5 petitions for late intervention?

6 MS. MAKAROW: We have not at this time, but
7 the deadline is 5:00 p.m. this Friday.

8 JUDGE TOREM: So this Friday we will know on
9 that issue as well as to any other parties joining the
10 rest of you at the table there if their petitions are
11 granted at this time. Have you had any phone calls or
12 otherwise interest that you expect?

13 MS. MAKAROW: No, none.

14 JUDGE TOREM: Other issues or witness lists?
15 Any other parties have issues that at this time they want
16 to bring up that may not be of the normal EFSEC course
17 that we should be anticipating testimony on at any
18 adjudication that may be held? I know we're up to the
19 what ifs right now at this prehearing conference.

20 The rest of those I think that I'm going to
21 postpone, and this item will be a carryover item for the
22 next time we discuss this sometime in February. Anything
23 else on Item 6 from the Councilmembers or the parties?

24 MR. PEEPLES: I will say I will give a firm
25 date for the Council and people to shoot at for our

1 prefilled. I don't think the prefilled testimony is
2 especially linked to the land use or anything like that.
3 So next time I will say when we can get it in. It will be
4 sooner than later.

5 JUDGE TOREM: All right. Let's move on to
6 Item 7 then. Are there any stipulations or settlement
7 agreements that have been reached between the Applicant
8 and any other parties?

9 None at this stage?

10 MR. PEEPLES: None at this stage.

11 JUDGE TOREM: None at this stage of the
12 proceedings. I would expect that we will always want to
13 ask that at these prehearing conferences.

14 And finally the question of when is the next
15 prehearing conference going to be scheduled?

16 It would appear to me that one might be
17 held, and this would be a telephone hearing or not at the
18 next regular scheduled Council meeting in February. I
19 think that would be after the long weekend in February on
20 Tuesday. We usually have them on the first and third
21 Mondays. That would be the 20th of January.

22 February 17 seems to me at least, Mr. Luce,
23 the next logical time to bring this set of parties before
24 the Council for some sort of prehearing conference because
25 by then Mr. Peeples will have had to file his -- the

1 extension will have run out and we will have heard
2 something from Mr. Peeples and the Applicant.

3 Councilmembers, is there any other reason to
4 discuss this Kittitas Valley Wind Project prior to that?

5 Ms. Makarow, do you see any reason to
6 schedule something before then?

7 MS. MAKAROW: No.

8 CHAIR LUCE: So we should schedule for
9 February 17?

10 JUDGE TOREM: So then February 17th. The
11 issues again will probably be much the same as this agenda
12 with update, if any, on No. 5 as to schedule for the land
13 use because by then we may have comments. We may have
14 heard from staff on the status of responses to that is.
15 The comment period will have closed nearly a month before
16 on January 20th, so we will be in a position to tell the
17 County where we are as a Council in making any
18 modifications or responses to that. So that would be
19 something we can figure out, and we'll, of course, have
20 any response from the Applicant.

21 Any other additional agenda items,
22 Mr. Hurson, that would require an appearance here to hold
23 the Council meeting in Ellensburg on that that you can
24 see? It would simply be a prehearing conference and where
25 are we on these issue we have all gotten together today.

1 MR. HURSON: Well, I'm not sure. I think
2 what action Zilkha takes the week before is going to
3 determine as to whether that prehearing conference is a
4 major deal that needs to be done locally or whether it's a
5 minor telephone call that might be handled telephonically.

6 JUDGE TOREM: My thought process is that I
7 think if there's going to be a request for preemption,
8 let's say that that occurs, there won't be an action item
9 other than a discussion on what will the future schedule
10 be or what other discussions. We won't be expecting a
11 substantive response from the County or any other party
12 for that matter at the next prehearing conference.

13 At the prehearing conference, Chairman Luce,
14 correct me if I'm wrong, we would be wanting to schedule
15 an appropriate time and place to discuss that in more
16 detail, hear substantive responses, perhaps setting a
17 briefing schedule and other things, so the Council could
18 be fully informed as it decides what to do with the
19 preemption request. I'm not anticipating unless the
20 Councilmembers see otherwise a substantive discussion on
21 perhaps a preemptive request filed that date but a
22 schedule discussion on how to handle that request. It may
23 not come. If it does, we have to handle it at that time.

24 CHAIR LUCE: I think that would be correct.

25 MR. PEEPLES: I agree with Jim. If

1 something significant happens, then there needs to be a
2 full prehearing conference. We don't know if that's going
3 to be needed or not, but I guess if it is needed, we would
4 want to have it set here, you know, as soon as possible,
5 so we can get into those items that we generally, those
6 agenda items, those six as soon as possible. So I guess
7 the necessity of the prehearing conference is going to be
8 more dependent upon what my client's decision is. And
9 that, you know, I mean it's something to bring up at the
10 EFSEC meeting and not as a prehearing conference.

11 If a prehearing conference is going to be
12 needed, then it's going to be a significant item, and it
13 should be set. I mean we might pick a tentative date for
14 that as sometime in that third week of February, and I
15 guess my suggestion is pick a tentative date for a
16 prehearing conference, and if it's needed, you guys can
17 send out notice. That's my idea, but I'm not totally
18 wedded to it.

19 JUDGE TOREM: Do you have any suggestions as
20 to dates or anybody that knows their calendar that far in
21 advance for that shorter week in February? Any of the
22 parties know that that date will or won't work for them?
23 Do Councilmembers at this point know they have conflicts?

24 COUNCILMEMBER ADELSMAN: I will be out of
25 the Country on February 17 until actually March 16.

1 JUDGE TOREM: So you will be gone for that
2 week.

3 COUNCILMEMBER ADELSMAN: Yes, I will be
4 gone.

5 JUDGE TOREM: Any other Councilmembers have
6 known conflicts of scheduling?

7 Any other parties for that week of February
8 17th to the 20th?

9 MR. SLOTHOWER: Jeff Slothower. I'm not
10 available that week. I will be out of the office on a
11 scheduled time that's been accounted for for quite some
12 time.

13 JUDGE TOREM: I know that everybody is
14 reaching for palm pilots trying to figure this out today.
15 Why don't we have all the parties get in touch with
16 Ms. Makarow and give her dates that you are available from
17 February 17 until the end of that month, maybe into March
18 perhaps to get together here in Ellensburg to discuss the
19 request for preemption, if one is made. At this time we
20 will still put a tentative date for a very short
21 prehearing conference to say here's where we are, and that
22 may yet get continued by motion of the Council at its
23 February 2 meeting, and we would then give notice to the
24 parties a change in that date.

25 But hold the 17th, and, Mr. Slothower, if

1 you've got someone else in your office that could
2 represent Mr. Lathrop that day. It would only be to hear
3 what the Council is going to schedule, nothing substantive
4 at a conference like that.

5 MR. SLOTHOWER: Okay. I will check.

6 CHAIR LUCE: Could we go ahead and get those
7 palm pilots back out and try to pick a tentative date
8 because my concern is, and Ms. Makarow can tell me
9 otherwise, but I have a vision of 20 parties all trying to
10 email her dates and scheduling would be difficult. So if
11 we can get 80 percent of the people here today and get
12 their palm pilots out and find some date on which they
13 would all be available and then that means 20 percent to
14 clean up which is a lot better than starting from ground
15 zero at a hundred percent.

16 JUDGE TOREM: It sounds as though,
17 Mr. Slothower, you wouldn't be available that entire week.

18 MR. SLOTHOWER: I will check to make sure
19 somebody else in the office is, but I will not be here
20 that entire week.

21 JUDGE TOREM: Anybody else unavailable that
22 entire week?

23 Mr. Hurson.

24 MR. HURSON: I tentatively was going to be
25 gone a few days that week, but if you're going to set a

1 date that week, if you let me know, I will switch the
2 schedule, so I'm out a couple days the week before.

3 MR. PEEPLES: We should know I'm not going
4 to run up to the February 15th. I'm going to know before
5 that time, and I'm going to let everybody know well before
6 that time what we're going to do, so you could have it the
7 week before too.

8 CHAIR LUCE: Valentines Day seems a little
9 inappropriate.

10 JUDGE TOREM: Well, it's on Saturday
11 anyways.

12 CHAIR LUCE: I was thinking some movies.

13 JUDGE TOREM: Staff has agreed to be the
14 glutton for punishment to sort that out, so we will stick
15 with Plan A. Everybody please get their dates
16 availability for the 17th at least until the end of the
17 month and project into next month. Mr. Fiksdal and
18 Ms. Makarow will work with all of you to find the most
19 agreeable day.

20 COUNCILMEMBER TOWNE: Mr. Torem, what about
21 the week prior, the week of the 9th? Could we also do
22 that?

23 JUDGE TOREM: My concern is that
24 Mr. Peeples' clients they've now got an extension until
25 the 15th.

1 COUNCILMEMBER TOWNE: But he said he was
2 going to inform us before that.

3 JUDGE TOREM: His clients aren't here today.

4 COUNCILMEMBER TOWNE: Yes, they are.

5 MR. TAYLOR: We can commit to making a
6 decision before then.

7 JUDGE TOREM: All right. If you will commit
8 to that, then we can look at the week before as well.

9 Let's move onto then anything under other,
10 Item 9. Anything under other for the agenda?

11 Councilmembers, anything else to raise?

12 Seeing none, any other parties have issues
13 to raise?

14 Is there a motion to adjourn the prehearing
15 conference?

16 CHAIR LUCE: So Moved.

17 COUNCILMEMBER IFIE: Second.

18 JUDGE TOREM: All in favor?

19 COUNCILMEMBERS: Aye.

20 JUDGE TOREM: We are adjourned. Thank you.

21 * * * * *

22 (Whereupon, the prehearing conference was
23 adjourned at 3:50 p.m.)

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A F F I D A V I T

I, Shaun Linse, CCR, Certified Court Reporter,
do hereby certify that the foregoing transcript
prepared under my direction is a true and accurate
record of the proceedings taken on January 13, 2004,
in Ellensburg, Washington.

Shaun Linse, CCR

CCR NO. LI-NS-ES-M4020H