

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 July 12, 2006, at 4:00 p.m., at 512 North Poplar Street, Kittitas Valley Events Center, West Youth Craft Meeting Room, in Ellensburg, Washington, before Energy Facility Site Evaluation Councilmembers.

* * * * *

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 and Timothy McMahan, Attorney at
 Law, Stoel Rives, LLP, 805 Broadway Street, Suite 725,
 Vancouver, Washington 98660.

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

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

Reported by:

Shaun Linse, CCR NO. 2029

1 Appearances (cont'd):
 2 F. STEVEN LATHROP, F. Steven Lathrop, Attorney at
 3 Law, Lathrop, Winbauer, Harrel, Slothower & Denison, LLP,
 4 201 West Seventh Avenue, Ellensburg, Washington 98926
 5 ECONOMIC DEVELOPMENT GROUP OF KITTITAS COUNTY,
 6 Debbie Strand, Executive Director, 1000 Prospect Street,
 7 P.O. Box 598, Ellensburg, Washington 98926.
 8 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),
 9 Ed Garrett, Lay Representative, 19205 64th Avenue S.E.,
 10 Snohomish, Washington 98296.
 11 * * * * *
 12 CHAIR LUCE: The Washington State Energy
 13 Facility Site Evaluation Council will come to order. This
 14 is a prehearing conference in the matter of Kittitas
 15 Valley Wind Power Project, Application No. 2003-01. My
 16 name is Jim Luce and I'm the Chair of the Energy Facility
 17 Site Evaluation Council. We are meeting today on
 18 Wednesday, July 12, at the Kittitas Valley Events Center
 19 at the Kittitas County Fairgrounds.
 20 I would ask the clerk at this point in time
 21 to call roll. Someone will call the roll.
 22 MR. MILLS: I will call the roll.
 23 MR. FIKSDAL: We can just have appearances.
 24 CHAIR LUCE: Councilmembers please identify
 25 themselves for the record.

1 MS. WILSON: Judy Wilson, Department of
 2 Natural Resources.
 3 MS. TOWNE: Chris Towne, Department of Fish
 4 and Wildlife.
 5 CHAIR LUCE: Jim Luce, Chair.
 6 MR. FRYHLING: Dick Fryhling. I'm with the
 7 Department of Community, Trade, and Economic Development.
 8 MS. JOHNSON: Patti Johnson, Kittitas
 9 County.
 10 CHAIR LUCE: Thank you very much.
 11 Appearance by the parties. Could parties present, those
 12 present in the room please identify themselves, identify
 13 who they are representing.
 14 MR. PEEPLES: The Applicant is here. We'll
 15 just go down. To my left is Chris Taylor. I'm Darrel
 16 Peeples.
 17 MR. McMAHAN: Tim McMahan, Stoel Rives Law
 18 Firm.
 19 MS. ANDERSON: Erin Anderson, Cone Gilreath.
 20 MR. PECK: Dana Peck, Horizon Wind Energy.
 21 CHAIR LUCE: For the County.
 22 MR. HURSON: For Kittitas County, Jim
 23 Hurson, Deputy Prosecutor.
 24 MR. PIERCY: Darryl Piercy, Director of
 25 Community Development.

1 MR. LATHROP: Steve Lathrop on behalf of
 2 myself.
 3 MR. GARRETT: Ed Garrett, representing ROKT.
 4 MR. UFKES: I'm John Ufkes with Cone
 5 Gilreath, but I'm just observing.
 6 CHAIR LUCE: Sure.
 7 MR. JOHNSTON: Milt Johnston with the
 8 Department of Natural Resources.
 9 CHAIR LUCE: Milt, thank you very much.
 10 JUDGE TOREM: On the telephone.
 11 MR. TRIBBLE: Counsel for the Environment,
 12 Mike Tribble, Assistant Attorney General.
 13 JUDGE TOREM: Anybody else on the line?
 14 CHAIR LUCE: Staff, could we have an
 15 identification of staff who are present here today.
 16 MS. MAKAROW: Irina Makarow.
 17 MR. FIKSDAL: Allen Fiksdal.
 18 MR. MILLS: Mike Mills.
 19 CHAIR LUCE: Thank you very much.
 20 JUDGE TOREM: Councilmembers absent have
 21 been excused. Right?
 22 CHAIR LUCE: Councilmembers absent have been
 23 excused, is that correct, Mr. Fiksdal?
 24 MR. FIKSDAL: That's correct. Mr. Sweeney
 25 from the Utilities and Transportation Commission and

1 Ms. Adelsman from the Department of Ecology.
 2 CHAIR LUCE: All right. We have with us
 3 today the Administrative Law Judge Adam Torem. At this
 4 point in time I'm going to turn the proceedings over to
 5 our Administrative Law Judge for the balance of the
 6 hearing.
 7 Judge Torem, you can handle the agenda from
 8 here forward.
 9 JUDGE TOREM: All right. Thank you.
 10 There's yellow sheets in front of those that are here this
 11 afternoon in person in Ellensburg and this is the proposed
 12 agenda. We're going to add between number three and four
 13 putting on the record some ex-parte contacts that I'll
 14 take care of as well as another Councilmember.
 15 Any other agenda items besides the update on
 16 prehearing filings and an update from the Applicant
 17 regarding the witness scheduling for the hearing in
 18 September? Any other items that we need to put on right
 19 away?
 20 MR. TRIBBLE: Just as a point of order,
 21 Judge, this is Mike Tribble on the telephone. I don't
 22 have an agenda; so if as you go through the agenda, if you
 23 could identify pretty clearly what it is that we're
 24 addressing I'd appreciate that.
 25 JUDGE TOREM: All right. Certainly. Let me

1 just put that on the record. The first two items were,
2 number one, the introduction; and two, the appearances.
3 Those have been taken care of, and I'm at the point for
4 number three to entertain a motion to adopt the proposed
5 agenda for today. After that again the additional items,
6 Mr. Tribble, will be those ex-parte contacts to make sure
7 those are on the record, and then we'll go through number
8 four, an update from the Applicant and other parties
9 regarding any prehearing filings. Number five, an update
10 from the Applicant regarding the process to schedule
11 witnesses, and then anything else, other or new business,
12 is six. If we need a next prehearing conference, we'll
13 talk about that at Item 7, and then eight will be
14 adjournment; and I think that will come up pretty quickly.

15 MS. TOWNE: I will move the adoption of the
16 proposed agenda as modified to incorporate ex-parte
17 contacts.

18 MS. WILSON: Second.

19 JUDGE TOREM: All right. That's been moved
20 and seconded. All those in favor?

21 COUNCILMEMBERS: Aye.

22 CHAIR LUCE: Let the record reflect that the
23 vote was unanimous. We've had other two parties--this is
24 Jim Luce--join us, two other individuals. Could you
25 please identify yourselves for the record.

1 MS. STRAND: Debbie Strand, Economic
2 Development Group.

3 MR. KNUDSON: I am just a participant here.
4 Desmond Knudson.

5 CHAIR LUCE: Thank you.

6 JUDGE TOREM: All Right. Ex-parte contacts.

7 I want to note for the record that earlier today Puget
8 Sound Energy hosted a celebration to kick off the official
9 opening of the Wild Horse Project and took a tour of a
10 number of folks up there. Councilmembers and myself that
11 are present today were all present at the luncheon and in
12 varying capacities up on the hill for the tour as were
13 many of you in the room today. I just want to put that on
14 the record that the Council was in town and therefore
15 moved the proposed date of the prehearing conference from
16 yesterday to today to accommodate that travel and take
17 care of this bit of business today here in person in
18 Ellensburg.

19 Second, Patti Johnson wants to put on the
20 record a couple of items.

21 MS. JOHNSON: Yes. For the record, I have
22 been contacted by another wind power group regarding
23 placing wind turbines on county property which I supervise
24 and manage so it has nothing to do with this project but
25 wanted to make it known to everyone that I have been

1 contacted by someone else.

2 JUDGE TOREM: That other proponent of a wind
3 power project hasn't proposed it to this body or to the
4 County, although my discussion with Patti is that it's
5 probably going to come to the County process, if any; but
6 they're simply looking around for that so we wanted it on
7 the record. We haven't got anything official from an
8 Attorney General, but my initial look at it is it doesn't
9 present a conflict for this decision making process
10 because it's a proposed project. It's nothing to do with
11 this Kittitas Valley Project. So we wanted that on the
12 record as well that Patti's had those discussions, and I'm
13 sure other County officials have also been involved in
14 that process. I'm sure Darryl Piercy's office knows about
15 it more than anybody else in the room I would suspect.

16 MR. PIERCY: We have had several contacts
17 with that party, yes.

18 JUDGE TOREM: All right. So we wanted the
19 rest of the parties to know that at least one
20 Councilmember has a supervisory role of a potential
21 leaseholder later on. Any other ex-parte contacts from
22 Councilmembers?

23 Seeing none, we can move onto Item No. 4.
24 That's the update from the Applicant and parties regarding
25 prehearing filings. My understanding is that prehearing

1 filings were scheduled in Prehearing Order No. 23 which
2 was adopted at the last conference in mid June, Council
3 Order No. 820.

4 When I looked at this not having been at the
5 meeting, it made sense to just look at page 5 of 6 in your
6 printed copies, and the prehearing schedule was discussed
7 several times but they're actually set forth on page 5.
8 So if there's any confusion, those are the dates; one of
9 which has already past, the June 20 deadline for the
10 Applicant submitting a request for preemption. I think
11 most people would have noticed that filing. It's two
12 binders and it was timely filed. The next deadline is
13 later this month.

14 MR. PEEPLES: Next week.

15 JUDGE TOREM: Next week filing prefiled
16 supplemental testimony. Are we on schedule for that as
17 far as you can tell, Mr. Peeples?

18 MR. PEEPLES: Yes. We are working on it,
19 Your Honor.

20 JUDGE TOREM: All right. The next deadline
21 after that is August 15. All other parties are going to
22 submit any prefiled supplemental testimony they feel is
23 relevant, and I imagine some of that will be dependent on
24 what comes in from the Applicant.

25 MR. PEEPLES: Your Honor, I believe there's

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1 one missing in there. That's rebuttal testimony which is
2 to be filed two weeks after the 15th.
3 JUDGE TOREM: I don't see that date in
4 there.
5 MR. PEEPLES: It's not in there.
6 JUDGE TOREM: So perhaps we need to clarify
7 that. Let me make sure that other parties to this
8 proceeding have got that August 15 deadline on their
9 calendars and are working toward meeting that. Again, I
10 was about to say that may be dependent on what is filed by
11 the Applicant if you feel there's any need for
12 supplementing, but being ready to get that when it comes
13 in next week.
14 MR. HURSON: I don't know at what point you
15 want me to raise some issues I have.
16 JUDGE TOREM: This is probably it because it
17 would be other parties so, Mr. Hurson.
18 MR. HURSON: Jim Hurson, Deputy Prosecutor
19 Kittitas County. The current schedule calls for what is
20 being referred to as the supplemental testimony due on
21 August 15. Supplemental may be technically correct, but I
22 think for practical purposes this is a whole new process,
23 a whole new preemption, a whole new set of testimony. I
24 have submitted some informal discovery requests to the
25 Applicant as I understand is under Order 790. That was

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1 last Thursday and I have received no response back from
2 them. So I was going to file a formal discovery request
3 which I understand under that rule is to be received by
4 the Council by noon on Monday and then Judge Torem makes a
5 ruling by Thursday and then based upon that we proceed.
6 Frankly, I see this as probably the first
7 discovery request, and frankly I don't think that the
8 current schedule is realistic the County can meet an
9 August 15 deadline when we need to undergo some discovery
10 on this. I understand discovery is unusual in the EFSEC
11 process, but this is also the first time anybody has ever
12 asked for a preemption request; and I believe it's
13 incumbent upon that the Council have all the information
14 they need, and it's also important that I have all the
15 information I need to represent my client, and our
16 discovery request revolve around that.
17 I know that's a different issue, but this is
18 going to relate to basically the scheduling and whether
19 this is even a reasonable schedule. Because frankly when
20 it's all said and done, I later on plan to ask that you
21 strike the current hearing date so we can set a more
22 reasonable time frame.
23 This is a big issue with a lot of issues.
24 One of the issues that the Applicant was suppose to be
25 able to present is that all other potential locations

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1 within the County have been examined and rejected. Their
2 preemption request just basically says, well, the comp.
3 plan doesn't want them anywhere so there isn't anything.
4 I believe as we all saw in Wild Horse there are potential
5 sites in this county that are viable. Wild Horse is an
6 excellent site. That's why we approved it from the County
7 and that's why EFSEC approved it too. It frankly defies
8 our I think imagination that other wind farm companies are
9 not interested in looking at other potential sites, and
10 this County probably has many, many potential sites for
11 expansion of Phase 2 of Wild Horse which we anticipate
12 that is being investigated, perhaps infill of Wild Horse,
13 perhaps expansion of Wild Horse.
14 We talked about the other wind farm that has
15 contacted Kittitas County about another wind farm. That's
16 another alternative site within the County, and part of
17 our request from the Applicant is to tell us everything
18 they know about what they're looking at and anybody else
19 is looking at for other potential sites because frankly we
20 believe there's probably many, many sites that are good
21 viable sites properly mitigated.
22 The one that they propose in this case
23 isn't, but we believe there's many other potential sites
24 that are potentially out there and they should be required
25 to demonstrate it, but it doesn't look they're going to.

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1 So we want to demonstrate that there are many other sites
2 and therefore preemption is inappropriate. So some of the
3 discovery goes along that line. Others go essentially to
4 the good faith arguments. I'm kind of just trying to talk
5 in big, round terms because I know this isn't the forum to
6 get the discovery requests approved.
7 But as far as good faith, it's still unclear
8 to the County what is even being proposed. They say
9 there's a 65-turbine proposal, but we've never even seen a
10 65-turbine proposal. They have never mapped a 65-turbine
11 proposal. They've never said these are the locations for
12 these turbines. There are things like, well, they will be
13 somewhere in these string lines and we'll figure it out
14 later. That kind of ignores all the environmental impact
15 and what you can do, and this has become a key issue
16 because they've asserted that anything beyond a 1,320-foot
17 setback from residents would make this economically
18 nonviable. I believe we have a right to investigate
19 whether that is in fact true and/or whether they could be
20 properly mitigated and set back with a proper location in
21 there, and so we've asked some requests on that line.
22 One of the confusing things as I was looking
23 through the history, 2003 EFSEC Application the Applicant
24 asked for a 181.5-megawatt project. That's what their
25 cover letter said. In order to seek consistency with the

1 County, the 2006 development application draft that they
2 sent to us called for a 246-megawatt project. So they're
3 trying to seek consistency but asked for a project that's
4 actually larger than the one that they've asked EFSEC to
5 approve as far as what it will produce. They later on
6 reduce it. Okay. We'll reduce it to a 65 turbine, but
7 their project has always asked for up to three megawatts.
8 That's a 190-megawatt project which is still larger than
9 the initial EFSEC application.

10 The preemption request says, however, that
11 they're asking for approximately a 120-megawatt project.
12 We've never seen a 120-megawatt project proposed. The
13 smallest thing they proposed is 65 three megawatts. What
14 it looks like they're looking at now is they're looking at
15 a ceiling maximum of 65 1.8-megawatt turbines, and the
16 basic engineering as it's been explained to me by the wind
17 folks over the period of time is smaller turbines could be
18 placed closer together because the wing span is smaller
19 and the wind turbulence vortex goes away. The smaller
20 ones like in State Line you put them closer together. The
21 bigger ones have to be spaced out more.

22 So if they're really asking for 1.8-megawatt
23 turbines but they were proposing us three megawatts, that
24 means they should be able to squeeze all other things
25 being equal the turbines closer together. If you can

1 squeeze them closer together, you should then be able to
2 remove some of our outer turbine lines that are in close
3 proximity to people's homes, and you could still have a
4 project and you could be properly set back and mitigated.
5 We would like to see what, if any, analysis they've done
6 on that point because they've given us a map that showed
7 the 2,500-foot setback for columns that they say will make
8 it completely nonmarketable. If you overlay that setback
9 over the 2003 application, they can put up 65 turbines.

10 So it's really kind of very confused. I
11 can't figure out what they're applying for. It's all very
12 kind of slippery slope, mystical what they're asking for,
13 why they can't do it nonspecific information, and this is
14 a huge issue to ask for preemption and it should not be
15 rushed.

16 I would trust the Council would want to know
17 this information too during our hearing. We would ask
18 them where are those turbines going to go. They wouldn't
19 tell us. We had asked them how is this not economically
20 viable. They wouldn't tell us. Have you done any other
21 analysis? They won't tell us. We think we're entitlement
22 to that.

23 So we do intend to submit a formal discovery
24 request which I understand would then mean at the earliest
25 there would be an order next Thursday for you to direct

1 them to supply information. I don't know what the delay
2 will be to get that done.

3 JUDGE TOREM: Let me ask first: All of
4 these issues substantively may be part of the Council's
5 evidentiary hearing in September if it stays on schedule.
6 The underlying idea is that there was an informal
7 discovery request and in the last week you've heard
8 nothing back. Let me have just a response directly to
9 that from the Applicant.

10 MR. PEEPLES: I'll respond a little bit and
11 then I'm going to turn it over to Tim. I saw that request
12 late Thursday about four o'clock and it's long. A week
13 hasn't even ran. I think any expectation by anyone for us
14 to respond to that request in less than a week is
15 absolutely ridiculous period. We are also in the middle
16 of trying to get our testimony on the 18th. We do plan to
17 respond, and I think the response will take care of part
18 of it. Part of it will be a legal response; part of it
19 will be an information response. To at this point say,
20 well, I gave you an informal request five days ago and you
21 haven't responded so now I can go ahead and get a formal
22 discovery request is just passing strange to me. It
23 really is.

24 JUDGE TOREM: Well, I understand both sides.

25 MR. PEEPLES: But we can't respond that

1 quick period.

2 JUDGE TOREM: Maybe Mr. McMahan will tell me
3 when the response will be out. I'm not going to play
4 shepherd here as to when is a formal discovery request.
5 We have a tight schedule coming and I can appreciate
6 pushing the deadlines as much as you can to get a response
7 from the other side. That much I can appreciate. But the
8 Council if it's going to entertain any motions to strike
9 hearing dates and continue will want to know that a
10 response was filed and an unreasonable amount of time went
11 by and no response was forthcoming and there's a
12 requirement for a delay.

13 So with that in mind, let me have
14 Mr. McMahan explain what the Applicant's position is.

15 MR. McMAHAN: Thank you, Your Honor. I do
16 just for the record want to object to Mr. Hurson trying
17 his case here when you asked about a discovery request and
18 we're not going to respond to that. I mean that's what
19 the adjudicatory hearing is for. We're not going to go
20 there right now.

21 Beyond that I will just note in Order No.
22 790 there's some verbiage in there from March of '04 with
23 Mr. Peoples indicating historically prefiled testimony has
24 tended to address discovery issues. In unusual
25 circumstances additional discovery can be sought and

1 obtained. Here we are filing prefiled testimony on
2 Tuesday. Quite frankly we believe that much of that
3 prefiled testimony is going to be responsive to these
4 discovery requests. I'm sure Mr. Hurson won't be entirely
5 satisfied but that's okay. That's what your process is
6 for per Order 790. We will submit a response early next
7 week. Monday or Tuesday is our intention. We are indeed
8 focusing right now on getting prefiled testimony in and
9 having it be of a quality that can move this process
10 forward. That is our first priority, and that is what we
11 intend to do. So I don't think that it's timely right now
12 to request that an order be entertained by Monday given
13 the timing here in the order.

14 JUDGE TOREM: I think in deference to
15 Mr. Hurson's schedule--and I'm not recalling exactly what
16 790 says right now. Much has past since we've wrote and
17 issued that order--what I'm thinking is if Monday you want
18 to file a formal discovery request and put that time line
19 in motion, then on Tuesday you'll have a response of some
20 sort. What I might suggest is that on Thursday, and I'm
21 just trying to visualize what my calender for next week
22 is, Thursday or Friday of next week we have a telephonic
23 discussion with the parties. If we do that, it would
24 probably just be with me and the parties as sort of a it
25 will be on the record of some sort. We'll tape record the

1 phone call if we need to and add it to the record if it
2 needs to be transcribed. I can certainly tape record and
3 hold that with an EFSEC staff member on the line, and I
4 don't think we'll get our court reporter involved. But we
5 can have the County and the Applicant on the line. Any
6 others that want to we can work it with a bridge line as
7 well, and we'll send out an electronic notification if we
8 choose to do it. Let me see the formal request actually
9 come in. Let me see a response come out.

10 Mr. Hurson, if there's still a need for the
11 motion for you to review briefly materials and see what
12 you think might be missing, then we'll have a
13 teleconference and figure out where it can go to fit the
14 schedule of 790. If you need a quick decision, you'll
15 have to review what their response is and tell me what you
16 think is still missing and determine what it is you're
17 asking me to have them produce and get a response to that.
18 Getting me to issue an order by Thursday may be premature
19 given the schedule we've laid out today, but having the
20 discussion about it Thursday or Friday if we can fit it
21 into everyone's schedule might be more appropriate and
22 then getting a directed response the following week.

23 So next week is the week of the 17th to the
24 22nd I think it is. Hopefully then by the week of the
25 25th we will have clarified this and we'll still be coming

1 up on the August 15 deadline and see if there's any reason
2 to hold a more formal prehearing conference with the rest
3 of the parties if there's going to be any extension of any
4 deadlines for supplemental testimony.

5 But I understand your concern. I understand
6 the time lines we're working under, but I think the
7 Council was fairly clear in late May, and I understand
8 from reading what happened last time again in mid June
9 that we're going to work everything we can to get these
10 hearing dates to be the hearing dates and the final
11 hearing dates, and unless there's incredible showings that
12 this is prejudicial to one of the parties and won't allow
13 them a fair adjudication to go forward, those will be the
14 hearing dates. That's what I'm hearing from the Council
15 both in May and in mid June. Unless somebody is changing
16 that today, I would be surprised, but it's premature to
17 make a motion to strike the dates yet. If you want to,
18 you may today. Whether the Council will act on it or
19 table it, we'll see. But I appreciate making the issue
20 known today while we're all together.

21 MR. HURSON: Jim Hurson again for the
22 record. I mean they say I didn't give them enough time,
23 but then we have how much time?

24 JUDGE TOREM: Time is scarce.

25 MR. HURSON: That's I guess is my point is

1 apparently this is inadequate for them. Yet under the
2 rule I had this and then there's suppose to be a ruling by
3 Thursday, and I think that's probably an unreasonable
4 short period of time for you to make your decisions, but
5 that's what it says. And I guess it appears that the
6 Applicant and their four attorneys are overwhelmed. I'm
7 the only one.

8 JUDGE TOREM: Well, no one said that,
9 Mr. Hurson. Well, let's see what comes in on Monday and
10 Tuesday. That again as Mr. Peebles and McMahan said that
11 very well may answer most, if not all, of the mail. If it
12 doesn't, let me know. Send an e-mail to me and to
13 Mr. Peebles and the rest of his compatriots. If we need
14 to, we'll schedule something for Thursday or Friday on
15 short notice and we'll discuss what's still missing from
16 that formal discovery request that you're going to file on
17 Monday and we'll let the process work.

18 MR. HURSON: Okay.

19 JUDGE TOREM: Today we have a maybe. So
20 let's see what we have at the end of next week, middle of
21 next week, and then if there's something to go forward on
22 we will.

23 MR. HURSON: If I could, just part of the
24 frustration here is apparently the Applicant is frustrated
25 because they have to get their prefiled in. My

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1 frustration is going to be if their prefiled is going to
2 be in my lap next week, we've already seen what their
3 preemption request was like and to expect me to be able to
4 efficiently and timely respond to whatever they intend to
5 file next Tuesday and run a discovery request and filing
6 and get everything taken care of by August 15, I frankly
7 just think this is--I realize that the Council set it, but
8 I think from representing my clients there's just a
9 fundamental issue of process that we should be able to
10 properly research it, and I would hope that the Council
11 would want to have all the information too. This has been
12 going on. I know this has been going on for three years,
13 but I still don't know where they're going to put the
14 turbines. They have not told in three years where the
15 turbines will go, just in generic concepts.

16 JUDGE TOREM: Let me just interrupt and ask
17 from the Applicant, do you think that the testimony will
18 clarify some of the substantive issues?

19 MR. PEEPLES: Well, it's really hard for us
20 not to start into substantive argument now.

21 JUDGE TOREM: You can just give me a yes or
22 no. Will the locations of the turbines be known?

23 MR. PEEPLES: I think it will from our point
24 of view be reasonable answers to the reasonable questions
25 that he has asked. Now, I want to point out that we

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1 didn't have exact locations up at Wild Horse either.
2 Okay? We had corridors without exact locations. So this
3 is doing it to a certain extent exactly like we did at
4 Wild Horse. And the other thing I want to point out is we
5 started out trying to compromise this, and we came back
6 last fall and reapplied. We were going from the 65 to 80
7 approximate turbines in the middle of the hearing. We
8 were basically requested and suggested that we reduce it
9 to 65. We did that as part of the county hearing process.
10 So it's not like this thing came out of nowhere when we
11 reduced it.

12 JUDGE TOREM: Mr. Peeples, the Council is
13 well aware that the application they saw initially in 2003
14 has changed a number of times, and personally I've set
15 those things, those binders aside and will pick them back
16 up later this month and next month to really spin of what
17 was and what is to make sure those issues are straight in
18 my mind to run this show in September and Councilmembers
19 will do the same.

20 MR. PEEPLES: We will have the testimony
21 showing where they are.

22 JUDGE TOREM: I want to reassure Mr. Hurson
23 and the rest of the parties that as much confusion and
24 changes and other items that are possible when it comes
25 down to the hearing itself the same burdens of proof will

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1 apply, the same procedures will apply, and I certainly
2 don't expect it to be near as friendly as the Wild Horse
3 project came out to be. But this Council has to be
4 convinced as to what it's certifying if it's going to do
5 so or what it's rejecting if it chooses to do that and be
6 able to articulate those reasons to the very same governor
7 that approved the last project and was here to dedicate
8 that today.

9 So this Council still answers to the same
10 boss with the same standards. So all of the reasons that
11 you're suggesting, Mr. Hurson, that there might be delays,
12 if the Council doesn't think it can tell the Governor
13 enough to justify its reasoning one way or the other, it
14 will then set the hearing aside to ask for more time. If
15 it thinks it has enough information or can tell the
16 Governor that the parties didn't provide enough, then
17 Council will make that decision as well; but today isn't
18 the day to move the hearing dates or not.

19 Let's follow the process. If there is a
20 true discovery dispute to be resolved next week, I'll do
21 it according to the procedure in 790. It may be off by
22 another week. If that again impacts the reason to move
23 it, we'll deal with that when the time comes up. For
24 other parties present is there any other issues as to
25 witness availability, other issues that have come up now

Page 25

1 that you've had time to digest those hearing dates or
2 deadlines to get their prefiled supplemental testimony in?
3 I'm not seeing any from the other parties.

4 Mr. Lathrop.

5 MR. LATHROP: I would just simply indicate
6 that again the volume of the preemption request is such
7 that we certainly, I will be supplementing my testimony
8 and that of certain witnesses. The time frame is
9 certainly short. We too have an interest in seeing what
10 is disclosed through discovery and also what the
11 supplemental prefiled testimony the Applicant turns out to
12 be and have similar concerns as the County as to the
13 compressed time frames to be able to come up with what we
14 think would be adequate information to address those
15 items.

16 JUDGE TOREM: I just want to remind the
17 parties I don't think that these time frames as they're
18 set out were all that more compressed than the initial
19 round of filings, and if they're compressed at all, it's
20 due to what we call the supplement nature. So we've been
21 here at the cusp with the preemption request before. All
22 of us have been here before, and now we're back again with
23 some different information. I think the two binders that
24 we got that are sizable many of them are transcriptions of
25 what occurred in front of the Board of County

1 Commissioners. Many of you may have actually been there
2 first hand. None of us were. So we may have the hardest
3 job of all to get ready, and the Councilmembers have told
4 me to a person they're going to get ready for this
5 hearing. So as long as everybody else is pulling their
6 weight--I'm not suggesting anybody is not, but I know
7 we're all going to be belly aching. When we roll in in
8 mid September, if those are the dates, we all will have
9 worked very hard in the next eight weeks to make it
10 happen, and we appreciate that on your side of the table.
11 Trust us. We all have other things going on too and we're
12 focusing things down and saying this is it. This is our
13 calendar. It's not going to go away this time unless
14 there's a really darn good reason.

15 MR. LATHROP: If I might, primary to my
16 concern is similar to what Mr. Hurson was speaking about,
17 and that is the ability and the idea preemption is one
18 that revolves around a consistent application and a
19 consistent approach. The County is entitled to have and
20 consider an application and that is something that the
21 EFSEC board is equally entitled to have a review of
22 exactly what the County got; otherwise, we're talking
23 about apples and oranges. And we're confused because they
24 don't appear to be the same. And so to contest preemption
25 when there is lack of clarity on the consistency of what

1 was given to the County to be reviewed versus what you're
2 being asked to review that's the primary area of concern.

3 JUDGE TOREM: I understand that and
4 certainly it's something that will be subject to the
5 litigation on the couple of days when we talk about
6 preemption. We can't satisfy those discussions now, but I
7 appreciate you putting that out there.

8 Mr. Peeples, anything else from the
9 Applicant on this one?

10 MR. PEEPLES: I just want to point out that
11 except for 30 pages it was the County record. Everybody
12 has seen that in this room. So there's nothing new in our
13 request for preemption. A lot of the testimony will
14 merely be, much of it will be referring to things that
15 were provided to the County during the County hearings
16 process.

17 With regard to the number of turbines issue,
18 the corridors have been pointed out and what controls is
19 the setbacks. The setbacks control where we put it. We
20 can't move a turbine there and violate the setback. Okay?
21 There will be micrositing. There will be stuff happening,
22 but we cannot violate whatever the setbacks are. So the
23 setbacks will control not a point on the map. It will be
24 the setbacks.

25 JUDGE TOREM: All right. Other prehearing

1 filing issues? Apparently we do have to set and clarify a
2 date for the rebuttal testimony and, Mr. Peeples, you were
3 saying that should have been apparently August 29.

4 MR. PEEPLES: Do you have a map? Not a map.

5 JUDGE TOREM: Calendar.

6 MR. PEEPLES: Does anybody have a calendar?

7 MR. FIKSDAL: Yes, a very small one.

8 JUDGE TOREM: It looks like August 15 is the
9 date for the prefiled supplemental testimony that we're
10 discussing now, and you had suggested two weeks later
11 would have been the rebuttal.

12 MR. PEEPLES: Yes.

13 JUDGE TOREM: That would have been the 29th.

14 MR. PEEPLES: The 29th. Could we make it
15 the 31st? Can we make that the 31st instead of the 29th?

16 JUDGE TOREM: What's the day of the week
17 we're talking about?

18 MR. PEEPLES: A Thursday. I think for
19 everybody that two weeks for everybody to get rebuttal
20 testimony in is very short. It's short anyway. The
21 schedule is tight.

22 JUDGE TOREM: I don't think that necessarily
23 would affect supplemental opening statements so I don't
24 see any reason. Councilmembers, any discussion of the
25 position from the 29th to the 31st to slide that date?

1 Okay.

2 MR. LATHROP: And that's for all parties.

3 JUDGE TOREM: That would be for all parties'
4 rebuttal testimony. Chairman Luce and I were just
5 questioning if moving it to the next weekend would be any
6 better, but given the Labor Day weekend I think do it in
7 advance.

8 MR. PEEPLES: Yes.

9 JUDGE TOREM: None of your staff wants to
10 work that weekend so I'll do them this favor. We'll just
11 have it August 31. That's a Thursday deadline and add
12 that to the calendar that's presently on page 5 of 6 of
13 Council Order No. 820. The rest of the dates will stand.
14 There will be a flurry of activity right after the weekend
15 with the motions to strike any of the prefiled testimony.
16 That was no fun, but we will do it again if we need to.
17 Again, the hearings would start on the 18th as everything
18 stands now.

19 With that in mind, let's move to Item 5 and
20 hear from Mr. Peeples as to the process on scheduling
21 witnesses.

22 MR. PEEPLES: I thought we'd use the same
23 process. I would propose we use the same process as we
24 used before in Wild Horse and in this case. I don't think
25 we're ready to do that. We won't be ready to do that

1 until everybody's looked at everybody's testimony because
2 the key issue is who you're going to cross-examine and how
3 long. I think everybody did a good job when they sent it
4 out getting back to me. We won't be able to do--unless
5 there's disagreement, we won't be able to do that until
6 everything is there. I will send out though ahead of time
7 kind of once we get the witnesses I'll do a matrix like I
8 did last time. So we can get that out to everybody, but I
9 don't think people will be really able to do that until
10 the 31st.

11 JUDGE TOREM: Let me ask Mr. Tribble, last
12 time Mr. Lane worked with the Applicant to essentially
13 represent not all the other parties named but just overall
14 the people and the environment in scheduling the
15 presentation of the topics and working out and agreeing
16 with the Applicant as to who would be presented on what
17 days and which topics would come up, such as if it was
18 birds one day, if it was going to be bats another day, if
19 it will be something else. Preemption I think we've
20 agreed will be the first topic we take up and then the
21 rest of them can be set up in whatever order the witnesses
22 can be strung together. Council doesn't need to be
23 involved in setting that schedule. No one has expressed
24 to me strong preferences as to which date any particular
25 topic is taken up. We recognize that some witnesses

1 overlap from one or two or three topics, but the majority
2 would be scheduled by topic.

3 Mr. Tribble, would you be willing take on
4 the responsibility of working with Mr. Peeples and
5 Mr. McMahan to make sure that the schedule is set up? The
6 two of you set the agenda, if you will, and then make sure
7 that you communicate with the other parties so that when
8 their issue comes up it works for them as well.

9 MR. TRIBBLE: You mean all the other named
10 parties, not just the witnesses that we plan on putting
11 on?

12 JUDGE TOREM: Correct. We look at that
13 because many of these issues are environmental related and
14 although you may not be bringing the witnesses you work on
15 the schedule for the presentation because you may be
16 cross-examining or supplementing the questioning of those
17 witnesses. I want to make sure that Mr. Peeples--as much
18 as I would trust him to set up a schedule that's fair for
19 all, I want to also maintain the appearance of fairness
20 that another party that's everybody's party, if you will,
21 being the Counsel for the Environment, works with them to
22 do it, and Mr. Lane did that quite gracefully when we set
23 it up the last time.

24 MR. TRIBBLE: Yes, I have no problem with
25 that.

1 JUDGE TOREM: All right. Excellent. So
2 other parties if you have specific requests for time let
3 Mr. Peeples know, but I think if you will copy Mr. Tribble
4 on the e-mail as well, you'll know that your efforts are
5 in good hands; and even if you're adverse to the project,
6 you don't have to feel as though you're waiting I guess
7 the fox and the henhouse comes to mind that your issue is
8 set to some day which appears less important than another.
9 But Mr. Tribble will make sure that the appearance of
10 witnesses is equally fair or unfair for everyone as the
11 case may be.

12 Thanks, Mike, for taking that on. It takes
13 it out of the Council's realm and makes the parties work
14 together. That worked quite well when John Lane did it.

15 MR. PEEPLES: What I think we did last time
16 is we did group it by subject area, we circulated that,
17 and then people who had witnesses with problems on the
18 schedule got back and we rearranged people.

19 JUDGE TOREM: Because certainly we're going
20 to have enough to do with motions to strike and other
21 issues that come up in discovery, if we can have you and
22 Mr. Tribble be the point people on that, that takes one
23 thing off of our schedule and gets it done.

24 MR. PEEPLES: Yes.

25 JUDGE TOREM: Excellent. So that takes us

1 to the other issues. Are there any other issues today?

2 From the Applicant first.

3 MR. PEEPLES: No.

4 JUDGE TOREM: From the County, Mr. Hurson?

5 MR. HURSON: Just wanted to go back in
6 essence to make sure on the disclosure that Patti Johnson
7 made.

8 JUDGE TOREM: Yes, sir.

9 MR. HURSON: I'm deputy prosecutor. Patti
10 Johnson is the solid waste director for the County. She's
11 also the interim public works director right now because
12 our public works director is gone so I do have
13 communications with her on a fairly regular basis on these
14 things; so I want people to be aware of that.

15 In fact, I think it was yesterday or the day
16 before I was talking to her about a public works issue and
17 I saw the prefiled, and I basically made the suggestion to
18 her at that point in time that the prior contact with the
19 wind farm people needs to be brought forth, should I do
20 that or should you, and she said she wanted to do that.
21 So I just wanted that because that could be considered an
22 ex-parte contact also because we did--that was the first
23 time we ever talked about anybody related to a wind farm
24 application so I wanted that on the record.

25 I guess from a County perspective the one

1 thing I want to note, I want clear is one of the things
2 about all other alternative sites have been investigated
3 and rejected, and now I don't remember the exact words but
4 that concept, that is going to be part of our case.

5 JUDGE TOREM: I certainly would anticipate
6 that.

7 MR. HURSON: And I wouldn't necessarily need
8 Patti Johnson to testify because she had one conversation
9 with the developer, but I know that Mr. Piercy has also.
10 But if somebody sees that's a conflict and was going to
11 challenge her, then the County would need to know sooner
12 rather than later because we need to have someone on the
13 Council. Like I believe Chris Towne is no longer on the
14 Council except for this one and I assume that's for some
15 continuity of knowledge; and so if that is an issue with
16 Patti Johnson, the County would need to know very quickly.

17 JUDGE TOREM: Part of the purpose of putting
18 that on the record today was to make sure at the next
19 possible meeting that anybody that sees this as a need to
20 make a motion to disqualify her otherwise would make it as
21 soon as possible. It's out there today on July 12 as soon
22 as we could. If there is something, and again I've looked
23 at it and I discussed it with Patti, I don't see
24 something, but someone else may have a different angle on
25 it and they're welcome to bring that forward. We'll

1 consider it at that time.

2 MR. PEEPLES: I just want to say
3 categorically the Applicant is not going to bring that
4 forward. We don't think there's a conflict there, and
5 we're not going to do it.

6 JUDGE TOREM: Well, we'll let someone else
7 make that case.

8 MR. HURSON: Frankly, I just wanted to make
9 it real clear so there wasn't ambiguity. We don't need a
10 challenge a month from now.

11 JUDGE TOREM: You're not aware as County
12 counsel that there's any reason the County would be asking
13 for a substitute.

14 MR. HURSON: No. The only reason would be
15 if somehow based upon their testimony I believe it would
16 be necessary to have Patti called as a substantive
17 witness.

18 JUDGE TOREM: I imagine that would only be
19 in the case of clarifying what the discussion was or
20 something else; so, again, we'll leave that. If something
21 comes up and it needs to be aired out, we'll do it in the
22 appropriate forum.

23 MR. HURSON: Okay.

24 JUDGE TOREM: Anybody else with other issues
25 today procedurally for keeping us on track?

1 MR. FIKSDAL: Judge Torem, Allen Fiksdal,
2 staff. We are going to schedule a public portion of the
3 adjudicated hearings and our initial thought was to
4 schedule for the second week, and we wanted to ensure that
5 we didn't have to come back. Is this process going to
6 last more than one week? Should we schedule the public
7 session for the evening during the first week or the
8 second week? We want some sense that nobody thinks that
9 this is going to end after three days, and we may have to
10 come back the next week just for the public hearing.
11 Should we schedule the first week or the second week?

12 MR. PEEPLES: I would schedule it the first.

13 CHAIR LUCE: The first week and if we have
14 to come back, we have to come back.

15 JUDGE TOREM: I would almost suggest that
16 we--my observation from watching what's gone on in the
17 newspapers here and what our experience was in the Wild
18 Horse project is that we really had much of a love fest
19 with Wild Horse and as much as people wanted to turn out
20 most of what they wanted to have said about the Wild Horse
21 project had already been said and become part of the
22 record and therefore very few people spoke at that public
23 hearing. It was quiet.

24 I don't think we're going to have that this
25 time around, Mr. Fiksdal. There's a lot more people that

1 want to be heard. Even if they're heard a second or third
2 time as part of the record, they'll be happy to do that I
3 get the drift here. I would suggest we schedule an
4 initial public hearing one night and arrange a carryover
5 if it's necessary because comments that were made to me
6 today in passing at the Wild Horse celebration was that
7 some of the County process ran quite late and folks that
8 had signed up to speak felt based on the hour that rolled
9 by, although the Board of County Commissioners was willing
10 to sit longer, they couldn't stay longer for a variety of
11 reasons, and that we might need two nights the first week.
12 And if we need additional, if we're still here the next
13 week, we leave ourselves room for error.

14 MR. FIKSDAL: Thank you.

15 JUDGE TOREM: So that would be my
16 suggestion.

17 Mr. Peeples, you concur?

18 MR. PEEPLES: Yes, I can.

19 MR. HURSON: Yes, there were two or three
20 nights of testimony and I think we stopped before 11:00.

21 JUDGE TOREM: My suggestion would be we
22 schedule on two nights conditionally.

23 MR. FIKSDAL: Could I ask, Mr. Hurson, is
24 the County Commissioners going to meet on Tuesday? Is
25 that their normal meeting?

1 MR. HURSON: Their normal meeting time is on
 2 Tuesday afternoons.
 3 MR. FIKSDAL: So Tuesday evenings would be
 4 okay or Tuesday and Wednesday or Wednesday and Thursday.
 5 There's nothing to conflict with the County.
 6 MR. HURSON: The planning commission has
 7 night meetings on Monday and Tuesdays and then you might
 8 run into the Ellensburg--
 9 MR. FIKSDAL: We will try to schedule
 10 Wednesday, Thursday then.
 11 MR. HURSON: Okay. Because Ellensburg is
 12 going through the conference of planning review process
 13 which is causing a lot of public input; so there may be
 14 some people that have conflicts.
 15 JUDGE TOREM: So, Mr. Hurson and Mr. Piercy,
 16 if you will check the County calendar for Wednesday the
 17 20th and Thursday the 21st for evening sessions, one or
 18 both of those, and let Mr. Fiksdal know that may be part
 19 of the schedule if people want to start rounding up the
 20 troops those would be the evenings to pencil in.
 21 MR. PIERCY: Darryl Piercy for the record.
 22 I can essentially say that there's no land use issues
 23 pending for either of those nights so there would be no
 24 public hearings schedules.
 25 MR. FIKSDAL: Thank you.

1 JUDGE TOREM: Okay. Ed Garrett.
 2 MR. GARRETT: Ed Garrett from ROKT. I
 3 assume these are going to be open hearings for the public.
 4 The concern I have in putting them on two different nights
 5 is for most people the public they want to have a total
 6 picture of the information before they respond, and to
 7 have one public hearing early on when not to much has been
 8 decided already and then come back and have another one is
 9 one issue I request to have it just done at the end where
 10 everybody has a total picture. They can make up their
 11 minds, their comments, and get it on the record because
 12 everything is out there.
 13 If you go do two of them, unlike what has
 14 happened with us in the county, is that once you sign on
 15 the list to speak for the first night, you come back on
 16 the second night to listen and all of a sudden you want to
 17 comment on something that was in the night before, you're
 18 not allowed to speak. So I would assume you're going to
 19 have two open hearings, do one earlier and one later, but
 20 then people who still want to speak again they have that
 21 opportunity.
 22 JUDGE TOREM: I can't promise you what the
 23 format will be. The interest will be to make sure that
 24 the due process concerns of an open meeting are served,
 25 that we're able to hear from everybody, but let me

1 reassure you as I did the folks that spoke early on at the
 2 last public hearing and because we had time could get back
 3 up to clarify, there's always the opportunity to send in a
 4 written comment to round out comments or make sure.
 5 The Council did a great job with Kittitas
 6 Valley on early items on making sure everybody was heard.
 7 They did a great job with Wild Horse in reviewing all the
 8 written comments that came in after the hearing. Again,
 9 we can't predict where the adjudication will necessarily
 10 be when we hold these, and it's not a comment on what's
 11 happening at the adjudication per se as on what the
 12 application and other environmental documents say.
 13 Believe it or not it's harder for the Council, it's the
 14 hardest for the Council to get everything reigned in when
 15 it's all submitted, but we do have to close the door at
 16 some point. Our job is to find the fairest way to do that
 17 and trust me we'll try to do it.
 18 Other parties anything else today?
 19 All right. Seeing none, Council, is there a
 20 need right now to set a next prehearing conference?
 21 Maybe I should direct that to staff. Does
 22 the staff think we need to meet again on a formal basis
 23 right now and schedule something?
 24 MR. FIKSDAL: Prior to the hearing beginning
 25 on the 18th?

1 MS. MAKAROW: I think we might. Maybe we
 2 can do a check-in at the end of next week when Judge Torem
 3 has his conversation with the parties regarding the
 4 discovery issues.
 5 JUDGE TOREM: Right now I don't think
 6 there's a need to schedule anything. I'm not hearing any
 7 demands. It may be helpful sometime after September 8
 8 after the motions to strike or September 11 after they're
 9 issued to have one more let's check in and hear if
 10 anybody's got sick or ill on the witness schedules and
 11 know if we need to put them by telephone in an emergency.
 12 We know that today is probably the best phone day we've
 13 had for an EFSEC procedure in Ellensburg. It hasn't been
 14 this pretty where folks have been on the line and been
 15 able to participate and not do it, and when the bigger
 16 meetings come it gets harder.
 17 So right now we won't schedule one. If
 18 something comes out of discovery and it turns into a true
 19 dispute and it can't be resolved without the other
 20 parties, we'll let you know. If we do issue a ruling on
 21 discovery, everybody will get a copy of it. Again, if you
 22 individually have an issue with discovery look back to
 23 Order 790 and follow those procedures, but send your
 24 e-mails in and we'll get cooking from there.
 25 Parties, Councilmembers, anything else?

1 All right. Then we are adjourned at five
 2 minutes to 5:00.
 3 * * * * *
 4 (Whereupon, the prehearing conference was
 5 adjourned at 4:55 p.m.)
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 5 AFFIDAVIT
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 7 I, Shaun Linse, CCR, Certified Court Reporter,
 8 do hereby certify that the foregoing transcript
 9 prepared under my direction is a true and accurate
 10 record of the proceedings taken on July 12, 2006,
 11 in Ellensburg, Washington.
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 15 _____
 16 Shaun Linse, CCR
 17 CCR NO. 2029
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