

**Draft MINUTES
ENERGY FACILITY SITE EVALUATION
COUNCIL OF WASHINGTON
May 3, 2004 Meeting**

925 Plum Street S.E., Building 4, Room 308
Olympia, Washington, 1:30 p.m.

ITEM 1: CALL TO ORDER

CHAIR LUCE: The Washington State Energy Facility Site Evaluation Council meeting for Monday, May 3, 2004 will come to order. The clerk, that is the manager and the clerk will the roll.

ITEM 2: ROLL CALL

EFSEC Council Members

**Community, Trade & Economic Development
Department of Ecology
Department of Fish & Wildlife
Department of Natural Resources
Utilities and Transportation Commission
Chair**

Richard Fryhling
Hedia Adelman
Chris Towne
Tony Ifie
Tim Sweeney
Jim Luce

MR. FIKSDAL: The Chair is here, and there is a quorum.

OTHERS IN ATTENDANCE

EFSEC STAFF AND COUNSEL

Allen Fiksdal
Mariah Laamb

Ann Essko, AAG
Shaun Linse, Court Reporter

EFSEC GUESTS

Bill LaBorde – Northwest Energy Coalition
Darrel Peeples – Kittitas Valley Wind Project
Mike Robertson – Intervenor for Kittitas Valley
Wind Power Project (via phone)
Cindy Custer – BPA

David Reich – Ecology
Lauri Vigue – WDFW
John Lane – CFE for Kittitas Valley Wind
Power Project
Charles Carelli – Independent Contractor

NO. 3: ADOPTION OF THE PROPOSED AGENDA

CHAIR LUCE: We have the matter of the adoption of the proposed agenda. Has the Council had an opportunity to review the proposed agenda? Are there any changes, additions, or requested deletions? Hearing none, the agenda as proposed is adopted. We have information updates with respect to –

ITEM NO. 4: APPROVAL OF MINUTES

MR. FIKSDAL: Mr. Chairman, may I interrupt before. I should have noticed we do not have on our agenda the minutes of any last meeting. We do have three sets of minutes in your packet if you wish to take notice of them now or if you might want to wait. It's up to you.

CHAIR LUCE: If it's up to me, let's go do it right now. We have within our packets the minutes of March 15, 2004 Special meeting and April 22, 2004; two special meetings on April 22, 2004 and on March 15, 2004. Does anybody have any comments, corrections, additions to those minutes?

MS. LAAMB: On the April 22 meeting that noticed that we had Shaun Linse earlier than when she actually arrived, so we will take those out on for the finals.

CHAIR LUCE: All right. I'm not going to abstain from the April 22, meeting, since I wasn't there. It seems like that would be appropriate. First, let's have approval of the March 15 special meeting minutes.

MR. IFIE: So move.

CHAIR LUCE: Second?

MS. ADELSMAN: Second.

CHAIR LUCE: All in favor say aye.

COUNCILMEMBERS: Aye.

CHAIR LUCE: The Chair will abstain from the April 22, 2004 special meeting minutes.

MR. FIKSDAL: If I may, Mr. Chairman, there is one that's in pink and one that is in green. I think you want to take each one. One was the special meeting at the fairgrounds.

CHAIR LUCE: Let's start with the 10:30 a.m. meeting, the green sheet.

MR. SWEENEY: You might want to capitalize John Lane.

MR. IFIE: I move that we approve the green or the 10:00 a.m. on April 22 or 10:30 April 22, 2004 special meeting.

MS. ADELSMAN: Second.

MR. IFIE: It has been moved and seconded; therefore, we approve the April 22, 2004 special meeting. Any objections to the approval? Hearing none, it stands approved. You want me to take the next one? We have before you the April 22, 2004 meeting that started at one o'clock. Any comments or questions, corrections? Hearing none, do we have a motion to move to approve?

MR. FRYHLING: So moved.

MS. ADELSMAN: I second.

MS. TOWNE: I have a question, and I think I noted it when I went through the draft. On the EFSEC guests this was our tour, and we convened at the Home Arts Building and then immediately climbed into our vans. And to my recollection Fiedler from Bonneville and Kurz

from Fish and Wildlife and others were not with us. It was a fire district person. And I think I went through and noted.

MS. LAAMB: I verified these with Irina, and she said all those individuals in question were also present.

MS. TOWNE: They didn't go on the tour.

MR. FIKSDAL: They were there right at the beginning, but they didn't continue. I don't know how you we want to do that.

MS. TOWNE: I'll leave it up to you.

MR. IFIE: Is that a correction or just let it go?

MR. FIKSDAL: I think we should note that some of those people in attendance may not have attended the tour.

MR. IFIE: So the minutes will read as modified by Allen Fiksdal. So do we have a motion to approve?

MS. TOWNE: So moved.

MR. SWEENEY: Second.

MR. IFIE: So the April 22, 2004 special meeting that started at 1:00 p.m. is now approved. I will give control of the meeting back to our Honorable Chair.

CHAIR LUCE: Honorable? I think I'm at Sumas all of a sudden again for Counsel for British Columbia anyway. Those of us that lived through Sumas will have to understand honorable.

ITEM NO. 5: PROJECT UPDATES

<i>Kittitas Valley Wind Power Project</i>	<i>Allen Fiksdal, EFSEC Manager</i>
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CHAIR LUCE: Project updates. Irina is on holiday I believe.

MR. FIKSDAL: She's at BPA at an important meeting talking about the BP Cogeneration Project and BPA.

CHAIR LUCE: That's certainly not holiday.

MR. FIKSDAL: I'll take over.

CHAIR LUCE: All right.

MR. FIKSDAL: In your packet there's a white sheet with the title May 3, 2004 Council Meeting of Kittitas Valley. These are her notes regarding the meeting. I could highlight them or you could just read them at your leisure, whichever is your wish.

MS. TOWNE: Thank you for the response, Mr. Fiksdal.

CHAIR LUCE: All right.

MS. ADELSMAN: We'll just read them at our leisure.

CHAIR LUCE: Leisure works.

MR. FIKSDAL: I just might note that there is some information about the release of some cultural resource information. There's a description and a letter that we sent to the Colville Tribe explaining what happened and attached also is a letter to Chris Taylor regarding the same issue.

MS. ADELSMAN: Allen, it may be good to spell out OAHP because we haven't said it in the document.

MR. FIKSDAL: I'll give a brief explanation. In the Kittitas Valley Project in the application there was some identification of some cultural resources that the Office of Archaeological and Historic Preservation and the tribes were concerned that were being released to the public. And we took efforts and means to take that information off our website, and so it wasn't available

anymore, and that activities were taken to ensure that these sites had not been disturbed based on that incorrect release of information. And it has not been disturbed, and therefore I think we're on good grounds; although, we do apologize to the tribe about that incident.

<i>Wild Horse Wind Power Project</i>

<i>Allen Fiksdal, EFSEC Manager</i>

CHAIR LUCE: Thank you. That covers the Kittitas Valley Wind Power Project. Wild Horse do you have some comments?

MR. FIKSDAL: I don't have comments other than I think that most of the Council was over in Ellensburg at the public information and land use hearing, and they did take a tour of the site and it was nice weather.

<i>BP Cherry Point Project</i>

<i>Allen Fiksdal, EFSEC Manager</i>

CHAIR LUCE: Anything regarding BP Cherry Point?

MR. FIKSDAL: No, other than they're still working with or we're working with EPA on some air emission issues. I think the last I heard they were still working on trying to get through it.

ITEM NO. 6: EFSEC OPERATIONS

<i>Update</i>

<i>Allen Fiksdal, EFSEC Manager</i>

CHAIR LUCE: EFSEC operations.

MR. FIKSDAL: In your packet there should be a purple sheet that says draft draft draft. This is EFSEC's non-attributable work policy. This is ongoing in your development of a policy regarding what is attributable or non-attributable work activities. You saw most of this at your last meeting; although, I have on the back side is the draft policy that I had suggested that we might start looking at. It says draft policy April 19. I've revised that to another draft policy entitled May 3, which I think a little bit better defines it. According to your schedule you're going to try to develop the draft policy this month and adopt it in June.

CHAIR LUCE: All right. Any questions from Councilmembers? You'll recall that we need to report back to the Senate Energy Committee on this during legislative weekend which I believe is in September, September 18.

MR. FIKSDAL: I don't know the date in September at this time. I guess if you have any comments and think of suggestions for changes to words, direction, or anything, I would be more than happy for you to submit, email me, or knock off what you think or just whatever you want to do.

MS. ADELSMAN: Can we assume this is the draft policy that we would be looking at, Allen?

MR. FIKSDAL: I think the draft policy of May 3 is my suggestion right now, and it's up to the Council to consider that, if you think it's in the right direction or not or whatever. It was just something to start you working and thinking about.

MS. TOWNE: Allen, help me. You say charge non-attributable work funds designated to those types of activities, if funds are available.

MR. FIKSDAL: Right.

MS. TOWNE: It is my understanding there is no such funding available at this time.

MR. FIKSDAL: That's correct.

MS. TOWNE: That part of the policy is prospective in application if we come up with some funding.

MR. FIKSDAL: That's right. I think the Council, you know, based on what the development on your policy the Council will look at asking for funds, those types of funds in the next biennium,

so I wanted to capture if that policy continues or if we get some money in the interim. But it recognizes that there could be some funds for that type of activity.

MS. ADELSMAN: Allen, how are we going to determine the percent? Is it going to be different from one --?

MR. FIKSDAL: Well, that's a good idea. I was looking for some direction here. If that's a way to go or you may say minimal or at one time I brought forward what's the term that the state uses for use of phone? Deminimus.

MS. ADELSMAN: Deminimus.

MR. FIKSDAL: If we're going to do this or if there is the decision is it a certain percent? How do you measure? How do you gauge? Is it a little bit or is it a lot? What's the right word?

MS. ADELSMAN: Given that a lot of the costs is my understanding that is not attributed to really the work that we've been doing on the rules; is that correct?

MR. FIKSDAL: Yes.

MS. ADELSMAN: Is there a way to project say once we adopt the rule in July, August; is there a way to then project how much really we think when we have non-attributable costs?

MR. FIKSDAL: That's going to be the big question is how much activity and what type of activity is the Council going to be involved with. I think if you turn back to the front page and look under other or rule making, I think we all are pretty sure that's going to be complete very soon. We're not spending a lot of time. Conferences, if there's a conference is that one percent or a half a percent? A couple of hours a week is half a percent or something like that. Other public information, coordination on transmission line and liquid natural gas siting that's going to be some issues that are coming up that we're going to have to spend some time on or we think we should be spending time on. At least I think we should be spending some time on. But, again, it's not directly related to any specific activity. So how much is that going to be, an hour a week, two hours a week, three hours a week? You know, between Jim and I and any of you. I think that's something we're going to have to figure out pretty soon. You know, less than five percent. You know, I'm thinking less than five percent, but that's a ball park.

MS. ADELSMAN: Okay.

MR. FIKSDAL: Now, this is basically mostly just staff time. I mean the staff time. It doesn't cover rent. It doesn't cover telephone. That should be attributable I believe. We have to have an office. We have to have telephones. Those are costs that the applicant and certificate holders should bear, so it's this non-attributable extra work outside of the normal -- I shouldn't say normal functions. Depends on what you define as normal. But the discussions with the public, talking about future activities, and whatnot. I should think that's less than five percent.

MR. IFIE: It seems to me that the overhead should be covered here somehow. I mean at least talking about if it's not included, it's not attributable. That should be stated upfront, so there's no question.

MR. FIKSDAL: Okay. Well, we have another meeting. You can think about it, and I suggest at our next meeting try to finalize.

CHAIR LUCE: It seems to me picking a percentage, whether we pick a percentage, if we pick a percentage, it's going to be a little bit of a most reasonable estimate.

MR. FIKSDAL: Right.

CHAIR LUCE: Because we don't have the codes to go back and fall on to determine with precision what most reasonable estimates would be. Let me just ask a clarifying question. Are we going to have those codes in the future to determine a better reasonable estimate?

MR. FIKSDAL: We will have a code if we can charge to it.

CHAIR LUCE: Let me ask it differently then. Would we have codes in the future that we could look at that we could charge to?

MR. FIKSDAL: If we had money. I'm sorry. I'm going around in circles, but technically you've got to have money.

CHAIR LUCE: Hypothetically if the legislature gave us five percent. Okay?

MR. FIKSDAL: Right.

CHAIR LUCE: Would we then have codes which we could charge to?

MR. FIKSDAL: Yes.

CHAIR LUCE: Then on sort of an annual true-up basis, we could charge to those codes and determine on sort of a lagging basis, you know, on an annual basis go back and look at and see was it really five percent? Well, maybe it was a little more. Maybe it was really less. So you will get there. It just won't be the first year out because we don't have the data with any level of precision that we need right now.

MS. ADELSMAN: How many dollars are we talking about if it's five percent?

MR. FIKSDAL: I think it's in the 10s and 20s of thousands. Well, no, it should be more than that. Maybe it could be a hundred thousand a year.

MS. TOWNE: By a year or biennium?

MR. FIKSDAL: A year. It depends. Again, we're going to be asking for some money, or if we ask for some money, you want to have enough to do something. You don't know what the projected work load actually is really going to be. The issue though is once you have the money. I think I have some reservation about an exact percentage. It's easy to write; it's easy to figure. But there are some words that would be better for a more policy oriented. Should be minimal; shouldn't be -- I don't know if there's some wordsmithing that you could use. I'm sure looking for some recommendations of something other than a percent. Come up with a better term somehow.

CHAIR LUCE: Well, let's put our thinking caps on for the next meeting. All I'm trying to suggest is there's no precision the first year out. It looks like there could be more precision in out years.

MR. FIKSDAL: And I'll try to put together some information of what the budgets and percentage wise, what the amounts may or may not be in our budget.

MR. IFIE: The only question I have is don't we have some legal issues that are not quite settled on this policy? Are we proceeding based on an assumption or by interpretation? Because I remember one time we were saying, well, you know, maybe we will. We're doing it for a legal way to go. And, you know, there's no -- and then we said, well, maybe, you know, different parties can take different interpretation. I feel like the pendulum is slowly swinging to the point where I'm saying maybe the way we were doing it before is definitely not right. Now the new interpretation is that the right way is to look for additional money, and people keep swinging. Maybe it didn't stop yet. Maybe it's going to swing to the point where the general fund should fund it, all of EFSEC activities. So my point is how we determine it? How is this pendulum swinging, and what is contrary to our swing? Is it based on legal interpretation? Is it based on pressure from applicants? So where are we going with that? It seems to me like we should have a debate on what is the basic foundation of this policy, so before we start building it that we come to the foundation of the policy. I was wondering if you take that once step further, you could say, "Okay. Let's have the issue framed. It demands that we come to a landing point with regards to the pendulum swing. Where do we want to end? Are there any others based on some strong feeling and conviction?"

CHAIR LUCE: Okay. Let's do that at the next meeting. It would be a great idea.

MS. ADELSMAN: It's similar to what Tony is bringing up because if I remember, I think some of the legal interpretation is we may not be able to charge some of the non-attributable. So the second sentence if such are not available are we actually thinking legislative or are we just saying that our interpretation is there's a level of non-attributable that we could go ahead and charge? It means it's a similar question to what Tony is asking.

CHAIR LUCE: I think what we -- permit me. I think what we did earlier was have quite a discussion about this issue, whether it was directly attributable or not directly attributable. I think we had this discussion, and, Ann, help me out regarding the legal issues. What we haven't done is asked for formal legal opinion. What we have done instead, and what we did before the Senate Energy Committee is to say let's not try and resolve this by writing a legal opinion. Let's just recognize that there are certain activities that we carry on which as a matter of policy we will recognize are not directly attributable to project activities, either in the licensing process or the monitoring process, and therefore as a matter of policy, not law we will list those activities, which we have done here on this page. And then as a matter of policy we will request funding either through the general fund or seek funding from other means. So rather than try to attain a final legal opinion from the Attorney General's Office or anywhere else we have accepted the fact that there are certain activities which may not be directly attributable. So I think that that's the sum and substance of it. I think we had quite a discussion about this earlier.

MS. ADELSMAN: I understand. I agree with you, and I think we discussed this. My only question is when you say if such fund, then we to some degree a little bit are contradicting ourselves in the sense of saying, yeah, there's some activity that are not, cannot be charged, but if we don't get the money, some of us will be charged, and it's X percent. Or what you're saying is maybe they're deminimus. So all I'm saying if we're saying, no, we cannot charge, then even five percent would become a problem. I don't know.

CHAIR LUCE: We could have that discussion. My assumption is if we don't get funds to these activities, they will not be done period. We will not pick up the phone and answer inquiries from the public. We will not talk to the press. We will not go to the legislative sessions, period.

MS. TOWNE: I agree with that interpretation, Jim, but then why do we need the sentence that begins with, such funds are not available?

CHAIR LUCE: That's what Hedia raised, and I'm looking at that now for the first time. I'm just saying that we told the committee in our testimony that if these funds are not forthcoming either from a general fund or otherwise, and we've identified them as being not directly attributable either to applicants we're not going to do them. It just ain't going to happen.

MR. FIKSDAL: But I think the issue is that we've got almost 18 months before the next biennium.

CHAIR LUCE: That's true.

MR. FIKSDAL: So this is a policy from now on.

MS. ADELSMAN: They supplement it.

CHAIR LUCE: That's correct. This is prospective.

MS. ADELSMAN: We should try a supplemental proposal.

MR. FIKSDAL: It's already gone. We're done.

CHAIR LUCE: The supplemental has come and gone.

MR. FIKSDAL: There's nothing more.

CHAIR LUCE: So we're looking at 2005, Hedia.

MS. ADELSMAN: And I'm not against it. I'm just kind of questioning. It seems like the message is a little bit either we stay silent or we -- I don't know.

CHAIR LUCE: I understand what you're saying, Hedia.

MR. FIKSDAL: Again, I'm looking for help in wordsmithing.

MS. ADELSMAN: I know. I know. It's not easy.

MS. TOWNE: There's nothing you can say. Either it is or it isn't.

MR. IFIE: I'm not saying we should ask for an Official AG rule. All I was saying was that EFSEC has it seems a way of exercising some liberty in making an interpretation of the law right now, and so we need to settle on our interpretation, so the pendulum doesn't swing back and forth.

MR. FIKSDAL: Well, I think what I'm looking for is where do we go from here on the next 18 months? And then based on that, on some of that what our level of involvement is, and then we can ask for money in the next biennium. But I've got to put in a budget very soon.

MS. ADELSMAN: Allen, any possibility now that the rules which really are the biggest, most expensive part are behind us, any possibility of sitting down with key like maybe seven and then working on something temporarily until the next budget? And, you know, a couple thousand or if it's actually 150 is really not that much money to really address pending any action and see whether there's anything that could be worked out.

MR. FIKSDAL: That's an idea.

MR. IFIE: Jim, so the point what you were saying that we should probably discuss this issue a little bit next time? Are you still thinking of that?

CHAIR LUCE: I think we've discussed this issue quite fully, but we can discuss it some more next time if you would like to.

MR. IFIE: I think I would like to because I don't think we've really -- the last time we discussed it we had different comments that were diabolic. Is that word accepted? That were opposed to each other. They weren't to one result. I mean there were comments coming from here, from there. They were all hanging. I feel like we have a fragment situation, so we need to land on something. So that would give better direction I believe to Allen, as well as give signals to our stakeholders as far as in the direction that we're going. Just to give an example, I remember one of the comments we got last time was that only activities that are directly connected with the monitoring, even overhead shouldn't be included. You go with some narrowing interpretation. It should only be activities that are directly related to monitoring for certificate holders and therefore applicants, activities that concern the application process. So if you use that narrowing down, that's one extreme or another interpretation. The other extreme is that the applicant should carry all costs. So we need to land on something. I don't feel like we've really landed on anything. If we could discuss this and come to a landing point next time, I think that would be helpful.

CHAIR LUCE: Maybe in the interim could you review the testimony that Allen and I offered at the Senate Energy Committee. I know you were there. Maybe it might help if you go back and reread what we said there because I think we addressed a number of those issues at that time.

MR. IFIE: It seemed like the discussion there seemed to begin with an assumption. That is a big, big problem. So all I'm saying is that the basis of the problem should be clearly delineated. That's where I am coming from.

CHAIR LUCE: Okay.

MS. ADELSMAN: So are we going to put it back on the agenda for next time so we could have more discussion?

CHAIR LUCE: I guess we are. In the interim I would suggest that if individual Councilmembers have questions that they contact Allen and/or myself and let's try to have some of these discussions one on one, if you have questions. I am more comfortable with where we have come than obviously perhaps Tony or Hedia are.

MS. TOWNE: Right.

CHAIR LUCE: Are you uncertain as well?

MS. TOWNE: I read what's on the first page as a strict interpretation of 071. If they're not attributable, they should not be charged to the accounts, and that is in deminimus amount or demaximus amount. It's either legal or it's not legal under 071, and I say it's not; therefore, we should stop doing it unless somebody can find some money. And unless and until someone comes up with funding, then the activity should be terminated.

MS. ADELSMAN: Mr. Chair, I don't think it's a matter of not being informed. I heard on TVW the whole testimony and the discussion and so on. I think we're discussing the policy not lack of information. So I kind of to some degree object to the idea that we need to go and get ourselves a little bit more educated before we discuss this. I think we're aware of that. I'm just bringing an issue of contradiction in what we say. What we heard last time the attorney from Cherry Point was very clear. Her interpretation is even more strict than monetary. She made a statement that the law is very clear that it's only certain things that are attributed, so she raised it in the last meeting. So we're just reacting to the proposal in front of us. It's not that we're not trying to solve the problem. We're just raising the issue that I don't know if this language solves.

CHAIR LUCE: Let me just restate what I thought and then let's move ahead. What I thought was that this policy was prospective for 2005. If it is to apply today, if it is to apply today, then we won't go to meet with the Senate Energy Committee on this issue in September, and I will write a letter to Senator Morton and respectfully decline his request to appear before him on the basis that we have -- or else what I will do is take a day of leave, and I will tell the Chairman that I'm here on annual leave today to appear before him. Allen will no longer answer the phone for anybody who calls him on general EFSEC business. And we can do that. Okay? We can do that. I think we probably ought to check with the Governor's office before we do it and maybe CTED. That might be a pretty good idea because they might want to question us. So the question is, are we going to put this policy in effect today with whatever the ramifications of that are today? I had thought this policy was prospective beginning in 2005 biennium. As prospective of the 2005 biennium I'm fine with this policy. I'm also fine with putting it in effect today, but I think we need to run a few bases and make sure that people know we're going to do this because it will have some pretty significant ramifications. I don't think there is anymore money around right now, \$100,000, \$50,000, \$150,000, whatever it is to go do this. But let's all put it down for another round of discussion at the next Council meeting.

MS. ADELSMAN: Just a question. When you said 2005, that's July 1, 2004, whatever the next budget says.

MS. TOWNE: No, July 1, 2005.

MS. ADELSMAN: So that would be fiscal year 2006.

MS. TOWNE: Yes.

CHAIR LUCE: Whatever the next budget cycle is.

MR. IFIE: All I'm saying is that the policy pretty much we need to give some basis to make sure that the bases are all agreed to by all the relevant parties. So that when we do a policy, it will be based on a good foundation.

CHAIR LUCE: That's fine. Let's do that.

MS. ESSKO: One cautionary note is that discussions about this policy need to take place in a public forum. This is covered by the Open Public Meeting Act, so there should not be any emails or conversations on the side about this policy, including questions to Jim.

CHAIR LUCE: So I can't talk to the Councilmembers about this issue.

MS. ESSKO: The discussions about this have to take place in a public meeting, and we can talk about what the implications are of that. We've talked about what the Open Public Meeting Act requires.

MR. FIKSDAL: It's past two o'clock. We need to get to our hearing. Okay.

CHAIR LUCE: Is it a hearing or meeting?

MR. FIKSDAL: It's a meeting or whatever you want to call it.

PUBLIC COMMENT MEETING ON PROPOSED REVISED RULES

<i>Rules Review Discussion</i>	<i>Allen Fiksdal, EFSEC Manager</i>
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CHAIR LUCE: We are going to have a meeting. It's now five after 2:00. We're having a meeting. We're going to take comments on our draft rules, proposed draft rules on the list on the website. The proposed draft rules have been sent to the Code Reviser. I think comments are appropriate, and the proposed draft rules were available and are -- I see green out there on the table -- are still available outside on the table. Specifically I think we are going to listen to any comments that anybody may have to offer with respect to the need for power standard as contained in the draft rules.

MS. TOWNE: Jim, I have a question for clarification before we commence.

CHAIR LUCE: Yes.

MS. TOWNE: We put on our website the draft that we submitted to the Office of Typing Services, and they returned their conformed version of our proposal to them, submittal to them which is now in the green form.

MR. FIKSDAL: No.

MS. TOWNE: No?

MR. FIKSDAL: Yes, let me back up. This is what we submitted to OTS, the Order Typing Service at the Code Reviser's office, this green sheet. This is what's on the website.

MS. TOWNE: I'm sorry. I'm sorry.

MR. FIKSDAL: This is what we are looking for people to comment on.

MS. TOWNE: Our draft.

MR. FIKSDAL: This is our draft. This is EFSEC's draft. We submitted this to OTS. The green sheet is what we submitted to OTS. We did this week. I just haven't had a chance to talk to Jim about it. We received the OTS version back, and we have been going over it line by line to ensure that this version or the OTS version matches what we sent them; that they didn't make any mistakes, and that's what we have. And I've gone through them, and there are some mistakes and some corrections that need to be made on the OTS copy.

MS. TOWNE: When that process is completed, should the OTS version go on our website in lieu of our version that we submitted to them?

MR. FIKSDAL: Correct. Yes. Once we get the final back from OTS based on maybe comments we hear today, some of the errors that we've seen in their version, we will get that back from OTS. We will put those on our website, and that version will go with the CR 102 for public comment. That will be the official final version for public comment. These are pretty

close to what I've seen back from OTS. There are some numbering issues that we missed in this green version. There's a couple A, B, C, Es. We forgot D in this, and some other kind of numbering things. There's a couple places where it says instead of on, or on instead of, a few of those things. A couple missed parenthesis and whatnot. There's a couple places that I still want to talk to Ann about, some issues about some citations. But otherwise these are I think pretty close to what the Council's final version is going to be, and that's why I think it's appropriate to hear comments on substantive issues. The issues that we are going to send back to OTS I don't believe are going to be substantive issues unless there's some testimony today that causes you to want to change one or more of these rules. So with that background, you want to call for public comment?

CHAIR LUCE: I have called for public comment. Public comment is now open.

MR. FIKSDAL: Anybody want to get up? Don't all jump up at once.

MR. LaBORDE: A couple quick statements.

CHAIR LUCE: Sure.

MR. LaBORDE: Chair Luce, Members of the Council, for the record, I'm Bill LaBorde representing Northwest Energy Coalition. Northwest Energy Coalition founded in 1980 is an alliance of more than 100 environmental, civic, community service organizations, utilities and businesses from Washington and the other northwestern states. We promote energy conservation and renewable energy resources, as well as consumer and low income protection. The Energy Coalition participated in and contributed to the rule making process, particularly with regard to the regulation of greenhouse gases since the rule making commenced with the Krogh-Leonard process.

First, we want to thank the Chair and Councilmembers for including Energy Coalition as a prominent stakeholder in the rule making process, and although the legislature has resolved the CO2 mitigation issue, for now we do have some remaining concerns with the draft rules. Those generally fall into two sections of the rules. The first is the need for power. The Energy Coalition firmly believes that requiring applicants to meet a need standard is consistent with the Council's mission to balance demand for energy facilities with broad interests of the public as stated in RCW 80.50.010. EFSEC can best balance the interest in providing abundant power with minimal impact on the environment surrounding communities and public health and health interest by requiring the applicant to demonstrate the need for new facilities, especially those facilities which have a detrimental impact on the environment.

Secondary is certificate expiration. As carbon offset markets rapidly develop and prices likely escalate in the next ten years, allowing developers a ten-year build window will provide an enormous loophole for developers trying to evade the responsibility to mitigate the global warming pollution as now required by statute. We therefore would urge the Council to adopt a shorter build window. Five years is our suggested period of time, and we may have some further points that we would like to submit by writing. But those are the two big areas we have concerns about in the draft rules.

CHAIR LUCE: Thank you.

MR. FIKSDAL: Can I ask a question?

CHAIR LUCE: Let's have Councilmembers ask questions.

MS. ADELSMAN: I think the question that I have is did we set up a deadline for when we're getting public comment?

MR. FIKSDAL: No.

MS. ADELSMAN: Okay. Because you were suggesting that you're going to submit them before we go out to the hearing; is that correct?

MR. LaBORDE: Although, the other areas we have to comment it would probably be more appropriate to just submit those comments as part of the 102 process.

MR. FIKSDAL: I think the schedule that we have is that we're attempting to try to go out with CR 102 the final rules near the beginning of June or June sometime, so prior to that we need it. The sooner the better obviously.

MR. LaBORDE: Sometime in May. The next couple weeks we can get something in.

MR. SWEENEY: Bill, can we go back to your concern about need for power and the environment. You cited 80.50.010.

MR. LaBORDE: Yes.

MR. SWEENEY: We do have a section in here just in citing 80.50.010 as need for power. Is there something more you want?

MR. LaBORDE: Let me pull out the --

MR. FIKSDAL: It would be in the very last chapter or maybe not in this version. It's construction and operation standards for energy facilities. It's the second to the last page.

MR. SWEENEY: There we go.

MR. LaBORDE: There's an earlier section in general referring to policy that doesn't refer to the statute in this one. In this section it essentially says no need for power is the standard.

MR. SWEENEY: Are you in agreement with the first section that I was referring to?

MR. LaBORDE: Yes, I am.

MR. SWEENEY: So you see a conflict between this section here and the other section.

MR. LaBORDE: I think to be honest with you I'm a little bit confused in how they relate to each other in terms of the big picture. Referencing the statute I think we're happy with the reference to the statute. In this section it seems to be broader than that. So I don't know if the first in the section entitled policy interpretation if that would govern the construction. The other section that it refers to that's titled construction and operation standards for energy facilities maybe that is something that the Council can clarify.

CHAIR LUCE: I'm sure you will give us some more comments in writing.

MR. SWEENEY: It's really on how those two relate.

CHAIR LUCE: Thank you.

MR. FIKSDAL: So you think that 463-42-020 is okay. Is that what you're saying?

MR. LaBORDE: I think referring to the governing statute.

MR. FIKSDAL: That's what you would prefer to see.

MR. LaBORDE: Yes.

CHAIR LUCE: Where are you?

MR. FIKSDAL: Under 463-14-020, about six or seven pages. It's an existing rule. It says need for energy. The legislative rule intent binding. RCW 80.50.010 requires the Council "to recognize the pressing need for increased energy facilities."

CHAIR LUCE: There's another provision, Bill, I think you may be familiar with. It's later on actually. It's construction standards 463-XX-XXX toward the end actually. I think it's on page - - actually the pages aren't listed.

MS. LAAMB: The second to the last page.

CHAIR LUCE: It's the third or fourth page to the last.

MS. ADELSMAN: That's the one he was referring to, and we were just talking about.

CHAIR LUCE: Right. And the provision is that the Council shall not consider the question of need for power in site certification proceedings.

MR. FIKSDAL: That's what you are objecting to.

MR. LaBORDE: Yes.

CHAIR LUCE: What's your objection to that?

MR. LaBORDE: Our objection is essentially there's no balance. Maybe it's implied, but it's not clear in here that there's a balancing of need for power versus other concerns that are addressed by the statute, environmental public interest, health.

CHAIR LUCE: The Council, correct me if I'm wrong, but the Council is a siting council, right?

MR. LaBORDE: Right.

CHAIR LUCE: And the Council has certain standards that applicants bring a project to the Council, and say it brings whatever it brings. It brings a combined cycle gas turbine to the Council, and it says here's my \$20,000 or whatever it is. I want to start the process. I've got a combined gas cycle turbine project. Okay. And we contract with our independent consultant, and they do the EIS, and the applicant has never by any stretch of the imagination been required to demonstrate need for power. The applicant all they are required to do is say I want to build a project. The statute says there's need for power. It actually says there's more than that. It says there's a pressing need for power, demand for power, and the applicant is required to show that the site is a good site, meets our standards, and then meets all of the environmental standards that we set forth. And it either does that or it doesn't do that. If it does do that and it meets the mitigation requirements that we place on that as set forth in these WACs, thumbs up. It passes go, and goes from us on a recommendation basis to the Governor for siting, a recommended site certificate agreement. If it doesn't do that, then it doesn't pass go, and presumably we would not recommend siting. You would agree with that, right?

MR. LaBORDE: Yeah, I guess what I'm saying is that rule seems to leave the decision in terms of whether to site a power plant admittedly governed by the environmental rules that are in the statute that are in other parts of the draft rules. It essentially leaves it up to the market, and we're saying it shouldn't be just left up to the market. There should be other considerations.

CHAIR LUCE: What are these other considerations?

MR. LaBORDE: They're --

CHAIR LUCE: Conservation?

MR. LaBORDE: It's a need for power balanced against the environmental implications, against the health implications of adding more emissions to not just CO2 emissions but other pollutants.

CHAIR LUCE: What I'm searching for is where in the EFSEC statute, where in the EFSEC authorities is there a principled basis for EFSEC? I'm not saying this is bad policy. Okay? Where is there in EFSEC's statutes the authority to make EFSEC the determiner? Just pick on conservation, which I perfectly think, which I actually think is the resource of first choice. If somebody came in with a combined cycle gas turbine, which I don't think they'll do for quite a while because I don't think -- well, for a whole variety of reasons. And an intervenor came in and said, you know, it's a very nice project. It's probably a good project, but we think that there's a lot of conservation out there, and that's better. It's a better resource. So we want EFSEC to deny this project application on the basis that there's a better resource out there, conservation. Is that what you're saying that the need for power should allow the Council to deny an applicant who brings a project to the Council on the basis that there's a better resource out there such as, you know, conservation or whatever, distributed generation, you name it?

MR. LaBORDE: Not necessarily. What I'm saying is that --

CHAIR LUCE: Yes or no?

MR. LaBORDE: What I'm saying is that in the statute -- I don't have the statute in front of me, but I believe it does say that the purpose of EFSEC, that the role of EFSEC is to balance need for power with other considerations, and what we're saying is that this need for power statement leaves out a reference to those other considerations.

CHAIR LUCE: But the purpose of the Governor's directive, at least to me, was to find as much certainty as possible as you could. Of course, you'd agree I think that you write WACs to interpret statutes, and I mean that's the purpose of Washington Administrative Codes. A code gives clarity to statutes that aren't otherwise as clear as they could be, so that's why you do that. And so you read in what the balance is, and so I guess I come back to you and you said not necessarily. I'm looking for a yes or a no.

MS. LaBORDE: This is what I'm referring to. In the statute 80.50.010, it's the policy of the State of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities would produce minimal adverse effects on the environment, etc. It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of public. Such action will be based on these premises: To assure -- and there's several premises listed. And applicability to federal policy preserve and protect all the environment to enhance the public's opportunity to enjoy aesthetic and recreational benefits of the air, water, and land resources to promote air cleanliness and pursue beneficial changes to the environment.

CHAIR LUCE: Right. But you would agree, wouldn't you, that one of the reasons you write code, Washington Administrative Code, is to interpret the statute that you're reading from.

MR. LaBORDE: Yes. Yes.

CHAIR LUCE: So some of the WACs that we have written, including this one for need for power and the other ones that deal specifically with air quality and water quality and fish and wildlife and habitat, are designed to do exactly that. They are to give the meaning to the language that you just read. Now as a matter of policy I can respect the fact that you may not agree with all of the policy meaning that underlie the WACs that the Council has in draft form. You may or may not. I'm sure you agree with a whole lot of them and you don't agree, for example, with the term of the site certificate. You think it should be five years instead of ten.

MR. LaBORDE: Sure, but I just wanted to get on the record that -- I think that made my point.

MS. ADELSMAN: Mr. Chair, can I ask a question.

CHAIR LUCE: Always.

MS. ADELSMAN: You know we put the draft out, but that particular section, that testimony is on today. I'm not sure that some of us agreed to that section. We discussed it before, and I remember at the February 2 meeting when I brought this issue your proposal was we need to discuss it further.

CHAIR LUCE: That's what we're doing today.

MS. ADELSMAN: So you're expressing then your --

CHAIR LUCE: I'm expressing my point of view.

MS. ADELSMAN: Your point of view. Okay.

CHAIR LUCE: I've written a paper which is contained in your package which sets forth my point of view.

MR. IFIE: That is later in the agenda.

MR. SWEENEY: I have more questions.

CHAIR LUCE: Yes.

MS. ADELSMAN: He's not a witness.

MR. SWEENEY: Excuse me. Thank you, Bill, for tolerating this. I have to think this whole thing through. When I read this Section 010, I read a section that says there's a pressing need for energy. I do not read -- and then I read that there's a balance that we play, we being EFSEC, between the pressing need and these other variable premises, including making sure there's abundant power at an affordable price. I don't read in here a gatekeeper rule of deciding whether or not the statutory statement of pressing need is true or not. It's already stating a fact that there is going to be need for power, and the question then is how do you balance that with environmental concerns, aesthetic concerns, etc., etc., including affordable power. So presumably an issue of whether or not a project is going to produce affordable power may be an issue. The fact that there's going to be a need for that power doesn't seem to play into this section, so I'm kind of sharing with you my opinion. You can feel free to comment.

MR. LaBORDE: I think you certainly make the argument that the rest of these rules reflect this statute or this piece of the statute in their entirety that it's implied. But the argument that I'm making is that there is a balancing implicit in the section of the statute that's -- and it may not be a true balancing, 50/50 balancing between the two concerns, but there's certainly at least in the statute some reference to these other concerns that I think EFSEC needs to address when it's looking at site certification. That it's not just need for power. It is a need for power balance to some degree at least with these other concerns.

MR. SWEENEY: Would you say that in the terms of burden of proof, if the statute says there's a need, who has the burden of proof otherwise, the applicant or a party coming in and saying there isn't a need?

MR. LaBORDE: I think probably the way the statute reads to me I think it would probably be an intervenor's role to prove that there is not a need and balance for these other interests.

MR. SWEENEY: So if the intent of the section is just to make clear that the burden of proof on demonstrating need is on the intervenor are you more comfortable with that?

MR. LaBORDE: Probably it would be better.

MR. SWEENEY: To craft language that you are comfortable with.

MR. LaBORDE: More comfortable than the way it reads currently.

MS. TOWNE: I will take Tim's premise on what 010 is talking about and where the balance is and put another twist on it. It is not the need for power that is to be balanced against these other factors. It is the siting, conditioning, operation, monitoring of the energy facility that we'll take into consideration balanced with these needs for environmental protection and what have you. The need for power is a condition precedent to going on into the balancing process of the facility permitting and operation, and these other public interest items that are listed in 010. So just for the record, that's mine. This proves why we should write rules because we all see the law a little differently.

CHAIR LUCE: I just don't think the legislature set us up as a gatekeeper for evaluating alternative resources in lieu of a project that's brought before us. We pass judgment on a project that's brought before us. Either thumbs up because it met our standards, which are pretty high in some cases, most cases, or thumbs down because it didn't. Just to play the devil's advocate on one more front, some of these projects when I've heard them criticized on the basis, well, you're going to site these projects, but they won't be built. So isn't that a bad thing? So I guess I would go back to you cited the Power Council earlier. In reality the Power Council earlier, and I think it still has on the books, has what they call -- and this cuts back to your ten-year window too --

site banking policy. And they said, you know -- I don't want to use the word hurrah because that's a little juvenile. But they said it's good policy to site these projects even if they're not going to be built, even if there's not certainty that they're going to be built right away because simply to put them through the, you know, put the pig through the python takes several years and several, you know, hundreds of thousands, if not close to a million dollars. So if you've got a license, and the project is ready to go, and the energy need does arise and as we all know the energy markets swing rapidly. Oil closed today at above \$38 a barrel. And the economy is picking back up, and the Northwest is going to be the last one to enjoy it, but it will happen. The market will come back up, and so some of these projects that will be licensed and will have a ten-year window maybe, maybe five year if Northwest Environmental -- but in any case, it's a good thing from my perspective to have those there and have them ready to go.

MR. IFIE: Mr. Chair, I would like to move the meeting to order. It seems like we are interrogating one commenter.

CHAIR LUCE: Just asking questions.

MR. IFIE: We are using him for a platform for our own views. I'm moving that we release the witness.

CHAIR LUCE: Release the witness.

MR. LaBORDE: If I could respond to one thing you said.

MR. SWEENEY: He doesn't want to be released.

MR. LaBORDE: I have a question.

MS. TOWNE: We can't rid of him.

MR. LaBORDE: I don't buy that EFSEC should be a gatekeeper in terms of balancing in assuming like the UTC might be with an IRP. That it shouldn't be a gatekeeper in terms of balancing an application for a new facility versus conservation or wind for that matter, if it's an application for a gas. What I'm saying is, and I think it's appropriate to consider that it might be good, it might be desirable to have some site certifications that are complete and ready to go that are waiting in the wings. But I think it's worth considering whether there's truly a need for power in terms of capacity in the system versus demand and versus even forecastable demand; whether it's desirable to have six or eight site certifications in the wings for polluting gas equipment turbine plants. I mean it may be, and I think it's appropriate for the Council when it gets to certification to say, "Hey, we have already got four site certifications out there. We know that demand is much less than the capacity that is out there. It may not be appropriate to accept this application at this point for a combined cycle plant, but it may be appropriate to accept the application for a smaller wind facility because it has no impact, minimal impact on the environment."

CHAIR LUCE: I am not going to ask a question. I'll just leave you with one thought. That it's not the applicant actually that's coming to us. It's the bank, and the bank isn't going to make that application if the bank can't get some reasonable idea that it's going to get a return on its investment. If there's that many site certificates out there that have already been granted, then the bank isn't going to put its good money down a rat hole so to speak. So they're not going to come, or if they do, they're never going to get built. Thank you for coming. I appreciate it.

MR. FIKSDAL: Can I have one just about the ten-year thing?

CHAIR LUCE: Oh, sure.

MR. FIKSDAL: In our rule about the ten years there's provisions in there that requires the applicant to update its environmental or come back to the Council about the environmental conditions if they change, if the project changes. Does that have any comfort with you? It isn't

just going to be a ten year come whenever you want to build it. There are building provisions where they have to come back to us and demonstrate that they still meet the environmental conditions and that the conditions haven't changed.

MR. LaBORDE: I think the question there that I'm most focused on is, for example, an applicant comes in today. They come in after July 1. The price for offsetting CO2 is 160. They don't build the plant for another nine years. The question is if the price is significantly higher, which EFSEC would have the opportunity to raise that price significantly, would that provision that you're siting require that applicant to then pay more? I think the answer is no.

MS. TOWNE: You can change your rules.

MR. LaBORDE: You could change your rules, but if that applicant already has their site certificate.

MS. TOWNE: If their price rises with the market.

MR. FIKSDAL: Well, I haven't thought this through. If we were to, or if the Council were to issue a site certificate I think for the CO2 mitigation they're required to pay that money within a year or right up front. I don't think it's been conditioned on starting construction. I can't recall.

MS. TOWNE: Maybe it isn't.

MR. FIKSDAL: Is that the kind of issue that you're getting at?

MR. LaBORDE: I thought it was conditioned on start of construction.

MR. FIKSDAL: So that's an issue if they pay at the ten years previous level not at the higher level.

MR. LaBORDE: Right. Exactly. And the effective mitigation ends up being what I'm talking about.

MR. FIKSDAL: That's the main issue. It's the CO2. It's not the other environmental.

MR. LaBORDE: Yes. That's the one that we're focused on.

CHAIR LUCE: And I do want to thank again Northwest Environmental Coalition for all of the help you provided on House Bill 3141. I mean it really was a joint effort, and we never would have got it through the legislature in the short session without your help.

MR. LaBORDE: Thank you. We appreciate it, and we have some issues with one, especially one condition of the statute.

CHAIR LUCE: We all have issues with it, but that's legislation.

MR. LaBORDE: But we do feel it's a good outcome overall.

CHAIR LUCE: Thanks.

MR. PEEPLES: Darrel Peeples. I just have a couple comments. First, on the stuff that you guys were interrogating Bill on.

CHAIR LUCE: Building a record.

MR. FIKSDAL: Do you want us to interrogate you?

MR. PEEPLES: I guess my comment to Bill is maybe you ought not to be fighting the last battle because I think the projects you're going to see are wind, and you may not get a wind project built in five years. And I don't think what's good for one is good for the other, so I think that's probably the last thing you want to do. And Allen emphasized the fact that after that first five years you've got to go through a whole environmental review too. It would probably take less time as going through a whole application, but still I think that's a considerable check there.

Further, with regard to PSD for any gas plant that's an 18-month window, you've got to be back to go through, and you get one free time -- not one free time. You get one renewal. And if you haven't built in 36, you've got to go back and do the whole PSD over again. So any technology

that's changed in the interim, that catches up with it. And I guess the last obvious thing is I don't think you will see anymore gas plants for a long time coming in here the way things are.

I have a comment with regard to, and I don't know if any of my clients are going to do written comments. But I do have a comment that relates back to something that you were talking about with regard to the non-attributable and attributable, and that's the new section you have which is entitled Council overhead costs.

CHAIR LUCE: Council overhead what?

MR. PEEPLES: Council overhead costs. Overhead administrative costs incurred by the Council for maintenance of office business.

MR. FIKSDAL: It's an 06.

MR. PEEPLES: Will be equitably allocated. I mean this is the battlefield, and going to your policy whether it's attributable or non-attributable.

MR. FIKSDAL: Darrel, which --

MR. PEEPLES: It's on Page 5.

MR. FIKSDAL: Of which?

MR. PEEPLES: All I have is the green one. It's under policy and interpretation.

MS. TOWNE: That isn't 06. It's a 14.

MR. FIKSDAL: 14.

MS. TOWNE: 14, Page 5, top of the page.

MR. FIKSDAL: Triple X.

MR. PEEPLES: Triple X, yes. Now, to me I'm not sure I'm representing a client, so I'm going to say I'm representing myself right now. I think everybody needs to get together and come up with something by this September to the legislature. I see this Council is reacting under practical really serious fiscal problems, but those things are not quite as far as I'm concerned in sync with the legal issues. And my concern about adopting this and then maybe adopting that policy that you're talking about adopting right now, especially prior to going to the legislature, is you might incur a reaction that will benefit no one in this thing. Because I think if you pass this policy, this is the crux. You know, I think maybe some of the applicants and certificate holders are a bit concerned about some of these other items that clearly aren't related, like this process we're going through now and like going to conferences or something. But quite frankly that's pretty nickel, dime I believe. You're talking maybe 10s, 20s of thousands and that's it. It's the other that's creating the concern, and I think where the battle will ultimately be fought. And it is a legalistic, it's a legal question versus the practical question you guys are having. How do you get through the next 18 months? I think Hedia's comment was really good. I think you need to get together with the interested parties and try to see if we can get something worked out in the interim. And that's the only comment I want to make. I think it's premature right now, and I don't think it will be beneficial to adopt or go forward with this section because to me it forces the issue. I don't think we want to force the issue at all here.

CHAIR LUCE: Darrel, do you think equitably allocated forces an issue?

MS. PEEPLES: Yes. Because equitably allocated what's that mean? What's that mean? Is that prorata for the time that you have for everybody, and should overhead be included in on it? Take a look at how it talks about direct costs. I don't have the words in front of me. You can look it up in the statute with regard to certificate holders. I think the issue is better avoided and try to work something out with the legislature than going forward with a policy or something like this. And if the policy and a WAC need to be adopted, let's go through this process first. I think the worst thing that could happen to you is go in and say, oh, it's only ten percent. You get involved

in a lawsuit, and all of a sudden the interpretation is a bigger piece of damage. I would rather tell the legislature this is the potential damage. It's big and it's serious and let the legislature craft a resolution. And I think only the legislature at this point can craft a resolution.

CHAIR LUCE: I guess you deserve equal treatment with Mr. LaBorde. We will equitably allocate the time between the two of you. But seriously I mean you could delete this entirely and just go to the legislature. Hypothetically the legislature might not do anything, or you could try and define among the different stakeholders what equitably allocated means and a lot more. You could do a Code Napoleon approach. You could really get definitive here. What's it mean for one project developer, a big one as opposed to a smaller one, one that's actually operating as opposed to one that's not operating? It seems to me like this isn't perfect language by any means, but this is I would say my intuition is it's reasonable language, and then you go to the legislature and you say, "Look. We've got an issue here. We've told you about it previously. This is the WAC that we have in place. We realize this is not an end all and be all. That's why we're still working with you in September trying to get through this issue in a more specific way. So we continue to need your help." If the legislature does something, the legislature is going to supersede any sort of WAC that we have in place. But at least it gives you a starting point that's not a bad starting point. In some of the language that we saw over there on HB 3141 it came from some of the stakeholders actually had -- didn't it have the words equitably allocated in them? I don't want to say which particular project operator; although it's a big one, a real big one had an amendment that included those words equitably allocated in it.

MR. PEEPLES: What I'm telling you is I believe this is going to create a reaction and probably that will focus the issue here. I think it will focus it prematurely. I mean that's my view on it, and is it all overhead administrative costs? I mean there's a lot of issues there. If you're saying it so general it doesn't mean anything, then let's get it defined before.

CHAIR LUCE: All right. Good comment.

MR. PEEPLES: I think we need to have a talk rather than a confrontation. I've done everything I can to avoid that.

MR. FIKSDAL: Is this your personal opinion or do you think it's based on your knowledge?

MR. PEEPLES: It's based on my knowledge of being around. It's my personal opinion. Like I say, I speak for myself. No one else. But you're right. I mean if you want to say that it doesn't mean anything, it's just equitable, and we'll figure that out, I don't know what you get by it then.

CHAIR LUCE: All right. Well, certainly this is the first opportunity to comment on these. It's not the 102, and your advice to talk to stakeholders is very thoughtful. Yes.

MR. SWEENEY: This language just to kind of scrape out some of the cobwebs is in response to the letter we received regarding the questions of whether or not we were doing things according to the statute.

MR. FIKSDAL: Yes.

MR. SWEENEY: This was triggering.

MR. FIKSDAL: We all know there's ongoing issues in our whole policy. This was an attempt to at least have something in writing that demonstrates to people how we deal with this.

MR. SWEENEY: But it was an issue based on one or more of our applicants.

MR. PEEPLES: Probably about all the stakeholders were involved in that.

MR. SWEENEY: And we have not had a workshop on this issues with those.

MR. FIKSDAL: No. We had invited those folks and we explained how we did things. We had a show and tell. The same one we did for the Council we had one for them. We had something similar we presented to the Senate Energy Committee a few weeks ago.

MR. SWEENEY: But there's legislative interest in this.

MR. FIKSDAL: There's legislative interest in this, but we haven't had this section out saying, "Gee, this is what we've decided" other than just recently put this out.

MR. SWEENEY: Well, this is a new section.

MR. FIKSDAL: Correct.

MR. SWEENEY: And we have a rather comprehensive rewrite of our rules that has years behind it as opposed to a section in which we have a couple months behind in terms of work.

MR. FIKSDAL: Correct.

MR. SWEENEY: One option might be to pull this and take it on a different track that is more designed to bring in the stakeholder and then maybe take our research to the legislature. That would be one option.

CHAIR LUCE: This is an alternative suggestion. How about we send this section, this new section to Bob Kahn, head of NIPPC with a little explanation of why it's there, etc., etc., and suggest that we'd appreciate meeting with him to talk about it? I think pulling it right now is a little bit overreaction. But offer to sit down and talk to him about it, where we go from here is probably a good idea. Hedia.

MS. ADELSMAN: Well, there are two issues. This one deals with only the overhead, and then the policy deals with the non-attributable, and I think we need to deal with both of them.

CHAIR LUCE: Right.

MS. ADELSMAN: This section, if I recall, was in the original rules that we put out.

MR. IFIE: It was.

MR. FIKSDAL: Yes, it's been there. It's been rewritten a few times.

MS. ADELSMAN: I don't think we got comments on that during our first go around.

MR. FIKSDAL: Other than Darrel. I think Darrel has been commenting on it for a while.

MR. PEEPLES: I'm not trying to cause any trouble you understand. I'm really not. I just think that I don't want trouble created by it.

CHAIR LUCE: I think it's a good idea. We'll get a hold of Bob, and we'll talk about both issues.

MR. PEEPLES: Okay. Thanks. Other comments from the public?

MR. SWEENEY: Nobody else walked in.

MR. FRYHLING: When you say we're going to talk to Bob, who's Bob?

CHAIR LUCE: Bob Kahn is the Executive Director of the Northwest Independent Power Producers Coalition.

MR. FRYHLING: Is he going to discuss this with all of us?

CHAIR LUCE: Well, I assume we'll have a work session, and any Councilmembers who would like to attend should feel free to do so either by phone or in person.

MR. FRYHLING: That's what I was trying to get at; that he was going to talk to us. And I think the entire Council needs to be around the table on that particular issue.

CHAIR LUCE: Right.

MR. FRYHLING: This seems to be the biggest issue that we have before us right now as a Council as to how we're going to handle these kinds of costs over the next number of years here.

CHAIR LUCE: I agree.

MR. FRYHLING: And I think we've got some applicants out there that feel that they're footing a lot of the bills that they don't think they should have to at this point in time just by the fact of the number of applicants we have.

CHAIR LUCE: Yes, I think we should all have a chance to sit down and talk.

MR. FRYHLING: Thank you.

MR. SWEENEY: I've got to get it off my chest. The notion of sending draft rule language or rule language that's come this far to someone and already getting an indication from someone who probably has some good indication what the reaction would be seems to be saying like we've already made up our mind. It just seems like we've skipped a step here where it might be more useful to actually report back and share with all the stakeholders what are the overhead costs, what are the various effects of attributing it in different ways. Here are our options. And lay out an option sheet as opposed to language because language is subject to interpretation. Everybody is going to have a different cut on it, and you're not going to get a real good feel of what the reaction is. You're going to get the reaction they're going to get when they interpret it. You're not sure how they're going to interpret it. It's better to lay out to me some idea and get a reaction back that way without any language associated with it.

MS. ADELSMAN: I agree with Tim. I don't think we should do it under an umbrella of the rules. I think we should just do it as a discussion. Maybe a follow up to your presentation to the Senate.

CHAIR LUCE: That's fine. The power point presentation I think to the Senate lays out the costs and the options.

MR. FIKSDAL: And we had more details on the costs and numbers than the presentation we gave to the applicants and the certificate holders back whenever it was, months and months ago.

MR. PEEPLES: It was a good presentation, Allen. Everybody appreciated it. If you haven't seen it, you really should. He did a real good job on it.

MR. SWEENEY: I guess I just haven't seen the next step which is okay. Here's the effects of what would happen if we allocated it this way. Here's how it would be if it was allocated this way. Here's an option where all the EFSEC members, and we're not all the overhead costs, the agencies pick up the overhead cost. It just seems like we need to brainstorm out some options a little bit more before we bog down on what is equitably attributed.

MS. TOWNE: Maybe I missed the point when the issue was first raised by NIPPC. I thought their position was that the language of 071 should be construed strictly so as to exclude any allocation formula of those costs which are not directly attributable. Now maybe I misunderstood. But if you start with that as your premise, then it doesn't matter how you allocate them because you can't. So we may be –

MR. PEEPLES: That's the battleground.

MS. TOWNE: That was my understanding of what the fight was about. If that is the case, then it doesn't make any difference. I could imagine where we could talk about different ways to do it.

MR. SWEENEY: Well, we should come forth with language that tries to -- I mean that even argues more for not.

MS. TOWNE: That's precisely my point.

MR. IFIE: That's why I was saying that we should spend time talking about a foundation. Where do we land? What is our position? We say this is what is done as opposed to now it seems like it depends on which audience we are talking to. We seem to emphasize one from the other.

CHAIR LUCE: Before we go too far we're finished with public comment. Oh, I guess that's still part of the rules. Okay.

MS. ADELSMAN: The question that I have is there's still maybe another end result issue. Is there a process that we have to address that issue or do we want to agree to a process before we go out of the CR 102?

MR. FIKSDAL: If I might. I think there's a couple issues. One is we've got this proposed section in the rule, and you've got your policy development process. Now, they overlap it appears, and I guess you could combine them into one. One option is to say, you know, your decision could be let's not go forward with this Council overhead cost rule. Let's just extract that for now and put that into the policy, and then at some later date you may want to write a rule based on your findings. The other option is, well, this doesn't cover those non-attributable costs. One interpretation I guess would be those cover telephones, the rent, our insurance, you know, those costs that aren't directly, don't directly pertain to an application or review or certificate but are the costs of conducting that business. So in a way you could say, yes, they are attributable to those projects because that's the cost of doing business. You have to have a place for an office. You have to pay rent. You have to pay telephones. You have to pay, you know, the state whatever money they ask for.

MS. ADELSMAN: Indirect costs.

MR. FIKSDAL: So that there's two. Yes, those indirect costs you don't want to call overhead costs. So there's two things, if you want to separate those two or join them. But I think what Darrel is saying this isn't clear. It may not be clear, so you may want to -- I don't know.

CHAIR LUCE: I'm not going to fall on my sword. If the sense of the Council is we pull this thing, that's okay by me. So let's get a sense of the Council right now. I mean this is not one that I'm not going to lose any sleep tonight over pulling this thing out and put it on a separate track. Okay? So sense of the Council?

MR. FIKSDAL: Before we go too much further, essentially we're done with it appears public comments. Nobody else wants to comment, but I'd say three issues have been raised. One is this issue, the cost overhead. The other is the ten-year limit for site certification and the need for power, so I suggest you now start taking one in order and decide what you want to do.

MR. SWEENEY: Let's go to the one we have on now.

CHAIR LUCE: Okay.

MR. FIKSDAL: What you're going to do here.

CHAIR LUCE: What?

MR. FIKSDAL: I was trying to set a structure to our discussion.

MR. SWEENEY: Thank you.

CHAIR LUCE: On this Council overhead costs as far as I'm concerned let's get a sense of the Council. Do you want to just pull it out of the package?

MS. TOWNE: Well, wait a minute. We're talking non-attributable, and in that is a separate category overhead with a question mark as to whether it is attributable.

MR. FIKSDAL: Well, I guess the question is, is this language clear enough in your mind that inclusion of the rule is clear and would not cause an issue? I would guess if it's not clear, and the potential could cause a problem and is not clear enough and maybe overlaps enough, it should be thrown into the policy section.

MR. SWEENEY: Here's where I stand. I would like to see the overhead language and the non-attributable piece not be part of this package. And I'd even go to the next step which is to suggest that we work through a decision package in the budget, and that be our vehicle for having a discussion on how to work it through the budget process. That would show intent to the legislature that we're trying to resolve the issue. It would show the financial impact, and we can hold a workshop during the summer because we're suppose to do stakeholder work on our decision package anyway to be able to foster what the reaction is to. And the decision package would be we need X number of dollars to cover the non-directly attributable and overhead costs

that aren't covered by state law or by the fees associated with it. I mean that would be the process that I would use to show good faith to the legislature and to our stakeholders that we are trying to work through the process.

CHAIR LUCE: Dick, where are you on that?

MR. FRYHLING: That sounds like a good way to get rolling.

MS. TOWNE: I think we've mixed apples and oranges and a banana or two.

MS. ADELSMAN: They're all fruit.

MS. TOWNE: I think that 463-14, Page 5, talks about overhead and administrative costs, and I think overhead costs are defined by OFM in budgeting, at least I've run into that term before.

That means something very specific like rent and things, and I think what we say here about overhead and administrative costs is appropriate and would withstand legal scrutiny. I think the issue is the non-attributable, and by mixing them up together it implies that we fear or think that overhead administrative costs may well be non-attributable. I don't take that position; therefore, I would put them in two pots. And I think that 14-XXX dealing as it does with overhead and admin is okay as written, and we should leave them alone and agree to deal with non-attributable as a separate topic that I think maybe what Darrel is concerned about on behalf of his clients and others. That is just my route.

CHAIR LUCE: What you're saying, if I can repeat it back, is maybe we check with OFM before we make any final decision.

MS. TOWNE: I'm really dim because I haven't done a budget in years, but 14-XXX looks to me -- Ann, do you have comments?

MS. ESSKO: I know that the state and county manual does define administrative costs, and I think overhead or vice versa. I would recommend that you do talk to OFM and see how this fits in with the preexisting budgeting scheme. I think it's a good idea.

MS. TOWNE: I would say that I don't think 14-XXX picks up non-attributable, whatever they are.

CHAIR LUCE: I don't think it does either.

MS. TOWNE: Therefore, that still has to be dealt with somewhere, and we might as well pull it off track over here and say let's go figure this out sooner rather than later. And if we can write a rule for it and put it in here, by the time we do the CR 102, fine. If not, then we'll do it later.

MR. FIKSDAL: I guess the question on that, Chris, is if we didn't have this rule would it make any difference?

MS. TOWNE: No, because the law IS the law, whatever it says. But people may have a need to know. We have a lot of other stuff in here that doesn't have to be here. This is certainly as important as some of the other things we've put in without a compelling need. So I'd probably spell it out. And it does go to the allocation question which may be unique to us. I don't know.

MS. ADELSMAN: I have a question and then a comment. The first question we are not the only agency that actually has fees. Do we know what others do with the indirect? I mean they call it indirect, so 39.2 percent that's what the indirect is. What do they do with that in the fees? Is it included?

MR. FIKSDAL: It depends what you mean by fees.

MS. ADELSMAN: Well, say the NPDES, and I haven't checked it.

MR. FIKSDAL: In the law there are specific I guess if you call fees. There's a requirement when an application is filed. If they submit \$25,000 for consultant costs and \$20,000 for EFSEC costs for a total of \$45,000. We all know that isn't enough. So we work with them, and they submit a whole bunch of more money for what the costs are we bill. They put that in the

treasury. We bill, we take out of the treasury, and they put money back in. I mean that whole amount could be called a fee. You know, we don't have a distinct other than a \$45,000 distinct fee.

MS. ADELSMAN: The statute calls if a fee, fees or charges.

MR. FIKSDAL: It charges, so everything is a fee. Part of that cost, EFSEC cost is because we belong to CTED, CTED has a 30.5 or 30.9 overhead charge on salaries and benefits like many agencies do. We get charged that or they take that, and that is part of our administrative or overhead costs if you want to call it that is the indirect.

MS. ADELSMAN: I have a tendency to go with what Tim was proposing for a couple of reasons. One of them the only thing that this section does that maybe we won't do normally it talks about equitably allocated and charged to these applicants, so it raises the concern about how you really allocate it. It goes back to, again, the same issue of how this non-attributable, how you allocate and don't allocate it. So if you stopped and just say overhead administrative costs are included, then I'm saying, you know, that's maybe fine. But we go one step further. And I prefer to see us pull this out and for maybe the next month until we're ready to really go with one or two and see if there's any way we could bring some of the stakeholders together real quick, discuss this issue, both this one and then the non-attributable. Talk a little bit more with OFM, look at what other people are doing, what the laws and rules say about indirect. And either we put it back because we found something necessary or we leave it out and come back later, and we could just do something. Because I'm like Tim. I think if we send it out, it's already, you know, it's not the same. I think just saying this is where we want to go, react to it, instead of saying we have an issue, a big issue, and we want to help solve it. I mean that would be my preference on this one.

MR. IFIE: My preference is to go with Tim's proposal as well on the basis that it appears we're not settled on the legality of this rule either just like the other issues we discussed earlier about the non-attributable. So it seems obvious, but I don't know if it's something that needs to be thought through in terms of can you just decide I also want to issue -- I mean I guess I'm going back to what Darrel was saying earlier about the constraints of the practical against the legal. From practical it seems like, yeah, sure. The upshot is you charge them to the applicants and the stakeholder as a practical side of me. However, on what basis do you do that? Then you go back to the law. You go back to the rules or the laws. The interpretation of the law seems to be in question, at least in many people's mind. So I'm saying let's settle on -- I go back to my thought, original argument before. Let's settle where the pendulum is now, so that we can use that for a basis to make all these decisions. So that being the case, I would say let's pull it. I mean I agree there's terminology here that I agree upon on the overhead, but that is not the real issue. The issue is not really whether or not the overhead that we have incurred. The question is who's going to pay for this overhead and on what basis, on what legal basis? When I say legal basis, I'm not saying we should go ask the AGO. I'm saying that EFSEC should settle on what the basis is.

CHAIR LUCE: So what's the consensus?

MR. FIKSDAL: The consensus essentially is Tim's suggestion.

CHAIR LUCE: Pull it.

MR. PEEPLES: I just have a discussion on that. Tim, when you do a budget process, my suggestion is to break it out, you know, worst case, middle case, you know, so you can see how it goes. The worst case if the law is interpreted like this, this would be the hit. Mid case, and then

we can take that and maybe get parties talking about what compromises we can come up with and come up with some proposed legislation.

MR. SWEENEY: Then it becomes a tool to work with.

MR. PEEPLES: Yes.

MR. SWEENEY: Because I'm kind of like with Chris on the interpretation side, but in terms of caution I would much rather have it out at this time and foster a discussion.

CHAIR LUCE: Good. I don't have to lie awake tonight. Pull it. We are not set for final decisions today.

MR. FIKSDAL: No. The issue, one of the issues that's going to be when we send the revisions back to OTS whether we should strike this or not.

CHAIR LUCE: Strike it.

MR. FIKSDAL: The decision as far as right now the decision is let's strike unless there's a change.

MR. SWEENEY: Right.

CHAIR LUCE: Right. Okay. What's the next one?

MR. FRYHLING: I want to ask one more question. If I asked you to look at whatever applicants, since Darrel's here, Wallula, that if we looked at that, can we pull out how much of that cost, the money that has been provided to us has gone to overhead?

MR. FIKSDAL: Yes.

MR. FRYHLING: Because this becomes --

MR. FIKSDAL: It depends on what you mean by overhead.

MS. TOWNE: The agency CTED overhead, the 30.--

MR. FRYHLING: The administration overhead, any incidentals. The cost that is being allocated against that applicant that we are not giving to Shapiro or somebody else along the way, so that when we look at this statement in here what is it? What does it mean? Right now it's words, and someplace along the way it gets translated into money.

MR. FIKSDAL: What I can't tell you exactly is how much that cost -- I could tell you how much the telephones, how much the rent, how much all those other types of costs that were probably allocated to Wallula. What I couldn't tell you is Councilmembers' and staff's salaries and benefits that weren't, you know, if you're not counting that as overhead or administrative costs.

MR. FRYHLING: Okay. Well, I just think someplace down the way --

MR. FIKSDAL: I can tell you the physical things. I can't tell you salaries and whatnot.

MR. FRYHLING: Someplace down the line somebody is going to ask you that question, whether it's the legislature or somebody else.

MR. FIKSDAL: If they wanted to know how much of the rule making they paid, I couldn't really tell them. I could make a sort of educated guess.

MR. FRYHLING: Okay.

MR. FIKSDAL: But I could tell you how much they probably paid for their part of the rent, their part of that type of stuff.

MS. ADELSMAN: Oh, I see.

MR. FRYHLING: Okay. Thank you.

CHAIR LUCE: Okay.

MR. FIKSDAL: Ten-year.

CHAIR LUCE: Ten-year. Any questions about the ten-year? Ten year, like you are a ten-year site certificate.

MR. SWEENEY: I have none.

CHAIR LUCE: The question is, is there any reason to change the ten-year site certificate?

MS. TOWNE: I need to go back and read 3141 and see how it fits in.

CHAIR LUCE: At this point in time is there any reason to change it?

MS. TOWNE: I don't know of any.

CHAIR LUCE: I mean what's the process ahead of us?

MS. ADELSMAN: Allen, you know, you brought up the issue about the environmental, keeping it up to date. I know there is some requirements in SEPA that says if things change, they need to do a supplemental or whatever. Is that clear in your mind?

MR. FIKSDAL: Yes.

MS. ADELSMAN: Okay.

MS. TOWNE: This is a question of 3141.

MR. LaBORDE: That's the question.

MR. FIKSDAL: I think that's the question.

MS. TOWNE: And I don't have that in front of me, so that's what I have to look at.

MR. FIKSDAL: And I don't have the answer to that. That's the only question I have about it; otherwise, I don't have any. That is the CO2 law legislation.

MS. ADELSMAN: I have a copy here, and I couldn't find it. Maybe somebody knows where it is whether they paid during construction.

MR. FIKSDAL: Yes, I can't remember.

MS. TOWNE: If it's a one-time payment or if there's a lump sum and then payment over time.

MR. FIKSDAL: Or maybe it may not be clear. I don't know.

CHAIR LUCE: Well, we have a lot of process ahead of us, so the question is, is there a need to change it now?

MR. IFIE: I don't see there's a need to change. It looks like it's valid. What we have is an extreme situation. It has been modified, and I mean I say modified but what we have is a compromised rule.

MR. FIKSDAL: Basically the rule is the precedent that the Council has set over the past several site certification agreements that have been produced, and essentially what we have taken is those precedents or those requirements in the last four or five SCAs that the Council has issued, and we're making that into a rule.

CHAIR LUCE: Okay.

MS. ADELSMAN: Can we get back to this one?

MR. FIKSDAL: Yes I think at the next Council meeting you can bring that issue and look at 3141. That would be -- I don't know. It's up to you.

CHAIR LUCE: We can always get back to it.

MR. IFIE: Well, today it looks like it's fine.

CHAIR LUCE: Need for power. You know where I am on this. Yes, Tony.

MR. IFIE: On the need for power the last time we discussed it in February my gut feeling at that point was that we should stick it out, and the reason I felt that way was because like Bill indicates that there is already a section that deals with need for energy which is the same as need for power. Basically what that section says is that we will enforce the rules and comply with the law. It seems to me that's one way to do it is compromising it that way. We don't tie our hands in terms of what the Council can or cannot do. It doesn't explain the authority of the Council or it doesn't constrain the authority of future Council, as well as the present Council. So that is one reason. The other reason I was thinking that it's good to be silent on it because the Council before us have taken the position that EFSEC has authority to consider need for power in

adjudication, and presumably the Council went to the AAG at that time and got legal counsel. So for us to now say that the Council doesn't have the authority without getting approval, I don't see an issue or any authoritative document that counter the interpretation that has been used before except that now we're thinking that -- I see that as an interpretation issue. The rule before says that the Council will comply with the law, and the Council in its interpretation of the law decided that they could consider need for power. So it seems like I don't see -- we're not reversing because the Council already said we don't comply with the law all the time. I'm trying to figure out what does this new rule do for us? What it does is counter, it goes counter towards the time-tested position that the Council has taken in the past. For us to do so it seems like we need a stronger reason, compelling reason. So in order to fight our battles it seems like one easy way is to just pull out that new section and leave the one that was there before as modified. I believe we modified it by taking out the references, so leave that as it is and just pull this one. To me it seems like a safe way to go. If not, then we should ask for a legal analysis.

CHAIR LUCE: Tony, -- Hedia, go ahead.

MS. ADELSMAN: Are we going to have a discussion before we vote?

CHAIR LUCE: Sure. Have at it.

MS. ADELSMAN: I agree with Tony. And my proposal would be if we want to make it very clear that we are not going to ask applicants to submit any information on the energy needs, then we could keep the first part of the sentence. The second part which starts in Line No. 4 is the one that really gives me the biggest heartburn where it says and the Council shall not consider the question for power in site certification, shall specifically. That whole sentence for me I prefer if we're going to keep this section, I prefer to see that. Actually it's more than prefer. I would like to see that part completely deleted and be silent, and already the statute says we should. And we said that set that up in the front, pressing needs for increased energy. Just leave it silent as to whether we do or not, and who knows maybe years from now somebody, different Chair, different Councilmembers decide they're going to ask for some justification for the need for energy. I don't know why we should lock our self and future Councilmembers by saying we shall not consider.

CHAIR LUCE: Okay.

MR. SWEENEY: Actually that's the part that when I read this, and I read the other section, and then I read the law, I realize we have kind of a conflict here. We're saying in one section that we have to recognize the pressing need, and then we have another sentence that says we shall not consider the question of need. So there's a conflict there. What we really, what seems to be the intent here is, the intent of the section seems here to be to not require applicants to show need, and I think that's a reasonable thing to allow or to grant. And I think it would even be more powerful if we took the sentence and we put it up here with the policy statement that says need for power intent. So that where we say the Council recognizes the pressing need for increasing energy facilities, we also point out it's not necessary for applicants to demonstrate need. I think we've accomplished what we want which is to make it clear that applicants don't need to show need for power, and we stated that the Council has a predisposition of believing that there's a pressing need for it.

CHAIR LUCE: The legislature stated that.

MR. SWEENEY: Yes, but we also stated it in our rule too.

CHAIR LUCE: Chris.

MS. TOWNE: I subscribe to Tim's argument as he has just laid it out. The only question I have is we put it back in the standards section, but it's a negative standard. It's what you don't get

measured against, and everything else is an affirmative standard, the air quality, noise, seismicity. And so I guess my inclination would be, but we should be careful we do it deliberately to take it out of the standard and put it in policy obviating the need for a negative standard because we've already put it up in the policy. That would be I guess my rationale.

MS. ADELSMAN: Or move it to the application.

MS. TOWNE: Again, that's a negative. Everything else is affirmative except that, and therefore, I would probably find a way to avoid it by putting it in the policy.

MR. IFIE: I have a question for you. Which part? It seems like the rule is in two parts.

MS. TOWNE: And I'd take the back part that's on the 463-XX or whatever on Page 1 and move it up there to the front end in 014.

MR. SWEENEY: You mean the first one and the back part?

MS. TOWNE: Yeah.

MR. IFIE: And then what are you doing with the second, the last part?

MS. TOWNE: Go away.

MR. SWEENEY: Just to be clear, right after the word how.

MS. ADELSMAN: That is correct.

MR. IFIE: I agree with that.

MR. FRYHLING: I think most of us sitting on this side of the table have already lined out the last part of that sentence if we put a period after power, if I look down the line here.

CHAIR LUCE: Let me state why I think that's a bad idea. Okay? I'm serious about this. Did you read the CTED memorandum?

MS. ADELSMAN: Yes.

MS. TOWNE: Yes.

CHAIR LUCE: Basically what the CTED memorandum says on need for power is that, first of all, the CTED memorandum acknowledges that applicants don't need to demonstrate need for power. That's self-evident. What it goes on to say is that the Council, our Council should be able if it so desires to deny an applicant a site certificate if our Council decides not that the application for a power plant, a combined cycle gas plant, locate a wind plant whatever, is not meeting all of our criteria, is not properly zoned, doesn't meet the land use, doesn't meet all of the air quality, but instead there's a better idea. That there's conservation out there. That there's distributed generation out there. If you read the CTED memorandum, we're not evaluating this plant, this project. The statute gives us authority to evaluate the project before us. In my opinion that's all it gives us the authority to do. It does not give us the authority to say, yeah, the project as in Sumas the first case, the project meets all of the standards, but we don't like it. Go away.

That's what the CTED memorandum says.

MS. ADELSMAN: That's their opinion. I don't think it's the opinion of the Council or some of us.

CHAIR LUCE: Well, then we need to figure out a way to say that because that's exactly what the Office of Energy Policy is saying that we have said in previous cases on this issue. And I think Mr. Fiksdal would agree that in fact is exactly what this Council has said in previous instances on this issue. So you're on a big, slippery slope here, folks. You're setting yourselves up for a situation where five years from now -- and that's why I wrote a negative in here. -- you're setting yourselves up for a situation where five years from now when I'm gone and all of you are gone somebody is going to take this need for power memorandum out that Tony Usibelli's office wrote. I don't mean to personalize it. The CTED Energy Policy office wrote, and if you go read their arguments with respect to what our authorities are, and the Energy Policy

Office wrote about our authorities and about need for power, and you strike the negative part that you don't like, and you go back and look at the previous Council decisions that EFSEC has made, you're going to be able to make a case that, you know, maybe not withstanding the fact that the primary reason for the Governor going through this exercise was to get certainty on the application that was brought before us, not on some other application, not on whether conservation is good, not on whether load resource balance is effective in the region or not, not on whether distributed generation was a good idea, but on the application before us, you're going to be able to make the case that, you know, yeah, they met all the criteria, but I don't like it. Go away.

MS. ADELSMAN: What if the tables turn around? What if you have a project that has a terrible environmental, and it's just really bad?

MS. TOWNE: We turn it down on those terms.

MS. ADELSMAN: But from the energy point of view it's maybe the best. This says we shall not consider the question of need for power. We always look at it one way, but I personally think we all express our opinion. We heard you. We heard all of us, and like you said, I think I'd like to see us move on this issue because we've discussed it so many times.

CHAIR LUCE: Hedia, do you realize what you're doing? Do you realize that you're setting yourself up to allow future Council to reject? Tony, do you realize what you're doing?

MR. FRYHLING: I don't think you are, Jim. I think this is as straightforward as you can get. You don't have to demonstrate a need for power. That's as simple as it can get. And anything Tony has written is no more than anything I've written in any memo.

CHAIR LUCE: In Mr. Carelli's record that he is writing -- I'm just telling you this as a former attorney -- Mr. Carelli is writing a record. He is going to have to respond to Mr. Usibelli's memorandum, and it's going to be in there, folks. Okay? So I'm just telling you five, six years from now when we're all gone, the record is going to be to say the least very ambiguous on this issue.

MR. FRYHLING: I don't know. It's in black and white are not required to demonstrate a need for power.

CHAIR LUCE: Well, of course, they're not. Of course, they're not. That's not the question. The question is whether intervenors are able to --

MR. SWEENEY: Raise those issues.

CHAIR LUCE: -- raise those issues not germane to the plant before them, not germane to the plant before us, but to raise energy policy issues about whether there's a better form of energy that forms a predicate for us denying the application before us. Now if you really feel that way, -

MR. FRYHLING: But I don't think they can because with the rules set forth we cannot consider that in an adjudicative process.

CHAIR LUCE: All I'm telling you is you're opening the door for that happening.

MR. FRYHLING: I don't think it is.

CHAIR LUCE: And I challenge you to go back and read this Energy Policy Office memorandum because that's exactly what it tells you that you're going to do, and it cites previous decisions by this Council as the basis for continuing to do that. Now if you really want to do that, what you're opening the door to again, and let me be really clear on the record, our great record keeper here -- you're opening the door to Sumas 2 all over again or Sumas 1 all over again. Do you want to do that?

MR. IFIE: Jim, I think, you know, in the past EFSEC certainly I think there may have been decisions based on the advice of legal counsel. They had a chance to discuss the issue. (Off the record to change paper.)

CHAIR LUCE: You were saying about previous decisions.

MR. IFIE: The previous decisions were based on the best analysis that they could point to at that time. So at that point I believe that they had authority to review the question of need, and we see the authority hasn't changed. The law did not change from that time to this time, but the law has remained the same. So my point is that we should it seems to me like the wise thing to do is to not mess with it unless we're going to go through some thorough investigative, I don't know, legal analysis.

CHAIR LUCE: I guess the last thing I would say is with respect to the fact that you make a bad decision as a matter of law in the past such as we did in an earlier Sumas case does not mean that you continue that decision making process simply because you did it in the past. Simply because you made a mistake once before does not support continuing to do that because we did it before; therefore, it must be legal.

MR. IFIE: I think in the past there was an interpretation issue. It's not the way I see it. It's not a rule issue. It's not a lack of rule issue. It's a matter of interpretation, and no matter how good, no matter how we write this rule right now I think it could still be interpreted differently than what we truly meant.

CHAIR LUCE: I don't think the statute is crystal clear on this issue at all. I don't think you can read the statute 010 and come away with any of this is the truth.

MS. ADELSMAN: But we are writing it like it is the truth, and that's why what we are suggesting that leaving the last part of the sentence would keep it even maybe --

CHAIR LUCE: What I'm saying is 010 is not the truth. What is the truth is that you are only empowered to act on a specific application before you on the siting of that application, on the criteria before that application. You are authorized to grant that application or deny that application on the basis whether that application meets your standards. You're not authorized to grant or deny that application on the basis of whether there's some other resource out there in the ephemeral that you think would be a better resource. As a policy matter you think that, gee, nice gas plant, but I really like conservation, so I don't want to do that. I don't want a gas plant. I would rather have conservation. There is no Office of Energy Policy within the Office of the Energy Siting Council. It doesn't exist.

MR. IFIE: I think though that to help Chuck a little bit on his response, we are not saying we should delete the second part just because of what CTED said, but rather for me personally it's because of the time-tested interpretation that EFSEC has the authority, and we should not give away the authority.

CHAIR LUCE: The time-tested interpretation which says that you don't have to follow rules. You can make them up as you go.

MS. ADELSMAN: I have a question. We are dealing with this both to help Chuck write the response but also as Councilmembers we need to decide where we're going to take this. Like we said, we've discussed it many times. I'd like to as a member see this come to a resolution.

Maybe we need to either take a vote or do something that would say how we want to address it, so when we send the text to the Code Reviser it reflects whatever we want to be reflected. So we don't come back again and discuss it again at a later date, or it comes out of the CR 102, and then we find ourselves in a bad position. I think I personally am very aware of the consequences of what it means to take out this particular sentence. I think Tim articulated it really, really well.

The statute already says there is a pressing need. We already have that in there. This is actually there's conflict, and from my perspective to keep it silent, if future Council if they decide to ask for it, they're subject to whatever legal interpretation at that time. But maybe this Council is going to say we're not going to ask for it, but at the same time I don't want the language as it is. It binds and creates some kind of conflict. So I personally think it's time that we see if we could take an action and go one way or the other.

CHAIR LUCE: This is not a decision meeting, and I would object to any vote.

MS. ADELSMAN: I'm sorry then. I thought we did that with the other sections.

CHAIR LUCE: Well, I'm objecting. I'm going to object to any vote. This is not a decision meeting. It has not been noted for action.

MS. ADELSMAN: All right. I'm sorry.

MS. TOWNE: I'm having a sudden hot flash here on locating the need for power piece in 463-XX. It should be in the application section if it's anywhere. It definitely does not belong. Applications are not required to demonstrate it. It definitely ought to get moved out of where it is in the construction and operation standard. My one concern where we try to bind ourselves, shall not consider the question of need, is Jim's question about what if an intervenor raises the issue. Do we need to have the magic words, the Council shall not consider, in order to ignore what an intervenor said in an adjudicatory proceeding?

CHAIR LUCE: If an intervenor wants to defend an application on the merits and demonstrate that this is a bad project, doesn't meet the environmental standards, air, water, fish and wildlife, habitat, you name it, then Amen. Defeat the project. Thumbs down. But if an intervenor wants to come in with something extraneous, we are not an energy policy office. That is not our job. If an intervenor wants to come in with some extraneous energy policy argument about you can all imagine whatever you want to imagine, and say to the Council that, you know, it's a good project, and we acknowledge that. We just don't think that for the following energy policy reasons you should grant this application.

MS. TOWNE: My question is, Jim, do we have the implied right to ignore testimony like that at hearing?

CHAIR LUCE: You don't have the authority to hear it. It's all implied.

MS. TOWNE: Okay. Then there's either an implication that we can't pay any attention or there's an implication that we can choose not to pay any attention to it. I want to make clear in my own head that we have that power to ignore testimony we deem to be irrelevant to the requirements of the act.

CHAIR LUCE: I would say it's not a right. It's an obligation. That's why I wrote in a negative. You don't have the right to take testimony on something that's outside the scope of the application before you. It's like saying, you know, you pick it. You have a right to take testimony on the issue before you and only on the issue before you. If we're taking testimony on Venus, and somebody wants to come in and talk about Mars, sorry. You know, it doesn't work.

MS. TOWNE: So would we cut off testimony?

CHAIR LUCE: That hearings officer is suppose to do that. It hasn't always happened.

MR. FIKSDAL: Usually what happens in an adjudicative proceeding in my experience is there's identification of issues, and then in that identification of issues, if there is an issue that the Council feels is not appropriate, they can I think with my geological background can say this is not an appropriate issue for the Council to consider and we will not consider it. Thank you very much. There's no testimony. There's no nothing. We aren't going to do it.

MS. TOWNE: And my question for you is, is that authority to do that clear in the act and the rules?

MR. FIKSDAL: Under APA it would be the area where you would.

MS. TOWNE: To 34.05, whatever.

MR. FIKSDAL: Using my geological knowledge to give you legal advice.

MS. ADELSMAN: Allen, are you saying we don't need the rule to tell us not to hear something, for us not to hear it?

MS. TOWNE: That's what I'm looking for.

MS. ADELSMAN: Maybe we should ask Ann that. I don't know.

MR. FIKSDAL: Rules to me are giving yourself guidance and other people guidance on how you interpret things, and whether you need a rule is up to you to decide. There may be other ways. It's just like this overhead cost thing. Do we need a rule? Is it implicit already in the state law? Is it good to have guidance? I think, you know, you're looking for that type of rationale.

MS. TOWNE: That's a good analogy. I don't know the answer to that either.

MR. FIKSDAL: And I think it's up to you to decide how you want to go ahead.

CHAIR LUCE: The practical problem in the past is that the Council in several instances has given very wide discretion to people who wanted to intervene and raise issues that were outside of the scope of the case before them. Why they did that, I don't know. I wasn't part of the Council at that point in time, and then they decided the case in substantial part on those issues. So the purpose of my second part of that sentence, and I don't care where you put it or how it's expressed, is to simply foreclose that opportunity.

MS. TOWNE: To close that up.

CHAIR LUCE: So that you don't have future Councils saying, "Oh, what the heck. Let them raise it. We like whatever it is alternative resources, and the fact that this fellow or this particular project developer wants to develop a wind project, well, we don't like wind projects at all. We think that they should develop conservation or maybe, you know, conservation is not in anymore. Let's go with distributed generation. That wind generation is no good. The towers are ugly. Yeah, it meets all the criteria, but go away. Don't bring that wind stuff to us. We don't want to hear this."

MS. ADELSMAN: That's why I have a problem with this section because we are binding future Council.

MS. TOWNE: They can change the rules.

MS. ADELSMAN: We are distrusting the decision of future Councils. I'm saying I think we need to have a little more trust in the system.

CHAIR LUCE: That's the essence of rules, to bind the Council.

MS. ADELSMAN: I don't know.

MR. FIKSDAL: You're essentially binding yourself because I think what Chris just said is if future Councils don't like that, they can change the rules.

MS. ADELSMAN: That's right. That's true.

MR. FIKSDAL: So it's what you think is most appropriate for what you think the Council and the way the Council should act.

MR. PEEPLES: Allen, I just want to point out that the applicants have been a big part of this problem because historically they even though they say, "Okay. We don't have to show need for power," they've always come forward for a moral justification of the project type of thing and put that evidence on.

MR. FIKSDAL: It's for the public.

MR. PEEPLES: So according to what Allen is saying is if you're going to say no, you've got to say no to the applicant and everybody. And I do think if that's what the decision is going to be, I'm not going to get into that. But if you're going to eliminate the applicants cheating that way, you've got to put in a rule saying nobody does it.

MS. TOWNE: Well, in effect we have. We say the applicant shouldn't bring up the subject, and the Council shouldn't consider the subject, and the implication is no matter who brings it up.

MR. PEEPLES: But I think you need a road rule to say that. You just can't ignore it and go by the statute I think because of what's happened for the past 30 years.

MS. ADELSMAN: What's the next step on this thing?

MS. TOWNE: I think we're all too tired to think clearly.

MR. SWEENEY: I would just like to say something. It's hard to get words in edgewise. Jim, I've been working on the need for power as stated, as they don't need to demonstrate a need for power from the beginning. But when I read the second half, and then I read this section here where we already state that we're going to recognize the need, I see a conflict, and that's what needs to be dealt with. Now whether we go with requiring no evidence or not, I don't really care because frankly I'm not going to be considering need as a member of this Council. Because I don't think it's relevant or it's not our role to be checking for need. It's stated in the statute that there's a pressing need. Now I'm comfortable with the suggestion that Hedia's made. If you want to get where you want to go, you've got to deal with this conflict we have with these two sections. One we're saying we're going to recognize the pressing need, and the other one we're saying that we're not going to look at it at all, and I've got a problem with that.

CHAIR LUCE: And that's a legitimate problem.

MR. SWEENEY: And I think they need to be combined, and, again, wherever appropriate. But I think you can put a lot of power behind our message by tying that first sentence in 020 with what we're trying to achieve which is not wasting our time listening to evidence on need for power.

CHAIR LUCE: Tim, my main issue for all of you is very simply what I said; that we should be deciding the case before us on the application before us and whether that applicant meets the criteria and the standards that we've laid out. That does not include the issue of bringing in extraneous resources, possibilities, options, other alternatives and allowing that material into the record as an alternative basis for rejecting the application. Now, I'm open to any number of any alternative ways of expressing that, but an application has a right to submit an application and have the application decided on the merits of that application. The merits of that application do not involve this Council's views which it has no right to pass judgment as a matter of law with respect to what energy policy is or ought to be. That's not our job. I mean as I said earlier, I have a view that energy conservation is the best resource, the cheapest resource.

MR. SWEENEY: We've been there.

CHAIR LUCE: But we don't make decisions on that for right or wrong. Maybe the legislature should give us that right, but previous Councils have done that. So if we could find another way to state it, Hey, I'm all for it. I don't like writing rules in the negative.

MR. SWEENEY: My preference would be -- and we don't need to keep stating. I understand. We know where you stand there, Jim. My preference would be that we stay within the statute, and that's why I like working off of this section here, 020, because it very clearly states that we're going to review based on the interpretation of 010. And I think adding a line that says, thus, applicants are not required to show a need or, thus, Council does not need to review the issue of need for power, so that it's clearer, I am okay with it. But, again, it's just a matter --

CHAIR LUCE: Maybe if we put something in the application regarding intervenor status, and we just state very clearly that intervenors --

MR. SWEENEY: I'm a little nervous about foreclosing and saying intervenors can't put evidence in there. I'm more in the notion of just stating, you know, if you want what we're going to be looking at.

CHAIR LUCE: Council's decision will be made on the basis of --

MR. SWEENEY: 80.50.010, and if we want to add an interpretation which means there does not need to be a demonstration of a need for power, then we can state that or however you want to play with the language. But having it all there in one section means that -- having it separated from the reference to 010 bothers me for one thing. I want 80.50.010 right in there in the rule and making a clear statement to the applicants that they don't need to make a demonstration is one thing, but I think what you want is a little more which is that we don't need to --

MR. FIKSDAL: Consider it.

MR. SWEENEY: Yes, review the issue of whether there's need for power. We're not the Northwest Power Planning Council with teeth, right?

CHAIR LUCE: Right.

MR. SWEENEY: If you gave them teeth, we're not them. We have teeth, but we're not the Northwest Power Planning Council, and you can't make us, and I'm comfortable going there. I'm just not sure. I can play with the words.

CHAIR LUCE: Play with the words.

MR. SWEENEY: I just want to give you an idea of what I would be looking at.

CHAIR LUCE: I just want to make sure that we're the Energy Siting Council making decisions based on the application before us, on the standards in place and whether the applicant meets those standards.

MR. FIKSDAL: You weren't here when Darrel made a pretty profound statement I think once in his life. No, just kidding.

MR. SWEENEY: A profound statement?

MR. FIKSDAL: The applicants have been putting that need for power in the applications because they feel not because of the Council, but it's more of a public need that they have to demonstrate to the public and to whomever may ask the questions of whether or not that power is "needed".

CHAIR LUCE: Well, they don't need to do that anymore.

MR. FIKSDAL: I think that's the case is what Tim is getting at is in the application or we should say that that is not a requirement of the application.

MR. SWEENEY: That would go a long way of just not even teeing it up in the application.

MR. PEEPLES: Not needing it is one thing. Not an issue to be considered by the Council is another thing, and I think it has to be stated it's not an issue to be considered by the Council.

MR. FIKSDAL: Right.

MR. PEEPLES: Or shall not be considered by the Council.

CHAIR LUCE: Okay. I agree. We're all dead tired.

MR. FIKSDAL: We have a couple more items.

MS. ADELSMAN: I just wanted to know where we're talking about here the 102 in June, so when is the next meeting?

MR. FIKSDAL: It's two weeks from today.

CHAIR LUCE: Two weeks from today we'll decide it.

MS. TOWNE: The 17th.

MS. ADELSMAN: So you and I are going to give to the Code Reviser the final thing to CR 102.

MR. FIKSDAL: We'll wait until the Council decides what they want to do.

MS. ADELSMAN: So we're going to have a decision meeting, next meeting both acts and pulling the overhead and doing this one.

CHAIR LUCE: And the site certificate agreement.

MS. ADELSMAN: All three issues.

CHAIR LUCE: Sure. Okay.

MS. ADELSMAN: So that's deferred to that one. That's right.

MR. FIKSDAL: Next item on the agenda.

CHAIR LUCE: I hope so.

MR. SWEENEY: There's something left?

Draft Small Business Environmental Impact Statement (EIS)

Allen Fiksdal, EFSEC Manager

MR. FIKSDAL: Small Business Economic Impact Statement.

CHAIR LUCE: Dave.

MR. REICH: I guess as far as this goes I know everyone is totally dog tired, but I don't know if you want me to give you a synopsis as I see it and then ask for your comments or it's better for you to go ahead and try to address those on our own and email them to Allen or me.

MR. FIKSDAL: I think I've got comments from Chris, and I think, Tim, did you?

MR. SWEENEY: I sent one on what?

MR. FIKSDAL: His small business.

MR. SWEENEY: Oh, no, I didn't.

MR. FIKSDAL: You can send it directly to David. Irina sent you some.

MR. REICH: Yes, I've got everything.

MR. FIKSDAL: What I'd like to do is sits down with you, I think Irina and I sit down with you and go over our comments and Chris's comments and who else has any. Chris has written some comments. There's some things that we need to talk about.

MR. REICH: Okay.

MR. FIKSDAL: That's fine. Just come in this week sometime

MR. REICH: Okay. Any other comments?

MS. TOWNE: It looks good.

MR. REICH: Okay.

MR. FIKSDAL: Overall it looks good.

MS. TOWNE: I kept thinking why are we doing this? And having read it, it's a useful piece of information documentation, a rounding up of a lot of discrete pieces, putting it all together and making it look like it makes sense. I was impressed.

MS. ADELSMAN: Allen, do we need to take action on it to approve it? It has to be final.

MR. FIKSDAL: It goes out with the CR 102.

MR. REICH: It does go out with the CR 102. It's written so that if you do more than 30 pages, it's takes more than two weeks for OTS to type it. So I tried to keep with the 30 pages. So we need to make sure that we make the revisions and still have two weeks after that to get it entered in. I guess there's a couple issues we'll need to resolve about need for power and such because it does affect the report a little bit. We can resolve all our comments now and then just be ready for that other stuff, so it doesn't stop us.

MR. FIKSDAL: I haven't thought about that kind of timing. You will have to take some action on it to accept it.

MS. ADELSMAN: As a final.

MR. FIKSDAL: As a final and included in the CR 102. I assume you can do that at the same time as the CR 102

MR. REICH: I can check for you.

MR. FIKSDAL: As long as you said, yes, we accept the Small Business Economic Impact Statement, and therefore, we feel confident we can issue the CR 102.

MS. ADELSMAN: Fine. It sounds good.

MR. FIKSDAL: I'm assuming that. I had one other issue that we'll not go ahead with at the time.

CHAIR LUCE: That's the right decision.

MR. FIKSDAL: If that's okay with you, Mr. Chairman.

CHAIR LUCE: It's fine with me at this point.

MR. FIKSDAL: Any other?

MR. SWEENEY: Move to adjourn.

MS. TOWNE: Second.

CHAIR LUCE: We may call a special meeting between now and the next two weeks just to give you notice to decide these three issues in the interim that we talked about here today, so that we can get this material to the Code Reviser sooner rather than later if Allen tells me that everything has been pretty well put together. So I'll just give you notice now that I'm going to hold that option open.

MS. ADELSMAN: How about the small business?

MS. TOWNE: That can go with the CR 102.

MR. FIKSDAL: Well, whatever we have to do.

MS. ADELSMAN: Okay. Sounds good.

CHAIR LUCE: Does that sound reasonable?

MR. FIKSDAL: Yes.

ITEM NO. 7. ADJOURN

CHAIR LUCE: Okay. Adjourned.

(The meeting was adjourned at 3:55 p.m.)