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ENERGY FACILITY SITE EVALUATION COUNCIL
WHISTLING RIDGE PREHEARING DISCOVERY CONFERENCE
OCTOBER 12, 2010
JUDGE ROBERT WALLIS

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1 APPEARANCES

2
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5 Gary Kahn: Friends of the Columbia Gorge

6 Nathan Baker: Friends of the Columbia Gorge

7 C. Bruce Marvin: Counsel for the Environment

8 Darrel Peeples: Attorney At Law

9 Jason Spadaro: SDS Lumber Whistling Ridge Energy

10 Kyles Crews: EFSEC Assistant Attorney General

11 Dennis Moss: UTC Council Member

12 Jim Luce: EFSEC Chair

1 ***** FIRST PART OF HEARING NOT RECORDED *****

2
3 UNKNOWN FEMALE SPEAKER: Here we go. And they couldn't
4 hear you. Did you put -- push the mute button?

5 UNKNOWN MALE SPEAKER: No, not intentionally.

6 UNKNOWN FEMALE SPEAKER: Okay. Are they on the phone
7 still? They're not on the phone.

8 JUDGE WALLIS: (Inaudible). Yeah, we're about at that
9 point.

10 UNKNOWN FEMALE SPEAKER: Okay, we're back.

11 UNKNOWN MALE SPEAKER: Well that's good.

12 UNKNOWN FEMALE SPEAKER: Okay. Hello?

13 JUDGE WALLIS: Hello. Apologies for the brief
14 intermission here. We discovered not in a terribly timely
15 fashion that we had no means of recording this conference.
16 And took a break so that the -- so we could get a -- an
17 audio recording device in here. And we're prepared to
18 proceed with that.

19 MR. LUCE: Well, Bob, this is Jim Luce. Where are we
20 in terms of the argument? When we last were on the phone
21 the essence of the argument was that we had -- you had two
22 motions and -- and we're going to have enough time maybe to
23 talk about the second one. And I -- I think that the
24 respondent I'm not sure. The argument had just begun.

25 JUDGE WALLIS: Very well. We had a summary argument

1 and my understanding is that the party's will expand on that
2 as we go through the remainder of the afternoon. Right now
3 what I would like to do is go on the record, then we can ask
4 for a one minute summary of the party's arguments. And that
5 may be a challenge but let's work at it. And then we'll
6 proceed with some other questions that I have for the
7 party's.

8 So let's be on the record please. This is a prehearing
9 conference matter of the application of Whistling Ridge
10 Energy. My name is Robert Wallis; I am the presiding
11 administrative law judge. Present with me in the hearing
12 room are Dennis Moss, Council Member and Kyle Crews,
13 Assistant Attorney General for the Council. On the bridge
14 line is Chairman, Jim Luce of the Council.

15 I would like Counsel to introduce themselves for the
16 record and lead counsel state the name of any other attorney
17 who is representing you at this conference. Beginning with
18 the movant.

19 Richard Aramburu representing Save Our Scenic Area.
20 Tom Drock is in the hearing room with me, a member of the
21 SOSA Board.

22 MR. KAHN: Gary Kahn I'm on the bridge line
23 representing Friends of the Columbia Gorge. On another
24 phone calling into the bridge line is Nathan Baker, also
25 representing Friends of the Columbia Gorge and Rick Till

1 with Friends of the Columbia Gorge.

2 MR. MASTEL: Derrick Mastel, Rives law firm here with
3 Darrel Peeples, legal counsel and Jason Spadaro, President
4 of SDS Whistling Ridge Lumber.

5 JUDGE WALLIS: Counsel for the environment.

6 MR. MARVIN: Bruce Marvin, Assistant Attorney General,
7 Counsel for the Environment.

8 JUDGE WALLIS: Very well, thank you. Mr. Marvin, you
9 earlier indicated that you did not expect to be taking an
10 active role but of course you have that opportunity as
11 matters proceed. Now I -- and I know this is a -- a
12 challenge if you could for the benefit of the people who --
13 with whom we lost contact, if you could give us a -- a one
14 minute or perhaps 90 second summary of the arguments that
15 you presented.

16 MR. ARAMBURU: This is Richard Aramburu representing
17 SOSA. This is a discovery motion in which we seek to
18 receive information from the applicant concerning a number
19 of essential points. It is only a discovery motion it does
20 not resolve the case on its merits. The standard for
21 discovery is a liberal one, that is discovery is allowed
22 unless there's some very good reason not to. Questions of
23 economic viability are not a part of these proceedings
24 because we concede that the project is -- is economically
25 viable.

1 Concerns have been raised with respect to
2 confidentiality of the material and concerns that -- that
3 the materials that might be produced could fall into the
4 wrong hands. While we don't concede that the material since
5 we haven't seen them are of such a manner we would be fully
6 agreeable to agreements to keep -- keep these matters
7 confidential. We are dealing here with materials and
8 questions raised by the applicant, not -- not necessarily by
9 SOSA or other interveners. We are seeking to respond to
10 their -- to their references and -- and concerns and we
11 think this material is important for the review of the
12 council. One minute and 15 seconds.

13 JUDGE WALLIS: Thank you very much. Mr. McMahan.

14 MR. MCMAHAN: All right, Tim McMahan for (inaudible) --

15 MR. KAHN: Actually, Your Honor, this is Gary Kahn.

16 May I speak for 30 seconds on the one issue that we've added
17 to the agenda that Mr. Aramburu didn't discuss?

18 JUDGE WALLIS: Yes, Mr. Kahn.

19 MR. KAHN: It is very simply -- it's a -- a request for
20 a previously prepared transcript of a public hearing --
21 excuse me, of a hearing in front of Skamania County, nothing
22 to do with this specific project. It's my understanding
23 that Mr. Mann's firm had that -- the -- the tape from that
24 proceeding transcribed and we have requested a copy of the
25 transcription.

1 JUDGE WALLIS: Very well.

2 MR. BAKER: And Your Honor, this is Nathan Baker.

3 JUDGE WALLIS: Mr. Baker --

4 MR. BAKER: If I could take the remaining 30 seconds
5 for Friends of the Columbia Gorge?

6 JUDGE WALLIS: Very well, but I would like to establish
7 a rule that we don't double team here and that we have one
8 counsel for each party if that's feasible.

9 MR. BAKER: Okay. Well, when we get into the
10 individual requests for information several of us have
11 divided it up. But as far as introduction that would work.

12 JUDGE WALLIS: Very good. Please proceed with your
13 summary.

14 MR. BAKER: Okay. All right I just wanted to list the
15 items that I'm prepared to address. They are No.'s 5, 8, 9
16 and 10. And just so everyone knows for No. 5, which is
17 Communication Between the Applicant Agencies and
18 Consultants, that one has been resolved. We've been
19 provided some information and so No. 5 is no longer an
20 issue. That's all, thank you.

21 JUDGE WALLIS: Thank you. Mr. McMahan.

22 MR. MCMAHAN: Thank you, Your Honor. And I -- frankly
23 on this No. 11 we can get that resolved very quickly and we
24 can get it resolved at the end as far as I'm concerned. And
25 I don't think we need to devote any argument time to it.

1 A couple things, Your Honor, but first of all I -- I
2 want to just emphasize that the request for information is
3 -- is characterized as information that we have submitted,
4 we have put into evidence, we -- arguments we've made. The
5 arguments are from the draft Environmental Impact Statement
6 not the ASC. If you look through the briefing it's DEIS
7 statements not ASC statements and I think last weeks order
8 has something to do with resolving in this matter.

9 Second, all party's seem to agree, concede that -- that
10 this information is proprietary business information,
11 confidential information, information that in other
12 proceedings would be considered protected under the Trade
13 Secret Act. I don't think we're arguing about viability
14 except maybe the NEPTAR data, which I would disagree that it
15 doesn't weather -- measure weather information as far more
16 than that.

17 The law requires in these circumstances where there's
18 concerns about confidentiality that the evidence be -- be
19 determined -- that -- that there be determination where the
20 evidence is admissible or likely to lead to admissible
21 evidence and whether the disclosure of that information
22 could affect the outcome of the proceedings.

23 Notwithstanding how this is characterized, this information
24 is about two things, one -- or at least as it would be used
25 by the opponents.

1 One, economic viability. The question isn't a
2 concession that the project is economically viable, that is
3 not the issue. The issue is the stated intent by these --
4 these opponents to prove or disprove or require us to prove
5 or disprove the some configuration, some design, some
6 business model other than what we've presented as
7 economically viable. And that was completely resolved in
8 (inaudible) case and that was all this is really about.

9 Secondly, a somewhat misguided argument based upon the
10 Sumas and Chehalis cases on whether or not and under what
11 circumstances under what cost -- under what market
12 conditions power will be sell -- sold to whom, to what
13 source to whatever. It is the other apparent basis for --
14 that the alleged to require this information. Under neither
15 grounds would this information A) be admissible, or B) would
16 in any way lead to -- lead to anything that would be
17 relevant or help advance their case.

18 JUDGE WALLIS: Thank you. To begin the discussion I
19 did have a question for Mr. Aramburu on behalf of the makers
20 of the motion that Mr. McMahan just identified. And that is
21 whether you -- noting that you have cited to the draft
22 Environmental Impact Statement and wondering if there are
23 any citations to prefile dividends that would tie this in
24 with the adjudicated proceeding?

25 MR. ARAMBURU: The -- the Environmental Impact

1 Statement plainly references on Pages 1-4 to 1-15. That
2 information that is provided in the impact statement is
3 information from the applicant. We see that material in the
4 Environmental Impact Statement as -- as essentially an
5 argument for the project discussing regional need, citations
6 to the draft six -- northwest power plan, needs for reliable
7 transmission lines and representations concerning where the
8 power will be used.

9 I don't know that that information is found in the
10 prefile testimony, but this applicant who's had control over
11 the - over the Environmental Impact Statement because
12 essentially it's applicant consultants that are writing it
13 was overviewed by EFSEC I understand, but this is material
14 that comes from - from the applicant and I presume is
15 material that is to be submitted that would be the basis for
16 findings that - that the commission might make in its
17 recommendations.

18 So if it is found in the impact statement then it's
19 found somewhere else I think it - it certainly matters that
20 are fair for us to review particularly since the source for
21 information is the applicant not anyone else.

22 JUDGE WALLIS: Very well. Before we get into the
23 specifics of each of the items in question, I would like the
24 party's to address the issue of discretion. The APA gives
25 the discretion to an agency whether to exercise - whether to

1 allow discovery and what forms of discovery. And the
2 Council's rule places the discretion in the presiding
3 officer, which in this case is most probably I believe the
4 Council itself, to decide whether to exercise that
5 discretion to hear -- to allow discovery. So if you could
6 take a moment or two and address the question of discretion
7 and what factors the Council should consider in deciding
8 whether to exercise that discretion it would be potentially
9 very helpful to us.

10 MR. ARAMBURU: Would you like me to start?

11 JUDGE WALLIS: If you would care to, certainly.

12 MR. ARAMBURU: Certainly, I will. Richard Aramburu for
13 -- for SOSA. We -- we made particular mention to RCW
14 34.05.446, which is the APA adopted rule, respect and
15 discovery. And in particular Sub-Section 3. Now as -- as
16 we look at discovery and procedures involving discovery we
17 also need to make some distinctions between these
18 proceedings and common proceedings that might be in superior
19 court. Superior court proceedings are typically between two
20 -- two individual persons without necessarily involving the
21 public interest. But -- but in -- in these proceedings the
22 public interest is for -- is forefront in all the decisions
23 and considerations that -- that are made and in the
24 recommendation that's made to the Governor.

25 So -- so having sufficient information and sufficient

1 material in adjudicated proceedings I think is essential to
2 meet that function.

3 In any event, Sub-Section 3 does allow the decision to
4 be made by the presiding officer. One of the provisions
5 that's not found in the civil rules is the conditioned used
6 of discovery on a showing and of necessity and
7 unavailability by other means.

8 Now, with respect to the met data that is not otherwise
9 discoverable by us because we can't go put a met tower on
10 private land. With respect to their estimates of -- of met
11 generation, expected generation that's not material that we
12 can -- we can develop. Information respecting how and where
13 the power will be sold is again not information that we
14 have.

15 So we did -- this is not material that we can get from
16 some other means. And the other provisions of Sub-Section 3
17 address undue expense or delay. I don't think that's --
18 that's an issue here although we may be requesting some
19 brief addition time to use the data in the event you rule in
20 our favor on all or part of the material. Whether discovery
21 will promote the orderly and prompt conduct of the
22 proceedings and whether the interest of justice will be
23 promoted. We think that -- that there will be arguments
24 about the scope of -- of matters to be considered. Mr.
25 McMahan has raised some of those -- those arguments today,

1 but we're not at that point. Right now we need to have that
2 basic information to assist us in making the points that we
3 intend to make. And we think it's -- it's appropriate for
4 you, Mr. Wallis, who do have discretion in this area to --
5 to rule that these documents can be provided to us if
6 necessary subject to confidentiality or protective order
7 provisions, which could extend into the hearing as well,
8 which was the case with -- with the UTC provisions. So.

9 JUDGE WALLIS: Thank you. Mr. Kahn, do you have
10 anything to add to that?

11 MR. KAHN: No, I'll stand with what Mr. Aramburu said.

12 JUDGE WALLIS: Very well. Mr. McMahan.

13 MR. MCMAHAN: Thank you, Your Honor. I will agree with
14 one thing in particular that Mr. Aramburu said, which is the
15 -- this issue involves matters of public interest. And
16 these are matters of public interests that are completely
17 within the discretion of the Siting Council. The
18 application of Section 010 of the statute as being
19 propounded by the opponents here is within the discretion of
20 the Siting Counsel and fundamentally must form the basis for
21 whether or not this information to be provided in these
22 proceedings at all.

23 And as I indicated previously this information is -- is
24 -- is not about anything other than economic viability and
25 whether and under what market conditions power might be sold

1 to another party. And it -- through that to uncover the
2 basis business model, proprietary data and information that
3 guided the applicant to be in EFSEC in the first place.

4 So part of consideration of this matter under the
5 Council's and Hearings Officer's discretion need to be
6 understanding and undertaken -- undertaking frankly some
7 analysis of -- of whether those Chehalis and Sumas findings
8 have any bearing whatsoever in these proceedings. And that
9 needs to happen under the context of the legislative rule
10 making and policy changes that this Siting Counsel has --
11 has undergone over the last 11 years since then.

12 And as I noted previously in the comments that weren't
13 recorded what is not provided to the Siting Council is
14 citations to the orders issued in the last 11 years. The
15 Sumas and Chehalis cases have largely been superseded
16 particularly in the wind generation cases, Wild Horse KV and
17 Desert Claim, which take the very -- very different approach
18 in applying those factors.

19 So, should information that is not relevant, is
20 immaterial cannot advance any case of -- except by EFSEC
21 under the rulings of the - the Supreme Court KV and under
22 the precedent that this Council has established under the
23 rule making adopted since Sumas and Chehalis. Should that
24 evidence be required to be produced to put this project at
25 -- economically at risk in that context?

1 And this Council does have discretion and should
2 exercise that discretion to say, "No." And the
3 ramifications of not saying no will be very significant to
4 this applicant and future applicants that might hazard
5 coming into EFSEC. That knowing from a precedent from
6 Siting Council that all of this information is going to be
7 put into a public arena and no protective order can protect
8 it.

9 JUDGE WALLIS: Thank you. Mr. Marvin, this is a matter
10 of public interest, did you wish to say anything on the --
11 on the issue?

12 MR. MARVIN: I'll - I'll make my very brief comment.
13 Indeed it is an issue of -- of public interest. And to that
14 degree we believe that the -- the greatest degree of
15 transparency that can be judiciously brought to the hearing
16 system would be appropriate. And I think that both parties
17 are ably presenting their -- their arguments both for and
18 against. But I think there is probably from -- from this
19 advocates position there is probably a tilting movement in
20 favor a little bit more towards having a -- the exercise of
21 discretion towards opening up some of these issues and --
22 and providing the detailed information regarding the
23 conclusions that are present in both DEIS and in the
24 application.

25 JUDGE WALLIS: Very well, thank you. Mr. McMahan has

1 called attention to discovery practice at the Utilities and
2 Transportation Commission. The UTC has the benefit of both
3 a statute, which provides protection under the public
4 disclosure laws for documents that is not available to the
5 Council. And the Utilities and Transportation Commission
6 has extensive rules that govern discovery. And my question
7 to you all is whether it is appropriate under those
8 circumstances that the Council follow the examples of the
9 UTC and if so how things could be structured to provide
10 protection to what seems to be an - an agreed observation
11 that the information here indeed is confidential?

12 MR. ARAMBURU: You're -- you're looking at me. But --

13 JUDGE WALLIS: You have first crack at it, yes.

14 MR. ARAMBURU: There -- there -- I am not aware and
15 we've done some research but I am not aware of protective
16 orders being entered by the Council in its proceedings. And
17 I -- that can be proven wrong because there's many orders
18 and many interim orders on -- on that score. It does seem
19 to me that -- that absent -- absent a rule adopted through
20 rule making or statutory authority, the -- the Council
21 should be guided -- guided by the general procedures under
22 the Superior Court rules. And under the Superior Court
23 Rules protective orders are permitted, are allowed, if
24 there's a showing of confidential information. And I don't
25 -- I don't want to concede that there's confidential

1 information here, I just don't know what -- what is -- is
2 out there any that's one of the reasons we're asking for it.

3 But -- but -- but the very much protective orders are
4 designed to individual circumstances of the case. And in
5 this -- in this situation Mr. McMahan -- I -- I don't think
6 he's making this an ad hominem attack on -- on my client's but
7 -- but we're going to be very careful with this information.
8 We're not going to go give it out to a bunch of people, this
9 is going to be shared between the clients, our expert
10 witnesses and our expert witnesses will sign confidentiality
11 agreements as required so this information doesn't fall into
12 other people's hands.

13 Now, the only other matter that is of concern here that
14 -- that has been adopted apparently in UTC proceedings, is
15 some protection for this information during the course of
16 the hearings. Now, Mr. McMahan while suggesting this
17 material shouldn't be -- be given to us at all doesn't
18 provide any guidance or any proposed protective orders or
19 any procedures to protect this information during the course
20 of the proceedings.

21 And -- and -- and once again, we're not, you know,
22 we're not out -- we're not out to destroy these people,
23 we're not out to give away trade secrets or anything else,
24 we think this information is going to be useful to us. And
25 if it turns out that the information is sensitive

1 information then perhaps at a later time as we get into
2 evidence filings and these other things that -- that we can
3 adopt some provisions to make sure that these materials
4 don't get to -- to the light of day. And -- and I should
5 we're not -- we're not interested in financial details,
6 we're not interested in how much in particular people are
7 going to pay per kilowatt hour for electricity from this
8 project. We're more interested in -- in where this power is
9 going to go? Who's going to be using it? Is this going to
10 be material that's going to -- power that's going to benefit
11 Washington consumers? Or is it going to be to -- to benefit
12 the -- the growing appetite of the bear from California that
13 -- that wants -- wants more renewable energy?

14 So -- so -- we're not particularly interested in the
15 details of how much people are bidding for any for any of
16 this. That's -- that's not a matter of our particular
17 concern. But we are interested in -- in what's going to
18 happen to this power because this is being done essentially
19 as we understand kind of as a spec project, we'll build it
20 and see who's going to buy the power, so.

21 JUDGE WALLIS: Mr. Kahn.

22 MR. KAHN: I'll -- I have nothing to add to what Mr.
23 Aramburu said.

24 MR. MCMAHAN: Your Honor, at a -- the right in the
25 process and I'd be very happy to address further this issue

1 of selling power to California and the commerce (inaudible)
2 other issues I don't right now is the time. So I'm not
3 going to address that one. However, I -- I think the -- the
4 issue of -- of protection available under the UTC versus
5 EFSEC is an absolutely critical issue. The other issue is
6 whether in the UTC proceedings that we've at least cited to
7 form the basis to -- to demonstrate how important this
8 information is and how confidential it is, is very much
9 distinguishable from these proceedings. And it has to do in
10 fact with the regulatory background and the protection
11 afforded to the UTC that is not afforded here. And it has
12 to do with the kind of issues adjudicated in the UTC that
13 are not appropriately adjudicated before the signing
14 council.

15 The UTC proceeding that we cited and I think it's an
16 appropriate example here to guide this discussion, is about
17 Puget Sound Energy's acquisition of a major real energy
18 project and the impact on customer rates. There the data
19 had arguable likely maybe even agreed significance or
20 relevance; it was material to the proceedings. There the
21 party's were regular participants in the UTC proceeding,
22 they shared a common objective of assured - assuring a fair
23 and open and competitive energy market with fair and
24 reasonable power rates. There a protective order was aimed
25 at relevant information that could be protected and the

1 party's were able to -- to buy into protections that were
2 afforded under the applicable rules.

3 Here, this proceeding is about land use and
4 environmental impacts of a renewable energy resource that
5 are - have been adopted under RCW 50.040, not 010. It's not
6 about associated power rates or power markets. The
7 opponents are not motivated toward a fair, open and
8 competitive power marketplace. There is no reasonable
9 argument that the information is reasonably calculated to
10 lead to relevant or material or admissible information. And
11 frankly there is a stated intent in the opponent's own
12 briefing that they intend to use this information in the
13 proceedings, in direct testimony, in cross examination and
14 that is not afforded any protection under a protection order
15 and would not frankly be afforded much protection even under
16 the UTC rules and certainly where we have no guidance or
17 rule making from Siting Counsel, I think we have a very big
18 problem here.

19 And the summary -- the -- the data is fundamentally
20 business proprietary information. If EFSEC does this, in
21 other words orders this information forward, even if ordered
22 under a protective order it will have a very significant
23 effect on this project and others. A chilling effect where
24 an applicant needs to really think about coming to EFSEC if
25 this information is to be put into a public arena and become

1 the subject of an adjudicated proceeding. And this
2 applicant would never have come into these proceedings under
3 the rules that this Council operates under if this -- if
4 this were known and -- and so yes, I think the -- I think
5 that the comparison between the UTC rules and what we have
6 here is absolutely immaterial and does goes to - toward the
7 examiner's and the Council's discretion on whether to issue
8 this order.

9 JUDGE WALLIS: Mr. Marvin?

10 MR. MARVIN: I -- I really don't have much to add but I
11 do believe that clearly within the Council's discretion to
12 impose a protective order and to take whatever steps it
13 deems necessary to protect information that is confidential
14 from more broader dissemination than is bound to be
15 necessary. I'm not familiar with the UTC proceedings and
16 therefore I'm not prepared to comment on applicability or
17 the appropriateness of those standards here. But I do
18 believe that, you know, EFSEC as -- as with any
19 administrative proceeding has the authority (inaudible) the
20 party -- the entity adjudicating has the authority to -- to
21 take whatever steps it deems necessary upon proof that
22 information is worthy of a - of that protection.

23 JUDGE WALLIS: Thank you. Mr. Aramburu, did you wish
24 to respond briefly?

25 MR. ARAMBURU: The -- one of my witnesses asked me -- I

1 said, "Well, is there any confidentiality agreement you want
2 me to sign?" And I said, "Not yet." And so --so it's
3 standard in -- in this business for confidentiality
4 agreements to be signed. And you will note that -- that --
5 that the authority cited by the applicant here at UTC were
6 not authorities in which UTC refused to divulge this
7 information. It was -- it was rulings made that these
8 materials would be subject to the protective orders.

9 And once again, I'm having a very difficult time
10 arguing this point because I haven't seen what these things
11 are and I think once we -- we get them it -- it we may be --
12 this may be a (inaudible) teapot because the materials may
13 not be useful, only parts of them may be useful, some
14 generalities out of the materials would be useful. But --
15 but once again it's a case by case situation and we're
16 certainly agreeable as a general matter to the receipt of
17 this information. To agree that we're not going to
18 disseminate it beyond our experts and -- and my clients.

19 MR. KAHN: And this is Gary Kahn, Friends of the
20 Columbia Gorge would also agree with that.

21 JUDGE WALLIS: Thank you, Mr. Kahn. Let's go into the
22 individual items. Please remember as we discuss these that
23 you have made your general statements and now what we're
24 looking for is information relating to the specific items in
25 question. Please keep in mind also that you have presented

1 memoranda and we have the -- the presentations in the
2 memoranda as a basis as well.

3 MR. ARAMBURU: Would you like me to discuss them one at
4 a time? Is that what --

5 JUDGE WALLIS: Yes, please. Let's take them one at a
6 time.

7 MR. ARAMBURU: Okay. And we'll take them in order then
8 I suspect is the best manner in (inaudible).

9 JUDGE WALLIS: That -- that works for us.

10 MR. ARAMBURU: Okay, good. Thank you. The first
11 request is for the meteorological data that -- that may
12 exist for this project. We -- we know, because it was a
13 subject of a permit by Skamania County that there is a -- a
14 met tower, meteorological met tower that's located kind of
15 in the middle of the V-array for -- for this project. And
16 we assume that the applicant -- and he's not denied it is --
17 is collecting information. We don't know what the applicant
18 has -- is collecting but we -- we -- we know at a minimum it
19 is -- it is wind speed and direction probably taken at
20 regular intervals, maybe every 15 minutes or 20 minutes or
21 hour. I -- I just don't know. We haven't -- we haven't
22 received that information.

23 This is not information we can otherwise receive
24 because we cannot go put up our met tower on - on private
25 property. It's critical information to determine a couple

1 of issues. One, what is the nature of this site? How
2 valuable is this site? The applicant asserts that this is a
3 proven robust wind resource. And we want to find out if
4 that's -- if that's really the case. The applicant wants to
5 just say, "It is a proven robust wind resource and we don't
6 have to -- we don't have to give you any background
7 information for that." And the output of the -- of these --
8 these facilities of course as I think the Council members
9 know and you know, Mr. Wallis, is -- is based upon the
10 amount of wind that blows in certain times of the day and --
11 and seasonally.

12 The other matter that was -- was raised and is
13 important here is an issue of geographic distribution of
14 wind resources. Data we've provided in our motion indicates
15 that these wind resources tend to ramp up and ramp down very
16 quickly in the matter of a half a day we go from -- from no
17 -- from no wind generation to 23, 24, 25 hundred megawatts
18 of -- of wind generation. And that is identified by the
19 people in know as a concern for ramping up and -- and
20 transmission line issues.

21 It's stated in the AIS that perhaps this site is
22 different from the others that are generally farther to the
23 east in Klickitat County and -- and Garfield and Columbia
24 and Walla Walla Counties. So that will be of interest to
25 know whether there really is value to this site based upon

1 that distribution and whether the wind regimes found at the
2 Whistling Ridge -- Ridge site are different than those found
3 in other locations.

4 But essentially this is not -- the arguments made that
5 this is -- this is some sort of -- of business plan
6 provision. But all this is -- is recorded data. And much
7 like recorded data is -- is gathered from 300 or so
8 observation points across the Northwest by the National
9 Weather Service. So it's -- it -- it really cannot be a
10 part of the business plan it's simply data. And as such
11 it's -- it's very difficult to know why this would be a part
12 of a -- of -- of a -- of a business plan. Recorded data
13 usually is not considered, particularly data of this nature,
14 not considered to be confidential information. And quite
15 frankly again, this is a -- this is a public matter. You're
16 going to recommend to the Governor that -- that one way or
17 the other on this project it would be useful for you to know
18 the answers to these questions. Apparently the applicant's
19 not going to produce this information. We think it's very
20 relevant to the determination you're going to make and I'll
21 speak later on Item No. 2, but -- but this is all important
22 information going through this balancing determination.

23 JUDGE WALLIS: Well, Mr. Aramburu, let me just
24 interject briefly with a -- a short question.

25 MR. ARAMBURU: Sure, feel free.

1 JUDGE WALLIS: If the applicant does not present this
2 information are you not able to argue very strenuously the
3 point that there is no information?

4 MR. ARAMBURU: Well, if -- if I was in the Superior
5 Court trial and I had a jury there, I had a -- it was a
6 bench trial or whatever that might make -- that might make
7 me a perfectly good proposition. Burdens of proof,
8 standards of review are pretty vague here I'll have to say.
9 And -- and you -- you as -- as EFSEC have some
10 responsibilities beyond just kind of calling balls and
11 strikes here. And I don't know that it's -- it's enough
12 just to say, "Well, we don't have any information on that
13 Governor, so gee here you go." I -- I don't think that
14 that's the way that EFSEC has conducted itself in the past
15 and I don't know if that's the appropriate thing to do. We
16 want to find out, do the essential balancing test -- is the
17 resource that is being proposed to be put online by this
18 application balanced by or outbalanced by other matters of
19 public interest including scenic, biological, cultural and
20 other -- other issues. That balance has to be done and you
21 got to start with what are we talking about here? Something
22 -- and something a bit more detailed than -- than 75
23 megawatts. Does that answer your question?

24 JUDGE WALLIS: Yes, thank you.

25 MR. BAKER: Your Honor, this is Nathan Baker for

1 Friends of the Columbia Gorge.

2 JUDGE WALLIS: Mr. Baker.

3 MR. BAKER: We would agree that this information is
4 absolutely relevant and we would point you to one of the KV
5 orders, Order No. 826 at Page 823, where the Council did
6 hear expert -- oh, I'm sorry, Page No. 23, where the Council
7 heard expert testimony on the quality of the weather
8 resource. So it's absolutely relevant. It does go into the
9 balancing mandate that EFSEC has to engage in as it's
10 independent duty for EFSEC to verify the assertions made by
11 the applicant on this statute.

12 JUDGE WALLIS: Thank you, Mr. Baker. Mr. McMahan?

13 MR. MCMAHAN: Thank you, Your Honor. This information
14 is critical and essential to the application. It -- it's
15 not just data it's proprietary data. It's proprietary data
16 that is never shared with competitors, it is never in the
17 public arena, it was not in the public arena in the KV case.
18 And this data is -- is not of the kind that -- that -- that
19 needs to be provided or should be provided and its
20 dissemination puts this project at very significant
21 commercial disadvantage.

22 The point about the KV case is interesting. The -- the
23 witness referred to was Mr. Nearimburg (phonetic). We
24 certainly could resolve this matter by submitting testimony
25 from Mr. Nearimburg. In fact, I think that is a likely

1 outcome here. Mr. Nearimburg in that case did not talk
2 about meteorological data. He did talk in general terms
3 about the wind resource, his comparison to other areas and
4 in generic -- in general terms about how robust the wind was
5 on that particular site.

6 That information certainly can be put forward in these
7 proceedings to advance this interest and to address this
8 issue. But it would be my objection in the proceedings if
9 cross examination questions come in for Mr. Nearimburg that
10 demand disclosure of meteorological data and the data sheets
11 applicable to that information. It is highly, highly
12 sensitive business information. And the UTC order certainly
13 covered this and I think that that was sufficiently in play
14 and understood in those proceedings.

15 JUDGE WALLIS: Thank you very much. Item 2.

16 MR. ARAMBURU: I'll kick off again. Item No. 2
17 requests information concerning the power production of the
18 -- the project and in some way it's a -- it's a similar
19 request item to No. 1. As members of the Council and you,
20 Mr. Wallis and others in this room are aware the -- the
21 nameplate reading of a -- of a wind turbine or a series of
22 wind turbines says very little about -- about what the power
23 production is in kilowatt hours that would be delivered to
24 consumers.

25 And -- and so it -- we -- we're -- I think assured,

1 although Mr. McMahan can dispute this, that there are some
2 estimates that have been made of -- of the number of
3 kilowatt hours that this -- this project would -- would in
4 fact produce.

5 And once again, that's essential for this -- for the
6 balancing analysis that is to be undertaken here. Just how
7 valuable a resource is this in comparison to the
8 environmental impacts that are going to -- to occur here
9 during the -- during the course of the proceedings?

10 And again, they say this is a part of their business
11 plan, I guess everything can be a part of their business
12 plan if that's some sort of -- of sort of overall blanket in
13 which we can keep information from the public. But -- but I
14 do think that in the Northwest I -- I -- I just read a
15 request for proposal from Seattle City Light yesterday,
16 that's just out. They're not asking for capacity they want
17 -- they want to buy a certain number of kilowatt hours from
18 -- from -- from resources. That's what we're interested in.
19 What -- what's the predicted kilowatt hours from -- from
20 this project? When -- when will this project be producing
21 those -- those kilowatt hours? And once again, essential
22 information to determine the value of this material.

23 And again, subject to confidentiality. We're not going
24 to go broadcast this on -- on KUOW or some local radio
25 station, that's not our intention here. If we decide that

1 this material is useful we can certainly alert the Council
2 and you, Mr. Wallis, that this material would be something
3 that -- that would be used and we can -- we can resolve
4 whether or not that would be admissible or not during the
5 course of the proceedings. Right now we're not at that
6 point. And we don't know how much of this information we're
7 actually going to use. But we think that it's highly
8 relevant to -- to the mission of EFSEC and the Governor
9 saying, "This is a project that produces how much kilowatt
10 hours?" We don't know, nobody's got any idea unless this
11 information is -- is coming forward. That's -- that's --
12 that's essential product of every electrical general project
13 whether it's hydro, thermal, wind or -- or anything else.
14 We -- we've got to know that. That's not a part of a
15 business plan. You should order that we have it subject to
16 confidentiality provisions.

17 MR. BAKER: Your Honor, this is Nathan Baker for
18 Friends. Again, we support the request. We believe this is
19 also relevant. On this one we would point you do one of the
20 Desert Claim orders, Order No. 843 on Page 24 from November
21 2009. It's also cited in our reply. And on that matter
22 EFSEC did look to the evidence and reached the conclusion on
23 whether the region needs additional electrical capacity and
24 whether the proposed order provided abundant energy. So
25 this claim is totally relevant and we think the information

1 should be provided.

2 JUDGE WALLACE: Thank you. Mr. McMahan?

3 MR. MCMAHAN: Your Honor, the Desert Claim order was
4 not based on this -- on this information. It was based on a
5 policy framework. That's a misconstruction of that order it
6 has nothing to do with this. The item in No. 2, predictions
7 of average daily energy production of the Whistling Ridge
8 Project (inaudible) energy production. That is actually the
9 business model that relied -- result from the meteorological
10 data in No. 1. That is the proprietary business model that
11 is a direct outcome of that of that data. Mr. Aramburu
12 interesting refers to his -- I guess the Seattle City Light
13 request for a proposal. You know, if requesting -- a
14 request for a proposal from a utility this data would be
15 covered by a non-disclosure agreement because it is so very
16 sensitive and it should not and cannot be produced and
17 released. It is inappropriate particularly given the lack
18 of materiality here as I've argued previously and I won't
19 repeat that. It is inappropriate to demand that
20 information. And it is also a misrepresentation of it to
21 call it "Just data" that isn't proprietary and isn't
22 business model information. This is in fact proprietary and
23 critical business information by the applicant.

24 JUDGE WALLIS: Thank you. Mr. Marvin, I'm bypassing
25 you based on your earlier statement. If at any point you

1 want to comment you're certainly welcome to.

2 MR. MARVIN: Thank you, Your Honor.

3 JUDGE WALLIS: Item 3, Contracts Or Agreements With
4 Utility Companies.

5 MR. ARAMBURU: We've -- we've asked for -- for
6 communications by the applicant with other utility companies
7 or potential purchasers of -- of this -- this power. We've
8 -- and we provided information that for the most part it
9 appears we don't know about this project, but it appears
10 that most of the new wind generation production is -- is
11 headed to California either on short term or long term
12 contracts or -- or in fact, outright purchases of the entire
13 production and -- and hardware of these -- these projects.

14 So we are interested in -- in reviewing this
15 information to determine whether or not this project is --
16 is going to be one that serves the consumers of the State of
17 Washington or it serves the consumers elsewhere.

18 Notwithstanding all the complaints that Mr. McMahan has over
19 the Sumas and -- and Chehalis cases, we've not had any
20 indication that those are overruled and there's been no
21 citation of authority to indicate that they have been
22 overruled.

23 And in both of those cases the -- the Council did
24 consider where the power was to be sold and in particular
25 whether or not that it was essentially going to be what the

1 Council referred and you, Mr. Wallis, were part of the
2 Council at the time, whether or not the -- the project was
3 going to be a merchant plant, that is to be sold to the
4 highest bidder. And the question was raised whether or not
5 that factor ought to be considered in the balancing of the
6 project with the other environmental factors.

7 Now, Mr. McMahan says, "Well, look those were - those
8 were two gas turbine plants and so -- so that's different
9 than here." Well it's not any different from here because
10 it's a question plainly stated in our authorities of -- of
11 -- of the balancing of -- of adverse impacts. And those
12 adverse impacts in those cases had to -- had to do with CO2
13 but in these -- in this case it's a very different and we
14 believe equally serious and important matter of -- of
15 biological, cultural and scenic resources that are at stake.

16 So, so that's why this information is useful. Now make
17 no mistake, we're not interested in the details of -- of
18 which person is going to buy which amount of power and how
19 much they're going to pay per megawatt hour and deliveries
20 and all these other things. We're not -- we're not
21 interested in the financial details of what they're going to
22 sell the power for. We are interested in whether or not
23 this -- this project is going to be one that's going to bid
24 out in the open market. And again, we don't -- we don't
25 know what's going on and that's why this information is

1 useful to us.

2 The applicant -- I understand the project. And Mr.
3 McMahan can correct me is that there's currently no
4 contracts but they're going to sell this -- these -- these
5 products and this plan to the highest bidder. And that --
6 that would help move along where this -- where this
7 discussion is. So we think this is -- this is important
8 information to determine the balancing -- the application of
9 the Sumas and -- and Chehalis cases to these proceedings.
10 Mr. McMahan may be right that these issues haven't come up
11 before but we're talking about a very different environment
12 in 2010 as we were in 2001, 2005 when other cases may have
13 come up with regard to the - what is now the abundance of --
14 of wind energy.

15 So with respect to these issues they should be provided
16 to us. We will kip -- keep them strictly confidential and
17 quite frankly I -- I don't know how much this information is
18 going to be used and we're going to alert and signal if any
19 of this information would actually be -- be brought into the
20 proceedings. And then we can make decisions about its
21 admissibility but right now it's a question of discovery
22 under the broad discovery rules and we think this
23 information's relevant.

24 MR. BAKER: Again, Nathan Baker for Friends of the
25 Columbia Gorge. We also believe this one's relevant. EFSEC

1 has a long history of applying the statutes and the
2 regulations to determine whether the -- a regional need --
3 and a locator being mapped by projects on a project specific
4 basis.

5 In response to a question that the Judge asked at the
6 beginning of the proceeding, while our written materials
7 don't cite to the -- to the application I did want to
8 provide a citation to the application here on this issue.
9 It's Page 1-1 where the applicant states that, "The project
10 is designed to provide low cost renewable electric energy to
11 meet the growing needs of the Pacific Northwest." Later in
12 the paragraph the application says that, "The project will
13 provide energies to the Vancouver/Portland Metropolitan
14 areas."

15 So again, the applicant has made this an issue and we
16 believe it's certainly relevant under the statute. Thank
17 you.

18 JUDGE WALLIS: Thank you. Mr. McMahan?

19 MR. MCMAHAN: Your Honor, on the Sumas issue
20 (inaudible) first I didn't say they weren't relevant because
21 they were thermal facilities. I said they'd been superseded
22 by 11 years of policy development, legislative change and
23 rule making and Supreme Court decisions that have occurred
24 since Sumas and Chehalis.

25 Secondly, Sumas and Chehalis were aiming at the

1 environmental effects, analyzed the effects of gas
2 generation, CO2 emissions and air quality effects. In a --
3 in -- in a context where there was insufficient, in the
4 Council's view, insufficient information to show that those
5 effects were mitigated. Both -- both cases ultimately were
6 settled by the proponents, as I understand it, by the
7 proponents bringing in additional mitigation to deal with
8 air quality issues. Neither of those cases were adjudicated
9 ultimately based upon whether power would or would not be sold.

10 And on power sales, since we seem to be into that, if
11 we're talking about mitigating or denying a project because
12 power may or may not be sold, north, south, east, wherever
13 there's a serious commerce cause issue that were raised in
14 the Kittitas Valley case. And that -- that was not taken up
15 by the -- by the Siting Council although it was raised by
16 the opponents of KV it was not taken up -- I think it was
17 not taken up because it was specious.

18 So -- and -- and moreover I think as -- as -- as you,
19 Your Honor, know power is sold north and south. Washington
20 buys power. Power is sold north -- north and south every
21 day. The trading circumstances in the western grid are very
22 complex, it's very integrated and to deny or condition to
23 require an applicant to prove anything about where power may
24 or may not be marketed is ridiculous because even a utility
25 buying the power may ultimately transfer during summer or

1 hot conditions to California. So it really means nothing to
2 these proceedings and it is irrelevant.

3 What is asked for here though I want to break this into
4 three pieces. First, any contracts agreements and we'll
5 stop there, with any utility or other company to purchase
6 the output of the Whistling Ridge Project. First, there are
7 no contracts or agreements selling or to purchase the power
8 within the utility or other company, period. There are no
9 such agreements, there are no such agreements because this
10 project is in a hell on wheels litigation and frankly
11 nobody's going near it until we complete this process.

12 The other piece of it communications. And this is what
13 we're concerned about and focusing on. Communications
14 within the utility or other company to purchase the output
15 of the Whistling Ridge Project. We addressed, we responded
16 to that in my September 13th letter. To demand from us
17 communications with utilities or potential buyers, potential
18 partners is astounding. To -- to -- to suggest that that's
19 material to these proceedings is amazing. Those agreements,
20 responses to request a proposal are submitted with non-
21 disclosure agreements. And they aren't just some generic
22 statement about the amount of power generated. They are
23 material -- those -- those documents have material terms --
24 material terms about suggested power prices, suggested
25 elements that are not appropriate for this Council's

1 consideration in any event.

2 So if this request is about is power being sold to
3 California no, there's no agreement to sell power to
4 California. Let's be done with this. If it's about
5 communications with utilities we stringently object to that
6 as such information would be an ignorance event in non-
7 disclosure agreements.

8 JUDGE WALLIS: Thank you. Are we ready for Item 4?

9 MR. ARAMBURU: I'm actually going to talk about Item 6
10 and I think that --

11 JUDGE WALLIS: Okay. Initial response I believe was
12 that -- from Mr. McMahan was that that information has been
13 provided.

14 MR. ARAMBURU: Yes, it has.

15 JUDGE WALLIS: Is that no longer in dispute?

16 MR. ARAMBURU: (Inaudible).

17 JUDGE WALLIS: Some of the items that were -- that I
18 had noted as -- as being provided apparently still are in
19 dispute.

20 MR. MCMAHAN: Well, under the BPA -- the items having
21 to do with BPA are simple responses. We can provide that --
22 that information if the -- if -- if requesting communication
23 or offers from BPA what we have is all stamped confidential
24 and trade secret by BPA or critical energy infrastructure
25 information. If BPA wants to release that information under

1 FOIA, that's up to BPA. If they want to fight about that's
2 up to BPA, we are not at liberty to release that
3 information. I don't object to its release the point is we
4 are bounded by some very strict requirements from BPA. So
5 -- and I know that these opponents have filed a FOIA with
6 BPA. That's the source of the information.

7 JUDGE WALLIS: Very well.

8 MR. ARAMBURU: I think we're good on that.

9 JUDGE WALLIS: Okay. Item 5.

10 MR. BAKER: Your Honor, this is Nathan Baker. Item 5
11 has been resolved. We've been provided some information.

12 JUDGE WALLIS: Thank you, Mr. Baker. Item 6.

13 MR. MARVIN: Your Honor, (inaudible) object.

14 JUDGE WALLIS: Oh I'm sorry, Mr. Marvin.

15 MR. MARVIN: I -- I believe that early on in the
16 discovery process we discussed the desirability of making
17 discovery that was generated generally available to -- to
18 the party's at large as opposed to just individuals. I
19 -- I have a request with Friends and SOSA receive any
20 discovery that they received and I would just ask that, you
21 know, I think under just normal civil rules I would be
22 entitled to receive the -- the discovery and I -- I'd that
23 that -- that courtesy be extended to me and Mr. Kahn as
24 well.

25 In other words, I -- I -- I have not received any --

1 actually I have not -- I have not been receiving any of the
2 outgoing communications regarding discovery in that regard
3 (inaudible) discovery requests and I -- I guess at this time
4 I would ask that if there are communications regarding
5 discovery (inaudible) that they would disclosed and shared.

6 MR. ARAMBURU: I think we can do that that's no
7 problem. You'll get everything.

8 JUDGE WALLIS: Very well. Thank you, Mr. Aramburu.

9 MR. MARVIN: (Inaudible) a computer.

10 MR. ARAMBURU: Yeah, (inaudible).

11 MR. MARVIN: Okay, very good.

12 JUDGE WALLIS: Okay. Now, Item 6.

13 MR. ARUMBURU: Item 6 has to do with a very specific
14 reference that's been made by the applicant concerning its
15 project and that's found on Page 1-14 of the EIS. And
16 again, this is not information that's been developed either
17 by EFSEC as far as I know or by BPA. But is -- is applicant
18 produced information. So as you examine this matter, Your
19 Honor, you'll need to -- to look specifically at that
20 reference.

21 Now, what that says is that they can't -- that is
22 Whistling Ridge Energy, cannot and will not develop a
23 project that is any smaller than 70 megawatts. And they
24 based this on -- on -- on really two things and that is, No.
25 1, that anything less than 70 megawatts would not meet the

1 return on investment requirements that the applicant has.

2 And No. 2, that they must provide -- and I'll quote
3 here, "A minimum level of generation to be attractive to
4 utilities seeking to fulfill their RPS requirements." And
5 so a line has been drawn in the sand here. The -- the --
6 we've got a -- it's sort of 70 megawatts or else 54/40 or
7 fight, something in that -- that nature that's -- that's
8 been raised by the applicant.

9 Now, I think the applicant's material here was drawn
10 very carefully by the lawyers to attempt to bring themselves
11 within the rulings found in the Kittitas Valley case. But
12 there's a big distinction here. This is material that has
13 been provided by the applicant that is a part of essentially
14 their initial presentation. That is that this is -- this is
15 the minimum that meets our business plan. And I know that
16 the applicant will want the Council to -- to reiterate that
17 in any findings that it makes. But I think we're entitled
18 to find out why that is and also a second factor that wasn't
19 -- wasn't found in the Kittitas Valley case is this question
20 of the minimum level of generation to be attractive to
21 utilities to fulfill their RPS requirements.

22 That is a blanket statement, technically hearsay I
23 suppose because they're intending to say what other people
24 think. But that's a different factor and I think that that
25 factor is something that -- that information should be

1 provided as to the basis for that for -- for that -- that
2 conclusion. Who are these utilities? Why are -- why do
3 they need to have 70 megawatts? What's - what's the minimum
4 here that's -- that's -- that's being talked about?

5 Again, this is -- this is not material in reaction to
6 what citizen's groups or opponents of a project are doing
7 kind of by clawing at a project and trying to cut it down so
8 it eventually is going to become uneconomic. This is
9 material that's -- that's right off the bat coming out of --
10 of this information.

11 We think that it's appropriate to be able to inquire as
12 to the background of this information. Why -- why is it 70
13 megawatts? Well why isn't -- why isn't it 50? Why isn't it
14 90 for that matter? And secondly, who are these utilities
15 that won't take anything less than 70? Again, we needed get
16 into -- to it today but I -- I don't see that in some of
17 these requests or proposals that we're looking at, that --
18 that 70 is a number that's -- that's out there.

19 So I think in some ways it kind of can be divided up
20 into two parts. One has to do with the business needs but
21 this is very different than Kittitas Valley where in essence
22 to use an lawyer term, instead of using the Kittitas Valley
23 case or the economic viability issues as a shield to protect
24 itself from those who would try to get improper information.
25 Here the applicant is using it as a sword, that is to keep

1 people away from data and information that is highly
2 relevant to -- to what the -- to what -- what the Council
3 needs to be doing.

4 So again, subject to confidential information if -- if
5 this is based upon some letter that -- that they've gotten
6 from a -- a PSE or PGE or another utility that says, "We
7 won't take anything less than 70" well -- well fine. I
8 don't know that that necessarily has to become a part of the
9 record. But there's some basis for this or these statements
10 and I think it's really inappropriate that this applicant
11 gets to come in and say, "Okay, this is -- this is what it
12 is. You make a finding about and nobody can ask about it."
13 I think that's inappropriate, we should have the information
14 subject to a protective order.

15 MR. BAKER: Your Honor, Nathan Baker. Friends has
16 nothing further to add.

17 JUDGE WALLIS: Thank you. Mr. McMahan?

18 MR. MCMAHAN: Your Honor, as to the specific language
19 of the request, financial analysis, revenue projections or
20 other analysis that support the conclusion that the site
21 must have an installed capacity of 75 megawatts to be
22 feasible. That's what's asked for not a letter from a
23 utility. What's asked for is proprietary confidential trade
24 secret data generated by the applicant to justify the
25 fundamental economics of the project.

1 In Kittitas Valley case, the applicant provided
2 testimony -- the -- the applicant, you know, Chris Taylor's
3 (phonetic) principally and -- and Andrew Young's (phonetic)
4 testimony, testimony was offered about the minimum
5 configuration site at a hundred and -- 110 to 120 megawatt
6 range, 110 to 120 megawatt range. And the opinion that was
7 provided by that applicant that that was minimum that they
8 needed to sufficiently market the power in the then existing
9 marketplace.

10 What is -- what is -- what Mr. Aramburu is aiming for
11 here is an opinion offered by this applicant this 70, 75
12 megawatts is a threshold that is necessary to compete in the
13 marketplace. If -- if -- if SOSA and the Friends want to
14 cross examine Mr. Spadaro or, you know, perhaps a -- a wind
15 expert about what is or isn't available -- what is or isn't
16 relevant in the marketplace, we can at that time make
17 objections to that. But if they want to test the opinion
18 the can test the opinion. They shouldn't have financial
19 analysis, revenue projections or other analysis to support
20 the conclusion. It is an opinion. So I -- there is no need
21 whatsoever to -- to foist confidential data into this record
22 to -- to justify this request.

23 MR. ARAMBURU: I -- I -- just -- just on brief
24 response. The -- the reason you request documentary
25 evidence in a -- in any kind of a legal proceeding is to

1 have some background upon which to prepare your case and
2 also to prepare the -- the cross examination of -- of
3 witnesses. In -- in this case we probably will be asking
4 Mr. Spadaro some of those kinds of questions. But without
5 some background as to where his -- his -- his information
6 comes from it -- it makes that -- that cross examination
7 very difficult and of course that would be information that
8 would be provided at our hearing beginning January 5 of
9 2011. No opportunity for us to prepare information relative
10 to that for a pre-filing deadline which is coming up in less
11 than 3 weeks. Thank you.

12 MR. MCMAHAN: Your Honor, if I could reply briefly to
13 that. Again, this is absolutely square dead on the issue
14 that was in front of -- the -- the Siting Council and the
15 Supreme Court in the Kittitas Valley case. I don't care how
16 Mr. Aramburu wants to spin it, this is spot on what was
17 adjudicated in that case. And -- and if Mr. Spadaro has
18 derived opinions from his review of requests for proposals
19 or maybe even submitting some requests for proposals for
20 Northwest Utilities those opinions can be tested through
21 cross examination if Mr. Aramburu wants it and having
22 proprietary data to assist in that preparation will not in
23 any way change his opportunity to do that.

24 JUDGE WALLIS: Thank you. Let's move on to No. 7.

25 MR. ARAMBURU: I think 7's been resolved as I recall.

1 JUDGE WALLIS: The locations of alternative turbine
2 locations?

3 MR. ARAMBURU: The answer -- we requested that
4 information and if I recall correctly the response was that
5 -- that they didn't have anything that would be of a -- a
6 written -- of a written nature. And then I believe Mr.
7 McMahan -- if I don't have it wrong here and I'll let me
8 say, was that they had -- they did come up with some drawing
9 that -- that indicated some different locations for the
10 turbines and they were going to be provided.

11 MR. MCMAHAN: Let -- let me -- let me explain this,
12 Your Honor. I don't think we need to talk much about this.
13 Our response to the request is in our September 13 letter.
14 I don't have much to add to that. It is true that first of
15 all, a major alternative turbine configuration was seeking
16 flexibility to the north of the project on DNR property, a
17 proposal which the opponents did a nice of destroying
18 through comments on the -- on the SEPA determination for
19 that potential lease. That was the key issue.

20 But secondly, there may or may not be almost cartoonish
21 drawing of -- of turbines -- dots -- dots on a map in the
22 applicant's files. And we're -- we will look into that, it
23 would be old information. It's not especially relevant
24 quite frankly but (inaudible) --

25 JUDGE WALLIS: The bottom line is that whatever

1 information you have you're going to provide.

2 MR. MCMAHAN: That is correct.

3 JUDGE WALLIS: Yeah.

4 MR. MCMAHAN: But by and large these were more verbal
5 discussions and nothing that was produced to writing.

6 JUDGE WALLIS: Very well. So there's nothing to argue
7 at this time?

8 MR. ARAMBURU: Nothing to argue at this time.

9 JUDGE WALLIS: Very well. Number 8, Wildlife Data. Is
10 there any issue with that?

11 MR. BAKER: Yes, Your Honor, this is Nathan Baker.

12 JUDGE WALLIS: Mr. Baker.

13 MR. BAKER: He -- we misstated those in our reply.
14 There -- there was miscommunication between the attorneys on
15 our end and the applicant had in fact given us some
16 information prior to that. So starting in late September we
17 -- we have gotten a good amount of information. There --
18 the only remaining issue is we believe there were some
19 spotted owl surveys in the fall of 2007 that we have not yet
20 received. And we've asked the applicant to look
21 specifically at that issue.

22 MR. MCMAHAN: And Your Honor, again quickly to -- to
23 dispose of this one. We're in a circumstance here where my
24 law firm and Mr. Spadaro did not -- did not maintain the
25 data keeping exercises of wildlife results in Cheyenne,

1 Wyoming. We pressed on him very hard to provide all the
2 data sheets and information they have. They provided to me
3 -- they did a scour through their with our archive files.
4 We have Cheyenne, Wyoming and Portland, Oregon, two
5 different locations.

6 We have provided what they have told me is the universe
7 of information that wasn't deleted or could somehow could be
8 fined -- found from archives. I will take Mr. Baker's
9 request back to have them look again for spotted owl data
10 sheets from the fall of 2007. I -- I was assured we got all
11 they have but I will try again.

12 JUDGE WALLIS: Very well. Number 9. My notes --

13 MR. BAKER: Again Nathan Baker. This one is still
14 unresolved especially on the same types of inquiries that
15 will be made on the other request for information.
16 Specifically, are there any internal analyses of the -- the
17 wind speed, amount of energy that would be produced,
18 etcetera from the DNR land? So we're still waiting on that
19 information.

20 MR. MCMAHAN: Your Honor, I have responded to that. We
21 -- we didn't get a lease to put a met tower up on the DNR
22 property and leaving Mister -- Mr. Spadaro to confirm no,
23 that data wasn't achieved from the DNR property because the
24 lease was denied to us due to negative comments on the
25 -- the SEPA process. The offer to lease and the SEPA

1 determination were withdrawn by DNR after received comments.
2 So again, my response is there is no such information. We
3 submitted written correspondence and information that had
4 been exchanged with DNR during the lease negotiations and --
5 which were frankly was quite shallow there was much there.
6 But we gave the opponents everything we had relating to
7 communications with DNR. There is nothing further to
8 provide on No. 9 and I've said that in my letter.

9 JUDGE WALLIS: Very well, Item No. 10.

10 MR. MCMAHAN: Can I just take this one up? I think I
11 can get to the bottom of this. This one's been fascinating
12 to me in a way. We -- we had initially responded in my
13 September 13 letter that no such UTM data was available.
14 Subsequently I learned just -- Mr. Spadaro and I sort of
15 realized a week or two ago that UTM data -- and I'm --
16 that's probably not even an accurate description of it,
17 lat/longitude data was achieved that was -- that was an
18 impute into the FAA no hazard determinations for the
19 project. And I did communicate this issue in writing the
20 opponents.

21 Friends of the Gorge apparently ran that data and found
22 something fascinating, which is we seem to be proposing a
23 bunch of wind turbines within the scenic Gorge area, which
24 we are not. So that does call into -- some question about
25 whether the data supplied to the FAA was -- was entirely

1 correct. It -- from what we've learned just today the
2 visual simulation modeling was done with GIS inputs, which
3 accurately showed the locations of the potential turbines
4 for analysis within the corridors. They -- the consultant
5 translated the GIS inputs into lat/longitude data,
6 apparently made an error or two. I'm looking at Mr. Spadaro
7 who, for the record is nodding in agreement.

8 So we -- I guess in a way I have to thank Friends of
9 the Gorge for showing us this mistake and we will correct
10 it. But in any event to the extent that the lat/long. Data
11 is helpful once we get it corrected we would be happy to
12 provide it. Formal survey and UTM data was not provided,
13 was not done for the project, it was a translation of GIS
14 information. So I hope that that responds to that question.

15 MR. BAKER: Nathan Baker. So yeah, I mean this is a
16 constantly involving issue that's been fascinating to me as
17 well. I -- I guess based on what I've just heard it sounds
18 like there were some GIS inputs that we may not have
19 received yet. And again, we -- we would like any set of
20 coordinates that have been used for this project regardless
21 of the format.

22 MR. MCMAHAN: Yeah, I don't see a -- we really focused
23 the EGUTM data and maybe I shouldn't have read EG. We will
24 -- if it's GIS inputs we'll talk about that but I see no
25 reason not to provide that.

1 Can I just then just hop to No. 11, because I would
2 like to just resolve that? No. 11 is not on your list, Your
3 Honor and that is not No. 11 like a spinal tap. Number 11
4 -- that was a jest. Number -- No. 11 is -- is information
5 having to -- information -- a transcript that -- that the
6 applicant prepared -- my office prepared at the applicant's
7 cost from the appeal proceedings in Skamania County
8 appealing the environmental determination for wind energy
9 overlay zone ordinance that Skamania County was preparing.

10 So we I think it's been two years I'm not sure, but we
11 -- we prepared a transcript of those proceedings. We were
12 not a party to those proceedings. The Friends of the Gorge
13 and SOSA were party's to those proceedings. We had
14 achieved, acquired county tapes from the county clerk and we
15 had them transcribed by a qualified court reporter and the
16 transcript -- the transcript was prepared.

17 Now, my -- my initial reaction is this work product.
18 This is not discovery, this is work product. And Friends
19 and SOSA can go get the county tapes and do the same thing
20 if they want. However, I think that's a little ridiculous
21 so my proposal would be that if Friends and SOSA wish to pay
22 for half the cost of this transcript I will be happy to
23 provide it and we can all use it to (inaudible) relevant in
24 these proceedings.

25 MR. KAHN: Mr. McMahan, this is Gary Kahn, what was the

1 cost?

2 MR. MCMAHAN: I don't remember frankly again, it's like
3 two years ago. It's -- I -- I don't think it's much more
4 than like in a thousand dollarish range but I don't know.
5 And you and I can talk about that offline if you want, Gary.

6 MR. KAHN: Okay. And if we can't reach an agreement
7 and we still want to raise this issue we can do it at
8 another time I suppose.

9 JUDGE WALLIS: Yes. Item No. 10.

10 MR. KAHN: And that's fine, Tim, you and I can talk.

11 MR. MCMAHAN: Oh, I'm sorry. Oh, we did No. 10, didn't
12 we?

13 UNKNOWN MALE SPEAKER: We did 10.

14 UNKNOWN MALE SPEAKER: Already completed.

15 UNKNOWN MALE SPEAKER: (Inaudible).

16 JUDGE WALLIS: We did 10? Oh, yes, okay.

17 UNKNOWN MALE SPEAKER: (Inaudible) towards the data.

18 JUDGE WALLIS: Okay.

19 MR. ARAMBURU: And I have two other matters when you're
20 ready, Mr. Wallis.

21 JUDGE WALLIS: Very well, please proceed.

22 MR. ARAMBURU: The two matters - No. 1, you had
23 indicated, Mr. Wallis, in one of the prehearing orders that
24 this was not going to be a part of the adjudicative record,
25 these proceedings regarding discovery. It -- it -- and I'm

1 not quite sure why that -- why that was. But it does seem
2 to me that -- that given I think the importance that the
3 party's have put on this that -- that these proceedings
4 ought to be a part of the adjudicative record.

5 JUDGE WALLIS: I -- I do not recall the specific
6 statement to which you refer but my understanding would be
7 that any record of this proceeding and the correspondence
8 and the briefing is inherently a part of the adjudicative
9 record.

10 MR. ARAMBURU: Okay. Perhaps I just read that wrong,
11 so -- so -- let's (inaudible) that.

12 JUDGE WALLIS: Sometimes I mumble and sometimes my
13 mouth operates before my brain engages. So it's entirely
14 possible.

15 MR. ARAMBURU: The -- the second item, Your Honor and I
16 -- I don't want to be presumptuous here, but we have noted
17 in our reply that we may be requesting depending on the --
18 your rulings here some -- some brief delay in -- in those
19 portions of -- of SOSA's testimony that would be related to
20 these -- these materials.

21 We -- we made our original request to the applicant in
22 -- in -- in August with the anticipation that sometime to
23 the -- in the middle of September we would -- we would have
24 this information in hand and would be able to use it in the
25 six weeks between then and the time that our prefile

1 testimony was due on November 1st. And as it's turned out
2 and to some extent not due to anyone's fault and I
3 understand the objections that have been made by the
4 applicant were not made for purposes of delay they were
5 principal objections. But nonetheless, it is now less than
6 three weeks before the -- the hearing. Some of this data --
7 and I don't know how much there is but I -- but I'll be that
8 if your ordered the met data it's a couple years worth of --
9 of pieces of information.

10 But it's going to take us a while to -- to put this
11 material together and use it in the course of our testimony.
12 So I -- I -- I would like you to consider depending on your
13 ruling to give us some additional time to be able to
14 incorporate this material because by the time you make your
15 ruling, by the time the material if you so rule is provided
16 to us it's probably going to be two weeks before our -- our
17 testimony is due and I -- I think that's really too short
18 given the circumstances. So I wanted to make that request.
19 We did so in our brief.

20 JUDGE WALLIS: Mr. McMahan, your response.

21 MR. MCMAHAN: Thank you, Your Honor. This actually to
22 me is a key issue. And I think it does go to the Council's
23 discretion under the EPA. If -- if the -- if what is agreed
24 I believe to be proprietary confidential information somehow
25 made available through a protective order, there will I

1 predict be a significant portion of time devoted to arguing
2 about the content and the protection afforded by that
3 protection order.

4 Secondly, I would anticipate that we will spend between
5 now and the summer litigating every piece of paper covered
6 by that protective order, it's admissibility, its relevance,
7 the level of protection needed to be afforded and how the
8 Siting Council could somehow on earth protect it from public
9 disclosure if it's used in written direct testimony, which
10 is exactly what Mr. Aramburu is talking about or on cross
11 examination. I do not believe that's possible in these
12 proceedings particularly given that we are not subject to
13 the UTC protections. So I -- I want to just flag that. I
14 think this goes to the -- both material and to discretion by
15 the Siting Council under the APA.

16 MR. ARAMBURU: I do want to make clear from our -- our
17 standpoint that -- that in -- in ordinary courts usually a
18 protective order is one proposed by the party to whom
19 information is requested. And while Mr. McMahan has -- has
20 made a number of arguments he hasn't talked about the terms
21 of a protective order and I would not want to see further
22 delay here while we're arguing about the terms of a
23 protective order.

24 We will stipulate -- and I think Mr. Kahn and Mr. Baker
25 are on the phone, we will stipulate that any material that

1 is received by us will remain confidential to -- to the
2 party's. That it will remain confidential to our witnesses
3 that the material will not be distributed under any
4 circumstances to any other party's at -- at any time and
5 that you will resolve questions of admissibility and
6 appropriateness of -- of those matters at the time. But I
7 -- I -- I want to expedite this process because it -- I
8 think it really unfair to have two weeks to look at this
9 information. But we did I think make a good faith effort to
10 have this available. We set the time in which the material
11 would be provided to be just after the -- the direct
12 testimony was provided by the applicant. So -- so we -- we
13 do make that request, Mr. Wallis.

14 JUDGE WALLIS: Very well. We are aware of the party's
15 positions on this and if the decision so indicates then we
16 will expect some discussion with the party's about it. That
17 concludes the list of items. Is there anything further that
18 the party's would like to bring forward? Or, Mr. Marvin,
19 that you would like to bring forward before we conclude this
20 session?

21 MR. MARVIN: No, Your Honor.

22 MR. ARAMBURU: Is -- is it appropriate to ask about the
23 -- about the status of the EIS? And I noticed Mr. Posner is
24 here. Is -- is that appropriate for these proceedings? If
25 not I'll keep my mouth shut.

1 JUDGE WALLIS: Certainly I -- we're certainly willing
2 to share whatever information we have but why don't we do
3 that off the record?

4 MR. ARAMBURU: (Inaudible).

5 JUDGE WALLIS: I don't see any reason to have it on the
6 record at this point. Very good. There will be an order
7 entered shortly. I can't produce -- predict exact when but
8 we recognize the timeframe that everybody is under and we
9 will do our best to have a Council order to you imminently.
10 Thank you very much for your presence today.

11 MR. ARAMBURU: Thank you very much for your attention.

12 *** TOO MANY PEOPLE TALKING CANNOT MAKE IT OUT ***

13 JUDGE WALLIS: Thank you for bearing with us with the
14 technological challenges that we had. And as I say we will
15 be entering an order shortly. Thank you.

16 MR. LUCE: Judge Wallis? Judge Wallis?

17 JUDGE WALLIS: Chairman Luce.

18 MR. LUCE: I have listened with a great deal of
19 interest to the arguments here and prior (inaudible) showing
20 I would -- I would like the opportunity for the Council to
21 reflect on this because it does seem to me that insofar as
22 the economic viability issues that have raised this is --
23 this is more than a discovery request, this is a substantive
24 issue, which runs to some of the precedent of the Council,
25 in particular Kittitas Valley.

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JUDGE WALLIS: Certainly, Mr. Luce.

MR. ARAMBURU: And Mr. Luce, if you'd like any more authorities a briefing from us we're happy to provide it. This is Rick Aramburu speaking for the -- for SOSA.

MR. LUCE: Thank you very much.

JUDGE WALLIS: Very good. Thank you all. This session is concluded.

(End of Whistling Ridge Prehearing Conference)

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IN RE: Energy Facility Site Evaluation Council
Whistling Ridge Prehearing Discovery Conference

HELD: October 12, 2010

AFFIDAVIT

I, Anna Hirsch do certify that the recordings provided to me
of the EFSEC Whistling Ridge Prehearing Discovery
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the best of my ability.

Anna Hirsch,
Transcriptionist