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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITIES SITE EVALUATION COUNCIL

In the Matter of)
Application No 2003-01) KITTITAS COUNTY
SAGEBRUSH POWER PARTNERS, L.L.C.) CLOSING ARGUMENT
KITTITAS VALLEY WIND)
POWER PROJECT)
_____)

“**Good’ faith’**, accordance with standards of honesty, trust, sincerity, etc. (usually prec. by *in*): *If you act in good faith, he’ll have no reason to question your motives. Cf. badfaith.*”¹

The record fails to demonstrate that the applicant acted in good faith to resolve consistency issues with the county. To the contrary, the record shows that the applicant acted in bad faith and simply went through the motions of filing a request with the County. The project proposal was and still is ill-defined, ambiguous, poorly sited, improperly mitigated, and contrary to the county lawfully adopted GMA development regulations and comprehensive plan. The applicants efforts are little more than a half hearted attempt of going through the motions with the County and then expecting EFSEC to bail them out when their ill-conceived project failed to obtain approval. In the decades of existence of EFSEC there has never been a preemption request granted. Under the EFSEC rules preemption is designed to be a very difficult hurdle for an applicant to overcome. Under those rules, preemption is supposed to be difficult so that a

¹ *The Random House Dictionary of the English Language - 2nd Edition – unabridged (1983) at page 822.*

1 local jurisdiction can consider the multitude of local planning issues that impact a community.
2 If preemption were to be granted under these facts it would render the consistency requirement
3 under EFSEC rules meaningless and would be contrary to planning laws of this state.

4 The applicant's initial argument is quite lengthy. We do not intend to attempt to match
5 the applicant in length or verbosity. They have far more attorneys, staff and finances to throw
6 limitless resources at the issues. Despite this seemingly limitless resource and volumes of paper
7 expended it is, however, quite notable that for all of the arguments and papers they submitted,
8 there is very little that address the key issues at hand. This is no doubt in large part due to the
9 fact that despite there seemingly limitless resources they were unable to present the information
10 necessary to justify the project proposal. This is because the project as proposed is
11 fundamentally flawed.
12

13 The County would ask that the Counsel take the time to reread the prefiled testimony of
14 Darryl Piercy again in its entirety. As you read through that document you will again capture the
15 essence of the applicants' bad faith in dealing with the County. Also when reading through the
16 transcripts, please pay particular attention to the County public hearing transcripts of April 12,
17 2006 through to the end of the county process on June 6, 2006. That is where most of the
18 discussions with applicant on the record occurred. That is where the Council can read for itself
19 the conversation that transpired rather than the mischaracterizations that are rampant in the
20 applicants brief. Those are the public discussions that show the applicant's lack of good faith to
21 resolve this issue and there attempt to mischaracterize them simply further highlight their bad
22 faith effort.
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1 proposal. Yet the applicant would apparently have the county and EFSEC believe that although
2 they plan to spend literally hundreds of millions of dollars to build a project, they have never
3 actually done an analysis that matches the number of turbines proposed. If it is in fact true that
4 they have never actually mapped out such a layout, how could they possibly know how many
5 they could site or how can they make any analysis to figure out what is “economically viable”?
6 Yet the applicant refused to provide such a layout to the county during its hearing process and
7 also refused to prove such a layout to the county as part of the informal discovery in the EFSEC
8 process.
9

10
11 **Why did Horizon continually delay its own project application?** The testimony of
12 Clay White setting forth the facts of the early stages of the applicant’s project shows a continual
13 history of the applicant providing incomplete information and delaying their own application
14 submittals to the county and yet continually attempt to paint the erroneous picture that the
15 County was causing delays. If a project proposal is a good one, and if they were acting in good
16 faith to work through the county land use rules, there would be no need for such gamesmanship.
17

18
19 **Is the assertion of lack of economic viability true or not?** The applicant asserted that
20 the project is not economically viable with a setback of greater than 1320 feet. They refused to
21 explain that assertion to the County during the county land use hearings. In response to the
22 county informal discovery request through EFSEC the applicant again failed to provide any
23 documentation to back up such a claim. They assert this although they have already developed
24 other wind farm projects with far fewer towers than one which would result if proper setbacks
25 were imposed. They say this despite the fact that they cannot even show a map delineating the

1 tower layout for the number of turbines proposed. If the assertion is true, it simply demonstrates
2 a poorly proposed and sited project. The fact that they may have spent a lot of money on the
3 project does not justify ignoring the environmental analysis. Would EFSEC approve a project
4 that fails to mitigate damage to wetlands or bird kills simply based upon an applicant's assertion
5 that following the environmental analysis makes the project not economically viable?
6

7 The testimony of the applicants witness appears to imply however that the assertion was
8 simply a negotiation tactic. If it is not just a tactic, how could they claim they were simply
9 waiting for a counter proposal on setbacks? If it's just a negation tactic, how is that being honest
10 with the County or acting in good faith?
11

12 **Why did the applicant refuse to negotiate in public?** The applicant repeatedly complains
13 that their inability to work out issues was in part related to the County insistence on a public
14 process. This complaint is based solely upon the fact that the County told them repeatedly that
15 the negations on issues would not occur behind closed doors in private meeting, but rather would
16 occur in public. For the County to have acted as the applicant wanted would, however, been in
17 violation of the open public meeting act and appearance of fairness laws. The applicant gives no
18 explanation as to how it is not possible to negotiate in public, but rather continues to insist that
19 the inability to meet in private with County commissioners somehow made it not possible to
20 negotiate issues. They give no explanation as to what could only have been negotiated in
21 private, but somehow place blame on their failure due to a lack of ability to have private
22 meetings with the commissioners. In light of the fact that they did not seek such private
23 negotiations session with EFSEC and yet are even in their briefing apparently negotiating with
24 EFSEC, this complaint is yet just another example of their failure to work with the County in
25

1 good faith. It is incompressible that they are attempting to blame their lack of success on the fact
2 that the county has an open public process.

3
4 **Why is Horizon negotiating and offering concession to EFSEC when it refused to do so**
5 **with the County?** Horizon declined to offer any negotiations to address the impacts on visual
6 impact and shadow flicker. Yet during the EFSEC hearing they unilaterally offer up mitigation
7 on addressing the shadow flicker issue without any request from EFSEC. Why is it that Horizon
8 is willing to negotiate and offer up proposals to EFSEC, but failed to do so with the County?

9
10 The county was looking for proposals from the applicant, but the applicant refused to offer any.
11 Their willingness to offer up such mitigation to EFSEC when they failed to do so with the
12 County is further evidence of bad faith by the applicant and did not take the County process
13 seriously.

14
15 **How is the applicant walking away from the negotiation process acting in good faith?**

16 The applicant walked away from the public process with a refusal to answer questions or respond
17 to the questions of the commissioners and giving the ultimatum that “At this point you could
18 vote thumbs-up, thumbs down this project. The application is before you.” (May 3, 20006 at 49
19 – 52) It was the County who sought EFSEC assistance in getting the applicant back to the
20 table.
21

22
23 **Why didn't the applicant appeal the County denial of their application to the**
24 **Hearings Board or the Superior Court through a LUPA appeal?** It is clear that the reason
25 they did not appeal the County denial because they knew County decision would be affirmed. If

1 they actually had a good faith basis to believe the County decision would be overturned they
2 obviously would have filed such an appeal since a reversal of the County decision would have
3 assisted them in a request with EFSEC. There pages of argument of the alleged errors are wholly
4 without merit, but will not be addressed since they were not timely appealed to the proper
5 authority and as such the validity of the County decision is already affirmed as a matter of law.
6

7
8 **Why does the alleged “lack of criteria” from the county process cause such difficulty**
9 **for the applicant while the absence of criteria for EFSEC appears to cause them no**
10 **difficulty?** One of the alleged complaints the applicant has of the County land use process is the
11 County has not yet adopted specific standards for issue like setbacks. Given the lack of specific
12 setback criteria in the ESFEC rules, if this was a legitimate complaint then they should have the
13 same complaint and inability to proceed with EFSEC.
14

15 There are far too many unanswered questions in a process that should have complete, full,
16 truthful, and accurate information. The applicant should not be rewarded for their obfuscation
17 and lack of openness.
18

19
20 **THE SETBACK PROPOSED BY THE APPLICANT IS NOT SUPPORTED BY THE**
21 **ENVIRONMENTAL ANALYSIS**

22 Initially the applicant proposed a 1000 foot setback from residences. That would be the
23 same setback distance that the County had rejected in the first Desert Claim project proposal.
24 This was specifically based upon the finding in the Desert Claim EIS and the applicant
25 representatives were well aware of that case and had been monitoring its progress during those

1 hearings. The County was then told without any explanation to support it that a setback in
2 excess of 1250 would render the project no longer viable. Then a day or two later the County
3 was told that a 1320 setback would work, but any setback greater than that would make the
4 project no longer economically viable. When asked to explain how that was the case the
5 applicant essentially stated that it was none of the County's business. When asked for
6 information to support and justify their proposed setback they provided none to contradict the
7 environmental review.

8 None of those setbacks they proposed are supported by the environmental analysis.
9 There is no visual analysis conducted at that distance that shows there is not a significant
10 environmental impact at that distance. Not even one. The environmental analysis shows
11 significant adverse impacts exist at the one quarter to one half mile distance and even at that
12 outer distance there are still some significant impacts in some locations. The significant negative
13 visual impacts were demonstrated in the Desert Claim EIS and the Kittitas Valley Project EIS.
14 The absence of significant negative impacts at greater distances was further demonstrated and
15 confirmed in the Wildhorse EIS.

16 Despite that fact that the applicant cannot point to even one location in the project area
17 that has been analyzed at their proposed setback distance that shows a lack of significant adverse
18 impact, the applicant seeks a setback that would **always** allow such a setback at **all** places and **all**
19 locations at **all** times regardless of the quality of view that is being impacted. They seek such a
20 blanket approval even though the applicant at this point cannot or will not identify the locations
21 of turbines other than they would be somewhere along a line drawn on a map. The DEIS for this
22 project and the EIS for the other windfarm projects in this County demonstrate that significant
23 adverse impacts exist within a half mile range. For the applicant to insist upon a setback at 1320
24 feet is bad faith effort to obtain consistency with local land use regulations.
25

1 The applicants attempt to get around the objective determinations of the environmental
2 analysis could be characterized as comical if the issues at hand were not so serious. The
3 applicant position necessarily works from the erroneous assumption that the only place from
4 where you can see the turbines would be the EIS specific visual analysis locations. It further
5 would need to assume that the view can only be seen from those locations in the direction chosen
6 for the EIS visual simulation. The EIS identified several areas of significant visual impact at
7 distances at distance even greater than 1320 feet at the visual assessment locations. The
8 applicant then simply removed the turbines located in the view of the visual simulation
9 performed in the EIS. The removal of turbines was based solely upon the happenstance of the
10 location and direction of the visual simulation. The applicant did little more than redesign the
11 layout around the visual simulations. This failed to take what the EIS analysis demonstrates and
12 apply it across the board to other locations. The visual simulation demonstrate significant
13 adverse impacts at the distances the applicant proposes.

14 The most obvious misuse of the EIS analysis is viewpoint 2 show in VIS-1 Revised, Part
15 A (one of the large blowups presented by the applicant). The visual simulation was looking to
16 the north. Based upon the simulation and analysis, the applicant removed all of the turbines
17 visible in the visual simulation analysis photo. There were turbines actually physically closer to
18 the viewpoint, but the applicant didn't remove the turbines that were located even closer to visual
19 site. The only reason for this is because the camera for the visual simulation was pointing north
20 instead of south or east where the other turbines were located. Carrying forth the illogic of the
21 applicant's use of the environmental analysis, if the camera for the visual assessment had been
22 pointing south east instead of north, the turbines to the north would have remained, but the
23 turbines to the southeast would have been removed.

1 The applicants attempt during the hearing to justify the 1320 setback is clearly devoid of
2 any merit. Their “expert” Mr. Priestly on the one had asserts that the towers dominate up to a
3 distance of 1640 feet. (If this is true the applicant own expert has confirmed that the 1320 foot
4 setback the applicant instead upon is invalid and unsupported). Mr. Priestly then also urges that
5 an item only dominates a view if the object is so big that you cannot see the entire object. Such a
6 characterization defies all common sense and logic. We would invite the council member to look
7 at the visual simulations of Mr. Priestly and then place a picture of any item (a building a pet
8 animal or other object) that is slightly smaller than his pictures and place them over the picture.
9 Even though the item you place over the picture may cover 90% of the picture, he would
10 conclude that the item does not dominate the picture. Such a characterization is clearly without
11 merit.

12 Finally, the applicant now is some last ditch effort to try to justify a reduced setback has
13 now presented some sort of argument that the setback be based up the turbines being shorter than
14 they really are by assuming that they are in a “Y” position. This latest argument raises several
15 issues of concern all of which simply further affirm the lack of good faith of the applicant. First,
16 in order to get approval they are asking that we basically pretend that turbines are shorter than
17 they really are. Second this new proposal contradicts their own “expert” Mr. Priestly who said
18 1640 was the number for turbines dominating the view. Third, why is the applicant attempting to
19 negotiate with EFSEC when it failed to do so with the County?

20 The visual impacts at the distance proposed by the applicant are not supported by the
21 environmental analysis. The refusal of the applicant to work with the County to achieve a
22 setback supportable by the environmental analysis demonstrates their failure to work with the
23 County in good faith.

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3 **THE APPLICANT FAILED TO PURSUE A VARIANCE PROCESS FOR THE 2500**
4 **FOOT SETBACK THAT WAS SUPPORTED BY THE ENVIRONMENTAL ANALYSIS**

5 The commissioners brought forth suggestions and willingness to the applicant to create
6 exceptions to the 2500 foot setback when it could be demonstrated that such a variance was
7 warranted. This course of action had also been suggested to the applicant by county staff in
8 order to work out the setback issue. The record shows that the applicant failed to even consider
9 or pursue such a process with the County, but continued to remain entrenched in opposition to
10 any setback of 2500 feet from residences. In light of the environmental review that demonstrates
11 significant adverse impacts at less than 2500 feet, the failure to pursue such a variance process
12 was bad faith. The applicant seeks a 1320 foot setback in all situations even though it contradicts
13 the environmental analysis to have such a short setback. The County on the other hand insisted
14 on a 2500 foot setback from home that would always be allowed and offered to consider a
15 variance process that could allow for lesser distance if analysis so warranted (such as an
16 obstructed view or a situation where the view quality was so poor that a smaller setback did not
17 cause significant environmental harm). It is the applicant obligation to act in good faith to
18 attempt to resolve the consistency issue. Even up to the minute before the County rendered its
19 final decision of denial, the County still gave the applicant the opportunity to reengage the
20 county in discussions, but the applicant declined to do so. (June 6, 2006 page 5). The applicant
21 failed to act in good faith to resolve this issue.
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1 **THIS PROJECT FAILS TO SATISFY THE EFSEC CRITERIA THAT ALL OTHER**
2 **ALTERNATIVE SITES HAVE BEEN REVIEWED AND FOUND UNACCEPTABLE**

3 The facts are uncontradicted that there are multiple other sites in Kittitas County and in
4 the State of Washington to site windfarms. Windfarms are allowed in Kittitas County, but they
5 are only allowed in areas designated as Windfarm Resource areas in the Comprehensive Plan.
6 The Wildhorse Wind Power Project has been approved by both Kittitas County and EFSEC.
7 Wildhorse is currently under construction and the construction oversight is being undertaken by
8 Kittitas County CDS under contract with EFSEC. At least three other potential windfarms sites
9 have also been identified in the record as currently identified sites for new windfarm
10 development in Kittitas County.
11

12 Even before it has been completed, an expansion of Wildhorse is being evaluated and is
13 an alternative. Invenenergy also has a potential site south and east of Wildhorse. In addition,
14 enXco's Desert Claim project is undergoing a radical revision from the project previously
15 reviewed by the County, so is yet again another project that has not been reviewed nor found
16 unacceptable. The applicant's argument that they meet this criterion would render the criteria
17 meaningless.
18

19 **THE COUNTY PROCESS IS A LAWFUL WORKABLE AND CONSOLIDATED**
20 **“ONE STOP SHOPPING” PROCESS**
21

22 The applicant has taken issues with the alleged “difficulty” of the County process. Any
23 such negative assertions or implications are clearly without merit particularly in light of the
24 applicant's ability to achieve approval for the Wildhorse project. The shortcoming is not with
25 the County process. The shortcoming is the applicant and their project. Zilkha (Horizons

1 predecessor) and several of the intervenors were actively involved with County development of
2 its land use process for siting Windfarms in this County. In the end, neither opponents nor
3 Horizon obtained a process or decision that they ideally wanted. Opponents wanted them all
4 prohibited. Horizon wanted the other extreme. The Kittitas County Board of County
5 Commissioners adopted a middle ground where applicants could ask for changes and would then
6 need to demonstrate that the there proposals were justified. No one appealed the process that
7 was adopted. No one challenged the legality or validity of that process. Horizon could have
8 exercised it rights to file such a challenge but chose not to.

9
10 No only did Horizon not challenge the County process but they used that process to their
11 advantage and successfully received approval of the Wildhorse project. Now after having
12 successfully used the lawfully adopted and enacted public process of Kittitas County, Horizon
13 appears to be years after the fact in some way challenging the lawfulness or validity of the
14 county process. As a matter of law, however, the county process is lawful and their success with
15 Wildhorse process demonstrates that it is not only lawful, but is workable to approve well
16 located and thought out projects.

17
18 Horizon also appears to be in some way challenging the validity of the denial of their
19 project proposal. EFSEC is not the forum for such a challenge and this late date is clearly not
20 timely. If the applicant truly believed there was any legitimacy to its argument that the denial
21 was legally in error it's recourse to challenge that decision was to the Growth Management
22 Hearing Board or to Superior Court through Land Use Petition Act depending upon the basis of
23 the challenge. Horizon did not, however, appeal that decision and its attempt to challenge the
24 legality of the denial through the EFSEC process is just further evidence of there bad faith.
25

1 Having failed to challenge those to the proper forum in a timely fashion they are bound by the
2 lawfulness of the County determination.

3
4 **THE PROJECT DOES NOT SERVE THE INTEREST OF WASHINGTON STATE**

5 The applicant has no purchaser for the power from this project. The applicant has not guaranteed
6 or proposed that the power that could be generated from this facility would be used in the State
7 of Washington. Preemption of Washington State GMA land use laws to provide power to out of
8 State users does not serve the interests of the State. The project also produces a relatively small
9 amount of power for a very large land area that is impacted.
10

11
12 **PREEMPTION IS NOT ALLOWED FOR SITING WINDFARMS IN A**
13 **GROWTH MANAGEMENT ACT COUNTY**

14 This issue is being raised last because it is one that EFSEC need not decide if it denies the
15 request for preemption. The legislative structure of state law, however, provides that growth
16 management planning prevails over the EFSEC sitting process. The EFSEC “preemption”
17 provision cited by the applicant is RCW 80.50.110 which provides
18

19 (1) If any provision of this chapter is in conflict with any other provision, limitation, or
20 restriction which is now in effect under any other law of this state, or any rule or regulation
21 promulgated thereunder, this chapter shall govern and control and such other law or rule or
22 regulation promulgated thereunder shall be deemed superseded for the purposes of this
23 chapter.

24 The “now” as reference in the provision is the 1970’s. Some twenty years later, however, the
25 legislature enacted the Growth Management Act under RCW 36.70A. The GMA is a bottoms up
local land use planning laws that dramatically changed the way that planning occurs in the State

1 of Washington. GMA is based upon local planning and consideration of the balancing of more
2 than a dozen often conflicting goals that are inherent in planning. The GMA gives this planning
3 authority to the local jurisdictions that plan under the GMA. There is no ambiguity in the fact
4 that the GMA local land use plans are binding upon all state agencies. RCW 36.70A.103 makes
5 this crystal clear:

6
7 State agencies shall comply with the local comprehensive plans and development regulations
8 and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW
9 71.09.250 (1) through (3), 71.09.342, and 72.09.333.

10 The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to
11 site any other essential public facility under RCW 36.70A.200 in conformance with local
12 comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

13 [2002 c 68 § 15; 2001 2nd sp.s. c 12 § 203; 1991 sp.s. c 32 § 4.]

14 EFSEC is a state agency. As such, EFSEC is obligated to comply with local comprehensive
15 plans and development regulations for those Counties that plan under the GMA. In that Kittitas
16 County is a GMA county, any siting approval of an energy facility in Kittitas County must
17 comply with the Kittitas County comprehensive plan. The applicant's proposal fails to comply
18 with the comprehensive plans and development regulations and as such EFSEC lacks the
19 authority to "preempt" the local land use regulations.

20 It should be noted that the GMA has made provision for a process for the state to site
21 "essential public facilities". Neither wind farms in general, nor energy facilities in particular,
22 fit within the definition of "essential public facilities" under that statutory definition. If the
23 legislature had intended to include energy facilities within the "essential public facilities"
24 category of GMA it could have easily done so but did not. As such in a GMA county such as
25 Kittitas County state agencies (including EFSEC) must comply with local comprehensive plan
and development regulations.

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CONCLUSION

The applicant has failed to make a good faith effort to resolve non-compliance. The applicant has failed to demonstrate that alternate locations within the County have been reviewed and found unacceptable. The applicant has failed to demonstrate that this project meets the interest of the State. The applicants request for preemption must be denied. Such denial also necessarily requires that the Council recommend reject of site certification.

Dated this 13th day of November, 2006


James E. Hurson WSBA #12686
Chief Civil Deputy Prosecutor for
Intervener Kittitas County