



This Brief is provided by Residents Opposed to Kittitas Turbines (“ROKT”) with respect to Post Hearing Response Briefs filed by various parties in this proceeding.

## I. INTRODUCTION

Post Hearing Response Briefs focused upon purported benefits arising from promotion of indigenous and renewable energy resources. This proceeding is not, however, a referendum upon the benefits and detriments of wind resource facilities, but a locational choice for a specific identified project. More important, this proceeding requires a determination regarding the exercise of extraordinary preemptive authority to eliminate local decision making for such projects. That authority should not be exercised under the facts of this case.

## II. ARGUMENT

### **2.1 Department of Community Trade and Economic Development (CTED) is Precluded from Participation in the Process and All Testimony, Evidence and Briefing Should Be Stricken from the Record.**

Department of Community, Trade and Economic Development (CTED) has appeared and advocated a support position for Kittitas Valley Wind Power Project. Intervenors ROKT and Lathrop have registered objections to the participation by both CTED and Department of Natural Resources. The apparent and obvious conflict of interest undermines fundamental due process and appearance of fairness in this proceeding. It is improper to have an advocate also participate as a decision maker. CTED’s participation is limited for another reason – the statutory guidelines specifically prohibit CTED’s participation in any regulatory proceeding in this state. RCW 43.21F.055 provides:

The Department shall not intervene in any regulatory proceeding before the Washington Utilities and Transportation Commission or proceedings of utilities not regulated by the Commission. Nothing in this chapter abrogates or diminishes the functions, powers, or duties of the Energy Facilities Site Evaluation Council pursuant to Chapter 80.50 RCW, the Utilities and Transportation Commission pursuant to Title 80 RCW, or other state or local agencies established by law.

The Department shall avoid duplication of activity with other state agencies and officers and other persons.

CTED should be precluded from participation and all evidence and briefing stricken from the record.

**2.2 CTED Offers Misplaced Authority With Respect to Unnecessary Duplication of Effort and Review Processes.** CTED also makes the unsupported assertion that Growth Management Act (GMA) (and regulations implementing GMA) are influential in the review of preemption in this proceeding. It is argued:

*In a number of sections in WAC 365-195, CTED addresses the issue of Act's planning requirements relative to other planning requirements. CTED directs counties and cities to attempt to identify other statutes and legal authorities affecting subjects addressed by the plans and regulations that the counties and cities develop under the Act. WAC 365-195-710(1). A key reason for this is to avoid unnecessary duplication of effort. But it has the practical purpose of helping counties and cities not waste time in planning efforts that are not in their jurisdiction. In the same section, CTED suggests that state agencies, among others, shall aid in this identification by implementing programs to inform the planning entities of relevant programs and provisions within their jurisdiction or expertise.*

CTED's position in this matter is the antithesis of the argument and directives contained in regulatory provisions. Kittitas County proceeded with a thoughtful effort to develop procedures and criteria for the siting of wind-free source facilities. All agencies and interested parties were given an opportunity to provide input and provide comment. That procedure resulted in the adoption of the Kittitas Valley Wind Resource Overlay Ordinance. No appeal was filed and no objection raised to the process during the public proceedings on the Kittitas Valley Wind Power Project application.

CTED is correct in asserting that one of the primary purposes of Growth Management Act (GMA) was to “. . . avoid unnecessary duplication of effort.” This mandate compels the recognition of the local decision making process. At the heart of this proceeding is the critical issue of state “preemption” of that local decision making process.

CTED next offers a series of generalized comments upon the value and importance of alternative energy facilities. It is asserted that the project is a renewable resource; makes use of an indigenous energy resource – wind; will provide power at low cost relative to alternatives; will help diversify Washington State's portfolio of energy resources; and is proposed to be located in an area zoned for resource extraction that has rural characteristics. None of these assertions, whether or not accurate, address

the real issues of this case. CTED has ignored the pertinent issues of this case, including specifically that the Applicant has not demonstrated a good faith effort to resolve the noncompliance issues with local ordinances and that alternate locations which are within the same county and city have not been reviewed and found unacceptable. These issues must be resolved before any argument of preemption can even be addressed. However, CTED has remained silent on these points and is relying solely on Applicant's preemption argument that is not only unconvincing but has predicate requirements that have yet to be established, nor can be established.

It has been well noted that EFSEC has limited and circumscribed authority to preempt local determinations regarding the “. . . location, construction and operational conditions of certification of energy facilities.” WAC 463-28-020. This authority does not extend to review of local ordinances and comprehensive plans for compliance with other statutory regimes. And it is not authority to replace or circumvent procedures for review of Land Use Decisions under LUPA (RCW 36.70C).

An applicant before EFSEC is required to take steps to resolve “inconsistency” with local land use plans and zoning ordinances. WAC 463-28-030(1) requires:

As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

EFSEC has made a prior determination of inconsistency in this proceeding. That conflict has not been resolved and Applicant and CTED are requesting the extraordinary remedy of preemption. WAC 463-28-040 requires that the following findings be made as a condition to the exercise of preemptory authority.

The request for preemption must address the following requirements:

- (1) That the application has demonstrated a good faith effort to resolve the noncompliance issues.
- (2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.
- (3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.
- (4) Interests of the state as delineated in RCW 80.50.010.

Post Hearing Response Briefs have ignored the predicate requirements for the exercise of preemption authority. Preemption in this case is therefore inappropriate on this basis and for the other bases detailed in Intervenor ROKT's previous filings.

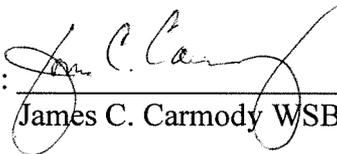
### III. CONCLUSION

CTED is specifically prohibited from participating in this proceeding by statute. CTED's participation should furthermore be prohibited due to conflicts of interests. For these reasons, ROKT urges EFSEC to strike from the record all briefing and testimony provided by CTED.

Furthermore, Post Hearing Briefs have presented nothing to refute that Applicant has failed to establish the predicate requirements for the exercise of preemption authority. ROKT therefore encourages EFSEC to deny Applicant's request for preemption and to recommend reject of site certification.

Respectfully submitted this 20<sup>th</sup> day of November, 2006.

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