

STOEL RIVES LLP
805 Broadway, Suite 725, Vancouver, WA 98660-3302
Main (360) 699-5900 Fax (360) 699-5899

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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2003-01:
SAGEBRUSH POWER PARTNERS, LLC;
KITTTITAS VALLEY WIND POWER
PROJECT

SAGEBRUSH POWER PARTNERS'
CLOSING POST-HEARING BRIEF

SAGEBRUSH POWER PARTNERS' CLOSING POST-HEARING BRIEF

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I. INTRODUCTION

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The Applicant, Sagebrush Power Partners, LLC (also “Sagebrush,” “Horizon” and “Applicant” herein) submits this Closing Brief to respond to the “Post-Hearing Response Briefs” and “Closing Statements” submitted by Kittitas County (the “County”), Lathrop, ROKT and the Council for the Environment (“CFE”). For sake of convenience, the County, Lathrop and ROKT are referred to collectively below as the “opponents.” Horizon replies to the County, Lathrop and ROKT response briefs collectively, principally because these briefs often copy each other, and as is clear from their content, they were drafted collaboratively. Toward the end of this brief, Horizon responds separately to the CFE’s post-hearing brief.

It is indeed unfortunate that EFSEC is asked to preempt Kittitas County’s decision in this case, involving an environmentally positive renewable energy resource.¹ However, it is impossible to reconcile the County’s position with EFSEC’s fundamental legal authority, and the County’s position is utterly at odds with the public interest of the citizens of the state of Washington as a whole. EFSEC should be particularly concerned about the untenable precedent for the citizens of Washington that would be established by sanctioning the efforts of a local government that deliberately sets out to adopt and enforce an energy facility siting process calculated in large part to render EFSEC powerless to fulfill its statutory mission.

The opponents contend that this case is about one thing only: setback distances from a very small handful of residences within a 6,000 acre project area planned and zoned for agricultural and natural resource uses, and characterized by very low housing density. This case is about far more than that, and the setback issue is but one of a host of issues concerning the Council. And despite the County’s misguided efforts to wrap itself in the Growth Management Act (“GMA”) flag, as discussed below, this location is ideally suited for a

¹ It is particularly unfortunate, in that the County’s siting process applies only to wind energy and not to fossil fuel and nuclear facilities.

1 commercial scale wind energy generation facility, and the Project is fully compatible with, and
2 in fact implements, the County’s adopted GMA-based Comprehensive Plan and the zoning
3 designations that govern the area. The Applicant does not ask this Council to preempt the
4 County’s GMA planning or the development regulations enacted by the County ostensibly for
5 the purpose of discouraging sprawl and encouraging rural agricultural and natural resource-
6 based industries. Indeed, this case is about the GMA only in the sense that Kittitas County’s
7 role in the process is totally at odds with the GMA and at odds with its own GMA-based
8 Comprehensive Plan and development regulations.

9 This case calls into question the very reason for EFSEC’s existence. The opponents
10 grossly exaggerate the visual impacts of the Project, ridicule Horizon’s four-year effort to
11 design a Project compatible with the County’s plans and development regulations, and they
12 contend that EFSEC must abide by a local process that would require an applicant to spend
13 over a decade in appeals of local decisions, and even after doing so, EFSEC would have no
14 power to even consider preemption or to site a an energy facility to serve public energy needs.
15 Contrary to what we hear from the opponents, the Project enjoys wide support from the
16 citizens of Kittitas County. Parochialism and obstructionism cannot control the destiny of
17 Kittitas County’s residents, nor can it control and the destiny of the citizens of Washington,
18 benefiting from affordable, clean renewable energy.

19 **II. THE COUNCIL HAS ALREADY DECIDED LATHROP’S OBJECTIONS TO**
20 **THE PARTICIPATION OF VARIOUS COUNCIL MEMBERS**

21 Lathrop continues to challenge the participation of nearly one-half of the Siting
22 Council, alleging bias and violations of the “Appearance of Fairness” doctrine. Horizon
23 understands the legislative scheme in the composition of EFSEC, and the significant expertise
24 agency representatives bring to the job of siting energy facilities. Consequently, while
25 Horizon notes the irony of Lathrop not challenging the County’s representation on the
26 Council, Horizon believes that the Council, as constituted, is fully capable of deciding this

1 matter in a fair and impartial manner. The Council, in Pre-Hearing Orders Nos. 2 through 6
2 (EFSEC Orders 778, 781, 782, 783 and 798), has already addressed this issue, and Horizon
3 assumes that the Council stands by those Orders. The Orders are legally sound and are
4 dispositive of this issue. Horizon has nothing further to add to that analysis and decision.

5 **III. EFSEC AND THE GOVERNOR POSSESS THE POWER TO PREEMPT**
6 **KITTITAS COUNTY’S “DENIAL”**

7 Lathrop, ROKT and the County all contend that by virtue of enactment of the GMA,
8 EFSEC no longer possesses its authority to supersede and preempt the County’s decisions in
9 this case. Their arguments are legally flawed, based on misstated case law, and fail to
10 acknowledge an explicit constitutional impediment to the GMA “trumping” RCW chapter
11 80.50.

12 RCW 80.50.110 sets forth EFSEC’s preemption authority with perfect clarity:

13 (1) If any provision of this chapter is in conflict with
14 any other provision, limitation, or restriction which is now in
15 effect under any other law of this state, or any rule or regulation
16 promulgated thereunder, this chapter shall govern and control
17 and such other law or rule or regulation promulgated thereunder
18 shall be deemed superseded for the purposes of this chapter.

19 (2) The state hereby preempts the regulation and
20 certification of the location, construction, and operational
21 conditions of certification of the energy facilities included under
22 RCW 80.50.060 as now or hereafter amended.

23 Additionally, RCW 80.50.120 could not be more clear in establishing EFSEC’s
24 plenary authority over energy facility siting:

25 RCW 80.50.120
26 Effect of certification.

(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

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(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not.

These statutory provisions are implemented by the Council’s rules, codified at WAC chapter 463-28. If anything, the Council’s rules are overly deferential to local plans and zoning, and require efforts by an applicant as a precondition of “seeking” preemption, despite the legislature’s clear direction that EFSEC possesses preemptive authority at the very outset of energy facility siting proceedings. It can be debated whether EFSEC has unduly compromised its plenary siting authority. What is completely clear, however, is that the enactment of the Growth Management Act, RCW chapter 36.70A, did nothing to compromise, limit or repeal EFSEC’s preemptive siting authority.

The opponents essentially argue four things: (1) preemption is limited exclusively to “any provision, limitation, or restriction” “in effect” in the 1976, and EFSEC has no power to preempt any plan, regulation, ordinance or statute enacted thereafter—EFSEC’s preemptive power, they say, is forever confined to the laws in effect in 1976; (2) because the GMA was enacted after RCW chapter 80.50, the latter enactment prevails over the former, and EFSEC therefore has no preemptive power; (3) the GMA provisions related to “essential public facilities” somehow compromise EFSEC’s energy facility siting authority; and (4) based on RCW 36.70A.103, EFSEC is required to comply with locally adopted GMA-based plans and development regulations.

As discussed further below, the opponents’ arguments are fatally flawed for two fundamental reasons. First, the “now in effect” language can only be reasonably construed to implement the overarching statutory scheme, not to restricting EFSEC’s power to the regulatory antiquities in effect in 1976. Rather, the “in effect” language ensures a living, enduring, plenary authority and legal effect of preempting *every* restriction “now” in effect—

1 today, yesterday and tomorrow—at any date when an energy facility proponent seeks
2 certification. The opponents make no effort to reconcile their argument regarding RCW
3 80.50.110(1) with subsection (2), which can only mean what it says: “The state hereby
4 preempts the regulation and certification of the location, construction, and operational
5 conditions of certification of the energy facilities included under RCW 80.50.060 as now or
6 hereafter amended.”

7 Second, and most importantly, the opponents utterly disregard, and make no effort to
8 reconcile their arguments with Article II, section 37 of the Washington Constitution and with
9 the line of cases cited in Horizon’s Opening Brief regarding this constitutional prohibition.
10 The law could not be more clear—without an explicit statement in the Growth Management
11 Act repealing, amending or restricting EFSEC’s and the Governor’s authority, that authority
12 remains fully intact, regardless of whether a particular county is required to plan under the
13 GMA. Any implied amendment or repeal is repugnant under Washington’s constitution.

14 **A. To Limit Preemption to Laws “In Effect” in 1976 Would Yield Absurd**
15 **Results, Contrary to the Statute Considered as a Whole.**

16 RCW 80.50.110(1) does not limit EFSEC’s preemptive authority to the regulatory
17 scheme in effect at the time the Legislature enacted this provision. That is not what the
18 language says, and such a construction singles out three words (“now in effect”), out of
19 context, and in disregard of the overall statute and its comprehensive regulatory scheme. Such
20 a construction of the statute would insulate every law, regulation and ordinance enacted since
21 1976 from the application of both RCW 80.50.110(1), and from the mandate in subsection (2)
22 of that section: “[t]he state hereby preempts the regulation and certification of the location,
23 construction, and operational conditions of certification of the energy facilities included under
24 RCW 80.50.060 as now or hereafter amended.” Such an interpretation is also wholly at odds
25 with RCW 80.50.120, quoted above.
26

1 In *Lathrop v. EFSEC*, 130 Wn. App. 147, 150-51, 121 P.3d 774 (2005), the Court set
2 forth the following standards for construing the statutes in this case:

3 When interpreting a statute, our duty is to discern and implement
4 the legislature’s intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d
5 318 (2003). We give effect to the plain meaning. *McGinnis v.*
6 *State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). We construe
7 statutes to avoid strained or absurd results. *Strain v. W. Travel,*
8 *Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003), *review denied*,
9 150 Wn.2d 1029 (2004).

10 *See also Lieutenants Assn. v. Sandberg*, 88 Wn. App. 652, 658 (1997) and *Johnson v.*
11 *Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981) (“Statutes should receive a
12 sensible construction, such as will effect the legislative intention, and, if possible, so as to
13 avoid unjust or absurd consequences”); *Young v. Estate of Snell*, 134 Wn.2d 267, 948 P.2d
14 1291 (1997) and *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979) (Statutes will be
15 construed to avoid unlikely, absurd or strained consequences). Further, a statute must be
16 construed so that no part is rendered inoperative. *Young at 278; Lieutenants Assn. v.*
17 *Sandberg*, at 658 (A statute will be construed according to its plain language, to give effect to
18 the legislative intent.) Such construction is done by “construing the statutory language in the
19 context of the statute as a whole, rather than by looking at the phrase at issue in isolation.” *Id.*
20 *See also Davis v. Dept. of Licensing*, 90 Wn. App. 370, 373-74, 952 P.2d 197 (1998).

21 Opponents pull three words from RCW 80.50.110(1) and read them out of context.
22 They disregard the overall statutory scheme, disregard the plain language in the following
23 subsection and in other sections of the statute that contradict their “spin,” and would have the
24 Council and the Governor limit the state’s preemptive power to laws long since amended and
25 repealed—not only Kittitas County’s so-called-GMA-based wind farm ordinance, but every
26 statute, plan, rule and ordinance statewide. The statute does not say “in effect at the effective
date of this section, without future amendment thereto.” It says “now in effect.” In
furtherance of the plenary authority that is explicit, to fully occupy the energy facility siting
regulatory “field,” and consistent with the state’s unambiguous power to “preempt the

1 regulation and certification of the location, construction, and operational conditions of
2 certification of the energy facilities” (RCW 80.50.110(2)), Kittitas County’s wind farm
3 ordinance, and the County’s decision there under, are preempted.²

4 **B. The “Last in Time” Rule Does Not Nullify EFSEC’s Statutory Preemption Power.**

5 The opponents contend that simply because the GMA was enacted after RCW chapter
6 80.50, the GMA controls. The opponents misrepresent the law. In *State v. J.P.*, 149 Wn.2d
7 444, 450, 69 P.3d 318 (2003) (cited by ROKT), the court held: “The plain meaning of a statute
8 may be discerned ‘from all that the Legislature has said in the statute and related statutes
9 which disclose legislative intent about the provision in question. [Citation omitted].’” The
10 court held that where two statutes cover the identical matter (in that case, assessment of
11 restitution for a particular crime), “(1) the statutory provision that appears latest in order of
12 position prevails unless the first provision is more clear and explicit than the last, and (2) the
13 latest enacted provision prevails when it is more specific than its predecessor.” *Id* at 452. That
14 is not the case here. The GMA and the EFSEC statute do not both address identical issues,
15 such as how to assess restitution in a criminal case. Even if they did, RCW chapter 80.50
16 contains an explicit grant of preemption authority, in contrast to no language in the GMA that
17 would undermine that authority. The “last in time” rule is not applicable.

18 _____
19 ² The opponents also allege that HB 2402 does not apply in this case, because the effective
20 date of the bill was after Horizon filed its ASC and also after Horizon filed its request for preemption.
21 Opponents miss the point. RCW chapter 80.50 needed no change for EFSEC’s preemptive authority to
22 apply to Kittitas County’s wind farm ordinance. The “vesting” date is irrelevant. Second, to the extent
23 any change was needed (*i.e.* not to change the law, but to avoid any confusion by any county regarding
24 the applicability of EFSEC’s authority over GMA-based plans and regulations), the amendment was
25 curative, did not change the substance of the statute, and simply confirmed what has always been the
26 case—EFSEC preempts locally adopted land use plans and zoning ordinances, whether they are based
on the GMA or other enabling legislation. As the Court held in *Magula v. Benton Franklin Title Co.*,
131 Wn.2d 171, 182, 930 P.2d 307 (1997), “an amendment may apply retroactively if its is curative or
remedial and intended to clarify rather than change the law. [Citation omitted]. An amendment is
curative if it clarifies or technically corrects an ambiguous, older statute, without changing prior case
law [citation omitted].” The legislature’s action in amending the statute in 2006 absolutely disposes of
the contention that EFSEC’s preemptive authority applies only to those restrictions in effect in 1976.
If RCW chapter 80.50 were applicable only to laws “in effect” in 1976, the legislature would not have
bothered with the 2006 amendment, which makes reference to laws enacted in the 1990s.

1 If the “last in time” rule were controlling where two statutes cover entirely different
2 matters, one can conjure up countless absurd outcomes, seriously eroding the entire fabric of
3 Washington’s overall statutory scheme. An accurate statement of the law prohibits the
4 legislature from amending or repealing prior statutory enactments without explicitly stating, in
5 the subsequent statute, that the prior statute is amended and/or repealed. Washington’s
6 constitutional prohibition (Article II, Section 37) was adopted in part to avoid precisely these
7 absurd outcomes.

8 **C. Wind Energy Facilities are Not “Essential Public Facilities,” and if They Were,
9 EFSEC Would Still Preempt their Construction and Operation.**

10 Opponents contend that the “essential public facilities” element of the GMA indicates
11 that the legislature intended to revoke EFSEC’s preemptive authority over energy facilities.
12 This argument is unintelligible, and even the opponents cannot agree regarding whether
13 energy generation facilities constitute “essential public facilities.” “Essential public facilities”
14 are “public,” and are defined as those that are “difficult to site.” RCW 36.70A.200(1). The
15 definition lists several types of “essential public facilities,” including airports, correctional
16 facilities, and waste disposal facilities. *Id.* The list is by its terms (“such as”) not an exclusive
17 list.³ Wind energy facilities, however, are of completely different character from public
18 facilities like sewage treatment plants and prisons that the Legislature contemplated when it
19 enacted RCW 36.70A.200.

20 The Central Puget Sound Growth Management Hearings Board (“GMHB”) has
21 interpreted “essential public facilities” to be those whose siting “has traditionally been
22 thwarted by exclusionary land use policies, regulations, or practices,” and this interpretation is
23 consistent with the plain language of RCW 36.70A.200. *Children’s Alliance v. Bellevue,*

24 ³ Notably, the opponents cannot agree among themselves regarding whether wind energy
25 facilities fall within the definition of an essential public facility. *Compare* ROKT Brief at 7 (“a private
26 wind energy project is not within the statutory definition” of an EPF), *with* Lathrop Brief at 8 (EPFs
“include facilities that are typically difficult to site and would also include power generating facilities”)
and the County “Closing Statement” at 15 (“Neither wind farms in general, nor energy facilities in
particular, fit within the definition of “essential public facilities”).

1 Cent. Puget Sound Growth Mgmt. Hearings Bd., Case No. 95-3-0011, Final Decision and
2 Order at 8 (July 25, 1995). When viewed in this light, the success of wind project siting
3 throughout every county in Washington outside of Kittitas County does not lend support to the
4 proposition that such siting has “traditionally been thwarted.” In short, wind energy projects
5 are not “essential public facilities” as defined by the GMA. The opponents cannot make a
6 wind farm an essential public facility merely by being obstructionist.

7 RCW 80.50.110 preempts the County’s GMA-based comprehensive plan and
8 regulations, and the decisions made thereunder. Therefore, it also preempts the “essential
9 public facility” siting provisions of the GMA. The reference in the GMA does not imply that
10 EFSEC must comply with the County’s wind farm ordinance, whether wind farms are
11 “essential public facilities” or whether they are not. Even if a wind energy facility is an
12 “essential public facility,” the statute’s only requirement is that counties include provisions in
13 their plans to allow siting of “essential public facilities;” EFSEC retains the power to preempt
14 those plans. Furthermore, even assuming for the sake of argument that wind energy facilities
15 could be considered EPFs, Kittitas County’s arcane, obscure, obtuse and constantly changing
16 requirements for permitting wind energy facilities may violate its duty under RCW
17 36.70A.200 by making siting of such facilities “impracticable.”

18 **D. RCW 36.70A.103 Does Not Obligate EFSEC to Comply with Comprehensive**
19 **Plans and Development Regulations In Force in GMA-Regulated Counties.**

20 Horizon addressed this contention in its Opening Brief. Without any analysis of
21 Horizon’s argument, the opponents do no more than argue that all state agencies must comply
22 with locally adopted plans and regulations. That is not the law. CTED has interpreted RCW
23 36.70A.103 as follows:

24 . . . each state agency must meet local siting and building
25 requirements *when it occupies the position of an applicant*
26 proposing development Generally this means that *the*
development of state facilities is subject to local approval
procedures and substantive provisions[.]

1 WAC 365-195-765(2) (emphasis added).

2 The statute does not repeal or modify RCW chapter 80.50 for GMA counties, but
3 merely requires that state agencies comply with locally adopted plans and regulations when
4 they are *permit applicants*. In contrast, according to CTED regulations, plans and regulations
5 adopted under the GMA “should accommodate situations *where the state has explicitly*
6 *preempted all local land use regulations, as for example, in the siting of major energy*
7 *facilities* under RCW 80.50.110.” WAC 365-195-745(1) (emphasis added). As noted in
8 CTED’s Response Brief at 2, this rule “has the practical purpose of helping counties and cities
9 not waste time in planning efforts that are not in their jurisdiction.”

10 This regulation directly acknowledges the state’s primary role in energy facility siting
11 and expressly acknowledges that local land use laws that would otherwise bar such siting are
12 preempted and superseded. What is clear from this case is that Kittitas County, both in
13 enacting the wind farm ordinance, and in applying it to the KV Project, has done exactly the
14 opposite of the direction in then CTED rule. There is no “accommodation,” only obstruction.
15 See Testimony of Darryl Piercy, EFSEC Tr. at 477-78. Thus the opponents’ argument that the
16 GMA repealed RCW chapter 80.50 is contradicted by regulations promulgated by the very
17 agency charged with drafting guidance for interpreting and complying with the GMA.

18 Finally, Lathrop cites WAC 463-47-120, which directs EFSEC to “respect” local
19 “critical area designations,” and WAC 463-47-130, which directs EFSEC to “inquire of the
20 [SEPA] threshold levels adopted” by cities and counties. (Brief at 9-10). These provisions are
21 not helpful to the opponents. The WAC provisions cited are intended to appropriately
22 coordinate environmental review by EFSEC, as lead agency under SEPA, and as the siting
23 authority, with local governments, to ensure that the environmental thresholds established
24 locally are considered. Notably, these provisions require EFSEC to “respect” and “inquire,”
25 *not* “comply with,” “adopt” or “use” such provisions.

26

1 **E. Summary of Reply to Opponents’ Arguments Regarding Preemption.**

2 It is not possible to reconcile EFSEC’s and the Governor’s statutory role as the
3 preemptive energy facility siting authority with a generalized assertion that the GMA
4 impliedly stripped EFSEC and the Governor of their fundamental legal authority, nor have the
5 opponents offered any cogent argument of how EFSEC could possibly enact rules or take any
6 other action to weaken or eliminate legislatively conferred authority of great significance to
7 the fundamental business of permitting energy facilities. While the opponents can debate the
8 merits of the recent legislative enactments, they can debate the applicability of the holding of
9 the Court of Appeals in this very case (*Lathrop v. EFSEC*)⁴, and they can wave off CTED’s
10 GMA administrative regulations acknowledging preemption under RCW chapter 80.50, they
11 cannot, and have not argued that an implied repeal of EFSEC’s fundamental authority is
12 constitutionally valid. RCW chapter 80.50 expressly supersedes all state and local laws that
13 would otherwise regulate energy facility siting, and CTED has acknowledged this superseding
14 authority in its GMA rulemaking. The GMA does not set forth the statutory sections the
15 opponents claim it amends. The GMA does not specifically state that EFSEC shall comply
16 with plans and development regulations adopted locally under the GMA, nor does it otherwise
17 amend RCW chapter 80.50. With or without the process required by WAC chapter 463-28,
18 EFSEC preempts and supersedes the County’s actions.

19 **III. HORIZON HAS IN GOOD FAITH MADE ALL REASONABLE EFFORTS TO**
20 **RESOLVE LOCAL LAND USE “NONCOMPLIANCE” ISSUES AND HAS**
21 **SATISFIED ALL EFSEC REQUIREMENTS FOR PREEMPTION.**

22 The Applicant and the opponents have each given the Council, through four days of
23 adjudicative hearings and voluminous briefing, their respective versions of the facts and

24 ⁴ The *Lathrop* decision is discussed further below, to respond to the opponents’ contention that
25 to demonstrate “reasonable” and “good faith” efforts, Horizon was obligated to file an endless string of
26 administrative and judicial appeals, outside of, and collateral to the EFSEC process. We note that the
Court of Appeals’ decision, confining all appeals and adjudication to the EFSEC process, is
fundamentally based on the court’s confirmation that despite the enactment of the GMA, the EFSEC
process and the Governor’s certification decision is the exclusive, preemptive course of action, and that
all decisions and appeals must occur within the EFSEC procedural framework.

1 testimony developed over the last four years in support of their positions. The record will
2 ultimately speak for itself.

3 Lathrop’s legal argument exposes the impossibility of reconciling the opponents’
4 factual contentions with the Council’s legal authority in this and any future energy facility:

5 The Council has previously determined the Kittitas Valley Project
6 is not in compliance with Kittitas County land use codes, a
7 determination which essentially *divests the Council of any*
8 *authority to act until the Applicant has made its application*
compliant with Kittitas County Codes and the decisions of the
Board of Commissioners.

9 Brief at 13 (emphasis added).⁵ The EFSEC rules require “reasonable efforts” to seek
10 compliance with local land use plans and zoning. They do not condemn an energy facility
11 applicant to limbo. Lathrop’s version of the law is not the legal standard (*see* WAC 463-28-
12 030 and -040). If it were the legal standard, no measure of “good faith” or “reasonable
13 efforts” would ever enable an exit from the local process (to “make the necessary application
14 for change in, or permission under” local land use plans and zoning ordinances) required by
15 EFSEC’s rules as a precursor to seeking preemption. There would be no purpose for EFSEC
16 to impose the “good faith” and “reasonable effort” requirements if EFSEC were “divested” of
17 its authority until an application is “compliant” with local decisions. Fundamentally, the
18 opponents contend that a local government may hijack EFSEC’s siting authority by refusing to
19 find an application “compliant.” This leaves nothing more for EFSEC to do as an energy
20 facility siting authority.

21 **A. Despite Horizon’s Good Faith Efforts, “Consistency” With the County’s Wind**
22 **Farm Ordinance was Not Possible, and the Parties Were Unable to Reach an**
Agreement.

23 The parties’ participation in these preemption proceedings is *prima facie* evidence that
24 they were unable to reach an agreement that would have resolved the alleged

25 _____
26 ⁵ Similarly, ROKT states: “EFSEC must defer to local decision makers in matters of local land
use planning and decisions.” Brief at 14.

1 “noncompliance” with the wind farm ordinance process. As noted in Horizon’s Opening
2 Brief, such “noncompliance” relates not to the Comprehensive Plan and land use zoning
3 applicable to the zoning districts at issue, but relates only to the County’s unique wind farm
4 ordinance. In their briefs, no opponent, not event the County, has rebutted this fact. The
5 various opponent briefs indicate the parties are in agreement that the legal element (“unable to
6 reach an agreement”) has been satisfied, with the exception of ROKT.⁶

7 ROKT makes brazen, naked assertions (including alleged statements in “ ” quotes)
8 with no citation to the record to support them. The most flagrant example is found at Brief p.
9 3, where ROKT contends that it was led to believe that “the Kittitas Valley Project would be
10 dropped if the alternative site [Wild Horse] was permitted.” No such statement was ever
11 made. Nobody from the County, the Applicant, the various experts and consultants, nor even
12 ROKT’s own membership ever hinted at the same. When Mr. Carmody attempted to elicit
13 such an admission from Horizon representative Chris Taylor during cross-examination, his
14 answer was unequivocal:

15 You’re asking me did Puget Sound Energy [successor to Applicant
16 at Wild Horse] tell Horizon or to my knowledge was Horizon ever
17 told by Puget Sound Energy that if ROKT agreed to drop its
18 intervention to Wild Horse that Puget Sound Energy would never
19 agree to purchase electric power from the Kittitas Valley Project?
20 No. The answer is no.

21 (EFSEC Tr. at 136:18-25; 137:1-3). Chris Taylor’s statement was never rebutted.

22 _____
23 ⁶ In a mischaracterization of the facts to fit its version of the law, ROKT suggests that Horizon
24 does not meet that requirement, because the Applicant did not fail to reach an agreement with the
25 County. Although the record speaks quite clearly to the fact that the parties did not reach agreement,
26 ROKT, at pp. 31-32 of its brief, without any citation to the record, contends at least three times, that
the Applicant withdrew from the process. *Id.* The Applicant never withdrew its application,
notwithstanding repeated inquiries from the BOCC whether the inability to come to an agreement
meant the Applicant was withdrawing its application. (May 3, 2006 County Hearing, Tr. at 49:8-10,
21-22; 50:2-3).

1 This disingenuous practice of unsupported arguments is repeated throughout the
2 opponents' briefs. ROKT, for instance, complains at p. 4, that the Applicant obtained
3 "continuances and extensions" to submit materials, yet contradicts itself in the very next
4 paragraph and complains that despite being given opportunities to provide information, the
5 Applicant refused to submit information. The Applicant never requested continuances and
6 extensions of the County hearings, nor did the Applicant fail to provide information. In his
7 Brief at 16:9-12, Lathrop acknowledges that Horizon was told by the County to use the Wild
8 Horse example as a template for the initial Development Agreement, but then takes the
9 Applicant to task, stating that the initial draft "had essentially nothing more done to it than to
10 change the names in the document from Wild Horse to Kittitas Valley". What is conveniently
11 ignored are the County's criticisms, no less than ten of them⁷, about the differences between
12 the Wild Horse Development Agreement and that submitted for Kittitas Valley.⁸

13 First the Applicant is ridiculed in a public hearing because the proposed KV
14 Development Agreement was too similar to that of Wild Horse (April 12, 2006 County
15 Hearing Tr. at 14:11-25 through 17:17, obviously referencing a typographical error), then gets
16 questioned, only after the close of testimony, as to why the KV Development Agreement was
17 so different from Wild Horse. The internally inconsistent behavior by the Board of
18 Commissioners is now heralded by the opponents as somehow constituting "bad faith."

19 The opponents simply ignore efforts by the Applicant to meet the County's concerns.
20 Kittitas County, in its brief, persists in pretending that mitigation materials given to it by the
21 Applicant do not exist. In its Closing Argument (which itself contains not a single reference

22 _____
23 ⁷ May 3, 2006 County Hearing, Tr. at 33:20-25; 34:2-13; 34:18-25; 37:25, 38:1-15; 38:24-25,
39:1-4; 30:24-25, 40:10-6; 40:12-16; 42:10-16; 42:24-25, 43:1-5; and 43:6-16.

24 ⁸ See, e.g., "...Page 18 [of KV Development Agreement] the collateral assignments without
25 consent of the County. [Horizon] [d]eleted the last phrase that's in the Wild Horse one which said 'and
26 maintains financial assurances for decommissioning,' so that was – that language was in the Wild
Horse when we approved it. It's not in this proposal." (May 2, 2006 County Hearing Tr. at 42:24-25,
43:1-6).

1 to the hearing record or to Washington law), the County argues that the Applicant refused to
2 modify its application:

3 Horizon declined to offer any negotiations to address the impacts
4 on visual impact and shadow flicker. Yet during the EFSEC
5 hearing they unilaterally offer up mitigation on addressing the
6 shadow flicker issue without any request from EFSEC. Why is it
7 that Horizon was willing to negotiate and offer up proposals to
8 EFSEC, but failed to do so with the County? The county was
9 looking for proposals from the applicant, but the applicant refused
10 to offer any.

11 (Closing Argument at 6:5-10).

12 The Applicant submitted a letter dated April 25, 2006 (Exhibit 7 of its Second Request
13 for Preemption) at the instruction of the County BOCC, to explain how the Applicant intended
14 to amend the Development Agreement in order to accommodate issues raised by the Board at
15 its April 12, 2006 hearing. In response to the Board’s instruction to further mitigate shadow
16 flicker effects, Horizon offered at page 4 thereof as follows: *“if an adverse impact is
17 identified, new technology will be utilized that can curtail the operation times of certain
18 turbines as needed to reduce the shadow flicker to a virtually imperceptible level.”*

19 (Emphasis added).

20 This offer to mitigate shadow flicker impacts was never acknowledged by the County.
21 Instead, although the letter was a direct response to the BOCC’s request at the immediately
22 previous meeting, the Applicant was, instead, chided by the Board for introducing “new
23 evidence.” (April 27, 2006 County Hearing, Tr. at pp. 16-17, 24-25). Then, *the County
24 fundamentally based its denial on shadow flicker impacts*, despite knowing that such impacts
25 *would* be eliminated to an imperceptible level.⁹

26 ⁹ See, Resolution No. 2006-90, Finding No. 26: “The applicant refused to discuss any additional setback to mitigate shadow flicker;” Finding No. 39 further bases the denial on “unresolved concerns including shadow flicker” and indicates that another location “could negate shadow flicker as an adverse impact to existing residents and thus fully mitigate the issue of shadow flicker.” Horizon’s Opening Brief, **Appendix B**.

1 The County, Lathrop and ROKT simply pretend that the Applicant never offered to
2 further negotiate additional efforts to avoid, minimize and mitigate impacts including, without
3 limit, shadow flicker. The Applicant’s efforts to resolve alleged local “inconsistency” have
4 been criticized, shamed, minimized, demeaned, mischaracterized or simply ignored in an
5 effort that continues in the briefs submitted by the opponents, to pretend that the Applicant’s
6 efforts to compromise simply never happened. The record speaks far more loudly than the
7 concerted opposition table-pounding.

8 Insofar as the County posits in its Closing Argument at 11:15-16 that the BOCC
9 “offered to consider a variance process that could allow for lesser distance if analysis so
10 warranted...” the County offered nothing. The County discussed hypothetical “variances,”
11 but never established the criteria or process. The only actual description of a “variance” in the
12 record is from Commissioner Huston, who defined such a process not as a “variance,” but as a
13 requirement that Horizon obtain setback waivers from neighboring property owners. (May 31,
14 2006 County Hearing, Tr. at 54-55.) Such a process is not a “variance” within the meaning of
15 Washington Law, as adopted by Kittitas County.¹⁰ See May 31, 2006 County Hearing, Tr. at

16 _____
17 ¹⁰ Under the County’s variance criteria, it is impossible to imagine how a variance would be a
18 legal action under the circumstances, particularly in light of the County’s rationale for denying the
Project. KCC 17.85.010 states:

19 A variance shall be made only when all of the following conditions and facts
20 exist:

- 21 1. Unusual circumstances or conditions applying to the property and/or the
22 intended use that do not apply generally to other property in the same vicinity or
district, such as topography;
- 23 2. Such variance is necessary for the preservation and enjoyment of a
substantial property right of the applicant possessed by the owners of other
24 properties in the same vicinity or district;
- 25 3. The authorization of such variance will not be materially detrimental to
the public welfare or injurious to property in the vicinity or district in which the
26 property is located;
4. That the granting of such variance will not adversely affect the
realization of the comprehensive development pattern. A variance so authorized

1 33-39, 53 - 55. *See also* EFSEC Hearing, Tr. at 508:18-25; 509:1-4. Most notable is that the
2 discussion of variances occurred only after the County had already preliminarily denied the
3 application and closed the public testimony portion of the hearing.

4 **B. As Part of its “Reasonable Efforts,” Horizon Was Not Obligated to Prosecute**
5 **Non-EFSEC Forum Appeals.**

6 The opponents allege that in order to meet its “good faith” and “reasonable efforts”
7 responsibilities, Horizon was obligated to prosecute multiple interlocutory appeals of County
8 decisions (as well as the County’s refusal to render decisions). It is a legislative mandate of
9 chapter 80.50 RCW that siting decisions for energy generation facilities be expedited. This
10 duty is reaffirmed in *Lathrop v. EFSEC*, 130 Wn.App. 147, 121 P.3d 774 (2005):

11 In chapter 80.50, our legislature set out an expedited administrative
12 procedure to consider energy facility site applications. The
13 procedure is designed to “avoid costly duplication in the siting
14 process and ensure that decisions are made timely and without
15 unnecessary delay. RCW 80.50.010 (5).

16 Despite this appellate reaffirmation of the duty to expedite this process, ROKT
17 suggests that the Applicant’s request for preemption must fail because the Applicant did not
18 first appeal every planning, zoning and interim administrative decision to its terminus before
19 seeking preemption.

20 First, as noted in Horizon’s Opening Brief, Horizon is not “appealing” the County’s
21 decision, nor is Horizon “appealing” the wind farm ordinance. Horizon’s discussion of the
22 County’s deeply flawed wind farm ordinance and process demonstrates that Horizon made

21 shall become void after the expiration of one year if no substantial construction
22 has taken place;

23 5. Pursuant to Title 15A of this code, the board of adjustment, upon
24 receiving a properly filed appeal to an administrative determination for approval
25 or denial of a variance, may permit and authorize a variance from the
26 requirements of this title only when unusual circumstances cause undue hardship
in the application of it. The granting of such a variance shall be in the public
interest. A variance shall be made only when all of the conditions and facts
identified within subsections A through D of this section are found by the board
of adjustment to exist.

1 extraordinary efforts, not once, but twice, despite a Byzantine process unlike any other
2 existing anywhere for energy facility siting—a process calculated to obstruct EFSEC energy
3 facility siting for projects not supported by the BOCC. (EFSEC Hearing, Tr. at 478-479;
4 491:5-25; 492:1-19). What the opponents are really asking this Council to do is jeopardize the
5 interests of every citizen in the state of Washington by creating energy facility siting gridlock
6 that could last literally decades.

7 An applicant would first need to participate in and appeal the adoption of the local
8 siting ordinance through the Growth Management Hearings Board. To be sure of a sufficient
9 demonstration of all “good faith” efforts, an applicant would presumably need to exhaust its
10 appeals through to the Supreme Court. To meet the opponent’s version of “reasonable
11 efforts,” conservatively, an applicant would anticipate over five years of litigation before
12 submitting a local application.

13 ROKT even contends in its Brief, at p. 3, that Horizon was obligated to seek judicial
14 review of the County’s *failure to amend the ordinance* (a “change in . . . land use plans or
15 zoning ordinances” under WAC 463-28-030(1)). An applicant would anticipate at least five
16 more years of litigation before submitting a local application. Once an energy facility
17 applicant has exhausted years of appeals of the adoption of local plans and regulations and the
18 refusal to amend them in accordance with WAC 463-28-030(1), the applicant must then, and
19 only then, submit a redundant application for local discretionary land use permits—a full
20 permit application is required, contend the opponents, in derogation of EFSEC’s exclusive and
21 preemptive siting authority.

22 After months or even years trying to divine what criteria must be satisfied under the
23 County’s ordinance (because no development regulations or criteria have ever been adopted
24 by Kittitas County for wind farms—criteria are made up “on the fly” after the public
25 testimony portion of the hearing closes) an unsuccessful applicant must, before it seeks
26 preemption, prosecute its appeals through both the Growth Management Hearings Board and

1 Superior Court (Land Use Petition Act appeal), presumably continuing up to the Washington
2 Supreme Court.¹¹ Again, to make all “reasonable efforts” in “good faith,” say the opponents,
3 these appeals must be fully prosecuted before preemption can be sought, unless the matter is
4 remanded for further proceedings below, in which case the parties go back to where they left
5 off at the County level. Not surprisingly, this could certainly involve yet another round of
6 dual forum appeals after a second decision is rendered by the County. These appeals would
7 easily add five additional years on top of the ten years required to challenge the ordinance, and
8 the refusal to amend the ordinance, as described above.

9 The process that the opponents ask this Council to accept is the very antithesis of the
10 Legislature’s express mandate to expedite energy facility siting decisions. The opponents’
11 proposed process is exactly why the EFSEC process was created in the first instance: to avoid
12 the type of legal acrobatics, obstruction and decades of delay being promoted by the
13 opponents in this case. Were this the law, no new energy facilities would ever be sited in the
14 state of Washington. Local governments, acceding to the parochial complaints of a handful of
15 residents, would adopt regulations to shove energy facilities into someone else’s backyard.
16 For Counties like Kittitas County, bent on obstructing EFSEC’s authority, Kittitas County’s
17 process would then, indeed, become a disruptive “model” ordinance, not only for wind energy
18 facilities, but for any energy facilities, including transmission corridors.

19 Remarkably, the opponents completely ignore that the Court of Appeals has already
20 adjudicated this very issue, in this very case:

21 Taken together, the legislature unambiguously vested statutory
22 authority solely in the Thurston County Superior Court to sort
23 through interlocutory decisions, final EFSEC recommendations,
and the governor's decision in a single consolidated proceeding.
Certification of the petition for review to the Supreme Court is

24 ¹¹ Appeals in both forums are required because the much touted “one-stop shopping” (EFSEC
25 Hearing, Tr. at 362:16-18) process adopted by Kittitas County that ostensibly expedites application
26 review, inextricably links both legislative comprehensive planning functions with permit-specific
development permit actions, requiring separate forum dual appeals on any decision with which an
applicant is aggrieved.

1 required upon specified conditions. The court may conduct fact-
2 finding to complete its review or to include the factual
3 determinations with the Supreme Court certification. RCW
4 80.50.140(1).

5 * * *

6 Further, the statutory scheme would have no meaning using Mr.
7 Lathrop's interpretation. For example, the requirement of RCW
8 80.50.140(2) for objections to EFSEC procedures to be filed with
9 the council to avoid waiver of the error for purposes of judicial
10 review under RCW 80.50.140 would be pointless.

11 While superior courts have broad general original jurisdiction,
12 here, the statutory authority to review energy facility siting
13 decisions under RCW 80.50.140(1) rests solely with the Thurston
14 County Superior Court after final decision by the governor. Under
15 RCW 80.50.100, the governor has 60 days from the council's
16 report of recommendations to approve, reject, or

17 direct reconsideration of any aspect of the draft certification
18 agreement. Notably, EFSEC argues the governor has the power to
19 preempt land use plans or reject an EFSEC recommendation for
20 preemption. In any event, the expedited process is partly designed
21 to avoid time-consuming, piecemeal litigation over the council's
22 interlocutory decisions and processes like that before us today.

23 *Lathrop v. EFSEC*, Wn. App. at 150-51. This decision (wholly binding and precedential in
24 these proceedings) dispenses with the opponents' contentions that an EFSEC applicant must
25 stand by while the public need for electric power marches on, and pursue virtually endless,
26 fruitless appeals of arbitrary, parochial local decisions in non-EFSEC, forums, finding no basis
in applicable statutes or rules. Importantly, the Court of Appeals decision in this case is
fundamentally based on the legal conclusion that RCW chapter 80.50 fully preempts the local
decisionmaking which would otherwise require the administrative and judicial appeals as
described by the opponents.

23 **C. Horizon Made All Reasonable Efforts to Resolve Local Land Use**
24 **“Noncompliance;” Failure to Reach Agreement Constituted an Impasse, not “Bad**
25 **Faith.”**

26 The only remaining legal issue for this Council to address is whether the Applicant
made all reasonable efforts in good faith to resolve the *comprehensive planning and zoning*

1 noncompliance. The record demonstrates that Sagebrush Power Partners, LLC, undertook not
2 only reasonable, but extraordinary efforts in good faith to resolve the Project’s noncompliance
3 with the County’s wind farm ordinance.

4 However, the briefs submitted by the opponents demonstrate a concerted effort to
5 recast Horizon’s efforts. The opponents invite this Council to conclude that a failure to reach
6 agreement regarding the setback distance constitutes bad faith and failure to undertake all
7 reasonable efforts. This is simply not the law. The Applicant is required to show that it
8 undertook all reasonable efforts in good faith to address noncompliance with **comprehensive**
9 **planning and zoning, not** project micrositing through site-specific impact mitigation. Site
10 specific permitting mitigation is a province exclusively reserved for EFSEC.

11 Contrary to the County’s urging otherwise, failure to reach an agreement does not
12 imply “bad faith”. It means that one or both parties could not compromise further. The
13 context within which this occurred was not “negotiation,” which necessarily requires the open,
14 fair exchange of views and information between reasonable people with open minds, aimed at
15 achieving a common goal. The County never came to this process prepared to undertake a
16 sincere negotiation, although the County staff itself admitted that it did participate in
17 negotiation for the Board on another project involving this same Applicant. (May 3, 2006
18 County Hearing, Tr. at 40, pp. 7-11).

19 By the County’s own testimony at the EFSEC adjudicative proceedings, it admits that
20 the BOCC never delegated authority to its staff to substantively negotiate. (EFSEC Hearing,
21 Tr. at 440-449). As pointed out by Roger Wagoner in his unrebutted Supplemental Pre-Filed
22 Testimony, Exhibit 41 R SUP (RW-R SUP), the legislative components of this proceeding
23 (subarea comprehensive plan amendment and rezone) are not typically subject to a prohibition
24 on *ex parte* contact, yet the BOCC deliberately used its staff as a barrier to access to the
25 Board, while simultaneously refusing to enable the staff to negotiate. Instead of serving as a
26 filter for ideas, the staff served as a barrier to dialogue. The BOCC, as a result, never even

1 deliberated, mind not negotiated, the first legal element of a preemption standard –
2 comprehensive plan inconsistency – before denying the project in its entirety. As noted in the
3 Applicant’s Opening Brief, the BOCC and the Planning Commission never addressed, and
4 completely disregarded the Applicant’s proposed findings, demonstrating the Project’s
5 consistency with local land use plans and zoning. (Horizon’s Opening Brief, **Appendix A**).

6 The opponents are also unable to even come to a consensus regarding whether the
7 County process invited “negotiation” at all. In fact, ROKT argues with itself regarding
8 whether the process constituted or even allowed negotiation:

9 Contrary to the assertion made by Sagebrush, the adoption of a
10 development is not a “negotiation.” [Citation omitted]. A
11 development agreement may only be adopted at a “public hearing”
12 with proper notice and public participation. The County’s wind
13 farm ordinance “requires” a development “agreement.” ROKT at
14 19.

15 * * *

16 “Application and permit processing is not a “negotiation.” It is a
17 public process. Decisions and elements of a development
18 agreement are appropriate only after public hearings.” ROKT at
19 20.

20 Paradoxically, the opponents contend that no “negotiation” is permitted, but an
21 “agreement” is required. ROKT reiterates the County staff’s position that no “new
22 information” may be exchanged during “negotiation,” complaining about the process: “[t]he
23 public was being foreclosed from meaningful participation.” ROKT at 26. Then, remarkably,
24 ROKT states: “Sagebrush withdrew from the process; failed to provide requested information;
25 and made unsubstantiated claims based on economic viability.” ROKT at 32. ROKT
26 continues: “[T]he question is whether the County and the Applicant have failed to reach an
27 agreement on the issues. . . . Kittitas County was open to further discussions and Sagebrush
28 was not open to such dialogue.” ROKT at 32.

29 Lathrop also accuses the Applicant of failing to “negotiate,” but conversely criticizes
30 Horizon for submitting “new information that it has failed to timely introduce” after the record

1 was closed. (Brief at 30). This despite the fact that the BOCC did not reveal its setback
2 standard until after the record and public testimony portion of the hearing were closed. These
3 inconsistent legal and factual arguments demonstrate, with complete clarity, the dilemma the
4 Applicant faced. In a flawed attempt to show “bad faith,” the opponents on one hand contend
5 that “negotiation” is required and expected, and that Sagebrush refused to “negotiate.” In a
6 starkly contrasting, equally flawed attempt to dispute the Applicant’s contention that the
7 process did not allow or facilitate true “negotiation,” the opponents actually concur with the
8 Applicant’s belief as set forth in Horizon’s Opening Brief: This was a regulatory process, a
9 regulatory denial decision was issued, and no further opportunity for “dialogue” ever truly
10 existed with this County. True, meaningful “negotiation” was never allowed, tolerated or
11 accepted. The opponents find no inconsistency in their contention that Horizon was prohibited
12 from responding to the BOCC’s setback, and their accusations that Horizon “refused” to
13 provide information to the BOCC in response to the setback requirement.

14 When the BOCC ignored the Applicant’s proposal to expand setbacks by more than
15 one-third of the original 1000 foot proposal and demanded that the Applicant respond to the
16 various setback distances discussed but never adopted by the BOCC, the BOCC was not
17 asking for a “counter-offer.” The BOCC demanded *capitulation* to a change that the BOCC
18 knew very well would destroy more than fifty percent of the turbine locations, along with
19 attendant electrical generation capacity and revenues for local property owners and local
20 taxing districts.

21 ROKT and Lathrop assert in concert that the Applicant took an immovable position
22 throughout these proceedings. They do so entirely without **any** direct, honest, verbatim,
23 citation to the voluminous record. Instead, in the ROKT Brief at p. 4 and again at p. 21, they
24 assert “Sagebrush’s ‘take it or leave it’ ultimatum/demand...” and Lathrop Brief at 20:24:
25 “...the ultimatum the Applicant presented...”.

26

1 If the process is truly designed to reach an agreement, then each side must have the
2 ability to decide it simply cannot compromise further and allow the process to end without
3 agreement. If one side or the other cannot choose to leave of its own free will, then the
4 process is not a fair, open, arms-length negotiation process; it is simply a governmental
5 decision to approve or deny. This distinction is critical: the opponents would have this
6 Council find that one party’s inability to compromise its position further is “bad faith” yet also
7 takes the irreconcilable position that it was the applicant who delivered an ultimatum that
8 forced the County to simply deny the project. The County cannot have it both ways. It
9 remains unclear to this day what the real process was: project review aimed at a negotiated
10 development agreement where only the County could walk away, otherwise, failure would be
11 “bad faith,” or it never really was a negotiation to arrive at a development agreement at all,
12 and instead the County had an “approved/denied” power of review all along. Neither
13 approach vests the Applicant with any power to deliver ultimatums, yet Horizon was the only
14 party to the proceedings that continually tried to placate the BOCC.

15 In response to the clear question from EFSEC Chairman Luce “Are you saying that to
16 evidence good faith the parties have to agree?”, the County CDS Director admitted “No”.
17 (EFSEC Hearing, Tr. at 484:5-7). The County itself then clarified by characterizing the
18 County’s test for reasonable good faith efforts at resolving inconsistencies as “a willingness to
19 express a desire to create discussion and conversation that perhaps could lead to that
20 agreement”. (Id. at 8-10).

21 What, then, did the Applicant do to “express a desire to create discussion and
22 conversation” that “perhaps could lead to agreement”? First and foremost, Horizon did not
23 *need* to withdraw its initial petition for preemption, and could have proceeded with the
24 original, larger project. Rather than doing that, the Applicant did the following:

- 25 • Reduced the initial proposal from 120 to a range of 65-80 turbines

26

- 1 • Reconfigured the remaining turbines to remove turbines from the largest visual-impact
2 area, causing financial/tax revenue reductions to the Applicant, participating
landowners, Kittitas County and junior taxing districts
- 3 • Approached the County, voluntarily informing it of Applicant's desire to try again
- 4 • Agreed to the County's demand that before it would entertain a new application,
5 Applicant must withdraw its preemption request (which Applicant had already invested
two years of time in processing)
- 6 • Hired two new staff people with extensive prior experience with Central Washington
7 local governments to work on the project application, increasing Applicant's
investment in the proposal notwithstanding its small size
- 8 • Underwent supplemental SEPA review at added cost to the Applicant, including
9 retaining services from consultants to analyze the reduced impacts from the smaller
Project
- 10 • Met with County staff from October 2005 through May, 2006, repeatedly seeking
clarification
- 11 • In response to BOCC threats that if Applicant did not increase setbacks, it was
12 "wasting everybody's time" (VRP 4/12/2006 at 56:11-12) the Applicant reduced the
setback unilaterally and voluntarily from 1000' to 1250' to 1320', thereby limiting
13 EFSEC's technical siting flexibility and significantly restricting the areas available for
turbine siting within the corridors analyzed in the DEIS. The additional setback areas
14 were offered, despite absolutely no flexibility or interest in "negotiation" from the
County
- 15 • Agreed unilaterally, under pressure and without any promises of approval, to a
16 maximum of 65 turbines
- 17 • Provided a position paper answering all questions raised in 4/12/2006 hearing
- 18 • Rewrote the Development Agreement
- 19 • Agreed every time to the BOCC's demands the Applicant "reconsider" its positions in
20 a space of 10-15 minutes or else face a denial
- 21 • Paid for all County staffing to facilitate its review and labor for 6 months of processing
- 22 • Expended hundreds of thousands of dollars on project redesign and engineering,
consultants, and permit processing
- 23 • Participated in six months of County hearings

24 This record, categorically, is not that of an applicant "going through the motions."

25 This is an extraordinary effort in terms of scope as well as the huge investment of time, energy
26 and money both expended and revenues foregone in order to seek a local determination of

1 “land use consistency.” Horizon made its renewed effort with the County in the face of a prior
2 aborted attempt, and despite Horizon’s very serious reservations regarding the fairness and
3 legal underpinnings of the County’s mandatory process. The Applicant went above and
4 beyond a reasonable, good faith effort in a County with a process that is not a “model,” but is
5 instead in complete contrast to the process for wind project approval found anywhere in the
6 nation, defying a statewide public policy compelling *predictable*, reasonable and expeditious
7 land use permitting processes generically (*See* Regulatory Reform Act, RCW chapter 36.70B),
8 and for energy facilities in particular.

9 With this in mind, this Council is asked to concede its statutory authority and mandate
10 to an impossible standard by which no project could ever be sited by EFSEC, because the
11 opponents of this project posit that the foregoing constitutes the Applicant’s mere “going
12 through the motions.” These accusations are not based on the record. In fact, as the County’s
13 hearing process wound down, certainly the BOCC did not characterize the Applicant’s efforts
14 as “bad faith.” As confirmed by the BOCC, failure to reach an agreement is an “impasse,” not
15 “bad faith”. Certainly, the parties did not reach agreement. BOCC Chairman Bowen, late in
16 the County hearing process, discusses the “sticking points” with candor and clarity rather than
17 animus. By the County’s own admission, Horizon took the process seriously. BOCC
18 Chairman David Bowen put it most succinctly:

19 It sounds like we have hit an impasse regarding both or all three of
20 us. Kind of from an independent route we came up with similar
21 numbers. We didn’t end up agreeing, necessarily, on those
22 numbers, but they were all on that – you know, a range starting at
23 2000 feet on out. I guess I would – Mr. Taylor’s comments
regarding the time spent on this and the effort that’s gone into this,
everybody has taken this quite seriously, and I appreciate those
comments you made.

24 (May 3, 2006 County Hearing, Tr. at 47:21-25; 48:1-6).

25 Chairman Bowen himself does not differ: a good faith, reasonable effort was made to
26 resolve the inconsistencies between the Applicant’s proposal and Kittitas County’s wind farm

1 overlay process and decision. Impasse, rather than success, was the outcome. Having
2 satisfied the EFSEC criteria of a good faith effort and expenditure of reasonable efforts
3 unsuccessfully in trying to achieve consistency, preemption is in the best interest of serving
4 the energy needs of the citizens of the state of Washington.

5 **D. Contrary to the Opponent’s Contentions, Alternate Locations Within the County**
6 **Have Been Reviewed and are Unacceptable.**

7 Despite a record to the contrary, Lathrop, ROKT and the County continue to argue that
8 alternate locations are “available” in Kittitas County, and contend that Horizon has not
9 sufficiently considered them. For example, the County alleges that the existence of “multiple
10 sites” in the County is “uncontradicted.” (Opening Statement at 12). The County offers no
11 citation to the record. In Horizon’s Opening Brief, pages 70-75, Horizon “contradicts” the
12 existence of “multiple sites” and shows, based on the record, that alternate locations within the
13 County are not available or acceptable. *See also* Testimony of Chris Taylor, Ex. 20 SUP (CT-
14 T SUP) p 21.

15 As discussed in Horizon’s Opening Brief, KCC Chapter 17.61A does not allow wind
16 farms as a permitted use anywhere in the County—they are a prohibited use. There is no site
17 or area in the County that allows a wind farm as a permitted use, without going through the
18 entire County siting process. Particularly given what the Council now knows about the
19 County’s legal position—that “good faith” “reasonable efforts” includes potentially decades of
20 collateral, non-EFSEC forum appeals, ending in no EFSEC jurisdiction—the facts cannot be
21 more clear: Under this County’s zoning, there are no acceptable “alternate locations”
22 anywhere within the County.

23 An analysis of alternative sites in the County for the KV Project was included in
24 Chapter 2.7 of the EFSEC DEIS, the EFSEC Supplemental DEIS, Chapter 2.4.1 of the Kittitas
25 County DEIS for the enXco Desert Claim Wind Power Project and Chapter 3.16 of the Wild
26 Horse Wind Power Project DEIS. The analysis in the EFSEC DEIS was the same used by

1 Kittitas County for its DEIS for the enXco Desert Claim wind farm site, as well as the Wild
2 Horse DEIS. These DEIS’s established criteria for the analysis of alternatives are set forth in
3 Horizon’s Opening Brief, page 70. While the opponents categorically allege that alternate
4 locations exist, they do not even mention these criteria, and they certainly do not attempt to
5 rebut the application of these criteria to the alleged “alternate locations.”

6 The DEIS’s clearly concluded that the KV Project and Desert Claim Project are not
7 alternatives to each other. The County also alleges that another wind power firm is
8 considering a potential site south and east of the Wild Horse Project site (the Invenergy site).
9 Darryl Piercy admitted in cross-examination that no formal pre-application conference has
10 occurred with the County, and that Invenergy has submitted nothing to the County in writing.
11 EFSEC Tr. at 439. As noted in Horizon’s Opening Brief, pages 73-74, economically viable
12 transmission appears unavailable to this site.

13 The opinion of the professional meteorologist consulted in developing the Wild Horse
14 and Kittitas Valley Projects, who is also familiar with the wind resource at both the Desert
15 Claim site and the purported Invenergy site, closed all room for speculation on the issue. He
16 testified that due to poor wind resources, the Invenergy site is likely capable of a maximum 50
17 MW site—a project size that is not an acceptable alternative to the robust generation capacity
18 of the KV Project site. He also testified that the Desert Claim site does not have wind
19 resources comparable to the KV Project site. EFSEC Tr. At 706-09. He further stated that in
20 terms of its capacity to generate electrical power, the KV Project site is clearly one of the best
21 undeveloped sites remaining in the County and in the state of Washington. EFSEC Tr. at 709-
22 10.

23 For reasons discussed in Horizon’s Opening Brief at 72, the Wild Horse “expansion”
24 project is not an alternative to the KV Project. Such a project would best be characterized as
25 an expansion of Wild Horse, rather than a new project. (Ex. 20 SUP (CT-T SUP) p 21).

26

1 grow” lithosol. The applicant believes that this requirement is not proper, for several reasons.
2 Horizon is not aware of any record in this proceeding documenting any habitat value or
3 attributes of lithosol. While the KV Project will minimize impacts to lithosol soils, the
4 lithosol soil areas impacted by the project represent a small and regionally insignificant
5 proportion of the total lithosol in the vicinity. (Ex. 30 (RK-T) pp 7-8). The impact related to
6 temporary disturbance has already been mitigated. The mitigation package proposed by the
7 Applicant is comprehensive, and was approved by WDFW as consistent with the agency’s
8 wind power guidelines.

9 Based on the overall habitat categorization (relating to habitat in general, not only
10 impacts to lithosols), the Applicant would have been required under WDFW’s wind power
11 guidelines to mitigate for approximately 345 acres of suitable habitat. The mitigation parcel is
12 approximately 550 acres, far exceeding the WDFW requirement for habitat mitigation. (Ex.
13 29R (WE-R) P 9). Revegetation of lithosol is extremely tenuous and uncertain. As a result
14 the Applicant provided a mitigation parcel which essentially treated such areas as permanently
15 disturbed for all practical purposes. Further, one of the purposes of the trenching protocols
16 agreed to by the Applicant attempts to keep the natural seeds and disturbed plants in situ, in
17 order to maximize the opportunities to revegetate in these areas. The Applicant believes that it
18 has proposed adequate mitigation for the lithosol areas and requiring anything more as
19 requested by the CFE would be burdensome and have little chance of any greater success.

20 **C. No Further Mitigation Measures are Needed to Address Avian Mortality Risks.**

21 The CFE sites opposition testimony, and suggests that the SCA set out a detailed plan
22 to address potential avian mortality scenarios, if the mortalities are higher than predicted by
23 the Applicant’s pre-project studies. As confirmed by WDFW, the Applicant’s pre-project
24 assessments are fully consistent with the WDFW wind power guidelines, particularly in light
25 of the characteristics of the Project site. The Applicant believes that a categorical requirement
26 to shut down turbines is improper and should not be placed in the SCA. A similar request was

1 made and rejected by the Council in the Wild Horse hearings. The WDFW wind power
2 guidelines, at page 4 state, “[a]djustments that are not feasible because they would make the
3 wind project un-financeable include removing turbines or shutting down turbines during
4 certain periods of the year.”

5 The scope of study and protocols for the KV Project were developed with input from
6 the WDFW and the U.S. Fish and Wildlife Service (USFWS) and are consistent with the wind
7 power guidelines recently developed by the WDFW. As the resource agencies responsible for
8 protection and management of wildlife resources, the expert opinions of these agency
9 personnel are an appropriate measure of the sufficiency of the studies and appropriate
10 mitigation measures. (Ex. 29-R (WE-R) p. 2). Applicant’s witness Wally Erickson responded
11 to this issue at the Council’s hearing. He pointed out to the Council how complicated it is to
12 project into the future and arrive at solutions without an investigation of the specific facts. It
13 would depend upon interrelated factors that cannot be readily assessed ahead of time. It would
14 relate to an analysis of such things as type of species, and whether any impacts rise to level of
15 concern, based on an appropriate consideration of biological significance of the impact, and
16 not simply the number of mortalities for a particular turbine in a particular year.

17 Impact at a specific turbine could be higher than projected in any given year, but not
18 rise to a level of biological significance, particularly when assessed in the context of the
19 Project as a whole. The TAC should investigate and determine whether there is a cause for
20 concern and make recommendations to the Council. The Council has the ability to propose
21 changes, increase mitigation and take whatever reasonable action it deems appropriate
22 addressing a specific well investigated and analyzed situation, in a venue enabling informed,
23 science-based analysis. (EFSEC Hearing, Tr. at 681). Potential mitigations schemes
24 exceeding standards accepted and proposed in tandem with experience wildlife agencies are
25 premature at the SCA level. The Council should address this issue based on the precedent of
26 Wild Horse.

1 **D. Membership of the TAC Should be Left to EFSEC, and Should Not Categorically**
2 **Include an Adjacent Landowner.**

3 The CFE has further suggested that an adjacent landowner without a turbine lease
4 agreement, or any other contractual obligation be included as a member of the TAC.

5 Although the Council creates the TAC and approves its members, the Applicant believes that
6 such appointment should conform to the purpose of the TAC. The purpose of the TAC is to
7 provide the Council with expertise and input regarding biological elements. Its purpose is not
8 to just give a voice all who might have an ax to grind. Therefore the Applicant encourages the
9 Council to limit its appointments to those with expertise and background for which the TAC is
10 being created. The Applicant requests that the Council preserve its discretionary
11 decisionmaking in this regard, and not categorically require the appointment of an adjacent
12 landowner.

13 **V. CERTIFICATION OF THE KV PROJECT SERVES AND ADVANCES THE**
14 **PUBLIC INTEREST**

15 The regulation of the siting, construction, and operation of energy facilities is of the
16 utmost statewide importance. The very existence of EFSEC reflects the Legislature's
17 recognition that the siting, construction, and operation of energy facilities cannot be impeded
18 by the inevitable parochial concerns raised at the local level. The interests of the citizens of
19 the state of Washington as a whole should not be impaired by the opposition of a small
20 handful of property owners voicing subjective complaints. RCW 80.50.010 specifically
21 recognizes the overwhelming state interest as follows: "It is the policy of the state of
22 Washington to recognize the pressing need for increased energy facilities, and to ensure
23 through available and reasonable methods, that the location and operation of such facilities
24 will produce minimal adverse effects on the environment, ecology of the land and its wildlife,
25 and the ecology of state waters and their aquatic life." To further the legislative recognition of
26 the state's interest and the pressing need for increased energy facilities EFSEC has been
mandated with the following: (1) To provide abundant energy at reasonable cost; and (2) To

1 avoid costly duplication in the siting process and ensure that decisions are made timely and
2 without unnecessary delay. (RCW 80.50.010).

3 The Project fulfills the interests of the state as a whole. The Project will provide power
4 at low cost relative to alternative sources. The Project is a renewable resource, with no
5 significant air emissions (criteria pollutants or greenhouse gases), negligible water use, and
6 with a small footprint. No other major electricity supply resource can be constructed so as to
7 allow ongoing agricultural and natural resource use of the land after construction. This is
8 particularly beneficial when it allows continued grazing and farming and maintenance of the
9 rural character of the site. The Project is compatible with the land use in the area and will help
10 maintain its rural nature in the face of the virtually unregulated urban sprawl in Kittitas
11 County. This project promotes all aspects of RCW 80.50.010. It will provide much needed
12 energy resources at a reasonable cost and serve to protect and preserve the quality of the
13 environment; enhance the public's opportunity to enjoy the aesthetic and recreational benefits
14 of the air, water and land resources; promotes air cleanliness; and promotes beneficial changes
15 in the environment.

16 **A. The KV Project will Help the State of Washington Meet State and Regional
17 Energy Needs.**

18 The Legislature has already recognized the pressing need for abundant energy at
19 reasonable cost and as such, the issue of need for power is not relevant in this hearing.
20 However, Horizon would like the Council to note the increasing demand for renewable energy
21 resources in the region. Several regional electric utilities have recently issued requests for
22 proposals to acquire wind power, including PSE, Pacific Power, Avista Corporation, and
23 Portland General Electric. This trend has accelerated with Initiative 937, which passed in
24 November 2006 implementing requirements for most of the state's electric utilities, both
25 public and private, to increase their use of renewable energy by 15 percent by 2020.

26

1 Even as demand for wind energy has been increasing in the region, wind resources in
2 the state of Washington are finite and limited. As stated in Section 3.5-6 of the EFSEC
3 Project DEIS, “Estimates of the wind resource are expressed in wind power classes ranging
4 from Class 1 to Class 7, with each class representing a range of mean wind power density or
5 equivalent mean speed at specified heights above the ground. Areas designated Class 4 or
6 greater are suitable with advanced wind turbine technology under development today.” The
7 DEIS further states that the state of Washington compared to other states, is “ranked in the
8 bottom tier in terms of wind energy potential.” This point is echoed in Avista’s 2005
9 Integrated Resource Plan Executive Summary: “The wind limitation reflects Company
10 agreement with the Northwest Power and Conservation Council (NPCC) that a limited amount
11 of economically viable wind potential exists in the Northwest.” *See DEIS, supra.*

12 The DEIS also states in Section 3.5 that the Ellensburg corridor in Central Washington,
13 where the KV Project and the Wild Horse Project are located and proposed, sustains one of the
14 strongest wind energy resources in the state. Data from several sites throughout the central
15 Washington corridor indicate that exposed areas have a Class 4 to 5 annual average wind
16 resource, with a Class 6 resource during the spring and summer seasons. Wind resources of
17 this class near transmission lines and load centers (such as the KV Project site) are finite and
18 are critical to meeting state and regional energy needs with abundant energy at reasonable
19 cost, a point that is particularly important when the ability to deliver renewable energy to
20 major load centers in western part of the state of Washington is considered. *Id.*

21 It is clear from the DEIS and the testimony of Ron Neirenberg that this is one of the
22 best proposed projects both in the county and the state (Testimony of Ron Neirenberg, EFSEC
23 Tr. at.710), and is capable of interconnecting to either the BPA’s or PSE’s transmission
24 system in a cost-effective manner. It is also located closer to major load centers (*e.g.* the
25 Puget Sound region) than most other proposed wind project sites. Finally, it is located in a
26 completely different area than the vast majority of likely Northwest wind projects (*i.e.* the

1 Columbia Gorge), and therefore can provide utilities with some resource diversity relatively
2 close to their likely purchases from other wind projects.

3 With the passage of I-937, Washington public and investor-owned utilities will need to
4 acquire roughly 1,500 to 1,700 average megawatts (or 4,500 to 5,000 megawatts of wind
5 *capacity*) to meet the 15 percent RPS requirement by 2020. Although I-937 applies to all
6 renewable resources (*e.g.* biomass and geothermal), the vast majority of resources acquired to
7 meet the standard are expected to be wind-powered, due to the favorable pricing of wind
8 energy. (Randy Hardy Supplemental Testimony, Ex. 43 (RH-T Sup) at 8). Achieving these
9 requirements will be challenging with the limited wind resource potential in this state. Wind
10 sites are unique and cannot be relocated. The KV Project is one of the best undeveloped wind
11 sites remaining in Washington. It cannot be replaced. The mandate of I-937 will never be met
12 if wind sites are denied because of few subjective complaints regarding potential perceived
13 visual impacts.

14 **B. The Project is Consistent with and Implements State Energy Policy.**

15 The Legislature has expressed a strong public policy in favor of renewable energy in
16 RCW 43.21F.010 and RCW 43.21F.015(1). As noted both at the EFSEC Hearing and its
17 Closing Brief, CTED, which is the state agency that manages the State Energy Policy Act and
18 GMA, fully supports state preemption and the siting and construction of this project. CTED
19 believes the record developed at the hearing demonstrates unequivocally that the Project will
20 be an exceptional renewable energy source, with great benefits for the State and the county
21 with few negative impacts. (CTED Brief at 4-6).

22 The opponents brush off the fact that the KV Project is consistent with and implements
23 Washington’s energy policy. Instead of responding to the public interests set forth in
24 Horizon’s Opening Brief, the opponents take a decidedly parochial stance. Lathrop
25 categorically states, without any citation to the record: “There is no demonstrated interest of
26 the State in approving this project as there appear to be more than enough such projects

1 proposed for Kittitas County to serve future power needs.” Brief at 32. The County, Brief at
2 14, accuses Horizon of not “guaranteeing” that the power generated “would be used in the
3 State of Washington,” adding: “Preemption of Washington GMA land use laws to provide
4 power to out of State users does not serve the interests of the State.” The County goes
5 overboard in wrapping itself in its GMA flag. As stated previously, Horizon does not suggest
6 “preemption of Washington GMA land use laws.” Horizon recommends preemption of
7 Kittitas County’s arbitrary decision made in contravention of those laws, and in disregard of
8 the County’s own comprehensive plan policies and zoning provisions.

9 For its electrical power supply, Kittitas County is not an island, nor is Washington. At
10 the EFSEC Hearing, Tony Usibelli and Randy Hardy explained that the power grid is
11 interconnected throughout the Northwest and along the west coast:

12 I think it’s important to recognize that the electricity system is an
13 integrated system in the Western United States and specifically
14 along the West Coast of the United States. So at times we provide
significant power to California and at times they provide
significant power to us.

15 EFSEC Tr. At 634. *See also* Tr. At 635, 638, 640, and 663-66. Randy Hardy’s testimony was
16 similarly clear in describing the importance and need of wind energy, and the important
17 interests of the state of Washington, as one state within an interconnected western U.S. power
18 grid. (EFSEC Tr. at 753-58).

19 **C. The Project Strikes a Highly Beneficial Balance Between Energy Needs with**
20 **Environmental Impacts.**

21 In fulfilling its mandate to provide abundant energy at reasonable cost in response to
22 the legislatively recognized pressing need for energy facilities, EFSEC is charged by RCW
23 80.50.010 to balance the environmental impacts of the project. The testimony of expert
24 witnesses and members of the public, as well as the Draft EIS, Supplemental DEIS and
25 Addendum to the DEIS clearly establish that this Project, with its proposed mitigation
26

1 measures, is appropriate for this location and would have a minimal impact on the
2 environment.

3 The Council should consider the fact that the Project will have a *de minimus* effect on
4 the land use in the area. What is lost in the debate with the opponents regarding local “land
5 use compatibility” is the fact that the Project will not cause or result in any actual change to
6 the land use in the County as a whole, or even in the Project vicinity. The KV Project is
7 proposed in a sparsely populated location, planned and zoned for rural, agricultural, and
8 natural resource extraction uses. The County’s Comprehensive Plan, policies and zoning code
9 purport to discourage residential development in the Project area, and encourage uses that will
10 conserve large land areas for rural, agricultural, and natural resource uses. The Plan and
11 applicable zoning code also explicitly encourage industries that discourage the conversion to
12 sprawling housing developments. (See Horizon’s Opening Brief, **Appendix A**).

13 Although the Project has been deemed “inconsistent” with local land use plans, as
14 described in Horizon’s Proposed Findings of Fact and Conclusions of Law, Horizon’s
15 Opening Brief, **Appendix A**, the Project conforms to all relevant General Planning Goals,
16 Objectives and Policies defined in the Kittitas County Comprehensive Plan. The KV Project
17 is “consistent,” “compliant,” and “compatible” with County plans and regulations. Wind
18 energy facilities, although generally prohibited in Kittitas County in the abstract, are
19 permissible when presented with the level of detail, analysis and mitigation found in the KV
20 Project application, thereby rendering proposals such as these a compatible land use, under
21 County plans and ordinances. The County has never rebutted the Project’s consistency with
22 the County’s Comprehensive Plan and County’s policies governing land uses allowed in the
23 applicable zoning ordinances. Instead, the County contends that by failing to achieve an
24 approval under the wind farm ordinance, the Project is categorically inconsistent with “GMA
25 laws.” (County’s Closing Statement at 14).

26

1 Notwithstanding the findings in Resolution 2006- 90, the actual hearing record,
2 including the deliberations by the BOCC, establishes that the BOCC concluded the Project
3 complies with the Wind Farm Resource Overlay ordinance, KCC Ch. 17.61A in all aspects,
4 except for potentially perceived visual impacts relating to a handful of residences (not the
5 community as a whole) and shadow flicker effects to existing residences within 2,500 feet of
6 turbines.

7 With the Applicant’s stipulation regarding shadow flicker, the only impact issue being
8 raised in this case relates to the perceived visual impact on existing residential structures
9 within ½ mile of a turbine. The BOCC did not take issue with area-wide or territorial visual
10 effects. This County concern was never raised in the County’s comments regarding the DEIS.
11 This comment was only raised after the public SEPA and County hearing records were closed.
12 There are only 16 residential structures within 2,500 feet of proposed turbines. Ex. 34 CUP
13 (TP-T-SUP) at 19. Only eleven of those residential structures would actually have other than
14 an insignificant view at the most, due to topography and screening. Of these remaining 11
15 residential structures, only one has its primary viewshed toward turbines within 2,500 feet.

16 The geographical context is critical: The 6,000 acre Project area is sparsely populated,
17 presumably in part because the constant, howling wind makes for rough, inhospitable living.
18 Within this large Project area, the County’s denial focuses on at most 11 residences, but
19 realistically, only one with more than a very modest level of impact.¹² The area is not a
20 “neighborhood” as has been represented by the opponents. For a project such as the KV
21 Project, whose siting and design have shaped and minimized its overall visual impacts, any

22 _____
23 ¹² In its Closing Statement at 9, the County accuses Horizon of removing turbines “based upon
24 the happenstance of the location and direction of the visual simulation,” adding that Horizon “did little
25 more than redesign the layout around the visual simulation.” This is a complete fabrication. The
26 County makes no reference to the record for this accusation. Like other untimely comments and
accusations regarding visual impacts, the County did not provide this comment during the SEPA
process. Horizon coordinated all visual simulations with EFSEC, as the SEPA lead agency, in an
attempt to provide a representative depiction of the Project from the largest number of viewers.

1 visual impact that might be identified as affecting small numbers of viewers must be evaluated
2 in the context of the fact that, on the whole, the Project’s visual impacts are relatively low,
3 Ex. 34 SUP (TP-SUP) at 6-11, and a much more significant statewide interest is at issue.

4 The degree to which visual impacts are adverse significantly depends on the viewer’s
5 location and sensitivity and the impact on view quality. Because of the fact that the primary
6 viewsheds of residential structures that can actually see the turbines within 2,500 feet are
7 overwhelmingly away from or not directly towards the turbines and because most of the
8 turbines are beyond the point of visual dominance even if the views were located toward the
9 turbine, as described in Dr. Priestley’s supplemental testimony, the visual impacts with a
10 1,320 foot setback (as proposed by the Applicant) for this project are not significant.

11 The nature of aesthetic judgments is inherently subjective and thus easily subjected to
12 attack as evidenced by the opponents’ briefs. However, the Applicant hired qualified experts
13 to carry out an extensive visual and aesthetic impact analysis which was based primarily on
14 the widely accepted Federal Highway Administration methodology for determining visual
15 resource change and assessing viewer response to that change. Further, the Council, in its
16 environmental review, hired its own independent experts who used similar and empirically
17 defensible methods. Those experts concurred with the Applicant’s experts. The County’s and
18 opponents’ analysis and attacks were not based on the use of any accepted visual assessment
19 protocols. They are truly in the category of pure subjectivity and speculation. They
20 misconstrue the treatment of the issue of visual sensitivity as it was presented in the original
21 visual assessment in the ASC, and as it was repeated in the DEIS and Addendum thereto. The
22 only objective analysis of the visual issues was presented by the Applicant and reviewed and
23 concurred in by the Council’s own experts.

24 The Applicant’s analysis, the DEIS and the DEIS Addendum concluded that the visual
25 impact of the Project would not constitute a significant impact because of the low to moderate
26 levels of sensitivity of the affected views. Moreover, it is appropriate and necessary for

1 EFSEC, as the SEPA lead agency, to balance the moderate impact to a handful of
2 nonparticipating residential structure owners against the overwhelming statewide public
3 benefit of the Project.¹³

4 **VI. CONCLUSION**

5 As shown by the Applicant and confirmed by EFSEC’s DEIS and Addendum thereto
6 and Supplemental DEIS, this Project will provide much needed renewable electricity for the
7 growing regional demand without creating significant unavoidable adverse impacts on the
8 environment. The Applicant has demonstrated that the project meets all criteria for approval
9 set forth in RCW 80.50, and will provide abundant renewable energy at reasonable cost,
10 serving the broad interests of the public.

11 Wind resources are finite and cannot be relocated and/or replaced. It is unrebutted in
12 the record that the Kittitas Valley Project is one of the best proposed wind power projects both
13 in Kittitas County and the state of Washington, with robust winds, on-site transmission, and
14 close proximity to load. It cannot be replaced. The will of the people of Washington, as
15 expressed by the recent approval of I-937, will never be met if potential wind energy sites are
16 denied because of subjective complaints by a few neighboring property owners regarding the
17 perceived visual impacts

18 The Project is located in a very sparsely populated and harshly windy area of the
19 County. The Project is consistent with underlying and surrounding land uses which are rural,
20 agricultural, and natural resource in nature. The Project will aid in preserving agricultural and
21 natural resource uses of the area as contemplated in the County’s land use plans and zoning
22 ordinances. In furtherance of the County’s own GMA-based planning and policies, the Project

23 _____
24 ¹³ Without citation to legal authority, ROKT, Brief at 33, argues: “Kittitas County has full
25 authority to mitigate or deny the application for comprehensive plan amendment, rezone, project
26 permit or development agreement. Lead agency status has nothing to do with substantive SEPA
authority.” If an attorney wishes to posit the position that “lead agency status has nothing to do with
substantive SEPA authority,” he should back up such a specious allegation with sufficient supporting
legal analysis.

1 will provide economic incentives to discourage conversion of the land to sprawling residential
2 development—despite the County’s misapplication of those plans and policies. There is no
3 credible evidence in the record of an adverse impact on property values. The Project will also
4 indisputably provide significant economic benefits to the County. The record has clearly
5 established that the Project will not cause or result in any actual change to the land use in the
6 County as a whole, or even in the Project vicinity.

7 EFSEC’s explicit mandate from the legislature is to balance the interests of the state
8 and the impacts of the Project. After a rigorous, multi-year review, no significant,
9 unavoidable adverse environmental impacts have been identified in the DEIS or the
10 Addendum and Supplement thereto. The only issue remaining unresolved with Kittitas
11 County is the appropriate visual setback for existing residential structures within 2,500 feet of
12 turbines. The issue of perceived visual impacts is, by its very nature, subjective. More
13 importantly, the BOCC only raised this issue *after* the SEPA record and the public hearing
14 record were closed.

15 There are only 16 houses within the Project area, some of which cannot even see a
16 turbine within 2,500 feet. In fact, only 11 residential structures will actually have a view of a
17 turbine within that distance. Of these, all but one of the residential structures’ viewsheds are
18 oriented away from the turbines. The Council must balance this subjective insignificant
19 impact with the overwhelming benefit to both the environment and fulfilling the State’s
20 energy needs. Clearly the benefits of the Project vastly outweigh the parochial and
21 insignificant considerations for which the County denied the Project. If the subjective and at
22 worst marginal view impacts of 11 or fewer residences can be the basis of the denial of this
23 project, then no energy project can be sited in the state of Washington including integrated
24 gasification combined cycle (IGCC), combined cycle turbines, and transmission corridor
25 projects. All it would take would be aesthetic complaints of a couple of land owners around a
26 project to “kill” a proposed project. The chilling effect that such an approach to energy

1 facility siting would have on the development of new energy facilities in Washington should
2 not be overlooked. Given the success in siting projects through local counties and EFSC just
3 across the border in Oregon, investors and developers might choose to ignore Washington in
4 favor of jurisdictions with more reliable permitting regimes.

5 The Applicant has continually attempted to resolve concerns identified by the public
6 and the County throughout this entire process. It has compromised repeatedly and without any
7 hint of ultimate County approval in return, in an effort to address comments raised during the
8 public hearing and SEPA processes. Horizon continued to do so through the County and
9 EFSEC hearing processes. In its letter of submittal accompanying its opening brief, Horizon
10 summarized its compromises, attempts to obtain resolution, and offers to mitigate for
11 perceived impacts made during the EFSEC hearing process.¹⁴ This was an attempt to provide
12 clarity in an ongoing effort to respond to issues even as they arose during the EFSEC hearings.
13 Applicant only received criticism from the opponents regarding this list. Again, the opponents
14 have used Horizon’s efforts at compromise and issue resolution against it.

15 Horizon has operated in good faith in an effort to resolve issues throughout this case,
16 and its attempts continue to today and will into the future, despite the abusive responses by the
17 opponents. The Applicant will continue to work with the Council in a positive and
18 constructive manner regarding all issues, and remains open and willing to work on issues with
19 the County and anyone with a legitimate interest regarding the Project. Horizon is open at all
20 times to discussion with the County, participating landowners and non-participating
21 landowners. As it has done at other project throughout the country, Horizon has voluntarily
22 entered into neighbor agreements with non-participating landowners to address neighbors’
23 concerns and allow them to benefit directly from the Project. This is an ongoing effort. The
24 ///

25 ///

26 _____
¹⁴ See WAC 463-42-690(3).

1 Applicant desires to be a good neighbor and it is in Horizon’s best interests to have good
2 relationships with its neighbors.

3 Respectfully submitted this 20th day of November, 2006.

4 **STOEL RIVES LLP**

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Timothy L. McMahan, WSBA No. 16377
7 Of Attorneys for Applicant Sagebrush Power
Partners, LLC

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9

10

Darrel L. Peeples, WSBA No. 885
11 Of Attorneys for Applicant Sagebrush Power
Partners, LLC

12

13

14

Erin L. Anderson, WSBA No. 23282
15 Of Attorneys for Applicant Sagebrush Power
Partners, LLC

16

17

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **Sagebrush Power Partners’ Closing post-**
3 **Hearing Brief** on the following named person(s) on the date indicated below by

4 mailing with postage prepaid

5 email

6 to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s)
7 at his or her last-known address(es) indicated below.

8 Energy Facility Site Evaluation Council:	
9 Mr. Allen J. Fiksdal (original and 15 copies) 10 EFSEC Manager 11 Energy Facility Site Evaluation Council 12 925 Plum Street SE, Building 4 13 PO Box 43172 14 Olympia, WA 98504-3172 15 Ph: (360) 956-2152 16 Fax: (360) 956-2158 17 allenf@cted.wa.gov	Adam Torem Administrative Law Judge Office of Administrative Hearings Olympia Field Office – SHS P.O. Box 42489 Olympia, Washington 98504-2489 Ph: (360) 753-2531 Fax: (360) 586-6563 atorem@oah.wa.gov
13 Serve an electronic version of all documents to both:	
14 NOTE NEW E-MAIL	
15 allenf@cted.wa.gov	
16 irinam@cted.wa.gov	
17 Counsel for the Environment:	
18 Michael Tribble 19 Assistant Attorney General 20 Counsel for the Environment 21 Office of the Attorney General 22 1125 Washington St. S.E. 23 P.O. Box 40100 24 Olympia, WA 98504-0100 25 Ph: (360) 753-2711 26 Fax:(360) 664-0229 michaelt1@atg.wa.gov	

Applicant - Sagebrush Power Partners L.L.C.:

<p>Chris Taylor Horizon Wind Energy 53 SW Yamhill Street Portland, OR 97204 Ph: (503) 222-9400 Fax:(503) 222-9404 chris.taylor@horizonwind.com</p>	<p>Darrel Peeples Attorney at Law 325 Washington Street NE, #440 Olympia, WA 98501 Ph: (360) 943-9528 Fax: (360) 943-1611 dpeeples@ix.netcom.com</p>	<p>Timothy L. McMahan Attorney at Law Stoel Rives LLP 805 Broadway Street, Suite 725 Vancouver, WA 98660 Ph: (360) 699-5900 Fax: (360) 699-5899 tlmcmahan@stoel.com</p> <p><i>Please also e-mail to:</i> Joy Potter joy.potter@horizonwind.com and Wendy McMillen wendy.mcmillen@horizonwind.com</p>
<p>Dana Peck Horizon Wind Energy 222 E Fourth Avenue, Suite 105 Ellensburg, WA 98926 dana.peck@horizonwind.com</p>	<p>Erin L. Anderson Attorney at Law Cone Gilreath Law Offices 200 E. Third Ave. P.O. Box 499 Ellensburg, WA 98926 Ph: (509) 925-3191 eanderson@eburglaw.com</p>	

WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT:

<p>Tony Usibelli Assistant Director, Energy Policy Division CTED PO Box 43173 Olympia, WA 98504-3173 Ph.: (360) 725-3110 Fax: (360) 586-0049 tonyu@cted.wa.gov</p>	<p>Mark Anderson Senior Energy Policy Specialist CTED PO Box 43173 Olympia, WA 98504-3173 Ph.: (360) 725-3117 Fax: (360) 586-0049 marka@cted.wa.gov</p>
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Kittitas County:

<p>JAMES E. HURSON KITTITAS COUNTY PROSECUTOR KITTITAS COUNTY COURTHOUSE - ROOM ELLENSBURG, WA 98926 PH: (509) 962-7520 FAX: (509) 962-7022 JAMESH@CO.KITTITAS.WA.US</p>	<p>DARRYL PIERCY KITTITAS COUNTY PLANNING 411 N RUBY STREET, SUITE 4 ELLENSBURG WA 98926 PH: (509) 933-8228 FAX: (509) 962-7682 DARRYL.PIERCY@CO.KITTITAS.WA.US</p>
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RENEWABLE NORTHWEST PROJECT:

<p>Troy Gagliano Renewable Northwest Project 917 SW Oak Street, Suite 303 Portland, OR 97205-2214 Ph: (503) 223-4544 Fax: (503) 223-4554 troy@rnp.org</p>	<p>SUSAN ELIZABETH DRUMMOND FOSTER PEPPER & SHEFELMAN P.L.L.C. 1111 THIRD AVENUE, SUITE 3400 SEATTLE, WA 98101-3299 PH: 206-447-4400 DRUMS@FOSTER.COM</p>
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1 ECONOMIC DEVELOPMENT GROUP OF KITTITAS COUNTY:

2 **DEBBIE STRAND**
3 **EXECUTIVE DIRECTOR**
4 **ECONOMIC DEVELOPMENT GROUP OF KITTITAS**
5 **COUNTY**
6 **221 E 4TH AVE.**
7 **PO BOX 598**
8 **ELLENSBURG, WA 98926**
9 **PH: (509) 962-7244**
10 **FAX: (509) 962-7141**
11 **PHOENIX@ELLTEL.NET**

12 **Sierra Club Cascade Chapter:**

13 **LOUISE S. STONINGTON**
14 **SIERRA CLUB CASCADE CHAPTER**
15 **1922 15TH EAST**
16 **SEATTLE, WA 98112**
17 **PH: (206) 322-7193**
18 **lstoni@hotmail.com**

19 **ANDY SILBER**
20 **6552 37TH AVE SW**
21 **SEATTLE WA 98126**
22 **PH: (206) 774-4218**
23 **CELL: (425) 443-8692**
24 **ANDYDS11@MAC.COM**

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Timothy L. McMahan, WSBA No. 16377
Of Attorneys for Applicant Sagebrush Power
Partners, LLC