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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:)
Application No. 2003-01)
) Adjudicative
SAGEBRUSH POWER PARTNERS, LLC,) Hearing
)
KITTTITAS VALLEY WIND POWER PROJECT) Pages 350 - 560
_____)

An adjudicative hearing in the above matter was held in the presence of a court reporter on September 19, 2006, at 8:40 a.m., at Kittitas County Fairgrounds, 512 North Poplar Street, Fine Arts Building, in Ellensburg, Washington, before Energy Facility Site Evaluation Councilmembers.

* * * * *

The parties were present as follows:

SAGEBRUSH POWER PARTNERS, LLC, Darrel Peeples, Attorney at Law; Timothy L. McMahan, Attorney at Law; Erin L. Anderson, Attorney at Law, 325 Washington Street N.E., Suite 440, Olympia, Washington 98501.

COUNSEL FOR THE ENVIRONMENT, Michael Tribble, Assistant Attorney General, 1125 Washington Street S.E., P.O. Box 40100, Olympia, Washington 98504-0100.

KITTTITAS COUNTY, James E. Hurson, Kittitas County Prosecutor, Kittitas County Courthouse, Room 213, Ellensburg, Washington 98926.

Reported by:
Shaun Linse, CCR

1 Appearances (cont'd):

2 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),

3 Ed Garrett, Lay Representative, 19205 64th Avenue S.E.,

4 Snohomish, Washington 98296.

5 F. STEVEN LATHROP, Jeff Slothower, Attorney at

6 Law; and F. Steven Lathrop, Attorney at Law, Lathrop,

7 Winbauer, Harrel, Slothower & Denison, LLP, 201 West Seventh

8 Avenue, Ellensburg, Washington 98926.

9 ECONOMIC DEVELOPMENT GROUP, Debbie Strand,

10 Executive Director, 1000 Prospect Street, P.O. Box 598,

11 Ellensburg, Washington 98926.

12 * * * * *

13 JUDGE TOREM: Good morning. It is now 8:40

14 a.m. on Tuesday, September 19, 2006. We're back on the

15 record on the Kittitas Valley Wind Power Project, and

16 today we have three witnesses scheduled for this morning

17 and a number of other issues we had carried over for

18 potential resolution today or later in the day.

19 The first thing we're going to get through

20 this morning is review a list of witnesses that maybe at

21 the time of their testimony will come in by affidavit.

22 I'm going to survey the Council. So the Council will get

23 out their list for who they might have cross-examination

24 for or willing to waive, we'll deal with that. We'll also

25 ask for Counsel for the Environment and the Applicant to

1 discuss Peggy O'Neill and her availability if there's any
2 cross-examination for her.

3 I think we'll put off until this afternoon
4 the discussion of scheduling the time for the site visit
5 and its itinerary and also the question as to whether or
6 not Mr. Peck comes back to discuss if these are actually
7 going to be offered into the record, the Benton County and
8 Klickitat County energy overlay ordinances and how the
9 cross-examination on those should be limited or not
10 limited. So rather than have that discussion which could
11 turn into a bit of argument this morning, let's put that
12 off until the afternoon and get these three witnesses on
13 and any other business and if there's more time before for
14 the noon hour, we'll take those up at that time; and
15 otherwise, we'll put it off until after lunch.

16 The first witness today is going to be
17 Mr. Wagoner. If he wants to come up to the table while
18 the Council gets through its list of affidavit witnesses,
19 that's fine. We'll get ready for him.

20 Council, we will I believe there's eight
21 witnesses that were potential for taking their testimony
22 by affidavit and avoiding their appearance all together or
23 having to appear by telephone tomorrow afternoon, and
24 those witness are Mr. Weaver, Mr. Bevis, Mr. Flenniken,
25 Mr. Polisky, Peggy O'Neill, Mr. Butler, Ms. Acutanza, and

1 Mr. Pitzler. Maybe I'll do this by a show of hands.

2 Raise your hand if you have cross-examination
3 as I name the witnesses. Mr. Weaver? Anybody have
4 questions for Mr. Weaver?

5 Seeing none, Mr. Bevis? None for Mr. Bevis.

6 Mr. Flenniken? All right. None for
7 Mr. Flenniken.

8 Mr. Polisky? None for Mr. Polisky.

9 Ms. Peggy O'Neill? Mr. Butler?
10 Ms. Acutanza? And finally Mr. Pitzler?

11 All right. The Councilmembers have appeared
12 they have satisfied themselves by reading the testimony
13 and do not have any cross-examination. This presumes, of
14 course, that none of the other parties do.

15 At this point let me survey the parties if
16 those eight witnesses are not going to have to appear
17 and/or with the exclusion of Ms. Peggy O'Neill, and I want
18 to get back to the Counsel for the Environment on her.
19 For the seven other witnesses--Weaver, Bevis, Flenniken,
20 Polisky, Butler, Acutanza, and Pitzler--do any of the
21 parties wish to ask them questions in cross-examination?

22 Seeing none, it appears that those wishing to
23 offer their testimony into the record will then be
24 responsible. If they want to enter those exhibits, the
25 testimony and supporting exhibits, as part of the record

1 just submit an affidavit in a similar format to that be
2 used by the County for Mr. White.

3 Yesterday at the end of the testimony and our
4 proceedings, Mr. Hurson, you were asked to provide a copy
5 of Clay White's affidavit, and I know you went from here
6 to the planning commission. Perhaps between last night
7 and this morning did you have a chance by any way to find
8 that e-mail and bring it?

9 MR. HURSON: Yes, actually Clay White's
10 affidavit, signed affidavit I have that here, and I did
11 make a copy and, frankly, last night I changed his
12 affidavit to be a blank form. I'm pretty sure I printed
13 it. But as I'm looking at it here, I couldn't find my
14 blank form that I had made. I can try to get that over
15 the lunch hour. I didn't have an opportunity to go back.

16 JUDGE TOREM: I see that Mr. Slothower has
17 handed Mr. Peebles something that might function in that
18 regard.

19 MR. SLOTHOWER: Well, it's just a copy.
20 That was Jim's only copy. He had given it to me and I was
21 going to make a copy for you.

22 JUDGE TOREM: Is that the format you were
23 suggesting?

24 MR. PEEPLES: If that format is okay with
25 everybody else, it's okay with me. Mr. Slothower

1 mentioned he thought he might need more detail as
2 exhibits, but I can go either way.

3 MR. HURSON: Frankly, what this is simply
4 referencing is Clay White's Exhibit 50. So it's Exhibit
5 50 CW-T, Clay White affidavit. I, Clay White, swear or
6 affirm under the penalty of perjury the prefiled testimony
7 and exhibits previously submitted by myself in this
8 matter, the testimony and supporting exhibits of Kittitas
9 County response testimony Witness No. 1 Clay White it is
10 true and correct to the best of my knowledge. Then it's
11 dated and signed by Clay White. That was the extent of
12 the affidavit.

13 JUDGE TOREM: I believe that aside from
14 Mr. Weaver all the testimony is being offered by the
15 Applicant in this case or Mr. Bevis is your witness,
16 Mr. Tribble?

17 MR. TRIBBLE: Yes, he is.

18 JUDGE TOREM: So is that affidavit form
19 going to work for you as well?

20 MR. TRIBBLE: It should, yes. I'll probably
21 name the exhibit, but that's the only thing that's
22 different.

23 MR. PEEPLES: If Mr. Hurson could e-mail
24 that to everybody in word form and then we'll just all use
25 it.

1 MR. HURSON: Sure.

2 MR. PEEPLES: Thanks, Jim.

3 JUDGE TOREM: The Council has accepted and
4 I'll just ask for acclamation to approve this one more
5 time for the record that the following witnesses will
6 testify by affidavit, and those affidavits will be due no
7 later than the close of the record next Friday, September
8 29. If they're not received by close of business on
9 September 29, then these pieces of testimony will not
10 become part of the record. So it's offering attorneys to
11 make sure those get into EFSEC staff. If there's for some
12 reason that a person becomes ill and can't sign them, let
13 us know before five o'clock on the 29th so we can quickly
14 send an e-mail out and give notice that we're extending
15 the record, especially on an exception for that particular
16 reason if it becomes necessary. So that will be
17 Mr. Weaver, Mr. Bevis, Mr. Flenniken, Mr. Polisky,
18 Mr. Butler, Ms. Acutanza, and Mr. Pitzler. All those in
19 favor?

20 COUNCILMEMBERS: Aye.

21 JUDGE TOREM: Any opposed?

22 Then with those conditions those witnesses
23 will testify by affidavit.

24 Turning to Ms. Peggy O'Neill, I understand
25 Mr. Tribble you had some questions for her and she may

1 have resolved those through the Applicant.

2 MR. TRIBBLE: Yes.

3 JUDGE TOREM: You want to address that?

4 MR. TRIBBLE: Yes. By agreement this
5 morning I would with some contingencies be willing to
6 waive questions I have with Ms. O'Neill regarding her area
7 of testimony wetlands, and the contingency is this: The
8 Applicant recommend and as well as Counsel for the
9 Environment that if this project is approved, that there
10 be environmental monitoring put into place that is not an
11 employee of the Applicant. So it's an employee of EFSEC
12 or the County and at the very least EFSEC approved the
13 environmental monitoring.

14 JUDGE TOREM: Mr. Peeples, is that agreeable
15 to you?

16 MR. PEEPLES: Yes. This kind of came out of
17 the Wild Horse experience. So I don't think the Applicant
18 wants to be frankly responsible for that and has given it
19 up to the Council, but that's our recommendation is that
20 there needs to be some distance at that point.

21 JUDGE TOREM: So this is essentially an
22 arm's length agreement in the events of conflicts of
23 interest?

24 MR. PEEPLES: Yes. I would recommend some
25 type of engineering firm like DEA which finally stepped in

1 and did an excellent job up on the Wild Horse site.

2 JUDGE TOREM: But, Mr. Tribble, your concern
3 again was that the Applicant not monitor itself on this
4 sort of a project and then EFSEC approve some other
5 third-party for arm's length, conflict-free, and a neutral
6 watching on whatever might come along at the Kittitas
7 Valley site just to approve it.

8 MR. TRIBBLE: Yes, and a company like David
9 Evans & Associates would be perfect.

10 JUDGE TOREM: That would be the extent of
11 what you needed to ask Ms. O'Neill?

12 MR. TRIBBLE: Now with that in the record, I
13 waive any questions I have for Ms. O'Neill.

14 JUDGE TOREM: Any other parties seeing the
15 agreement being reached between Mr. Tribble and
16 Mr. Peeples have any questions or concerns that they want
17 to follow up in perhaps cross-examining Ms. O'Neill or
18 maybe add to this general discussion?

19 Seeing none, Councilmembers, there's another
20 motion before you for Peggy O'Neill to be allowed to
21 testify by affidavit. All those in favor?

22 COUNCILMEMBERS: Aye.

23 JUDGE TOREM: Any opposed?

24 Then we'll add her to the list of those
25 testifying by affidavit. I think that should simplify

1 tomorrow's schedule somewhat, particularly in the late
2 afternoon telephone session.

3 Any other scheduling notes or questions
4 before we get to Mr. Wagoner?

5 Seeing none, Councilmembers, if you turn to
6 Exhibits 41-R and 41-SUP-R. This morning we will be
7 talking with Roger Wagoner.

8 (Roger Wagoner sworn on oath.)

9 JUDGE TOREM: Mr. Tim McMahan for the
10 Applicant.

11 MR. McMAHAN: Good morning, Your Honor,
12 Members of the Council.

13 ROGER WAGONER,
14 being first duly sworn on oath,
15 testified as follows:

16
17 DIRECT EXAMINATION

18 BY MR. McMAHAN:

19 Q. Mr. Wagoner, you have in front of you what's
20 been marked as Exhibit 41-R and 41-R-SUP; is that right?

21 A. Yes, sir.

22 Q. Mr. Wagoner, is that your testimony that
23 you're to represent here today?

24 A. Yes, it is.

25 Q. Is that the testimony that you're here to

1 cross-examine on?

2 A. Yes.

3 Q. Has anything changed in that testimony since
4 this preparation that you want to notify the Council
5 about?

6 A. No.

7 MR. McMAHAN: I move to admit those
8 exhibits, Your Honor, plus the attached exhibits.

9 (Exhibit Nos. 41.0-R and 41.1-R and 41-R-SUP
10 identified for the record.)

11 JUDGE TOREM: Council, all those in favor?

12 COUNCILMEMBERS: Aye.

13 JUDGE TOREM: Any opposed?

14 Any opposition or objections from the rest
15 of the parties?

16 Seeing none, then Exhibits 41-R and 41-SUP
17 are now part of the record along with their supporting
18 exhibits.

19 (Exhibit Nos. 41.0-R and 41.1-R and 41-R-SUP
20 admitted into evidence.)

21 JUDGE TOREM: Cross-examination for this
22 witness is scheduled to be Mr. Lathrop and ROKT so we'll
23 will have one attorney for those as well as Mr. Hurson.
24 Mr. Hurson, go ahead and go first. You have a longer set
25 of cross-examination.

1 MR. HURSON: Thank you.

2 CROSS-EXAMINATION

3 BY MR. HURSON:

4 Q. Mr. Wagoner, just in going through your
5 prefiled testimony, I just want to confirm a few points.
6 Your testimony is not saying that the County process that
7 we adopted for review and approval of wind farms is in
8 violation of the law, is it?

9 A. No.

10 Q. So you do agree that we have a lawfully
11 adopted process.

12 A. Yes, sir.

13 Q. You simply disagree and say if you were the
14 decision maker, you perhaps would have adopted a different
15 process.

16 A. Yes, and I to some extent disagree with the
17 application of the process.

18 Q. You're aware, of course, that this process
19 was modeled after our master planned resort process.

20 A. Yes, I've been told that.

21 Q. You're aware that the master planned resort
22 of Kittitas County there's been testimony that it's a
23 rural process and was approved and it's in fact in a
24 construction development phase.

25 A. That's my understanding.

1 MR. HURSON: I would just for the Council
2 because of Ms. Johnson's position in the County she would
3 have information regarding that because she's solid waste
4 director and also interim public works director; so she
5 has a copy of the development agreement. I don't see that
6 as an issue but wanted to do that just in case.

7 BY MR. HURSON:

8 Q. So that made it through the process. You're
9 also aware that there's a wind farm being currently
10 constructed in Kittitas County referred to as the Wild
11 Horse Wind Power Project. Correct?

12 A. Yes, I am.

13 Q. That project was able to successfully work
14 its way through the County process.

15 A. That's my understanding.

16 Q. All right. Do you have an objection or a
17 problem with I would refer to as a one-stop shopping
18 concept for permit purposes?

19 A. For permit purpose, no.

20 Q. And review purposes?

21 A. What I have an objection to is a combination
22 of legislative and quasi-judicial processes in one
23 package.

24 Q. So your preference would be, for
25 instance--and the County could lawfully do this. You

1 could set up a situation where the County you would have
2 to have an amendment to your comprehensive plan, then
3 you'd have to have an amendment for a rezone to a zoning
4 district that could involve a conditional use for a wind
5 farm, and then you can go through the conditional use
6 process.

7 A. Yes, or include a subarea plan and
8 conditional use as part of the comprehensive plan.

9 Q. You find that to be a more attractive
10 process?

11 A. My personal experience is it works better. I
12 think it's probably much more used in the state in my
13 experience.

14 Q. But in the process I described a scenario
15 could be Applicant requests a comprehensive plan
16 amendment. County approves it. Somebody appeals it to
17 the Growth Management Hearings Board. If they're not
18 satisfied with the hearings board upholding the County,
19 that goes to Superior Court, that goes to the Court of
20 appeals. If the Supreme Court denies cert, two, three
21 years later now they can ask for rezone. Then they ask
22 for rezone. County can approve the rezone. That can go
23 to an appeal through a Land Use Petition Act. That could
24 go through the court system for two or three years. If
25 that's upheld, then the Applicant comes back, asks for a

1 conditional use permit. Board of Adjustment reviews
2 conditional use permit and that's subject to appeal to
3 Superior Court. That could go to the courts for two or
4 three years. In my experience that would be a less than
5 expeditious process.

6 MR. McMAHAN: Objection to Mr. Hurson
7 testifying here.

8 BY MR. HURSON:

9 Q. Would you agree that that is a less than
10 efficient process?

11 A. If it's strung out like that it would be, but
12 it's hard for me believe it would string out like that.

13 Q. But a process you have like that could string
14 out like that.

15 A. I guess anything is possible.

16 Q. So I guess the County process actually since
17 everything is done at one time it's one unified appeal.
18 If someone actually wants to get something approved, can
19 get it through the review process one time, one set of
20 appeals, and get a final decision through the courts in
21 perhaps a third of the time.

22 A. I can't speak to how fast the courts operate.

23 Q. But that could be the consequence of having
24 this sequential process. Right?

25 A. That's a question?

1 Q. Yes.

2 A. I guess so.

3 Q. The process the County adopted you understand
4 that your client participated in the public hearing in
5 that process?

6 A. Yes, sir.

7 Q. They chose not to appeal the process.

8 A. Yes, sir.

9 Q. So they agreed or at least implicitly or by
10 lack of action agreed this is the process they were
11 willing to go through.

12 A. I guess the process is still underway. So I
13 guess without having the final, final result, I don't see
14 how they would want to appeal it in the middle.

15 Q. I mean the County process itself.

16 A. Okay.

17 Q. You also had some comments about SEPA. The
18 purpose of SEPA is to give a decision maker information
19 that will help them make their decision. Right?

20 A. Correct, and the public disclosure, etc.

21 Q. As far as let's say the County has a minimum
22 setback of 50 feet from whatever type, a Type 5 water or
23 Type 4 water. Anyway, whatever type. Let's say there's a
24 minimum setback and the project itself was one that's
25 significant enough where they undergo an EIS. And if the

1 EIS identifies that the minimum setback is inadequate and
2 you need under this circumstance a 200-foot setback, would
3 you agree that the purpose of SEPA is to let the decision
4 maker know that even if there's a minimum 50-foot setback
5 which would really mean it's a 200-foot setback?

6 A. Well, I guess the only thing I would add to
7 that, however, is in addition to identifying the impact,
8 the EIS you should also identify mitigation.

9 Q. Right.

10 A. And that there might be other creative ways
11 to resolve that issue.

12 Q. But if the identified mitigation is a
13 200-foot setback, you agree that that would be what the
14 decision maker would look for.

15 A. Yes.

16 Q. So it depends on a site-specific basis and
17 what the environmental analysis does as to what the
18 decision maker will deem to be the necessary setbacks
19 under any particular circumstance.

20 A. In cases where the whole issue is setbacks
21 it's a function of a specific condition on a site. Of
22 course, in most jurisdictions setbacks are applied
23 uniformly across a jurisdiction by zone or some other
24 category.

25 Q. Right. But if there is an environmental

1 analysis that shows that a minimum setback set forth in
2 the zoning is inadequate you then protect the
3 environmental impact by imposing a greater impact than the
4 EIS analysis calls for. Correct?

5 A. Well, if I understand your question right,
6 you're saying if the EIS finds that the setback in the
7 current regulations are inadequate, then I guess the
8 choice would either be to, yes, deal with that project
9 level or to amend the regulation to be consistent with the
10 conditions that were shown in the site-specific analysis.

11 Q. But for that particular project you can't
12 amend the regulations because of vesting. Correct?

13 A. Well, I guess in the Kittitas Valley case
14 though supposedly you were to adopt new regulations.

15 Q. I'm asking you about the hypothetical
16 wetlands issue.

17 A. So ask the question again, please.

18 Q. An applicant's already vested to existing
19 regulations. Correct?

20 A. Yes.

21 Q. So you look at the SEPA analysis, the
22 environmental analysis to have the decision maker make an
23 informed decision what is or is not an appropriate
24 setback.

25 A. Yes. Then either the setback could be

1 revised or as part of the mitigation could be for the
2 applicant to request a reasonable use exception.

3 Q. You've had some experience with various types
4 of projects. Correct?

5 A. Correct.

6 Q. Would you agree that a 5,000 plus acre
7 project with multimillion dollars worth of infrastructure
8 that requires an environmental impact statement is a
9 rather significant project?

10 A. Certainly the project is significant.

11 Q. How long would you reasonably expect a
12 project of that size a local county would be able to
13 process that?

14 A. Anywhere from in my experience anywhere from
15 six months to two years.

16 Q. So if a local jurisdiction with the project
17 like that was able to process from receipt of application
18 to a decision in perhaps a nine-month range, you would
19 find that to be a reasonable time frame for the
20 jurisdiction to accomplish that task?

21 A. The applicants might not, but I think it
22 would be.

23 MR. HURSON: Nothing further. Thank you.
24 Nothing else. Thank you.

25 JUDGE TOREM: Mr. Carmody? On behalf of

1 Mr. Carmody, Mr. Slothower.

2 MR. SLOTHOWER: I'm going to fill two roles
3 today.

4 CROSS-EXAMINATION

5 BY MR. SLOTHOWER:

6 Q. Mr. Wagoner, in reading your supplemental
7 testimony as a whole am I correct that you are opining
8 that the Kittitas County process lacks an objective
9 standard?

10 A. Could you define what you mean by objective
11 standard.

12 Q. Well, as I go through your testimony and
13 listening to the testimony yesterday, it appears that the
14 Applicant expected bright line rules on what they would
15 have to meet in order to have their project permitted.

16 A. Okay. What I said was that in my experience
17 the process of getting comprehensive plan amendments,
18 rules, and policies in align with a subarea plan objective
19 and then moving down from that into develop regulations
20 ultimately into a development agreement is a sequence
21 which works better than trying to lump them all together.
22 During the application of this process it seemed to me in
23 reading the transcript that there were some very
24 subjective conditions applied.

25 Q. There were some.

1 A. Yes, sir.

2 Q. Did you attend any of the hearings with
3 Kittitas County?

4 A. No, sir.

5 Q. Were you involved in the negotiations at that
6 point?

7 A. No, sir.

8 Q. So you're looking at this after the fact
9 reading the transcript.

10 A. That's correct.

11 Q. It's not uncommon in permitting projects that
12 there are circumstances in which there is a lack of
13 objective standards; isn't that correct?

14 A. Certainly there are cases when comprehensive
15 plans and development regulations do not cover the project
16 at hand and so therefore whether or not they're objective
17 standards, at least there needs be to standards that are
18 created during the process to be applied.

19 Q. At page 11 of your testimony, supplemental
20 testimony you suggest that at the County level the
21 Applicant made changes in the proposal. Do I read that
22 testimony correct?

23 A. I'm sorry. You're talking where it says
24 typically in a project--

25 Q. Yes.

1 A. Yes, correct.

2 Q. And given the nature of those changes was a
3 new notice, a new process called for?

4 A. Not to my knowledge.

5 Q. Do you think it should have been?

6 A. Yes, sir.

7 Q. So if the process should have been restarted
8 based upon the Applicant's changes, do you know why that
9 wasn't done?

10 A. No, I don't necessarily believe the process
11 should have been started over. I just believe that if
12 there were new conditions like the 2,500-foot setback
13 brought in that late, then presumably there were people
14 who maybe were not necessarily part of the record at that
15 time who should have had the opportunity to participate in
16 further discussions on that.

17 Q. Are you then saying that the County process
18 is incomplete?

19 A. I would say that that final, the final
20 decision is incomplete in my opinion based upon the need
21 to address the subarea plan, develop regulations,
22 rezoning, and a development agreement. The final
23 conclusion doesn't mention all of those parts in its
24 decision.

25 Q. In looking at your resume, it's clear to me

1 you have an extensive background in land use issues. In
2 confining your testimony to Washington are you aware of a
3 quasi-judicial land use process in which the applicants
4 and the decision maker would negotiate a resolution?

5 A. Yes.

6 Q. What process is that?

7 A. One of the processes I'm familiar with from
8 my involvement was a subarea plan for the City of Mill
9 Creek which involved what we call a stakeholder's group of
10 property owners', interested developers, citizens, general
11 citizen, and planning commissioners. Not all the planning
12 commissioners but a representation of the planning
13 commissioners to participate in formulation of the plan
14 which also became a planned action EIS and development
15 agreement.

16 Q. But that was not a quasi-judicial process,
17 was it?

18 A. It was not at the time of the subarea
19 planning stage, no.

20 Q. But in a quasi-judicial process, for
21 instance, a rezone the applicant and a decision maker do
22 not negotiate the resolution; is that correct?

23 A. My experience is that normally if you want to
24 call it negotiation, normally the applicant and the staff
25 of the jurisdiction work together to try to formulate

1 something which ultimately is a development agreement that
2 the decision maker can act on.

3 Q. But staff can't always control their decision
4 makers, can they?

5 A. That's true.

6 Q. Again, falling back on your experience as a
7 land use consultant, is economic viability of a particular
8 project the decision maker's responsibility or the
9 applicants?

10 A. I would say it's the applicant's, but let me
11 add something to that.

12 Q. No, you've answered my question. Thank you.
13 In your supplemental testimony you also opine that
14 Kittitas County's definition of a neighborhood either
15 doesn't exist, or if it does exist is confused. Am I
16 correctly characterizing your testimony?

17 A. Yes, I think that that whole term, the
18 application of that term came through I believe in the
19 January 30 planning commission public hearing where they
20 started talking about community and they said, "Well, it's
21 a not community. Is it, you know, something else?" And
22 then finally they settled on neighborhood and then the
23 board picked up on that in their decision.

24 Q. Have you had a chance to review Kittitas
25 County's zoning code in their comprehensive plan?

1 A. Yes, sir.

2 Q. They use the term neighborhood community
3 throughout, don't they?

4 A. Yes.

5 Q. And that's fairly common with most
6 jurisdictions in the State of Washington. They use a term
7 like that; is that correct?

8 A. That's correct.

9 Q. In fact, if you look at some of the case law
10 promulgated by our court system when they look at rezones
11 and things of that nature they also go into those terms;
12 is that correct?

13 A. That's correct.

14 Q. And those terms are not defined anywhere.

15 A. They are not.

16 Q. The only place I've really seen the term
17 neighborhood defined, if you will, is actually in a prior
18 EFSEC Washington Administrative Code provision where it
19 was actually placed at the time this application was
20 filed, but in that situation they designated certain
21 distances from certain types of projects. For instance--

22 MR. McMAHAN: I would object to this line of
23 questioning unless we have this right in front of us so we
24 can all see it. I don't think Mr. Wagoner knows what he's
25 talking about.

1 MR. SLOTHOWER: Yes, I have the citation.
2 It is Washington Administrative Code provision. It's WAC
3 463-42-362. That has been recodified as 463-6362.

4 BY MR. SLOTHOWER:

5 Q. But in that situation--

6 MR. McMAHAN: Again just to go a little
7 farther, I would like to make sure that Mr. Wagoner has it
8 in front of him.

9 JUDGE TOREM: Can you read that for us
10 again.

11 MR. SLOTHOWER: 463-42-362.

12 JUDGE TOREM: Have you been handed a copy of
13 that Mr. McMahan?

14 MR. McMAHAN: 463-42--what's the
15 recodification?

16 MR. SLOTHOWER: The recodification is
17 486-463-6362. The recodification is significantly
18 different.

19 JUDGE TOREM: I've got the copy of the older
20 and I think you're being handed one by EFSEC staff. It
21 will be in the 2001.

22 MR. SLOTHOWER: That's right. It's the
23 packet that was distributed to all the parties at the time
24 the application was filed.

25 JUDGE TOREM: And these are still under

1 EFSEC's rules what the applicant's vested under, what
2 applies for this proceeding.

3 MR. SLOTHOWER: That's correct, yes.

4 MR. McMAHAN: What subarea, Mr. Slothower?

5 BY MR. SLOTHOWER:

6 Q. Well, if you look at that, that WAC suggests
7 that, for instance, in the case of a thermal power plant
8 EFSEC should do a land use survey basically within a
9 25-mile radius; is that correct?

10 A. I'm sorry. I'm not seeing that.

11 JUDGE TOREM: It's under 1(a).

12 A. Thermal power plants 25 miles radius. Okay.

13 BY MR. SLOTHOWER:

14 Q. Then you've got petroleum refinery at a
15 ten-mile radius.

16 A. Okay.

17 Q. Doesn't that give you some idea or some
18 perspective of what a neighborhood or a community should
19 be when you consider a project of that magnitude?

20 A. Not to me.

21 Q. Not to you?

22 JUDGE TOREM: Mr. Slothower, in fairness as
23 to what the Council's got, I think you ought to go through
24 A, B, C, and D of all four different types and the
25 different distances that EFSEC at the time considered

1 neighborhoods along this line of questioning.

2 MR. SLOTHOWER: Certainly.

3 JUDGE TOREM: All four kinds.

4 BY MR. SLOTHOWER:

5 Q. In 1(c) they talk about a petroleum or LNG
6 gas storage area. In that situation it's a ten-mile
7 radius. In the case of a pipeline and its electrical
8 transmission route it's one mile on either side of the
9 center line. Do you understand that?

10 A. Yes.

11 Q. That does not constitute a neighborhood or a
12 community to you?

13 A. To me what I would characterize it is under
14 SEPA it would be so-called affected environment.

15 Q. But in reality when you determine what a
16 neighborhood is or a community is, don't you have to look
17 at the built environment or what type of structures are
18 there, what type of project is being proposed, those types
19 of factors?

20 A. Certainly, and you also look at the
21 demographics and the characteristics of the population,
22 the needs of the community or neighborhood in terms of
23 infrastructure, schools, parks in my view to do a holistic
24 job. I think the planning commission talked about this at
25 length.

1 Q. But still you don't believe that they truly
2 considered--when I say they, you don't believe that
3 Kittitas County truly defined the neighborhood of this
4 project.

5 A. No, I don't. In fact, the Applicant's
6 proposal is in a 6,000-acre area shown on maps and yellow
7 shading. I've never seen anything which defined a line
8 around that to be what would be considered to be the
9 neighborhood or community. So to me the subarea plan was
10 dealing with merely the yellow area.

11 Q. But the subarea plan typically under planning
12 under the Growth Management Act subarea plan would be
13 planning in context with its relation to the overall
14 community, is that correct, or the county?

15 A. Again, the needs of the community to be
16 resolved by public investment in particular.

17 Q. Should the community or the neighborhood in
18 this situation include the City of Ellensburg 12 miles
19 away where the turbines will be visible?

20 MR. McMAHAN: Object. That states facts not
21 in evidence as visible from Ellensburg.

22 MR. SLOTHOWER: Well, I beg to differ. I
23 believe that some of the photos I've seen submitted into
24 the record some of the testimony indicates that it would
25 be visible from Ellensburg 12 miles away.

1 JUDGE TOREM: Rather than settle that point
2 which could take quite a while, I'll have you rephrase
3 that as a hypothetical if visible from Ellensburg.

4 BY MR. SLOTHOWER:

5 Q. Hypothetically if those towers were visible--

6 MR. SLOTHOWER: I'm sorry. Can you read my
7 question back.

8 (Last question read back.)

9 BY MR. SLOTHOWER:

10 Q. Hypothetically if in Ellensburg, for
11 instance, on the top of the hill here, Craig's hill, the
12 Craig Hill Park, I was able to view the turbines from 12
13 miles away, should the city of Ellensburg be a part of the
14 community that the County considers?

15 A. I think in the larger sense given the fact
16 that the public good has to be addressed in the process
17 and so in fact all citizens of Kittitas County are members
18 of the community affected by the project; however, visual,
19 only visual effect is something Mr. Priestley discussed
20 and I can't speak to that.

21 Q. Certainly. But picking up on your answer,
22 then from your perspective the entire County, the citizens
23 of the county are going to be impacted by the project; is
24 that correct?

25 A. I said affected not impacted.

1 Q. I'm sorry. You're correct. You did say
2 affected. That's correct. Right?

3 A. Yes.

4 Q. So in that sense the entire county makes up
5 the neighborhood and the community. Am I correct?

6 A. Not neighborhood, not in my book.

7 Q. Community.

8 A. It's the same as following the legal
9 community or the developed community or the economic
10 community. We overuse that term.

11 Q. Hypothetically if the application was for a
12 nuclear power plant in the exact location of the
13 Applicant's proposed wind generation facility, how big
14 should the neighborhood be?

15 A. I have no idea.

16 Q. You can't answer that question?

17 A. No.

18 Q. To me that seems to drive home the point
19 again like so much of what we've been discussing what a
20 neighborhood is to one person is different to another
21 person. Am I correct?

22 A. That's correct.

23 MR. SLOTHOWER: Thank you. I don't have
24 anything further.

25 JUDGE TOREM: Yes, you do. Put on your

1 other hat.

2 BY MR. SLOTHOWER:

3 Q. You mentioned the term public good. How do
4 you define that?

5 A. Well, I'm sure it's well defined somewhere in
6 state statute. My planning of an application of public
7 good would be making sure that the fiscal return to the
8 jurisdiction from the project itself, if it's a private
9 project in particular, is equal to or greater than the
10 fiscal impacts which the jurisdiction in the situation
11 could be subject to.

12 Q. Is that the only consideration of fiscal
13 impact?

14 A. No, fiscal impact is not the only one. In
15 cases where let's say, again hypothetically, a new
16 subdivision is being developed. If the new subdivision
17 provides as part of the project saving a park open to the
18 use by all members of the community, that's a public good
19 that goes beyond the normal subdivision requirements.

20 Q. Have you visited the area shaded in the
21 yellow personally?

22 A. I won't say I've visited the whole thing, but
23 I did drive 97 and Bettas Road yesterday and about two
24 months ago.

25 Q. What about the rest of the county? Have you

1 traveled extensively through the County to see what the
2 county is like?

3 A. I haven't traveled extensively recently. In
4 '95 and '96 my firm worked on a comprehensive plan. So we
5 did visit a good deal of the county at that time.

6 Q. But that's ten years ago.

7 A. Correct.

8 Q. In fact, we're now in the middle of a
9 ten-year update of that comprehensive plan.

10 A. Yes, I understand.

11 Q. And changes can occur in a ten-year period;
12 is that correct?

13 A. Indeed they do.

14 Q. When you drove through did you observe
15 changes?

16 A. Through this area, the valley?

17 Q. Yes.

18 A. Yes, obviously there is some new homes that
19 have been built there fairly recently. The architecture
20 certainly looks like the latest the builders are doing
21 these days.

22 Q. Do you characterize this--you noticed a
23 significant number of homes being built in the area.

24 A. Didn't see any being built. I saw in
25 whatever part of the valley that Bettas Road runs through

1 there appeared to be four or five houses that looked like
2 new to me.

3 Q. Did it appear to you that this area was an
4 area that was possibly in transition?

5 A. Transition from what?

6 Q. Well, ten years ago this area of the
7 county--you're familiar with this area ten years ago?

8 A. Yes.

9 Q. Ten years ago this area of the County was
10 essentially cattle pasture. Am I correct?

11 A. Yes.

12 Q. And now when you drive through the area you
13 don't see the cattle operations. You see residential
14 structures and people living in basically a rural
15 residential area; is that correct?

16 A. Yes.

17 MR. SLOTHOWER: Nothing further.

18 JUDGE TOREM: I believe that's all the
19 scheduled cross from the parties. Are there any other
20 parties that had something come up during the
21 cross-examination that needs to asked?

22 All right. Seeing none, let me poll the
23 Councilmembers and then I'll come back to you,
24 Mr. McMahan, for further redirect.

25 Councilmember Johnson?

1 MS. JOHNSON: No.

2 JUDGE TOREM: Mr. Fryhling?

3 MR. FRYHLING: No.

4 JUDGE TOREM: Mr. Sweeney?

5 MR. SWEENEY: No.

6 JUDGE TOREM: Ms. Wilson?

7 MS. WILSON: No.

8 JUDGE TOREM: Ms. Adelsman?

9 MS. ADELSMAN: No.

10 JUDGE TOREM: Councilmember Towne?

11 MS. TOWNE: Yes. Do you want to keep going
12 while I look for my question?

13 MS. ADELSMAN: You're it.

14 MS. TOWNE: Oh, all right. You say,
15 Mr. Wagoner, in Exhibit 41-R, page 5, discussing your
16 observation about the County and how it addressed the
17 conflicts and confusion in its own process. I'm quoting
18 here or paraphrasing. They disregarded important local
19 comp. plan policies focusing instead on one dominant
20 issue. In your review of their findings of fact and
21 conclusions of law at the end of the process what is your
22 observation about their regard for local comprehensive
23 plan policies?

24 THE WITNESS: Back to the planning
25 commission, the planning commission's hearing I believe

1 January 30, Mr. Piercy actually instructed the commission
2 or recommended to the commission that it read the
3 Applicant's response or the application which describes
4 the comp. plan policies and how the project applies to
5 them. I don't read anything in that transcript that there
6 was any reflection on either the comp. plan policies or
7 the way the Applicant addressed them.

8 When it got to the board, I find nothing in
9 the record that shows that the board looked at those comp.
10 plan policies. What there was, was a discussion that said
11 that the area was designated rural in the comprehensive
12 plan; however, the zoning is in my opinion resource
13 zoning. In fact, if you read the intent statements of the
14 zoning ordinance for the forest, range zone and ag,
15 whatever zone, it says specifically that both of those
16 zones are to protect the resource and the economic value
17 of substantial resources. It doesn't mention residential
18 development.

19 MS. TOWNE: You speak of that later in your
20 testimony on page 8. You're commenting on Finding No. 39
21 presumably of the BOCC.

22 THE WITNESS: Yes.

23 MS. TOWNE: You're quoting the finding,
24 "This area of the county has character of rural
25 residential and agriculture mixed use." You go on to say

1 then in that paragraph, Finding 39 is in conflict with the
2 adopted zoning for the area which is divided between 820
3 agriculture and FR forest and then range, and you then
4 detail the outright permitted uses.

5 But here where this process which Horizon was
6 in the middle of involves comp. plan change all the way to
7 the development agreement would you assume then that the
8 County would make those adjustments to reconcile these
9 inconsistencies?

10 THE WITNESS: I would have assumed that the
11 County would have at least discussed that through THE
12 planning commission and the board as to whether or not
13 they wished to keep those particular zoning categories or
14 change the comp. plan policies.

15 MS. TOWNE: In your professional judgment
16 are planning and land use decisions based on the character
17 of the development or what the plan and code allow or
18 disallow?

19 THE WITNESS: Those two and politics.

20 MS. TOWNE: Oh, gee.

21 JUDGE TOREM: Let me clarify the record that
22 what Councilmember Towne is looking at is Exhibit 41-R-SUP
23 for the record, even though it's not marked such at the
24 bottom of the page.

25 MS. TOWNE: It's not marked.

1 JUDGE TOREM: But I want everybody to be at
2 the same place, and when we get to the inevitable appeal,
3 whoever is reading this will know what we're looking at.

4 MS. TOWNE: Then on page 12 of 41-R-SUP,
5 you're discussing 36.70B.170 and quoting, a development
6 agreement shall be consistent with the applicable
7 development regs adopted by the local government planning
8 under GMA, and you then comment that your opinion is that
9 such agreements between the local governments and project
10 proponents are the last step of the permitting process.

11 THE WITNESS: Correct.

12 MS. TOWNE: Then you add for good reason.

13 THE WITNESS: Correct.

14 MS. TOWNE: Here where they're all together
15 how then could the County have met that development
16 agreement shall be consistent with provision?

17 THE WITNESS: I wish I knew. I'm sorry. I
18 guess the only thing I would say there would be that, and
19 this may sound a little I guess artificial, perhaps the
20 result would have been a development agreement, to do a
21 development agreement so that the outcome of the board's,
22 the status of the board's process there would have been a
23 definition of specific conditions that were in effect the
24 boundaries within which this more detailed part of the
25 development agreement could be written later on.

1 MS. TOWNE: Then you discuss the same issue
2 a few pages back, page 5 to be precise. You said the
3 County appears to have addressed the inevitable conflicts
4 and confusion in the process by discarding any effort to
5 engage in a meaningful subarea planning process and simply
6 disregarded important local comp. plan policies, focusing
7 instead on one dominant issue setback. This focus is
8 primarily through review of the development agreement.
9 And then you come to the conclusion that quote, in fact,
10 the denial is fundamentally based on failure to come to
11 terms on an "agreed" development agreement.

12 THE WITNESS: Yes.

13 MS. TOWNE: Can you elaborate a little bit.

14 THE WITNESS: Well, again, the last whatever
15 the date was that the board's final decision making the
16 entire discussion literally was 90 percent of discussion
17 was about the setback question, what it should be, and
18 then the decision was made that it had to be 2,500 feet.
19 2,000 which would had been discussed a little earlier from
20 property owners was a part of that particular date as my
21 recollection.

22 So even though they denied the project,
23 which I guess in this case meant the subarea plan or the
24 rezone and everything else, they really couched it in
25 terms of the development agreement. But because the

1 development agreement didn't nail down the setback that
2 entire deal, if you will, was voided.

3 MS. TOWNE: Thank you. No further
4 questions.

5 JUDGE TOREM: Councilmembers, any further
6 questions?

7 MS. ADELSMAN: Just one quick one. Were you
8 ever consulted on what would be a reasonable setback for
9 this project?

10 THE WITNESS: No, I'm sorry I don't know
11 that.

12 JUDGE TOREM: Councilmembers, anything else?

13 Mr. Wagoner, I just want to ask a couple of
14 questions putting what your knowledge with the County
15 process is and the Growth Management Act and perhaps the
16 EFSEC process as well and get your expertise. I'll ask
17 some similar questions to Mr. Piercy later on, but I just
18 want to have this score for the Council so as they decide
19 the request for preemption they have a full context of the
20 different processes available to the Applicant and what
21 they ultimately chose to do.

22 First off, are you familiar with the EFSEC
23 process of allowing for these alternative energy projects
24 to come to the Council or otherwise apply to the local
25 county?

1 THE WITNESS: Yes, sort of.

2 JUDGE TOREM: Back in 2003 I believe EFSEC
3 determined that this project was not consistent with the
4 Kittitas County land use ordinances. What did that mean?

5 THE WITNESS: I guess it meant that the
6 Applicant then had to initiate this process that we're
7 talking about today.

8 JUDGE TOREM: Mr. McMahan, do you have in
9 front of you a copy of what is required when land use
10 consistency is not achieved?

11 MR. McMAHAN: The EFSEC rules? Hang on a
12 second. Let me get my copy. So the WAC or the statute?

13 JUDGE TOREM: It would be both.

14 MR. McMAHAN: So the Section 110 first
15 maybe?

16 JUDGE TOREM: If you look 80.50.090(2), the
17 concluding sentence of that section states: If it is
18 determined that the proposed site does conform with land
19 use plans or zoning ordinances in effect as of the date of
20 the application, the County then goes on to say it can't
21 go after and change them later. That's the does conform
22 part of it. The idea is to determine whether or not it's
23 advised with local land use plans and zoning ordinances.
24 That's the statute. There's other citations to the
25 preemption under 110. That's where the requirement comes

1 there under WAC 463. I believe it's in 463-28. Under
2 463-26-050 it talks about a purpose for a hearing.

3 THE WITNESS: Okay.

4 JUDGE TOREM: Commencement of the initial
5 public hearing the Council shall explain the purpose of
6 the initial hearing under RCW 80.50.090(1) is to determine
7 whether the proposed facility is consistent and in
8 compliance with county or regional land use plans or
9 zoning ordinances and that these matters shall have a
10 priority. I believe that's a misstatement in the
11 reference. It should be 090(2). But regardless it goes
12 back to the correct portion of the statute.

13 Reading those in conjunction and perhaps any
14 other knowledge you have, I'm sure it's cited elsewhere in
15 463-26-050. What then is the purpose of EFSEC determining
16 something that's not consistent when they sent the
17 Applicant back to the County?

18 THE WITNESS: Can you restate that a little
19 differently?

20 JUDGE TOREM: As simply as I can, what was
21 the direction of EFSEC to the Applicant when they said,
22 "Your project is not consistent as foreclosed. Go back
23 and do what"?

24 THE WITNESS: I don't and I haven't read the
25 earlier part of this, but I guess my understanding is that

1 since the County at least zoning doesn't allow wind farms
2 at all, then in fact an application couldn't be consistent
3 with the County regulations. So that is why then the wind
4 farm overlay process has to be initiated. So I'm assuming
5 that EFSEC told the Applicant to go to the County and go
6 through this process.

7 JUDGE TOREM: Kittitas County as it's been
8 pointed out by Mr. Hurson's cross-examination they've
9 adopted an ordinance specifically regarding the siting of
10 these facility; is that correct?

11 THE WITNESS: Yes.

12 JUDGE TOREM: My understanding again reading
13 this is that EFSEC's direction was to go back and get a
14 comprehensive plan amendment and appropriate modifications
15 to the zoning ordinance that would allow consistency.

16 THE WITNESS: Okay.

17 JUDGE TOREM: Is that possible to do that in
18 this County with the ordinance as it has been adopted?

19 THE WITNESS: I guess the other project
20 whose name I can't remember right now proves that it is
21 possible.

22 JUDGE TOREM: Do you know if there was a
23 comprehensive plan, as well as a zoning amendment only in
24 the other case of Wild Horse or were there other adopted
25 issues as well?

1 THE WITNESS: I believe there was a
2 development agreement as well.

3 JUDGE TOREM: Is that necessary under the
4 EFSEC process to achieve consistency, that is a
5 development agreement and be agreed upon with the county?

6 THE WITNESS: Because that's what the
7 County's regulations require.

8 JUDGE TOREM: But under the EFSEC process is
9 that's what's required?

10 THE WITNESS: I don't believe so. In my
11 understanding consistency with comprehensive plan and the
12 regulation. I guess since in this case regulations
13 include the requirement of the development agreement so
14 then I guess that folds all up together.

15 JUDGE TOREM: In the course of the time that
16 EFSEC adopted its statutes from the legislature as well as
17 to the different translations this type of all one-stop
18 shopping well intentionally as it is wasn't apparently
19 contemplated by this law. Is that a correct statement?

20 THE WITNESS: I would guess so, yes.

21 JUDGE TOREM: So from a legal perspective if
22 the Council has to decide can they preempt this County as
23 the Applicant's requesting something that they've never
24 done or had to exercise its power in 30 some years before,
25 how would they determine is the judgment did the Applicant

1 comply with what EFSEC told them to do or is it the
2 question could they comply with what the County wanted
3 them to do, or perhaps there's a third question that has
4 the County essentially preempted EFSEC by taking care of
5 all the locations and the site-specific issues.

6 I think that's the ultimate issue in this
7 case. Which of those questions or maybe there's different
8 ways of phrasing have occurred and what should the Council
9 do about the development of the various laws, none of
10 which have been appealed?

11 THE WITNESS: I can't give you the legal
12 opinion.

13 JUDGE TOREM: I just want your best opinion
14 then on this County's comp. plan of ten years and having
15 worked the growth management issues for a while.

16 And, Mr. Piercy, take note because you'll
17 get the same sort of question.

18 THE WITNESS: My statement would be that
19 EFSEC said go back and make yourself consistent with
20 whatever the County has. So I think the Applicant tried
21 to do that. I don't believe in my opinion that the County
22 acted totally objectively in applying that process that
23 they adopted by ordinance to this particular application.

24 JUDGE TOREM: If the County's ordinance
25 hasn't been appealed and that's the law in this county,

1 can EFSEC grant an application for preemption when they
2 haven't been able to get consistency with the County?

3 THE WITNESS: I don't think I can answer
4 that.

5 JUDGE TOREM: All right. I didn't expect
6 that you might want to. But, Councilmembers, is that all?

7 MS. TOWNE: I have just the one quick
8 question and it's not here so I'm going far afield. Stop
9 me if I'm overstepping here.

10 As you reviewed the comprehensive plan of
11 Kittitas County, what was on the books when all this
12 began? How did they deal with resource lands and
13 essential public facilities to your recollection?

14 THE WITNESS: I think that the--I can't
15 speak to the essential public facilities. I didn't really
16 look at that. On resource lands I think that the rules
17 and policies in the county comp. plan are as good as or
18 consistent with pretty much what I see in other similar
19 counties.

20 MS. TOWNE: Thank you.

21 JUDGE TOREM: Councilmembers, do my
22 questions or those of Councilmember Towne bring any others
23 to mind?

24 Seeing none, Mr. McMahan, do you have
25 redirect?

1 MR. McMAHAN: Thank you, sir.

2 REDIRECT EXAMINATION

3 BY MR. McMAHAN:

4 Q. Mr. Wagoner, I think Mr. Hurson asked you a
5 question about the large resort that was approved by the
6 county through a master planned resort process involving
7 apparently these four legislative and quasi-judicial
8 things all lumped together. Are you familiar with the
9 master planned resort requirements and policy under the
10 Growth Management Act.

11 A. I have never worked on one, but I have read
12 the statute and the WACs.

13 Q. In your opinion based on your knowledge of
14 the Growth Management Act can you discuss whether you see
15 a distinction between a wind farm proposed in a rural area
16 like this and a master planned resort proposed in a rural
17 area?

18 A. Sure. I think that as I understand the
19 background of the master planned resort's amendments to
20 the GMA was because there was a groundswell of these type
21 of projects in rural areas in counties which to be
22 developed properly need to meet the market they are
23 looking towards requiring in effect the development of
24 urban level infrastructure.

25 So the question was can we other than making

1 these independently UGAs out there can you figure out a
2 way so that they can be developed and do that urban
3 development level thing in terms of sewer and so on and
4 what would it take to make that happen. So I think that's
5 the basis to that legislation. To me the master planned
6 resort is a very, very different kind of development than
7 a wind farm because of the complexity. You've got
8 recreation uses, residential uses. In some cases rebuild
9 commercial uses, a lot more traffic, and so on than a wind
10 farm does.

11 Q. Thank you. Mr. Hurson asked you questions
12 about this one-stop shopping and whether you've got a
13 problem with it and then Mr. Torem asked you a series of
14 questions about the relation between EFSEC and this County
15 process. I want to ask a few more questions about that.

16 Can you elaborate a bit. You had talked
17 about the combination of legislative and quasi-judicial
18 functions, and I think you were not allowed to fully
19 answer that question so would you mind elaborating on what
20 exactly your concern is about that in this case as applied
21 here?

22 A. Our concern is at the comprehensive plan
23 level generally when you're dealing with county-wide or
24 jurisdictional-wide issues and goals and policies to
25 address those issues in looking at 20-year growth and so

1 on, the constituency that should be involved and the
2 public, certainly, all public should be much more in tune
3 with participating in those kinds of discussions that
4 ultimately come in dispute with the comp. plan.

5 When dealing with quasi-judicial
6 determinations, the focus by the constituency doesn't have
7 to but frequently in my experience narrows down quite a
8 bit again to the affected environment; that is, the
9 immediate adjoining and nearby property owners and
10 sometimes special interest groups, environmental groups,
11 and so on. But, again, the comp. plan is really the comp.
12 plan for the whole county and a project review which
13 involves a whole different level of disclosure and in
14 fairness and so on I think are much different.

15 Q. Have you ever seen aside from maybe the
16 County's invention for the Mountain Star Resort Project,
17 have you seen those coupled together in one process, those
18 elements of quasi-judicial development permit on up to a
19 legislative subarea plan?

20 A. I've seen them in a process, but I've seen a
21 paper mill process where you essentially deal with the
22 product general rules and policies and work your way down
23 into the regulations and then ultimately project review
24 it; and, of course, planned actions under SEPA in the
25 subarea take that down to a point where decisions can be

1 made at the project level based on the process that went
2 through. The comp. plan and zoning proposals as long as
3 projects were adequately mitigated by the regulations
4 they're exempt for the SEPA review.

5 Q. Now, Mr. Torem had asked you a question about
6 EFSEC rules requiring an applicant upon the determination
7 of inconsistency requiring an applicant to go back and
8 seek consistency with the comprehensive plan and any
9 zoning inconsistency problems. I'm going to hand you the
10 wind farm resource ordinance or the resource overlay zone,
11 Chapter 16.61(a) of the Kittitas County code. Are you
12 familiar with the wind farm resource overlay zone?

13 A. I have read it, yes.

14 Q. If you wouldn't mind, please, have a look at
15 Section 040(4). If you wouldn't mind just reading that to
16 the Council.

17 A. The comprehensive plan amendment or subarea
18 plan for a wind farm resource overlay district must be
19 processed by the county concurrent with the rezone
20 application and development permit and development
21 agreement required for approval of a wind farm.

22 Q. Now, Mr. Wagoner, would you agree that at
23 least the development permit--I'm not so sure about the
24 development agreement--but the development permit is a
25 site-specific quasi-judicial permit typically?

1 A. Yes.

2 Q. Do you see any opportunity in Sub 4 for any
3 applicant to decouple that from the comprehensive plan or
4 the subarea change?

5 A. No, I don't see it here.

6 Q. Do you know Mr. Hurson asked whether--he
7 implied that the Applicant agreed to this process. That
8 was his question to you. Are you aware of whether the
9 Applicant by this ordinance is offered any alternative
10 other than to agree to this process in terms of coupling
11 these permits together?

12 A. No, I'm not.

13 Q. You asked some questions about SEPA being an
14 avenue for consideration of additional issues, including
15 setbacks. Would you mind elaborating a little bit on the
16 requirement that SEPA mitigation be based on adopted
17 policies and plans and ordinances?

18 A. Sure. In fact, a number of jurisdictions
19 when they adopt their SEPA ordinance most jurisdictions
20 adopt by reference the entire SEPA WAC, but some
21 jurisdictions actually adopt mitigation measures for a
22 specific project. So an example would be parking lots in
23 cities. Some cities SEPA ordinances in fact talk about
24 the maximum number of cars you can have in a parking lot
25 before you have to do mitigation and landscaping and other

1 kind of treatments.

2 Q. In terms of aesthetic setbacks, setbacks
3 entirely for aesthetic purposes, exclusively for aesthetic
4 purposes, are you aware of any setback adopted by a local
5 government related exclusively to aesthetic purposes?

6 A. No, I'm not.

7 Q. Have you ever seen that in your 30 some years
8 of practice?

9 A. I've seen people try and do it, but I've
10 never seen them be successful.

11 Q. Mr. Hurson asked you a question about a
12 hypothetical great big project that could take a year or
13 two for local government to process. Do you remember that
14 question?

15 A. Yes.

16 Q. And then he asked you whether it would be
17 unreasonable for a project to take I think he said six to
18 nine months to go through a local process. Correct?

19 A. Yes.

20 Q. Typically in those large projects in the time
21 frame Mr. Hurson was talking about doesn't that include
22 the initiation drafting adoption of an EIS, environmental
23 impact statement?

24 A. Frequently it does, yes.

25 Q. Can you describe how that in fact protracts

1 or adds to the process for local approval of large
2 projects?

3 A. It can protract the process a great deal
4 because depending on the complexity of the project the
5 analysis that has to be done to identify impacts that
6 result in mitigations can take quite a bit of time.

7 Q. Years? One or two years?

8 A. You know, in my experience with siting of the
9 King County Jail in downtown Seattle I think the EIS
10 process took three years.

11 Q. And who was the lead agency here?

12 A. Kittitas County.

13 Q. For SEPA. Who was the SEPA lead agency?

14 A. EFSEC.

15 Q. Mr. Lathrop, I think misquoted,
16 mischaracterized your testimony on page 11 of your
17 supplemental prefiled testimony. If you wouldn't mind
18 going to that page. I want to clarify that question and
19 your answer.

20 A. Okay.

21 Q. The question that Mr. Slothower--I said
22 Lathrop. Excuse me.

23 MR. McMAHAN: I don't know if you guys take
24 offense to that or not.

25 BY MR. McMAHAN:

1 Q. Mr. Slothower asked you a question about
2 whether changes in the application by the Applicant should
3 have required reopening the record. That question above
4 was actually asking not that question but whether when the
5 County contended that the Applicant should have proposed a
6 new layout or designed where turbines would be removed
7 from the outer areas closer to the center of the project
8 subarea, etc., would that require reopening of the public
9 record? Would you please clarify your testimony on that.

10 A. I guess my answer may not have been directed
11 exactly to the question, but I do believe that whenever
12 there's a significant change in the proposal, whether
13 induced by the Applicant or by the permitting
14 jurisdiction, that, again, the parties of record may need
15 to be expanded because the scope of the project may change
16 to a point where other people who weren't involved before
17 now may have an interest and may want to be involved, and
18 the way to do that is public notice and additional public
19 hearings and discussion.

20 Q. Let's just assume for a moment if the
21 Applicant had submitted a revised proposal that removed
22 turbines from certain locations and the County said,
23 "Well, why don't you come back, put those turbines back in
24 other locations because we think those may be less
25 impact." What process would that require typically in a

1 county process?

2 A. I guess it would to some extent--maybe I'm
3 hedging here--but to some extent that would be depend on
4 the county's direction; how this was directed; whether
5 that was by a motion of the approving body or whether it
6 was more informally talked about. In my opinion the best
7 way to do these sorts of things is staff and applicant and
8 then come back up to the electeds to make the decision.

9 Q. But if additional homeowners in an area that
10 didn't know that turbines were going to be--

11 AUDIENCE MEMBER: Excuse me. I know it's
12 important for the EFSEC members to hear what's going on.
13 That's fine, but I'm not hearing except maybe every third
14 word of what's being said. My wife's got better hearing
15 than I have and she's not hearing either so I would
16 appreciate it if you would speak into the microphone.

17 JUDGE TOREM: We will do what we can on
18 that, sir.

19 AUDIENCE MEMBER: Thank you.

20 MR. McMAHAN: Thank you, sir.

21 BY MR. McMAHAN:

22 Q. If turbines were proposed in an area where
23 the application itself indicated they had been removed and
24 would not be proposed would that not require additional
25 public notice and additional hearings?

1 A. I would think so.

2 Q. Just one moment. I think I'm done here.

3 Mr. Slothower asked you about whether this is an area in
4 transition I guess to rural residential use or something.
5 In your review of the comprehensive plan does that in any
6 way reflect a change of policy from the County other than
7 to protect these areas for rural resource and agricultural
8 use?

9 A. Well, I would say probably, but, again, of
10 course, it's a matter of scale how much density is going
11 to be added to it and therefore reducing the amount of
12 land for local resource uses.

13 Q. Does the zoning code in any way reflect that
14 this is an area slated residential development?

15 A. Not to my knowledge. I believe at least in
16 one of the zones I believe the forest and range zone it
17 talks about actually discouraging residential growth.

18 MR. McMAHAN: I have no further questions.

19 JUDGE TOREM: Recross, if necessary?

20 Mr. Hurson.

21 RE CROSS-EXAMINATION

22 BY MR. HURSON:

23 Q. You made reference in your testimony saying
24 that this is an area of resource lands. Correct?

25 A. Yes.

1 Q. You understand we're a Growth Management Act
2 county in Kittitas County?

3 A. I do.

4 Q. Under the Growth Management Act resource
5 lands has a very specific definition, doesn't it?

6 A. Yes.

7 Q. Resource lands under the Growth Management
8 Act are resource lands of long-term commercial
9 significance.

10 A. Correct?

11 Q. Those would include agricultural lands
12 long-term commercial significance, forest lands long-term
13 commercial significance, and mineral lands long-term
14 commercial significance. Correct?

15 A. Yes

16 Q. And none of this area we're talking about is
17 in any of those classifications, is it?

18 A. Not in the comprehensive plan but again
19 zoning. Its zoning in my opinion is resource land zoning.

20 Q. So you disagree with the Growth Management
21 Act definition of resource lands.

22 A. No, I don't.

23 Q. But these are not GMA resource lands.
24 Correct?

25 A. They are not designated in the comprehensive

1 plan as resource lands.

2 Q. In fact, they are designated as rural lands.

3 Correct?

4 A. That's correct.

5 Q. It has a rural lands zoning of forest and
6 range 20 and ag 20. Correct?

7 A. I just read the intent statements which
8 talked about the resource, the importance parts of the
9 resource.

10 Q. So you don't know what the zoning is?

11 A. I do know what the zoning is, yes.

12 Q. It's not zoned commercial ag, commercial
13 agricultural zoning as a resource land long-term
14 commercial significance. Correct?

15 A. Yes.

16 Q. It's not zoned for commercial forest as a
17 forest lands long-term commercial significance.

18 A. Yes.

19 Q. So it's zoned a rural zone.

20 A. Correct.

21 Q. You seemed to have some questions about,
22 well, the County focused on an issue of setbacks. So do
23 you find it helpful to a public process if there's an
24 elephant in the room and everybody knows the elephant is
25 in the room to talk about everything except the elephant?

1 A. Of course, not.

2 Q. So if everybody involved in the discussion on
3 all sides of it realizes that setback is a key issue,
4 wouldn't you expect that to be the primary discussion
5 point?

6 A. It would if everybody in the room agreed to
7 that. I'm not sure that everybody did.

8 Q. Everybody didn't? So you didn't see that it
9 was clear from reading your record that the setback issue
10 was a key issue that needed resolving?

11 A. It certainly is a key issue that needs
12 resolving. When I read the transcript of the public
13 hearing, I thought there was a lot of testimony about a
14 lot of other things.

15 Q. Right. But if you recall from the transcript
16 I believe of the commissioners they basically said, "Look.
17 This is a major issue. If we can't get over this one, do
18 we really need to discuss the others? So really let's try
19 to sort out the main issue setting a block. If we get
20 past that one, then you work on all the others."

21 A. I think the term they used was deal killer.

22 Q. So they saw the elephant in the room and
23 said, "Let's talk about the elephant" and that was never
24 resolved.

25 A. Correct.

1 Q. Okay. So why would there be--if there's
2 clearly a key issue that isn't going to get you past it,
3 what possible purpose does it serve the public and the
4 time and everybody else to talk about all the other myriad
5 of issues that you would discuss if in fact there is one
6 issue that basically made this project proposed by the
7 Applicant fail?

8 A. Because I think in my opinion, in my
9 experience if a subarea plan had been done to address the
10 issue very early on, then perhaps this deal killer
11 condition might not have emerged this late in the game.

12 Q. In developing a subarea, a subarea plan could
13 include issues as far as in this area you're going to
14 allow these kind of uses and as long as these uses are set
15 back how far from the subarea boundary. Correct?

16 A. Yes.

17 Q. So, in other words, talking about setbacks
18 from a subarea boundary is consistent with discussing
19 about subareas?

20 A. It's consistent and it would have been great
21 if it would have been done early in the process.

22 Q. Well, there's a purpose for public hearing,
23 isn't there?

24 A. Of course.

25 Q. And shouldn't the Board of Commissioners when

1 they're dealing with these things let the public speak and
2 then that's when you start discussing how to resolve the
3 issues that the public has all brought up?

4 A. I guess in my view of overall process it's
5 better if you have the public involved early on before you
6 get to the hearing process. Try to engage the public,
7 discuss the issues, and try to come up with at least
8 alternatives solutions before you bring a proposal for
9 actual public hearing.

10 Q. Were you here yesterday?

11 A. Yes, I was.

12 Q. You heard the testimony where the Applicant
13 understood before it applied for this with us that the
14 County had previously turned down another wind project
15 less than two miles away with a 1,000-foot setback
16 proposed by an Applicant, and that one of the stated
17 findings and the reasons was a finding that there was a
18 necessity for a half-mile setback to mitigate visual.
19 Correct?

20 A. Yes.

21 Q. So wouldn't you think that a reasonably
22 prudent business person or planner would take that
23 information and use that as this is an issue to discuss
24 and then the Applicant can then present evidence to the
25 record on that issue?

1 A. And I thought the Applicant did.

2 Q. Are you aware of any visual assessments done
3 at 1,000 feet?

4 A. I listened to Mr. Priestley's testimony, but
5 I'm sorry. It escapes me.

6 Q. So if the record shows that the Applicant had
7 absolutely no visual assessments done for the board at
8 1,000 feet, at 1,250 feet, at 1,320 feet, they didn't
9 address an issue that was the elephant in the room before
10 the hearing started.

11 A. Again, the way I read the record I think they
12 did address it. Perhaps not by having simulations, but I
13 think they did address it. In fact, I think the
14 characterization of this project, the previous project
15 that was denied from what I heard I don't know anything
16 about the previous project, but I heard the conditions
17 were sort of apples and oranges between the two.

18 Q. But you're not aware of anything in the
19 record that my client had in reading the transcripts where
20 the Applicant actually addressed those visual impact
21 issues at the setbacks that they were proposing. There's
22 nothing in the transcripts you've read that indicate the
23 Applicant submitted information to demonstrate that
24 there's not a negative visual impact at these setbacks
25 you're proposing.

1 A. Well, I think in the EIS I think it was
2 addressed. It wasn't the Applicant, but it was EFSEC.

3 Q. Could you point to me in the EIS where there
4 is any analysis done at 1,000 feet to 1,250, 1,320 feet,
5 1,500 feet, 2,000 feet, any visual assessment analysis
6 done in that EIS at those distances?

7 A. I cannot point to it, no.

8 Q. Would it surprise you that there are none?

9 A. I can't say.

10 Q. Mr. McMahan had you look at our County code--

11 A. Yes.

12 Q. --for on the rezone. If you read that, the
13 rezone requires the approval of a development agreement
14 concurrent with the rezone. Correct?

15 A. Yes.

16 Q. So, in other words, when EFSEC says Applicant
17 go back and seek consistency, that requires to get the
18 consistency that the comprehensive plan be developed, be
19 amended, the rezone occur, and the rezone can only occur
20 if the development agreement occurs and then do the
21 permit. Correct?

22 A. That was my earlier answer I believe, yes.

23 Q. So the development agreement was a necessary
24 thing to reach in order to receive consistency on the
25 zoning.

1 A. Yes.

2 Q. And a development agreement requires
3 agreement of the parties.

4 A. Yes.

5 Q. So it isn't a thing where the County could
6 have said we will approve the project with 2,500 feet
7 because the Applicant has to agree with that.

8 A. Well, sometimes in other cases the
9 jurisdiction might approve a condition based on completing
10 a development agreement.

11 Q. Well, but the development agreement requires
12 agreement of parties. Correct?

13 A. At some point, yes.

14 Q. You saw nothing in the transcripts I take it
15 where the Applicant was ever agreeable to a 2,500-foot
16 setback.

17 A. That's correct.

18 Q. In fact, the only thing that they indicated
19 in that transcript you read is that they were agreeable
20 with a 1,320-foot setback.

21 A. Correct?

22 Q. It talks about the master planned resort.
23 Growth Management Act calls and asks for jurisdictions to
24 use innovative planning techniques. Correct?

25 A. Yes.

1 Q. And each jurisdiction is given direction to
2 adopt development regulations that work for them that fit
3 within the context of the Growth Management Act.

4 A. Yes.

5 Q. And the process that we have adopted fits
6 within the comp. plan, the Growth Management Act, and it's
7 a lawfully adopted and valid process.

8 A. It was never appealed so I guess so.

9 Q. There were questions about various codes.
10 Are you aware of any code that talks about view blockage?

11 A. Oh, yes. View blockage definitely.

12 Q. What code is that?

13 A. Most jurisdictions--well, I'm not going to
14 say most. Many jurisdictions, most urban jurisdictions,
15 many jurisdictions have some provisions for blocking
16 views. Usually though they are based on views off some
17 specific iconic mountain, Puget Sound, or something else.
18 So view blockage is based on controlling development
19 within a distance from a viewpoint that's usually
20 identified to a view of something and therefore
21 development is restricted in those areas.

22 Q. That basically has to do with structural
23 heights, things like that?

24 A. Generally speaking.

25 Q. So various codes recognize views are

1 important.

2 A. Yes, they do.

3 Q. Ordinances, regulations are adopted by
4 jurisdiction to protect and maintain views.

5 A. In specific locations.

6 MR. HURSON: I have nothing further at this
7 time. Thank you.

8 JUDGE TOREM. Thank you, Mr. Hurson.

9 Mr. Slothower, anything else brief?

10 MR. SLOTHOWER: Yes, brief.

11 RE-CROSS-EXAMINATION

12 BY MR. SLOTHOWER:

13 Q. I just want to follow up on a couple of
14 things.

15 MR. FIKSDAL: Could you have Mr. Slothower
16 speak into the microphone.

17 MR. SLOTHOWER: I'm sorry. I thought it was
18 pointed towards me.

19 I wanted to follow up on a couple things and
20 one is a point of order or just a question to Judge Torem.
21 We talked on yesterday about the Council taking notice
22 under the WAC of certain things, and I wonder in looking
23 at the record and briefly reviewing it while I was
24 listening to the witness testify, it's unclear to me as to
25 whether the entire text of the Kittitas County Zoning Code

1 and the entire text of the comprehensive plan have been
2 submitted. I'm unclear as to whether that has occurred,
3 and if not, I would ask that the Council be given the
4 opportunity to review those and to take notice of them
5 pursuant to the WAC.

6 JUDGE TOREM: Let me defer, first, to staff
7 to know what the status of the record is whether they
8 include the entire comp. plan and the entire Kittitas
9 County Zoning Code as it existed and whether those come
10 in. I'm being reminded by the Chair that Clay White may
11 have put those in.

12 Mr. Hurson, is that correct?

13 MR. HURSON: I don't have all the
14 documentation with me but if staff has them. I seem to
15 recall that the initial application itself had a copy of
16 at least portions of the comprehensive and I believe that
17 it may have also had our wind farm resources zoning
18 ordinance. I don't know for sure and if it isn't, I agree
19 with Mr. Slothower. But if it is and somebody can pull
20 them up, that would answer the question.

21 JUDGE TOREM: I believe they were,
22 Mr. Peeples.

23 MR. PEEPLES: They're part of the
24 application.

25 JUDGE TOREM: The entire text?

1 MR. PEEPLES: Yes, I believe so.

2 JUDGE TOREM: Staff concur?

3 MS. MAKAROW: Yes, as part of the
4 application process the Applicant did submit the
5 comprehensive plan. As for the entire county code, I
6 don't think we have the entire county code. We have the
7 pertinent portions with respect to the wind project
8 overlay.

9 MR. HURSON: It may also have the forest and
10 range 20 and agriculture.

11 MR. PEEPLES: You didn't include the
12 critical stuff and things of that nature, but I believe
13 everything else is in there.

14 MR. SLOTHOWER: Mr. Peeples, I wasn't
15 suggesting that when I referenced the zoning code. I just
16 wanted to make sure that we're talking about the portion
17 of the code that deals with defining some of the zones we
18 talked about because in order really to truly read the and
19 determine what is allowed in, for instance, the ag 20
20 zone, one must have the ag 3 zone. So I just wanted to
21 make sure that those were there.

22 And with respect to the comprehensive plan
23 in addition to the text, I want to make sure the maps were
24 there. If they were not, I wanted to make sure that the
25 Councilmembers were afforded an opportunity to take notice

1 of those in the WAC.

2 JUDGE TOREM: My personal recollection is
3 that most of that was in the record, if not all of it, so
4 early in the process that I can't exactly. If you're
5 making a motion for the Council to then take official
6 notice of that under the WAC provisions, I don't think
7 there would be any objection. If you find that we need to
8 supplement and find those things, it would only be
9 reference to what was in existence when the application
10 came in Kittitas County zoning codes and comprehensive
11 plan, but it would appear I think that we have that
12 already.

13 MR. PEEPLES: I believe we have the map in
14 too, Jeff. I really do, but, again, that's several years
15 ago.

16 MR. SLOTHOWER: We're pushing three years,
17 and my memory isn't what it used to be, and I just wanted
18 to make sure it was there to the extent its necessary I
19 believe that the Councilmembers should have an opportunity
20 should they be so inclined to do that.

21 JUDGE TOREM: Well, I think the Council is
22 not opposed to taking official notice of that. Is there
23 any objection if it turns out if we search this during the
24 break in the record that there's something that needs to
25 come in? Let's identify that specifically if there's a

1 deficiency if anybody finds any, but, otherwise, I'm going
2 to take Mr. Slothower's comment as a motion to Council to
3 take official notice of any pertinent provisions of the
4 Kittitas County Comprehensive Plan and Zoning Code and as
5 needed amend those to the record. If it turns out during
6 deliberations that needed to occur, we would certainly let
7 you know what else we looked at, but I want the parties to
8 know without any objections today that will occur so a
9 complete deliberation on this process can occur.

10 Any objections?

11 Councilmembers, all those in favor?

12 COUNCILMEMBERS: Aye.

13 JUDGE TOREM: So the record I think we'll
14 find it already complete, but if it's not, we'll
15 supplement accordingly from those plans and certainly seek
16 concurrence from Mr. Hurson's office on what we're looking
17 at and indeed what was in effect at that time, and we will
18 consult with Mr. Piercy as needed and certainly the
19 parties will be notified if that occurs.

20 MR. SLOTHOWER: Thank you.

21 JUDGE TOREM: Your questions continue.

22 BY MR. SLOTHOWER:

23 Q. Sir, what is the comprehensive plan
24 designation of the property in yellow on that exhibit
25 we've all been looking at?

1 A. It's rural.

2 Q. Did you review the rural, the text of the
3 Kittitas County rural lands designation?

4 A. Yes.

5 Q. Do you recall this sentence from the rural
6 land designation: The rural lands exhibiting vibrant and
7 viable landscape where a diversity of--I think that's a
8 typo--land uses and housing denses are compatible with
9 rural character?

10 A. Yes.

11 Q. You do recall that?

12 A. Yes.

13 Q. So I'm troubled by your suggestion that this
14 is an area in the county where rural residential uses are
15 discouraged.

16 A. Well, let me read you the intent statements
17 from the zoning ordinance.

18 Q. Well--

19 A. Rural zone were talking about?

20 Q. But I'm talking about the comprehensive plan.

21 A. And I understand that, but that's what I was
22 saying. In my reading of the code there was a conflict
23 between the code and the statements in the comprehensive
24 plan.

25 Q. The comprehensive plan though does specify

1 what the County intends to have occur on rural lands.

2 Correct?

3 A. Yes, or to allow.

4 Q. To allow. The zoning codes do not
5 specifically in the forest and range and the ag 20 zones
6 do not specifically disallow rural residential uses.

7 A. No, they don't but they should regulate the
8 way those uses are actually approved.

9 Q. The conflict that exists between this
10 proposed project and the underlying comprehensive plan
11 designation would you agree that there is a conflict then?

12 A. Yes, under the case you're building.

13 Q. And that goes to the issue of whether this is
14 an appropriate site, does it not?

15 A. Well, I think it's both site and use. In my
16 opinion, wind farms these giant devices certainly are not
17 the use of that type of land use that could ever be
18 applied in an urban area. So by definition to me they
19 really are a rural land use. Whether the county agrees
20 with that or not, that would be my assertion.

21 Q. But you're familiar with the Wild Horse
22 Project to a certain extent.

23 A. Yes.

24 Q. In fact, the conflict was not present in Wild
25 Horse, was it?

1 A. I'm sorry?

2 Q. The conflict was not present between rural
3 residential and this type of a project. It was not
4 present at Wild Horse, was it?

5 A. I guess not. That's what I heard yesterday.
6 I don't have personal experience with it.

7 Q. Let me back up a minute and talk about land
8 use in Washington in general. Again, based upon your
9 extensive background, I assume that you're familiar with
10 it. But in the late 1980s and early 1990s Washington
11 embarked on a series of legislative amendments that
12 modified the land use law as we know it in Washington; is
13 that correct?

14 A. Correct.

15 Q. It adopted the Growth Management Act; is that
16 correct?

17 A. Yes.

18 Q. Which provides for localized planning.

19 A. Yes.

20 Q. In fact, mandates localized planning once a
21 jurisdiction opts into the Growth Management Act; is that
22 correct?

23 A. Yes.

24 Q. In addition, the Washington State Legislature
25 wisely in my opinion streamlined the process from

1 resolving land use appeals by adopting the Land Use
2 Petition Act.

3 A. Yes.

4 Q. That was part of the modification of how we
5 approach land use in Washington. Correct?

6 A. Correct.

7 Q. In addition at the same time the State of
8 Washington passed certain laws which are commonly referred
9 to as regulatory reform law; is that correct?

10 A. That's right.

11 Q. In fact, one of the impetuses behind
12 regulatory reform was to streamline the process for making
13 land use decisions. Correct?

14 A. For making permit decisions, not for making
15 legislative decisions.

16 Q. But the outcome of the regulatory reform laws
17 is that many jurisdictions within the state have adopted
18 what is known as for lack of a better term one-stop
19 shopping for permitting. Correct?

20 A. I wouldn't say many have and I can't put a
21 number on it.

22 Q. But would you agree that regulatory reform
23 calls for one-stop stopping for permits?

24 A. For permits it definitely does.

25 Q. Oftentimes as we are here and you have to get

1 a permit, you also have to address changes to code and
2 land use designations

3 A. I wouldn't necessarily say oftentimes.

4 MR. SLOTHOWER: Okay. Fair enough. I don't
5 think I have any additional questions.

6 JUDGE TOREM: All right. Thank you. We're
7 just about to the 1.75 hours we had allotted for this
8 witness. So, Mr. McMahan, whatever redirect you have.

9 MR. McMAHAN: Just one question I think.

10 RE-REDIRECT EXAMINATION

11 BY MR. McMAHAN:

12 Q. Mr. Wagoner, you are familiar with the
13 exhibit--well, the proposed findings of fact and
14 conclusions for the Kittitas Valley Project that the
15 Applicant proposed to the County for consideration; is
16 that correct?

17 A. Yes.

18 Q. Does that document contain a number of
19 planned policies that are analyzed?

20 A. Yes, it does.

21 Q. So aside from the one that Mr. Slothower
22 quoted, there are numerous others that are contained in
23 there. Right?

24 A. Yes, there are.

25 Q. In fact, the plan contains a great many

1 policies that deal with rural and agriculture and other
2 issues. Correct?

3 A. Correct.

4 MR. McMAHAN: Thank you.

5 JUDGE TOREM: Anything further for this
6 witness, Councilmembers?

7 Thank you, Mr. Wagoner. We're right at a
8 point where we can take a break for about 10 or 15
9 minutes. Come back at approximately 10:30 for
10 Mr. Piercy's testimony. We'll be at recess until 10:30.

11 (Recess taken.)

12 JUDGE TOREM: It's now 10:40 in the morning.
13 We're back on record in the Wild Horse--not Wild
14 Horse--Kittitas Valley. But for another blast from the
15 past we're going to now introduce for a second Clay
16 White's affidavit. I have a signed affidavit dated
17 September 13, that Mr. White was in Colbert, Washington
18 and he swears and affirms under penalty of perjury that
19 his prefiled testimony and exhibits previously submitted,
20 specifically Exhibit No. 50 and all the supporting
21 documents included in the record, are true and correct on
22 the basis of his knowledge. This was the affidavit we
23 talked about last Tuesday on the 12th of September. So
24 that was executed the following day and it's now to the
25 Council. Any questions on requests, Council, especially

1 as to this affidavit whether it meets the needs to
2 introduce that testimony?

3 (Exhibit Nos. 50.1 through 50.41 identified
4 for the record.)

5 JUDGE TOREM: Seeing none, then all in favor
6 of admitting into the record Exhibit 50 and all supporting
7 documents regarding Clay White's testimony prefiled back
8 in 2004, all those in favor?

9 COUNCILMEMBERS: Aye.

10 JUDGE TOREM: Opposed?

11 I'm going to trust staff with this
12 affidavit. If other parties want to have copies of it,
13 those will be made available.

14 (Exhibit Nos. 50.1 through 50.41 admitted
15 into evidence.)

16 JUDGE TOREM: The next witness is Mr. Darryl
17 Piercy. Anything before we get going with Mr. Piercy?

18 MR. McMAHAN: Your Honor, Tim McMahan for
19 the record. Just on a procedural question and perhaps an
20 objection, we have a notice of intent to cross-examine by
21 Mr. Lathrop and ROKT where Mr. Slothower is both
22 Mr. Lathrop and ROKT today. I think I would certainly
23 characterize that as friendly cross-examination, and we
24 would object to the use of cross-examination for that
25 purpose for this witness.

1 JUDGE TOREM: No need Mr. Slothower. I
2 think we'll see what the cross-examination questions are,
3 and I certainly at the break discussed with Mr. Slothower
4 and Mr. Lathrop that I didn't see them more as adversarial
5 questions but perhaps remedial questions that perhaps are
6 better answered on redirect by Mr. Hurson. But I want to
7 see if there are highlights of the County process that
8 they felt were deficient.

9 It's entirely possible that the County had
10 they gone ahead and rendered consistency then you may not
11 be making the statements you are today. But there may be
12 issues in the County record that Mr. Slothower or
13 Mr. Carmody, Mr. Slothower today on his behalf, want to
14 bring up, and I can't rule on the overall setting that
15 they're not entitled because I do believe their interests
16 as under intervenor status is different from that of the
17 County.

18 I deny the motion at this time. But if you
19 find that the questions are softballs enough all the way
20 through, certainly renew your objection at that point;
21 then we'll deal with it as the case may be.

22 MR. McMAHAN: All right. Understood. Thank
23 you.

24 JUDGE TOREM: Everybody should know if there
25 is cross-examination, it should be for purposes of

1 cross-examination bringing those things out and not
2 certainly as the proponent of further testimony or
3 backslapping a witness saying, "Great. We agree."

4 Mr. Hurson, your witness is Darryl Piercy.
5 I'll swear him in.

6 (Darryl Piercy sworn on oath.)

7 DARRYL PIERCY,
8 being first duly sworn on oath,
9 testified as follows:

10
11 DIRECT EXAMINATION

12 BY MR. HURSON:

13 Q. Mr. Piercy, you previously submitted Kittitas
14 County response testimony for Witness No. 2 Darryl Piercy.

15 A. I have.

16 Q. There's questions and answers contained
17 within that document?

18 A. That's correct.

19 Q. Are the answers to those questions to the
20 best of your knowledge true and correct?

21 A. Yes.

22 Q. Do you incorporate those answers into your
23 testimony today?

24 A. Yes.

25 Q. Are the documents to the rest of your

1 knowledge true and accurate documents as indicated in the
2 testimony?

3 A. Yes.

4 Q. Since your initial filing of that response
5 testimony has there been additional information that has
6 come to your attention regarding the Invenergy project
7 that you mentioned in your prefiled testimony?

8 A. There has. There's an e-mail that has been
9 provided to our department from the Department of Natural
10 Resources which outline the SEPA determination and the
11 designation of lead agency for the Department of Natural
12 Resources regarding lease of property to Invenergy.

13 Q. When did your office receive that?

14 A. We received that on September 14.

15 Q. So you didn't have this in your possession at
16 the time of preparing your prefiled testimony.

17 A. That's correct.

18 Q. Does this document indicate or provide some
19 further information on the actual Invenergy project?

20 A. Well, there's two elements contained in the
21 document that I think are specific to the project. One is
22 that they're proposing a lease of approximately 90 acres
23 or 540 excuse me, from the Department of Natural Resources
24 for the placement of a wind power project. They identify
25 within that document a total project size of 4,500 acres

1 and turbine numbers up to 62.

2 JUDGE TOREM: Mr. Hurson, is this--let me
3 just ask staff.

4 Ms. Makarow, is this the statement document
5 you've given me earlier that may have to be acknowledged
6 in our final environmental impact statement?

7 MS. MAKAROW: I would have to reflect that
8 question back to Mr. Piercy and Mr. Hurson.

9 MR. HURSON: The document you're referencing
10 is a multi-page document. The first page of the
11 document--

12 JUDGE TOREM: It's a printout from your
13 e-mail?

14 MR. HURSON: An e-mail from James Hurson.

15 JUDGE TOREM: Yes, an e-mail on James Hurson
16 printout. It's from Darryl Piercy, Thursday, September 14
17 at 1:34 p.m. It was from Mr. Piercy to you.

18 MR. HURSON: Correct. Just for
19 clarification, I know the County wanted to do this. It
20 was kind of late last night so I printed it from my
21 computer; so I used my e-mail so there's a reference to
22 the copy.

23 JUDGE TOREM: We're looking at the same
24 document. It's followed with an e-mail which is two sided
25 on one page with a memorandum from DNR. It's dated

1 September 14, 2006 followed by the determination of
2 nonsignificance and the environmental checklist; is that
3 correct?

4 MR. HURSON: Sure.

5 JUDGE TOREM: So this document as I
6 understand talking to EFSEC staff is part of our
7 environmental impact statement process. It's going to be
8 acknowledged through that process based on the analysis of
9 alternative sites within the County. Are you asking if
10 Mr. Piercy wants to add this as an exhibit for his
11 testimony as well?

12 MR. HURSON: Yes, I would. The purpose of
13 it was the Invenergy project was mentioned in his
14 testimony. There wasn't a lot of detail. We just
15 received last week some further detail about as far as
16 other alternative sites in the County. I think it's
17 probably relevant and was not available at the time of the
18 prefiled.

19 JUDGE TOREM: With that introduction of this
20 material, I'm going to ask the Council to entertain a
21 motion to suspend the rules as to the seven-day limit and
22 then we'll have discussion on that motion and take
23 objections during the discussion portion of that from
24 other parties and then we'll have the Council vote as to
25 whether to make this part of the record as an exhibit. I

1 still think the understanding that EFSEC staff will
2 clarify this on the record as to what must happen with
3 this EIS process.

4 First, Council, can I have a motion to
5 suspend the hearing rules to allow the seven-day notice so
6 that this document can be discussed and potentially
7 admitted as an exhibit?

8 MS. TOWNE: So moved.

9 JUDGE TOREM: Moved by Councilmember Towne.
10 Is there a second?

11 MS. ADELSMAN: Second.

12 JUDGE TOREM: All right. Discussion on
13 this. Let me first ask the parties if they have and
14 particularly the Applicant, any objection to this matter
15 becoming part of the record in one or two ways?

16 MR. McMAHAN: Your Honor, the Applicant
17 would stipulate to a submittal for SEPA purposes. In
18 terms of it being incorporated into the testimony, I don't
19 think that's necessary and I would ask that the seven-day
20 rule apply to that. I understand that there's a SEPA
21 process here. I think that's the appropriate way for it
22 to come into the record.

23 JUDGE TOREM: Do you have any suggestion on
24 how we handle the fact that nobody could have had this
25 seven days in advance? It only came to the parties'

1 attention last Thursday.

2 MR. McMAHAN: I think the document speaks
3 for itself, first of all. I don't understand the need for
4 any further elaboration by Mr. Piercy, and, secondly, on
5 page 6 and 7 of his testimony he talks about the Invenergy
6 project and some potential application, but I think it's
7 sufficiently covered.

8 Mr. Hurson, is there going to be extensive
9 redirect or additional direct on this?

10 MR. HURSON: I did not intend any further
11 questioning on it. I would assume we were going to have
12 it submitted into evidence related specifically to the
13 alternative site requirements under the preemption
14 regulations, and I believe it's clearly relevant to that
15 to show other alternative sites that are available,
16 potentially available in the County.

17 Frankly, I think some of the response of
18 testimony to Mr. Piercy was basically saying things in
19 essence there's not really enough information. We don't
20 know if there's anything else there. So there is new
21 information, newly discovered, and there's no way we could
22 have supplied it. And to sort of buttonhole it in to only
23 allow it to be considered for SEPA purposes defeats the
24 whole purpose. The whole purpose of this is to go to
25 alternative sites.

1 JUDGE TOREM: I see the dilemma and I'm not
2 sure that that's only a SEPA document for consideration by
3 the Council. It also addresses the requirements under the
4 WAC for preemption. It's going to have to be discussed in
5 that context as well.

6 MR. McMAHAN: That's fine. We'll stipulate
7 to it.

8 JUDGE TOREM: Any other parties have
9 objection to this being admitted to the record sort of for
10 two different purposes?

11 Seeing none, Councilmembers, any other
12 discussion or questions to clarify what would now be a
13 no-limits use of this document? It will be under SEPA as
14 well as kind of a conditional item in the record for
15 Mr. Piercy to support his testimony.

16 Seeing no other discussion, is there a
17 motion to call for the question?

18 That's your job.

19 CHAIR LUCE: Wake up, Luce. Strike that
20 from the record, please. Let the record reflect the Chair
21 is fully awake and apprised to the situation.

22 JUDGE TOREM: He's calling for the question.
23 So the question is called. All those in favor of
24 admitting this document to the record?

25 COUNCILMEMBERS: Aye.

1 JUDGE TOREM: All opposed?

2 All right. And I believe, correct me if I'm
3 wrong, we've already taken Mr. Piercy's other documents
4 and made them part of the record. We already had that
5 motion.

6 MR. HURSON: I would then move and ask for
7 the Council to accept Mr. Piercy's prefiled testimony and
8 exhibits into the record.

9 (Exhibit Nos. 51.0 through 51.5 identified
10 for the record.)

11 JUDGE TOREM: Maybe we didn't do that quite
12 yet. So we've already taken this one. Let's take the
13 rest of Exhibit 51 and the supporting documents at this
14 time. All those in favor of making those part of the
15 record?

16 COUNCILMEMBERS: Aye.

17 JUDGE TOREM: Any against?

18 Seeing none, that's all part of the record.

19 (Exhibit Nos. 51.0 through 51.5 admitted
20 into evidence.)

21 JUDGE TOREM: All we need right now,
22 Ms. Makarow, is 51 point whatever designation for this
23 document and you will also make that part of the FEIS. So
24 for now this will be Exhibit 51--

25 MS. MAKAROW: .6.

1 JUDGE TOREM: 51.6.

2 (Exhibit No. 51.6 marked for identification
3 and admitted into evidence.)

4 MS. MAKAROW: And we will be distributing
5 copies of this document to the Councilmembers shortly.

6 JUDGE TOREM: All right. Mr. Hurson, the
7 testimony has been adopted. Do you have any other direct
8 or further direct before we start to cross-examine?

9 MR. HURSON: I understand the rules that I
10 I'm not allowed to ask any other questions.

11 JUDGE TOREM: This is new information. I'll
12 just allow you to cover that.

13 MR. HURSON: Right.

14 JUDGE TOREM: So, Mr. McMahan, your witness.

15 MR. McMAHAN: Thank you, Your Honor. Just a
16 few questions I think.

17 CROSS-EXAMINATION

18 BY MR. McMAHAN:

19 Q. Mr. Piercy, on page 6 of your testimony,
20 Exhibit 51, you indicate that the Desert Claim process
21 will be expanding the land area and then intends to submit
22 an application to Kittitas County; is that correct? Is
23 that what you said?

24 A. What I believe I indicated in the testimony
25 on page 6 was that we have information that would indicate

1 Desert Claim is proposing to lease additional area from
2 the Department of Natural Resources that may lead to an
3 additional or revised application, but we have not yet
4 received that application nor have we had any specific
5 discussions or knowledge from Desert Claim in regards to
6 that.

7 Q. Well, your testimony states that DNR has,
8 however, come to an agreement with the Desert Claim
9 proponents to expand the land area for the project area
10 and then intend to resubmit an application to Kittitas
11 County. That is your testimony. Correct?

12 A. According to the SEPA documentation that was
13 issued by the Department of Natural Resources there's an
14 indication that the area would be expanded; that there's a
15 lease proposed with the Department of Natural Resources
16 for an expanded area for Desert Claim that would lead to a
17 wind power project. So I suppose there was an assumption
18 on my part that that will lead to an application.

19 Q. Would you mind turning to page 2 of the SEPA
20 checklist that you've attached to your testimony, sir.
21 I'm looking at paragraph or Section 8. Does that not
22 state that the proponent will perform extensive
23 environmental information and will submit environmental
24 information to EFSEC in support of its application for
25 site certificate? EFSEC will evaluate potential

1 environmental impacts and will address prior to permitting
2 address sensitive design elements; is that correct?

3 A. That's correct.

4 Q. And then 10 in government approvals do you
5 see in there a county wind farm permit?

6 A. I do not.

7 Q. You do see a site certificate agreement with
8 EFSEC. Correct?

9 A. Correct.

10 Q. Now, both this information from DNR for this
11 project, as well as this one you've recently received and
12 we've talked about for the Invenergy project, that is
13 simply information provided by DNR; is that correct?

14 A. That's correct.

15 Q. Nothing more. Nothing more. Statement from
16 DNR an intent to lease land. Correct?

17 A. That's correct.

18 Q. Now, just to confirm what I think we all
19 understand, neither the Desert Claim site nor the
20 Invenergy or what may not be this Invenergy is considered
21 an unallowed use under the zoning code. Correct?

22 A. Not an outright permitted use. That's
23 correct.

24 Q. Nor is it even allowed as a conditional use;
25 is that correct?

1 A. That's correct. There's a process that wind
2 farms will go through to obtain a subarea plan as you well
3 know and the additional elements associated with that.

4 Q. Right. So you're required to undergo the
5 process that Mr. Wagoner we have talked about here this
6 morning. Correct?

7 A. Correct.

8 Q. Isn't it true then Invenergy has not
9 conducted a formal preapplication conference with the
10 County?

11 A. Well, the County does not have a formal
12 preapplication process. We have had meetings with
13 Invenergy where they've discussed their proposal. They've
14 discussed the County's process and our requirements. That
15 has not resulted in any direct correspondence between the
16 County and Invenergy.

17 Q. So you have nothing in writing from
18 Invenergy. Correct?

19 A. That's correct.

20 Q. Just a couple of other questions. Tell me
21 something. In the SEPA scoping process for the Kittitas
22 Valley Wind Power Project and during the formulation of
23 the environmental impact statement for the Kittitas Valley
24 Wind Power Project are you aware of any time during that
25 entire process where the County has ever requested in

1 writing or otherwise visual assessments for turbines as
2 close as 1,000 feet, 1,200 feet, 1,300 feet ever?

3 A. Well, I was not involved. I was the person
4 on staff of the County during the period of time when that
5 scoping process took place so I was not aware or involved
6 with that scoping process. So I'm not sure I could
7 correctly answer your question because I was not part of
8 that process.

9 Q. Fair enough. I understand that. So during
10 your tenure with the County--by the way, when did you
11 start with the County?

12 A. October 18, 2004.

13 Q. Okay. Thanks. So during your tenure with
14 the County are you aware of any time when the County
15 submitted that request to EFSEC as the lead agency under
16 SEPA?

17 A. I'm not aware of that.

18 Q. I want to just one further area here to
19 explore with you. In your testimony you talk about a
20 2,500 setback imposed by or demanded by the Board of
21 County Commissioners. Correct?

22 A. I spoke to the issue of 2,500 feet, yes.

23 Q. You've indicated that the staff is unable to
24 confer with the Board of County Commissioners regarding
25 setbacks and to get direction from them during this

1 process; is that correct?

2 A. What I've indicated that the County does not
3 make decisions outside of the public process.

4 Q. So you're saying then, Mr. Piercy, that it
5 would have been outside the public process for you to have
6 gone to the Board of County Commissioners, sought
7 direction about a 2,500 or any setback; is that correct?

8 A. To the Board as a whole, that is correct.

9 Q. So have you then met with individual board
10 members during that public hearing process?

11 A. Yes, I have. And during that public hearing
12 process those meetings were fully disclosed by the Board
13 of County Commissioners in their testimony prior to each
14 hearing.

15 Q. So staff then had an opportunity to go from
16 door to door to door and talk to the Board of the County
17 Commissioners about their view of things like setbacks.
18 Correct?

19 A. That was not necessarily the process in which
20 we took. We responded to the specific inquiries and
21 request by the Board of County Commissioners. We did not
22 go door to door to door shopping for answers on specific
23 issues. We waited for the public process to be able to
24 flush those specific elements of what the Board was
25 thinking about during that process. There were times the

1 Board would come to us and through staff to ask particular
2 questions in regard to the project, the application,
3 elements of the application, legal process a lot of
4 different topics that were all fully disclosed at the
5 hearings, but we did not go shopping for answers from the
6 board.

7 Q. So did you confer with board members
8 individually about these so-called policy issues that you
9 talked about in your testimony?

10 A. Again, in response to their inquiries, yes.

11 Q. So you did have access to the board on these
12 questions; is that correct?

13 A. Certainly. We have access to the board on a
14 daily basis as individual board members. But, again, we
15 did not go to the board with specific inquiry as to
16 whether or not they were going to vote in a certain way on
17 a particular topic.

18 Q. So you didn't have any opportunity to confer
19 with them at all about the setback question prior to the
20 open public meetings?

21 A. The question was did we have an opportunity
22 to do that. I suppose the answer to that would be, yes,
23 we could have got opportunity to do that. Did we
24 specifically search out policy direction from the board as
25 individual members outside the public hearing, the answer

1 is no.

2 Q. I gather that it would be your opinion that
3 the Applicant certainly didn't have an opportunity to go
4 visit with council or commissioners door to door to door
5 during this process?

6 A. I'm certainly not aware of any discussions
7 that took place and none that I'm aware of were disclosed
8 in the public testimony; so I believe my answer would be
9 no to that.

10 Q. Would you consider that to be a violation of
11 procedural protection, appearance of fairness, open
12 meetings if the Applicant had done that?

13 A. I think it would have been inappropriate,
14 yes.

15 Q. Now, so you never sought any clarification
16 from the board outside of the public hearing process about
17 setbacks. I think that's your testimony.

18 A. My testimony was that we did not go searching
19 from door to door to the Board of County Commissioners for
20 specific policy direction.

21 Q. All right. The question was about setbacks
22 though. Did you or did you not?

23 A. I don't recall any specific conversation that
24 we had with the board regarding setbacks. Again, any of
25 the conversations that we had with the board would have

1 been disclosed.

2 Q. Individual contacts with board members that
3 is the question. Did you have individual contacts,
4 discussions with board members about setbacks during any
5 time in this process?

6 A. The only conversation we had in regards to
7 the Board with setbacks was when they were preparing to
8 conduct their field visits on an individual basis. We
9 talked about the distances that they would identify within
10 their walk through and what areas they would be looking
11 at, and what we were trying to establish is some level of
12 consistency. So that if one commissioner looked at 1,000
13 feet, all three commissioners would look at 1,000 feet.
14 1,250 was one of the distances that we recommended. 1,500
15 feet was another distance, 2,000 feet, half a mile and so
16 on. So there was some discussion in regard to what areas
17 on their site visits that they should be trying to
18 establish in terms of their sense of impact of the project
19 that they were looking at from a particular visit.

20 Q. And I do recall that being disclosed. Now,
21 turning your attention to the May 31 hearing. If you need
22 the transcript--probably we all have a fairly vivid memory
23 or those of us who were there. But if you need the
24 transcript, I'm sure Mr. Hurson has it. Do you have that
25 in front of you, sir, May 31?

1 A. I think we're working on it.

2 MR. HURSON: I believe off the record I
3 asked counsel if there were documents we needed to get in
4 front of us so we could get them--

5 JUDGE TOREM: Take your time. We'll just
6 get them as we go. Don't worry.

7 MR. McMAHAN: I apologize, Mr. Hurson. I
8 wasn't sure I was going to ask this question.

9 A. Book 2. I do now have the transcripts from
10 May 31 in front of me.

11 BY MR. McMAHAN:

12 Q. Do you recall Horizon representatives seeking
13 clarification from the board regarding the setback
14 requirements at that meeting? I think one Tim McMahan was
15 asking some questions.

16 A. Could you identify the page you're speaking
17 of, please.

18 Q. All right, sir. What comes directly to me is
19 actually there was quite a long discussion and back and
20 forth really between myself and board members. I talked
21 at the beginning on page 24 and on through 29 and beyond.
22 Horizon's representative talked about this conundrum and
23 the impacts of setbacks on the project. Do you recall
24 that?

25 A. I do recall that there was a discussion and

1 I'm verifying that in the transcripts.

2 Q. Do you recall the Board of County
3 Commissioners at that meeting discussing not only to 2,500
4 feet from residences but also 2,000 feet from property
5 lines?

6 A. I recall there was discussion in regard to
7 2,000 feet from property boundaries as well, yes.

8 Q. Do you recall us advising the Board of
9 Commissioners about the impact of that property line
10 setback on the project?

11 A. I believe you indicated, if my memory is
12 correct, that you indicated it would have a result in
13 removing about half of the project from its current
14 configuration.

15 Q. Just to be clear for the record, the
16 distinction of 2,500 feet and the property line setback
17 and the additional impact of the property line setback, do
18 you recall that?

19 A. Yes.

20 Q. Now, did the Board of County Commissioners
21 make any formal motion at all at the conclusion of that
22 hearing to clarify a setback? Did they ever adopt by
23 motion a setback?

24 A. If I may, I'm just looking.

25 Q. Absolutely.

1 A. I don't believe there was a specific motion
2 made in regard to what the setbacks of the project at that
3 time should be.

4 Q. So would it be your--well, and you would
5 agree that at that time we were responding to two setback
6 distances in trying to figure the impact of the project
7 out; is that correct?

8 A. I would say at that time there were at least
9 two setback distances that were being discussed. Whether
10 or not you were anticipating or expecting to respond to
11 those as a question only you could answer I believe.

12 Q. Sure. That's fine. But there were in
13 fact--well, you make a good point. There were actually a
14 variety of setback distances that were being discussed at
15 that May 31 distance. Correct?

16 A. Yes.

17 Q. Did you or Mr. Hurson then--well, I would
18 gather, Mr. Piercy, there's not--not Mr. Hurson. I won't
19 ask about what Mr. Hurson did in your cross-examination.

20 Did you then from your prior testimony I
21 would understand then that you did not go to the board
22 members individually or otherwise to ask for clarification
23 about the setback. Correct?

24 A. Following that meeting I did not.

25 Q. So in Resolution 2006-90, which is Exhibit 1

1 in our preemption filing, that is the County's denial
2 resolution, Resolution 2006-90 could you please show me
3 where the 2,000-foot property line setback is. Where is
4 that document in that decision?

5 A. I don't believe that it is.

6 Q. That was the meeting right after May 31 that
7 they--it was that meeting that they adopted the
8 resolution. Correct?

9 A. I don't believe that resolution was adopted
10 directly following that meeting but let me check. It was
11 indicated in their decision the resolution was first
12 reviewed by the Board of County Commissioners on June 6
13 and was discussed on May 31st.

14 Q. Right. So I think there was as I recall a
15 draft of the resolution on May 31st?

16 A. That's correct.

17 Q. So, again, isn't it true that that 2,000-foot
18 setback is not in the 2006-90, Resolution 2006-90?

19 A. I believe that's correct.

20 Q. So despite the fact at that May 31 hearing
21 that that was what we were asked in what you call
22 negotiations to respond to it didn't end up in the final
23 order, did it?

24 A. It did not.

25 Q. And you didn't talk to staff, to the board

1 members about this.

2 A. No, I did not.

3 MR. McMAHAN: I have nothing further.

4 JUDGE TOREM: Mr. Slothower.

5 CROSS-EXAMINATION

6 BY MR. SLOTHOWER:

7 Q. Mr. Piercy, the impression I've sat
8 here--well, let me ask a couple background questions for a
9 minute.

10 First of all, none of the intervenors, if you
11 will, in this case participated in discussions with you
12 and the Applicant outside of the public forum, did they?

13 A. That would be correct.

14 Q. I have sat here listening over the last day
15 and a half as an outsider to these discussions back and
16 forth between representatives of Kittitas County and the
17 Applicant and it sounds like there were extensive
18 discussions; is that correct?

19 A. There were a number of meetings that we had
20 with the Applicant both prior to application, shortly
21 after the initial application, and through the process to
22 discuss the project, seek clarification, and to offer
23 limited advice that we could as a staff.

24 Q. In reviewing the written testimony and
25 listening to Mr. Peck and Mr. Taylor yesterday, my

1 impression is that the Applicant expected an answer from
2 the County on whether the project would be approved
3 outside the public forum report. Am I correct in my
4 impression?

5 A. Well, my sense was is that there was an
6 expectation from Mr. Peck that staff had considerably more
7 power within the process, if you will, or influence within
8 the process than staff in our circumstances actually has.
9 We are a staff and not policy makers. I do not get a
10 chance to vote on the project, and there was at least some
11 expectation or at least the sense of my expectation from
12 the Applicant that the issues would be fully resolved
13 prior to hearing.

14 MR. McMAHAN: Mr. Torem, I'm going to object
15 again to this line of questions. This is the softball
16 that you warned about. This doesn't go to Mr. Lathrop's
17 issues. This has to do with bolstering this. This is
18 indeed friendly cross.

19 MR. SLOTHOWER: Judge Torem, if I amy make
20 two points. First of all, we identified well over a
21 number of days ago we intended to cross-examine this
22 witness.

23 JUDGE TOREM: That part is not being
24 disputed. Why don't you focus on the response to the
25 objection on the nature of the topic, and then I would be

1 better able to rule.

2 MR. SLOTHOWER: Well, I represent
3 Mr. Lathrop who is a citizen of the County and he was
4 allowed to intervene as a citizen on the issues, on local
5 issues. I'm also providing this testimony on behalf of
6 ROKT, and the inference that we've been under over the
7 last couple of days that there were a number back-room
8 negotiations, and I believe that that is relevant evidence
9 and we're entitled to go into on cross-examination. We're
10 not limited by the scope of cross-examination that
11 Mr. McMahan engaged in. These are questions that we've
12 developed based upon reading Mr. Piercy's testimony and
13 also reading or listening to Mr. Taylor and Mr. Peck
14 testify yesterday.

15 JUDGE TOREM: I'm prepared to allow both
16 your client and ROKT to inquire further into on a limited
17 basis the integrity of the public process by the testimony
18 that's been raised; however, this body clearly is not the
19 one to appeal any potential violations or inappropriate
20 things that you might consider as citizens of this county
21 and how it's going to conduct its process.

22 But for background to see if your point is
23 was the process fair, and I believe that's the point
24 you're trying to make in your cross-examination here, I'll
25 allow limited to that. But when it starts to get lengthy

1 into, "Mr. Piercy, wasn't the process of the County the
2 best process for the Applicant?", those are the softballs
3 that I want to avoid. This limited issue as to what the
4 meaning of the meetings and negotiations of the Applicant
5 and the County were and clarifying what your expectations
6 as to what the Applicant expectations are I'll allow it.
7 But I think I want to acknowledge Mr. McMahan's objection
8 it's in the right direction that I was seeking. So let's
9 keep this limited and finish this line of questioning and
10 move on to whatever else there might be.

11 MR. SLOTHOWER: Okay. Thank you.

12 BY MR. SLOTHOWER:

13 Q. I'm sorry. Are you ready to go now?

14 A. Yes. Would you like me to finish answering
15 that or is that question--

16 JUDGE TOREM: I think the portion that may
17 remain to be answered is did the County believe that the
18 Applicant wanted approval on a particular setback outside
19 of the public proceeding essentially in advance to know
20 what the standard would be? Is that a fair
21 characterization?

22 MR. SLOTHOWER: Yes, that's a fair
23 characterization.

24 JUDGE TOREM: That's pretty much a yes or no
25 answer.

1 A. My sense was that the Applicant was looking
2 for a definitive number that would be developed by staff
3 that they could go to the public hearings with confidence
4 that would be approved.

5 BY MR. SLOTHOWER:

6 Q. That's on the setback issue.

7 A. Correct.

8 Q. Again, listening to the back and forth
9 yesterday and then again today, did the discussions--and
10 I'm not talking about the public process. I'm talking
11 about the discussions that occurred at the meetings that
12 you had with the Applicant about setback. Did it break
13 down for setback? Is that what I'm hearing? Do I
14 understand that correctly?

15 A. Well, the final meeting that we had with the
16 Applicant where there was a breakdown in that meeting
17 occurred we discussed the desire to have additional
18 setbacks as was expressed by the board in their
19 discussions in the public hearing. We did discuss the
20 idea of having a setback identified on a drawing and to
21 identify exactly to determine what impact that setback
22 would have on the project itself because there was a
23 statement made that the project would be significantly
24 impacted if additional setbacks would be allowed. So we
25 were interested in seeing how that might be impacted to

1 the project and what the actual layout might look like if
2 we could meet a 2,500-foot setback requirement. We were
3 given assurance in this meeting that that document, that
4 that analysis would take place and the document would be
5 provided but unfortunately that never was.

6 Q. On this setback issue I'm somewhat confused.
7 Well, more than somewhat confused by the testimony where
8 did the 1,320-foot setback come from?

9 A. That came from the Applicant.

10 Q. As part of the original application?

11 A. No.

12 Q. When did that number come up?

13 A. My recollection was I couldn't give you the
14 specific date. I would have to look back in the
15 transcripts, but it would have come through the public
16 hearing process. It was brought forward by the Applicant
17 as an alternative to their original 1,000-foot setback.

18 It should be noted that there was a
19 conversation between staff that 1,250 may be an option
20 that could be looked at. Several days later at a public
21 hearing it went to 1,320. So it was a proposal by the
22 Applicant I think in an effort to identify the need for
23 additional setbacks but not to meet the requirements that
24 were to be discussed by the Board of County Commissioners.

25 Q. Was this the only number that was proposed by

1 the Applicant in addition to the 1,000 foot?

2 A. As I indicated there was a discussion in the
3 hallway of the Community Development Services offices. It
4 was a visit by Mr. Peck. He indicated that they had been
5 exploring the feasibility of a 1,250-foot setback. Would
6 the County consider that? I indicated that it's something
7 that should be discussed in public hearing if they were
8 interested in proposing that. It happened to be a number
9 that the Board of County Commissioners was going to be
10 looking at in terms of their site visit. This was just
11 prior to their site visit. So 1,250 was proposed or at
12 least discussed by Mr. Peck. It was not a number that
13 they proposed however when they got to public hearing.
14 The number at that time was then 1,320.

15 Q. Mr. Piercy, I have to be candid. This sounds
16 to me like it is negotiation back and forth between the
17 County and the Applicant outside the public process. Am I
18 wrong?

19 A. Well, you're wrong. We made it very clear
20 that we were not negotiating that setback. That we
21 advised Mr. Peck and Horizon to bring those proposals to
22 the public hearing, to take them before the Board of
23 County Commissioners and make their case. We were not
24 going to go forward as a support for any particular
25 setback until we'd had clear direction from the Board of

1 County Commissioners that's the direction that they wanted
2 to go.

3 Q. But as these numbers were bantering back and
4 forth is there supporting documentation on where they come
5 from or was there supporting documentation?

6 MR. McMAHAN: I object again, Your Honor.
7 This is so clearly softball questioning on documentation
8 support. That's been covered in the testimony.

9 JUDGE TOREM: I disagree with you,
10 Mr. McMahan, because I think the point that I thought as a
11 citizen might be inquiring into this process as to whether
12 or not it's proper. We're not the body to decide whether
13 this is outside the hearing process discussion or is it
14 proper under County procedures, but I can say it rolls at
15 the end of where I want to see this go as to whether the
16 County did something perhaps improper or not on staff's
17 behalf.

18 Mr. Piercy may have answered the question in
19 his previous response that staff didn't represent they had
20 any authority to choose a particular setback, and I
21 believe the record does speak to what Mr. McMahan says
22 that the numbers that he's now clarifying 1,000 was
23 offered in the initial application. 1,250 was discussed
24 but never in public meeting. But perhaps staff made that
25 discussion in disclosure as to what distance they had

1 recommended for the County Commissioners to review when
2 they made their visit to Dayton and then at the following
3 meeting despite if you look at Mr. Peck's testimony there
4 may be some confusion as to whether 1,250 was represented
5 by the Applicant as to a make or break number and then a
6 shift to 1,320, or a quarter mile. That number then you
7 said came up in public meeting that the Applicant
8 proposed. Mr. Piercy, did I characterize all that
9 correctly?

10 THE WITNESS: I believe you did.

11 JUDGE TOREM: So if the question was the
12 County taking a position on behalf of the Commissioners,
13 Mr. Piercy said no. If there's further questions about
14 the propriety of that, I'm not sure what else and how that
15 can help this decision making body.

16 MR. SLOTHOWER: What I'm trying to get at is
17 whether those numbers, those distances were based upon
18 data or were they simply one party suggesting a number,
19 "Oh, no, that's not good enough. I'll come back with a
20 different number." So I think the question is whether
21 those discussions were based upon data to back the numbers
22 up is relevant. I think it goes--I mean it's central, key
23 I think to the issue, one of the issues you must decide in
24 preemption.

25 JUDGE TOREM: Let me ask, Mr. Piercy, do you

1 disagree with my assessment of the record as its been
2 developed and discussed over the last day and a half?
3 It's pretty clear that Mr. Priestley said he didn't do any
4 studies less than I think it was a half mile or a mile
5 away. He had some that were .8 and sharply discussed
6 yesterday in his tables.

7 So is there any data? I think the answer
8 would be no. No, there wasn't any data specifically
9 backing up 1,000, 1,250, or 1,320. Mr. Hurson covered
10 that I thought very well yesterday with Mr. Priestley
11 saying, no, he hadn't. He didn't have this data
12 specifically except for those shots of Klondike and the
13 discussion we had about what dominates a view. So aside
14 from that, Mr. Piercy, are you aware of anything else in
15 the record that was presented to the County that had that
16 data for less a half mile away?

17 THE WITNESS: No.

18 BY MR. SLOTHOWER:

19 Q. Also in the record, Mr. Piercy, is an
20 indication that the County was, correct me if I'm wrong,
21 but the County was proposing a setback of 2,500 feet. Did
22 the County propose that?

23 A. There were certainly discussions of a setback
24 ranging from 2,000 feet to a half mile. I'm trying to
25 recall how we specifically came to the number of 2,500

1 feet. I believe that was forwarded by Commissioner Huston
2 at some point during the discussion. I would have to go
3 back and look at the testimony to be certain. And there
4 was at least indication within the hearing both in terms
5 of nods and agreement by other commissioners that that was
6 a distance that they could work with to move forward with
7 the project.

8 As indicated in my testimony earlier, there's
9 clearly no formal decision on the record of that, but
10 there clearly was agreement between the three board
11 members as to a number to begin to work with in terms of
12 how the project could move forward in a positive manner.

13 Q. In these discussions that you had with the
14 Applicant--well, it seems pretty clear based upon some of
15 Mr. Priestley's testimony yesterday that what would be an
16 appropriate setback for one residence, if you will, might
17 be different for another residence. So was there a
18 discussion about case-by-case basis on setbacks?

19 A. Well, both at the staff level and in public
20 testimony there was conversation regarding a process that
21 you could undertake to allow for specific site variances
22 on placement of the turbine in relationship to any
23 adjoining structure that's a nonparticipating property
24 owner.

25 It was recognized both at the staff level and

1 I believe was identified within the public testimony by
2 Commissioner Bowen that clearly there would be
3 site-specific incidences or instances where the standard
4 default setback of 2,500 might not work and that in fact
5 there would be circumstances where there's not that kind
6 of impact on an individual basis. Those would have to be
7 examined on an individual basis and a determination made
8 as to what the appropriate setback might be, but certainly
9 there was an avenue that would allow for reduced setbacks.
10 This was discussed and contemplated, but we never quite
11 got far enough into the process to be able to lay out the
12 details of how that would work.

13 Q. Did it appear that that was acceptable to the
14 Applicant?

15 A. I'm not sure we had any specific feedback
16 from the Applicant in regards to that process or if it was
17 even recognized that was a process that was available.
18 Clearly it was discussed at staff level and discussed in
19 public hearing in regards to providing for a process that
20 would allow for reduction in the default setback of 2,500
21 feet or those circumstances warranted that.

22 I might add that was one of the reasons why
23 we thought it was very appropriate and necessary at some
24 level either to establish what that variance process might
25 be or to know the locations of specific towers within the

1 project so that we could make at least an initial
2 assessment of what that determination might be on a
3 site-by site basis.

4 MR. SLOTHOWER: I'm done.

5 JUDGE TOREM: Thank you, Mr. Slothower.

6 Council, I've been handed a couple of
7 different questions during the course of these so I will
8 ask those that have been brought to my attention first on
9 the Council's behalf and then with the Council's
10 indulgence ask Mr. Piercy the same line of questions that
11 I promised him earlier this morning in my discussion with
12 Mr. Wagoner.

13 Any Councilmembers want to ask their
14 questions first?

15 MS. TOWNE: Well, I have one quick question.
16 Mr. Piercy, on page 13 of your testimony it's the first
17 full Q and A.

18 JUDGE TOREM: Let's give Ms. Towne the
19 microphone.

20 MS. TOWNE: Sorry. To repeat, I'm on page
21 13 of the first full Q & A section. You state at the end
22 of your answer, "The analysis that was done at further
23 distances all showed significant adverse impact within one
24 half mile of turbines." Significant adverse impact is a
25 term from SEPA. So I go to the KV Wind Power Project

1 Draft EIS, Section 3.9 at page 51 and 3.9.6 is significant
2 unavoidable adverse impacts.

3 JUDGE TOREM: Why don't you pause there so
4 we can locate the documents that need to be looked at with
5 this witness. So this is the Draft EIS, Section 3.9, page
6 31?

7 MS. TOWNE: Yes.

8 JUDGE TOREM: Mr. Hurson, are you retrieving
9 that as we speak?

10 MS. TOWNE: It's the last page of 3.9.

11 JUDGE TOREM: I believe Mr. Piercy has it.
12 Go ahead, ma'am.

13 MS. TOWNE: I read that paragraph and other
14 than a sentence fragment that says "the degree to which
15 impacts are adverse depends on the viewer's location," I
16 don't see anything about the analysis done at distances
17 further than 1,320 foot I guess all showed significant
18 adverse impacts. I do not read that in the environmental
19 analysis and wonder if you could explicate your conclusion
20 in your testimony, reconcile it with that paragraph in the
21 Draft EIS.

22 THE WITNESS: I will try. First of all,
23 within the record of this project, within the overall
24 review, you should know that the environmental impact
25 statement for Desert Claim as well as the environmental

1 impact statement for Wild Horse was submitted into the
2 record and considered to be part of the record for this
3 project as the County reviewed the project. The reason
4 for that is because we were not the lead agency in the
5 review process under the environmental impact statement,
6 and we were in a unique position of looking at a proposal
7 before us for consideration that did not in fact have a
8 final environmental impact statement attached to it which
9 would normally you would be looking at a project that
10 would have that.

11 So we did have that level of analysis and
12 conclusion from the two previous wind farm proposals and
13 felt that could provide some benefit in those areas where
14 gaps might or might not be missing in the project before
15 us for review and consideration. As we look at the visual
16 analysis that was done within the EIS for the Kittitas
17 Valley Project, they chose, and I don't know that I can
18 understand the reasons for this, but they did choose in
19 their visual analysis to rate not on whether there was a
20 low, moderate, or significant impact which is typical of
21 an impact designation within the environmental impact
22 statement, they chose to use a different range which was
23 low, medium, and high; and the only conclusion we could
24 make is at a high level impact related to a significant
25 level of impact. And then certainly I think a reasonable

1 conclusion to make based on the consistency of that
2 analysis with the other final environmental documents that
3 were actually submitted into our record there we saw
4 evidence from the Desert Claim project, for example, where
5 a range of 0 to .5 miles resulted in a significant impact.

6 Here we have a situation where the analysis
7 for the view corridors that were addressed and identified
8 showed a high impact on these that had view corridors in
9 the .4 mile range, for example, and those I think
10 clarified to some degree and verified in the testimony
11 what we heard yesterday in regards to the visual impact
12 analysis.

13 So while the nomenclature may be different,
14 I think it's equivalent in terms of how the low, medium,
15 and high impacts relate to low, moderate, and significant
16 impacts that you might normally see within the language of
17 an environmental impact statement, and it's consistent
18 with the level of impact that was identified in other
19 environmental documents that we had to call upon as well.
20 I hope that answered your question.

21 MS. TOWNE: Thank you.

22 JUDGE TOREM: Councilmember Adelsman.

23 MS. ADELSMAN: I have a real quick question
24 and this goes back to the May 31.

25 JUDGE TOREM: Pass the microphone down.

1 Just hang on there.

2 MS. ADELSMAN: On May 31st--

3 JUDGE TOREM: Now that it's there, you
4 actually have to use it.

5 MS. ADELSMAN: Oh, excuse, me. I think we
6 say this is involving two and we talked a little bit on
7 the May 31st transcript on page 37. It seems like
8 Chairman Bowen on line 16 to line 22 is saying I guess I
9 got the 2,000 feet from information in the record,
10 comments from Mr. Taylor and Mr. Young and from the
11 Applicant, and then you said 2,500 feet came from site
12 visits and looking at compatible land use in the county
13 code, and that's where my rationalization comes for
14 setbacks.

15 My question is, is there anything, any
16 analysis, any other thing that the County Commissioner
17 would have asked you to actually put down that
18 rationalization in some kind of document or is the 2,500
19 just really come up because of the visit to Hopkins Ridge
20 where they looked at how far are the residents from the
21 project and you it looked like it's much more than half a
22 mile?

23 THE WITNESS: Right. I think I understand
24 the context in which the Board of County Commissioners
25 were attempting to make their determination in the decree

1 that a setback that they thought it was a fair and viable
2 setback for the project and yet consistent with the idea
3 of providing mitigation to those adjoining landowners.
4 They looked at a number of issues, and again they have
5 seen throughout the entire testimony of the Desert Claim
6 Project where the environmental impact statement was
7 introduced that half a mile was that magic point where you
8 began to reduce the significant impacts, visual impact of
9 the towers. They were also referring in this case to the
10 2,000 feet that you're hearing from Mr. Bowen I believe
11 related specifically to the issue of sound and noise
12 impacts associated with the project.

13 There was testimony I believe from
14 Mr. Taylor or from some Horizon representative that
15 indicated that 2,000 feet was a number in which sound was
16 greatly dissipated on these projects and also shadow
17 flicker was the other issue that I believe the testimony
18 from Mr. Taylor addressed. From that perspective, 2,000
19 feet was indicated that shadow flicker was no longer an
20 issue in terms of needed mitigation. Now, we believe we
21 have other documentation that would indicate something
22 contrary to that, but nevertheless that was the number
23 that remained I think in the minds of our commissioners as
24 they were looking at that, and that had been introduced
25 into the record.

1 So it had environmental documentation that
2 talked to half a mile. They had other information that
3 talked to mitigating other impacts such as shadow flicker
4 and noise at 2,000 feet, and they were trying to come up
5 with a range or at least a mid point where you could
6 address all of those impacts collectively from a single
7 setback requirement, and then I think that was the
8 analysis that was going on in public for Commissioner
9 Bowen in trying to come to that conclusion which his
10 conclusion in this case to 2,500 feet. So they were
11 creating their analysis in public obviously, and going
12 through the discussion of how he got to and derived at the
13 2,500-foot setback, I believe was the combination of all
14 those factors that led up to that point.

15 JUDGE TOREM: Thank you. A couple other
16 questions that have come up from Councilmembers.

17 First, it didn't appear to a few of them
18 that Counsel Tim McMahan's question was ever answered
19 about did the County ever ask the Applicant for specific
20 visual impact analyses as close as 1,000 feet or 1,320
21 feet? Did County staff or the commissioners ever do that?

22 THE WITNESS: We did ask if that information
23 was available. I don't believe we asked it formally
24 through a public hearing process. I'm certain we
25 discussed it at a staff level, although did not present it

1 in a form of we require this information to fully review
2 your application. We did specifically ask for a turbine
3 site layout that identified the location of the 65
4 turbines that we were proposing.

5 JUDGE TOREM: That's clear from the record.

6 THE WITNESS: Part of that purpose was to
7 identify and begin to at least have the ability to address
8 those residences that potentially fell within that
9 2,500-foot range, and the 1,000 or 1,320-foot range so
10 that we could understand the scope of the issue in terms
11 of that setback.

12 JUDGE TOREM: Mr. McMahan also asked you
13 about the resolution that was adopted on June 6 and where
14 this never made reference to the setback numbers and
15 adopted them anyplace. Do you have that in front of you?

16 THE WITNESS: I do. Mr. McMahan I believe
17 asked specifically if the resolution that was adopted by
18 the Board addressed the 2,000-foot setback from a property
19 boundary, and I don't believe that it did. I believe it
20 did, however, address the 2,500-foot setback from
21 nonparticipating residences.

22 JUDGE TOREM: When I read the resolution, it
23 didn't leap out other than it mentioned setback to
24 numbers, but when I turn to Page 29--

25 THE WITNESS: If you look at page 10, Item

1 40, I believe that speaks to the issue of 2,500 feet
2 separation from wind turbines.

3 JUDGE TOREM: That's in the findings of
4 fact.

5 THE WITNESS: Yes. Which is an attachment
6 to the resolution.

7 JUDGE TOREM: That's what I wanted to make
8 clear to the Councilmembers that resolution itself the
9 whereas didn't specify any numbers, but Findings of Fact
10 14 had, perhaps 17, and as you point out 40 and even
11 perhaps I think it's 39, the last half of 39 address the
12 issue in a more specific fashion. So from the
13 Councilmember's review what the Board of County
14 Commissioners did the resolution and the findings of fact
15 probably in fairness may be read together.

16 THE WITNESS: That's correct. Certainly a
17 resolution without findings is not the entire picture
18 obviously.

19 JUDGE TOREM: I wanted to take care of that
20 now. This may seem somewhat schizophrenic because now
21 I'll go back to the harder questions, not the softballs
22 that we just had.

23 When I look at the attachment, I think it's
24 the April 12 transcript that's attached to your testimony.
25 This is April 12 and it's about page 6 to 7. Commissioner

1 Huston is speaking. He makes it very clear that in his
2 opinion "I remind everybody that it was the legislative
3 intent of the Board of County Commissioners, of which I
4 was a member when this was adopted, that each and every
5 one of these projects would be evaluated on a
6 site-specific basis." It goes on at the end of line 8 and
7 9 and says, "That's key: Site-specific basis."

8 So from that am I to understand that the
9 County wants to site each and every wind farm project that
10 is in Kittitas County to the exact locations of the
11 turbines and everything else that goes with the
12 development agreement?

13 THE WITNESS: Well, within the context of
14 the subarea plan which is an element, the key element of
15 the starting point for review of these projects. One of
16 the reasons that it was so important to look at these on a
17 site-specific basis is that each one of those can be
18 significantly different, and I'll give you two examples.

19 Wild Horse, for example, the project that
20 was approved. It went through this very same process.
21 You heard testimony that the Wild Horse process did not
22 require that kind of specific detailed information in
23 terms of turbine locations through the review of that
24 project as was being requested for the Kittitas Valley
25 project. I think that's an accurate statement. If you

1 look at the circumstances associated with Wild Horse, we
2 had the nearest residential dwelling that was not a
3 participating property owner at one and three quarter
4 miles from the boundary of the subarea.

5 JUDGE TOREM: So would it be fair to sum
6 this up and say that the specifics that need to be
7 addressed at the site at Wild Horse were much different
8 than the County's perspective on what you think need to be
9 addressed with Kittitas Valley?

10 THE WITNESS: Correct.

11 JUDGE TOREM: So regardless though the
12 County wants a site-specific analysis. It may be a
13 different site-specific analysis for each wind farm and
14 for Kittitas Valley which we know clearly what the
15 conflicts are that are attempting to be resolved in the
16 County process.

17 THE WITNESS: Correct.

18 JUDGE TOREM: In this case they weren't
19 resolved; is that correct?

20 THE WITNESS: That is other our, yes.

21 JUDGE TOREM: So back to the second part of
22 the question is you review that WAC that requires when you
23 can't present from an Applicant's point of view a
24 certificate of compliance with the County land use our
25 regulation and the law requires that to go out and find

1 and seek compliance with county or regional land use plans
2 or zoning ordinances. In your opinion could the Applicant
3 have reached consistency with just the comprehensive plan
4 to have a wind farm in this subarea?

5 THE WITNESS: Well, the ultimate of the
6 subarea requires consistency with the zoning code as well.

7 JUDGE TOREM: Correct. I want to just go
8 down you have four steps to your process. EFSEC in my
9 evaluation has two of those steps and then because of the
10 site-specific nature of what the County is doing or your
11 acknowledgment earlier of Commissioner Huston's indication
12 of legislative intent Steps 3 and 4 are those
13 site-specific issues. So for the comprehensive plan step
14 could a wind farm have been built in those yellowed areas
15 of that subarea?

16 THE WITNESS: Just looking at the specific
17 elements associated with the comprehensive plan was that
18 allowed within the comprehensive plan? Yes.

19 JUDGE TOREM: So it could have, even if it
20 wasn't directly consistent, without amendment the plan
21 could have been tweaked at some level by the County to
22 allow this particular use in this particular area.

23 THE WITNESS: Well, the way the process
24 works it would have required an adoption of the subarea
25 plan to actually amend the comprehensive plan.

1 JUDGE TOREM: Do you think that was a
2 reasonable possibility for the County process?

3 THE WITNESS: Yes.

4 JUDGE TOREM: So from there then the zoning
5 may have had some other issues that needed to be
6 addressed, including I think there's a height restriction
7 that was in the zoning code. So the exceptions to that,
8 whether they be conditional use permits under the old
9 system or some other way to address the zoning exception
10 or a variance, may have been required here.

11 THE WITNESS: Well, under the current county
12 ordinance the requirement is that once a subarea plan is
13 brought forward and considered, the zoning code must also
14 be consistent with the designation of that subarea
15 overlay. So in order to have a valid subarea plan and
16 comprehensive plan amendment that is consistent with
17 requirements under GMA, we'd also have to have a zoning
18 code that is consistent with that amendment to the
19 comprehensive plan. They are interlinked and tied to
20 where you do not have one without the other.

21 JUDGE TOREM: You indicated you could have
22 reached, the County could have approved a subarea plan.
23 So does that imply the second approval could have been
24 possible for a zoning amendment?

25 THE WITNESS: It implies the second approval

1 would have had to have occurred to be able to allow for a
2 valid modification to the comprehensive plan.

3 JUDGE TOREM: Because what I want to look at
4 now is Steps 3 and 4 on the site-specific item, and you've
5 heard my suggestion earlier to Mr. Wagoner that perhaps
6 the County's four-step approach doing it all in one in
7 reality preempts EFSEC from doing its job given the lawful
8 ordinance that was adopted. So we have this conflict of
9 law that has to be resolved.

10 With that in mind as background, if you go
11 to your testimony Page 16, the questions actually in the
12 prior page it's asking why knowing the specific locations
13 is so important for the turbines. You say here the
14 Applicant wants a setback of only 1,320 feet. The
15 environmental analysis that was referred to earlier I
16 believe shows significant adverse impacts within a half
17 mile and then you say it might be, however, that based
18 upon the specific location of a turbine there wouldn't be
19 an adverse impact if the turbine is properly located to
20 eliminate the impact.

21 Now, I think what you meant by that was
22 there may be some residences that could be charted out if
23 you know where they were within 1,320 feet that the
24 turbine might not be in their view shed; so 1,320 feet
25 might be a reasonable mitigation for that particular

1 nonparticipating residence. Am I correct?

2 THE WITNESS: You're correct in the basic
3 premise. I would take the number and change the number
4 because the County actually identified very specifically
5 that the absolute minimum setback for safety purposes
6 should be a different number than that. So I think if you
7 were going to take it to the point where you were looking
8 at a site-specific analysis, the safety setback would be
9 the minimum number that you could go to, not the 1,320.

10 JUDGE TOREM: What number are you thinking
11 as that safety specific?

12 THE WITNESS: I believe we used 541 feet.

13 JUDGE TOREM: So even smaller than the
14 1,320.

15 THE WITNESS: Right. And it really depends
16 on tower height. There's a formula that's established for
17 both the Wild Horse Project and the one that's being
18 proposed for this project in order to determine what that
19 safety setback should be. It's a little more complicated
20 than just a straight tower height of the tip, and that's
21 the safety setback.

22 JUDGE TOREM: For this purpose I think the
23 Applicant has asked this body to consider 1,320-foot
24 setbacks as was proposed and went before the County
25 Commissioners and now before EFSEC. So what I'm trying to

1 flesh out a little bit so when there are deliberations the
2 Council will have a little bit better idea if they choose
3 to preempt, which is maybe a separate issue, and they look
4 at if they preempt they have to demonstrate how they're
5 going to make compliance with the County land use plans,
6 and you have acknowledged that perhaps the comp. plan and
7 the zoning portions could have been made consistent. If
8 they weren't by the County then perhaps by statutory and
9 regulatory direction EFSEC will have to do that and
10 explain it. Again, only if they get to that point.

11 But then for the site specific they would
12 have to take into account those local concerns as well
13 that come up not only in public hearings and expect they
14 will come up again tomorrow and Thursday night through
15 testimony and the record. EFSEC will have to determine on
16 a turbine-by-turbine or home-by-home depending whose
17 perspective you take basis for what is an appropriate
18 general setback, and perhaps if you recall a little land
19 use in reverse, grant a new variance in advance for
20 specific homes that shouldn't have that larger setback.

21 That may be the way EFSEC finds that they
22 want to permit this process to recommend approval to the
23 Governor and say in general this is the setback. For
24 these homes it's less than that because here's the
25 exception to the rule that they have arrived at through

1 deliberations. Here's what we have. Is that a process
2 that you think the County itself that was what they were
3 trying to do?

4 THE WITNESS: That was what was being
5 actually identified as an alternative to a standard firm
6 setback. We had a default setback that was being proposed
7 of 2,500 feet, but in specific circumstances because of
8 things such as topography, the orientation of the
9 structure, or other reasons that could have been modified
10 based on the specific circumstances of that tower location
11 and the residence location.

12 Now, I would agree with your reasoning, your
13 line of thinking to a point, and that is without a
14 development agreement our code it is not consistent with
15 the zoning code. So there is a requirement within our
16 zoning code that a development agreement be established
17 and executed.

18 JUDGE TOREM: And that's the site specific
19 portion. Right?

20 THE WITNESS: It's the site-specific
21 portion, but it's a requirement in order to provide for
22 the elements needed in the zoning code to meet that part.

23 JUDGE TOREM: I think there's generally
24 agreement that the County doesn't have a way to
25 accommodate EFSEC and decouple any of those four parts.

1 It's kind of an all or nothing approval from the County.

2 THE WITNESS: We believe that's correct. I
3 think one of the things to keep in mind is that the rules
4 for EFSEC came into being in advance of a little law
5 called the Growth Management Act and the adoption of the
6 comprehensive plan consistent with the Growth Management
7 Act, and so I think what we have is in essence somewhat of
8 a conflict, if you will, between the EFSEC rules and
9 process and that which is allowed and encouraged and
10 supported under the Growth Management Act.

11 I think there's probably a legal argument
12 that I'm not going to try to make today in terms of which
13 one of those should take precedence. I know it's the
14 County's position that certainly the latter should in
15 terms of the kind of construction that would be the case.

16 JUDGE TOREM: And I'm going to leave that
17 for the attorneys to tell us in post-hearing briefs.

18 THE WITNESS: But I think it's an issue that
19 is interesting to raise and certainly the discussion needs
20 to addressed in some form of your decision. I would
21 anticipate anyway that that would be addressed in terms of
22 how you create some reconciliation of a process in the
23 Growth Management Act and the deference to local
24 government for decision making and a previously set of
25 regulations and procedures to the Growth Management Act

1 that might be in conflict with that.

2 JUDGE TOREM: So the ultimate question I
3 guess comes down to would you agree with me that by
4 adopting this one-stop shopping ordinance in Kittitas
5 County, applicants have no choice but to go through the
6 County process and don't have statutory choice provided in
7 80.50 to go to EFSEC or with this type of project go to
8 the County? In essence, no matter who they choose they
9 have to do the County too.

10 THE WITNESS: We believe that to be true.

11 JUDGE TOREM: That's the last of my
12 questions for this witness.

13 Councilmembers, any other questions?

14 I will start with Councilmember Wilson and
15 then Chair.

16 MS. WILSON: Thank you. If I did my math
17 here, you came in 2004 you mentioned. Were you part of
18 the Wild Horse approval process at all?

19 THE WITNESS: I was.

20 MS. WILSON: It's been implied that that was
21 an easy process. Is that a fair statement that it just
22 went along great, no problems?

23 THE WITNESS: If you consider all that and
24 this application is an easy process then, yes. I mean
25 with any application process there are going to be

1 questions. For example, it was the first time that this
2 County had gone through the process of creating a
3 development agreement specific to a wind farm. We had
4 certainly experience in doing that with other projects on
5 a similar large scale such as the Mountain Star now
6 Suncadia.

7 But specific to the development agreement
8 for a wind farm it was new territory and so we worked
9 through that development agreement particularly on areas
10 of guarantees and bonding and that sort of thing. There
11 were some I would call disagreements in terms of that
12 process. So was it always smooth sailing? No. But was
13 there a willingness to get to a point where they could
14 reach agreement and the answer is yes.

15 One of the things that obviously was not
16 facing us at Wild Horse was the issue of what is the
17 appropriate setback because those were determined and
18 established quite frankly just by the nature of the
19 ownership of properties, and we did not have the kind of
20 concern in regards to direct impacts to adjoining
21 nonparticipating property owners as we have at this site.
22 So from that standpoint it was considerably easier than
23 the process we're going through currently.

24 MS. WILSON: So you mentioned that each
25 application is going to be site specific, but given the

1 discussion that's taken place for this application is the
2 County now going to tell subsequent applicants that there
3 is an established distance that needs to be adhered to?

4 THE WITNESS: Well, I don't think it's
5 a--it's actually a new number that the County has
6 established as part of this particular project. We saw in
7 the environmental documents for Desert Claim very similar
8 information in regards to where significant impacts occur
9 in relationship to nonparticipating adjoining residences.
10 There was a range there that clearly identified anything
11 within a half a mile that potentially was a particular
12 impact of those residences. Very similar circumstances
13 within the visual analysis that took place here.

14 We did not have frankly the need for that
15 visual analysis at Wild Horse because we knew we were
16 dealing with distances in excess of a mile and a half. So
17 as projects come forward that's one of the things we'll
18 certainly look at to determine whether or not the level of
19 review and analysis needs to be greater on those projects
20 where they're proposing to locate nearby existing
21 residences.

22 Certainly as each project comes forward we
23 build our knowledge in terms of what the impacts are in
24 general and then try to apply it on a site-specific basis
25 to the information that's pertinent to that site.

1 MS. WILSON: So that really doesn't give an
2 applicant any feel for what they're going to need, what
3 standard they're going to need to apply their project,
4 does it? Under regulatory reform one of the issues was to
5 have some kind of consistency and knowledge about what
6 you're doing. So this process really doesn't do that.

7 THE WITNESS: Well, I think it does because
8 I think what the applicant has is the same opportunity to
9 review the environmental documentation that has been
10 utilized for other wind projects just as the County does.

11 In this case there was testimony that would
12 indicate that the Applicant clearly had the ability to
13 review the issues that were raised by the Board of County
14 of Commissioners in the Desert Claim Project. It's a very
15 similar project in terms of its proximity to adjoining
16 residences. There are some topography changes within this
17 project, but clearly the issue of setback to adjoining
18 properties and specifically to adjoining residences shares
19 a common theme with the Desert Claim Project.

20 And I would think a reasonable person
21 looking at that process under Desert Claim could have at
22 least anticipated that the setback issues were going to be
23 a significant issue of discussion, if you will, for the
24 review of this project, and that that environmental
25 information that was contained in that document clearly

1 would have had impact in the analysis of the Kittitas
2 Valley Project.

3 MS. WILSON: Thank you.

4 CHAIR LUCE: Mr. Piercy, you have been
5 planning director for quite a while either in this
6 jurisdiction or in other areas. Right?

7 THE WITNESS: Well, I've been involved in
8 the planning profession for some time. I was not planning
9 director in my previous position with Kitsap County. I
10 was in their planning department for 14 years. I served
11 as senior planner and also assistant director, and for a
12 brief period had the position of interim director, but
13 this is actually my first position within Kittitas County
14 as Director of Community Development Services.

15 CHAIR LUCE: In that position you had the
16 opportunity to work with lots of different applicants
17 seeking permits from counties.

18 THE WITNESS: I would say a wide range of
19 applicants and a wide range of projects.

20 CHAIR LUCE: Sometimes the applicants agreed
21 with the County on whatever needs to be done and sometimes
22 they don't. Right?

23 THE WITNESS: Correct.

24 CHAIR LUCE: So would you give me your
25 definition of good faith?

1 THE WITNESS: I think a good faith effort in
2 any project is a willingness and a desire to come to a
3 satisfactory conclusion that is mutually agreeable to both
4 parties.

5 CHAIR LUCE: Are you saying that to evidence
6 good faith the parties have to agree?

7 THE WITNESS: No, a willingness to get to
8 that agreement or at least a willingness to express a
9 desire to create discussion and conversation that perhaps
10 could lead to that agreement.

11 CHAIR LUCE: Okay. So there was a
12 three-year effort ongoing in this particular case to get
13 to an agreement. Right?

14 THE WITNESS: I'm not sure I would
15 characterize it as a three-year effort. It has spanned
16 three years.

17 CHAIR LUCE: All right. There was an effort
18 that has spanned three years to get an agreement.

19 THE WITNESS: However, the discussion at the
20 local level has been since October.

21 CHAIR LUCE: Well, that will stand as your
22 statement. Whether the Council agrees with that or not is
23 a separate thing.

24 THE WITNESS: I agree.

25 CHAIR LUCE: One of the criteria for EFSEC's

1 preemption is the applicant demonstrated a good faith
2 effort to resolve the noncompliance issue. So I think I
3 understand your statement of good faith to agree with me
4 when I say that good faith effort does not necessarily
5 result in agreement.

6 THE WITNESS: However, as I indicated in my
7 definition, it should have a willingness to try to achieve
8 an agreement.

9 CHAIR LUCE: A willingness.

10 THE WITNESS: I think I know where you're
11 leading with this question, and I might suggest if you
12 refer to the testimony and to the public process that the
13 County went through, I might suggest that standing before
14 the Board of County Commissioners silent when asked a
15 specific question by elected officials and refusing to
16 answer those questions does not demonstrate a good faith
17 effort towards coming to an agreement as far as seeking
18 resolution to the agreement.

19 CHAIR LUCE: That's your position on what
20 happened. That's your statement on what you believe
21 transpired in that particular County Commissioner meeting.

22 THE WITNESS: It's my suggestion that if you
23 review the transcripts.

24 CHAIR LUCE: I have. Thank you. Next
25 question. You have an applicant for a shopping center and

1 an applicant for low income housing comes to--this is a
2 hypothetical--comes to a county and says, "You know,
3 County. I own this piece of land called Black Acre, and
4 I'd like to build a low income housing development on this
5 particular piece of property." In your experience as a
6 person involved with planning, would it be reasonable for
7 or would you expect the County Commissioners to say,
8 "Well, you know, we do need some low income housing in
9 this county because our tax base isn't what it should be
10 and, you know, let's make this a shopping center because
11 that will help the tax base, but we don't like Black Acre.
12 We think you have to go to White Acre or maybe Green Acre
13 or Blue Acre." I guess what I'm getting to is that
14 something that you would ordinarily expect from the county
15 commissioners?

16 THE WITNESS: What I would expect from the
17 county commissioners is that they follow the code.

18 CHAIR LUCE: Would you expect from the
19 county commissioners to give the applicant for whatever a
20 decision?

21 THE WITNESS: On a specific proposal?

22 CHAIR LUCE: Yes.

23 THE WITNESS: Yes.

24 CHAIR LUCE: So I want to go specifically to
25 WAC 463-28-040 refers to our inability to resolve

1 noncompliance. It says alternative locations within the
2 same county and city have been reviewed and found
3 unacceptable. By whom, Mr. Piercy?

4 THE WITNESS: I'm sorry. I don't understand
5 your question.

6 CHAIR LUCE: By whom have these alternatives
7 sites been found unacceptable? Is that the county that
8 makes that decision or is that the applicant that has
9 looked at alternative sites?

10 THE WITNESS: I'm sorry. I still don't
11 understand your question.

12 CHAIR LUCE: In the Supplemental EIS a
13 number of different sites were look at. Right?

14 THE WITNESS: Correct.

15 CHAIR LUCE: They were concluded, it was
16 concluded that the applicant didn't have the control of
17 those sites and that they were for various reasons not
18 acceptable. Right?

19 THE WITNESS: Correct.

20 CHAIR LUCE: So what I'm asking you is, is
21 it your position or the County's position that the County
22 has to come to a conclusion which EFSEC will then accept
23 that alternative locations are available within the
24 county?

25 THE WITNESS: What the County has suggested

1 is that there are alternative locations available within
2 the county.

3 CHAIR LUCE: Who makes that decision,
4 Mr. Piercy?

5 THE WITNESS: I don't believe that's the
6 County making those decisions. We've seen evidence in the
7 record that would indicate that other firms are looking at
8 other locations and other locations potentially are viable
9 locations for the site.

10 CHAIR LUCE: But it an applicant-specific
11 process. Correct?

12 THE WITNESS: In this it's a site-specific
13 process.

14 CHAIR LUCE: So if another company Invenergy
15 were here, then that might be the case or if another
16 company Desert Claim were here, that might be the case.
17 But in this case we have one applicant that at least
18 according to the Supplemental EIS as I read it there's
19 been an examination of alternative sites and no
20 alternative sites have been found available; is that
21 correct?

22 THE WITNESS: I guess if I were to accept
23 that logic in terms of this process and what the intent of
24 the WAC is that the applicant could have identified two
25 sites that were completely incapable of supporting the

1 project. It could have picked the top of Mount Stuart and
2 Snoqualmie Pass and made a determination that no other
3 sites were therefore available.

4 So I think it comes down to at least a
5 reasonable level of judgment both on the part of the
6 County and by the part of the EFSEC board to determine did
7 the Applicant take a reasonable approach to looking at
8 alternative sites or was it just simply two alternative
9 sites that had no possible alternative.

10 CHAIR LUCE: Would you agree that if the
11 applicant doesn't have control over those sites, doesn't
12 have a leasehold interest or a real property or fee
13 interest that no matter how many sites there might be in
14 the County is somewhat irrelevant?

15 THE WITNESS: Then I will suggest to you
16 that for most applicants there would be no alternative
17 sites because most applicants are not going to come to the
18 county with options at hand for three or four or other
19 multiple sites in which alternatives could be identified.
20 So I think that's an unrealistic expectation.

21 JUDGE TOREM: Let me follow up on Chairman
22 Luce's question about this because the Council is going to
23 have to wrestle with what exactly it means and who
24 determines what's an unacceptable site.

25 When this regulation was adopted, it's my

1 impression, Mr. Piercy, there may have been a thought
2 process that in each particular county EFSEC was being
3 asked to permit a facility it may have been the only
4 facility in the county, and perhaps if the county was
5 going to have a nuclear power plant or a gas-fired turbine
6 there would be one in the county. Is that a reasonable
7 idea of perhaps where this regulation came from?

8 THE WITNESS: You know, I'm not certain how
9 the framers of that legislation, you know, in the
10 implementation of the WACs came about. What I can suggest
11 to you is that under those types of circumstances you
12 might actually be dealing with a facility that's
13 identified as an essential public facility and would have
14 a siting criteria and a process associated with that
15 probably within a context of County 1 Planning Policy.
16 That is not the case here. So I don't know that there's a
17 correlation between that analysis and what the WAC
18 intends. It probably would not be appropriate for me to
19 try to anticipate where the framers of that regulation and
20 the implementation document wanted to have happen.

21 What I think is important to note is that
22 there are a number of sites that have been identified as
23 viable locations of sites for these facilities, including
24 the one that we're considering today.

25 JUDGE TOREM: Let me just suggest my

1 questioning from Chairman Luce and I'm following up now
2 are great topics for the post-hearing briefs to tell us
3 what does the law say about this, and one of the criteria
4 for preemption is that there are no other alternative
5 sites that are found acceptable. There's at least a
6 two-part question in that line that needs to be analyzed
7 so that this body can better understand exactly what
8 Chairman Luce was asking. Who gets to decide what's
9 unacceptable? Is it the Applicant or the County or is it
10 ultimately this body that decides they're unacceptable,
11 and, if so, for what criteria and to analyze also for us
12 when you think that through, if there are multiple sites
13 in the county that are acceptable does that mean that one
14 can never preempt from the state to a county, especially
15 when its anticipated there will be many more than one of
16 those types of projects around?

17 So I think those are issues that none of us
18 has the answers to today, but certainly all of us have
19 opinions on it, and they need to be briefed out and fleshed
20 out after the hearing process.

21 THE WITNESS: I think if I may just respond,
22 Judge Torem, that one of the issues at hand is again it
23 goes back to what is the response of a reasonable person
24 in terms of looking at those issues and what is in fact a
25 reasonable alternative. In the case of Kittitas County

1 we've demonstrated that we have at least one site that's
2 gone through the approval process and it's provided in
3 testimony where expansion of that site is a viable
4 alternative; and we have at least one other firm who is
5 looking at a site in the general location of the Wild
6 Horse site exploring the possibility and feasibility of
7 that site becoming a viable site as well.

8 So if you look at that from a reasonable
9 standpoint, I think it would be difficult to conclude that
10 there aren't at least alternative sites that potentially
11 could be developed to support wind power in Kittitas
12 County that would meet the code requirements of Kittitas
13 County; but, again, I think it's at what point as you've
14 indicated who gets to make that decision. And if it is
15 simply up to the applicant, it's very clear to me that the
16 applicant identified two sites that are not a viable site
17 and make the conclusion that no other sites are viable so
18 therefore you must preempt. I don't think that's the
19 intent of the legislation.

20 JUDGE TOREM: And I don't think there's
21 going to be a whole lot of disagreement on your
22 clarification. I think it is what it is.

23 At this point it's about five minutes after
24 12:00. We're suppose to go to lunch for an hour until
25 1:00.

1 Mr. Hurson, how much redirect do you have?

2 MR. HURSON: I would hope it wouldn't be
3 more that five minutes.

4 MR. FRYHLING: Could I ask him one more
5 question?

6 JUDGE TOREM: Certainly. I put the proposal
7 I think to see if we're going to break for lunch and come
8 back to this witness which is not my preference because
9 lots of things come up over the lunch hour that will
10 extend this. If people can sit tight, we'll delay the
11 lunch hour and will let other Councilmembers, Mr. Fryhling
12 ask his question, come back for the five or ten minutes,
13 and I'll be looking at the watch when five minutes comes
14 up, Mr. Hurson, and then ask if there's anymore limited
15 cross. And hopefully by 12:20 we will be out the door,
16 out to lunch, and come back one hour from then. Hang on.
17 I'll bring the microphone, Mr. Fryhling.

18 All right. I'll ask the question on his
19 behalf. Mr. Piercy, does the County feel that the wind
20 power project is an essential public facility?

21 THE WITNESS: It's not identified as an
22 essential public facility within our comprehensive plan so
23 the answer would be no.

24 JUDGE TOREM: Any follow up?

25 Mr. Hurson, I'll chart your five minutes.

1 MR. HURSON: It may take longer.

2 REDIRECT EXAMINATION

3 BY MR. HURSON:

4 Q. Just a few quick clarifications on--

5 JUDGE TOREM: I'm going to let Councilmember
6 Adelsman have it on recross. Let's go with Mr. Hurson so
7 he gets done.

8 BY MR. HURSON:

9 Q. On the environmental checklist for the Desert
10 Claim drawing your attention to the first page of your
11 background paragraph 1 does that indicate that the
12 Applicant was going through environmental process to
13 include the appropriate county and/or state permitting
14 process?

15 A. Yes, it does.

16 Q. Would it be your understanding based upon the
17 EFSEC process that if an applicant was going to have a
18 different project, a larger, more expanded project that
19 they would need to come back to the County for seeking
20 consistency?

21 A. That would be my understanding.

22 Q. Thank you. As far as there's some questions
23 about good faith. Were you present during the--it's part
24 of the transcript--but were you present at the time where
25 the commissioners asked questions of the applicant and

1 they didn't respond?

2 A. I was.

3 Q. So you have personal knowledge of that that
4 go beyond what the transcripts allege?

5 A. I was in attendance, yes.

6 Q. Could you describe what happened.

7 A. Well, there was a discussion that took place
8 and it led to a number of questions by the Board of County
9 Commissioners in an effort to seek a conversation with the
10 Applicant in regards to how can we work this out. I think
11 it was truly a public negotiating effort on behalf of our
12 Board of County Commissioners that asked the Applicant how
13 can you get to a solution. What steps can we take? What
14 is it you're willing to do? The Applicant had indicated I
15 think in your testimony that the negotiation was part of
16 the process and, in fact, the County Commissioners at that
17 point were truly trying to negotiate a solution in terms
18 of asking the Applicant questions.

19 The response from the Applicant was exactly
20 nothing. They stood at the podium with no response, no
21 indication that they did not choose to answer a question,
22 no indication that that was not a question that they could
23 answer; that they would get back to the County. They
24 simply stood there silent. And, frankly, in my 20 plus
25 years of public service talking many times before boards

1 of elected officials, the disrespect that I felt was shown
2 to our elected officials by not even responding to a
3 simple question was one that clearly indicated their
4 desire to not continue with the process at that point. It
5 was like nothing else I've ever seen frankly in my
6 professional career.

7 Q. The 1,320-foot setback that the Applicant
8 proposed did they ever propose any other setback in
9 addition to that?

10 A. I'm sorry.

11 Q. The applicant talked about a 1,320-foot
12 setback and they indicated that anything beyond that would
13 make it economically nonviable. Correct?

14 A. Correct.

15 Q. Did they ever propose a different setback?

16 A. To my knowledge not publicly, although again
17 the conversation that I had in the hallway of CDS with
18 Community Development Services with Mr. Peck indicated
19 that they were willing to go from 1,000 feet to 1,250
20 feet, but that is as far as they could go. And then I
21 suggested that they propose that through the public
22 process at that next hearing, but we would use the 1,250
23 feet as a distance that the Board of County Commissioners
24 would utilize in their site visits; and that was actually
25 a distance that was intended to be used by the board prior

1 to that conversation so it worked out fine.

2 Q. Did they ever indicate the 1,320 foot when
3 they said it was not economically viable did they ever
4 indicate to you that their assertion it was
5 noneconomically viable was false?

6 A. No.

7 Q. Now, the County had talked about a 2,500-foot
8 setback. Correct?

9 A. Correct.

10 Q. And your testimony indicates things could be
11 maybe depending on a specific location you could mitigate
12 those impacts. Correct?

13 A. Correct. Again, the 2,500-foot setback was
14 intended to be the base or the default setback with
15 site-specific analysis if necessary on the available
16 turbine locations to determine that the reduced setback
17 from that would be acceptable based upon the individual
18 circumstances of that location.

19 Q. Did conversation occur between County staff
20 and the Applicant staff regarding potential approaches for
21 addressing this issue?

22 A. There was a discussion in regards to how a
23 variance process might be utilized or implemented, what
24 that might include. In fact, I might add that during the
25 course of that conversation it was you representing the

1 County as the prosecuting attorney that actually suggested
2 that for the first time in conversations.

3 Q. What were the suggestions made during that
4 meeting with the Applicant?

5 A. That the 2,500-foot setback or a similar
6 setback could be utilized as a default setback with at
7 least a process developed as part of the development
8 agreement as to how that might work and what issues might
9 be addressed in terms of that variance process. But
10 clearly the issues of things such as topography,
11 orientation of the residence, a number of items were
12 discussed that might affect the ultimate setback
13 requirements associated with a specific site.

14 Q. Do you recall specific examples that were
15 given to give the Applicant some direction or at least
16 some thoughts of how to address the commissioners on
17 resolving this issue?

18 A. Well, certainly in terms of resolving the
19 issue providing for a specific setback with that process
20 was one proposal that we recommended to go forward. In
21 terms of the issue that he might look at clearly
22 topography was one of those that is key to allowing for
23 reduced setbacks because you could have a tower either in
24 a valley or a residence in the valley with the tower, and
25 a residence on top of the ridge would be a totally

1 different set of circumstances than if the residence and
2 the tower were at equal elevations, for example.

3 So, again, it was one of those things that we
4 suggested that where there was a desire and need, and,
5 frankly, the entire project the need did not span all 65
6 turbine sites. It only spanned a number of those, maybe
7 less than 20 depending on where the placement was. So
8 with site-specific analysis each of those decisions could
9 be made in an objective, reasonable, rational process that
10 could allow for reduced setbacks in those cases.

11 Q. Was this meeting and the suggestions that
12 were made by us that was in a meeting following my trip to
13 EFSEC where I asked EFSEC to get the Applicant back to the
14 negotiating table? Correct?

15 A. The meeting was precipitated by that action
16 and that request by the board. That resulted in a letter
17 indicated from the Applicant indicating that there was a
18 desire to get back together to discuss those issues, and
19 that's when the issue of the process in which you could
20 provide for revised or modified setback requirements from
21 the default was discussed.

22 Q. With that suggestion for pursuing a variance
23 process or recognizing exceptions based upon, did the
24 Applicant ever at a staff level or before the Board of
25 County of Commissioners pursue that suggestion to look at

1 and address a variance or exception to the 2,500-foot
2 setback?

3 A. Well, it actually came forward in the
4 discussion as part of a combination of things that the
5 Applicant wanted to look at; at least was our
6 understanding when the meeting ended that the Applicant
7 would be getting back to the County with at least two
8 things. One was a revised layout showing when you had the
9 2,500 setback to the overall project. In other words, we
10 would like to see the 64 turbines in a 2,500-foot setback
11 and how many of those could not meet that requirement, and
12 then for those that could not meet that requirement what
13 would be the proposal to deal with those on a
14 site-specific basis in terms of how could we look at those
15 for possibly reductions.

16 That never came forward, came back from the
17 Applicant. Instead we received a letter from the
18 Applicant's attorney I believe asking for very specific
19 detailed information that obviously at a staff level we do
20 not give. Again, we responded back suggesting that they
21 take the opportunity that they have before the Board of
22 County Commissioners to propose those and ask those
23 questions in public forum.

24 JUDGE TOREM: Mr. Hurson, do you have
25 additional questions?

1 BY MR. HURSON:

2 Q. Actually my only other question was basically
3 did you see your role to door-to-door shop the
4 commissioners to try to circumvent the public meeting
5 process?

6 A. No.

7 MR. HURSON: Thank you.

8 JUDGE TOREM: Can you clarify--I appreciate
9 there wasn't an objection to that question. Can you
10 clarify for us the dates or the exhibit numbers in the
11 letter that you referenced? I believe one was you get
12 back to the negotiating table correspondence and then the
13 other letter that came from the Applicant's attorney when
14 Mr. Piercy said he was waiting for some more justification
15 responses to what to do with the 2,500-foot setback towers
16 and those impacted by that. Do you have reference to
17 those two letters that will help the EFSEC board deal with
18 that?

19 MR. HURSON: I don't. I think the letters
20 are the Applicant's, and I believe they submitted them in
21 their preemption.

22 JUDGE TOREM: I think you're right. So why
23 don't we look for those in the preempt request.

24 Now, we have a Councilmember who's been
25 patiently waiting to ask a question.

1 Councilmember Adelsman.

2 MS. ADELSMAN: Yes, real quick. I think you
3 talked about this. It looked like the County
4 Commissioners were looking at some kind of ranges from 541
5 feet which is the safety to the 2,005 and then that's the
6 base with variance base on site by site.

7 THE WITNESS: Let me just clarify that
8 because the safety setback was one that they held fast to.
9 If you have a public road or a private road, if you have
10 any structure, if you have a participating property owner
11 their residence could not fall within the safety setback
12 area. Then there was the setback area that was identified
13 in terms of needed for mitigation for the impacts that
14 were being identified as part of the project. That's when
15 the 2,500 feet came about.

16 MS. ADELSMAN: I think it's described as a
17 base, but in the resolution of the Findings of Fact and
18 Conclusions of Law No. 40 talk about a minimum of 2,500
19 feet, and it doesn't talk about any of the variance, any
20 of the other things that seems like the commissioners
21 talked about in the May 31, 2006.

22 THE WITNESS: The resolution does not go
23 into the discussion of the variance process because we
24 never got to the point where we were able to work out the
25 details of the process where that variance would be with

1 the Applicant. They literally walked away from the
2 process at that point.

3 What the record speaks to, however, the
4 testimony and the discussion and clearly within the public
5 meetings of the Board of County Commissioners the
6 Commissioners brought forward the concept of providing
7 some process for reducing of setbacks on a site-specific
8 basis for that as warranted and could be demonstrated as
9 not having a significant impact.

10 So I think that the commissioners did speak
11 to that. We just did not get to the point in terms of
12 conversations with the Applicant to be able to develop
13 that into an element of the development agreement which
14 would have been the appropriate location for that
15 discussion.

16 MS. ADELSMAN: I think the only thing that I
17 was looking at is at one time the 2,005 is described as
18 the base but in here it's described as the minimum.

19 MS. TOWNE: 2,500.

20 MS. ADELSMAN: What did I say?

21 THE WITNESS: 2,005.

22 MS. ADELSMAN: No, 2,500.

23 THE WITNESS: I guess in terms of
24 nomenclature the minimum that's identified in the decision
25 reflects the fact that we weren't able to follow that

1 further through the development of a variance process, and
2 again that was base of the minimum, whatever you might
3 call it. I call it the default setback. If you provided
4 no other additional analysis that would identify the need
5 to or the ability to reduce that, that becomes the
6 setback.

7 MS. ADELSMAN: Okay.

8 JUDGE TOREM: Councilmembers, any other
9 questions raised by this further discussion?

10 Seeing none, let me just check the parties.

11 Mr. McMahan, you want to ask additional
12 questions?

13 MR. McMAHAN: I have several.

14 JUDGE TOREM: I imagine you would.

15 Mr. Slothower?

16 MR. SLOTHOWER: No.

17 JUDGE TOREM: Okay. So, Mr. McMahan, I'm
18 going to let you ask some additional questions. I'm
19 hoping you'll keep it down to five to ten minutes and
20 Mr. Hurson you'll have the last word and we'll break for
21 lunch at that point for an hour. After lunch we'll come
22 back and determine how much time we need for Mr. Garrett
23 and how much time we need for Mr. Lathrop and we'll
24 reconvene in the afternoon and take those matters up.

25 Go ahead, Mr. McMahan.

1 MR. McMAHAN: Mr. Hurson, I'm going to refer
2 to Exhibit 3-1 which is the May 15, 2006 letter from Erin
3 Anderson to the Board of County Commissioners.

4 JUDGE TOREM: Exhibit 3-1 to?

5 MR. McMAHAN: In the preemption filing.

6 JUDGE TOREM: Thank you.

7 RE CROSS-EXAMINATION

8 BY MR. McMAHAN:

9 Q. So, Mr. Piercy, you talked about a request
10 that we submit a setback, a drawing depicting the effect
11 of setbacks on the project design; is that correct? That
12 was your testimony?

13 A. I'm sorry. I wasn't paying attention. I was
14 reading this.

15 Q. You bet. I think your testimony under a
16 question from Mr. Slothower your testimony was during
17 these discussions with staff that you had asked for a--you
18 had a desire for a setback, a map or a drawing that
19 indicated the setbacks and the impact on the project
20 design, correct, that was your testimony?

21 A. Correct.

22 Q. So we did submit that, didn't we? And it's
23 attached to Ms. Anderson's letter dated May 15, 2006 and
24 this is the map I think you all have in front of you.
25 It's a color map. It looks like that.

1 MR. FIKSDAL: We have copies of the map I
2 have to hand out.

3 JUDGE TOREM: I think the Councilmembers are
4 getting a copy right now.

5 MR. McMAHAN: To be clear we submitted a
6 color copy to the Board of County Commissioners.

7 JUDGE TOREM: Go ahead.

8 BY MR. McMAHAN:

9 Q. So, yes, we did submit that to the board,
10 didn't we?

11 A. Yes.

12 Q. So the board had in front of it at least the
13 impact of the 2,500-foot blanket setback from residences.
14 Correct?

15 A. I believe that's correct, yes.

16 Q. You make kind of a big deal out of this
17 so-called variance process in your testimony. Just to be
18 clear, that variance process was not, again, not part of
19 any motion, verbal motion, written motion adopted by the
20 Board of County Commissioners, was it?

21 A. It was not a vocal that was being forwarded
22 by the applicant so it was not something that the board
23 actually provided as part of their review. It was
24 suggested by the board that the applicant consider that as
25 an element for identifying what the appropriate setbacks

1 should be as part of your proposal, but it was not
2 something that was adopted or formally discussed by the
3 board in any of the decision making resolution that was
4 passed.

5 Q. In fact, Mr. Piercy, at the May 31--well, let
6 just ask you. From your testimony about that variance
7 process it sounds like you have pretty good command of
8 what the board was saying about that so-called variance
9 process at the May 31 hearing. Correct?

10 A. A pretty good command of what the staff said
11 in terms of our suggestion at the meeting that we had with
12 Horizon staff. I'm meaning that Commissioner Bowen
13 indicated that the possibility of some process that would
14 allow for a variance to the 2,500 setback could be
15 addressed.

16 Q. Now, in your experience as a professional
17 planner a variance process is a formal application
18 process. It's governed by a certain criteria. Correct?

19 A. That's correct. It's used to set standards
20 that would be developed and utilized as a way to create an
21 objective view of determining what an appropriate variance
22 would be.

23 Q. Now, I want to draw your attention to pages
24 54 to 55 of that May 31 transcript, if you will.

25 A. And the page number again?

1 Q. Yes, 54 to 55. Would you mind reading from
2 lines 19 on 54 to the end of line 4 on 55 into the record
3 for us please about what Mr. Huston understood about the
4 so-called variance process.

5 A. Say the line numbers. I'm sorry.

6 Q. Line 19 on page 54, it's just a few lines,
7 down to line 4 it would be on page 55 regarding what
8 Mr. Huston at least thought that process was.

9 A. "The rest of it, in terms of process, I
10 don't--use the term 'process'. I'm not sure exactly what
11 you're getting at. If they are successful in getting into
12 agreements with property owners willing to waive, if you
13 will, that setback, that's a private agreement between the
14 proponent and the property owner, as long as it's recorded
15 and runs with the title of the land, needless to say.
16 Can't be a handshake; we need something perhaps a bit more
17 formal than that."

18 Q. Mr. Piercy, this certainly when Mr. Bowen
19 talks about a variance process, Mr. Huston talks about a
20 waiver agreement with property owners. The Board of
21 County Commissioners that evening did not provide the
22 Applicant with direction what on earth they were talking
23 about. Correct? There was no consensus on that process
24 by the Board of County Commissioners. Correct?

25 A. I would characterize it as saying there was

1 not a specific process that was identified by the Board of
2 County Commissioners in terms of a preference of how a
3 variance element might be included within the development
4 agreement.

5 Q. Now, you've talked some about the Desert
6 Claim environmental impact statement. The County was the
7 lead agency in that EIS; is that correct?

8 A. Correct.

9 Q. And you've indicated that turbines were
10 proposed within 1,000 feet of residences in that EIS; is
11 that correct?

12 A. That's correct--or excuse me, within that
13 application.

14 Q. Thank you. Isn't it true that the County as
15 lead agency that EIS did not include any visual
16 simulations within 1,000 feet of residences?

17 A. That is correct.

18 MR. McMAHAN: I have nothing further.

19 JUDGE TOREM: Mr. Hurson, any follow-up
20 redirect? and then we'll break for lunch.

21 MR. FRYHLING: Can I ask one more question?

22 JUDGE TOREM: Certainly.

23 Mr. Hurson, do you have anything else?

24 MR. HURSON: I'll just save it for briefing.

25 JUDGE TOREM: Okay.

1 MR. FRYHLING: Is a variance a part of the
2 Board of Adjustment or would this be a different separate
3 group that a variance be granted?

4 THE WITNESS: Well, again, we did not get to
5 the level of detail how a variance could be approached.
6 The development agreement actually would have a broad
7 range in terms of identifying process and criteria which a
8 variance could be identified and determined. We have a
9 process for administrative variance within Kittitas County
10 contained within our code. That certainly was not a
11 process or a reasonable approach that was yet ruled out.
12 It did not mean that they needed to go through a formal
13 public hearing process to allow for the variance. My
14 belief is that had we been able to pursue that line of
15 thinking further one of two things would have happened.

16 One is that the development agreement up
17 front would have identified those sites where variances
18 could have occurred, what that variance would have been,
19 or the Board of County Commissioners would have granted
20 the authority to me, the director, or any future director
21 to make that determination based upon a clear set of
22 criteria that would be utilized to make that decision.

23 JUDGE TOREM: All right. Is there anything
24 else for this witness either from the County who's
25 presenting the witness or any other members of the

1 Council?

2 All right. Seeing none, it's now about
3 12:30. We'll take a recess and break for lunch and come
4 back at 1:30. We're now off the record.

5 (Lunch recess taken from 12:30 p.m. to 1:40
6 p.m.)

7 JUDGE TOREM: We will be reconvening Kittitas
8 Valley Wind Power Project hearing a little after 1:30,
9 about 1:40 p.m. on Tuesday. This afternoon we have two
10 remaining scheduled witnesses. Those are Ed Garrett and
11 Steven Lathrop. We're going to start with Mr. Garrett's
12 testimony in just one moment.

13 Later this afternoon when we're done, and
14 I've been led to believe that the cross-examination will
15 be relatively short or nonexistent from parties with both
16 of these witnesses and depending on what the Council has
17 how long we go, we need to talk a little bit about the
18 site visit for Thursday.

19 The Council has expressed over the lunch hour
20 its views on where to go. We promise it will be just a
21 three-hour tour. We're going to need the parties input as
22 to selecting four, five, or six stops along the tour, and
23 I'm going to put on the Applicant's shoulders the
24 collection of specific one-paragraph descriptions of what
25 each party can or will be viewed from those particular

1 stops. What I'm hoping to do is by Thursday have seen a
2 final draft of this and that each party will have had
3 their input and we'll talk more about it more off the
4 record later today.

5 So begin thinking about one-paragraph
6 descriptions of what can be seen from whichever angle you
7 look and how to convey that to the Council. My hope is
8 that we can have a nonspeaking tour at least at the sites
9 so that nothing untoward or unattended gets into the
10 record and clutters things through some discussion or
11 something else that would make something unreviewable. So
12 to have a piece of paper that can be read by each
13 individual person making the view becomes part of the
14 record and anybody could easily duplicate that on any
15 other day. That's what I'm looking for. So we'll talk
16 more about that off the record.

17 The other items we need to deal with
18 hopefully today are the Benton County and Klickitat County
19 regulations, and we'll take those up after the witnesses.
20 I imagine there will be a motion of some sort of bringing
21 them into the record, if that's today or tomorrow and
22 whether that's just by Applicant attorney or via Mr. Peck
23 supporting these exhibits. Then we'll determine from
24 anybody else in the room, other parties what
25 cross-examination is necessary or not.

1 So we'll take that discussion up immediately
2 after the witnesses, and when we go off the record we'll
3 take up the matter of the site visit and all the logistics
4 that are going to go into that on Thursday afternoon.

5 Parties, are there any other issues
6 procedurally that we need to address this afternoon before
7 or after the witnesses?

8 Councilmembers, any other issues we're trying
9 to keep track of today that need to be addressed?

10 Seeing none, I think we're ready for
11 Mr. Garrett's testimony. He's in place. These are
12 exhibits 110-R and exhibits it's not really numbers but
13 110-SUP.

14 For today's purposes, Ms. Makarow, is that
15 accurate?

16 MS. MAKAROW: Yes.

17 (Ed Garrett sworn on oath.)

18 JUDGE TOREM: Mr. Slothower, you can go
19 through the preliminaries.

20 MR. SLOTHOWER: Thank you.

21

22 ED GARRETT,
23 being first duly sworn on oath,
24 testified as follows:

25

1 DIRECT EXAMINATION

2 BY MR. SLOTHOWER:

3 Q. Would you state your full name.

4 A. Ed Garrett.

5 Q. What is your address?

6 A. 19206 67th Avenue S.E., Snohomish, 98296.

7 Q. Mr. Garrett, you are sponsoring Exhibits
8 110-R, 110-SUP, 110.1-R, and 110.2-R; is that correct?9 (Exhibit Nos. 110.0-R, 110.1-R, 110.2-R and
10 110-SUP identified for the record.)

11 A. That is correct.

12 BY MR. SLOTHOWER:

13 Q. If asked today under oath those questions
14 would your answer be the same?

15 A. Yes, it would.

16 Q. Are you prepared to be cross-examined on both
17 your testimony and the exhibits?

18 A. Yes.

19 MR. SLOTHOWER: I would move for admission
20 of 110-R, 110-SUP, 110.1, and 110.2.

21 MR. PEEPLES: Your Honor, I would like--

22 JUDGE TOREM: I fully anticipate,
23 Mr. Peeples, to note that a good portion of Mr. Garrett's
24 110-R proposed exhibit had been stricken by previous
25 counsel order. I believe it's the entirety of pages 2, 3,

1 4, 5, 6, and half of it's probably--it skips on my copy to
2 page 8 and 9. It's all the way through the middle of page
3 9 to the answer that ends in the word industry. All of
4 that was stricken previously and the next admissible
5 question was on line 20, "What do you have to say
6 regarding Mr. Bevis' testimony?" From there to the
7 remainder of that proposed testimony was proposed
8 testimony not stricken. So that's in Council Order No.
9 802, and Irina had already sent around to all of you a
10 reminder note.

11 MR. PEEPLES: I don't care how the Council
12 handles it in their deliberations. Whether they redact it
13 or direct them not to take it into consideration, it
14 doesn't make any difference to me.

15 JUDGE TOREM: Well, that's the motion. Is
16 there any other further clarification?

17 MR. PEEPLES: No, that's it and with regard
18 to that, that's all I had for that.

19 JUDGE TOREM: So, Council, the motion is to
20 admit those referenced exhibits 110-R, 110-SUP, and
21 supporting exhibits with the cautions and the notation
22 from the enforcement of our previous Order 802 that
23 technically those pages are not being offered. They were
24 previously stricken. With that in mind, all those in
25 favor?

1 COUNCILMEMBERS: Aye.

2 JUDGE TOREM: Any opposed? All right. So
3 those portions of the exhibits that are not previously
4 stricken are now admitted to the record.

5 (Exhibit Nos. 110.0-R, 110.1-R, 110.2-R and
6 110-SUP admitted into evidence.)

7 JUDGE TOREM: Mr. Peeples, you're first on
8 the cross-examination. I note that my list says ROKT had
9 reserved some spots to cross-examine so we'll strike
10 those. Its their only witness. Counsel for the
11 Environment has some time reserved as does the County. So
12 I'll ask Mr. Tribble and then Mr. Hurson in that order
13 once Mr. Peeples is done.

14 Go ahead, sir.

15 MR. PEEPLES: My understanding is that the
16 County was not going to cross-examine this witness; is
17 that correct?

18 MR. HURSON: At this point I have no
19 questions, but it may change depending upon the scope of
20 this examination.

21 JUDGE TOREM: I certainly understand that.

22 MR. PEEPLES: And I agree. I'm not going to
23 repeat that, but that's the Applicant's position too. We
24 have no cross at this time for this witness. If there's
25 anything else brought up, then we reserve the right to

1 come back but I doubt if we'll come back.

2 JUDGE TOREM: Mr. Tribble.

3 CROSS-EXAMINATION

4 BY MR. TRIBBLE:

5 Q. As I've shared with Mr. Garrett's counsel the
6 purpose of my questions are to clarify the scope of
7 Mr. Garrett's testimony, also his argument on behalf of
8 himself and on behalf of ROKT.

9 Mr. Garrett, in your prefiled supplemental
10 testimony on the first page you talked about a dual role,
11 did you not? That you represent yourself as well as your
12 spouse and also ROKT; is that correct?

13 A. That's correct.

14 Q. In your description on page 2 of ROKT, isn't
15 it true that you stated ROKT is an association of local
16 resident as well as some landowners such as myself who
17 have not yet developed our properties near Ellensburg?

18 A. That's correct.

19 Q. When you said local residents what was the
20 locality you were referring to?

21 A. It would be Ellensburg in general. When ROKT
22 was formed it was specifically the residents that were
23 located around the project area, and then it expanded on
24 from there. So now it's a combination of landowners in
25 the area around the project area extending out a mile or

1 more. It could be people that residences that are now
2 concerned as they became aware of the project after the
3 press release done by the Daily Record in June of 2001.
4 And then when the enXco project application came through,
5 it extended out to people around Reecer Creek all the way
6 up to Sun East so I had to say we had an area.

7 Now the majority of our group who are really
8 adamant about some of these siting concerns reach from Elk
9 Springs to the west all the way to the north to southeast
10 and now with the latest project changes brings in people
11 down to Highway 10 around Ellensburg Ranches Road.

12 Q. Do any of these individuals who are members
13 of ROKT--I'll rephrase the question.

14 Do all of these individuals who are members
15 of ROKT either own or own property within Kittitas County
16 or live within Kittitas County?

17 A. Combination of both. I would say probably
18 half actually own property. Most of them own property in
19 Kittitas County. A lot of it is undeveloped property for
20 some. We have maybe half that group actually has a
21 residence, a seasonal cabin, or a lot that they bring
22 their RV up on which is what I'm doing now since I haven't
23 built yet. And the other owners live in Seattle,
24 Bellevue, people from the west side who just want to come
25 across the mountains, have a place to hang out; and when

1 they bought it, a lot of them it was over ten years ago
2 when the land was really, really cheap and the parcels
3 were relatively large. So we're talking in that area of
4 zoning anywhere from mostly around 50-acre lots, but you
5 can't go smaller than 10 in some of the areas.

6 Q. I appreciate your interest. I don't think
7 you got to the point of my question which is, is there
8 anyone that is a member of ROKT that does not either own
9 property within the county or reside within the county?
10 Is there a member of ROKT that has no situational
11 relationship with the county?

12 A. None come to mind.

13 Q. Thank you. In your testimony you identify
14 the subject, did you not, the subject of your testimony in
15 three separate areas of comments? I'm referring to page
16 2.

17 A. Yes.

18 MR. SLOTHOWER: Is this the supplemental
19 testimony?

20 MR. TRIBBLE: Well, I don't believe there
21 was any original prefiled direct testimony. So, yes, I'm
22 referring to the same document.

23 MR. SLOTHOWER: Okay.

24 BY MR. TRIBBLE:

25 Q. In those three areas you've defined in loose,

1 if I may, changes in development that occurred in
2 proximity of the proposed Kittitas Valley Wind Power
3 Project. That was the first. Correct?

4 A. Correct.

5 Q. The second comments concerning purported
6 revisions to KVVPP project proposed.

7 A. Correct.

8 Q. And third comments and observations on the
9 recent land use consistency hearings; is that correct?

10 A. That's correct.

11 MR. TRIBBLE: Thank you. I have no further
12 questions.

13 JUDGE TOREM: The Applicant or the County
14 did that raise any questions?

15 MR. PEEPLES: None for me.

16 MR. HURSON: No.

17 JUDGE TOREM: I think we're ready to poll
18 the Councilmembers.

19 We'll start with Councilmember Wilson. Any
20 questions for Mr. Garrett?

21 MS. WILSON: No.

22 JUDGE TOREM: None, Ms. Adelsman.

23 Ms. Towne?

24 MS. TOWNE: No.

25 JUDGE TOREM: Ms. Johnson?

1 MS. JOHNSON: No.

2 JUDGE TOREM: Mr. Fryhling, no.

3 Mr. Sweeney?

4 MR. SWEENEY: No.

5 CHAIR LUCE: No.

6 JUDGE TOREM: All right. There's nothing
7 from the Council. I'm sorry. I didn't load up for bear
8 for Mr. Garrett. So I don't have questions either. Then
9 the exhibits have been admitted. If there's no further
10 questions from anybody in the room for Mr. Garrett, we
11 will move onto to Mr. Lathrop's testimony.

12 Thank you, sir.

13 If folks want to get ready for Mr. Lathrop's
14 testimony, he is Exhibit No. 103. Let me clarify that for
15 the record that there was Exhibit 102. I believe his
16 entire prefiled testimony last time was stricken by
17 Council Order 802; is that right, Mr. Slothower?

18 MR. SLOTHOWER: 102 would have been--

19 JUDGE TOREM: That was David Taylor.

20 MR. SLOTHOWER: -- that is David Taylor. He
21 is scheduled for testimony.

22 MR. PEEPLES: I believe the only testimony
23 of Steve was the supplemental.

24 MR. SLOTHOWER: That's correct. Mr. Lathrop
25 has only provided 103 which is his direct testimony filed

1 as supplemental testimony. Then that has attached to it
2 Exhibit 103.1 and 103.2, and I should point out that
3 Exhibit 103.1 is a map of Kittitas County showing
4 Mr. Lathrop's property in relation to the project
5 boundaries and that is a relatively small document. I
6 have brought an original map for the aid of the Council,
7 and if it's not objected to, we would substitute that as
8 the original.

9 JUDGE TOREM: All right. So, Council, as
10 you can see to my left, the map that's there has a much
11 larger representation of what we have here in Exhibit
12 103.1.

13 Let me swear in Mr. Lathrop and then you can
14 go through the preliminaries with him.

15 (F. Steven Lathrop sworn on oath)

16 F. STEVEN LATHROP,
17 being first duly sworn on oath,

18 Testified as follows:

19

20 DIRECT EXAMINATION

21 BY MR. SLOTHOWER:

22 Q. Would you state your full name.

23 A. Frank Steven Lathrop.

24 Q. What is your current address?

25 A. 1572 Robinson Canyon Road, Ellensburg.

1 Q. Mr. Lathrop, you're sponsoring Exhibit 103
2 with attachments 103.1 and 103.2; is that correct?

3 (Exhibit Nos. 103.0, 103.1 and 103.2
4 identified for the record.)

5 A. Yes.

6 BY MR. SLOTHOWER:

7 Q. If asked these questions today under oath,
8 would you answer these questions in the same manner?

9 A. Yes, with two exceptions, and that would be
10 two I think typographical omissions that I would like to
11 insert. The first being on page 11 at line 7.

12 MR. PEEPLES: Could you repeat that page?

13 THE WITNESS: Page 11.

14 MR. SLOTHOWER: Line 7.

15 A. Line 7 where it says to wind farms does not
16 mean they insert "do not" have an area.

17 BY MR. SLOTHOWER:

18 Q. In other words, the words "do not" were
19 omitted.

20 A. Yes. And likewise, I don't know why we got
21 two negatives that were omitted, page 22, line 1, towards
22 the end of that line of the Council "did not" speak out.
23 "Did not" was not included. It should have been. With
24 those two corrections my testimony today would be the same
25 as set forth in this prefiled supplemental.

1 Mr. Lathrop is scheduled or at least reserved by the
2 Applicant, by ROKT. That would be a pretty hard role for
3 you to play, Mr. Slothower.

4 MR. SLOTHOWER: I discussed that yesterday
5 with Mr. Carmody, and he indicated he didn't have any
6 questions.

7 JUDGE TOREM: So we will strike that. That
8 takes away some questions. I have the County as well.

9 Mr. Peeples.

10 MR. PEEPLES: Your Honor, it's my
11 understanding that none of the parties who previously
12 indicated they wanted to cross Mr. Lathrop intends to
13 cross Mr. Lathrop. I believe I'd reserved the right to
14 ask questions if anything comes up when the Council asks
15 him any questions.

16 JUDGE TOREM: All right. So you're
17 reserving yours.

18 Mr. Hurson.

19 MR. HURSON: Basically the same thing. If
20 there's something that comes up that I thought would need
21 question or clarification, but at this point, no.

22 JUDGE TOREM: So now we're going to go
23 directly to the Councilmembers. Were there any other
24 parties in the room that wanted to ask some questions of
25 Mr. Lathrop? I know none is reserved.

1 Seeing none, then let me poll the
2 Councilmembers. We'll give them just a minute to finish
3 looking through testimony and stay in place for two
4 minutes and then I'll poll the Councilmembers.

5 Councilmember Wilson?

6 MS. WILSON: No.

7 JUDGE TOREM: Let me ask a couple questions
8 just to remind the Councilmembers about Mr. Lathrop had
9 the distant view we see on the blown-up 103.1 now, and
10 I'll have Mr. Lathrop get a chance to elaborate a little
11 bit on things that may have occurred to his actual views
12 and then see if that raises any other questions.

13 Mr. Lathrop, how many miles do you estimate
14 your property is from the southern boundary of the
15 proposed wind farm?

16 THE WITNESS: Approximately six to seven.

17 JUDGE TOREM: Do you remember how many miles
18 it might be from the Wild Horse site?

19 THE WITNESS: It's approximately 19 to 20.

20 JUDGE TOREM: And today with the
21 construction going on at Wild Horse from your property on
22 the clearest possible day how would you describe the
23 visual impact, visibility impact on your horizon looking
24 that direction?

25 THE WITNESS: It's quite noticeable. I

1 think that the EFSEC Council may well recall that there
2 was considerable discussion and in fact opposition to my
3 intervention in the Wild Horse Project, and one of the
4 declarations or prefiled testimony that was submitted--and
5 I'm sorry. I should have brought it. It's laying open on
6 the floor next to my desk--stated that it would be very
7 difficult from my home and my property to see any part of
8 the Wild Horse Project. Well, they didn't believe that to
9 be true at the time and now that it's up I can tell you
10 quite clearly that I at last count very clearly count at
11 least 34 complete tower mechanisms and in all candor would
12 not want anyone to have a driver's license that could not
13 see those 34 towers and tell if their blades were moving
14 and that's at some distance. And it doesn't take the
15 clearest possible day. It takes just the ordinary day,
16 and the difficulty I was having with the Wild Horse
17 Project as it impacted my property was that it is now
18 virtually impossible to look to the east which is an
19 expansive view--in fact, a view that's quite common to
20 many people in the valley--and not have the eye drawn to
21 these structures, and that's a remarkable change.

22 JUDGE TOREM: Would you say that it's the
23 same impact to you day or night or would you draw a
24 distinction?

25 THE WITNESS: I would draw a distinction. I

1 would say that that at night the lighting does not appear
2 obtrusive, and I will apologize. This exhibit is not a
3 good reason why you shouldn't hire a graphics person to
4 put it together as opposed to an ordinary copy machine and
5 scotch tape. At any rate, I do like pink.

6 JUDGE TOREM: All right. Well, the next
7 question that comes to my mind to the Council so the
8 Council is better able to remember exactly where you're
9 coming from as an intervenor in this project, there was a
10 question as to whether the paint scheme would blend in,
11 and I believe it came up somewhere yesterday. It may have
12 been an off-record discussion, but certainly in your
13 testimony you refer to the affect that the white paint has
14 on the turbines at Wild Horse as opposed to a blending
15 color. Can you elaborate on that for me a little bit?

16 THE WITNESS: Certainly. I have read
17 probably the same literature that many of the participants
18 here today and the Council have read and I see two things.
19 On the one hand shall I say on the proponent's side or the
20 applicant's side their experts and I believe you had a
21 visual expert yesterday in his prefiled testimony,
22 Mr. Priestley in his report in fact as one of his bullet
23 point mitigations indicates that the color of these towers
24 will be a neutral color, a blending color, if you will.
25 I'm sure we've all got the prefiled testimony here.

1 In fact, counter to that is what I
2 understand to be two very clear dictates that say that the
3 color isn't to be that, and that would be what's required
4 by the Federal Aviation Administration as to these towers
5 being visible to aircraft, and, second, the avian concern
6 of having the tower blades visible to birds.

7 Now, those were the two understandings that
8 I have. Suffice it to say, that in viewing many wind
9 farms, and I have taken steps even within the last ten
10 days to look at the Wild Horse Project from various
11 angles, not being on the project I should clarify, and
12 also down around Walla Walla and looking at those colors.
13 And, of course, now observing the Wild Horse Project, and
14 the colors of those towers which to me I'm not a color
15 expert would be a consistent color of a white or merely
16 off-white. To me that's quite visible as opposed to shall
17 we say taupe or a model color.

18 If you're trying to camouflage something,
19 you want to break up the lines, break up that symmetry so
20 that it has more of a blending characteristic. And when
21 it comes to the Kittitas Valley Project, the reason color
22 becomes so important is that it is down well inside the
23 rim of this valley, and its elevation, although somewhat
24 higher than my property, from a distance won't appear to
25 be that much higher even though it may be a few hundred

1 feet. As a result the total backdrop is landscaped, and
2 it's that surrounding topography and white will be
3 extremely visible.

4 JUDGE TOREM: Now, my understanding was the
5 reason white was chosen for that was alluded to the FAA
6 aircraft visibility that in exchange for maybe a white
7 instead of another color there were other visibility
8 concerns that were dropped such as daytime lighting and
9 some other things. I'm getting nods from behind you at
10 the Applicant's table. Perhaps that's a reasonable
11 generalization.

12 Would you agree with me that if there was to
13 be some thought process to minimizing the overall impact
14 and that your personal impact on Wild Horse was maybe
15 greater than you would have liked but perhaps the overall
16 impact on the valley itself was it better mitigated by
17 choosing that color in exchange for less lighting and
18 other things that might have needed to happen during the
19 day?

20 THE WITNESS: That would not be my opinion,
21 no. I would have looked at--I do look at reduced daytime
22 lighting as an example as a very slight concession. If
23 you look at the strobe lights around the average cell
24 tower, and we've got a lot of cell towers around the
25 valley that are about 85 feet tall on average. While that

1 strobe is visible it is intermittent and doesn't have
2 the--it's not a constant form, and so therefore I think
3 the colors is the driver.

4 I do think the Applicant may well be between
5 a rock and a hard place on the fact that I'm not sure that
6 they would be allowed to do a different color. I would
7 hope that given an option an applicant would attempt to
8 camouflage structures, but, again, my reading of it is I'm
9 not sure they've got that option.

10 JUDGE TOREM: Those are the questions that I
11 have for Mr. Lathrop just to make sure the Council at
12 least be reminded of where your views are going from.

13 I'll start with Councilmember Wilson. Do
14 you have any questions?

15 MS. WILSON: No.

16 JUDGE TOREM: Councilmember Adelsman?

17 MS. ADELSMAN: No.

18 JUDGE TOREM: Councilmember Towne?

19 MS. TOWNE: Yes.

20 JUDGE TOREM: Would you get the microphone
21 from your partner there.

22 MS. TOWNE: Mr. Lathrop, I'm reading your
23 Exhibit 103, page 3, line 16. You assert that "There is
24 no place within the boundaries of the proposed site that
25 one or more wind turbines can be located which can meet

1 the criteria under established county code"; is that
2 correct?

3 THE WITNESS: That's correct.

4 MS. TOWNE: So not one? And you state that
5 the county can only approve an application that meets
6 elements including, and I'm paraphrasing, not detrimental
7 or injurious to the character of surrounding neighborhood.
8 So is that the basis of your allegation?

9 THE WITNESS: Yes.

10 MS. TOWNE: Then why did the County go
11 through the exercise from January to June to consider the
12 application?

13 THE WITNESS: Well, and I don't mean to be
14 flip, but I'm only partially successful in ever getting
15 the County to go along with what I think and they didn't
16 in this case. It has been my position from the beginning
17 that and it was my specific objection to Wild Horse. In
18 fact, my only objection to Wild Horse, and that was that
19 this type of project should not be allowed within the rim
20 of the valley because it is not within the character of
21 any area inside the rim of the Valley; and therefore, in
22 my opinion it does not meet this section of the county
23 code and can't almost by definition.

24 MS. TOWNE: On page 10, line 25, you state,
25 "As demonstrated by EFSEC'S own rules, distance is the

1 only reasonable mitigation for a facility such as this."
2 Can you point me to what part of our rules you're talking
3 about?

4 THE WITNESS: Well, yes, I can. 463-42-362
5 old version, and mind you that was codified or filed and
6 made effective in 1992. It deals with areas that within
7 which the Applicant is supposed to take into account
8 distances, and my reading of that WAC where it has
9 specific types of energy projects listed it does not list
10 wind farms I grant you, but I think it's indicative that
11 the rules that EFSEC needs to deal with need to take
12 distance into account.

13 MS. TOWNE: 362 and what was the sub part?

14 THE WITNESS: Well, WAC 463-42-362.

15 JUDGE TOREM: These are the same WAC that
16 Mr. McMahan was referencing earlier today.

17 THE WITNESS: Yes.

18 MS. ADELSMAN: Existing ones.

19 JUDGE TOREM: It's the previous WAC and this
20 is the ones that dealt with at least Subsection 1(a), the
21 requirement that EFSEC consider certain distances around
22 any proposed projects; and for clarification thermal power
23 plants was a 25-mile radius, petroleum refineries was a
24 10-mile radius, petroleum or natural gas storage areas a
25 10-mile radius, pipelines or electrical transmission

1 routes one mile on either side of the line. If you'll
2 recall, Councilmembers, from the neighborhood and what is
3 the neighborhood that was the earlier discussion of this.
4 Mr. Lathrop was interpreting this slightly different as to
5 what's required for mitigation.

6 Mr. Lathrop, is that a fair statement? The
7 distance based on here showing what distances are
8 sensitive to these areas projects, and although wind is
9 not listed, the implication of distance as a way to
10 consider what's impacted what you're inferring from that
11 is that anything within an inappropriate distance might be
12 negatively affected.

13 THE WITNESS: Yes. And also Subpart 4 of
14 the same section which deals with aesthetics.

15 JUDGE TOREM: So that's as to aesthetics.

16 THE WITNESS: Yes.

17 JUDGE TOREM: There's some confusion here
18 because the rules have changed, and if anybody brought
19 their current rules, it's not there anymore.

20 THE WITNESS: Yes.

21 JUDGE TOREM: Let me read the aesthetics
22 paragraph for everybody so we're on the same page as you.
23 This part of 463-42-362(4) says aesthetics. The applicant
24 shall describe the aesthetic impact of the proposed energy
25 facility and associated facilities and any alteration of

1 surrounding terrain. The presentation will show that
2 location and design of the facilities relative to the
3 physical features of the site in a way that will show how
4 the installation will appear relative to its surroundings.
5 The applicant shall describe the procedures to be utilized
6 to restore or enhance the landscape disturbed during
7 construction (to include temporary roads). That's that
8 subparagraph in its entirety.

9 Councilmember Towne, you have further
10 questions?

11 THE WITNESS: If I could, please.

12 MS. TOWNE: I do not on that issue.

13 JUDGE TOREM: If you want to clarify that
14 issue.

15 THE WITNESS: I want to clarify that issue
16 by also citing to 462-42-302(4), and I'll read it because
17 it's only one sentence. And this has to deal with the
18 applicant providing detailed descriptions of the existing
19 environment. "Unique physical features--the applicant
20 shall list any unusual or unique geologic or physical
21 features of the project area or areas potentially affected
22 by the project."

23 And I could go on with some other areas
24 dealing with the scenic resources and also under
25 preemption sections, but sprinkled throughout the

1 regulations appears to me a myriad of places where
2 distance and locale are, if not called out to say you must
3 look at something within this distance, at least suggests
4 that a broader approach to the affected areas is required.

5 MS. TOWNE: On page 18 at line 24, you're
6 talking about the County process and you make the
7 statement that "there are no objective standards with
8 which to decide this application." Were you speaking of
9 what the County had to work with or what EFSEC will be
10 doing in this matter?

11 THE WITNESS: Both. Both because having
12 carefully read and being quite familiar with the County
13 standards and also with the EFSEC standards and then
14 looking with some interest on the two approaches to the
15 decision making process, if you will, the Applicant has
16 submitted a substantial volume of testimony that deals
17 with the uncertainty or the lack of direction, if you
18 will, on the County process. And, yet, I think that it's
19 much more clear than that given EFSEC, and unfortunately
20 many of the directives to EFSEC come from regulations that
21 were adopted I think as far back as 1978. The Chair and,
22 I'm sorry, Judge Torem I believe referred to a particular
23 section prior to lunch that was the good faith and the
24 alternative site.

25 Believe me, and I was practicing land use

1 law in 1978, and I'd have to say that the rules and our
2 understanding and our approaches to things like that I'm
3 not sure anybody would have been astute enough to ask the
4 question that the Chair asked as to who decides whether or
5 not there are alternative sites. We've evolved and yet
6 we're working with rules that haven't.

7 MS. TOWNE: Then the last question and it'
8 related on the next page, page 19 at line 15. You asked,
9 "How can EFSEC preempt unless what it is presented with is
10 the same as was presented to the County?" Are you arguing
11 that EFSEC should go back to the application submitted by
12 Horizon to the County on which the County operated
13 starting in January of '06? Is that your position?

14 THE WITNESS: No. My position is that, and
15 I regret I wasn't able to stay the full afternoon
16 yesterday and hear all of that testimony. But I was here
17 yesterday morning and, as I said, I looked at the volume
18 of materials, and in all honesty I would challenge anybody
19 in this room. Now the applicant may be different, but I
20 don't know today exactly what the applicant asked the
21 County to approve. And I certainly don't, and I'll be
22 specific here in a moment, I certainly don't understand
23 what has been asked or presented to EFSEC to approve. And
24 I will give you specifics.

25 It was an oral discussion only as to the

1 setbacks with the County. There has been no other
2 discussion from the Applicant as to any other issues that
3 were not resolved insofar as the subarea plan, the zoning
4 requirements, or the development agreement with the
5 County other than that particular issue. That the parties
6 got high centered on that issue is undeniable, but here
7 we sit and the Applicant has said that EFSEC needs to
8 preempt the process and preempt the County decision
9 making.

10 And I'm going to leave the propriety of that
11 aside for a moment and just say, "All right. What have
12 you been asked to do? Is this a completion of those
13 negotiations, if you will, that were unsuccessful with the
14 County? Is it that the County comprehensive plan elements
15 will be followed, that its zoning code will be followed,
16 and that specific elements of the development agreement
17 are yet to be filled in?"

18 If you recall, Mr. Taylor's testimony from
19 yesterday morning, he was asked directly are you opposing
20 to execute the development agreement that you had worked
21 out or had proposed to the County and he didn't know.
22 Ultimately he said, well, he supposed so and since they
23 had suggested that he probably didn't have any objections.
24 But how are we, how are you to know then what you're being
25 asked to approve?

1 And that's my point is that they stopped the
2 County process. The Applicant stopped even though the
3 County never closed the door on saying, "Are you done?
4 Will you talk to us about a variance process? Will you
5 tell us specifically locations or give us data about
6 specific tower locations that would change our minds on
7 having a lock-down setback of 2,500 feet?" They got no
8 response. They said, the County said, and this is clearly
9 in the record, "We'll keep talking. You give us some
10 information. Tell us what you want." The Applicant quit
11 and said, "No, make a decision." County did. It had no
12 choice, mind you. I don't know what else they could do
13 and here we are.

14 And we don't have a clear picture today, and
15 as I say, this isn't a test. But if I would say or
16 suggest that people put their heads down and write down
17 what they think EFSEC is being asked to approve, I bet you
18 get different answers.

19 MS. TOWNE: Thank you, Mr. Lathrop. No
20 further questions.

21 JUDGE TOREM: Back to Councilmember Wilson
22 or Adelsman, does that raise any other questions for you?

23 MS. ADELSMAN: No.

24 JUDGE TOREM: Councilmember Johnson?

25 MS. JOHNSON: No.

1 JUDGE TOREM: Councilmember Fryhling?

2 MR. FRYHLING: No.

3 JUDGE TOREM: Mr. Sweeney?

4 MR. SWEENEY: No.

5 JUDGE TOREM: Chairman Luce, any other
6 questions for this witness?

7 CHAIR LUCE: No.

8 JUDGE TOREM: Then from the Applicant any
9 other questions that came up based on that?

10 MR. PEEPLES: Nope and if no one asks any
11 other questions, there will be none.

12 JUDGE TOREM: County?

13 MR. HURSON: No.

14 JUDGE TOREM: Any need for redirect,
15 Mr. Slothower?

16 MR. SLOTHOWER: No.

17 JUDGE TOREM: A resounding no. Thank you,
18 Mr. Lathrop.

19 MR. SLOTHOWER: One thing if I might though,
20 Judge Torem. One thing that I wanted to be clear on. We
21 talked this morning and this afternoon about WAC
22 463-42-362. It is my understanding and perhaps we should
23 make it clear for purposes of post-hearing briefing that
24 this is the WAC that this Applicant is tied to, not the
25 newer version that's out; is that correct?

1 JUDGE TOREM: That's correct. The Applicant
2 vested under the regulations in place at the time. I'm
3 not like getting nods from my lawyer that says otherwise
4 so, yes, those that were--there was a booklet handed out
5 some time ago. I think it was 2001 was the effective date
6 of the regulations on the cover.

7 MS. WILSON: That's the new one.

8 JUDGE TOREM: Sorry.

9 MR. SLOTHOWER: I have it as 1998.

10 MR. PEEPLES: It's the lavender one.

11 JUDGE TOREM: The blue one that's the RCW.
12 The lavender copy of 1998 should be most applicable.
13 Thank you.

14 CHAIR LUCE: A point of clarification.
15 Again, that discussion with the underlying statute.

16 JUDGE TOREM: Right. That's the point. The
17 blue will be the 2001 statute. The purple or lavender is
18 the 1998 WACs. Both of those together are what this
19 Applicant will be judged on.

20 MR. SLOTHOWER: That's what I understood,
21 yes.

22 JUDGE TOREM: Thank you. All right. Ladies
23 and gentlemen, that seems to exhaust our witness schedule
24 supply for the afternoon. We're not done yet though.
25 This afternoon it's now almost 2:30. I want to first talk

1 about tomorrow morning.

2 We have a hearing back here in the morning
3 starting at nine o'clock and then in the afternoon we have
4 a phone session over at Central Washington University. So
5 tomorrow whenever we break for lunch, hopefully before
6 noon, we will reconvene in the afternoon and I'll remind
7 you again at Central Washington University's Executive
8 Board Room at the Student Union Building. That should be
9 on the third floor, Room 301. I have no idea what the
10 scope and size of that facility is as to how many people
11 it will fit, but I anticipate, Mr. Fiksdal, everybody
12 that's here today will be able to attend tomorrow.

13 MR. FIKSDAL: Yes.

14 JUDGE TOREM: The answer is yes.

15 MR. FIKSDAL: I understand it will fit 50
16 people.

17 JUDGE TOREM: So we have 50 bodies that we
18 get in there. If we need to sell tickets on standing room
19 only, we'll figure it out.

20 Tomorrow morning here we should have
21 Mr. Taylor, Mr. DeLacy, Mr. Usibelli from CTED,
22 Mr. Nierenberg he's the weather person, and then
23 Mr. O'Neill was listed again there but she's already been
24 taken care of by affidavit. Wally Erickson will be here
25 and Mr. Bastasch. I believe Mr. Bastasch is to noise.

1 MR. PEEPLES: Yes.

2 JUDGE TOREM: Is that correct?

3 MR. PEEPLES: Yes.

4 MS. TOWNE: What about Mr. Bevis?

5 JUDGE TOREM: Mr. Bevis is coming in by
6 affidavit. So we have six witnesses to get through
7 tomorrow morning and then several more in the afternoon.
8 The balance of those that are not going to be by affidavit
9 will call in. Two of them at one o'clock, we still have a
10 group of four left at two o'clock, and two additional
11 witnesses that will call in by three o'clock. And when
12 we're finished with their testimony and cross-exam we're
13 going to close for the day and then have a public hearing
14 tomorrow night. So that's just a brief preview of
15 tomorrow's schedule.

16 Today we have the remaining to do on the
17 record of what to do with the--well, to put it in best
18 terms to see now that the Council is getting what it asked
19 for how to handle it. We have the Klickitat County Energy
20 Overlay and the Benton County Planning Department
21 Guidelines that will be referenced by Mr. Peck.

22 Mr. Peeples, are you prepared to address how
23 we should handle these and how we should we have the
24 Council take official notice of them, and, second, what,
25 if any, cross-examination of Mr. Peck who would introduce

1 them would be done; if so, when he could be made
2 available?

3 MR. PEEPLES: It is my understanding that we
4 were discussing how to get those things into evidence. My
5 suggestion is that for all of these things if somebody
6 else has something they wish to put in that would be done
7 and requested to take judicial notice, and I would suggest
8 no questions. I mean it's an awkward thing. I think all
9 the attorneys out here are going to say this is a pretty
10 awkward thing coming up at the last moment. My suggestion
11 is we just do it by judicial notice. I would not propose
12 to bring back Mr. Peck at all. I think once we start
13 doing this, we're going to open it up and open it up and
14 open it up.

15 JUDGE TOREM: Well, let me read quickly what
16 WAC 463-30-230(1)(c). It says upon written or oral motion
17 the Council may officially notice codes or standards that
18 have been adopted by an agency in the United States, of
19 this state, or of another state, or by a nationally
20 recognized organization or association.

21 So these two fall squarely within what's
22 contemplated by 460-30-230(1)(c), as well as the
23 supporting provisions of the Administrative Procedure Act.
24 It goes on under Sub 2, the parties can be notified either
25 before or during the hearing--we cleared that hurdle--or

1 by reference in preliminary reports or otherwise, of the
2 materials so noticed and the sources thereof, including
3 any staff memoranda and data. And this is the part I want
4 to make sure if there's an agreement by the parties to no
5 cross, great, but it says, and they shall be afforded the
6 opportunity to contest the facts and materials so noticed.

7 The way I see it, Mr. Peeples, is there's
8 several ways to contest or review. As you said, they can
9 put in their own materials that speak to whatever
10 perceived deficiencies they have and submit it to be
11 addressed by official notice to competing ordinance that
12 it says something completely different or they have to
13 have some other opportunity to do that that could be in
14 person. It would be less helpful I think based on
15 discussion yesterday as to all the characteristics
16 specifically available to Mr. Peck's knowledge and memory
17 of Klickitat County without opening the door to floods of
18 other tangentially relevant issues. Or they could take
19 this up in a post-hearing brief to describe in short
20 detail why these are or aren't persuasive for the Council.

21 MR. PEEPLES: It would seem to me the
22 cross-examination issues would be more related to is this
23 really an official ordinance, etc. It would be foundation
24 issues, not relevance meaning issues.

25 JUDGE TOREM: Let me see if I can ask some

1 of the other parties. Mr. Hurson and Mr. Carmody is not
2 here today. Mr. Slothower may want to weigh in as well as
3 to whether there's any desired cross-examination in any
4 way to satisfy Sub 2 of the WAC. They could be afforded
5 that opportunity to disagree with these officially noticed
6 documents in some way. Would it help if you want some
7 cross-examination and, if so, what scope?

8 MR. SLOTHOWER: Judge Torem, I think before
9 I can really respond to that my question is why is this
10 information being solicited? And I want to make sure I
11 fully understand exactly what information is being
12 solicited because listening to Mr. Peeples I mean I became
13 somewhat concerned that he may be inviting for lack of a
14 better word a document dump; for example, a laundry list
15 of ordinances from around the state, United States, the
16 world, and I don't know that that's what you really asked
17 for. So I think some clarification on exactly why this
18 information is sought may streamline this process.

19 MR. PEEPLES: We've had the same concern. I
20 think we're all on the same page here.

21 JUDGE TOREM: That's why I opened this with
22 you have to be careful what you asked for because we did
23 ask last Tuesday that if there were any ordinance that had
24 been adopted to deal with wind farms and the specific
25 question was in regards to the setback issue, particularly

1 the setback from residence or nonparticipating residences
2 that we saw the Kittitas County Board of County
3 Commissioners struggle with so much. I presume if there
4 were an easy solution to this, both sides would have
5 brought it into this County's Board of County
6 Commissioners and told them.

7 We were not aware of anything that
8 referenced as such in the record and that came quickly
9 yesterday afternoon that Mr. Peck knew that in his own
10 prior jurisdiction Klickitat County had an ordinance. It
11 may or may not be helpful, but that's what we're asking
12 for. Something like that. We also got the Benton County
13 ones for the wind farms that are there.

14 I think I heard some specific states
15 yesterday in reviewing this that New York, Wisconsin,
16 Pennsylvania, there are 50 states and jurisdictions to
17 choose from. We could have a document dump, but I'm
18 looking for those that someone thinks are helpful to the
19 County. If there was a specific ordinance as to Wild
20 Horse, it wouldn't be that helpful in this case because
21 the areas are different. We don't know what the areas
22 here are without further testimony and we didn't ask for
23 it, but at least one of these will have a setback
24 addressed. I haven't gone through them in enough detail
25 to speak to them to know if it can help the County or

1 Council, but Mr. Peck thought that they would yesterday;
2 at least in his realm of knowledge that they were
3 responsive to the request.

4 MR. SLOTHOWER: My concern is exactly what
5 you indicated. I took a quick look at Benton County's and
6 Mr. Lathrop has done some additional research on some
7 others. He may be able to respond better than I, but
8 looking at Benton County we need to take the document in
9 context with it looks like the other portions of their
10 zoning code, potentially some maps. That may just be the
11 tip of the iceberg as we get these coming in from
12 Wisconsin and places like that. Is it to be read as just
13 a stand-alone ordinance? If it isn't, then what other
14 documents do you need to interpret? So those are the
15 concerns I've got.

16 MR. PEEPLES: I think that's the same
17 concern we have. I think we're all together on that
18 concern. It's a real difficulty that you're trying place
19 on counsel and the parties at this stage of the proceeding
20 to come up with this. And I think you're talking about a
21 Pandora's box is what you're talking about. I don't think
22 there's any disagreement.

23 JUDGE TOREM: Well, let me back up and just
24 see if we can solve this by asking the Council if they
25 still want to go down this road?

1 MS. ADELSMAN: No.

2 JUDGE TOREM: Hold on. Just wait a minute.

3 I'll ask you guys in just a minute. The question came up
4 last week with some of the same questions I believe that
5 what we were dealing over yesterday's testimony as to what
6 exactly is an appropriate setback, and I think the Council
7 from the cross-examination that came up with Mr. Priestley
8 may have gotten the ideas as to 541 foot, 1,000 foot,
9 1,250, 1320, and beyond as various setbacks that were
10 discussed by the Board of County Commissioners. I don't
11 think that context was readily available a week ago when I
12 had the initial request, and I'll defer to the Chair first
13 because he and I discussed this. And I put that out after
14 discussion with the Chair to you in the documents
15 supporting the prehearing conference for Tuesday the 12th
16 and thought it would be a good idea at the time.

17 Well, so, Chairman Luce, with your
18 permission then do you think that these are still going to
19 be helpful?

20 CHAIR LUCE: I made the request based on the
21 fact that prior to this adjudication I've been aware from
22 different continuing legal education programs and
23 otherwise that there are a number of different states and
24 political subdivisions of those states that deal with this
25 issue. It's not unusual to have shadow flicker, ice throw

1 setbacks, and there's no guidance to my knowledge in
2 anything that Kittitas County has within its purview and I
3 looked for those to find some guidance for the Council,
4 some potential guidance.

5 JUDGE TOREM: The record remembers repeat
6 references to the industry standard. So what we were
7 looking to clarify what that was and as a basis that's
8 what we came to.

9 CHAIR LUCE: Absolutely. What I now hear
10 none of the parties--well, to state it differently, what I
11 hear is the parties are really willing to go with the
12 record as it is; so I'll go with the record as it is.

13 JUDGE TOREM: Let me poll the rest of the
14 Councilmembers and see they think still, and again this
15 may be a case of as the record developed or opinion
16 developed as to what would be relevant and helpful to the
17 ultimate finders of fact and deciders on this case. I
18 think as a judge in my own experience this looked like it
19 would have been relevant, and I might have overruled an
20 objection otherwise last week. Today I might very well
21 sustain that.

22 So with that in mind, Councilmember Wilson,
23 do you think these are going to be helpful to you in
24 making your decision?

25 MS. WILSON: No, sir.

1 JUDGE TOREM: Councilmember Adelsman?

2 MS. ADELSMAN: No.

3 JUDGE TOREM: Councilmember Towne?

4 MS. TOWNE: No.

5 JUDGE TOREM: Councilmember Johnson?

6 MS. JOHNSON: No.

7 JUDGE TOREM: Fryhling?

8 MR. FRYHLING: No.

9 JUDGE TOREM: Councilmember Sweeney?

10 MR. SWEENEY: No.

11 JUDGE TOREM: And the Chair?

12 CHAIR LUCE: No.

13 JUDGE TOREM: So I think that the Council is
14 withdrawing its request to see any of these; so keep your
15 documents.

16 MR. PEEPLES: Thank you.

17 JUDGE TOREM: So with that in mind, the
18 Benton County Ordinance and the Klickitat County Energy
19 Overlay Ordinance will not be officially noticed or
20 otherwise come into the record unless somebody else asks.

21 Now, if there are any other matters to be
22 taken care of on the record still today, I'm not aware of
23 them. Does anybody want to raise any concerns, any other
24 issues? Otherwise, for the parties coming back, the next
25 on-the-record proceeding will be tomorrow morning at 9:00

1 a.m., and I believe the first witness is Mr. Taylor; is
2 that correct?

3 MR. PEEPLES: Yes, it is. We will talk
4 about that.

5 MR. HURSON: I was just going to point out
6 one thing for tomorrow night's meeting because we had that
7 confusion with the voters today. I believe this is the
8 Fine Arts facility which is where we're meeting during the
9 day. Tomorrow night's meeting is at the Home Arts
10 Building, the building next door where we're voting today.
11 So I think we've had 50 different voters trying to come in
12 here to vote. Just for everybody's planning for tomorrow
13 night.

14 JUDGE TOREM: So leaving this building there
15 are only seven voters?

16 MR. HURSON: The other voters are next door
17 today.

18 MR. PEEPLES: Your Honor, may I bring up one
19 more matter? Do you have something first?

20 MR. SLOTHOWER: Yes. Judge Torem I was
21 curious was the discussion about the site visit was that
22 on the record or off the record and when is that going to
23 occur?

24 JUDGE TOREM: We're going to have that
25 discussion with staff off the record when we close this

1 afternoon.

2 MR. PEEPLES: I just wanted to give notice
3 to probably ROKT and Mr. Lathrop that we will be objecting
4 to cross-examination of Randy Hardy and I believe to a
5 certain extent Troy Gagliano with regard to the regional
6 energy issues on the basis that we believe that's outside
7 of the scope of intervention. So I want to let everybody
8 know right now on that. Take it up in the morning, review
9 the order, and I don't want to waste time on it either.
10 You know, one way or the other. The order and the
11 consolidated issues.

12 JUDGE TOREM: Understand.

13 MR. PEEPLES: I don't want to surprise
14 people tomorrow.

15 JUDGE TOREM: I understand that. The
16 advance noticed that if, Mr. Slothower, you're still
17 stepping in for Mr. Carmody tomorrow afternoon when it
18 comes to Randy Hardy on the telephone there will be a
19 motion to strike the ability for your client and ROKT to
20 cross-examine him.

21 MR. SLOTHOWER: And Mr. Lathrop from what I
22 hear.

23 MR. PEEPLES: I believe so, and I don't want
24 to waste much time because it could probably waste more
25 time than on cross-examination time.

1 potential witnesses for which the Applicant is going to
2 object to the scope of cross-examination tomorrow. In the
3 morning Mr. Usibelli, in the afternoon Mr. Hardy, and on
4 Thursday morning Mr. Gagliano. So attorneys that applies
5 to be prepared. I'll be prepared to rule based on the
6 orders of intervention that we granted some time ago.

7 Any other business?

8 Hearing none, then we are adjourned for
9 today at 2:40 p.m.

10 * * * * *

11 (Adjudicative hearing adjourned at 2:40
12 p.m.)

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I N D E X

	WITNESS	EXAMINATION	PAGE
1			
2	WITNESS		
3	ROGER WAGONER,		
4		Direct by Mr. McMahan	359
5		Cross by Mr. Hurson	361
6		Cross by Mr. Slothower	369
7		Redirect by Mr. McMahan	396
8		Recross by Mr. Hurson	405
9		Recross by Mr. Slothower	415
10		Re-Redirect by Mr. McMahan	424
11			
12	DARRYL PIERCY,		
13		Direct by Mr. Hurson	428
14		Cross by Mr. McMahan	436
15		Cross by Mr. Slothower	449
16		Redirect by Mr. Hurson	494
17		Recross by mr. McMahan	505
18	ED GARRETT,		
19		Direct by Mr. Slothower	514
20		Cross by Mr. Tribble	517
21	F. STEVEN LATHROP,		
22		Direct by Mr. Slothower	522
23			
24			
25			

E X H I B I T S (Cont'd)					
	NO.	DESCRIPTION	ID	AD	REJ
1					
2					
3	50.20	E-mail	426	426	
4	50.21	Letter dated 4/15/03	426	426	
5	50.22	Application draft 3/26/03	426	426	
6	50.23	Letter 4/30/03	426	426	
7	50.24	E-mail	426	426	
8	50.25	Application KVVPP 5/5/03	426	426	
9	50.26	Letter dated 5/7/03	426	426	
10	50.27	Letter dated 5/28-03	426	426	
11	50.28	Activities Application 1/28/03	426	426	
12	50.29	Memorandum dated 2/4/03	426	426	
13	50.30	Activities Application 6/16/03	426	426	
14	50.31	Memorandum dated 6/25/03	426	426	
15	50.32	Letter dated 7/2/03	426	426	
16	50.33	E-mail dated 8/20/03	426	426	
17	50.34	E-mail dated 10/7/03	426	426	
18	50.35	Letter dated 1/15/04	426	426	
19	50.36	KVVPP Draft EIS Chap. 1	426	426	
20	50.37	Excerpt from Act. Application	426	426	
21	50.38	Excerpt Act. App, 1/12/03	426	426	
22	50.39	EFSEC website 6/23/04	426	426	
23	50.40	Chapter 17.5 Forest, Range zone	426	426	
24	50.41	E-mail dated 1/29/04	426	426	
25	51.1	Response Darryl Piercy	435	435	

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A F F I D A V I T

I, Shaun Linse, CCR, Certified Court Reporter,
do hereby certify that the foregoing transcript
prepared under my direction is a true and accurate
record of the proceedings taken on September 19, 2006,
in Ellensburg, Washington.

Shaun Linse, CCR

CCR NO. 2029