

BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:)
 Application No. 2003-01)
 SAGEBRUSH POWER PARTNERS, LLC,) Adjudicative
) Hearing
 KITTITAS VALLEY WIND POWER PROJECT) Pages 774 - 838
 _____)

An adjudicative hearing in the above matter was held in the presence of a court reporter on September 21, 2006, at 9:10 a.m., at Kittitas County Fairgrounds, 512 North Poplar Street, Fine Arts Building, in Ellensburg, Washington, before Energy Facility Site Evaluation Councilmembers.

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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.

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

Reported by:

Shaun Linse, CCR No. 2029

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 RENEWABLE NORTHWEST PROJECT, Susan Elizabeth
 13 Drummond, Foster Pepper & Shefelman, PLLC, 1111 Third
 14 Avenue, Suite 3400, Seattle, Washington 98101-3299.

15 * * * * *

16 JUDGE TOREM: It's a little after 9:10 in the
 17 morning, Thursday, September 21, 2006, and we're ready to
 18 reconvene the Kittitas Valley Wind Power Project
 19 adjudication. It appears that this morning we're getting
 20 pretty close to taking all the scheduled witnesses.

21 Three preliminary matters before we get to
 22 the three witnesses that we have. I've been informed that
 23 the Applicant wants to make a stipulation as to shadow
 24 flicker. We'll take that in a little bit. We need to
 25 discuss the impacts of the windmill visibility and

1 property values study by Mr. Hoen that was requested and
 2 handed out to the parties yesterday. We want to talk
 3 about the post-hearing brief schedule and we also want to
 4 firm the final plans for this morning on our site visit.
 5 Again, the goal is to depart whenever the witnesses are
 6 done this morning. That can be as soon as ten o'clock and
 7 that depends I guess on how quickly we can get through
 8 preliminaries and the witnesses.

9 First, let me deal with this property values
 10 study on Madison County, New York. As the parties know it
 11 was handed out yesterday to review. It was requested by
 12 two of the Councilmembers as to make sure exactly what
 13 Mr. DeLacy was inferring from this report; and there were
 14 some discussions we had off the record as to is it really
 15 relevant, has he summarized it well enough, and are we
 16 hearing apples or oranges.

17 I talked to the Councilmembers yesterday just
 18 to see how much they wanted this to come in, how much they
 19 want another 60 some pages in the record, and they could
 20 do without it they decided and just be happy with the
 21 record as it is.

22 However, in talking to some of the other
 23 parties, it seems that there may be some questions now
 24 that they've read the report which they hadn't had the
 25 previous opportunity to do and might still be interested

1 in cross-examining Mr. DeLacy a few questions further.
 2 And that can be done one of two of ways, either by
 3 telephone at a session next week on the phone he may be
 4 available at a time on Wednesday that we can all agree on,
 5 and I'm informed that we may be able to do this through
 6 stipulated I don't know if it's called prefiled
 7 cross-examination such that the questions will be
 8 submitted to him in writing or they could have an
 9 off-the-record conversation and reduce it to writing and
 10 bring it in as some additional stipulation as what to the
 11 report says and doesn't say as far as distances from
 12 homes, turbines, how many turbines, etc. I'll let the
 13 parties sort that out later today.

14 But it appears to me, Mr. Hurson, why don't
 15 you tell me again if I've summarized your concerns
 16 adequately. In your review and Mr. Piercy's review you
 17 just want to make sure that the Council understands your
 18 position that perhaps the Hoen report doesn't apply as
 19 much. And if we bring it into the record, it would have
 20 to come in, and you could only ask those questions if it
 21 was in the record. You couldn't simply argue about it in
 22 your post-hearing because it's a fact not in evidence yet.

23 MR. HURSON: Yes. In looking at the report,
 24 and I guess since it's not already in the record, I won't
 25 go into some detail, but I think when he was testifying

1 the other day, I was reading just the number of turbines
 2 and the distances away as indicated in the report. I
 3 think they are pertinent to my client's concerns about the
 4 setback issues. So if you don't want to include it,
 5 that's fine. If you do, that's fine. But we would want
 6 to be able to cross-examine him on issues related to
 7 frankly primarily focus on the setback issues and those
 8 also interrelate to property value issues.

9 Frankly, one of the things as far as a
 10 stipulation, I don't know if the parties can just all get
 11 around and agree that it's this number of turbines and
 12 these kind of sales, and these kinds of distances; and if
 13 there's some way of doing that, it may eliminate the need
 14 for a phone conference. But if there's a phone
 15 conference, I would assume it would be very, very brief.

16 JUDGE TOREM: So I'll let you confer with
 17 Mr. McMahan and also Mr. Slothower because he had a dog in
 18 this fight too I think.

19 MR. SLOTHOWER: That's correct, Your Honor.
 20 I read it yesterday afternoon and last night. To the
 21 extent we reserved an objection yesterday to that coming
 22 in, we waive it. If Councilmembers want that in the
 23 record and want to be able to read it, it should come in.
 24 I don't anticipate having any questions for Mr. DeLacy on
 25 that document. I would like to participate in the phone

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1 conversation or the phone cross-examination if that occurs
2 because I did cross-examine Mr. DeLacy, and I don't know
3 what he'll say. So it's possible that based upon what he
4 says I may have an additional question or two, but I do
5 not anticipate any questions, any additional questions to
6 him based upon that document. That is our position.
7 JUDGE TOREM: Let me leave it at this and
8 have Mr. McMahan, Mr. Hurson, and Mr. Slothower all get
9 together and anyone else who may have cross examined
10 Mr. DeLacy, and you can talk this morning before we leave
11 on the site visit. We'll take a break and come back on
12 the record right before we leave I guess just to make sure
13 what the procedure is going to be.
14 If it's agreed that you can get a
15 stipulation in among the parties, a joint stipulation as
16 to the clarification of what wasn't said on yesterday's
17 cross-examination and it need not come into the record,
18 that's one option. If it comes into the record, there's a
19 phone session, that's the other extreme. If there's
20 something in between, I think Council is happy to be
21 available next Wednesday. There may be some
22 Councilmembers who can't be, and if that's the case they
23 will just review the transcript of that particular session
24 so they can participate in full deliberations on it.
25 Mr. McMahan, is that satisfactory?

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1 MR. McMAHAN: Well, let me just suggest that
2 hopefully we would resolve it right now. Let me just
3 suggest that again as we indicated yesterday there are a
4 great many studies cited in Mr. DeLacy's analysis, and
5 from what I've seen everything is on the internet anymore
6 so one could pull that up if one had seen that report and
7 cross-examined him.
8 I'm obviously sympathetic to the issues that
9 Mr. Hurson raised and what I would suggest if there's any
10 further need for Mr. DeLacy to explain the report and if
11 the Council wants to have it in the record, I would just
12 suggest that it would be done in writing and we'll have
13 Mr. DeLacy answer those questions in writing. I think
14 availability could be tough I think. At least I'm
15 catching up next week. If that's satisfactory, maybe we
16 can just put this one to bed.
17 JUDGE TOREM: Would you all be able to
18 agree, Mr. Hurson, on the sort the questions? Maybe
19 talked to McMahan at the break and make sure that it's to
20 exactly the points you're wanting to make.
21 MR. HURSON: Probably the simplest thing is
22 for us to just talk. I mean you send questions in writing
23 and since you never know what the answer is you don't know
24 what the follow-up question is.
25 JUDGE TOREM: I guess by action it is a

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1 joint stipulation that would come in as his clarification
2 of the report, and it will either be attached to the
3 report that you're submitting to the record. Again, the
4 Councilmembers have said they just have questions about it
5 and that that may clarify, this joint stipulation. Then
6 they don't have to read the whole 62 pages. And both
7 sides, again, I can safely say that you have different
8 ideas about the property value or setback impacts of this.
9 If the two of you have a joint stipulation that should
10 satisfy the Council they're getting the full issue, and
11 you can in that rather than that attached report itself,
12 and so as long as it comes in by Friday, the 29th, we're
13 good.
14 MR. McMAHAN: That's fine.
15 MR. HURSON: Frankly, we haven't had a
16 chance to talk. I think once we talk he will say, "Oh, is
17 that all?"
18 MR. McMAHAN: That's fine. That's fine.
19 That's reasonable. Thank you.
20 JUDGE TOREM: So we'll look for that. Tell
21 me hopefully later today if we need to schedule something
22 for next week, even if you need to tell me at the public
23 comment session tonight. But for right now we won't
24 schedule Mr. DeLacy unless you let me know and then as
25 soon as we know I can let Irina know to notify all the

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1 parties by e-mail and get that done.
2 So if there are parties here today that are
3 concerned about their availability, let Irina know before
4 the close of the morning session. She'll make sure that
5 it works for all the parties that are particularly
6 interested for any potential recross on Mr. DeLacy.
7 Moving onto the second item--did you have
8 something, Mr. Slothower?
9 MR. SLOTHOWER: Yes. Is the Council going
10 to assign an exhibit number for that report?
11 JUDGE TOREM: It will probably just be the
12 next one in DeLacy's supplemental testimony, but the
13 report has not been identified. It would probably be that
14 joint stipulation that I'm anticipating will be the only
15 new exhibit coming in.
16 MR. SLOTHOWER: Okay. Thank you.
17 JUDGE TOREM: So the report for right now is
18 proposed but not offered, if that makes sense.
19 MR. SLOTHOWER: It does.
20 JUDGE TOREM: All right. The second issue,
21 Mr. Peeples, you wanted to discuss the shadow flicker
22 issue?
23 MR. PEEPLES: Yes. Mr. McMahan and I are
24 going to present a stipulation. This has been something
25 that we've been working on, trying to kind of figure out

1 how to do all night. So we're going to do it together.
2 If he interrupts me and kicks me, just please bear with us
3 on that.

4 Just as background, we had proposed a basic
5 1,000-foot setback with regard to shadow flicker. We
6 thought that was adequate. With all due respect to the
7 County, they came back and asked for a 2,500-foot shadow
8 flicker setback having to do with what they thought would
9 take care of the shadow flicker problem. We came back and
10 said we don't think shadow flicker is an issue, and it's
11 not because we have assured calculation that would allow
12 us to know each minute on each day that the shadow flinger
13 could possibly happen on a residence. This is a
14 scientifically calculable thing, and if it's a problem,
15 then we said we would probably turn it off. In fact, we
16 said if it was an adverse impact we'll turn it off.

17 MR. McMAHAN: During the shadow event.

18 MR. PEEPLES: During that Shadow flicker.
19 And we thought in our minds that we don't agree with a
20 2,500-foot setback, but we're willing to do that for
21 anybody that has an adverse affect within 2,500 feet. And
22 I think the Council heard that, and I think the Council
23 questions they kind of to a certain extent related to the
24 same problem we were dealing with then: How do you define
25 what that is? And I think there was a question to Andrew

1 Young about, well, who would determine whether it's
2 significant and Andrew said to the Council it would be the
3 Council. And I'm sure you thought, "Well, thank you very
4 much for making us figure out what is significant." And
5 we didn't have an idea what's significant.

6 I think we kind of first slowly then kind of
7 immediate flashed in the mind I don't want to go there to
8 the determination of what is significant or not. I mean
9 because then we're back in adjudicative mode, and it has
10 to come back and there's not certainty to that. So what
11 we're essentially going to propose is to take care of
12 that. We're not admitting that there is a--with due
13 respect to the Council, we're not admitting a 2,500-foot
14 setback is a legitimate setback for our purposes. They
15 can still say it is. We respectfully disagree, but we
16 don't care.

17 MR. McMAHAN: As to shadow flicker.

18 MR. PEEPLES: As to shadow flicker within
19 2,500 feet. If any existing residence within 2,500 feet
20 of a turbine is hit with this shadow flicker, and I'm
21 talking about actually hit. If there's terrain in the
22 way, if there's trees in the way, if there's no line of
23 site, that's a different matter. I think it can be ground
24 truth at the time. But if there's any complaint by
25 landowners with regard to that, we're not going to get

1 into subjectivity to those complaints if they can see it.
2 I mean if it's hid by a tree on the residence or they
3 can't see it because there's a forest, which there's not
4 out there, we're not going to. I mean that's a loser for
5 every side and that's a loser for the Council. We're just
6 going to turn them off for those periods of time. The
7 only exception is if they really can't see that turbine
8 from that residence, and I'm interpreting residence in the
9 larger way from porch, from the window, outside or
10 whatever, from that general residence. It's just easier
11 for us to program in and dispatch that turbine at that
12 time.

13 So that's what our stipulation is, and I
14 think that it handles an objective way with some certainty
15 so we don't have to go in to make this subjective
16 judgment. I don't want any subjective judgments in here.
17 Somebody complains, that's fine. They can see it.
18 They're within 2,500 feet. I think that should accomplish
19 the County's purpose with regard to the 2,500 foot
20 setback, and I think with that stipulation with regard to
21 Mr. Neilson I think it's academic at this point except
22 that once we site the turbines, there will be some
23 micrositing; then we're going to have to do these analyses
24 again and then that will be available and so we will know.

25 JUDGE TOREM: Mr. Hurson, the County

1 response and then, Mr. Tribble, I want to hear from
2 Counsel for the Environment as well.

3 You look like where has this stipulation
4 been all my life?

5 MR. HURSON: That's about where I am.

6 JUDGE TOREM: Well, let's not go there. Can
7 you tell me if you're happy with that as to this issue?

8 MR. HURSON: I would have been happy with
9 this issue if they brought it up with my client because
10 this is the kind of discussion my client would want during
11 the public hearing process and we never saw.

12 JUDGE TOREM: Well, let's have them come
13 later this morning and hear it. I don't have anything
14 else I can do about that. Water under the bridge. We're
15 here today. Is this satisfactory for that issue?

16 MR. HURSON: Well, I don't--it's not
17 satisfactory to the issue because the County's issues is
18 they want to preempt all the local use on the basis of
19 good faith efforts and what we're seeing now is an effort
20 that should have been made during our hearings not at this
21 hearing. And the fact that they can make it in this
22 hearing, I think makes it clear that they could have made
23 it with my client, and that's inconsistent with the good
24 faith effort to resolve the issues with my client so it
25 doesn't satisfy any issues the County has.

1 JUDGE TOREM: Let me have you put that in
 2 the post-hearing brief, and I understand the difference of
 3 where negotiations breakdown and that's the County's
 4 definition of good faith, bad faith, the argument this
 5 Council is to decide. Put it in the briefs. Don't go on.
 6 It does reduce the issue ultimately wherever that happens
 7 before this body or before the Board of County
 8 Commissioners. That's all I wanted to get. It sounds
 9 like it does.

10 MR. HURSON: Well, the County issue is
 11 they're attempting to preempt us.

12 JUDGE TOREM: I understand that.

13 MR. HURSON: And anything short of them
 14 withdrawing a preemption issue does not satisfied the
 15 County issues.

16 JUDGE TOREM: I'm just drawing the
 17 distinction between process of who makes the decision and
 18 the ultimate what the decision is substance. I think the
 19 latter case is satisfied.

20 Mr. Tribble.

21 MR. HURSON: I might also the 2,500 foot
 22 setback my clients were talking about was more than shadow
 23 flicker, and I think he was trying to make it sound like
 24 this takes care of the 2,500 foot.

25 MR. PEEPLES: No, I was not saying that. I

1 one to put this into effect. We will put through proposed
 2 language and the Council can do whatever it desires.

3 MR. McMAHAN: Your Honor, I want to make
 4 sure that this record is clear about what Mr. Hurson just
 5 said so I'm sorry to keep beating this dead horse. But
 6 this Applicant it's in un rebutted testimony at this point,
 7 this Applicant did bring this up, this issue on operation
 8 and control. It did bring it up to County staff. We did
 9 put it in a letter that went directly to the Board of
 10 County Commissioners we can implement operation controls.
 11 Talk to us about that. We heard nothing back from the
 12 County, and I want that to be very clear on the record.

13 JUDGE TOREM: It's very clear that you heard
 14 nothing and they heard nothing, and I really don't want to
 15 hear anything more about it either today. We have this
 16 fun, exciting site visit to go on. So, again, gentleman,
 17 save it for the closing briefs and we'll sort it out as to
 18 the Council as to what was good faith because that appears
 19 to be where this issue is heading. I appreciate the offer
 20 for this morning.

21 Post-hearing brief schedules.

22 MS. ADELSMAN: Can we have a question on
 23 this?

24 MR. SWEENEY: Regarding the stipulation.

25 JUDGE TOREM: It's not in writing yet so I'm

1 specifically was not saying that. I limited it to shadow
 2 flicker.

3 JUDGE TOREM: All right Mr. Tribble,
 4 Counsel for the Environment's thought on this.

5 MR. TRIBBLE: This stipulation makes my
 6 questions regarding Mr. Nielsen's direct testimony
 7 unnecessary, but I do reserve based on any questions the
 8 Council has.

9 JUDGE TOREM: My understanding, Mr. Peeples,
 10 is that this stipulation would be captured in the
 11 application for site certification as a proposed and
 12 agreed mitigation measure that's going to be put in place
 13 from my understanding with you before when you had let me
 14 know this was coming. This would be something that it's
 15 essentially taking the ball away from the Council having
 16 to wrestle with the issue of shadow flicker and saying
 17 we're going to the most conservative view at the
 18 2,500-foot level of residences. We will stipulate that
 19 anybody that wants them off what we think clearly from the
 20 landscape has a clear view it will be off, and that will
 21 be reduced to writing and the appropriate terms for that
 22 in the post-hearing briefing and application for site
 23 certification.

24 MR. PEEPLES: That's correct, and the
 25 Council can use its own. The Council will be the ultimate

1 hesitant to do it. I'd rather that we save it for
 2 deliberations and trust that some application for site
 3 certification draft we get from the Applicant and the
 4 comments we get back from the responsive briefs from the
 5 other parties will give us enough to talk about and
 6 hopefully answer our questions. But as Mr. Peeples' said
 7 ultimately we make the decision as to what mitigation will
 8 be required if we're going to recommend that the site be
 9 built. So the stipulation is just there.

10 We are going to have Mr. Nielsen on about
 11 shadow flicker. He's the actual witness on it, and it may
 12 be appropriate to ask him questions about technical
 13 feasibility or otherwise what he's heard. He's in the
 14 room and knows about the stipulation and apparently worked
 15 on the technical feasibility of this with the Applicant
 16 since he arrived in town yesterday.

17 MR. PEEPLES: I do want to point out the
 18 technical feasibility on this thing has been unquestioned
 19 and we really don't go over it. You can do it. He can
 20 say you can do it. Andrew Young said could do it. It's
 21 in there. It's just programming your computer on your
 22 data system to shut it down on these times and it's
 23 predictable. So that's not an issue.

24 JUDGE TOREM: So let me encourage Council
 25 that it would be more appropriate to ask questions for an

1 evidentiary nature of a witness other than the arguments
 2 that we're hearing this morning about the stipulation and
 3 its intent.

4 Post-hearing briefs. Today will be the last
 5 day for the adjudication unless we schedule something with
 6 Mr. DeLacy next week. I'm hoping that will be minor. As
 7 Mr. Hurson has suggested that might not even be necessary.
 8 I've been informed that the transcript will be ready two
 9 weeks from when we close. So I'm going to indicate
 10 tomorrow is a travel day and Monday is the first workday
 11 on the transcript. So that would get us to Columbus Day,
 12 Monday, October 9. That's the first day the transcripts
 13 will be available, and from there there's two options.

14 In the past the Applicant was scheduled to
 15 file a brief first and then two weeks would go by and all
 16 of the responding parties would file their brief and then
 17 finally a reply brief or a final rebuttal brief would come
 18 in one week later from anybody who wanted to file one or
 19 anything they had. And those dates would come out as
 20 October 16, giving essentially three weeks from now and a
 21 week after if they got the transcript. Two weeks later
 22 the response briefs would be the day before Halloween on
 23 October 30, and then finally all the briefing will be in
 24 by Monday, November 6.

25 Prior to today's session beginning I talked

1 to some of the parties and they thought that perhaps with
 2 the transcript coming on the 9th everybody could file a
 3 joint brief, just one round of briefing, and that would be
 4 I presume 30 days essentially so October 23, and then two
 5 weeks later or one week later depending on what you wanted
 6 for rebuttal briefs could be done as soon as October 30, a
 7 week earlier than the other schedule.

8 So I wanted to see if people wanted a
 9 three-part briefing or a two-part briefing. But, again,
 10 the first briefs would be due by the Applicant the 16th,
 11 response briefs the 30th, reply briefs the 6th of November
 12 or a joint briefing. Everybody's briefs due on October 23
 13 and everybody's rebuttal due a week later after they've
 14 read each other's briefs on October 30.

15 MR. PEEPLES: Your Honor, I mean we talked
 16 with Mr. Slothower and I think it's more efficient. I
 17 don't have a real big document planned, but I think it's
 18 far more efficient to maybe I want people to have enough
 19 time. We figure 30 days from what, Mr. Slothower?

20 MR. SLOTHOWER: We did have an opportunity
 21 to discuss this and I believe that the two-brief approach
 22 is much more efficient and there's also less trees being
 23 cut down.

24 JUDGE TOREM: Would the October 23 date be
 25 sufficient?

1 MR. PEEPLES: I think the Applicant I
 2 probably share their concerns about the timing on that
 3 because the transcript will be coming in. It's going to
 4 take some time to read it, and we had talked about 30 days
 5 from the date the transcript was available, but I
 6 understand that that's the Council's discretion. I think
 7 that given the issues that have been presented an extra
 8 week to put these arguments together and put them in
 9 writing doesn't harm the process since it's the Council's
 10 desire to have a decision sooner rather than later.

11 JUDGE TOREM: So your proposal would be to
 12 make it essentially on October 30. I talked to Ms. Linse
 13 and she indicates that you won't get the transcript all in
 14 one wallop. I guess that gives the UPS guy a little bit
 15 of problems. But she's going to be getting this out in
 16 pieces to you and so it would all be done by on or before
 17 October 9. My guess is probably a couple days ahead of
 18 that. But if we make it October 30, if everybody agrees
 19 that gives you three weeks with a full transcript and
 20 probably more than a month with strips and scraps of it.

21 MR. SLOTHOWER: That's more than fair.
 22 Again, I like the idea of everybody files one brief on a
 23 given day and then whatever time later the response briefs
 24 are done and then it's submitted.

25 MR. PEEPLES: I think two weeks. I think

1 people at least need two weeks, don't you think, to
 2 respond?

3 JUDGE TOREM: Mr. Hurson, what's the
 4 County's thought? You probably have a busy, busy schedule
 5 with the rest of your clientele. What's the earliest you
 6 think you can file a brief and which style do you like?

7 MR. HURSON: Well, frankly, I think the
 8 three-part one actually burns less trees up because what
 9 it would be is the Applicant only filing on October 16,
 10 and I think it helps the briefing from the County's
 11 briefing on preemption if I understand all of the
 12 Applicant's issues when we prepare our response brief. If
 13 we're unclear on what they are, frankly, I think my
 14 initial brief will probably be bigger rather than smaller.
 15 And so I think the three-part one actually there's no more
 16 briefs. The Applicant just does the first one, October
 17 16. Everyone else does one on a response a few weeks
 18 later.

19 So everybody would still be given two
 20 briefs. It's just a matter of the Applicant submitting
 21 their brief in advance of everyone else's so we can focus
 22 our energies. So that would be my preference to do that,
 23 and I would think if my response brief is due October 30,
 24 that's fine. And then I would think reply it would be
 25 nice to have more than one week.

1 Frankly just because of the volume, and I
2 don't know what all the other intervenors are going to
3 say. It's not going to be your traditional all I have to
4 do is reply to. The reply is really the response to all
5 the other intervenors and that could be rather extensive.
6 So I would suggest a three-part one. Only allow the reply
7 briefs perhaps two weeks instead of one week.

8 JUDGE TOREM: When I look back and we have
9 Counsel Order 801, which is our previous order on
10 post-hearing schedule events, and that's where the
11 three-part brief came in. I think that's probably what we
12 did in Wild Horse, and staff, correct me if I'm wrong,
13 that maybe the general pattern of what we've done in the
14 past for these contested site certification drafts.

15 I agree with you, Mr. Hurson, it might
16 actually be easier for the Council to see the issues come
17 in in that order because you get a draft site
18 certification agreement, everybody gets it, and has a few
19 weeks to look at it. So from the Applicant's perspective
20 I know, Mr. Peeples, you've been able to get the draft
21 site certification agreement to us reasonably quickly. I
22 don't know how much they're depending on the argument in
23 the transcript. Perhaps for the argument in the
24 preemption they will be, but beyond that I'm not so sure
25 the other issues other than Mr. Priestley's view shed

1 issues and now with the stipulation for shadow flicker
2 that that will be that intense as far as laying them out.

3 MR. PEEPLES: If we're going that way,
4 October 23 was not working for us.

5 JUDGE TOREM: What day would you be able to
6 file?

7 MR. PEEPLES: Tim, I don't have a calendar
8 in front of me, but--

9 MR. McMAHAN: Tim McMahan for the record.
10 If we have transcripts on the 9th. First of all, I would
11 just request that the court reporter maybe if we could
12 have the transcript of the adjudicative hearing before the
13 public hearings.

14 JUDGE TOREM: Clearly.

15 MR. McMAHAN: But I still would say if we're
16 going to go in that mode, then we're moving a lot more and
17 I think we all agree we need the transcript to even really
18 be able to do much work on the brief. So I would suggest
19 that the opening brief then be at the end of August. I
20 don't know what the day is.

21 MR. PEEPLES: October.

22 MR. McMAHAN: I believe it's the 30th.
23 Excuse me. August--at the end of October. And then I
24 don't know if it's two or three weeks or whatever for the
25 response and then a two-week reply I think would be

1 sufficient. I mean ten days would be sufficient, and
2 that's fine. Frankly, I think the three-brief mechanism
3 is better for the Applicant. So in terms of that, as long
4 as the timing's okay, we're fine with three weeks.

5 JUDGE TOREM: Okay.

6 MR. McMAHAN: We thought that the
7 simultaneous exchange was probably more in taking the part
8 of the other parties.

9 MR. PEEPLES: I just want to say I think the
10 two-part is better for efficiency. I think the Applicant
11 was giving up the hammer so we don't care on that. You
12 want to go on three part and give us the hammer, that's
13 fine.

14 MR. McMAHAN: And we'll take it.

15 MR. PEEPLES: Yes, we'll take it.

16 JUDGE TOREM: What I'm hearing then is the
17 schedule that I'll just put out with the general
18 acclamation. If this is unacceptable to anybody, let me
19 know. The transcript October 9. The Applicant having
20 three weeks until then October 30 to get a draft site
21 certification agreement and accompanying brief in. The
22 respondents then, Mr. Hurson, you and the rest of the
23 parties would have until two weeks after that. That is
24 November 13 and then the reply briefs I would give it one
25 week because of the pending Thanksgiving Holiday on

1 November 20. The Council would then have a chance over
2 the holidays to have all the briefs and come back and do
3 the deliberations.

4 We had thought we might have one preholiday
5 session deliberative day and talk about things and know
6 which way we're going and then finishing deliberations in
7 late November, early December. It looks like we'll just
8 go ahead and shift the deliberations to late November,
9 early December dates and do it all at once and hope to
10 come back.

11 One concern, and I don't think it's
12 particularly impacted by the brief schedule, is that
13 Councilmember Towne and her designation by Fish and
14 Wildlife ends at the end of the year. So when we get the
15 decision out, whatever it is, I believe that any
16 reconsideration period that would occur under the APA
17 rules and our own rules, whatever the decision recommends
18 to the Governor might be, that reconsideration period
19 would probably not end until January of 2007; and it
20 wouldn't be until that point at the earliest where this
21 could be forwarded to the Governor for her decision, and I
22 don't believe anybody has taken less than 60 days as
23 authorized to go through this record and make sure that
24 they follow, modify, or otherwise ignore the Council's
25 recommendation.

1 So we're talking at the time it's all
2 officially said and done Councilmember Towne will have
3 long past her term on the Council and will have to
4 negotiate a specific contractual agreement, and the Chair
5 is telling me with his persuasive authority with Fish and
6 Wildlife we can get her back for what we need.

7 I think that's all the procedural issues as
8 to post-hearing briefs. So we'll issue another order
9 briefly next week. As to the order for post-hearing
10 schedule of events I will have those dates October 9 for
11 the transcript as anticipated, October 30 for the
12 Applicant's brief, and November 13 for respondents', and a
13 reply brief for anyone who wants to file one no later than
14 November 20.

15 MR. HURSON: I have a question, if I could.
16 If I understood it, the Applicant as part of their closing
17 brief is going to submit a draft site certification
18 agreement?

19 JUDGE TOREM: That's correct. It's required
20 I believe under Revised Code 80.50.100(1) that that's the
21 format for the site certification agreement, and it's been
22 the tradition of the Council to request from the Applicant
23 in a rather optimistic fashion to submit to us their draft
24 site certification agreement, and if the Council
25 recommends going forward, at least all the parties know

1 what conditions are being suggested and agreed to
2 otherwise, and then the Council tweaks that. That's what
3 we did in the Wild Horse case.

4 MR. HURSON: I guess it's just if it's now
5 being done for the first in briefing, then it somewhat
6 makes me feel like I'm put in a disadvantage that we
7 didn't have a proposed draft site certification agreement
8 to work off during our entire adjudicatory hearing.

9 JUDGE TOREM: You had an application for
10 site certification to begin.

11 MR. HURSON: Right. Well, I understand
12 that.

13 MR. PEEPLES: It's been that way for
14 approximately 33 years; so it's always the Applicant will
15 submit a brief, proposed findings of facts and conclusions
16 of law and proposed order and proposed SCA, and it's been
17 done that way forever.

18 JUDGE TOREM: Let me just say that if you go
19 back to Council Order 801, that's how we were going to do
20 it two years ago so it's nothing new.

21 The last issues this morning before we get
22 to the witnesses is the project site tour, the driving
23 directions. I believe all of you had a chance to look at
24 these eight locations that the Council will be visiting,
25 and I want to find out who's going this morning and also

1 let you know that as far as the Elk Spring Road stop
2 there's been one added direction suggested; that when we
3 go past the gate up the gravel road, it's suggested that
4 the directions to the Council be that they stop before the
5 the power lines at the gate and take in a territorial view
6 there while the gate is being unlocked and then proceed up
7 the road to wherever the final stop is going to be. So
8 that's the only added suggestion of getting that
9 territorial view from the gate and then another view again
10 at the top. Remember that on this there are no directions
11 saying look south, look west. Simply it's going to be
12 Councilmembers will have their map looking at where the
13 proposed turbines are and looking at those directions
14 specifically from wherever they're standing and then be
15 able to look around in the general area and take terrain
16 pictures.

17 Who is going to accompany the Council on the
18 tour this morning?

19 Mr. Hurson's going.

20 Are any others?

21 MS. ANDERSON: Your Honor, Ms. Potter and I
22 will be following along.

23 JUDGE TOREM: All right. Ms. Potter and
24 Ms. Anderson, you're going to go as well.

25 There were a couple of rumors last night

1 that other members of the public would be coming, and I
2 just wanted to know if they're here. I don't see the
3 folks I was looking for.

4 MS. STRAND: Your Honor, I may go.

5 JUDGE TOREM: All right. Ms. Strand may go
6 as well.

7 What we're going to do is make sure it's in
8 the record who was on the tour. Ms. Makarow and
9 Mr. Fiksdal will put down an attendance roster, clip it to
10 this copy of directions that goes into the record, and
11 from there it will just be noted as to who was officially
12 on the tour. If there are other hangers on parts of it,
13 we're not going to be talking to folks about the EFSEC
14 process or about the valley other than people will be out
15 there. That's all that will be occurring.

16 Some of the Councilmembers asked because
17 they like views out there if they could take some
18 photographs, and I told them that as long as those
19 photographs are not used in deliberations, as long as
20 those photographs are not referenced again as part of it
21 making their decision, I don't have a problem with it; and
22 I trust the discretion of Councilmembers who are just
23 nature lovers that want to take some pictures of a place
24 that they might not otherwise get back to. That's fine.

25 But if you see cameras out, that's the

1 purpose. We're not adding to the record. We're not
 2 getting our own view shed simulations. It's
 3 Councilmembers who assured me they'll put those
 4 photographs aside. They won't be at deliberations, I'll
 5 assure you of that, and that they won't be referring to
 6 them until this matter is done.

7 Any objections to the tourist nature of the
 8 visit for some of the members?

9 Seeing none, I think that we're done with
 10 the preliminaries for this morning.

11 Mr. Nielsen, if you're here, come up to the
 12 witness table.

13 While you're getting seated, Mr. Garrett, is
 14 Mr. Carmody going to be here this morning?

15 MR. GARRETT: No, he isn't.

16 JUDGE TOREM: Then I take it that his
 17 questioning of Mr. Nielsen, Mr. Clausing, and Troy
 18 Gagliano will be waived.

19 MR. GARRETT: I would like to reserve
 20 comment if anything comes up appropriate.

21 JUDGE TOREM: Okay. He's the registered
 22 lawyer to do this, and because of the nature of this
 23 proceeding I'd rather have lawyers asking questions and he
 24 has been here before. If you have something you want
 25 asked, if you could work it out with Mr. Hurson or Counsel

1 for the Environment as other designated cross-examiners by
 2 handing them a note, and then they would be able to step
 3 in just as Mr. Slothower did on ROKT's behalf.

4 MR. GARRET: Is it okay if I ask
 5 Mr. Slothower?

6 JUDGE TOREM: He's not scheduled to do that
 7 so I want to keep the designated lawyers. I don't think
 8 that Mr. Tribble or Mr. Hurson would be too troubled to
 9 look at your questions and ask them on your behalf.

10 (Arne Nielsen sworn on oath.)

11 ARNE NIELSEN,
 12 being first duly sworn on oath,
 13 testified as follows:

14

15 DIRECT EXAMINATION

16 BY MR. PEEPLES:

17 Q. Mr. Nielsen, you have submitted two exhibits.
 18 The first one was Exhibit 40 which was your shadow flicker
 19 analysis with regard to the original layout and the second
 20 was Exhibit 40-SUP which was your shadow flicker analysis
 21 with regard to the layout that was changed I guess in
 22 2005, fall of 2005; is that correct?

23 A. That's correct.

24 (Exhibit No. 40.0, 40.1, 40.2, and 40-Sup
 25 identified for the record.)

1 Q. Now, you were here and heard the stipulation
 2 this morning; is that correct?

3 A. Yes.

4 Q. After hearing that stipulation would you be
 5 able to add anything to your testimony or the questions of
 6 the Council regarding the technical feasibility? I
 7 believe those questions were out there whether or not you
 8 could predict with accuracy from the position of the
 9 turbine wherever that ends up being to the residence and
 10 be able to program into this data system to dispatch which
 11 I believe would be the right word that computer operation
 12 during those specific times of shadow flicker. Could you
 13 add that to this testimony, please.

14 A. Yes. You want me to explain it?

15 JUDGE TOREM: Mr. Nielsen, could you speak
 16 more directly into the microphone.

17 A. The modern wind farms they're controlled by
 18 essential computer systems and they shut down turbines by
 19 commands and this command would be a simple timer derived
 20 from a model like the model I've been running that tells
 21 exactly what time the shadow will hit the residence and
 22 for how long a time it will be there.

23 The only additional input to the system would
 24 be whether the sun is shining or not and those kind of
 25 sensors are available also. So it's not necessary to shut

1 the turbine down if the sun is not shining and it's a
 2 cloudy day.

3 MR. PEEPLES: I think our stipulation we're
 4 not going to let the sun decide. Okay? It's down. Okay?

5 JUDGE TOREM: All right.

6 MR. PEEPLES: It's not a big deal.

7 JUDGE TOREM: I'll wait to see what you're
 8 recommending, but I understand the technical parts
 9 Mr. Nielsen is testifying to.

10 MR. PEEPLES: With that addition of his
 11 testimony, I move the entry of his testimony.

12 JUDGE TOREM: Councilmembers, you have
 13 before you with additional explanation as to the
 14 stipulation you heard about this morning and you will see
 15 in writing later on Exhibit 40 and Exhibit 40-SUP and
 16 supporting exhibits. All those in favor of moving them
 17 into the record?

18 COUNCILMEMBERS: Aye.

19 JUDGE TOREM: Any opposed?
 20 (Exhibit No. 40.0, 40.1, 40.2, and 40-Sup
 21 admitted into evidence.)

22 JUDGE TOREM: All right. Mr. Nielsen, stay
 23 here for a minute. I'm going to see, Mr. Tribble, do you
 24 want--

25 MR. TRIBBLE: Reserve.

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1 JUDGE TOREM: The County, Mr. Hurson, any
2 questions at this time?
3 MR. HURSON: I was going to ask questions,
4 but I think I'll just reserve for argument.
5 JUDGE TOREM: Okay. Councilmembers, any
6 questions for Mr. Nielsen on the submitted testimony?
7 Councilmember Wilson?
8 MS. WILSON: No.
9 JUDGE TOREM: Councilmember Adelsman?
10 MS. ADELSMAN: No.
11 JUDGE TOREM: Councilmember Towne?
12 MS. TOWNE: No.
13 JUDGE TOREM: Councilmember Johnson?
14 MS. JOHNSON: No.
15 JUDGE TOREM: Fryhling?
16 MR. FRYHLING: No.
17 JUDGE TOREM: Sweeney?
18 MR. SWEENEY: No.
19 JUDGE TOREM: And Chairman Luce?
20 CHAIR LUCE: No.
21 JUDGE TOREM: Well, that was quite easy this
22 morning, Mr. Nielsen. Thank you. We'll look for
23 Mr. Peeples to submit the full explanation of the
24 stipulation. Thank you, sir, for your visit to the
25 valley.

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1 Ted Clausing. Councilmembers, if you're
2 looking to switch binders, it's Exhibit 71.
3 Good morning, Ms. Drummond.
4 MS. DRUMMOND: Good morning.
5 JUDGE TOREM: Council, you should have in
6 front of you exhibit I believe it's 71-R and 71-R-SUP.
7 Ms. Drummond, were there any other exhibits?
8 MS. DRUMMOND: Just the ones that he had
9 entered previously. I think it was 71-R 1 through 3.
10 JUDGE TOREM: Those are the supporting
11 exhibits.
12 MS. DRUMMOND: Right, for Ted Clausing.
13 JUDGE TOREM: And then supplemental
14 testimony that came in as well I believe.
15 MS. DRUMMOND: Yes, yes. And that did not
16 have any exhibits attached to that.
17 (Exhibit Nos. 71.0-R, 71.1-R 71.2-R 71.3-R
18 and 71-R-SUP identified for the record.)
19 (Ted Clausing sworn on oath.)
20 JUDGE TOREM: Ms. Drummond, if you go
21 through that testimony with him.
22 MS. DRUMMOND: Yes.
23 TED CLAUSING,
24 being first duly sworn on oath,
25 testified as follows:

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1 DIRECT EXAMINATION
2 BY MS. DRUMMOND:
3 Q. I don't have any questions, but,
4 Mr. Clausing, if you could state your name and address for
5 the record.
6 A. Ted Clausing, 1300 Pleasant Valley Road in
7 Yakima.
8 Q. And your work title with the Washington State
9 Department of Fish and Wildlife?
10 A. Regional Wildlife Program Manager in Region
11 3.
12 Q. And the testimony that you have submitted is
13 accurate?
14 A. Right.
15 Q. Your title has changed or would that be the
16 only clarifying thing?
17 A. Correct. My job changed from about a year
18 from Regional Habitat Program Manager to Regional Wildlife
19 Program Manager.
20 Q. With the Washington State Department of Fish
21 and Wildlife?
22 A. Still with the Department of Fish and
23 Wildlife.
24 MS. DRUMMOND: I would move unless there are
25 questions to enter Mr. Clausing's testimony and the

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1 exhibits that were referred to.
2 JUDGE TOREM: All right. Are there any
3 objections to Mr. Clausing's testimony?
4 Seeing none, Councilmembers, Exhibit 771-R
5 and it's supporting exhibits and 71-R-SUP are now before
6 you. All those in favor of entering them into the record
7 say aye.
8 COUNCILMEMBERS: Aye.
9 JUDGE TOREM: Any opposed?
10 All right. Those are part of the record.
11 (Exhibit Nos. 71.0-R, 71.1-R 71.2-R 71.3-R
12 and 71-R-SUP admitted into evidence.)
13 JUDGE TOREM: Mr. Clausing, I believe that
14 the designated time for cross-examination was reserved by
15 Counsel for the Environment, if I find the right piece of
16 paper again, and, yes, by ROKT. And I see that
17 Mr. Garrett did move up to talk to Mr. Tribble about any
18 questions he might have.
19 Mr. Tribble.
20 MR. TRIBBLE: On behalf of Counsel for the
21 Environment I will reserve any questions I have pending
22 questions and answers from the Council.
23 JUDGE TOREM: You don't have any questions,
24 Mr. Garrett, that you want to ask at this time?
25 MR. GARRETT: No.

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1 JUDGE TOREM: So I'm going to defer to
 2 Councilmembers then.
 3 Councilmember Johnson?
 4 MS. JOHNSON: No.
 5 JUDGE TOREM: Fryhling?
 6 MR. FRYHLING: No.
 7 JUDGE TOREM: Mr. Sweeney?
 8 MR. SWEENEY: No.
 9 JUDGE TOREM: Councilmember Wilson?
 10 MS. WILSON: No.
 11 JUDGE TOREM: Ms. Adelsman?
 12 MS. ADELSMAN: No.
 13 JUDGE TOREM: Ms. Towne?
 14 MS. TOWNE: Mr. Clausing, we have heard
 15 comments from the public throughout this process about
 16 bats. When I went through the Wind Power Wildlife
 17 Guidelines of WDFW, I found a couple of references to
 18 bats. One was under the heading of "Minimization of
 19 Wildlife Impacts," a recommendation to minimize the use of
 20 lights because they may attract flying wildlife. Is a bat
 21 a flying wildlife form?
 22 THE WITNESS: Yes.
 23 MS. TOWNE: And the second place was under
 24 operational monitoring and it was a discussion in the
 25 guidelines of the TAC reviewing the monitoring and

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1 recommending adjustments as it gives an example: It may
 2 include additional monitoring or research focused to
 3 understand the identified impacts, e.g., bats.
 4 Other than that, I saw no other mention of
 5 bats either in your testimony or in the guidelines. Is
 6 there a resident population? Are there migratory
 7 populations passing through? What can you tell me about
 8 bats?
 9 THE WITNESS: That would be more residents,
 10 a small amount of residents and migrants. In most wind
 11 projects it's the migrants that are interactive with the
 12 turbines. So the TAC is the way that we address that.
 13 It's unknown what would be found when they monitor, but
 14 the TAC is an organization that would receive that
 15 information and suggest how to adapt to whatever is found.
 16 MS. TOWNE: In your work have you come
 17 across a reasonable, feasible means of evaluating bat
 18 populations?
 19 THE WITNESS: No, I haven't personally, and
 20 we discussed it quite a bit in developing the guidelines,
 21 and there was not a real sort of accepted state-of-the-art
 22 procedure at that time that seemed feasible. I haven't
 23 followed whether there's any developed since then.
 24 MS. TOWNE: We have heard no evidence that
 25 there is something now that wasn't available, what, four

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1 or five years ago when the guidelines were adopted?
 2 THE WITNESS: Right.
 3 MS. TOWNE: Another area that has been
 4 brought up by commentators as recently as last night is
 5 raptor migration, and on page 4 in the guidelines you say,
 6 "If a site has unique characteristics such as high raptor
 7 use, additional surveys may be required."
 8 To your professional knowledge is this area
 9 a raptor migratory route?
 10 THE WITNESS: Not that we've documented or
 11 have documented, no. I mean they migrate in broad areas,
 12 so, no.
 13 MS. TOWNE: We're talking a concentrated
 14 number moving the nest.
 15 THE WITNESS: No, no.
 16 MS. TOWNE: That's all I have.
 17 MS. ADELSMAN: I have a quick follow-up
 18 question.
 19 JUDGE TOREM: Councilmember Adelsman, if
 20 you'd grab the microphone.
 21 MS. ADELSMAN: Yes. Just follow-up question
 22 too. Yesterday we heard also from I believe from the
 23 Audubon speaker that they requested I believe about a
 24 couple years--to design a study for like a year, at least
 25 a year study to see both relating to the birds and the

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1 bats. Could you actually design a study and get some
 2 information before the project is built to get an idea of
 3 what the real mortality could be or I mean simulate or do
 4 something?
 5 THE WITNESS: The guidelines describe that
 6 the standard protocol to do one season, sort of a spring
 7 or summer season surveys for birds. It's not designed for
 8 bats. It's a breeding bird survey basically to let you
 9 know what the local population is. That was done.
 10 MS. ADELSMAN: You said that was done?
 11 THE WITNESS: That was done by the
 12 consultants.
 13 MS. ADELSMAN: By the Applicant? Thank you.
 14 MS. WILSON: I have a follow up. Good
 15 morning. This is a follow up to the question about the
 16 migration zone. You said we haven't identified a
 17 migration zone so I'm assuming you're meaning Fish and
 18 Wildlife has not identified a migration zone.
 19 THE WITNESS: Right.
 20 MS. WILSON: Apparently the Audubon Society
 21 has identified a migration zone and you work with that
 22 organization?
 23 THE WITNESS: Right. I don't know how many
 24 miles it is, but Table Mountain north of the project
 25 there's a known raptor viewing area there of migrations,

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1 but it's not at the project site. It's a high point of
2 the landscape up in the National Forest.
3 MS. WILSON: Their assertion is that these
4 windmills will be in the way. So are you saying that's
5 not the case given the migration zone is above that?
6 THE WITNESS: I don't have any information
7 that they come right down through there.
8 MS. WILSON: Thank you.
9 JUDGE TOREM: Councilmembers, any other
10 questions for this witness?
11 Mr. Tribble, Mr. Garrett, any questions come
12 to mind in cross?
13 MR. TRIBBLE: Could I have a minute?
14 CROSS-EXAMINATION
15 BY MR. TRIBBLE:
16 Q. If this project is built and if a particular
17 turbine or string or group, cluster ends up having what
18 the Council, TAC, or what environmental monitor believes
19 to be a significant amount of raptor kills, what do you
20 believe the next step should be?
21 A. I think the only provisions in the guidelines
22 are for the TAC to consider that information and then to
23 come back to this body and look at the variety of
24 information and make recommendations. As an agency we
25 didn't answer that question.

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1 MR. TRIBBLE: Thank you very much.
2 JUDGE TOREM: Mr. Clausing, if the TAC
3 recommends shutting turbines down during raptor migration
4 season, would that be something consistent with the avian
5 protection that your agency is looking to achieve?
6 THE WITNESS: I think that goes beyond what
7 the guidelines had. Shutting down or relocating turbines
8 was something that was sort of beyond the guidelines
9 again.
10 JUDGE TOREM: Okay. Councilmembers, any
11 other questions on that?
12 Any other recess?
13 Mrs. Drummond, did you want to have any
14 redirect at this point?
15 MS. DRUMMOND: No, I don't think I have
16 anything further.
17 JUDGE TOREM: Thank you, Mr. Clausing. You
18 are excused.
19 The next and our last witness is Troy
20 Gagliano.
21 Ms. Drummond, I note in the record that you
22 substituted Mr. Gagliano's testimony when Ms. Sonja Ling
23 became unavailable so I wanted to know what Renewable
24 Northwest Project, your client's intention was with regard
25 to Exhibit 70 which was her testimony, and there was two

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1 supporting exhibits, clearly a resume 70-1 to go with
2 testimony, and Mr. Gagliano put in his resume as well. On
3 Exhibit 70-2, these are the Washington Fish and Wildlife
4 baseline and monitoring studies. Would you like that
5 ten-page document as a substantive exhibit that was not
6 reoffered for Mr. Gagliano's testimony? But if he is
7 going to be sponsoring that today, we need to be put on
8 notice.
9 MS. DRUMMOND: Yes. We've intended the WDFW
10 guidelines to be included in the record as an exhibit.
11 That was 70-2 as located as Sonja Ling to put forward.
12 Mr. Gagliano assumed Sonja Ling's responsibilities which
13 is the reason for the substitution.
14 JUDGE TOREM: He's not going to sponsor her
15 prior testimony in the record but his own instead; is that
16 right?
17 MS. DRUMMOND: Well, he would be referring
18 to that testimony as stated is accurate, of course. He's
19 not Sonja Ling, but in terms of what she stated about wind
20 energy, he would refer to that testimony. That was our
21 intention.
22 JUDGE TOREM: So it would be then with that
23 reapplication, Exhibit 70 and it's supporting exhibits and
24 Exhibit 72-SUP, and let me see if there's anything else
25 attached to that. There are five different supporting

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1 exhibits with that?
2 MS. DRUMMOND: That's correct. There were
3 five and then we had made a correction to the map that I
4 believe was Exhibit TG-5.
5 JUDGE TOREM: So, Councilmembers, just so
6 you understand, when I swear in Mr. Gagliano, he's not
7 only going to be sponsoring his own testimony, 72-SUP, but
8 also Sonja Ling's testimony that was prefiled in 2004,
9 Exhibit 70 and it's supporting exhibits which include a
10 resume and include the WDFW guidelines.
11 Mr. Gagliano, I'll swear you in, we'll get
12 through that, and then I'll ask if the parties have any
13 objections.
14 (Exhibit Nos. 70.0 through 70.2, 72 SUP, and
15 72.1 through 72.5 identified for the record.)
16 (Troy Gagliano sworn on oath.)
17 JUDGE TOREM: Ms. Drummond.
18 TROY GAGLIANO,
19 being first duly sworn on oath,
20 testified as follows:
21
22 DIRECT EXAMINATION
23 BY MS. DRUMMOND:
24 Q. Mr. Gagliano, could you state your name and
25 address for the record.

1 A. Troy Gagliano and my business address 917
2 Southwest Oak Street, Suite 303, and it's Portland, Oregon
3 97205.

4 Q. Is the testimony that Ms. Ling had submitted
5 for RNP and that you have also submitted is that still
6 accurate?

7 A. Yes, it is.

8 MS. DRUMMOND: Those are the only questions
9 I have. I would move to enter Mr. Gagliano's testimony
10 and Ms. Ling's previously submitted testimony and exhibits
11 that we discussed exhibits into the record.

12 JUDGE TOREM: Parties, any objections?

13 Seeing none, Councilmembers, you have before
14 you Exhibits 70 and its supporting exhibits, Exhibit
15 72-SUP and it's supporting exhibits a motion to enter into
16 the record. All those in favor?

17 COUNCILMEMBERS: Aye.

18 JUDGE TOREM: Any opposed?

19 All right. Ms. Ling and her supporting
20 testimony and Mr. Gagliano and his supporting testimony is
21 now in the record.

22 (Exhibit Nos. 70.0 through 70.2, 72 SUP, and
23 72.1 through 72.5 admitted into evidence.)

24 JUDGE TOREM: Cross-examination has been
25 reserved by the County and Counsel for the Environment.

1 Mr. Hurson?

2 MR. HURSON: No questions.

3 JUDGE TOREM: Reserve that.

4 Mr. Tribble?

5 MR. TRIBBLE: Reserve.

6 JUDGE TOREM: Mr. Garrett, did you have any
7 questions you wanted on behalf of ROKT at this time for
8 Mr. Gagliano?

9 MR. GARRETT: Not at this time.

10 JUDGE TOREM: Councilmembers?

11 Ms. Wilson?

12 MS. WILSON: No.

13 JUDGE TOREM: Ms. Adelsman?

14 MS. ADELSMAN: No.

15 JUDGE TOREM: Ms. Towne?

16 MS. TOWNE: No.

17 JUDGE TOREM: Ms. Johnson?

18 MS. JOHNSON: No.

19 JUDGE TOREM: Mr. Fryhling?

20 MR. FRYHLING: No.

21 JUDGE TOREM: Mr. Sweeney?

22 MR. SWEENEY: No.

23 JUDGE TOREM: And Chair Luce?

24 CHAIR LUCE: No.

25 JUDGE TOREM: An easy morning for you,

1 Mr. Gagliano. You are excused. Thank you for coming and
2 being available this morning.

3 THE WITNESS: You're welcome.

4 JUDGE TOREM: That exhausts the list of
5 witnesses for this morning's adjudication so the last
6 thing we're going to do is we're going to take a break
7 until 20 after 10:00. I'll come back and see if there's
8 anything else that the parties want to put on the record
9 before we close the adjudication, and I may even have a
10 note from the parties on what we're going to do about the
11 Hoen Report and Mr. DeLacy.

12 If counsel could take these ten minutes to
13 discuss those issues, we will come back and have one final
14 discussion on the record, and then we'll schedule the site
15 visit to leave shortly thereafter. We'll be in recess for
16 ten minutes.

17 (Recess taken.)

18 JUDGE TOREM: All right. It's 10:20. We
19 are back on the record for our last session in the
20 adjudication. A couple clarifications have come up during
21 the break.

22 I've been asked about filing of the briefs
23 scheduled and to confirm that those are not delivery of
24 the hard copy, but to give everybody the most flexibility,
25 electronic filing will satisfy those dates so long as it's

1 by close of business on those dates. It also came to my
2 attention that some of you are neglecting to make sure the
3 e-mail addresses are all correct in your bulk mails. So
4 I'd like to make sure of that and have your staff follow
5 up somehow with return receipts or somehow to get those
6 e-mails done and ensure it gets to all the parties. I'll
7 just instruct those parties that if they think they've
8 been neglected somehow or have the wrong e-mail address,
9 please send a note out to the parties, all the parties
10 now, and say this is the e-mail address to use for the
11 filing of briefs.

12 Ms. Makarow will have those briefs by five
13 o'clock the days given, and if for some reason you don't
14 have it, she'll be happy to forward you the copy that
15 proved it was timely filed and hopefully get it to you
16 without any prejudice in time.

17 MR. PEEPLES: Could I have a clarification,
18 Your Honor? Are they still going to file them at EFSEC on
19 that given date but just not served, or are we just
20 talking about electronic filing meets all conditions for
21 the date of filing?

22 JUDGE TOREM: We're going to continue to
23 file everything as we have been with the hard copies
24 because that will allow for the distribution to the
25 Council and the rest. But also if you want to worry about

1 what day to get it served all around the nation here, get
2 it served electronically and then the subsequent delivery
3 can go there.

4 If somebody else wants to waive their hard
5 copy, EFSEC is not waiving that requirement. We still
6 want the hard copies.

7 MR. PEEPLES: Would it be fair to say what
8 you're using then, I want to make sure I'm clear that
9 filing hard copies with EFSEC and electronic copies
10 serviced electronically by the time period and then
11 serviced by mail on that date also?

12 JUDGE TOREM: Correct, by mail. It would be
13 postmarked by that date. It will get to the other
14 parties a few days later.

15 MR. PEEPLES: Okay.

16 MR. HURSON: I was going to say frankly that
17 was something I asked Judge Torem about. Because of the
18 distance between Ellensburg and Olympia it's just
19 problematic to get it there. You either have to drive
20 over that day or you have to mail it the Thursday before
21 to actually make sure you get it there.

22 So as I understand and I appreciate it, that
23 as long as the electronic is e-mailed to EFSEC and
24 everything else on time and then we put it in the mail
25 that day to EFSEC, it may take a day or two to get to

1 Olympia and that's okay.

2 MR. PEEPLES: So we're not talking service
3 of hard copies on EFSEC as of the date required for
4 filing.

5 JUDGE TOREM: Electronic service--

6 MR. PEEPLES: --on EFSEC is okay.

7 JUDGE TOREM: Right, and with all the other
8 parties as well electronic service on the date. Hard
9 copies can follow one of two days more.

10 MR. HURSON: But they have to be mailed that
11 day.

12 JUDGE TOREM: Yes, postmark them, please,
13 but once they arrive electronically that's satisfied.

14 MR. PEEPLES: The distinction I was trying
15 to get is there is a distinction between filing and
16 service. So filing can be done by electronically also.

17 JUDGE TOREM: Correct. As to distribution
18 of the transcripts, I'd urge folks to see the court
19 reporter. I don't know what arrangements are going to
20 made, if EFSEC is going to buy the transcript or if you're
21 a party that wants a transcript has to purchase it on
22 their own. That's not my discretion to order or otherwise
23 just indicate here.

24 But if you want a transcript make sure you
25 let Ms. Makarow know and then we're going to determine

1 what the pricing is going to be. If EFSEC does buy the
2 transcript outright and then is free to distribute copies,
3 we will determine that later today, but I don't think we
4 need to discuss that further. I just want parties to know
5 if you're looking for the transcript, if we don't buy it
6 outright, you're to buy your own copies; and there's a
7 slightly lesser fee for the copies, and we'll see what's
8 negotiated depending on what need for transcripts to be
9 brought to Ms. Makarow's attention.

10 JUDGE TOREM: Another question that's come
11 up and I wanted the Applicant just to be clear about it.
12 When you file your brief, the Council has been asking a
13 little bit there was some questions yesterday about the
14 color of turbines and I believe it came up with
15 Mr. Priestley's testimony and again yesterday in the
16 lighting issues; that there had been some new FAA
17 regulations that came out that made promises of blending
18 into the landscape color a tradeoff for less lighting
19 during the daytime, and I believe those new FAA
20 regulations are referenced or may themselves be part of
21 the record. I know they're referenced by documents in the
22 record.

23 When perhaps that site certification comes
24 in, I would like to see a range of what you know about the
25 lighting tradeoff. If it can be white like the turbines

1 apparently are at Wild Horse or if I they can come as
2 Mr. Lathrop had indicated at a more blending so they
3 wouldn't stand out quite so much. So if the Council if
4 they're going to look at that particular mitigation
5 measure has a range of ideas as to what the Applicant is
6 recommending and what those tradeoffs might be.

7 Certainly there will be other opportunities
8 to respond to what folks' preferences might be if the
9 application gets that far, but I just want the Council to
10 be fully informed on those color lighting tradeoffs as
11 possible as part of the briefs.

12 MR. PEEPLES: We'll get what is in the FAA
13 part of it. My only comment is what's white and what's
14 tan and what's another color. There are variations. I've
15 heard them described as white. They look pretty light tan
16 to me, but for whatever that goes there's got to be some
17 technical description. I just don't have it right now.

18 MR. McMAHAN: Mr. Torem, what I understand
19 you're asking for is some explanation from the Applicant
20 regarding those FAA standards and what the equipment is on
21 the market and our commitment to minimize the visual
22 impacts within the range of what we could do under the FAA
23 guidelines. I think that's what I understand, and there's
24 a lot of equipment on the market and it's been our
25 commitment and I think it's in your Draft EIS the color

1 will be the maximum extent utilized, the extent feasible
2 utilized to minimize the impacts, and that is our
3 commitment and we will document that in the Draft SCA, if
4 that's what I'm hearing.

5 JUDGE TOREM: I think the Council also wants
6 to know if they order specifically a color that that's
7 going to be what's the recommendation for the Governor
8 from Council. So if the Council recommends white, maybe
9 we'll get a color swatch and put it in the draft, if
10 that's what they do to understand the differences.

11 MR. PEEPLES: As I understood the question
12 as something for the Council to look at like color
13 swatches. Is that what you're kind of looking for?

14 JUDGE TOREM: And I don't know that we
15 expect a whole range of colors from the Applicant and
16 swatches, but simply tell us what the tradeoffs are
17 between color ranges, and then the Applicant and all the
18 others can tell us what the options are, and then Council
19 can decide what the best mitigation is for the different
20 items here and the visual impact.

21 Frankly, if that could be mitigated for the
22 parties, the closest residents, and the public that's
23 interested, I think the Council wants to take that to
24 heart and know if they try to accommodate that, how many
25 more lights are there going to be and what's the slighting

1 scale of visual impact. So that's something else that may
2 be brought into the briefs.

3 MR. McMAHAN: We'll go to Home Depot and get
4 that book of swatches and give it to the Council and you
5 can expect it's going to be a colorful brief.

6 JUDGE TOREM: All right. Anybody else that
7 is present that's going on the site visit? I see
8 Mr. Knudson is here. Mr. Knudson, are you planning on
9 accompanying us on the site visit?

10 MR. KNUDSON: Yes, I'll be taking
11 Ms. Strand.

12 JUDGE TOREM: All right. Very well. I see
13 we have a total of four vehicles going I've got to count,
14 maybe five.

15 Ms. Makarow and Mr. Fiksdal will be leading
16 the way and they have the scheduled stops. We'll be
17 bringing these other larger boards with us so we can see
18 what the proposed layout of the turbines is and go from
19 there. But we'll do a quick roster. That will become
20 part of the record as will the directions and maps that we
21 have.

22 Anything else, Ms. Makarow, on the site
23 visit?

24 Anything else for the record in the
25 adjudication?

1 Oh, Mr. DeLacy's we have to deal with this
2 Hoen Report still.

3 MR. PEEPLES: Could I deal with one thing
4 real quick? With regard to the declarations for
5 testimony, I would ask for electronic copies and obviously
6 people have been very busy right now, and Jim has not had
7 a chance to get it to me.

8 Could somebody please give me a copy of one
9 because we've got to get ours out right away. If anybody
10 has a copy? Does Council have copies of the declaration
11 for Mr. Clay White?

12 JUDGE TOREM: I've given it to Mr. Fiksdal.

13 MR. PEEPLES: If you have a copy, I'd like
14 to get one.

15 JUDGE TOREM: Clarification as to the filing
16 deadline, there will be a post-hearing order going out.
17 That will be a very similar order to 801. I think that
18 will have what our new dates will be so it will be put out
19 as for the order of business from today.

20 Finally, the Hoen Report I understand the
21 attorneys had a chance to talk about Mr. DeLacy's
22 subsequent cross-examination, if necessary, and we had the
23 62 pages not yet offered and the concerns of the attorney
24 that they want to ask questions, whether it comes in or
25 not.

1 Mr. McMahan, what's the latest?

2 MR. McMAHAN: I understand from talking to
3 my honorable counsel to the left here that everybody is in
4 agreement that if the Council or any member, individual
5 members of Council would like to have that it in the
6 record, there are no objections to it being admitted
7 without any further foundation being made and without
8 cross-examination of Mr. DeLacy.

9 If I can accurately characterize
10 Mr. Hurson's concerns was that if it's not in the record,
11 that he wanted stipulations about some qualifying factors
12 on how it doesn't perhaps represent the circumstances of
13 this project. I think it's just more easily done by the
14 Council sizing it for themselves. I think Mr. DeLacy was
15 clear enough, but let the Council read the report. As far
16 as I'm concerned it doesn't matter. I think it speaks for
17 itself as to Mr. DeLacy's testimony.

18 MR. SLOTHOWER: We agree. We'd ask for it.
19 It's been testified to. It should go into the record.
20 There is no need to cross-examine Mr. DeLacy on it. You
21 can read it, draw your own conclusions which I think is
22 completely appropriate.

23 MR. HURSON: The County has no objection to
24 that. In reading it I don't know what, if any, assistance
25 it will help the Council, but it's kind of like it's out

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1 there; just so you can see it and everybody's curiosity is
2 satisfied and there's that unknown out there. So that's
3 fine.
4 JUDGE TOREM: The last elephant in the room
5 now.
6 MR. HURSON: I was going to say that but I
7 didn't.
8 JUDGE TOREM: Ms. Makarow, do you have an
9 exhibit number?
10 MS. MAKAROW: 36.4.
11 (Exhibit No. 36.4 marked for
12 identification.)
13 JUDGE TOREM: Councilmembers, all those in
14 favor of--I don't want to ask all those in favor.
15 Any opposed to having Exhibit 36.4, the Hoen
16 Report, come into the record?
17 Seeing none, then that's in the record as
18 well and we're done with that.
19 (Exhibit No. 36.4 admitted into evidence.)
20 JUDGE TOREM: Is there any need for us to
21 have another adjudicative session next week?
22 MR. SLOTHOWER: From our perspective,
23 Mr. Lathrop's perspective, no.
24 JUDGE TOREM: All right. Then the only
25 remaining item in the record for testimony will be the

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1 public comment tonight at seven o'clock at the adjacent
2 building. The site visit will occur and the written
3 portions that are coming into the record other than the
4 roster and the attendees that's already distributed and
5 the final deadline to items to come into the record which
6 includes the affidavits and the public comments that will
7 be filed in writing is next Friday, September 29.
8 You've got the dates for briefs, and you
9 will get a written copy of the order by electronic filing
10 as well in the mail in the week ahead or so.
11 MR. HURSON: Will you be able to mention the
12 thing I told you about some questions I'm getting from the
13 public about how the EFSEC process works and all that
14 other stuff?
15 JUDGE TOREM: Yes. One other thing that
16 came up and then I'll get to Mr. Slothower. There was a
17 question as to what the County process was and all the
18 discussions the last couple of days and perhaps
19 perceptions in the newspaper, otherwise the last couple
20 months, has been that the Applicant and the staff and the
21 County Commissioners would continue to work things out
22 until there was a development agreement, and that would
23 have been the ultimate resolution if the County
24 Commissioners had approved this project that there would
25 be an open negotiation.

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1 Mr. Hurson brought to my mention that some
2 members wondered whether or not when we leave Ellensburg
3 it will be up to EFSEC staff and Mr. Peebles and
4 Mr. McMahan and the rest of the applicant staff to
5 continue to have discussions and then feed that
6 information to the Council. I want to make it clear that
7 once the record closes today and after the public comment
8 there is no such process for us. This is a closed
9 process. When the record closes, no new information comes
10 in.
11 So even if it Applicant on the 1st of
12 October has a brilliant and bright idea, unless there's a
13 movement to open the record, there will not be any new
14 evidence of that. If they want to put it in argument,
15 that's clearly argument and we'll have it. I know you're
16 out of bright ideas.
17 MR. HURSON: I just wanted to clarify. I
18 was asked the question. That's essentially what I told
19 the person that was inquiring, but I figure if somebody
20 asks me a question like that other people might have the
21 same questions. So I assured them that this is a closed
22 process. There isn't some mew information. But public
23 perception is important, and so I was just suggesting that
24 you might let the public know how that works so I'm not
25 fielding questions on how the EFSEC process works.

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1 JUDGE TOREM: And I will do my best to do
2 that this evening, but it's part of the record now that,
3 yes, there is no backdoor process for EFSEC. It's simply
4 the parties that have got their exhibits admitted, and
5 Irina and I went through the list this morning and all
6 that offered is now admitted. There's the DEIS and all of
7 its associated environmental SEPA documents and the
8 application or filings that came in. Only those items
9 that are part of the record when closed will be considered
10 by the Council during deliberations and then those briefs
11 that come in will characterize the record as well.
12 I'll see if I can make that announcement
13 again tonight. I feel badly that I didn't make it last
14 Tuesday or last night, but if that's still an issue, I can
15 say that this really is the close and only the things that
16 come in writing.
17 Mr. Slothower.
18 MR. SLOTHOWER: I just had a--never mind. I
19 think I've got an answer.
20 JUDGE TOREM: The Chair's reminded me,
21 optimistic as he usually is, that if the parties somehow
22 reach a settlement on all these issues and you want to
23 reopen the record to tell us, have at it.
24 All right. It's now 10:35. The
25 adjudication is now closed. Let's have the site visit.

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1 MR. FRYHLING: I just want to thank
 2 everybody that's here for their cooperation and that it's
 3 been a pleasure sure to do this this week.
 4 JUDGE TOREM: Councilmember Fryhling is
 5 pointing out it's been a pleasure to do this this week,
 6 and all of you should be complimented on your
 7 professionalism to get the issues to us and to trust the
 8 Council to read reports for what they are and we
 9 appreciate that. Thank you.
 10 * * * * *
 11 (Adjudicative hearing adjourned at 10:35
 12 a.m.)
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1 I N D E X
 2 WITNESS EXAMINATION PAGE
 3 ARNE NIELSEN,
 4 Direct by Mr. Peeples 804
 5
 6 TED CLAUSING,
 7 Direct by Ms. Drummond 809
 8 Cross by Mr. Tribble 815
 9
 10 TROY GAGLIANO,
 11 Direct by Ms. Drummond 810
 12
 13
 14 E X H I B I T S
 15 NO. DESCRIPTION ID AD REJ
 16 36.4 Hoen Report 831 831
 17 40.0 Direct Arne Nielsen 804 806
 18 40.1 Arne Nielsen Resume 804 806
 19 40.2 Shadow Flicker Modeling 804 806
 20 40-SUP Supplemental Arne Nielsen 804 806
 21 71.0-R Direct Ted Clausing 808 810
 22 71.1-R Ted Clausing Resume 808 810
 23 71.2-R KV Comments on DESI 808 810
 24 71.3-R Letter 3/10/04 808 810
 25 71-R-SUP Supplemental Ted Clausing 808 810

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1 E X H I B I T S (Cont'd)
 2 NO. DESCRIPTION ID AD REJ
 3 70.0 Direct by Sonja Ling 818 819
 4 70.1 Sonja Ling Resume 818 819
 5 70.2 WDFW Baseline study 818 819
 6 72-SUP Supplemental Troy Gagliano 818 819
 7 72.1 Excerpt PSE Report 2005 818 819
 8 72.2 RNP document 818 819
 9 72.3 RNP document 818 819
 10 72.4 RNP document 818 819
 11 72.4 RNP document 818 819
 12 72.5 RNP document 818 819
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 5 A F F I D A V I T
 6
 7 I, Shaun Linse, CCR, Certified Court Reporter,
 8 do hereby certify that the foregoing transcript
 9 prepared under my direction is a true and accurate
 10 record of the proceedings taken on September 21, 2006,
 11 in Ellensburg, Washington.
 12
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 15 _____
 16 Shaun Linse, CCR
 17 CCR NO. 2029
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