

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of)
Application No. 2006-02)
DESERT CLAIM WIND POWER, LLC) Post-Hearing Conference
DESERT CLAIM WIND POWER PROJECT) Pages 118 - 169
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A Post-Hearing Conference in the above matter was held on Wednesday, July 22, 2009, at 905 Plum Street, in Olympia, Washington at 11:00 a.m., before the Energy Facility Site Evaluation Council members.

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DESERT CLAIM WIND POWER, Karen McGaffey, Attorney at Law; and Kelly Moser, Attorney at Law; Perkins Coie, LLP, 1201 Third Avenue, Suite 4800, Seattle, Washington 98101.

COUNSEL FOR THE ENVIRONMENT, H. Bruce Marvin, Assistant Attorney General, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100.

ECONOMIC DEVELOPMENT GROUP, Ron Cridlebaugh, Executive Director, P.O. Box 598, Ellensburg, Washington 98926-0598.

Reported by:

SHAUN LINSE, CCR

CCR NO. 2029

1 APPEARANCES (Cont'd):

2 COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, Alice M.
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6 JUDGE WALLIS: This proceeding will please come to
7 order. This is a post-hearing conference in Council matter
8 2006-02 Application of Desert Claim Wind Power, LLC. This
9 matter is being heard on July 22, 2009 pursuant to notice in
10 Olympia, Washington.

11 My name is Robert Wallis. I'm the Administrative
12 Law Judge for the proceeding and I acknowledge the presence
13 of the following Council Members: Council Chair Jim Luce.
14 Dick Byers represents Utilities and Transportation
15 Commission; Hedia Adelsman, Department of Ecology; Dick
16 Fryhling, Department of Commerce, Mary McDonald, Department
17 of Natural Resources, Jeff Tayer, Department of Fish and
18 Wildlife; and Ian Elliot, Kittitas County. I also
19 acknowledge the presence of Kyle Crews, Assistant Attorney
20 General, assigned to the Council.

21 The purpose of today's session is to allow the
22 Council to inquire into two documents. One is Exhibit 30
23 which is a stipulation between Counsel for the Environment
24 and Desert Claim Wind Power, LLC. The second is a
25 late-filed exhibit which is being offered as an agreement

1 between Desert Claim Wind Power and the Washington
2 Department of Fish and Wildlife. This latter document
3 marked as Exhibit 20 for identification was delivered to the
4 Council yesterday and issued to Council Members yesterday.

5 I would like at this time to take the appearances
6 of counsel. Please indicate your name and the name of the
7 party that you represent.

8 MS. MCGAFFEY: For the applicant Desert Claim,
9 Karen McGaffey and Kelly Moser from Perkins Coie. With us
10 today is David Steeb, the project director.

11 JUDGE WALLIS: Counsel for the Environment.

12 MR. MARVIN: Yes, Your Honor. Bruce Marvin,
13 Assistant Attorney General, Counsel for the Environment.

14 JUDGE WALLIS: And Department of Commerce now.

15 MS. BLADO: Alice Blado, Department of Commerce.
16 Thank you for reminding me.

17 JUDGE WALLIS: I understand that on the telephone
18 we have Mr. Cridlebaugh, the Economic Development Group of
19 Kittitas County; is that correct?

20 MR. CRIDLEBAUGH: That's correct, Your Honor.

21 JUDGE WALLIS: Is Kittitas County represented on
22 the phone?

23 Let the record show Mr. Caulkins has not entered
24 an appearance.

25 I would like to begin if I may with Exhibit 30

1 which has previously been offered and received into
2 evidence, and I have indications that Council Members may
3 have questions about this document. To the extent that they
4 involve factual information I understand Mr. Steeb, David
5 Steeb of Desert Claim Wind Power is present and available to
6 offer testimony; is that correct?

7 MS. MCGAFFEY: That's correct.

8 JUDGE WALLIS: Again, Mr. Steeb has previously
9 been sworn in this matter and would remain under oath.

10 So let me ask at this time whether Council Members
11 have questions related to Exhibit 30, the stipulation
12 involving Counsel For the Environment or the Applicant.

13 Mr. Elliot.

14 MR. ELLIOT: Yeah, I have two questions that came
15 up through testimony that I'd like to ask Mr. Steeb. One in
16 regards, if you will, the approach to the minority
17 community, their involvement of the project, and I'm asking
18 because I'm not sure whether there's another time in which
19 to ask the question.

20 MR. STEEB: Sure.

21 MR. ELLIOT: And that is that Kittitas County that
22 represents a minority also that we have very few people in
23 the valley that have trades that would fall under the union
24 classification of what you are doing and going to be
25 building, and so I'm questioning whether or not that in

1 going out to the minority community that the issue of union
2 or Davis-Bacon or any of those issues are going to come up
3 for opportunities of people within the valley to participate
4 in the construction of this project?

5 MR. STEEB: Sure. Let me address that. As you're
6 aware last night there were a couple people that made
7 testimony relating to minority employment groups that looked
8 at that. They approached us and we've approached them. It
9 was sort of a mutual approach to each other, especially
10 since this last meeting was in the Seattle area on the west
11 side. What they said was they see the value of renewables
12 within the context of what it is for Desert Claim both for
13 the growth that we see in the state and across the United
14 States and they want to be involved. I said, well, let's
15 discuss that, and part of that was for them to get
16 recognition, number one, for showing up last night.

17 The second part of that is to continue dialogues
18 with them. There's no commitment to them on hiring practice
19 or anything of that nature. This is a very, very early
20 thing, but they saw renewable energy where that was going
21 and what that meant not only for all citizens of the United
22 States and Washington State, but they also saw that as a
23 valuable piece of their future. And so as a starting point
24 they spoke up last night and we will continue to have
25 discussions with them, but it's at a very early stage.

1 MR. ELLIOT: Okay. So at this point there's just
2 no comment essentially with regards to how this is going to
3 play out with respect to any local hiring.

4 MR. STEEB: As we've always said this is a local
5 project, and as we build the project, as our contractor
6 builds the project he will be hiring in the local area and
7 that depending on the size and the qualifications in that
8 area as always happens it moves from the local to maybe
9 Yakima, other counties, and out from there. But this
10 project still remains a project that is focused on hiring
11 local people.

12 MR. ELLIOT: The second question I had was
13 somebody had asked the question regarding properties that
14 you had purchased. I was wondering if there was any
15 validity to the allegation that the agreements of purchasing
16 property included a stipulation that the property owner
17 could not testify against the project?

18 MR. STEEB: Let me clarify. We have three
19 succinct types of property within the project, and it's been
20 laid out in both my testimony and also in our application.
21 The three types of property that's within the 5,200 acres
22 one of it is state DNR land. The second piece of it is
23 leases with private property owners. They continue to own
24 the property, but we would lease from them the rights to
25 build the wind farm. The third piece is the option to

1 purchase a piece of property in the southwest corner. So
2 that is an option to purchase. If this proceeds on to
3 building a project, Desert Claim and enXco would purchase
4 that property and that would become a part of the project
5 and the property owned by either enXco or an affiliate of
6 it. Under none of those scenarios do we have anything in
7 there that asks anybody to not participate.

8 MR. ELLIOT: So it was not a valid claim.

9 MR. STEEB: No, no.

10 MR. ELLIOT: Thank you very much. I appreciate
11 that.

12 MR. STEEB: Okay.

13 MR. TAYER: Your Honor.

14 JUDGE WALLIS: Other Council Members?

15 MR. TAYER: Yes, I had a couple things that I
16 wanted to you ask about to try to get something in the
17 record about. One is there's quite a bit of discussion on
18 several of the documents about bald eagles being present,
19 particularly the calving issue within the bald eagle area,
20 attraction issues was well addressed in I believe the
21 Counsel for the Environment's stipulation. But the one
22 thing that I don't see any discussion about is the specific
23 federal law that protects bald eagles, and I would like to
24 see something in here about how the Bald Eagle Protection
25 Act interacts with these agreements and discussions. I

1 don't want to find out after the fact that we didn't know
2 enough about the federal law. So that's one question. The
3 second question --

4 JUDGE WALLIS: Why don't we stop with just one and
5 perhaps counsel can address the concern that was raised.

6 MR. MARVIN: I'd be glad to address that. I did
7 have conversations with the -- unfortunately I don't have
8 his name handy, but I believe he was the district manager of
9 the U.S. Fish and Wildlife Service asking about
10 recommendations and how the federal laws protecting bald
11 eagles would interplay with this project.

12 The U.S. Fish and Wildlife Service, first of all,
13 does not have any authority to enter into agreements or
14 impose restrictions on projects. So in that sense they
15 don't really have a -- they're not really in a position
16 other than to provide guidance to applicants or developers
17 in regard to what would be good practices regarding the
18 protection of the bald eagles. They do have enforcement
19 power once a "take" occurs, and the penalties I believe
20 would be either monetary in nature or they can be working
21 out some kind of agreement with the developer to mitigate
22 the situation that resulted in the take.

23 I think it's also notable that unlike other
24 endangered species issues there is no provision within
25 federal law that allows for a take permit for a bald eagle.

1 That is not an option that's available. We did discuss
2 these during the course of the stipulation. We indicated
3 that -- I don't know that we specifically discussed the
4 federal law. I believe I suspect that opposing counsel is
5 well aware of the restrictions that are in place, but I'll
6 let Desert Claim speak on its own behalf.

7 MS. MCGAFFEY: Yes. As I'm sure the Council is
8 aware, although the bald eagle has been delisted under the
9 Federal Endangered Species Act, there are other federal
10 statutes, the Migratory Bird Treaty Act and the Golden and
11 Bald Eagle Protection Act, that provide additional
12 protection for eagles.

13 I think our view as far as the relationship
14 between those statutes and the stipulation is that they are,
15 although substantively related in the sense they both
16 address eagles, they are jurisdictionally separate. The
17 Applicant is aware that they have to comply with federal
18 statutes. They have as a company an ongoing relationship
19 with U.S. Fish and Wildlife to get the latest input from
20 that agency on best management practice and guidance. There
21 would undoubtedly be federal notification requirements
22 should a take occur, and I think from the Applicant's
23 standpoint they understand that there's a federal regime
24 that they would have to comply with. The stipulation is not
25 intended nor could it supersede that federal set of

1 requirements. It's merely intended to address sort of the
2 bald eagle issues from the standpoint of the Washington
3 State regime set up that guides EFSEC.

4 So the stipulation I mean as Mr. Marvin has
5 indicated we had extensive discussions with him and his
6 consultant about how best to address all bald eagle issues.
7 That's also an issue that's addressed in the Fish and
8 Wildlife Agreement and we had extensive discussions with the
9 Department of Fish and Wildlife staff on the best way to try
10 and address that potential risk out there. That's what the
11 agreements try to outline.

12 MR. TAYER: Has there been any discussion with the
13 Federal Fish and Wildlife Service about any additional
14 measures they would like to see in this project to protect
15 the bald eagles?

16 MS. MCGAFFEY: We have not gotten any indication
17 from them of additional measures they would like. We've
18 received their somewhat standard set of information they
19 send out to every wind project. That's something that going
20 forward we will likely have additional discussions with
21 them.

22 MR. TAYER: The liability for the take is there
23 any sense or understanding of whether that is only on the
24 operator of the facility or would that apply to the
25 department entity as well?

1 MS. MCGAFFEY: I think it's only on the operator.
2 Your attorney could probably address that issue, but I'm not
3 aware of any situation in which a permitting entity is
4 faced.

5 MR. TAYER: The reason I ask that is because under
6 the Endangered Species Act permitting at least have been
7 held liable for the take and I didn't know.

8 MS. MCGAFFEY: Under the Federal Endangered
9 Species statute there are several obligations placed on
10 federal agencies to consult with the Fish and Wildlife and
11 they're prohibited from taking actions that would jeopardize
12 endangered or threatened species. So that statute outlines
13 a number of specific obligations of agencies so I think
14 you're right. Agencies can get sued under the Federal
15 Endangered Species Act.

16 There are not those similar kinds of provisions,
17 at least that I'm aware of, under the Bald and Golden Eagle
18 Act or the Migratory Bird Treaty Act. They have the take
19 prohibition that you also see in the Endangered Species Act,
20 but that's written more in terms of if a person takes,
21 meaning kills or harms, a list or covered species they could
22 be subject to liability, and I'm not aware of any situation
23 in which the permitting entity has been accused of, much
24 less found guilty of a take based on issuing a permit for a
25 project.

1 MR. CREWS: I'd like to add the case law has
2 nothing about the permitting agency. It was like
3 Ms. McGaffey said the operating appropriation person. So I
4 suppose somebody can make the argument, but the statute and
5 the case law to date there hasn't been anything like that.

6 MR. TAYER: Okay.

7 MS. MCGAFFEY: I guess an additional clarification
8 I would like is although those statutes are written in
9 fairly absolute terms any take is prohibited. The
10 communication that we've received and that I think every
11 wind project receives from U.S. Fish and Wildlife indicates
12 that as a matter of the agency's discretion if they feel
13 that wind projects are using best management practices and
14 taking appropriate precaution they have not prosecuted wind
15 operators for the occasional fatalities in migratory birds
16 that do occur.

17 MR. TAYER: Ms. McGaffey, that was actually my
18 interest in this because this is a bird that's protected by
19 the federal law and some signal from the service that best
20 management practices have been applied, I really don't have
21 any reason to think they haven't been, but it would be of
22 interest to me to get that signal from the feds that they
23 think what was done is what they think should be done.

24 MS. MCGAFFEY: My guess referring back to what
25 Mr. Marvin said earlier I think the federal agencies have

1 been reluctant to certainly put anything in writing saying
2 that they are blessing or excusing a particular project. It
3 is not uncommon to have very productive meetings with staff
4 people where you get the clear impression that they are
5 pleased with the way the project is developed and you would
6 not expect them to take enforcement action, but getting some
7 sort of promise or seal of approval from a federal agency is
8 often a challenge.

9 MR. TAYER: Understood.

10 JUDGE WALLIS: Other questions from Council
11 Members?

12 CHAIR LUCE: I have a couple of questions. Fire
13 suppression there have been some discussion about fire --

14 MR. STEEB: Yes.

15 CHAIR LUCE: -- at the close of our hearing,
16 public meeting in Ellensburg. I am curious whether you have
17 executed an agreement with the fire district at this time or
18 would you be in the very near future that will address that
19 issue that was raised?

20 MR. STEEB: We have not completed an agreement
21 with them. We will and part of that I've seen in the past
22 certifications have said prior to construction, prior to
23 these things it will be in place and we expect that same
24 thing to take place. I am in discussion with the fire
25 district. As I've said in the past, this project is a

1 little different than some of the other projects out there
2 in that half of that project is already in the fire
3 district, and so expanding that is where we're in
4 discussions with them along those lines.

5 CHAIR LUCE: But you agree that there will be a
6 fire agreement prior to the start of construction.

7 MR. STEEB: Right.

8 CHAIR LUCE: If I recall correctly, there was a
9 question about private roads.

10 MR. STEEB: Yes. I'm still trying to research
11 that a little bit. As we're all aware I think even over
12 here where we drive down a road and we see a street sign
13 that says, you know, Northeast 45th and know that's a public
14 road, but we've also seen the next one Northeast 56th Place
15 private. This is my interpretation or my understanding at
16 this stage is the county or jurisdiction says, well, that's
17 a private road; i.e., it's not a county or city road, but it
18 gets back to places we've allowed people to live to build
19 their homes, and therefore because of that we want certain
20 standards to be met so that fire can get back there service.
21 So that's where I see the dividing line. I'm still
22 researching that, but that's my understanding in talking and
23 looking at what is in Kittitas County. Still researching
24 that, beyond that.

25 On the project itself where you're not going to go

1 to make a whole bunch of parcels down a road for habitation,
2 you know, I consider that a project road, not a private
3 road. But we're still researching that issue.

4 CHAIR LUCE: You'll be addressing that distinction
5 hopefully in other filings as you make before the Council.

6 MR. STEEB: Yes.

7 CHAIR LUCE: Do you have any agreements with
8 Kittitas County that have not been entered into exhibits
9 here? Or I know there was a draft agreement, Mr. Steeb, at
10 the end of your testimony and that's what in turn led to the
11 filings before that. There was an inability to conclude an
12 arrangement with the County that led to your EFSEC filing.
13 So is there anything out there that I don't know about that
14 includes agreements with the County?

15 MR. STEEB: Not that I'm aware of.

16 CHAIR LUCE: All right. I have a couple questions
17 about setbacks. Your testimony is that there are seven
18 residences that are within I believe 2,500 feet.

19 MR. STEEB: Correct.

20 CHAIR LUCE: And your testimony also is that no
21 turbine is closer to a nonparticipating residence four times
22 the turbine tip height which is 1,640 and then you point out
23 that that's what the Council approved in the Kittitas Valley
24 case; is that right?

25 MR. STEEB: That's correct.

1 CHAIR LUCE: You also testified that the turbines
2 that you're proposing are two-megawatt units?

3 MR. STEEB: That is correct.

4 CHAIR LUCE: Have you purchased those turbines?

5 MR. STEEB: EnXco has turbines of that type, that
6 size, that type in their pipeline so the answer is: Are
7 turbines like that purchased? Yes. Are those the exact
8 turbines that will go on that site? Very likely so. But
9 under market conditions there may be turbines that meet that
10 constraint but aren't the same turbines to answer your
11 questions directly.

12 CHAIR LUCE: I'm told there are larger turbines
13 available on the marketplace now; is that correct?

14 MR. STEEB: They are.

15 CHAIR LUCE: If hypothetically you were to use
16 larger turbines and produce the same amount of generation
17 that you're proposing would it be possible to modify your
18 setback in such a way as to need a larger setback say 2,500
19 feet?

20 MR. STEEB: Yes. What I see is the beauty of the
21 four times the height is you don't do that once to come up
22 with the 1,640. You do that on the specific unit that's
23 going to be built. So therefore, for instance, if we made
24 them from my simple math a thousand feet tall we would be
25 talking about 4,000 feet distance.

1 CHAIR LUCE: Not hopefully. I wouldn't say
2 hopefully. I'm having a hard time envisioning a thousand
3 feet tall.

4 MR. STEEB: I want to overexaggerate just to show
5 how the mechanism. If it was only 100 feet tall, it would
6 be 400 feet.

7 CHAIR LUCE: That's correct. I guess the question
8 basically is if you were able to acquire turbines larger
9 than two megawatts, two and a half megawatts would you be
10 able to configure the project in such a way as to provide a
11 2,500-foot setback?

12 MR. STEEB: So we're no longer talking about four
13 times the height but a 2,500 setback?

14 CHAIR LUCE: Hypothetically. Your testimony in
15 your direct testimony was to discuss the possibility of
16 2,500 feet at which I think there were several numbers that
17 were put out by the County at various times, 2,000 feet
18 2,500 feet. There was never a final action or decision by
19 the County on what the setback was, but you've addressed it
20 here in your testimony about 2,500 feet as being one
21 situation and then you've listed seven residences that are
22 within 2,500 feet.

23 MR. STEEB: Correct.

24 CHAIR LUCE: So I guess what I'm asking is if
25 you've got two and a half megawatt turbines would you be

1 able to reconfigure the project in such a way as to meet the
2 2,500-foot setback that you addressed in your testimony?

3 MR. STEEB: Well, since we're talking about those
4 seven, let's talk a little bit about those seven that are in
5 that 2,500 feet. First off, the 2,500 foot is not a county
6 ordinance or anything in the record, but we have provided
7 records from their planning department that succinctly says
8 2,500 feet in an issue.

9 CHAIR LUCE: Right.

10 MR. STEEB: So that's what I'm using as that
11 guideline, if you would.

12 CHAIR LUCE: Understood.

13 MR. STEEB: So as we look at it, I think there's
14 two parts to answer your question at the 2,500 feet. I
15 think we can configure some of the project to meet that, but
16 I also put in that we are actively talking to those seven
17 landowners and there may be ways to work and have the
18 ability to maintain closer than the 2,500 feet with those
19 residences. So that's the best way that I can answer it at
20 this time.

21 CHAIR LUCE: All right. You state in your
22 testimony that a setback to 2,500 feet could eliminate up to
23 10 turbines or 20 megawatts of capacity. I'll ask the
24 question then. Would that render the project economically
25 unviable?

1 MR. STEEB: No, it would not render it
2 economically unviable. It would render it probably more
3 expensive for the rate payers of this state for electricity.

4 CHAIR LUCE: Why would that be true?

5 MR. STEEB: There are sunk costs. There are a lot
6 of things that are fixed costs, and when you spread it over
7 less megawatts it goes up.

8 CHAIR LUCE: I do understand that. All right. I
9 think those are my questions on setbacks. I appreciate your
10 answers.

11 JUDGE WALLIS: Are there any other questions from
12 the Council Members on this particular topic?

13 Mr. Byers.

14 MR. BYERS: On the topic of setback?

15 JUDGE WALLIS: On the topic of the stipulation
16 with the Counsel for the Environment.

17 MR. BYERS: I have a question that actually
18 bridges the two stipulations. Would that be hard?

19 JUDGE WALLIS: Why don't we talk about the
20 agreement Exhibit 20 for identification.

21 Ms. McGaffey, do you offer that exhibit into
22 evidence?

23 MS. MCGAFFEY: Yes.

24 JUDGE WALLIS: Is there objection?

25 Let the record show that there is no objection and

1 Exhibit 20 is received. Would it be appropriate to --

2 (Exhibit No. 20 admitted into evidence.)

3 MS. ADELSMAN: I'm sorry. Is it 20 or 24?

4 CHAIR LUCE: Twenty is the Desert Claim Washington
5 DFW I believe. Twenty is DFW. Correct?

6 JUDGE WALLIS: Yes.

7 CHAIR LUCE: Exhibit 30 is the CFE.

8 MR. FRYMIRE: I heard 24 also.

9 MS. ADELSMAN: I think we are the two oldest
10 people.

11 CHAIR LUCE: I'm not sure about that, but I'm
12 sitting closer to Judge Wallis.

13 JUDGE WALLIS: That's what my notes indicate.
14 Would it be appropriate for the Applicant to indicate the
15 purpose for which this document is being offered?

16 MS. MCGAFFEY: I am happy to do that, if you'd
17 like.

18 JUDGE WALLIS: Please proceed.

19 MS. MCGAFFEY: Exhibit 20 is the agreement between
20 Desert Claim and the Washington Department of Fish and
21 Wildlife. It's that the agreement that we described we were
22 having anticipating for you when we met a couple weeks ago
23 now in a prehearing conference. As I think I said at that
24 time, from very early on in this project the Applicant has
25 had discussions with Department of Fish and Wildlife

1 recognizing that the Department has considerable expertise
2 in this area, has developed the Fish and Wildlife Guidelines
3 for wind power development. So it was important to the
4 Applicant to not only work with the agency but benefit from
5 the agency's expertise and experience with wind projects.
6 Although the agency did not intervene in this proceeding,
7 the agency as you're aware filed comments with respect to
8 the Supplemental Environmental Impact Statement, and
9 therefore the Applicant continued to meet with the agency to
10 see whether we could figure out solutions to some of the
11 concerns that they had identified in those comments.

12 We are pleased to say that we successfully have
13 worked through that list of issues with the agency. Our
14 meetings with them were very productive and very informative
15 on ways that the project could be designed and managed to
16 minimize impacts. We were able to develop and outline those
17 issues in this agreement that you have as Exhibit 20. You
18 will undoubtedly note some similarity and overlap between
19 this agreement and the stipulation with the Counsel for the
20 Environment since the agency and the Counsel for the
21 Environment had many of the same concerns regarding the
22 project.

23 We are now submitting the Fish and Wildlife
24 Agreement to the Council so that the Council understands
25 what the Applicant has committed to in regard to Fish and

1 Wildlife and habitat issues. Some of these commitments are
2 really just clarifications or expansion commitments that
3 were already made in the application, but I think the
4 additional explanation that's provided in the agreement is
5 helpful for the Council to understand what is meant by the
6 Applicant's commitment. And I think it also is useful for
7 the Council to have it clearly written on paper that the
8 agency believes that the project is consistent with the
9 agency's Fish and Wildlife Guidelines and that all of the
10 concerns that were reflected in the agency's comments on the
11 SEIS have been resolved with the commitments made in this
12 agreement.

13 JUDGE WALLIS: Mr. Byers.

14 MR. BYERS: This is a question that has to do with
15 both Exhibits 20 and 30, and it has to do with the
16 description of the Technical Advisory Committee. I note as
17 you've described that there's a significant amount of
18 overlap in the description of the Technical Advisory
19 Committee; however, the descriptions are not identical.
20 There are some provisions in Exhibit 20 that don't exist in
21 Exhibit 30 having to do with the makeup of the committee,
22 for example.

23 And my question is since the stipulation in
24 Exhibit 20 is between the Applicant and/or I should say the
25 agreement is between the Applicant and the Department of

1 Fish and Wildlife and Exhibit 30 is between the Applicant
2 and Counsel For the Environment which of these descriptions
3 is the final position of the Applicant with respect to
4 commitments?

5 MS. MCGAFFEY: I think you're absolutely correct
6 that there is some additional items included certainly in
7 the stipulation that are not in the agreement and it may be
8 true the other way as well. It's the Applicant's
9 expectation that any provision that is included in either
10 the stipulation or the agreement would be included in the
11 site certification agreement and will be included in the
12 proposed draft of that document that we provide to you.

13 Another way of saying that is to acknowledge that
14 the stipulation and the agreement may include with respect
15 to this issue and frankly other issues as well may include
16 slightly different descriptions, but we do not believe those
17 descriptions are inconsistent. And so if the agreement
18 requires three items and the stipulation requires those
19 three items and a fourth item, our understanding is all four
20 items are required and will be in the proposed site
21 certification agreement we give you.

22 I'm sure by now Mr. Marvin has had an opportunity
23 to review both these documents, and I don't know whether he
24 has an opinion whether they're consistent with one another,
25 but certainly we provided a copy I believe of the Counsel

1 for the Environment's stipulation to the folks at Fish and
2 Wildlife and discussed with them how some issues might be
3 more thoroughly addressed in one document versus the other.
4 But I think we were all comfortable that they were
5 consistent, if not identical.

6 MR. BYERS: You anticipated my next question. I
7 was going to turn to Mr. Marvin and ask him if he's had a
8 chance to look at the Fish and Wildlife Exhibit 20 agreement
9 since there was some I won't call them discrepancies but
10 they're overlapping issues and in some cases there are
11 things that aren't in the stipulation that you've entered
12 into, and if you are comfortable with the way in which
13 Counsel has described both and rather than either/or?

14 MR. MARVIN: Generally I am comfortable with the
15 way counsel has described the interplay between the two
16 documents. In our stipulation the understanding that's been
17 reached between the parties is that the stipulation creates
18 a floor of minimum standards that must be met in order to
19 satisfy our expectations. It does not foreclose EFSEC or
20 any other party from imposing additional mitigation measures
21 or protections or conditions above and beyond that.

22 So I think it's important to understand that this
23 is not -- like I said, it provides a floor and you're
24 welcome to build on that to the extent that you think it's
25 appropriate and necessary.

1 With regard to the actual agreement that's been
2 reached between Fish and Wildlife and the Applicant, I have
3 a couple concerns. First of all, I understand that EFSEC
4 has retained, correct me if I'm wrong, this is just a guess,
5 but I'm wondering is Fish and Wildlife or members of Fish
6 and Wildlife serving as consultants on the EIS review?

7 MR. FIKSDAL: Correct.

8 MR. MARVIN: I would have some concerns regarding
9 potential or actual conflicts of interest that may be raised
10 by the fact that I don't know what your agreement is with
11 Fish and Wildlife and I don't know whether there's been
12 cross pollination between the negotiation of this document
13 and your consultants. I am concerned just on a procedural
14 basis that there should be a clear delineation. I
15 understand that we're in a situation where there's a lot of
16 crossover. We have a lot of agencies and a lot of people
17 wearing different hats, but I do think it's important and I
18 suppose I would like some clarification with reassurance
19 regarding how that EIS process evaluation is going to
20 continue moving forward in light of this document.

21 My second concern is again in some ways it's
22 addressed by my understanding that our document provides a
23 floor as opposed to a conflicting document. I've only had
24 this in my possession for probably less than 24 hours and
25 haven't really done a thorough evaluation, but again with

1 the understanding that our document is the floor I've taken
2 some comfort in that and that it's not going to undermine
3 our position. There are some instances in which these
4 documents are not on all fours with one another, for
5 example, on avian mortality issues. Our document provides
6 that, our stipulation provides that there will be two years
7 of avian mortality monitoring. The agreement between Fish
8 and Wildlife says that there will be two years with the
9 option of converting one of those years into some kind of an
10 additional research project.

11 And interestingly as an issue we applaud the idea
12 of getting additional research and expanding the knowledge
13 of how these projects will interact with the natural
14 environment; however, we do believe that two years of
15 mortality study is important and necessary for this project
16 in that as we can tell just by the fact that this summer
17 there are variations in weather patterns and how things play
18 out so just getting mortality ratings on one year is
19 probably not sufficient, and that second year was
20 intentionally negotiated. And, in fact, we had considered
21 putting an option of doing additional research for that
22 second year and rejected that idea because we felt that
23 having that second year of data was critical to ensuring
24 that there was good information being generated that would
25 be useful not only to this project but for evaluating the

1 cumulative impacts for the projects throughout the state.

2 So I think there's other similar issues with
3 regard to bat studies. I don't know that there's any
4 specific commitment with regard to doing mortality studies
5 for bats. That may be taken for granted in the Fish and
6 Wildlife document, but I don't believe it specifically
7 referenced our document. It does contain that provision and
8 my understanding in interpreting the two documents together
9 that our document would take precedent; that we would be
10 anticipating that two years of study would be done. So that
11 would be an example of how the two documents would be read
12 in conjunction with one another and the document with more
13 stringent additional requirements would prevail in those
14 circumstances.

15 MR. BYERS: Thank you. One more question
16 regarding the TAC specifically. Again, there's not been a
17 whole lot of time to focus a great deal on Exhibit 20. We
18 just received it yesterday, but it appeared to me that the
19 way the TAC is described in Exhibit 20, this is the Fish and
20 Wildlife Agreement, it applies primarily if not exclusively
21 to avian issues. Was that the intent? Because it appears
22 to me in the stipulation with the Counsel For the
23 Environment that the TAC scope which reads to me to be
24 broad.

25 MS. MCGAFFEY: I think that I guess I would start

1 by saying that I agree with Mr. Marvin's previous
2 characterization of these two documents as them each setting
3 a floor, and if one asks for something in addition that's
4 part of what the Applicant has agreed to.

5 With respect to the TAC specifically, I think it's
6 fair to say that in our discussions with Fish and Wildlife
7 they were primarily focused on avian and eagle related
8 issues whereas in our discussions with Counsel For the
9 Environment some additional issues had more prominence: the
10 squirrel, the bats, some other things. I think the
11 description of the TAC's scope of responsibility, if you
12 will, there's some I think in both documents some fairly
13 broad language and then there are some specific tasks
14 assigned if you will. And so while it is true that in the
15 Fish and Wildlife document probably most of those specific
16 tasks are bird related, that is not meant to say that the
17 TAC would not be involved in other issues.

18 And in particular the Counsel For the
19 Environment's stipulation identifies some other issues that
20 the TAC, identifies a specific role for the TAC with those.
21 So again it's our understanding that the TAC would cover all
22 the things in those documents.

23 MR. BYERS: The point of the question it's not the
24 Applicant's intention that there be two TACs.

25 MS. MCGAFFEY: No.

1 MR. BYERS: One TAC perhaps a broader scope than
2 what's in the agreement.

3 MR. STEEB: If I may address. The Counsel for the
4 Environment in their role in this is really to protect the
5 environment for all of us as citizens of the state and
6 looked at it from that standpoint. Therefore, they were
7 looking at specific instances of bat mortality, things like
8 that. That was important feedback, and that's why we
9 incorporated that in that stipulation. With Fish and
10 Wildlife since they weren't an intervenor because they did
11 comment we were working off their comment letter to the SEIS
12 and wanting to address and because they have some experience
13 in another couple other wind projects, one of them already
14 being built, I thought it was very worthwhile for us to
15 spend the time and so did they, the local people in that
16 area to spend the time and try to address that in not only
17 look at the guidelines, look at what the Counsel for the
18 Environment, look at other comments, but also take some of
19 their practical experience and say how do we address this
20 more as a working document and clarify as much as we can up
21 front.

22 As you're probably aware there were probably times
23 in the Wild Horse Project that you had things come to you
24 that nobody thought of. Well, we were trying to incorporate
25 some of those in here and understand that in more of a

1 working relationship. So if I classify the Fish and
2 Wildlife one, it's more of a working. We would try to come
3 up with some working agreement to address some of these
4 things that we didn't see in the guidelines, beyond the
5 guidelines, we didn't see in the Counsel for the
6 Environment, and so they were really just specific for that.
7 They weren't far reaching, but they were tuned in more of
8 trying to get some of the working pieces so that when we
9 talk about this in the future we've already talked about how
10 we're going to handle that.

11 MR. BYERS: I just have one more question.

12 JUDGE WALLIS: For the record, there may be some
13 people who pick up the record that don't know what a TAC is.
14 Could you identify that.

15 MS. MCGAFFEY: Yes. The TAC is an acronym used
16 for a Technical Advisory Committee which will be a committee
17 made up of representatives of various organizations and
18 government entities that will gather together to review some
19 of the technical information concerning the issues we've
20 discussed, avian mortality, bats, etc.

21 JUDGE WALLIS: It is a T-A-C instead of a T-A-C-K.

22 MS. MCGAFFEY: Yes, I'm sorry. Correct.

23 CHAIR LUCE: And that was very tactful.

24 MR. BYERS: On another tact, I have a question on
25 a slightly different subject on Exhibit 20. On page 11,

1 Point No. 12, there's discussion of initial decommissioning
2 and site restoration plan, and I apologize I guess if you've
3 heard something that I've forgotten from the application or
4 from the prefiled record. What I don't see in the
5 discussion of initial decommissioning site restoration plan
6 is any commitment on the part of the Applicant to provide
7 for some kind of surety, some kind of either a bond or
8 letter to something for insurance that in fact site
9 restoration can be executed down the road. Is that omission
10 intentional or is there an intent on the part of the
11 Applicant to provide for that kind of financial assurance?

12 MS. MCGAFFEY: There is a discussion in the
13 revised application and we can dig out the specific
14 reference for you of site restoration, and there's a
15 description of the plan and there is a reference to
16 financial security there. I believe there's also a brief
17 discussion or summary of that in Mr. Steeb's testimony which
18 is Exhibit 11, but I would have to check that to make sure.

19 The purpose of Section 12 of Exhibit 20 of the
20 agreement of Fish and Wildlife was primarily to be clear
21 that Fish and Wildlife wanted, the Department wanted to be
22 involved in the development of that plan and so we wanted
23 clear in the agreement that we intended to consult with the
24 Department in developing that plan. It's our intention as
25 explained in the revised application that the site

1 certification agreement as the Council commonly provides
2 will require that a site restoration be submitted prior to
3 beginning construction; that it include all of the elements
4 required by the Council's regulations, including providing
5 financial assurances.

6 MR. BYERS: Thank you.

7 MS. ADELSMAN: I have a question. Exhibit 20 in
8 the beginning of I think page 7 it talks about construction,
9 talks about the preconstruction, during construction. And
10 as you know Ecology will have at least EFSEC has in the past
11 worked with Ecology to deal with storm water spill response,
12 the erosion, all of that stuff, and also to even monitor the
13 compliance under the Wild Horse is one. If you get into the
14 consultation with Fish and Wildlife on some stuff, then it
15 may conflict with what Ecology wants to see happening, we
16 think should that happen. Ecology is the agency with
17 expertise on at least the stuff that I named. There's
18 nothing in the agreement that would say what would happen.

19 And I have some concerns because also later on in
20 the TAC it talks about it's numbered as No. 10. It's like
21 almost a section on its own. It talks about the monitoring
22 and so on. Are they going to get into monitoring beyond
23 what's happening with the eagle, the big game, and so on and
24 getting to some of the storm water spill responses and so
25 on? Or I mean so I'm kind of trying to understand what does

1 this means in the future?

2 MS. MCGAFFEY: The agreement with the Department
3 of Fish and Wildlife and I believe the stipulation with the
4 Counsel for the Environment as well identifies a number of
5 plans that the Applicant will have to develop the plans that
6 the Council has required other certificate holders to
7 develop. It's our anticipation that the ultimate decision
8 with respect to approval of all those plans will reside with
9 EFSEC.

10 It is given past experience with EFSEC projects
11 the suggestions or your comments about Ecology's involvement
12 in the review of those plans and providing advice is not a
13 surprise to us. We anticipate that in areas where the
14 Department of Ecology has expertise it would not be
15 surprising for EFSEC to look to that expertise, and for that
16 matter it would not surprise me if the Applicant in
17 developing those plans went directly to the Department of
18 Ecology to learn from that expertise from the beginning.
19 That's not outlined in this agreement because it's not an
20 agreement with the Department of Ecology.

21 MS. ADELSMAN: Yes, I know.

22 MS. MCGAFFEY: I imagine that is conceivable that
23 with respect to some plans the Council might find itself in
24 a position where the Department of Fish and Wildlife would
25 like something to be done a particular way and the

1 Department of Ecology would like something to be done
2 another way, and I guess that's both the benefit and the
3 downside of being the decision makers. We by this agreement
4 the Applicant is merely committing to consult with the
5 Department of Fish and Wildlife in developing those plans so
6 that we do get that input. At the end of the day plan
7 approval is going to be the Council's job.

8 With respect to the second question about the
9 scope of the TAC, it's not my expectation that the TAC would
10 be getting involved in storm water monitoring or things like
11 that that are traditionally kind of within Ecology's zone of
12 enforcement, and I don't think that's been the practice of
13 TACs on other projects such as the Wild Horse project.

14 MS. ADELSMAN: When it's open ended, it's more
15 likely there would be other related monitoring data that
16 could be maybe broad, and I don't know whether there's a way
17 to limit it to the wildlife, you know. And Ecology's role
18 really it's during the construction period when you're
19 having storm water, you're having all this stuff. The TAC
20 is really looking at the long-term operation of the plant,
21 and the monitoring that's happening.

22 So it's I just wanted to make sure it's on the
23 record and also that there's some clarification about it
24 because I don't want the Council to end up feeling that this
25 stipulation with Fish and Wildlife carries more weight than

1 say Ecology or something.

2 CHAIR LUCE: One stop shopping, Hedia. That's
3 what it's all about.

4 MS. McGAFFEY: Right.

5 MS. ADELSMAN: No, but at the same time when I
6 look at all of this and I'm saying the expertise is in one
7 agency and other the agency there's different expertise.
8 We're trying to draw the best.

9 MR. FRYHLING: The SCA will spell all that out.
10 It will be very specific to these activities of the agency.

11 MS. McGAFFEY: One of the challenges that we have
12 in front of us over the next week or so is to synthesize all
13 this material into a proposed site certification agreement
14 for you and the other parties to review. Because the
15 Applicant has made these commitments you're going to see a
16 proposed site certification agreement that includes these
17 commitments and there may be some instances where we have to
18 figure how slightly different wording fits together along
19 the lines that I've described and Mr. Marvin's described.
20 You may find when you see what we give you that some of the
21 issues that you've just identified were not something that
22 we talked about and require further clarification or would
23 benefit from further clarification and once again that's why
24 you guys have the job of decision makers.

25 MR. MARVIN: At least from Counsel for the

1 Environment's position there was no intent or concept of
2 what kind of assigning duties to different agencies in terms
3 of how to do this work. We were looking primarily at Fish
4 and Wildlife and so Fish and Wildlife became the agency that
5 we referred to most. But we assumed that when best
6 management practices or plans were developed that the lead
7 agency in those areas in the state would be assigned
8 responsibility for regulating them.

9 MS. ADELSMAN: I have no concern in Exhibit 30.
10 The only thing is the agreement with Fish and Wildlife and
11 we did not have in the other places, and it gets into an
12 area like construction which kind of gets into some of the
13 issues that goes beyond just the TAC and all the other work.

14 MR. STEEB: I think it was a subject for please
15 read the Fish and Wildlife agreement as a working agreement
16 or the guidelines are in place, Fish and Wildlife
17 Guidelines. For instance, the TAC is spelled out very well
18 in the Fish and Wildlife. But to take it the next step and
19 to be pragmatic and look at trying to answer questions now,
20 especially based on the experience of Wild Horse and KV, we
21 took this approach to try to address that with Fish and
22 Wildlife, and so it's sort of to expand where we were and
23 get that clarified up front so that when Karen and Company
24 put together the certificate we can roll that into what --
25 we can look very clearly at what this Council has presented

1 on Wild Horse. We did. I mean I've got copies of it and
2 marked them up. We've also looked at KV. So you also have
3 to put this in light that we're doing this as we've also
4 read and looked at the certifications for two other projects
5 that this Council has done. So this isn't an avoid. It's
6 parallel with.

7 MS. ADELSMAN: That's fine.

8 CHAIR LUCE: I just want to go back quickly over
9 this setback issue.

10 MR. STEEB: Okay.

11 MS. ADELSMAN: Jeff has a quick question.

12 CHAIR LUCE: Oh, I'm sorry, Jeff.

13 MR. TAYER: I had just a clarification for the
14 record. Mr. Marvin raised the concern about the consulting
15 role of the agency and this agreement, but I'm not sure
16 whether that concern really extended to whether I was
17 involved in that agreement as a Council Member so I want to
18 clarify.

19 MR. MARVIN: No, no. That was not what I was
20 alluding to. I was just concerned that, and again I would
21 just like to express that as a concern, and I would like to
22 make sure that we retain the independence of the consultants
23 that have been retained and just noting that there is an
24 issue there, and we should progress with appropriate
25 sensitivity now that this document is in the record.

1 MR. TAYER: And I have a question. Well, a third
2 of the project is public lands and I wasn't clear as I don't
3 think I've read in the record any baseline in terms of
4 public access or sort of an oblique reference landowners are
5 in charge of their own thing in terms of access. But
6 there's not a lot on the record in terms of whether there is
7 public access to those lands now, do people use the land now
8 for recreation, and what would happen.

9 MR. STEEB. As I said before, there's three
10 sections or two and a half sections of DNR land out there.
11 Of course, DNR land are public lands which means the public
12 can walk on them, get on them. That's number one. The
13 second part of that is can they get to them. A couple of
14 those sections are accessible by public means. One of those
15 sections is what I would call an island or land locked by
16 private land around there; therefore, you would be
17 trespassing before you got to the public land so that's
18 that.

19 If you're talking about access pre and post
20 project, we don't see changing the way DNR handled those
21 lands in the past for this project. Granted whether it's
22 this or they put some other facility there's the issues of
23 safety, things like that, especially if we're talking about
24 hunting season that you have to look at that from a
25 pragmatic standpoint. But the way we try to state it is

1 whether it's a private land or public lands our whole intent
2 in our contracts with each of those groups is that they can
3 continue doing it except for if there are safety issues or
4 those types of issues. Does that answer your question?

5 MR. TAYER: In large part it does. Is there a
6 sense of I mean one thing -- I assume. I'm making an
7 assumption and this is something that's always dangerous to
8 do that. Since there wasn't testimony with the access
9 issues that there's not a lot but I was curious.

10 MR. STEEB: Let me address that if I can. If
11 everybody's aware of Wild Horse, that is a very different
12 type of project that has a lot of project lands, both Fish
13 and Wildlife land and DNR, historically has been a hunting
14 area, has had access through it.

15 These parcels that are in this project none of
16 them are contiguous first off so therefore you have three
17 parcels, two full sections and half sections. None of them
18 are contiguous so therefore if you got on one you couldn't
19 get to the other without either taking a public road or
20 crossing somebody's private property.

21 So that is a difference between this and other
22 projects, and then again that gets down to the hunting from
23 a pragmatic standpoint, and I'll make an assumption here
24 too. It's hard for me to see somebody, I could see somebody
25 walking across it because it's a public land and having the

1 right to do so if they can get there legally, but I have a
2 hard time conceiving anybody doing high powered rifle
3 hunting on a square mile that has even a few residences
4 around it, etc., whereas up at Wild Horse you have that
5 contiguous nature between different public lands.

6 MR. TAYER: Thank you.

7 CHAIR LUCE: I just wanted to go back over my
8 notes on the setback issues. Your testimony reflected that
9 in May 2007 Darrel Piercy who was Kittitas County's Director
10 of Community Development Services said that he believed,
11 although he didn't know, that the county commissioners would
12 require a 2,500-foot setback.

13 MR. STEEB: Correct.

14 CHAIR LUCE: The testimony further lays out that
15 there are seven residences within 2,500 feet that have so
16 far, and I emphasize so far, have failed to reach agreement
17 with you, but you're having some discussions with some of
18 them.

19 MR. STEEB: I would say so far there's at least
20 one that I know we have agreement with and there's others
21 that we're working with.

22 CHAIR LUCE: That you're working with.

23 MR. STEEB: Putting it concisely, we're working
24 with all seven. Each one's a different individual;
25 therefore, one size doesn't fit all.

1 CHAIR LUCE: Right.

2 MR. STEEB: And that increases the time frame to
3 make it happen.

4 CHAIR LUCE: You have agreement with one of those.

5 MR. STEEB: Correct.

6 CHAIR LUCE: And you're currently planning on two
7 megawatt units for your capacity, but there are larger ones
8 out there on the market that would be accessible to enXco.

9 MR. STEEB: There are larger ones accessible,
10 correct.

11 CHAIR LUCE: And if the two megawatt units were
12 increased to say two and a half hypothetically you could
13 provide larger setbacks.

14 MR. STEEB: Well, based on the setback criteria of
15 four times the height the setback would increase.

16 CHAIR LUCE: I understand that.

17 MR. STEEB: Yes.

18 CHAIR LUCE: But you could provide setbacks
19 perhaps up to 2,500.

20 MR. STEEB: Correct.

21 CHAIR LUCE: That would not render the project
22 uneconomical but would increase your fixed costs.

23 MR. STEEB: That is correct.

24 CHAIR LUCE: I guess the last question I had is do
25 you have any visual sims of those seven or six now that

1 you've reached agreement with one? What do they see when
2 they look out? I'm in the market for a car so I go on this
3 Toyota site and it gives me a 360 view and I can look
4 around. Are there visual simulations I guess of those
5 residences?

6 MR. STEEB: You mean farmers what they would see?

7 CHAIR LUCE: If they're in the record, I'll find
8 them.

9 MR. STEEB: The residences if referring to our
10 revised application for site certification under Tab 2 which
11 is the visual simulations.

12 CHAIR LUCE: Okay.

13 MR. STEEB: Looking at that the closest
14 approximations for I think -- first off, each of you
15 individually can go look at I believe it's Figure 4 that
16 shows the seven residences, and if you overlay that with the
17 first figure in the simulations, you can see where Residence
18 No. 1 is in this area; therefore, these would give you an
19 idea of what that residence has in their view scape. There
20 are three residences up and down Pheasant Lane. We have a
21 point there. I think there's one or two down in this area
22 so I think you can do that and do that type of visualization
23 back and forth.

24 We've also set out in here, we give you the
25 approximate distances that each of them are. So you cannot

1 only even if we don't have one there you could probably look
2 at one of these simulation points and look at that distance
3 and get the same idea if it's 2,400 feet, along those lines.
4 I also believe within the testimony that was received
5 from -- I need counsel's help there.

6 What was the testimony on the visual?

7 MS. MCGAFFEY: David Blau.

8 MR. STEEB: If you review that he talks about some
9 of these distances and there may be additional information
10 there. There is additional information there that you can
11 look at.

12 CHAIR LUCE: Just to be perfectly clear what I'm
13 struggling with, when I got this job my mandate was clear,
14 quantifiable standards because applicants need to know when
15 they come before the Energy Siting Council what the rules
16 are.

17 MR. STEEB: Right.

18 CHAIR LUCE: And I am still in that space. Then
19 we embark on about a two-year process with Ms. McGaffey in
20 which we had discussions about clear, quantifiable standards
21 and we got some. We got seismicity and we got noise. Then
22 we turned to Fish and Wildlife and I heard from my friends
23 at Fish and Wildlife, well, Fish and Wildlife Guidelines.
24 The standards, well --

25 So what I'm struggling with here quite frankly is

1 visual may or may not be capable of being in all cases clear
2 and quantifiable. Would I prefer that it were? Yes,
3 absolutely because I want to give as much certainty not just
4 to the Applicant but the Counsel for the Environment and
5 everybody else's involvement in these processes. So that's
6 the reason for my line of questioning and I just wanted to
7 make that clear for the record.

8 MR. STEEB: As a developer I appreciate hat
9 because that's the same struggle that I have is tell me what
10 you want and let's get on from there.

11 CHAIR LUCE: Absolutely.

12 MR. STEEB: So I can appreciate that. I would add
13 one thing more, Chair Luce, for you is to go and read the
14 Dave Blau, David Blau's discussion there. I think in light
15 of what the Council did on previous projects with this four
16 times the height and read in light of the decisions and the
17 thought patterns that you had then, I don't know what they
18 are for each of you, but read that in light in what he did.

19 Part of our goal was to try to get to that
20 quantifiable with some science in an area that is not sound
21 or two plus two equals four but is somewhere in there. And
22 I think in light of your questions and my first set of
23 answers I'd also ask each of you to read that because I
24 think those together I feel comfortable in what we've
25 presented here.

1 CHAIR LUCE: I definitely will do that, and I just
2 wanted to make clear what my perspective was I guess.

3 MR. FRYHLING: Can I add to that? This is a gray
4 area. We're looking at a changing piece of equipment out
5 there. We started this process in EFSEC we were looking at
6 400-foot towers to the top so this has changed dramatically,
7 and a 300-foot thing out there is something different from a
8 400 and the visuals start changing. And so it is a very
9 kind of gray area of knowing how far that setback should be,
10 and it's just something we have to deal with. But it's a
11 moving target. I don't know how much higher or the taller
12 these things are going to get. Who knows? But they've
13 changed in the short time we've been over this the last four
14 or five years.

15 MR. STEEB: Yes, I appreciate it. Again, please
16 read that over because I think that at least helps part of
17 the quandary that you find yourselves in.

18 MR. FRYHLING: We've read this stuff and the
19 experts say a thousand feet that's great. Well, that's not
20 the use of the equipment we're talking about out there.
21 That's a thousand feet from residences and so forth. So
22 that's been changing, and these are whatever you call
23 experts that is some of the testimony we've got.

24 CHAIR LUCE: Thank you very much, Mr. Steeb. I
25 appreciate it.

1 MR. ELLIOT: I think Mr. Steeb has been beat up
2 enough on this already so I won't do that one anymore.

3 For the Counsel for the Environment I do have
4 question. I notice that there is a no mention in the
5 Counsel for the Environment's testimony or request for
6 testimony on views, vistas, scenic flyway impacts, and is
7 the Counsel for the Environment satisfied with the
8 Applicant's testimony response given the issues of the
9 cumulative effects and other testimony and what's all been
10 said here? Because it is environmental issues that is being
11 the Counsel for the Environment's issues, but it's not
12 really been brought up.

13 MR. MARVIN: Right. I think that based on the
14 application and the evidence that we've read in the record
15 that we are comfortable that the issue with regard to
16 aesthetic view scape is adequately addressed, and again it
17 is I would agree with you that it is kind of a gray area and
18 one that is probably more subjective than just about any
19 other issues that's in front of you. And our assessment is
20 based on what's happened in the past again, and based on
21 what we saw in the record we felt comfortable it was
22 acceptable to the Counsel for the Environment.

23 And again just so you know we're looking at this
24 from a somewhat broader perspective than individual
25 homeowners, and so there's a balancing of interest that's in

1 play there as well; that is, what aesthetically may impact
2 an individual homeowner may on a micro level is obviously
3 very important to that individual, but in terms of this
4 state-wide policy and what benefits the project from an
5 environmental standpoint that there's that kind of a
6 balancing going on.

7 MR. ELLIOT: You guys had the discussion and
8 that's always important. Thank you.

9 JUDGE WALLIS: Is there anything further?

10 Let the record show that the Council has no
11 further questions.

12 Do counsel have anything to add?

13 MS. MCGAFFEY: Your Honor, could I ask a few
14 questions on redirect in light of the Council's to clarify a
15 few items?

16 JUDGE WALLIS: Yes.

17 DAVID STEEB,

18 having previously been sworn on oath,

19 testified as follows:

20

21 REDIRECT EXAMINATION

22 BY MS. MCGAFFEY:

23 Q. Mr. Steeb, Chairman Luce has asked you several
24 questions about the possibility of larger turbines being
25 used. Are you sure that larger turbines are available in the

1 market today to use on the schedule the Applicant's proposing
2 to proceed?

3 A. No. As of this stage as I mentioned before we have
4 turbines in our pipeline and that has gone into all our
5 discussions in talking about this project. If it
6 successfully moves through the state to break ground either
7 late this year or early next year that wouldn't change under
8 that from a business standpoint.

9 Q. If the Council required you to use a larger turbine
10 on the ones you proposed are there any other business
11 complications that would present for the project?

12 A. I'd have to reflect on that because when we talked
13 about visual only, there are other considerations. This
14 whole process that we've gone through has specifically looked
15 at these turbines, the size of the blades, the height, and
16 that relates to sound issues, maintaining sound setbacks, a
17 lot of other things. And so just focusing on that alone it's
18 one thing to say a larger turbine or more megawatts, but
19 there are other -- I just don't know what the other
20 ramifications are until we look at a specific unit and that
21 would take time to evaluate them and understand them.

22 Q. Would there be business costs associated with not
23 being able to place the turbines that the company has ordered
24 at this project?

25 A. As everybody's well aware we've been in this

1 process, we've all been in this process in various forms for
2 a long period of time, and we've expended a lot of money to
3 get to this point to where we are today to continue on for a
4 longer period of time with turbines in the pipeline. All
5 those things add up to additional costs to this company.

6 Q. Finally there's been some questions about the seven
7 residences that are located closer than 2,500 feet to a
8 turbine under the current project configuration. Have any of
9 the residents of those residences testified at the public
10 hearings, the EFSEC public hearings expressing concern about
11 the impact on their views?

12 A. None of the seven residences that we've designated
13 spoke at any of the public meetings.

14 MS. MCGAFFEY: Nothing further, Your Honor.

15 MR. BYERS: I have another clarifying question.

16 JUDGE WALLIS: Mr. Byers.

17 MR. BYERS: On that last point have any of the
18 seven residents submitted written comments to the public
19 record?

20 MR. STEEB: To my knowledge of that I've seen so
21 far one has provided written.

22 MR. ELLIOT: Have you been in active negotiations
23 with all seven during this whole period?

24 MR. STEEB: Yes, I have.

25 MR. ELLIOT: Thank you.

1 JUDGE WALLIS: Is there anything further? Let the
2 record show there is no response, and this hearing is
3 concluded. I will thank you all.

4 * * * * *

5 (Whereupon, the post-hearing conference was
6 adjourned at 12:22 p.m.)

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In re: Desert Claim Wind Power Project

A F F I D A V I T

I, Shaun Linse, CCR, do hereby certify that the foregoing transcript prepared under my direction is a full and complete transcript of proceedings held on July 22, 2009, in Olympia, Washington.

Shaun Linse, CCR 2029