BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2003-01 SAGEBRUSH POWER PARTNERS, L.L.C. KITTITAS VALLEY WIND POWER PROJECT	PREHEARING ORDER NO. 8 COUNCIL ORDER NO. 790 ORDER ON DISCOVERY PROCEDURES, PRE-FILED TESTIMONY, AND SETTING SCHEDULE FOR ADJUDICATIVE HEARINGS

Nature of the Proceeding: This matter involves an Application from Sagebrush Power Partners L.L.C. (the Applicant), to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for preemption of local land use plans and zoning ordinances and certification to construct and operate the Kittitas Valley Wind Power Project (Project), an approximately 182-megawatt wind turbine electrical generation facility. The proposed Project would be located within Kittitas County, on the ridges on either side of Highway 97, roughly 12 miles northwest of the city of Ellensburg.

Procedural Setting: The Council convened a prehearing conference on Thursday, February 19, 2004, at 9:00 a.m., in Ellensburg, Washington, pursuant to due and proper notice. The prehearing conference was held before Council Chair James Luce, and Councilmembers, Chris Towne (Department of Fish & Wildlife), Tony Ifie (Department of Natural Resources), Richard Fryhling (Department of Community, Trade, and Economic Development), Tim Sweeney (Utilities and Transportation Commission), and Patti Johnson (Kittitas County), and Adam E. Torem, Administrative Law Judge (ALJ). Assistant Attorney General Ann Essko was also present as the Council's legal advisor. Councilmember Hedia Adelsman (Department of Ecology) was not available due to prior commitments and therefore excused by the Council Chair from attending this prehearing conference.

The primary purposes of the prehearing conference were to (a) consider the procedural impact of the Applicant's request for preemption of local land use plans and zoning ordinances pursuant to Chapter 463-28 Washington Administrative Code (WAC), as filed on February 7, 2004, and (b) to consider setting a schedule for the adjudicative proceedings in this matter.

Participants: The Parties were present as follows:

Applicant Darrel Peeples, Attorney at Law, Olympia, Washington; Charles Lean,

	Attorney at Law, Olympia, Washington; Chris Taylor, Sagebrush Power Partners L.L.C., Portland, Oregon;
Counsel for the Environment (CFE)	John Lane, Assistant Attorney General, (AAG), Olympia, Washington;
State Agencies	**Washington State Department of Community, Trade & Economic Development**, Mark Anderson, Senior Energy Policy Specialist, Olympia, Washington;
County Government	**Kittitas County**, James Hurson, Chief Civil Deputy Prosecuting Attorney, Kittitas County, Ellensburg, Washington; Clay White, Kittitas County Community Development Services, Ellensburg, Washington;
Organizations and Persons	**Renewable Northwest Project (RNP),** Susan Elizabeth Drummond, Attorney at Law, Foster Pepper & Shefelman, Seattle, Washington (by phone) and Sonja Ling, RNP, Portland, Oregon;
	Phoenix Economic Development Group, Debbie Strand, Executive Director, Ellensburg, Washington;
	Residents Opposed to Kittitas Turbines (ROKT), Mike Robertson, Cle Elum, Washington (by phone); Ed Garrett, Snohomish, Washington;
	F. Steven Lathrop, Jeff Slothower, Attorney at Law, Ellensburg, Washington;
	Chris Hall, pro se, Ellensburg, Washington.

Summary of Prehearing Conference:

1. Ex-Parte Disclosures

No Councilmembers made any ex-parte disclosures.

2. Clarification of Council Order No.789 (Prehearing Conference Order No.7)

Ed Garrett, ROKT, expressed a wish to clarify information contained in Prehearing Conference Order No.7, as follows:

a. Mr. Garrett attended the previous prehearing conference held on January 13, 2004, and this should be reflected in the record.

b. Mr. Garrett noted his belief that the Order's summary of the conference as to the discussion regarding the Applicant's anticipated request for preemption was not wholly correct. Mr. Garrett recalled Judge Torem ordering the Applicant to submit a letter of intent on or about February 10th, not February 15th, as reflected in the existing Order.

Applicant's Counsel, Mr. Peeples, disagreed with Mr. Garrett's characterization of the date Judge Torem had set for submission of the letter of intent to request preemption.

Mr. Garrett indicated that he would not be submitting any written request to modify the existing Prehearing Conference Order No.7. Therefore, the Council took no action to formally amend or otherwise modify the existing order.

3. Process and Schedule to Consider Applicant's Request for Preemption (*PHC Agenda Item 4*)

On February 7, 2004, Darrell Peeples, legal counsel for the Applicant, submitted a request for EFSEC to preempt Kittitas County's land-use plans and zoning ordinances. On February 9, 2004, EFSEC asked that all interested parties submit briefs no later than February 17, 2004, on how EFSEC should process and schedule hearings on the preemption request. CFE, Kittitas County, and ROKT submitted written responses.

At the prehearing conference, Darrell Peeples expressed his opinion that due to the language contained in WAC 463-28-060, the Council had to consider the Applicant's preemption request at the same time as all other issues presented by the project. Mr. Peeples stated his agreement with the position taken in the brief filed by CFE, essentially: a separate subject-matter hearing on preemption would be appropriate, but EFSEC procedural rules required the Council to cover both preemption and all other substantive issues together in one recommendation to the Governor. Even so, Mr. Peeples stated the Applicant's willingness to approach the process in some other way if all parties stipulated that such a procedural deviation from EFSEC rules would not create a ground for later appeal. The Applicant then noted a desire to hold the hearing on the merits in mid-June or early July and, even if an earlier separate hearing and ruling on preemption was possible, not to delay the hearing on the merits beyond mid-summer.

John Lane, Council for the Environment, briefly summarized the position taken in CFE's written submission that preemption is part of the adjudicative proceeding, not a separate issue.

James Hurson, Kittitas County, agreed with CFE's position but added that the adjudicative hearing should be conducted in phases, with phase I addressing preemption issues and phase II addressing the remaining substantive issues, effectively bifurcating the process. If the Council decided to recommend against preemption, then there would be no reason to proceed with the remainder of the hearing.

Mr. Peeples indicated his concurrence with the inherent logic of the County's suggested approach, but reiterated the procedural limitations imposed by Chapter 463-26 WAC.

Ed Garrett, ROKT, noted that ROKT's Attorney James Carmody had filed a brief agreeing with the County's proposal to bifurcate the hearing, allowing the Council to decide the preemption issue first, then proceeding only if necessary to the remaining substantive issues.

Mark Anderson, CTED, offered his interpretation that the EFSEC rules might have been written to require a Council recommendation on preemption of local rules together with the site certification issues in order for the Council to be in the best position to evaluate the extent of the state's interest in seeing a proposed project come to fruition.

Susan Drummond, RNP, voiced her approval for the comments made by the Applicant and CFE.

Jeff Slothower, representing F. Steven Lathrop, stated that separating the preemption issue from the other substantive issues made sense because the required evidence was so different. He suggested scheduling the adjudicative hearings with preemption being the first topic, then pausing to allow the Council make a decision on preemption before determining whether it remained necessary to continue the hearings.

Mr. Hurson announced the County's intention to file a motion requesting the Council to dismiss the Applicant's request for preemption due to a failure to meet the prima facie requirements set out by EFSEC regulations, specifically the requirement of WAC 463-28-040 that a preemption request demonstrate that alternative locations in the county have been found unacceptable.

No other Parties present expressed additional opinions on how EFSEC should process the Applicant's request for preemption and the Council took the matter under advisement.

4. Process and Tentative Schedule for Adjudicative Proceedings (*PHC Agenda Item 5*)

Prior to the prehearing conference, the Council circulated to the parties a draft proposed schedule for the Adjudicative Proceedings, beginning with the Applicant's pre-filed testimony being due as early as the first week of April 2004 and two weeks of adjudicative hearings beginning on August 9, 2004.

At the prehearing conference, Darrell Peeples expressed the Applicant's ability and willingness to pre-file its testimony on March 15, 2004, earlier than suggested by the Council, with all other parties completing their pre-filed testimony by May 1, 2004. The Applicant would then file its rebuttal testimony on June 1, 2004, and be ready to commence the adjudicative hearings on June 15, 2004.

James Hurson responded that the Applicant's proposed schedule would not allow the County sufficient time to respond and prepare for the adjudication. The County suggested that the Applicant pre-file its testimony even earlier, on March 1, 2004, together with all Intervenors who might be labeled as "pro

applicant." Mr. Hurson explained that the County suggested realignment of the parties to make the process more efficient. Following filing of the initial pro-project testimony, CFE and all other Intervenors, including Kittitas County, would have until June 15, 2004, to conduct discovery and submit pre-filed testimony. The Applicant would then be given two weeks to file any rebuttal testimony by July 1, 2004. Finally, the County proposed a discovery cut-off date of August 1, 2004, with adjudicative hearings beginning on August 9, 2004, focused first on the issue of preemption.

John Lane, CFE, expressed a preference for the Council's original schedule which would begin the adjudicative hearings on August 9, 2004, but stated an ability to be ready by mid-June.

Jeff Slothower also said the Council's original schedule was more appropriate than that set out by the Applicant, especially as to the amount of time allowed between the pre-filing of rebuttal testimony and the beginning of the adjudicative hearings. Mr. Slothower was also concerned that rebuttal testimony not be utilized to "sandbag" the other Parties by the Applicant being allowed to submit the bulk of its pre-filed testimony in the form of rebuttal.

A colloquy ensued regarding rebuttal testimony. Mr. Peeples assured the Council and all Parties present that the Applicant would not distort the purpose of rebuttal testimony. Mr. Hurson then added his views on a prior EFSEC adjudication in which another Applicant was seen to have filed the majority of its testimony as rebuttal, yet the Council would not delay the scheduled hearing in order to allow the other parties time to review the newly filed material. Judge Torem assured the Parties that the Council's rules of evidence provided a tool for the ALJ to exclude evidence that was not timely and appropriately filed.

The Parties were then offered an opportunity to comment directly on an appropriate date to begin the adjudicative hearings. Chris Hall stated her support for the August 9, 2004, date suggested by EFSEC because, as a citizen already working full-time, it would allow her additional time and weekends to prepare for the hearing. Susan Drummond, RNP, suggested that the Applicant's proposed schedule appeared reasonable to her.

The discussion then focused on the County's proposal for realigning the parties. Mr. Peeples expressed the Applicant's objection to having the parties grouped or aligned in any fashion because of the potential for agreement on certain issues but disagreement on others. Instead, he suggested that all parties file a preliminary witness list and that each unit of pre-filed testimony indicate which issue(s) it addresses. Mr. Hurson offered a comparison to proceedings in Superior Court where the parties are typically categorized by their interests. Judge Torem suggested allowing the Applicant to pre-file its testimony, as traditionally done in EFSEC proceedings, followed by all parties pre-filing their own testimony, both responsive to the Applicant and any additional submissions as relevant and necessary. Then, the Applicant and all other Parties would be permitted to file rebuttals of any other party's pre-filed testimony. Judge Torem noted that some of the Intervenors in this case might be easily stereotyped as pro-project while others might be expected to oppose the Applicant, but the statutorily-mandated Counsel for the Environment couldn't necessarily be and shouldn't be forced into such a zero-sum

stance on a project that might be described as environmentally sensitive. Judge Torem advised that the Council would review all of the suggestions on aligning the parties and make a decision.

5. Discovery Process

Mr. Peeples pointed out that WAC 463-30-190 governs discovery in EFSEC proceedings, that rule referring in turn to RCW 34.05.446. Mr. Peeples stated that pre-filed testimony is the usual discovery tool relied upon by EFSEC and that more formal discovery measures found in civil litigation were not the norm. Even so, Mr. Peeples pointed out that RCW 34.05.446 empowers the "presiding officer" to allow discovery and control that process. He then noted that Kittitas County had expressed a desire to take depositions of certain EFSEC staff members as well as of EFSEC's independent consultants who had prepared the Draft Environmental Impact Statement (Draft EIS). Mr. Peeples said he had never seen such a request, nor had his co-counsel,
Mr. Charles Lean.

Mr. Lean, on behalf of the Applicant, asserted that the discovery process should not extend to allowing other Parties to depose EFSEC staff or other supporting personnel involved in a quasi-judicial decision. He explained that EFSEC can commence its adjudicatory hearings prior to completion of a Final EIS, a document that by definition would not be complete until the Council was ready to forward its recommendation to the Governor. Mr. Lean suggested that any challenge to the environmental analysis of the project would have to come at that point, not earlier.

James Hurson said that Kittitas County was interested in deposing various individuals involved with the creation of the Draft EIS in order to identify facts that might be relevant to the preemption issue, particularly in the area of showing a good faith effort to resolve the project's non-compliance with the County's land-use plans and zoning ordinances. When asked to explain the need to depose EFSEC staff members, Mr. Hurson noted that it would probably be unnecessary to depose Mr. Fiksdal, but that the County was interested in exploring further
Ms. Makarow's prior comments regarding the reasons for delay in preparing the Draft EIS.
Mr. Hurson conceded that it was unusual to depose an agency's staff members and thought another method might be utilized.

Judge Torem pointed out that WAC 463-30-200(5) appeared to prohibit issuing subpoenas that might require members of the Council or its staff to testify or produce evidence in any EFSEC proceeding. Thereafter, some additional discussion was had regarding the Draft EIS and the ability of the discovery process to explore the integrity of that document.

6. Stipulations and Settlement Agreements

The Applicant reported that no settlement agreements or stipulations had been reached between the Applicant and other Parties to this proceeding.

7. Next Prehearing Conference

The Council did not schedule another prehearing conference in this matter. Parties seeing a need for an additional prehearing conference should forward their request and appropriate justification for calling together all of the parties to the EFSEC Manager. The Council will schedule additional prehearing sessions as necessary.

Following some final comments on, and suggestions for, an appropriate facility for conducting the adjudicative hearings, the prehearing conference was adjourned at approximately 11:38 a.m.

Discussions and Decisions:

1. Process for Consideration of Applicant's Preemption Request.

The Council carefully considered the briefs filed prior to the prehearing conference as well as all positions expressed during the prehearing conference and, having met to confer and vote after individually considering all available information, decided that RCW 80.50.100, and WAC 463-28-060 do not allow the Council to consider and make a recommendation on the Applicant's preemption request separate and prior to its consideration of its recommendation on the other substantive issues presented by the Application pending in this matter.

As such, it is hereby ORDERED that the issue of preemption shall be taken up as the first subject matter area during the adjudicative hearings, but no decision or recommendation on preemption shall be made until completion of the entire hearing on the merits of all other subject matter areas. The Council shall consider evidence presented with respect to each subject-matter area, including the session on preemption, when it deliberates and makes its recommendation to the Governor on the Site Certification Application.

2. Schedule for Pre-Filed Testimony, Pre-Hearing Briefs, and Adjudicative Hearing.

Further, having weighed all suggestions regarding the schedule in this matter, the Council now ORDERS the following deadlines for pre-filing of testimony and this schedule for the adjudicative hearing:

Applicant's Pre-Filed Testimony	Monday, May 24, 2004
All Other Parties' Pre-Filed Testimony	Tuesday, July 6, 2004
Applicant's and All Other Parties' Rebuttals	Tuesday, July 27, 2004
Pre-Hearing Briefs (Optional)	Friday, August 6, 2004
Adjudicative Hearings (10 days)	Monday, August 16, 2004 thru Friday, August 27, 2004

The deadline for submittals, in this and following sections of this Order, is end of business, 5:00 p.m., of the date indicated.

3. Rebuttal Testimony.

Any Party may pre-file rebuttal testimony. Pre-filed rebuttal testimony shall be limited to witness statements and related information that is responsive to other existing pre-filed testimony *or* which can

otherwise be shown as relevant to the proceeding and the need for which could not have been reasonably foreseen prior to July 6, 2004, the deadline for filing of all Parties' pre-filed testimonies.

4. Motions to Strike Pre-Filed Testimony.

Any party wishing to file a *Motion to Strike* any pre-filed testimony, including pre-filed rebuttal testimony, shall do so no later than Tuesday, August 3, 2004. The potentially affected Party shall file a responsive pleading, if desired, no later than Friday, August 6, 2004. The Council will not hear oral arguments but will issue a ruling based only on the pleadings on or before Tuesday, August 10, 2004. *Motions for Reconsideration* of the Council's rulings on *Motions to Strike* will not be entertained.

5. Pre-Filed Testimony - Topics.

The pre-filed testimony for each witness should identify the topic(s) the witness will be addressing, which may include but are not limited to the following issue areas:

A. Applicant's Request for Preemption
   1. Good Faith Efforts to Resolve Land-Use Inconsistency (WAC 463-28-040(1))
   2. Applicant's Inability to Reach Agreement with Kittitas County (WAC 463-28-040(2))
   3. Alternative Locations in Kittitas County Unacceptable (WAC 463-28-040(3))
   4. State Interests (WAC 463-28-040(4)) and RCW 80.50.010)
   5. Purpose of Kittitas County Land-Use Plans and Zoning Ordinances sought to be preempted (RCW 80.50.100(1))

B. Environmental & Natural Resource Issues
   1. General Environmental Impacts
   2. Vegetation and Wildlife
   3. Fish
   4. Land and Water
   5. Environmental Benefits of Wind Energy Project

C. Human Impact Issues

1. Public Health, Safety and Welfare Concerns
    a. Aesthetic & Visual Impacts
    b. Noise
    c. Light and Glare, "Shadow Flicker," and "Blade Glint"
    d. Electromagnetic and Vibration Impacts
    e. Seismic Issues
    f. Soil Contamination
    g. Communications (radio, television, cell phones, etc.)
    h. Additional Health/Safety/Welfare Concerns (i.e. ice throw, fire, etc.)

2. Growth Management Issues and Impacts
    a. Housing and Urban Sprawl
    b. Public Facilities and Public Services
    c. Transportation Facilities
    d. Recreation Facilities

3. Cultural Resources and Historic Preservation

4. Local Concerns and Attitudes

D. Economic Issues
1. Property Values
2. Local Economic Development
3. Agricultural Interests

E. Project-Specific Issues
1. Proper Location and Consideration of Alternatives
2. Construction: Roadways, Turbine Foundations, Transmission Corridors
3. Decommissioning and Site Restoration

F. Energy Policy Issues
1. Consistency of Project with Washington State Energy Policy
2. Benefits of Clean and Environmentally Sustainable Energy Sources

G. Miscellaneous Issues
   1. Compliance with Applicable Laws and Regulations
   2. Regulatory Framework
   3. Mitigation Compliance Mechanisms (including Assignment of Interest)
   4. Cumulative Impacts
   5. Protection of Local Governmental and/or Community Interests Affected by the Construction or Operation of the Project (RCW 80.50.100(1))

As noted above, although the Council will hear evidence on a wide variety of different topics, it will make its overall recommendation to the Governor based upon the totality of the evidence presented at hearing and all other argument and evidence that is or becomes part of the record in this matter. Therefore, the Parties are asked to avoid duplication of testimony; where overlap between issues exists, the Council encourages each Party to adopt by reference its pre-filed testimony from other subject matter areas.

6. Pre-Hearing Briefs.

In order to enhance the organization of presentations to the Council, Parties may, but are not required to, submit pre-hearing briefs that set out a Party's stance on any or all issues regarding the proposed project and summarize the critical issues and conclusions to be addressed through their witnesses. Submissions shall not exceed a total length of twenty (20) pages (double-spaced, font size no smaller than 12 characters per inch); oversize briefs shall not be considered by the Council. The deadline for submittal of pre-hearing briefs is Friday, August 6, 2004. The Council may chose at a later date to require pre-hearing briefs; however the Council does not contemplate hearing opening oral statements. Post-hearing briefs may be required by the Council, subject to a schedule to be set at the adjudicative hearings.

7. Discovery.

The Council notes that Prehearing Conference Order No. 1, Council Order No. 777, issued on July 3, 2003, previously authorized informal discovery between the parties (see page 8 of Council order No. 777). The Council strongly encourages all Parties to cooperate in exchanging information and prevent the need for resort to more formal tools for procuring access to documents and witnesses. However, pursuant to the request of Kittitas County to conduct formal discovery in this matter and in accordance with WAC 463-30-020, WAC 463-30-190 and RCW 34.05.446, the Council hereby appoints Administrative Law Judge Adam E. Torem as the presiding officer for all procedural matters involving this case, specifically including discovery.

Judge Torem hereby ORDERS the following procedures for consideration of each one of any Party's formal discovery requests:

1. A showing that informal discovery has been attempted and refused shall be required prior to consideration of any formal discovery request.

2. Formal discovery requests shall be served on the affected Party or Parties and simultaneously submitted to the Council Manager, and/or other EFSEC staff as indicated in the official service list in this matter.

3. The Council Manager and/or other EFSEC staff shall transmit any and all discovery requests to Judge Torem once per week. EFSEC staff will deliver each week's accumulated discovery requests to Judge Torem on Monday afternoon, with Judge Torem to render decisions on each pending request on or before noon on the subsequent Thursday of the same week, unless a later decision date will be required for good cause. If a later decision date is required, Parties will be notified of such later date in the Thursday ruling. Discovery requests received by EFSEC staff after 12:00 p.m. on any given Monday shall not be transmitted to Judge Torem until the following week.

Notice to Parties: Unless modified, this prehearing conference order shall control all further proceedings in this matter. In accordance with WAC 463-30-270(3), any objections to this order must be stated within ten days after the date of mailing of this order.

DATED and effective at Olympia, Washington, the 12th day of March, 2004.

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Adam E. Torem, Administrative Law Judge