BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of: Application No. 2003-01
SAGEBRUSH POWER PARTNERS, LLC, Prehearing Conference
KITTITAS VALLEY WIND POWER PROJECT

A prehearing conference in the above matter was held in the presence of a court reporter on February 19, 2004, at 9:00 a.m., at the Kittitas County Fairgrounds, in Ellensburg, Washington, before Energy Facility Site Evaluation Councilmembers.

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The parties were present as follows:


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

DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT, Mark Anderson, Senior Energy Policy Specialist, P.O. Box 43173, Olympia, Washington 98504-3173.

Reported by:
Shaun Linse, CCR
Development.

CHAIR LUCE: I would note the absence of our member from the Department of Ecology, Heidi Adelsman. It's an excused absence. She wishes she could be here.

JUDGE TOREM: We have two staff members here today, Irina Makarov, as well as Allen Fiksdal, the manager of the staff. And Allen will be doing two roles today, representing the Council, as well as helping out with folks on the telephone, Susan Drummond from Foster Pepper & Shefelman and Mike Robertson for Residents Opposed to Kittitas Turbines Kittitas. And let's take, folks on the telephone, that I've made your appearances for you.

Can we start to my left with John Lane, Counsel for the Environment, and make our way down the table.

MR. LANE: John Lane, Counsel for the Environment.

MR. TAYLOR: Chris Taylor, Applicant Representative.

MR. PEEPLES: Darrel Peeples, Attorney for the Applicant.

MR. LEAN: Charles Lean, Attorney for the Applicant.

MS. STRAND: Debbie Strand with the Economic Development Group of Kittitas County.

Development Group of Kittitas County.

MS. LING: Sonja Ling, Renewable Northwest Project.

MR. ANDERSON: Mark Anderson with Community Trade and Economic Development.

MR. SLOTHOWER: Jeff Slothower, Attorney for Intervener Lathrop.

MR. GARRETT: Ed Garrett, spokesperson for Residents Opposed to Kittitas Turbines.

MS. HALL: Chris Hall representing myself and my husband.

MR. WHITE: Clay White, Kittitas County.

MR. HURSON: Jim Hurson, Deputy Prosecutor for Kittitas County.

JUDGE TOREM: Are there any other parties present this morning or anyone else in our galaxy that needs to make an appearance this morning?

Seeing none, let's move on to the adoption of the proposed agenda, Item 3. We have today scheduled a discussion after the adoption of this agenda a process and schedule for consideration of the Applicant's new request for preemption of the local land use regulations. We'll have a series of presentations as noted there, then we will discuss a process and a tentative schedule for the adjudicative hearings in this matter. Then we will see if

Chair of the Energy Siting Council and to my left is --

Let's quickly go around and take appearances from the rest of the parties.

First from the Council and its members that are here and from the rest of the parties.

Chairman Luce.

CHAIR LUCE: My name is James Luce. I'm the Administrator Law Judge presiding in this matter. Let's quickly go around and take appearances first from the Council and its members that are here and from the rest of the parties.

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MR. IFIE: Tony Ifie. I represent the Department of Natural Resources.

MR. SWEENEY: My name is Tim Sweeney. I'm with the Washington Utilities and Transportation Commission.

CHAIR LUCE: To my right is our Assistant Attorney General.

MS. ESSKO: I'm Ann Essko. I represent the Council.

MS. JOHNSON: I'm Patti Johnson. I am the County representative.

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Mr. Peeples. on that?

Seeing none, Councilmembers, any discussion his view of the order are?

have any comments on what Mr. Garrett's clarifications in JUDGE TOREM: All right. Any other parties have any the stuff on preemption because essentially right now if we adopt the agenda would be the best time.

Are there any other suggestions or modifications to the agenda as is set out today?

Seeing none, is there a motion for the Council to adopt the agenda?

CHAIR LUCE: So moved.

MR. IFIE: Second.

CHAIR LUCE: Question.

All in favor say aye.

COUNCILMEMBERS: Aye.

JUDGE TOREM: The agenda is adopted.

Mr. Garrett, Prehearing Conference Order No. 7 was issued on February 9, and today is the last day for any modifications to it, and I understood your discussion with Ms. Makarow was that you had some suggestions, including I think the recognition that you were here for Residents Opposed to Kittitas Turbines. Mr. Garrett: Correct.

JUDGE TOREM: But you don't want to go ahead and make a formal written amendment to it. We can do this on the record today.

MR. GARRETT: Correct.

JUDGE TOREM: What are your concerns, sir?

MR. GARRETT: The first issue was on the participants list that my name be added instead of the way that it's currently listed which is Residents Opposed to Kittitas Turbines so that my name, Ed Garrett, is shown as my continued standing in this issue.

The second issue that I have is regarding the summary of the Prehearing Conference Section 3, third paragraph. The record should reflect that the Council, Judge Torem, ordered that Sagebrush Power Partners submit a letter of intent to preempt by the third week into the 30-day extension on or about February 10. The current statement that Mr. Peeples said I don't want to go back and reread the transcript right at the moment and settle this if there is any dispute to be settled. Is there any substantive effect on where we are today in the next agenda item?

MR. GARRETT: I stand by what I say. If someone could go back into the transaction they will be able to see what I'm talking about.

JUDGE TOREM: Mr. Garrett, as far as what Mr. Peeples said I don't want to go back and reread the transcript right at the moment and settle this if there is any dispute to be settled. Is there any substantive effect on where we are today in the next agenda item?

MR. GARRETT: No.

JUDGE TOREM: So we will just take those matters as creating a record of that. Councilmembers, any additions, deletions to the prehearing conference order as previously issued and now as clarified in Mr. Garrett's view?

All right. Seeing none, let's move on to the next item on the agenda. There's no need for us to take any further action at this time. The order will remain unchanged, but we have created a record today as to what concerns may be there or may be consistent or incomplete with the previous record or any created last month.

Item No. 4, Process and Schedule for Consideration of the Applicant's request for Preemption. Let me state for the record that on February 7, 2004, which was a Saturday, the Applicant completed a request for preemption. It was served the next following business day, Monday February 9, 2004, and it is a document of some heft, maybe from its attachments. All of you should have received a copy directly from the Applicant. I do appreciate the fact that when we sent out the cover letter on the 9th instructing folks to reply with initial take on this that several of you did file something at least by email on the deadline given on the 17th. So I thank you. If there are other people who have not filed something in writing today, they should not feel prohibited from speaking on the preemption request, but they just want to have the benefit of having the Council know where they stood before we walked in this morning.

So the way it's set up today we'll have a presentation from Mr. Peeples and anyone else from the Applicant as necessary, then the County and Counsel for the Environment have both filed their feelings, initial
feelings at least on the schedules. We'll hear from them. Then the other parties that's where you'll come in if you haven't yet filed something in writing. If we need to schedule any additional briefs or oral argument, we will do that, and move on to the next agenda item after that.

Mr. Peeples.

MR. PEEPLES: Essentially I just want to comment that the letter we received from EFSEC dated February 9 requesting briefs, I want to state I took that limitation that the content of that brief to the method in which the preemption matter would be held within the hearing context, and that the request was for comments regarding schedule and the preemption process.

I believe that the brief filed by the County went beyond that. I did not take that as a request for brief on schedule and on the other items, so we did not respond to that. We have developed our own proposed schedule we would like to propose, but I would like to ask directly from the Administrative Law Judge whether I should talk about that now or on the next agenda item.

JUDGE TOREM: You're correct in thinking, Mr. Peeples, that what we asked for is exactly that, comments on the scheduling and response to the preemption.

There will be additional details on the schedule as well that were set out on the second page of that letter. So let's focus on the preemption itself now.

MR. PEEPLES: Okay. I mentioned at the last prehearing conference that I didn't know how the Council pursuant to the WACs, its own WACs, could rule on preemption until it occurred in the typed record. That's still our position. There was a brief filed by the Counsel for the Environment. I think that legal analysis is the best legal analysis that's been given to you. I don't see a way around it. I think the Council however you handle that in your hearing, whether it's the first thing when you start your hearing process which makes a good deal of sense to me, whether you call it a separate hearing, or whether you just have a subject area for preemption like we'd have a subject area for wildlife, I don't think it makes any difference.

I think if you read 463-28-060 it refers to you have to consider everything in 80.50.100. I wish it didn't say that. I wish we could do it to a certain extent in the manner that is proposed by the County, but I just don't see how you can do it. And I would say personally it scares me from the field point of view trying to do it that way.

With that said, I don't think we're totally opposed to handling it in a different way under certain assumptions and certain requirements. Number one, all the parties agree that they will not file an appeal on that issue after the EFSEC hearing. I don't want that going up on appeal if you go that route, but I don't think lawfully you can go that route. But if all the parties want to do it in a different manner and everybody stipulates to that, we could potentially agree to that.

The other thing is the way the County has proposed it. It puts it way back until right before the hearing in chief I'll call it, the other issues. To me that's certainly a little bit counterproductive. That means all the parties have to get prepared way early. So if you decide to do it that way, my suggestion, and everybody agrees to it, my suggestion would be to move it up to have it within a month or so. And then the parties, you know, if there's no preemption, if the Council rules it that way, then the parties don't have to worry about getting ready for the other witnesses.

The other thing is that the hearing date which we are going to propose to be held in the middle of June, beginning of July, we need to preserve that hearing date for the final hearing date. We would not want everything, the hearing date set way back because we would hear it early in the month.

So that's essentially our position on it. I think the law requires it to be heard, you know, within the context of the main hearing, and that I don't see how the Council pursuant to the WAC can make a decision until it's considered all the evidence, and I agree with the Counsel for the Environment's brief. But, again, that's not to say if parties want to talk and stipulate about doing it different, we would sure be willing to talk about it.

JUDGE TOREM: Thank you, Mr. Peeples. Despite what the agenda says, I think I'm going to ask to hear from Mr. Lane first because it seems that his position follows naturally now from what the Applicant has said. So I'll come to you, Mr. Hurson and Mr. White, as necessary after Counsel for the Environment.

Mr. Lane.

MR. LANE: We don't have a particularly vested interest in this question necessarily, but we did provide some responses. My interpretation of WAC 463-28-060 in the first sentence discusses preemption as a part of the adjudicative proceeding which then when going to the definition of adjudicative proceeding in WAC 463-10-010 means a proceeding conducted pursuant to RCW 80.50.090(3) in the state Administrative Procedures Act which then takes us then into the overall siting adjudicative proceeding. That's why Counsel for the Environment has taken the position that it is a component.
of not a separate form of a prehearing kind of type of
motion type issue.

Just for clarity's sake, Counsel for the
Environment has taken the position that it would be best
to discuss the preemption issues in one setting at the
beginning, just so that all the parties can address those
issues and be set on that and then move to the more
substantive issues on the actual siting of the process.
And then in the end I think that the determination is that
the preemption question becomes a component of the overall
order most likely that goes to the Governor's office.

JUDGE TOREM: All right. Thank you,
Mr. Lane. I did appreciate the brief focusing on the
rules that we have, those statutes governing the process.

Turning now to the County, who's speaking
for the County this morning?

MR. HURSON: Well, Jim Hurson, Deputy
Prosecutor. I guess I don't quite understand what
Mr. Peeples' position is. He says he has a schedule, but
I haven't seen it, so I don't know what I'm responding to.

JUDGE TOREM: At this time let's look at
when we schedule the preemption hearing, and I understand
that Mr. Peeples may have another proposed schedule under
Item 5, the schedule for the adjudicative hearings, and
that will be a separate discussion. But we need to know

essentially now, Mr. Hurson, the County's position if they
want to elaborate what's in their process and schedule
comments regarding only the preemption hearing itself.
And I think the real issues are should it be separate.
The County has already stated as much they think it should
be held in advance, and if so, when.

MR. HURSON: The preemption is part of the
adjudicative hearing as I understand it as I read the
rules, so I don't think I disagree with the Counsel for
the Environment on it. It is part of the same procedure;
however, it's a completely separate issue in substance.
If you look at the WAC regulation and what it is that the
Applicant is to demonstrate in order for the Council to
get a preemption to grant their request for preemption,
they have to demonstrate good faith efforts to resolve
issues with local authorities under the agreement,
alternative locations within the County that are reviewed
and have been found acceptable in the interest of the state,
so that's a certain set of issues that are dealt
with on preemption.

The siting issues you look at a whole
different set of WACs and those issues, so they are really
factually going to be different issues discussed and
legally different issues. So all I'm saying is, yes, it's
all under the auspices of the adjudicatory hearing, but

you have phases. You have the first phase is the
preemption issue. Second phase is the substance. Because
if you talk about them both at the same time, you get lost
and confused and it makes no sense.

We're suggesting preemption be done first in
that phase because WAC 463-28-080 says that during the
adjudicative proceeding if the Counsel for the Applicant
has failed to justify the request for state preemption,
Council shall do so by issuing an order that defines the
facts and conclusions of law, report to the Governor its
recommendation for rejection.

So we're suggesting that because the WAC
says necessarily by definition that when you reject the
request for preemption that means that you are telling the
Governor to reject the site certification and reject the
preemption. That takes care of the whole case, and so it
make no sense to go into Step 2.

If I'm understanding Mr. Peeples, and I
don't know if I was, it sounds like he wanted to have them
all heard at the same time and have all the facts
intermingled and combined on both substance and preemption
even though they're completely separate issues. I haven't
even met with my clients. For me to get with my clients,
my clients are county commissioners. I have to meet with
them with notice.

JUDGE TOREM: I understand the open public
meeting.

MR. HURSON: Public meetings, executive
sessions, and everything like that. I haven't even had a
chance to discuss with them do we just talk about
preemption and not even deal with substance or are we also
going to try to resolve ourselves in substance? And from
my understanding Mr. Peeples wants us to blend them all
together even though they're completely separate legal
factors.

JUDGE TOREM: I'm not sure I heard
Mr. Peeples say it quite that way, but when I heard your
comments, the word bifurcation jumped out at me. You
suggested to include a bifurcated hearing, and this
morning I'm hearing you say that you recognize that it has
to be a separate topic. And would that be a sufficient
bifurcation, or are you suggesting that that topic be
heard and that the Council render a decision with findings
of facts and conclusions of law and make a separate
recommendation to the Governor, and if their
recommendation is no do away with everything else?

MR. HURSON: Exactly. That would be under
my Page 2 under schedule. What I have proposed is when
they're going to file their -- essentially what I was
envisioning is we want everything combined together
because we don't want to delay the process, and so the
Applicant can present their prefiled on the preemption
issue and their prefiled on the substance at the same
time but actually make them two physical documents. Here's our
preemption testimony. Here's our substantive testimony.
JUDGE TOREM: And I think you were all in
agreement on that.
MR. HURSON: And then the idea was then what
I suggested is just a date for discussion is on August 9
we can do the adjudicative hearing on the issue regarding
preemption presumably be done within a week. Then the
Council would have time to then render a decision. If the
Council renders a decision denying preemption, then you
don't even go to the second phase. Otherwise what would
be the point?
JUDGE TOREM: Well, I understand the logic
of that. The logic may be better than what we actually
have to work with in our rule. Can you make that fit with
what the Counsel for the Environment's position is with
463-28-060 last sentence; that a determination of
preemption has to be by Counsel order? But the sentence
goes on: And shall be included in its recommendations to
the Governor pursuant to the statute. And that
recommendation, if I'm reading it correctly, and
Mr. Lane's interpretation may be the best on the language
available, that recommendation is whether to certify or
not, not necessarily preemption one recommendation and the
next part being certification. Is there any way to
unravel the two of those threads given the statute and the
law despite what the logic may say?
MR. HURSON: I think when you include it in
your recommendation to the Governor, and by rule the
recommendation will be to reject. And so yet we have this
-- I don't see an inconsistency there. If there is two
phases, basically there's two issues. Are you going to do
preemption? And if they're going to preempt is there
going to be site certification approved with an agreement?
And Zilkha has to have both of those, and if neither of
one of them, then the Council's recommendation necessarily
by rule is to deny. And so I guess what the issue is here
is okay. Let's say for some reason the Council does what
I think it will be which is to deny preemption. What
would then the Council do on the substance? Hold a
hearing on that and then recommend a site certification
agreement even though they're recommending that it be
denied? How do you come up with an agreement when the
fundamental requirement of consistency has not been met?
I don't see how the Council could recommend anything other
than denying.
JUDGE TOREM: We recognize this is a matter
of first impression for the Council, and all of that makes
logical sense, but the assumption built in is that the
Council has the legal ability to make a decision on the
recommendation for preemption prior to and separate from
its recommendations on the site certification and any
conditions that go along with that. I'm not convinced,
and the Council hasn't had a chance to meet, as your
clients as well. They have not sat down and really hashed
this out since the preemption request was filed and
they've had the issue on the radar screen so to speak
since we met in January. But now it's really here, and
the Council has to make a decision on how to go forward,
and that's the purpose of this agenda item.
MR. PEEPLES: Judge Torem, I want to insert
something just for clarification.
JUDGE TOREM: Hold one second. Because of
logistics today, we will let Mr. Fiksdal retrieve the cell
phone and give it to you, so that Mr. Robertson and
Ms. Drummond as best they can participate.
MR. PEEPLES: I don't want to interrupt
Mr. Hurson personally. I really apologize for this. The
thing is I wish I could come out with Mr. Hurson. I
really do, but I think the rules keep us from that. And I
don't think what's been mentioned is 463-28-060 references
463-28-040 and the things that have to be shown. In paren
It's taken longer. Slowing things down, but the way the process has unfolded and we're past that by a lot. Not at all due to parties the original time frame thought of for EFSEC is one year, has mentioned this several times before, and I emphasize timely without unnecessary delay. And I know Mr. Peeples to point out when I think they're trying to obfuscate and confuse the Council, so that it gets all confused and all muddled together, so you go, oh, well, what the heck? You because they have to meet both burdens.

As far as Mr. Peeples last comment, in the interest of the state he's trying to read that the site certification will deal with all sorts of minutia detail. You may talk about the width of the roads, the type of gravel that we used on the roads, but none of those things are necessary to be discussed in the context of whether you agree on the GMA County's local land use regulations because they were waiting for environmental documents before they held their hearings. Because they're completely unrelated issues, and it will simply serve to try to confuse the issues and take the Council off focus on the preemption issue which is that Zilkha is asking the Council to preclude the County from doing its job with the Growth Management Act and then its comprehensive plan records what rules, regulations, etc. That's what I am fearful of, what they are trying to do. They are trying to take that focus away. No one has ever preempted in 30 years at EFSEC. That should show how rare this is, what a great burden it is on them to get preemption. We recognize that. JUDGE TOREM: We recognize that. MR. HURSON: But I think they are trying to -- they want to blend it together to try to mislead and confuse the Council, so that it gets all confused and all muddled together, so you go, oh, well, what the heck? You guys have already taken care of it. What difference does it make?

JUDGE TOREM: Well, I think you should trust in the members of the Council to listen to everything and as all representatives of the various agencies as required by statute do their job and not have the wool pulled over their eyes. You're certainly going to have plenty of opportunity to make sure any obfuscation as there might be from the County's perspective is undone. So I'll trust that between the two of you we will get things straight. MR. HURSON: And I will take the opportunity to point out when I think they're trying to obfuscate and confuse too.

JUDGE TOREM: I trust that you will. MR. HURSON: Thank you. JUDGE TOREM: The legislative finding of policy and intent, the last bullet there is number five, talks about the purposes to avoid costly duplication in the siting process and ensure that decisions are made timely without unnecessary delay. And I know Mr. Peeples has mentioned this several times before, and I emphasize the original time frame thought of for EFSEC is one year, and we're past that by a lot. Not at all due to parties slowing things down, but the way the process has unfolded at this particular time it's taken longer.

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Are there any other parties wishing to comment on this issue of scheduling and process on simply the preemption portion of the adjudicative hearing?

Mr. Anderson, Community Trade and Economic Development.

MS. DRUMMOND: I want to make a comment regarding --

JUDGE TOREM: Ms. Drummond, I'll call on you shortly, and we'll see how Allen does as an interpreter here. We're going to hear from Mr. Anderson first.

MR. ANDERSON: Thank you. We originally were not planning to make any comments. It seems more an issue of defining legal issues, and we weren't planning to comment. However, in listening to the comments today I have a response.

The reason for preemption in my understanding is that you are deciding for the good of the state, for the good of the people that this project ought to be sited, and therefore if you need to preempt, you preempt. My understanding is that is the reason you would consider them together. If you don't believe the facility is for the good of the people, for the good of the state, and that it shouldn't be sited, you don't need to consider preemption either. So it does seem to me that they come together, and while I would think that you would be able to discuss the two issues separately, in other words, not confuse them by talking about roads at the time same you're talking about preemption, it seems to me that they logically fit together. That is why the rule is probably written the way it does.

My second point is are we going to address -- I think Mr. Garret just raised the issue of the realignment. Are you going to address the other things that have been stated as well or are we focusing just on sort of process and schedule?

JUDGE TOREM: I read the County's comments, as well as Mr. Carmody's support of them. The realignment questions I wanted to leave for the next agenda item.

Mr. Hurson, correct me if I'm wrong. It seems that the scheduling of who gets to file and when they get file and if they get to file rebuttal goes to both issues for adjudicative hearings. Once we schedule the preemption whether it's separate or together with the adjudicative proceeding that will be a blanket issue that covers both.

MR. ANDERSON: That would be fine. That would be the end of my comments.

JUDGE TOREM: Mr. Hurson does that sound about right?

MR. HURSON: I understood you wanted comments about anything regarding process and schedule that I could think of, and as I sat at my computer these issues that popped to mind, so I tried to get it to you, so everybody has our thoughts.

JUDGE TOREM: all right. We'll get to that part at the next agenda item.

Mr. Fiksdal, if you would interpret for Ms. Drummond.

MR. FIJKSDAL (For Ms. Drummond): She feels that the Counsel for Environment and Mr. Peeples has handled issues of preemption quite well.

JUDGE TOREM: Let me state that for everybody that couldn't hear. Ms. Drummond is stating through Mr. Fiksdal that she believes the issue about preemption has been handled sufficiently at this time.

MR. FIJKSDAL: Correct.

JUDGE TOREM: All right. Are there any other parties wishing to comment on preemption?

Mr. Slothower.

MR. SLOTHOWER: Yes.

JUDGE TOREM: Just wait for the phone for one second.

MR. SLOTHOWER: Listening to what the Applicant is saying and the County is saying and then looking at the schedule that Mr. Hurson is proposing, I just want to summarize because I'm not sure I'm tracking with both of them, and I guess I want to make sure I'm tracking with both of them.

I hear the Applicant saying that it has to be these two issues, the preemption and the siting, have to be considered in one hearing. Mr. Hurson is basically saying two hearings. But if you look at his schedule, I wonder if we're really talking about the same thing. You theoretically could start the hearing, and as part of the prehearing order you can schedule the issues that will be considered in one hearing. And I believe that the preemption issues or the issues you need the evidence, if you will, that need to look at in deciding preemption is clearly spelled out in the statute, and it is different than the evidence that you need to decide whether you're going to site this facility.

So one thing you could do is you could set a start date for your hearing, whether it's August 9 or a different date. I think it is not really the issue. But when you set that hearing, you specify the order in which you will consider issues, and I believe that if you do that, you can consider the evidence on preemption first, make a decision on preemption, and then from there move right into the core issues and the evidence that you need to look at in order to decide siting because they are
different if you look at what the WAC specifies on preemption.

So basically it can be done in one hearing, but what is common is in certain situations where a court will make a decision on one issue and then based upon that issue they will move right into their decision. They'll move right into other processes within the same hearing. JUDGE TOREM: I think if I understood you correctly, you're suggesting that we could follow the schedule set up by Mr. Hurson.

MR. SLOTHOWER: And be within the statute. Mr. Peeples' interpretation of the statute.

MR. PEEPLES: I guess my response is not if you make the determination of preemption before you hear the rest of the evidence. I have no problem having a section of the hearing as suggested by Counsel for the Environment with regard to the primary preemption issues.

But if you look at 040, 463-28-040 when they reference 80.50.010 that's everything that EFSEC would ever consider in this hearing, and I don't see how they can make a decision. First of all, I don't see how they can make a decision before they analyze everything else. That's number one.

And number two, if by any reason everybody agrees, you know, they'll waive their right for an appeal on that issue, then the efficiency of the process says it should be moved up and held immediately before you go to the other issues, so those are my two comments.

And contrary to what Mr. Hurson has commented about my motives, I'm trying to be as transparent as possible, and I just want to make sure we all go down a path that is legally defensible.

Mr. Slothower, my fear is the County would suggest one thing, and then I have other opponents sit back and then appeal on the way you had the procedure.

You know, that's my nightmare. You know, like have them propose it. You sit back, I'm not saying you are. But somebody else sitting back and then file the appeal to the Supreme Court on that issue. So I think it's pretty -- the best part -- although you can have different interpretations of that. I'm not casting any dispersions on people's interpretation of the law, but I think to me the clearest and most sustainable interpretation is that put forward by the Counsel for the Environment. I don't know how you can make that decision without considering everything else. I wish you could, but I don't see how you can.

MR. SLOTHOWER: I think you're putting undue emphasis on reference to the legislative intent. I think it could come down to a disagreement on the law. It is an issue of first impression, and we're going to have to sort that out. But I think you've got an undue emphasis in your analysis on the declaration of legislative intent.

JUDGE TOREM: Members of the Council, any comments at this time? To my right any members of the Council wishing to make any comments on this discussion?

To my left? Chairman Luce, any comments at this time?

I think then we'll close the discussion on Item 4 by asking if there is any need -- I think we've thoroughly hashed out the issue in the briefs as much as you might think they're cursory. There's not a whole lot more out there to tell us about the issue. Is there any need for any party to file a brief following the discussion today or do you trust the Councilmembers know what the options available are, what the various interpretations of the statute and the regulations are, and what each party's position are? Is there any need to get a further briefing on this?

Mr. Hurson.

MR. HURSON: Well, I'm not sure if it's directed to this, but I don't want to feel like I'm precluded from getting into talking about preemption. One of the things I do intend to do is I was going to file a motion for the Council to reject the request for preemption. Just from the County's standpoint the Applicant hasn't complied with WAC 463-28-040 in its submission, and so our position is that the Council can reject it because they haven't met even the prima facie requirement. So that would have to do with scheduling. So that's the only reason I'm bringing it up now. I was going to bring it up in some context later, but I want to get the work in today's schedule like a filing deadline for us, response time for them, and then some sort of hearing date. One of the things you ruled as they want us to do things efficiently and expeditiously, and if we can get this back on track to getting a land use application back before the County, so that the County can make its decision, so then we can get to the substance, I think we're all better served instead of fighting about the preemption issue.

So frankly this is what I am understanding as I am envisioning it now is it isn't to say you're free to send the request to the Governor to preempt now, but it's simply to say that this doesn't meet the requirement to ask for preemption, so you still have to work with the County and then basically direct them to go back to the County and try to get consistency.

JUDGE TOREM: If I understand that correctly then, Mr. Hurson, that 463-28-040 in its four part test in general the County is going argue it has not been met.

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JUDGE TOREM: If I understand that correctly then, Mr. Hurson, that 463-28-040 in its four part test in general the County is going argue it has not been met.
MR. HURSON: Correct.

JUDGE TOREM: Are you arguing a procedural defect in addition to what you're going to allege are substantive defects in meeting those four points?

MR. HURSON: I think there's a procedural defect because it lacks the substance necessary to meet the requirement.

JUDGE TOREM: What I'm asking you for is a simple question as to when I say procedural defect that Mr. Peeples on behalf of the Applicant failed to file it correctly, serve it correctly, or otherwise not jump through a hoop to be able to ask the question. You're not going to have it dismissed on a technicality ground before we even get to those four subissues.

MR. HURSON: Quite frankly I haven't looked at it that closely to see. I mean I don't recall if the APA require there be a verification, a sworn verification. But frankly what it is, it's Issue 3 is the one I would be focusing on saying alternative locations within the same County have been reviewed and have been found unacceptable. The basis is that apparently they are unaware that EnXco has applied for a wind farm application immediately east of their proposal which would produce the same amount of power which is an alternative energy wind resource in this county. It has not been found unacceptable by the County, and Zilkha is also as Council is aware Sagebrush where it has the Wild Horse project which would be another facility within this county which is an alternative wind farm resource location that would produce approximately the same amount of power, and that has not been reviewed and found unacceptable.

JUDGE TOREM: We read the comments of the DEIS as well, so we know that there is some questions about the alternative analysis, and the Council and staff are working on those issues separately. But what I'm hearing you tell me is that you're going to oppose the request for preemption, and, again, that's not a surprise given your client and the County's land use regulations are at risk here. It sounds to me as though that's the subject of the adjudication on that issue, and so the filing of that motion you can do at your leisure, but we'll schedule a hearing on the opposition of the request and the opposition based on that. It doesn't sound like there's a procedural thing that would keep us from having the hearing on those four points, specifically Point 3 on the location of alternatives.

MR. HURSON: Well, I think if I mental what you're saying what we have is this line.

JUDGE TOREM: You're going to argue no preemption.

MR. HURSON: No, this isn't trying to get to the merit. This is saying that the regs require them to submit information that alternative locations have and everybody in this room knows that those other alternatives exist. So we're saying they haven't met the regulatory requirement in the filing, and so it's basically saying we are rejecting this filing as legally inadequate. It's like a 12(b)(6) motion in court to state the claim upon relief may be granted because it's a given. Now whether we use an analysis of summary judgment or a 12(b)(6) motion that's what I am talking about, and then we would be asking the Council to say, no, this is legally insufficient. You're rejected. Not that you're going to recommend that the Governor deny certification. It's just you're rejecting the request directing Sagebrush to resubmit their application to the County, so that the County can go through the process. That's all its ever wanted.

JUDGE TOREM: Let me suggest you do what you think the County has to do in that regard, and the sooner the Council has a motion like that may affect the schedule the better. And if there is any necessity at least to amend that application for preemption that would give Mr. Peeples an opportunity to address that issue as well prior to an adjudication that might be null and void based on the County's motion is found to have merit.

MR. HURSON: I just wanted to mention that because you're talking about scheduling and if you wanted to work that into the schedule or if you didn't and you just wanted to leave that blank. Frankly I was hoping I could have it with me today, but I didn't have a chance to meet with my clients until yesterday afternoon, so it didn't give me ample time to get my work together. I would anticipate getting it by the end of next week. So just so you know sort of that would be what I would anticipate doing is by the end of next week getting that motion and affidavit here, and then we could set a schedule on it sometime in the near future.

JUDGE TOREM: When we get your motion, we'll schedule as necessary a time for response and a time for a prehearing conference hearing for any oral argument that is necessary to rule on it and if that affects the schedule. The Council may have already determined a preliminary schedule by that time based on deliberation following today's meeting. So we'll see. Knowing that's coming is helpful. Thank you.

MR. HURSON: Thank you.

MR. PEEPLES: I have a question on that.
that WAC 463-28-040 would comply with this regarding the
alternative. Will that be the end of it? Then
substantively we must have shown, you know, in that
hearing that that was complied with. Is that what I'm
hearing? I don't know how you get into this because he's
talking about a substantive thing.

JUDGE TOREM: This is one where procedure
and substance really are interwoven, Mr. Peeples, so I
don't know the answer to that question until I read the
motion. And certainly your response would be appropriate
to take that up as to how the Council should deal with
that, whether they can grant the motion prior to a full
adjudication on that or if as Mr. Hurson has hinted today
there may not be enough substance to that Point 3 in your
request for preemption to even get to that hearing. We
will have to decide that issue one step at a time.

Mr. Lane.

MR. LANE: I would just state that WAC
463-28-040 states that the request shall address the
following topics. It doesn't state prove or provide
evidence, and my recollection is that the document did
address that section. So I think my interpretation is
that we're heading on the substance than procedurally.
Procedurally it seems to have been fine.

JUDGE TOREM: And we'll see based on what

Mr. Hurson's motion is if there are responses to it that
Counsel for the Environment wishes to file or any other
parties agreeing or disagreeing. That would be helpful to
the Council. Again, this preemption statute and
regulation this is the first time we're dealing with it,
and some of these issues until they're flushed out at this
time around and everybody becomes more familiar it's going
to be a bit of a mystery to predict where these people are
going to want to go.

All right. Let's move onto Item 5. We've
been going for about an hour now. Is there a need for a
break?

Nobody is indicating they need a break for
any reason, so we will move right into Item 5. This is
the process and tentative schedule for the adjudicative
hearings. I know we have touched on some of this already.

In Ms. Makarow's letter of February 9, she
and I had sketched out a bit of a proposal just to have
something to work with today. For the record that is that
we would have the Applicant's prefiled testimony as one
milestone event, and this would be prefiled testimony on
each and every topic potentially including preemption, if
there is any need for additional testimony in that
particular topic area followed by prefiled testimony from
any of the other parties, and then rebuttal testimony and

then the adjudicative hearing. Those are the four
milestones, and dates given for those were in April and
June, mid-July, then somewhere around August 9 is the
earliest possible start date for adjudicative hearings and
whether that would start with preemption and go right into
other issues or start with preemption and have a break as
we've already discussed today. So leaving that when
should preemption be discussed issue aside, let's look at
the overall items there.

Because this is the Applicant's request to
have the project, I want to hear from them first, but I
want to note already the issue of realignment the County
has raised that who's for the project and who's against
the project I think is how I understood that. I'll give
Mr. Peeples a chance to comment on the proposed schedule.
He's indicated he may have one to suggest.

Mr. Peeples, are you going to have a handout
for that?

MR. PEEPLES: No.

JUDGE TOREM: All right. So we will all be
prepared to take notes on what the Applicant's proposals
are and then go back to the other parties that have filed
b briefs by the deadline on Tuesday and then hear from the
rest.

MR. PEEPLES: Again, I did not file a brief
referring to scheduling because I did not think that's
what was requested by the Council and essentially the
County did file one. I think the schedule we would
propose, and I think the way I developed this was off the
schedule that was put in the information coming from EFSEC
would be we could file our prefiled March 15th and that's
when I would suggest we file our prefiled. Our suggestion
would be to have the other parties prefiled, all other
parties prefiled May 1st. We would have our rebuttal June
1st and commence the hearing 15 days later.

Essentially what I did was take the schedule
as set out, reduced it by 15 days, the date when the
Applicant was to file its prefiled. Reduced by 15 days
the response period for Applicant's rebuttal testimony and
reduced by 15 days the time by which the other parties
were to file their prefiled. And then I believe two weeks
is an adequate period of time after all the prefiled was
in to go ahead and go into the hearing process. Do you
want me to leave it at that or would you want me to go
into the other issues that are under Sub 5?

JUDGE TOREM: Let's leave it at that for
now. We'll come back to the other questions about
discovery, which I know I'm going to address later today
as well.

MR. PEEPLES: Well, I think they're somewhat
JUDGE TOREM: You provided what you felt the Council's proposed discussion schedule by at least six weeks.

MR. HURSON: And what I did in my schedule proposal is I took Council's proposed schedule, so the hearing date wasn't behind a single day. So we would be able to proceed and then try to juggle that, so that we would have sufficient time to get our work done because we need to take depositions.

Frankly, I am hoping that the response to the Draft DEIS comments would be coming out in the next few weeks or a month. We would like to be able to see those before we get into the hearing. We would like to see those before we submit testimony. I'm sure other parties would too. I don't know what the time is on that either, so that would be relevant to any schedule also because other parties whoever is going to deal with substantive issues is undoubtedly going to want to see the response to the Draft DEIS comments, so that can be part of their structure for the testimony. That can affect the case.

Our schedule was we needed several months because to take depositions. You have to take depositions. You've got to get court reporters. It takes time for them to get the transcript done unless you're going to pay an expedite fee to the court reporter. That costs a lot of money. If Zilkha wants to pay for expedited transcript fees for the County, let us know that. That could probably save us some time. If they're not willing to pay for the transcript cost, then we need to do it. We're not trying to delay. Our proposed date as the hearing date is starting the same day that the Council did. It is simply saying the Applicant has said they're ready. Okay. File. And we need more time than was proposed because if you take depositions, you've got to get it transcribed. That takes time. Once you get the deposition, you have to be able to read and review. You have to figure out what to do. You have to figure out how to get your prefilled testimony and have your witnesses put together.

I don't have the luxury at this being the only case that I have to work on. You are looking at the entire civil division of the Kittitas County Prosecutors Office. I have bankruptcy issues I'm dealing with my clerk right now. I have other land use issues. I'm advising elections officer. I'm a jack of all trades, master of none. And I'm not going to be able to spend, you know, 60 hours a week to try to get all this done in a compressed time frame. It's an unrealistic expectation, and they're aware of that.

I think our schedule it meets your proposed time frame as far as this getting going. It will give us...

mixed in, so that's why I was saying that.

JUDGE TOREM: You provided what you felt the Applicant can do, and I know your interest is to have the adjudicative hearing as soon as possible. So the earliest date I have going on is June 15th assuming the Council can support that as well.

JUDGE TOREM: Mr. Hurson, let me come back to you now on the schedule. What response, if any, do you have to the Applicant's suggestion of those dates, other than what I anticipate that June 15 may be too early given some other questions? But tell me what you think has to be done that couldn't be done, if anything, before June 15th.

MR. HURSON: Well, I think what the Applicant is proposing would preclude the County from having adequate time to respond. Leaving no time for us to do discovery, which we think is important. We have a lot of questions about process. We talked about the need for taking depositions.

Frankly, what they're proposing doesn't surprise me because I have repeatedly expressed my concerns with Mr. Peeples that his client seems to just delay, delay, and delay everything, and once they get something, then they want everything to race through so the County doesn't have adequate time to prepare the responses. I sent a letter in June of last year telling him that I was basically getting tired of that.

JUDGE TOREM: I don't want to get into discussion about delays and accusations.

MR. HURSON: Well, it is clearly they are simply trying to give us inadequate time. They have been talking to Council. They suggested a schedule for since late last year saying they are ready to prefile. That's why I said why don't they do it March 1st. They've been telling us for four or five months they're ready to prefile, but they're not. Now they want to no, no, they need more time to put it together. They're the ones who said they want things hurried along. Why aren't they ready to go?

When we were last here, they said, well, they're thinking about preemption. They're going to talk about it. After the meeting Mr. Peeples told me he would give me a call to talk about it. We never got a call. We never got a letter. They never said anything to us. They basically took time to put together the preemption motion.

JUDGE TOREM: We are where we are now.

MR. HURSON: I know, but they are by their actions trying to squeeze the County.

JUDGE TOREM: They're moving up the Council's proposed discussion schedule by at least six
adequate time to get our discovery done and will give us
time to prepare.

Zilkha's process you're basically just
saying no discovery is allowed if you use Zilkha's
proposed time frame.

JUDGE TOREM: Mr. Lane, you had filed your
brief on the preemption issue, but do you have any
comments as far as Counsel for the Environment's position
on the timing of the adjudicative hearing, whether June is
too soon and August 9th is about right? Where's your
feeling?

MR. LANE: We could make it work. I could
make it work. I would certainly prefer the schedule that
the Council had outlined in their initial letter.

JUDGE TOREM: Other parties with comments?

We'll bring the phone back to you, Mr. Slothower.

MR. SLOTHOWER: Our position would be that
the schedule or the date for the hearing that the Council
came up with, the August 9 date, is a more appropriate
date. My concerns about the schedule that is outlined by
Zilkha is that there is not enough time between the filing
of the rebuttal testimony and the hearing.

I was tangentially involved in another EFSEC
hearing a number of years ago, and my recollection there
was that the Applicant filed their prehearing testimony,
then the people in opposition then filed theirs. And the
rebuttal testimony that came was not truly rebuttal
testimony but was instead the bulk of the evidence that
they were going to rely on in deciding issues on the
siting issue, the major issues that the Council had to
decide. I want to avoid that for lack of a better word
sandbagging approach here. I think that there needs to be
ample time for all of the parties to review the prefiled
testimony and plan their presentation in their case in
chief based upon that prefiled testimony.

I think the reason why it makes sense too --
I don't like the term realign the parties, but I think it
makes sense to specifically delineate when various parties
are going to file their prehearing testimony. I don't
want to get into a situation where, you know, literally a
banker's box shows up or three banker's boxes show up two
weeks before the hearing and only have two weeks to do
that. I think that that's an inappropriate way to
approach your decision making process, and I think that it
is not a service or it does a disservice to not only my
client but other parties.

People in Kittitas County have to live with
this decision and the state, so I think you have got to
make this process fair. And what they're asking you to do
is set it up, stack the deck in their favor, and I don't
think that is appropriate. You have to have more time
between the filing of the rebuttal testimony and the start
of the hearing.

JUDGE TOREM: All right I appreciate that
perspective, Mr. Slothower, that rebuttal should truly be
rebuttal, and some judges are more lenient on that than
others as you know. How much control as an Administrative
Law Judge presiding over a proceeding I have to exclude
inappropriate rebuttal testimony, I don't know. But I
anticipate that the parties affected if there is any
sandbagging that they would file the appropriate motions
to allow the presiding officer to do that, if necessary,
keeping in mind that the more information the Council gets
is better. But the timing of it is important to preserve
the integrity of the process, and I appreciate you raising
it now and acknowledge that.

And I know Mr. Peeples would have no intent
of sandbagging. If he did would say so on the record. So
he knows now that there are people in the room that felt
that way before and maybe not from any dealings with this
Applicant and this representative. Mr. Peeples from I
understand has been around the Council long enough to know
the importance of what we're talking about as well, so we
will just leave that as it may.

I don't think, Mr. Peeples, there's a need
to respond. Nobody is directly impugning the Applicant's
rebuttal because it hasn't been filed yet.

MR. PEEPLES: I do just say to Mr. Slothower
I'm not going to do it to you. You will know as soon as I
know even before prefiled what it's going to be. You will
have the content. I mean we're going to be transparent.

MR. SLOTHOWER: I'm not suggesting that you
personally are going to do that, but what my concern is
that the schedule that you're proposing lends itself to
that, and I think that to avoid the problem that I'm
concerned about is simply craft the schedule to create a
disincentive to do that.

MR. PEEPLES: I think if that happens and I
do sandbag somebody through any good reasons, things come
up, you know, there can always be a continuance granted
for the hearing. I think we have enough in place, you
know, and I understand Mr. Slothower's views, and I really
do appreciate it. But I think if that happens the Council
is going to know that, and they can continue the case.

And I provide all the information as soon as I know what
it's going to be as soon as I have it, even though it may
not even be in prefiled. Anybody who wants information
from us, ask us. You don't have to go through discovery.
We'll get it to you. That's the way this proceeding has
always ran when I was involved in them. I think generally
We should have a case in chief and it doesn't meet the burden. We are going to move for dismissal. The Council said, no, we've already got the Lakewood Mall scheduled. All these people are going to have to be handled, so we still had the hearing. They combined the rebuttal in with the case in chief, and then they wouldn't grant a continuance. And the resolution was is the hearings happened on Tuesdays, Wednesdays, and Thursdays, and then on Mondays and Fridays they let depositions happen. And so for five days a week people were suppose to dedicate a full time attorney to handling the hearing. Like I said, I'm the civil division for the County. It was impossible for me to participate in any deposition, and it was a nightmare.

JUDGE TOREM: I've been in those types of proceedings myself.

MR. HURSON: Yes, and like I said though, I think if you share these things, and this is a nightmare, that was a huge problem.

JUDGE TOREM: I will do my best. I don't know who the judge on the Olympic case was, so in case they're a friend of mine, I don't want to impugn them. But nonetheless I will do my best not to have that happen here and trust if people feel that is happening here, the appropriate parties will let me know through a letter that goes to everybody else and puts it right on the table.

This is a problem. I want a continuance because. And the Council will not rule simply because the Rodeo is out of town, and we have the fairgrounds available. We will do what's appropriate to make the Council have a defensible position. I think that's the theme we've been setting probably since the beginning, at least since I've been involved in December.

MR. HURSON: And, frankly, I think the way the Council is handling it I feel more comfortable than I did the last time through.

JUDGE TOREM: I'm looking just at the WAC on rules of evidence for the Council. It's 463-33-010, and it tells us that Sub 2 talks about prefiling of documentary evidence. 2(b) subject that not submitted in advance as required it may not be received absent a showing of clear cause that it was not offered before. If you see rebuttal sandbagging that comes up, make your motion to have it excluded under 33-10 2(b), and let's have a response and let me rule on it.

MR. HURSON: The fact of the matter is that was the first thing I did in the adjudication on Olympic, and it was denied. And I'm sorry, and I know you went through this, but they said it was just too much momentum.

JUDGE TOREM: As much as I like physics, momentum is not my strong suit, so we'll just leave it at that.

MR. HURSON: I trust this isn't going to happen. It's good to share war stories sometimes because then that precludes that sort of scenario from happening again, and in the end that makes everybody feel that they're doing a better job than their predecessors did.

JUDGE TOREM: Let's take a look at the adjudicative hearing date itself, June 15 or August 9 or after that or any other range of dates. Are there any other parties that want to comment on what they think is a suitable date from their perspective? Because I don't need a date that drives things coming backwards.

Ms. Hall, if you will wait for the phone to get to you.

Ms. Drummond, you will be next in line.

Chris Hall, go ahead.

MS. HALL: I would like to support what the Council is proposing because most of the people here do this 8:00 to 5:00. My work has to be done 5:00 to 8:00, and so I would like to have adequate weekends to do my work in.

JUDGE TOREM: Okay. Thank you.

Ms. Drummond, would you care to relay to Mr. Fiksdal what it is you would like to add on the
subject.

MR. FIKSDL (For Ms. Drummond): No objection to the Applicant's schedule. It looks like it's reasonable. The process has gone on for quite a while, and we are familiar with the issues. And they have plenty of time between March and May to get in their prefiled. That's the end of their comment.

JUDGE TOREM: Thank you, Ms. Drummond.

Mr. Peeples, we were going to come back to list of subissues under Sub 5. I think the Council probably has enough feedback on proposed schedule.

Mr. Lane, first.

MR. LANE: I just want to clarify. When was the other parties' prefiled for the Applicant's suggestion?

MR. PEEPLES: May 1st.

JUDGE TOREM: May 1st, yes.

MR. LANE: Oh, I had April 1st.

JUDGE TOREM: And you're okay with that?

MR. LANE: Yes.

JUDGE TOREM: Mr. Peeples, back to all the other subissues under Sub 5. Do you have any specific input on the issues of witness list and discovery process and any prehearing briefs and timing for those?

MR. PEEPLES: Just with regard to schedule, I'm going to be real blunt. I gave away 30 days for us, and you, you know, if the Council is going to do something other than our schedule that we proposed and maybe go back to the others, I don't like giving something up and nobody else giving anything up, so I want that very apparent.

I was proposing that giving up something of myself and everybody giving a little bit on it. But if you decide that nobody else needs to give, I don't think we should either.

The comment I had with regard to you had listed issues, witness lists, I would propose that we file our witness lists around March 15th at the time that we according to our schedule we plan to file our prefiled, and I think everyone would file whomever they note they're going to have as witnesses at that time, and the parties supplement when they know. When I know I'm going to have a witness, I'm going to let you know. I'm probably going to let you know when I'm going to have a potential witness. So I think we should do a preliminary witness list. I put March 15, but I don't care when it is.

Everybody should get a preliminary witness list out. That's kind of up to the examiner.

With regard to issues, you had issues down, and I think the parties are limited to the issues contained in the intervention order because I think that was published a little bit more than a year ago now. And that, you know, in the past when I have been a hearings officer in your place I've always kept trying to refine issues by forcing parties together to get stipulations here and there. I found that never worked. It just took time. It took effort. And even if the parties are going to agree to limit issues, they're going to do it by their own best interests like we did in Wallula where we solved all the issues because everybody was so motivated to solve all those issues.

This is not a Wallula case. I don't see parties motivated to try to really solve the issues. So I think this is a different case, so I don't think the Council should go down a path of trying to have prehearing conferences to try to solve the issues. I think the prefiled testimony of all the parties will identify the issues in conjunction with those issues and subject areas that's designated by the hearings officer in his order.

So we totally disagree that parties that may have some things in common we are going to be required to file their testimony at the same time we are. We think they should be handled as other parties. I can't speak for any of these people as to whether or not they're going to totally agree with what we have in our testimony. They may disagree.

So that's the issue I guess or my position or comments I have on the issues and the witness lists.

Do you want me to go into discovery now? Discovery I think is a real issue.

JUDGE TOREM: Not yet. I just want to handle the realignment, if you will, that Mr. Hurson raised at this time.

If I read the issue correctly, Mr. Hurson, as Mr. Peeples just hinted to, you would like to take the proponents and opponents and just group them together. And if I read this correctly, then the prefiled would have the proponents filing at the same time, and then any opponents would file then rebuttal. You really could turn this into a group of coalition parties.

MR. HURSON: Well, I think any time we have an adverse hearing, whether it's in Superior Court or an adjudication, there's sort of vague lines and times but there's sort of people that are generally for or generally against. The County was never against the application, but by seeking preemption it necessarily sort of forces the County into we don't want preemption, and by rule that means it's a recommendation for denial. That was the Applicant's choice.

And they need to be aligned, so that they at least make some sense as far as who is presenting which...
side or who is rebutting who. For instance, there's several parties here I think when you look at the intervenor requests it's clear that they're going to be supportive of the project and recommend that you approve it, and they may do little else other than to simply say you should approve it because they think it's the greatest thing since life's breath.

JUDGE TOREM: It would be rather short prefiled testimony, so it would be real easy to respond to, right?

MR. HURSON: Yes. But the fact of the matter is under the schedule Mr. Peeples has I can't respond to it because those people would be submitting their testimony the same time I would, and there's nothing in the schedule for me to respond to. The County would have no ability to respond to prefiled testimony presented by these others people who are clearly here simply to support the Applicant.

JUDGE TOREM: Well, if you talk just about sliced bread, I don't think you have to respond. Let me suggest that perhaps just process does allow if Mr. Peeples files as traditionally the Applicant files first, and then all other parties as we suggested in the Council's schedule that you might be able to be accommodated by being allowed rebuttal testimony to any other party's prefiled testimony that's filed at the same time as the County's under the Council proposed schedule.

So perhaps the rebuttal is not limited for the Applicant to rebut all of the parties as necessary, but also for other parties to say, hey, this other party said something and I want to make sure in a limited fashion at least I can rely or rebut some of that testimony.

MR. HURSON: And that was key. We need to be able to rebut other testimony.

JUDGE TOREM: I don't know how you're going to fit it in your schedule, but if that's necessary, we'll allow it.

MR. HURSON: That was the whole point. That's why I said have the Applicant and all the people that are sort of on their side of the issue they all submit it at the same time.

JUDGE TOREM: Let me ask one question.

MR. HURSON: Does anybody think that Renewable Northwest Project IS going to say one bad thing about the application?

JUDGE TOREM: They might.

MR. HURSON: Nobody in this room I really think thinks that.

JUDGE TOREM: I have some intervenors who are a lot easier to pigeonhole, if you will, than others.

What do I do with Mr. Lane as a statutory intervenor for the people? As Counsel for the Environment when would you have him file his testimony?

MR. HURSON: I think he would be filing with us. This isn't a matter of everybody is for or against. It is a general realignment. I mean when you have lawsuits you can have the plaintiffs, the defendants, the third parties, and then the next third party sets. There isn't a clear line. Yes, Mr. Lane by law is nature reader for an Applicant. He's suppose to be looking out for the people's interest. I guess to say for and against might be a little harsh, a little too abrupt.

What it is, is you have for people and then you have the neutral or opposed people is the other side because I'm sure Mr. Lane's role is if this is going to happen make sure that it's done properly. Make sure you put the proper sideboards on it. Make sure the environmental things are respond to. Make sure these all these issues are taken care of. I'm seeing any of the other intervenors -- and Mr. Lane is a statutory party.

In fact, in the Olympic proposal it was clear that it was basically Olympic versus Counsel for the Environment. Counsel for the Environment was the lead attorney in that process, so those are clearly there. And it's a matter of where does everybody else fit on it. I think it's really easy to look at the intervention motions to see where many of these parties align. Then you simply just put it, so that it makes logical sense and somebody would have to be opposed to the project to be with the Counsel for the Environment's side.

JUDGE TOREM: Let me just say that the Council will consider that, and if based on the review of the intervenor's applications, petitions for intervention as a group they find that they can do it, and its advantageous to the process, it's something that they will entertain. But in our deliberations we will figure out where that is and determine what extent, if any, those coalitions can be drawn to make the process work that much faster.

If it's chosen not to follow your suggestion on realignment, then we will also look at the need for all the parties to have a chance to rebut what each other says and determine how to schedule the rebuttal testimony and prefiled to accommodate the needs. So one way or another everybody will have a chance to comment in advance in writing on everything that's been filed either by the Applicant or by the other parties. I hope we don't satisfy the process again. The goal is to get the Council the best information possible and make sure there's no sandbagging at the hearing itself.
MR. HURSON: That was frankly the schedule I had was the people that are for it will supply the testimony at the same the County would and then there would be nothing set for the County to ever provide rebuttal testimony. That was why the realignment kicked in. I said I'm going to have these alter egos of the Applicant submitting testimony the same time I do, and I have no idea what it is until after my opportunity to comment is gone.

JUDGE TOREM: We will address that, and you will have an opportunity to comment.

Ms. Ling.

MS. LING: I would like to respond to Mr. Hurson's comments that we are intervening in support of the project. For the record, we have participated in siting proceedings of renewable projects and have actually proposed projects in the past. We look at the evidence on the DEIS to make sure the project is properly sited. We would also object to the County's request that we be aligned with the Applicant.

JUDGE TOREM: Thank you, Ms. Ling, for that input.

I'm hearing Ms. Drummond is seconding the comment by you, Ms. Ling.

MR. FIKSDAL: She would just like to comment. She hasn't said what that comment is yet.

JUDGE TOREM: Ms. Drummond, go ahead.

MR. FIKSDAL (For Ms. Drummond): RNP objects to the County's motion that we realign. RNP is not the same as the Applicant. It's entirely inappropriate to treat the intervenors as the Applicant. The intervenors' participation is limited to limited issues and not an entire application like the Applicant. As Ms. Ling pointed out RNP's interests are distinct from the Applicant's. RNP's interested in having renewable projects well sited in the global interest, and the Applicant's interest is more limited and narrow to interests in that particular project.

The County has provided no statutory or regulatory support for their motion. If you look at 34.05.443 it talks intervenors combining their testimony to be more efficient, but it does not talk about the intervenors combining their testimony with the Applicant.

RNP will try and coordinate with the other parties to streamline the proceeding but should not be required to prefile their testimony at the same time as the Applicant. Thank you.

JUDGE TOREM: Mr. Anderson.

MR. ANDERSON: Just real briefly. I think Your Honor has come up with a positive solution. Like the County we would like to be able to rebut the comments of other intervenors as well, and your suggestion that the Applicant file first, intervenors file secondly, and then everyone have the opportunity to rebut seems like a very positive suggestion, and I would like to encourage the Council to take your suggestion.

JUDGE TOREM: Thank you, Mr. Anderson.

Mr. Lane.

MR. LANE: I would like to say that I provide my support for that idea as well. I don't object to the County's desire to somehow have rebuttal, whether that comes in the form of surrebuttal, spontaneous rebuttal of some sort, but I have very serious concerns about realigning in this particular case and would be very opposed to that.

JUDGE TOREM: Okay. Any other comments on this issue?

Ms. Strand had her hand up earlier. I think we may have skipped her.

MS. STRAND: Like Mr. Hurson our staff at the Economic Development Group are very small and requiring us to file testimony at the same time as the Applicant would basically take us to the point where we more than likely would not be able to make any comments.
result of comments from the Environmental Impact Statement that are also going on in deliberations to figure out how that plays into the schedule. So the Council needs to have opportunity to deal with those as well.

So hopefully the first week of March you'll see a prehearing conference order on what occurred today, and Mr. Peeples based on your suggestions about prefiling, whether it would be March 15 or April 1, I want to make sure that I tell you on the record today be ready to go as early as March 15 with your prefiled and you'll have at least ten days notice. I'm hoping by March 5 you will get a fax copy of the order telling you what the actual deadline is. It may be March 15, since that's the earliest date I've gotten you saying you could go. And I don't know whether the give and take you suggested we'll take you up on that or not. But that's the earliest date, and that may be something we expect to hold you to, so I just don't want it to drop on you March 14 and say that's the deadline.

MR. PEEPLES: I hear you.

JUDGE TOREM: Any other issues before we turn to the discovery?

Mr. Peeples, on the discovery.

MR. PEEPLES: First of all, I'm going to cover certain elements of it, and then I think with regard to those issues that you were referring to Mr. Hurson about some of the EFSEC people he wants to take depositions of I'm going to have Chuck Lean respond to that right off the bat. Those are what I consider SEPA issues.

Discovery is provided in WAC 463-30-190. It refers to RCW 34.05.446. That is what determines discovery. Generally I want to state there's been very little discovery in EFSEC's proceedings. We file prefiled testimony. That's a method of discovery. So way before any time anybody needs to get ready for cross-examination and file their testimony. It's all pretty much out in the open. The Applicant will agree to any informal request, informal discovery. If you need information, let us know. We'll provide it. I've always done that in the past.

Now, if you look at RCW 34.05.446 it says the presiding officer may allow discovery, and the parent 3 in that statute I'll just read it. Except as otherwise provided by agency rules the presiding officer may decide whether to permit the taking of depositions, requesting the admissions and all other procedures authorized by Rules 26 through 36 of the Superior Court rules. The presiding officer may condition the use of discovery on the showing of necessity and unavailability by other means. In exercising such discretion the presiding
More to the point on SEPA, the whole
which in some ways is somewhat similar to the situation
discovery being done on a Superior Court clerk or bailiff
sitting in a quasi-judicial capacity. I've never heard of
other thing before we get to SEPA. The Council here
involves SEPA.

MR. LEAN: I would echo what you just said
Lean right now.
and the SEPA issues, I'm going to turn it over to Chuck
independent consultant who prepared the DEIS. And I've
been around for a long time, and I think Chuck's been
around for a long time. I've never seen discovery, I've
never seen discovery with regard to a preparer of an EIS
or county staff. I don't know if Mr. Hurson allows
discovery with regard to its EIS. They're preparing an
EIS, and I guess that means that they're willing to have
any opposition in the Desert Claim to go in and depose
their staff people and depose the preparer of their EIS.
I doubt if that happens, and I really don't know if that
would be his position in that case.

But anyway with regard to discovery on EIS
and the SEPA issues, I'm going to turn it over to Chuck
Lean right now.

MR. LEAN: I would echo what you just said
on taking discovery of EIS preparers of local government.
I've never heard of it being done, but that doesn't mean
that it hasn't been done. I haven't obviously been
involved in every case before local government that
involves SEPA.

But I think it's important that while -- one
other thing before we get to SEPA. The Council here
is sitting in a quasi-judicial capacity. I've never heard of
discovery being done on a Superior Court clerk or bailiff
which in some ways is somewhat similar to the situation
the Council is in.

More to the point on SEPA, the whole
situation with SEPA the adjudicatory hearing that the
County conducts is almost unique as far as I'm aware in
state and local government. You are making your decision
in the course of an adjudicatory hearing. And actually
your decision is not a decision, but it's a recommendation
to the decision maker.

Now SEPA itself if you look at the basic law
says it reports on recommendations for legislation or
other proposals involving significant adverse
environmental impacts shall be accompanied by an impact
statement. It's pretty clear from reading the rules that
when the Council was adopting their rules trying to figure
out the timing of all this, they figured that the final
EIS had to accompany the recommendation to the Governor.

And if you look at the Council rules of WAC
463-47-060 it says you can start an adjudicatory hearing
even without the DEIS, without the Draft Environmental
Impact Statement. Now most of the time recently you have
been doing the Draft Environmental Impact Statement before
the adjudicatory hearing starts, but the final is made up
of the comments, the responses to comments that come into
that draft. And the Council I believe has figured that
the adjudicatory hearing or at least the public hearing
that's goes on simultaneously with that as part of it has
comments on the Draft EIS. And the contents of the
adjudicatory hearing and the public hearing comments are
then considered along with the written comments in their
responses that lead to the Final EIS.

It's important to recognize that state law
prohibits an appeal of a Draft EIS, and so that there
cannot be an issue of the adequacy of the Draft EIS in the
Council's adjudicatory hearing because you would then be
conducting an appeal on the adequacy of the Draft EIS
contary to state law. So those legal citations were in
our preemption request.

So it seems that we've got to recognize that
SEPA adequacy is not an issue before the Council in an
adjudicatory on the application for an energy facility.
It just is not one of the issues that are there that you
consider. If it's not an issue and if it's not relevant
to the adjudicatory hearing, I really don't see how
information that could be relevant could come out of
discovery of the EIS preparer, especially the Draft EIS
preparer.

Now, it doesn't say that you can't challenge
the Final EIS, but I think if you're wanting to challenge
the decision of the Governor, than part of that challenge
should be to the Final EIS, should be the SEPA adequacy,
and that's where it comes. I just don't see it coming
before that, especially in the EFSEC process. And that's
JUDGE TOREM: Thank you, Mr. Lean.

Mr. Peeples, anything further?

MR. PEEPLES: Not right now.

JUDGE TOREM: Mr. Hurson, if we could come back to you. You've indicated in your brief on Page 3 that you tentatively anticipate the need to take depositions of a series of people. Chris Taylor and Andrew Young and other official agents of the Applicant, then Zilkha's employees and agents, EFSEC staff and then Shapiro & Associates personnel, the ones who drafted the EIS and, of course, any other witnesses that are involved in the prefilled testimony.

Let's presume for today's purpose that as indicated in EFSEC rules and in the Administrative Procedure Act that a presiding officer is going to have to authorize the overall taking of depositions and perhaps that could be done in a blanket approval or it would be done one at a time depending on the request for each one. As I read the Council's rule there's no indication that could occur. It's something that the Council is going to have to discuss today to figure out how to handle the rule on any motions for discovery that are entertained, whether in total or one request at a time.

So I want you to know that right now we don't know, the Council doesn't know, and hasn't advised me that I'm the person to make those decisions. If they do, that will be noted in the prehearing conference order that comes out from this proceeding today. You may be trying to convince the entire Council of this as well, so I just want to make sure you point your comments as to why discovery and how it might go to the entire body and not just to whom you might think is the presiding officer. We don't know who that is yet.

So with that preamble we will turn it over to you to talk about what you've got on Page 3 in your request and if necessary respond to anything that Mr. Peeples and Mr. Lean had.

MR. HURSON: And perhaps the way of dealing with this, I don't have a problem with a question and answer sort of a concept here instead of a long speech. I find that doesn't get us to the issues quickly. Frankly as far as the presiding officer issue, I didn't look at it that closely, I assumed the Administrative Law Judge was the presiding officer. You're doing a fine job at presiding today.

JUDGE TOREM: We'll see if the context extends into discovery as well.

MR. HURSON: That's just it. That particular nuance hadn't occurred to me because every time EFSEC meets you are presiding over, and you were assigned as Administrative Law Judge. So I've been working under that assumption.

I'm also aware the discovery under the Administrative Procedures Act is done with permission of the presiding officer. And when you talked about process and the things you wanted initially, I thought at least what I should do is say these are the sorts of things we are looking at. These are the areas we would want to talk about, so the presiding officer would be aware of those. And then there would be a discussion as to is this going to be on a case-by-case basis or is there going to be a formal blanket that allows discovery? Because I believe the rule would allow a blanket rule of discovery, much like you could have in court or it could have some limitations. I think the rule makes sense that you wouldn't in an APA situation say that we want to keep a little more restricted than Superior Court but not as restricted as District Court, but it kind of strikes a little balance in between there.

As far as the discovery of the depositions, I think Zilkha's counsel misunderstands why the issue of the EIS, Draft EIS is important to the County, and I will be happy to share that with you.

It appears that one of the big issues in this document that they presented is that Zilkha is just tired of waiting, and the fact that the County wants to wait until there's a response to the Draft EIS comments and have an adequate EIS before the County proceeds is unacceptable to them. From reading the Draft EIS, and I believe Planner Clay White put that in and made a comment basically to the effect that it appears that Zilkha wrote the Draft EIS. It appears like the Applicant wrote the Draft EIS. So basically it's our preference or theory that it was a clearly inadequate draft because Zilkha didn't provide enough information to make it an adequate draft.

JUDGE TOREM: So tell me how that leads to the discovery issue because I've read your comments.

MR. HURSON: Because I think what's part of discovery that's what I want to inquire because they're
JUDGE TOREM: Is that going to be relevant to the issues that the Council is to decide at the adjudicative hearings? Because that's how I see discovery in no matter what court is to bring out information that may be admissible at hearing.

MR. HURSON: Yes, I believe very relevant to the preemption issue because they have to prove a good faith effort to resolve noncompliance. And I think if Zilkha is providing inadequate and insufficient information to EFSEC, creating an inadequate environmental document for a GMA accounting to try to make a comprehensive plan amendment, and then is claiming fowl at the hearing based upon an inadequate document, that's bad faith.

And you read the DEIS, and it looks like everything in there is based upon the information that the Applicant supplied or most everything. It doesn't appear that the DEIS consultants really did their independent investigation, so there's many unanswered questions. I think there's comments from the consultant that says, well, they wouldn't give us any other information, so we don't know what to do with it.

JUDGE TOREM: Very often I find that the deposition is the easiest one to resort to because it gives the most latitude. In Superior Court you're an attorney, you sign a piece paper, you drag somebody off the streets and take their deposition, and you can ask them whatever the heck you want. And it may be that we can use some of the other tools that are suggested by the civil rules to get to the same result using written interrogatories that are more focused rather than -- especially given some of the distances involved in the in person. I say this with in mind your schedule of being available for depositions and everybody else's. They are very time consuming and involve travel where interrogatories are just helping to support our postal service and our fax machines. So it may be that you can focus some of those issues out there.

We'll see what the Council wants to do in how to handle discovery with these issues because preemption certainly is a separate issue again that hasn't been dealt with before, and certain issues may need to come out, especially on the points you're raising, which I think are valid to give the Council the information it needs to make a decision on preemption.

Let's shift over to the EFSEC staff issues.

I could see where the DEIS issues are of concern to that area, but necessarily to the rest of the certification issues before the Council where Ms. Makarow and Mr. Fiksdal come in to a deposition and why would that be appropriate?

MR. HURSON: Well I'm not sure Mr. Fiksdal would be necessary. Frankly, the only reason I brought Irina Makarow was based upon the comment she made a couple months ago at one of the hearings that the reason the EIS was delayed were two reasons, the County and the County. And it's still unclear to the County how when it was suppose to initially be issued in June that the only reason it was issued in December was because of things the County did. And perhaps she just misspoke. Perhaps we've had a misunderstanding.

And I know it's unusual to bring this. When I was doing it, I said, yeah, I've never heard of this happening before. But that was the bell that's been rung, and I need to have an opportunity to respond and maybe just talk with her about it and Allen about it. And if we can get some sort of an agreement as to what really happened, then that issue is resolved.

JUDGE TOREM: It sounds like when you listed under discovery as a formal issue, staff, our staff is -- for everybody else to be on page with this, they're sort of a hybrid in being Council staff as was made reference to court bailiff and court staff which you would never have a deposition request granted for any of those folks except in the most extraordinary circumstances. It would seem to me that the Council does not want to hide their staff from anybody on the issues that may be relevant, and they certainly have a dual role in helping to advise the Applicant and any other intervening party on how to go through the process. So there may be times when they're not acting in a deliberative capacity with the Council, but they're supporting the public's role and the Applicant's role in going through this. That may be open to discussion.

But there's even a specific rule that the Council has adopted that has to be overcome before you could even get there to ask those sorts of questions, and I will just refer you to 463-30-200. It's a rule dealing with subpoenas and practice, and Sub 5 which says no subpoena shall be issued or given effect to require the attendance and testimony of or the production of evidence by any member of the Council or any member of the Council staff in any proceeding before the Council.

So if the rule itself is excluding the testimony and discovery must lead to things that are
22 (Pages 82 to 85)
my motion to dismiss that I told you about that I was
going to do as far as other things. The things they cite
to in support of their assertion of, well, there's no more
alternative to the Draft EIS, well, our consultant for the
Kittitas County project put together that part of the EIS
except it got rewritten in that section because ours
doesn't say that's not an alternative site.

JUDGE TOREM: You're talking about the

Desert Claim?

MR. HURSON: Yes. The County's, the other
project that's going on. Our consultant basically wrote
those sort of sections and gave them to your consultant,
so that they could put it in there. But the part that's
changed is the key part. They're citing as well there's
no other alternatives. Our EIS that our consultant put
together says there's an alternative. So I'm curious as
to how that language got changed because for that
language put in the DEIS that EFSEC put out, they wouldn't
have anything to point to.

And it creates again a question of who's
controlling the language in this Draft EIS. Because if
the Applicant is telling, hey, now put this in here, pull
this one portion, you need to get this fixed, and then
they side with the Applicant's as their authorities that,
again, also shows the lack of good faith dealing because
they're trying to manipulate your EIS.

JUDGE TOREM: It's the Council's EIS and
Shapiro & Associates is the Council's agency to do that.
Trust me that the Council is discussing with Shapiro their
own review of the DEIS, as well as comments from others
that have pointed out much of what you're saying today.
That issue is not going unaddressed. Whether or not we do
the Wizard of Oz thing and remove the green curtain for
you or not, I don't know the deliberative process
authorizes it. So there is a man behind the curtain. In
fact, the whole Council is working that issue, and it will
be resolved, so that the Council has a defendable EIS
whatever direction they take. Because if the Council
recommends not having site certification, we need to be
able to look the Applicant in the eye as a group and say
this is why we're doing this. So the Council has as
strong an interest as anybody in this integrity of that
DEIS and the Final DEIS that we will put out
contemporaneously with its recommendations to the
Governor.

Other parties on the discovery issues? Is
there anything else that we need to cover?

Mr. Slothower.

MR. SLOTHOWER: Yes, a couple of things
quickly. I'm concerned about your comments about who the

presiding officer is because my perception is that
discovery issues will really come to the floor when you
see prefiling testimony, and I want to make sure that there
is enough time and we know who to go to if based upon that
prefiled testimony there are people that we want to
conduct discovery with. And given the time line that we
are under here, whether it's June or August, I think that
depositions do make the most sense as a vehicle for doing
discovery. Interrogatories taking too long whereas a
deposition you face to face. You can ask the questions
you need to ask and be gone. But I'm concerned about
having a clear bright line process on who we go to for
permission if we have to get permission to take a
deposition.

JUDGE TOREM: It will come up out by March 5
as I've previously stated my goal to have a prehearing
conference order out for this. We'll designate a
presiding officer for purposes of discovery, and it may
actually include that presiding officer's process for
entertaining discovery requests and tell you what the time
line is for response turnaround, etc.

It will be an expedited process I would
expect whoever the presiding officer is that involves fax
or email service and quicker turnaround to deal with that.
So that will be addressed, and I appreciate you

Highlighting that concern because we don't want to burn
anymore days waiting for permission to go do something
that you felt you should have been able to do right away.
And as much blanket authority as can be given by a
presiding officer that should be addressed as well, so
that you don't have to come for every little thing to get
permission. God knows that whoever the presiding officer
doesn't want to be dealing with 40 discovery requests per
day because there's a lot of parties in this room. It's
pretty obvious that you could get snowed under pretty
quickly despite the weather outside.

Anything else?

Counsel for the Environment, please.

MR. LANE: Just on the last issue. My
reading of WAC 463-38-020 places you as the presiding
officer. It's my understanding that if the Council elects
to use an Administrative Law Judge that person becomes the
presiding officer, but if the Council elects to hold the
administrative hearing by themselves, then they will
appoint a presiding officer. So while it's not
specifically stated, I believe that it is sort of
dormantly there.

JUDGE TOREM: I don't want to be
preemptive and tell the Councilmembers that's what it
says too. It might say that. I've talked with Ms. Essko
Now Mr. Hurson says that's this statute was
statement the way I read it.
only entity that can require an environmental impact
regulations or SEPA rules says that for energy facilities
lead agency, and the Council expressly by Ecology
Secondly as to who manages the EIS, it's the
lead agency, and the Council expressly by Ecology
regulations or SEPA rules says that for energy facilities
control both the nature of the process, and you are the
only entity that can require an environmental impact
statement the way I read it.

As I understand Mr. Hurson what he's saying is that the
going to get the final detailed statement. The statute
says we're not required to because you can't get us that.
But what we were working toward and understood we are
working when talking with your staff and the Applicant is
you get the Draft issues, you get the comment issues, your
response to comments, and then hopefully that then created
a document that functionally my clients could use as a
Final EIS because you can't legally issue a Final EIS.

JUDGE TOREM: Given the constraints of the
proceeding as you've accurately described it, it seems to
me the County is focusing on what information EFSEC
consultants in the DEIS we crank out and the comments to
it can provide to the County. In this situation it's
obvious there's another DEIS that's being done by County
consultants that would seem look at a lot of the same
issues.

So could you use other outside information
for the County's review process that's not necessarily
provided by Shapiro & Associates? Is there any limitation
on the County I guess going out and getting whatever
information it needs from wherever it wants?

MR. HURSON: Frankly, I like the question
because that was something that I was trying to struggle
with myself as far as proceeding forward. Because I think
we owe it to the public, and my board of commissioners

when they go to hearing, they expect and they know they
typically have an EIS, and I have to able to justify why
we don't have a filing. And so I was talking with our
planner about the idea of, well, okay. Even if response
and comments we don't have the stuff in EFSEC's EIS that
we need, could we also basically do what would be
complicable to like an addendum or a supplement and just
take out of our EIS from the other one to answer some of
those questions and meld those together and use those as
our function when we go to hearings? And those were the
things that we were waiting once we got the response to
your EIS for us to fine tune, and now we're going to
proceed. And we reached the point of, well, okay. We've
got your draft, the comments, response to comments, taken
what we have out of these others and collectively we think
this is sufficient for us to go with the GMA, and we're
going to set the hearings.

We never reached that point because they
withdrew their application last week. We don't have an
application from Zilkha anymore to proceed on, so we can't
set a hearing. So never reached that point, and that's
the frustrating part from the County is getting so close
to the time that we could set the hearing, then they pull
it. We were anticipating hopefully within, you know, by
next month we would have your responses back. We would

have ours in. We would have all of ours and we would look
at and say I think we could go. Let's set a hearing.

But as we got to the threshold we were
pulled back. That's our frustration. And, frankly, if I
could, as long as I have this time, the County is more
than willing if Zilkha wants to submit an application to
go forward. They withdrew the application. Our hands are
tied. We can't do anything new on application because
there is no application before us. It has always been our
desire, my client's desire to hold a public hearing with
adequate information to make a local land use decision
that is over five thousand acres in size in a subarea. It
would be larger than the City of Ellensburg. It's a huge
land use issue.

It's more of a land use issue than the
energy issue. This is by far the smallest energy
production thing EFSEC has ever seen. This is, what, less
than 20 percent of your threshold for thermal. So just so
the Applicant knows, the door is open. If they want to
submit, so we can go forward, they can. We don't want to
have to fight two tracks though. We don't want to be
trying to fight preemption and process. That's the only
good thing I can say about withdrawing. At least they're
not trying to have us work both tracks.

It has always been our desire that this be

resolved through the public hearing process with my client
making the land use decision. We were on the threshold of
being able to go forward we think, and we think the next
few weeks we would go with that. But that's not there,
but that's still an option that's still there.

JUDGE TOREM: Okay. Thank you.
Mr. Lean, I will give you one last chance to
hit the ball back and forth, then we're going to move
along.

MR. LEAN: Basically one of our major
arguments on the preemption was that the County is seeking
to require SEPA processes be done before they will rule on
the application we had before them, and they wanted to
wait until they had a chance to rule on the EIS adequacy
of the draft. The adequacy of responses to comments until
we wanted to get done with any appeal hearings on those
two subjects, and then however the appeal came out, we may
have to start the whole round robin on the appeal on the
adequacy on all of that over again. And our position is
that, number one, there's just simply no authority for the
County to do that or to make any SEPA requirement.
Mr. Hurson is saying, well, he thinks there
should have been one, and we were trying to come up with
something of functional equivalence. He's just making
stuff up. You know, ultimately we're a government of
laws, and he's got to be able to point to someplace that
authorizes that behavior, and it's just not there. SEPA
doesn't authorize it. Nothing else that I know of. The
GMA certainly doesn't purport to get involved in these
energy facilities, especially with respect to the
80.50.180.
So those requirements just do not exist, and
to try to impose them upon the Applicant repeatedly and to
hold up the process while they want us to jump through
these hoops that are not required by law that to us was
the basis, one of the bases for our request for
preemption. But I don't see that it brings SEPA into this
case or discovery of it at all.
JUDGE TOREM: Okay. I think we've had
enough discussion. No, I don't want you to respond.
MR. HURSON: I know but he raised another
issue. It would be very brief.
JUDGE TOREM: He's raised it for the
purposes I think of what is preemption? What do we need
the SEPA for? I want to leave that for whenever we get to
the adjudication on the preemption issue and hash that out
in full because this is a prehearing conference on
procedural issues and we're really delving into substance
that we could keep going back and forth all day.
On the discovery issue any questions from

Councilmembers on discovery issues that we need to address
further from the parties?
And it doesn't sound like we have any other
comments even from over the telephone.
All right. Hearing none, let's move off
from Item 5 and move on to what should be the quick part
of the rest of our agenda.
Item 6 are there any stipulations and
settlement agreements, Mr. Peeples, to report?
MR. PEEPLES: No.
JUDGE TOREM: Any other parties had any that
they agreed with any of the other parties for any reason?
I didn't think so.
Let's move on to Item 7. The next
prehearing conference I'm not sure when it will be or if
there's going to be a need for another prehearing
conference once the adjudicative schedule is out. It may
be item specific. There may be another prehearing
conference dealing with the comments to the DEIS or some
other procedural issues.
But, Members of the Council, is there
anything obvious or staff members to Council that we need
to meet again on other than just setting the process in
our next prehearing conference order and letting it go
from there with the presiding officer whoever that may be
want to spend three weeks in the summer, whether it's June
or August, particularly August in this room.
And I've been involved in water rights
adjudication for some time, and the Yakima County Superior
Court frequently meets or the Department of Ecology office
through the Yakima Superior Court frequently is able to
make arrangements with the college to use facilities there
that can accommodate large numbers. I suggest that you
talk to someone up there.
JUDGE TOREM: Excellent. I know that
Mr. Fiksdal is definitely in favor of the better
conferencing system.
MR. HURSON: Actually when we did the
Mountain Star Project we used university facilities also.
The student union has a ballroom, and a number of other
facilities. Even though the fairgrounds is one of my
clients and I would like them to be able to generate
revenues, as it is the summer months are rather busy for
the fairgrounds and they're not for the university, so you
might find a better facility.
JUDGE TOREM: What's the official starting
date of classes, does anybody know, for Eastern Washington
University in the Fall?
MR. HURSON: It's Central.
JUDGE TOREM: Central.
MR. SLOTHOWER: I'm not sure of the exact starting date, but the student union building is large enough that even when classes are in session they can accommodate groups. They have a number of rooms with collapsible walls and things like that, so you can accommodate varied numbers of people. And I think if you tell them you need conference call facilities, they can do that.

JUDGE TOREM: I just want to make sure that if the dates stay in August that it doesn't interfere with the beginning of their school schedule.

MR. HURSON: I think school starts right after Labor Day weekend.

MS. STRAND: It's actually at the very end of September.

CHAIR LUCE: If we met here in July we might be able expedite the process and three weeks might collapse into one.

MR. HURSON: Well, actually this room does have air conditioning. You can crank it up and hold on pretty good for awhile.

JUDGE TOREM: Well, as long as we're out here before anybody comes in with cattle ropes and the rest, we'll have a civilized proceeding before that.

MR. HURSON: The fairgrounds have a busy schedule all summer, and then you've got the annual fair and rodeo which is the big kahuna here.

JUDGE TOREM: They may actually get the front page rather than us if we're doing it at the same time though.

MR. HURSON: It would probably be both of us.

JUDGE TOREM: Any other issues that we need to take up today before we adjourn?

MR. SLOTHOWER: I have someone's cell phone.

I don't know whose it is or who's on it.

MR. HURSON: I have one here too.

JUDGE TOREM: Seeing no other issues other than property interests, we are adjourned at 11:38 a.m.

* * * * *

(Whereupon, the prehearing conference was adjourned at 11:38 a.m.)

AFFIDAVIT

I, Shaun Linse, CCR, Certified Court Reporter, do hereby certify that the foregoing transcript prepared under my direction is a true and accurate record of the proceedings taken on February 19, 2004, in Olympia, Washington.

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Shaun Linse, CCR
CCR NO. LI-NS-ES-M4020H