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1 Appearances (cont'd):
2 KITTITAS COUNTY, James L. Hurson, Kittitas County
3 Prosecutor, Kittitas County Courthouse, Room 213,
4 Ellensburg, Washington 98926
5 RENEWABLE NORTHWEST PROJECT, Susan Elizabeth
6 Drummond, Attorney at Law; and Sonja Ling, Lay
7 Representative; Foster Pepper & Shefelman, PLLC, 1111 Third
8 Avenue, Suite 3400, Seattle, Washington 98101-3299.
9 PHOENIX ECONOMIC DEVELOPMENT GROUP, Debbie
10 Strand, Executive Director, 1000 Prospect Street, P.O. Box
11 598, Ellensburg, Washington 98926.
12 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT), Ed
13 Garrett, Lay Representative; and Mike Robertson, Lay
14 Representative; Velikanje, Moore & Shore, P.S., 405 East
15 Lincoln Avenue, P.O. Box 22550, Yakima, Washington 98907.
16 F. STEVEN LATHROP, Jeff Slothower, Attorney at
17 Law; Lathrop, Winbauer, Harel, Slothower & Denison, LLP,
18 1572 Robinson Canyon Road, P.O. Box 1088, Ellensburg,
19 Washington 98926.
20 CHRIS HALL, Chris Hall, Pro Se, 106 East 10th
21 Avenue, Ellensburg, Washington 98926.
22 * * * * *
23 JUDGE TOREM: It is now about five minutes
24 after 9:00 on Thursday, February 19, 2004. This is the
25 prehearing conference that's been scheduled in the

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1 Kittitas Valley Wind Power Project Application No. 2003-01
2 before the Washington State Energy Facility Site
3 Evaluation Council. My name is Adam Torem. I'm the
4 Administrative Law Judge presiding in this matter.
5 Let's quickly go around and take appearances
6 first from the Council and its members that are here and
7 from the rest of the parties.
8 Chairman Luce.
9 CHAIR LUCE: My name is James Luce. I'm the
10 Chair of the Energy Siting Council and to my left is --
11 MR. IFIE: Tony Ifie. I represent the
12 Department of Natural Resources.
13 MR. SWEENEY: My name is Tim Sweeney. I'm
14 with the Washington Utilities and Transportation
15 Commission.
16 CHAIR LUCE: To my right is our Assistant
17 Attorney General.
18 MS. ESSKO: I'm Ann Essko. I represent the
19 Council.
20 MS. JOHNSON: I'm Patti Johnson. I am the
21 County representative.
22 MS. TOWNE: Chris Smith Towne. I represent
23 the Department of Fish and Wildlife.
24 MR. FRYHLING: Richard Fryhling, and I
25 represent the Department of Community Trade and Economic

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1 Development.
2 CHAIR LUCE: I would note the absence of our
3 member from the Department of Ecology, Hedia Adelsman.
4 It's an excused absence. She wishes she could be here.
5 JUDGE TOREM: We have two staff members here
6 today, Irina Makarow, as well as Allen Fiksdal, the
7 manager of the staff. And Allen will be doing two roles
8 today, representing the Council, as well as helping out
9 with folks on the telephone, Susan Drummond from Foster
10 Pepper & Shefelman and Mike Robertson for Residents
11 Opposed to Kittitas Turbines Kittitas. And let's take,
12 folks on the telephone, that I've made your appearances
13 for you.
14 Can we start to my left with John Lane,
15 Counsel for the Environment, and make our way down the
16 table.
17 MR. LANE: John Lane, Counsel for the
18 Environment.
19 MR. TAYLOR: Chris Taylor, Applicant
20 Representative.
21 MR. PEEPLES: Darrel Peeples, Attorney for
22 the Applicant.
23 MR. LEAN: Charles Lean, Attorney for the
24 Applicant.
25 MS. STRAND: Debbie Strand with the Economic

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1 Development Group of Kittitas County.
2 MS. LING: Sonja Ling, Renewable Northwest
3 Project.
4 MR. ANDERSON: Mark Anderson with Community
5 Trade and Economic Development.
6 MR. SLOTHOWER: Jeff Slothower, Attorney for
7 Intervener Lathrop.
8 MR. GARRETT: Ed Garrett, spokesperson for
9 Residents Opposed to Kittitas Turbines.
10 MS. HALL: Chris Hall representing myself
11 and my husband.
12 MR. WHITE: Clay White, Kittitas County.
13 MR. HURSON: Jim Hurson, Deputy Prosecutor
14 for Kittitas County.
15 JUDGE TOREM: Are there any other parties
16 present this morning or anyone else in our galley that
17 needs to make an appearance this morning?
18 Seeing none, let's move on to the adoption
19 of the proposed agenda, Item 3. We have today scheduled a
20 discussion after the adoption of this agenda a process and
21 schedule for consideration of the Applicant's now request
22 for preemption of the local land use regulations. We'll
23 have a series of presentations as noted there, then we
24 will discuss a process and a tentative schedule for the
25 adjudicative hearings in this matter. Then we will see if

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1 there are any stipulations and settlement agreements and
2 if necessary schedule another prehearing conference and
3 take up other matters.
4 I'm aware of one additional item.
5 Mr. Garrett wants to comment on Prehearing Conference
6 Order No. 7. We will have him do that before we get into
7 the stuff on preemption because essentially right now if
8 we adopt the agenda would be the best time.
9 Are there any other suggestions or
10 modifications to the agenda as is set out today?
11 Seeing none, is there a motion for the
12 Council to adopt the agenda?
13 CHAIR LUCE: So moved.
14 MR. IFIE: Second.
15 CHAIR LUCE: Question.
16 All in favor say aye.
17 COUNCILMEMBERS: Aye.
18 JUDGE TOREM: The agenda is adopted.
19 Mr. Garrett, Prehearing Conference Order No.
20 7 was issued on February 9, and today is the last day for
21 any modifications to it, and I understood your discussion
22 with Ms. Makarow was that you had some suggestions,
23 including I think the recognition that you were here for
24 Residents Opposed to Kittitas Turbines.
25 MR. GARRETT: Correct.

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1 JUDGE TOREM: But you don't want to go ahead
2 and make a formal written amendment to it. We can do this
3 on the record today.
4 MR. GARRETT: Correct.
5 JUDGE TOREM: What are your concerns, sir?
6 MR. GARRETT: The first issue was on the
7 participants list that my name be added instead of the way
8 that it's currently listed which is Residents Opposed to
9 Kittitas Turbines so that my name, Ed Garrett, is shown as
10 my continued standing in this issue.
11 The second issue that I have is regarding
12 the summary of the Prehearing Conference Section 3, third
13 paragraph. The record should reflect that the Council,
14 Judge Torem, ordered that Sagebrush Power Partners submit
15 a letter of intent to preempt by the third week into the
16 30-day extension on or about February 10. The current
17 statement that Mr. Peeples agreed to inform the Council on
18 or before February 15 is not fully reflective of what was
19 discussed and ordered by the Council. That's all I have.
20 JUDGE TOREM: All right. Any other parties
21 have any comments on what Mr. Garrett's clarifications in
22 his view of the order are?
23 Seeing none, Councilmembers, any discussion
24 on that?
25 Mr. Peeples.

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1 MR. PEEPLES: I just want to disagree. I
2 think it was clear that we said basically 30 days, and
3 that we had the 15th to file for preemption. I might have
4 made a statement that we'd let you know as soon as we
5 could, but there's no misunderstanding in my mind that
6 there was the 30-day additional period for preemption.
7 JUDGE TOREM: Mr. Garrett, anything further
8 on that?
9 MR. GARRETT: I stand by what I say. If
10 someone could go back into the transaction they will be
11 able to see what I'm talking about.
12 JUDGE TOREM: Mr. Garrett, as far as what
13 Mr. Peeples said I don't want to go back and reread the
14 transcript right at the moment and settle this if there is
15 any dispute to be settled. Is there any substantive
16 effect on where we are today in the next agenda item?
17 MR. GARRETT: No.
18 JUDGE TOREM: So we will just take those
19 matters as creating a record of that.
20 Councilmembers, any additions, deletions to
21 the prehearing conference order as previously issued and
22 now as clarified in Mr. Garrett's view?
23 All right. Seeing none, let's move on to
24 the next item on the agenda. There's no need for us to
25 take any further action at this time. The order will

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1 remain unchanged, but we have created a record today as to
2 what concerns may be there or may be consistent or
3 incomplete with the previous record or any created last
4 month.
5 Item No. 4, Process and Schedule for
6 Consideration of the Applicant's request for Preemption.
7 Let me state for the record that on February 7, 2004,
8 which was a Saturday, the Applicant completed a request
9 for preemption. It was served the next following business
10 day, Monday February 9, 2004, and it is a document of some
11 heft, maybe from its attachments. All of you should have
12 received a copy directly from the Applicant. I do
13 appreciate the fact that when we sent out the cover letter
14 on the 9th instructing folks to reply with initial take on
15 this that several of you did file something at least by
16 email on the deadline given on the 17th. So I thank you.
17 If there are other people who have not filed something in
18 writing today, they should not feel prohibited from
19 speaking on the preemption request, but they just want to
20 have the benefit of having the Council know where they
21 stood before we walked in this morning.
22 So the way it's set up today we'll have a
23 presentation from Mr. Peeples and anyone else from the
24 Applicant as necessary, then the County and Council for
25 the Environment have both filed their feelings, initial

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1 feelings at least on the schedules. We'll hear from them.
2 Then the other parties that's where you'll come in if you
3 haven't yet filed something in writing. If we need to
4 schedule any additional briefs or oral argument, we will
5 do that, and move on to the next agenda item after that.
6 Mr. Peeples.
7 MR. PEEPLES: Essentially I just want to
8 comment that the letter we received from EFSEC dated
9 February 9 requesting briefs, I want to state I took that
10 limitation that the content of that brief to the method in
11 which the preemption matter would be held within the
12 hearing context, and that the request was for comments
13 regarding schedule and the preemption process.
14 I believe that the brief filed by the County
15 went beyond that. I did not take that as a request for
16 brief on schedule and on the other items, so we did not
17 respond to that. We have developed our own proposed
18 schedule we would like to propose, but I would like to ask
19 directly from the Administrative Law Judge whether I
20 should talk about that now or on the next agenda item.
21 JUDGE TOREM: You're correct in thinking,
22 Mr. Peeples, that what we asked for is exactly that,
23 comments on the scheduling and response to the preemption.
24 There will be additional details on the schedule as well
25 that were set out on the second page of that letter. So

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1 let's focus on the preemption itself now.
2 MR. PEEPLES: Okay. I mentioned at the last
3 prehearing conference that I didn't know how the Council
4 pursuant to the WACs, its own WACs, could rule on
5 preemption until it occurred in the typed record. That's
6 still our position. There was a brief filed by the
7 Counsel for the Environment. I think that legal analysis
8 is the best legal analysis that's been given to you. I
9 don't see a way around it. I think the Council however
10 you handle that in your hearing, whether it's the first
11 thing when you start your hearing process which makes a
12 good deal of sense to me, whether you call it a separate
13 hearing, or whether you just have a subject area for
14 preemption like we'd have a subject area for wildlife, I
15 don't think it makes any difference.
16 I think if you read 463-28-060 it refers to
17 you have to consider everything in 80.50.100. I wish it
18 didn't say that. I wish we could do it to a certain
19 extent in the manner that is proposed by the County, but I
20 just don't see how you can do it. And I would say
21 personally it scares me from the field point of view
22 trying to do it that way.
23 With that said, I don't think we're totally
24 opposed to handling it in a different way under certain
25 assumptions and certain requirements. Number one, all the

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1 parties agree that they will not file an appeal on that
2 issue after the EFSEC hearing. I don't want that going up
3 on appeal if you go that route, but I don't think lawfully
4 you can go that route. But if all the parties want to do
5 it in a different manner and everybody stipulates to that,
6 we could potentially agree to that.
7 The other thing is the way the County has
8 proposed it. It puts it way back until right before the
9 hearing in chief I'll call it, the other issues. To me
10 that's certainly a little bit counterproductive. That
11 means all the parties have to get prepared way early. So
12 if you decide to do it that way, my suggestion, and
13 everybody agrees to it, my suggestion would be to move it
14 up to have it within a month or so. And then the parties,
15 you know, if there's no preemption, if the Council rules
16 it that way, then the parties don't have to worry about
17 getting ready for the other witnesses.
18 The other thing is that the hearing date
19 which we are going to propose to be held in the middle of
20 June, beginning of July, we need to preserve that hearing
21 date for the final hearing date. We would not want
22 everything, the hearing date set way back because we would
23 hear it early in the month.
24 So that's essentially our position on it. I
25 think the law requires it to be heard, you know, within

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1 the context of the main hearing, and that I don't see how
2 the Council pursuant to the WAC can make a decision until
3 it's considered all the evidence, and I agree with the
4 Counsel for the Environment's brief. But, again, that's
5 not to say if parties want to talk and stipulate about
6 doing it different, we would sure be willing to talk about
7 it.
8 JUDGE TOREM: Thank you, Mr. Peeples.
9 Despite what the agenda says, I think I'm
10 going to ask to hear from Mr. Lane first because it seems
11 that his position follows naturally now from what the
12 Applicant has said. So I'll come to you, Mr. Hurson and
13 Mr. White, as necessary after Counsel for the Environment.
14 Mr. Lane.
15 MR. LANE: We don't have a particularly
16 vested interest in this question necessarily, but we did
17 provide some responses. My interpretation of WAC
18 463-28-060 in the first sentence discusses preemption as a
19 part of the adjudicative proceeding which then when going
20 to the definition of adjudicative proceeding in WAC
21 463-10-010 means a proceeding conducted pursuant to RCW
22 80.50.090(3) in the state Administrative Procedures Act
23 which then takes us then into the overall siting
24 adjudicative proceeding. That's why Counsel for the
25 Environment has taken the position that it is a component

1 of not a separate form of a prehearing kind of type of
 2 motion type issue.
 3 Just for clarity's sake, Counsel for the
 4 Environment has taken the position that it would be best
 5 to discuss the preemption issues in one setting at the
 6 beginning, just so that all the parties can address those
 7 issues and be set on that and then move to the more
 8 substantive issues on the actual siting of the process.
 9 And then in the end I think that the determination is that
 10 the preemption question becomes a component of the overall
 11 order most likely that goes to the Governor's office.

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

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

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

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

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

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

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

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

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

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

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

1 JUDGE TOREM: I understand the open public
 2 meeting.

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

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

22 MR. HURSON: Exactly. That would be under
 23 my Page 2 under schedule. What I have proposed is when
 24 they're going to file their -- essentially what I was
 25 envisioning is we want everything combined together

1 because we don't want to delay the process, and so the
2 Applicant can present their prefiled on the preemption
3 issue and their prefiled on the substance at the same time
4 but actually make them two physical documents. Here's our
5 preemption testimony. Here's our substantive testimony.

6 JUDGE TOREM: And I think you were all in
7 agreement on that.

8 MR. HURSON: And then the idea was then what
9 I suggested is just a date for discussion is on August 9
10 we can do the adjudicative hearing on the issue regarding
11 preemption presumably be done within a week. Then the
12 Council would have time to then render a decision. If the
13 Council renders a decision denying preemption, then you
14 don't even go to the second phase. Otherwise what would
15 be the point?

16 JUDGE TOREM: Well, I understand the logic
17 of that. The logic may be better than what we actually
18 have to work with in our rule. Can you make that fit with
19 what the Counsel for the Environment's position is with
20 463-28-060 last sentence; that a determination of
21 preemption has to be by Counsel order? But the sentence
22 goes on: And shall be included in its recommendations to
23 the Governor pursuant to the statute. And that
24 recommendation, if I'm reading it correctly, and
25 Mr. Lane's interpretation may be the best on the language

1 available, that recommendation is whether to certify or
2 not, not necessarily preemption one recommendation and the
3 next part being certification. Is there any way to
4 unravel the two of those threads given the statute and the
5 law despite what the logic may say?

6 MR. HURSON: I think when you include it in
7 your recommendation to the Governor, and by rule the
8 recommendation will be to reject. And so yet we have this
9 -- I don't see an inconsistency there. If there is two
10 phases, basically there's two issues. Are you going to do
11 preemption? And if they're going to preempt is there
12 going to be site certification approved with an agreement?
13 And Zilkha has to have both of those, and if neither of
14 one of them, then the Council's recommendation necessarily
15 by rule is to deny. And so I guess what the issue is here
16 is okay. Let's say for some reason the Council does what
17 I think it will be which is to deny preemption. What
18 would then the Council do on the substance? Hold a
19 hearing on that and then recommend a site certification
20 agreement even though they're recommending that it be
21 denied? How do you come up with an agreement when the
22 fundamental requirement of consistency has not been met?
23 I don't see how the Council could recommend anything other
24 than denying.

25 JUDGE TOREM: We recognize this is a matter

1 of first impression for the Council, and all of that makes
2 logical sense, but the assumption built in is that the
3 Council has the legal ability to make a decision on the
4 recommendation for preemption prior to and separate from
5 its recommendations on the site certification and any
6 conditions that go along with that. I'm not convinced,
7 and the Council hasn't had a chance to meet, as your
8 clients as well. They have not sat down and really hashed
9 this out since the preemption request was filed and
10 they've had the issue on the radar screen so to speak
11 since we met in January. But now it's really here, and
12 the Council has to make a decision on how to go forward,
13 and that's the purpose of this agenda item.

14 MR. PEEPLES: Judge Torem, I want to insert
15 something just for clarification.

16 JUDGE TOREM: Hold one second. Because of
17 logistics today, we will let Mr. Fiksdal retrieve the cell
18 phone and give it to you, so that Mr. Robertson and
19 Ms. Drummond as best they can can participate.

20 MR. PEEPLES: I don't want to interrupt
21 Mr. Hurson personally. I really apologize for this. The
22 thing is I wish I could come out with Mr. Hurson. I
23 really do, but I think the rules keep us from that. And I
24 don't think what's been mentioned is 463-28-060 references
25 463-28-040 and the things that have to be shown. In paren

1 4 on 040 says: Interest of the state as delineated in RCW
2 80.50.010, and that's the whole shooting match. I mean
3 that's everything. If that wasn't in there, I would agree
4 with Mr. Hurson a hundred percent. But when you throw
5 that in, I mean that's why I think the Council has to hear
6 everything to comply with its rules. Thank you.

7 JUDGE TOREM: For the record, 80.50.010 is
8 the legislative finding of the policy of intent in
9 adopting and creating a whole EFSEC regime.

10 Mr. Hurson, is there any additional comments
11 on this?

12 MR. HURSON: Well, what I was going to say
13 is it makes sense. The fact that you're saying my
14 comments make their logical sense I think is an indication
15 that my comments are logical. And the fact of the matter
16 is we are looking at interpretation of the rules and
17 regulations that are suppose to make sense. Those are
18 suppose to be logical. And that's just one of the
19 intuitive things we do.

20 And if it's set up that, yes, you should do
21 preemption first because if they don't get the preemption,
22 then why take the time to go through all the other
23 details? And if they do that, then why would you go to
24 Phase 2? And I think that is perfectly consistent with
25 the rules require. Fortunately you go to the first one

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

1 If we did what makes logical sense, what
 2 you're saying, and I think as Mr. Peebles says he wishes
 3 he could, but he doesn't see the rules as being supportive
 4 of that position, it would take some of the burden and
 5 risks off of the Applicant. They don't want to risk
 6 putting all their resources into going forward on all
 7 those other minutia details if they're not going to get a
 8 recommendation to preempt. And if there was a way to do
 9 it, I think the Council would want to. And we're going to
 10 have a deliberative session in which we discuss these
 11 rules and see what flexibility we see in our own rules to
 12 allow what you're suggesting. If there is there, we will
 13 consider that, and the Councilmembers will adopt hopefully
 14 a logical position but the most logical one allowed by the
 15 statute and the rules.
 16 If the hearing has to go forward with the
 17 preemption and the certification issues together as
 18 suggested by Counsel for the Environment, as agreed to
 19 reluctantly as I implied by Mr. Peebles and the Applicant
 20 under the constraints of the rules, it may tell us as we
 21 go through this preemptive process for the very first time
 22 in 30 years that the rule needs another look to adopt the
 23 reality of preemption as opposed to what it may have been
 24 thought of 30 years ago when the rule was written and
 25 statute allowed for preemption.

1 guys have already taken care of it. What difference does
 2 it make?
 3 JUDGE TOREM: Well, I think you should trust
 4 in the members of the Council to listen to everything and
 5 as all representatives of the various agencies as required
 6 by statute do their job and not have the wool pulled over
 7 their eyes. You're certainly going to have plenty of
 8 opportunity to make sure any obfuscation as there might be
 9 from the County's perspective is undone. So I'll trust
 10 that between the two of you we will get things straight.
 11 MR. HURSON: And I will take the opportunity
 12 to point out when I think they're trying to obfuscate and
 13 confuse too.
 14 JUDGE TOREM: I trust that you will.
 15 MR. HURSON: Thank you.
 16 JUDGE TOREM: The legislative finding of
 17 policy and intent, the last bullet there is number five,
 18 talks about the purposes to avoid costly duplication in
 19 the siting process and ensure that decisions are made
 20 timely without unnecessary delay. And I know Mr. Peebles
 21 has mentioned this several times before, and I emphasize
 22 the original time frame thought of for EFSEC is one year,
 23 and we're past that by a lot. Not at all due to parties
 24 slowing things down, but the way the process has unfolded
 25 at this particular time it's taken longer.

1 This is the first time, so there's going to
 2 be some bumps. It may not be the best process available,
 3 but unfortunately the few years I've been doing
 4 administrative law as opposed to what I previously did in
 5 Superior Court, statutes logic is left a little bit more
 6 to the imagination in administrative law. So we don't
 7 always get the best of the schedules.
 8 Let me now go over and look at Residents
 9 Opposed to Kittitas Turbines' comments regarding process
 10 and schedule, and Jim Carmody I don't see him here today.
 11 Is there another member of ROKT that wants to speak up?
 12 Mr. Garrett, if you will wait for the phone
 13 to make its way to you.
 14 MR. GARRETT: Mr. Carmody on our behalf
 15 filed a brief regarding this issue, and it's relatively
 16 short, so I will just read it. It says we concur with
 17 Kittitas County's request to realign the parties --
 18 JUDGE TOREM: Mr. Garrett, you don't need to
 19 read it into record. It's already part of the record, so
 20 if you have anything you want to add to it, that would be
 21 fine.
 22 MR. GARRETT: I have nothing to add to this.
 23 JUDGE TOREM: Okay. Great. I just don't
 24 want to trouble you to read the whole thing when it's
 25 already part of the record.

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

4 Mr. Anderson, Community Trade and Economic
5 Development.

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

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

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

16 The reason for preemption in my
17 understanding is that you are deciding for the good of the
18 state, for the good of the people that this project ought
19 to be sited, and therefore if you need to preempt, you
20 preempt. My understanding is that is the reason you would
21 consider them together. If you don't believe the facility
22 is for the good of the people, for the good of the state,
23 and that it shouldn't be sited, you don't need to consider
24 preemption either. So it does seem to me that they come
25 together, and while I would think that you would be able

1 comments about anything regarding process and schedule
2 that I could think of, and as I sat at my computer these
3 were issues that popped to mind, so I tried to get it to
4 you, so everybody has our thoughts.

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

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

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

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

16 MR. FIKSDAL: Correct.

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

19 Mr. Slothower.

20 MR. SLOTHOWER: Yes.

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

23 MR. SLOTHOWER: Listening to what the
24 Applicant is saying and the County is saying and then
25 looking at the schedule that Mr. Hurson is proposing, I

1 to discuss the two issues separately, in other words, not
2 confuse them by talking about roads at the time same
3 you're talking about preemption, it seems to me that they
4 logically fit together. That is why the rule is probably
5 written the way it does.

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

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

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

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

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

25 MR. HURSON: I understood you wanted

1 just want to summarize because I'm not sure I'm tracking
2 with both of them, and I guess I want to make sure I'm
3 tracking with both of them.

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

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

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1 different if you look at what the WAC specifies on
2 preemption.
3 So basically it can be done in one hearing,
4 but what is common is in certain situations where a court
5 will make a decision on one issue and then based upon that
6 issue they will move right into their decision. They'll
7 move right into other processes within the same hearing.
8 JUDGE TOREM: I think if I understood you
9 correctly, you're suggesting that we could follow the
10 schedule set up by Mr. Hurson.
11 MR. SLOTHOWER: And be within the statute.
12 Mr. Peeples' interpretation of the statute.
13 MR. PEEPLES: I guess my response is not if
14 you make the determination of preemption before you hear
15 the rest of the evidence. I have no problem having a
16 section of the hearing as suggested by Counsel for the
17 Environment with regard to the primary preemption issues.
18 But if you look at 040, 463-28-040 when they reference
19 80.50.010 that's everything that EFSEC would ever consider
20 in this hearing, and I don't see how they can make a
21 decision. First of all, I don't see how they can make a
22 decision before they analyze everything else. That's
23 number one.
24 And number two, if by any reason everybody
25 agrees, you know, they'll waive their right for an appeal

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1 on that issue, then the efficiency of the process says it
2 should be moved up and held immediately before you go to
3 the other issues, so those are my two comments.
4 And contrary to what Mr. Hurson has
5 commented about my motives, I'm trying to be as
6 transparent as possible, and I just want to make sure we
7 all go down a path that is legally defensible.
8 Mr. Slothower, my fear is the County would
9 suggest one thing, and then I have other opponents sit
10 back and then appeal on the way you had the procedure.
11 You know, that's my nightmare. You know, like have them
12 propose it. You sit back. I'm not saying you are. But
13 somebody else sitting back and then file the appeal to the
14 Supreme Court on that issue. So I think it's pretty --
15 the best part -- although you can have different
16 interpretations of that. I'm not casting any dispersions
17 on people's interpretation of the law, but I think to me
18 the clearest and most sustainable interpretation is that
19 put forward by the Counsel for the Environment. I don't
20 know how you can make that decision without considering
21 everything else. I wish you could, but I don't see how
22 you can.
23 MR. SLOTHOWER: I think you're putting undue
24 emphasis on reference to the legislative intent. I think
25 it could come down to a disagreement on the law. It is an

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1 issue of first impression, and we're going to have to sort
2 that out. But I think you've got an undue emphasis in
3 your analysis on the declaration of legislative intent.
4 JUDGE TOREM: Members of the Council, any
5 comments at this time? To my right any members of the
6 Council wishing to make any comments on this discussion?
7 To my left? Chairman Luce, any comments at this time?
8 I think then we'll close the discussion on
9 Item 4 by asking if there is any need -- I think we've
10 thoroughly hashed out the issue in the briefs as much as
11 you might think they're cursory. There's not a whole lot
12 more out there to tell us about the issue. Is there any
13 need for any party to file a brief following the
14 discussion today or do you trust the Councilmembers know
15 what the options available are, what the various
16 interpretations of the statute and the regulations are,
17 and what each party's position are? Is there any need for
18 further briefing on this?
19 Mr. Hurson.
20 MR. HURSON: Well, I'm not sure if it's
21 directed to this, but I don't want to feel like I'm
22 precluded from getting into talking about preemption. One
23 of the things I do intend to do is I was going to file a
24 motion for the Council to reject the request for
25 preemption. Just from the County's standpoint the

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1 Applicant hasn't complied with WAC 463-28-040 in its
2 submission, and so our position is that the Council can
3 reject it because they haven't met even the prima facie
4 requirement. So that would have to do with scheduling.
5 So that's the only reason I'm bringing it up now.
6 I was going to bring it up in some context
7 later, but I want to get the work in today's schedule like
8 a filing deadline for us, response time for them, and then
9 some sort of hearing date. One of the things you ruled as
10 they want us to do things efficiently and expeditiously,
11 and if we can get this back on track to getting a land use
12 application back before the County, so that the County can
13 make its decision, so then we can get to the substance, I
14 think we're all better served instead of fighting about
15 the preemption issue.
16 So frankly this is what I am understanding
17 as I am envisioning it now is it isn't to say you're free
18 to send the request to the Governor to preempt now, but
19 it's simply to say that this doesn't meet the requirement
20 to ask for preemption, so you still have to work with the
21 County and then basically direct them to go back to the
22 County and try to get consistency.
23 JUDGE TOREM: If I understand that correctly
24 then, Mr. Hurson, that 463-28-040 in its four part test in
25 general the County is going argue it has not been met.

1 MR. HURSON: Correct.
2 JUDGE TOREM: Are you arguing a procedural
3 defect in addition to what you're going to allege are
4 substantive defects in meeting those four points?

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

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

15 MR. HURSON: Quite frankly I haven't looked
16 at it that closely to see. I mean I don't recall if the
17 APA require there be a verification, a sworn verification.
18 But frankly what it is, it's Issue 3 is the one I would be
19 focusing on saying alternative locations within the same
20 County have been reviewed and have been found
21 unacceptable. The basis is that apparently they are
22 unaware that EnXco has applied for a wind farm application
23 immediately east of their proposal which would produce the
24 same amount of power which is an alternative energy wind
25 resource in this county. It has not been found

1 unacceptable by the County, and Zilkha is also as Council
2 is aware Sagebrush where it has the Wild Horse project
3 that they've already gone and submitted to the Council
4 which would be another facility within this county which
5 is an alternative wind farm resource location that would
6 produce approximately the same amount of power, and that
7 has not been reviewed and found unacceptable.

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

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

25 JUDGE TOREM: You're going to argue no

1 preemption.

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

20 JUDGE TOREM: Let me suggest you do what you
21 think the County has to do in that regard, and the sooner
22 the Council has a motion like that that may affect the
23 schedule the better. And if there is any necessity at
24 least to amend that application for preemption that would
25 give Mr. Peebles an opportunity to address that issue as

1 well prior to an adjudication that might be null and void
2 based on the County's motion is found to have merit.

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

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

23 MR. HURSON: Thank you.

24 MR. PEEPLES: I have a question on that.
25 Let's say the Council has that motion, and they decide

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

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

17 Mr. Lane.

18 MR. LANE: I would just state that WAC
19 463-28-040 states that the request shall address the
20 following topics. It doesn't state prove or provide
21 evidence, and my recollection is that the document did
22 address that section. So I think my interpretation is
23 that we're heading on the substance than procedurally.
24 Procedurally it seems to have been fine.

25 JUDGE TOREM: And we'll see based on what

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

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

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

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

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

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

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

19 MR. PEEPLES: No.

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

25 MR. PEEPLES: Again, I did not file a brief

1 referring to scheduling because I did not think that's
2 what was requested by the Council and essentially the
3 County did file one. I think the schedule we would
4 propose, and I think the way I developed this was off the
5 schedule that was put in the information coming from EFSEC
6 would be we could file our prefiled March 15th and that's
7 when I would suggest we file our prefiled. Our suggestion
8 would be to have the other parties prefiled, all other
9 parties prefiled May 1st. We would have our rebuttal June
10 1st and commence the hearing 15 days later.

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

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

25 MR. PEEPLES: Well, I think they're somewhat

1 mixed in, so that's why I was saying that.
2 JUDGE TOREM: You provided what you felt the
3 Applicant can do, and I know your interest is to have the
4 adjudicative hearing as soon as possible. So the earliest
5 date I have going on is June 15th assuming the Council can
6 support that as well.

7 JUDGE TOREM: Mr. Hurson, let me come back
8 to you now on the schedule.

9 What response, if any, do you have to the
10 Applicant's suggestion of those dates, other than what I
11 anticipate that June 15 may be too early given some other
12 questions? But tell me what you think has to be done that
13 couldn't be done, if anything, before June 15th.

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

20 Frankly, what they're proposing doesn't
21 surprise me because I have repeatedly expressed my
22 concerns with Mr. Peebles that his client seems to just
23 delay, delay, and delay everything, and once they get
24 something, then they want everything to race through so
25 the County doesn't have adequate time to prepare the

1 responses. I sent a letter in June of last year telling
2 him that I was basically getting tired of that.

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

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

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

21 JUDGE TOREM: We are where we are now.

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

24 JUDGE TOREM: They're moving up the
25 Council's proposed discussion schedule by at least six

1 weeks.

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

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

20 Our schedule was we needed several months
21 because to take depositions. You have to take
22 depositions. You've got to get court reporters. It takes
23 time for them to get the transcript done unless you're
24 going to pay an expedite fee to the court reporter. That
25 costs a lot of money. If Zilkha wants to pay for

1 expedited transcript fees for the County, let us know
2 that. That could probably save us some time. If they're
3 not willing to pay for the transcript cost, then we need
4 to do it. We're not trying to delay. Our proposed date
5 as the hearing date is starting the same day that the
6 Council did. It is simply saying the Applicant has said
7 they're ready. Okay. File. And we need more time than
8 was proposed because if you take depositions, you've got
9 to get it transcribed. That takes time. Once you get the
10 deposition, you have to be able to read and review. You
11 have to figure out what to do. You have to figure out how
12 to get your prefiled testimony and have your witnesses put
13 together.

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

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

1 adequate time to get our discovery done and will give us
2 time to prepare.

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

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

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

15 JUDGE TOREM: Other parties with comments?
16 We'll bring the phone back to you, Mr. Slothower.

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

23 I was tangentially involved in another EFSEC
24 hearing a number of years ago, and my recollection there
25 was that the Applicant filed their prehearing testimony,

1 then the people in opposition then filed theirs. And the
2 rebuttal testimony that came was not truly rebuttal
3 testimony but was instead the bulk of the evidence that
4 they were going to rely on in deciding issues on the
5 siting issue, the major issues that the Council had to
6 decide. I want to avoid that for lack of a better word
7 sandbagging approach here. I think that there needs to be
8 ample time for all of the parties to review the prefiled
9 testimony and plan their presentation in their case in
10 chief based upon that prefiled testimony.

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

22 People in Kittitas County have to live with
23 this decision and the state, so I think you have got to
24 make this process fair. And what they're asking you to do
25 is set it up, stack the deck in their favor, and I don't

1 think that is appropriate. You have to have more time
2 between the filing of the rebuttal testimony and the start
3 of the hearing.

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

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

25 I don't think, Mr. Peeples, there's a need

1 to respond. Nobody is directly impugning the Applicant's
2 rebuttal because it hasn't been filed yet.

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

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

13 MR. PEEPLES: I think if that happens and I
14 do sandbag somebody through any good reasons, things come
15 up, you know, there can always be a continuance granted
16 for the hearing. I think we have enough in place, you
17 know, and I understand Mr. Slothower's views, and I really
18 do appreciate it. But I think if that happens the Council
19 is going to know that, and they can continue the case.
20 And I provide all the information as soon as I know what
21 it's going to be as soon as I have it, even though it may
22 not even be in prefiled. Anybody who wants information
23 from us, ask us. You don't have to go through discovery.
24 We'll get it to you. That's the way this proceeding has
25 always ran when I was involved in them. I think generally

1 that's the way they run.
 2 JUDGE TOREM: Mr. Hurson, go ahead.
 3 MR. HURSON: I have just one thought that I
 4 want to throw in because I wasn't tangentially involved in
 5 the other. I was directly involved in the other one. And
 6 I'm glad that we're having the discussion because I've
 7 found when you discuss these issues it minimizes the
 8 chance that things like this will happen.

9 But what happened on the Olympic project is
 10 the Applicant, and I trust that Mr. Peeples didn't have a
 11 share in what was happening in the Olympic project. I
 12 don't know any of these Councilmembers were there. The
 13 Olympic project they submitted their prefiled, which is
 14 this small amount of information. I think they had four
 15 or five witnesses. Some of the witness they attached
 16 curriculum vitae of many, many experts but provided no
 17 testimony or information. Then everybody responded and
 18 most of responses were you don't have information on this.
 19 You don't have information on this. How do we respond
 20 when we don't have anything? Then the supposed rebuttal
 21 was this mountain of paperwork which magically now had
 22 testimony from all these people whose curriculum vitae
 23 had been attached, and that was all supplied just shortly
 24 before the hearing happened.

25 The parties said no, no. That's rebuttal.

1 goes to everybody else and puts it right on the table.
 2 This is a problem. I want a continuance because. And the
 3 Council will not rule simply because the Rodeo is out of
 4 town, and we have the fairgrounds available. We will do
 5 what's appropriate to make the Council have a defensible
 6 position. I think that's the theme we've been setting
 7 probably since the beginning, at least since I've been
 8 involved in December.

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

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

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

25 JUDGE TOREM: As much as I like physics,

1 We should have a case in chief and it doesn't meet the
 2 burden. We are going to move for dismissal. The Council
 3 said, no, we've already got the Lakewood Mall scheduled.
 4 All these people are going to have to be handled, so we
 5 still had the hearing. They combined the rebuttal in with
 6 the case in chief, and then they wouldn't grant a
 7 continuance. And the resolution was is the hearings
 8 happened on Tuesdays, Wednesdays, and Thursdays, and then
 9 on Mondays and Fridays they let depositions happen. And
 10 so for five days a week people were suppose to dedicate a
 11 full time attorney to handling the hearing. Like I said,
 12 I'm the civil division for the County. It was impossible
 13 for me to participate in any deposition, and it was a
 14 nightmare.

15 JUDGE TOREM: I have been in those types of
 16 proceedings myself.

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

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

1 momentum is not my strong suit, so we'll just leave it at
 2 that.

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

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

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

16 Ms. Drummond, you will be next in line.

17 Chris Hall, go ahead.

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

23 JUDGE TOREM: Okay. Thank you.

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

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1 subject.

2 MR. FIKSDAL (For Ms. Drummond): No

3 objection to the Applicant's schedule. It looks like

4 it's reasonable. The process has gone on for quite a

5 while, and we are familiar with the issues. And they have

6 plenty of time between March and May to get in their

7 prefiled. That's the end of their comment.

8 JUDGE TOREM: Thank you, Ms. Drummond.

9 Mr. Peeples, we were going to come back to

10 list of subissues under Sub 5. I think the Council

11 probably has enough feedback on proposed schedule.

12 Mr. Lane, first.

13 MR. LANE: I just want to clarify. When was

14 the other parties' prefiled for the Applicant's

15 suggestion?

16 MR. PEEPLES: May 1st.

17 JUDGE TOREM: May 1st, yes.

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

19 JUDGE TOREM: And you're okay with that?

20 MR. LANE: Yes.

21 JUDGE TOREM: Mr. Peeples, back to all the

22 other subissues under Sub 5. Do you have any specific

23 input on the issues of witness list and discovery process

24 and any prehearing briefs and timing for those?

25 MR. PEEPLES: Just with regard to schedule,

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1 I'm going to be real blunt. I gave away 30 days for us,

2 and, you know, if the Council is going to do something

3 other than our schedule that we proposed and maybe go back

4 to the others, I don't like giving something up and nobody

5 else giving anything up, so I want that very apparent.

6 I was proposing that giving up something of

7 myself and everybody giving a little bit on it. But if

8 you decide that nobody else needs to give, I don't think

9 we should either.

10 The comment I had with regard to you had

11 listed issues, witness lists, I would propose that we file

12 our witness lists around March 15th at the time that we

13 according to our schedule we plan to file our prefiled,

14 and I think everyone would file whomever they note they're

15 going to have as witnesses at that time, and the parties

16 supplement when they know. When I know I'm going to have

17 a witness, I'm going to let you know. I'm probably going

18 to let you know when I'm going to have a potential

19 witness. So I think we should do a preliminary witness

20 list. I put March 15, but I don't care when it is.

21 Everybody should get a preliminary witness list out.

22 That's kind of up to the examiner.

23 With regard to issues, you had issues down,

24 and I think the parties are limited to the issues

25 contained in the intervention order because I think that

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1 was published a little bit more than a year ago now. And

2 that, you know, in the past when I have been a hearings

3 officer in your place I've always kept trying to refine

4 issues by forcing parties together to get stipulations

5 here and there. I found that never worked. It just took

6 time. It took effort. And even if the parties are going

7 to agree to limit issues, they're going to do it by their

8 own best interests like we did in Wallula where we solved

9 all the issues because everybody was so motivated to solve

10 all those issues.

11 This is not a Wallula case. I don't see

12 parties motivated to try to really solve the issues. So I

13 think this is a different case, so I don't think the

14 Council should go down a path of trying to have prehearing

15 conferences to try to solve the issues. I think the

16 prefiled testimony of all the parties will identify the

17 issues in conjunction with those issues and subject areas

18 that's designated by the hearings officer in his order.

19 So we totally disagree that parties that may

20 have some things in common with us are going to be

21 required to file their testimony at the same time we are.

22 We think they should be handled as other parties. I can't

23 speak for any of these people as to whether or not they're

24 going to totally agree with what we have in our testimony.

25 They may disagree.

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1 So that's the issue I guess or my position

2 or comments I have on the issues and the witness lists.

3 Do you want me to go into discovery now? Discovery I

4 think is a real issue.

5 JUDGE TOREM: Not yet. I just want to

6 handle the realignment, if you will, that Mr. Hurson

7 raised at this time.

8 If I read the issue correctly, Mr. Hurson,

9 as Mr. Peeples just hinted to, you would like to take the

10 proponents and opponents and just group them together.

11 And if I read this correctly, then the prefiled would have

12 the proponents filing at the same time, and then any

13 opponents would file then rebuttal. You really could turn

14 this into a group of coalition parties.

15 MR. HURSON: Well, I think any time we have

16 an adverse hearing, whether it's in Superior Court or an

17 adjudication, there's sort of vague lines and times but

18 there's sort of people that are generally for or generally

19 against. The County was never against the application,

20 but by seeking preemption it necessarily sort of forces

21 the County into we don't want preemption, and by rule that

22 means it's a recommendation for denial. That was the

23 Applicant's choice.

24 And they need to be aligned, so that they at

25 least make some sense as far as who is presenting which

1 side or who is rebutting who. For instance, there's
2 several parties here I think when you look at the
3 intervenor requests it's clear that they're going to be
4 supportive of the project and recommend that you approve
5 it, and they may do little else other than to simply say
6 you should approve it because they think it's the greatest
7 thing since life's breath.

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

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

19 JUDGE TOREM: Well, if you talk just about
20 sliced bread, I don't think you have to respond. Let me
21 suggest that perhaps just process does allow if
22 Mr. Peeples files as traditionally the Applicant files
23 first, and then all other parties as we suggested in the
24 Council's schedule that you might be able to be
25 accommodated by being allowed rebuttal testimony to any

1 other party's prefiled testimony that's filed at the same
2 time as the County's under the Council proposed schedule.
3 So perhaps the rebuttal is not limited for the Applicant
4 to rebut all of the parties as necessary, but also for
5 other parties to say, hey, this other party said something
6 and I want to make sure in a limited fashion at least I
7 can rely or rebut some of that testimony.

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

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

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

17 JUDGE TOREM: Let me ask one question.

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

21 JUDGE TOREM: They might.

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

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

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

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

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

21 In fact, in the Olympic proposal it was
22 clear that it was basically Olympic versus Counsel for the
23 Environment. Counsel for the Environment was the lead
24 attorney in that process, so those are clearly there. And
25 it's a matter of where does everybody else fit on it. I

1 think it's really easy to look at the intervention motions
2 to see where many of these parties align. Then you simply
3 just put it, so that it makes logical sense and somebody
4 would have to be opposed to the project to be with the
5 Counsel for the Environment's side.

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

15 If it's chosen not to follow your suggestion
16 on realignment, then we will also look at the need for all
17 the parties to have a chance to rebut what each other says
18 and determine how to schedule the rebuttal testimony and
19 prefiled to accommodate the needs. So one way or another
20 everybody will have a chance to comment in advance in
21 writing on everything that's been filed either by the
22 Applicant or by the other parties. I hope we don't
23 satisfy the process again. The goal is to get the Council
24 the best information possible and make sure there's no
25 sandbagging at the hearing itself.

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1 MR. HURSON: That was frankly the schedule I
2 had was the people that are for it will supply the
3 testimony at the same the County would and then there
4 would be nothing set for the County to ever provide
5 rebuttal testimony. That was why the realignment kicked
6 in. I said I'm going to have these alter egos of the
7 Applicant submitting testimony the same time I do, and I
8 have no idea what it is until after my opportunity to
9 comment is gone.
10 JUDGE TOREM: We will address that, and you
11 will have an opportunity to comment.
12 Ms. Ling.
13 MS. LING: I would like to respond to
14 Mr. Hurson's comments that we are intervening in support
15 of the project. For the record, we have participated in
16 siting proceedings of renewable projects and have actually
17 proposed projects in the past. We look at the evidence on
18 the DEIS to make sure the project is properly sited. We
19 would also object to the County's request that we be
20 aligned with the Applicant.
21 JUDGE TOREM: Thank you, Ms. Ling, for that
22 input.
23 I'm hearing Ms. Drummond is seconding the
24 comment by you, Ms. Ling.
25 MR. FIKSDAL: She would just like to

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1 comment. She hasn't said what that comment is yet.
2 JUDGE TOREM: Ms. Drummond, go ahead.
3 MR. FIKSDAL (For Ms. Drummond): RNP objects
4 to the County's motion that we realign. RNP is not the
5 same as the Applicant. It's entirely inappropriate to
6 treat the intervenors as the Applicant. The intervenors'
7 participation is limited to limited issues and not an
8 entire application like the Applicant. As Ms. Ling
9 pointed out RNP's interests are distinct from the
10 Applicant's. RNP's interested in having renewable
11 projects well sited in the global interest, and the
12 Applicant's interest is more limited and narrow to
13 interests in that particular project.
14 The County has provided no statutory or
15 regulatory support for their motion. If you look at
16 34.05.443 it talks intervenors combining their testimony
17 to be more efficient, but it does not talk about the
18 intervenors combining their testimony with the
19 Applicant's.
20 RNP will try and coordinate with the other
21 parties to streamline the proceeding but should not be
22 required to prefile their testimony at the same time as
23 the Applicant. Thank you.
24 JUDGE TOREM: Mr. Anderson.
25 MR. ANDERSON: Just real briefly. I think

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1 Your Honor has come up with a positive solution. Like the
2 County we would like to be able to rebut the comments of
3 other intervenors as well, and your suggestion that the
4 Applicant file first, intervenors file secondly, and then
5 everyone have the opportunity to rebut seems like a very
6 positive suggestion, and I would like to encourage the
7 Council to take your suggestion.
8 JUDGE TOREM: Thank you, Mr. Anderson.
9 Mr. Lane.
10 MR. LANE: I would like to say that I
11 provide my support for that idea as well. I don't object
12 to the County's desire to somehow have rebuttal, whether
13 that comes in the form of surrebuttal, spontaneous
14 rebuttal of some sort, but I have very serious concerns
15 about realigning in this particular case and would be very
16 opposed to that.
17 JUDGE TOREM: Okay. Any other comments on
18 this issue?
19 Ms. Strand had her hand up earlier. I think
20 we may have skipped her.
21 MS. STRAND: Like Mr. Hurson our staff at
22 the Economic Development Group are very small and
23 requiring us to file testimony at the same time as the
24 Applicant would basically take us to the point where we
25 more than likely would not be able to make any comments,

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1 so I too would support the schedule that you are
2 proposing.
3 JUDGE TOREM: Okay.
4 MR. HURSON. Can I make a comment?
5 JUDGE TOREM: Mr. Hurson.
6 MR. HURSON: Just for one clarification. I
7 intentionally put in my memo when I said realigned I put
8 it in quotes because I wasn't talking about realignment in
9 the sense that you do in court where you actually move
10 someone from being defendant to plaintiff. It was
11 intended to be an analogy. I wasn't trying to argue that
12 any of the people who called on the line before are one in
13 the same with the Applicant.
14 JUDGE TOREM: I think we flushed it out
15 enough today.
16 MR. HURSON: It's some of the comments
17 people were trying to make. If they misunderstood me, I
18 apologize. I wasn't trying to say that Renewable
19 Northwest Project are alter egos of the Applicant. It's
20 just they have more of a commonality interest and it makes
21 sense. Frankly, I find what you are proposing as far as
22 just getting people's response to comment was the whole
23 point was for us to have meaningful response to prefiled
24 testimony in the case.
25 JUDGE TOREM: What I'm suggesting is

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1 palatable to everybody here. The Council will take that
2 under consideration. We'll see if they agree with me as
3 much as everyone else has stated.
4 MR. PEEPLES: I would like to make one
5 comment. I don't think it's beneficial to get into
6 surrebuttal, sur-surrebuttal, sur-sur-surrebuttal. I mean
7 there's got to be a date. And if the situation is
8 everybody files their prefiled and then everybody can file
9 rebuttal, that's a good idea. I will support that. When
10 you get into surrebuttal, sur-surrebuttal and all that,
11 then we'll go on for years.
12 JUDGE TOREM: I get enough of the sir stuff
13 in my military uniform, and we'll leave it there. At this
14 time we're going to take a ten minute break. We're going
15 to come back after the break and discuss the discovery
16 process. We will see you in ten minutes.
17 (Recess taken from 10:32 a.m. to 10:45 a.m.)
18 JUDGE TOREM: It's now about 10:45, and we
19 will be on the record.
20 We need to take up one additional issue
21 before we complete this prehearing conference, and that is
22 the discovery issues that are raised in Sub Topic 5 on the
23 agenda. What I anticipate is to hear briefly from
24 Mr. Peeples and then turn back to the other parties that
25 have discovery concerns. There's no need to restate the

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1 fact that in responding to the Applicant's prefiled more
2 time is better for discovery. I'm well aware of that
3 theme. So if anybody has specific items or they know
4 there are specific witnesses they're going to have take
5 depositions and there are conflicts, that sort of thing, I
6 want to hear about it.
7 Mr. Hurson, you raised some specific issues
8 on this and I'll just give you advanced notice I'm going
9 to ask you about some of the specific depositions you
10 would like. You mentioned Mr. Taylor, Mr. Young, and
11 other officials and agents of the Applicant to clarify if
12 necessary today who those might be and also regarding the
13 proposed discussions of EFSEC staff. I'll get some
14 specifics on that when I pose the question to you, but
15 there's definitely some questions coming about that.
16 When we're done with those issues, we will
17 go through the rest of the agenda, and when we adjourn the
18 conference all the parties will be free to go. We're not
19 going to come back on the record today, but the Council is
20 going to stay around on site to do some deliberations on
21 some of the issues today. The Council's next scheduled
22 meeting is March 1, and whether or not the Council will be
23 able to issue its prehearing conference order on all the
24 issues raised today by March 1, I can't make any promises.
25 There's some other issues that are being discussed as a

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1 result of comments from the Environmental Impact Statement
2 that are also going on in deliberations to figure out how
3 that plays into the schedule. So the Council needs to
4 have opportunity to deal with those as well.
5 So hopefully the first week of March you'll
6 see a prehearing conference order on what occurred today,
7 and Mr. Peeples based on your suggestions about prefilng,
8 whether it would be March 15 or April 1, I want to make
9 sure that I tell you on the record today be ready to go as
10 early as March 15 with your prefiled and you'll have at
11 least ten days notice. I'm hoping by March 5 you will get
12 a fax copy of the order telling you what the actual
13 deadline is. It may be March 15, since that's the
14 earliest date I've gotten you saying you could go. And I
15 don't know whether the give and take you suggested we'll
16 take you up on that or not. But that's the earliest date,
17 and that may be something we expect to hold you to, so I
18 just don't want it to drop on you March 14 and say that's
19 the deadline.
20 MR. PEEPLES: I hear you.
21 JUDGE TOREM: Any other issues before we
22 turn to the discovery?
23 Mr. Peeples, on the discovery.
24 MR. PEEPLES: First of all, I'm going to
25 cover certain elements of it, and then I think with regard

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1 to those issues that you were referring to Mr. Hurson
2 about some of the EFSEC people he wants to take
3 depositions of I'm going to have Chuck Lean respond to
4 that right off the bat. Those are what I consider SEPA
5 issues.
6 Discovery is provided in WAC 463-30-190. It
7 refers to RCW 34.05.446. That is what determines
8 discovery. Generally I want to state there's been very
9 little discovery in EFSEC's proceedings. We file prefiled
10 testimony. That's a method of discovery. So way before
11 any time anybody needs to get ready for cross-examination
12 and file their testimony. It's all pretty much out in the
13 open. The Applicant will agree to any informal request,
14 informal discovery. If you need information, let us know.
15 We'll provide it. I've always done that in the past.
16 Now, if you look at RCW 34.05.446 it says
17 the presiding officer may allow discovery, and the paren 3
18 in that statute I'll just read it. Except as otherwise
19 provided by agency rules the presiding officer may decide
20 whether to permit the taking of depositions, requesting
21 the admissions and all other procedures authorized by
22 Rules 26 through 36 of the Superior Court rules. The
23 presiding officer may condition the use of discovery on
24 the showing of necessity and unavailability by other
25 means. In exercising such discretion the presiding

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1 officer shall consider whether all parties are represented
2 by counsel, whether undue expense or delay in bringing the
3 case to hearing will result, whether discovery will
4 promote the orderly conduct of the proceeding, and whether
5 interest of justice will be promoted.
6 It's my concept that if somebody wants
7 discovery, they're going to have to make application to
8 the hearings officer, state why, when, and how those
9 conditions are fulfilled. I believe parties should be
10 able to respond to that request, if they have a response,
11 and then the hearings officer needs to rule on each
12 individual request for discovery. And I don't know of any
13 other way to go about it because it specifically says the
14 presiding officer shall allow and it has the criteria. So
15 that's the procedure I would propose. If somebody wishes
16 to have discovery, they've got to apply to the presiding
17 officer, and the presiding officer has to look at each
18 individual discovery request.
19 And that's essentially the Applicant's
20 position on this, and people should be able to respond to
21 those requests.
22 Now, Mr. Hurson in his brief made comments
23 that he wished to depose EFSEC staff and the EFSEC
24 independent consultant who prepared the DEIS. And I've
25 been around for a long time, and I think Chuck's been

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1 around for a long time. I've never seen discovery, I've
2 never seen discovery with regard to a preparer of an EIS
3 or county staff. I don't know if Mr. Hurson allows
4 discovery with regard to its EIS. They're preparing an
5 EIS, and I guess that means that they're willing to have
6 any opposition in the Desert Claim to go in and depose
7 their staff people and depose the preparer of their EIS.
8 I doubt if that happens, and I really don't know if that
9 would be his position in that case.
10 But anyway with regard to discovery on EIS
11 and the SEPA issues, I'm going to turn it over to Chuck
12 Lean right now.
13 MR. LEAN: I would echo what you just said
14 on taking discovery of EIS preparers of local government.
15 I've never heard of it being done, but that doesn't mean
16 that it hasn't been done. I haven't obviously been
17 involved in every case before local government that
18 involves SEPA.
19 But I think it's important that while -- one
20 other thing before we get to SEPA. The Council here is
21 sitting in a quasi-judicial capacity. I've never heard of
22 discovery being done on a Superior Court clerk or bailiff
23 which in some ways is somewhat similar to the situation
24 the Council is in.
25 More to the point on SEPA, the whole

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1 situation with SEPA the adjudicatory hearing that the
2 County conducts is almost unique as far as I'm aware in
3 state and local government. You are making your decision
4 in the course of an adjudicatory hearing. And actually
5 your decision is not a decision, but it's a recommendation
6 to the decision maker.
7 Now SEPA itself if you look at the basic law
8 says it reports on recommendations for legislation or
9 other proposals involving significant adverse
10 environmental impacts shall be accompanied by an impact
11 statement. It's pretty clear from reading the rules that
12 when the Council was adopting their rules trying to figure
13 out the timing of all this, they figured that the final
14 EIS had to accompany the recommendation to the Governor.
15 And if you look at the Council rules of WAC
16 463-47-060 it says you can start an adjudicatory hearing
17 even without the DEIS, without the Draft Environmental
18 Impact Statement. Now most of the time recently you have
19 been doing the Draft Environmental Impact Statement before
20 the adjudicatory hearing starts, but the final is made up
21 of the comments, the responses to comments that come into
22 that draft. And the Council I believe has figured that
23 the adjudicatory hearing or at least the public hearing
24 that's goes on simultaneously with that as part of it has
25 comments on the Draft EIS. And the contents of the

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1 adjudicatory hearing and the public hearing comments are
2 then considered along with the written comments in their
3 responses that lead to the Final EIS.
4 It's important to recognize that state law
5 prohibits an appeal of a Draft EIS, and so that there
6 cannot be an issue of the adequacy of the Draft EIS in the
7 Council's adjudicatory hearing because you would then be
8 conducting an appeal on the adequacy of the Draft EIS
9 contrary to state law. So those legal citations were in
10 our preemption request.
11 So it seems that we've got to recognize that
12 SEPA adequacy is not an issue before the Council in an
13 adjudicatory on the application for an energy facility.
14 It just is not one of the issues that are there that you
15 consider. If it's not an issue and if it's not relevant
16 to the adjudicatory hearing, I really don't see how
17 information that could be relevant could come out of
18 discovery of the EIS preparer, especially the Draft EIS
19 preparer.
20 Now, it doesn't say that you can't challenge
21 the Final EIS, but I think if you're wanting to challenge
22 the decision of the Governor, than part of that challenge
23 should be to the Final EIS, should be the SEPA adequacy,
24 and that's where it comes. I just don't see it coming
25 before that, especially in the EFSEC process. And that's

1 our position.
 2 JUDGE TOREM: Thank you, Mr. Lean.
 3 Mr. Peeples, anything further?
 4 MR. PEEPLES: Not right now.
 5 JUDGE TOREM: Mr. Hurson, if we could come
 6 back to you. You've indicated in your brief on Page 3
 7 that you tentatively anticipate the need to take
 8 depositions of a series of people. Chris Taylor and
 9 Andrew Young and other official agents of the Applicant,
 10 then Zilkha's employees and agents, EFSEC staff and then
 11 Shapiro & Associates personnel, the ones who drafted the
 12 EIS and, of course, any other witnesses that are involved
 13 in the prefiled testimony.
 14 Let's presume for today's purpose that as
 15 indicated in EFSEC rules and in the Administrative
 16 Procedure Act that a presiding officer is going to have to
 17 authorize the overall taking of depositions and perhaps
 18 that could be done in a blanket approval or it would be
 19 done one at a time depending on the request for each one.
 20 As I read the Council's rule there's no indication that
 21 simply because I'm sitting here running the meeting today
 22 I'm the presiding officer for those purposes. I looked
 23 through briefly, and I didn't find a definition of the
 24 presiding officer. There's some indications that could
 25 read either way, so I may or may not be the person to make

1 those approvals. The Council as a whole has to appoint
 2 the presiding officer and could delegate this discovery
 3 issue such as create a discovery master. It's probably
 4 too big a word for this particular proceeding, but that
 5 could occur. It's something that the Council is going to
 6 have to discuss today to figure out how to handle the rule
 7 on any motions for discovery that are entertained, whether
 8 in total or one request at a time.
 9 So I want you to know that right now we
 10 don't know, the Council doesn't know, and hasn't advised
 11 me that I'm the person to make those decisions. If they
 12 do, that will be noted in the prehearing conference order
 13 that comes out from this proceeding today. You may be
 14 trying to convince the entire Council of this as well, so
 15 I just want to make sure you point your comments as to why
 16 discovery and how it might go to the entire body and not
 17 just to whom you might think is the presiding officer. We
 18 don't know who that is yet.
 19 So with that preamble we will turn it over
 20 to you to talk about what you've got on Page 3 in your
 21 request and if necessary respond to anything that
 22 Mr. Peeples and Mr. Lean had.
 23 MR. HURSON: And perhaps the way of dealing
 24 with this, I don't have a problem with a question and
 25 answer sort of a concept here instead of a long speech. I

1 find that doesn't get us to the issues quickly.
 2 Frankly as far as the presiding officer
 3 issue, I didn't look at it that closely, I assumed the
 4 Administrative Law Judge was the presiding officer.
 5 You're doing a fine job at presiding today.
 6 JUDGE TOREM: We'll see if the context
 7 extends into discovery as well.
 8 MR. HURSON: That's just it. That
 9 particular nuance hadn't occurred to me because every time
 10 EFSEC meets you are presiding over, and you were assigned
 11 as Administrative Law Judge. So I've been working under
 12 that assumption.
 13 I'm also aware the discovery under the
 14 Administrative Procedures Act is done with permission of
 15 the presiding officer. And when you talked about process
 16 and the things you wanted initially, I thought at least
 17 what I should do is say these are the sorts of things we
 18 are looking at. These are the areas we would want to talk
 19 about, so the presiding officer would be aware of those.
 20 And then there would be a discussion as to is this going
 21 to be on a case-by-case basis or is there going to be a
 22 formal blanket that allows discovery? Because I believe
 23 the rule would allow a blanket rule of discovery, much
 24 like you could have in court or it could have some
 25 limitations. I think the rule makes sense that you

1 wouldn't in an APA situation say that we want to keep a
 2 little more restricted than Superior Court but not as
 3 restricted as District Court, but it kind of strikes a
 4 little balance in between there.
 5 As far as the discovery of the depositions,
 6 I think Zilkha's counsel misunderstands why the issue of
 7 the EIS, Draft EIS is important to the County, and I will
 8 be happy to share that with you.
 9 It appears that one of the big issues in
 10 this document that they presented is that Zilkha is just
 11 tired of waiting, and the fact that the County wants to
 12 wait until there's a response to the Draft EIS comments
 13 and have an adequate EIS before the County proceeds is
 14 unacceptable to them. From reading the Draft EIS, and I
 15 believe Planner Clay White put that in and made a comment
 16 basically to the effect that it appears that Zilkha wrote
 17 the Draft EIS. It appears like the Applicant wrote the
 18 Draft EIS. So basically it's our preference or theory
 19 that it was a clearly inadequate draft because Zilkha
 20 didn't provide enough information to make it an adequate
 21 draft.
 22 JUDGE TOREM: So tell me how that leads to
 23 the discovery issue because I've read your comments.
 24 MR. HURSON: Because I think what's part of
 25 discovery that's what I want to inquire because they're

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1 going to say, they're saying we want the County to not
2 have a right to make the land use decision because the
3 County wanted to have a good environmental document before
4 it made a Growth Management Act amendment to the comp.
5 plan.

6 JUDGE TOREM: Is that going to be relevant
7 to the issues that the Council is to decide at the
8 adjudicative hearings? Because that's how I see discovery
9 in no matter what court is to bring out information that
10 may be admissible at hearing.

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

20 And you read the DEIS, and it looks like
21 everything in there is based upon the information that the
22 Applicant supplied or most everything. It doesn't appear
23 that the DEIS consultants really did their independent
24 investigation, so there's many unanswered questions. I
25 think there's comments from the consultant that says,

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1 well, they wouldn't give us any other information, so we
2 don't know what to do with it.

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

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

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1 Let's shift over to the EFSEC staff issues.
2 I could see where the DEIS issues are of concern to that
3 area, but necessarily to the rest of the certification
4 issues before the Council where would Ms. Makarow and
5 Mr. Fiksdal come in to a deposition and why would that be
6 appropriate?

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

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

24 JUDGE TOREM: It sounds like when you listed
25 under discovery as a formal issue, staff, our staff is --

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1 for everybody else to be on page with this, they're sort
2 of a hybrid in being Council staff as was made reference
3 to court bailiff and court staff which you would never
4 have a deposition request granted for any of those folks
5 except in the most extraordinary circumstances. It would
6 seem to me that the Council does not want to hide their
7 staff from anybody on the issues that may be relevant, and
8 they certainly have a dual role in helping to advise the
9 Applicant and any other intervening party on how to go
10 through the process. So there may be times when they're
11 not acting in a deliberative capacity with the Council,
12 but they're supporting the public's role and the
13 Applicant's role in going through this. That may be open
14 to discussion.

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

24 So if the rule itself is excluding the
25 testimony and discovery must lead to things that are

1 admissible at the hearing and authority precluded that
 2 would be a hard hurdle to overcome.
 3 Even saying that, if that rule has been
 4 adopted in violation of a statute or any other things then
 5 a presiding officer is going to listen to argument as to
 6 why that rule may be invalid and should be ignored or
 7 accepted. But it sounds like even the limited you're
 8 discussing, if why the DEIS came out in December rather
 9 than an earlier date, we are where we are as I said
 10 earlier, and that may or may not be relevant at all to
 11 even the preemption issues.

12 The preemption issues are what efforts were
 13 made not necessarily the timing; although, timing could be
 14 an element. So that's my personal view. If I'm the
 15 presiding officer, then you know where I'm leaning. If
 16 I'm not, well, we'll find out where the rest of the
 17 members of the Council are on this issue.

18 But I just wanted to make sure we discussed
 19 it today. As you've indicated sometimes just airing these
 20 issues out can get them resolved. But it did raise a red
 21 flag when I read the deposition of staff, and I wanted to
 22 be clear about that.

23 MR. HURSON: And, frankly, I haven't read
 24 463-30-200. But even now I think it was like you said
 25 before just logically it sounds odd, and I realize it

1 sounds odd. But like I said before, when they're talking
 2 about Zilkha's just tired of waiting. Well, like I said,
 3 the last time if we had a good Draft EIS out back in June
 4 that was complete, we'd be done. And Zilkha's main
 5 objection seems to be that they're just tired of waiting
 6 for time, but we have been waiting for it, and so I think
 7 it's relevant. And I really don't want to cross-examine
 8 Irina, but I still can't quite figure out what it is that
 9 the County did to delay the June release of the Draft EIS.
 10 And like I said, maybe she just misspoke. Maybe it's a
 11 matter clarifying. Maybe we can talk with the Zilkha
 12 folks or the consultant, but that was why that came up.
 13 Maybe I can get that information from the folks from
 14 Shapiro; that they can explain what all that time was. We
 15 just don't see where we delayed anything. But that's
 16 being said that we did.

17 And so I guess on that, if you just want me
 18 to segue into the other SEPA issues, they're all somewhat
 19 related to that because the County has a question over
 20 who's controlling the SEPA issue.

21 JUDGE TOREM: What I'm hearing over all the
 22 SEPA questions and all these other process issues that may
 23 have been mentioned in your discovery Page 3 of your brief
 24 and the comments on process those are all concerns as to
 25 would relate to preemption as to whether or not there's

1 been a good faith effort to resolve things. And I'm well
 2 aware that there's a blame game played as to why is there
 3 delay. I've read the local papers. I've seen the ad
 4 taken out. I've seen the comments made on both sides.
 5 I'm aware of it. That's not the issue the Council has to
 6 address, so I want to make sure the appropriate filters
 7 apply here to what's going to come in the adjudicative
 8 hearings, as well as the adjudicative hearing on
 9 preemption and the timing of that is going to be decided
 10 hopefully in the next couple weeks.

11 But I'm not hearing that is definitely a
 12 relevant issue today. So when we get to a point of
 13 appointing a presiding officer, I just would tell you my
 14 personal approach would be if there's going to be
 15 discovery allowed on that topic that we have a little bit
 16 more correspondence between the County that's requesting
 17 that information and the presiding officer to say this is
 18 why we want it and have a good explanation as to where
 19 it's going to fit to make it not relevant to explaining
 20 every mystery and comment that may have come up along the
 21 last year plus the process, but what does the Council have
 22 to decide this next coming summer, whether it be in June
 23 or August.

24 If you're going to take the deposition,
 25 filing interrogatories or ask questions at all, let's see

1 that it's going to fit into the process or support another
 2 issue getting to the process, so that it's not just an
 3 exercise in helping to hammer out blame games. That's
 4 really irrelevant to the Council except possibly
 5 tangentially on the issue of preemption. If it's a
 6 question of they delayed, we delayed, that's not going to
 7 be here nor there when the Council makes its decision
 8 except maybe did the Applicant do enough to resolve land
 9 use consistency issues that came up last May.

10 So it's a very limited issue, and we're
 11 spending a lot of time on that today. Convince me or the
 12 Council's presiding officer if you disagree with that
 13 later, but I just wanted to lay out that issue and start
 14 to move away from that again today.

15 MR. HURSON: I bring that up for a reason.
 16 But the whole -- I mean you've seen their ads. That's
 17 their whole thing. They're just tired of delay, delay,
 18 delay, and it's basically our hypothesis that the reason
 19 there's been a delay is because Zilkha has chosen to
 20 delay.

21 JUDGE TOREM: So Zilkha is the one that has
 22 to make a decision.

23 MR. HURSON: Right.

24 One other issue I did want to bring up is to
 25 why we want to put in DEIS issues is I guess it relates to

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1 my motion to dismiss that I told you about that I was
2 going to do as far as other things. The things they cite
3 to in support of their assertion of, well, there's no more
4 alternative to the Draft EIS, well, our consultant for the
5 Kittitas County project put together that part of the EIS
6 except it got rewritten in that section because ours
7 doesn't say that's not an alternative site.
8 JUDGE TOREM: You're talking about the
9 Desert Claim?
10 MR. HURSON: Yes. The County's, the other
11 project that's going on. Our consultant basically wrote
12 those sort of sections and gave them to your consultant,
13 so that they could put it in there. But the part that's
14 changed is the key part. They're citing as well there's
15 no other alternatives. Our EIS that our consultant put
16 together says there's an alternative. So I'm curious as
17 to how that language got changed because but for that
18 language put in the DEIS that EFSEC put out, they wouldn't
19 have anything to point to.
20 And it creates again a question of who's
21 controlling the language in this Draft EIS. Because if
22 the Applicant is telling, hey, now put this in here, pull
23 this one portion, you need to get this fixed, and then
24 they side with the Applicant's as their authorities that,
25 again, also shows the lack of good faith dealing because

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1 they're trying to manipulate your EIS.
2 JUDGE TOREM: It is the Council's EIS and
3 Shapiro & Associates is the Council's agency to do that.
4 Trust me that the Council is discussing with Shapiro their
5 own review of the DEIS, as well as comments from others
6 that have pointed out much of what you're saying today.
7 That issue is not going unaddressed. Whether or not we do
8 the Wizard of Oz thing and remove the green curtain for
9 you or not, I don't know the deliberative process
10 authorizes it. So there is a man behind the curtain. In
11 fact, the whole Council is working that issue, and it will
12 be resolved, so that the Council has a defensible EIS
13 whatever direction they take. Because if the Council
14 recommends not having site certification, we need to be
15 able to look the Applicant in the eye as a group and say
16 this is why we're doing this. So the Council has as
17 strong an interest as anybody in this integrity of that
18 DEIS and the Final DEIS that we will put out
19 contemporaneously with its recommendations to the
20 Governor.
21 Other parties on the discovery issues? Is
22 there anything else that we need to cover?
23 Mr. Slothower.
24 MR. SLOTHOWER: Yes, a couple of things
25 quickly. I'm concerned about your comments about who the

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1 presiding officer is because my perception is that
2 discovery issues will really come to the floor when you
3 see prefiled testimony, and I want to make sure that there
4 is enough time and we know who to go to if based upon that
5 prefiled testimony there are people that we want to
6 conduct discovery with. And given the time line that we
7 are under here, whether it's June or August, I think that
8 depositions do make the most sense as a vehicle for doing
9 discovery. Interrogatories taking too long whereas a
10 deposition you're face to face. You can ask the questions
11 you need to ask and be gone. But I'm concerned about
12 having a clear bright line process on who we go to for
13 permission if we have to get permission to take a
14 deposition.
15 JUDGE TOREM: It will come up out by March 5
16 as I've previously stated my goal to have a prehearing
17 conference order out for this. We'll designate a
18 presiding officer for purposes of discovery, and it may
19 actually include that presiding officer's process for
20 entertaining discovery requests and tell you what the time
21 line is for response turnaround, etc.
22 It will be an expedited process I would
23 expect whoever the presiding officer is that involves fax
24 or email service and quicker turnaround to deal with that.
25 So that will be addressed, and I appreciate you

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1 highlighting that concern because we don't want to burn
2 anymore days waiting for permission to go do something
3 that you felt you should have been able to do right away.
4 And as much blanket authority as can be given by a
5 presiding officer that should be addressed as well, so
6 that you don't have to come for every little thing to get
7 permission. God knows that whoever the presiding officer
8 doesn't want to be dealing with 40 discovery requests per
9 day because there's a lot of parties in this room. It's
10 pretty obvious that you could get snowed under pretty
11 quickly despite the weather outside.
12 Anything else?
13 Counsel for the Environment, please.
14 MR. LANE: Just on the last issue. My
15 reading of WAC 463-38-020 places you as the presiding
16 officer. It's my understanding that if the Council elects
17 to use an Administrative Law Judge that person becomes the
18 presiding officer, but if the Council elects to hold the
19 administrative hearing by themselves, then they will
20 appoint a presiding officer. So while it's not
21 specifically stated, I believe that it is sort of
22 dormant there.
23 JUDGE TOREM: I don't want to be
24 presumptuous and tell the Councilmembers that's what it
25 says too. It might say that. I've talked with Ms. Essko

1 about that because it's not in black and white. If the
2 Council wants to appoint me, great. If they want to take
3 on this duty, I'm not going to cry any tears over that
4 either.

5 Anything else on the discovery issue?
6 Coming back to you, Mr. Peeples.

7 MR. PEEPLES: I just want to rebut a couple
8 things said by Mr. Hurson. He's misstating what our
9 request for preemption stated. He's saying the only
10 reason we're doing this is because of time. I think our
11 request speaks for itself. He's referenced to the date
12 that the DEIS was published. That's not even really
13 mentioned. Much in that, you know, in our request really
14 the issues of what are referred to as chutes and ladders.
15 Their process they finally gave to us in January. That
16 together with their assertion of EFSEC's EIS authority and
17 the ability to determine what is an adequate DEIS together
18 with their comments which essentially challenged the DEIS
19 that those are real key elements.

20 Again our request speaks for itself. But
21 misstating, misstating it completely. He says we're only
22 here because the issue of lack of time, and Chuck would
23 like to give some response on the EIS issues.

24 MR. LEAN: Yes, I'm going to keep it short.
25 As I understand Mr. Hurson what he's saying is that the

1 County has to have an EIS because they are going to adopt
2 a land use amendment under the GMA. That's roughly it.

3 So I would like to point the Council, number
4 one, to RCW 80.50.180 which exempts from SEPA all actions
5 by any agency except EFSEC. All actions by any state or
6 local agency that had to do with establishing procedures
7 for authorizing permitting, the location financing, or
8 construction of any energy facility subject to
9 certification under Chapt 80.50. Well, this is one of
10 those energy facilities. The County is clearly planning
11 or their process would involve an overlay zone, a change
12 in the land use plan to allow energy facilities. And they
13 say they need to do an EIS for that. It looks to us that
14 that's exempt under the expressed provision of law. And
15 if it's exempt, then they don't have any authority to
16 require an EIS. The only entity with authority to require
17 an EIS is the Council.

18 Secondly as to who manages the EIS, it's the
19 lead agency, and the Council expressly by Ecology
20 regulations or SEPA rules says that for energy facilities
21 the Site Evaluation Council is the lead agency. So you
22 control both the nature of the process, and you are the
23 only entity that can require an environmental impact
24 statement the way I read it.

25 Now Mr. Hurson says that's this statute was

1 somehow repealed by implication. I would sure like to --
2 that 80.50.180 was repealed by implication. I haven't
3 really heard a coherent argument as to why that's so or
4 even when it happened. But it's still there, and I think
5 that he's obligated, as well as anybody else in the state
6 to follow it.

7 JUDGE TOREM: Mr. Hurson, I want you to
8 respond to that.

9 MR. HURSON: Well, I guess I have to respond
10 because it seems like they opened a whole new issue here.

11 JUDGE TOREM: What I don't want to do is
12 spend the rest of the day going back and forth about the
13 SEPA issue. But just as briefly as you can what's the
14 County's reading on 80.50.180, and what's the County's
15 reading just on the requirement for an EIS, per se,
16 whether how EFSEC requires it, how the County may use it
17 in the process, some of the issues we discussed last month
18 as well.

19 MR. HURSON: And that's why I wanted to
20 bring that up is because, again, they're mischaracterizing
21 what the County has said. They're saying that the County
22 is requiring an EIS. We have never said that the County
23 is requiring an EIS. The County has always acknowledged
24 and agreed that EFSEC is the lead agency under SEPA. It's
25 clear as can be they're the lead agency under SEPA. We're

1 not going to require an EIS. That's been clear from the
2 get go. It's never been our intention to require it.
3 We've never said we're requiring it, but they keep saying
4 that we are, and that's not true. You're the lead agency.

5 What statute he cites says is to make those
6 decisions we're not required to have the detailed
7 statement required under and I can't remember what the
8 cite is. But the detailed statement is what we all in
9 land use planning commonly refer to as a Final EIS. Our
10 position is, well, of course, we can't require a Final EIS
11 to get our job done under the Growth Management Act
12 because your rules won't let you issue a final issue until
13 after the adjudication. And so it's an exception that
14 makes sense because we can't have it. You can't issue a
15 Final EIS in time for us to have our hearing.

16 What they're trying to read that in and say
17 this is what that means is the County is precluded from
18 having any environmental documents when they make a
19 decision, and I think that's a huge quantum leap in law
20 that makes no sense. We're not precluded from having a
21 good environmental document.

22 To meld the goals, directives, and
23 obligations to the Growth Management Act with EFSEC's
24 rules that is why I started with what I was referring to
25 as a functional equivalent to the EIS. I know we're not

1 going to get the final detailed statement. The statute
 2 says we're not required to because you can't get us that.
 3 But what we were working toward and understood we are
 4 working when talking with your staff and the Applicant is
 5 you get the Draft issues, you get the comment issues, your
 6 response to comments, and then hopefully that then created
 7 a document that functionally my clients could use as a
 8 Final EIS because you can't legally issue a Final EIS.

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

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

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

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

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

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

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

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

25 It has always been our desire that this be

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

6 JUDGE TOREM: Okay. Thank you.

7 Mr. Lean, I will give you one last chance to
 8 hit the ball back and forth, then we're going to move
 9 along.

10 MR. LEAN: Basically one of our major
 11 arguments on the preemption was that the County is seeking
 12 to require SEPA processes be done before they will rule on
 13 the application we had before them, and they wanted to
 14 wait until they had a chance to rule on the EIS adequacy
 15 of the draft. The adequacy of responses to comments until
 16 we wanted to get done with any appeal hearings on those
 17 two subjects, and then however the appeal came out, we may
 18 have to start the whole round robin on the appeal on the
 19 adequacy on all of that over again. And our position is
 20 that, number one, there's just simply no authority for the
 21 County to do that or to make any SEPA requirement.

22 Mr. Hurson is saying, well, he thinks there
 23 should have been one, and we were trying to come up with
 24 something of functional equivalence. He's just making
 25 stuff up. You know, ultimately we're a government of

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1 laws, and he's got to be able to point to someplace that
2 authorizes that behavior, and it's just not there. SEPA
3 doesn't authorize it. Nothing else that I know of. The
4 GMA certainly doesn't purport to get involved in these
5 energy facilities, especially with respect to the
6 80.50.180.

7 So those requirements just do not exist, and
8 to try to impose them upon the Applicant repeatedly and to
9 hold up the process while they want us to jump through
10 these hoops that are not required by law that to us was
11 the basis, one of the bases for our request for
12 preemption. But I don't see that it brings SEPA into this
13 case or discovery of it at all.

14 JUDGE TOREM: Okay. I think we've had
15 enough discussion. No, I don't want you to respond.

16 MR. HURSON: I know but he raised another
17 issue. It would be very brief.

18 JUDGE TOREM: He's raised it for the
19 purposes I think of what is preemption? What do we need
20 the SEPA for? I want to leave that for whenever we get to
21 the adjudication on the preemption issue and hash that out
22 in full because this is a prehearing conference on
23 procedural issues and we're really delving into substance
24 that we could keep going back and forth all day.

25 On the discovery issue any questions from

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1 Councilmembers on discovery issues that we need to address
2 further from the parties?

3 And it doesn't sound like we have any other
4 comments even from over the telephone.

5 All right. Hearing none, let's move off
6 from Item 5 and move on to what should be the quick part
7 of the rest of our agenda.

8 Item 6 are there any stipulations and
9 settlement agreements, Mr. Peeples, to report?

10 MR. PEEPLES: No.

11 JUDGE TOREM: Any other parties had any that
12 they agreed with any of the other parties for any reason?

13 I didn't think so.

14 Let's move on to Item 7. The next
15 prehearing conference I'm not sure when it will be or if
16 there's going to be a need for another prehearing
17 conference once the adjudicative schedule is out. It may
18 be item specific. There may be another prehearing
19 conference dealing with the comments to the DEIS or some
20 other procedural issues.

21 But, Members of the Council, is there
22 anything obvious or staff members to Council that we need
23 to meet again on other than just setting the process in
24 our next prehearing conference order and letting it go
25 from there with the presiding officer whoever that may be

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1 playing discovery referee?

2 Ms. Makarow, do you see anything that we
3 need to schedule one?

4 MS. MAKAROW: No.

5 JUDGE TOREM: So for right now Item 7 unless
6 there's something another party has a request for a
7 specific prehearing conference on a specific topic, we
8 will not set another one. You could just look for the
9 week of March 1 to March 5 having us issue a prehearing
10 conference order that tells you based on all the input
11 today what the schedule will be for the items discussed in
12 four and five on our agenda today.

13 Anything else on the need for another
14 prehearing conference?

15 Item 8, are there any other issues that need
16 to be addressed by the Council?

17 Mr. Slothower.

18 MR. SLOTHOWER: This isn't really an issue.
19 It's just a friendly suggestion. It might be a good idea
20 if you consulted with someone at the university about
21 better facilities to hold not only prehearing conferences
22 but the adjudicative proceedings. The university,
23 particularly during the summer, has a lot of space
24 available. Many of their facilities will enable people to
25 participate by conference call, and I think that you don't

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1 want to spend three weeks in the summer, whether it's June
2 or August, particularly August in this room.

3 And I've been involved in water rights
4 adjudication for some time, and the Yakima County Superior
5 Court frequently meets or the Department of Ecology office
6 through the Yakima Superior Court frequently is able to
7 make arrangements with the college to use facilities there
8 that can accommodate large numbers. I suggest that you
9 talk to someone up there.

10 JUDGE TOREM: Excellent. I know that
11 Mr. Fiksdal is definitely in favor of the better
12 conferencing system.

13 MR. HURSON: Actually when we did the
14 Mountain Star Project we used university facilities also.
15 The student union has a ballroom, and a number of other
16 facilities. Even though the fairgrounds is one of my
17 clients and I would like them to be able to generate
18 revenues, as it is the summer months are rather busy for
19 the fairgrounds and they're not for the university, so you
20 might find a better facility.

21 JUDGE TOREM: What's the official starting
22 date of classes, does anybody know, for Eastern Washington
23 University in the Fall?

24 MR. HURSON: It's Central.

25 JUDGE TOREM: Central.

1 MR. SLOTHOWER: I'm not sure of the exact
 2 starting date, but the student union building is large
 3 enough that even when classes are in session they can
 4 accommodate groups. They have a number of rooms with
 5 collapsible walls and things like that, so you can
 6 accommodate varied numbers of people. And I think if you
 7 tell them you need conference call facilities, they can do
 8 that.

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

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

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

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

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

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

25 MR. HURSON: The fairgrounds have a busy

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 5 AFFIDAVIT
 6
 7 I, Shaun Linse, CCR, Certified Court Reporter,
 8 do hereby certify that the foregoing transcript
 9 prepared under my direction is a true and accurate
 10 record of the proceedings taken on February 19, 2004,
 11 in Olympia, Washington.

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 15 _____
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1 schedule all summer, and then you've got the annual fair
 2 and rodeo which is the big kahuna here.

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

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

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

9 MR. SLOTHOWER: I have someone's cell phone.
 10 I don't know whose it is or who's on it.

11 MR. HURSON: I have one here too.

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

14 * * * * *

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