

1 BEFORE THE STATE OF WASHINGTON
2 ENERGY FACILITY SITE EVALUATION COUNCIL
3 In the matter of:)
4 Application No. 2003-01)
5)
6 SAGEBRUSH POWER PARTNERS, LLC,) Prehearing Conference
7)
8 KITTITAS VALLEY WIND POWER PROJECT) Pages 1 - 75
9 _____)

7 A prehearing conference in the above matter was
8 held in the presence of a court reporter on August 2, 2004,
9 at 1:42 p.m., at 925 Plum Street S.E., in Olympia,
10 Washington, before Energy Facility Site Evaluation
11 Councilmembers.

10 * * * * *

11 The parties were present as follows:
12 SAGEBRUSH POWER PARTNERS, LLC, Darrel Peeples,
13 Attorney at Law; 325 Washington Street N.E., Suite 440,
14 Olympia, Washington 98501.
15 COUNSEL FOR THE ENVIRONMENT, John Lane, Assistant
16 Attorney General; 1125 Washington Street S.E., P.O. Box
17 40100, Olympia, Washington 98504-0100.
18 KITTITAS COUNTY, James L. Hurson, Kittitas County
19 Prosecutor, Kittitas County Courthouse, Room 213,
20 Ellensburg, Washington 98926.
21 DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC
22 DEVELOPMENT, Mark Anderson, Senior Energy Policy Specialist,
23 P.O. Box 43173, Olympia, Washington 98504-3173
24 Reported by:
25 Shaun Linse, CCR

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1 Appearances (cont'd):
2 RENEWABLE NORTHWEST PROJECT, Susan Drummond,
3 Attorney at Law; Foster Pepper & Shefelman, PLLC, 1111 Third
4 Avenue, Suite 3400, in Seattle, Washington 98101-3299.
5 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),
6 James C. Carmody, Velikanje, Moore & Shore, P.S., 405 East
7 Lincoln Avenue, P.O. Box 22550, Yakima, Washington 98907.
8 F. STEVEN LATHROP, Jeff Slothower, Attorney at
9 Law; Lathrop, Winbauer, Harrel, Slothower & Denison, LLP,
10 201 West Seventh Avenue, Ellensburg, Washington 98926.
11 * * * * *
12 CHAIR LUCE: The next item on the agenda
13 pertains to the Kittitas Valley Wind Power Project
14 prehearing conference. It is the Kittitas Valley Wind
15 Power Project prehearing conference. At this time I yield
16 the Chair to our Administrative Law Judge, Adam Torem, and
17 I will turn the gavel over to Administrative Law Judge
18 Adam Torem at this point in time.
19 Judge Torem.
20 JUDGE TOREM: Thank you, Chair Luce. I want
21 to make sure who is present as we now call this prehearing
22 conference to order at approximately 1:42 p.m. We have
23 all members of the Council already present and accounted
24 for, and I recognize Attorney Darrel Peeples here
25 representing the Applicant, Assistant Attorney General

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1 John Lane is in the room as Counsel for the Environment.
2 For Community, Trade, and Economic Development as
3 intervenors, Mr. Anderson is present. For Kittitas County
4 I see that Deputy Prosecutor Jim Hurson is present along
5 with Clay White.
6 We've noted already present on the telephone
7 Susan Drummond. Are you still there?
8 MS. DRUMMOND: Yes, I am.
9 JUDGE TOREM: And Sonja Ling?
10 MS. LING: Yes, I am.
11 JUDGE TOREM: Both of you are for RNP.
12 For Residents Opposed to Kittitas Turbines
13 or ROKT, Attorney Carmody, are you there?
14 MR. CARMODY: Yes.
15 JUDGE TOREM: Ed Garrett?
16 MR. GARRETT: Yes, I am.
17 JUDGE TOREM: Is Mr. Robertson associated
18 with this group as well?
19 MR. ROBERTSON: Yes.
20 JUDGE TOREM: For Intervenor Lathrop, Jeff
21 Slothower is on the line as well; is that correct?
22 MR. SLOTHOWER: Yes.
23 JUDGE TOREM: Are there any other parties or
24 other interested persons present for the Kittitas Valley
25 Wind Power Project Prehearing Conference?

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1 So now we know who is here. We have a
2 couple informational items to catch up on, and then we're
3 going to take the one item on the agenda which was the
4 proposed Item 9 the last time but is now the question of
5 the preliminary response to the request for a response to
6 the comments on the Draft Environmental Impact Statement.
7 Before we get to that a few other things
8 have come up, and I want to determine the status of the
9 witness schedule and its preparation. I would also like
10 to hear from the Applicant as to a proposed response time
11 for the recently filed motion to stay which came in I
12 believe last Thursday afternoon from Attorney Jeff
13 Slothower on behalf of his client and then determine if
14 there are going to be from any of the parties any motions
15 to strike prefiled testimony. Those are going to be due
16 this week. If they're going to be filed, it would be
17 helpful for my work load and that of the Council to know
18 if anyone is planning to file those motion, and I believe
19 the deadline for that may be tomorrow based on Prehearing
20 Order No. 8. Yes. Those would be no later than tomorrow
21 August 3.
22 So let's hear first on the witness schedule.
23 Mr. Peeples, you had left last time with guidance to get
24 together with all the parties to determine a schedule.
25 MR. PEEPLES: Yes, I sent it out I believe

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1 it was last week.
2 JUDGE TOREM: Mr. Peeples, why don't you
3 come up to the microphone. It will help given today's
4 logistics.
5 MR. PEEPLES: I sent out an email and a
6 draft or a copy. It's not a draft. A form setting out my
7 proposed witness order. Again, I'm not wedded to that. I
8 tried to put people together in the most logical order
9 that I could and with the request for the parties to
10 respond by Wednesday as to the amount of time they are
11 going to cross with regard to the respective witnesses
12 they have within the scope of their intervention, along
13 with whether their witnesses could make the approximate
14 date that I indicated on the form. It's an Excel form,
15 and I left it blank for people to fill in if they had that
16 program. If not, you know, they can email me the response
17 in support or fill it in and fax it.
18 JUDGE TOREM: So are you still waiting for
19 this coming Wednesday?
20 MR. PEEPLES: So this Wednesday I'll have
21 the information whether or not the witnesses can make it
22 that day, if there's disagreement with the order I put
23 them in and the approximate cross-examination time
24 anticipated for each witness. I did not put in the
25 subject areas. Mainly I'm having a real hard time with

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1 that because a lot of witnesses are on different subject
2 areas. I've grouped them pretty much in order generally
3 of the subject areas that you had set out in the order,
4 but I didn't break it out. I was just having a difficult
5 time doing that because like I say witnesses, several
6 witnesses are on several different subject areas.
7 JUDGE TOREM: All right. I think perhaps
8 the most important question is does it look like from
9 everyone you've been in touch with so far that all the
10 witnesses will be able to fit into the available days as now
11 scheduled for hearing?
12 MR. PEEPLES: I've had a request from RNP.
13 Susan Drummond is new with child as of last week, and it's
14 going to be difficult for her to come over with the
15 newborn infant. She tried to have her witnesses on at one
16 time. I've received that request, and then I also
17 received an email and response from the Phoenix Group
18 which is now known as it's a local economic group --
19 They've changed their name, and that escapes me right now.
20 -- indicating their witness day availability, but I can't
21 recall that. I will put that together and hopefully get
22 something to the Council by Friday afternoon.
23 JUDGE TOREM: Do you anticipate any
24 disagreement with any of the other parties as far as
25 length or topic area perhaps out of scope of intervention

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1 issues?
2 MR. PEEPLES: I've heard nothing at this
3 point.
4 JUDGE TOREM: If I need to be reached after
5 your Wednesday self-imposed deadline, I will be in the
6 office on Thursday and Friday this week and available for
7 any call it another off-the-record ex parte prehearing
8 conference with you and any other necessary parties. Let
9 me know, and we'll set those up as needed hopefully and
10 have this all resolved by the end of the week. I have one
11 hand in the room before I get to that on the phone.
12 Mr. Anderson, if you will come forward to
13 the microphone, it will help today.
14 MR. ANDERSON: Mark Anderson with CTED.
15 Just a real quick comment. CTED and this building have
16 been having difficulty receiving emails. In fact, I found
17 out this morning that we have been rejecting emails since
18 last Thursday, so we have not seen this information. And
19 EFSEC itself may have been rejecting emails in this
20 process. It's just a FYI. We were going to call Darrel
21 today to get the information.
22 MR. PEEPLES: I will bring one down to you
23 this afternoon.
24 JUDGE TOREM: Thanks for that advisory.
25 Who is on the phone that had a comment on

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1 the witness schedule?
2 MR. SLOTHOWER: Your Honor, this is Jeff
3 Slothower. I did not receive the email. I was my in
4 office until about noon Friday, and it had not come by
5 then. I ask that it either be resent or the document
6 faxed to my office.
7 MR. PEEPLES: I'll do both of them. It went
8 out on Wednesday, so you should have received it. I
9 didn't get a rejection from you. I got a rejection from
10 Hall and Sierra Club, but I didn't get a rejection back on
11 you.
12 MR. CARMODY: This is Jamie Carmody. My
13 email was received at 5:05 on Thursday the 29th.
14 MR. PEEPLES: Okay. Then that's when I sent
15 it.
16 MR. CARMODY: We didn't get it on Wednesday.
17 MR. PEEPLES: Probably you're right.
18 Probably I sent it on Thursday if that's when you received
19 it. I thought I sent it Wednesday. I can't recall.
20 JUDGE TOREM: Okay. Thanks for the update
21 on that. Does anyone else have any updates on scheduling
22 of witnesses or other issues that Mr. Peeples needs to be
23 made aware of while we're all on the line today?
24 MR. CARMODY: Your Honor, this is Jamie
25 Carmody again. I was out Friday. I saw this for the

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1 first time this morning, and I guess there's an imposed
2 deadline of sorts Wednesday. I don't know if that's
3 realistic for us to get everything back by that time.
4 We'll try, but it's very little time to respond to the
5 whole package.
6 JUDGE TOREM: We understand there's going to
7 be a few accelerated deadlines. If the hearing is going
8 to occur on the 16th and commence at that time, I'll trust
9 that all the parties and their witnesses understand we are
10 already in the month of August officially, and there's
11 only two weeks from today before if all goes as planned
12 everyone is sitting in Ellensburg and conducting this
13 hearing.
14 There, of course, is the motion to stay
15 which needs to be resolved by that time as well. Let's
16 move onto the motions to stay as filed by Mr. Slothower.
17 Mr. Slothower, did you have anything else
18 you wanted to state on the record today about that motion?
19 MR. SLOTHOWER: No, I didn't have anything I
20 wanted to state on the record. I did want to discuss the
21 briefing schedule and then a hearing schedule.
22 JUDGE TOREM: That is what I'm prepared for
23 right now. It would be helpful for everybody involved,
24 including Councilmembers, to know whether the hearing is
25 going to go forward in two weeks as soon as possible. It

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1 certainly impacts whether the witness schedule which so
2 much work is being put actually comes to any fruition. So
3 my recommendation is, Mr. Peeples, is that by coming
4 Wednesday, just over 48 hours from now, if the Applicant
5 can have a response. Now the motion itself is but seven
6 pages, and it raises substantive and procedural issues.
7 Depending on how much detail you want to put into your
8 response would Wednesday at five o'clock work well enough
9 to get in an appropriate response?
10 MR. PEEPLES: First of all, let me say that
11 our Council order said 45 days prior to a hearing.
12 JUDGE TOREM: I understand you're referring
13 to the dispositive motions.
14 MR. PEEPLES: That's right, and it's a
15 dispositive motion.
16 MR. SLOTHOWER: It's not a dispositive
17 motion, Your Honor.
18 JUDGE TOREM: I'm not certain it's a
19 dispositive motion either, Mr. Peeples, because it's not a
20 motion to dismiss. It's not something for Summary
21 Judgment. This is one that merely puts off -- had it been
22 phrased differently based on the Growth Management Act
23 hurdle that's been posed by the motion, it could have been
24 a motion to dismiss based on that. It's not. It's a
25 motion to stay. So I think by its characterization it's

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1 not a dispositive motion.
2 I looked at that with staff as to whether
3 the schedule, whether this could simply be set aside to
4 say it's an untimely motion and move on because that given
5 the tight schedule would be the pragmatic, easiest way to
6 deal with things at this late stage of the game. It does
7 not lend itself to that the way it's been characterized
8 and whether that's correctly characterized or not,
9 Mr. Slothower made the motion, and I think the Council
10 owes it to all the parties to deal with it as the motion
11 has been made.
12 So given that argument is not going to win
13 anything today, can you respond to the motion as it's
14 phased in the motion to stay by Wednesday?
15 MR. PEEPLES: Well, I didn't see it until,
16 you know, late Friday, and I haven't really had a chance
17 to take a look at it in-depth except to review it once.
18 JUDGE TOREM: I know you're busy.
19 MR. PEEPLES: That's it. And we've got
20 everything else coming up, and I will have respond. I
21 don't know I can get it adequately done. It really it's a
22 motion that goes at the heart of EFSEC's jurisdiction
23 period. So, you know, and other parties might have some
24 input in that too. We just received it.
25 JUDGE TOREM: I think what I'm looking for

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1 more or less really nothing too much more is does your
2 client agree with and want to stay the proceeding or does
3 your client oppose and want the proceeding to go forward?
4 If I can know that much by Wednesday evening and some
5 reasons, then I think I can have Mr. Lathrop's reply to
6 whatever you file at that time by the next day.
7 MR. PEEPLES: Clearly I'll state now we do
8 not agree to a stay, and I believe this motion could have
9 been brought at any time essentially in this proceeding,
10 and that the proceeding must go forward. I believe this
11 is just an attempt to delay the proceeding and nothing
12 more than that, so we do want to go forward.
13 JUDGE TOREM: Can you put that with a little
14 bit of legal reasoning behind it into a written response
15 by Wednesday afternoon?
16 MR. PEEPLES: On that I can.
17 JUDGE TOREM: That's all I'm asking for at
18 this time. If there is additional briefing required, if
19 the Council is going to seriously consider staying the
20 proceeding, then the Council will ask for additional
21 briefing on any specific matters necessary.
22 Are there any other parties that intend to
23 respond to the motion, whether in support or against?
24 Mr. Hurson, if you are, can you come to the
25 table or are you just indicating that you intend to file a

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1 response?
2 MR. HURSON: Yes, I do intend to file a
3 response.
4 JUDGE TOREM: Will the five o'clock
5 Wednesday deadline be sufficient for you?
6 MR. HURSON: It will be tight, but I assume
7 are we going under the electronic filing is okay for
8 everything for the next two weeks?
9 JUDGE TOREM: Electronic filing is going to
10 have to do.
11 MR. HURSON: I will have something to the
12 Council by 5:00 on Wednesday.
13 JUDGE TOREM: Okay. Great. Keeping in mind
14 if you would please, call those other or just take it upon
15 yourself to fax rather than email to those parties that
16 have indicated they're having trouble. That would be
17 Mr. Slothower I believe and those at the Community, Trade,
18 and Economic Development. If you're copying the other
19 parties, fax it to them as well as email. Is there anyone
20 else that needs a fax copy instead of just electronic
21 service on these?
22 All right. Then, Mr. Slothower, can you if
23 you receive this by five o'clock or thereabouts on
24 Wednesday, assuming that the faxes might be rolling in a
25 little bit after that, but fairly simultaneously, can you

1 respond in 24 hours with anything additional the Council
2 needs to know to make a decision?

3 MR. SLOTHOWER: No, I can't, Your Honor.
4 I'm actually not in the office this entire week. I'm
5 appearing by telephone from a vacation spot with my
6 family, so I will not be able to respond to anything that
7 is filed by Wednesday with a response.

8 JUDGE TOREM: When do you return?

9 MR. SLOTHOWER: I will be back in the office
10 on Saturday morning.

11 JUDGE TOREM: My proposal was going to try
12 to get a response out on Monday evening or at the very
13 latest Tuesday morning, so that parties could make their
14 plans for the following week, either keep them or suspend
15 them. I'm a little bit frustrated that you won't be
16 available to reply on the schedule we're going to need,
17 and I'm sure the family vacation was planned well in
18 advance of the motion.

19 MR. SLOTHOWER: It was.

20 JUDGE TOREM: So what I will do then is
21 because your reply would be the last word, when we receive
22 the responses on Wednesday, then we will begin to
23 formulate the Council's response. Send me your reply
24 whenever you can. If your reply comes in before and it
25 changes the Council's outlook, I'll note it was received

1 and considered or I will note that it was not received in
2 a timely fashion and it wasn't considered, but I'm not
3 going to wait to see what your reply might be. I'm going
4 to read the motion, hopefully it speaks enough for itself
5 as you've noted, and look and weigh the responses either
6 in support or in opposition, and then draft an order for
7 the Council to review on Monday. If I have a chance
8 before I circulate that with the Council on Monday
9 afternoon to have your reply in hand, send it to me by
10 email as you did the other one, I'll incorporate it.

11 MR. SLOTHOWER: Okay.

12 JUDGE TOREM: But I would have preferred to
13 have it on Thursday afternoon with a 24-hour turn. But if
14 you're not even going to be in the office to pick up the
15 response, I will ask you to come in and work over the
16 weekend and you can turn something out, if necessary. If
17 no reply is necessary, I'd just invite you to send a short
18 one-line email that says choosing not to reply.

19 MR. SLOTHOWER: Okay.

20 JUDGE TOREM: Your Honor.

21 Mr. Anderson.

22 MR. ANDERSON: Mark Anderson with CTED. We
23 have just seen this as well and have not made a decision
24 about whether we are going to respond or not, but we will
25 try and meet the same you said five o'clock Wednesday time

1 in order to do so.

2 JUDGE TOREM: Then we'll see if we have
3 responses from the Applicant, Kittitas County, and from
4 CTED on this matter. As soon as we have --

5 MR. CARMODY: Jamie Carmody. We would plan
6 on responding as well.

7 JUDGE TOREM: Okay.

8 MS. DRUMMOND: Also if RNP elects to
9 respond, we have no problem meeting that deadline.

10 JUDGE TOREM: Ms. Drummond, any indication
11 of whether you intend to respond now?

12 MS. DRUMMOND: We have not made a decision
13 on that. If we do, we would meet the Wednesday deadline.

14 JUDGE TOREM: All right. Thank you. Moving
15 on to the final procedural issue before we get to that
16 list on the agenda. The motions to strike testimony were
17 there any parties, start with you Mr. Peeples and
18 Applicant, that intended to file a motion by tomorrow to
19 strike any testimony that's been filed at this time?

20 MR. PEEPLES: Yes, we will be filing a very
21 short one I believe. We'll make the final decision
22 probably later on today.

23 JUDGE TOREM: All right. Then for whichever
24 party that might be, and we'll leave that for tomorrow
25 unless you have already communicated to them the response

1 has to be in by Friday, August 6. That's this coming
2 Friday, and we are not going to hear any oral argument on
3 that, but certainly issue a ruling based on the pleadings
4 on or before Tuesday. So that decision if a motion merits
5 it and a response doesn't make any conceptions will come
6 out on Tuesday, and, again, hopefully Monday afternoon or
7 earlier on Tuesday I'll have the response on the motion to
8 stay.

9 Implied in that, Mr. Slothower, you had
10 originally indicated on comments today perhaps you wanted
11 argument on the motion. If oral argument is necessary,
12 then the Council will contact the parties and set up a
13 very short noticed meeting and hopefully all the parties,
14 and especially all those responding, will be included. We
15 will work our hardest to make that happens. But at this
16 time Council I don't think is going to be trying to fit
17 oral argument in next week on the motion to stay unless
18 the briefs and the responses turn out to be such in the
19 initial research that it merits it. It appears it's a
20 strict legal issue, and we will make some decisions once
21 we have all the pleadings in as to whether oral arguments
22 will be requested, but at this time it's not anticipated.

23 MR. SLOTHOWER: Okay.

24 JUDGE TOREM: Any other procedural issues
25 that have come up since two weeks ago other than now

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1 dealing with the Draft Environmental Impact Statement
2 comments?
3 All right. Then let's move on to that issue
4 which was continued from two weeks ago. There was a memo
5 dated July 9 that went out, and in the original notice of
6 intent to hold a prehearing conference for last meeting on
7 July 19 asked for folks to be ready to present their
8 positions. Last time there were some questions as to
9 everyone's readiness to go forward.
10 Today we continue to resolve this.
11 Everybody should have had a chance to read the preliminary
12 memo and to be clear this is something that was drafted by
13 staff and discussed among staff and proposed to the
14 Council as a way to handle a request by the County, by
15 Kittitas County to release in advance of the adjudicative
16 proceeding any work that might have been done so far on
17 responding to the comments on the Draft Environmental
18 Impact Statement that was issued last December.
19 As you can see in the memo, the original
20 proposal here from staff is to not set that out because
21 the assumption was it was necessary only for the County to
22 proceed with its process. Since the Applicant has now
23 pulled its application from the Board of County
24 Commissioners and its planning staff there is no other
25 process going on actively in the County other than its

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1 intervenor status before EFSEC as regards to this
2 application.
3 Ms. Essko, did you want to add anything
4 further about the memo or about the proposal to the
5 Council?
6 MS. ESSKO: No.
7 JUDGE TOREM: I think the memo speaks for
8 itself.
9 MS. ESSKO: Right.
10 JUDGE TOREM: Are there any parties that
11 wish to make a presentation on their position on this
12 before the Council takes up the proposal through a motion
13 and perhaps a vote this afternoon?
14 MR. CARMODY: Your Honor, this is Jamie
15 Carmody. We have prepared and are submitting today a
16 motion for stay based on that exact issue with a statement
17 of our legal position on the matter. This process quite
18 frankly on this point is becoming a little bit confusing
19 to me because I had understood motions were to be filed
20 tomorrow on these type of things, and that they would be
21 appropriately scheduled. So we had proceeded on that
22 basis.
23 But to let you know what our thought and our
24 assessment is, we believe that proceeding with any
25 adjudicative proceeding prior to the issuance of a Final

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1 EIS is violative of the SEPA rules and regulations, as
2 well as the statute, and we have put forward a list of
3 regulations and statutory provisions that deal with that.
4 And most particularly EFSEC has adopted the SEPA rules and
5 regulations which require the issuance of a FEIS seven
6 days prior to any action on a matter, and that we are not
7 going to be compliant with that particular issuance rule.
8 JUDGE TOREM: I'll look for the motion to
9 come in. My only concern --
10 MR. CARMODY: I'll argue at that point.
11 That would be fine with us. I don't know where you want
12 to go with it today.
13 JUDGE TOREM: Well, nowhere today. This was
14 on the agenda two weeks ago as well, and this point was
15 not raised. I think you may risk an issue of mootness
16 once the Council votes today because if you're asking me
17 to stay the Council's vote today, I will leave that up to
18 the Councilmembers, but I would deny at this point. The
19 Council can be so advised that you may be filing such a
20 motion.
21 Is there any other party that has input into
22 the substance of the memo rather than the procedural
23 potential motion for stay that ROKT will be filing perhaps
24 tomorrow?
25 Mr. Hurson, if you will come to the table,

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1 that would be great.
2 While he's coming to the table, are there
3 any other parties or participants on the phone line who
4 anticipate comment at this point on this item?
5 MR. SLOTHOWER: This is Jeff Slothower on
6 behalf of Intervenor Lathrop. We reserve the right to
7 comment on the motion once we see it.
8 JUDGE TOREM: Certainly. But as far as the
9 memo that's on the agenda today are there any?
10 MR. SLOTHOWER: No, no comment on that.
11 JUDGE TOREM: Mr. Hurson.
12 MR. HURSON: Yes, thank you. Jim Hurson,
13 Deputy Prosecutor for Kittitas County. As I understand it
14 the notice says that this is EFSEC's suggestion, but I
15 understand it's the actually the staff's suggestion. From
16 the County's perspective one of the problems we see here
17 is we see a staff proposal that doesn't set forth the
18 options for the Council but instead basically is asking
19 the Council to direct staff to not release information
20 that the staff has.
21 We disagree with the staff's suggestion and
22 recommendations. In fact, believe that to not release the
23 information would be a violation of the Appearance of
24 Fairness rules. The response to comments and the Draft
25 EIS as I understand it have been circulated to the

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1 Councilmembers. What that means is the Councilmembers now
 2 have in their possession information directly related to
 3 this project proposal which no member of the public has.
 4 Under the Appearance of Fairness Doctrine
 5 the information, any information that the Council has
 6 related to the project necessarily has to be fully
 7 disclosed to the public, so that the public would then
 8 have an opportunity to respond and refute that information
 9 or that ex parte information. The only way that the
 10 public, including my client, can respond is to know
 11 exactly what it is that you have reviewed and seen, and
 12 unless it is released we don't know what it is that we
 13 would be responding to. So we disagree with the
 14 suggestion from EFSEC staff that this should not be
 15 released. In fact, we believe it must be released.
 16 I'd also note that the various statutes and
 17 regulations that EFSEC staff pointed to they indicate,
 18 well, they don't see any legal requirement that the
 19 information be disclosed. But if you read those, you'll
 20 also see that there's no legal objection or prohibition
 21 having that disclosed. I would suggest that based upon
 22 the RCWs and WACs that they cite which don't prohibit the
 23 disclosure and the Appearance of Fairness Doctrine both by
 24 statute and by case law is required that information
 25 directly related to this project be made available to the

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1 public. Under the Appearance of Fairness you then
 2 disclose that full information, and then the public is
 3 given an opportunity to respond and rebut that
 4 information. But we're not in a position right now to
 5 know what that is.
 6 JUDGE TOREM: Do you have any case law
 7 citations that would characterize it quite that way?
 8 MR. HURSON: I haven't prepared a brief on
 9 this, no. Frankly, I was out of town last week too, and I
 10 could try to track some down, if you want. But just under
 11 the general Appearance of Fairness Doctrine rules if you
 12 look through general treatises, it would be general
 13 processes. If there's ex parte contracts with a
 14 particular individual, they could be disqualified. But if
 15 there's a distribution of information to the board, so
 16 then you would have a rule on necessity that you lack a
 17 quorum, so they couldn't proceed, then the way you solve
 18 that defect is you make your full and complete disclosure
 19 to the public of the ex parte contact or the other
 20 information that's been provided.
 21 JUDGE TOREM: I guess I want to jump in and
 22 ask we had a Draft Environmental Impact Statement issued
 23 last December. We had a public hearing on it and a
 24 response time for comments, so the public had all the
 25 information in the DEIS and has responded to it. If

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1 you're correct, and the Council has proposed responses
 2 from the author, the contractor who created the DEIS and
 3 those have been circulated, had they been circulated after
 4 the adjudicative proceedings what would be the position?
 5 Because certainly they're going to be circulated at some
 6 point before the Council completes the process. Is it the
 7 County's viewpoint that under the Appearance of Fairness
 8 Doctrine there would have to be another opportunity for
 9 public comment after the adjudicative proceeding is
 10 already closed?
 11 MR. HURSON: If there is information in the
 12 hands of the Council.
 13 JUDGE TOREM: So when does the cycle stop?
 14 When does the public and the body making the decision stop
 15 going back and forth and exchanging information and a
 16 decision finally get made?
 17 MR. HURSON: Well, in this particular case,
 18 and I believe that the staff has said, well, this is
 19 different for them to even do this, respond to comment.
 20 Particularly I'd note that staff has repeatedly made
 21 comments about that they're doing the off-site alternative
 22 analysis, and they indicated just a year ago that they'd
 23 never do an off-site alternative analysis, but in this
 24 particular case there's apparently been a great deal of
 25 effort putting together an off-site alternative analysis.

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1 I haven't had a chance to review it, and the
 2 reason it's of particular concern to the County is because
 3 the alternative location criteria under -- and it may just
 4 be that the words are the same with alternative. But when
 5 you have a response to comment and revisions to the Draft
 6 EIS relating to the off-site alternative analysis, and
 7 we're dealing with an attempted preemption base that
 8 includes an alternative response, that rings the bell as
 9 being an issue of legal concern that my clients would want
 10 to be able and believe they have a right to identify.
 11 Now if the typical process that the Council
 12 uses is they don't do response to comments, they wouldn't
 13 do any further supplement, then there isn't any other
 14 information the Council last in its hands. But in this
 15 particular case as I understand it there has in fact been
 16 additional information developed. There has been drafts
 17 done. There has been an additional off-site alternative
 18 analysis done. There has been response to comments
 19 prepared. So the fact that they were prepared and EFSEC
 20 has them now makes that information that we think should
 21 be distributed. If they haven't done any work, then we
 22 wouldn't be asking to see the information because it
 23 wouldn't have been prepared. But it has been prepared, so
 24 we believe we have a right to see it.
 25 JUDGE TOREM: But it still comes down to a

1 timing issue. If I understand that these responses to
 2 comments would typically be developed with the preparation
 3 of the Final Environmental Impact Statement which in the
 4 typical EFSEC process would come after the adjudicative
 5 proceeding. But for the request from the County to
 6 determine that they needed the functional equivalent of
 7 that FEIS none of this work would have been accelerated
 8 and that was only for the Council -- well, for Mr. White's
 9 department to be able to look at the functional equivalent
 10 of an FEIS, send that on to your Board of County
 11 Commissioners to look at the Applicant's application
 12 before the County to try to resolve land use inconsistency
 13 which has now been pulled back as moot because they've
 14 asked for preemption. So now we have something that was
 15 created, and through that chain of events which I think is
 16 as close to correct as can be for today's purposes that
 17 chain of events now you're saying creates a new obligation
 18 for disclosure under the Appearance of Fairness Doctrine.
 19 MR. HURSON: Yes. I believe any information
 20 that's been developed, and, frankly, typically when you do
 21 a revised, you get a Draft EIS, you get comments,
 22 frequently your staff will then discuss with the
 23 Applicant. "Okay. We got these comments. What do we do
 24 with it? Do you want to amend your application? Do you
 25 do a revision?" You frequently have staff-to-staff

1 contacts between the people doing the Draft EIS, and the
 2 Applicant they're having communications together.
 3 Well, if you have staff-to-staff
 4 communications, then that makes its way to a response or
 5 revised draft, and then the Council now has this response
 6 draft you in essence have the Applicant has the ability to
 7 then get information to the Council that the public
 8 doesn't have.
 9 Now, has that happened in this case? I
 10 don't know. I'm not privy to what has occurred. But the
 11 fact that information has been developed I believe makes
 12 it then it's now information. The Council has it, so the
 13 public has a right to see it. I guess one of the other
 14 points here is we've been hearing for many months that
 15 this was going to be developed. In fact, I understood it
 16 would have been released several months ago or a month or
 17 so ago at least.
 18 And then when this came up, I think was in
 19 the June meeting, and they said that this was going to be
 20 released I think in July. And then in the July meeting it
 21 said, well, it's going to be delayed a little bit more,
 22 and it wasn't going to be released until like partway
 23 through the adjudicatory hearing which is the first time
 24 I'm hearing we aren't even going to get this document
 25 that's being worked on for months.

1 And I actually didn't, as I recall I didn't
 2 ask for -- I didn't make a motion. I didn't ask for
 3 relief. I was simply on the phone trying to give a heads
 4 up saying now that this is being released so late, if you
 5 already were in the middle of adjudication, I simply
 6 attempted to get a heads up saying, "I can see this as an
 7 issue, folks." This was intended as a friendly heads up
 8 from the County that "Wait a minute. Now we're going to
 9 be in the hearing. We aren't going to have this
 10 information. I can see where this would be an issue. I
 11 can see where parties are going to say I need to file a
 12 motion. We should stay this proceeding. We need
 13 something." And so I don't even recall making a request.
 14 But then apparently my comment was taken as
 15 a request and now apparently what the recommendation from
 16 staff is, is to not only don't release it when they
 17 originally were going to but to delay the release even
 18 though the document is done until after the adjudication.
 19 JUDGE TOREM: I think it would be accurate
 20 that staff is recommending as there's no other reason to
 21 release them as an application pending before the County
 22 that it should go back to the normal EFSEC schedule, even
 23 if there is anything produced which for sake of your
 24 argument let's assume there is. If there's anything to
 25 release that the normal FEIS which contains these

1 responses to comments be the appropriate measure and
 2 vehicle to release this information as part of the
 3 process.
 4 That I think, Ms. Essko, is what the
 5 recommendation is.
 6 MS. ESSKO: Yes.
 7 MR. WHITE: I have a quick question.
 8 JUDGE TOREM: Mr. White, go ahead.
 9 MR. WHITE: Because the comment period ended
 10 on January 20, 2004 and the preemption request was made in
 11 early February, then I'm kind of wondering why was the
 12 information prepared in the first place? I mean it's been
 13 prepared since early February to this point. It's
 14 prepared. The board has it. They obviously can evaluate
 15 it and look at it. Why if our point was moot in early
 16 February and comment period ended in January, why was
 17 EFSEC preparing this information for the last four or five
 18 months?
 19 JUDGE TOREM: Well, I think I can tell you
 20 eventually those responses are needed for the FEIS, so
 21 they have to be prepared at some point or another. The
 22 fact that they were being accelerated has gone on I don't
 23 know if we got a contract change out or not to tell them,
 24 "Oh, now it's moot. Stop working on it." I don't know
 25 the internal workings. So they need to be prepared.

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1 Whether they would be prepared early and held in other
2 cases, it's possible. I don't know the answer to that.
3 MR. HURSON: I guess one of the questions I
4 have for the Council is who does it benefit to not release
5 information? You have this information. As I understood
6 the staff from our last minutes this draft has been
7 released to the Council. So why wouldn't you want the
8 public to be able to see this information if it's related
9 to the project? And so I believe it's required to be
10 released. But even if it wasn't required to be released,
11 why would the Council want to keep it from being released?
12 This is a public process.
13 JUDGE TOREM: When you ask the question that
14 way, Mr. Hurson, it's impossible for me to give you any
15 good answer, and you're putting the process on its head.
16 Now I've asked for something that's now potentially moot
17 and the normal process is to release in a course of
18 dealings which has been well established over 30 years of
19 EFSEC process that a response to comments in the SEPA
20 process is to come out as part of the FEIS. We're not
21 issuing that document, so there would be no reason to
22 issue those comments.
23 The fact that they exist along the SEPA line
24 of open discussion and allowing for public comments
25 there's nothing here to hide. Don't characterize it that

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1 way and make the Council look -- we got into a little bit
2 of a disagreement two weeks ago on appearances and what
3 was being set out as who was hiding the ball. I
4 appreciate the friendly nature of today's conversation,
5 and I want to keep it there.
6 But I think if you characterize it that way,
7 it's impossible for EFSEC to come back without looking
8 like it's hiding something. It's not.
9 The normal course of information is to
10 release this as part of the FEIS. The FEIS is not being
11 released, and doing the County's parallel procedure a
12 favor by accelerating this for a reason that no longer
13 exists is now being characterized in my view as an
14 entitlement which neither the law nor the process
15 requires. Does it exist? Could it be released? Maybe.
16 But would it be released in an incomplete form that may be
17 misleading? Perhaps that's a good enough reason to
18 withhold it until it's an appropriate point in the
19 proceeding.
20 We have two weeks of adjudicative hearings
21 perhaps if a motion for stay is not granted in which all
22 manner of information, the whole record in this matter is
23 going to be put before the public. There will be an
24 adequate opportunity on the first Thursday. I believe
25 that would be on the 19th. Is that correct, Ms. Makarow?

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1 MS. MAKAROW: That's correct.
2 JUDGE TOREM: For a public comment session
3 on everything that's developed thus far, but the public
4 won't be able to comment the following week on what
5 happens in testimony, so we're not going to have another
6 public comment period after the whole adjudication and
7 say, "Folks, what did you think?" We're having it on one
8 designated night. People that know what their issues are
9 can come and tell the Council what they need to know, and
10 the adjudication will go on. There won't be another
11 public comment period at that point.
12 If your argument was correct under the
13 Appearance of Fairness Doctrine, every time we finished a
14 day on the record we should consider more public comment
15 on what we just heard. That's not the case. It's going
16 to happen once on Thursday the first week. It's not going
17 to be Friday night at the end of the second week. It's
18 just not set up that way.
19 So the Appearance of Fairness Doctrine I
20 think is being tossed about today to make the Council look
21 bad, and perhaps you're right; that there is information
22 that today could be released. But if there's no legal
23 obligation you could point to, and there's no brief on
24 this issue which you had notice of ten days before two
25 weeks ago, I wonder when we're going to get any briefing

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1 on it or if I can turn this back to you and make this
2 quasi insulting "Why are waiting for the last minute to
3 raise this issue?" But you told me that it was a month
4 ago you raised it as an informational item.
5 All I can say is that if the Council runs
6 into a procedural issue that you flagged for them, they'll
7 thank you in advance. And if somehow down the road this
8 turns out to be a fatal flaw, you can come back and say I
9 told you so.
10 If you think there's a violation of the Open
11 Public Meetings Act or you if think there's a violation of
12 the Appearance of Fairness Doctrine, you've raised it
13 here, and if the Council doesn't want to act to prevent
14 what you see as a potential violation of doctrines, take
15 it to another forum and find another judge that thinks
16 that it does and have that judge who wears a black robe,
17 he or she, and is elected stay the proceeding. Have them
18 exercise their authority if you think that's what's
19 necessary.
20 But I don't know that, Ms. Essko, you have
21 any changes to the memo today. If you do, speak to them
22 so the Council can be fully informed, and then I want to
23 hear from Mr. Peebles as to any response he thinks is
24 necessary to the County's issue they raised today.
25 MR. HURSON: I have a couple comments

1 actually.

2 JUDGE TOREM: Sure.

3 MR. HURSON: A lot of the comments seem to
4 be, well, this is the way EFSEC has always done it, and I
5 believe we had that from staff; that that's how it's done.
6 What we have here isn't really to try to say what has gone
7 on in the past with EFSEC. You pretty much have to put
8 that aside.

9 JUDGE TOREM: You can't put aside the
10 procedural rules that have been adopted.

11 MR. HURSON: I understand that. Well,
12 they've never done this before. As I understand EFSEC has
13 never done an off-site alternative analysis before.
14 That's what I believe Irina told Clay about a year ago.
15 They've never done one, but they're doing one now. That's
16 directly relevant to this. The other thing is in 30 years
17 no one has ever, EFSEC has never preempted a local land
18 use jurisdiction, but for the first time this is going to
19 happen. So to say this is the same as always happened I
20 think is a mischaracterization of where we are.

21 Frankly, a huge issue which I don't think
22 has popped up with the Council is that the EIS process,
23 this wind farm up until I think it was 2001, 2002 when
24 they did the amendments, the only applications you ever
25 got before the EFSEC Council energy producers were

1 required to go to EFSEC. Renewable energy are issues that
2 there's an opt-in provision. People are allowed to seek
3 it, but they're not required. In this particular case
4 EFSEC has assumed the lead agency status under this which
5 under the usual way it would have done under WAC
6 197-11-938(1). But the Wind Farm is an opt in. And with
7 WAC 197-11-938(1) which is cited by EFSEC for saying they
8 have lead agency status it relates to projects for which
9 certification is required under Chapter 80.50.
10 Certification isn't required under Chapter 80.50 for a
11 wind farm. It's an option. It's not a requirement. The
12 default position under the WACs is the County's the lead
13 agency. So if the County is the appropriate lead agency
14 for the EIS under this particular case because the
15 exception that EFSEC cites as lead agency status doesn't
16 apply because this sort of a certification is not
17 required.

18 So we're set to go in a hearing in two
19 weeks. I know that your rules allow you to go into
20 hearing. I believe it says that EFSEC can issue a draft
21 before it goes into hearing if it wants, but there has to
22 be a final before it makes its decision. Well, under the
23 rules and regulations the only entity that can issue a
24 Final EIS is the County. We haven't given our lead agency
25 status to the Council, and so we're set to go into a

1 hearing in two weeks without a real EIS or Draft EIS being
2 done. I know that's what it's called. The County as lead
3 agency could use that information or adopt it when it does
4 its own revision, but a final decision of the Council
5 can't take place until you have a Final EIS, and the
6 County is the only jurisdiction with the authority to do
7 it because of the opt-in for the wind farms. I see this
8 as a huge issue. And so this is how we don't always -- or
9 this is the way we've always done it. This is completely
10 different in how EFSEC has done it before, and we need to
11 look at that.

12 And, frankly, if the Council doesn't do it
13 today, I would plan on filing a motion tomorrow, and we
14 already have the motion for Mr. Slothower to stay the
15 proceedings. I think that's really the only logical thing
16 to do right now is let's do this right. I don't want to
17 have to go through this process twice. My clients haven't
18 told me whether they support or oppose the wind farm in
19 this Zilkha location. I've specifically asked them not
20 to. What they do oppose is them not being able to make
21 the local land use decision that they are suppose to make.
22 All that the County wants is what they're entitled to
23 which is the right to make a land use decision.

24 And if we stay the proceedings,
25 Mr. Slothower has already got his memo there. I agree

1 with that and plus there's some other citations that
2 further support his position. We stay the proceedings.
3 We get Zilkha to resubmit to the County. We get an EIS
4 done and it's done correctly. We go through a public
5 hearing process. The County can do its job under the
6 Growth Management Act, and we go from there. And for us
7 to try to proceed forward with the hearings in two weeks I
8 don't think makes any sense at all.

9 You have information in your hand that's
10 related to the process that we haven't seen. Once you do
11 release it to us when are we going to have an opportunity
12 to get our responses together? So we're probably going to
13 need a continuance right there because everybody has
14 already done their prefiled. We're racing up against a
15 time line here. There's a lot of procedural issues. I
16 don't think it's very efficient of government to -- and I
17 speak because I work for government. I mean I've worked
18 for the prosecutor's office for a dozen years, and we
19 better serve the public when we do it right. Let's not
20 rush into things. Let's do it right, follow our
21 processes, and get a good decision. I just want to do
22 this once. Procedure flaws. Here's procedure flaws.

23 My goal here isn't to let's have procedure
24 flaws. It gets up, the Court reverses, and we come back
25 and we have another hearing two or three years from now.

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1 That serves none of us any good. Let's do it right.
 2 Let's do it one time. So I intend to file that motion
 3 tomorrow.
 4 JUDGE TOREM: So in addition to Mr. Carmody,
 5 you're going to file a similar motion to stay on the
 6 grounds that these comments have not been -- SEPA is not
 7 being complied with in some way.
 8 MR. HURSON: Yes. That SEPA hasn't been
 9 complied with, and we should be given this response to
 10 comments and the off-site alternative analysis, so we can
 11 do it. Frankly, we would like the Applicant to just
 12 resubmit their application with the County and let's get
 13 back to work. That's all the County ever wanted was the
 14 Applicant to get the information and for us to have a good
 15 environmental document.
 16 JUDGE TOREM: Ms. Essko has a question for
 17 you.
 18 MR. HURSON: Yes.
 19 MS. ESSKO: Mr. Hurson, I just want to make
 20 sure I understand your argument with respect to the
 21 responses to comments. Am I correct that your argument is
 22 predicated on the assumption that the Council has received
 23 draft responses to comments from staff, and that those
 24 draft responses to comments contain information from the
 25 Applicant or other third parties that turn some or all the

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1 responses to comments into ex parte contacts that they
 2 have to disclose to the public under the Appearance of
 3 Fairness Doctrine?
 4 MR. HURSON: I don't know what the Applicant
 5 has or hasn't supplied to your staff, but if the staff
 6 supplies information to the Council regardless of source
 7 that is information related to the project that the public
 8 should know about. When our planners supply information
 9 to the Board of County Commissioners on land use planning,
 10 everything that the Commissioners know from the staff
 11 they've received in a written document the public has seen
 12 or they heard it in public. The planners don't meet with
 13 the commissioners some other point in time. So all the
 14 documents are just out there for public, and that's all
 15 I'm saying is if your staff has developed documents
 16 regardless of the source of information, that's
 17 information related to the project that we believe that
 18 the public is entitled to know and respond to and rebut.
 19 Particularly in this situation because the off-site
 20 alternative analysis under the traditional EFSEC you never
 21 do them. But apparently there's been a lot of effort
 22 spent on doing one in this particular instance, so I
 23 believe I am entitled to see what it is that is being
 24 developed.
 25 Because frankly I mean the Applicant in

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1 their preemption filing the only thing they could cite to
 2 for saying there wasn't alternative sites was the Draft
 3 EIS which Clay White responded to and said that's simply
 4 not true, and we're trying to rebut that. So we just
 5 don't want a Draft EIS comment to be then the basis for
 6 the Council decision and cite a Draft EIS that the Council
 7 itself is creating. We're just wanting whatever is there
 8 for the public to see good, bad, or indifferent, so we
 9 have an opportunity to respond to it. And if there's
 10 nothing there, then there's nothing there.
 11 MS. ESSKO: So your legal position is that
 12 the Appearance of Fairness Doctrine requires public to
 13 disclosure of any and all documents prepared by staff to
 14 any decision maker that's covered by the Appearance of
 15 Fairness Doctrine regardless of the source of the
 16 information.
 17 MR. HURSON: I think if the staff is
 18 supplying information regarding wind farms or energies or
 19 needs or anything else like that, yes, that should be a
 20 public document that the public has a right to see.
 21 MS. ESSKO: Under that Appearance of
 22 Fairness Doctrine.
 23 MR. HURSON: Under the Appearance of
 24 Fairness Doctrine or maybe some other doctrines or some
 25 case law out there. I'm using that as my generic term.

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1 It may fit under a different process.
 2 MS. ESSKO: Okay. And your second --
 3 MR. CARMODY: This is Jamie. Just as a
 4 follow up on that point, this is Jamie Carmody. Has
 5 information been provided to the Council by staff that's
 6 not been a part of a public record for all of us to look
 7 at? The suggestion Mr. Hurson has made is that there were
 8 comments associated with the Draft EIS that have been
 9 provided by staff to Councilmembers, but that those will
 10 not be disclosed to the public until the conclusion of the
 11 hearing process and then incorporated into a Final EIS.
 12 And the question just so I'm clear on the factual state of
 13 the record is has that information been provided to the
 14 Council at this point in time?
 15 MS. ESSKO: Am I understanding your question
 16 correctly has draft responses to comments gone to the
 17 Council?
 18 MR. CARMODY: Yes.
 19 MS. ESSKO: I personally don't know the
 20 answer to that question.
 21 JUDGE TOREM: I was hoping you would because
 22 I don't either.
 23 Ms. Makarow, do you want to address that?
 24 MS. MAKAROW: Draft responses to the Draft
 25 EIS comments have not been circulated to the Council.

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1 JUDGE TOREM: Okay. Mr. Carmody, I guess
2 the answer is no.
3 MR. CARMODY: Is there a plan to provide
4 those to the Council in advance of the hearing or in the
5 course of the hearing?
6 MS. MAKAROW: No.
7 MR. HURSON: Is there anything in the
8 off-site alternatives?
9 MS. MAKAROW: The off-site alternatives are
10 currently being prepared by staff, and we're attempting to
11 issue that next week in all good faith giving the
12 pressures of preparing for everything that is happening.
13 JUDGE TOREM: Can you describe the intended
14 mode of the release, so that there's no question of
15 anything hidden.
16 MS. MAKAROW: The intent and mode of release
17 is as a SEPA document for public comment.
18 JUDGE TOREM: So everything that the Council
19 is going to get –
20 MR. CARMODY: So it would be a supplement
21 EIS, supplemental to the Draft EIS is that the procedure
22 you're contemplating?
23 MS. MAKAROW: We have not totally decided on
24 whether it's going to be called a supplemental or not, but
25 it is going to be a SEPA document that will be issued for

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1 public comment.
2 MR. CARMODY: The issuance of that will have
3 what impacts in terms of prefiled testimony and testimony
4 at the time of hearing? Will the parties be allowed to
5 provide testimony in response to that?
6 JUDGE TOREM: Certainly if it's a SEPA
7 document, Mr. Carmody, there will be a public comment
8 period involved and sessions involved with that. At this
9 time I don't believe there is any anticipation of it
10 having a need for additional prefiled testimony or as
11 staff has considered there's been nothing raised that to
12 me or to members of the Council that would indicate staff
13 believing there's a need to delay the substantive
14 adjudication of the proceedings on that basis.
15 MR. CARMODY: Isn't that a critical
16 consideration in the preemption issue?
17 JUDGE TOREM: It's one of those things that
18 the Council has to look at to determine one of the prongs
19 in its own four-part analysis in its rules, but we're
20 going to have a day and a half at least, perhaps two days
21 of testimony on that on the facts. As to whether or not
22 the Applicant carries the burden on that point, the
23 testimony alone in my opinion should be sufficient to
24 handle that. This additional information will be put out
25 there and public comment can be made upon it, of course,

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1 and the Council will consider all of the information in
2 making its decision.
3 So I think, no, is the short answer to your
4 question. It will be additional information; that the
5 testimony would be one source. This SEPA document that
6 talks about the off-site alternative analysis will be
7 another, and it will be responded to by public comment of
8 whatever length, whether it be verbal or written, that the
9 commenters think is appropriate to give to the Council,
10 and then the Council will need to see. If the Council
11 believes, Mr. Carmody, that additional testimony or
12 additional commentary is needed in the form of an
13 extension or a reconvention of the hearing, you can be
14 assured it will occur. But at this point the Council
15 doesn't know what's in that document and can't make a
16 decision about whether it wants to stop this proceeding or
17 supplement this proceeding down the road.
18 Now let's stay on the issue that's on the
19 table. There's a whole lot of what ifs and the rest of
20 this Council meeting to turn it back over to Chair Luce to
21 get to the rest of the agenda.
22 Let's turn back to this document, the July 9
23 memorandum, that staff has prepared and is recommending to
24 Council that the request for response to comment be denied
25 and those response to comments not be issued until they're

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1 made part of the FEIS.
2 Does the Applicant have a position in
3 response? And I guess that would include having
4 Mr. Hurson and Mr. White vacate the table there, so that
5 we can get this response with today's logistics with TVW.
6 MR. PEEPLES: The response essentially is
7 EFSEC rules provide for the issuance of the FEIS after the
8 hearing. One of the primary reasons for that was I think
9 EFSEC in the past have always felt that there may be
10 things coming up in the hearing. They may want to add to
11 that FEIS, so they have all the information. I think
12 there's a difference between the type of county hearing
13 process, and the adjudicative hearing, county hearing
14 process that the parties, some of the other parties have
15 been used to, and the EFSEC process which is an
16 adjudicative hearing, a contested case hearing and then
17 with the duplicate requirement of SEPA to do an EIS. The
18 EIS process is separate from the hearing process, and it's
19 separate from the evidentiary issues in the hearing.
20 So I guess those are my only comments.
21 JUDGE TOREM: Do you have a position as to
22 this memorandum whether the Council should adopt it or do
23 you think there's some other alternative to this that the
24 Applicant recommends that the Council should take?
25 MR. PEEPLES: The Applicant does not have

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1 any recommendation. I think it's up to the Council how
2 they wish to go. The historic practice has been to issue
3 the FEIS in the end. I think SEPA does not require an
4 FEIS to be to be circulated and released prior to the
5 decision. That's a practice in the County land use cases,
6 but that's not the practice in front of this Council, and
7 they're two different types of hearing procedures.
8 This is a contested case. If we're going
9 for a zoning hearing or something like that, that's more
10 of a legislative. No, I mean and I don't think the FEIS
11 or the responses are relevant to the contested case
12 hearing record. I think you're talking about apples and
13 oranges.
14 JUDGE TOREM: Thank you, Mr. Peeples.
15 Mr. Lane, Counsel for the Environment is a
16 statutory party to the case. I always like to ask if you
17 have anything you would like to add to the discussion
18 today?
19 MR. LANE: As Counsel for the Environment we
20 don't have any specific comments on the substantive
21 discussions taking place. I would say there is a serious
22 concern about the lack of timeliness and the last minute
23 nature of the numerous motions that seem to be filed in
24 this case. It's unfortunate that those could not have
25 been addressed at an earlier time since many of these

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1 issues have been addressed over the past several months.
2 Thank you.
3 JUDGE TOREM: Thank you, Mr. Lane. Parties
4 on the telephone? Mr. Slothower, you had reserved the
5 right to make comments. Is there anything you can add to
6 the discussion at this point?
7 MR. SLOTHOWER: No, there is nothing I want
8 to add.
9 JUDGE TOREM: Are there any other parties on
10 the telephone who would like to add anything?
11 MR. CARMODY: This is Jamie Carmody. I
12 would like to comment on Mr. Peeples' comments to you.
13 First of all, SEPA does not distinguish between a
14 legislative and a project review process. The preparation
15 of an EIS is an environmental review. It's the same under
16 both circumstances. So the distinction between county
17 processing and the processing before EFSEC is a
18 distinction without a difference. The same rules under
19 SEPA should apply to either process.
20 The purpose of SEPA, and we've made a
21 motion, and I guess I would ask that you have the benefit
22 of our motion before the Council makes a decision. But
23 the purpose of SEPA and the only point of this request is
24 that the hearing process is predicated upon full and
25 complete disclosure of all environmental impacts,

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1 mitigation, alternatives, and the process contemplates
2 that information being provided to a decision maker in
3 advance of decision making.
4 JUDGE TOREM: Mr. Carmody, I think that's
5 the point is that all the information is there before the
6 decision. The hearing is not the decision. When the
7 recommendation to the Governor is made one way or the
8 other, that's it. All the information will be in, and it
9 will be cited to whether it occurred in a public hearing,
10 came through at a public comment that came by mail and was
11 circulated, or something that came up after the hearing as
12 a response to comments. The Council will certainly be
13 considering all of that. So I hope we're not confusing
14 the process and the actual decision making that occurs
15 after all of the process is done.
16 MR. CARMODY: Let me cite to you the SEPA
17 statute which is RCW 43.21C.030(2)(d) which requires that
18 an environmental impact statement must accompany the
19 proposal through the existing agency review processes, so
20 that officials will use it in making decisions. That
21 language and process has been approved and referenced by
22 Professor Settle in his materials. It was also referenced
23 by the Court in West Main Associates vs. City of Bellevue,
24 49 Wn. App. 513 at Page 518. If there is information
25 developed through a hearing process, that information can

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1 then be incorporated into the final decision in the form
2 of a supplemental EIS or addendum, whichever is
3 appropriate based upon the level of information provided.
4 The only request that we're having is to
5 have a meaningful process before the Council, and that
6 should be predicated upon information in advance rather
7 than after the fact. And asking that that comments be
8 responded to when the DEIS was issued in January and
9 there's normally a 60-day finalization process it just
10 seems appropriate. I don't understand why the Council
11 would not want to have those responses in advance of a
12 hearing, and I don't understand why having those responses
13 in advance and allowing the public an opportunity to
14 comment upon those in the process is a procedure that's
15 troubling to anyone. I would think that the Council in
16 making a decision would want the full benefit of all
17 information in advance of the hearing, so that when they
18 listen to the testimony and they listen to argument, they
19 can fully weigh and consider that. And that's the only
20 point that we were trying to make and why we think that's
21 important.
22 Bear with me one second. I will find one
23 other. The final WAC that I would like you to look at is
24 197-11-406, and that confirms the earlier information, and
25 that regulation that provides that the lead agency shall

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1 commence preparation of the Environmental Impact Statement
2 as close as possible to the time the agency is developing
3 or is presented with a proposal, so the preparation can be
4 completed in time for the final statement to be included
5 in appropriate recommendations or reports on the proposal.
6 The statement should be prepared early enough, so it can
7 serve practically as an important contribution to the
8 decision making process and will not be used to
9 rationalize or justify decisions already made.
10 So that to me the regulation and the purpose
11 of SEPA is to have the fullest and most complete
12 disclosure in advance of a process, so that the decision
13 making, the testimony, the argument can all be developed
14 in the context of a full and complete environmental
15 information. That's why we think it's important that that
16 be addressed. Kittitas County in fairness is trying to
17 address this issue and bring it up during the course of
18 this proceeding and we're at a relatively late stage with
19 the issuance of a memorandum on July 9. That's neither
20 here nor there particularly, but it is important we
21 believe that that information be provided to
22 Councilmembers, so they can listen and evaluate testimony
23 appropriately. That's the only point that we're trying to
24 make on this.
25 JUDGE TOREM: Thank you, Mr. Carmody. I

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1 don't see anyone else clamoring to come to the microphone.
2 Is there anyone else on the telephone that has anything
3 else to add?
4 So, Council, you have before you a
5 memorandum, all of the input that you've heard today. Is
6 the Council ready to adopt a position on the memorandum or
7 does the Council wish to delay adopting, taking any action
8 on this recognizing that no action today very well results
9 in no comments being released until Council may have
10 directed that or told staff to do otherwise? Staff will
11 stick waiting by the position its adopted over time over
12 30 years of sending these out only with the FEIS unless
13 there is a recommendation from staff otherwise.
14 So as I see it, Ms. Essko may correct me if
15 I'm wrong, there's one of two positions here. First, the
16 staff can choose not to respond to the County's request as
17 its been characterized here to go ahead and release those
18 documents and ignore it, or it can simply act and adopt or
19 modify the memo today or at another date prior to the
20 adjudicative proceeding if the County's request is to be
21 taken with any timeliness that needs to have a decision
22 before then. And the Council staff probably needs at
23 least, oh, a few days to if you're going to direct them to
24 issue these comments to round them up and put them into
25 some sort of publishable means, assuming they exist at

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1 this point.
2 CHAIR LUCE: I had a question, Judge Torem.
3 I had heard one of the parties to say that they were going
4 to be making a motion to stay based on this particular
5 argument.
6 JUDGE TOREM: I think you heard two
7 different parties made related indications. First,
8 Mr. Carmody on behalf of ROKT indicated on SEPA grounds
9 they would be filing a motion to stay these proceedings
10 tomorrow, and I had advised them and you heard that that
11 it may become moot if the Council takes any steps today.
12 Second, then Mr. Hurson indicated there may
13 be a separate issue from Kittitas County as to the
14 Appearance of Fairness Doctrine which is related to the
15 theory that Mr. Carmody is raising, but I don't think that
16 it would be a carbon copy of the legal theory being
17 advanced.
18 Ms. Essko, did you hear something
19 differently?
20 MS. ESSKO: Maybe I misunderstood the last
21 part of your comment. What I heard Mr. Hurson to say that
22 he will be filing a motion on the basis that EFSEC is not
23 even the SEPA lead agency, but that the County is the SEPA
24 lead agency.
25 JUDGE TOREM: Right. So as I'm saying it's

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1 just a separate SEPA issue, but not the same one advanced
2 by Mr. Carmody. So we'll see what the motions are when
3 they come in. I don't think there's any further need for
4 clarification, but in answer, Chair Luce, there are two
5 potential motions to stay on SEPA grounds. We already
6 have Mr. Slothower's motion on behalf of his client on the
7 Growth Management Act and jurisdictional grounds.
8 CHAIR LUCE: Then I guess I would ask legal
9 counsel do you think we have it within our ability today
10 to make a decision on this particular issue not
11 withstanding the potential pendency of other motions of a
12 related nature?
13 MS. ESSKO: I think you can make a decision
14 today.
15 JUDGE TOREM: Councilmember Adelsman.
16 MS. ADELSMAN: I had a quick question. So
17 what are the, I don't know, consequences right for the --
18 what are the pros and the cons again for us avoiding this
19 motion? One of them is I heard the staff would not
20 release or is it the staff could choose to not release it
21 you said?
22 JUDGE TOREM: This memorandum,
23 Councilmembers, tells you that staff believes that given
24 the procedural posture of this application, and that there
25 is no parallel proceeding now pending before the County,

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1 there is nothing served by changing the adopted EFSEC
2 process over many years of releasing responses to comments
3 on the DRAFT EIS in advance of the issuance of the Final
4 EIS which is the normal procedure.
5 This document tells you to stick with the
6 normal procedure and adopts that reaffirms that, if you
7 will, as to policy in this case. And the only reason that
8 we have to take this action item, whether you have to take
9 it is because Kittitas has asked for those items and now
10 to give them a formal response, yes, we will or, no, you
11 won't. This says, "We've never done it before. There's
12 now no reason to do it. We're not going to."
13 MS. ADELSMAN: So if we don't vote for it
14 what are the consequences?
15 JUDGE TOREM: Essentially we're being rude
16 to the County in not answering their request.
17 CHAIR LUCE: I believe Councilperson
18 Adelman that at the end of this discussion it would be
19 appropriate to have a motion. That would be a motion
20 which would be either to the effect that we approve not
21 necessarily staff recommendation, but that we approve
22 either the release of the materials now or not approve the
23 release of these materials right now for two reasons.
24 First, legal counsel has advised us that there is no legal
25 obligation to release these materials, and, second that,

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1 our procedures, long-standing procedures are in variance
2 with that release. Third, as it's been argued one of the
3 reasons that we don't release that information right now
4 and we hold off on the Final Environmental Impact
5 Statement is information comes up during the course of the
6 hearing and you hold your powder so as to speak and make
7 your final adjustments to the Environmental Impact
8 Statement based on everything you hear.
9 I think I also heard people say, and I think
10 correctly so, that this is not the end of the process.
11 The fact that these documents, whatever they may be, and
12 none of us have seen them, may be released is interesting.
13 But it's not the end of the story. The hearing is only
14 one part of this process. We will have a separate public
15 meeting on the Environmental Impact Statement. We will
16 listen to public testimony. We will have the right to
17 reopen the case if we consider it necessary to take
18 additional testimony if we consider it necessary on the
19 Environmental Impact Statement. And as always in our
20 final recommendation to the Governor, whatever it may be,
21 we will consider the entire record before us, and that
22 includes all of the information in the Environmental
23 Impact Statement.
24 MS. ADELSMAN: I have a second question.
25 Could the County get this information through public

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1 disclosure through the staff? Can they get it? Is that
2 something that would quality or not?
3 MS. ESSKO: At this point it probably falls
4 within the deliberative process exemption to the Public
5 Disclosure Act.
6 JUDGE TOREM: Part of the reason I concur,
7 the deliberative process I concur with Ms. Essko probably
8 keeps it from public view at this time because the
9 Council's response has not been determined on those
10 comments. As Chair Luce pointed out if the hypothetical
11 is you agree and say, "County, we are going to give you
12 the draft responses to comments," what happens when you
13 want to respond differently after the adjudicative hearing
14 when you've heard more information? Now the Council has
15 flip flopped between two different responses. Which is
16 it? So there's a deliberate attempt here to make it look
17 as though the Council is withholding information, but the
18 Council is making a response. A response, a decision, one
19 where it makes up its mind. So we're put in this Hobson's
20 choice of like we're withholding information or go ahead
21 and come out with one response and stick to it which I
22 think is what the public would like to see, especially if
23 there's no reason to change your mind.
24 If we follow what the County is requesting
25 here, this staff analysis tells you if you give them

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1 initial response, then we have as Chair Luce points out
2 the whole hearing and say, "You know, that initial
3 response now we have more information isn't so good
4 anymore." That's why the process is designed the way it
5 is now, to have one response to comments in the Final EIS
6 which comes out as part of the process of making a
7 recommendation thumbs up or thumbs down on the application
8 to the chief executive of the state.
9 CHAIR LUCE: A lot of the argument here has
10 based around the hearing. Somehow the hearing is it.
11 It's the essence of everything that we do. The hearing is
12 very important. Don't get me wrong. It's critical to
13 gathering information for the record. The parties are
14 going to present their testimony. There will be
15 cross-examination. It will be very valuable. But it is
16 not as Paul Harvey would say the end of the story. There
17 is more, and the more includes the Environmental Impact
18 Statement and the comments we will get on that and our
19 deliberative process and all that follows thereafter. So
20 there will be more information on the Environmental Impact
21 Statement and the public comment and the testimony, and if
22 necessary, additional hearings -- I don't know if that
23 will happen or not -- with respect to the Environmental
24 Impact Statement. So I guess I made my position rather
25 clear. I would support the staff recommendation and the

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1 advice of our legal counsel.
 2 MR. IFIE: I have a question. The question
 3 is the public comments that have already come in are those
 4 already made public? Is that something they're aware of?
 5 JUDGE TOREM: By their nature they have been
 6 made public either through the testimony given, there's a
 7 transcript of the entire public comment proceeding we had
 8 earlier this year, and I believe, Ms. Makarow, correct me
 9 if I'm wrong, anyone that wants a copy of the public
 10 comments filed thus far on the DEIS can obtain those by
 11 simply contacting her. I don't think a public disclosure
 12 request would be necessary.
 13 MS. MAKAROW: That is correct. In fact,
 14 copies of those comments have been made for all of the
 15 parties, as well as general public comments that were not
 16 specifically related to the Draft EIS.
 17 MR. IFIE: That clarification is helpful
 18 because the issue here is not withholding public comments
 19 that have already been made.
 20 JUDGE TOREM: Simply it's responses to them.
 21 MR. IFIE: It's the Council's response to
 22 those comments to the initial things filed and then the
 23 initial would become final.
 24 JUDGE TOREM: It's responses within the
 25 context of the environmental context of SEPA. The

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1 Council's recommendation to the Governor will be a
 2 response to the entire process. The specific comment
 3 responses are within the ambient of SEPA and the
 4 environmental impact analysis that's required by that
 5 statute. So these are specific responses that in the DEIS
 6 process to become an FEIS are incorporated, and one is
 7 required by statute and regulation to indicate while they
 8 do you actually consider what everybody said about your
 9 initial draft and you're required comment by comment to
 10 tell them did you ignore it, did you incorporate it, did
 11 you change your mind when you get to the Final EIS stage.
 12 Those are the comments that we're responding to here that
 13 are at issue.
 14 MR. IFIE: One more comment. There was a
 15 statement I heard earlier about the possibility of
 16 providing misleading information to the public by
 17 publishing the initial response to comments because it
 18 might send mixed messages to mislead the public; is that
 19 correct?
 20 JUDGE TOREM: That's my view of one of the
 21 reasons that the deliberative process anything that goes
 22 on within deliberative process is protected from
 23 disclosure under any of the variety of documents that have
 24 been cited today, public disclosure being one of them. So
 25 the Council might have a draft response to comments, and

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1 then change its mind. And one is not required to publish
 2 draft comments, only final responses to comments, and
 3 therefore the typical approach of the Final Environmental
 4 Impact Statement.
 5 So my example, Councilmember Ifie, was if we
 6 were to respond affirmatively to the County's request and
 7 put out the initial responses to comments, once we go
 8 through the adjudicative proceeding and having read the
 9 prefiled testimony and heard cross-examination, the
 10 response to those same comments that were made once before
 11 adjudication now viewed in a fresher light with testimony
 12 that's been sworn and subject to cross-examination, that
 13 might change; therefore, when the final response to
 14 comments come out, the same comment may have changed from
 15 its draft response to its final response, and in my
 16 opinion raise questions of credibility or raise questions
 17 of at least confusion publicized dealing with which one is
 18 it? Is EFSEC responding as it did perhaps today in August
 19 or at the recommendation in the Final EIS come out
 20 hypothetically in November or December or maybe early next
 21 year, and it's a different response in that issue along
 22 the way today? Does that truly serve the public?
 23 CHAIR LUCE: For example, if the Draft
 24 Environmental Impact Statement dealt with avian mortality,
 25 bird mortality, and if it said X number of birds were

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1 likely to perish as a result of construction of some wind
 2 turbines, and the response to comments said yes, no, or
 3 maybe or we reject, and we publish that. And then in the
 4 course of cross-examination and the filed testimony quite
 5 the opposite turns out to be the case, and we have to
 6 appropriately change the comments in the EIS. And instead
 7 of saying yes, we say no; or instead of no, we say yes.
 8 We're put in the position of, well, you said yes before.
 9 Why are you saying no now? If you said no before, then
 10 why are you saying yes now?
 11 So we need to hear the entire story before
 12 the analysis. That's why they call it a Final
 13 Environmental Impact Statement. We need to get the full
 14 picture of all of the information before we proceed.
 15 That's why we keep the comments now as draft.
 16 MR. IFIE: One more comment. It seems to me
 17 that it also has to do with trust of the public. If
 18 releasing a preliminary set of documents is noted as
 19 preliminary as an issue what is so wrong about saying
 20 final? This is not final, and the reason why it became
 21 final is because we heard a bunch of new testimony that
 22 changed the decision from the responses that have been
 23 provided. So the issue can we trust the public to see the
 24 difference between initial and final?
 25 CHAIR LUCE: You could take that position if

1 you want to.
 2 MR. IFIE: Well, I guess I'm thinking it
 3 through as we are talking because this is now we're
 4 deliberating in public.
 5 CHAIR LUCE: That's right.
 6 MR. IFIE: So on the one hand there's the
 7 possibility of confusion by providing initial that is not
 8 final. On the other hand, any information as we provide
 9 it, we provide it with a caveat that this is initial,
 10 preliminary information. The final is coming down the
 11 pike between now and then. Testimony is going to be
 12 listened to and then a final document to the public. So
 13 I'm weighing the ups and downs.
 14 CHAIR LUCE: Okay. I understand.
 15 Hedia, do you have anything?
 16 MS. ADELSMAN: Well, if I heard Irina right,
 17 it seems like the off-site document is going to be out
 18 next week, and that will go through the public process,
 19 and it will be added to I mean I'm assuming the comments,
 20 and that will be added to the Final EIS eventually. And
 21 then you say we do not at this moment have any responses
 22 to comments or at least we know we didn't receive any. So
 23 what is there to even put out?
 24 MS. MAKAROW: The only document that is
 25 ready is the off-site alternatives analysis.

1 MS. ADELSMAN: But you're going to release
 2 it next week.
 3 MS. MAKAROW: Yes.
 4 MS. ADELSMAN: So I'm kind of trying to look
 5 at this, and so what's at issue that is making such a big
 6 thing?
 7 JUDGE TOREM: Councilmember Adelsman, the
 8 County has requested these comments.
 9 MS. ADELSMAN: I know. I understand. I
 10 understand all that.
 11 JUDGE TOREM: And that staff characterizes
 12 it the County wanted this for its own process which is no
 13 longer going on. Now, that's my view of it.
 14 Councilmember Ifie has another equally valid view that
 15 perhaps in full disclosure you put out everything you have
 16 before you've developed a position, but remember it's not
 17 just information. It's a response to comments, a Council
 18 talking as a whole about how will you respond to the
 19 comments. And later in the hearing there is I think a
 20 procedural danger of having someone else come to the
 21 microphone and say, "Well, you already said this. Here's
 22 what your position is, and your position is right or
 23 wrong." Our decision as a Council will be open to public
 24 review when it goes to the Governor, and the Governor will
 25 say yea or nay on the Council's view.

1 If you would like to have the preliminary
 2 views quoted back and forth to you and batted around and
 3 refined it further, that's one view of it. But if you
 4 want to trust this deliberative process which has ten full
 5 days of adjudicative hearings scheduled, everything that
 6 you've done up to this point, and you need another layer
 7 of intermediate review of this Council having a chance to
 8 second guess itself, I suppose then release it all. But
 9 the process may not end in two weeks. We may have too
 10 much information.
 11 MR. IFIE: We need clarification from Irina
 12 on this issue. Do we have the responses to the comments
 13 prepared, ready to be distributed if they should wish to
 14 distribute them?
 15 MS. MAKAROW: No.
 16 MR. IFIE: It seemed to me the premise or I
 17 was assuming that there was something some document to be
 18 released.
 19 JUDGE TOREM: There's been a lot of assuming
 20 about the status of those comments.
 21 MR. IFIE: If there is none to be released
 22 why are we going through this one-hour discussion?
 23 JUDGE TOREM: Councilmember Sweeney had
 24 something here.
 25 CHAIR LUCE: Clay, we're are in discussion

1 right now as a Council, so hold your comment, please.
 2 JUDGE TOREM: Councilmember Sweeney.
 3 MR. SWEENEY: I don't have any questions. I
 4 think the County deserves a response, and I was ready to
 5 make a motion.
 6 JUDGE TOREM: Is there any other discussion
 7 before essentially a motion is made?
 8 CHAIR LUCE: Well, I would just like to add
 9 one point because I think it's an important one that Judge
 10 Torem just made. If there were any there in terms with
 11 response to comments, which I don't there is based on what
 12 staff has just said, I think that when you release
 13 response to comments we are speaking as a Council, and I
 14 don't know what's going out or whether I would buy in or
 15 not to those comments. So I would hate to be in a
 16 position of having to look at them and have some
 17 Councilmember say, "Well, that's s great idea or that's
 18 bad or that's wrong." I think it's always all right to
 19 have differing views, but it would be nice to be able to
 20 look at them together without having them just go out.
 21 So I think we had a motion about to be made.
 22 MR. SWEENEY: I move the Council indicate
 23 that it will issue its response to DEIS comments after the
 24 adjudicative hearing proceeding as recommended by staff.
 25 JUDGE TOREM: Is there a second?

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1 MR. FRYHLING: I will second that.
2 JUDGE TOREM: Now we'll have a call for
3 comments.
4 MS. ADELSMAN: Just to address the issue
5 that you just raised. I mean we could make sure that what
6 we are releasing is the Council's response, not the
7 consultant drafting a response for us or whatever would be
8 released is something that we would have discussed and
9 agreed to. So I'm okay with that; that it's not just the
10 staff writing the response draft for us or the consultant
11 when we had not had a chance to discuss them as Council.
12 But once they are available, I will sort of
13 like to see them released.
14 CHAIR LUCE: We would not have time even
15 they if they did exist, which they don't, to discuss them
16 as a Council prior to the adjudicative hearings. But they
17 don't exist, so that's somewhat irrelevant.
18 MR. IFIE: Let me understand the motion that
19 was just made. You are moving that the response to DEIS
20 comments should be outside the adjudicative proceeding.
21 MR. SWEENEY: Should be after the
22 adjudicative, and I might add that the Council intends to
23 issue its response, that means our responses to the DEIS
24 comments after the adjudicative proceedings are as
25 recommended by this memo here.

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1 CHAIR LUCE: Any other comments by
2 Councilmembers?
3 Any other discussion?
4 Do I have a call for the question?
5 MS. TOWNE: Call for the question.
6 CHAIR LUCE: I think the Council has heard
7 all it wants to hear on this subject, Mr. White. I
8 appreciate your interest, but we've had a chance to
9 testify. We're back in deliberative session now.
10 MR. WHITE: I'm just trying to answer your
11 questions.
12 CHAIR LUCE: Do I have a call for the
13 question?
14 MS. TOWNE: I called for the question.
15 CHAIR LUCE: Question has been called for.
16 All in favor say aye.
17 COUNCILMEMBERS: Aye.
18 CHAIR LUCE: Motion is passed. Thank you
19 very much.
20 MR. CARMODY: Can I ask you this? This is
21 Jamie Carmody. Can I ask for a clarification now?
22 JUDGE TOREM: Yes.
23 MR. CARMODY: It sounds like the decision
24 that was made renders moot the motions that we will be
25 filing. So is it my understanding then that there will be

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1 no further action on those motions, and that those will be
2 sufficient registrations of objections for the record?
3 JUDGE TOREM: Mr. Carmody, I can't tell you
4 what's going to be in a motion I haven't seen yet.
5 MR. CARMODY: Exactly what I said it was in
6 this conversation today.
7 JUDGE TOREM: And you heard my earlier
8 comments that if the Council adopted the position that it
9 just did --
10 MR. CARMODY: That it would be moot.
11 JUDGE TOREM: That I would think it would be
12 moot. If you choose not to file your motion, that is up
13 to you. If you would like to file your motion, then I'll
14 ask that any parties that wish to respond to a motion
15 that's filed tomorrow, please do so. We're asking for
16 motions that were filed last week to have a response on
17 Wednesday. I will ask that they be filed on Friday if at
18 all possible if there's any need for responses to any
19 other motions to stay that are filed tomorrow. That
20 includes yours on behalf of ROKT and the County's that
21 Mr. Hurson mentioned earlier.
22 If it does come in tomorrow, that would be
23 Tuesday; that we then give three full business days to
24 respond which would be Friday counting that third day, and
25 we'll try to issue a ruling as soon as possible, middle of

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1 next week. We promise to respond on Mr. Slothower's by
2 Monday afternoon or Tuesday morning at the latest, so
3 these would get in line behind it.
4 If you judge that based on the Council's
5 actions today, there's nothing to be gained by a motion,
6 it saves me work, but it's up to you to file that motion
7 or not.
8 MR. CARMODY: We will file the motion. I
9 was going to try to save you work because of the view is
10 that it's moot. You just made a decision that it's moot.
11 We will have filed it, and that will be the end of
12 discussion.
13 JUDGE TOREM: I just can't give you an
14 advisory opinion on something I haven't seen, so I can't
15 do that. If you make work for yourself, and you've got
16 more work for me, I'm happy to do it.
17 Mr. Peeples, you're back at the microphone.
18 MR. PEEPLES: Yes. I would like to -- can
19 we have a summary of when responses are due by date of the
20 week and day of the month.
21 JUDGE TOREM: Anybody correct me if I'm
22 getting this wrong.
23 MR. PEEPLES: Okay.
24 JUDGE TOREM: We have a motion filed by
25 Mr. Slothower that I believe was received last Thursday,

1 July 29.
2 MR. SLOTHOWER: Your Honor, it was filed on
3 Friday. This is Jeff Slothower. You received it on
4 Friday, Friday about noon.

5 JUDGE TOREM: Thank you. I was trying to
6 give you the benefit of the doubt because my memory is a
7 bit of a blur last week. So if it came in on Friday, then
8 responses to that we had asked be due on I said Thursday
9 of this week. That would be August 5, and that -- I'm
10 sorry. Responses on Wednesday, August 4, and reply 24
11 hours later which Mr. Slothower can't meet because he is
12 on vacation; although, I'm sure he's not enjoying it
13 particularly at the moment. He will file something this
14 weekend as a reply. So Wednesday is the date we're asking
15 for.

16 MR. PEEPLES: See I was understanding that
17 it was Wednesday after the 4th.

18 JUDGE TOREM: You're correct, Wednesday the
19 4th.

20 MR. PEEPLES: But I thought it was next
21 Wednesday, not this Wednesday when I said --

22 JUDGE TOREM: No, because that's the motion
23 to stay the proceeding based on a GMA, the Growth
24 Management Act and the jurisdictional questions that have
25 been raised. If you want me to wait until next Wednesday,

1 then we're only two days before the hearing, and I will be
2 issuing my response the day of the hearing and saying,
3 "Okay. Folks, we are or aren't staying", and everybody is
4 assembled in Ellensburg. I just think that's a bit late.

5 MR. PEEPLES: It's just really a tight line
6 to respond.

7 JUDGE TOREM: I recognize that. I'm not
8 asking for a full blown Supreme Court brief as to your
9 response. Simply you told me already what's going to be
10 in the response that you oppose it, and it's a seven-page
11 motion. I don't think the response needs to be in excess
12 of that. A reply will be filed over the weekend if one is
13 necessary, and we'll be in discussing as a Council a
14 response and a decision on Monday afternoon hoping to have
15 something in writing quickly that afternoon, if not the
16 next morning. And that's Monday the 9th, Tuesday the 10th
17 of August.

18 There are two other motions that have yet to
19 be filed. Whether or not those makers of the motions will
20 choose to see them as moot or whether the two different
21 SEPA motions will be seen as something that needs to be
22 filed after today's discussion, I'll leave that up to the
23 County and ROKT individually. If they come in tomorrow,
24 we will give three business days until Friday to respond
25 to them.

1 The reason these deadlines are so tight is
2 because if the Council is going to find any grounds to
3 stay this proceeding, the sooner the better for everybody
4 and your witnesses. I understand you have some
5 international air travel among your witnesses, and it
6 doesn't do any good if the plane's wheels are off the
7 ground and I make a decision and tell them to go home or
8 stay home. So I'm sorry for all the late filings that are
9 occurring here and the pressure on all of the parties.
10 I'm trying to make lemonade for you, Mr. Peeples.

11 MR. PEEPLES: Yes.

12 JUDGE TOREM: It's the best I can do.

13 All right. Is there anything else to be
14 added up to those filing deadlines or days of the week?
15 Is there any other business for the prehearing conference
16 itself that needs to be taken up at this time?

17 MR. PEEPLES: I would just like to with
18 regard to witnesses give notice to everybody I mentioned I
19 think Mr. Butler who I thought was going to be in Japan.
20 I believe right now he will be back in the U.S. probably
21 at the hearing; however, I do have a problem with I
22 believe what is my witness No. 2, Andy Lenehan. He is
23 commencing chemotherapy for cancer and a pretty high
24 regimen of chemotherapy, so we're going to need to do him
25 by telephone. He's going to be pretty sick and not be

1 well, and there's no way that we can postpone the chemo.

2 JUDGE TOREM: Please remind us again prior
3 to his testimony, so the appropriate courtesy can be
4 extended to him. The Council understands that there's a
5 question of advice or agreement to the time for his
6 testimony, so we can best work around that. If you find
7 out from him or his physician that a particular time of
8 day is best for him.

9 MR. PEEPLES: Monday is the best because
10 he's off at chemo for two days.

11 JUDGE TOREM: Let's accommodate that the
12 best we can. If the schedule is going to be something
13 that's out of order of the flow of the hearing just let
14 the Councilmembers know, so they can arrange their notes
15 accordingly and just give a reminder. As you know there's
16 so much information flowing here that I don't know that we
17 will remember the personal circumstances of that witness
18 in two weeks.

19 Just to be clear, my legal counsel here is
20 suggesting that I make sure if these motions come in when
21 is a response due. They're coming in supposedly Tuesday
22 the 3rd. I'm saying a response from any parties that want
23 to respond would be Friday the 6th. I don't think that
24 there's a time a reply based on the schedule.

25 We are going to try to turn the response

1 out. The Council is going to discuss other motions to
2 stay and the draft responses and the reply that come from
3 Mr. Slothower maybe Monday. They can then have time to
4 take up the discussion of these motions that are
5 anticipated and the responses that would be filed by close
6 of business this coming Friday, August 6. We'll do it all
7 in one shot because we don't have much time next week to
8 deal with these issues, let alone be prepared for the
9 first witnesses if they're going to be presented a week
10 from next Monday.

11 All right. Seeing nothing else, this
12 prehearing conference is adjourned.

13 * * * * *

14 (Prehearing conference adjourned at 3:15
15 p.m.)
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A F F I D A V I T

I, Shaun Linse, CCR, Certified Court Reporter,
do hereby certify that the foregoing transcript
prepared under my direction is a true and accurate
record of the proceedings taken on August 2, 2004,
in Olympia, Washington.

Shaun Linse, CCR
CCR NO. 2029