

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:)
Application No. 2003-01)
)
SAGEBRUSH POWER PARTNERS, LLC,) Prehearing Conference
)
KITTITAS VALLEY WIND POWER PROJECT) Pages 1 - 61
_____)

A prehearing conference in the above matter was held in the presence of a court reporter on September 12, 2004, at 2:45 p.m., at 925 Plum Street S.E., in Olympia, Washington, before Energy Facility Site Evaluation Councilmembers.

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The parties were present as follows:

SAGEBRUSH POWER PARTNERS, LLC, Darrel Peeples, Attorney at Law; Timothy McMahan, Attorney at Law; Erin Anderson, Attorney at Law, 325 Washington Street N.E., Suite 440, Olympia, Washington 98501.

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

KITTITAS COUNTY, James L. Hurson, Kittitas County Prosecutor, Kittitas County Courthouse, Room 213, Ellensburg, Washington 98926.

Reported by:
Shaun Linse, CCR

1 Appearances (cont'd):

2 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),
3 James C. Carmody, Velikanje, Moore & Shore, P.S., 405 East
4 Lincoln Avenue, P.O. Box 22550, Yakima, Washington 98907.

5 F. STEVEN LATHROP, Jeff Slothower, Attorney at
6 Law, Lathrop, Winbauer, Harrel, Slothower & Denison, LLP,
7 201 West Seventh Avenue, Ellensburg, Washington 98926.

8 ECONOMIC DEVELOPMENT GROUP, Debbie Strand,
9 Executive Director, 1000 Prospect Street, P.O. Box 598,
10 Ellensburg, Washington 98926.

11 * * * * *

12 CHAIR LUCE: This is a prehearing conference
13 and I'm not sure what the number is, but the prehearing
14 conference in the Kittitas Valley Wind Power Project,
15 Application 2003-01 for Tuesday, September 12, 2006 is
16 called to order. The time is 2:45. Presiding at this
17 prehearing conference will be Judge Adam Torem.

18 Judge Torem.

19 JUDGE TOREM: Thank you, Chair Luce. Let me
20 ask the clerk to go through the roll with the Council as
21 to who's here.

22 MR. FIKSDAL: Department of Community,
23 Trade, and Economic Development?

24 MR. FRYHLING: Dick Fryhling is here.

25 MR. FIKSDAL: Department of Ecology?

1 MS. ADELSMAN: Hedia Adelsman.

2 MR. FIKSDAL: Department of Fish and
3 Wildlife?

4 MS. TOWNE: Chris Towne.

5 MR. FIKSDAL: Department of Natural
6 Resources?

7 MS. WILSON: Judy Wilson.

8 MR. FIKSDAL: Utilities and Transportation
9 Commission?

10 MR. SWEENEY: Tim Sweeney.

11 MR. FIKSDAL: Kittitas County?

12 MS. JOHNSON: Patti Johnson.

13 MR. FIKSDAL: And the Chair.

14 CHAIR LUCE: The Chair is present.

15 JUDGE TOREM: Let me take appearances then
16 from the Applicant.

17 MR. PEEPLES: Darrel Peeples.

18 MR. McMAHAN: Tim McMahan.

19 JUDGE TOREM: Counsel for the Environment?

20 MR. TRIBBLE: Mike Tribble here.

21 JUDGE TOREM: And Renewable Northwest?
22 Not present apparently today.

23 Kittitas County?

24 MR. HURSON: Jim Hurson present at the
25 hearing.

1 JUDGE TOREM: Community Trade and Economic
2 Development?

3 Not here.

4 Mr. Lathrop?

5 MR. SLOTHOWER: Jeff Slothower on behalf of
6 Steve Lathrop. Mr. Lathrop is not present.

7 JUDGE TOREM: Thank you, sir.

8 And for ROKT?

9 MR. GARRETT: Ed Garrett.

10 JUDGE TOREM: And the Economic Development
11 Group?

12 MS. STRAND: Debbie Strand is here.

13 JUDGE TOREM: All right. Did I miss anybody
14 from the parties or intervenors?

15 MS. COMBO: This is Mary Ellen Combo with
16 the Attorney General's Office, counsel for the EFSEC.

17 JUDGE TOREM: Thank you, ma'am, for joining
18 us today.

19 MR. PIERCY: Also Darryl Piercy of Kittitas
20 County on the phone.

21 MS. ANDERSON: Good afternoon, Your Honor.
22 Erin Anderson with Horizon Wind here in Ellensburg on the
23 phone.

24 JUDGE TOREM: Any others on the phone?

25 All right. The next item on the agenda is

1 adoption of our proposed agenda. It is a short one today.

2 Do I have a motion to do so?

3 MR. FRYHLING: So move.

4 MS. ADELSMAN: Second.

5 JUDGE TOREM: All right. Moved by

6 Mr. Fryhling and seconded by--

7 MS. ADELSMAN: Adelsman.

8 JUDGE TOREM: -- Hedia Adelsman. It came

9 from over there is all I know.

10 MS. ADELSMAN: I'm one of the three women.

11 CHAIR LUCE: Question is called for.

12 All in favor say Aye.

13 COUNCILMEMBERS: Aye.

14 JUDGE TOREM: All right. The proposed
15 agenda now includes that we'll talk about the witnesses
16 and hearings scheduled, see if there are any other
17 additional questions and issues for the adjudicative
18 hearings, and there's a separate handout on that, and
19 finally, the cleanup items as to procedural matters and,
20 if necessary, another prehearing conference.

21 Let's look at Item 4. All of you should
22 have gotten from Mr. Tribble and Mr. Peeples a proposed
23 schedule, and there were a few more then circulated in
24 yesterday's late afternoon just juggling the amounts of
25 time and what dates people would show up. I had talked to

1 EFSEC staff, as well as just before today's meeting
2 Mr. Peeples about how to best ensure what I think is
3 perhaps an overly optimistic schedule is going to be
4 achieved.

5 So let me ask Mr. Peeples first to tell me
6 and the rest of you what he thinks is the current best
7 up-to-date schedule and how many days of hearing we're
8 going to need. Then I'm going to ask Mr. Hurson from the
9 County if he concurs specifically as to the amount of time
10 set aside for the preemption matter and other parties I'll
11 ask if you concur with Mr. Peeples' assessment as to how
12 many days of hearing we need.

13 Mr. Peeples.

14 MR. PEEPLES: First of all, I think the way
15 Mr. Tribble and I did this, and Mike did the final wrap-up
16 on this putting it all together and really put a lot of
17 work into this. The amount of time for cross-examination
18 of the sum reported by the parties my assessment on that
19 is I think they're really pretty accurate. I think all
20 the parties except for ROKT did a thoughtful job, and I
21 think those are pretty good figures. ROKT looked like
22 they put a placeholder of .25 hours for every single
23 witness including their own.

24 Now, I think probably their attorney was
25 just too busy that week to get at it. I don't know. But

1 that I think skews this and throws it off, and Jim and I,
2 we were talking about this right before. We really think
3 that once you make that adjustment, and Jim can speak for
4 himself, I think we have a chance to get it done in three
5 days on that, and a lot of those I'm going to make the
6 other request that we take a look at these witnesses and
7 perhaps discuss them here.

8 We've already talked about Clay White.
9 There's no reason why Clay White has to show up. He's a
10 county employee. He's up in Ponderay, Stevens County.
11 ROKT put a .25. If anything, that would be friendly
12 cross. We'll stipulate to Clay's testimony. It'd be nice
13 to see him. We haven't seen him for a couple months, but
14 there's no reason to bring him down. I think we have many
15 like that.

16 JUDGE TOREM: Mr. Hurson, no outstanding
17 warrants in the County?

18 MR. HURSON: No.

19 JUDGE TOREM: All right then.

20 MR. PEEPLES: So we have a lot of witnesses
21 like that which I think we potentially unless the Council
22 has questions can really to a certain extent totally get
23 rid of. They're not issues that people have really raised
24 in this process. The type of people I'm talking about is
25 Tom Tebb for CFE. He's a DOE employee. There's no reason

1 for him to bring Tom over, and we have a lot of other
2 people. We have people that are going to be
3 cross-examined for about .25 hours or .35 hours, one of
4 which is coming from Denmark. We have people coming from
5 D.C. for .25, .35 hours of cross-examination, and I really
6 want to take a look at those, especially everybody
7 starting from George Sterzinger, excluding Barton DeLacy,
8 Roger Weaver, Tony and Arne and Troy Gagliano. I think we
9 do those by stipulation or at best by telephone.

10 And we had problems in the room last time
11 with the telephone, and I agree that room was not really
12 set up for it. We're trying to see if maybe we could have
13 a day hearing or a couple hours of hearing if we need to
14 do it by telephone someplace over at CWU. They must have
15 a setup like WSU and UW with a really good audio visual
16 type of setup where we could do that effectively there.

17 And I think that's a lot for these
18 witnesses' convenience. I hate to bring people across the
19 country, bring state employees in for probably when I say
20 .25, that's ROKT, and a lot of those are completely out of
21 their area intervention. So I want to throw that out on
22 the table now, and I think we can get it done I mean
23 pretty responsibly within three days.

24 JUDGE TOREM: I appreciate what you're
25 suggesting for the witnesses' convenience, but I want to

1 make sure none of these cross-examination times take into
2 account that the Councilmembers may have questions they
3 have, and you and I discussed this before the meeting.

4 There are a number of questions that have
5 been filtered to me by the Councilmembers that I do get a
6 feel of what their questions and issues would be at the
7 hearing, and some of them we're going to talk about it at
8 the next agenda item. But there's a lot more that I told
9 them to hold those for the cross-examination of those
10 particular witnesses. So we're going to get to the
11 Councilmembers and their input on it shortly.

12 I just want to advise them a little bit in
13 advance if there's any witnesses you see that are say less
14 than a half an hour of allocated cross-exam time that you
15 think your questions will lineup there and you do want
16 them present and you're not willing to risk a bad phone
17 connection, be prepared to identify those witnesses when
18 we get done hearing from the County. That way we'll know
19 if there are going to be witnesses that will only be
20 called by phone or by stipulation we'll accept their
21 testimony somehow, we will know if the Council has any
22 questions or concerns for those particular witnesses.

23 And I knew that some of you had questions
24 for the noise and the weather witnesses. So those I can
25 tell you in advance we may want to have come over to have

1 them available for perhaps even short Council questioning.

2 MR. PEEPLES: I haven't marked those off.

3 Those are ones there's no problem bringing them.

4 JUDGE TOREM: From past practices I know
5 we've had witnesses come over and it's a little bit
6 embarrassing that no questions actually turn up; none that
7 you anticipated and none that the Council may have
8 anticipated, and I would like to follow some efficiencies
9 for them as well as for the Council and the rest of the
10 citizens of Kittitas County that were trying to plan their
11 days in attending this.

12 So, Mr. Hurson, tell me from the County's
13 perspective what you think of Mr. Peeples' comments.

14 MR. HURSON: I think scheduling wise we
15 probably can get this done in the three-day time frame. A
16 lot of the times I think I tried to make an estimate. You
17 never know. I'm sure dealing with many hearings or trials
18 sometimes the questions what you think is a simple yes or
19 no and somebody starts telling their life story and it
20 takes a lot longer to actually get the answer out. So
21 there's a lot of flexibility.

22 But, frankly, I think we're pretty
23 realistic. The folks listed for the 18th I think we can
24 get those done in a day. It may go over to the morning of
25 the 19th would be my guess, but I doubt that we'd get done

1 earlier. If we do, I wouldn't see that as necessarily a
2 major problem. I know I'd appreciate being able to get
3 back to my office and check e-mail sooner than later.

4 But the one thing I would ask is under Clay
5 White's his testimony relates basically to the first
6 preemption issue. He's not been an employee for the
7 County for a couple of years. He's now in Stevens County.
8 He's the planning director, public works director there.

9 MR. SLOTHOWER: Judge Torem, I hate to
10 interrupt, Mr. Hurson, but it's very hard on the phone
11 hearing him.

12 MR. HURSON: I'm sorry, Jeff. Is that
13 better, Jeff?

14 MR. SLOTHOWER: Yes.

15 MR. HURSON: We moved the mic next to me.
16 Yes, Clay is the Stevens County planning director, public
17 works director. He wouldn't have any information
18 regarding the last round of hearings and all that other
19 information. The only party that indicated an interest in
20 cross-examining regarding that I guess you could call it
21 the old information is ROKT. I called Mr. Carmody
22 yesterday. He said that I could represent to the Council
23 that he would waive his right to examine Mr. White because
24 I explained the situation, and, frankly, Mr. White's
25 schedule is such that Monday he could possibly make it,

1 but the rest of the week was not working well at all. So
2 I was hoping we could waive his necessity of appearing. I
3 told Mr. White I would be asking this request. He called
4 me yesterday actually to find out the schedule, and I
5 suggested that perhaps we could just have him submit an
6 affidavit because when you submit the prefiled, you don't
7 have him sworn in and I know you want sworn-in testimony.
8 So I could have him fill out an affidavit that swears
9 under penalty of perjury that the testimony that he gave
10 previously in the written was true and correct so you get
11 the sworn testimony.

12 MR. PEEPLES: We would also be willing to
13 stipulate to that. I think most parties would.

14 JUDGE TOREM: While we're all thinking of
15 Mr. White, are there any other parties that have an
16 objection to Mr. White's testimony coming into the record?
17 That's Exhibit 50 and there's a lot of supporting exhibits
18 as to the first preemption request that was later
19 withdrawn, but it does I think give a flavor as to what
20 the record in this case was and there was some question
21 about maybe it would be withdrawn or stricken, but I don't
22 think that's something we need to address today. I leave
23 that to the County's decision. But they want it to come
24 in and submit an affidavit.

25 Parties on the phone any objections to that?

1 MR. SLOTHOWER: Jeff Slothower. I don't
2 have any objection to that.

3 JUDGE TOREM: Mr. Tribble, any objections to
4 that?

5 MR. TRIBBLE: No, I do not.

6 JUDGE TOREM: And I don't think the rest of
7 the parties had any other items. ROKT is already spoken
8 for through Mr. Carmody via Mr. Hurson.

9 So, Councilmembers, any concern about not
10 having Mr. White available and/or just allowing that
11 testimony to come in by affidavit?

12 CHAIR LUCE: I think it would be a good idea
13 to have him by affidavit.

14 JUDGE TOREM: It appears that the Council is
15 behind that so we'll go ahead and strike Mr. White from
16 the testifying witnesses, and at this time you can relieve
17 him from the need to travel back to the old school.

18 MR. HURSON: All right. Thank you. It
19 would be nice to see him again, but I'll do that and then
20 what I'll try to do is I'll try to e-mail him an affidavit
21 that he can download, sign it, and then mail it back to me
22 and I should have that before Monday morning. Hopefully
23 I'll have the signed one. Now if I don't have a signed
24 one, I hopefully will have a faxed copy and then get the
25 other one to the Council.

1 JUDGE TOREM: All right. Very well.

2 Now, as to the rest of the witness schedule
3 issues, you feel again you said we can get this done in
4 that three days.

5 MR. HURSON: I think we can. I think
6 there's just some key issues. We can either try to talk
7 about every small minutia or just the key issues, and I
8 think our intent is to try to focus more on the big
9 issues. I assume everybody has looked at the
10 cross-examination correctly.

11 My one thing frankly is the 18th. I've only
12 been through an EFSEC process once before in the Olympic
13 Pipe Line Project. We were going to start in the morning
14 and then I think there was motions and all sorts of
15 things, and I don't think we started our first witness
16 until 3:00 in the afternoon or something like that. I'm
17 anticipating that won't happen here, but I didn't realize
18 that was going to happen on the Olympic Pipe Line Project
19 either. That's the only thing I think on the slide.

20 But what I would suggest is you take the
21 schedule you basically have and like the witnesses for the
22 19th wouldn't be called until the 19th. So if we're
23 finished up early, we just go home and everybody can get
24 ready for the next day. Or if we go over, carry over the
25 18th to those first and then move to the 19th. It looks

1 like most of the witnesses scheduled for the 20th have
2 very little that needs to be worked through. So if the
3 18th and the 19th slide a little bit, it looks like on the
4 20th we will be able to pick that up.

5 JUDGE TOREM: Councilmembers, in my looking
6 through the list of witnesses, and other parties on the
7 phone I'll let you have a shot at this next, but the
8 witnesses that I see aside from Clay White are Tom Tebb
9 and then starting down with No. 80 Steven Grover, Michael
10 Pappalardo, Josh Butler, Randall Krichbaum, and on the
11 back page Jeffrey Flenniken, Les Polisky, Dan Pitzler,
12 Henrik Jorgensen, Michael Bernay, and Dan Kammen. Those
13 ten plus Mr. Tebb are the ones that I didn't see a whole
14 lot of concern or questions from Councilmembers and what
15 you've submitted to me. That was ten witnesses off that
16 list.

17 MR. PEEPLES: Could you repeat that.

18 JUDGE TOREM: Yes, I will. So, again, it's
19 Tebb, No. 90. He's the fifth one down at the top of the
20 list. Then you'll drop all the way down toward the bottom
21 of the page, No. 80, Steven Grover. Two witnesses down
22 from him is No. 23, Michael Pappalardo. 24 is Josh
23 Butler. The very last witness on that first page is
24 Randall Krichbaum, No. 30. Then on the next page Jeffrey
25 Flenniken, No. 28; Les Polisky, No. 31; Dan Pitzler, No.

1 32; and then these next three in a row 37, 38, and 39,
2 Jorgensen, Bernay, and Kammen they are mostly about the
3 risk and the turbine safety and those sorts of issues.
4 I've believe we heard from those three in the Wild Horse
5 Project, but that doesn't make a record for us here.
6 Their testimony would have to come in essentially without
7 cross-examination or a telephone adoption of it and
8 telephone cross-examination, if necessary.

9 There were some questions Councilmembers had
10 at the last hearing on those, but no one submitted to me
11 that those were big issues for them. It may be that your
12 minds have already been set at ease from your prior
13 experience, but, again, remember the record in this case
14 still has to be made. So if there are cross-examination
15 type questions, I'm suggesting for these witnesses they
16 might be appropriate for telephone, assuming we have the
17 facilities to do that.

18 MR. PEEPLES: I've been informed there's
19 facilities available at CWU.

20 JUDGE TOREM: All right. Ms. Adelsman.

21 MS. ADELSMAN: No. 28 the cultural resources
22 did you include him on the list?

23 JUDGE TOREM: Yes, I did.

24 MS. ADELSMAN: What was the reason?

25 JUDGE TOREM: The logic that I gave you for

1 the names I included to have them only come by telephone
2 is that, again, we're showing that these are only reserved
3 for cross-examination by ROKT, and to the best of my
4 recollection there was no questions from Council submitted
5 to me in advance demonstrating a got-to-have-them-there
6 interest for further cross-examination.

7 MS. JOHNSON: But they will be available by
8 phone for us at least to ask some questions?

9 JUDGE TOREM: I'm not suggesting that all of
10 these be given Mr. White's accommodation; that they just
11 have their testimony in by affidavit; but that they might
12 be quick telephone calls and not have to travel.

13 MR. PEEPLES: May I also inquire about some
14 of CFE's people. Ken Bevis, he just has ROKT. Would the
15 people want to talk to Bevis? And Ted Clausing.

16 JUDGE TOREM: The reason I left the CFE
17 witnesses alone for this first round of trimming was I
18 wanted to hear from Mr. Tribble if he wanted those people
19 left off.

20 Second, there were some issues last time as
21 to which witnesses were having the Department's position
22 for Ecology and Fish and Wildlife, and I think those might
23 be better hashed out in person than by telephone. So
24 that's why I left them off my first list and that was the
25 logic there. It may be that I'm remembering issues from

1 Wild Horse that don't apply here, but I just thought some
2 of these same names came up in both cases and the same
3 confusion might still apply.

4 MR. PEEPLES: I can speak to my
5 understanding is specifically with WDFW we gave them a
6 witness that was not the agency's position and they kept
7 somewhat of a wall between them.

8 MR. TRIBBLE: This is Mike Tribble. I can
9 speak to that issue if now is the right time.

10 JUDGE TOREM: Go ahead, Mr. Tribble.

11 MR. TRIBBLE: We can stipulate as Counsel
12 for the Environment that these witnesses are based on--the
13 witness testimony is offered based on their specific
14 personal knowledge and expertise in the field, but they do
15 not speak on behalf of their representative agency.

16 JUDGE TOREM: I think that may be covered in
17 their testimony making that clear.

18 MR. PEEPLES: I believe it is.

19 JUDGE TOREM: When you were referring to
20 those witnesses again, Mr. Tribble, is just Mr. Bevis?

21 MR. TRIBBLE: Ken Bevis and Tom Tebb.

22 JUDGE TOREM: Mr. Tebb was already on my
23 initial screen list simply because, again, storm water and
24 wetlands weren't coming up as key issues. It had already
25 been mentioned by Mr. Peeples today.

1 Councilmembers, from that list is there
2 anyone you want to hold back from that initial screen that
3 might go to a telephone only appearance?

4 CHAIR LUCE: I would like to add one to a
5 telephone appearance.

6 JUDGE TOREM: Okay.

7 CHAIR LUCE: Possibly and that's Randy
8 Hardy.

9 JUDGE TOREM: He's No. 43 on the front page.

10 CHAIR LUCE: No. 43. I don't know how the
11 parties feel about Randy Hardy. I sort of feel about
12 Randy Hardy the same way that Mr. Hurson feels about his
13 former planning director. I would love to see Randy. I
14 think I know--I just don't know whether it's necessary to
15 have him here present.

16 JUDGE TOREM: Well, he's being presented by
17 the Applicant and Mr. Lathrop appears to be the key to
18 cross-examine. Mr. Slothower, are you still there?

19 MR. SLOTHOWER: Yes, I am.

20 JUDGE TOREM: Tell me what your feeling is
21 about having Mr. Hardy actually make an appearance for the
22 personal cross-examination or if you would be comfortable
23 doing it by phone?

24 MR. SLOTHOWER: I would be comfortable doing
25 it by phone.

1 JUDGE TOREM: Okay. If you're willing to do
2 that then Mr. Tribble and Mr. Hurson are the other ones
3 listed.

4 Mr. Hurson, any trouble with Mr. Hardy by
5 phone?

6 MR. HURSON: Off the top of my head I can't
7 remember exactly what questions I was going to ask him.

8 MR. PEEPLES: I think that's a .1.

9 JUDGE TOREM: Mr. Tribble, any questions for
10 Mr. Hardy that you couldn't ask by phone?

11 MR. TRIBBLE: No, and that goes for every
12 single witness that I have listed I can ask questions by
13 telephone.

14 JUDGE TOREM: We'll put you and a telephone
15 in another room, Mr. Tribble, and arrange for that.

16 All right. So then Mr. Hardy has been added
17 to the potential first trimming of witnesses that may not
18 appear in person and it would be simply minimal
19 cross-examination by telephone.

20 MR. SLOTHOWER: Judge Torem, this is Jeff
21 Slothower.

22 JUDGE TOREM: Yes, Mr. Slothower, if you
23 could speak up just a little bit.

24 MR. SLOTHOWER: I'm sorry. Is that better?

25 JUDGE TOREM: Slightly. Go ahead.

1 MR. SLOTHOWER: Is this better?

2 JUDGE TOREM: Very much so.

3 MR. SLOTHOWER: Okay. The individuals that
4 will testify by telephone will they have--I suppose it
5 depends upon whose witness they are, but it would be
6 helpful if they had in front of them their testimony with
7 attached exhibits and things of that nature.

8 JUDGE TOREM: I expect at the minimum they
9 would have that, and if there additional supplemental
10 exhibits that were presented say the day of the scheduled
11 cross-examination, we would work hard to get them to them
12 by fax. But if you know you're going to have additional
13 witness exhibits for these people that might be by
14 telephone, if that's formally approved today, it would be
15 wise to bring those exhibits as soon as possible,
16 hopefully on Monday, and get those faxed to them well in
17 advance so they have time to digest them before they have
18 to answer any questions. I know we have in our original
19 ground rule order the possibility of that sort of exhibit
20 coming in, but with these additional telephone
21 considerations we want to add the extra courtesy so that
22 you can ask appropriate questions if something is kind of
23 late breaking.

24 MR. SLOTHOWER: Understood. That answered
25 my question.

1 MR. PEEPLES: I think for Mr. Lathrop I
2 think the only person is Randy Hardy. I tried to make
3 sure that I had everybody there that Mr. Lathrop's
4 attorney was going to cross. So I think that really just
5 only relates to Randy Hardy.

6 JUDGE TOREM: Councilmembers, any other
7 additions or concerns?

8 MR. CARMODY: Your Honor, this is Jamie
9 Carmody. I think I can--

10 JUDGE TOREM: Hold on just one second,
11 Mr. Carmody. I just want to see if my Councilmembers have
12 anything further and then I'm going to go down the list of
13 parties.

14 MR. CARMODY: Okay.

15 JUDGE TOREM: Councilmembers, any other
16 concerns?

17 MS. TOWNE: Mr. Torem, I did have one
18 question. Should we assume that the exhibits of
19 particular focus for the Council will be those
20 accompanying the names that remain standing after this
21 exercise?

22 JUDGE TOREM: As far as the exhibits and the
23 issues that they represent?

24 MS. TOWNE: Yes.

25 JUDGE TOREM: I think we're trying to make

1 sure that the key issues that are in debate, there may be
2 key findings that we need to make for the recommendation,
3 if it's thumbs or thumbs down, to the Governor. Some of
4 those may not be at issue. They may just be a given that
5 they have to make a finding one way or the other. But,
6 yes, as to the key issues in contention that's who I think
7 you'll find in person unless there's a darn good reason
8 that they can't make it.

9 MS. TOWNE: With their accompanying
10 exhibits.

11 JUDGE TOREM: Correct. Correct.

12 MS. ADELSMAN: Let me see if I understand
13 right. I don't think you took any names out of the list.
14 We actually said by phone or Clay, Clay White, excuse me.
15 But I think the rest we didn't say take them out.

16 JUDGE TOREM: No. No.

17 MS. ADELSMAN: So we still have the--

18 JUDGE TOREM: The reason, the distinction is
19 even with Mr. White no one has any questions for him
20 because of the original preemption request being
21 withdrawn. That's no longer on the table.

22 MS. ADELSMAN: His material is still there.

23 JUDGE TOREM: His material is still there.
24 It becomes part of the record but only after he swears it
25 in. So that affidavit allows us then to accept that into

1 the record, and Mr. Hurson will make a motion at the
2 appropriate time when he presents it, and it will become
3 part of the official record. All the rest of the exhibits
4 are proposed, and if you recall from previous practice,
5 the witness comes, is sworn to tell the truth, then adopts
6 their testimony, and then it's entered into the record.

7 Each of these witnesses will do that by
8 phone. It's anticipated based on the cross examination
9 time desired by the parties and what I've seen in the
10 questions you've circulated to me in advance there will be
11 very little, if any, questions for these people, and from
12 our experience in other hearings having a person travel
13 all the way to the site just to look at our shining faces
14 may not be worth the time.

15 So we're just trying to create a convenience
16 issue. All these witnesses are still witnesses before the
17 Council and subject to cross-examination, but it's the
18 scope and extent that's so minimal we think we could do
19 them by phone and be that much more efficient.

20 If there's nothing further for the
21 Councilmembers comments, Mr. Carmody, since you expressed
22 an interest, tell me what your thoughts are.

23 MR. CARMODY: In reviewing the list, and I
24 spoke with Mr. Hurson yesterday about Mr. White, we would
25 waive our cross-examination on a number of witnesses if it

1 helps to accommodate those parties.

2 JUDGE TOREM: All right. If you have a list
3 of those that you want to waive, that will help with the
4 final scheduling idea. So if you want to go down that
5 list now, that's fine.

6 MR. CARMODY: I do and I'll work off the
7 list that you had gone through. The first would be Thomas
8 Tebb.

9 JUDGE TOREM: All right.

10 MR. CARMODY: The second would be Michael
11 Pappalardo.

12 JUDGE TOREM: All right. He's Witness No.
13 23.

14 MR. CARMODY: Witness 23, Witness 24, Josh
15 Butler.

16 JUDGE TOREM: All right.

17 MR. CARMODY: Witness 30, Randall Krichbaum.

18 JUDGE TOREM: All right.

19 MR. CARMODY: Witness 28, Jeffrey Flenniken.

20 JUDGE TOREM: All right.

21 MR. CARMODY: Witness 31, Les Polisky;
22 Witness 32, Dan Pitzler; Witness 33, Jeanne Acutanza. I
23 think that's the list.

24 JUDGE TOREM: All right. Did you want to
25 reserve your right then as to 37, 38, and 39 as well?

1 MR. CARMODY: Yes.

2 JUDGE TOREM: I anticipated those would
3 be--and are you comfortable with the three of them being
4 by telephone?

5 MR. CARMODY: That would be fine.

6 JUDGE TOREM: I believe that Mr. Jorgensen
7 we may have to make some specific time change and
8 adaptation items if he's not going to travel from Denmark.

9 MR. PEEPLES: Right.

10 JUDGE TOREM: Ms. Acutanza wasn't on the
11 list. That was because of Counsel for the Environment.
12 If we want to add her at this time, Mr. Tribble, would she
13 be someone that would also be for transportation issues
14 someone you would be comfortable cross-examining by
15 telephone?

16 MR. TRIBBLE: For the transportation issue?

17 JUDGE TOREM: Yes.

18 MR. TRIBBLE: I can also waive that as well.
19 If we want to treat--if Council doesn't have any specific
20 questions for these people, I suggest that we treat them
21 the same way as Mr. White.

22 JUDGE TOREM: The Council may have some
23 questions and I think these folks probably--Mr. White's a
24 separate issue in a special class I think. Unless the
25 Council were come to me and say we know we don't have any

1 questions for this person, we absolutely positively won't,
2 I want to leave open the possibility for them to at least
3 appear by telephone. But if you're waiving that, then
4 we'll add Ms. Acutanza to the list of folks that could be
5 made into telephone witnesses.

6 Now, the other issue that's going to come up
7 for staff is to make sure that on the date that the
8 Central Washington University facility is available that
9 all of these witnesses are available for the telephone
10 that we have to do and we would have to schedule which
11 sessions might be at Central Washington. So it certainly
12 won't be Monday, the 18th, but one of the days. It looks
13 like it would be Wednesday, the 20th, if that's when the
14 facility is available that all these witnesses would be
15 accommodated on that date. So that's the other issue.

16 Other parties on the phone are there any
17 other concerns?

18 Debbie, I took your witness, Mr. Grover, and
19 put him on the list for telephone. Ms. Strand, any
20 concerns from your perspective?

21 MS. STRAND: No.

22 JUDGE TOREM: Is he local? Remind me.

23 MS. STRAND: No, he is from Portland.

24 JUDGE TOREM: So would he be appreciative
25 then not having to drive up?

1 MS. STRAND: Correct.

2 JUDGE TOREM: Any other parties whose
3 witnesses I've just blankly added to the list of telephone
4 folks and any concerns?

5 MR. SLOTHOWER: Your Honor, this is Jeff
6 Slothower. Couple of points. One, the time that we
7 estimated we were trying to ensure that we had enough
8 time. I anticipate, for instance, with witness 20, Chris
9 Taylor there after Kittitas County is done cross-examining
10 Mr. Taylor our cross-examining may be very brief. It's
11 just we were unsure as to what areas others would be
12 covering; therefore, we left time to cover the issues we
13 wanted to make sure got covered, but those times may very
14 well slip back and be significantly shorter depending upon
15 who cross-examines ahead of us.

16 Also I have one witness, Witness 101, David
17 Taylor who I learned today in talking with him again that
18 he cannot be there on the 19th and would prefer to testify
19 on the 20th if that is acceptable.

20 JUDGE TOREM: Any concerns about the 20th,
21 Mr. Peeples, moving that one witness?

22 MR. PEEPLES: No, I have no--just let me
23 see. It was CFE .1, us .5, County .1. No, I have no
24 problem with him of moving him, and he's also one
25 depending on what comes up we may not even ask him

1 questions too. So we'll clarify that. We'll talk to--I
2 think attorneys need to talk between ourselves as to when
3 we put placers down whether we're going to use them. So
4 we need some communication on that.

5 JUDGE TOREM: All right. Any other parties
6 on the phone have any other input as to telephone witness
7 appearances?

8 Nothing from the parties then.

9 Ms. Adelsman.

10 MS. ADELSMAN: Just clarification. When
11 you're talking about waiving, are we talking by phone or
12 just waiving?

13 JUDGE TOREM: Right now the only the witness
14 who is not going to for sure get any cross-examine
15 questions is Clay White.

16 MS. ADELSMAN: So waiving meaning not to be
17 inclusive but to be by phone.

18 JUDGE TOREM: Correct. Nothing is being
19 waived. It's just now the convenience issue of who
20 travels and who doesn't next week.

21 MS. ADELSMAN: I understand. Just the use
22 of the word waive that kind of got me.

23 JUDGE TOREM: So at this time then I'm going
24 to ask the Council for an acclamation vote that the
25 following witnesses need not travel.

1 MR. PEEPLES: May I ask about Sterzinger
2 too? He's coming from D.C. and he's down for a .35 on
3 property values. 35, George Sterzinger we only have ROKT
4 for .25.

5 JUDGE TOREM: Mr. Carmody, as far as your
6 cross-examination of Mr. Sterzinger would that be okay for
7 him to be by telephone and avoid the trip from Washington,
8 D.C.?

9 MR. CARMODY: That would be fine.

10 JUDGE TOREM: Mr. Hurson, you've got a tenth
11 of an hour down for that one.

12 MR. HURSON: Yes, I'm trying to distinguish
13 between him and Mr. DeLacy. I can't remember. I'm sure I
14 can be adaptable.

15 JUDGE TOREM: Councilmembers, let me have
16 instead of the pantomime we got, we have the description
17 as to the difference between Mr. Sterzinger and
18 Mr. DeLacy. Tim, can you give that to the Council. That
19 way they can decide if that's okay if he's by telephone.

20 MR. McMAHAN: Yes. Tim McMahan. Not in any
21 way to portray the strength or weaknesses of any
22 testimony, Mr. Sterzinger is the fellow that did the
23 nationwide analysis of property values with some fairly
24 broad global concepts. There's controversy in some of the
25 rebuttal about it.

1 Mr. DeLacy was the fellow who's actually
2 been out in the County, testified before the Board of
3 County Commissioners, and there's some record in those
4 transcripts of Mr. DeLacy's testimony. So he's the more
5 really on-the-ground fellow who we would be offering as a
6 witness.

7 JUDGE TOREM: Councilmembers, does that
8 sound like Mr. Sterzinger for his short cross-examination
9 as anticipated he could be by telephone as well?

10 MS. ADELSMAN: Yes.

11 JUDGE TOREM: So we'll add that. Any other
12 ones that need to be added to the list before I just recap
13 it for the record and ask for a quick vote from the
14 Council?

15 Seeing no additions, the following
16 witnesses, Council, a vote of yes would mean the Council
17 would not physically see these people but would have them
18 available only by telephone for the adoption of their
19 testimony and cross-examination: Witness No. 90, Tom
20 Tebb; Witness No. 43, Randy Hardy; Witness No. 35, George
21 Sterzinger; Witness No. 80, Steven Grover; Witness No. 23,
22 Michael Pappalardo; Witness 24, Josh Butler; Witness 30,
23 Randall Krichbaum; Witness 28, Jeff Flenniken; Witness 31,
24 Les Polisky; Witness 32, Dan Pitzler; Witness 33, Jeanne
25 Acutanza; Witness 37, Henrik Jorgensen; Witness 38,

1 Michael Bernay; and Witness 39, Dan Kammen.

2 Those are the witnesses that we have on the
3 list that need not travel if you vote yes but would still
4 be available for cross-examination from the parties,
5 intervenors, and Councilmembers by telephone, and staff
6 will make sure the arrangements for telephone and the
7 dates that facility will be available are coordinated with
8 the attorneys presenting those witnesses.

9 MS. WILSON: So moved.

10 CHAIR LUCE: Second.

11 JUDGE TOREM: There's a movement to do that
12 from Ms. Wilson and seconded by Chair Luce.

13 CHAIR LUCE: We all seconded it.

14 JUDGE TOREM: All right. All those in
15 favor?

16 COUNCILMEMBERS: Aye.

17 JUDGE TOREM: So the witnesses that were
18 listed now will be by telephone unless they choose to
19 appear on their own volition.

20 MR. FIKSDAL: Judge Torem, I haven't added
21 up the number of hours or time that it may take. I don't
22 know if it's more than a day or half a day or the numbers
23 of time, but we'll work that out.

24 JUDGE TOREM: I want to direct Mr. Peeples
25 to calculate that. He and Mr. McMahan have been putting

1 this together with Mr. Tribble and since, Mr. Tribble,
2 you're not here this afternoon, I hope that before the
3 departure for Seattle occurs in a half an hour or so that
4 those numbers can be totalled and a particular time chosen
5 with attention to Mr. Jorgensen's availability as to the
6 time in Denmark how we can accommodate that with the rest
7 of the schedule, if at all possible. My hope is that
8 we'll have one either a morning or one afternoon session
9 at that alternate facility, and all of these telephone
10 witnesses will be processed through at that time. Is that
11 going to be sufficient, Mr. Fiksdal?

12 MR. FIKSDAL: We'll do our best.

13 JUDGE TOREM: All right. We'll hope for the
14 best. Also on the schedule in discussion with Mr. Peeples
15 this morning it sounded as those if we assigned particular
16 times for each witness the inevitable filling of that time
17 will occur. What I propose then is to give some time
18 lines for starting and ending, and these will be
19 identified targets to accommodate things and give then
20 Mr. Tribble and Mr. Peeples some boundaries as to when to
21 fill in the witnesses.

22 Monday we'll start at 8:30 in the morning,
23 and as Mr. Hurson said hopefully there won't be too many
24 preliminaries and we can get on the first witness shortly
25 after 8:30. But we will stop between 12:00 and 1:00 each

1 day for lunch and go to as close to five o'clock as we can
2 either until the witnesses run out, or if a witness is
3 just going to have a few more minutes, we'll carryover and
4 be flexible on Monday. So if we go from 8:30 to 12:00 and
5 1:00 to 5:00, that would 7-1/2 hours. Certainly there
6 will be breaks between witnesses for comfort, etc., until
7 the max we'll get in is 7-1/2 hours on the record,
8 probably closer to 6-1/2 when it's all said and done.

9 Tuesday we have the same schedule, 8:30 to
10 12:00 and 1:00 to 5:00. Wednesday and Thursday evening I
11 want you to remember we have noticed public comment
12 meetings similar to what we're doing tonight. Those can
13 probably run anywhere from two to three hours each evening
14 depending on how many people attend. So, therefore, so
15 people are a little bit fresher, I want to start a little
16 bit later on Wednesday and go from 9:00 in the morning
17 until 12:00 and then only from 1:00 to 4:00 in the
18 afternoon. So it's 9:00 to 12:00 and 1:00 to 4:00 on
19 Wednesday. The same schedule for Thursday and Friday
20 morning if necessary 9:00 to 12:00.

21 Now, there's been discussion and you'll see
22 the next bullet point there of a site visit for the
23 Council to the--there's new members of the Council that
24 have never made a site visit and it's been years since the
25 last site visit. So while the Council is in town, we're

1 going to announce at some point--I think we'll wait until
2 we get the weather report on Monday and Tuesday as to what
3 day. But either Thursday morning, Thursday afternoon, or
4 Friday morning, somewhere in those blocks of time would be
5 the most advantageous times to go out to the site, and
6 certainly that would be part of the hearing. There
7 wouldn't be any communications really allowed with the
8 Councilmembers because it's all on-the-record time, but we
9 would have some sort of staff guided tour and any comments
10 that were there would be recorded so that they become part
11 of the record. But it would be really a looky-lou visit.

12 If there were questions, they would have to
13 become part of record, and we'll arrange for some way to
14 take those down out in the field, but we'll try to keep
15 that communication to a minimum so that anything that's
16 said in front of the Councilmembers is said in front of
17 everybody. We'll find a way to do this. It's been done
18 before. But Thursday morning or afternoon or Friday
19 morning before the Council leaves town would be the
20 preferred site visit time.

21 So those are the other things that we would
22 be working with as we put this together, and if the
23 witnesses are done in three days, it gives us plenty of
24 time on Thursday to get a site visit and still have the
25 public meeting.

1 Councilmembers, that's all I have on Item
2 No. 4 for the hearing schedule.

3 Chairman Luce, is there anything else that
4 you have a concern with?

5 CHAIR LUCE: No. I think all matters have
6 been handled expeditiously. I'm comfortable with the
7 schedule. I appreciate the parties agreeing to take a
8 number of witnesses by telephone which I think will help
9 greatly.

10 JUDGE TOREM: Mr. Peeples, you had something
11 else?

12 MR. PEEPLES: Yes, I do. There probably are
13 going to be some objections at least we'll be making with
14 regard to some of the areas that apparently ROKT are still
15 trying to cross-examine on. We believe they're outside of
16 their area of intervention. So do you want to handle that
17 now or when those witnesses come up?

18 JUDGE TOREM: I would like to handle that
19 either first thing Monday, and if you can let Mr. Carmody
20 know who you will be objecting to sooner rather than
21 later, that way he can prepare and decide if you need to
22 make any argument whatsoever or if those are simply
23 placeholders that he will withdraw. Monday then I'll have
24 the order on intervention in front of me, and I'll be able
25 to make a more accurate ruling. I've reviewed that

1 recently in anticipation of that procedural movement, but
2 I'm not ready to do that today, and I'd rather get to
3 Ellensburg and be ready and have reviewed the testimony as
4 well.

5 MR. PEEPLES: Okay. That's fine. There's
6 not very many.

7 JUDGE TOREM: Just let Mr. Carmody have some
8 advanced knowledge so that if he wants to withdraw,
9 perfect. If he doesn't, he's having a little bit more
10 time to argue as to why that's within the scope of his
11 intervention.

12 MR. CARMODY: This is Jamie Carmody. If
13 Mr. Peeples will just call me, we can work those things
14 out.

15 MR. PEEPLES: Sure. I'll try to give you a
16 call--I might not be able to get a hold of you, Jamie,
17 today but I'll try to call you tomorrow.

18 MR. CARMODY: That would be fine.

19 MR. PEEPLES: Okay. Thanks.

20 JUDGE TOREM: Anything else on Item 4?
21 Hearing none, let's move to Item 5. You should have
22 gotten a copy of three additional questions or issues
23 labeled in setbacks, aesthetics, and preemption, a couple
24 of bullets under each. As I went through the questions
25 that were circulated from Councilmembers to me and try to

1 find common themes, these were the areas where the
2 Councilmembers had some remaining concerns. And I didn't
3 mean to elevate those issues as the remaining issues, but
4 these were areas where I didn't think that the
5 Councilmembers could simply ask the question on
6 cross-examination whole to the witness and expect to get
7 the best possible answer.

8 So I wanted to publish a list of themes of
9 areas that might be out there and might lend themselves to
10 the attorneys bringing a supplemental exhibit, if one
11 exists, to help clarify things for the record next week
12 and get this to you today or I think most of you got it by
13 yesterday afternoon and at least be on record that the
14 Councilmembers are thinking in these directions, and it
15 would be hard for them to focus this into just one or two
16 or a series of cross-examination questions.

17 These aren't the extent of their
18 cross-examination questions that I've seen so I don't want
19 you to think they'll be mute the rest of the time, but
20 certainly these are the ones that I didn't think would be
21 fair to your witnesses to just have them sprung on them
22 next Monday or Tuesday.

23 So if you see anything in there that you can
24 find a supplemental exhibit and bring it Monday or
25 Tuesday, please do. If you know that this is going to be

1 one of your witnesses that you're presenting, when you
2 have them adopt their testimony you might say, "It's come
3 to my attention that the Council has an inquiry in this
4 area, would you like to explain your position." That will
5 help us out in cross-examination further. So that's what
6 the intent of this was.

7 Councilmembers, does that sound like what I
8 told you I was going to say today?

9 All right. Good.

10 MR. PEEPLES: May I ask a clarification on
11 the last thing?

12 JUDGE TOREM: Please.

13 MR. PEEPLES: So what you're eliciting is
14 new testimony from the witnesses on these things?

15 JUDGE TOREM: This is sort of an advanced
16 hit list to where the Council wants to go on cross. They
17 may be able to clarify their positions on any of these
18 issues as to why. It may be obvious to you. It's your
19 witness and some other thinking you've done, but I'm not
20 eliciting a long stretch of additional testimony, just a
21 direct answer to those questions which somehow will be
22 asked on cross. If you find a way in direct to solve what
23 you might perceive is confusion here, maybe I've captured
24 the Councilmembers' themes and I've confused them, you
25 might be able to set me or the Councilmembers straight as

1 to why these answers can be found somewhere else in their
2 testimony or with an additional sentence or two.

3 MR. PEEPLES: Okay.

4 JUDGE TOREM: Yes, in that regard I do want
5 additional clarifying testimony but not a long and
6 certainly nothing prewritten. It will just be verbal
7 testimony that day.

8 MR. PEEPLES: Okay.

9 MR. McMAHAN: Mr. Torem, Tim McMahan. If I
10 might just clarify something on the first area setbacks
11 without going into matters that are subject to the
12 hearing. One could bring in a notebook full of
13 ordinances. I mean I'm just kind of looking to understand
14 better what the Councilmembers might think is an
15 appropriate response to that. One could have a witness
16 just talk about what they know about setbacks from other
17 places. One could do a big research project on the
18 internet and bring things in and surprise everyone so that
19 one--

20 JUDGE TOREM: That one is probably the
21 widest area, and I'm certainly not looking for someone
22 like Mr. Sterzinger to go do some research this weekend
23 and find out how many areas or jurisdictions nation wide
24 or world wide have rules and laws on this, but there may
25 be that there's been issue taken with Kittitas County's

1 ordinances and why we're going back and forth from 1,320
2 to 2,500 and what's the setback. Where does that come
3 from?

4 Mr. Hurson might come in with a binder and
5 say this is why the Council had 2,500 feet. It's not
6 otherwise explored in the testimony from Mr. Piercy. This
7 is where they're getting this idea and show us a model
8 ordinance from somewhere else. He may not. You might
9 come in and say here's five other wind farms. I don't
10 think you want a whole lot more testimony or exhibits to
11 be three-feet thick. You just want to say here's a basis
12 where it's worked somewhere else from your perspective and
13 Mr. Hurson might say 1,300 feet has been proven
14 ineffective in other jurisdictions. Then the Council will
15 have to decide what's right for Kittitas County.

16 So I'm not looking for a treatise, but the
17 Councilmembers want to know if there's somebody else
18 that's done this successfully from either perspective, put
19 the wind towers farther away or allow them closer in, and
20 what's their experience been.

21 CHAIR LUCE: Let me amplify on that. There
22 was testimony from the Applicant that discussed I believe
23 1,320 feet is generally acceptable. So, you know,
24 generally accepted by whom? You know, where did this
25 number come from? Then the Board of County Commissioners

1 discussed at various times, Mr. Hurson, 2,000 or 2,500 I
2 think. So where did that come from? Is there anything
3 specific that these numbers were drawn from either from
4 existing laws or model ordinances or comparable wind
5 projects? Where did the numbers come from?

6 JUDGE TOREM: So I don't know, Mr. McMahan,
7 whether that answers your question, but we're not looking
8 for an exhaustive list but something that tells us the
9 numbers that have been argued and will be argued about
10 next week how can the Council best know a basis for that
11 then later on when the Council makes its findings of fact.
12 I'm looking for you to help us make that finding of fact
13 better and so it doesn't appear to anybody, particularly
14 nine justices, an arbitrary capricious decision as we pick
15 a number.

16 CHAIR LUCE: Maybe hypothetically it's how
17 far would a turbine blade be thrown potentially under
18 safety conditions. That would be one issue. I mean maybe
19 that's the basis for it. Maybe it is relating to what do
20 they look like. Maybe it's relating to the property
21 value. But there's got to be some standard out there
22 somewhere that other people have utilized.

23 JUDGE TOREM: You can see where his
24 cross-examination is going to go next week.

25 MR. McMAHAN: Sure.

1 JUDGE TOREM: So I just want you to be aware
2 if there's something in documentation that you can bring
3 in, that's the sort of thing I want you to know today
4 rather than have to come in next week cold and say let me
5 get back to you. I'm giving you a week to get back to us
6 essentially.

7 MR. McMAHAN: I appreciate the notice.
8 That's fair and it's helped a great deal to understand
9 where that was coming from. The concern I had was
10 witnesses, and not the Applicant, of course, but witnesses
11 doing a great huge internet research project and bringing
12 in a lot of interesting standards, and I think at least I
13 as one of the lawyers here understand better sort of where
14 this is coming from. So I think we are better prepared to
15 deal with it.

16 JUDGE TOREM: We may get some large internet
17 submissions from comments tonight or next week so I don't
18 know. But nevertheless that's the issues and where
19 they're coming from.

20 Mr. Hurson, does that clarify it for you as
21 well?

22 MR. HURSON: I can see where this could have
23 some real potential problems however. Part of this I mean
24 the big thing for the County is there a basis for
25 preemption. No such information was supplied to the

1 County during the course of the public hearing process for
2 the County that my clients would have before them to use
3 as a supposed standard.

4 JUDGE TOREM: Understood.

5 MR. HURSON: So we would be having new
6 information that we never saw.

7 JUDGE TOREM: If it comes up that there's
8 new information, I expect you will make the argument as
9 against preemption at that point. But I'm looking to see
10 because the Council at your Board of County Commissioners
11 may have very well had that same issue and wanted to ask
12 it. I've just taken the liberty of doing so in advance.

13 MR. HURSON: Well, I think as you go through
14 ours where the numbers I believe the transcripts from the
15 Commissioners pointed to the environmental analysis for
16 the basis for coming up with the setbacks and then that
17 their personal visits confirmed to them personally what
18 the environmental analysis had already told them.

19 JUDGE TOREM: Okay.

20 MR. HURSON: You have to read the transcript
21 to do it and that was something I was going to point out
22 basically in closing argument brief and cite line and
23 verse out of transcripts. But if you're looking for some
24 point to where that is, that's where you'll find it
25 already.

1 JUDGE TOREM: So this is again just not an
2 invitation for voluminous new information and not an
3 invitation for anybody to backdoor anybody else with brand
4 new information, but simply that's what the Council was
5 thinking and we need some answers if they're out there.

6 Other parties on the line any questions
7 about these setbacks, aesthetics, or preemptions issues?

8 All right. Seeing none, that's all there
9 was in Item 5. Are there any other procedural matters
10 that we are not going to handle Monday morning? We've
11 already indicated questions as to striking
12 cross-examination rights if it's outside the scope of
13 intervention. We'll take that up next week. Any other
14 procedural items?

15 Mr. Hurson.

16 MR. HURSON: I would just one thing. As you
17 recall earlier on, I think it was Mr. Ifie was the DNR
18 representative and we filed an appearance of fairness
19 challenge. I know that was turned down and you have a new
20 representative. It was intended to be basically as to the
21 DNR representative in general. It may have said Mr. Ifie.
22 So rather than bringing this up on Monday, it just makes
23 sense to reiterate and confirm that the County's challenge
24 was to the DNR representative.

25 JUDGE TOREM: Certainly. I'll make that

1 part of the record now and accept that the challenge was
2 not against Mr. Ifie personally but his appearance on
3 behalf of the Department and therefore Ms. Wilson's
4 substitution for them that's a continuing objection; and
5 the ruling by the Council will then be a continuing ruling
6 on appeal, if there is one, that will be taken up and can
7 go from there. And I don't remember was yours against
8 also Mr. Fryhling from Community, Trade, and Economic
9 Development or did that come from Mr. Lathrop?

10 MR. HURSON: I think Mr. Lathrop had one for
11 Mr. Fryhling, yes.

12 JUDGE TOREM: Mr. Slothower, if you're still
13 with us, I'll take it that if there's any substitution of
14 folks that continues on that objection goes to the basis
15 of that county or that agency having a seat and also a
16 potential interest.

17 MR. SLOTHOWER: That's correct. We weren't
18 challenging that person as an individual but more because
19 of their capacity as a representative of the agency, and
20 we continued our objections in a brief opening statement
21 that we filed.

22 JUDGE TOREM: Understood. So those remain.
23 Any other procedural matters holding over?

24 Mr. McMahan.

25 MR. McMAHAN: Yes, Your Honor. You had

1 asked that we do the math on the numbers of hours for
2 cross-examination of telephone testimony, and it appears
3 to be 4.35 hours not taking away the 1.75 hours of ROKT
4 that at least by my account looks like was the area waived
5 within those testimonies are moved over to telephone. So
6 in terms of continuing over to another facility that has a
7 good phone that looks like the number based on what's on
8 the paper here.

9 MR. FIKSDAL: But we have to take into
10 account time dialing, getting the person or having the
11 person call in. We have to work those logistics out
12 whether we dial or they dial in. That's going to take as
13 much time as the testimony itself I think.

14 JUDGE TOREM: Stretch your hands out, Allen,
15 and get ready.

16 MR. CARMODY: This is Jamie Carmody. I
17 don't know if there was a misunderstanding. It was my
18 intent to waive the cross-examination on the one that I
19 identified.

20 JUDGE TOREM: I think that's fine. We've
21 got then probably a block of anywhere between three and
22 five hours depending on how long it takes to swear people
23 in, adopt their testimony, and dial. So we'll work with a
24 three to five hour block. If we need to move lunch back a
25 little bit, we'll do that and move things around.

1 Any other procedural matters?

2 MR. HURSON: Maybe if Allen wants to check
3 with our fairgrounds. I know that the phone problem
4 before was something that was brought to their attention.
5 I don't know if they got it fixed, but they may very well
6 have so there isn't a need for moving. But I'd suggest
7 you check in advance to make sure that it's working.

8 MR. FIKSDAL: It appears the Applicant has
9 been working with Central.

10 MR. PEEPLES: The acoustics are really bad
11 in that room for that type of thing. It's okay for what
12 we have. I think they're bad for a telephone.

13 MR. FIKSDAL: We'll work this out in the
14 best venue as possible.

15 JUDGE TOREM: Excellent.

16 MR. TRIBBLE: This is Mike Tribble. I have
17 a point of clarification I would like to ask regarding
18 telephone testimony. Did you identify a specific single
19 day that telephone testimony would be made, and if so, any
20 identifying person from an earlier day would then be moved
21 to a later date?

22 JUDGE TOREM: That's the idea, Mr. Tribble,
23 that they will all be taken in one block in whatever
24 order, and I'll leave that for the individual presenting
25 parties to get with Mr. Peeples to schedule if there's

1 specific times. But we don't even know what date the
2 facility would be there. If they're a Monday witness,
3 right now Mr. Tebb I see that he's unavailable the 19th
4 and the 20th.

5 MR. TRIBBLE: That's the basis of my
6 question.

7 JUDGE TOREM: I was anticipating that. So
8 it may be for him for the one witness that you have if
9 he's not available on the date that the Central Washington
10 University site is available we'll to go with Plan B and
11 as Mr. Hurson suggests try to make the best due we can
12 with his testimony by phone in the fairgrounds room. So
13 there will be some exceptions I'm sure, but we're going to
14 try to get everybody that we can into one block of
15 telephone witnesses so that the Council travels to Central
16 Washington one time, has the hearing session there one
17 time, and as many witnesses as possible are sworn in,
18 adopt their testimony, and if there is any, cross-examined
19 at that time.

20 MR. TRIBBLE: As I have not personally gone
21 through this process before, I just want to make it clear
22 so that I'm not crossed up. Mr. Tebb does not have to
23 make the trip let's say if the 20th or the 19th is the
24 only days we're doing telephonic.

25 JUDGE TOREM: Correct.

1 MR. TRIBBLE: He can testify by a separate
2 less reliable telephone.

3 JUDGE TOREM: Correct.

4 MR. TRIBBLE: Okay. Thank you very much.

5 JUDGE TOREM: If you want Mr. Tebb to
6 testify on the 18th, HE'LL have to travel because we won't
7 be having telephone witnesses that day at Central. If you
8 talk to Ms. Makarow and she's convinced that we could get
9 telephonic testimony in the room on Monday and do it with
10 that quasi less reliable telephone we might very well be
11 able to take Mr. Tebb that day, and there's no parties
12 that have reserved cross-exam time for him so it would
13 simply be a question of swearing him in on Monday with the
14 telephone and having Council cross-exam if there is any.
15 I'll leave that to you and Ms. Makarow to decide if that's
16 even a possibility for Monday so that you can keep him on
17 the schedule and not have to worry about his availability
18 the rest of the week.

19 MR. PEEPLES: Can we take him by affidavit?

20 JUDGE TOREM: I don't know if there's
21 questions for storm water or wetlands yet. There were
22 some issues about wetlands discussion. It may be that
23 there's a movement or a motion on Monday, Mr. Tribble, to
24 bring in his testimony by affidavit so you may want to get
25 one prepared before you come over, and then if the Council

1 then says we don't have any, it would be a done deal on
2 Monday morning. You can make that motion at that time.

3 MR. PEEPLES: It would seem to me that we
4 could make the motion. As long as the affidavit is in at
5 the end of the close of the record, that's all that we
6 would need to do.

7 JUDGE TOREM: So that's another way. Again,
8 the list we went through today was the first cut. There
9 may be that you want to present a motion Monday morning
10 for those people you see don't have anybody to
11 cross-examine them. You may want to move for affidavit
12 and see if the Council has any questions before we call
13 them, that sort of thing. Okay? But, again, we'll have
14 to get their testimony in at one point or another.

15 MR. TRIBBLE: Thank you.

16 JUDGE TOREM: Anything else?

17 Mr. Peeples.

18 MR. PEEPLES: Yes. Mike, are you going to
19 be in Olympia tomorrow morning?

20 MR. TRIBBLE: Yes, I will. I'll be in
21 Olympia all day and we can coordinate all this.

22 MR. PEEPLES: Rather than trying to get at
23 it tonight, can Mike and I try to put this all together
24 maybe with Irina tomorrow over here early in the morning
25 and get it out? Is that Okay?

1 Jim, would you be available on telephone if
2 we need to call you and go over it? I'm trying to get the
3 final thing.

4 MR. HURSON: No, I have a meeting at 9:00 in
5 the morning.

6 MR. PEEPLES: Okay. Okay. Well then I
7 would like to have Mike and I meet with Irina tomorrow
8 morning and do the final to get it out to everybody.

9 JUDGE TOREM: All right. Certainly. And I
10 think--

11 MR. PEEPLES: Will you be available too if
12 we need to talk to you as far as you've got your notes
13 down there too?

14 JUDGE TOREM: Yes, Irina knows the telephone
15 numbers to reach me at tomorrow.

16 MR. PEEPLES: Okay. If that's okay with
17 everybody.

18 JUDGE TOREM: So we're done with Item 5
19 then--or Item 6. Are there other procedural matters?

20 MR. GARRETT: Ed Garrett with ROKT.

21 JUDGE TOREM: Sir, how are you?

22 MR. GARRETT: I'm fine, sir. Your Honor, I
23 just have a question of clarification on your site visit.
24 Do you plan on just taking the EFSEC Councilmembers in a
25 van and driving down Highway 97 looping around Bettas Road

1 coming back or do you actually plan on trying to tour the
2 other private road accesses that actually go up into the
3 project area such as Cricklewood Lane and Elk Springs
4 Road?

5 JUDGE TOREM: My understanding, Mr. Garrett,
6 is the last time there were site visits they were more
7 informal along the lines of just driving on the highway
8 and trying to find points that might have been shown in
9 the illustrative exhibits and looking and saying, "Here's
10 what we see now, here's what those pictures showed us,"
11 that sort of thing. I don't know that we've made any
12 access arrangements to get onto other private roads in the
13 past so I'm not certain that we would do this now.

14 Ms. Makarow, I wasn't there on some of those
15 site visits back in 2003.

16 MS. MAKAROW: The only access to private
17 roads that we had were those through which the Applicant
18 had keys for gates and issues like that. So we did not
19 seek out access on other private roads through other
20 people.

21 JUDGE TOREM: So I guess we would try to
22 repeat whatever is available this time, Mr. Garrett, and
23 the Councilmembers would be in the van, but other parties
24 would certainly again as this would be part of the hearing
25 process allowed to accompany and see what the

1 Councilmembers are seeing. So we'll have to make sure
2 that the arrangement for access allowed for a much larger
3 parade to go along with.

4 MR. GARRETT: I sent an e-mail to Irina. It
5 was a couple weeks back. I will volunteer to bring keys
6 to open up the access gate for at least Cricklewood Lane
7 and I also have someone who's willing to open the gate for
8 Elk Springs Road if the Councilmembers would choose to
9 just take a little trip up those roads, check the maps,
10 look at the land ownership, and get an idea of what it's
11 going to look like from the inside.

12 JUDGE TOREM: Well, I'm leaving that for
13 staff to accommodate the request from the Councilmembers
14 for another site visit and figure out the exact itinerary.
15 I don't know that the Councilmembers would have been so
16 busy reading that we thought about which roads should be
17 driven on or not. But if parties have recommendations,
18 I'd just ask them to forward those to staff and the
19 Council will go where staff take us.

20 MS. MAKAROW: Maybe I can coordinate
21 informally with the parties when we're in Ellensburg prior
22 to the site visit so that we can work something out.

23 JUDGE TOREM: Yes, please, Monday as I'm
24 suggesting this visit wouldn't occur until Thursday at the
25 earliest weather permitting. So we'll find out from staff

1 as the week goes on what folks want us to see, and Council
2 may have its own questions as to viewpoints.

3 I've been reminded by talking about those
4 illustrative exhibits, Mr. Peebles and Mr. McMahan, and
5 maybe also, Mr. Slothower, this might be relevant to you
6 if you're still on the line. The pictures that we got I
7 think in Mr. Priestley's most recent photographs from CH2M
8 Hill that showed the visualizations if you're planning on
9 bringing larger portions of those in poster board size
10 ones or certain ones you think are key for either side,
11 those might be something that would be helpful for the
12 Councilmembers to have at a break in the hearing to
13 actually see a bigger picture of. That is a suggestion
14 not a direct request, but it's been something we talked
15 about. Those are always helpful at the public meetings to
16 show the public what the proposed project might or might
17 not look like from one perspective. Councilmembers
18 already have some of these in the attachments to
19 supporting exhibits and certainly they're going to become
20 part of the record. But if there's a better illustration
21 please do it, if it's not too much trouble.

22 Also when those are identified in the
23 testimony the sort of additional question might be, "And,
24 Mr. Priestley, what's the views for the current proposed
25 project?" so the Councilmembers can really go through it

1 if it's not directly in his testimony already to circle
2 the exhibit numbers that are the current views, not of the
3 views that's proposed of the old project from years ago.
4 That's a little bit of a confusion.

5 That's one issue I didn't raise in the
6 attached issue sheet, but something to know which exhibits
7 are the ones that tell us what we're looking at that's the
8 one that you're asking from the Applicant's perspective to
9 approve. As long as those are clarified that would be
10 great.

11 CHAIR LUCE: This is Jim Luce, Chair.
12 Earlier, and I'm not sure whether it was in the initial
13 application, the Draft EIS, or the Supplemental EIS or
14 just the initial application, there were two maps prepared
15 by CH2M Hill, one of which showed a model of the local
16 project visual impacts and it had lots of red all over it.

17 MR. PEEPLES: What's the number on that?

18 CHAIR LUCE: I'll leave that up here to
19 figure out.

20 JUDGE TOREM: This one doesn't have a figure
21 number on it.

22 CHAIR LUCE: Then there was a separate one,
23 potential project visual impact in the region. There were
24 maps and they identified particularly simulated views and
25 views, and I guess what I'd like to do is to have pictures

1 that lined up with those, whether it's that particular map
2 or the revised map. There were a whole series of
3 photographs I believe again perhaps in the original
4 application that ran from Photo 1 through 15 or 16 or 18,
5 something on that order. I'll just leave them here. And
6 then there were additional, and I believe that that was in
7 the green sheet, Exhibit 22-4, and I think that was part
8 of the original application, but I could be in error
9 there.

10 JUDGE TOREM: We'll leave those up here for
11 you to look at so you know what he's asking about.

12 CHAIR LUCE: Then there were additional
13 pictures in the EIS and then there are further pictures in
14 the supplemental, the addendum to the Draft Environmental
15 Impact Statement, and some of those pictures which was
16 confusing to me--maybe that's just because it's
17 me--started out with Viewpoints 1 through 5 and then
18 seemed to jump to No. 11. So I'm trying to get all of the
19 pictures as they are today. Today what we're going to
20 talk about starting on Monday lined out in my mind
21 together with a map that shows the simulated views and the
22 actual views. It's just me.

23 MR. HURSON: I hear you. I hear you.

24 CHAIR LUCE: I apologize.

25 JUDGE TOREM: Clearly it's been a long

1 process. There's a lot of other exhibits that were out
2 there that were changes and I think the opening statements
3 helped put a lot of them in context. So I encourage the
4 Council again after you review the testimony to go back to
5 the opening statements. Each party has done a good job if
6 there are updates of telling what's happened since 2004
7 and where we are in 2006, two years later. But the
8 specific issues of which pictures are no longer relevant
9 those might be helpful from the witnesses we go to to say
10 old information, current information, and some of that
11 will factor into the discussion we have Monday with the
12 witnesses in preemption and what the County got or didn't
13 decide on.

14 MR. GARRETT: Your Honor?

15 JUDGE TOREM: Yes, sir.

16 MR. GARRETT: Ed Garrett for ROKT. That was
17 one reason I was making my question because a lot of the
18 visual pictures that were taken and were part of the
19 record none were ever taken from Cricklewood Lane. None
20 were ever taken from Eburg Ranches Road. They were taken
21 basically from the main route from a distance back, and so
22 I just think the Councilmembers would like to get a clear,
23 up-front view of what it's going to look like from the
24 people that had properties within the project area or
25 right on that list of the people that have properties 300

1 feet right on the outskirts to properties because those
2 pictures are not part of the record.

3 JUDGE TOREM: As we indicated with the
4 Council's vote to have a public meeting tonight, which I
5 think people are getting antsy to get to, more information
6 is welcome; and so if the Council is going to view those
7 things, Mr. Garrett, just please tell Ms. Makarow how and
8 the best way to make those arrangements, and I think
9 she'll incorporate that into the proposed itinerary for
10 the tour so that the Council has a full view of everything
11 that's going to be talked about throughout next week.

12 And, again, all the parties if there's a
13 specific road you want us to be on to see views from a
14 certain point, just let Ms. Makarow know early in the week
15 and she'll get with all the representatives and hopefully
16 we can have one proposed itinerary presented; and if there
17 are objections for some reason or why we should or
18 shouldn't go to certain places, those can be addressed
19 before the tour itself is adopted and sent out on and off
20 we go.

21 MR. GARRETT: Thank you, Your Honor. I'll
22 work that out with Ms. Makarow.

23 JUDGE TOREM: Thank you. Any other issues?
24 I don't think we need another prehearing
25 conference before Monday so I'm going to strike No. 7 from

1 the list. But we'll start and find out if there are
2 additional procedural matters on Monday morning in
3 addition to the discussion that you, Mr. Carmody, and
4 Mr. Peeples are going to have about cross-examination and
5 if there are any arguments left on that. Then we'll see
6 what else comes up Monday morning before we get to
7 Mr. Taylor's cross-examination.

8 All right. We are adjourned then at about
9 12 minutes until 4:00.

10 * * * * *

11 (Whereupon, the prehearing conference was
12 concluded at 3:48 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 September 12, 2006,
in Olympia, Washington.

Shaun Linse, CCR

CCR NO. 2029