

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 - 39  
 \_\_\_\_\_ )

A prehearing conference in the above matter was held in the presence of a court reporter on May 30, 2006, at 8:30 a.m., at 925 Plum Street S.E., Building 4, Conference Room 308, in Olympia, Washington, before Energy Facility Site Evaluation Councilmembers.

\* \* \* \* \*

The parties were present as follows:

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

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

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

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

Reported by:

Shaun Linse, CCR NO. 2029

Page 2

1 Appearances (cont'd):  
2 ECONOMIC DEVELOPMENT GROUP OF KITTITAS COUNTY,  
3 Debbie Strand, Executive Director, 1000 Prospect Street,  
4 P.O. Box 598, Ellensburg, Washington 98926.  
5 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),  
6 James C. Carmody, Attorney at Law, Velikanje, Moore & Shore,  
7 P.S., P.O. Box 22550, Yakima, Washington 98907.  
8 COMMUNITY TRADE AND ECONOMIC DEVELOPMENT,  
9 Tony Usibelli, Assistant Director of Energy Policy Division,  
10 and Mark Anderson, Senior Energy Policy Specialist, P.O.  
11 Box 43173, Olympia, Washington 98504-3173.  
12 \* \* \* \* \*  
13 CHAIR LUCE: The Energy Siting Council for  
14 the State of Washington will come to order for a  
15 prehearing conference on the Kittitas Valley Wind Power  
16 Project. Today is Tuesday, May 30, 2006. The time is  
17 roughly 8:30 a.m. The purpose of the meeting today is to  
18 have a prehearing conference and to discuss the status of  
19 this case which by my recollection has been pending for  
20 some substantial period of time since January 2003. I  
21 will now turn this hearing over to Adam Torem, our  
22 Administrative Law Judge to conduct.  
23 JUDGE TOREM: Excellent. My first delegation  
24 will be to ask Allen Fiksdal, manager, to call roll of the  
25 folks that are on the line.

Page 3

1 MR. FIKSDAL: For those on the line, would  
2 you please identify yourselves.  
3 MR. PIERCY: Darryl Piercy, Kittitas County.  
4 MR. FIKSDAL: Thank you, Darryl.  
5 MR. CARMODY: Jamie Carmody from ROKT.  
6 MR. FIKSDAL: Thank you, Jamie.  
7 MR. SLOTHOWER: Jeff Slothower.  
8 MR. FIKSDAL: Thanks, Jeff.  
9 MR. ROBERTSON: Mike Robertson.  
10 MR. FIKSDAL: Thanks, Mike.  
11 MS. STRAND: Debbie Strand.  
12 MR. FIKSDAL: Thanks, Debbie.  
13 MR. GARRETT: Ed Garrett, ROKT.  
14 MR. FIKSDAL: Thanks, Ed.  
15 MR. TRIBBLE: Mike Tribble, Counsel for the  
16 Environment.  
17 MR. FIKSDAL: Thanks, Mike.  
18 MS. JOHNSON: Patti Johnson, Kittitas  
19 County.  
20 MR. FIKSDAL: Thank you.  
21 JUDGE TOREM: Allen, can you go around and  
22 get the Councilmembers to identify themselves for the  
23 record.  
24 MR. FIKSDAL: Yes.  
25 Starting with the Department of Fish and

Page 4

1 Wildlife.  
2 MS. TOWNE: Chris Towne.  
3 JUDGE TOREM: Thanks, Chris.  
4 MS. ADELSMAN: Hedia Adelsman, Ecology.  
5 MR. SWEENEY: Tim Sweeney with the Utilities  
6 and Transportation Commission.  
7 MR. FRYHLING: Dick Fryhling with CTED.  
8 CHAIR LUCE: Jim Luce, the Chair.  
9 MR. FIKSDAL: For EFSEC staff, Allen  
10 Fiksdal.  
11 MS. MAKAROW: And Irina Makarow.  
12 JUDGE TOREM: We have other parties present  
13 in the room.  
14 MR. HURSON: Jim Hurson, Kittitas County.  
15 MR. PEEPLES: Darrel Peeples, the Applicant.  
16 MR. ANDERSON: Mark Anderson for CTED.  
17 MR. USIBELLI: Tony Usibelli for CTED.  
18 JUDGE TOREM: Have we missed anybody else  
19 that's present on the telephone line?  
20 We have a proposed agenda. Quickly, if you  
21 look at it, it will involve an update from the Applicant  
22 and the County on the land use consistency issues, then  
23 we'll talk about the scheduling of the adjudicative  
24 hearings, and talk about any other prehearing scheduling  
25 that we need to have once we've adopted a hearing

Page 5

1 schedule. Are there any other items to add for the  
2 prehearing conference agenda today?  
3 Okay. Seeing none, we have a motion to  
4 adopt the agenda.  
5 MR. FRYHLING: So moved.  
6 JUDGE TOREM: Thank you, Mr. Fryhling.  
7 MS. ADELSMAN: Second.  
8 JUDGE TOREM: Been so moved by Mr. Fryhling  
9 and seconded by Ms. Adelsman. All in favor?  
10 COUNCILMEMBERS: Aye.  
11 JUDGE TOREM: So we've done the  
12 preliminaries. Let me turn it over to Mr. Peeples and  
13 Mr. Hurson.  
14 MR. PEEPLES: Essentially you want to  
15 update. I just want to say there's ongoing communication  
16 on the issues. Jim came to I guess the last Council  
17 meeting and asked to reengage in communications and that's  
18 happening. The county commissioners will meet tomorrow  
19 and I think we'll know more tomorrow evening; and I would  
20 suggest that there's nothing more we can really say at  
21 this time, and I think it would be probably  
22 counterproductive for our efforts that are ongoing to go  
23 into more than that.  
24 JUDGE TOREM: Mr. Hurson.  
25 MR. HURSON: Yes, Jim Hurson for the record.

1 The next meeting of the Board of County Commissioners is  
2 tomorrow night. They set that over. There was a  
3 preliminary motion. They did emphasize preliminary. So  
4 the only time the County can in essence negotiate because  
5 of the public process is at those specific meetings; so  
6 that's the next opportunity. Based upon what I've been  
7 seeing--I was actually out of town last week--but from  
8 what I understand, I'm anticipating that there may be some  
9 further discussions tomorrow and then we'll just see where  
10 that goes from there.

11 MR. PEEPLES: But we won't know until  
12 tomorrow night.

13 JUDGE TOREM: Clearly not. I don't expect  
14 anybody to predict with any accuracy what the county  
15 commissioners might do on a given Wednesday evening, but  
16 the last meeting that they had there was some discussion I  
17 thought from local press accounts that they had rejected  
18 indicating the land use consistency. Is that accurate or  
19 can you tell us more what happened at the last meeting  
20 which you would know best what occurred?

21 MR. PEEPLES: Well, essentially there were  
22 communication issues I'm going to say, and we would rather  
23 put it that way, and the parties got back and we're  
24 communicating and Jim indicated that there was a--what was  
25 the word that was used--conditional?

1 MR. HURSON: Preliminary.

2 MR. PEEPLES: --conditional preliminary  
3 motion to deny it, and that's where it stands now. The  
4 county commissioners are coming back into session  
5 tomorrow.

6 MR. HURSON: There was a preliminary motion  
7 to deny I think. Darrel and I are both trying to keep the  
8 conversation at not getting into too many details because  
9 you don't want to rock the boat.

10 MR. PEEPLES: We don't want to try a case  
11 here.

12 MR. HURSON: We're not here to argue our  
13 case one way or the other, but the discussion ended.  
14 There was a motion preliminarily, yes, from the press  
15 accounts I believe if you saw that. There was also an  
16 indication from at least one of the board members that  
17 part of that was to leave so there's enough time to see if  
18 the Applicant wanted to come back and have further  
19 discussions. I'm gathering that the Applicant does want  
20 to do that and so then we see tomorrow what happens as far  
21 as any further discussions. But, like I said, the County  
22 can't act other than through the Board and the Board can't  
23 act other than at the meetings. So I'm kind of left at  
24 leaving it at that, and then tomorrow we'll have a better  
25 idea whether we're still going forward to work something

1 out or whether we've concluded.

2 MR. PEEPLES: And there has been  
3 communication.

4 JUDGE TOREM: All right. I'm clear on that.  
5 Back in October there was a withdrawal of the preemption  
6 request which led to all the discussions.

7 MR. PEEPLES: Yes.

8 JUDGE TOREM: Is there any indication or  
9 thought that either of you as we move from Item 4 into  
10 Item 5 what the time line for the completion of this  
11 communication and discussion might be between the  
12 Applicant and the County?

13 MR. PEEPLES: My suggestion is we've got a  
14 regular Council meeting coming up for June 13, and I think  
15 at that time we'll have more solid information and we can  
16 talk about that. I think if we're ultimately denied by  
17 the county commissioners, then there's the obvious  
18 potential for a request for preemption. I mean we're  
19 trying to work through to avoid that so then that is done.  
20 Then we go through kind of the process I would say of  
21 sometime after that denial filing a request for  
22 preemption. So then we get back into kind of the same  
23 place we were in whenever it is on the schedule.

24 MR. SWEENEY: September 2004.

25 MR. PEEPLES: Yes.

1 JUDGE TOREM: Well, then, Councilmembers,  
2 anything on Item 4 for questions about the update?

3 MS. TOWNE: Mr. Hurson, my experience is  
4 under Chapter 35 not 36, but I'm not familiar with a  
5 preliminary motion. Is this just something that your  
6 commissioners use to get something on the table?

7 MR. HURSON: It was the motion I believe was  
8 for a preliminary motion to deny based upon the  
9 development agreement that was submitted, but you don't  
10 take final action until they've heard documents.  
11 Typically what the Board does is they can take an action  
12 during staff hearing any documents, and then you go  
13 through the enabling document process for them to review,  
14 revisit, and look at the issues as far as the final  
15 decision.

16 MS. TOWNE: Under your county procedures is  
17 there an appeal mechanism? Does it go to superior court  
18 of a final decision of the commissioners?

19 MR. HURSON: Under state law any GMA appeal  
20 would go to Growth Management Act. Land Use Petition Act  
21 appeals through superior court under the Land Use Petition  
22 Act.

23 MS. TOWNE: But how would this work here,  
24 this 3670(a) and (b) having different appellant  
25 provisions? What would happen in the case of this which

Page 10

1 is an amendment to the comp. plan, amendment to the zoning  
2 code, and an overlay?  
3 MR. HURSON: Actually you're probably  
4 looking at you have--  
5 MS. TOWNE: --both?  
6 MR. HURSON: Both, yes.  
7 MS. TOWNE: Thank you.  
8 MR. HURSON: I think there's a couple of  
9 cases where there's been just on routine land use issues  
10 that can have a component that's some of the Land Use  
11 Petition Act and another component fits under the Growth  
12 Management Act, and here this Board has exclusive  
13 jurisdiction of certain matters and then superior court  
14 has exclusive jurisdiction of other matters, and then you  
15 parse those together.  
16 MS. TOWNE: I think that's what I thought.  
17 MR. PEEPLES: I don't think there's any  
18 preliminary concept in the ordinance, but that's--I mean  
19 I'm not complaining about it. I'm just saying the words  
20 used by the person who made the motion--which I forget who  
21 it was. One of the county commissioners--was preliminary.  
22 MR. HURSON: And there's been no final  
23 action adopted.  
24 MS. TOWNE: I understand. And that might  
25 come--well, you wouldn't have the documents prepared for

Page 11

1 the county commissioners to take final action tomorrow  
2 night, would you?  
3 MR. HURSON: The directions from the Board  
4 was for staff to prepare enabling documents based upon the  
5 preliminary motion, and then they can either take action  
6 on those or they could table those and then go forward  
7 with what other path they might take on the land use  
8 consistency.  
9 MS. TOWNE: Much clearer. Thank you.  
10 JUDGE TOREM: Any other questions for Item 4  
11 about the update and the status?  
12 Let's move to Item 5 formally for the  
13 scheduling of hearing, and let me just push back to the  
14 Applicant and ask Mr. Peeples. The Council was coming  
15 prepared today to set a hearing date or set up dates. I  
16 believe it was as early as the first week of September  
17 following the rodeo weekend, as late as into the first  
18 week of October. In that range of dates given what you've  
19 reported with the efforts with the county commissioners,  
20 could this body still set a hearing date today in your  
21 opinion?  
22 MR. PEEPLES: I would suggest we wait until  
23 June 13. I mean it's only two weeks away. I would think  
24 that we would have a much more concise idea because I  
25 think there may be a difference, and Jim can set this out,

Page 12

1 between when you set it if there's preemption involved and  
2 when you set it if there's no preemption involved.  
3 MR. HURSON: Right.  
4 MR. PEEPLES: I would suggest we wait until  
5 June 13.  
6 MR. HURSON: Jim Hurson. Yes, I agree with  
7 that. Right now we don't know which path it's going to  
8 take, and I know the County's involvement would be  
9 substantially different on a preemption request than a  
10 nonpreemption request, and that I would assume  
11 substantially impact the scheduling that would be needed  
12 to set out.  
13 If we just review this in the monthly EFSEC  
14 meeting, give you a status update, and then I would  
15 suggest then if there's a need to reconvene on the  
16 adjudication, we could set another date after that. I  
17 don't know if you want to actually try to have like Your  
18 Honor attending the monthly meeting or it could just be an  
19 update, and then if the Council thinks there's the  
20 necessity of resetting the hearing, you could set the  
21 formal hearing notice and we could do a prehearing  
22 schedule.  
23 MR. PEEPLES: I would just suggest we have a  
24 prehearing conference that date. I would suggest you send  
25 out notice. I mean you can set it any day you want. It's

Page 13

1 just everybody is going to be in town that day, and that's  
2 not a hard date from my mind. It was I thought just a  
3 convenient date.  
4 JUDGE TOREM: Parties on the line any  
5 comments or questions about the schedule and whether we  
6 should do it today or wait until two weeks from now?  
7 All right. Hearing none, the  
8 Councilmembers?  
9 MS. TOWNE: Question on this timing, and I'm  
10 trying to get it in my head without a calendar in front of  
11 me. The county commissioners will next meet after  
12 tomorrow, when, on the 14th?  
13 MR. PEEPLES: Don't know.  
14 MR. HURSON: We don't know. That will be up  
15 to the Board. It will depend on where the discussions go,  
16 the documentation, the issues that may need to be sorted  
17 out.  
18 MS. TOWNE: My concern is are we going to  
19 have enough information on the 13th based on what happened  
20 on the 31st to make a firm decision? And I keep looking  
21 at the three and a half years we've been struggling with  
22 this and our statutory duty to act within a year, and I  
23 hate to see it slide and slide and slide.  
24 MR. PEEPLES: I think everybody does, but I  
25 think it's a really good chance we will know on the 13th.

1 JUDGE TOREM: Mr. Peeples, is that saying if  
 2 negotiations stop, you will be submitting a preemption  
 3 request and if the negotiations continue, that would only  
 4 be in good faith that you will actually not have to do it?  
 5 MR. PEEPLES: Correct.  
 6 CHAIR LUCE: I have some real thoughts on  
 7 this. January 2003 is when the application was submitted  
 8 to EFSEC. Today is May 30 and the county commissioners  
 9 meet tomorrow and they're, Mr. Hurson--well, first, I want  
 10 to compliment counsel for both the County and for the  
 11 Applicant and for the intervenors. Everybody has done a  
 12 really excellent job struggling with difficult issues up  
 13 to date, and the county commissioners are encumbered by  
 14 their inability to act without having a full council and  
 15 having a full delegation of commissioners present in open  
 16 public meeting. We actually share that in common with the  
 17 county commissioners. We're also unable to do that, and  
 18 the county commissioners make conditional motions and  
 19 maybe we'll make one here today too.  
 20 I guess where I'm coming from is to pick up  
 21 on what Chris said. This matter under the statutes is to  
 22 be resolved after an application is filed within one year  
 23 and it's approaching three years.  
 24 MS. TOWNE: Three and a half.  
 25 CHAIR LUCE: Three and a half years, excuse

1 me. As I see it there are basically three options for the  
 2 Council--four actually. The fourth one is we can wait  
 3 until June 13 and then see what the County does tomorrow  
 4 and then we'll go from there and maybe we'll have a  
 5 hearing date and maybe we won't.  
 6 But the other three options are for the  
 7 Applicant and the County to settle their differences and  
 8 then we're to have a hearing and the hearing will not  
 9 involve land use consistency issues because they will have  
 10 been resolved and there would be no need to do that.  
 11 The other option is that the Applicant under  
 12 the statute has, the Applicant I want to stress, has the  
 13 right to request preemption not the Council, and the  
 14 Council would strongly prefer not to see preemption. We  
 15 want to work cooperatively together with the County and  
 16 the Applicant, and we will use every effort to help them  
 17 resolve their differences; and just parenthetically there  
 18 is provision for a mediator in the statute if that's  
 19 necessary.  
 20 And the last thing that the Council can  
 21 under the statutes that we have is to dismiss the  
 22 application for failure to proceed in a timely manner.  
 23 Under 463-28-050 the time to resolve disputes between the  
 24 local subdivision and the county is 90 days unless  
 25 mutually agreed by the Applicant and the Council.

1 So I guess where all of that leads me today  
 2 is let's set a conditional hearing date and let's be clear  
 3 about it, and we will affirm our conditional hearing date  
 4 on June 13, and at that hearing date one of three things  
 5 is going to happen hopefully.  
 6 Either the differences will be resolved  
 7 between the Applicant and the County or the Applicant  
 8 should it desire to do so will signal that it's going to  
 9 request a preemption hearing, and at that final hearing  
 10 date in August or September we will have a hearing for  
 11 sure. And we'll either have a hearing on the application  
 12 without preemption, a hearing on the application with  
 13 preemption, or we'll recommend to the Governor that the  
 14 parties haven't been able to go further and get over the  
 15 hump and the Council of its own volition under the  
 16 statutory authority provided to us will recommend that the  
 17 Governor deny the--and the words of the WAC are deny the  
 18 petition. But we wouldn't be denying it. We would be  
 19 dismissing it. So that's the space I'm in.  
 20 Again, I think both counsel for the  
 21 Applicant and the County have shown very good faith in  
 22 trying to work through a difficult situation, but I think  
 23 it's time to call the question.  
 24 So any remarks by Councilmembers are  
 25 welcome.

1 Tim.  
 2 MR. SWEENEY: May I ask a question of  
 3 Mr. Hurson and Mr. Peeples?  
 4 If we were to set a hearing date say in late  
 5 September or early October, and by June 13 you understand  
 6 now that there's not going to be an agreement and you  
 7 either have a choice of withdrawing or seeking preemption  
 8 and really it turns out to be that's the case the  
 9 direction you go, is that hearing date too soon? Is that  
 10 what you're implying?  
 11 MR. PEEPLES: I think that if my--and we may  
 12 have different opinions on this, but in my opinion if  
 13 there is no requirement for preemption we could perhaps,  
 14 depending upon schedules, hear it in August, okay, if  
 15 there's no preemption.  
 16 If there is a preemption, then I would say a  
 17 late September, October date would be reasonable, but we  
 18 won't know until you know.  
 19 MR. SWEENEY: Mr. Hurson.  
 20 MR. HURSON: Yes, I mean if there isn't a  
 21 preemption request, the County's involvement would be very  
 22 minimal; but if there is a preemption request, frankly I  
 23 wouldn't know how to anticipate what that would involve  
 24 because there isn't one pending. I wouldn't know what the  
 25 theory of the preemption request is, the facts that would

1 be submitted to support a preemption request, the  
2 testimony that would be involved. I wouldn't know if we  
3 need depositions, what kind of discovery.

4 MR. SWEENEY: Would three months be  
5 sufficient time?

6 MR. HURSON: Well, that's just it. I don't  
7 know. If it's three months, but it would be three months  
8 from when: from the time of preemption request is filed or  
9 the time the prefiled testimony is submitted? That's what  
10 I'm just saying. I don't know what the timing would have  
11 to be in a preemption request because I don't have the  
12 request filed, and then you don't have the prefiled  
13 testimony to support a preemption request yet. Frankly  
14 until I would have either of those, I wouldn't know what  
15 kind of discovery I might be asking for or depositions or  
16 requests for production and those sorts of issues.

17 Frankly, at this point I think for the  
18 benefit of trying to have negotiations, I think it's  
19 helpful to not try to work out those details because  
20 that's kind of counter to try to work on the consistency  
21 issues. So I guess one thing I could look at it is maybe  
22 a way of looking at it I think is picking up from what  
23 Mr. Peebles was saying, if there's not a preemption  
24 request, maybe that's one hearing date you could try to  
25 lock in. But my guess is if there's a preemption request,

1 the time frames you're calling for probably won't work  
2 because I'm not going to be able to know what I'm going to  
3 need to do.

4 MR. SWEENEY: Even though there has been  
5 prefiled testimony on this topic? I know it was a  
6 different application. I mean the application has  
7 changed, but we have gone down the preemption route of  
8 almost a hearing postponing it up to like about two weeks  
9 before we went to that.

10 CHAIR LUCE: A weekend.

11 MR. SWEENEY: A weekend.

12 MR. PEEPLES: I would imagine there will be  
13 supplemental testimony on the preemption request. If  
14 there's a new preemption request, I believe there will be  
15 supplemental testimony.

16 CHAIR LUCE: The law hasn't changed,  
17 Mr. Sweeney, if I recall correctly, and the WAC requires  
18 the Applicant demonstrate good faith that they're unable  
19 to reach agreement and hopefully according to the WAC this  
20 should be done within 90 days; so we're not pushing them  
21 beyond that period.

22 MR. SWEENEY: I understand that part. I'm  
23 just trying to figure out if we're doing a conditional  
24 hearing date whether we were setting one for one in which  
25 there was an agreement on the land use and one in which

1 we're headed toward preemption. I'm thinking we're  
2 setting one for the latest possible date which is the  
3 preemption one.

4 MR. PEEPLES: If you're setting a  
5 conditional hearing, probably the end of September,  
6 October would be ball park in my mind I mean as a  
7 conditional hearing date.

8 CHAIR LUCE: That would be fine with me. My  
9 preference is the sooner the better because quite frankly  
10 I don't know--I understand it will take time to put the  
11 case together, but the chronology indicates there's been a  
12 lot of discussions. The question will be in my mind a  
13 question of law as to whether the statutes or WAC have  
14 been complied with. I don't think it's going to take that  
15 long to pull all that together, but late September, first  
16 of October would be fine with me.

17 But I think we need to set a hearing date.  
18 The other salutary purpose I think this will send is that  
19 quite frankly a signal to the county commissioners we're  
20 going to proceed on this case to one end or the other.

21 MR. SWEENEY: So land use isn't the only  
22 issue, and if we're setting a hearing date I guess I would  
23 like to hear from at least the other parties regarding  
24 that rough time frame. Wouldn't that be the Counsel for  
25 the Environment?

1 JUDGE TOREM: Mr. Tribble?

2 MR. TRIBBLE: Yes.

3 JUDGE TOREM: Mr. Sweeney, can you pose your  
4 question directly to him.

5 MR. SWEENEY: Mr. Tribble, we're talking  
6 about setting a tentative date, hearing date that may  
7 encompass preemption but also would encompass the wide  
8 range of issues of siting. Correct? And just one hearing  
9 we're talking about and the time frame would be sometime  
10 in late September or early October and you would obviously  
11 be involved in that. How does that time frame sound for  
12 you?

13 MR. TRIBBLE: Well, my involvement in  
14 preemption, the issue of preemption would be very minimal,  
15 and I think John Lane, my predecessor for the Counsel for  
16 the Environment, already has argument with regard to the  
17 preemption issue prefiled is my understanding, but it's  
18 been a while since I've looked at it. I'm very  
19 comfortable with proceeding maybe with a double set  
20 schedule and that would be if there is land use  
21 consistency keeping our two weeks in August and going  
22 forward as planned. I don't know if anybody else, but I'm  
23 very comfortable with that and my availability should we  
24 need to extend out and everyone discuss hearing on the  
25 issue of preemption my availability is pretty open for

1 September, October.  
 2 MR. SWEENEY: Thank you.  
 3 JUDGE TOREM: Any other Councilmembers'  
 4 questions or discussion on whether we should set a hearing  
 5 date today?  
 6 MR. FRYHLING: I would like to see us set a  
 7 hearing date, and I would suggest the first couple weeks  
 8 in October. It gives ample time for us to process through  
 9 and then we have to start looking at people's schedules  
 10 and see.  
 11 CHAIR LUCE: I think that's very generous,  
 12 Mr. Fryhling. I would go earlier than that, but I would  
 13 accept that. What I want to encourage the Council to do  
 14 is when we do set a hearing date, let's stick with the  
 15 hearing date to some end. Either the petition is going to  
 16 go forward or we have a preemption hearing or the parties  
 17 are going to reach consistency, but we're not going to get  
 18 like we did last time up to the Friday before and then,  
 19 oh, no hearing date.  
 20 MR. FRYHLING: Well, this gives three full  
 21 months from the June, July, August, I think four months  
 22 from the time the commissioners make a decision.  
 23 CHAIR LUCE: That's a lot of time.  
 24 MR. FRYHLING: And that should give  
 25 everybody ample time to do whatever if we have preemption

1 or if we don't.  
 2 CHAIR LUCE: It certainly should.  
 3 MR. FRYHLING: Or we could put it a couple  
 4 weeks earlier, but I just thought let's set something and  
 5 then it gives everybody ample time.  
 6 JUDGE TOREM: Councilmembers, my suggestion  
 7 might be that we set a hearing date today is what I'm  
 8 hearing, but we hold off until the 13th at the next  
 9 scheduled Council meeting to set all the when are things  
 10 going to be due dates. That way we'll know if there's  
 11 going to be supplemental testimony due. We'll know if  
 12 there's going to be a need for additional prehearing  
 13 briefs or if we're going forward with essentially the  
 14 record that's been made previously by the parties that are  
 15 present in the room and all those that are on the line  
 16 with their prefiled testimony; and I think we even had  
 17 opening statements come because Chairman Luce is correct.  
 18 We went up to the weekend before and then struck the  
 19 hearing dates.  
 20 Mr. Tribble, we already at the last  
 21 prehearing conference in April struck the August dates  
 22 from the calendar so those I wouldn't want to reinstate as  
 23 a conditional double schedule, but I think in what  
 24 Chairman Luce has said set one set of dates and stick with  
 25 them and bet on these being as far out as possible to

1 accommodate all the potential what might happen.  
 2 The earliest date that I've looked at for  
 3 calendaring, Councilmembers, was starting right after the  
 4 Labor Day holiday. That's the short week of September 5th  
 5 to 8th, and the last week that I looked at on the fifth  
 6 week later is October 2 through October 6. If we want to  
 7 split that in the middle, I think last time we had 12 days  
 8 of hearing scheduled. We had a full week and then two  
 9 weeks I think with three or four days, and we already had  
 10 the argument that there was not going to be a division of  
 11 the preemption issue if it came up from the rest of the  
 12 hearing; that we would hear the issue separately but we  
 13 would not decide it separately, and if there was going to  
 14 be a recommendation for site certification, the ruling,  
 15 recommended ruling on preemption would accompany that.  
 16 So I don't think there's any need to go back  
 17 to the discussion of splitting a bifurcated hearing five  
 18 weeks at a time, but we might essentially have a  
 19 three-week period in which to hear the case if necessary,  
 20 and perhaps in two weeks the Council could lop off a set  
 21 of dates that preemption is not necessary. Something like  
 22 that could occur today.  
 23 Other parties on the line?  
 24 Mr. Slothower, how's your client feel about  
 25 a mid to late September perhaps running into the first

1 week of October for two to three weeks of hearings to get  
 2 this matter concluded?  
 3 MR. SLOTHOWER: That should work. We run  
 4 into some scheduling problems commencing the week of  
 5 October 9th. So if we could get it done before that, that  
 6 would be our preference. If you had to spill over, then I  
 7 would ask for some adjustment in the scheduling so we  
 8 could deal with Mr. Lathrop's testimony, cross-examination  
 9 prior to Friday the 5th of October.  
 10 JUDGE TOREM: Mr. Carmody, how about your  
 11 client?  
 12 MR. CARMODY: I would have to check with  
 13 them, but I have no problems with that date. Several of  
 14 them are on the line and they could speak to that.  
 15 JUDGE TOREM: Mr. Garrett?  
 16 MR. GARRETT: I have no problem with that  
 17 time line.  
 18 JUDGE TOREM: Mr. Robertson?  
 19 He may have dropped off. Okay.  
 20 Debbie Strand, you're still on the line?  
 21 MS. STRAND: Yes.  
 22 JUDGE TOREM: What's your schedule for mid  
 23 to late September into that first week of October?  
 24 MS. STRAND: I should be available at that  
 25 time.

1 JUDGE TOREM: Mr. Piercy, assuming if the  
 2 County has to participate in one form or another?  
 3 MR. PIERCY: That would work fine.  
 4 JUDGE TOREM: So it sounds as though,  
 5 Councilmembers, we've got folks at CTED, Department of  
 6 Transportation, anything?  
 7 MR. USIBELLI: CTED the only conflict we  
 8 would have we're hosting a National Energy Conference on  
 9 the week of the 11th of September, but it sounds like if  
 10 there's a two-week window, we could work around that for  
 11 our testimony.  
 12 JUDGE TOREM: So it sounds as though if we  
 13 started that week of September 11th, we would schedule  
 14 your testimony later, but otherwise we could start on  
 15 September 18 and schedule those three weeks and pick the  
 16 exact dates based on what happens tomorrow night at the  
 17 county commissioners and how we schedule the prehearing  
 18 items in two weeks.  
 19 Mr. Peeples, does that sound reasonable?  
 20 MR. PEEPLES: That sounds fine and we'll  
 21 come back on the 13th and solidify the schedule.  
 22 JUDGE TOREM: So Councilmembers, I'll  
 23 entertain a motion then to schedule the hearing for the  
 24 weeks of September 11 through 15 as week number one,  
 25 September 18 through 22 as week number two, and the 25th

1 to the 29th as week number three, and the motion that I  
 2 would like to entertain would be one that says those dates  
 3 be held today as the tentative preliminary schedule and  
 4 based on what we get from folks on the meeting of the 13th  
 5 that there will be a final schedule set that date. If  
 6 preemption is not going to be filed, we might choose to  
 7 lop off the last week or the first week depending upon  
 8 what preferences come in. And if preemption is going to  
 9 be filed, then we might specifically set topics for which  
 10 dates and work that out at the next meeting.  
 11 CHAIR LUCE: That's a good motion. The only  
 12 qualification I would make is we are going to set a  
 13 hearing date on the 13th. You said I think tentative  
 14 where this is a tentative hearing date and we would decide  
 15 on the 13th whether we're going to finalize that. I think  
 16 we have a final hearing date on the 13th and then the only  
 17 question is or the question is what kind of hearing is it  
 18 going to be.  
 19 JUDGE TOREM: But my motion is to reserve  
 20 these three weeks and then the actual what date we're  
 21 going start may still be the 11th as that first Monday,  
 22 but we would simply decide how the hearing is going to be  
 23 structured and when all the prehearing documents will be  
 24 due at the Council's next scheduled meetings.  
 25 MR. SWEENEY: I would move that.

1 MS. TOWNE: Second.  
 2 JUDGE TOREM: All right. It's been moved  
 3 and seconded. Is there any discussion from the parties on  
 4 the line?  
 5 MR. GARRETT: Judge Torem?  
 6 JUDGE TOREM: Yes.  
 7 MR. GARRETT: Ed Garrett, ROKT. I would  
 8 like to seek some clarification on the process now that  
 9 we're talking about adjudicative hearings as well as a  
 10 preemption hearing. Am I to understand that the Council  
 11 will decide the preemption hearing first and then we won't  
 12 have to go into an adjudicative hearing or it would be  
 13 carried along at the same time?  
 14 JUDGE TOREM: No, Mr. Garrett, I think if  
 15 you review the orders that were--I can't remember if it  
 16 was your motion from ROKT or a motion from the County for  
 17 that matter or from Mr. Lathrop, but one of the parties  
 18 filed a request to bifurcate the hearing, and there was I  
 19 believe an order that came out that said no and had the  
 20 justification as to why. It's a little bit old so I'd  
 21 have to really dust off the cobwebs to go into it today,  
 22 but I believe the record will speak for itself that the  
 23 Council looked at the law and said there's no basis for us  
 24 to bifurcate the hearing, and that if a request for  
 25 preemption comes in, we deal with it at the same time.

1 So what I've said by separating the issues  
 2 but as to what day of the hearing. The hearing would be  
 3 one set of weeks of proceeding and depending on how long.  
 4 But the preemption issue would be taken up as the first  
 5 issue was how we scheduled this in 2003, and the first  
 6 issue then would be all the testimony on that. Just as we  
 7 scheduled for birds, bunnies, human environment, all those  
 8 issues were scheduled in the Wild Horse hearing one at a  
 9 time, we would focus the preemption witnesses toward the  
 10 front end of the schedule so that the County could, if  
 11 it's participating in that regard, have its energies  
 12 focused up front and then the other environmental issues  
 13 would come up one at a time or two at a time depending on  
 14 the volume through the course of the remaining days of the  
 15 hearing. So there wouldn't be two hearings, but there  
 16 would certainly be as any other adjudicative process a  
 17 hearing broken up into separate topics; preemption being  
 18 the first.  
 19 Does that answer your question, sir?  
 20 MR. GARRETT: Yes, thank you for your  
 21 clarification.  
 22 MR. PEEPLES: Your Honor, we also I did a  
 23 proposed schedule that kind of reflected that that we sent  
 24 out before and that's someplace. I can't remember exactly  
 25 what the order was, but I had grouped things and sent it



1 out for comment, and I can't remember if we got any  
 2 comment on that or not. I was tasked to do that.  
 3 JUDGE TOREM: That was prior to the hearing  
 4 dates we had set for August.  
 5 MR. PEEPLES: Yes, the last go-around.  
 6 CHAIR LUCE: That's the one that was  
 7 canceled on Friday.  
 8 JUDGE TOREM: Right. So I think we have the  
 9 basis to keep that same structure unless the preemption  
 10 issue drops out or doesn't come back up again as its  
 11 posture is now. But the motion right now is for hearings  
 12 to begin the week of September 11 and conclude as late as  
 13 Friday, September 29. Any other comment on that motion?  
 14 MR. CARMODY: Judge Torem, this is Jamie  
 15 Carmody. On that issue of preemption would you anticipate  
 16 that there would be a potential for argument or  
 17 determination on preemption at the conclusion of that  
 18 first phase?  
 19 JUDGE TOREM: No, I think as the previous  
 20 ruling said Mr. Carmody that everything would be decided  
 21 in the Council's order. I believe the logic for that was  
 22 the Council makes a recommendation to the Governor, and  
 23 that the Council would be hard pressed to make a decision  
 24 and have the Governor reverse it. Let's say the EFSEC  
 25 Council decides to the Governor not to grant preemption,

1 but the Governor says, no, preempt the County's land use  
 2 and give me the rest of your recommendation. The Council  
 3 would have to come back into session. So the Council  
 4 wishes to make a recommendation to the Governor all at  
 5 once as to preemption, whether that's thumbs up or thumbs  
 6 down, and following that tell the Governor what the  
 7 recommendation for the rest of the item would be; if it's  
 8 to give a draft site certification agreement to the  
 9 Governor with a recommendation for preemption or to say  
 10 even if you disagree with us on preemption, here's what we  
 11 would do with the rest the application.  
 12 That's going to be the challenge for the  
 13 writing of this particular decision to the Governor to  
 14 provide the appropriate decision tree, but it would come  
 15 all at once and there won't be any ruling like a motion to  
 16 dismiss the rest of the case if that preemption issue  
 17 isn't carried. One way or the other we'll finish the  
 18 testimony and the cross-examination, but there won't be  
 19 any interim deliberations and decision on that matter.  
 20 Councilmembers, do you recall it essentially  
 21 like that?  
 22 CHAIR LUCE: Yes.  
 23 MS. ADELSMAN: Yes.  
 24 MR. PEEPLES: I would just one of the issues  
 25 there also that the Applicant pointed out was many of the

1 criteria for preemption are contained in a bunch of other  
 2 testimony not directly related. So the things we have to  
 3 consider would be actually the full scope of most of the  
 4 issues that we brought in the hearing, and it was hard  
 5 segregating those out witness by witness. It would have  
 6 been confusing.  
 7 JUDGE TOREM: Mr. Carmody, does that answer  
 8 your question?  
 9 MR. CARMODY: It does. Thank you.  
 10 JUDGE TOREM: Any other comments from those  
 11 on the line? Hearing none, from CTED, transportation, the  
 12 County, or the Applicant here in the room?  
 13 All right. There's a motion then to  
 14 schedule these three weeks for the hearing and set a  
 15 complete schedule for prehearing activity and the actual  
 16 perhaps dates for what will happen in that three-week  
 17 period on June 13; is that correct?  
 18 MR. PEEPLES: Yes.  
 19 JUDGE TOREM: All those in favor?  
 20 COUNCILMEMBERS: Aye.  
 21 JUDGE TOREM: All against?  
 22 All right. Then the motion carries and  
 23 EFSEC will take up the Kittitas Valley Wind Power Project  
 24 on September 11. The hearing as we understand will be in  
 25 Ellensburg, and we'll set those three weeks as a window

1 for the hearing to be completed.  
 2 That leads us to Item No. 6 which I think my  
 3 understanding of this motion is table the scheduling of  
 4 any additional submittals and briefs prior to the  
 5 adjudicative hearings. That will be tabled to June 13.  
 6 Councilmembers, is that your understanding  
 7 as well?  
 8 MR. SWEENEY: Yes.  
 9 MR. FRYHLING: Yes.  
 10 MS. ADELSMAN: Yes.  
 11 JUDGE TOREM: Then the next prehearing  
 12 conference will take place on the 13th.  
 13 Mr. Fiksdal, Ms. Makarow, is that going to  
 14 allow us enough time for notice to the parties?  
 15 MR. FIKSDAL: Yes.  
 16 JUDGE TOREM: That will take place as part  
 17 of the normal schedule; is that correct?  
 18 MR. FIKSDAL: Correct.  
 19 JUDGE TOREM: What time is that set for?  
 20 MR. FIKSDAL: The monthly Council meeting  
 21 starts at 1:30 on June 13 in this room.  
 22 JUDGE TOREM: And that's a Tuesday; is that  
 23 correct?  
 24 MR. FIKSDAL: Yes, it's a Tuesday, and we  
 25 can adjust the schedule for that meeting to accommodate

1 however you want to deal with this issue.  
2 JUDGE TOREM: All right. I'm going to ask  
3 that Chairman Luce handle the things here in person. I  
4 can make my best effort to call in, and I should be able  
5 to arrange that and be on the line, but I'll let you run  
6 the meeting and be of assistance as necessary for these  
7 scheduling items.

8 Ms. Makarow, if you will find the last  
9 prehearing conference order that had a prehearing brief  
10 schedule and perhaps pull that section out of it and put  
11 it with the prehearing conference meeting packet.

12 Mr. Peeples, I'll delegate to you the  
13 responsibility to find depending on what happens tomorrow  
14 night what proposal you might have for schedules working  
15 with Ms. Makarow on that existing with the rhythm of the  
16 filings were.

17 I'll ask all the parties given that we now  
18 have a firm hearing date that I get the feeling from the  
19 Councilmembers is not going to be shifted again but for a  
20 natural disaster; so unless the mountain gets active, I  
21 think we're going to Ellensburg September 11; please look  
22 at your prefiled testimony and determine if there's any  
23 basis for supplemental testimony, whether on preemption or  
24 anything else, to file submittals and be prepared to  
25 notify the Council and justify that request to the Council

1 on the 13th of June.

2 MR. PEEPLES: I think the two relevant  
3 orders are Order No. 8 and Order No. 16 for scheduling.  
4 Order No. 8 is prehearing and Order No. 16 is post  
5 hearing. I mean I'm not saying those are the dates that  
6 you're referring to.

7 JUDGE TOREM: I just want to make sure we  
8 had an idea of what the structure might be. If you have  
9 modifications to suggest to that, and Mr. Hurson certainly  
10 if it turns out the Council will be heavily involved in a  
11 preemption issue, let us know how best to accommodate your  
12 preparation during the summers months but work to make  
13 sure everything is in on or before that September 11th  
14 date so we can make everything work. All right?

15 MR. TRIBBLE: I have a point of order, Judge  
16 Torem.

17 JUDGE TOREM: Yes, sir.

18 MR. TRIBBLE: This is Mike Tribble, Counsel  
19 for the Environment. I just wanted to take this  
20 opportunity to announce to the parties that I may or may  
21 not be able to attend this meeting. My wife and I are  
22 expecting a child that is really due any minute.

23 JUDGE TOREM: You can't schedule her?

24 MR. TRIBBLE: Unfortunately this isn't a  
25 planned C-section where there's an opportunity that we can

1 actually schedule the surgery.

2 JUDGE TOREM: Well, if you can't be there,  
3 if you'll have someone else from your office raise any  
4 concerns or perhaps just give Ms. Makarow a call and let  
5 her know what you would like to have the--although we have  
6 ex-parte rules here, it's certainly procedural in nature.  
7 So feel free to communicate that to the EFSEC staff and  
8 have the Counsel for the Environment's feelings set up.

9 MR. TRIBBLE: I will. I will either file  
10 something in advance believing that most likely I will not  
11 attend the meeting or if I don't have time to do that in  
12 the next day or so I will have someone attend.

13 JUDGE TOREM: Very well. Thank you,  
14 Mr. Tribble. Good luck with the addition to the family.

15 MR. TRIBBLE: Thank you.

16 JUDGE TOREM: Any other points of order or  
17 questions about what the Council's motion this morning  
18 was?

19 MR. FIKSDAL: Judge Torem, this is Allen  
20 Fiksdal. Before you start, I think we should recognize  
21 that Ms. Wilson joined us from the Department of Natural  
22 Resources.

23 MS. WILSON: The day-after-vacation space  
24 out.

25 JUDGE TOREM: We were all lucky to be here

1 ourselves.

2 Parties on the line, any other final closing  
3 inputs before we adjourn until the 13th for the next  
4 prehearing?

5 MR. GARRETT: Ed Garrett, ROKT.

6 JUDGE TOREM: Yes, sir.

7 MR. GARRETT: Judge Torem, I just want to  
8 say welcome back and thank you for your service.

9 JUDGE TOREM: Thank you very much. Thank  
10 you. I appreciate that. I haven't talked or seen all of  
11 you since I got back from Iraq, but I appreciated the  
12 interest that was shown and care that I got back in one  
13 piece. There were questions at times, but I'm back and  
14 none the worse for wear. Thank you.

15 Anything else from the folks on the line?

16 MR. FIKSDAL: There was a motion. Was there  
17 a vote?

18 JUDGE TOREM: Yes, all the procedures are  
19 taken care of.

20 Anything else from the folks in the room or  
21 Councilmembers?

22 Then at 9:17 this prehearing conference is  
23 adjourned. We'll talk to folks on the 13th and good luck  
24 to the Applicant and County. We hope we'll hear good  
25 news.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

\* \* \* \* \*  
(Prehearing conference adjourned at 9:17  
a.m.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 May 30, 2006,  
in Olympia, Washington.

\_\_\_\_\_  
Shaun Linse, CCR  
CCR NO. 2029.