

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 - 73
_____)

A prehearing conference in the above matter was held in the presence of a court reporter on July 19, 2004, at 12:05 p.m., at 925 Plum Street S.E., 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 and Timothy McMahan, Attorney at Law; Stoel Rives, LLP, 805 Broadway Street, Suite 725, Vancouver, Washington 98660.

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

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1 Appearances (cont'd):
 2 DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC
 3 DEVELOPMENT, Tony Usibelli, Assistant Director, Energy
 4 Policy Division, and Mark Anderson, Senior Energy Policy
 5 Specialist, P.O. Box 43173, Olympia, Washington 98504-3173
 6 RENEWABLE NORTHWEST PROJECT, Sonja Ling, Lay
 7 Representative from Renewable Northwest Project, 917 S.W.
 8 Oak Street, Suite 303, in Portland, Oregon 97205.
 9 RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT),
 10 James C. Carmody, Velikanje, Moore & Shore, P.S., 405 East
 11 Lincoln Avenue, P.O. Box 22550, Yakima, Washington 98907.
 12 F. STEVEN LATHROP, Jeff Slothower, Attorney at
 13 Law; Lathrop, Winbauer, Harel, Slothower & Denison, LLP,
 14 281 West Seventh Avenue, Ellensburg, Washington 98926.
 15 * * * * *
 16 JUDGE TOREM: This prehearing conference is
 17 now called to order. My name is Adam Torem. I'm the
 18 Administrative Law Judge presiding in this Kittitas Valley
 19 Wind Power Project, Application No. 2003-01. This is a
 20 prehearing conference on Monday, July 19, 2004. It was
 21 called for 12 o'clock noon. It's now about five minutes
 22 after 12:00.
 23 Councilmembers, if we can go around the room
 24 and make introductions. Let's start with Mr. Fryhling to
 25 my right.

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1 MR. FRYHLING: Richard Fryhling. I
 2 represent the Department of Community Trade and Economic
 3 Development.
 4 MR. SWEENEY: I'm Tim Sweeney, and I'm the
 5 representative for the Washington Utilities and
 6 Transportation Commission.
 7 MS. ADELSMAN: I'm Hedia Adelman. I
 8 represent the Department of Ecology.
 9 MS. TOWNE: Chris Towne, representing the
 10 Department of Fish and Wildlife.
 11 MR. IFIE: Tony Ifie, representing the
 12 Department of Natural Resources.
 13 MS. ESSKO: I'm Ann Essko with the AG's
 14 Office, and I represent the Council.
 15 MS. JOHNSON: Patti Johnson, representing
 16 Kittitas County.
 17 JUDGE TOREM: EFSEC staff present include
 18 Allen Fiksdal and Irina Makarow.
 19 Any other EFSEC staff participating at the
 20 hearing?
 21 MR. MILLS: Mike Mills.
 22 JUDGE TOREM: Thank you, Mr. Mills.
 23 Now we'll take appearances from other
 24 parties at the table. Ms. Ling, we'll start with you on
 25 my left.

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1 MS. LING: Sonja Ling, Renewable Northwest
 2 Project.
 3 MR. ANDERSON: Mark Anderson with Community,
 4 Trade, and Economic Development, Energy Policy Division.
 5 MR. USIBELLI: Tony Usibelli with Community,
 6 Trade, and Economic Development.
 7 MR. PEEPLES: Darrel Peeples representing
 8 the applicant and with me is Tim McMahan, my co-counsel,
 9 and Chris Taylor, my client.
 10 JUDGE TOREM: Thank you, and I would note
 11 for the record you've passed around Mr. McMahan is with
 12 the Law Firm Stole Rives out of Seattle I believe.
 13 MR. McMAHAN: Vancouver.
 14 JUDGE TOREM: Out of Vancouver. And there's
 15 a letter for those of you on the phone that I imagine
 16 could be provided to you or may have already been mailed.
 17 MR. HURSON: Jim Hurson, Kittitas County
 18 Deputy Prosecutor.
 19 MR. LANE: John Lane, Counsel for the
 20 Environment in this case.
 21 JUDGE TOREM: On the telephone for ROKT we
 22 have two members.
 23 Mr. Garrett, you're there?
 24 MR. GARRETT: Yes, I am.
 25 JUDGE TOREM: And Mr. Carmody.

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1 MR. CARMODY: Yes, I am, and I think Mike
 2 Robertson is also on the line.
 3 MR. ROBERTSON: Yes, I'm on.
 4 JUDGE TOREM: All right. So there are three
 5 members on the line for ROKT. Two others folks were on
 6 the line?
 7 MR. SLOTHOWER: Jeff Slothower.
 8 JUDGE TOREM: I thank you, Mr. Slothower,
 9 and your client is Mr. Lathrop, one of the intervenors.
 10 MR. SLOTHOWER: That's correct.
 11 JUDGE TOREM: Who else is on the line?
 12 MR. WHITE: Clay White, Kittitas County.
 13 JUDGE TOREM: Okay. Great.
 14 MR. HURSON: You can back up from the
 15 microphone a little, Clay.
 16 JUDGE TOREM: All right. We're ready to
 17 proceed, and I want to look at the proposed agenda for
 18 today. We have covered Items 1 and 2, of course. There
 19 were two objections that I want to note, and I think
 20 everybody got my e-mail responses on those. First,
 21 Mr. Slothower objected and requested that the hearing be
 22 held in person in Kittitas County, and then Mr. White
 23 noted that and responded as well. I overruled both of the
 24 objections and denied the request based on the fact that
 25 we're going to focus mainly on procedural matters, and the

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1 Council had other business to attend to today here, not
2 simply on the Kittitas Valley Wind Power Project. So I do
3 hope that it wasn't too much of an inconvenience. I see,
4 Mr. Hurson, you traveled over here I presume specifically
5 for this proceeding today.
6 MR. HURSON: Yes.
7 JUDGE TOREM: Council, do we have a motion
8 to adopt the remainder of the proposed agenda?
9 MR. IFIE: I move for adoption of the rest
10 of the agenda.
11 JUDGE TOREM: Thank you, Mr. Ifie. Second?
12 MS. ADELSMAN: Second.
13 JUDGE TOREM: Is there any discussion or any
14 additions to the proposed agenda? Were there any other
15 parties that had items that they wanted to add to the
16 agenda that we're not aware of already?
17 All right. Seeing none, all in favor?
18 COUNCILMEMBERS: Aye.
19 JUDGE TOREM: All right. The agenda is
20 adopted. We're going to move straight into the missing
21 prefiled testimony issues. In the prior prehearing
22 conference orders we had sent out a deadline for the
23 Applicant to file its prefiled testimony on May 24. That
24 was done. All other parties were to have a response by
25 July 6, a few Tuesdays ago, and that was done with the

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1 exception of three parties, the Residents Opposed to
2 Kittitas Turbines or ROKT, the Sierra Club, and Chris
3 Hall. Council has been advised that Ms. Hall may be
4 settling out and may be in a private settlement and no
5 longer participating. When we know that for sure, we will
6 advise. Council's been advised that the Sierra Club does
7 not intend to file any prefiled at all, and Council
8 through discussions that I've had with Mr. Carmody and
9 Mr. Garrett, as well as other staff members have had with
10 them have been advised that they did not file any prefiled
11 testimony at this point but may have missed the deadline
12 inadvertently or may choose to file any testimony in the
13 form of rebuttal.
14 What I wanted the rest of the parties to
15 know was that rebuttal testimony as we said at the
16 original prehearing conference I think several months ago
17 was in Ellensburg was said it had to be true rebuttal
18 testimony, so the Applicant need not fear any rebuttal
19 coming in as a back door to its original prefiled
20 testimony. That would be unfair to the Applicant. But if
21 the parties are able to file rebuttal to each other, and
22 within that, if you will, boot strap any kind of further
23 discussion opposing the Applicant's testimony as true
24 rebuttal to something that's been filed, that may be
25 allowed but subject to a motion to strike, of course.

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1 So with that already said, Mr. Carmody,
2 Mr. Garrett, and Mr. Robertson, which of you is going to
3 be speaking to this today?
4 MR. CARMODY: This is Jamie Carmody. I'll
5 start, but I think Ed and Mike may have some supplemental
6 comments they would like to make.
7 A beginning point, they are a citizen group,
8 a public group, and this process in general is
9 extraordinarily difficult and expensive for them either to
10 understand or to financially participate in. And so
11 they've been doing the best they can under the
12 circumstances. There was some ambiguity in their mind
13 with respect to the prefiled testimony, particularly with
14 respect to the instructions from the earlier order not to
15 duplicate testimony that had been provided by other
16 parties. And so they looked to and relied upon partly
17 Kittitas County, partly Mr. Lathrop, and all of their
18 prior testimony and information provided thinking that was
19 going to be a part of the record and would be the evidence
20 in the record. There was also their understanding that as
21 a party they would be entitled to participate in the
22 hearing process through cross-examination and that type of
23 thing in the hearing, as well as commenting on the public
24 piece of that.
25 To say this whole situation has got a little

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1 more confusing over the last week or so I think is
2 probably an understatement. What they're going to try to
3 do as best they can would be to submit some additional
4 duplicative in effect testimony based on their earlier
5 testimony and comments in the context of rebuttal. If
6 there was a question about whether Zilkha or the Applicant
7 wanted or needed any further time to respond to that, the
8 proposal or the concept would be that that testimony would
9 be provided by the rebuttal deadline, and that Zilkha or
10 other parties could submit information in response to that
11 but we would propose August 9 which I think is a timetable
12 that fits with the hearing. I believe you indicated you
13 wanted to have that final bit of testimony in by August 9
14 if that was to occur. I don't think that there would be
15 any additional testimony from Zilkha, but that's what we
16 propose just for clarification.
17 JUDGE TOREM: Mr. Carmody, our discussions
18 prior to the meeting today were that either (a) you were
19 going to submit rebuttal, or (b) if you wished to actually
20 make a motion to extend the deadline to your client to
21 file its prefiled testimony, then at that point the
22 Applicant would, of course, be and all other parties would
23 get a chance to respond and rebut your client's testimony.
24 If you file true rebuttal testimony, there won't be any
25 need to extend any deadlines.

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1 MR. CARMODY: That's correct. I understand
2 that, and what I was trying to do is remove any ambiguity
3 with respect to what's there. So rather than spend a lot
4 of time debating the character of it, build into the
5 procedure and opportunity to respond if other parties
6 wanted to, but more thought being that it's going to be
7 primarily, if not, solely rebuttal testimony.
8 JUDGE TOREM: I guess I have to have it one
9 way or the other. You're either making a motion to extend
10 those deadlines which takes our discussion another
11 direction, and I need input from my Councilmembers as well
12 if they want to extend the deadlines. The reason we
13 discussed the August 9th deadline was that I absolutely
14 must preserve the week of August 9th for Councilmembers to
15 finally be prepared for the hearing and nothing let alone
16 prehearing briefs or any prefiled testimony can come in
17 after that because they need time to prepare and read
18 everything. So that was what I told you. I couldn't
19 allow anything to come in after that even if a
20 Councilmember wanted it.
21 MR. CARMODY: I understand. Well, I guess
22 then specifically we would request or make a motion that
23 the ROKT group be entitled to file prefiled testimony,
24 either rebuttal or otherwise, by the deadline for rebuttal
25 testimony which I think is the 26th and that other parties

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1 be allowed until August 9 to submit anything in response
2 to that. That would help deal with the ambiguities that
3 the group had.
4 JUDGE TOREM: I think it's the 27th is the
5 deadline for rebuttal testimony. Any other parties? My
6 notes are the 27th. Does anybody have a note otherwise?
7 MR. PEEPLES: The 27th.
8 MR. CARMODY: I think it is the 27th.
9 You're right. I have that.
10 JUDGE TOREM: It's a week from tomorrow. So
11 the motion then, if I understand it, I'll restate it for
12 those here, is to allow ROKT to file its missing prefiled
13 testimony that would have originally been due on July 6 on
14 the 27th and allow all parties to file any necessary
15 rebuttal to that no later than August 9.
16 Let me turn to the Applicant first then and
17 get a response to this because it is Mr. Peeples' client
18 that is applying for the certification, and then I will
19 hear from any other parties, intervenors, or the like and
20 then hear from Councilmembers discussion on this.
21 Mr. Peeples.
22 MR. PEEPLES: Well, I can't really tell you
23 how strenuously we're going to object to this. That order
24 was not ambiguous. It was clear. They're represented by
25 counsel. The order said rebuttal only to these things

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1 that came in after we filed our testimony. So as far as I
2 am concerned this is a blatant attempt to sandbag, and
3 we're going to object. And trying to bring that in on the
4 27th, we've got briefs due. We're getting ready for trial
5 and then to have to rebut things, contact witnesses
6 perhaps, and get things ready by the 9th while we're doing
7 everything else trying to get together for hearing is
8 absolutely unacceptable.
9 JUDGE TOREM: Any other parties want to
10 support or oppose the motion as made by Mr. Carmody?
11 MR. SLOTHOWER: This is Jeff Slothower on
12 behalf of Intervenor Lathrop. We don't object to
13 Mr. Carmody's request.
14 JUDGE TOREM: Any other intervenors or other
15 parties that wish to comment on the motion?
16 Councilmembers, is there a strong feeling
17 one way or the other? We've heard from the party that's
18 affected, as well as the Applicant.
19 Okay. Hearing none, Mr. Carmody, I have to
20 deny your motion because although I've considered it and
21 said that I wouldn't act in advance on it, I don't see
22 that there's any agreement with the Applicant. They're
23 the party that's most affected. So I won't allow any
24 prefiled testimony to come in late today. After all the
25 thought and the discussions we had, despite that, if there

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1 was agreement from the Applicant to allow it and they're
2 the party that would be most prejudiced I think. I think
3 it's pretty clear they're in opposition, and the order was
4 clear. If there was a time for asking what was expected
5 of prefiled testimony, it should have been ahead of the
6 6th and not after that time.
7 However, the parties, including Mr. Garrett
8 and anyone else, Mr. Robertson or otherwise that's a
9 member of ROKT that wishes to participate in public
10 comment sessions can certainly do so. If you wish to
11 offer their testimony as a rebuttal witness that is
12 certainly still available, but it truly has to rebut
13 something that came in from one of the other parties filed
14 on July 6.
15 So if their testimony is crafted in such a
16 way to actually be rebuttal and not to include a direct
17 response to the Applicant which was owed on July 6, then
18 it should survive a motion to strike. I can't give you a
19 preruling on that because I haven't seen the testimony,
20 nor would I lawfully be able to do so. But I'm not
21 telling you that anything that does come in on the 27th
22 will be allowed. But if there's a motion to strike, I'll
23 hear arguments on both sides.
24 This is simply my advice to you that any of
25 Mr. Garrett's or anything else you intend to provide come

1 in the appropriate format and be rebuttal to something
2 that was filed on the 6th. If, again, that includes
3 additional response to the Applicant's original testimony,
4 it should be an appropriate rebuttal to all that's out
5 there.

6 Ms. Makarow, was there any other issues with
7 the prefiled testimony that was missing or have we covered
8 that?

9 MR. MAKAROW: No, Judge Torem. We covered
10 everything.

11 JUDGE TOREM: All right. Then let's move on
12 to the witness scheduling for the hearing dates. We do
13 begin the hearing on August 16, and we go five days that
14 week. We would come back again August 23 and come back
15 for that full week, if necessary. My understanding is
16 that the temperatures already in Ellensburg are cresting
17 100 degrees, and if there is a way the hearing is done shy
18 of that, those of us from this side of the mountain would
19 gladly come back to what I think are lesser climate
20 extremes.

21 With that in mind, Mr. Peeples is going to
22 be the lead counsel for the Applicant here in scheduling
23 his witnesses. My encouragement is to all the parties, in
24 fact my instruction to all the parties is to contact
25 Mr. Peeples and determine if you want to cross-examine one

1 of his witnesses, find out when he's going to schedule
2 them. Hopefully the Applicant's testimony will be done
3 within the first week, and we will only have the second
4 week to follow on for other witnesses. There may be some
5 other ways to go, topic by topic, so we can group the
6 Applicant and responding parties in the same week. But I
7 am going to leave that to some coordination with
8 Mr. Peeples. If you have witnesses that can only be in
9 Ellensburg on a particular day, please make Mr. Peeples
10 aware of that and EFSEC staff, so he can accommodate
11 travel schedules as best as possible.

12 Mr. Peeples, did you have preliminary
13 comments or ideas?

14 MR. PEEPLES: Yes. I am prepared to -- I
15 don't think I have a preference going through all our
16 witnesses first or doing it by subject matter. I don't
17 have a preference. I can do it either way. I guess what
18 I look to you, Your Honor, is to tell me which way you
19 want us to do it. It doesn't make any difference to me.
20 I think everybody should be flexible allowing witnesses
21 who have scheduling problems to testify. I would like to
22 note that with regard to we have one witness which is
23 Hendrick Henstra Jorgenson who's coming over from Denmark,
24 so we have slated him for the second week just because we
25 didn't know how the first week was going.

1 JUDGE TOREM: What topic will you be
2 speaking to?

3 MR. PEEPLES: He will be speaking
4 essentially to the safety issues, health and safety
5 issues. He is an engineer and designer. Tower and
6 turbine safety engineering is what his area would be.

7 JUDGE TOREM: The one topic I think should
8 be taken up first is the preemption motion that was filed.

9 MR. PEEPLES: Correct.

10 JUDGE TOREM: So I would imagine that your
11 witnesses and then those of Mr. Hurson on the County would
12 be required on the first day or two of the hearing. I'm
13 hoping that the preemption matter, granted it's a
14 procedural issue, but it is a substantive, there is
15 several substantive matters that need to be determined by
16 the Council. There will not be an interim decision on
17 preemption, but it would help to get the Council to focus
18 from one discrete issue of should they preempt Kittitas
19 County's land use regulated zoning ordinances that should
20 be a discrete part of the hearing, and then move on to
21 what, if any, recommendation they want to make to the
22 Governor for the operation of the wind farm.

23 MR. PEEPLES: Your Honor, when I filed my
24 testimony I referred to each of my witnesses as 1 through
25 40, and there was a typo I think with regard to Michael

1 Popalardo. He didn't have a number. He would be No. 4.
2 There was a type with regard to Dan Cayman. He came out
3 as Witness 39 and he's Witness 20. But unless somebody
4 requests otherwise or we decide to do it another way I
5 plan to take them in that order. I've grouped my
6 witnesses together in categories. So if anybody wishes to
7 -- I mean they're pretty self-explanatory when you go
8 through the list. If anybody wants to change the
9 categories around, I can do that. If anybody wants to
10 have their witness available and put them on at the same
11 time, that's fine with me.

12 JUDGE TOREM: Ms. Makarow, is there other
13 items or suggestions from your experience with this that
14 you want to make to the rest of the parties?

15 MS. MAKAROW: Well, first of all, before we
16 go into that. I did hear from Deborah Strand who
17 represents Kittitas County Economic Development Group.
18 She said her witness was only available Monday through
19 Thursday of the first week, so Mr. Peeples may want to
20 take that into consideration. I think in past projects it
21 has been helpful for the Council to really have issues be
22 dealt with topic by topic if they can do that; although, I
23 think always leeway in the case a witness is not available
24 to take them out of sequence.

25 JUDGE TOREM: Mr. Peeples, from your

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1 perspective for planning what time are you telling your
2 witnesses to be available on a given day?
3 MR. PEEPLES: Well, right now to me if I
4 have a real issue in my mind about time, it's going to be
5 how long are we going to take on the first issue which is
6 the preemption issue, and we have people holding right
7 now. I think if people let me know how much they're going
8 to cross, etc., how much time they would take on some of
9 these witnesses, that would help. The Council are going
10 to have questions of these people or issues because the
11 Council always will ask questions. It will be helpful to
12 know.
13 JUDGE TOREM: Does it sound unreasonable to
14 the Council or other parties to set aside the first day
15 and a half to deal with the preemption issue? Is there
16 any reason to set aside more time to Councilmembers as far
17 as your thoughts on the process? Parties, a day and a
18 half out of ten, or is there a need for more?
19 Mr. Anderson.
20 MR. ANDERSON: What would be done the second
21 half of the second day or are you leaving some space in
22 case you ended up moving into a full second day?
23 JUDGE TOREM: We can either leave that open
24 and try to schedule something that's in the evening for a
25 public comment; although, I think Ms. Makarow has already

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1 tentatively thought about the public's participation, and
2 it may be more help to have them participate once the
3 adjudicative substantive topical decisions are going.
4 That could occur or we could start off with some of the
5 basic preliminary witnesses that Mr. Peeples might have on
6 hold. I think that would be the best use of our time to
7 move into the Applicant's case in chief, if you will.
8 Mr. Hurson, do you think that a day and a
9 half could handle the issues on the County's main
10 opposition? I think you would be the main opposing party
11 for the preemption. I'm not sure what of the other
12 parties' opinions may or may not be involved.
13 MR. HURSON: I guess in a way I don't know
14 how to respond because when I believe several months ago
15 we asked to bifurcate basically, so we had preemption and
16 then we have substance. The Applicant took the position
17 you can't possibly segregate the two.
18 JUDGE TOREM: The Council is not
19 bifurcating.
20 MR. HURSON: That's my point is the
21 Applicant said you can't bifurcate because whatever it was
22 Issue 4 under the WAC is basically all the substance, and
23 now there seems to be a recognition of the Applicant that
24 you can actually segregate the preemption issues in and of
25 themselves. If that's the case, it seems more efficient

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1 to me to reopen our request to bifurcate the proceedings,
2 have a hearing on preemption. At the conclusion of the
3 preemption hearing make a decision because the County's
4 position is factually and legally there's no possible way
5 to grant preemption given the facts that we have, and then
6 we can avoid the rest of the hearing. Because what I'm
7 hearing is the Applicant thinks he can get it done in a
8 day and a half, and then we're going to spend ten days
9 talking about everything else.
10 JUDGE TOREM: Again, what I'm asking it's my
11 words that are the day and a half, and we're not going to
12 bifurcate the hearing. We've already decided that legally
13 to send everything to the Governor at once, so there is
14 nothing to be done by bifurcating or going through that
15 discussion again. That road has been explored. It's a
16 dead end. Whether the Applicant wants it or whether the
17 County wants it under the EFSEC laws and rules we can't go
18 there, so we're not.
19 What I want to make sure is that this
20 separate and discrete topic that the Council has to
21 include within its order is addressed separately from --
22 it's an add-on issue. The Council has never had it in 30
23 years of hearing, so it's a separate issue. Whether you
24 want to look at it as the same as safety or it's the same
25 type of issue as something else, we're breaking up all

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1 these other discrete issues. This is going to be a
2 separate topic.
3 Do you have an extensive number of witnesses
4 I guess is my question that are going to take longer than
5 a day and a half when you consider the Applicant will also
6 have witnesses explaining why they think preemption is
7 appropriate subject to your cross-examination?
8 MR. HURSON: Well, my only witness that I
9 have is Clay White, and I guess one thing I wanted to make
10 sure then is other witnesses that they have I don't think
11 have been identified as preemption witnesses, but I think
12 there may be some limited cross-examination of many of
13 Zilkha's witnesses related to it because the Applicant
14 said basically everything is related to preemption, and I
15 just want to make sure that if I don't ask a question in
16 the first day and a half that I'm precluded from
17 participating.
18 JUDGE TOREM: No, I recognize there's going
19 to be spillover, and we will try to focus in on a
20 particular topic.
21 MR. HURSON: I'm not sure who the Applicant
22 is calling for the preemption issue that's now being
23 redefined.
24 JUDGE TOREM: You're anticipating my
25 question to see who are the primary witnesses that you

1 foresee now being called on the preemption issues.
 2 MR. PEEPLES: I'm going to call Chris Taylor
 3 and Andy Lenehan are going to be our two primary witnesses
 4 and maybe another rebuttal witness. We don't know at this
 5 time. So it's those three, and I believe on the County's
 6 side will primarily be Clay White. So my analysis is it
 7 would be essentially those four witnesses and perhaps
 8 maybe in -- it would be those three or four witnesses.
 9 That's what my analysis was.
 10 JUDGE TOREM: So the hearing will open with
 11 Mr. Taylor's cross-examination.
 12 MR. PEEPLES: Yes, and then I presumably
 13 would go to Mr. Lenehan's cross-examination.
 14 JUDGE TOREM: Do any other parties have
 15 witnesses they intend to present on this particular topic
 16 of preemption? Again, this is focusing solely on should
 17 the County's land use planning and zoning regulations be
 18 preempted. The rest of the issues as to whether its
 19 appropriate to site this proposed wind farm in that
 20 portion of Kittitas County will come up in the days ahead
 21 of that, but this would solely be which rules should apply
 22 discussion.
 23 Any of the parties on the telephone have any
 24 witnesses for that topic?
 25 MR. SLOTHOWER: This is Jeff Slothower on

1 behalf of Intervenor Lathrop. It may be that some of our
 2 witness David Taylor testimony link to preemption.
 3 JUDGE TOREM: All right. So as necessary --
 4 will he be available those first two days?
 5 MR. SLOTHOWER: I can check. I don't know
 6 the answer to that right now.
 7 JUDGE TOREM: If the answer is no, please
 8 contact Mr. Peeples immediately as soon as you learn that,
 9 so that we can make arrangements so the Council is made
 10 aware to hold open a time period later to handle that.
 11 So, Mr. Peeples, if you'll take that
 12 direction.
 13 I don't see any other -- Counsel for the
 14 Environment, is there anything that you foresee
 15 participating actively in presenting witnesses on this
 16 topic?
 17 MR. LANE: No.
 18 MR. WHITE: Judge Torem, I have a question.
 19 This is Clay White.
 20 JUDGE TOREM: Mr. White, go ahead.
 21 MR. WHITE: Since we don't have times now,
 22 what are you considering as a day? Is this going to be an
 23 8 hour day, so that would give us 12 hours?
 24 JUDGE TOREM: Approximately. That was part
 25 of where I wanted to go next, Mr. White, is to find out

1 what time folks wanted to start.
 2 MR. WHITE: That may have a little to do
 3 with how much time we need is how long we're going to go
 4 each day.
 5 JUDGE TOREM: Correct. My thought is we're
 6 going to take at least a 15-minute break in the morning
 7 and afternoon sessions, and we'll schedule around
 8 realistic times not just a rote 15 minutes at 10:30 or 15
 9 minutes at 2:30, but something realistic. Much of that
 10 will depend on the flow of caffeine during the day. The
 11 lunch break will either be 60 minutes or 90 minutes, but
 12 probably plan on 60 minutes from 12:00 to 1:00. If
 13 there's a reason to move it back, it will be no less than
 14 60 minutes unless there's a separate Councilmembers'
 15 motion to take a shorter lunch break. We'll see what the
 16 circumstances are. I wanted to start everyday no later
 17 than nine o'clock and no earlier than eight o'clock, but
 18 there may be some witness issues.
 19 I want to turn to Mr. Peeples as essentially
 20 the chief orchestrator of the proposed witness schedule
 21 that involves all the parties to let me know is there any
 22 reason not to start at 8:00, 8:15, 8:30, somewhere in
 23 there on a routine daily basis?
 24 MR. PEEPLES: I think 8:30 would be a really
 25 good time to start.

1 JUDGE TOREM: Any other input from parties
 2 as to a starting time?
 3 MR. WHITE: This is Clay White again. The
 4 only thought that I have is we're going to have hearings
 5 for two weeks. Is there a chance that we're going to have
 6 a chance for public participation in the evenings?
 7 JUDGE TOREM: There is.
 8 Ms. Makarow, did you have some thoughts
 9 already on scheduling that?
 10 MS. MAKAROW: Right now we have an evening
 11 session scheduled for the Kittitas Valley Project on
 12 Tuesday the 17th and, frankly, I can't quite remember the
 13 time at which the public meeting starts. It's probably in
 14 the vicinity of seven o'clock. We'll be noticing that
 15 very shortly. I would also think the parties should take
 16 note that we do have another public meeting scheduled for
 17 the evening of Tuesday the 23rd starting also at seven
 18 o'clock which would be the comment meeting on the Wild
 19 Horse Wind Power Project Draft EIS.
 20 Traditionally the Councilmembers have broken
 21 off the hearings early on days when there's an evening
 22 meeting, so they have a little bit of time to stretch
 23 their legs and have dinner before going to the public
 24 meeting.
 25 JUDGE TOREM: So hearing that, my suggestion

1 --

2 MR. CARMODY: Your Honor, could you repeat

3 that. It wasn't picking up on the phone.

4 JUDGE TOREM: It sounds as though our

5 hearings are the week of the 16th and the week of the

6 23rd. The week of the 16th there's already a proposal by

7 Ms. Makarow that we schedule the public participation

8 portion of this Kittitas Valley Wind Project on Tuesday

9 the 17th. So if preemption is actually done before lunch

10 on that day, we have an option of starting with the next

11 main substantive topic on that afternoon and having an

12 abbreviated afternoon and then a public comment meeting

13 that night.

14 The following week on Tuesday a separate

15 hearing requires a Draft Environmental Impact Statement

16 public comment period. That's for the Wild Horse Wind

17 Power Project. We will break earlier that day as well to

18 allow the Councilmembers and parties to get a bite to eat

19 and shift gears before hearing separate public testimony

20 on that project's DEIS.

21 Ms. Makarow, did I state that accurately?

22 MS. MAKAROW: That is correct.

23 JUDGE TOREM: So Mr. Peeples.

24 MR. PEEPLES: Just generally. I just want

25 to comment that the primary time that will be used will be

1 cross-examination. We'll be putting on a quick brief

2 summary testimony. So how long this is going to take it

3 really determines how long the people with the right to

4 cross-examine the certain witnesses will cross them. So

5 if we get an idea of how long the crosses are going to be,

6 I mean that would probably be helpful to you. The

7 redirect generally has been not that long, not that time

8 consuming overall.

9 I mean, Irina, you might have a different

10 observation, but that's been my historic observation. So

11 I think that's probably what you need to look at for your

12 consideration of the time.

13 And, Clay, I doubt with you, Clay, I don't

14 think we're going to be too long on you. I mean it's

15 going to be kind of an on and off thing from our point of

16 view on the preemption.

17 JUDGE TOREM: What I'm hearing then is

18 Mr. Peeples needs from the rest of the parties an idea as

19 to how long each of you plans through your attorney to

20 cross-examine his witnesses. He will be doing the same

21 courtesy to you and letting you know how long he wants to

22 cross-examine any of your witnesses that were identified

23 in prefiled testimony on July 6.

24 Once we get the rest of the rebuttal

25 testimony in on the 27th, I would encourage all the

1 attorneys to be in touch directly with Mr. Peeples. If he

2 doesn't hear from you, he has a responsibility to schedule

3 this, and he'll be having a work in progress as to

4 proposed scheduling. So if your witness was not clear in

5 the testimony or wasn't labeled as such as to what topic

6 they intend to be on or you're unclear as to one of the

7 Applicant's witnesses what topic they are going to be on,

8 figure out those questions to Mr. Peeples by either his

9 email or call them directly. But figure out about how

10 long you want. We know it's not a cookbook this witness

11 takes one hour or forty minutes, but some amount of flex

12 time will be built in. So if we need to carry witnesses

13 over to another day we can.

14 But, again, he's correct in highlighting

15 that Council will have read the prefiled testimony ahead

16 of them being on the stand. They will know once the

17 witness adopts their testimony, and that's what occurs.

18 We're not going to rehash any testimony. It will be do

19 you adopt this testimony as your own? Yes. Who's up for

20 cross-examination?

21 There won't be any recalling of witnesses if

22 we can avoid it. If they're a one-topic witness, they're

23 going to be on once, and if they're not necessary in

24 rebuttal, they're going to be gone. So don't come on the

25 last day of hearing and ask to call back another witness

1 if that has not already been prearranged.

2 So work with Mr. Peeples is the message

3 today to make sure you're on the list. If you know you're

4 not going to have any cross-examination questions, fine.

5 If some come up during the hearing, that can be

6 accommodated. But if you definitely know you have an

7 extensive cross-examination, Mr. Peeples needs to know

8 about it in advance. And if he has any for your witnesses

9 or the other parties or each other, make sure that's known

10 in advance. If there are problems, then I can handle

11 those procedurally in advance with the affected parties,

12 and we'll note that on the record in the future.

13 MS. MAKAROW: Judge Torem, in the past the

14 Council has required all the parties and the Applicant to

15 submit their estimates for cross-examination on various

16 witnesses by a certain deadline, and certainly that might

17 make Mr. Peeples' job a little bit easier if he knows that

18 he's going to get all the information he is going to get

19 by a certain time.

20 JUDGE TOREM: I would like to have the

21 proposed witness schedule no later than the 9th of August.

22 Working backwards from there would the prior Monday allow

23 you that full week of the 2nd, Mr. Peeples, to finalize it

24 or do you need it even earlier than that? Because we only

25 have rebuttals on the 27th.

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1 Starting now would be great, folks, to get
2 it in advance, but I don't want to handcuff it too late in
3 the procedure.
4 MR. CARMODY: Your Honor, could I ask a
5 quick question, so I understand the process that you want
6 to follow? When we've talked about preemption, that is
7 both sides presenting their evidence and crossing and
8 providing rebuttal on that issue, we've defined it as a
9 day and a half. Is that the procedure that will be
10 followed with each and every other issue? That is, will
11 both sides of an issue come, and then we'll move to the
12 next category?
13 JUDGE TOREM: Yes. And this is Mr. Carmody,
14 correct?
15 MR. CARMODY: Yes.
16 JUDGE TOREM: Mr. Carmody, that's exactly
17 right. Once we have a proposed schedule to focus on those
18 topics, witnesses in favor or on one side of the topic for
19 the Applicant will adopt their testimony and be
20 cross-examined and then redirect as necessary and perhaps
21 recross but no more than that. We'll move onto other
22 witnesses on the other side.
23 MR. CARMODY: On matters like preemption
24 where there's a discrete legal issue are you anticipating
25 any legal argument at that point with respect to that

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1 issue or how will that fit into the process?
2 JUDGE TOREM: We will have post hearing
3 briefs to accommodate those arguments legally. There may
4 be room for closing arguments, but most often in a case
5 like this post hearing briefs will best organize and make
6 efficient use of everyone's time.
7 MR. CARMODY: Okay.
8 MR. PEEPLES: I take it you want them
9 grouped by subject areas.
10 JUDGE TOREM: I think as Ms. Makarow said
11 that's probably best for the Councilmembers, and I'm not
12 hearing anything different as I look around the table.
13 That was my initial preference as well, so I am happy with
14 it.
15 MR. PEEPLES: What I will try to do, Your
16 Honor, is get out not this week but sometime next week a
17 draft order. When I say draft, I mean a draft schedule
18 with order, and then I will distribute that, and then
19 people can respond or do what they may.
20 I do have one specific issue with regard to
21 one witness I have. Josh Butler he's the geotechnical
22 person. I had him listed as the fifth witness. He's
23 going to have to be in Japan. In fact, I think he's
24 already there. So I guess I would like to ask leave of
25 the Council to be able to if people want to ask him

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1 questions -- and my gut reaction it's not too
2 controversial. There's not an earthquake up there. --
3 would be to have his cross and any questions the Council
4 might want to ask him by telephone. But presently he's in
5 Japan, and I don't think we're going to be able to get him
6 back.
7 JUDGE TOREM: Has any party already reviewed
8 his testimony and come to the opinion they need to have
9 him in person for cross-examination?
10 MR. PEEPLES: The two people I have whose
11 subject areas would cover his would be Kittitas County and
12 CFE.
13 JUDGE TOREM: Gentlemen, have you had the
14 time or leisure to look at his testimony yet?
15 MR. HURSON: I haven't looked at it yet.
16 MR. LANE: I've looked over all the
17 testimony, and it doesn't come to mind as a topic that I
18 have serious concerns about at this time, but I'll look
19 over it again and get back to you as soon as possible.
20 JUDGE TOREM: Councilmembers, given the
21 geographical constraints, and I don't expect the
22 Councilmembers have necessarily reviewed his testimony, do
23 you see a problem procedurally with having someone there
24 only by telephone? That's assuming that Mr. Fiksdal and
25 Ms. Makarow could have the telephones working to Japan

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1 that day.
2 MR. FIKSDAL: Yes. This is Allen Fiksdal.
3 I don't know if we discussed having a telephone in the Hal
4 Holmes Center. I assume they have a link. We'll try to
5 set one up.
6 MR. PEEPLES: Thank you.
7 JUDGE TOREM: Let's work with the Applicant.
8 Mr. Hurson and Mr. Lane, if you please review his
9 testimony. And the witness's name again?
10 MR. PEEPLES: It's Josh Butler. We're
11 trying to have him here. I just can't assure you that we
12 are going to be able to do it.
13 JUDGE TOREM: Let's then, Mr. Hurson and
14 Mr. Lane, if I don't get at least an email objection to
15 his being by telephone by this time next week, actually
16 we'll make it the same dateline as the rebuttal testimony
17 by the 27th, then, Mr. Peeples, you will have the
18 Council's permission if there's no objection to hold him
19 by telephone. If that works more convenient for his
20 schedule, then take that accommodation for what it is.
21 Anything else on the witness scheduling?
22 Does anyone have any questions?
23 MR. SLOTHOWER: This is Jeff Slothower. I
24 have a question.
25 JUDGE TOREM: Yes, sir.

1 MR. SLOTHOWER: We talked about grouping
2 witnesses by issue. In your Prehearing Order No. 8, there
3 is a list of five of the issues. Is that the list we are
4 going to be working off of or working from in grouping
5 these witnesses?

6 JUDGE TOREM: That would be my preference.
7 Let's see if Mr. Peeples has some other modification to do
8 that.

9 MR. PEEPLES: Jeff, I don't know if that
10 directly relates to a lot of the issues we have. What I
11 was thinking was I'd send to you these witnesses that we
12 have kind of matched up with each other, and I was going
13 to group like in a certain area our witnesses first and
14 then after that your witnesses if they're in that area,
15 send it to you, and have you take a look at it. I'm just
16 trying to get a witness order. Does that sound okay to
17 you, and then you can just respond on it?

18 MR. SLOTHOWER: Well, just when we talk
19 about issues, I mean issues do a lot of different things
20 to different people. And I'm trying to get a handle on
21 what the grouping will be. I mean this Item 5 in
22 Prehearing Order No. 8 is helpful because it lays
23 everything out, and it would be nice to have a schedule
24 like this laid out with witnesses.

25 JUDGE TOREM: Mr. Peeples, you're aware

1 which part of the order he's referring to?

2 MR. PEEPLES: Yes, I know.

3 JUDGE TOREM: Does that respond to what you
4 were thinking you were going to do with the proposed
5 witness schedule?

6 MR. PEEPLES: Pretty much. I think my
7 witnesses are almost exactly in this order, pretty much in
8 this order, and I was going to take -- in fact, they are.

9 JUDGE TOREM: All right. If they're in that
10 order, fantastic. If they're by those topic groupings,
11 that would be helpful, and we have to shuffle them out of
12 the order that they're in this prehearing order.

13 MR. PEEPLES: That's basically what I was
14 going to do then, try to get common, put the witnesses
15 together from various parties in common areas.

16 JUDGE TOREM: There may be reasons to
17 shuffle the order of the topics as they're listed there to
18 accommodate witness schedules and availability, but as
19 long as the topics are grouped as much as possible, I
20 think that would be preferable to the Council.

21 Anything else on witness scheduling?

22 MR. CARMODY: Your Honor, this is Jamie
23 Carmody again. I would like to ask you to consider
24 switching the two public comment dates with one another,
25 so that the public comment date on this application would

1 be August 23, and the comments on the Wild Horse Draft EIS
2 be on the 17th. That would allow the public an
3 opportunity to consider and see the evidence that was
4 brought into the hearing and then comment an appropriate
5 way.

6 JUDGE TOREM: Parties, any response to that?
7 Councilmembers?

8 Part of me says that that makes sense and a
9 part of me also says, Mr. Carmody, that much of the
10 testimony has already been posted on the website, so
11 that's already in, if you will, once it's adopted
12 officially. And if Ms. Makarow has no real reason to have
13 one earlier than the other, then we could do that. But I
14 want to hear from her and find out there may be some other
15 methods to the madness here as to which Tuesday for which.

16 MS. MAKAROW: The basis for trying to
17 schedule both meetings in during the two weeks was that
18 the Council was already in Ellensburg. If the Kittitas
19 Valley Public testimony is moved to the second Tuesday, I
20 will have missed my deadline for noticing the public
21 comment meeting on the Wild Horse Draft EIS, and we would
22 have to have it at a later date. We can't move the Wild
23 Horse public comment meeting up earlier because I wouldn't
24 meet my notice schedule.

25 MR. PEEPLES: In that event I do not want it

1 changed because I do not want to from my point of view I
2 don't want the Wild Horse EIS stalled.

3 JUDGE TOREM: So the only other option is to
4 move the public meeting on this matter later or move it
5 around.

6 MS. MAKAROW: Maybe one possibility is to
7 move the public comment meeting on the Kittitas Valley
8 matter to the second week for another evening, but we
9 would still -- I would have to coordinate that with our
10 administrative assistant with the location that we're
11 looking at holding the hearings to determine if that's
12 possible.

13 JUDGE TOREM: Councilmembers have any
14 objection to having two evening meetings the second week?

15 MS. TOWNE: As long as they're early in the
16 week.

17 JUDGE TOREM: Right. I want to see,
18 Mr. Peeples, if there's a way to do this hearing that's
19 scheduled for ten days in eight, then I don't want to
20 schedule something for the Thursday night of the second
21 week. And if it runs that day and we can end that day,
22 there would be no reason to keep the Council that extra
23 evening.

24 So we'll look, Mr. Carmody, if there's a way
25 to move the Kittitas Valley public comment to the

1 following week or, if not, maybe it's a Thursday of the
2 first week or Monday or Wednesday the second week are the
3 dates that I'm going to suggest Ms. Makarow look at. But
4 she'll coordinate with me and make sure that there's not
5 another conflict with the facility or something else.

6 MR. CARMODY: So the primary concern would
7 just be facility scheduling?

8 JUDGE TOREM: I think that is the primary
9 concern. My secondary concern is that by the time we get
10 to the second week folks will start to run out of stamina,
11 and we want the Council and we want the public and all the
12 parties to have enough energy to be -- it's long enough
13 days as it is and evening meetings take a little bit more
14 out of all of us. So I want to make sure that we address
15 that physiological concern as well and don't put too much
16 on people the second week. Once we have those dates
17 though as to what nights the evening meeting will be, we
18 probably will start an hour later the following morning or
19 break an hour earlier the afternoon of to accommodate
20 everybody's needs and allow the rest of the world to
21 happen outside the meetings.

22 Let's move on to Item 6.

23 MR. WHITE: Judge Torem, this is Clay White.
24 Can I make one comment?

25 JUDGE TOREM: Fire away.

1 MR. WHITE: Just for the record, on the 23rd
2 of August, I do have a public hearing at the planning
3 commission scheduled. It's going to impact Mr. Hurson and
4 myself. Mr. Carmody doesn't know it yet, but it may
5 impact him as well with the planning commission that night
6 for a set scheduled public hearing regularly scheduled for
7 the Kittitas County Planning Commission. If you could
8 keep that in mind, I can try to be in two places at once,
9 but it is difficult.

10 JUDGE TOREM: All right. Well, then I
11 appreciate you bringing that up. Is there any other known
12 conflicts that parties may have for other evenings?

13 Okay. Thank you, Mr. White.

14 Let's move onto Item 6, the prehearing
15 briefs. The Council very much wants to see legal argument
16 in advance of what the parties intend to do. We know all
17 the parties through their petition for intervention that
18 were granted what their general interests are, and from
19 reading their prefiled testimony and the witnesses they're
20 putting out there, we can start to guess a little bit as
21 to motivation and why they're participating and whether
22 they're for or against the project on any number of topic
23 areas. But prehearing briefs that are organized and tell
24 us where the parties' actual positions are and what
25 conditions, if any, they want to see built into a site

1 certification agreement if that is what goes forward to
2 the Governor are going to be helpful, so we know from
3 whence your questions might be coming in cross-examination
4 and help focus the Council.

5 Prehearing briefs I've looked at the
6 calendar and to make it as I said of any use for the
7 Council to be able to read them have to be in really no
8 later than Friday, August 6. The Council has encouraged
9 me to make this a mandatory item. I am not inclined to do
10 that despite my own Council telling me you must file a
11 prehearing brief because some of you have smaller issue
12 areas, and I don't want to make you incur attorneys' fees
13 or make you incur extra work. But if you want the Council
14 to know where you're coming from before the hearing, file
15 a prehearing brief.

16 Please don't think you have to go to
17 excessive lengths to make your case in advance. You will
18 have plenty of opportunity during the two weeks and in
19 post hearing briefs. But tell us like you would any
20 judicial procedure what you expect the evidence is going
21 to show as to why or why not this wind farm should be
22 where it's proposed in Kittitas Valley. You can take into
23 consideration the Council is aware of other wind farms
24 proposed in the valley. This decision will focus on this
25 one, but if you want to make arguments about location and

1 tell us there's other things, we expect that's going to
2 come in during the hearing as well.

3 The prehearing briefs need not be lengthy.
4 I don't want to set a page limit, but I think probably 15
5 to 20 pages is a good length. It shouldn't be too much
6 longer than that or the Council is not going to have
7 enough time to get through all it needs in that week.

8 Ms. Makarow, did you have any other guidance
9 that you've seen used effectively in prior adjudications
10 for prehearing briefs? Have I overcut it or undercut it?

11 MS. MAKAROW: We've only had prehearing
12 briefs in one case prior to this, but I don't remember
13 what the length of those briefs were.

14 MR. PEEPLES: They were 20 pages, and they
15 were denoted as opening statements in the Olympic Pipe
16 Line.

17 MR. HURSON: Olympic Pipe Line.

18 MR. PEEPLES: And that's the only one that
19 has ever been required.

20 JUDGE TOREM: So you gentlemen have more
21 experience with it than I do, but at least does this 20
22 pages strike either as unduly restrictive in this case?

23 MR. PEEPLES: I think that's good.

24 JUDGE TOREM: For the rest of the parties
25 though, maybe I can call on you, Mr. Peeples and

1 Mr. Hurson, in that order. Tell me what exactly you saw
 2 the opportunity as the opening briefs in that, so that the
 3 other parties might know what they've been used for and to
 4 what effect in the past.
 5 MR. PEEPLES: Well, you can go on line and
 6 find it. For the other parties you go to I think the site
 7 map and go down to Olympic Pipe Line archive, and you can
 8 find it there and read it. They were just essentially
 9 opening statements. This is kind of the overview of the
 10 law. This is what we're going to present. This is what
 11 our case is.
 12 JUDGE TOREM: Mr. Hurson.
 13 MR. HURSON: Well, it's a matter of are you
 14 looking for opening briefs in a legal sense that the
 15 lawyers often use or an opening statement? Because I see
 16 those as two separate matters.
 17 JUDGE TOREM: Well, I think more of a fact
 18 intensive opening statement is what would be most helpful
 19 to the Council at this point. The legalities we're
 20 familiar, of course, with our own statutes and rules, and
 21 we'll expect more once the facts are in to have a post
 22 hearing brief on how we should apply those rules and
 23 regulations. So an opening statement is probably a better
 24 characteristic, but for each party in the ball park of 15
 25 to 20 pages sounds appropriate. If you can go less than

1 that, impress us, please.
 2 MS. MAKAROW: Judge Torem, maybe what I'll
 3 do is I'll send by email the link to where those opening
 4 statements are located on our web page for the Cross
 5 Cascade Pipeline, so all the parties will know where to
 6 look.
 7 JUDGE TOREM: So prehearing briefs done by
 8 Friday, August 6. Same rules of service apply for those
 9 as with any other prefiled testimony.
 10 MR. HURSON: Can I ask a question? Given
 11 the distances, if the filing deadline for the physical
 12 document is in Olympia, that requires us to mail it at
 13 least three days in advance under normal mail or someone
 14 to drive it over. I guess for these purposes if we can at
 15 least have everything in the mail that Friday, we can
 16 electronically send you a copy. So if staff just wants to
 17 try to distribute it after five o'clock on Friday, so
 18 everybody could have a copy to take home for the weekend,
 19 we can do that. But it's just our prefiled testimony
 20 costs like \$1,800 for photocopying and another \$1,000 to
 21 mail. And I can promise you our opening brief isn't going
 22 to be as extensive as the prefiled. But just for
 23 convenience and given the time constraints, I'd just ask
 24 if we could for this purpose consider service on the
 25 Council be that we email it to you and put in the mail by

1 that deadline.
 2 JUDGE TOREM: It doesn't sound unreasonable.
 3 Ms. Makarow.
 4 MS. MAKAROW: I think that's a decision to
 5 be made by the Council, but it doesn't sound unreasonable.
 6 JUDGE TOREM: Any objection from
 7 Councilmembers?
 8 COUNCILMEMBERS: No.
 9 JUDGE TOREM: Then that will apply to all
 10 parties. If you can get it served electronically or if
 11 that's by fax or by email, it seems we've done a lot of
 12 business that way. That would be fine. Please include
 13 the rest of the parties on that, so they get it on the 6th
 14 as well.
 15 Mr. Peeples.
 16 MR. PEEPLES: My suggestion is that it
 17 should be emailed in probably PDF form, so that Irina can
 18 immediately put it on the website, and then everybody can
 19 get it.
 20 JUDGE TOREM: Does any party have a problem
 21 putting it into a PDF format?
 22 MR. HURSON: It took us a while, but we
 23 figured out how to do it.
 24 JUDGE TOREM: If anybody needs instruction
 25 on how to do that, Ms. Makarow is much more familiar than

1 I and hope will be able to give a primer on that to anyone
 2 that asks. So we will have that filed -- thanks,
 3 Mr. Hurson. If that saves everybody some money, that's
 4 great.
 5 MR. HURSON: Do you still want us to mail
 6 hard copies to everybody?
 7 JUDGE TOREM: It's a smaller document
 8 certainly than the prefiled testimony I hope.
 9 MR. HURSON: You want about 20 pages. Well,
 10 I mean because we're suppose to have an original and 20
 11 copies. I'll still mail mine. I just want to make sure
 12 I'm not getting confusion. If you don't want us to mail
 13 hard copies, I won't. If you want us to, we will.
 14 JUDGE TOREM: I think the document is mainly
 15 geared at the Council. The Council is going to have it
 16 already electronically. Most of us are getting those
 17 copies either from Ms. Makarow or not. I don't have a
 18 strong feeling one way or the other. Do other parties
 19 want to get just the electronic copy for this sort of
 20 document? I think that would make the most sense. If
 21 we're going to take the step, take the full step and just
 22 serve it all electronically.
 23 If anybody does not receive a prehearing
 24 brief -- maybe it's helpful if you're not filing a
 25 prehearing brief to send an email saying we're not filing

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1 it so no one is looking for it. So everybody then will be
2 required to have something come in August 6. If there's
3 not an attachment, then it will be the responsibility of
4 the other recipients to call and say I couldn't open your
5 attachment, fax it or whatever and make that work. If
6 Ms. Makarow has any questions that as long as they're in
7 by five o'clock on the 6th, they will be timely. If
8 they're not, and they're coming in after that in the email
9 receipt, then they will be subject to motions to strike.
10 But Councilmembers they're only to get what comes in
11 timely.

12 So we'll be clear. We'll dispense with any
13 requirement that there be hard copies and save the expense
14 that much further.

15 Item 7 is cross-examination exhibits.

16 MR. SLOTHOWER: Judge Torem, I have one
17 question. This is Jeff Slothower.

18 JUDGE TOREM: Yes, sir.

19 MR. SLOTHOWER: The schedule that you're
20 talking about for prehearing briefs does that apply to any
21 motions that parties may want to make based upon the
22 evidence or the prefiled testimony?

23 JUDGE TOREM: What sort of motions are we
24 foreseeing, Mr. Slothower?

25 MR. SLOTHOWER: There may be motions that we

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1 may want to make with respect to the preemption issue. We
2 don't know for sure whether we can make that motion until
3 we see all of the evidence that's submitted. So I just
4 want to try to understand where they come in making any
5 motions we may have which relate based to the evidence
6 that's prefiled.

7 JUDGE TOREM: Would these be potentially
8 dispositive motions from your perspective?

9 MR. SLOTHOWER: No, not from my perspective
10 they wouldn't be dispositive motions.

11 JUDGE TOREM: Okay. Motions to strike on
12 testimony should come in as soon as possible. I would
13 prefer if they came in by the 6th because everyone would
14 have the opportunity.

15 MR. PEEPLES: You have August 3 as the
16 motion to strike date.

17 JUDGE TOREM: Thank you for reminding me.

18 MR. PEEPLES: And the responses to motion on
19 August 6.

20 JUDGE TOREM: There's already a deadline in
21 existence, Mr. Slothower, as to motions to strike
22 testimony, and Counsel for the applicant is reminding me
23 it's already set for August 3 with responses due by August
24 6. So that's that August 6 deadline coming back to give
25 the Council a week ahead of time to deliberate on those as

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1 needed.

2 MR. SLOTHOWER: So those motions would be by
3 August 3.

4 JUDGE TOREM: Yes. That's if it's a motion
5 to strike. If it's another sort of motion, I don't really
6 see a reason to deviate from the August 3 filing deadline
7 then.

8 MR. SLOTHOWER: I wanted to make sure I
9 understood that.

10 JUDGE TOREM: Let's make it clear then. If
11 it's not a motion to strike, please file it unless there's
12 a great explanation why not by August 3, and if there's
13 necessary a response, unless there's a need to extend
14 that, then by August 6. That way we'll have that full
15 week in advance before the 16th to start considering. If
16 there's anything else we need, we can send out an order
17 saying file something additional before the 16th.

18 MR. SLOTHOWER: Okay.

19 MR. CARMODY: So August 3 for all other
20 prehearing motions.

21 JUDGE TOREM: Yes.

22 MR. CARMODY: Okay.

23 JUDGE TOREM: Anything else on this topic of
24 prehearing briefs or potential prehearing motions?
25 All right. Then moving onto No. 7, the

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1 cross-examination exhibits.

2 Ms. Makarow, I'm going to defer to you as to
3 the timing of this, but it's essentially advice in advance
4 that if you have exhibits that you want to raise on
5 cross-examination that are not already part of the
6 witness's prefiled testimony but will become your own
7 rebuttal exhibits, if you will, some submission
8 requirements and deadlines, so they're not showing up for
9 the first time at the hearing. Ms. Makarow, what's been
10 the requirement and experience in the past?

11 MS. MAKAROW: I think I will be very brief.
12 I'll just direct parties to reread the hearing guidelines.
13 The submittal requirements for cross-examination exhibits
14 are very well detailed in those guidelines, so this is
15 just a place holder to remind you all those exhibits do
16 have to come in with certain amount of advance to the
17 Council.

18 MR. HURSON: Can I ask a question for
19 clarifying? I haven't read the order in a while. If
20 exhibits have been submitted through one witness, can we
21 use them for cross-examination on another witness, and
22 we're okay to just say referring to exhibit so and so to
23 such and such, then ask questions about it?

24 MS. MAKAROW: Our practice in the past is
25 that, yes, you can use an exhibit for cross-examination of

1 another witness, but I think you should be courteous to
2 the party that you're going to be examining, cross the
3 witnesses of, and let them know that you're going to be
4 using it for somebody else in advance.

5 MR. HURSON: I just didn't want to have to
6 make photocopies of other people.

7 MS. MAKAROW: You do not have to reproduce
8 an exhibit twice.

9 JUDGE TOREM: Bear with me a moment. I'm
10 looking at Council Order 777, and it's Appendix A to see
11 if there is a more specific item. Item 20(e) tells you
12 that exhibits used for cross-examination that have not
13 been previously prefiled with the Council have to be
14 submitted no later than one week prior to the scheduled
15 start of the hearings except for good cause shown. So
16 that would be August 9 for those in this particular
17 hearing case.

18 MS. MAKAROW: Just for clarification, I do
19 believe the way we've interpreted that is that it's one
20 week prior to the date when you're going to be using the
21 exhibit, so not all of your exhibits have to be in the
22 week before, but they can cascade in.

23 MR. PEEPLES: The question I have what if a
24 witness gets moved up? I mean the problem I guess with
25 that I'm not suggesting anything other than we could

1 assume that we're going to have witnesses on a day certain
2 and then everything gets moved up.

3 MS. MAKAROW: I think if they get moved up
4 by one day, it's not much of a problem for the Council to
5 deal with.

6 JUDGE TOREM: I would concur. Item 8.

7 MR. CARMODY: Your Honor, we couldn't hear
8 exactly all of that. Could you summarize what was just
9 said.

10 JUDGE TOREM: Paragraph 20(e) has the one
11 week in advance requirement. Ms. Makarow indicated it
12 need not everything be filed August 9, one week in advance
13 of the proceeding, but essentially one week in advance of
14 the scheduled date of the witness. And Mr. Peeples'
15 question was simply what if the witness moves up, and
16 Ms. Makarow's comment and my concurrence was that a
17 one-day shift in the timing of a witness forward would
18 still give enough time and notice with the
19 cross-examination exhibit having been filed now
20 essentially four working days rather than five.

21 MR. CARMODY: Okay.

22 JUDGE TOREM: Moving on to Item 8, post
23 hearing briefs. The hearings will be done by the 27th at
24 the latest of August. Those are the two weeks we have
25 scheduled. Friday the 27th would be the outside date for

1 finishing. If we finish early, so be it.

2 My thought is that, Mr. Peeples, would give
3 you three weeks from that date. Three weeks is the
4 following Monday to file briefs, and then a two-week
5 response period for all the other parties and as necessary
6 a two-week reply brief period. So those dates would come
7 out approximately as the 20th of September, the 4th of
8 October, and the 18th of October.

9 MR. SLOTHOWER: I'm sorry. What was the
10 last date?

11 JUDGE TOREM: October 18.

12 MR. PEEPLES: Let me clarify on that. I
13 have three weeks, but we're talking about I have three
14 weeks in which to file my brief and then the other parties
15 have two weeks after I file my brief.

16 JUDGE TOREM: To respond.

17 MR. PEEPLES: And I have two weeks after
18 they respond.

19 JUDGE TOREM: Correct. That would be one
20 proposed way of doing it.

21 MR. PEEPLES: That would be acceptable to me
22 as long as they're not given dates upon when the briefs
23 are filed.

24 JUDGE TOREM: I'm not sure I understood
25 that.

1 MS. TOWNE: If he files his in one week,
2 then it moves everything up two weeks.

3 MR. PEEPLES: That's correct.

4 JUDGE TOREM: So you don't want a hard date
5 to file.

6 MR. PEEPLES: No. The other alternative
7 would be everybody files briefs at the same time in three
8 weeks AND No rebuttal.

9 JUDGE TOREM: What are other parties'
10 feeling on how they would like to approach the
11 post-hearing brief schedule?

12 MR. SLOTHOWER: This is Jeff Slothower. I
13 think that the schedule that you laid out with hard dates
14 work the best. At least from my experience in complicated
15 matters with lots of parties having those dates tied to
16 the calendar gives everybody some certainty as to when
17 things are due, then they can schedule accordingly.

18 MR. HURSON: Jim Hurson. I prefer a hard
19 date too because we have other work to do, and you have to
20 kind of prioritize. It's just we have to wait until
21 something shows up. I can't schedule my other hearings,
22 my other obligations. I assume that's why Mr. Peeples is
23 bringing this up is because he wants to get the decision
24 out sooner than later. So if he wants to get a date
25 certain that moves it up, if he wants to be committed to a

1 shorter time, that's fine. If he wants the time you've
2 given him, that's fine too. But we should be given the
3 full time you are allotting us. But if he wants the whole
4 schedule moved up a week, we can do that. But that would
5 be their choice to have less time to prepare.

6 JUDGE TOREM: Mr. Lane, does the Counsel for
7 the Environment have any input on this item?

8 MR. LANE: No.

9 MR. PEEPLES: I guess my response is that's
10 seven weeks. That's seven weeks of briefing, and it's a
11 seven-week delay. And I am concerned about that. It
12 would seem to me that if we had everybody file their brief
13 at the same time three weeks after the hearing is over,
14 everybody is kind of operating on an equal basis. If
15 anybody is giving up anything, it's the Applicant giving
16 up the rebuttal brief, and we're done, and the Council can
17 sit and start considering or you could have closing
18 arguments.

19 MR. HURSON: If I might. I want the
20 opportunity to respond to their legal arguments because
21 frankly --

22 JUDGE TOREM: You'll get it. His post
23 hearing brief as the Applicant is going to have, correct
24 me if I'm wrong, Mr. Peeples, a draft site certification
25 agreement.

1 MR. PEEPLES: Correct. But I think his
2 comment is if they're filed simultaneous.

3 MR. HURSON: Right. If they're filed
4 simultaneously, I wouldn't know how to respond because
5 frankly as I sit here I don't understand what his legal
6 arguments will be to get preemption. So I would like to
7 actually see it in writing.

8 JUDGE TOREM: You will. You will.

9 MR. HURSON: And his proposal wouldn't allow
10 me the opportunity is my point.

11 MR. PEEPLES: If you had closing argument
12 after everybody files simultaneous and closing argument a
13 week later, we could get it done.

14 JUDGE TOREM: Councilmembers, are you
15 inclined to hear additional arguments which I think if I
16 understand correctly would require if not a hearing like
17 this where everybody gets together by phone or another
18 trip to Ellensburg.

19 I know the Council it's not their only
20 matter. There's some other matters which they may have
21 scheduled deliberations in their draft calendar I've got
22 for this body. So I have concerns about going forward
23 into that type of arrangement, and I also have concerns,
24 Mr. Peeples, as Mr. Hurson correctly points out that if
25 you've got a draft site certification agreement, their

1 closing argument very well may be, great, site
2 certification recommended, but with additional conditions.
3 And so I think we owe it to at least one round of
4 responses. Do you want to take less time than the three
5 weeks I've offered? Do you want to make it two weeks?

6 MR. PEEPLES: I'll have to talk to my
7 client.

8 JUDGE TOREM: Because I don't need to set
9 the schedule today. I just wanted to get this out there.
10 We're going to be making an order. At the close of the
11 hearing we'll set the deadline, but this is a draft set of
12 dates that I want to put on everyone's radar screen. We
13 don't have to do that today.

14 MR. PEEPLES: By Jim's suggestion I think we
15 would only gain one week on it, and I would be the one
16 giving up the week, so in that situation I would go for
17 the three, two, two.

18 MS. TOWNE: Can we sacrifice the rebuttal?

19 JUDGE TOREM: That's a possibility as well.

20 MS. TOWNE: It would save two weeks.

21 MR. SWEENEY: Or simultaneous rebuttal.

22 MR. PEEPLES: To me from my point of view
23 either we go the way we go now because I can respond in a
24 week and rebuttal you can get on. I've got control of
25 that last week. So I guess we'll just take it the way the

1 judge has recommended it, and we can cut a week off by
2 getting our rebuttal in quick.

3 JUDGE TOREM: Let me know what the Applicant
4 wants to do and the other parties as well because we'll
5 have some time for these kinds of discussions during the
6 adjudication. But I want to put it out there that
7 post-hearing briefs come in, and we will set a schedule
8 probably the beginning of the second week once we know
9 where the hearing has gone.

10 MR. PEEPLES: I'm satisfied with the way you
11 set it out. It's not that big of a deal from my point of
12 view. I was just going to suggest. But as far as I'm
13 concerned that's fine.

14 JUDGE TOREM: That's more of a traditional
15 judicial approach to do it. If there's something creative
16 that will work for everyone, one thing that might be
17 considered also is having just two rounds of briefing,
18 your opening brief and a response. If the Council then
19 wants to hold any closing argument on specific topics, the
20 Council can order that, and we'll figure out a way to do
21 it. That may be better responsive to what the Council's
22 needs are than simply having to file a reply brief for the
23 sake of a reply brief.

24 MR. PEEPLES: If I don't need to file it, I
25 wouldn't. I guess my point is either they're simultaneous

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1 or the person who files first gets a rebuttal brief.
2 JUDGE TOREM: It may be that we take the
3 original you open, respond, reply, and then the Council
4 would preserve its right to call for closing argument if
5 they need to.
6 MR. PEEPLES: That would be fine.
7 JUDGE TOREM: That kind of satisfies all
8 parties.
9 MR. HURSON: From the County's standpoint I
10 can see where closing arguments could make sense. I mean
11 just traditionally in law you have an opening and response
12 and reply. Then if you have a thing where the reply brief
13 sort of raises new issues, then you can at least address
14 them verbally. You can ask questions of the parties. I
15 think it's very helpful to have. It's helpful in court.
16 And if you want to get a schedule, I know they're in a
17 hurry. I mean we could set oral arguments. You could
18 just set it up shortly after the rebuttal brief because
19 the rebuttal brief should be very, very short anyway.
20 JUDGE TOREM: What we may do is schedule a
21 date but leave it at the Council's discretion whether it's
22 going to be helpful to these members whose help is going
23 to be needed or not rather than schedule it as a hard
24 date. Maybe we will pick a date and the Council will as
25 needed after reading your briefs decide to strike it. So

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1 we'll have those dates and some availability I've
2 discussed with Ms. Makarow beforehand, but to pick those
3 at the second week of the hearing I think would be
4 appropriate.
5 Finally, Item 9. I guess we're not finally,
6 but Item 9, DEIS comments and the schedule for issuance of
7 the Final EIS was put on here. I will take a little bit
8 of lead on this and then defer to Ms. Makarow if needed to
9 indicate.
10 The Council had kind of a changing
11 relationship with its Draft EIS, and there were some
12 points when we thought preemption would not occur or the
13 request that the County had asked for the functional
14 equivalent of a Final EIS, so they could go forward with
15 their procedures and see if land use consistency could be
16 achieved. That's been overtaken by events because there's
17 no longer any pending matter before the County.
18 Mr. Peeples, the application has since been
19 withdrawn; is that correct?
20 MR. PEEPLES: Correct.
21 JUDGE TOREM: So there's no longer any issue
22 before the County for its process. My looking back on the
23 rules that apply here, as well as what are now the issues
24 before this body and the County it's the application
25 before EFSEC and that's it as to the Kittitas Valley Wind

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1 Power Project.
2 The County's approach of wanting a
3 functional equivalent of the FEIS in my opinion had its
4 place when the County had a proceeding in which its board
5 of county commissioners was involved and needed that
6 information to act. This body gets the functional
7 equivalent of the FEIS after the fact when it makes its
8 recommendation to the Governor that becomes the body of
9 information on which that recommendation is based. It
10 comes in as part of the adjudication.
11 There's additional comments at the
12 proceedings which now sounds like they will be the second
13 week. But the memo that went out with the agenda should
14 tell you that most likely there won't be any comments set
15 to distribute prior to the adjudication. So there was a
16 thought at one time of doing it, but the situation has
17 changed, and the Council would have been making an
18 exception when it did that.
19 Ms. Makarow, correct me if I'm wrong, or if
20 necessary, Ms. Essko, if you want to comment, this was
21 your memo. There won't be any publication to the rest of
22 the parties, specifically to the County of responses to
23 the comments on the EIS. If there are things that are
24 able to be released in advance, this is not play hide the
25 ball here. It's just that we're not moving up the

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1 contract with the individual EIS contractor to do that in
2 advance.
3 So this will be like any other normal EFSEC
4 proceeding where those comments would not be coming out in
5 advance. There's not a competing or a complementary
6 proceeding before the County that requires it any longer,
7 so we're going to go on normal EFSEC schedules. So those
8 won't be out and will become part of the recommendations
9 to the Governor.
10 Any comments from the Applicant on that
11 approach there?
12 MR. PEEPLES: No.
13 JUDGE TOREM: Any other -- I will come back
14 to you, Mr. Hurson, and give you a minute to digest that.
15 Any other parties have comments that they
16 want? And while you're formulating those, did I leave
17 anything out, Ms. Makarow on that comment?
18 MS. MAKAROW: No, Judge Torem. I think the
19 memorandum speaks for itself.
20 JUDGE TOREM: Mr. Hurson, did you have any
21 response to the memorandum or my summation of it?
22 MR. HURSON: Well, I guess I'm trying to
23 figure out where the memorandum came from. The memorandum
24 indicates that this is --
25 JUDGE TOREM: Can you speak up, please.

1 MR. HURSON: Yes. The memorandum, the July
2 9 memorandum indicates that it's direction from the
3 Council, but I'm trying to figure out what open public
4 meeting this took place in and what the vote was because I
5 don't believe there was one. And that's a thing that's
6 always confused me about the Council because the Council
7 is suppose to be acting as a body in public meetings. But
8 I'm getting a memo that I can't figure out when the
9 meeting was that generated the memo.

10 MS. ESSKO: This is the meeting. This is
11 the statement of the Council's draft position, and the
12 purpose of this meeting today is for you to comment on
13 this plan of the Council.

14 MR. HURSON: I guess my point is when did
15 the Council direct staff to do this as a plan? Because I
16 was on the conference call when I brought it up. I didn't
17 bring a motion. I just pointed out that you were going to
18 release the comments sort of halfway through the public
19 hearing, and then what I'm getting is three days later
20 you're not only not going to release it then, but the
21 Council apparently decided to direct staff to not release
22 anything until after the hearing.

23 MS. ESSKO: No, Mr. Hurson, the Council
24 hasn't directed the staff to do anything. You raised the
25 issue at the last meeting, and this is a trial balloon, if

1 you will, intended to elicit from you and other parties
2 what your views are of this approach. This is a public
3 meeting today, and the Council has not made a decision
4 yet, and the purpose of this meeting is for you to comment
5 on this proposed approach.

6 MR. HURSON: Well, I mean the memo says the
7 Council has evaluated the County's request, including but
8 not limited to examining the following legal authorities
9 and has been able to identify no legal requirements that
10 grants the County's requests, puts some cites down, and
11 for this reason the Council intends to issue its response
12 to DEIS comments after the adjudicative proceedings.

13 MS. ESSKO: It says EFSEC's preliminary
14 response to Kittitas County's July 6 request for response
15 to comments to the KVVWPP DEIS, and the front page says
16 parties' opinions regarding this issue are expected to be
17 ready to present its position to the Council at today's
18 meeting. The heading clearly says this is a preliminary
19 response to your request on July 6.

20 MR. HURSON: I guess I'm trying to figure
21 this out. That's what I'm just simply trying to clarify.
22 This memo appears to indicate that this was the Council's
23 direction. If this was just a memo saying staff
24 recommends the counsel that you do blah-blah-blah, that's
25 different. The memo seems to indicate that this was

1 direction the Council came up with.

2 MS. ESSKO: The Council did not give this
3 direction. The title of the memo says EFSEC's preliminary
4 response. It is a proposal for you and others to comment
5 on today. The purpose was to give the parties a heads up
6 about an approach the Council might take and to get your
7 comments before the Council made a decision.

8 JUDGE TOREM: I will directly answer your
9 question.

10 MR. HURSON: Thank you.

11 JUDGE TOREM: This memo came from
12 discussions between Ms. Essko, myself, and other EFSEC
13 staff, but there were no other Councilmembers involved in
14 it. Our legal advice to the Council as a whole, if you
15 will, on how to handle it procedurally, what to recommend
16 from Ms. Essko's office as an Assistant Attorney General
17 and staff was circulated to the Council in the format of a
18 memo the same as it was to the rest of the parties. If
19 the Council chooses to direct otherwise, it can. But I
20 think you and I in practice know the staff very often
21 recommends as you would as county counsel what the Council
22 should do. There are several experts on the Council with
23 SEPA issues that have participated in prior Council
24 meetings and demonstrated at least that if they wanted to
25 recommend to the Council not to adopt this, they will

1 speak today in the format of the public meeting.

2 So there was no phantom meeting of the
3 Council. I will put that on the record for sure. The
4 staff as is allowed by those laws had plenty of
5 discussions about this before it came to you and the rest
6 of the parties.

7 MR. HURSON: I guess that was my point.
8 This is written as if the Council has already made
9 directives. There isn't anything in here to indicate that
10 staff got together and this is a staff recommendation to
11 the Council.

12 JUDGE TOREM: I got ahead of myself in
13 characterizing it that way and speaking. I thought I used
14 the first person but maybe too strongly in describing what
15 this next agenda item was. My apologies. If this was
16 misinterpreted, then, again, I guess we thought it was
17 understood that the Council wouldn't be acting outside the
18 Open Public Meetings Act. This was on the agenda today
19 not as an informational item. Maybe we should have
20 indicated possible action item.

21 MR. HURSON: Frankly, I sometimes get people
22 that I'm paid to be paranoid as an attorney, but I showed
23 up here ten minutes after 11:00, 50 minutes before the
24 hearing, and the full Council was in here. I walked into
25 the room, and I asked if the public was able to stay, and

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1 I was told no. I was told to leave the room.
2 JUDGE TOREM: Right. There was an executive
3 session this morning that dealt with not this matter but a
4 number of other issues in preparing the Council for the
5 adjudicative hearings, as well as just a review of the
6 agenda for today.
7 MS. ESSKO: It was a deliberative session
8 outside of the Open Public Meetings Act which clearly
9 exempts APA proceedings from coverage by the Open Public
10 Meetings Act.
11 JUDGE TOREM: I think the rest of the
12 parties that arrived at a quarter to 12:00 and otherwise
13 were similarly inconvenienced when they couldn't come in
14 today, so no secrets there.
15 MR. HURSON: I wouldn't have known it if I
16 wouldn't have driven to Olympia today. I doubt that
17 anybody who is on the conference call would have known it.
18 I know that Patti Johnson, Kittitas County appointed, was
19 in the meeting, so it seems obvious that this was directly
20 related to this particular issue. And if it was an
21 executive session --
22 JUDGE TOREM: It was directly related to
23 this hearing, this adjudication, but not all directly
24 related to this issue.
25 MR. HURSON: Well, I mean it was related to

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1 the application.
2 JUDGE TOREM: Correct.
3 MR. HURSON: I guess I don't know where this
4 is going, but a lot of people have real concerns with
5 public entities and agencies when it looks like they're
6 not open to the public. I'm not saying that you aren't.
7 I'm saying appearance is everything. Your appearance is
8 your reality, and when there's a meeting being held that
9 no one gets public notice of, and when the public shows
10 up, and they're told they're not allowed to be there and
11 it's the entire Council that causes people to have
12 concerns.
13 JUDGE TOREM: Mr. Hurson, the public was
14 given notice of the public meeting. The Council can get
15 together, as you know the Board of County Commissioners
16 can get together, any other elected body appointed body
17 that's a public body can have deliberative and executive
18 sessions, and there are rules as to what can be discussed.
19 If you would like to challenge, go ahead and
20 challenge. But I don't think there's any reason for
21 raising suspicion about something of which no suspicion is
22 requested, desired, or deserved. Please don't insult the
23 integrity of this body and its staff by suggesting because
24 by raising it in a public forum you do. You do insult
25 this body and suggest that they're operating behind the

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1 back of the County and behind the back of the public.
2 That is not what's going on.
3 This came out and was published 10 days ago.
4 You had this memo. It wasn't formulated this morning nor
5 was the position. Do you have anything else on the topic?
6 MR. HURSON: Well, if you're taking offense,
7 I apologize for that. But the memo when I read it, I
8 about went through the roof because to me it looked like
9 the way it was written it was written in such a manner
10 that it appeared that the Council had already taken
11 action. And if they hadn't, then it shouldn't be written
12 so it looks like they took action. And that's just it.
13 I work for the department of government all
14 the time. Everybody I'm kidded all the time about that
15 I'm so anal about appearances for the public, and my board
16 if they need more than two or more of them are meeting
17 together, yes, we send notice. We've got the sign in the
18 door. We say we're in executive session. We give
19 citations for the reason we're there, and it's very
20 important from a public standpoint. Because I would have
21 liked to have been able to comment on the substance of the
22 memo.
23 MS. ESSKO: That's the purpose of today's
24 meeting. Are you ready to proceed with your comment?
25 MR. HURSON: So are you addressing the --

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1 now I'm confused as to who is in charge of the meeting.
2 The fact is this was written as if it was already done. I
3 wasn't aware that this was a staff proposal that you had
4 open and available for the public to comment on. I don't
5 think anybody here who read the agenda would have
6 understood that this was an internal staff proposal.
7 JUDGE TOREM: Then I'll take that as a
8 motion to continue it until August 2, the next regularly
9 scheduled staff meeting or meeting of this Council. This
10 item will be moved. Counsel, it's now publicly noticed
11 that if you have comment, go ahead and alter this to say
12 proposed memorandum. There will be no confusion. There
13 will be no question of the notice. It will be taken up in
14 August in a telephonic meeting as part of the regularly
15 scheduled Council meeting.
16 Ms. Makarow, will that work for the Council?
17 MS. MAKAROW: Yes, it will.
18 JUDGE TOREM: The next agenda item.
19 MR. HURSON: Am I allowed to comment on it
20 at this point?
21 JUDGE TOREM: On the 2nd, please.
22 The next agenda item.
23 MR. HURSON: Are any of the parties that
24 have called going to be allowed to comment?
25 JUDGE TOREM: On August 2.

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1 Item 10, are there any settlement
 2 agreements, Mr. Peeples, that we need to deal with?
 3 MR. CARMODY: Is that the end of the
 4 discussion?
 5 JUDGE TOREM: It is.
 6 MR. CARMODY: The DEIS and the issuance of
 7 the FDEIS.
 8 JUDGE TOREM: So we will take it up again.
 9 There's been no action on it. It will be discussed August
 10 2.
 11 MR. CARMODY: All right.
 12 MR. PEEPLES: We anticipate a settlement
 13 agreement with Chris Hall and her husband, and we will
 14 inform the Council as soon as that's finalized which
 15 should be shortly. And we anticipate that a withdrawal of
 16 their status as intervenors and parties will be sent to
 17 you by the Halls.
 18 JUDGE TOREM: Do you have an idea if that
 19 will occur on a particular date or do you have working
 20 deadlines?
 21 MR. TAYLOR: We anticipate it would
 22 certainly be prior to the last of the filing deadline.
 23 Certainly before the hearings and we would anticipate at
 24 the next meeting.
 25 JUDGE TOREM: Okay. So if we have any

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1 updates that can come up at the next regularly scheduled
 2 meeting.
 3 MR. PEEPLES: Yes.
 4 JUDGE TOREM: Any other items,
 5 Councilmembers, that need to be added at this time? Other
 6 parties?
 7 MS. MAKAROW: I do have one other. In the
 8 last week to ten days EFSEC staff did receive
 9 recommendations from both our contractors at Department of
 10 Ecology and Department of Fish and Wildlife regarding
 11 wetlands mitigation and hydraulic project approval and
 12 copies of those recommendations have been distributed to
 13 all of the parties on the service list and to the Council.
 14 MR. CARMODY: Hello?
 15 JUDGE TOREM: Other parties with --
 16 MS. TOWNE: Somebody is saying something.
 17 MR. CARMODY: Judge Torem.
 18 JUDGE TOREM: Yes.
 19 MR. CARMODY: There was something with the
 20 phones right there. That whole thing we didn't catch any
 21 of that.
 22 MR. SLOTHOWER: Yes, it didn't come through
 23 at all.
 24 JUDGE TOREM: Ms. Makarow is just letting
 25 everyone on the service list know that there was something

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1 else sent out about --
 2 MS. MAKAROW: It was recommendations from
 3 our Ecology and Fish and Wildlife contractors regarding
 4 what wetlands mitigation and hydraulic project approval
 5 for the project.
 6 JUDGE TOREM: Did that come through that
 7 time?
 8 MR. CARMODY: Yes. Thank you.
 9 JUDGE TOREM: Anything else for other issues
 10 that need to be taken up? One of the reasons I'm pushing
 11 to wrap this meeting up is there's a regularly scheduled
 12 1:30 meeting of the Council for its normal biweekly
 13 business. Anything else?
 14 All right. It's now 1:30. We are
 15 adjourned.
 16 * * * * *
 17 (Whereupon, the prehearing conference was
 18 adjourned at 1:30 p.m.)
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 5 **A F F I D A V I T**
 6
 7 I, Shaun Linse, CCR, Certified Court Reporter,
 8 do hereby certify that the foregoing transcript
 9 prepared under my direction is a true and accurate
 10 record of the proceedings taken on July 19, 2004,
 11 in Olympia, Washington.
 12
 13
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 15 _____
 16 Shaun Linse, CCR
 17 CCR NO. 2029
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