

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of:
Application No. 2003-01

SAGEBRUSH POWER PARTNERS, L.L.C.

KITTITAS VALLEY
WIND POWER PROJECT

PREHEARING ORDER NO. 15

COUNCIL ORDER NO. 800

ORDER DENYING KITTITAS COUNTY
PREHEARING MOTIONS

Nature of the Proceeding: On Tuesday, August 3, 2004, Intervenor Kittitas County, by and through its counsel James Hurson, filed its *Prehearing Motions and Argument* requesting, among other relief, that the Energy Facility Site Evaluation Council (EFSEC or Council) stay the adjudicative hearing on this matter. Responses to Intervenor Kittitas County's *Motion to Stay* were filed on August 6, 2004, by Intervenor Renewable Northwest Project (RNP) and the Applicant, Sagebrush Power Partners, LLC. An adjudicative hearing on this matter was scheduled to commence on August 16, 2004, in Ellensburg [*since the time of these filings, this date has changed to September 27, 2004*].

Summary of Ruling: The Council DENIES each and all of Intervenor Kittitas County's requests that EFSEC stay the adjudicative hearings from commencing as [previously] scheduled. Further, the Council also DENIES all other relief requested in Intervenor Kittitas County's *Prehearing Motions*, except as may have already been provided in Council Order No. 795 (Prehearing Order No. 12), which granted a continuance of the adjudicative hearing to September 27, 2004.

Issues Presented

1. Should the Adjudicative Hearings previously scheduled for August 16-27, 2004, be stayed in order to allow Intervenor Kittitas County to prepare and file additional rebuttal testimony?
- 2a. Should the Applicant's *Request for Preemption* dated February 7, 2004, be stricken?
- 2b. If not, should the Adjudicative Hearings currently scheduled for August 16-27, 2004, be stayed in order to allow Intervenor Kittitas County additional time to respond to this issue?
3. Should the Adjudicative Hearings previously scheduled for August 16-27, 2004, be stayed because EFSEC lacks authority under SEPA to act as lead agency for the Application?
4. Should EFSEC Councilmember Tony Ifie, Department of Natural Resources, be disqualified from participating in evaluating this Application under the Appearance of Fairness Doctrine?

5a. Should the Adjudicative Hearings previously scheduled for August 16-27, 2004, be stayed in order to (a) allow Intervenor Kittitas County and other Parties time to review additional SEPA documents scheduled to be released during the week of August 9, 2004, or (b) permit EFSEC to release its preliminary response to comments on the Draft Environmental Impact Statement?

6. Should the Adjudicative Hearings previously scheduled for August 16-27, 2004, be stayed due to the “cumulative effect of issues raised” by various Parties requesting a stay of proceedings?

7. Shall EFSEC disclose various information regarding meetings allegedly held by the Council regarding the Application without notice provided to the public?

Analysis

1. Request for Time to File Additional Rebuttal Testimony. No Party has been authorized additional time to submit pre-filed testimony or rebuttal testimony required by Council Order No. 790. At the prehearing conference held on July 19, 2004, Intervenor Residents Opposed to Kittitas Turbines (ROKT) requested additional time to submit their pre-filed testimony. This request was discussed and subsequently denied because ROKT had missed an established filing deadline.

Here, the issues raised by Intervenor Kittitas County focus on its ability to appropriately respond to the Applicant’s rebuttal testimony, apparently through the filing of surrebuttal testimony. At the prehearing conference held in Ellensburg on February 19, 2004, the Council previously entertained discussion regarding the extent of rebuttal and surrebuttal that would be permitted in pre-filed testimony. In particular, legal counsel for several parties expressed concerns over EFSEC’s overly permissive handling of pre-filed rebuttal testimony in a previous case. Attorney Jeff Slothower, Counsel for Intervenor Lathrop said:

I was tangentially involved in another EFSEC hearing a number of years ago, and my recollection there was that the Applicant filed their prehearing testimony, then the people in opposition filed theirs. And the rebuttal testimony that came was not truly rebuttal testimony but was instead the bulk of the evidence that they were going to rely on in deciding issues on the siting issue, the major issues that the Council had to decide. I want to avoid that for lack of a better word sandbagging approach here. I think that there needs to be ample time for all of the parties to review the prefiled testimony and plan their presentation in their case in chief based upon that prefiled testimony.

I don’t want to get into a situation where, you know, literally a banker’s box shows up or three banker’s boxes show up two weeks before the hearing and only have two weeks to do that. I think that that’s an inappropriate way to approach your decision making process, and I think that is not a service or it does a disservice to not only my client but other parties.

You have to have more time between the filing of rebuttal testimony and the start of the hearing.

See Transcript of Prehearing Conference, February 19, 2004, at pages 46-48. Deputy Prosecutor James Hurson, Counsel for Intervenor Kittitas County communicated even more specific concerns:

I have just one thought that I want to throw in because I wasn't tangentially involved in the other. I was directly involved in the other one. And I'm glad that we're having the discussion because I've found when you discuss these issues it minimizes the chance that things like this will happen.

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

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

See Transcript of Prehearing Conference, February 19, 2004, at pages 50-51. After hearing these concerns regarding potential tactics designed to submit pre-filed testimony that could not be responded to in an effective manner, the Council ruled that once the Applicant had submitted its pre-filed testimony, all Parties would be allowed a time period longer than six weeks to present their own pre-filed testimony. In addition, the Council then allotted *another* three weeks for not only the Applicant, but for all Parties, to submit any necessary rebuttal testimony to whatever pre-filed testimony had been submitted up to that point. *See* Council Order No. 790 (Prehearing Order No. 8). The adjudicative hearings would then begin almost 3 weeks after all such pre-filed testimony had been circulated.

In its *Prehearing Motions*, Intervenor Kittitas County challenges the Applicant's submission of 44 pages of additional testimony in rebuttal from Chris Taylor, as well as two new witnesses making their first appearances through rebuttal testimony: Robert Wagoner (17 pages presented by the Applicant) and Ted Clausing (8 pages presented by Intervenor RNP). Intervenor Kittitas County did *not* object to the remaining three witnesses and 31 pages of rebuttal testimony submitted by various Parties: additional testimony in rebuttal from Wally Erickson (11 pages presented by the Applicant), additional testimony in rebuttal from David Taylor (6 pages presented by Intervenor Lathrop), and Ed Garrett, a new witness making his first appearance in rebuttal testimony (14 pages presented by Intervenor ROKT).

Objections to Applicant's Rebuttal Submissions. Intervenor Kittitas County characterizes the submission of Robert Wagoner's and Chris Taylor's rebuttal testimony as "sandbagging" by the Applicant. The

Council disagrees. Neither witness presents topics so unforeseeable or testimony so voluminous that all Parties, including Intervenor Kittitas County, could not adequately prepare for an adjudicative hearing to be held three weeks after the Applicant timely submitted these pre-filed rebuttal testimonies. While the 44 pages of additional testimony in rebuttal proffered by Chris Taylor is the largest of the rebuttal testimonies submitted, these pages appear diminutive when compared to the 45 pages and 40 supporting exhibits formerly introduced by Intervenor Kittitas County's sole witness, Clay White. Further, as already noted above, no Party has been or will be allowed to submit additional pre-filed witness testimony as surrebuttal. The Applicant's filing of the rebuttal testimony objected to by Intervenor Kittitas County does not give rise to any reason to stay the proceedings.

Objections to Intervenor RNP's Rebuttal Submissions. Similarly, Intervenor RNP's submission of Ted Clausing's rebuttal testimony is not so unpredictable or so lengthy as to require any delay of the hearing. Intervenor Kittitas County had several weeks available prior to the scheduled adjudicative hearing to interview or even depose both Mr. Clausing and any competing witness sponsored by Counsel for the Environment (CFE) [indeed, given the continuance granted, that period of time has now been extended to several months in which to prepare a cross-examination of Mr. Clausing]. No delay of the proceedings is merited for such preparation.

Finally, Intervenor Kittitas County argues that Intervenor RNP's submission of Mr. Clausing's testimony implies some form of malpractice by CFE. The testimony of Kenneth Bevis, sponsored by CFE, does not purport to be the official position of the Washington State Department of Fish and Wildlife (WDFW). Upon preliminary review of CFE's sponsored witness testimony, Mr. Bevis appears to primarily question the adequacy of the Applicant's studies and proposed mitigation measures with regard to minimization of avian mortality. Mr. Clausing's rebuttal testimony, quite opposite in tone, asserts that the proposed project is consistent with recently adopted WDFW Wind Power Guidelines. According to RCW 80.50.080, CFE is to "represent the public and its interest in protecting the quality of the environment." CFE is not required to agree with the positions of WDFW, the Department of Ecology (DOE), or other executive agencies charged with various environmental missions. Here, CFE appears to be presenting a witness who is seeking *more* stringent protections for birds that might be impacted by the proposed wind power project than WDFW's Wind Power Guidelines require. This approach clearly falls within CFE's statutory mandate. Alleging malpractice is clearly inappropriate.

Even so, at this time, the Council withholds judgment on the propriety and admissibility of the pre-filed rebuttal testimony of Roger Wagoner, Chris Taylor, and Ted Clausing, reserving a decision on Intervenor Kittitas County's suggested alternative relief, essentially a *Motion to Strike*, for a separate ruling to be issued prior to the adjudicative hearing.

2. Request to Strike Applicant's Request for Preemption. Intervenor Kittitas County argues that the Applicant's *Request for Preemption* is an unverified pleading, not an exhibit, and should therefore be stricken from the record. This position is directly at odds with long-established statutory law governing agency records in administrative adjudications. Washington's Administrative Procedure Act (APA), specifically RCW 34.05.476(2)(c), expressly includes "any motions, pleadings, briefs, petitions, requests, and intermediate rulings" in the agency record. Thus, under the APA, whether a "request" or a "pleading,"

the Applicant's *Request for Preemption* is indisputably already part of the record in this case. Requirements for "verification" of pleadings are not found in the APA,¹ but only in the Superior Court Civil Rules, a set of rules that are not directly applicable in this administrative proceeding.² Further, EFSEC's own procedural rules for adjudicative proceedings, Chapter 463-30 WAC, only mention a requirement for verification of pleadings when discussing *Petitions for Intervention*, not with regard to any other pleading.³ For each of these reasons, this portion of Intervenor Kittitas County's *Prehearing Motions* must be denied.

In the case its specious argument regarding the alleged improper submission of the Applicant's *Request for Preemption* to the record failed, Intervenor Kittitas County went on to claim a need for more time to prepare a response to a document that was filed with the Council on February 7, 2004, and discussed extensively later that same month. At the prehearing conference held on February 19, 2004, Mr. Hurson announced

. . . one of the things I do intend to do is I was going to file a motion for the Council to reject the request for preemption.

See Transcript of Prehearing Conference, February 19, 2004, at page 32. This intention did not come to fruition in any timely fashion. No such motion was submitted until Intervenor Kittitas County's *Prehearing Motions* were filed on Tuesday, August 3, 2004, nearly six months after Mr. Hurson's original statement and less than two weeks prior to the scheduled adjudicative hearing. All Parties have had more than sufficient time to research and respond to the Applicant's *Request for Preemption*. Intervenor Kittitas County's request to stay the proceedings in order to further prepare its long overdue reaction to the *Request for Preemption* is denied.

3. Challenge to EFSEC's Authority as SEPA Lead Agency. Intervenor Kittitas County argues that EFSEC has inappropriately designated itself as the lead agency for environmental impact analysis and review under the State Environmental Policy Act (SEPA). In essence, Intervenor Kittitas County posits that because RCW 80.50.060 does not mandate that proponents of alternative energy projects such as wind farms apply to EFSEC for site certification, the Council is deprived of primary jurisdiction to review environmental impacts of project it might eventually permit and oversee. In pertinent part, that statute states:

(2) The provisions of this chapter apply to the construction, reconstruction, or enlargement of a new or existing energy facility that exclusively uses alternative energy resources and chooses to receive

¹ Verification of a pleading is accomplished by a party affirming under oath that the contents of the pleading are truthful. In Superior Court, only domestic relations pleadings are required to be verified; verification of other pleadings is optional. See CR 11.

² The APA refers to use of the Superior Court Civil Rules as guidelines for the discovery process in administrative hearings, but not with regard to the filing of pleadings. See RCW 34.05.446(3).

³ See WAC 463-30-400; compare to WAC 463-30-120(1) (requires only that pleadings be legible).

certification under this chapter, regardless of the generating capacity of the project. (emphasis added)

Intervenor Kittitas County focuses on an applicant's freedom of choice and now seeks to deprive EFSEC of lead agency status under SEPA because the SEPA Rules, specifically WAC 197-11-938(1), provide that EFSEC shall be the lead agency for "all governmental actions relating to energy facilities for which certification is *required* under chapter 80.50 RCW" (emphasis added). In the view of Intervenor Kittitas County, EFSEC can not assume lead agency status unless explicitly required by law or regulation to license a power-generating facility. This theory is without merit.

When the Applicant in this matter opted to request site certification from EFSEC, the Project came within the Council's jurisdiction under Chapter 80.50 RCW. Thus, certification became a requirement under Chapter 80.50 RCW, triggering the above-noted provision of WAC 197-11-938. The Applicant's choice of forum for the permitting process is inexorably linked to the determination of lead agency status under SEPA. If this were not the case, one of EFSEC's primary missions, to streamline the siting and permitting process for power-generating facilities, would be thwarted.

Further, even if the notion advanced by Intervenor Kittitas County had been worthy of consideration, the SEPA Rules required it to be raised much, much earlier. WAC 197-11-924(3) provides only 15 days for the lodging of objections to a lead agency determination. EFSEC indicated its intent to assume lead agency status for this Project on February 14, 2003, and issued its Draft Environmental Impact Statement (DEIS) on December 12, 2003. Intervenor Kittitas County participated vigorously in all of the EFSEC SEPA processes in 2003 and throughout the first seven months of 2004, never offering the slightest complaint about EFSEC's authority to act as lead agency. Clearly, Intervenor Kittitas County's waiting to raise this question until just 13 days prior to the scheduled commencement of the adjudicative hearings in this matter is untimely.

Intervenor Kittitas County's assertion that EFSEC has no authority or jurisdiction to act as SEPA lead agency is baseless and untimely. Therefore, this portion of Intervenor Kittitas County's *Prehearing Motions* must be denied.

4. Request to Disqualify Councilmember Ifie. This portion of Intervenor Kittitas County's *Prehearing Motions* patently overlooks the following rulings previously issued by the Council:

Council Order No. 778 (Prehearing Order No. 2)	Issued July 10, 2003
Council Order No. 781 (Prehearing Order No. 3)	Issued October 13, 2003
Council Order No. 783 (Prehearing Order No. 5)	Issued October 13, 2003
Council Order No. 786 (Prehearing Order No. 6)	Issued January 13, 2004

When Intervenor F. Steven Lathrop previously sought to disqualify Councilmember Tony Ifie (as well as Councilmember Richard Fryhling), EFSEC issued the above-noted rulings denying the request. Now, having observed Councilmember Ifie's participation in this proceeding for well over a year since Intervenor Lathrop initially filed his unsuccessful motion, Intervenor Kittitas County returns to this area, referring to a July 9, 2003, press release from the Department of Natural Resources announcing its \$5.6 million lease

revenue tied to the land on which the Applicant intends to build and operate the Project. This is not a new issue, nor does Intervenor Kittitas County even dignify the previously decided issue with any novel approach in its *Prehearing Motions*.

Intervenor Kittitas County asserts that the Appearance of Fairness Doctrine requires that Councilmember Ifie be disqualified. The Council's previous rulings, referred to above, contain a more than sufficient exposition on the Appearance of Fairness Doctrine and why its tenets do not function to disqualify Councilmember Ifie in this matter. Intervenor Kittitas County's citation to the Washington Supreme Court's ruling in Narrowsview Association v. Tacoma⁴ does not alter the Council's prior analysis of the issue. Therefore, this portion of Intervenor Kittitas County's *Prehearing Motions* is also denied.

5a. Request for Stay to Review and Respond to Additional SEPA Documents. This portion of Intervenor Kittitas County's *Prehearing Motions* is addressed and some relief, in the form of a six week postponement of the adjudicative hearings, was granted in Council Order No. 795, *Order Granting Continuance of Hearing Date*.

5b. Request for Release of Response to Comments to Draft Environmental Impact Statement. This portion of Intervenor Kittitas County's *Prehearing Motions* was previously discussed and decided at the Council's prehearing conference held on Monday, August 2, 2004. As voted upon at that time, the Council determined that there was no legal requirement to release the requested documents. Further, in an effort to prevent confusion over EFSEC's position on any single issue presented in the case, the Council decided that premature release of draft responses to comments that might yet change after hearing all available evidence at the adjudicative hearing was not in the best interest of the public. Intervenor Kittitas County is simply reiterating its earlier request for the same relief that was denied in Council Order No. 796. Although redundant, the Council again denies the remedy requested in this portion of Intervenor Kittitas County's *Prehearing Motions and Argument*.

6. Request for Stay due to "Cumulative" Effect of Issues Raised. After raising numerous ideas and thoughts on why the Council should stay the adjudicative hearings, Intervenor Kittitas County seeks to rely on the combined weight of its multiple *Prehearing Motions* to supply yet another reason to indefinitely stall the adjudication. Intervenor Kittitas County offers no legal authority for this request. The Council is aware of no test to be applied to the quantity of a party's objections. Therefore, as with all of foregoing individual specific objections and requests, the Council is not further persuaded to stay the proceeding when

⁴ 84 Wn.2d 416, 526 P.2d 897 (1974). In Narrowsview, a member of a planning commission that voted to approve a rezone was found to have a conflict of interest because his employer, a financial institution, held a security interest in the property subject to the rezone. Although the planning commission member did not benefit directly from his vote, the Court ruled that there could be no appearance of impartiality under those circumstances and reversed the lower court's upholding of the rezone. *Note:* an unrelated portion of the Narrowsview case addressing the appropriate standard of judicial review for certain SEPA decisions was overruled by Norway Hill Preservation & Protection Association v. King County Council, 87 Wn.2d 267, 276, 552 P.2d 674 (1976); the portion of the case addressing the appearance of fairness doctrine appears to remain valid.

considering the sum of the parts delivered by Intervenor Kittitas County and other Parties who have also filed their own *Motions to Stay* the proceedings in this matter.

7. Request for Council to Release Various Information. The final item in Intervenor Kittitas County's *Prehearing Motions and Argument* does not seek a delay of the pending adjudicative hearings, but asks for EFSEC to release a list of allegedly inappropriate Council meetings that took place regarding the Kittitas Valley Wind Power Project without the required public notice. As noted during the prehearing conference of July 19, 2004, the Council views Deputy Prosecutor Hurson's accusations in this regard as insulting and unprofessional. EFSEC takes very seriously its responsibilities under Chapter 42.30 RCW, the Open Public Meetings Act (OPMA). Any body of officials is entitled to conduct deliberative and executive sessions in private, as allowed by OPMA.⁵ Intervenor Kittitas County's unsupported claims against the Council that might lead the public to believe that EFSEC is attempting to hide information from view are not conducive to maintaining a proper level of decorum in these proceedings. The Council has conducted all meetings in accord with the requirements of OPMA and will continue to do so in the future.

This final portion of Intervenor Kittitas County's *Prehearing Motions and Argument* can not properly be addressed through a prehearing motion. If Deputy Prosecutor Hurson wishes to request copies of any EFSEC records, he should rely upon Chapter 42.17 RCW, the Public Disclosure Act, and submit an appropriate request thereunder.

Decision

After full consideration of each and every issue presented by Intervenor Kittitas County's *Prehearing Motions* and all pleadings filed in response, EFSEC hereby ORDERS all of the *Motions* DENIED, except insofar as a portion of the requested relief regarding a delay of proceedings in order to respond to additional SEPA documents has already been granted in Council Order No. 795. The adjudicative hearing now scheduled to commence on September 27, 2004, was not stayed for any reason raised in Intervenor Kittitas County's *Motions*.

DATED and effective at Olympia, Washington, the 1st day of September, 2004.

Adam E. Torem, Administrative Law Judge

⁵ See RCW 42.30.070 ("It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: PROVIDED, That they take no action as defined in this chapter."); see also RCW 42.30.110.