

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

In re Application No. 94-2

of

CHEHALIS POWER

Certification of the Chehalis
Combustion Turbine Project

ORDER NO. 696

**DENYING
RECONSIDERATION**

This is an application for certification of a proposed site near Chehalis in Lewis County, Washington for construction and operation of a natural gas-fueled combustion turbine facility to generate electrical energy. The Council entered Order No. 5 on March 4, 1996 resolving certain procedural issues.

On March 14, 1996, intervenor Critical Issues Council (CIC) moved for reconsideration of Council Order No. 5: 1) the motion asks the Council to enter testimony of Ms. Gail Blomstrom, an employee of the Department of Ecology, into the record of the proceeding; and 2) the Motion seeks reconsideration of the Council's decision to remove the segment of the CIC's "surrebuttal brief," called the "post hearing reply brief response" on the grounds that appellate court rules and the Administrative Procedure Act (APA) allow for such filings.

In support of (1) above, the CIC argues that other parties are not bound by the stipulation agreements entered into by two parties to the proceeding (in this case the Department of Ecology and the applicant), an agreement that provided Ms. Blomstrom's testimony would not be entered into the record of the proceeding. The CIC also contends that the Council should retain Ms. Blomstrom's testimony as illustrative materials. In addition, the CIC cites the Council's obligation to safeguard the public interest and prevent the implementation of an improper stipulation agreement, as grounds to place Ms. Blomstrom's testimony in the record.

As justification for its position that the Council should consider its post hearing reply brief response," the CIC notes that the state appellate court rules provide for surrebuttal filings and that RCW 34.05.437, of the APA, states that the presiding officer is required to afford parties a full opportunity to respond to pleadings, motions, objections and offers of settlement.

The Council hereby denies both requests in the CIC's motion for reconsideration.

1. Request to Admit Ms. Blomstrom's Testimony into the Record

Ms. Blomstrom's testimony is not part of the record of this proceeding because it was never offered into evidence by a party to this adjudication. The Council cannot consider evidence that is not in the record. The fact that other parties (notably petitioner) had a silent disagreement with the terms of the stipulation agreement that withdrew her testimony does not make the evidence admissible. All parties had an opportunity to object to the stipulation. During the adjudicative hearings, the CIC did not state the objection it raises now. If the CIC believed Ms. Blomstrom's testimony to be essential to a proper disposition of this proceeding, it could also have offered her testimony during the adjudicative hearing. The CIC failed to do so. The record of this proceeding closed on September 21, 1996, and the CIC does not show grounds to reopen the record.

Admission for "illustrative purposes" may be possible when procedurally appropriate¹ and when whatever the proposed evidence illustrates is a factual matter that the Council may consider. The CIC appears to suggest that such admission would allow the Council to consider the evidence for proof of facts represented in the testimony, and that is not the case. The request is not procedurally appropriate, as noted above, and the CIC does not identify what it wishes the testimony to illustrate. Again, the CIC does not persuade the Council that it should reopen the record to consider the evidence.

2. Request for Reconsideration of the Council's Decision to Strike the "Post Hearing Reply Brief Response" from the CIC's Surrebuttal Brief

The CIC's second request is for the Council to reconsider its earlier decision to strike the post hearing reply brief response from the CIC's surrebuttal brief. The Council struck this material on the grounds that the Council's rules and hearing guidelines made no provision for the filing of surrebuttal responses.

The CIC relies on two theories to support its position: 1) Appellate Court rules provide for such material; and 2) the APA, RCW 34.05.437, requires the presiding officer to give all parties a full opportunity to respond to pleadings, motions, objections and offers of settlement.

The CIC's reliance on appellate court rules is inappropriate. Since the Council has not yet completed adjudicating Application 94-2, the case is not in an appellate posture at this time. Appellate court rules have no application to administrative proceedings governed by the APA. Appellate court rules apply only to matters that have been taken up on appellate review after the completion of some agency action. The Council rules govern here, and do not provide for such responses.

¹ The Council received letters from members of the public to illustrate public sentiment, for example, and not to prove factual matters that persons may have alleged within the letters.

The section of the APA cited by the CIC, RCW 34.05.437, does require the Council's presiding officer to afford parties a full opportunity to respond to pleadings, motions, objections, and offers of settlement; however, it does not require the Council to extend this opportunity indefinitely. The CIC, similar to all other parties in this proceeding was afforded an opportunity by the Council to respond to the applicant's initial brief. The CIC filed its post hearing reply brief response with the Council on November 9, 1995. Chehalis Power responded to the CIC's post hearing reply brief response and those of other parties in this case by filing its post hearing reply brief on December 1, 1995. The CIC does not contend that the applicant raised any totally new or unanticipated argument to which it must respond -- a case in which the Council would, we believe, be obligated to allow a response by the "surprised" party by elements of fairness as well as law. Instead the issue appears to be continuing volleys on an existing issue in a continuing argument. The APA also allows the presiding officer the right to control the course of the hearing, RCW 34.05.449(1). The Council has complied with APA requirements and the CIC's rights have not been denied by the ruling.

O R D E R

The Council hereby denies the CIC's motion to reconsider Council Order No. 5. The testimony of Ms. Blomstrom will not be admitted into the record and the material entitled "post hearing reply brief response" in the CIC's surrebuttal brief will not be considered by the Council in its deliberations on this case.

DATED and effective this 13th day of May, 1996

Frederick S. Adair, Chair

Attest:

Jason Zeller, EFSEC Manager