

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

**In re Matter of
Application No. 99-1**

**POSTHEARING ORDER No. 1
In consideration of Second Revised
Application**

**Second Revised Application
of**

Sumas Energy 2, INC.

COUNCIL ORDER NO. 764

**SUMAS ENERGY 2 GENERATION
FACILITY**

Nature of the Proceeding:

This matter involves an application by Sumas Energy 2, Inc. (SE2 or Applicant) to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Sumas Energy 2 Generation Facility (SE2GF), a 660-megawatt combustion turbine natural gas-fired electrical generation facility in Sumas, Washington.

Motions before the Council: There are two motions before the Council:

- (1) The Province of British Columbia has filed a motion for leave to file a brief in response to the City of Sumas' post-hearing brief. The Appellant and the City of Sumas oppose the motion to file such a brief.
- (2) Constance Hoag's objects to a portion of the Appellant's brief and requests that the Council strike that portion of Appellant's brief.

Province of British Columbia's Motion:

In Prehearing Order No. 2, the Council established a briefing schedule that provided for the filing of the Appellant's Brief on November 26th, Other Parties' Response Briefs on December 10th, and the Applicant's Reply Brief on December 24th. See, Council Order No. 760, at Appendix A (August 9, 2001). The briefing schedule did not allow Intervenors to file responses to the briefs submitted by other intervening parties at that time or during a later revision of the dates of the schedule.

During the adjudicative hearings, the parties' attorneys met with the undersigned to consider a modification of that briefing schedule. On November 15, 2001, the undersigned established a revised briefing schedule after consultation with all the parties in the case. Attorneys for the Applicant, for the Province, and for the City of

Sumas participated in that off the record meeting. When back on the record, the agreements reached were put on the record as follows:

Judge Thomas: The next thing procedurally before we go back to redirect of Mr. Lazar is the parties have come up with some firm dates for briefing, and those dates will be December the 14th for the Applicant's opening brief which will include a proposed site certification agreement and proposed findings of fact and conclusions of law. The other parties will then have until January the 11th to submit their briefs, and anyone that wishes to propose any alternative language to the proposed site certification agreement their brief would be the place to do that, if they wish to do that. And then January 25th, the Appellant's reply brief would be due.

Am I forgetting anything that we decided in our little prehearing?

Mr. Bricklin: It's nothing you forgot, but one thing we didn't mention I suppose is that if the responding parties want to propose any findings and conclusions I think those would also be due on that same date.

Judge Thomas: Thank you. Absolutely. That could come in with their brief date. Thank you for that clarification.

Transcript of Proceedings at 2049-50.

On November 16, 2001, at the conclusion of the hearings, the undersigned reiterated the above briefing schedule and that anything further that any party had to say would come in with their post-hearing briefs on that schedule and asked all parties if there were any objections. No party raised any objections. Transcript of Proceedings at 2311.

The Applicant submitted its post-hearing brief on December 14, 2001; the other parties submitted their briefs on or before January 11, 2002 and the Appellant submitted its final reply brief on January 25, 2002, all in compliance with the agreed briefing schedule.

On January 24, 2002, the Province filed a motion for leave to file an additional brief in response to the City of Sumas' post-hearing brief. Province's counsel argues that it should be allowed to respond to the City of Sumas' brief. Counsel for the Province argues that as soon as it saw that the City "unabashedly and fully supported the company's position", the Province's counsel alerted the company's attorney and EFSEC staff that it might file a motion seeking leave to file a response to the City of Sumas' brief. The Province made its motion to the Council on January 24th. The fact that the City of Sumas supports the project is no surprise to anyone; to claim otherwise strains credibility. The City of Sumas has the right to support the project just as other parties have the right to oppose the project and the Council does not believe that any party that participated in the recent round of adjudicative hearings is surprised by the City's position. If, in fact, the Province or any other party wished to structure the post-hearing briefing in a different manner, they should have objected to the briefing order at the time it was set. Two opportunities to object or argue for a different schedule were

afforded on the record and the Province's counsel actually participated in the meeting to set the sequence and schedule of briefing. For a party to agree to the schedule, appear to adhere to it, and then to object the day before the end of the lengthy process serves only the purpose of delaying the Council's deliberation and recommendation to the Governor. Nothing has changed that would justify changing the briefing schedule at this late date.

Constance Hoag's Motion to Strike Portion of Applicant's Brief:

Ms. Hoag has informed the Council that the Applicant has misrepresented the testimony of a witness and asks the Council to strike a portion of SE2's brief. Representations by a party in briefing do not constitute a factual part of the record. It is the Council's responsibility to assure that any factual matters asserted in briefs are supported by evidence in the record. Therefore, it is unnecessary to strike portions of briefs whether or not they properly construe factual testimony in the record.

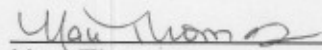
ORDER

The Council denies the Province's motion to submit additional briefing and strikes its supplemental brief.

The Council denies Constance Hoag's motion to strike portions of the brief of the Appellant.

DATED and effective at Olympia, Washington, the 7th day of February 2002.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL



Nan Thomas
Senior Administrative Law Judge