

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

**In re the Matter of
Application No. 2001-01**

WALLULA GENERATION, L.L.C.

WALLULA POWER PROJECT

COUNCIL ORDER NO. 767

PRE-HEARING ORDER NO. 2

**ORDER ON SCHEDULING,
DEADLINE FOR LATE
INTERVENTION, ADOPTING
HEARING GUIDELINES, AND
ESTABLISHING PROCEDURE FOR
SETTLEMENTS.**

Nature of the Proceeding:

This matter involves an application to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Wallula Power Project, a natural gas-fired energy facility located near Wallula, in Walla Walla County, Washington.

Procedural Setting and Participation:

The Council convened the second prehearing conference in Olympia, WA, on April 2, 2002, pursuant to due and proper notice to all interested persons. (WAC 463-30-270)

The conference was held before Council Chair, James Luce, and Council members Charles Carelli (Department of Ecology), Jenene Fenton (Department of Fish and Wildlife), Dick Fryhling (Department of Community trade and Economic Development), Paul Gerola (Port of Walla Walla), Tony Ifie (Department of Natural Resources), Jeffrey Showman (Washington Utilities and Transportation Commission), and the Administrative Law Judge Donald G. Meath.

The following persons appeared: Applicant, Wallula Generation LLC: Darrel Peeples, Chuck Lean, counsel, Olympia; Counsel for the Environment; Ronald Lavigne, Assistant Attorney General (AAG), and Michael Dunning, AAG, Olympia; Department of Fish and Wildlife: William Frymire, AAG, Olympia; Office of Trade and Economic Development: Tony Usibelli, Director, Olympia; Washington Utilities and Transportation Commission: Sally G. Johnston, AAG, Olympia; Walla Walla County: Dennis B. Reynolds, Davis Wright Tremaine LLP, Seattle; Port of Walla Walla: Thomas K. Baffney, Reese Baffney Schrag & Frol, PS, Walla Walla; Association of Washington Business: Daniel Seligman, Attorney at Law, Vancouver; Walla Walla Watershed Alliance: Robert N. Caldwell, Gordon Thomas Honeywell Malanca Peterson & Daheim LLP, Tacoma; Confederated

Tribes of the Umatilla Indian Reservation: Rick George, DNR EP\RP Program Manager, Pendleton.

Stipulation and Settlements:

Counsel for the Applicant advised the Council that most settlements would be ready in three weeks. Counsel for the Environment indicated that five to six weeks might be more realistic. Counsel for the Department of Fish and Wildlife requested that settlement conferences take place in Olympia.

After consideration, the Council has decided to request the Applicant and appropriate intervenors to submit proposed settlements along with a motion requesting a Settlement Hearing in three weeks. For those parties/intervenors who have not settled, the Council requests that the Applicant submit a letter, addressed to Allen Fiksdal, Council Manager, concerning the general status of progress in settlement.

The Council will set a hearing to consider settlements at a time consistent with Council rules and the availability of individual members. The initial settlement hearings will be held in Olympia.

The Council emphasizes that it can provide a qualified mediator upon request.

Late Intervention Based on Issuance of Draft EIS - Deadline Extension:

The Council adopts the deadline for late intervention as set forth in the Notice issued by EFSEC staff on March 29, 2002. The deadline for submitting petitions for late intervention based on issuance of the Draft Environmental Impact Statement (DEIS) is extended to April 11, 2002. To be considered timely, petitions for late intervention based on the issuance of the DEIS for Application No. 2001-01 must be received in the offices of the Council no later than the close of business (5 p.m. PDT) on April 11, 2002.

Preliminary List of Issues:

Pursuant to its order of March 12, 2002, the Council received preliminary issue lists from Association of Washington Business, Counsel for the Environment, Walla Walla County, and Port of Walla Walla.

The Council has not modified the requirements for preliminary issue lists and those parties who have not filed the required list must do so within five days of the date of this order.

Hearing Guidelines:

On January 24, 2002, the Council distributed draft hearing guidelines for the conduct of the hearing to assist parties in understanding the Council's expectations and to show how it will manage the adjudicative hearing. The parties were invited to submit to the Council comments or objections to the draft hearing guidelines no later than March 26, 2002. No

written comments were received. The Council considered the oral comments made at the pre-hearing conference and, after consideration, adopted the hearing guidelines with two changes. The hearing guidelines, as adopted, are set forth in Attachment A which is appended to this order and incorporated into this order as if fully set forth herein.

Consultant Reports:

Consultants are preparing two reports for the Council. Jones and Stokes is preparing a report reviewing waste water discharge. The Department of Ecology is preparing a report reviewing dam construction safety.

Upon written request, the Council will provide any party with a copy of either or both draft reports. The Council anticipates it will receive the draft reports on approximately May 6, 2002. The Council cautions that the draft reports will undergo internal review by EFSEC staff and Department of Ecology prior to final issuance.

If any parties believe that either of the final reports raise issues requiring the filing of supplemental prefiled testimony, such parties shall, no later than five business days from the date of issuance of such final report, file a motion with the Council requesting permission to file such supplemental testimony.

Preliminary Adjudicative Proceeding Schedule:

The Council adopts the schedule for the adjudicative proceeding as set forth in Attachment B as if set forth fully in this order. The Council draws the attention of the parties to the following dates: Applicant's prefiled due by April 15, 2002; Witness designation due by April 22, 2002; Parties' prefiled due by May 13; Applicant's rebuttal due by May 20, 2002.

The next Prehearing conference will be subject to call. Parties will be notified of the date, time and location.

Notice to Parties:

Any objection to the provisions of this order must be filed within ten days after the date of service of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this case.

Dated at Olympia, Washington and Effective this __9th____ day of April, 2002.

By

_____/s/_____
Donald G. Meath
Administrative Law Judge

HEARING GUIDELINES

Wallula Power Project Application No. 2001-01

Washington State Energy Facility Site Evaluation Council

These guidelines are of a general nature and are provided to assist counsel in understanding the Council's expectations and how it will manage the adjudicative hearing. The Council may, when appropriate, vary from the guidelines or use measures not specified.

ADMINISTRATIVE MATTERS

(1) General administrative matters.

(a) Case-related correspondence, pleadings, etc., should be addressed to the Council, not any Council member or staff member. Correspondence addressed directly to an individual may not be logged in, may not be inserted in the case file, and may not constitute a part of the official record for appeal or for other purposes.

Unless other instructions are given or other arrangements are made with the Council Manager, parties shall file an original and 15 copies of pleadings and case-related correspondence.

(b) Starting times will be strictly observed. The hearing may proceed without counsel who are late.

(c) All counsel are expected to address comments, objections, and statements to the Council rather than to other counsel. Questions will be addressed to the witnesses rather than to counsel.

(d) There will be no off-the-record discussions at the request of counsel unless counsel first asks leave to go off the record and states the purpose for the request. Extended colloquies regarding procedural issues should be conducted off the record. After such a colloquy, each attorney will be given the opportunity to state for the record a summary of his or her view on behalf of his or her client when the record resumes.

(2) **Prefiled evidence.** The Council may require that parties' evidence be distributed to the Council and other parties in advance of the hearing¹ or hearing session. The schedule for prefiling will be determined after consultation with the parties.

¹ Through these guidelines, the term "hearing" refers to the adjudicative hearing or a particular session thereof.

(3) Pleadings and exhibits.

(a) All pleadings and prepared exhibits shall be 8½ by 11 inches in size or reduced to that size. They may be folded to that size if reduction would render the document illegible. Large documents, charts, etc., may be used at the hearing for illustrative purposes so long as a legible reduction is provided for inclusion in the record.

(b) The Council prefers that pleadings and exhibits be double sided. If double-siding is not feasible for a party, the party may request authority from the Council Manager to file single sided pleadings and exhibits.

(c) Every pleading and exhibit shall be punched for insertion into three-ring binders.

(d) Line numbers shall be set out on all prepared testimony to facilitate transcript or exhibit references.

(e) Unless other instructions are given or other arrangements are made with the Council Manager, parties shall file an original and 15 copies of pleadings and exhibits.

(f) One (1) electronic (diskette) copy of all pleadings and exhibits must be submitted at the time hard copies are filed. Diskette specifications: Council software requires one of the following document formats, each for use on IBM-compatible hardware: Microsoft Word 97 for Windows, WordPerfect 6.0 or 5.1, or ASCII. Participants desiring to submit material in other formats should discuss this with Council staff well before the filing is due and may provide material in another format if doing so is approved by the Council Manager. All diskettes should be write-protected and clearly labeled with the party's name, the word processing program used, the name of the file, type of pleading or submission, witness' name, etc. Maps or illustrations need not be submitted on diskette, unless requested by the Council or Council staff. Page and line numbering must be consistent between the hard copy and the electronic copy.

(g) The electronic version shall also be e-mailed to the Council Manager and/or other EFSEC staff as specified in the Service List.

(4) Hearing format. The Council will decide hearing format and schedule after hearing parties' comments. At least three (3) format models are available: (i) exchange of evidence, followed by a single hearing session; (ii) individual hearing sessions for cross examination of applicant's case, intervenors' and Counsel for the Environment's cases, and rebuttal cases; and (iii) individual hearing sessions for cross-examination of all evidence on a given topic. In addition, one or more hearing sessions will be held specifically for the purpose of receiving comment from members of the public.

- (5) **Objections.** The Council need not specifically ask each representative whether that party objects to an offer of evidence or other motion or proposed action. Instead, the Council may ask generally whether there are objections, and persons having objections shall state them. Failure to respond or object means that the party does not object, and will constitute a waiver of the right to object.
- (6) **Daily prehearing conferences or administrative sessions.** The Council will set a time prior to the start of the presentation of evidence for a prehearing conference for marking, distribution, and argument regarding objections to exhibits to be offered during the day and for arguing motions or other matters. Counsel who anticipate such matters should request that the time be set aside.

DISCOVERY.

To the extent not inconsistent with the Administrative Procedure Act, chapter 34.05 RCW, EFSEC's administrative regulations, Title 463 WAC, and EFSEC's Hearing Guidelines, the Council shall be guided by the Washington State Superior Court Civil Rules, with the exception of CR 37, in questions related to discovery and motion practice in this proceeding.

- (7) **Informal and formal discovery.** Parties are encouraged to engage in informal methods to obtain discovery prior to using formal discovery. If a party desires to use formal discovery, such procedures are governed by WAC 463-30-190.
- (8) **Streamlining discovery.** Whether discovery is formal or informal, copies of a requesting party's questions (requests for discovery) shall be sent to all parties of record on the same day the questions are sent to the responding party. Parties of record shall advise the responding party within seven (7) calendar days that they would like to receive copies of the responses to particular questions. The responding party shall send its response to the original requesting party and all subsequent requesting parties on the same day.² If the responding party's response is not sent within 14 days after the request for information, the responding party shall provide a status report, indicating the timeframe necessary for a complete response.
- (9) **Limitations on discovery.** If a party determines that discovery has become unduly burdensome, the party may request that the presiding officer reasonably limit discovery.

² Certain discovery need not be shared. The Council acknowledges that at times parties may be engaged in sensitive negotiations as to which the sharing of discovery would be inappropriate. The process described above for sharing discovery information will not apply in such sensitive situations.

PETITIONS AND MOTIONS.

(10) Method of filing and service.

(a) Filing. One original and fifteen (15) copies of all motions and related pleadings must be filed with the Council in the manner required in WAC 463-30-120. Under unforeseen circumstances, a party may request and the Council Manager may grant authority to file a document by facsimile. If a document is filed by facsimile, the required number of copies must be received by the Council on the following business day.

(b) Service of pleadings and exhibits may be made on all other parties by mail³ or hand delivery. Alternatively, pleadings and exhibits not exceeding 25 pages may be served by facsimile, provided that the document is mailed on the date of facsimile.

(c) Parties are strongly encouraged to send courtesy copies of documents to the Council Manager⁴, and to each other via electronic mail.

(d) A party may expressly allow service upon it by electronic mail through a waiver of the statutory service requirements. A party may make a waiver as to all other parties, a limited waiver as to certain parties, or a mutual waiver by stipulation with another party. To make a waiver, a party shall file a one-page pleading stating that it “waives the protections afforded by RCW 34.05.010(18) and WAC 463-30-120,” that “service upon it by delivery, United States mail and/or facsimile is unnecessary,” and that it “expressly authorizes service upon it by electronic mail.”

(e) When a party serves a pleading by electronic mail upon another party who has filed such a waiver, the serving party shall on the same date file and serve upon the receiving party by method other than electronic mail a one-page “notice of service by electronic mail” which describes with particularity the document or pleading which was served by electronic mail. The receiving party shall, within five (5) days of service of the aforesaid notice, file and serve by method other than electronic mail a one-page response denominated either “confirmation of receipt of electronic mail” or “notice of non-receipt of electronic mail” specifically acknowledging and confirming receipt or denying same.

(11) Timing of filing and service. Filing and service shall occur on the same date.

(12) Date of filing or service. Filing is complete upon receipt by an authorized agent of the Council. Service is complete upon (i) delivery, (ii) deposit in the mail, or (iii) successful transmission by facsimile, provided that the document is deposited

³ All references to “mail” in this document include U.S. Mail and other systems of parcel delivery, including, but not limited to, Express Mail, Federal Express, United Parcel Service, Airborne Express, etc.

⁴ allenf@ep.cted.wa.gov

in the mail on the date of facsimile.⁵ Service by electronic mail upon parties who have specifically waived their right to other forms of service and who specifically accept service by electronic mail is complete when sent, provided that the sending party complies with Hearing Guideline 10(e).

(13) Dispositive motions.

(a) Defined. Dispositive motions include (without limitation) petitions or motions seeking the dismissal of any party or any portion of a proceeding.

(b) Filing schedule. Dispositive motions shall be filed at least 60 days before the next relevant adjudicative session. Answers, if any, shall be served and filed no later than 14 days after filing of the motion.

Replies to any answer shall be allowed. Replies, if any, shall be served and filed no later than seven (7) days after the earlier of (i) the date the last answer is filed or, if one or more named respondent does not respond, (ii) the deadline for filing answers.

(c) Oral argument. A dispositive motion shall indicate whether oral argument is requested. Oral argument may be allowed in the Council's discretion.

The Council may hear oral argument on dispositive motions at regularly scheduled Council meetings, at prehearing conferences, at regularly scheduled hearing sessions, or at times and places specially set for the purpose of receiving oral argument.

(d) Requests to shorten time. On the request of any party or in its own discretion, the Council may shorten the times established in this guideline relating to dispositive motions if it finds both good cause for the requester's failure to comply with the guideline and sufficient necessity that the matter be addressed in an expedited manner.

A request for shortened time shall be made to the Council and served no later than the time the dispositive motion is filed and shall state with particularity the circumstances demonstrating both good cause for failure to comply with time requirements and necessity for expedited review. The request shall propose a schedule for answers and replies to the dispositive motion. Responses to the request may be made by parties opposing the request if filed within two (2) business days or such shorter time as the Council may direct.

The Council may in its discretion allow or require oral argument on the request. Parties requesting oral argument should state why the written presentations are an insufficient basis for a reasoned and reasonable decision.

⁵ Filing by facsimile is not allowed in general. Under unforeseen circumstances, filing by facsimile may be allowed under Hearing Guideline 10.

(14) Non-dispositive motions.

(a) Defined. Motions related to evidence or to the procedural course of the hearing, but not involving dismissal of a party or a part of the proceeding, will be considered non-dispositive for the purposes of these guidelines. Non-dispositive motions include (without limitation) motions to extend time, set an adequate evidentiary foundation, and strike evidence previously admitted (based upon witness' response to cross examination).

(b) When raised. Non-dispositive motions should be raised no later than the start of the relevant adjudicative session, unless they arise from matters emerging during the adjudicative session that are not reasonably foreseeable. Counsel should notify the Council that a motion will be presented as soon as counsel decides to do so. If a motion is not presented at or before the start of the adjudicative session, the Council may refuse to hear it or may defer consideration.

(c) Briefing and oral argument. Non-dispositive motions may be written or oral. They will likely not require a formal briefing schedule. Written response or separately scheduled argument may be required in the Council's discretion.

(15) Computation of deadlines. Deadlines shall be computed by counting calendar days. Whether a due date is stated as a given number of days before or after a particular date of reference, the date of reference shall not be included in counting the designated period. If a calculated due date falls on a Saturday, Sunday, or legal holiday, the deadline is the first business day following the calculated due date.

WRITTEN AND ORAL EVIDENCE.

(16) Administration of evidence.

(a) When pre-filing of evidence is required, each party shall file one original and fifteen (15) copies of its evidence with the Council no later than the established filing date unless different instructions are given.

(b) Prefiled testimony will be treated as an exhibit and may be accompanied by other exhibits. Parties should not preassign numbers to their own prefiled testimony and exhibits. Instead the following system should be used, including the witness's initials, and marked serially. For John Q. Witness's prefiled testimony and accompanying exhibits:

- Ex (JQW-T)
- Ex (JQW-1)
- Ex (JQW-2)
- Ex (JQW-3)

Parties not familiar with this method of identification may contact the Council for further guidance. The official numbers for the record will be assigned at the hearing session.

(c) Each witness should present a short summary of his or her remarks at the beginning of prepared testimony.

(17) Revisions to prefiled evidence.

(a) A party finding it necessary to make a revision to prefiled evidence having substantive effect shall disclose the revision to other parties as soon as need for the revision is discovered.

(b) Any revisions to prefiled or previously admitted testimony or exhibits shall be prominently labeled "REVISED" and bear the date of the revision. The revised portions shall be highlighted, in legislative style or other manner clearly indicating the change for comparison with the original submissions. This practice should be followed even as to minor changes that involve only one page of an exhibit. Counsel should identify revisions by page and date at the time an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.

(18) Evidence at the hearing.

(a) Each party is responsible for having one revised, corrected copy of its exhibits ready for marking and inclusion in the official record at the hearing. A second revised, corrected set of exhibits will also be needed for the court reporter.

(b) An errata sheet may be used to indicate the corrections to prefiled evidence for a relatively small number of relatively minor revisions. A rule of reason will apply.

(c) Corrections and revisions should be made or attached to all documents distributed at the hearing before the copies are distributed.

(d) Parties must have sufficient copies at the hearing of each document that they distribute, other than prefiled evidence, so that each party, each Council member, the Council staff, and the Council consultant may each have a copy.

(19) Direct examination.

(a) Counsel should **not** ask the witness on the stand to correct obvious typographical errors in the prefiled testimony if more than three (3) corrections are required, but should submit an errata sheet or revised documents.

(b) Counsel will be expected to ask several foundation questions: the witness' name and business address, whether any prefiled testimony represents the answers the witness would give if asked those questions; whether any exhibits were prepared by

the witness or under her or his control or direction; and what subjects the witness will cover. The latter foundation question should request only a statement of the subjects to be covered by the witness, e.g., aquatic biota, not a summary of the witness's positions on the subjects.

(20) Cross-examination.

(a) For planning purposes, counsel should be prepared to provide time estimates for cross-examination of witnesses.

(b) Cross-examination will be limited to two (2) rounds except upon a showing that good cause exists.

(c) Witnesses should not be asked to perform calculations or extract detailed data on the stand. Such questions should be provided to the witness in advance or should be asked "subject to check."

(d) When a witness answers "subject to check," the witness must perform the "check" as soon as possible. A response given "subject to check" will be deemed accurate unless disputed by the witness within ten (10) days of distribution of the transcript or by the time the record is closed, whichever occurs first.

(e) Exhibits used for cross examination of witnesses that have not been previously prefiled with the Council will be submitted to the Council no later than one week prior to the scheduled start of the adjudicative hearings, except for good cause shown. Such exhibits will be submitted in the required number of copies, and with a cover sheet indicating which witnesses they are intended for.

(21) Stipulation and Settlement Agreements.

Any parties that come into stipulated or settlement agreements shall present copies of their settlements and stipulations, and any supporting documents, to the Council a minimum of one week prior to a scheduled settlement hearing date, except for good cause shown. Parties that come into such agreements shall notify the Council no less than one week in advance of any settlements or stipulation agreement presentations at scheduled prehearing conferences.

(22) Public testimony.

(a) At the beginning of a hearing session for the purpose of taking testimony from members of the public, Counsel for the Environment may inform the public of the major contested issues and the purpose of the hearing session.

(b) Documents provided by or on behalf of members of the public at a public hearing may be offered as illustrative exhibits.

(c) Letters received by the Council and Counsel for the Environment from members of the public may be offered into evidence as illustrative of the opinions of the correspondents.

(d) Documents from the public that Counsel for the Environment believes to contain factual information of a probative nature may be offered into evidence separately, provided that a sponsoring witness is available for cross-examination.

(e) If Counsel for the Environment knows that a witness intending to present evidence as a member of the public will be speaking with expertise in a technical or scientific area as opposed to expertise regarding the community, public sentiment or perception, or personal sentiment, Counsel should inform the Council in advance so that any questions of admissibility, scheduling, and rebuttal may be addressed.

(f) Only exhibits and testimony offered and received are part of the record and subject to consideration by the Council in its decision.

POST-HEARING PROCESS.

(23) The Council will confer with the parties at the conclusion of the hearing about post-hearing process.

(a) The Council will determine whether oral argument, briefs, or both will be required, taking into consideration the parties' preferences and its own needs.

(b) If the Council requests briefs, it may determine a format to be used by all parties. The Council will establish a maximum length for briefs. Number and complexity of the issues will be considered in setting the allowed length of briefs. Limited-issue intervenors may be allowed fewer pages than parties addressing all issues.

(24) Transcripts. Each party will bear its own costs for transcripts purchased from the court reporter, including charges for expedited service when the party requests it.

Wallula Power Project – Preliminary Adjudicative Proceeding Timeline

	Date
Notice of adjudicative proceeding	Dec 19
Notice of opportunity to intervene	Dec 19
Deadline for intervention	Jan 22
DEIS comment opens	February 22
First PHC	March 1
Order on intervention	March 12
Second PHC	April 2
Deadline for issues lists	April 2
Deadline for late intervention	April 11
Deadline DEIS comments	Postmarked by April 11
Applicant’s prefiled	April 15
Deadline for designating witnesses (parties)	April 22
Notice of: <ul style="list-style-type: none"> • PSD permit issued for public comment, • PSD public comment hearings, • Adjudicative hearings (including land-use and public witness testimony hearings) 	Beginning to mid May
Parties’ prefiled	May 13
Applicant’s rebuttal	May 20
Final consultant reports due	May 20
Hearings	Beginning to mid June
Post hearing briefs	Finished by July 3
FEIS issued	Beginning August
Recommendation to Governor	Mid August
Governor action	No later than mid October