

**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. 9

COUNCIL ORDER NO. 792

ORDER SETTING DEADLINES FOR
SUBMITTAL OF SCHEDULES FOR
WITNESSES, PRE-HEARING
STATEMENTS, AND PRE-HEARING
MOTIONS.

Nature of the Proceeding: This matter involves an application from Sagebrush Power Partners, LLC (the Applicant), to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for preemption of local land use regulations and certification to construct and operate the Kittitas Valley Wind Power Project (Project), an approximately 182-megawatt wind turbine electrical generation facility. The proposed Project would be located within Kittitas County, on the ridges on either side of Highway 97, roughly 12 miles northwest of the city of Ellensburg. An adjudicative hearing on this matter is scheduled to commence on August 16, 2004, in Ellensburg.

Procedural Setting: The Council convened a prehearing conference on Monday, July 19, 2004, at approximately 12:05 p.m., in Olympia, Washington, pursuant to due and proper notice. The prehearing conference was held before Councilmember and Acting Chair Tony Ifie (Department of Natural Resources), as well as Councilmembers Chris Smith Towne (Department of Fish & Wildlife), Hedia Adelsman (Department of Ecology), Richard Fryhling (Department of Community, Trade, and Economic Development), Tim Sweeney (Utilities and Transportation Commission), and Patti Johnson (Kittitas County), with Adam E. Torem, Administrative Law Judge (ALJ), presiding over the prehearing conference. Assistant Attorney General Ann Essko was also present as the Council's legal advisor. Council Chair James Luce was not available due to prior commitments and was therefore excused from attending this prehearing conference.

The primary purposes of the prehearing conference were to (a) discuss the status of various parties' prefiled testimony, (b) begin planning for the scheduling of witnesses at the adjudicative proceedings in this matter, (c) reiterate deadlines for the filing of prehearing statements, cross-examination exhibits, as well as discuss proposed deadlines for the filing of post-hearing briefs; and, finally, (d) discuss the Council's preliminary position on responding to comments to the Draft Environmental Impact Statement (DEIS) issued on December 12, 2003, and issuing the Final Environmental Impact Statement (FEIS).

Participants: The Parties were present as follows: the Applicant, SAGEBRUSH POWER PARTNERS, LLC, Darrel Peoples, Attorney at Law, Olympia, Washington, and Timothy McMahan, Attorney at Law,

Vancouver, Washington; Counsel for the Environment (CFE), John Lane, Assistant Attorney General, (AAG), Olympia, Washington; Washington State Department of Community, Trade & Economic Development, Tony Usibelli, Energy Policy Division Director, and Mark Anderson, Senior Energy Policy Specialist, Olympia, Washington; Kittitas County, James Hurson, Deputy Prosecuting Attorney, and Clay White (by phone), Planning Department, Kittitas County, Ellensburg, Washington; Renewable Northwest Project (RNP), Sonja Ling, Lay Representative, Portland, Oregon; Residents Opposed to Kittitas Turbines (ROKT), James Carmody, Attorney at Law, Yakima, Washington (by phone), and Mike Robertson, Lay Representative, Cle Elum, Washington (by phone) and Ed Garrett, Lay Representative, Snohomish, Washington (by phone); and F. Steven Lathrop, Jeff Slothower, Attorney at Law, Ellensburg, Washington (by phone).

Summary of Prehearing Conference:

1. Ex-Parte Disclosures

No Councilmembers made any ex-parte disclosures.

ALJ Torem indicated that in the week preceding this prehearing conference, two parties, Mr. Lathrop (through Attorney Slothower) and Kittitas County, had each filed (by e-mail) objections to the prehearing conference being held telephonically as part of one of the Council's regularly scheduled meetings in Olympia, Washington, rather than on-site in Ellensburg, Washington. ALJ Torem noted that he had overruled both objections (also via e-mail).

2. Missing Pre-Filed Testimony (PHC Agenda Item 4)

In Council Order No. 790 (Prehearing Order No. 8), dated March 12, 2004, the Council required the Applicant to submit its pre-filed testimony on or before Monday, May 24, 2004 and all other Parties to submit their pre-filed testimony on or before Tuesday, July 6, 2004. All Parties have until Tuesday, July 27, 2004, to submit relevant pre-filed rebuttal testimony.

The Applicant and all Parties complied with these deadlines, except for ROKT, Sierra Club, and Chris Hall. Council Staff confirmed that Darrel Peoples, representing the Applicant, had notified her both Sierra Club and Chris Hall intentionally failed to submit any pre-filed testimony; however, off-the-record procedural discussions with ROKT revealed that ROKT might wish to submit non-rebuttal pre-filed testimony.

Attorney James Carmody noted that ROKT intended to submit pre-filed testimony and made a motion to allow late filing of ROKT's pre-filed testimony, proposing to allow any necessary rebuttal testimony to be filed as late as Monday, August 9, 2004. The Applicant objected, claiming undue prejudice in its ability to adequately prepare for the adjudicative hearing. No other Parties objected.

Judge Torem denied ROKT's motion, advising ROKT that it would still be permitted to file any relevant rebuttal testimony as permitted by the guidelines contained in Council Order No. 790 (Prehearing Order No. 8).

3. Tentative Witness Schedule for Adjudicative Proceedings (PHC Agenda Item 5)

Darrell Peeples explained his intention to consult with each Party or its attorney and set a schedule for presenting each individual witness, including an estimate of the amount of time necessary for each participating Party's cross-examination of the witness.

ALJ Torem and the Council expressed a preference that EFSEC's tradition of separating witnesses by topics or issues be respected. Further, ALJ Torem confirmed that the Applicant's Request for Preemption shall be the first topic taken up when the adjudicative proceeding is convened in Ellensburg on August 16, 2004, at 8:30 a.m., with approximately one and one-half days being allocated to that particular topic.

4. Pre-Hearing Statements, Cross-Examination Exhibits, and Post-Hearing Briefs (PHC Agenda Items 6, 7, and 8)

ALJ Torem reminded the parties that pre-hearing briefs or opening statements remained optional. Darrell Peeples asked whether the August 6, 2004, deadline established in Council Order No. 790 (Prehearing Order No. 8) would remain in place. ALJ Torem confirmed that it would. At Mr. Hurson's request, ALJ Torem and the Council approved the filing of these pre-hearing statements electronically (in pdf format), without the need for Parties to incur the costs associated with copying and mailing this particular item.

Mr. Slothower indicated his intention to file a pre-hearing motion based upon the pre-filed evidence, but not, in his opinion, a potentially dispositive motion. Mr. Peeples reminded ALJ Torem that the previously established deadline for filing a *Motion to Strike Testimony* was August 3, 2004, with responses due by August 6, 2004. ALJ Torem then set those same dates as the deadlines for filing and responding to any other pre-hearing motions.

Irina Makarow, EFSEC staff, reminded the parties that any exhibits to be utilized during cross-examination of witnesses would have to be pre-filed in accordance with Appendix A to Council Order No. 777, *Final Hearing Guidelines*. Specifically, paragraph 20(e) of that order requires submission of previously unintroduced exhibits to be used during cross-examination at least one week in advance prior of the adjudicative hearings. In clarification, Ms. Makarow noted that cross-examination exhibits need not all be filed on August 9, 2004, but only one week in advance of the cross-examination of the particular witness with whom the exhibits would be used.

Finally, ALJ Torem indicated that post-hearing briefs would be required from all parties. ALJ Torem set out a proposed briefing schedule spanning seven weeks, as follows:

Applicant's Post-Hearing Briefs	September 20, 2004
Other Parties' Response Briefs	October 4, 2004
All Parties' Reply Briefs	October 18, 2004

Mr. Peeples raised the option of having response briefs due two weeks after the Applicant actually filed its post-hearing brief, rather than a series of set dates. Mr. Slothower and Mr. Hurson both expressed their preferences to have set, rather than fluid deadlines. Mr. Peeples also suggested the option of having all Parties file simultaneous post-hearing briefs, with no responses permitted, but perhaps allowing for the Council to hear final oral arguments thereafter. Each of the above-noted options was taken under

consideration by the Council and no definitive schedule was set during the prehearing conference. However, ALJ Torem anticipated that a final post-hearing briefing schedule would be issued early in the course of the adjudicative hearings.

5. Response to DEIS Comments and Schedule for Issuing FEIS (PHC Agenda Item 9)

In its *Notice(s) of Intent to Hold Prehearing Conference*, the Council circulated a *Proposed Agenda* as well as a *Memorandum to Parties in the Matter of EFSEC Application No. 2003-01, Sagebrush Power Partners, LLC, Kittitas Valley Wind Power Project* dated July 9, 2004, with the subject line “EFSEC’s Preliminary Response to Kittitas County’s July 6, 2004, Request for Response to Comments to the KVVPP DEIS.” Additionally, the *Notice(s) of Intent to Hold Prehearing Conference* contained the following language:

Parties are requested to specifically consider Agenda Item No. 9, Response to DEIS Comments, and Schedule for Issuance of Final EIS, and the attached memorandum regarding this item. Parties with opinions regarding this issue are expected to be ready to present their position to the Council at the July 19, 2004. prehearing conference.

The *Memorandum* contained EFSEC staff’s recommendation to the Council to deny the request of Kittitas County to produce and release its response to the comments received on the DEIS.

James Hurson, Kittitas County, questioned the origin of the *Memorandum*, querying whether a public meeting had been held prior to the Council adopting the *Memorandum* as its position. Assistant Attorney General Essko pointed out that the prehearing conference then occurring was the meeting, and that the *Memorandum* was only a draft position, with Parties invited to comment on the proposed position at the prehearing conference. Mr. Hurson indicated that from his reading of the *Memorandum*, it was not immediately clear that it was simply a recommendation from staff. ALJ Torem clarified that the Council had not conducted any previous meeting on the topic.

Mr. Hurson then indicated that due to the confusion over the character of the *Memorandum*, he was not prepared to comment on it. Therefore, ALJ Torem terminated discussion on the topic and continued the matter for the Parties’ input and a Council vote on the staff’s proposed EFSEC Response at the next regularly scheduled EFSEC meeting, on August 2, 2004.

6. Stipulations and Settlement Agreements

The Applicant reported that no settlement agreements or stipulations had yet been reached between the Applicant and other Parties to this proceeding. However, the Applicant was working with Chris Hall to finalize a full and complete settlement of all issues presented in her *Petition for Intervention*.

7. Next Prehearing Conference

The Council scheduled another prehearing conference in this matter for Monday, August 2, 2004, in order to again take up the issue of the Council's Response to DEIS Comments, as noted above. This prehearing conference is anticipated to be the last in this proceeding prior to those taking place during the course of the adjudicative hearings themselves. Parties seeing a need for an additional prehearing conference should forward their request and appropriate justification for calling together all of the parties to EFSEC staff. ALJ Torem will schedule additional prehearing sessions as necessary.

The prehearing conference was adjourned at approximately 1:30 p.m.

Discussions and Decisions:

Pre-Hearing Opening Statements. In order to enhance the organization of presentations at the adjudicative hearings, the Council again encourages the Parties to submit brief opening statements that summarize the critical issues and conclusions to be addressed through particular witnesses. Also, pre-hearing briefing that sets out a Party's stance and summarizes legal arguments on any or all issues regarding the proposed project would be welcomed. All Parties may, but are not required to, submit written opening statements or briefs covering these topics. Submissions shall not exceed twenty (20) pages (double-spaced, font size no smaller than 12 characters per inch); oversize briefs shall not be considered. The Council will *not* be hearing formal opening oral statements when the adjudicative proceedings commence.

Pre-Hearing Motions. All pre-hearing motions shall be filed no later than Tuesday, August 3, 2004. Any necessary responses shall be filed no later than Friday, August 6, 2004. The Council will issue its ruling(s) as soon as possible during the week of August 9, 2004.

Post-Hearing Briefs. Post-hearing briefs shall be required, subject to a schedule to be approved at the adjudicative hearings.

Notice to Parties: Unless modified, this prehearing conference order shall control all further proceedings in this matter. In accordance with WAC 463-30-270(3), any objections to this order must be stated within ten days after the date of mailing of this order.

DATED and effective at Olympia, Washington, the _____ day of August, 2004.

Adam E. Torem, Administrative Law Judge