

**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. 11

COUNCIL ORDER NO. 794

ORDER DENYING F. STEVEN
LATHROP'S MOTION TO DISMISS
APPLICANT'S MOTION FOR
PREEMPTION

Nature of the Proceeding: On Tuesday, August 10, 2004, the Energy Facility Site Evaluation Council (EFSEC or Council) held a prehearing conference in this matter at which it announced its rulings on various pending motions and also continued the commencement of the scheduled adjudicative hearing for six weeks in order to allow the Parties and the public to review and comment on a newly released Draft Supplemental Environmental Impact Statement (DSEIS). Council Order No. 793, issued immediately after the prehearing conference, denied Intervenor F. Steven Lathrop's *Motion to Stay Adjudicative Hearing*. In that Order, the Council noted that Intervenor Lathrop's *Motion to Stay*, a dispositive motion, was "nearly one month tardy" and that the Council "could deny and dismiss Intervenor Lathrop's *Motion to Stay* and all of the issues raised therein" on timeliness grounds alone. Even so, the Order advised that the Council would review and rule on the substantive jurisdictional issues raised in Intervenor Lathrop's *Motion to Stay* at a subsequent date.

On Wednesday, August 11, 2004, Intervenor Lathrop, by and through his counsel Jeff Slothower, filed a *Motion to Dismiss Applicant's Motion for Preemption* arguing that the Council's continuance of the adjudicative hearing allows a sufficient period for the timely filing of a new dispositive motion. Intervenor Lathrop now seeks to dismiss the Applicant's *Request for Preemption* on the same jurisdictional grounds raised in his prior unsuccessful *Motion*. This ruling is being issued without requiring the Applicant or any other Party to file a response. In accordance with the recent grant of continuance, the adjudicative hearing on this matter is now scheduled to commence on September 27, 2004, in Ellensburg.

Summary of Ruling: EFSEC's postponement of the adjudicative hearing did not include any provision to extend deadlines to allow for the filing of additional prehearing motions. The Council's rationale for granting the Applicant's *Motion to Continue Hearing Date* and a portion of Intervenor Kittitas County's *Prehearing Motions* was narrowly tailored and should not have been interpreted to allow any other prehearing filings beyond those specifically discussed at the prehearing conference, to wit: additional pre-filed testimony, additional pre-filed rebuttal testimony, and any necessary motions to strike any of that additional pre-filed testimony (all with regard to the DSEIS, and only the DSEIS). The Council will not entertain further non-emergency prehearing motions on any topic, with the exceptions of those related to the striking of pre-filed testimony. Therefore, the Council DENIES Intervenor Lathrop's *Motion to Dismiss*

Applicant's Motion for Preemption as untimely filed and, given the Council's prior commitment to address the substantive issues previously presented, as moot.

Issue Presented

Does the Council's continuance of the commencement of the adjudicative hearing in this matter reset or delay the deadlines previously established in Council Order No. 777?

Analysis

Council Order No. 777, at paragraph 13 of Appendix A, required dispositive motions to be filed at least 45 days before the next relevant adjudicative session. When previously filed, Intervenor Lathrop's *Motion to Stay* was styled as a nondispositive motion; however, the Council recharacterized it as dispositive and found that Intervenor Lathrop's filing failed to meet the deadline established in Order No. 777. Intervenor Lathrop now files essentially the same pleading, this time admittedly as a dispositive motion, seeking to take advantage of EFSEC's continuance of the date for commencing the adjudicative hearing in this matter. As measured from August 10, 2004, the date of the Council's vote approving a continuance, there would be at least 47 days remaining before the new date to begin the hearing, September 27, 2004. Thus, Intervenor Lathrop attempts to accomplish on another day what the Council had disallowed only the day before.

Although a literal and technical re-reading of the relevant portion of Council Order No. 777 could possibly support an argument that dispositive motions can be filed at any time so long as there are "at least 45 days before the next relevant adjudicative session," this reading is faulty under the circumstances present in this matter. At the prehearing conference held on Tuesday, August 10, 2004, EFSEC denied outright three separate *Motions for Stay* of the adjudicative hearing. The Council involved all Parties in an extended discussion of only one possible basis to postpone the hearing scheduled to begin the following Monday, August 16, 2004: the pending release of an DSEIS, a State Environmental Policy Act (SEPA) document analyzing the environmental impacts of the project through an offsite alternatives analysis. At the close of the prehearing conference, all Parties, including Intervenor Lathrop himself and his counsel, were given an opportunity to question the effect of the Council's decision to continue the adjudicative hearing for six weeks. No one, including Mr. Slothower, the signatory of the current filing, asked whether another round of prehearing motions would be possible. It should have been abundantly clear to all that the Council would not welcome additional prehearing filings other than those specifically enumerated as necessary and related to the DSEIS. Even though the presiding officer did not explicitly spell out a bar to a second wave of prehearing motions, the Council hereby explicitly states that the continuance granted in response to issues raised by the Applicant and Intervenor Kittitas County is a grant for continuance of only the hearing dates, nothing more.

Finally, as recognized in Council Order No. 793, it must be noted again that the substantive issue raised by Intervenor Lathrop's previous and current *Motion* is not new. The Growth

Management Act's (GMA) adoption in 1990 and an amendment thereto from 2002 relied upon in Intervenor Lathrop's *Motions* existed many months prior to the Applicant's *Request for Preemption*, filed in February 2004. Intervenor Lathrop's unexplained delay of waiting more than five months thereafter to file his original *Motion for Stay* did not justify the tardiness of the previous dispositive motion. As noted by Washington's Supreme Court (albeit in a different context), "inadvertence or attorney oversight is not 'good cause'" for a continuance, or, as applicable to this matter, an extension of previously established filing deadlines. See State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999) (citing State v. Tomal, 133 Wn.2d, 985, 989, 948 P.2d 833 (1997) and State v. Dearbone, 125 Wn.2d 173, 180, 883 P.2d 303 (1994)). Here, the Council's granting of a continuance for a very specific reason, wholly unrelated to the substantive issues raised by Intervenor Lathrop, shall not serve to relieve Intervenor Lathrop of the burden to have met the original filing deadline for dispositive motions. EFSEC's granting of other parties' request to postpone the adjudicative hearing did not revive or revise any other previously expired filing deadline. Therefore, as with the previous one, Intervenor Lathrop's current *Motion* must also be denied as untimely.

Even so, the Council previously took this matter of concern to Intervenor Lathrop under advisement and has already committed to issue a separate substantive ruling at a later time of the Council's choosing. A full and complete ruling on EFSEC preemption jurisdiction and the effect, if any, of the GMA, will be forthcoming at an appropriate future date. Thus, in addition to being untimely, Intervenor Lathrop's current *Motion* is effectively moot, too, as the Council has already obliged itself to provide an answer to his query.

Decision

EFSEC hereby ORDERS Intervenor Lathrop's *Motion to Dismiss Applicant's Motion for Preemption* DENIED.

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

Adam E. Torem, Administrative Law Judge