

**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. 13

COUNCIL ORDER NO. 796

PREHEARING CONFERENCE ORDER
DENYING KITTITAS COUNTY'S
REQUEST FOR ISSUANCE OF INITIAL
RESPONSES TO COMMENTS TO
DRAFT EIS

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 [*since the time of this prehearing conference, this date has changed to September 27, 2004*].

Procedural Setting: The Council convened a prehearing conference on Monday, August 2, 2004, at approximately 1:45 p.m., in Olympia, Washington, pursuant to due and proper notice. The prehearing conference was held before Council Chairman James Luce, as well as Councilmembers Tony Ifie (Department of Natural Resources), 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.

The purpose of the prehearing conference was to discuss the Council's preliminary position on Intervenor Kittitas County's request that the Council issue a response to comments to the Draft Environmental Impact Statement (DEIS) issued on December 12, 2003, prior to the adjudicative hearing and issuing the Final Environmental Impact Statement (FEIS).

Participants: The Parties were present as follows: the Applicant, SAGEBRUSH POWER PARTNERS, LLC, Darrel Peeples, 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, Mark Anderson, Senior Energy Policy

Specialist, Olympia, Washington; Kittitas County, James Hurson, Deputy Prosecuting Attorney, and Clay White, Planning Department, Kittitas County, Ellensburg, Washington; Renewable Northwest Project (RNP), Susan Drummond, Attorney at Law, Seattle, Washington, and Sonja Ling, Lay Representative, Portland, Oregon (by phone); 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:

Miscellaneous Procedural Matters

1. Ex-Parte Disclosures

No Councilmembers made any ex parte disclosures.

2. Witness Schedule for Adjudicative Hearing

Judge Torem invited Mr. Peeples to provide an update on the process of scheduling witnesses for the upcoming adjudicative hearing. Mr. Peeples indicated that he had sent out an e-mail with a proposed witness order and was seeking input from other Parties on which witnesses they wished to cross-examine and the amount of time needed for that task. After clarifying which Parties were experiencing difficulties with the e-mail, it appeared that the Applicant would be able to file a fairly complete proposed witness schedule by Wednesday, August 4, 2004.

3. Motion to Stay Adjudicative Proceeding filed by Intervenor Lathrop

Judge Torem acknowledged that Intervenor Lathrop had filed a *Motion to Stay Adjudicative Hearing* the prior Friday, July 30, 2004. The Applicant argued that Intervenor Lathrop's *Motion* was dispositive in nature and therefore was not timely filed; Intervenor Lathrop disagreed. The Applicant voiced opposition to a stay of proceedings and committed to filing its *Response* by Wednesday, August 4, 2004, at 5:00 p.m.. Intervenor Kittitas County also indicated its intention to file a *Response* by that same deadline. Judge Torem requested that Intervenor Lathrop file any needed Reply in the next 24 hours, by Thursday, August 5, 2004, at 5:00 p.m. Intervenor Lathrop was not certain that could occur due to a planned vacation, but stated he would file a *Reply* as soon as possible. Finally, various other Parties, including Intervenors CTED, ROKT, and RNP expressed potential interest in filing a Response to Intervenor Lathrop's *Motion to Stay*. Judge Torem indicated that the Council did not anticipate entertaining oral argument on the pending *Motion*.

4. Motions to Strike Pre-Filed Testimony – Anticipated Filings?

Mr. Peeples indicated that the Applicant would be filing a short *Motion to Strike* various testimony on Tuesday, August 3, 2004, the deadline for such pleadings. Judge Torem reminded

all Parties that any *Response* to a *Motion to Strike* affecting their witness(es) was due by 5:00 p.m. on Friday, August 6, 2004.

Scheduled Agenda Item

5. Response to DEIS Comments and Schedule for Issuing FEIS

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 KWWPP DEIS.” Additionally, the *Notices of Intent to Hold Prehearing Conference* contained the following language, respectively:

[First Notice] 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.

[Second Notice] The purpose of the conference is for Parties to present their opinions regarding Kittitas County’s request that EFSEC issue a response to comments to the Kittitas Valley Wind Power Project Draft EIS prior to the adjudicative hearings, and EFSEC’s proposed response to that request, also attached.

The *Memorandum*, attached to both *Notices*, 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.

Upon the opening of discussion, Attorney Carmody announced Intervenor ROKT’s intention to file a *Motion to Stay* based upon EFSEC’s alleged violation of the State Environmental Policy Act (SEPA) through its failure to issue a Final EIS prior to the adjudicative hearing.

Deputy Prosecutor James Hurson stated Intervenor Kittitas County’s opposition to the recommended position in the *Memorandum* before the Council, indicating his impression that the Councilmembers had information in their possession which EFSEC staff was instructing them not to release to the public. Judge Torem and Mr. Hurson engaged in a colloquy regarding the nature of the County’s request to see EFSEC’s responses to comments on the DEIS and the timing of releasing those responses to comments. Without providing any citation to legal authority, Mr. Hurson argued that the Appearance of Fairness Doctrine required EFSEC to release to the public “any information that the Council has related to the project,” stating his assumption that draft response to comments on the DEIS had actually been created by EFSEC and subsequently provided to EFSEC Councilmembers. Mr. Hurson eventually indicated Intervenor Kittitas County’s intention to file its own *Motion to Stay* on another SEPA topic, questioning whether EFSEC had appropriately assumed lead agency status in preparing the DEIS.

Assistant Attorney General Ann Essko queried Mr. Hurson to clarify his stance regarding the Council's release of its responses to comments on the DEIS. Mr. Hurson conceded that he wasn't certain the Councilmembers had yet or ever seen any documentation regarding the sought responses, but noted his desire to have as much information as possible released to the Parties and the public, again referring to the Appearance of Fairness Doctrine as requiring release to the public of all documents supplied to the Council, even those provided by EFSEC staff. Irina Makarow, Council staff, confirmed that draft responses to comments on the DEIS had *not* been circulated to Councilmembers, and that no plan existed to provide those prior to the hearing. Ms. Makarow then confirmed that EFSEC would be releasing another SEPA document the following week, perhaps a Supplement to the DEIS, focusing on offsite alternatives analysis.

Mr. Peeples indicated that the Applicant had no position regarding the Council adopting the stance suggested in the *Memorandum*. Assistant Attorney General Lane, CFE, also indicated no position on the *Memorandum*, but expressed a concern with the apparently last-minute procedural motions being filed just weeks prior to the scheduled adjudicative hearing. Attorney Carmody then elaborated on Intervenor ROKT's belief that EFSEC would violate SEPA by holding the adjudicative hearing prior to releasing the FEIS.

Council Discussion and Decision on Memorandum

Council Chairman James Luce inquired of legal counsel whether EFSEC could make a decision on the *Memorandum* with the announcement of two separate Parties intending to file separate *Motions to Stay* based upon different SEPA grounds. Ms. Essko voiced her opinion that the Council could move forward and make a decision, despite the proposed but as yet unfiled *Motions*.

Councilmember Adelsman inquired of the "pros and cons" of adopting the position suggested in the *Memorandum*, to wit: not releasing any draft responses to comments on the DEIS until the Council published its FEIS, which would include such information. Judge Torem and Chairman Luce offered various observations regarding established EFSEC procedures, the possibility of the Council altering its initial response to any given comment on the DEIS after hearing further testimony at the adjudicative hearing, and that there was no ongoing permitting process regarding this project at the county level. Chairman Luce then confirmed his support for not releasing any preliminary response to comments on the DEIS, supporting the *Memorandum*.

Councilmember Ifie questioned whether the comments made on the DEIS were available to the public and Ms. Makarow confirmed that they were. Councilmember Ifie inquired further into the possibility that providing responses to comments on the DEIS at this point might prove confusing. Judge Torem and Council Chairman Luce both offered hypothetical examples by which EFSEC's first response to a comment might change from its final response, and how publishing both of the responses could be somewhat bewildering to the casual observer of the EFSEC process. Councilmember Ifie wondered whether public release of initial responses now, with an explanation for any which would change later, after the adjudicative hearing, might lessen the confusion.

Councilmembers Adelsman and Ifie confirmed with Ms. Makarow that EFSEC would be releasing the offsite alternatives analysis the following week, and that no prepared document existed regarding the responses to comments to the DEIS.

Councilmember Sweeney moved to adopt the position of the staff Memorandum, having responses to comments on the DEIS issues after the adjudicative hearings. Councilmember Fryhling seconded the motion. The motion passed unanimously by acclamation.

Judge Torem then summarized the due dates for various motions and responses.

6. Stipulations and Settlement Agreements

No settlement agreements or stipulations were announced by the Applicant.

7. Next Prehearing Conference

At the close of the prehearing conference on August 2, 2004, the Council did not schedule another prehearing conference in the matter prior to the scheduled commencement of the adjudicative hearing. 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 3:15 p.m.

Discussions and Decisions:

As noted above, the Council hereby ORDERS that Intervenor Kittitas County's request that the Council create and publish its initial response to public comments on the DEIS is DENIED.

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