

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

**In the Matter of
Application No. 2004-01**

**WIND RIDGE POWER PARTNERS,
L.L.C.**

WILD HORSE WIND POWER PROJECT

**PREHEARING ORDER NO. 1
COUNCIL ORDER NO. 804**

**PREHEARING ORDER GRANTING,
ON CONDITION, PETITIONS FOR
INTERVENTION.**

Background and Procedural Matters:

On March 9, 2004, Wind Ridge Power Partners, L.L.C., a wholly owned subsidiary of Zilkha Renewable Energy (Applicant), submitted Application No. 2004-01 to the Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the proposed Wild Horse Wind Power Project (Project), an approximately 312-megawatt wind turbine electrical generation facility consisting of up to 158 wind generation turbines. If approved, the proposed Project would be located along the ridge tops of Whiskey Dick Mountain, two miles north of Vantage Highway, and 11 miles east of the city of Kittitas. In August 2004, EFSEC issued a Draft Environmental Impact Statement (DEIS) and held a public comment hearing on the DEIS in Ellensburg, WA.

First Prehearing Conference – September 30, 2004. Pursuant to Chapter 80.50 RCW and Chapter 463-26 WAC, the Council issued a *Notice of Intent to Hold Prehearing Conference* to consider and rule on four timely *Petitions for Intervention* filed by Kittitas County, the Economic Development Council of Kittitas County, the Friends of Wildlife and Wind Power, and F. Steven Lathrop. On September 30, 2004, the Council convened the prehearing conference in Ellensburg, WA, with the following Councilmembers present: Tony Ifie (Department of Natural Resources), Hedia Adelsman (Department of Ecology), Chris Smith Towne (Department of Fish & Wildlife), Richard Fryhling (Department of Community, Trade, and Economic Development), and Patti Johnson (Kittitas County). Council Chair James Luce and Councilmember Tim Sweeney (Utilities and Transportation Commission) appeared and participated by telephone conference call.

Second Prehearing Conference – November 1, 2004. After the September 30, 2004 prehearing conference, the Council issued another *Notice of Intent to Hold Prehearing Conference* to further consider the *Petition for Intervention* filed by F. Steven Lathrop and to take up various procedural issues. On November 1, 2004, the Council convened a second prehearing conference in Olympia, WA, with the following Councilmembers present: Council Chair James Luce, Tony Ifie (Department of Natural Resources), Hedia Adelsman (Department of Ecology), Chris Smith Towne (Department of Fish & Wildlife), Richard Fryhling (Department of Community, Trade, and Economic Development), and Tim Sweeney (Utilities

and Transportation Commission). Councilmember Patti Johnson (Kittitas County) appeared and participated by telephone conference call.

Assistant Attorney General Ann Essko was also present at both conferences as the Council's legal advisor. Adam E. Torem, Administrative Law Judge of the Office of Administrative Hearings, presided over each prehearing conference.

Participants in Prehearing Conferences:

The following parties participated in the conferences as parties of right pursuant to WAC 463-30-050 and WAC 463-30-060: Applicant (Darrel Peeples, Attorney, and Chris Taylor, Wind Ridge Power Partners L.L.C.); Counsel for the Environment (John Lane, Assistant Attorney General); and the Department of Community, Trade and Economic Development (Tony Usibelli, Assistant Director, Energy Policy Division).¹

The following petitioners for intervention also participated in the conferences: Kittitas County (James Hurson, Chief Civil Deputy Prosecuting Attorney; and on September 30, 2004 only, Clay White, Planning Department); the Economic Development Group of Kittitas County (Debbie Strand, Executive Director); Friends of Wildlife and Wind Power (David A. Bricklin, Attorney at Law, and Robert Kruse); and F. Steven Lathrop (Jeff Slothower, Attorney at Law, and F. Steven Lathrop).

Summary of Prehearing Conferences:

1. Sept 30th – Consideration of *Petitions for Intervention*

Four petitions for intervention were discussed and considered at the September 30th Prehearing Conference: a) Kittitas County, b) the Economic Development Group of Kittitas County, c) Friends of Wildlife and Wind Power, and d) F. Steven Lathrop. The petitions speak for themselves but can be summarized, in part, as follows:

a. *Kittitas County*. Kittitas County's *Petition for Intervention* asserted that citizens, lands, and resources within the County would be directly affected by the Council's decision on the Project and that the County had constitutional, statutory, and code responsibility for land use and zoning, environmental protection, and public health and welfare within its boundaries. The County noted that the Project is currently inconsistent with local land use and zoning regulations and asserted its interest in ensuring that the Project be accomplished in compliance with applicable laws such as the Growth Management Act, the Kittitas County Comprehensive Plan, and all County zoning ordinances.

b. *Economic Development Group of Kittitas County*. The Economic Development Group's *Petition for Intervention* asserted that the Group had been designated by the Kittitas County Board of County Commissioners as the Associated Development

¹ On September 30, 2004, Tony Usibelli, was present in anticipation of filing a *Notice of Appearance* for CTED to become a party as permitted by WAC 463-30-050. CTED formally filed its *Notice of Appearance* later on that same afternoon. At the November 1, 2004 prehearing conference, Judge Torem confirmed CTED's party status.

Organization to coordinate economic development services for the County. The Group identified its interest in stimulating business and promoting economic opportunities in the County through business development, expansion, and retention activities that diversify the County economy and create family wage jobs. It asserted that the outcome of the EFSEC proceeding will significantly impact the future growth and development of the County.

c. *Friends of Wildlife and Wind Power.* The Friends of Wildlife and Wind Power's *Petition for Intervention* asserted an interest in advocating for development of wind power while ensuring that appropriate protections for wildlife are implemented. The *Petition* specifically alleged that: (a) members of the organization own property in close proximity to the proposed Project and specifically, that one of the group's members owns 148 acres of land within 5 miles of the Project; (b) members of the organization make actual use of several canyons in the northerly portion of the proposed Project's location for recreational pursuits; and (c) members' enjoyment of these canyons, particularly as relied upon for wildlife viewing, would be adversely affected by the configuration of the proposed Project as set out in the Application.

d. *F. Steven Lathrop.* F. Steven Lathrop's *Petition for Intervention* asserted an interest in the economic impact of the project on land values in the County generally; development in the County in general; the precedent approval of the Project would set for the future; the visual impacts of the Project on his residential property and the associated economic impacts; the economic impacts of the Project on his real property; and the impacts of the Project on his agricultural land. Discussion during the conference clarified that Mr. Lathrop owns 40 acres of land in the southwest of the City of Ellensburg and that Mr. Lathrop seeks to represent only his own interests, not those of other similarly situated private property owners.

The parties and the petitioners did not object to the petitions for intervention filed by Kittitas County, the Economic Development Group of Kittitas County, or the Friends of Wildlife and Wind Power and the Council approved their petitions. The Applicant objected to Mr. Lathrop's *Petition*, arguing that his status as a sole private property owner with concerns about the proposed Project was not sufficiently different from the interests of the general public to justify the Council granting intervention.

In light of the Applicant's objections and the course of discussion among the petitioners, parties, and Councilmembers at the prehearing conference, the Council established a briefing schedule for Mr. Lathrop to file a brief in support of his *Petition for Intervention* followed by responsive briefs from the parties and other petitioners and a reply brief from Mr. Lathrop.

2. Nov 1st – Additional Consideration of Petition for Intervention of F. Steven Lathrop

In accordance with the briefing schedule, the Council timely received Mr. Lathrop's *Brief in Support* of his *Petition for Intervention*, the Applicant's *Brief in Opposition*, the Friends of Wildlife and Wind Power's *Brief in Opposition*, and Mr. Lathrop's *Reply Brief*. At the second prehearing conference, the Council indicated that although it had hoped to rule on F. Steven

Lathrop's *Petition for Intervention*, it was still in the process of deliberation. The Council offered Mr. Lathrop and the intervenors an opportunity to comment or ask questions. No one raised any concerns or asked any questions.

Discussions and Decisions:

1. Legal Standards for Intervention in EFSEC Proceedings

The Council is required to hold an adjudicative hearing under the Administrative Procedure Act (APA) before it issues its recommendation to the Governor. RCW 80.50.090(3). This adjudicative hearing is open to the public. In addition, as part of the adjudicative hearing, the Council holds a public meeting to give the public an opportunity to provide information and to comment on the project. RCW 80.50.090. The comments made at the public meeting are transcribed by a court reporter, become part of EFSEC's administrative record, and are considered by EFSEC in its deliberations on an equal basis with information received during the balance of the adjudicative hearing.

In EFSEC adjudicative hearings, three sorts of entities have party status as a matter of right – the applicant, the state agencies who are EFSEC member agencies, and the Counsel for the Environment. RCW 80.50.080; RCW 80.50.090; WAC 463-30-050; WAC 463-30-060. In addition, both the APA and EFSEC's rules authorize intervention by others under certain circumstances. These laws and rules, together with longstanding EFSEC precedent, do not allow for "open entry" to and full participation by any and all interested persons. The hearing is an adversarial proceeding that involves motions, legal arguments, discovery, and the offering, questioning and cross-examining of witnesses and both the APA and EFSEC's rules authorize the Council to impose limits on those who participate in this proceeding via intervention.

Intervention in an EFSEC adjudicative hearing is governed by RCW 34.05.443 and the Council's rules, WAC 463-30-400 and WAC 463-30-410. Intervention is not governed by procedural rules or principles applicable to proceedings in Superior Court although such rules and the cases interpreting them may be looked to for instructive guidance. Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, Thurston Co. No. 96-2-04073-5 (1998); In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 701 (1996).

The APA allows the presiding officer, as a matter of discretion, to allow intervention when 1) the petitioner qualifies as an intervenor under any provision of law, 2) intervention is in the interests of justice, and 3) intervention will not impair the orderly and prompt conduct of the proceedings. RCW 34.05.443. If the petitioner qualifies for intervention, the presiding officer may then impose limits on the petitioner's participation in the proceeding. Id.

The Council's WAC 463-30-400 emphasizes the discretionary nature of its decisions on intervention, unless a petitioner has a statutory right to intervene:

On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded. All

petitions to intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In exercising discretion with regard to intervention, the council shall consider whether intervention by the petitioner would unduly delay the proceeding or prejudice the rights of the existing parties. The council may establish a date after which petitions to intervene will not be considered except for good cause shown. When such a date has been established, the council will assure that adequate public notice is given.

WAC 463-30-410 addresses the limits the Council may place on an intervenor once intervention is granted:

In general, it is the policy of the council to allow any intervenor broad procedural latitude. To the extent that the council determines that numerous intervenors might unduly delay the proceedings or prejudice the rights of existing parties, intervenor status may be conditioned upon assent by the prospective intervenor and counsel for the environment to allow the counsel for the environment to act as lead counsel for the balance of the hearing, where the intervenor's interests more closely align with those of the counsel for the environment. Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate. The council reserves the right to prescribe other limitations and conditions, where appropriate.

Council precedent has applied the APA and the EFSEC rules by articulating a three-step process for evaluating intervention petitions:

- Step 1: Has the petitioner demonstrated with particularity (i.e. clearly and specifically) that the petitioner “qualifies” for intervention? Depending on the nature of the petitioner, the petitioner must make either a three-prong or a four-prong showing:
 - Prong 1: Interest. Does the petitioner assert a specific legal interest that is concrete, direct, different than the general public (i.e., unique), and not merely philosophical?
 - Prong 2: Adverse Affect. Has the petitioner identified how the interest asserted in Prong 1 could be adversely affected in a direct and substantial way by the proposed project?
 - Prong 3: Impairment. Has the petitioner identified how the petitioner’s ability to protect the interest asserted in Prong 1 could be impaired or impeded in a direct or substantial way if intervention is not allowed?
 - Prong 4: Expertise (Additional step for environmental or other public interest organizations): Does the entity demonstrate special expertise not otherwise available?
- Step 2: If the petitioner “qualifies” for intervention, will intervention nonetheless cause undue delay or prejudice existing parties?
- Step 3: If the Council allows intervention, are limits on the petitioner’s participation required or warranted?

In the Matter of Application No. 99-1 of Sumas Energy 2, Inc., Council Order No. 743 (2000); In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 716 (1998); In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 703 (1996); In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 701 (1996); In re Application No. 94-2 of Chehalis Power, Inc., Council Order No. 678 (1995); In re Application of Washington Public Power Supply System, Council Order No. 676 (1995); In re Application No. 93-2 of KVA Resources, Inc., Council Order No. 672 (1995).

Implicit in the Council's analysis of Step 1 is an assumption that the petitioner's demonstration of qualification for intervenor status must meet some reasonable level of plausibility. Two sources of information that the Council may consult in confirming the plausibility of a petitioner's assertions are the Application or the Council's Draft Environmental Impact Statement (DEIS) (if one has been issued). If the Application or DEIS describe a particular effect of a proposed Project, there is a reasonable likelihood that that particular effect may exist, at least to the degree necessary to support a petition for intervention.²

2. EFSEC's Past Application of the Standards Contained in the APA and WAC 463-30-400

The Council's application of these standards in the Olympic Cross-Cascade Pipeline and Sumas Energy 2 Generation Facility cases is particularly instructive and thus summarized here.

Olympic Pipeline Case

In the Olympic Pipeline adjudication, the Council recognized the impacts of the proposed pipeline on the lands it would directly traverse, allowing both governmental agencies with regulatory authority over the property and individual property owners to intervene. Environmental groups whose identified members had demonstrated interests in the proposed pipeline's impacts were permitted to intervene (i.e. Washington Environmental Council and People for Puget Sound), while environmental groups that could not identify with sufficient specificity the impact on their members' recreational interests were denied intervention (i.e. Cascade Columbia Alliance, including its representation of Trout Unlimited).³ See In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 703 (1996); In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 701 (1996).

On appeal of the Council's rulings on *Petitions for Intervention* in that matter, the Thurston County Superior Court ratified the intervention standards applied by the Council, but remanded the matter to EFSEC to ensure consistent application of the standards to all individual property owners allowed to intervene and regarding the fishing interests of both the Yakama

² While not an issue with respect to this Order, the Council recognizes that the converse may not be true. Because the Application is at issue in an EFSEC adjudication and because a DEIS is by definition not final, denial of a petition for intervention based on information in either document may be inappropriate.

³ Cascade Columbia Alliance was permitted to intervene only on behalf of five private property owners whose land was to be crossed by the proposed pipeline corridor, a readily identifiable and direct interest in the continued possession, beneficial use, and quiet enjoyment of their real property. In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 701 (1996).

Nation and Trout Unlimited. Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, No. 96-2-04073-5 (1998).

Upon remand and reconsideration of its original determination, the Council clarified its intent to permit each landowner whose property would be directly traversed and thus impacted by the proposed pipeline identical rights of participation. In addition, the Council also reiterated its denial of intervention to those landowners who could not demonstrate a direct impact on their real estate. In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 716 (1998). Further, EFSEC accepted the Superior Court's ruling that it require both the Yakama Nation and Trout Unlimited to identify their respective fishing areas with specificity in order to allow a proper determination on intervention and appropriate limitations. However, the Council did not alter its position with regard to Cascade Columbia Alliance's request to intervene on a broader basis. *Id.*

Sumas Energy 2 Case

In the Sumas Energy 2 adjudication, the Council clearly stated its commitment to

...providing an appropriate forum for all persons and entities to provide their views and expertise to the Council. Effective participation from all of the petitioners for intervention is encouraged. In individual cases, the most appropriate forum may be the formal adjudicative hearings with party status and responsibilities, participation as a witness for the Counsel for the Environment or another party to the hearings, participation in the public hearings provided for in WAC 463-14-030 and RCW 80.50.090, or in the land use law consistency and compliance hearings to be held in Whatcom County, or by submitting written comments for the Council's consideration.

In the Matter of Application No. 99-1 of Sumas Energy 2, Inc., Council Order No. 743 (2000).

After recognizing the variety of methods for interested persons and entities to present their concerns and comments to the Council, EFSEC further explained how it would apply its standards on intervention to environmental and other public interest organizations as well as to individuals, as follows:

Intervention of environmental organizations. In general, the Council believes that environmental organizations or other public interest groups should be allowed to intervene in EFSEC adjudicative proceedings if the following criteria are met: (1) the organization appears to the Council to have special expertise in issues relevant to the proceeding that would provide the Council with guidance that might not otherwise be available through the participation of other parties; and (2) the organization shows that it, or its members, have an interest in amenities that would be affected by the proposed facility.

...

Requirement for individuals to participate as intervenors on their own behalf. The Council has decided that any individual who has sought intervention who has shown that the project may have a direct and unique impact on his/her property

should be allowed to intervene. Such direct and unique impacts could include impingement of view beyond that experienced by the general public, noise caused by the proximity of the power plant to their property, potential flooding issues that specifically threaten their property, or a direct threat to a well. Potential impacts which are shared in common by many other citizens may be addressed [by] Counsel for the Environment, the local jurisdictions, or by individual testimony at the public hearings scheduled to be held in Whatcom County in early June, rather than by party intervention at the adjudicative proceedings. Any person allowed intervention because of such direct threat of impacts to their property will be allowed to present direct testimony and cross examine only as to those identified direct and unique impacts.

Id.

The Council then allowed two public interest groups (Northwest Energy Coalition and Washington Environmental Council) to intervene due to their special expertise in relevant issues. Additionally, they had shown that their members had direct interests in amenities that could be affected by construction of the power plant, interests which were different from those of the general public. However, the Council denied intervention and party status to three of the four individuals who had filed *Petitions*. For each person denied intervention, the Council noted that his or her interests could not be distinguished from those of the general public; the Council encouraged their participation as either witnesses for another party or through commenting at public meetings.⁴ As to the person granted intervention and party status (Constance Hoag), the Council determined that the impact on her was different than that on the public at large and specific to her property in that the power plant could affect the view from her residence in a way that was distinguishable from the public at large, could create noise that disturbed the enjoyment of her property, and might have an adverse effect on her well water.

3. Analysis of and Rulings on Wild Horse *Petitions for Intervention*

Approval of Petitions for Intervention -- Scope and Limitations. After full consideration of RCW 34.05.443, WAC 463-30-400, WAC 463-30-410, and the legal precedents discussed above, the Council hereby ORDERS that all four petitioners for intervention shall, in accordance with WAC 463-30-060(4), be granted intervenor status and may participate in this proceeding with the following limitations:

Kittitas County: The Council finds that Kittitas County, as the county in which the proposed Project is located, has demonstrated with particularity that it has a constitutional statutory, and code interest in the following issues associated with the project: environmental

⁴ In developing its recommendation to the Governor, the Council holds public information and land use hearings and other public meetings pursuant to the Council's enabling legislation and the State Environmental Policy Act, Chapter 43.21C RCW. The Council may hold additional public hearings if it is developing draft water quality, air quality, or other environmental permits associated with a proposed facility. At these various public hearings and meetings, members of the public can provide information and make comments. The Council also provides the public with an ongoing unrestricted opportunity to provide written information and comments to the Council on proposed projects.

protection; protection of the public health and welfare; and consistency of the proposed Project with local land use plans and zoning ordinances, including the potential impacts on urban growth, sprawl, transportation, housing, economic development, property rights, natural resources, open space, recreation, environment, public facilities, public services and historical preservation. As demonstrated by the Project application and the DEIS, the Project could directly affect the County's interests, including but not limited to, the possibility of state preemption of local land use plans and zoning ordinances. No other entity has the constitutional, statutory, or code authority to act on behalf of Kittitas County.

The Council therefore grants Kittitas County's petition, but limits its participation to matters within its constitutional, statutory, and code authority and to the issues itemized above as they may directly affect Kittitas County.

Economic Development Group of Kittitas County: The Council finds that the Economic Development Group of Kittitas County, as an entity designated by the Board of County Commissioners to coordinate economic development services for Kittitas County and with statutory obligations under RCW 43.330.010 and RCW 43.330.080-.090, has established a direct interest in the economic development aspects of the proposed Project. It asserts its obligation to represent the County with respect to the economic impacts of the Project on County residents and business community (including tax and property value issues) and with respect to the Project's impacts on business development, expansion and retention activities that diversify the County's economy and create family wage jobs. No other entity can fulfill the Economic Development Group's obligations pursuant to its designation by the Board of County Commissioners or its obligations under state law. Because of the potential economic impacts of the Project, denial of intervention would directly and substantially impact the Economic Development Group's interest in carrying out its delegated and statutory duties.

The Council therefore grants the Economic Development Group's petition, but limits its participation to matters within its statutory and delegated authority and to the issues identified above as they may directly impact the residents of Kittitas County. The Council denies the Economic Development Group's petition insofar as it seeks to address the precedent that approval or denial of the Project might set for approval or denial of other wind farms within Kittitas County.

Friends of Wildlife and Wind Power: The Friends of Wildlife and Wind Power asserts interests in 1) the successful development of wind power while minimizing the impacts of wind farm development on wildlife; 2) the potential adverse impacts of the Project on its members who use certain identified canyons within the proposed Project area for recreational pursuits including photography, hiking, and the opportunity to observe wildlife in its native setting; 3) visual quality; and 4) protecting the wildlife that use the canyons as a water source, or for shelter, foraging, or cover. The Friends of Wildlife and Wind Power assert that construction of the turbines could impact these interests. The Application and DEIS lend credence to the assertion that the Project could impact wildlife. Further, the direct and ongoing observations of members of Friends of Wildlife and Wind Power regarding wildlife habits and activities on and around the site of the proposed project represent a special sort of information not otherwise available to the Council from other parties, including Counsel for the Environment. Actual use of the land

adjacent to and on which the proposed turbines may be constructed constitutes a direct and unique impact on those members' interests in continued recreational use of the area.

The Council grants the Friends of Wildlife and Wind Power's *Petition* but limits its participation to 1) the potential adverse impacts of the Project on its members who use certain identified canyons for recreational pursuits (including photography, hiking and the opportunity to observe wildlife in its native setting); and 2) potential specific wildlife protection interests that are distinguishable from those of the general public. The Council denies the Friends of Wildlife and Wind Power's petition insofar as it seeks to assert 1) general philosophical interests in the successful development of wind power and minimizing impacts the impacts of wind farms on wildlife; 2) visual quality issues that are indistinguishable from those of the general public; and 3) generalized wildlife protection interests that are either indistinguishable from those of the general public or which are within the jurisdiction of the Counsel for the Environment. To the degree that these issues fall within the jurisdiction of the Council for the Environment, the Council invites the Friends of Wildlife and Wind Power to work with the CFE to make its views known to the Council during the adjudication or to present its views directly through the public meeting or through submission of written comments. The Council requests that the Friends of Wildlife and Wind Power and the Counsel for the Environment coordinate their activities to avoid duplicative testimony or cross-examination.

F. Steven Lathrop: F. Steven Lathrop asserts interests in 1) the general economic impacts of the Project on land values in the County; 2) generalized development in the County above and beyond Mr. Lathrop's own property interests, 3) the precedent that any approval of the Project might set; 4) the visual impacts of the Project on his residence and the economic impacts associated with those visual impacts; 5) the economic impacts of the Project on real property he owns; and 6) the impacts of the Project on Mr. Lathrop's agricultural land.

Initial Considerations. Before discussing each of these interests in turn, the Council will address Mr. Lathrop's assertion that he should be allowed to intervene because 1) he was allowed to intervene in another EFSEC adjudicative proceeding regarding a different wind farm; or 2) because he is the only petitioner overtly opposed to the project.

The Council recognizes that Mr. Lathrop has been granted party status in another adjudicative proceeding⁵ regarding a different proposed wind farm. However, that wind farm is at least twice as close to his property as the Wild Horse Wind Power Project. Thus, Mr. Lathrop's petition here is distinguishable from his prior filing with the Council; his party status in the other case is not dispositive of the Council's analysis and outcome in this matter.

Second, the fact that Mr. Lathrop currently appears to be the only petitioner overtly opposed to the Project does not automatically justify his intervention. Neither the APA and EFSEC rules nor EFSEC precedent require the Council to grant a petition for intervention simply because it is made by the only person or entity opposing a proposed project.

⁵ In the Matter of Application No. 2003-01 Sagebrush Power Partners, LLC, Kittitas Valley Wind Power Project

Generalized Economic Impacts on County Land Values. With respect to the general economic impacts on land values in the County, i.e. on the value of land other than land owned by Mr. Lathrop, Mr. Lathrop's attorney clarified at the September 30, 2004 prehearing conference that Mr. Lathrop was not seeking to represent anyone's interest other than his own. September 30, 2004 Prehearing Conference Transcript, page 26.

Both for this reason, and because Mr. Lathrop does not have a concrete, direct, legal interest in property that he does not own, the Council denies Mr. Lathrop's petition insofar as he seeks to address economic impacts on land values in Kittitas County generally.

While in his Reply Brief, Mr. Lathrop compares his interest to that of the Economic Development Group of Kittitas County and suggests that he and the Group are so similarly situated that the Council cannot grant the Group's petition and deny his petition, the Economic Development Group's interest in economic issues is distinguishable from Mr. Lathrop's interest. The Economic Development Group has both statutory authority and delegated authority from the Board of County Commissioners to concern itself with generalized economic issues in Kittitas County. Mr. Lathrop has no such authority.

Generalized Development in the County Above and Beyond Mr. Lathrop's Own Property Interests. Similarly, with respect to Mr. Lathrop's assertion of an interest in preventing or controlling development in the County above and beyond his own property interests (Declaration of F. Steven Lathrop, page 1), such an interest is not a specific, concrete, legal interest that is different from that of the general public. For this reason, the Council denies his petition insofar as it seeks to address this interest.

Precedent. With respect to Mr. Lathrop's assertion of an interest in the precedent set by possible approval of the Project, the Council finds that Mr. Lathrop does not have a concrete, direct legal interest in any precedent set by approval of the Project that is distinguishable than the interest of the general public.

While jurisprudence on standing in Superior Court does not apply to the Council's intervention decision, the Council nonetheless finds the Court of Appeals decision in Coughlin v. Seattle School District No. 1 instructive. 27 Wn.App. 888, 894, 621 P.2d 183 (1980). In that case, the court denied standing to an individual who attempted to appeal a school district's decision to close five elementary schools on the basis that the closure created a precedent for future closures that would harm her. The court concluded that such a claim of future precedential effect was too remote to justify standing.

Any interest that Mr. Lathrop may have is similarly remote, and also speculative, and indistinguishable from that of the other citizens of the County. For this reason, his petition to address issues of precedent is denied. To the degree that Mr. Lathrop is concerned that approval of the Project might set a precedent for the approval of other wind farms in Kittitas County, the Council's denial of his request is made on the same basis that it denied a similar request from the Economic Development Group. To the degree that Mr. Lathrop is concerned with the precedent that approval for the Project might set for county development in general, as discussed in the preceding section he has no legally protectable interest in preventing or controlling generalized

development in the County that justifies intervention. While the Council has allowed the Economic Development Group of Kittitas County to intervene to address generalized development issues, the Economic Development Group has both delegated and statutory duties with respect to economic development in Kittitas County.

Visual Impacts. With respect to the potential visual impacts of the Project on the view from Mr. Lathrop's property, his property is a 40-acre parcel southwest of the City of Ellensburg, located 19 miles away from the closest boundary of the proposed Project. Declaration of Chris Taylor, paragraphs 5 and 6; September 30, 2004 Prehearing Transcript, 18. Most of the project cannot be seen from Mr. Lathrop's property because it is below the ridgeline created by Whiskey Dick Mountain. Declaration of Chris Taylor, paragraphs 5 and 6. The visual simulation provided by Arne Nielsen indicates that on a clear day the turbines would at best be barely visible from Mr. Lathrop's property. Declaration of Arne Nielsen in Opposition to the Intervention Request of F. Steven Lathrop (attached visual simulation).

In past adjudications, the Council has granted intervention when an individual's property is directly occupied by construction of a project, contiguous to the site, or subject to direct impacts related to view, noise, or environmental quality concerns (i.e. well water) when those impacts are distinguishable from impacts on the general public. As to view impairment, Washington's Supreme Court has held that the right to an unobstructed view does not exist, absent an agreement, statute, or governmentally imposed condition affirmatively creating that right. Pierce v. Northeast Lake Washington Sewer and Water District, 123 Wn.2d 550, 559 - 560, 870 P.2d 305 (1994). The possible visual impacts of construction of the Project on and behind a ridge 19 miles away from Mr. Lathrop's property does not directly and substantially affect any concrete, specific interest of Mr. Lathrop that is distinguishable from that of the general public.

For these reasons, the Council denies Mr. Lathrop's request to intervene to address view impacts, just as it denied the petition of the Friends of Wildlife and Wind Power to address visual quality issues that are indistinguishable from those of the general public. As discussed in the next section, Mr. Lathrop is, however, free to address visual impacts insofar as they may impact the economic value of his 40-acre parcel.

Economic Impacts on Mr. Lathrop's Real Property. With respect to Mr. Lathrop's asserted interest in the potential economic impacts of the Project on his real property, whether caused by potential visual impacts or otherwise, it is not the case that every conceivable injury to economic interest automatically makes the interest legally protectable or that it automatically confers qualification for intervention. In re Application No. 96-1 of Olympic Pipeline Company, Council Order No. 703 (1996). Some minimal level of plausible evidence needs to be proffered in support of a petition for intervention. While the testimony proffered by Mr. Lathrop in support of his petition specifically addresses property values within the view shed of the Project, as defined by that proffered testimony, that view shed is limited to a 5-mile radius of the turbines. Reply Brief, Exhibit (Roger Weaver). Mr. Lathrop's property is not within that 5-mile view shed, but rather is 19 miles away from the closest string of turbines. The visual simulation provided by the Applicant shows that these turbines are barely visible. While both Mr. Lathrop and Mr. Weaver nonetheless make the bare allegation that construction of the turbines will

decrease property values in Kittitas County, presumably including Mr. Lathrop's property, the Council believes that those statements verge on the implausible, particularly given the lack of evidentiary support for the proposition proffered by Mr. Lathrop's own witness.

Nonetheless, the Council has decided to exercise its discretion and grant Mr. Lathrop party status even though the showing he has made is, at best, marginal. Given the discretion accorded to EFSEC by the APA and the applicable rules, EFSEC is electing in this case to grant Mr. Lathrop's petition with respect to economic impacts to his property because his participation will provide EFSEC a greater opportunity to fully consider the potential impact of the Project on one individual landowner's property values (i.e. Mr. Lathrop). Therefore, although he will only be representing himself and not any similarly situated landowners, the Council is granting Mr. Lathrop intervenor status, limited to issues concerning the direct economic impact of the Project on his 40-acre parcel of real property located approximately 19 miles southwest of the proposed Project. This may include any impacts of the Project on his view but only insofar as such visual impacts directly affect the economic value of his property.

Impacts on Mr. Lathrop's Agricultural Property. With respect to Mr. Lathrop's assertion of an interest in the impacts of the Project on his agricultural land, he has not specifically identified land ownership other than the 40-acre parcel discussed in the preceding section. He has also not identified a concrete interest in that land as agricultural land nor has he articulated any adverse effect the Project could have on his 40-acre parcel as agricultural land. For example, he has not described the agricultural uses of his land (grazing, crop production, etc.) or pointed to any adverse affect the Project could have on such uses. Therefore, the Council denies his petition with respect to any agricultural aspects of his land ownership.

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 December, 2004.

WASHINGTON STATE ENERGY FACILITY
SITE EVALUATION COUNCIL

Adam E. Torem, Administrative Law Judge

James Luce, Chair: Concurring in part, dissenting in part.

Council members had a robust and thoughtful discussion regarding intervention issues. Administrative Law Judge Torem, with advice from Assistant Attorney General Ann Essko, has issued an order reflecting the majority of the Council member's thinking concerning intervention petitions in this case.

I concur with the order in all but one intervention request, that regarding Mr. Lathrop. My disagreements are twofold: (1) its failure to deny Lathrop intervention outright based on EFSEC's long standing, well established test for gaining intervention and (2) its admission of Mr. Lathrop by discretion notwithstanding his ability to meet EFSEC's test.

I turn first to the Council's three prong test by which Mr. Lathrop's petition is to be judged on the merits. The test requires that that the petitioner demonstrate with particularity, ("clearly and specifically") that he has a legal interest different than the interest of the general public (prong 1); that he demonstrate how the interest could be adversely affected by the project (prong 2), and that he identify how the interest could be impaired or impeded in a "direct or substantial way" if intervention is not allowed. See Council three prong test at page 5 of Council opinion.

I respectfully submit that based on facts offered by Mr. Lathrop's own expert he cannot meet this test, and for that reason alone his intervention petition should have been denied.

Lathrop acknowledges that his property is nineteen miles from the proposed project. The undisputed declaration of Mr. Chris Taylor and the visual simulation of Mr. Arne Nielsen (Exhibit 40-1) discussed at page 12 of the order make it clear beyond any reasonable doubt that without significant magnification it is impossible to see the applicant's project from Mr. Lathrop's forty acres. Moreover, as noted in the order, the Washington Supreme Court has held that without an agreement, statute, or governmentally imposed condition affirmatively creating a right to an unobstructed view, one does not exist. Pierce v. Northeast Lake Washington Sewer and Water District. 123 Wn, 2nd 550, 559, 870 P.2d 305 (1994)

All agree that Mr. Lathrop's unimpeded view provides no basis for intervention. Pierce makes it clear that his viewshed interest is not legally protected, and the facts make it clear that at a distance of 19 miles Mr. Lathrop's interest is no different than that of the general public. (Prongs 1 and 2 of the Council test).

Prong three is the pivotal issue of Mr. Lathrop's alleged economic injury to his 20 acres of real property, which at its outermost boundary is again nineteen miles from the applicant's proposed project. Here, as the opinion correctly acknowledges, the burden on Mr. Lathrop is to demonstrate some "plausible evidence" of adverse impact to his property value.

And what "plausible evidence" does Lathrop offer? He offers his *expert's testimony that real property values are adversely impacted within a viewshed of five miles - not nineteen miles - of the turbines,* See Lathrop Reply Brief, Exhibit of Roger Weaver, cited in Council Opinion at page 12.

In other words, Mr. Lathrop's offers a witness who impeaches his own claim that his property value is reduced. While Lathrop also offers other claims, that property values more generally in Kittitas County may be devalued, the order grants him intervention solely for the purpose of showing supposed economic impact to his property.

The Council to its credit recognizes that as to Mr. Lathrop's testimony regarding his property that, "the Council believes that [his]statements verge on the implausible, particularly given the lack of evidentiary support for the proposition proffered by Mr. Lathrop's own witness." Council Opinion at 13.

However, apparently believing there is no acceptable alternative, or perhaps for some other unexplained reason, the majority then focuses on its ability to use discretion to grant intervention.

Government discretion is a powerful and potentially positive tool, as long as it is used sparingly and only in extraordinary circumstances. In my opinion, government should use it only when other reasonable alternatives which achieve the same end without its exercise have been exhausted.⁶ However such remedies are readily available in the Lathrop situation and seem to have been contemplated by earlier EFSEC Council's in promulgating WAC 463-30-400 and WAC 463-14-030, as discussed below. The present Council majority elects not to use them and I find this disappointing.

WAC 463-30-400 is directly on point and is the key provision governing EFSEC's use of discretion. It authorizes the Council discretionary authority only when there is no other way that to protect an intervener's interests and its language is parallel to EFSEC's own three party test for intervention. I do not find this coincidental.

WAC 463-30-400 provides in relevant part:

"...intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the Council to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded."⁷ (Emphasis added)

⁶ EFSEC has just completed a three year rulemaking process intended to bring certainty to its adjudicatory proceedings, believing that applicants and the public need to know the rules with as much clarity as possible. In that process, we recognized that discretion needed to be limited to achieve this end.

⁷ Note the emphasis regarding the exercise of Council discretion only if there are no other means to protect a potential intervener's interests; that is, if without intervention they may be "impaired or impeded." Note the parallelism between WAC 463-40-400 and EFSEC's three prong test for intervention indicating that this WAC was to be the guide for the Council when it elected to exercise discretion if a potential intervener could not satisfy the intervention test. While the APA is referenced in the majority opinion as a basis for the exercise of Council discretion, EFSEC's own statute and WAC's are more directly in point and should be accorded greater weight. In addition, as the facts in the Lathrop petition show, he cannot meet the Council's three prong intervention test.

The reader should focus on the last clause of WAC 463-30-400, “and whose ability to protect such interest may be otherwise impaired or impeded.”

Rather than searching for such a clear path, the majority turns to the exercise of discretion and concludes that it has no where else to turn and therefore “...has decided to exercise its discretion and grant Mr. Lathrop party status even though the showing he has made is, at best, marginal.” Council Opinion at page 13.

In my opinion, given the lack of facts supporting the Lathrop intervention, the majority should have looked harder to see whether there was another way to protect Mr. Lathrop’s interests. In fact, while it initially did so, in the end it rejected exactly the protection which I believe earlier EFSEC Council’s intended to afford individuals who had interests they desired to protect but who could not qualify as interveners.

WAC 463-14-030 provides all the protection Mr. Lathrop needs. The order supported by the majority recognizes this fact by observing that it:

“...gives the public an opportunity to provide information on the project. RCW 80.50.090. The comments are...transcribed by a court reporter as part of EFSEC’s administrative record, and are considered by EFSEC on an equal basis with information received during the adjudicatory hearing.” Council Opinion at 4.

Specifically, Lathrop could have used WAC 463-14-030 to state his case at a time concurrent with the adjudicatory hearing and his testimony would have been given the same weight as if he were an intervener. Instead, he is granted intervener status in what to my mind is a questionable exercise of discretion which does erodes the precedential value of the Council’s long standing test for intervener status.

As a matter of fairness it is important to note that in another wind project in the same case, other community members with similar real property financial impact to Mr. Lathrop utilized the public meeting process without difficulty. Now, in Wild Horse, Lathrop is receiving special treatment. I see no basis in law or equity to single out Mr. Lathrop for special treatment as against his peers in Kittitas County who have similar interests.

For the above reasons, I respectfully dissent from the majority Council thinking as expressed in this order.

James O. Luce
EFSEC Chair