

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. 5
COUNCIL ORDER NO. 810**

**ORDER ON APPLICANT'S
OBJECTIONS AND MOTION TO
STRIKE TESTIMONY**

Nature of the Proceeding: On Tuesday, February 15, 2005, the Applicant, Wind Ridge Power Partners, LLC, by and through its counsel Darrel Peebles, filed its *Objections and Motion to Strike Prefiled Testimony* requesting, among other relief, that the Energy Facility Site Evaluation Council (EFSEC or Council) strike ten (10) specified portions of the pre-filed testimony of Intervenor F. Steven Lathrop's own testimony. Jeff Slothower, counsel for Intervenor Lathrop, filed his *Response* to the Applicant's *Objections and Motion to Strike* on Friday, February 18, 2005.

Summary of Ruling: The Council partially GRANTS and partially DENIES the Applicant's request that EFSEC strike portions of F. Steven Lathrop's pre-filed testimony.

Legal Issues Presented by the Applicant's Motion to Strike:

1. Should EFSEC strike portions of the pre-filed testimony of F. Steven Lathrop as outside the limits of Intervenor Lathrop's intervention as set out in Council Order No. 805?¹
2. Should EFSEC strike portions of the pre-filed testimony of F. Steven Lathrop as beyond his personal knowledge, speculative, or argumentative?

ANALYSIS

¹ The Applicant's *Objections and Motion to Strike* refer to Council Order No. 804, Prehearing Order No. 1. However, one week after its original issuance, the Council issued an *Errata on Prehearing Order No. 1* advising all concerned that the ruling had been misnumbered and should have been Council Order No. 805. This ruling refers to it as such.

This adjudicative proceeding is being conducted under the auspices of the Washington Administrative Procedure Act (APA).² Thus, while the Washington Rules of Evidence are not directly applicable, they do serve as guidelines for the presiding officer in making evidentiary rulings.³ The following Evidence Rules (ER) are pertinent to the objections presented at this time:

ER 401 **DEFINITION OF "RELEVANT EVIDENCE"**. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402 **RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE**. All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403 **EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 602 **LACK OF PERSONAL KNOWLEDGE**. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 701 **OPINION TESTIMONY BY LAY WITNESSES**. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 702 **TESTIMONY BY EXPERTS**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

² Revised Code of Washington (RCW) 80.50.090(3).

³ RCW 34.05.452(2). The administrative rules of evidence adopted by the Council do not contain specific rules applicable to adjudicative hearings, but instead refer back to this section of the APA. *See* Washington Administrative Code (WAC) 463-30-310(1).

qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In addition to the above-noted laws and evidentiary rules, Council Order No. 805 contained the following specific rulings regarding F. Steven Lathrop's *Petition for Intervention*:

. . . the Council denies Mr. Lathrop's petition insofar as he seeks to address economic impacts on land values in Kittitas County generally.

. . . the Council denies his petition insofar as it seeks to address this interest [generalized development in the County above and beyond Mr. Lathrop's own property interests].

. . . his petition to address issues of precedent is denied.

. . . the Council denies Mr. Lathrop's request to intervene to address view impacts Mr. Lathrop is, however, free to address visual impacts insofar as they may impact the economic value of his 40-acre parcel.

. . . 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. . . . 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.

. . . the Council denies his petition with respect to any agricultural aspects of his land ownership.

See Council Order No. 805, at 10-13.

Finally, the Council notes its desire to obtain the maximum amount of relevant evidence during the course of processing and considering the *Application for Site Certification*. This desire is in keeping with the traditionally less stringent application of the Rules of Evidence in administrative proceedings. Thus, the Council adopts a liberal approach to the admission of evidence, to include portions of Mr. Lathrop's pre-filed testimony to which objections have been filed in this matter. With those applicable Rules of Evidence, prior EFSEC rulings, and general philosophy now set out, each objection made by the Applicant regarding Mr. Lathrop's testimony [Exhibit 60 -- DT-L] is considered in turn:

1. ***Lathrop Testimony, Page 4***. The Applicant objects to three separate portions (underlined) of page 4 of Intervenor Lathrop's pre-filed testimony in response to the following question:

Q: EFSEC has proposed to limit your testimony on the impact of the Wild Horse Project on your specific property. How does your knowledge of real estate activities and local land use rules and trends relate to your property in light of that proposed limitation?

A: There is simply no way to even approximately evaluate the impact of the Wild Horse Project on any specific piece of real estate, let alone my own, without something other than a general overview. [Applicant Objection “a”] An anecdotal analysis. I will comment on Mr. DeLacy’s opinions later in this testimony. I note with interest that even he purports to rely on general area qualities and characteristics in relating the impact of the Wild Horse Project to my property specifically. Likewise, Mr. Priestly uses a similar technique in assessing simulation of viewpoints. There is simply no other way to approach the question and I doubt that either of these two gentlemen disagree. [Applicant Objection “b”] Accordingly, my comments about the impact the Wild Horse Project will have on the County generally and specific parcel[s], including my own, is the most appropriate way to gain any degree of valid registration on impacts. [Applicant Objection “c”]

The Applicant asserts that Mr. Lathrop’s response is outside the scope of Council Order No. 805 and, as for one sentence, *Applicant Objection “b”*, speculative. Intervenor Lathrop’s *Response* explains that the Applicant’s own witnesses have offered generalized information, not property-specific analyses, regarding impacts of wind farms. Therefore, Intervenor Lathrop argues that he must be permitted to offer similar evidence through his own testimony.

Council Order No. 805 was exceedingly clear in the limitations it placed on Intervenor Lathrop and his ability to participate as a party in his capacity as a single landowner. The Applicant is correct that Mr. Lathrop’s responses, and perhaps the question itself, are outside the scope of and seemingly in protest of the substantive limitations set out in Council Order No. 805. However, this portion of Mr. Lathrop’s testimony does not actually offer proscribed evidence, but only his personal opinion on how EFSEC’s limits make it difficult, if not impossible, for him to explain the impact of the proposed Project on his parcel of land. These difficulties are relevant to the issues to be considered at the adjudicative hearing and therefore helpful to the Council’s full evaluation of this matter. Further, the Council wishes to provide all parties with considerable latitude in laying appropriate foundations for the opinions each witness will offer at hearing. Therefore, *Applicant’s Objections “a” and “c”* are noted, but overruled; the related testimony will not be stricken from the record.

The Applicant’s objection to Mr. Lathrop’s speculation as to Mr. DeLacy’s and Mr. Priestly’s agreement on methodology is meritorious and that section of testimony will be stricken. In this instance, Mr. Lathrop professes no direct knowledge on what Mr. DeLacy or Mr. Priestly might believe, other than what is contained in their pre-filed testimonies. Further, Mr. Lathrop’s opinion expressing doubt on what two other witnesses might or might not agree to is *not* helpful to EFSEC’s understanding of the issues in this case. If Intervenor Lathrop wishes to cross-examine either of these witnesses during the course of the adjudicative proceeding with regard to their opinions on the economic impact of the proposed Project on parcels of land in Kittitas County, his legal counsel is free to do so. However, it is not appropriate for Mr. Lathrop to offer witness testimony that does not comply with the requirements of ER 602, ER 701, or

otherwise provide assistance to the Council, as required by ER 401 and ER 403. Therefore, *Applicant objection “b”* is sustained and the related sentence of testimony will be stricken.

2. ***Lathrop Testimony, Pages 5-6.*** The Applicant objects to Mr. Lathrop’s reference to another witness, Mr. Priestly, estimating that “approximately 30 turbines will be visible from the community of Kittitas.” The Applicant asserts that this comment is prohibited by the limitations imposed on Intervenor Lathrop in Council Order No. 805. Mr. Lathrop’s Response does not directly address this objection or defend this reference to Mr. Priestly’s opinion.

The Council notes that Mr. Lathrop was granted limited intervenor status. However, the limits of Council Order No. 805 specifically allowed Intervenor Lathrop to participate with regard to “any impacts of the Project on his view, but only insofar as such visual impacts directly affect the economic value of his property.” Here, Mr. Lathrop’s reference to the projected impacts on the viewshed of the City of Kittitas is done only to allow a direct comparison to the supposed impacts on his own property. In the sentence following that objected to by the Applicant, Mr. Lathrop asserts that “the [higher] elevation of my property ensures that I will see many more” turbines than the 30 towers Mr. Priestly believes will be visible from the City of Kittitas. The Applicant does not object to this latter contention, but only to Mr. Lathrop’s prior citing to Mr. Priestly’s testimony regarding the City of Kittitas. In this instance, a piecemeal approach is not appropriate because it denies Mr. Lathrop the ability to make a potentially apt comparison. This is exactly the sort of evidence permitted by EFSEC’s previous ruling on intervention status.

Council Order No. 805 certainly means exactly what it says. However, it will not be read with an eye to making any Intervenor’s participation in the adjudication a meaningless exercise. EFSEC expects that Intervenor Lathrop will participate vigorously and effectively with regard to the narrow issue under which he was granted party status. The limits of Council Order No. 805 will be enforced, both in this ruling and at hearing, but not so strictly as to prevent any Intervenor from presenting the Council with the full range of relevant evidence contemplated by that EFSEC Order.⁴ Taken in context, this excerpt of Mr. Lathrop’s testimony is relevant and within the bounds of Council Order No. 805. Therefore, Applicant objection “d” is noted, but overruled; the related testimony will not be stricken from the record.

3. ***Lathrop Testimony, Pages 6-10.*** The Applicant objects to an extended portion of Mr. Lathrop’s testimony that suggests approval of any power project will create an “undeniable precedent” for more such projects to come in the future. Mr. Lathrop’s *Response* does not directly address this objection or defend his testimony’s contentions regarding precedent.

Council Order No. 805 discussed the case of Coughlin v. Seattle School District No. 1, 27 Wn. App. 888, 621 P.2d 183 (1980), which concluded that claims of future precedential effects were too remote to justify standing. EFSEC applied that holding in evaluating Mr. Lathrop’s claims of interest in any

⁴ As discussed more fully below, the range of participation and acceptable types of evidence to be offered by each party to this proceeding varies in accordance to their bases for intervention, statutory roles (i.e. Counsel for the Environment), and burdens of proof at the adjudicative hearing (i.e. Applicant).

precedent set by possible approval of the Project, determining that his interest, as in Coughlin, was remote, speculative, and indistinguishable from that of the other citizens of Kittitas County. Thus, the Applicant's objection must be sustained on this basis, but only as to those portions of the testimony in which Mr. Lathrop expresses his opinion on the precedential value of the Project. The Applicant's objection also asserts that this section of testimony is speculative and argumentative, and should be stricken on those grounds as well.

Applicant's Objection "e" seeks to carve out a substantial portion of Mr. Lathrop's pre-filed testimony, from page 6, line 24, through and including page 10, line 17. This is nearly 4 full pages out of a total of just over 16 pages of pre-filed testimony. Without a doubt, the following excerpts speak to the prohibited area of "precedent" or generalized impacts and shall be stricken:

Page 6, line 24 ("Second, the introduction of any one power project . . .")
through and including page 7, line 5 (" . . .equivalent to another ice age.")

Page 7, line 18 ("While these criteria are all cited by the applicant . . .")
through and including page 8, line 17 (" . . . they only destroy the exit strategies.")

In addition, the following excerpt of testimony strays from the narrow subject area granted to Intervenor Lathrop for proper intervention: impacts of the proposed Project on his own land.

Page 9, line 4 (" . . . comments about pre-filed testimony of Marlene Guhlke?")
through and including page 9, line 17 (" . . . should be ignored, if not stricken.")

The above-noted excerpt does not contain any testimony regarding Mr. Lathrop's own land and is therefore beyond the scope of his intervention and the bounds of Council Order No. 805. As noted previously, if Intervenor Lathrop wishes to cross-examine this witness during the course of the adjudicative proceeding with regard to her opinion on the economic impact of the proposed Project on parcels of land in Kittitas County, including his own, his legal counsel is free to do so.

The remaining portions of the testimony addressed by *Applicant's Objection "e"* are within the bounds of Council Order No. 805 because Mr. Lathrop discusses his own parcels of land and what he believes the proposed Project's impacts might have on that property. His critique of Mr. Priestly's visual simulation methodology is potentially helpful to the Council, but only when considered in the context of Mr. Lathrop's limited scope of intervention as to view impacts on his own more distant property. Therefore, *Applicant Objection "e"* is sustained only in part and the above-noted sections of testimony will be stricken.

4. Lathrop Testimony, Page 11. The Applicant objects to Mr. Lathrop characterizing one of the Applicant's witnesses, Mr. DeLacy, as using "to maximum advantage the materials with which he had to 'dress this pig.'" The Applicant contends that this testimony is speculative and argumentative, in violation of ER 602. Mr. Lathrop's *Response* does not mention or attempt to defend this comment.

Clearly, Mr. Lathrop is opposed to the Wild Horse Wind Power Project, as he openly states later in his testimony (page 14, line 2). However, the Council does not wish to allow the pending adjudicative hearing to devolve into anything less than a civil discourse among the parties, their counsel, and their various witnesses. Insults and barbs are unnecessary, unappreciated, and shall not be tolerated. This portion of Mr. Lathrop's testimony is argumentative, in violation of ER 403 and ER 602, and it offers no assistance to the Council's understanding of the issues presented. Therefore, *Applicant Objection "f"* is sustained and the related sentence of testimony will be stricken.

5. ***Lathrop Testimony, Pages 12-13.*** The Applicant objects to two excerpts of Mr. Lathrop's testimony criticizing Mr. DeLacy's pre-filed testimony with speculative and argumentative comments. Mr. Lathrop's *Response* does not mention or attempt to defend these positions.

The Applicant has not objected to the entirety of Mr. Lathrop's criticism of Mr. DeLacy's testimony, which extends from page 10, line 19, through and including page 13, line 24. Instead, the Applicant has objected to a total of 24 lines (approximately 1 page) out of a total of 82 lines (nearly 3 ½ pages). An objective reading of the 10 lines of testimony on page 12 reveals that Mr. Lathrop is questioning the ability of anyone, including Mr. DeLacy, to accurately predict the general economic impact of the proposed Project on land values in Kittitas County. The 12 line excerpt on page 13 also questions Mr. DeLacy's methodology, making a tangential reference to an alleged failure to analyze impacts on developments with parcels apparently similar to Mr. Lathrop's own property. Both of these excerpts resort to hyperbole, comparing Mr. Lathrop and his fellow landowners to "guinea pigs" (page 12, line 13) and equating Mr. DeLacy's analysis with a suggested failure 25 years ago to foresee that the Kent Valley in King County would not remain farmland (page 13, lines 10-12).

It is the Council's opinion that the majority of these portions of Mr. Lathrop's testimony do not focus on the proposed Project's potential effects on his own property, nor are the majority of them foundationally necessary to Mr. Lathrop's narrow case-in-chief. Further, for the most part, they are argumentative, in violation of ER 403 and ER 602, and they do not offer any assistance to the Council's understanding of the issues presented. However, page 12, lines 15-19,⁵ can be read to be a relevant critique of Mr. DeLacy's methodology and to assist the Council in understanding how difficult prediction of impacts of a proposed wind farm project might be. Therefore, *Applicant Objections "g", in part, and "h", in its entirety*, are sustained and the related sections of testimony will be stricken, but page 12, lines 15-19 shall not be stricken.⁶

⁵ This excerpt, which shall not be stricken, reads as follows: "The truth is neither side has a clue as to what the actual result will be until a particular project is constructed. At that point, there is not a need for statistical modeling because subsequent sales will demonstrate the impact. I think one can read the testimony to support any conclusion one wants. Suffice to say that as to what is going to happen to property values with the Wild Horse Project, Mr. DeLacy doesn't know either."

⁶ Again, as noted before, if Intervenor Lathrop wishes to cross-examine this witness during the course of the adjudicative proceeding, his legal counsel is free to do so. Specifically, he can raise any issues regarding Mr. DeLacy's awareness of Tahoma Farms and similar residential developments on cross-examination.

6. *Lathrop Testimony, Page 14.* The Applicant objects to a nearly page-long portion of Mr. Lathrop's testimony that compares the Wild Horse Wind Farm Project application with other wind farm projects under review in Kittitas County, focusing on the appropriate setback distance for a wind turbine tower and single family residences. Mr. Lathrop's *Response* does not mention or attempt to justify this discussion.

Nothing in this excerpt of testimony mentions Mr. Lathrop's property, which is nearly 20 miles distant from the closest proposed wind turbine. In fact, the testimony suggests that setbacks should be at least 1.75 miles, a distance that is less than 10% of the distance from Mr. Lathrop's property boundary to the closest possible wind turbine tower. Thus, it is clear that this section of pre-filed testimony is outside the specific limitations set by Council Order No. 805. Intervenor Lathrop did not comply with these restrictions. Therefore, *Applicant Objection "i"* is sustained and the related section of testimony will be stricken

7. *Lathrop Testimony, Pages 15-17.* The Applicant objects to the final page and a half of Mr. Lathrop's testimony which offers a general opinion on suggested residential density to be allowed within 5 miles of a wind farm, then discusses County government's obligations to protect property rights, and closes with a recommendation that the proposed Project be built in two separate phases. Mr. Lathrop's *Response* does not mention or attempt to justify any of this testimony.

As with the previous *Applicant Objection "i"*, these segments of Mr. Lathrop's testimony never mention his own property, but only address land-use issues more than 15 miles away from his property line and question the precedential impact of allowing a wind farm to be built in the Kittitas Valley. Thus, it is clear that these sections of pre-filed testimony are also outside the specific limitations set by Council Order No. 805. Again, Intervenor Lathrop did not comply with these restrictions. Therefore, *Applicant Objection "j"* is sustained and the related sections of testimony will be stricken.

Alternate Forum to Present Stricken Testimony. The Council recognizes that a significant portion of Intervenor Lathrop's own pre-filed testimony is stricken by this Order. Even so, this does not create any new limitations on the scope of his intervention and participation as a party in these proceedings. As permitted by statute and EFSEC regulations, Council Order No. 805 set specific restrictions on the scope of issues relevant to Intervenor Lathrop and his ability to offer evidence on those issues during the adjudicative hearing. Those restrictions are now being enforced, but only to filter the scope of evidence Mr. Lathrop can testify about during his appearance as a witness in the proceeding. Mr. Lathrop is *not* so limited if he wishes to appear at the public comment portion of the proceeding and offer his opinions on the general impacts of the proposed Project, even if those comments do not refer whatsoever to his own 40-acre property.

Intervenor Lathrop's Suggestion of Unfairness. In his *Response*, Intervenor Lathrop implies that the Applicant's witnesses are being permitted to offer testimony with regard to the general impact of the

proposed Project on land values and that he should be allowed to participate in a similar fashion. This argument ignores the differing roles that an Applicant and an Intervenor play in an adjudicative hearing before EFSEC. Under EFSEC statutes and Council Order No. 805, the Applicant, may present evidence on all relevant issues being considered by the Council and carries the burden of proving to the Council that its *Application for Site Certification* should be granted. This evidence could include both general information on impacts throughout Kittitas County as well as specific impacts predicted on particular parcels. Intervenor, on the other hand, are by all statutory and regulatory definitions, limited in their participation to issues of particular interest to them, and as further limited by the Council's order permitting them entry into the case as parties. Clearly, each Intervenor will have its individual role in the proceeding, participating actively on some issues and not at all on other topics.

In this case, with regard to economic impacts, the Applicant must address the widest possible array of impacts and explain its rationale for any proffered conclusions using the best scientific or other reasonably reliable data and methodology available. In contrast, under the terms of Council Order No. 805, Intervenor Lathrop's potential participation in the adjudicative proceeding comes within the topic of economic impacts, but only as to a very limited subset of economic impacts: those that will directly affect his 40-acre parcel of land nearly 20 miles from the Project. The Council has prohibited Mr. Lathrop from commenting on general economic impacts on land values, general development issues in the County, potential precedent set by approval of the proposed Project, any potential impacts on agricultural interests, and limited his input on potential impacts to local viewsheds, forcing him to focus only on those impacts that have a direct and unique effect on his personal land holdings. If Intervenor Lathrop wishes to question the validity of the methodology used by the Applicant or any other party testifying or providing evidence on the more general economic impacts on local land values, he may do so through cross-examination of their witnesses as well as his individual testimony, within limits. As necessary, the Council may expand the scope of Intervenor Lathrop's participation in the proceedings if it appears that cross-examination by his counsel will assist EFSEC in better understanding the limitations or weaknesses of economic impact testimony provided in the adjudicative hearing.

ORDER

In sum, it is hereby ORDERED that the Council GRANTS the Applicant's *Motion to Strike Prefiled Testimony* with regard to objections b, f, h, i, j, and portions of e and g. It is further ORDERED that the Council DENIES the Applicant's *Motion to Strike Prefiled Testimony* with regard to objections a, c, d, and portions of e and g. Intervenor Lathrop remains free to offer any of the stricken portions of his pre-filed testimony through submissions provided or comments made at the public comment hearing to be held during the course of the adjudicative proceeding.

DATED and effective at Olympia, Washington, the 25th day of February, 2005.

Adam E. Torem, Administrative Law Judge