

**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. 23

COUNCIL ORDER NO. 820

PREHEARING CONFERENCE ORDER  
REGARDING SCHEDULE FOR  
PRE-HEARING SUBMITTALS AND  
OTHER PROCEDURAL MATTERS.

**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 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 in September, 2006, in Ellensburg, Washington.

**Procedural Setting:** The Council convened a prehearing conference on Tuesday June 13, 2006, at approximately 1:40 p.m., in Olympia, Washington, pursuant to due and proper notice. The prehearing conference was held before Council Chair James Luce and Councilmembers Richard Fryhling (Department of Community, Trade, and Economic Development), Chris Towne (Department of Fish and Wildlife) and Judy Wilson (Department of Natural Resources). Councilmembers Tim Sweeney (Utilities and Transportation Commission), Hedia Adelsman (Department of Ecology) and Patti Johnson (Kittitas County) participated by phone.

The purpose of the prehearing conference was to receive an update regarding the status of the Applicant's ongoing application before Kittitas County to resolve the land-use inconsistency issue, and the scheduling of pre-hearing submittals and other procedural matters regarding adjudicative hearings in this matter.

**Participants:** The Parties were present as follows:

The Applicant, Sagebrush Power Partners, LLC: Darrel Peeples, Attorney at Law, Olympia, Washington; Timothy McMahan, Attorney at Law, Vancouver, Washington; Dana Peck, Horizon Wind, Portland, Oregon; and Joy Potter, Horizon Wind, Portland, Oregon (by phone).

Counsel for the Environment (CFE): Michael S. Tribble, Assistant Attorney General, (AAG), Olympia, Washington.

Department of Community, Trade and Economic Development: Greg Nothstein, Energy Policy Specialist, Olympia, Washington.

Kittitas County: James Hurson, Deputy Prosecuting Attorney, Ellensburg, Washington; and Darryl Piercy, Director, Kittitas County Community Development Services, Ellensburg, Washington (by phone).

Residents Opposed to Kittitas Turbines (ROKT): James Carmody, Attorney at Law, Yakima, Washington; and Ed Garrett, Lay Representative, Snohomish, Washington (both by phone).

F. Steven Lathrop: Jeff Slothower, Attorney at Law, Ellensburg, Washington (by phone).

Economic Development Group of Kittitas County: Debbie Strand, Executive Director, Ellensburg, Washington (by phone).

Renewable Northwest Project: Susan Drummond, Attorney at Law, Seattle, Washington (by phone).

### **Land-Use Consistency Status**

Mr. McMahan reported that the Kittitas Board of County Commissioners (BOCC) had entered a resolution denying the Kittitas Valley Wind Power Project's Application for a development agreement, finding that the project was not consistent with local land-use plans and zoning regulations. Mr. Peeples notified the Council that the Applicant expected to submit a request for preemption one week from June 13, 2006.

Mr. Hurson clarified that the BOCC signed the resolution last Tuesday (June 6, 2006). The BOCC and Horizon Wind were unable to agree on project setbacks.

Mr. Peeples indicated to the Council that the BOCC's decision would be submitted as part of the Applicant's request for preemption. Mr. Hurson noted that the decision was already available on Kittitas County's website, and agreed to provide a copy to the Council.

### **Schedule for Adjudicative Hearings**

At Council Chair Luce's request, EFSEC staff presented a proposed schedule for prehearing submittals in this matter. Based on schedules previously approved by the Council in this matter, staff proposed the following deadlines:

- July 10, 2006: Applicant submits its request for preemption and related testimony; Applicant and all other parties submit supplemental testimony on non-preemption matters;
- July 24, 2006: Parties submit objections to supplemental testimony that is not preemption related;

- July 31, 2006: The County and other parties submit responses to the Applicant's request for preemption;
- August 14, 2006: The Applicant replies to all supplemental testimony, including preemption responses;
- August 21, 2006: Motions to strike testimony are due;
- August 28, 2006: The deadline for any pre-hearing submittals, including amended opening statements;
- September, 2006: 3 weeks Adjudicative Hearings in Ellensburg, starting September 11;
- October, 2006: Post hearing briefs would be submitted according to the sequence already approved, starting with the Applicant's brief on October 13, parties' responses on October 27, and all parties' replies on November 3rd.

In response to a Council question, all parties attending the conference stated that they could attend the hearing dates scheduled for September.

Prior to presenting the Applicant's proposed schedule, Mr. Peeples requested a recess to be able to consider both calendars together. Mr. Hurson argued that the County would have to prepare a case without seeing the Applicant's preemption request. This is further complicated by the fact that it would be a different case, with different testimony, and with earlier witnesses for both the County and the Applicant not having been associated with the most recent County review process. Mr. Hurson reiterated EFSEC's lengthy review schedule for the project which originally started in January 2003. Ultimately the County received the most recent application in October 2005, and after consideration of additional information and SEPA documents for this and other projects, the BOCC completed their hearings and rendered a denial in June 2006. The hearing schedule under consideration by EFSEC does not give parties or the public sufficient time to prepare for a case that would ultimately be decided by the Governor, and might go to the Supreme Court. Mr. Hurson added that all parties need more time to prepare a Supreme Court-ready record; that discovery per the Administrative Procedure Act was an unusual process; and that the hearing would have implications under the Growth Management Act, as well as for EFSEC, County and State Government.

Mr. Hurson concluded by indicating that EFSEC's WAC 463-28-060 requires a hearing date to be set after a request for preemption has been filed. Therefore the Council should strike the hearing dates scheduled in September 2006, and convene a prehearing conference only after the request for preemption has been filed, and then take up issues involved such as discovery and scheduling.

Chair Luce reminded the parties that the Council is ready to proceed on the schedule set at the May 30<sup>th</sup> prehearing conference, with hearings in September 2006. The Applicant's proposed schedule was passed out to Councilmembers, setting out pre-hearing filings as follows:

June 20, 2006: Applicant submits request for preemption;

July 18, 2006: Applicant submits Prefiled Supplemental Testimony;

August 15, 2006: Other parties submit Prefiled Supplemental Testimony;

September 5, 2006: Supplemental Opening Statements submitted;

September 5, 2006: Motions to Strike Prefiled Testimony due;

September 8, 2006: Responses to Motion to Strike;

September 11, 2006: Ruling on Motions to Strike;

September 11-29: Adjudicative Hearings.

Chair Luce asked the Applicant whether substantial changes have been made to the Application. Mr. Peeples responded that he believed the request for preemption would be much simpler this time, and would be limited to policy issues, with the Applicant having performed all reasonable efforts to resolve the land-use inconsistency. He expressed concern with the way the EFSEC schedule separated the submittal of supplemental and preemption testimony. With a smaller project, and fewer impacts, he anticipated presenting supplemental testimony and witnesses that would address both project changes and the preemption issues concurrently.

Mr. Hurson agreed that substantive new testimony may be related to the preemption issue, and that separate submittals would not be efficient for the County. Mr. Peeples and Mr. McMahan argued that the submittal of all testimony by July 10<sup>th</sup> was a very tight schedule, and that the Applicant's schedule provided more latitude. Mr. Hurson countered that there was no process established for discovery, and that insufficient time was being accorded to the County regardless of whether 3 or 4 weeks were provided for preparation of a response. Mr. Peeples responded that the discovery process has already been set out in Prehearing Order No.8, Council Order No. 790. He reiterated that he believed the Applicant's schedule was fair and allowed five weeks for all parties to submit testimony.

Other parties were invited to comment on the schedules. Mr. Slothower indicated having previously seen the Applicant's schedule, but not EFSEC's version, he agreed with Mr. Hurson: he supports a process that allows all participants to create a record that will allow for support of the Governor's decision and review by the Supreme Court.

A discussion ensued regarding the differences in the Applicant's and EFSEC staff's schedules. Mr. Fiksdal, EFSEC Manager, asked if it was possible to cut the week of September 11th from the hearing schedule. Mr. Peeples responded that this might help the pre-filing schedule, and still reach the Council's hearing goals. Other parties agreed that this was the week with the most conflicts.

After a short recess, the Council considered the Applicant's schedule. Chair Luce recommended that the week of hearings starting September 11 be cut from the previously approved schedule, that parties use the discovery process laid out in Council Order No. 790, Prehearing Order No. 8, and that the Applicant's pre-hearing schedule be adopted. Councilmember Wilson commented that cutting the first week of hearings would seem to allow sufficient time for parties to prepare. She moved that the Council adopt the Applicant's schedule, striking the first week of hearings, but postponing decision on the post-hearing schedule. Councilmember Fryhling seconded the motion, and the Councilmembers approved the motion unanimously<sup>1</sup>.

The prehearing schedule is therefore set as follows:

- June 20, 2006: Applicant submits Request for Preemption;
- July 18, 2006: Applicant submits Prefiled Supplemental Testimony;
- August 15, 2006: Other parties submit Prefiled Supplemental Testimony;
- September 5, 2006: Supplemental Opening Statements submitted;
- September 5, 2006: Motions to Strike Prefiled Testimony due;
- September 8, 2006: Responses to Motion to Strike;
- September 11, 2006: Ruling on Motions to Strike;
- September 18-29: Adjudicative Hearings.

Prior to moving onto other conference business, Mr. Hurson commented that he thought the Applicant's schedule provided five weeks for parties to submit testimony. The schedule adopted would require him to miss an important family commitment.

### **Next Prehearing Conference**

No other business being brought before the Council, the next prehearing conference was tentatively scheduled for Tuesday July 11<sup>th</sup>, 2006, concurrently with EFSEC's monthly meeting, starting at 1:30 p.m. at EFSEC's offices in Olympia, Washington. This date will be confirmed pending confirmation of Judge Torem's availability.

Prior to conclusion of the conference, Mr. Peoples committed to getting the Applicant's request for preemption to the County as quickly as possible.

The prehearing conference was adjourned at 2:35 p.m.

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<sup>1</sup> Councilmember Adelman terminated her participation by phone and was not present for this vote.

**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 21st day of June, 2006.

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James O. Luce, EFSEC Chair