BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2006-01 ENERGY NORTHWEST PACIFIC MOUNTAIN ENERGY CENTER PROJECT	PREHEARING ORDER NO. 4 COUNCIL ORDER NO. 835 ORDER CLARIFYING COUNCIL ORDER NO. 833

Nature of the Proceeding: This matter involves an application by Energy Northwest (ENW or Applicant), to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Pacific Mountain Energy Center (PMEC or Project), an integrated gasification combined cycle (IGCC) facility proposed to generate 793 megawatts of electric energy. The proposed Project would be located within Cowlitz County, Kalama, Washington.

On November 27, 2007, the Council entered Order No. 833 finding the PMEC Greenhouse Gas Reduction Plan (GGRP) insufficient and suspending application processing for the PMEC adjudicative proceeding. On December 7, 2007, ENW filed a Motion for Clarification and Revisions of Order NO. 833. Counsel for the Environment Michael Tribble, Asst. Atty. General, submitted an answer to the motion on behalf of the State Parties. This order responds to the motion and the answer.

I. The motion for clarification.

The motion seeks answers to questions about the Council order. The State Parties answered, noting that the Council rules make no specific provision for such motions, and urging that no answer be made. It is true that there is no specific provision for such motions either in the Council's rules or in the general procedural rules in WAC 10-08. However, the Council has considerable discretion under the Administrative Procedure Act, RCW 34.05, to govern the course of proceedings consistently with law and applicable rules. There is no prohibition of such motions in applicable law or rules, and we find it reasonable to respond to the motion.

II. Response to questions or concerns raised in the motion.

1. ***Final Order.*** ENW's first question is whether the Council order is intended to be a final order. The answer is no. It does not meet the definition of a final order in the APA. It is not intended to be a final order, is not labeled as a final order, does not finally resolve any factual issues, does not reject or approve the application,

does not dismiss the application, and by its terms is applicable only to reject the proposed GGRP, a portion of the application that is required by law, as an intermediate step in application processing. The order speaks for itself, and makes clear its intention to be a temporary, interim measure. When ENW acts to correct the deficiency identified in the order, application processing may resume. Only if ENW fails to provide a sufficient alternative to its proposed GGRP might the Council by final order act to deny or dismiss the application.

2. ***Matters Decided***. ENW asks whether the sufficiency of the GGRP is the only issue "addressed" by the order, citing a statement to that effect in the order. ENW is correct – Sufficiency of the GGRP is the overriding issue addressed, but the order either directly or by implication answered or touched upon several other issues. The characterization, however, does not affect the result or the meaning or the order; the order's language on specific points makes clear its result. We correct the order by removing the sentence at page 4. In doing so, we note the following provisions of the order:

    a. *Rulemaking*: The order does resolve the Council's question about the possible need for this application to comply with rules now being promulgated by observing that the Applicant need not comply with those rules.

    b. *Timing of the GGRP analysis*: The order does determine (by rejecting a GGRP that does not facially comply with statutory requirements and by suspending application processing pending resolution) that a facially sufficient GGRP is necessary to application processing.

    c. *Vesting*: The applicant urges that the Council resolved the question of whether existence of its application vests the application with standing as a pending application under terms of the statute. Contrary to the Applicant's assertion, the order did *not* resolve the vesting question, but merely suspended processing pending an opportunity to resolve the flaws identified with the proposed GGRP. This action does not decide the issue, either directly or by implication.

    d. *Conditional permit:* ENW asks whether the order resolves the question of whether a conditional permit (allowing construction on condition that the applicant later provide an adequate GGRP) would be sufficient to comply with the statute. By requiring a facially sufficient GGRP prior to proceeding with the processing of this application, the order did determine by implication that a future GGRP would not comply with the statute.

3. Preparation of a Geologic Sequestration Plan:

    a. *Characterization:* ENW argues that the characterization of its sequestration plan is oversimplified and inaccurate. That is not true from

the Council's perspective. The analysis of the plan in the order is summary in form, suitable for the order, and provides adequate support for the order's conclusion. The Council understands what the plan contains, and pointed out provisions that it does not contain.

b. *Legal sufficiency:* ENW argues that the order is insufficient for lack of findings of fact and conclusions of law. The Council believes ENW is wrong in its view. It is *not* an initial order resolving the sufficiency of the application and whether or not to send it to the Governor. Neither is it a final order dismissing the application. Instead, it is a procedural order that looks only at the legal issue of whether the GGRP on its face meets the statutory requirement, and the only "fact" necessary for that finding is the GGRP itself. RCW 34.05.461(3) clearly does not apply to this order. The order does make legal conclusions based on the GGRP and the law requiring it; the relevant GGRP provisions (or lack thereof) and the conclusions flowing from the terms of the law are clearly set out in the order.

4. ***Sequencing of offsets:*** ENW contends that the Council is incorrect in ruling that offsets are only available after a finding of infeasibility. While the ruling appears clear and proper reading of the statute under the rule of *inclusio unius, exclusio alterius,* other readings of the law (in circumstances not anticipated in the discussion) may permit some variation. The Council clarifies the order by noting that the order found the proposal in the GGRP to be contrary to the clear meaning of the statute. It is true that offsets in other circumstances, neither anticipated nor described in the order, might be found consistent with the statute.

5. ***Good Faith Effort.***

a. *Specific steps.* ENW challenges terminology of the order that finds ENW has proposed no specific steps in its GGRP. It points to "specific" proposals to do geological surveys and testing in the future and it notes that it has in fact commissioned a URS preliminary study of area geology. This is a question of the meaning of words. The Council clarifies the order by noting that the GGRP proposes no specific steps to produce functioning sequestration *in compliance with the statute*. It does not identify where it will drill, or when, but merely that it will at some future time determine where and when to drill. The Council order emphasized our conclusion that the statute requires a specific plan, and a proposed schedule for specific action to implement a plan, to accomplish sequestration during the first five years of operation, as opposed to an outline of generalized future action, aimed at producing sequestration far later than required in the law.

b. *Good Faith effort.* ENW argues that, by implication, the order finds ENW's pledge to spend $60 million to not be a good faith effort and asks

that the Council clarify its order, as to why its proposal is not the kind of specific proposal required under the law. We reject ENW's argument. The order did not challenge ENW's good faith. A reasonable reading of the order will find in its language the clear meaning that the statute requires a plan to implement sequestration no later than five years after operations commence, followed by a good faith effort to implement that plan. The order casts no aspersions about ENW's good faith in making its proposal.

6. ***Determination of infeasibility***. ENW argues that the order is inaccurate in observing that the Council has a final say in the determination of infeasibility, and asks for clarification of reasoning. This is the present view of the Council rather than a final determination, which cannot be made until the situation arises. However, the applicant's view appears contrary to the meaning of the statute in the context of regulatory requirements – the applicable laws require applicants to perform many tasks and make many decisions, but they are subject to approval and review by the Council. We see no reason to distinguish this from other such decisions.

7. ***Financial assurances***. ENW asks that the Council clarify why ENW's pledge of $200 million plus its bonding capacity is inadequate as a financial assurance. We believe that does not correctly characterize the meaning of the order. The issue is not ENW's willingness to pledge its bonding and it's financial resources, which the Council acknowledges. Rather, the flaw is ENW's failure to provide current estimates of costs and details concerning the timing and issuance of bonds or other financial instruments, based on completion and operation of sequestration within five years of commencing plant operation. Without that information, there is no assurance that any amount is adequate.

8. ***Penalties.*** ENW notes that the Council order fails to identify the GGRP's provision that acknowledges the Council's ability to assess penalties, which the state parties noted. The order is hereby corrected. The Plan appears to be facially adequate on this point.

9. ***Operation as a natural gas-powered facility.*** ENW says that in any event, PMEC's operation under natural gas power will comply with emission requirements. If PMEC can be operated within legal emission requirements, it argues, then the Council should not quibble about the sequestration plan. The answer to that is, the proposal in the PMEC application is not for a natural gas facility, but for an IGCC facility with sequestration, and natural gas as a backup fuel. If ENW wants certification as an IGCC plant based on this application, it must comply with existing statutory requirements for a sequestration plan or obtain amendment of the statute. If ENW wants to propose a natural gas plant with pre-fitting for possible later IGCC operation, based on a future application for that purpose, it is free to amend its application to do so.

We find the questions to be of a relatively minor scope, and the Council responses are set out above. We amend and clarify the prior order as noted.

DATED and effective at Olympia, Washington, this _21st_ day of December, 2007.

James Luce, Council Chair