

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

**In re Matter of
Application No. 99-1
of**

**PREHEARING ORDER No. 3
COUNCIL ORDER NO. 746**

SUMAS ENERGY 2, INC.

Order on Revised Schedule: Notice of Prehearing conferences (June 12, 2000 and July 17, 2000); Notice of Commencement of Hearings (July 24, 2000); Notice of Hearing to Receive Evidence from Members of the Public (July 25 and 27, 2000); Order on Prefiled Rebuttal Evidence

**SUMAS ENERGY 2 GENERATION
FACILITY**

Nature of the Proceeding: This matter involves an application to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Sumas Energy 2 Generation Facility, a natural gas-fired electrical generation facility located in Sumas, Washington.

Procedural Setting: The Council convened a pre-hearing conference on May 15, 2000 pursuant to due and proper notice. The hearing was held before Nan Thomas, the Administrative Law Judge with the Office of Administrative Hearings, Council Chair Deborah Ross, and Council members Charles Carelli (Department of Ecology), Ellen Haars (Department of Health), Gary Ray (Department of Transportation), Gayle Rothrock (Department of Natural Resources), Heather Ballash (Department of Community, Trade, and Economic Development), Jenene Ratassepp (Department of Fish and Wildlife), C. Robert Wallis (Washington Utilities and Transportation Commission), and Bob Hilpert (Port of Bellingham).

At the hearing on May 15, 2000, David Grant, representing Whatcom County, informed the Council that the County intended to file a motion to continue the hearings which had been set to commence on June 8, 2000. The Council heard oral argument from the parties and allowed any party to submit written statements regarding the motion by May 17, 2000. The Appellant was to file its response to the motion by May 22, 2000.

Whatcom County's Motion to continue, for 60 days, was received by the Council on

May 16, 2000. The County's motion to continue the hearings was joined in by Constance Hoag, the City of Abbotsford, the Abbotsford Chamber of Commerce, the Northwest Energy Coalition, the Washington Environmental Council, and the Department of Community, Trade, and Economic Development. Those parties argued that because the Applicant had objected to the intervention of some of the parties, and party status was therefore delayed, that the intervenors were not being afforded adequate time to prepare for the adjudicative hearing. These parties also argued that in order to determine whether the area's present power transmission infrastructure can handle the additional power to be generated by the proposed project, an "integration study" of the grid has been undertaken by the Bonneville Power Administration (BPA) and that the final results of that study were not going to be available until July of 2000. The parties argued that the present hearing schedule would preclude any party, or the council, from utilizing or considering the capacity information determined by the BPA's study.

The Department of Ecology's (DOE's) response to the motion to continue the hearing dates agreed that a two month continuance of the schedule was warranted. Ecology argued that the hearing dates had been predicated on the lack of a contested issue regarding intervention and necessary information being available, and that intervention had been contested and that important information was not going to be available in time for the June hearings. DOE argued that a number of facts necessitated delay including: that the Applicant's proposed wastewater discharge option appeared to be unavailable because of a change in circumstances leaving the proposed facility without a discharge point for its projected 360,000 gallons per day of wastewater; that any alternative to address the wastewater issue would require the scrutiny of DOE and may raise new issues not presently contemplated by the parties; that the Applicant's proposed wetland mitigation plan did not adequately mitigate for the facility's wetlands impacts and that a new wetlands delineation for the site was needed; and that the Applicant had indicated plans to change the stormwater detention pond resulting in the filling of additional wetlands and that Ecology had requested, but not received, the design specifications for the newly proposed pond.

The Washington Utilities and Transportation (WUTC) also submitted a statement in support of a continuance based on its belief that information critical to the Council's evaluation would not be available in time for the June hearings. The WUTC noted that an Applicant's witness' prefiled testimony acknowledged that there are transmission constraints that limit the amount of power that can be moved between areas within the region. The WUTC asked for a delay in the hearings in order to explore the existing problem of constrained transfer capability in light of the BPA's report due in final draft in July of 2000. The WUTC argued that the lack of the BPA report, both prior to and at the hearings, would not allow a full disclosure of all relevant facts required by the Administrative Procedure Act, RCW 34.05.

The Department of Community, Trade and Economic Development (CTED) also concurred in the motion to continue based on the facts contained in the County's motion and also on the fact that CTED's attorney for this project is simultaneously representing his agency at another EFSEC proceeding which is presently in progress and because of problems caused by the overlap of CTED's witnesses between the two proceedings.

The City of Abbotsford and the Abbotsford Chamber of Commerce joined in the request for a delay based on the fact that these entities were unwilling to incur significant financial expense until the scope of their intervention had been determined which did not occur until May 10, 2000. The schedule then left them only 15 days after that to prepare their pre-filed testimony. These parties also raised issues including: that the Applicant had not yet responded to questions raised by the Ministry of Environment, Lands and Parks; that the DEIS contains deficiencies; and that studies by Canadian environmental agencies were planned to conduct measurements of air quality. These parties also asserted more time was needed for the Applicant to respond to the City's questions and concerns on air quality and for further discussion pursuant to the international agreement to refine and possibly narrow the issues for submission to EFSEC.

Constance Hoag also supported the motion to continue in order to allow her adequate time to have her expert witnesses prepare their testimony. Because she did not know whether she would be allowed to intervene, or the scope of her intervention, until the Council's intervention order on May 10, 2000, she only had 15 days from the date of the intervention order to the date that her pre-filed testimony was due. She also supported a delay based on the oral statements made by other parties at the May 15, 2000 prehearing conference

The Applicant submitted a timely response to the motion objecting to any deviation from the schedule set in the prehearing order and pointing out that delay must not be used to defeat a project. The Applicant argued that the parties waived their right to request a delay in the scheduling by not supporting the Counsel for the Environment's motion for a continuance made at the April 24, 2000 prehearing conference or objecting to the prehearing schedule, and that there has been ample time for discovery and hearing preparation. The Applicant also pointed out that even prior to the order on intervention, they proceeded with discovery as if all petitioners for intervention had been granted party status. The Applicant also argued that the BPA integration study is not required, or particularly relevant, to matters before the Council. The Applicant does acknowledge that the City of Abbotsford has changed its position on its intention to increase its sewage contract to accommodate wastewater from the proposed plant and that Abbotsford now is opposing the SE2 project which is contrary to its original position. However, the Applicant argues that, while it is hopeful it will be able to work with the Cities of Abbotsford and Sumas to increase the wastewater

treatment services provided by the Canadian city, it can operate within the existing contracts. The Applicant opines that the wetland mitigation issue and the stormwater detention pond changes are substantive issues which can be addressed at the scheduled hearings, and that the Clean Water Act 401 certification process is entirely separate from the EFSEC adjudicatory hearing. The Applicant argues that the proposed Canadian studies by non-parties are unnecessary to the EFSEC hearings and that any coordination between British Columbia and Washington State is separate from the EFSEC process. The Applicant points out that the responses to the DEIS are not due from the Applicant. The Applicant represents that it has entered into commitments to purchase equipment for the proposed plant, and to take delivery on a specific schedule, and that it has incurred millions of dollars in non-refundable deposits and that no change in the schedule should take place in light of the Applicant's significant financial commitments.

Discussion and Decision:

The Council has very carefully considered all of the oral and written statements of the parties and considers the issue of any postponement of the hearings to be a serious matter. The Council has met to confer and vote after individually considering all the testimony, argument, and pleadings submitted by the parties.

As a threshold matter, the Council does not agree that the parties waived their rights to seek a continuance of the hearings or an adjustment in the schedule because they failed to join in the motion to continue made by the Counsel for the Environment during the prehearing conference on April 24, 2000 or because the Council set out a schedule in the prehearing order. A prehearing order of the Council may be modified for good cause by subsequent order. WAC 463-30-270(3).

The Council agrees that delay in proceedings must not be used to defeat a project and even this relatively short continuance for six weeks was undertaken after serious consideration of the positions and the rights of all of the parties. However, the Council will not adjust the schedule, or fail to adjust the schedule when a real need arises, based on the Applicant's assertion that it has made financial investments in expectation of receiving a site certification agreement from the governor. As noted in our letter to the Applicant dated November 16, 1999, "the possibility that the Applicant has taken actions based on its assumption of a favorable recommendation should have no bearing on scheduling decisions."

The Council agrees with the general position of the Applicant that it is not possible for every detail of construction, operation, economics, and feasibility to be resolved prior to the beginning of hearings. As we have noted in prior pre-hearing orders and in previous cases, favorable recommendation to the governor, if any, would be conditioned upon receipt of further information and acquisition of rights over which

EFSEC has no authority. These include, for example, obtaining all necessary Canadian and federal permits, property rights, and the detailed plans described in the stipulations we have already approved.

Nevertheless, the Council does have a duty to “balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.” RCW 80.50.010. The Council’s laws and rules require the Applicant to provide sufficient information to us to be able to perform this task.

Ordinarily, as correctly noted by the Applicant, the Applicant is granted broad discretion to determine the type of information it believes will be sufficient to make its case. In certain cases, however, the Council has required the Applicant to come forth with additional information before completing the hearing process. This may be necessary when an application does not contain sufficient information to allow the Council to develop a recommendation for the governor.

Although it is a close question, the Council believes that certain recent developments warrant a modest extension of the hearing dates set in Judge Thomas’ May 10, 2000 prehearing order. These include acknowledgment of the following issues: (1) The June dates originally contemplated by the Council were based on the premise that there would be no significant, and relevant, issue that would warrant extension of the schedule. The parties have brought to the Council’s attention numerous new and unforeseen issues that may require exploration before the Council has sufficient information to make its findings; (2) The June hearing dates were also based on the Applicant filing no objections to intervention. The Applicant did file several such objections, as was entirely within its prerogative. Although the parties and the Council acted as expeditiously as possible in the process of that challenge to intervention status, the time it took to brief and rule on these objections may have prejudiced the challenged parties’ effective ability to prepare for hearing. Although it appeared in April that the early schedule might still be fair and effective, the combination of the challenge to intervention together with some unforeseen events have combined to make a June hearing date unfair to some of the parties; (3) The parties have collectively identified sixty witnesses to present testimony over the six days previously scheduled for hearing, not including any rebuttal and sur-rebuttal witnesses. The parties credibly indicate that additional time would assist them and the Applicant to narrow issues, eliminate duplication, and shorten time for cross examination; (4) The Council is still awaiting draft permits from its consultants upon which to hold air and water quality hearings. If these drafts are available within a reasonable time, the hearings on these drafts permits could be held in the same timeframe as hearings in July.

In light of these considerations and the Council's duty to allow for a full disclosure of all relevant facts and issues, the Council has decided to allow for a six week continuance for the commencement of the hearing.

Prehearing Conferences: The next prehearing conference will be held at 2:00 p.m. on June 12, 2000, in Olympia in a location to be announced. Another prehearing conference will be held on July 17, 2000 in Olympia in a location to be announced. Parties may appear telephonically for the prehearing conferences.

Pre-filed Rebuttal: Due to the large number of witnesses identified by the Applicant and the other parties, and in view of the extensions of time granted in this order, the Council has determined to require pre-filed rebuttal testimony by the Applicant and other parties. Rebuttal testimony should be limited to the subject matters raised in the direct testimony to which the rebuttal testimony is directed. "Friendly" rebuttal will not be allowed. Any sur-rebuttal will be presented orally.

Telephonic testimony: The Council is not certain whether, in view of the altered schedule adopted today, any parties are still requesting to present telephonic testimony from witnesses. The Council has a strong preference for in-person cross examination or, in the alternative, introduction of portions of depositions in lieu of cross examination. The Council will act on specific motions for telephonic or other alternative forms of cross examination on a case by case basis.

Order: Accordingly, the Council amends the schedule set forth in prehearing conference order number 1 as follows:

June 12, 2000: Prehearing conference: to discuss administrative matters;

June 26, 2000: Intervenor's prefiled testimony due;

July 10, 2000: Applicant's prefiled rebuttal and additional stipulations due;

July 17, 2000: Prehearing conference to discuss administrative matters and stipulation hearing, if needed;

July 24-28, 2000: Hearings, including public witness hearings, in Whatcom County (including, if possible, air and water quality permit hearings and reconvened land use hearings);

July 31-August 3: Hearings in Olympia to the extent needed;

August 24, 2000: Post hearing briefs due (exact schedule to be set later).

Notice to Parties: Any objection to the provisions of this order must be filed within ten days after the date of service of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this Docket.

DATED at Olympia, Washington and effective this 26th day of May, 2000.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

By

_____/s/_____
Deborah Ross, Chair of the Council