

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

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

**Second Revised Application  
of**

**SUMAS ENERGY 2, INC.**

**SUMAS ENERGY 2 GENERATION  
FACILITY**

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**PREHEARING ORDER No. 3  
In consideration of Second Revised  
Application**

**COUNCIL ORDER NO. 761**

**Nature of the Proceeding**

This matter involves an application by Sumas Energy 2, Inc. (SE2 or Applicant) to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Sumas Energy 2 Generation Facility (SE2GF), a 660-megawatt combustion turbine natural gas-fired electrical generation facility in Sumas, Washington.

**Procedural Setting**

This Order reflects the agreements of parties and the decisions of the Council on disputed issues following the third prehearing conference to consider the Applicant's Second Revised Application for the SE2GF project.

Pursuant to due and proper notice, the Council conducted a prehearing conference on September 24, 2001. The hearing was held before, Council Chair James Luce, and Council members Charles Carelli, (Department of Ecology), Ellen Haars (Department of Health), Tony Ifie (Department of Natural Resources), Gerald Richmond (City of Sumas), Jenene Fenton (Department of Fish and Wildlife), and Dan McShane (Whatcom County). Also present were Robert Fallis who serves as the Assistant Attorney General for the Council and Nan Thomas, Senior Administrative Law Judge with the Office of Administrative Hearings, who has been retained by the Council to facilitate and conduct hearings. Appearances of the parties were taken and made part of the record.

### **Council Chair James Luce's Statement**

On September 14, 2001, Governor Gary Locke appointed James Luce to the position of Chair of the Energy Facility Site Evaluation Council effective on September 17, 2001. At the prehearing on September 24, 2001, Chairman Luce made a disclosure statement delineating that in his prior capacity as a consultant he had worked for Pacific Public Affairs, a government relations firm which he believes represents the applicant. However, he stated that this work was on an entirely different project and would not affect his ability to fairly consider the SE2 project. He further indicated his intention to participate in the SE2 adjudication if he could become appropriately familiar with the record as it exists to date.

### **Council member Gerald Richmond's Statement**

Council member Gerald Richmond announced that in addition to serving as a Councilperson for the City of Sumas, he is now also a candidate for the position of mayor of Sumas and that he has avoided all ex-parte contacts with persons wishing to discuss the application of SE2 and that he will continue to do so in the future.

### **Decision on Constance Hoag's Motion for Reconsideration of the Council's Order denying her motion to expand the scope of her intervention**

Ms. Hoag's Motion for Reconsideration of Council Order No. 760 is denied. Ms. Hoag's scope of intervention will remain as described in Council Order No. 743.

### **Sumas Energy 2, Inc.'s Motion to Require Canadian Parties to Coordinate Participation through a Single Representative**

David Bricklin and Peter Andzans informed the Council of Mr. Bricklin's intent to withdraw as counsel for the City of Abbotsford and the Abbotsford Chamber of Commerce and for Mr. Andzans to substitute as the representative for the City and the Chamber. Mr. Bricklin announced his intention to continue representation of the Province of British Columbia.

The Applicant filed a motion asking the Council to require the City of Abbotsford, its Chamber of Commerce and the Province to coordinate their participation through a single representative. The Council called for answers from parties and received responses from the Province, the City of Abbotsford and its Chamber of Commerce, the Counsel for the Environment, and Whatcom County.

After considering all arguments of the Applicant in its motion and the responses to that motion, the Council denies the Applicant's motion to mandate that the City of Abbotsford and the Chamber of Commerce be represented by the same representative as the Province of British Columbia. However, the Council notes and appreciates the statements of Mr. Andzans and Mr. Bricklin that the two Canadian parties are committed to co-ordinating their efforts to the maximum extent possible.

The Council grants permission to allow a non-attorney officer, Peter Andzans, the City of Abbotsford's Manager of Environment and Community Planning, to represent the City and the Chamber of Commerce at these hearings. The Council notes that Patricia Ross is substituted as the principal for the City of Abbotsford in place of Mr. Andzans.

### **Whatcom County's Motion to Enlarge Scope of Hearings to Address Transmission Concerns**

The Council denies Whatcom County's motion to expand the scope of the hearing to include discussion of what have previously been referred to in this adjudication as the "alternative transmission lines." The Council will not expand the scope of the adjudication to include consideration of transmission lines that have not been applied for in the Applicant's First or Second Revised Applications. The Council again reiterates its decision on the subject of "alternative transmission lines" announced in Council Order No. 743 at page 6.

As announced at the prehearing of September 24, 2001, the Council will not entertain any further motions, in any form, to consider transmission lines not applied for by the Applicant unless the Applicant files a revised application seeking such consideration.

### **Stipulations and Settlement Agreements**

One of the purposes of the hearing on September 24, 2001, was for the Council to hear testimony and argument on two settlement agreements entitled (1) "Settlement Agreement Between Washington Department of Fish & Wildlife and Sumas Energy 2 Regarding Second Revised Application" (admitted as Exhibit 200), and (2) "Settlement Agreement Between Washington Department of Ecology and Sumas Energy 2 Regarding Second Revised Application" (admitted as Exhibit 203).

The Applicant informed the Council that it was the intent of the settling parties that these settlements would replace the prior settlements between the Applicant and Department of Fish & Wildlife and the Applicant and the Department of Ecology that were submitted previously in this adjudication.

This order sets forth the Council's decision regarding these stipulations.

### Discussion and Decision

In an EFSEC adjudicative proceeding, any stipulation or settlement must be stated on the record or submitted in writing and is subject to approval by the Council. WAC 463-30-250(2). The Council's approval of a stipulation or settlement means that the Council accepts it as binding between the stipulating or settling parties and as setting an appropriate minimum standard if the project is approved. No stipulation or settlement binds the Council either to approve or deny the project.

Further, no stipulation or settlement is binding on parties other than the stipulating and settling parties. Non-stipulating/settling parties may present relevant evidence during the adjudicative proceeding to support a different standard.

The Council has considered the text of the settlement agreements (admitted as Exhibits 200 and 203), the information contained in the “Summary of Wetlands, Wetland Impacts, and Compensatory Mitigation Planned for Sumas 2 Generation Facility” (admitted as Exhibit 202), the “Wetlands Compensatory Mitigation Site Plan” (admitted as Exhibit 201), and the testimony presented at the hearing of September 24, 2001. To the extent that the settlements are approved, as discussed below, the approvals are subject to the following conditions:

1. The Council is not foreclosed from adopting requirements more stringent than stated in the settlement agreements;
2. The Council also reserves the right to determine specific standards and detailed plans for monitoring and enforcement without submissions from the stipulating parties, if it deems doing so to be a significant element in its resolution of the issues in the proceeding.

Settlement Agreement Between Washington Department of Fish & Wildlife  
and the Applicant

The Council approves Applicant’s settlement agreement with Fish & Wildlife, that was accepted into evidence as Exhibit 200.

Settlement Agreement Between Washington Department of Ecology  
and the Applicant

The Council has decided to defer any decision on the Department of Ecology’s settlement at this time. The Council appreciates the information presented in the exhibits and testimony presented by the Department of Ecology and the Applicant. The Council may accept this settlement at a later date during this adjudication, but has decided that the continuing active involvement of the Department of Ecology at least until such time as the Council receives Ecology’s comments on the water quality certification issue involving issuance of the Section 401 permit will be helpful to resolution of this adjudication.

## Future Settlement Agreements

In the future, the Council will not hear testimony on settlement agreements unless the written settlement agreements are provided to the Council members at least five days prior to the hearing on the agreements.

### **Application for State of Washington Water Quality Certification**

Through the Applicant's submittal of the Second Revised Application No. 99-01 to EFSEC, EFSEC has received an application for water quality certification in accordance with Section 401 of the Federal Clean Water Act, pursuant to the requirements of WAC 173-225, for the proposed SE2 project.

### **Environmental Review**

On September 18, 2001, interested persons and parties were notified by EFSEC staff that the Draft Supplemental Environmental Impact Statement (EIS) was available for public comment. EFSEC staff also informed interested persons and parties that comment would be received on SE2's application for water quality certification. The Draft Supplemental EIS contains a technical memorandum prepared to evaluate the stormwater and spill prevention elements, and the proposed wetland mitigation plan (included in the June 2001 Second Revised Application for Site Certification for the SE2 project) as they address the requirements for certification under section 401 of the Federal Clean Water Act.

The assistant attorney general for the Department of Ecology, Joan Marchioro, has informed the Council that the Department of Ecology does intend to submit comments to the Council on the 401 certification for the SE2 project at the appropriate time. The Council appreciates this offer of input from Ecology and will expect to receive such comment by 5 p.m., October 19, 2001.

### **Other Procedural Matters**

Ms. McGaffey, representing the Applicant, and Ms. Barrett, Counsel for the Environment, will coordinate an effort by the parties to present the Council with a draft of a schedule showing the order and approximate times for witnesses for the adjudicative hearings.

The Applicant has informed the Council that it believes that some of the witnesses identified by the other parties intend to present evidence that is beyond the scope of the remaining adjudicative hearings. Mr. Bricklin, on behalf of the Province of British Columbia, has replied that it is impossible for the other parties to respond to this allegation without the specific witnesses identified who are allegedly offering evidence beyond the identified scope. The Applicant will submit to the Council a list of witnesses that the Applicant believes will be presenting testimony outside of the scope of the adjudication as described in Council Order No. 759 and the Applicant's explanation of

why identified testimony exceeds the scope of the adjudication. This will be served on the Council and all parties by October 9, 2001.

**Next Prehearing Conference**

The next prehearing conference, which will include discussion of whether proposed testimony exceeds the scope of the adjudication, will be held on October 18, 2001, starting at 9:00 am, at a location to be determined at a later date.

**Notice to Participants:** Unless modified, this prehearing order will control the course of the hearing. 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 and effective at Olympia, Washington, the \_\_4th\_\_ day of October, 2001.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

\_\_\_\_\_/s/\_\_\_\_\_  
Nan Thomas  
Senior Administrative Law Judge