

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

In the Matter of Application No. 2003-1: SAGEBRUSH POWER PARTNERS, L.L.C. KITTITAS VALLEY WIND POWER PROJECT	COUNCIL ORDER No. 831 ORDER ON REMAND LETTER FROM GOVERNOR GREGOIRE MODIFYING THE DRAFT SITE CERTIFICATION AGREEMENT ACCOMPANYING ORDER NO. 826
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NATURE OF THE PROCEEDINGS: This matter involves the Application by Sagebrush Power Partners, L.L.C. for certification to build and operate the Kittitas Valley Wind Power Project in Kittitas County, Washington.

PROCEDURAL SETTING: The procedural history regarding this application and adjudication is explained in detail in Council Order No. 826 that was announced at open public meeting in Ellensburg, WA, on March 27, 2007, and served on all parties on March 28, 2007. In sum, Council Order No. 826 recommended that the Governor approve the Kittitas Valley Wind Power Project Application and preempt Kittitas County Land Use regulations subject to conditions set out in that Order and the accompanying Draft Site Certification Agreement (SCA).

On June 22, 2007, the Governor sent a letter to the Energy Facility Site Evaluation Council (EFSEC or Council) directing the Council to reconsider the setback criteria addressed in Article I (C)(7) of the Draft SCA. Specifically, the directive to EFSEC to reconsider the Draft SCA was “solely focused on the need to determine on this particular Project whether additional setbacks beyond the four times height (4xh) requirement for non-participating landowners are achievable while allowing the Project to remain economically viable.”

COUNCIL PROCESS ON REMAND: On July 10, 2007, the Council, at its regular monthly meeting, discussed the Governor’s remand letter. The Council determined that it would best be able to determine whether to reopen the adjudicative proceeding, in accordance with RCW 80.50.100(2)(c), if all parties to the proceeding and members of the public were afforded an opportunity to comment on the Governor’s remand letter. Therefore, the Council issued a Notice of Public Meeting and Comment Opportunity (Tab 1)

On July 17, 2007, EFSEC held two public meetings in Ellensburg, WA. At the afternoon meeting, the parties to this adjudication addressed the Council and offered their views on whether additional opportunities for further mitigation of the Project’s impacts could be identified within the evidence contained in the existing adjudicative record. In particular, the Council inquired of the parties as to their opinions on whether additional setbacks beyond the four times height standard previously recommended in Order No. 826 could be supported upon the existing adjudicative record. All

parties who participated in the original adjudication attended the meeting, excepting Renewable Northwest Project (RNP), which provided written comments. A transcript of the meeting was prepared (Tab 2). Various parties submitted excerpts from the existing adjudicative record in support of their positions and/or supplied supplementary materials for the Council's review (Tab 3).

At the evening meeting, a total of 39 members of the public addressed the Council. At least four of the sixteen non-participating landowners with residences directly affected by the Council's four times height setback standard provided their comments to the Council (three in person and one in writing). In addition, several other non-participating landowners with undeveloped land adjacent to the Project addressed the Council. A transcript of this meeting was also prepared (Tab 4). The Council advised the public that written comments would be accepted until the close of this meeting; a total of 85 written comments were received (Tab 5).

On Tuesday, July 31, 2007, the Council met to deliberate on how to respond to the Governor's remand letter.

Single Issue for Reconsideration

As noted above, the sole matter set out for the Council's further consideration in the Governor's letter of June 22, 2007, was the potential for achieving additional turbine setbacks beyond the four times height requirement for non-participating landowners' existing residences while allowing the proposed Project to remain economically viable.

Economic Viability

The Council is authorized to consider "economic viability" of proposed projects, but only at a very broad level. A developer's ability to construct a project and earn a reasonable rate of return on its capital investment is simply beyond EFSEC's authority. The parties to this case and the general public were also united in their comments during the July 17 meetings that the ultimate responsibility for determining the economic viability of a privately financed for-profit undertaking must remain in the hands of its proponent. EFSEC's governing statutes supports this position.

RCW 80.50.010 directs the Council to select and utilize sites so as to "provide abundant power at reasonable cost." However, RCW 80.50.040, which enumerates the Council's powers, does not further authorize any EFSEC function to determine the economic viability of the projects it considers. Instead, the Council's statutorily enumerated powers as to siting are concerned with developing and applying "environmental and ecological guidelines in relation to the type, design, location, construction, and operational conditions of" certifying energy facilities. *See* 80.50.040(2). In essence, EFSEC is a siting agency, focused on land use and environmental responsibilities. The recommendations set out in Order No. 826 reflect this statutory charge and purposefully avoided inquiry into the economic justifications for the Kittitas Valley Wind Power Project.

The Applicant provided at least two witnesses who commented on economic viability, either in pre-filed direct testimony or during cross-examination at the adjudicative proceeding. Chris Taylor's prefiled supplemental testimony briefly discusses the Applicant's efforts to downsize the original

proposal and the economic impacts of reducing the number of turbines (*see* Exhibit 20 (CT-T), at 9-19). Cross-examination of Mr. Taylor by Mr. Slothower also discussed the Applicant's view that turbine setbacks of 2,500 feet rendered the project economically unviable (*see* Hearing Transcript at 140-143). In addition, cross-examination of witness Dana Peck by the Kittitas County Deputy Prosecutor and Residents Opposed to Kittitas Turbines' (ROKT) attorney yielded additional information on this issue (*see* Hearing Transcript at 215-226). Finally, transcripts from the Kittitas County Board of County Commissioners also discussed the issue of economic viability and varying setback distances (*see, e.g.,* May 3, 2006).

At the public meetings held on July 17, 2007, the Applicant demonstrated that its proposed setback distance of 1,320 feet allowed approximately 63 or 64 turbines to be constructed. However, under EFSEC's recommended four times height setback, the maximum number of turbines at the site would be reduced to 55. The Applicant indicated that the Project remained economically viable with this reduced number of turbines. Finally, the Applicant pointed out that increasing the setback to 2,500 feet would allow construction of a maximum of 39 turbines. According to the Applicant, this reduced scope would make the Project unviable. *See* transcript from July 17th Special Meeting beginning at 3:05 p.m., pages 42-43 and Exhibit 34-SUP, Pre-Filed Testimony of Thomas Priestly, at 6-11. There is no evidence in the record to allow a more specific analysis of economic viability.

The Council has reconsidered these portions of the existing adjudicative record and unanimously concludes that there is no statutory authority to reopen the adjudication and solicit additional evidence as to economic viability. The evidence available in the existing record demonstrates that only the Applicant can determine when a reduction in the number of turbines permitted will prevent construction of the Project.

Additional Setbacks for Non-Participating Landowners

At the public meetings on July 17, 2007, the testimony of the non-participating landowners indicated that moving the proposed turbines back several feet or several hundred feet beyond the four times height limitation recommended by the Council would not resolve their objections to the Project. *See* transcripts from July 17th Special Meeting beginning at 6:30 p.m. pages 18-20. It appears to the Council that the impact on these landowners can only be resolved to their full satisfaction through the cancellation of the Kittitas Valley Wind Power Project and the prohibition of wind turbine generators from their region of the county. Such an outcome is not supported by the record in this case, by Kittitas County's own land use and zoning codes, or even by the Kittitas County Board of County Commissioners' actions when they issued resolution No. 2006-90 in June 2006.

Maximum Mitigation through Micro-siting

EFSEC has considered the purpose behind the Governor's directive to reconsider the originally recommended setbacks and determined that, where possible, the location of individual turbines should reflect the highest possible consideration of the impact on non-participating landowners' existing residences. Past experience with the Wild Horse Wind Power Project has demonstrated that "micro-siting" of turbines, the establishment of the actual final location of the turbine foundations on the ground, can offer a varying degree of flexibility to EFSEC and to the Applicant. Environmental

conditions such as avoidance of sensitive habitat or cultural resource sites might require moving one or more turbines in a string out slightly out of the path originally presumed on paper. Further, geotechnical considerations such as subsurface stability or surface terrain obstacles can influence the exact placement of a turbine foundation. Finally, a long list of technical and engineering factors (i.e. wind speed, wake effects of other turbines, etc.) can limit the final siting of a turbine.

At the public meeting on July 17, 2007, the Applicant was asked to consider a micro-siting process to maximize the distance of each turbine from the existing residences of the non-participating landowners. See transcript from July 17th Special Meeting beginning at 3:05 pm, pages 41-42.

The Council, upon reviewing the record in this Application, has determined that micro-siting is the only feasible methodology for achieving additional setbacks beyond the four times height requirement.

COUNCIL ACTION:

The Site Certification Agreement shall be modified to include the following additional provisions:

ARTICLE I, SECTION C, SubSection 7 – Turbine Setbacks, shall include an additional requirement describing the four times height restriction, to read as follows: “For each turbine located within 2,500 feet of a non-participating landowner’s existing residence, micro-siting determinations shall give highest priority to increasing the distance of the turbine from that non-participating landowner’s residence, even beyond the minimum four times height setback described above, so as to further mitigate and minimize any visual impacts on that non-participating landowner. Prior to commencement of construction, the Applicant shall provide EFSEC with documentation demonstrating its engineering efforts to site the applicable turbine locations in this manner, indicating the various factors reviewed for each micro-siting recommendation.”

ARTICLE II: DEFINITIONS, shall incorporate an additional term defining “Micro-Siting” as follows: “Micro-siting” means the final technical and engineering process by which the Applicant shall recommend the precise placement of the final location of each wind turbine generator. The plans produced by this process shall be included in the Site Certification Agreement’s Construction Management Plan as required by Article IV, Section I and K.

ARTICLE IV, SECTION B – Mitigation Measures, second paragraph, shall incorporate additional language into its second sentence as follows: “For each of these mitigation measures, including the micro-siting of turbines required by Article I(C)(7), the Applicant shall further identify the construction plan and/or operation plan addressing the methodology for its achievement.”

ARTICLE IV, SECTION K – Construction Plans and Specifications. Paragraph (2) shall be replaced with the following language: “2. The Certificate Holder shall provide a final project layout plan to demonstrate that project structures comply with the setback conditions of Article I.C.7., to include the micro-siting determinations required to minimize visual impacts to non-participating landowners’ existing residences. The Council shall approve each individual turbine location, to

include micro-siting decisions, in accordance with the mitigation priorities identified in Article I.C.7.”

ORDER

THE COUNCIL ORDERS the Draft Site Certification Agreement accompanying its previous Order No. 826 be amended as described above and returned to the Governor for final action in accordance with RCW 80.50.100(2)(c).

DATED at Olympia, Washington and effective on this 8th day of August, 2007.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL

James O. Luce, Chair