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. 10 COUNCIL ORDER NO. 793 ORDER DENYING F. STEVEN LATHROP'S MOTION TO STAY ADJUDICATIVE HEARING

Nature of the Proceeding: On Friday, July 30, 2004, Intervenor F. Steven Lathrop, by and through his counsel Jeff Slothower, filed a *Motion to Stay Adjudicative Hearing* arguing that pursuant to the Growth Management Act (GMA), the Energy Facility Site Evaluation Council (EFSEC or Council) has no authority under Chapter 80.50 Revised Code of Washington (RCW) to preempt Kittitas County's Comprehensive Plan and its implementing development regulations. On August 4, 2004, Intervenor Kittitas County, Intervenor Department of Community, Trade and Economic Development (CTED), and the Applicant, Sagebrush Power Partners, LLC, each filed separate *Responses* to Intervenor Lathrop's *Motion to Stay*. On August 6, 2004, Intervenor Lathrop filed his *Reply* to these *Responses*. An adjudicative hearing on this matter is scheduled to commence on August 16, 2004, in Ellensburg.

Summary of Ruling: The Council does not now issue its substantive ruling on Intervenor Lathrop's contention that the GMA deprives EFSEC of the power to preempt a county's Comprehensive Plan and/or development regulations. The Council takes that matter under advisement for a later decision, either as a separate order or integrated as a part of its post-hearing Recommendation to the Governor. Accordingly, the Council DENIES Intervenor Lathrop's request that EFSEC stay the scheduled adjudicative hearings now scheduled to commence in less than a week's time.

Issues Presented

1. Does the Growth Management Act limit EFSEC's statutory authority to preempt local land use plans and regulations affecting the Regulation and Certification of the location, construction, and operation of the Energy Facilities specified in RCW 80.50.060?

2. Should the Adjudicative Hearings currently scheduled for August 16-27, 2004, be Stayed until the Applicant complies with all relevant portions of the Kittitas County Comprehensive Plan and its associated development regulations?

Analysis

Washington Administrative Code (WAC) 463-28-060 requires the Council to "determine during the adjudicative proceeding whether to recommend to the governor that the state should preempt the local land use plans or zoning ordinances for a site or portions of a site for the energy facility proposed by the applicant." Prior suggestions to bifurcate the preemption issue from the other issues presented by the Application have been rejected (*see* Council Order No. 790). The Council has not yet conducted a hearing on the issue of the Applicant's *Request for Preemption*, as required by EFSEC regulations. Thus, the Council has not yet taken any position on the merit of the Applicant's *Request for Preemption*, nor will it do so until after the adjudicative hearing has been held, all environmental review documents have been finalized, and all post-hearing briefs have been filed and reviewed.

Nonetheless, Intervenor Lathrop's *Motion* seeks to prevent the Council from considering the Applicant's *Request for Preemption*, arguing that adoption of the Growth Management Act, a law enacted at least a decade and a half after RCW 80.50.110 (the statute providing EFSEC with its preemption powers), may have superceded EFSEC's powers in that regard. If Intervenor Lathrop is correct, EFSEC would be without jurisdiction to further consider this Application until and unless the Applicant could resolve the project's land use inconsistencies under the Kittitas County Code. Given Council Order No. 776 (determining on May 7, 2003, that the Applicant's proposed site is not consistent with Kittitas County land use plans or zoning ordinances), Council Order No. 789 (allowing the Applicant in early 2004 a final extension of time to resolve land use inconsistencies), and the limited periods of time authorized by WAC 463-28-040 to resolve land use inconsistencies, it appears that if EFSEC is found to be without jurisdiction to preempt a County's local ordinances adopted under the GMA, no further recourse would be available to the Applicant. If the Application were not withdrawn, the Council would essentially be required, under WAC 463-28-050, to recommend denial of site certification to the Governor without the need to hold an adjudicative hearing. This result is the procedural equivalent of a *Motion to Dismiss*. Therefore, despite Intervenor Lathrop's contentions otherwise, the Council finds that Intervenor Lathrop's *Motion to Stay* is a dispositive motion.

Council Order No. 777, at paragraph 13 of Appendix A, required dispositive motions ("those seeking the dismissal of . . . any portion of a proceeding") to be filed at least 45 days before the next relevant adjudicative session. That portion of the *Order* allowed up to 14 days for the filing of answers and an additional 7 days for the filing of replies, with an allowance thereafter for the Council to hear oral argument, if desired, and then issue its ruling prior to a scheduled adjudicative session. Intervenor Lathrop's *Motion* was filed on July 30, 2004, only 17 days prior to the next scheduled adjudicative session in this matter: the adjudicative hearing itself. Thus, once the dispositive nature of Intervenor Lathrop's *Motion* is recognized, it is clear that this *Motion* is nearly one month tardy and therefore untimely. On that ground alone, the Council could deny and dismiss Intervenor Lathrop's *Motion to Stay* and all of the issues raised therein.

Further, it must be noted that the issues raised by Intervenor Lathrop's current *Motion* are not new. Intervenor Lathrop looks to the 1990 enactment of the GMA and a 2002 amendment thereto as the basis for the *Motion*. These statutes obviously predate the Applicant's *Request for Preemption* filed in

February 2004, yet Intervenor Lathrop waited more than five months thereafter to file this *Motion for Stay*, unnecessarily creating the need for a flurry of procedural activity just weeks before the adjudicative hearing. Of course, a Party is permitted to raise the issue of jurisdiction at any time during a proceeding, even bringing such an issue for the first time on appeal *after* an adjudication (*see* Washington Superior Court Civil Rule 12(h)(3) and Washington Rule of Appellate Procedure 2.5(a)(1); *see also* Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962, 969 (1998)). Here, however, there is no indication of a late-discovered flaw in EFSEC's preemption jurisdiction, allowing for the perception that Intervenor Lathrop's *Motion to Stay* is simply a tactic of delay.

Even so, the Council recognizes the potentially fatal nature of the substance of Intervenor Lathrop's *Motion to Stay* with regard to EFSEC's ability to make any Recommendation to the Governor supporting or repudiating the Applicant's *Request for Preemption*. At this late date, however, with only days remaining before the scheduled adjudicative proceeding, a superficial analysis and cursory order regarding such a possibly important topic would be a disservice to all Parties now before the Council, including the moving party and the Applicant. As noted by the membership of a previous Council (EFSEC as then composed for the Olympic Pipeline adjudication in July 1996), the current Council "does not intend to enter an advisory opinion on insufficient information or argument." *See* Council Order No. 699, at pages 12-13.

Therefore, the Council takes this matter under advisement and chooses not to issue a ruling on the substance of Intervenor Lathrop's *Motion to Stay*. The Council may choose to request additional briefing on this topic and may conduct its own further research on this jurisdictional matter in an effort to issue a separate substantive ruling. Such a separate ruling on the issue may be made at any time prior to the issuance of its Recommendation to the Governor; if no such separate ruling is made, the Council will include its ruling on the status of its post-GMA preemption jurisdiction within the body of the Recommendation to the Governor, as necessary.

The Applicant, in its *Response*, questions the authority of EFSEC to stay the consideration of an application pending before it. According to the Applicant, neither Washington's Administrative Procedure Act (APA, Chapter 34.05 RCW) nor EFSEC's own organic statutes (Chapter 80.50 RCW) nor even EFSEC's own administrative regulations (Chapter 463 WAC) authorize the Council to grant this type of delay. Admittedly, the only provision within the APA addressing a "stay" is found at RCW 34.05.467, which discusses a party's ability to request from the presiding officer a "stay of effectiveness of a final order." The Applicant correctly points out that this post-decisional remedy would not apply to the current *Motions* now before the Council. However, the Applicant overlooks RCW 34.05.416, which allows an agency to decide not to conduct an adjudicative proceeding at all when appropriate circumstances so dictate. In addition, the Applicant overlooks WAC 463-28-030(2), which allows all proceedings before the Council to "be stayed at the request of the applicant" when necessary to allow resolution of land use inconsistency matters with local authorities. While that regulation specifically addresses a stay with regard to a particular stage of the proceedings, it is reasonable to conclude that the Council's power to stay proceedings before it do not evaporate once land use consistency has been accomplished or a request for preemption has been filed.

In any case, the Council has here determined that granting a stay on the grounds raised by Intervenor Lathrop is not proper. Thus, it is unnecessary at this time to resolve the issue of authority to stay as raised

by the Applicant. Even so, the Council hereby reasserts its power under the APA and in accordance with RCW 80.50.040(7) to schedule and conduct adjudicative hearings in a fashion designed to best meet the requirement of reporting its Recommendation to the Governor within the twelve month time period required by RCW 80.50.100. If the Council is presented with a motion to stay a scheduled proceeding under suitable circumstances, strong consideration to granting such a request will be given if the other alternatives presented are unacceptable, such as creation of an incomplete hearing record, dismissal of an Application without an adjudicative hearing, or unforeseen circumstances indicating the Council requires new or additional information presented during the course of an adjudicative hearing. *See* Council Order No. 737 (EFSEC's consideration and denial of a stay (labeled as an "indefinite recess") of ongoing adjudicative hearing regarding Olympic Pipe Line Company's proposed Cross Cascade Pipeline project); *see also* Council Order No. 774 (EFSEC's approval of an Applicant's request to suspend proceedings prior to land use consistency stage being reached).

Decision

After full consideration of the issues presented by Intervenor Lathrop's *Motion to Stay* and all pleadings filed in response and reply, EFSEC hereby ORDERS the *Motion* DENIED. The adjudicative hearing scheduled to commence on August 16, 2004, shall not be stayed for any reason raised in Intervenor Lathrop's *Motion*. The Council reserves the right to issue a separate substantive ruling on the jurisdictional issues raised in Intervenor Lathrop's *Motion* at a later date.

DATED and effective at Olympia, Washington, the _____ day of August, 2004.

_____

Adam E. Torem, Administrative Law Judge