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. 17 COUNCIL ORDER NO. 802 ORDER ON MOTIONS TO STRIKE TESTIMONY

Nature of the Proceeding: On Tuesday, August 3, 2004, the Applicant, Sagebrush Power Partners, LLC, by and through its counsel Darrell Peeples and Timothy McMahan, filed its *Objections and Motion to Strike Prefiled Testimony* requesting, among other relief, that the Energy Facility Site Evaluation Council (EFSEC or Council) strike specified portions of the pre-filed testimony of (a) Intervenor Kittitas County's witness Clay White, (b) Intervenor F. Steven Lathrop's witness Dave Taylor, and (c) Intervenor Residents Opposed to Kittitas Turbines' (ROKT) witness Ed Garrett. Responses to the Applicant's *Objections and Motion to Strike* were filed on August 6, 2004, by Intervenor Kittitas County, Intervenor Lathrop, and Intervenor ROKT.

Also on Tuesday, August 3, 2004, Intervenor Kittitas County, by and through its counsel James Hurson, filed its Prehearing Motions and Argument, which requested, among other relief, that EFSEC strike specified portions of the pre-filed rebuttal testimony of (a) the Applicant's witness Roger Wagoner, (b) the Applicant's witness Chris Taylor and (c) Intervenor Renewable Northwest Project (RNP)'s witness Ted Clausing. Responses to Intervenor Kittitas County's *Prehearing Motions* regarding the striking of testimony were filed on August 6, 2004, by the Applicant and by Intervenor RNP.

In light of the Council granting a continuance of the adjudicative hearing from August 16, 2004, to September 27, 2004, this ruling was deferred for several weeks.

Summary of Ruling: The Council DENIES the Applicant's request that EFSEC strike portions of the pre-filed testimony of Clay White. However, the Council GRANTS the Applicant's request that EFSEC strike portions of the pre-filed testimony of Dave Taylor as well as the entirety of the pre-filed rebuttal testimony of Dave Taylor. Further, the Council partially GRANTS and partially DENIES the Applicant's request that EFSEC strike the entirety of the pre-filed rebuttal testimony of Ed Garrett. Finally, the Council DENIES Intervenor Kittitas County's motion to strike the pre-filed rebuttal testimony of Roger Wagoner, Chris Taylor, or Ted Clausing.

Issues Presented by the Applicant's *Motion to Strike*:

1. Should EFSEC strike portions of the pre-filed testimony of Clay White as speculative and argumentative?

2a. Should EFSEC strike a portion of the pre-filed testimony of Dave Taylor as an improper opinion which makes a conclusion of law regarding the ultimate issue of the case presented?

2b. Should EFSEC strike the entirety of the pre-filed rebuttal testimony of Dave Taylor as an improper rebuttal?

3. Should EFSEC strike the majority of the pre-filed rebuttal testimony of Ed Garrett as an improper rebuttal?

Issues Presented by Intervenor Kittitas County's *Motion to Strike*:

4. Should EFSEC strike portions of the pre-filed rebuttal testimony of Roger Wagoner as an improper rebuttal?

5. Should EFSEC strike portions of the pre-filed rebuttal testimony of Chris Taylor as an improper rebuttal?

6. Should EFSEC strike the pre-filed rebuttal testimony of Ted Clausing because the Parties may be unable to adequately prepare a suitable response?

ANALYSIS

This adjudicative proceeding is being conducted under the auspices of the Washington Administrative Procedure Act (APA).[1] Thus, the Washington Rules of Evidence are not directly applicable, but serve only as guidelines for the presiding officer in making evidentiary rulings.[2] Even so, the following Evidence Rules (ER) are pertinent to the objections presented at this time:

> ER 401 **DEFINITION OF "RELEVANT EVIDENCE".** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
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> ER 402 **RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE.** All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these

[1] Revised Code of Washington (RCW) 80.50.090(3).

[2] RCW 34.05.452(2). The administrative rules of evidence adopted by the Council do not contain specific rules applicable to adjudicative hearings, but instead refer back to this section of the APA. *See* Washington Administrative Code (WAC) 463-30-310(1).

rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403 **EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 602 **LACK OF PERSONAL KNOWLEDGE.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 701 **OPINION TESTIMONY BY LAY WITNESSES.** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 702 **TESTIMONY BY EXPERTS.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 704 **OPINION ON ULTIMATE ISSUE.** Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In addition, Council Order No. 790 contained the following ruling regarding the submission of pre-filed rebuttal testimony:

> Pre-filed rebuttal testimony shall be limited to witness statements that are responsive to other existing pre-filed testimony *or* which can otherwise be shown as relevant to the proceeding and the need for which could not have been reasonably foreseen prior to July 6, 2004, the deadline for filing of all Parties' pre-filed testimonies.

Finally, the Council notes its desire to obtain the maximum amount of relevant evidence during the course of processing and considering the *Application for Site Certification*. This desire is in keeping with the traditionally less stringent application of the Rules of Evidence in administrative proceedings. Thus, the Council adopts a liberal approach to the admission of evidence, to include the various pre-filed testimonies to which objections have been filed in this matter. With those applicable Rules of Evidence, prior EFSEC rulings, and general philosophy now set out, each objection made by the Applicant and Intervenor Kittitas County is considered in turn:

1. ***Clay White***. The Applicant objects to three separate portions of Intervenor Kittitas County's witness as speculative and argumentative, as Mr. White expresses the following opinions regarding the Applicant's approach to working with Kittitas County to resolve the proposed Project's land use inconsistencies:

> "I could not help but think that he did it on purpose." *Pg. 20, lines 18-20.*
>
> "The only conclusion I can draw is that this was their strategy from day one and they had no intention of going through the County process as prescribed by law." *Pg. 22, lines 23-25.*
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> "The tactics they took made it very apparent to me that they had never planned to discuss proceeding with the County and had planned to file for preemption all along." *Pg. 41, lines 3-4.*

The Applicant asserts that these portions of Mr. White's pre-filed testimony (Exhibit 50, CW-T) violate both ER 403 and ER 602. The County counters that Mr. White's opinions are admissible under both ER 701 and ER 702. The County is correct. Although the suppositions made by Mr. White regarding Mr. Taylor's motivations for the timing and contents of various submissions made by the Applicant to the County are certainly speculative, Mr. White's opinions are helpful to the Council in understanding the attempts made by the Applicant to resolve the existing land use inconsistencies associated with this proposed Project. Further, Mr. White's opinions might assist the Council in determining whether the relevant Parties, the Applicant and Intervenor Kittitas County, afforded each other good faith in their dealings in this regard. Thus, despite a possible technical violation of ER 602, Mr. White's opinion testimony shall NOT be stricken because it is admissible under ER 701.

2. ***Dave Taylor***. The Applicant objects to Intervenor F. Steven Lathrop's witness offering his opinion on one of the ultimate legal issues before the Council, to wit: did the passage of the Growth Management Act (GMA) void EFSEC's ability to preempt local land use plans and zoning ordinances? The Applicant relies on the general prohibition against witnesses stating conclusions of law, and also contends that this portion of Mr. Taylor's testimony is argumentative, in violation of ER 403 and ER 602. Intervenor Lathrop responds that his witness should be considered an expert on GMA and land use planning issues and that this qualification should overcome the Applicant's objections and allow EFSEC to simply consider and place appropriate weight on this portion of Mr. Taylor's testimony. While Mr. Taylor may very well be considered an expert on local planning measures due to his prior employment with Kittitas County, nothing in his pre-filed testimony indicates prior experience with EFSEC, Title 80.50 RCW, nor purports to qualify him as a legal or legislative expert. Thus, his theory on what impact passage of the GMA might have had on this Council's legal powers to preempt local land use plans and regulations cannot be considered an expert opinion under ER 702. Further, while ER 704 may allow opinion testimony on ultimate factual issues, it does not permit opinion testimony on ultimate legal issues, especially when those opinions are without the benefit of helpful expertise. Therefore, that portion of Mr. Taylor's testimony (Exhibit 101, DT-1), beginning on Page 4, Line 13,[3] and ending on Page 5, Line 3, shall be stricken under ER 704 and not considered by the Council.

[3] Although the Applicant's objection sought only to strike Mr. Taylor's proposed testimony, beginning at page 4, line 18, it is appropriate to also strike the original question posed (lines 13-17) because the entirety of Mr. Taylor's response to

The Applicant also objects to Intervenor Lathrop's witness' entire pre-filed rebuttal testimony as an improper rebuttal. Mr. Taylor's rebuttal testimony essentially concedes this point by stating:

Q. What is the nature of the testimony contained herein?

A. To offer rebuttal testimony to the pre-filed testimony previously filed with EFSEC by the applicant.

See Exhibit 102 (DT-T). Attorney Slothower's *Response* reiterates this concession, noting that Mr. Taylor's second testimonial submission is "in direct response to the applicant's pre-filed direct testimony." These acknowledgments by Intervenor Lathrop are correct: a review of the entirety of Mr. Taylor's "rebuttal testimony" finds him holding forth on the contents of several different witnesses' pre-filed testimony that the Applicant included in its original pre-filed witness testimonies filed on May 24, 2004. This "rebuttal testimony" contains no justification for submitting this testimony as rebuttal on July 27, 2004, rather than as part of his original pre-filed testimony three weeks earlier, on July 6, 2004. The Applicant correctly points out that this sort of delayed submission is in direct contravention to the above-quoted provision of Council Order No. 790. Attorney Slothower objected to such testimony at the Council's prehearing conference on February 19, 2004, saying:

> I was tangentially involved in another EFSEC hearing a number of years ago, and my recollection there was that the Applicant filed their prehearing testimony, then the people in opposition filed theirs. And the rebuttal testimony that came was not truly rebuttal testimony but was instead the bulk of the evidence that they were going to rely on in deciding issues on the siting issue, the major issues that the Council had to decide. I want to avoid that for lack of a better word "sandbagging" approach here.

See Transcript of Prehearing Conference, February 19, 2004, at page 46. Mr. Taylor's pre-filed rebuttal testimony, with criticism of several of the Applicant's witnesses, would disallow the Applicant a reasonable opportunity to respond in its own rebuttal testimonies. Therefore, the entirety of Mr. Taylor's pre-filed rebuttal testimony (Exhibit 102, DT-T) is stricken under the provisions of Council Order No. 790 and excised from the record in this case.

3. ***Ed Garrett.*** The Applicant objects to the first 9 pages of Mr. Garrett's testimony as an improper rebuttal and the remaining 5 pages as an improper "friendly" rebuttal that serves only to bolster testimony filed by another witness. Intervenor ROKT's response to the Applicant's objection claimed only that it did not timely receive the Applicant's *Objections* but failed to address the substantive issues raised therein. As noted above, "rebuttal" testimony by intervening parties was to be permitted only to discuss items that could not have been addressed in their original pre-filed testimonies due on July 6, 2004. Intervenor ROKT failed to submit any pre-filed witness testimony on that deadline and instead submitted Mr. Garrett's testimony as rebuttal. The Applicant is correct that the bulk of the first 9 pages of this submission is an improper rebuttal as most of the information it contains could, and should, have been submitted by the July 6, 2004, deadline. However, that

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that question is being excluded.

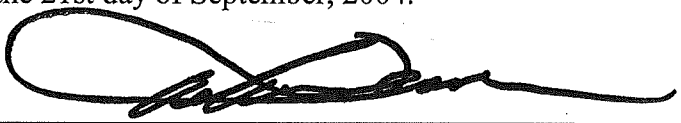
portion of Mr. Garrett's rebuttal testimony that addresses testimony of other witnesses filed on that same date could not, of course, have been submitted at an earlier date. With an eye toward a liberal reading of the provisions of Council Order No. 790 quoted above, the latter portion of Mr. Garrett's pre-filed rebuttal testimony is "responsive" to other witness pre-filed testimony. Thus, the Council will allow those portions of Mr. Garrett's testimony to become part of the record. That portion of Mr. Garrett's testimony (Exhibit 110R.0), beginning on Page 2, Line 1, and ending on Page 9, Line 19, shall be stricken as an improper rebuttal under the provisions of Council Order No. 790. The Council will consider the remaining portions of Mr. Garrett's testimony as opinion testimony admissible under ER 701 and afford those opinions appropriate weight after having an opportunity to observe cross-examination at the adjudicative proceeding.

4. ***Roger Wagoner***. Intervenor Kittitas County objects to Mr. Wagoner's pre-filed rebuttal testimony (Exhibit 41 R, RW-R) as an improper rebuttal. Mr. Wagoner was not one of the Applicant's original witnesses. A review of his seventeen (17) pages of rebuttal testimony finds him addressing a variety of issues raised by witnesses Clay White (Exhibit 50) and Dave Taylor (Exhibit 101); the Applicant's *Response* highlights specific thrusts that Mr. Wagoner's pre-filed rebuttal testimony attempts to parry. Although Mr. Wagoner's pre-filed rebuttal testimony covers some new areas of information, the nature of rebuttal testimony does not preclude such discussions. In fact, in any argument, one person must get the last word in; here, Mr. Wagoner will have that privilege. Thus, with the same liberal reading of the provisions of Council Order No. 790 relied upon above, Mr. Wagoner's pre-filed rebuttal testimony is "responsive" to other witness pre-filed testimony and therefore shall be considered by the Council.

5. ***Chris Taylor***. Intervenor Kittitas County objects to Mr. Taylor's pre-filed rebuttal testimony (Exhibit 20 R, CT-R) as an improper rebuttal. For essentially the same reasons set out with regard to Mr. Wagoner's pre-filed rebuttal testimony, the Council finds Mr. Taylor's pre-filed rebuttal testimony as "responsive" to other witness pre-filed testimony and therefore will NOT strike any portion of that submission.

6. ***Ted Clausing***. Intervenor Kittitas County objects to Intervenor Renewable Northwest Project (RNP) introducing a witness who disagrees with one presented by Council for the Environment.[4] Mr. Clausing's testimony is made in response to Mr. Kenneth Bevis and, as such, could not have been filed at any earlier time. Therefore, for essentially the same reasons set out with regard to the prior two objections made by Intervenor Kittitas County and denied by the Council, EFSEC finds Mr. Clausing's pre-filed rebuttal testimony as "responsive" to other witness pre-filed testimony and therefore will NOT strike any portion of that submission.

DATED and effective at Olympia, Washington, the 21st day of September, 2004.



Adam E. Torem, Administrative Law Judge

[4] The Council previously denied Intervenor Kittitas County's request to stay the proceeding in order to have more time to prepare to cross-examine Mr. Clausing. *See* Council Order No. 800.