BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 94-1 )
of )
WASHINGTON STATE PUBLIC )
POWER SUPPLY SYSTEM )
Certification of the )
Satsop Combustion )
Turbine Project )

PREHEARING ORDER No. 3 )
ORDER GRANTING MOTION, )
IN PART, TO EXCLUDE CERTAIN )
ISSUES )

On July 10, 1995, the Washington State Public Power Supply System (the

The applicant is represented by Charles Blumenfeld, attorney, Seattle; Counsel for the Environment is Thomas Young, assistant attorney general, Olympia, and the Energy Office is represented by Tommy Prud’Homme, assistant attorney general, Olympia.

The thrust of the applicant’s motion is that certain issues must be excluded from consideration during the adjudication as a matter of law. The applicant challenges ten of the issues noted as contested on its issues list. The Council will discuss the challenged issues in the groupings in which they were presented.

A. Mitigation by Compensation

The applicant contends that the Council lacks the jurisdiction to require mitigation in the form of compensation for impacts upon property values and the environment. Counsel for the Environment contends that "mitigation," as used in the Council’s rules, includes financial compensation.

The Council disagrees that this matter should be excluded from its consideration as a matter of law. It has the power to authorize voluntary compensation as mitigation in response to stipulations, and it has the power to authorize mitigation for which the applicant must pay -- the equivalent of cash mitigation. We are concerned that the applicant’s proposed principle, taken to its logical extension, could preclude us from proposing reasonable mitigation or conditions of any sort upon an application.
We also note that RCW 80.50.010 provides that the Council is to "... ensure through available and reasonable methods that ... such facilities will produce minimal adverse effects on the environment ..." It states as well that the legislation and the Council are to "... seek courses of action that will balance the increasing demands for energy [facilities] ... with the broad interests of the public." RCW 80.50.010 (emphasis added). We believe that financial mitigation can be an important element in the public interest, allowing government funding of appropriate mitigation measures, and that it appears to be within the range of available, reasonable methods allowed to assure minimal adverse environmental effects. In fact, in certain situations, this approach has the potential of proving more efficient and less costly than mitigation in kind.

There is no statutory prohibition against EFSEC authorizing or requiring financial mitigation. We decline to rule that the financial mitigation of impacts is excluded from the adjudication as a matter of law.

To the extent that an issue is contended to arise from the valuation of a public taking of pipeline right-of-way, the Council grants the motion to exclude. State law provides that the proper forum for the valuation of takings of that sort lies with the Superior Court, not with the Council.

B. Need for the Project.

The applicant contends that the Council is proscribed from (1) considering whether there is a need for the facility, and (2) considering the accuracy of BPA's projections of future need for power.

RCW 80.50.010 does express a legislative policy that energy is needed. The legislature had the opportunity to change that provision during its 1994 session but failed to do so. However, this expression of state policy does not necessarily mean that the Council is totally foreclosed from considering the issue of need.

Counsel for the Environment argues that the Council must consider need for additional power in order to balance properly the need for a project with the broad public interest. Counsel for the Environment contends that the only way EFSEC can effectively conduct this balancing is by weighing the need for power against a project's environmental impacts. We find his argument persuasive and decline to exclude the issue totally from the proceeding. This does not mean that the Council believes it may override the statutory statement of need, but only that it may use evidence of need while balancing need with environmental consequences.

EFSEC's authority to consider the accuracy of BPA's projections of need is limited - but may be appropriate in a limited sense. The accuracy of BPA's projections may affect the Council's approach to licensing and the term of any site certificate it issues. The Council has no jurisdiction to make BPA's determinations, nor to review or second-guess them. However, because BPA's determination affects the issues of project timing and likelihood of construction, the Council has the power to consider this matter.
The Council rejects the proposal to remove these issues from the hearing as a matter of law.


The applicant contends that the Council has no jurisdiction to consider whether the proposal is consistent with both the Northwest Power Planning Council's Power Plan and the Washington State Energy Strategy.

As to the former, it may be true that the Council has no jurisdiction to make a determination that the application is or is not consistent with the Power Plan, as it has no jurisdiction to make decisions for the Power Planning Council. It is also true, however, that the Council may need to consider the likelihood of the project being built in light of the Power Plan. This assessment would involve a consideration of the project's consistency with the Power Plan, in order to determine the length of any permit to be granted. The evidence may also be relevant to other conceivable limiting conditions that may be placed in the certification agreement. Therefore, the Council does not believe that these issues should be excluded from its consideration.

As to the Energy Strategy, the Council is not prepared to rule as a matter of law that consistency with the Energy Strategy is totally without relevance. Indeed, the Energy Strategy has been approved by the Legislature (Laws of 1994, Ch. 207, § 3; codified in Chapter RCW 43.21F) and has been deemed by the Governor as applicable to energy decisions made by state agencies (Executive Order 94-01).

D. SEPA Issues.

The applicant contends that SEPA issues\(^1\) should be excluded from the adjudication. The Council grants the motion on these issues and rules that the consideration of the identified SEPA issues during the adjudication is improper.

The Council has devoted considerable attention to the relationship between SEPA and the APA. Because the Council is required by SEPA to consider its SEPA determination in its final adjudicative order and is required by the APA to consider only evidence that is in the adjudicative record, the Council has determined that the SEPA documents should be part of the record. The sufficiency of the EIS is not a matter for determination during the adjudication, however. See generally WAC 465-47-060(3) ("The council shall initiate and conclude an adjudicative proceeding

\(^1\)The listed issues include whether SEPA has been complied with, whether the Council may adopt a BPA EIS, whether a supplemental EIS should be required, and whether the BPA EIS is adequate.
hearing required by RCW 80.50.100 prior to issuance of the final EIS.”). The Council rules that the
issues regarding the form, sufficiency, and timing of the Council’s environmental review process
under SEPA are outside the adjudicative hearing. Those issues may be raised within the SEPA
process itself.

ORDER

THE COUNCIL ORDERS That the motion is granted, in part, as to issues of the
form, sufficiency, and timing of the Council’s environmental processes under SEPA, which issues are
excluded from consideration in the adjudicative proceeding. The Council orders that with the
exception of issues relating to the valuation of public takings not within the Council’s jurisdiction, the
Applicant’s motion to exclude issues relating to mitigation in the form of monetary compensation is
denied. Lastly, the Applicant’s motion to exclude the issues of need and consistency from the
adjudication is denied to the extent discussed above.

DATED and effective at Olympia, Washington this 3rd day of August 1995.

Fred Adair, Chair

NOTICE TO PARTICIPANTS: Unless modified, this prehearing order will control the course of
the hearing. RCW 34.05.431; WAC 463-30-270(3). Objections to this order must be filed in
writing with the Council within ten days after the date of this order. WAC 463-30-270(3).
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ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 94-1

of

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Certificate of the
Satsop Combustion
Turbine Project

CERTIFICATE OF SERVICE

The undersigned certifies that on August 3, 1995, he served the enclosed:

PREHEARING CONFERENCE ORDER NO. 3

by depositing copies thereof in the United States mail, properly stamped and addressed, as indicated on the Satsop Combustion Turbine Project Service List.

DATED: August 3, 1995

[Signature]

Marcel J. Van Ooyen
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