BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 93-2
of
CSW ENERGY, INC., AND
KVA RESOURCES, INC.

PREHEARING CONFERENCE
ORDER No. 10

Certification of the
NORTHWEST REGIONAL
POWER FACILITY

NOTICE OF CONTINUED PREHEARING
CONFERENCE (OCTOBER 5, 1995)


APPEARANCES. The following parties participated in the prehearing conference: Applicant KVA Resources, Inc., by Darrell Peeples, attorney, Olympia, and Charles Lean, attorney, Tacoma; Counsel for the Environment, Deborah Mull, assistant attorney general, Olympia; Department of Ecology, by Rebecca VanderGrif, assistant attorney general, Olympia; Washington State Energy Office, by Tommy Prud'Homme, assistant attorney general, Olympia; Washington State Department of Fish and Wildlife, by William Frymire, assistant attorney general, Olympia; Confederated Tribes of the Colville Reservation, by Steve Suagee, attorney, Nespelem; Spokane Tribe of Indians, by Christopher B. Gray, attorney, Wellpinit; Lincoln County Ag Coalition, by Daniel C. Buob, Edwall.

In this order, the Council discusses scheduling matters, its consideration of the Draft Environmental Impact Statement (DEIS) in the deliberative process, pretrial and post-trial briefing, hearing procedures, and other administrative matters.

Scheduling and the DEIS in the Deliberative Process. On June 21, 1995, Counsel for the Environment asked that the Council continue the adjudicative hearing until after the Council has issued the final environmental impact statement (FEIS). On July 18, 1995, the Council ruled in Prehearing Order No. 8 that the SEPA process and the adjudicative process would be conducted contemporaneously, and denied the motion to continue the hearing. In that Order, the Council set out a suggested procedure allowing parties to offer the DEIS as evidence.

When Prehearing Order No. 8 was entered, the Council expected the DEIS to be available for review in mid-August. For reasons not relevant here, the DEIS is now expected to be issued on approximately October 9, 1995. Parties will receive copies on approximately October 2, 1995.
This delay prompted the Counsel for the Environment and intervenor parties to express opposition to the established hearing schedule. They asked that the adjudicative hearing be delayed until 30 days after the issuance of the DEIS. They argued that beginning the adjudicative hearing on October 17 would not allow the parties adequate time to review it, prepare cross examination of the Applicant’s witnesses based upon it, submit revised direct testimony, and otherwise prepare for the hearing. Counsel for the Environment claimed that holding to the prior schedule would violate the Council’s Prehearing No. 8.

The objections, and the ensuing scheduling discussions, caused the Council to review and reconsider its prior related rulings. After argument, the Council ruled that it would not modify the previously scheduled beginning date of October 17. The schedule is not a violation of Prehearing Order No. 8 or the Administrative Procedure Act (APA).

Counsel for the Environment and the intervenor parties contend that advance information about the draft environmental impact statement is necessary for their direct presentations and for their cross examination of opposing witnesses. Counsel for the Environment continues to contend that the hearing should not proceed until the Council first issues its final EIS.

We believe that the parties misconstrue the function of the SEPA process in this proceeding. The SEPA and adjudicative processes are separate and distinct. The DEIS is not an element of the applicant’s case. The parties do not have the right to respond to it as an element of the applicant’s case. The DEIS is the product of the Council’s consultant, and is prepared for the purpose of meeting SEPA requirements. The Council will consider the DEIS and produce a final EIS in the manner required under SEPA.

The parties’ rights are protected and the requirements of law are met when the application is tested in the adjudication and the SEPA process is conducted according to its own requirements.

SEPA is neither designed nor required to be conducted as an adjudication. The parties’ remedy for any error that they perceive to inhere in the DEIS is to comment on it within the time allowed. They are not entitled as a matter of law to respond to it in the adjudication. The Council is required to have completed the SEPA process prior to making its final decision but is not required to conduct that process in the adjudication.

The Council will reconsider its earlier ruling that any party may examine the Council’s consultant and offer the DEIS into evidence. The parties may, if they desire to do so, simultaneously submit briefs of no more than five pages to comment on or to supplement their earlier comments on the issue of interrelationship of SEPA and adjudication. Briefs on this issue will be considered if filed no later than October 2, 1995.

**Hearing Schedule.** At the prehearing conference, the Council denied the parties’ request for a continuance of the adjudication and determined that it will begin on October 17,
1995, in Olympia. Beginning then and continuing for the time needed, the parties will present evidence on all issues except socioeconomic, air quality, and effects of pipeline construction. The hearing will reconvene in eastern Washington during the week of October 23, 1995. The Council will conduct a view of the proposed site, conduct an evening session for purposes of receiving public comment on the application at which time it will allow members of the public to comment on the DEIS, and receive evidence relating to effects of the facility on local socioeconomic environment and on air quality, and to the extent permitted on pipeline construction.

**Stipulations.** The parties advised the Council that they have nearly completed stipulated agreements involving the Applicant and several intervenor parties. Stipulations will be filed with the Council on or before October 5 and parties to the stipulations will support them to the Council as the first order of business at the evidentiary hearing beginning October 17.

**Issues List.** The parties will present an agreed issues list by October 5, 1995. It will identify those issues that the parties intend actively to pursue through the presentation of direct evidence or cross examination and that they intend to argue on brief.

**Corrected Testimony.** The Applicant will submit revised prefiled testimony, limited to changes reflecting the Application's switch from air to water cooling, on or before October 5, 1995.

**Prehearing Briefing -- oral argument.** The Council denied Counsel for the Environment's request to submit a prehearing brief outlining her legal arguments. The Council will allow each party up to 15 minutes' opening argument and will allow post-hearing briefs. In addition, the parties are requested to brief by October 17 1995 the admissibility of evidence relating to construction of portions of the natural gas pipeline that are outside the Council's jurisdiction and within the jurisdiction of the Federal Energy Regulatory Commission, or FERC. The Council establishes no page limit for this brief, but strongly encourages the parties to present concise, well-reasoned documents.

**Post-hearing Process.** At the conclusion of the evidentiary hearings, the Applicant will submit documents reflecting its position on the issues in the adjudication in the form of a brief stating its legal arguments and citing to portions of the record that support its arguments, a model order, and a model site certification agreement with any needed permits. These documents represent the Applicant's best argument for certification and do not represent the Council's opinion that certification should be recommended to the Governor. Other parties may respond to the Applicant's presentation by briefing their own legal arguments, citing the record for any evidentiary support and, where appropriate, suggesting changes or providing their own suggested model documents. In turn, the Applicant may reply to the parties' presentations. Note: In briefing their arguments, the parties should follow the order of issues in the agreed issues list. The Council may deem a party's failure to address an issue as the party's acquiescence in its opponents' view of the issue.
The briefing schedule has been tentatively agreed, subject to determination at the conclusion of the evidentiary hearing. Tentatively, the Applicant's materials will be filed on or before December 1, 1995. Other parties' presentations will be filed on or before January 5, 1995. The Applicant may respond on or before January 19, 1995.

**Notice of Prehearing Conference.** A continued Prehearing Conference will be held on October 5, 1995, at 2:00 p.m., in Room 308 of the Energy Office, 925 Plum Street, Olympia WA, 98504-43172. The Council will designate exhibit numbers for the prefiled evidence, and will deal with remaining procedural matters.

DATED and effective at Olympia, Washington this 25th day of September 1995.

[Signature]

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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