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

The Department of Community, Trade and Economic Development (CTED) opposes Intervener F. Steven Lathrop’s Motion to Stay Adjudicative Hearing, and urges the Energy Facility Site Evaluation Council (EFSEC or Council) to deny the motion. The legislature, in enacting the Growth Management Act (GMA), did not intend to thwart the statutory authorities of EFSEC’s enabling statute (Chapter 80.50 RCW). The request to stay the consideration by EFSEC of the Application or the applicant’s request for preemption unless and until the applicant complies with all Kittitas County comprehensive plan and development regulations would duplicate the EFSEC process in direct conflict with the intent of the statute, that is “[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.” (RCW 80.50.010(5))
Both the EFSEC statute and the GMA statute must be complied with in the permitting of energy facilities. The EFSEC statute does not give the Council authority to run roughshod over the GMA or local land use regulations. But neither does the GMA, nor do local regulations, have the authority to thwart the statutory EFSEC process. The motion asserts that EFSEC’s authority to preempt local regulations ended with enactment of the GMA. The arguments in support of this assertion are apparently twofold: 1) that EFSEC’s authority to preempt dealt only with regulations promulgated under laws existing at the time of enactment, or latest amendment, (the motion is unclear on this point), and 2) that the GMA requirements that state agencies comply with local comprehensive plans and development regulations and amendments adopted pursuant to the GMA void EFSEC’s authority to preempt. Both these arguments are incorrect interpretations of the law.

Subsection (1) of the preemption statute, RCW 80.50.110, establishes that any provision, limitation, or restriction conflicting with the EFSEC statute in statute law at the time of enactment, or any rule or regulation promulgated under such law, be superseded by the EFSEC statute.

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in affect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

Subsection (2) establishes that from this time forward (enactment), the state (EFSEC) preempts the regulation and certification of the location, construction, and operational conditions of any facilities under EFSEC jurisdiction.
(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

Subsection (2) is an unmitigated assertion of state preemption in all matters regarding the locating of jurisdictional facilities. In these two subsections the legislature removed any conflict with any existing law at the time of enactment through superseding, and took preemptive control of regulating and permitting the location (and construction and operations) of any facilities subject to EFSEC jurisdiction. This preemptive control remains a statutory authority of EFSEC. No subsequently enacted law, including the GMA, has asserted that it supersedes RCW 80.50.110. Such a statutory assertion would be required to void EFSEC’s preemptive authority.

EFSEC’s standing preemptive authority does not allow the Council to bulldoze its way over other state laws (like the GMA) or local regulations, whether developed under the GMA or any other authority. Both the EFSEC statute and EFSEC rules provide for extensive efforts to take into account the laws, rules, rights and interests of affected parties and jurisdictions. These efforts represent coordinated planning efforts and respect local comprehensive plans and development regulations, even if EFSEC has final preemptive authority. Some of these efforts include:

- Statutory requirement to determine consistency with land use regulations;
- Statutory requirement to seat a local jurisdictional representative as a member of the Council;
Statutory requirement to admit local jurisdictions as parties to adjudication;

Statutory requirement to conduct public hearings and an adjudicative process;

Statutory requirement to conduct environmental review; and

Administrative requirement to require the applicant to make a “good faith effort” to resolve inconsistency with land use regulations before making a request that preemption be asserted.

These requirements, among others, demonstrate the degree to which the state attempts to permit facilities as if preemption were not a standing authority, so that the laws, rules, rights and interests of affected parties and jurisdictions may be respected to the fullest extent possible.

The late hour of this motion, asserting a fundamental lack of EFSEC jurisdictional authority, is disturbing. This issue could have been articulated at any time over the last 18 months, perhaps most appropriately as a response to the Applicant’s Petition for Preemption. CTED has statutory responsibility to assist in the removal of impediments to the timely development and construction of cost-effective energy resources. (RCW 43.21F.045(j)) This motion should be denied, and the Council should move forward to adjudicated hearing and to
determination of a recommendation, yea or nay, to the governor.

Respectfully Submitted,

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