

1 BEFORE THE STATE OF WASHINGTON  
2 ENERGY FACILITY SITE EVALUATION COUNCIL  
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5 In the Matter of Application No. 2003-01

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7 SAGEBRUSH POWER PARTNERS, L.L.C.

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9 KITTITAS VALLEY WIND POWER  
10 PROJECT  
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DEPARTMENT OF  
COMMUNITY, TRADE AND  
ECONOMIC DEVELOPMENT  
RESPONSE TO F. STEVEN  
LATHROP'S MOTION TO STAY  
ADJUDICATIVE HEARING

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14 The Department of Community, Trade and Economic Development (CTED) opposes  
15 Intervener F. Steven Lathrop's Motion to Stay Adjudicative Hearing, and urges the Energy  
16 Facility Site Evaluation Council (EFSEC or Council) to deny the motion. The legislature, in  
17 enacting the Growth Management Act (GMA), did not intend to thwart the statutory authorities  
18 of EFSEC's enabling statute (Chapter 80.50 RCW). The request to stay the consideration by  
19 EFSEC of the Application or the applicant's request for preemption unless and until the  
20 applicant complies with all Kittitas County comprehensive plan and development regulations  
21 would duplicate the EFSEC process in direct conflict with the intent of the statute, that is "[t]o  
22 avoid costly duplication in the siting process and ensure that decisions are made timely and  
23 without unnecessary delay." (RCW 80.50.010(5))  
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26 CTED's RESPONSE TO  
F. STEVEN LATHROP'S  
MOTION TO STAY  
ADJUDICATIVE HEARING / 1

TONY USIBELLI, Assistant Director  
State of Washington Department of Community, Trade and Economic Development  
Energy Policy Division  
925 Plum Street SE, Bldg. 4  
Olympia, WA 98504-3173  
(360) 956-2125; Fax: (360) 956-2180  
TonyU@ep.cted.wa.gov

1 Both the EFSEC statute and the GMA statute must be complied with in the permitting  
2 of energy facilities. The EFSEC statute does not give the Council authority to run roughshod  
3 over the GMA or local land use regulations. But neither does the GMA, nor do local  
4 regulations, have the authority to thwart the statutory EFSEC process. The motion asserts that  
5 EFSEC's authority to preempt local regulations ended with enactment of the GMA. The  
6 arguments in support of this assertion are apparently twofold: 1) that EFSEC's authority to  
7 preempt dealt only with regulations promulgated under laws existing at the time of enactment,  
8 or latest amendment, (the motion is unclear on this point), and 2) that the GMA requirements  
9 that state agencies comply with local comprehensive plans and development regulations and  
10 amendments adopted pursuant to the GMA void EFSEC's authority to preempt. Both these  
11 arguments are incorrect interpretations of the law.  
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14 Subsection (1) of the preemption statute, RCW 80.50.110, establishes that any  
15 provision, limitation, or restriction conflicting with the EFSEC statute *in statute law* at the time  
16 of enactment, or any rule or regulation promulgated under such law, be superseded by the  
17 EFSEC statute.

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

23 Subsection (2) establishes that from this time forward (enactment), the state (EFSEC)  
24 preempts the regulation and certification of the *location*, construction, and operational  
25 conditions of any facilities under EFSEC jurisdiction.

1 (2) The state hereby preempts the regulation and certification of the  
2 location, construction, and operational conditions of certification of the  
3 energy facilities included under RCW 80.50.060 as now or hereafter  
4 amended.

5 Subsection (2) is an unmitigated assertion of state preemption in all matters regarding  
6 the locating of jurisdictional facilities. In these two subsections the legislature removed any  
7 conflict with any existing law at the time of enactment through superseding, and took  
8 preemptive control of regulating and permitting the location (and construction and operations)  
9 of any facilities subject to EFSEC jurisdiction. This preemptive control remains a statutory  
10 authority of EFSEC. No subsequently enacted law, including the GMA, has asserted that it  
11 supercedes RCW80.50.110. Such a statutory assertion would be required to void EFSEC's  
12 preemptive authority.

13 EFSEC's standing preemptive authority does not allow the Council to bulldoze its way  
14 over other state laws (like the GMA) or local regulations, whether developed under the GMA  
15 or any other authority. Both the EFSEC statute and EFSEC rules provide for extensive efforts  
16 to take into account the laws, rules, rights and interests of affected parties and jurisdictions.  
17 These efforts represent coordinated planning efforts and respect local comprehensive plans and  
18 development regulations, even if EFSEC has final preemptive authority. Some of these efforts  
19 include:  
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- 21 ■ Statutory requirement to determine consistency with land use  
22 regulations;
- 23 ■ Statutory requirement to seat a local jurisdictional representative as a  
24 member of the Council;
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- 1                   ▪ Statutory requirement to admit local jurisdictions as parties to
- 2                   adjudication;
- 3                   ▪ Statutory requirement to conduct public hearings and an adjudicative
- 4                   process;
- 5                   ▪ Statutory requirement to conduct environmental review; and
- 6                   ▪ Administrative requirement to require the applicant to make a “good
- 7                   faith effort” to resolve inconsistency with land use regulations before
- 8                   making a request that preemption be asserted.
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10           These requirements, among others, demonstrate the degree to which the state attempts  
11 to permit facilities as if preemption were not a standing authority, so that the laws, rules, rights  
12 and interests of affected parties and jurisdictions may be respected to the fullest extent  
13 possible.

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

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3 Respectfully Submitted,

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6 Tony Usibelli, Assistant Director  
7 Energy Policy Division  
8 Department of Community, Trade  
9 and Economic Development  
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