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3 **BEFORE THE STATE OF WASHINGTON**
4 **ENERGY FACILITY SITE EVALUATION COUNCIL**

5 In the Matter of
6 Application No. 2004-1

7 WIND RIDGE POWER PARTNERS, LLC.
8
9 WILD HORSE WIND POWER PROJECT
10

F. STEVEN LATHROP'S BRIEF
IN SUPPORT OF THE
PETITION FOR
INTERVENTION
OF F. STEVEN LATHROP

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12 RCW 80.50.040(1) empowers the council to adopt rules of procedure, and WAC 463-30-
13 400¹ provides for intervention in EFSEC proceedings in a manner similar to that set out in CR
14 24(a) regarding intervention of right. The main difference is that intervention of one having an
15 interest in the subject matter, the protection of which interest may be impaired or impeded, is
16 discretionary with the council as opposed to a right under the court rule. In exercising this
17 discretion, the council "shall consider whether intervention by the petitioner would unduly delay
18 the proceeding or prejudice the rights of the existing parties." WAC 463-30-400. While this

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20 ¹ WAC 463-30-400 reads as follows:

21 On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute
22 confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter
23 and whose ability to protect such interest may be otherwise impaired or impeded. All petitions to intervene shall be
24 verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an
25 interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In
26 exercising discretion with regard to intervention, the council shall consider whether intervention by the petitioner
would unduly delay the proceeding or prejudice the rights of the existing parties. The council may establish a date
after which petitions to intervene will not be considered except for good cause shown. When such a date has been
established, the council will assure that adequate public notice is given.

1 qualification is the same as that for conditional intervention under CR 24(b)(2)², denying the
2 right of intervention where there is even a general interest in the outcome does not meet the due
3 process requirements embodied in CR 24(a). *American Discount v. Saratoga West Inc.*, 81
4 *Wn.2d. 34, 499 P.2d 869 (1972)*. It is unlikely that the application of a discretionary standard
5 would be sustained where one has an interest in the outcome of the action. The appropriate
6 authority to be applied in such case is that dealing with intervention of right.

7 Even if the Council utilizes permissive intervention standards, Mr. Lathrop's intervention
8 petition should be allowed. Case law on the on the subject of permissive intervention holds that
9 a party has a right to intervene in an action either where he has an interest in the matter in
10 litigation, or has an interest in the success of either party thereto. *Moses Lake Homes, Inc. v.*
11 *Grant County*, 299 P.2d 840, 49 Wn.2d 182 (Wash. 1956), *Cascade Timber Co. v. Northern*
12 *Pacific Railway Co.*, 28 Wash.2d 684, 184 P.2d 90; *State v. Inland Empire Refineries, Inc.*, 3
13 *Wash.2d 651, 101 P.2d 975*; *State ex rel. Resburg v. Superior Court*, 168 Wash. 384, 12 P.2d
14 *420*; *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 P. 596; *Muhlenberg v. City of*
15 *Tacoma*, 25 Wash. 36, 64 P. 925. This is consistent with "the trend of recent decisions in other

16 ² The relevant portion of CR 24 provides as follows:

17 (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a
18 statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the
19 property or transaction which is the subject of the action and he is so situated that the disposition of the action may
20 as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately
21 represented by existing parties.

22 (b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action:

23 (1) When a statute confers a conditional right to intervene; or

24 (2) When an applicant's claim or defense and the main action have a question of law or fact in common.

25 When a party to an action relies for ground of claim or defense upon any statute or executive order administered by
26 a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or
made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to
intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly
delay or prejudice the adjudication of the rights of the original parties.

1 jurisdictions toward liberalizing the requirements for intervention in favor of third party
2 practice.” *Fritz v. Gorton* , 8 Wn.App. 658, 659, 509 P.2d 83 (1973).

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4 Mr. Lathrop is opposed to every element of this application and vigorously disputes the
5 concept that this project provides any positive economic development for Kittitas County and
6 has clearly asserted in his intervention petition more than sufficient interest in the subject matter
7 of this application to justify intervention, and those interests will not all be repeated here.
8 Suffice to say that no party to the proceedings has the authority, duty, inclination or ability to
9 represent the interests of Mr. Lathrop, adequately or otherwise. In particular, however, the mere
10 precedents this project will set in this county for similar projects and the absence of any other
11 petitions opposed to this project alone are sufficient grounds. *Fritz v. Gorton*, 8 Wn.App. 658
12 659 509 P.2d 83 (1973).

13 The primary reason for any application to EFSEC, rather than to Kittitas County, is to
14 ultimately have the ability to request preemption of local land use regulations, and there can be
15 no doubt that the applicant on this project intends the same course. This applicant has been this
16 route before, and Mr. Lathrop has sued EFSEC on the grounds that it no longer has any
17 preemption authority as a result of passage of the Growth Management Act. Although the
18 Kittitas County Superior Court has ruled that it lacks subject matter jurisdiction and that issue is
19 on appeal, and, regardless of outcome, there is a court someplace that does have jurisdiction to
20 answer this question. Mr. Lathrop intends to pursue the answer and will, in all likelihood, need
21 to challenge preemption in this application as well.

22 The council allowed the Economic Development Group of Kittitas County, a private
23 local group that purports to support economic development and is clearly in favor of this
24 application, to intervene for reasons that are at best vague and at worst to have yet another
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1 cheerleader for the project at the proceedings.³ Certainly whatever interest this entity allegedly
2 has in the subject matter is no more substantial or compelling than that of Mr. Lathrop. Contrary
3 to the assertions of Ms. Strand, the group she represents has a purpose in the proceedings which
4 is diametrically opposed to that of Mr. Lathrop. For Ms. Strand to propose that she or her
5 “group” can or does represent the position of any individual citizen, let alone Mr. Lathrop,
6 opposed to the project is false, misleading and inaccurate.

7 The determining factors on intervention relate to the delay of the proceedings, the prejudice to
8 the applicant and the ability of the intervenor to adequately participate. Mr. Lathrop has already
9 demonstrated in the Kittitas Valley Wind Power project that he is fully capable of meeting all of
10 these conditions. Although the applicant has expressed its objection, it did not and cannot assert
11 that it will be prejudiced in any way should Mr. Lathrop be granted intervenor status. If Mr.
12 Lathrop is denied intervention, it can only be to eliminate the only negative voice concerning this
13 project.⁴ That would be error.

14 Dated this 7th day of October, 2004

15 Respectfully submitted,

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18 Jeff Slothower WSBA #14526
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23 ³ The Economic Development Group purports to be a “private, non-profit corporation whose mission is to provide
24 leadership that stimulates business and promotes economic opportunities to support the needs of Kittitas County”
25 according to information posted on the organizations web site.

26 ⁴ Friends of Wildlife and Wind Power (Friends) has stated that they are not opposed to the project, only that they
object to certain tower locations based on impacts to Wildlife and the impacts on Friends members ability to enjoy
the benefits of that wildlife.