BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 99-1: Of	**COUNCIL ORDER No. 757**
SUMAS ENERGY 2, INC.	**ORDER ON APPLICANT'S MOTION FOR RECONSIDERATION**
SUMAS ENERGY 2 GENERATION FACILITY	

SUMMARY

PROCEEDINGS: This matter involves an application by Sumas Energy 2, Inc. (Applicant) for certification to build and operate the Sumas Energy 2 Generation Facility (SE2), on a 37-acre site it has chosen in the City of Sumas, Washington. The proposed site is zoned industrial and some light industry. A 230 megawatt (MW) cogeneration facility operated by Applicant's owner is located nearby. The proposed site is situated in central Whatcom County approximately one-half mile south of the United State's border with Canada. The facility, as proposed by the revised application of Sumas Energy 2, Inc., submitted in January 2000, would be a natural gas-fired, combined cycle, 660 MW electric generation facility. The application proposed that the facility would have back-up diesel fuel capability, an associated 230 kV electric transmission line and a natural gas pipeline to the Canadian border.[1]

Following extensive process, including adjudicative proceedings required by statute and governed by the Washington Administrative Procedure Act (chapter 34.05 RCW) and the Council's procedural rules, the Council adopted its Order No. 754 in open public proceedings in Bellingham, Washington, on February 16, 2001. Order No. 754 states findings of fact and conclusions of law based exclusively on the record for decision that was developed during our proceedings. Order No. 754 constitutes the Council's recommendation to the Governor that site certification be denied. On motion by the applicant, the Council agreed to postpone conveying its recommendation to the Governor until it had disposed of an anticipated motion for reconsideration.

On March 5, 2001, Sumas Energy 2 filed a Motion for Reconsideration. On March 30, 2001, various parties (*i.e.,* Counsel for the Environment, City of Abbotsford and Abbotsford Chamber of Commerce, Whatcom County, Constance Hoag, Department of Ecology, NW Energy Coalition and Washington Environmental Council, Energy Division of the Washington State Office of Trade and Economic Development, and the City of Sumas) filed responses. Except for the response by the City of Sumas, none of

[1] Although the transmission line and gas pipeline would extend into Canada, our jurisdiction ends at the Canadian border.

these Parties support the Applicant's Motion and most of the Responses affirmatively oppose the Motion.

DISPOSITION: The Council denies the Applicant's Motion for Reconsideration. The motion is not well-taken to the extent it urges that the Council erred in assessing the factual record or in applying the law. Indeed, for the most part, the motion is more in the nature of a proposal to significantly alter the project plan so that it is, in fact, a different project from that which the Council considered in its Order No. 754. As further discussed below, governing laws do not permit the council simply to accept these changes without an adequate supporting record or opportunity for parties to be heard.

However, the Council also finds that the significant changes Applicant proposes to the project via its Motion appear at first blush to address many, if not all, the factors that led the Council to recommend against certification. It is consistent with the spirit of EFSEC's governing statutes and rules to allow the applicant to withdraw its current proposal and submit a second revised application, which includes the various amendments it suggests in its Motion. The Council could then consider the revised application on the basis of the current record, supplemented by further evidence developed by means of appropriate process that will ensure all parties' legal rights are protected. The Council believes such process could be conducted expeditiously and completed within a matter of months. Upon completion of the suggested process, the Council would be in a position to determine fairly, in a legally sustainable manner, whether the revised application proposes a project that is suitable for certification at the site proposed.

In the interest of efficiency, therefore, before sending its recommendation to the Governor the Council will grant the applicant an additional period of time to decide whether to withdraw its current application in anticipation of filing a new application with its suggested changes.

MEMORANDUM

Summary of Parties' Arguments

***Motion for Reconsideration*:** The Applicant filed its Motion for Reconsideration on March 5, 2001. The Motion states that it is based

> on two basic premises. First, the Council's conclusion that increasing the state's generating capacity through the development of privately owned "merchant" power plants provides little, if any, public benefit is contrary to the Council's governing statute, the Council's prior decisions, and the evidence presented in these proceedings. Second, the Council could address the environmental concerns articulated in Order No. 754 by imposing conditions and requirements in the Site Certification Agreement (SCA).

Motion for Reconsideration at 2. Quoting selectively from Order No. 754, the Applicant purports to distill from our extensive discussion of need and consistency an understanding that

> the Council has essentially concluded that increasing generating capacity in Washington through the development of privately-owned "merchant" power plants provides no benefit to the state or region, and, therefore, the Council will not recommend certification of a "merchant" power plants (sic) unless it has virtually no impact on the environment and fully internalizes its environmental costs.

Id. at 3. In the next two sections of its Motion, the Applicant argues that "the Council's conclusion" is inconsistent with governing law "and the overwhelming evidence presented during these proceedings." The Applicant's arguments are discussed in more detail below.

The Applicant itself would put this asserted inconsistency between Order No. 754, and our governing law, our prior decisions, and the evidence to one side in favor of a new proposal by the Applicant. The Applicant now says that it "is prepared to accept as conditions in the Site Certification Agreement 'need and consistency requirements' similar to those EFSEC has included in previous SCAs." *Id. at 8.* The Applicant then states that it will commit a portion of its capacity in specific ways that would demonstrate energy benefits that are consistent with the policy considerations expressed by the Washington legislature through RCW 43.21F.015(1) – (4) and the intent expressed in RCW 80.50.010.

In this same line of argument, the Applicant also urges us to consider a position it now takes, and to consider certain new evidence of changed circumstances in the power markets. In particular, the Applicant says that it "always hoped to secure long-term power purchase agreements for a significant portion of the output of the facility prior to beginning construction, but the nature of the power market in recent years made power purchasers extremely reluctant to enter into long-term power purchase agreements." *Id. at 9.* The Applicant's rationale for this change in position[2] is that "recent instability in the power market . . . has made long-term power purchase agreements more attractive..." and that "the market has changed such that SE2 now believes it may be possible to comply with the so-called 'need and consistency' requirements." *Id. at 9-10.*

In its second premise the Applicant argues that the Council could address the environmental concerns articulated in Order No. 754 by imposing conditions and requirements in the Site Certification Agreement. The Applicant asserts that it does not agree that the evidence supports the Council's findings and conclusions that led the Council to recommend against locating the proposed facility in Sumas. The Applicant devotes much of this part of its Motion to elaborating its view that the Council should

[2] At the time of hearing, the Applicant's position on this point was that if we imposed a requirement that SE2 enter into long-term agreements, the project would not be viable.

reverse its recommendation and impose a series of conditions to support a favorable recommendation.

Again, much of this line of argument depends on the suggestion that the Council should impose conditions to address its concerns. To that extent, the argument is not that we misperceived the evidence or erroneously applied the law to the facts presented. Rather, the applicant suggests that if we would now simply consider a project that is different from what the Applicant proposed though its application and subsequent advocacy, we could, and should, reach a different result.

This section of the Applicant's Motion for Reconsideration does include some argument that is not tied to its suggestions for conditions. This argument, however, depends in significant part on new evidence that the Applicant presents for the first time via attachments to its Motion. Yet, incongruously, the Applicant also argues that there is no need for us to reopen the record at this juncture.

The balance of the Applicant's arguments that the Council's findings and conclusions concerning various environmental and other impacts are "incorrect" in one fashion or another raise no specific points of error, but are more in the nature of characterizations of certain evidence or even simple rhetoric. We see little reason to summarize such points here.

Responses: The common theme of the arguments presented in opposition to the Applicant's Motion for Reconsideration is that what the Applicant proposes by its Motion is procedurally improper and legally infirm. With respect to the Applicant's first line of argument, for example, Whatcom County responds that SE2's proposal to commit a certain portion of its capacity to long-term contracts, a proposal steadfastly resisted by SE2 through the conclusion of the briefing prior to Order No. 754, is both "untimely" and "outside the permissible scope of a reconsideration motion." *Whatcom County Response at 4.* Citing WAC 463-42-690, which requires that amendments to applications be made at least 30 days prior to the beginning of the adjudicative hearing, Whatcom County asserts that the Applicant is attempting by its suggestion for a condition "to backdoor an amendment to their application in the guise of a motion for reconsideration." *Id.* Whatcom County argues that this "is not permitted under the Council's procedural rules and must not be rewarded." *Id.*

Whatcom County argues that

> SE2 has reformulated their application and offer a series of new and different ideas as to how their plant might be configured and under what conditions they might operate (such as now volunteering for long term contracts). For the first time, and long after their closing brief to the Council, they offer new concessions and design changes and none of these concessions or changes are a part of the record in this matter. It is all new evidence. In essence, the Council is being asked to review a new application presented in the guise of a motion for reconsideration.

Whatcom County Response at 10. Whatcom County submits that the Applicant should be required to file a revised application and argues that "[t]he Council must be mindful that the concepts of due process and fundamental fairness which spring from our Constitution are applicable to hearings conducted under the WAPA [Washington Administrative Procedure Act]." *Id. (citing Sherman v. State,* 128 Wn.2d 164, 905P.2d 355 (1995); State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 456 P.2d 322 (1969)*).*

Similarly, the City of Abbotsford and Abbotsford Chamber of Commerce (Abbotsford) begin by arguing that "[a] motion for reconsideration is not the time for an applicant to suggest new modifications to its project." *Abbotsford Response at 1.* Abbotsford, too, points to our procedural rules that require that an application must "reflect the best available current information and intentions of the applicant" and that amendments must be filed no later than 30 days prior to hearing. *Id. (citing WAC 483-42-690).* Abbotsford raises its concern that if we were to consider the Applicant's motion on its merits, then "[t]he adjudicative process would be turned into a bargaining process, contrary to its intended form and function." *Id.* Finally in this line, Abbotsford argues that our governing law "makes plain the avenue available to an applicant whose initial proposal has been rejected." *Id. at 4.* Abbotsford quotes from RCW 80.50.100(3), which provides that rejection of an application "shall not preclude submission of a subsequent application for the same site on the basis of changed conditions or new information." *Id.*

Counsel for the Environment's (CFE) argument follows a similar course, citing to us the same authorities. CFE points out that the Applicant did, in fact, follow the statutory and rule procedures in the first instance, withdrawing its original application for a gas-fired only facility and replacing that in January 2000 with a proposal to build a dual-fuel capable plant. CFE argues that it was this reconfigured project to which the Parties devoted significant resources and effort during the course of our adjudicative hearing and other proceedings. CFE argues that the motion is a petition to amend the application after fact-finding has been completed and that changing the project at this late date severely prejudices the rights of the parties. Specifically, CFE argues that she is in no position to evaluate "whether the changes proposed [via the Applicant's motion] would address all her concerns . . . ." *CFE Response at 4.* In summary, CFE argues that

> [t]he applicant offers no basis for why it should not be held to the requirements of WAC 463-42-690. This rule exists so that all parties have an opportunity to adequately prepare. It is ludicrous to suggest that the time for reconfiguring the proposal can be long past the 30-day limit as set forth in the WAC. There is no provision for amendment of an application post deliberation and a motion for reconsideration should not be used to attempt to circumvent the reasonable limits imposed by the procedural rules.

Id. CFE argues that there are inadequacies with many of the conditions Applicant proposes and that further hearings would be required on each of the Applicant's

proposed changes. Like Abbotsford, CFE argues that the proper course for the Applicant to follow at this juncture is to file a new application based on changed conditions or new information.

Constance Hoag focuses portions of her response on the "two premises" upon which the Applicant bases its Motion. She argues that "[t]he first [premise] assigns a conclusion to the Council which is not part of the Order." *Hoag Response at 5.* She points out that Order No. 754 does not say, as the Applicant asserts, that "increasing the state's generating capacity through the development of privately owned 'merchant' power plants provides little, if any, public benefit." *Id. (quoting from Applicant's Motion at 2).* Ms. Hoag quotes from various parts of Order No. 754 to emphasize her argument that Applicant's characterizations of the Order are "straw man arguments." *Id. at 1.* With respect to the Applicant's second premise, Ms. Hoag argues in the same vein as the other Parties that "[t]he applicant is suggesting a changed application." *Id. at 5.*

The Washington State Department of Ecology argues that "[g]iven the applicant's proposed changes to the project . . . the Council should require the applicant to file an amended application incorporating all of its proposed changes." *Ecology Response at 1.* Ecology urges that the public should be afforded an opportunity to comment "on those aspects of the project related to air and/or water quality[,]" consistent with the requirements of "federal and state Clean Air and Clean Water Act requirements." *Id.* Ecology argues that "[w]hile the applicant asserts that the modifications it offered will reduce the project's overall impacts to the environment, that claim cannot be verified until the proposed changes are scrutinized by the Council, the intervening parties and the public." *Id.*

The Energy Division of the Washington State Office of Trade and Economic Development (OTED) states that it takes no position on the Motion for Reconsideration. However, OTED argues that the Motion "introduces substantial changes to the project and new evidence into the record." *OTED Response at 1-2.* On this basis, OTED urges that the Parties and the Council "should be afforded a full opportunity for examination and response to the applicant's new information, proposed changes to the project, and other relevant issues." *Id. at 2.* OTED outlines five specific points it believes should be considered in further proceedings, including, among others, "the applicant's proposal to abandon diesel backup generation . . ." and the proposal by the applicant to accept need and consistency requirements[.]"

The Northwest Energy Coalition and Washington Environmental Council do not argue against reconsideration, but ask that additional conditions be imposed in the course of any such reconsideration. Likewise, the City of Sumas urges the Council to reconsider certain aspects of Order 754 relating to water quality and quantity and suggests that new hearings may be required on air permitting issues.

Council Discussion and Decision: As related above, the Applicant bases its Motion for Reconsideration "on two basic premises," *Motion for Reconsideration at 2.* We will address each separately.

Energy benefits of proposed plant.

Applicant's first premise is that the Council misapplied its governing statutes to the facts insofar as the Council took account of the evidence concerning SE2's asserted energy benefits. The starting point of the Applicant's argument is that

> the Council has essentially concluded that increasing generating capacity in Washington through the development of privately-owned "merchant" power plants provides no benefit to the state or region, and, therefore, the Council will not recommend certification of a "merchant" power plants (sic) unless it has virtually no impact on the environment and fully internalizes its environmental costs.
>
> * * *
>
> the Council . . . bases its ruling on the premise that increasing [power generating] capacity through the development of privately-owned "merchant" plants would provide no benefit to the state or region.

Motion for Reconsideration at 3. We decline to speculate whether the Applicant's purported "understanding" of Order No. 754 reflects a genuine misunderstanding of our findings, conclusions, and reasoning, or is, as suggested by Ms. Hoag, feigned in an effort to set up the proverbial "straw man" that can be easily toppled by the breeze of misdirected advocacy. Either way, we emphasize the fundamental error of the Applicant's argument. Had the Council intended to take the perspective the Applicant attributes to us, the Council certainly could have, and would have, made its view perfectly clear.

In Order No. 754, we discussed at considerable length the balancing test that is embodied in the concept of "need and consistency." *Order No. 754 at 12-16.* As described there, "need and consistency analysis is a delicate and difficult task in practice . . . " Our analysis involved consideration and weighing of evidence on a host of factors, both objective and subjective. We did not ignore in that balance the contribution the Applicant promised through its testimony to make to the widely recognized need for additional generation capacity in the Western states power grid. We expressly found that

> The Applicant has shown that the proposed plant would provide energy benefits in the form of mitigating to some extent forecasted energy and capacity constraints, and contributing to reliability on the Western states power grid generally. However, the Applicant has not shown that construction and operation of the plant will confer direct benefits on any identifiable segment of that market (for example, the citizens of Washington State) or lead to lower energy costs in the state or regionally.

Order No. 754 at 16. Under our need and consistency analysis, the promised contribution of the proposed plant shown by the record in this case is not ignored as the Applicant's Motion argues. As should be clear from our extensive discussion in Order No. 754, the evidence that the Applicant presented concerning energy benefits was simply not compelling enough to permit its location in an environmentally sensitive area. This evidentiary standard might have been met, for example, through a commitment by the developer to provide reasonably priced power to consumers in the vicinity of the plant or even to consumers in Washington State, or the Pacific Northwest. Alternatively, among other ways to show a greater energy benefit, the Applicant might have produced evidence that showed that this plant would contribute to reduced energy costs or confer some other distinct energy benefit upon the region. Because the Applicant elected to make no such commitment or produce such evidence, promising only to sell to the highest bidder anywhere under relatively short-term arrangements, the Applicant's energy contribution evidence simply weighed less heavily in its favor than it otherwise might have done.

Contrary to the Applicant's assertion in its Motion, we also did not determine in our Order No. 754 that the promised contribution of the proposed plant is so slight that it would be necessary for the Applicant to internalize and bear 100 percent of its environmental costs. In fact, we expressly found in Order No. 754 that even the relatively ill-defined energy benefits promised by SE2 are adequate to "permit the costs of a modest amount of environmental degradation to remain externalized . . . ." *Order No. 754 at 16.*

We emphasize in this connection, as we did in Order No. 754, that EFSEC's decisions require the Council to balance a complex array of benefits and costs that include economic, environmental, social, and other factors. The Council devoted many hours of careful study to the evidence presented and found that, on balance, the project, as proposed, should not be approved for location in Sumas, Washington. The Applicant's mischaracterization of the premises expressed in our Order is misguided.

The Council finds that the Applicant has misunderstood or mischaracterized the Council's findings and conclusions regarding need and consistency. The Council declines to reconsider its decision on this issue. We do not overlook the Applicant's new offer to change its application by agreeing to sell power under long-term contracts and meet other conditions advocated by the Energy Division of the Office of Economic Development during our hearings. But, by offering the change now, rather than during the hearings, the Applicant has deprived the other parties of their opportunity to respond to the Applicant's changed position. We cannot countenance such process by granting the Motion for Reconsideration, though we do provide through this Order a means by which the Applicant's changed position can be fully, and fairly, considered.

Conditions and mitigation measures.

The Applicant's second line of argument, that the Council can and should address the various concerns articulated in Order No. 754 by imposing conditions and requirements in a Site Certification Agreement, is more meritorious. We do not fundamentally disagree with the Applicant on this point. Indeed, the Council is authorized by statute to impose conditions on the issuance of a Site Certification Agreement and, in many prior cases, the Council has required conditions as part of a site approval recommendation to the Governor.

The difficult question we faced in this proceeding, however, was to what degree the Council may condition a recommendation for approval before it becomes, in essence, a different project. The Applicant perceives correctly that the scales of decision were tilted against approval by the proposal to include diesel back-up fuel burning capability. That aspect of the project raised concerns in several areas, including air impacts, water quality impacts, fire hazard, excessive truck traffic and potential for spills, wetlands impacts, flood impacts, and impacts on oil supply and price. *Order No. 754 at 8.* We considered carefully whether we could impose a condition that the Applicant remove the diesel back-up fuel capability and associated facilities. The majority of the Council was, and remains, convinced that the record that was before us at the time we deliberated did not include evidence that this would be a viable condition to impose. It appeared to the majority of the Council, from the evidence presented by the Applicant, that such a condition would be tantamount to a disapproval masquerading as an approval. This, the majority of the Council was unwilling to do.

In addition, because of the Applicant's insistence at hearing that the diesel fuel back-up option was essential to the project, the Council did not have an opportunity to ensure a fully developed record to support a reasoned decision on the question whether Sumas is a suitable site for a gas-only facility. Neither the Parties, nor the Council, pursued with the various expert witnesses the implications such a different project might have in terms of its environmental and other impacts. Nor did the public have an opportunity to consider and share with the Council its views on the implications of operating this plant exclusively on gas.

Now, the Applicant informs us for the first time through its Motion for Reconsideration that back-up diesel fuel capability is not essential. The Applicant invites the Council to impose a condition that this feature of the project be eliminated as a means to address some, if not all, of the Council's major concerns about the suitability of this project for the site where it is proposed to be built. We are open to the idea in principle that we should consider such a project design, but we also believe that the Council is legally constrained from granting such relief on the Applicant's Motion for Reconsideration.

The applicant also committed to making several additional significant changes or mitigation measures to meet concerns that were expressed by the Council in Order 754. Because of the conclusion we reach in this order, we will not address each of these to determine whether or not they could or should have been included as conditions in the original order. However, the changes appear to be largely positive and, as discussed below, worth pursuing further in the proper forum.

The parties responding to the Applicant's motion cite a compelling body of caselaw to suggest that a motion for reconsideration is not a proper vehicle to introduce new evidence that would lead to a different result. While the Council has some flexibility to reconsider its orders for a number of reasons, the extent of the changes and number of questions that they raise point to a conclusion that the second half of the applicant's "motion for reconsideration" is, de facto, a proposal to amend the project application. The Council therefore examined the extent to which an amended application would be permissible after the conclusion of an adjudicative hearing.

WAC 463-42-690, sets forth the conditions for amending an application. It provides in relevant part:

> (1) Applications to the council for site certification shall be complete and shall reflect the best available current information and intentions of the application.
>
> (2) Amendments to a pending application *must be presented to the council at least thirty days prior to the commencement of the adjudicative hearing, except as noted in subsection (3) of this section.*
>
> (3) *Within thirty days after the conclusion of the hearing*, the applicant shall submit to the council, application amendments which include all commitments and stipulations *made by the applicant during the adjudicative hearings.*

(Emphasis added.) The changes proposed by the Applicant, if interpreted to constitute amendments to the application, do not fall within either of the above provisions for amendments. The rule is not a mere technicality. The purpose of this rule is to avoid surprise to the other parties to the adjudication and to allow both the parties and the public to have an opportunity to adequately prepare and present their positions.

Had the changes that the Applicant now proposes been forthcoming during the adjudicative proceedings, other parties could have responded and EFSEC could have made determinations based on input from all parties on each issue. However, the Applicant waited until the record had closed and in its post-hearing brief offered to reduce the size of the diesel oil tank. The late offer foreclosed the opportunity of other parties to address or offer witnesses on the effects of that proposal. Now, in a pleading styled as a motion for reconsideration, the Applicant offers further significant changes to the project, including, most significantly, elimination of the diesel back-up fuel facilities, and asks the Council to "reconsider" its decision based on these post-hearing proposed

changes. The proposed changes are numerous and substantial and EFSEC's rules prohibit such changes at this stage of the proceedings.

The Applicant's motion for reconsideration proposes a significantly different project and argues that the other parties should not be afforded an opportunity to respond to the reconfigured project. At the time that the Applicant submitted three new pieces of evidence, it argued that the hearing need not be reopened to allow other parties to respond to this newly submitted evidence or to offer evidence relating to the proposed changes to the project.

Acquiescing to such a proposal would serve no one. It would raise serious questions regarding lack of due process and unlawful or improper procedure. For the Applicant to submit new evidence to this Council while it simultaneously argues that the record need not be reopened or any further hearings held is to misunderstand or ignore the concept of fair adjudicative procedure. Some parties have alleged that the new factual evidence submitted by the Applicant has been misrepresented or distorted by the Applicant. The problem with considering any such submission is that it is offered after the record is closed and the factual material has not been subjected to the scrutiny of cross-examination. Other parties would no doubt (indeed, they have informed us that they would) appeal any such process as a violation of due process and as illegal procedure in violation of our own rules.

The Council declines to reconsider its decision and is compelled by established rules and by fundamental fairness to deny this motion for reconsideration insofar as it requests a new decision on a substantially changed project. Granting Applicant's motion would undermine the integrity of the system under which all parties have proceeded in good faith.

For the reasons discussed in the above two sections of this order, the motion for reconsideration is denied.

Delay in transmittal to governor and opportunity to submit revised application.

As discussed above, applicable procedural requirements and the principles of due process and fairness compel us to deny the Applicant's motion for reconsideration. However, that is not necessarily the end of the process available for considering the Applicant's proposals. The Council also considered the spirit of our guiding statutes and our rules to determine how best to consider the changes that the Applicant is proposing. In particular, the Council finds that RCW 80.50.100, which governs the Council's responsibilities to the Governor, contemplates that the Council's recommendation should be based on the best information available to the Council concerning the project. Further, section (3) of that statute, while not directly applicable, seems to encourage the development of new proposals "on the basis of changed conditions or new information."

We are persuaded that the Applicant's revised project proposal, as outlined in its Motion for Reconsideration, should be considered on its merits.

The Council believes that, given the commitments the Applicant is now apparently willing to make, the interests of efficiency would best be served by transmitting a recommendation to the Governor that is based on the changes that the Applicant is proposing. The Council is therefore willing to delay transmitting its recommendation to the Governor until these new changes have been adequately explored. As discussed above, however, the only avenue available to the Applicant for doing so is through a new application, since the alternative of amending the existing application is no longer an option under WAC 463-42-690.

The Council proposes that if the Applicant voluntarily withdraws its current application and re-files an application with the modifications proposed in its motion for reconsideration, the Council will immediately thereafter schedule a prehearing conference to establish an abridged process to consider the revised proposal. This process necessarily will include some additional opportunity for evidentiary hearings and may require some additional opportunity for public comment to be received.[3] However, we believe such process can be undertaken and concluded in a relatively brief period of time – that is, in a matter of months. It appears that the record on the existing application includes much of what we would consider in evaluating the revised project. That record can be adopted for purposes of a new proceeding and would only need to be supplemented so that the implications of the new proposed facility configuration could be fully understood. Similarly, it may only be necessary to issue a supplemental environmental impact statement.

The Applicant also seeks a method to present to the Council what it perceives to be changed circumstances in the power market since the time that the record in this case was closed. The Council is open to considering the Applicant's revised position on need and consistency in the context of further proceedings that will give all parties an opportunity to address such new circumstances as might cause us to weigh differently the energy benefits promised by SE2 in its new proposal.

The Council will grant the Applicant five (5) business days from the effective date of this order to make a decision whether to withdraw its current application with the intent to substitute a revised application. (The revised application itself can be submitted at a later date within a reasonable period of time.) If the Council does not hear from the Applicant to this effect within five (5) business days, the Council will assume that the Applicant chooses to have the Council forward Order 754 to the Governor.

---

[3] These would most likely include hearings on air and water permits for the revised proposal. The Council will direct its consultant to reinitiate work on these permits if and when the Applicant files a revised application.

We caution that the Council has made no decision that a project, reconfigured as proposed via the Applicant's Motion for Reconsideration, will secure a positive recommendation at the conclusion of the expedited process we suggest here. We commit only to hear all sides of the matter impartially and to make a decision based on a full record, fairly developed, with consideration for the due process rights of all parties.

We are convinced, on the basis of the motion for reconsideration and the responses to that motion, that the procedure we suggest above is the best, and perhaps the only legally sustainable, alternative to simply denying the motion for reconsideration and submitting to the Governor our Order No. 754 recommending that the application be denied. Our processes are flexible, but constrained by legal requirements. We do not have unfettered discretion to proceed in any fashion we might choose. It is in no one's interest for us to employ questionable procedure and grant reconsideration when we are convinced that proper grounds for reconsideration have not been presented.

ORDER

THE COUNCIL ORDERS That Sumas Energy 2's Motion for Reconsideration is denied.

THE COUNCIL ORDERS FURTHER That Sumas Energy 2 may withdraw its current application and submit within five (5) business days of the date of this Order a statement of its intent to file a revised application consistent with its proposals as stated in its Motion For Reconsideration.

THE COUNCIL ORDERS FURTHER That if Sumas Energy 2 does not withdraw its current application and submit within five (5) days of the date of this Order a statement of its intent to file a revised application consistent with its proposals as stated in its Motion For Reconsideration, then, consistent with the discussion in the body of this Order, the Council will forward Order 754 to the Governor.

DATED at Olympia, Washington and effective on this 20th day of April 2001.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

Deborah J. Ross, Chair
Energy Facility Site Evaluation Council