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

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| **In the Matter of Application No. 99-1: of**<br><br>**SUMAS ENERGY 2, INC.**<br><br>**SUMAS ENERGY 2 GENERATION FACILITY** | **COUNCIL ORDER NO. 758**<br><br>**ORDER ON WHATCOM COUNTY'S MOTION FOR RECONSIDERATION OF COUNCIL ORDER NO. 757** |

**Nature of Proceeding:** This matter involves an application to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Sumas Energy 2 Generation Facility, a natural gas-fired electrical generation facility located in Sumas, Washington.

**Procedural Setting:** The Council announced its findings of fact, conclusions of law and order recommending denial of site certification for the Sumas 2 Generation Facility on February 16, 2001. The Council granted the Applicant's request to delay transmittal of that recommendation to the Governor until the Applicant had an opportunity to submit a motion for reconsideration.

On March 5, 2001, the Applicant filed its Motion for Reconsideration. Among other things the Applicant offered by its motion to change the project in a number of ways including offering to remove the ability to fuel the project with diesel oil, agreeing to sell power on long-term contracts, agreeing to an expanded level of greenhouse gas mitigation, agreeing to mitigate for residual air and water impacts, and several other changes. In response, several parties argued that changes of that magnitude could not legally be made without further adjudicative hearings.

On April 20, 2001, the Council issued its Order No. 757 disposing of the Applicant's motion. The Council agreed with the intervenors that it would be necessary for the parties and the public to have an opportunity to be heard if the Council is to consider ordering project changes of the magnitude suggested by the Applicant. However, the Council also recognized in Order No. 757 that the proposed changes may address many of its concerns and are worth serious consideration.

The statute that governs the Council's responsibilities contemplates that the Council's recommendation to the Governor should be based on the best information available. The Applicant asserts in its Motion for Reconsideration that its project can be revised in light of changed circumstances that arose after the close of the existing record, but prior to transmittal of the Council's recommendation to the Governor. The Council thus considered that if the Applicant could prove its assertion, a simple denial of its motion might result in a recommendation to the Governor that was not, in fact, based on the best information available.

Under these circumstances, to ensure administrative efficiency and the best use of all parties' resources, Order No. 757 provides that if the Applicant were to voluntarily withdraw its current application and re-file an application with the modifications proposed in its Motion for Reconsideration, the Council would schedule a prehearing conference to establish a fair process to consider the project in light of the modifications. The Council gave the Applicant five days to decide whether it wished to withdraw the current application and substitute a revised application. The Council cautioned that it had made no decision that a project, reconfigured as proposed via the Applicant's Motion for Reconsideration, would secure a positive recommendation at the conclusion of the process, but committed 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.

In response to Council's Order No. 757, on April 27, 2001, the Applicant informed the Council that it did intend to submit a second revised application, consistent with the conditions set forth in its Motion for Reconsideration.

**Motion for Reconsideration of Council's Order No. 757:** On May 1, 2001, the Council received a motion from Whatcom County captioned "Motion for Reconsideration of Council Order No. 757." Whatcom County argues that the Council's decision to allow the Applicant to withdraw its prior application and submit a new or revised application is tantamount to allowing SE2 to amend its application, which is not permitted under WAC 463-42-690. Whatcom County argues that the Council lacks legal authority to review a new or revised application. The County argues that, once an application is submitted for review by the Council and the Council has concluded its adjudicative hearings and issued an order containing a recommendation to the Governor, that the order must be submitted to the Governor. The County argues that should the Governor deny the application, then, and only then, may an applicant submit a subsequent application for the same site and at that time the Council could receive and process a new or revised application.

**Responses:** Constance Hoag and the Counsel for the Environment join in the County's motion. Ms. Hoag agrees with the County that the record should not be reopened. She asserts that there are no extraordinary circumstances in this case that would warrant consideration of a revised application at this time. Counsel for the Environment (CFE) states that while she "applauds the EFSEC's effort to attempt to be responsive to the pressures associated with the NW energy situation", the Council "needs to be mindful that as a creature of statute it has only those powers conferred by statute either expressly or by implication." CFE argues that once the Council publishes a recommendation, the only option is to transfer it to the Governor.

The Applicant responds that EFSEC's statute and regulations allow the Council broad procedural latitude to gather all information necessary to evaluate an application, to ensure appropriate public participation, to pursue courses of action that balance the pressing need for increased energy facilities and the broad interests of the public. The Applicant argues that Council Order No. 757 is well within this authority and furthers EFSEC's purposes and policies.

The City of Sumas agrees with the Applicant that, no party or interest would be prejudiced by allowing the revised proposal to be considered and that the interests of efficiency and economy

support the Council's decision to consider the revised proposal. The City of Abbotsford and the Abbotsford Chamber of Commerce also do not object to a procedure that would allow the Council to reconsider proposed modifications of the SE2 plant using a process that takes advantage of the analysis and evidence already of record so long as the process provides interested and affected persons and entities reasonable opportunities to be heard.

**Council Discussion and Decision:** The Council has considered the positions of all parties and concludes that the procedure described in Council Order No. 757 is appropriate and proper under the circumstances of this case. The process will allow the fair and efficient consideration of a revised SE2 proposal on its merits and permit the Council to fulfill its statutory duty to provide a recommendation to the Governor on the basis of the best information available. Accordingly, the County's Motion for Reconsideration of Council Order No. 757 is denied.

Contrary to Whatcom County's argument, the process delineated in Order No. 757 does not provide for an amendment of an existing application as contemplated in our rule, WAC 463-42-690; it allows for the withdrawal of the prior (revised) application and the submission of an application which is a complete and integrated document describing the project as presently configured by the Applicant. The purpose of WAC 463-42-690 is to control late piecemeal amendments to an application 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 so that the Council can make an informed recommendation to the Governor. It is with just these goals in mind that the Council has required that the Applicant withdraw its application that had been submitted in January of 2000, and submit a complete application that complies with the requirements of chapter 463-42 WAC. Council Order No. 757 expressly provides that there will be such further process as is necessary to safeguard the rights of all parties. The Council will not consider proposed changes to the project that other parties to adjudicatory proceedings have not had an opportunity to consider and address on the record in accordance with the requirements of due process.

Our decision in Order No. 757 was driven by principles of law and equity, and pragmatism. It would be extraordinarily wasteful of the parties' and the Council's resources to blindly recommend denial of this project to the Governor when the Applicant wishes to withdraw its application and submit a revised application that may meet the stated needs of many of the parties and the public. Indeed, under our statutory scheme, the only thing that would accomplish would be to delay the process of decision making on the merits of the revised project.

The EFSEC statute gives the Council the power:

> To prescribe the form, content, and necessary supporting documentation for site certification;
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> To receive applications for energy facility locations and to investigate the sufficiency thereof; ...

RCW 80.50.040(4) and (5).

The statute also provides:

> The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, *or such later time as is mutually agreed by the council and applicant.*

RCW 80.50.100 (emphasis added).

Nothing in the statute that governs EFSEC prohibits the Applicant from withdrawing a prior application and submitting a complete revised application. The statute makes clear that *even after* the Governor rejects an application, an applicant may submit a "subsequent application for the same site on the basis of changed conditions or new information." RCW 80.50.100 (3). This Applicant has informed the Council that the energy market has changed so substantially since the time of the prior application that they now can offer to build the proposed facility without diesel fuel, offer long term contracts that may assist in stabilizing the energy markets, and make other changes requested by other parties to the case. The Applicant clearly can resubmit an application for the same site after the Governor denies siting under RCW 80.50.100(3), and nothing prohibits a revised application for the same site prior to the Governor making such a decision. This Council will not insist on a procedure that serves no purpose but to delay a fully informed decision by the Governor.

The County also argues in its Motion that allowing the process provided by Order No. 757 would frustrate the settlement process embodied in the Council's procedural rules. The Council takes the opposite view and encourages the parties to meet and seek to reach settlements and stipulations pursuant to WAC 463-30-250. Indeed, it may be more likely that parties can resolve past differences now that the Applicant has offered through its Motion for Reconsideration to make changes in the project expressly advocated by other parties through their briefs and other argument during prior phases of this proceeding.

## ORDER

THE COUNCIL ORDERS that Whatcom County's Motion for Reconsideration of Council Order 757 is denied.

DATED at Olympia, Washington and effective on this 16th day of May, 2001.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

Nan Thomas

Nan Thomas, Administrative Law Judge