

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

PREHEARING ORDER NO. 1
COUNCIL ORDER NO. 777

PREHEARING ORDER: GRANTING, ON
CONDITION, PETITIONS FOR
INTERVENTION; ADOPTING HEARING
GUIDELINES AND TAKING FURTHER
ACTION

Nature of the Proceedings:

On January 13, 2003, SAGEBRUSH POWER PARTNERS, LLC (herein "Sagebrush" or the "Applicant"), submitted application No. 2003-01 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the Kittitas Valley Wind Power Project (herein the "Project"), an approximately 182-megawatt wind turbine electrical generation facility, consisting of 121 wind generation turbines. The proposed Project will be located within Kittitas County, on the ridges on either side of Highway 97, roughly 12 miles northwest of the city of Ellensburg.

Associated with the Project will be underground electrical transmission lines and a short overhead transmission line, sited on and parallel with the right-of-way and overhead transmission lines of Puget Sound Energy. The project will also include access roads, foundations, grid interconnection facilities, one or two substations, an operations and maintenance center and associated supporting infrastructure and facilities, including approximately 121 wind generation turbines which measure approximately 249 feet at tip height, with a 197 foot rotor diameter.

EFSEC is conducting an environmental review of this Project and will be issuing a draft Environmental Impact Statement for public comment under the Washington State Environmental Policy Act (SEPA). EFSEC will also conduct an examination of the project through a formal adjudicative proceeding.

Procedural Setting:

As noted, on January 13, 2003, "Sagebrush" submitted application No. 2003-01 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the Kittitas Valley Wind Power Project. On May 16, 2003, the Council issued a Notice of Intent to Hold Adjudicative Proceeding and Notice of Opportunity and Deadline to File Petitions for Intervention by June 16, 2003, Applicant's Objections or Response orally at the First Prehearing Conference on June 26, 2003, and Notice of Intent to Hold Prehearing Conference on June 26, 2003, with Petitioners' for Intervention replies to the responses of Applicant to any Petitions for Intervention to be submitted orally at the First Prehearing Conference.

The Council convened the first prehearing conference in the adjudication regarding this matter on June 26, 2003, pursuant to due and proper notice to all appropriate persons. The Conference was held before Council Chair Jim Luce, and Council members: Richard Fryhling (Community, Trade & Economic Development), Charles Carelli (Department of Ecology), Sue Patnude (Department of Fish & Wildlife), Tony Ifie (Department of Natural Resources), Tim Sweeney (Utilities and Transportation Commission), Patti Johnson (Kittitas County) and the Administrative Law Judge, Julian C. Dewell.

Participants:

The following persons participated in the prehearing conference:

Representing the Applicant: **SAGEBRUSH POWER PARTNERS, LLC**, by **Darrel Peeples**, Attorney at Law, Olympia, Washington.

Counsel for the Environment: **Michael Lufkin**, Assistant Attorney General, (AAG), Olympia, Washington.

Petitioners for Intervention:

Washington State Department of Community, Trade & Economic Development: **Mark Anderson**, Senior Energy Policy Specialist, Department of Community, trade and Economic Development, Olympia, Washington.

Kittitas County: **James E. Hurson**, Deputy Prosecuting Attorney, Ellensburg, Washington.

Renewable Northwest Project: **Susan Elizabeth Drummond**, Seattle, Washington.

Phoenix Economic Development Group: **Debbie Strand**, Executive Director, Ellensburg, Washington.

Sierra Club, Cascade Chapter: **Louise Stonington**, Seattle, Washington. [Participated by written petition only; did not appear at the prehearing conference]

Residents Opposed to Kittitas Turbines (ROKT): **James C. Carmody**, Yakima, Washington.

F. Steven Lathrop: **F. Steven Lathrop**, Ellensburg, Washington. Mr. Lathrop was accompanied by his legal counsel, Jeff Slothower, who agreed to submit a formal notice of appearance.

Chris Hall: **Chris Hall**, Ellensburg, Washington. [Chris Hall submitted her verification prior to the June 26, 2003 hearing].

Parties in EFSEC Adjudicative Proceedings:

Pursuant to WAC 463-30-060 and 463-30-050, parties to the adjudicative portion of an EFSEC proceeding include:

- The applicant; in this case SAGEBRUSH POWER PARTNERS, L.L.C.;
- Each member agency as defined in RCW 80.50.030(3)¹; in this case, the Department of Fish and Wildlife, the Department of Community Trade & Economic Development, the Washington Utilities and Transportation Commission, Department of Natural Resources and the Department of Ecology;
- The "Counsel for the Environment" as defined in RCW 80.50.020(12); in this case, Assistant Attorney General Michael Lufkin;

[1] RCW 80.50.030(3) provides that the council shall consist of the directors, administrators or their designees of the following departments, agencies, commissions and committees: the departments of ecology; fish and wildlife, health, military, community, trade, and economic development, natural resources, agriculture, transportation, and the utilities and transportation commission. In addition, RCW 80.50.030(4) provides that the county legislative authority of the county where an application for a proposed site is located shall appoint a voting member to the Council during the consideration of that site.

- Each person admitted to the adjudicative proceeding as an "intervenor", but such party is only a party for the purposes, and subject to any limitations and conditions, specified in the herein council order granting intervention.

Hearing Guidelines:

On June 17, 2003, by mail, the Council distributed draft Hearing Guidelines for the conduct of the hearing to assist parties in understanding the Council's expectations and to show how it will manage the adjudicative hearing. The Council adopted these Hearing Guidelines for this proceeding, at the prehearing conference on June 26, after allowing any party to comment or object to any of these guidelines. The Council reserves the authority to vary from these guidelines when there is good cause to do so. The Council expects all parties and intervenors to be familiar with and comply with the guidelines. Further, the Council reiterated the necessity for all parties to be familiar with the Administrative Procedure Act (Chapter 34.05 RCW), the Washington Administrative Code (Title 463 WAC) and EFSEC's statutory authority (Chapter 80.50 RCW), as they relate to these proceedings. The hearing guidelines are attached to this order as Appendix A.

1. Rulings and Background on Intervention:

A. Laws on intervention in EFSEC adjudicative proceedings:

The laws controlling the intervention of parties in EFSEC adjudicative proceedings are contained in the Washington Administrative Procedures Act (APA), at RCW 34.05.443, and in EFSEC's rules at WAC 463-30-400 and 410.

RCW 34.05.443, the part of the APA, which addresses intervention, provides:

(1) The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(2) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(3) The presiding officer shall timely grant or deny each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The

presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

EFSEC's rules at WAC 463-30-400 and 410 provide:

Intervention. On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded. All petitions to intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In 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.

Participation by intervenor. In general, it is the policy of the council to allow any intervenor broad procedural latitude. To the extent that the council determines that numerous intervenors might unduly delay the proceedings or prejudice the rights of existing parties, intervenor status may be conditioned upon assent by the prospective intervenor and counsel for the environment to allow the counsel for the environment to act as lead counsel for the balance of the hearing, where the intervenor's interests more closely align with those of the counsel for the environment. Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate. The council reserves the right to prescribe other limitations and conditions, where appropriate.

B. General principles for participation in EFSEC adjudicative proceedings:

The Council is committed to providing an appropriate forum for all persons and entities to provide their views and expertise to the Council. Effective participation from all of the petitioners for intervention is encouraged. In individual cases, the most appropriate forum may be the formal adjudicative hearings with party status and responsibilities, participation as a witness for the Counsel for the Environment or another party to the hearings, participation in the public hearings provided for in WAC 463-14-030 and RCW 80.50.090, or in the land use law consistency and compliance hearing which was held in Kittitas County on May 1, 2003, or by submitting written comments for the Council's consideration.

In addition to persons participating and communicating to the Council as parties to the proceedings, the law at RCW 80.50.090(3) also provides that, prior to the Council making any recommendation to the governor on a site application, the Council will conduct a public hearing as an adjudicative proceeding under the APA, Chapter 34.05 RCW. At that hearing, any person is entitled to be heard in support of, or in opposition to, the application for certification. RCW 80.50.090(3); WAC 463-14-030.

C. Identification of parties and rulings on specific petitions for intervention:

The Council has considered all of the petitions for intervention, the oral comments of the Applicant to the Petitions for Intervention, and the oral Responses of the petitioners for intervention party status. In light of those Petitions and with consideration of the statutes and rules on intervention, and the above-described principles of intervention, the Council makes the following decisions regarding parties to the adjudicative proceedings:

Applicant SAGEBRUSH POWER PARTNERS, L.L.C.: under WAC 463-30-060 the Applicant, who applies for a site certification, is a party as of right to the adjudicative proceedings.

Counsel for the Environment: the Counsel for the Environment is an assistant attorney general appointed by the Attorney General and represents the public and its interest in protecting the quality of the environment. Michael Lufkin has been duly appointed by the Attorney General and is a party as of right pursuant to WAC 463-30-060.

Approval of Petitions for Intervention: The following Intervenors, whose intervention is in the interest of justice and whose intervention will not impair the orderly and prompt conduct of these proceedings, are allowed with regard to the issues identified in the written Petitions for Intervention, to wit:

a. Washington State Department of Community, Trade and Economic Development: The Council finds that Washington State Department of Community, Trade and Economic Development (CTED), which has a representative on EFSEC, is entitled to party status in the Council's adjudicative proceedings as a matter of right. WAC 463-30-050 and WAC 463-30-060. CTED, pursuant to RCW 80.50.030(3), is therefore a party. CTED will be limited to the issue that it supports Sagebrush's application, as consistent with Washington Energy Policy, which is to encourage renewable energy resources, as such issues generally fall within CTED's jurisdiction in Washington State.

b. Kittitas County: The Council finds that the County in which the proposed plant is to be located has shown the legal criteria for intervention and is granted party status pursuant to WAC 463-30-060(4), limited to the issues which directly affect Kittitas county concerning land use and zoning; protection of the lands, waters and environment of Kittitas county; protection of the general health and welfare of the inhabitants of Kittitas county; the claim that Applicant's plan is inconsistent with Kittitas county land use and zoning ordinances; the assertion that Applicant should comply with state and local law, including the state Growth Management Act and the county Comprehensive Plan and zoning ordinances; and assertions dealing with impacts on urban growth, sprawl, transportation, housing, economic development, property rights, natural resources, open space, recreation, environment, public facilities, public services and historical preservation, as they apply to Kittitas county.

c. Renewable Northwest Project: The Council finds that Renewable Northwest Project is entitled to status as an intervenor, limited to the issues of proper siting; economic and environmental benefits of wind energy projects; importance of resource diversity and rate

stability of electrical energy; adverse impacts of solely relying on fossil fuel for electric generation to meet load growth; environment protection, including wildlife and habitat; and the regulatory framework needed to ensure appropriate investments in new renewable resources.

d. Phoenix Economic Development Group: The Council finds that Phoenix Economic Development Group is entitled to status as an intervenor, limited to issues of the economic impacts of the project on Kittitas county, the future growth and development of the county, and business development, expansion and retention activities that diversify the economy and create family wage jobs.

e. Sierra Club, Cascade Chapter: A representative of the Sierra Club did not attend the hearing on June 26, 2003; however, the Council considered the Sierra Club's Petition. The Council finds that Sierra Club, Cascade Chapter is entitled to status as an intervenor, limited to the issues of affordable and reliable electric power at consistent rates, full employment in a healthy and sustainable economic climate, regulatory processes supportive of the establishment of clean alternative [energy] technology, the responsive use of earth's resources, the protection and restoration of the quality of the natural environment, and the diversity of clean and environmentally sustainable energy sources.

f. Residents Opposed to Kittitas Turbines (ROKT): The Council finds that ROKT is entitled to status as an intervenor, limited to issues of proper location for the wind farm and alternate locations.

g. F. Steven Lathrop: The Council finds that F. Steven Lathrop is entitled to status as an intervenor, limited to issues of adjacent agricultural interests, local property values, and local concerns and attitudes and potential impact of the project on the area.

h. Chris Hall: The Council finds that Chris Hall is entitled to status as an intervenor, limited to issues of the siting of the wind farm and its effect upon cellular phones, highway safety, noise, wildlife, aesthetics, earthquake, ground water and "cradle to the grave" considerations, concerning assignment of interests and final terminations.

The Applicant (Sagebrush Power Partners), Counsel for the Environment and all Petitioners for Intervention were advised that at the Second Prehearing Conference the Council will consider questions of limitations on the number and consolidation of the examination of witnesses and exhibits and requiring Intervenors, with like issues, to use a lead counsel to present such issues, testimony and exhibits, rather than repetitive presentations by various intervenors.

2. Issue Identification:

The Council has requested that an issue list be developed to clarify what will be adjudicated. The Counsel for the Environment has submitted a list of issues in his Appearance herein. Some of the intervenors have submitted issues in their Petitions for Intervention, essentially set out in the foregoing paragraph. The parties were directed to meet with Counsel for the Environment and come to agreement, if possible, on an issues list within 45 days after the date of this order.

The Counsel for the Environment agreed to coordinate the effort to develop the issues list. All intervening parties were advised to communicate with Mr. Michael Lufkin regarding the issues, which they would like to see addressed in the adjudicative proceeding, restricted to those issues set out for the individual Intervenors in the foregoing paragraph. This matter will be discussed at the Second Prehearing Conference and thereat finalized, subject to alteration after the filing of the Draft Environmental Impact Statement (DEIS). In the event the DEIS raises issues which could not have been reasonably anticipated at the time the parties identified issues in this proceeding, any party may petition the Counsel, for just cause, to allow additional issues to be added to the issues list.

3. Discovery:

The parties were encouraged to conduct informal discovery. The Council will hear progress reports on the status of discovery at its Second Prehearing Conference.

4. Scheduling and next scheduled prehearing conference:

The Council will hold at least one more prehearing conference to take place at a time and date to be announced. Items to be discussed will include progress on stipulation and agreement discussions, finalizing the issues list, any discovery issues, and consideration of the hearing schedule. Further, there will be an opportunity for evidentiary hearings on any stipulations or agreements that were submitted for Council's approval at least 10 days prior to the Second Prehearing Conference.

5. Challenge to presence of Council member representatives of the Department of Natural Resources and the Department of Community, Trade and Economic Development:

At the Hearing on June 26, 2003, F. Steven Lathrop and his representative raised questions of conflicts of interest regarding Council member representatives from the Department of Natural Resources and the Department of Community, Trade and Economic Development. No facts were produced at the meeting, the issues was not raised in the Petition for Intervention and this oral challenge was the first indication that such a claim would be made. The Council advised F. Steven Lathrop and his representative that a formal Motion to disqualify such representatives must be filed with EFSEC one week from June 26, 2003.

6. Other issues discussed:

All matters on items 9 and 11 of the approved Agenda were brought forward and discussed and the parties were encouraged to direct their efforts to identifying and resolving these items. These items included: Intervention (Applicant's Objections; Petitioner's Responses; and Applicant's Rebuttal); Stipulations and Settlement Agreements; Preliminary List of Issues; and Procedural Matters and Other Matters in the Paragraph Entitled "Notice of Intention to Conduct a

Prehearing Conference” as identified in the may 16, 2003 Notice of Intent to Hold Adjudicative Proceeding.

7. Notice to parties:

Any objection to the provisions of this order must be filed within ten days after the date of mailing of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this matter.

A revised service list is attached to this order as Appendix B.

DATED at Olympia, Washington and effective this _____ day of July, 2003.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

By

Julian C. Dewell, Administrative Law Judge