

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

In re Application No. 94-2	)	COUNCIL ORDER No. 5	693
	)		
of	)	ORDER GRANTING CHEHALIS	
	)	POWER INC.'S MOTION TO	
CHEHALIS POWER	)	STRIKE PORTIONS OF THE	
	)	REPLY BRIEFS OF THE COUNSEL	
	)	FOR THE ENVIRONMENT AND	
Certification of the	)	THE DEPARTMENT OF ECOLOGY	
Chehalis Combustion	)	AND STRIKING PORTIONS OF THE	
Turbine Project	)	CRITICAL ISSUES COUNCIL'S	
.....)	)	SURREBUTTAL BRIEF	

This is an application for certification of a proposed site at Chehalis, Lewis County, Washington for construction and operation of a natural gas-fueled combustion turbine facility to generate electrical energy.

On December 1, 1995, the applicant, Chehalis Power Inc., filed a motion to strike portions of the response briefs that were filed by the Counsel for the Environment and the Department of Ecology. By letter dated December 13, 1995 the Council allowed parties until December 22, 1995 to answer Chehalis' motion. The letter also allowed Chehalis Power until December 29, 1995 to respond to the reply briefs. On or before December 22, 1995, EFSEC received answers to Chehalis Power's Motion from the Counsel for the Environment, the Department of Ecology and a document entitled the "Critical Issues Council Surrebuttal Brief" from the Critical Issues Council (CIC). Chehalis Power replied to the responses of the Counsel for the Environment (CFE) and the Department of Ecology on December 27, 1995.

Chehalis Power's motion seeks to exclude references to evidence in the response briefs of the CFE and the Department of Ecology that Chehalis Power contends were never admitted into evidence. Specifically Chehalis Power's motion asks the Council to strike Ecology's reference to the pre-filed testimony of Gail Blomstrom that Chehalis Power contends was withdrawn pursuant to the stipulation agreement that has been received as Exhibit 103 by the Council and the Council has been asked to strike three separate references by the CFE to newspaper articles and other documentary evidence that Chehalis Power contends were never introduced into evidence.

Ecology argues that evidence submitted by the applicant itself supports its position that significant water withdrawals from the Chehalis River will have an adverse effect on water quality in the River. Ecology also states that Ms. Blomstrom's testimony is essentially a summary of the findings of the Chehalis Watershed Assessment, a document that was submitted by the applicant as part of the record this proceeding.

CFE argues that the Council should allow references to other publications in his reply brief as "illustrative materials" about the types of CO<sub>2</sub> mitigation measures that are being used by other power plants. He contends that the materials were either appropriately cited or may be considered via official notice pursuant to RCW 34.05.452(5).

The Critical Issues Council's "Surrebuttal Brief" argues that Ecology's references to Ms. Blomstrom's testimony should be considered by the Council because the stipulation that removes her testimony has not yet been accepted by the Council. The CIC cites the *Application of Wilmington Suburban Water Corp.*, 58 Del. 8, 203 A2d 817 (1964), in support of its contention that the Council should have a complete record to review including Ms. Blomstrom's testimony.

Chehalis Power replies to CFE and Ecology, stating that applicable Council rules, statutes, hearing guidelines and the state Administrative Procedure Act (APA) bar EFSEC from considering information that has not been admitted into the record of the proceeding. According to Chehalis Power, none of the exceptions cited by the CFE as grounds for considering the material in question provide a justification for considering contested materials. The Council hereby grants Chehalis Power's Motion to Strike Portions of the Post-Hearing Response Briefs of the Department of Ecology and the Counsel for the Environment.

The CIC includes a segment titled "Post Hearing Reply Brief Response" which addresses a number of issues raised during the adjudicative hearing and the applicant's briefs. There is no provision in Council procedures, the hearing guidelines adopted at the outset of this proceeding, or the state's Administrative Procedure Act for surrebuttal briefs regarding issues that have been given a thorough airing in an adjudicative hearing. Because the "Post Hearing Reply Brief Response" was not provided for by Council rules, hearing guidelines nor the applicable statute, the Council will not consider the arguments included therein in its deliberations on the Chehalis Generation Facility application.

For the reasons noted above, the Council will not consider the "Post Hearing Reply Brief" of the Critical Issues Council.

**1. Motion to Strike the References to Ms. Blomstrom's Testimony** - Gail Blomstrom's prefiled written testimony was withdrawn by the Department of Ecology pursuant to the stipulation agreement the Department entered into with the applicant. The stipulation agreement was entered into the record as Exhibit 103. The express provisions of the Section IV of the stipulation agreement withdraw Ms. Blomstrom's testimony along with all of the rest of the Department's prefiled testimony. A review of the record of the proceeding reveals that the stipulation agreement was admitted into the record, (TR. p. 43), on the first day of the formal adjudicative hearings. Ms. Blomstrom's pre-filed testimony was not received in evidence by the Council and Ecology's own post-hearing brief acknowledges this fact, (Ecology's Response to Applicant's Post-Hearing Brief, p. 4, (footnote 1)). The applicable statute, RCW 34.05.461(4), provides that:

Findings of fact shall be based exclusively on the evidence of record in the adjudicative hearing and on matters officially noticed in that proceeding.

Because this testimony is not in the record, the Council will not consider the materials. Since Ecology's brief references testimony that the Department itself acknowledges was withdrawn pursuant to its settlement agreement, it cannot be considered by the Council in its deliberations on the Chehalis Generation Facility. In its defense, Ecology contends that Ms. Blomstrom's testimony merely summarizes other materials that the applicant placed in evidence. Regardless of what Ecology contends Ms. Blomstrom's testimony states, her testimony cannot be considered by the Council because it is not part of the record of the proceeding pursuant to a stipulation agreement that Ecology itself voluntarily entered into. Since Ecology has not deigned to attack its own stipulation agreement, Ms. Blomstrom's testimony and Ecology's reference to the same will not be considered by the Council and is hereby stricken from Ecology's response brief.

**2. Motion to Strike Portions of the CFE's Response Brief.** Chehalis Power's motion to strike and its subsequent reply request the Council to strike references in CFE's answer brief to "illustrative materials." The CFE contends that the references in question may be appropriately considered as illustrative of the types of measures that other utilities and power plant operators have undertaken to reduce or mitigate greenhouse gas emissions. Chehalis Power's reply notes that its search of Washington case and statutory law did not reveal any references to "illustrative authority or illustrative authorities." The Council's own research of the applicable law also failed to uncover any references to this phrase. In *State v. Mitchell*, 56 Wash. App. 610, 784 P.2d 568, 570 (1990), the Court of Appeals found that playing of a siren in a courtroom to simulate the sound of a police siren in a case involving the prosecution of a suspect for attempting to elude police was an example of "illustrative evidence." This form of illustration differs substantially in both form and content from the articles that CFE is attempting to introduce under the rubric of "illustrative authorities."

CFE also contended that under RCW 34.05.452(5) EFSEC could take official notice of the documents in dispute. Chehalis Power replies that the express language of RCW 34.05.452(5), states that parties must be notified in advance in order to have the Council take official notice. This statute also affords other parties an opportunity to contest the proposal. CFE did not follow the statutory procedure

Rule 201(b) of Washington's Evidence Code provides that a judicially noticed fact cannot be subject to reasonable dispute in that it must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of ready and accurate determination by resort to sources whose accuracy cannot reasonably be questioned. The articles referred to by the CFE do not appear to fit into either category. When the issue of judicial notice of newspaper articles was raised in the 9th Circuit out of a Washington case, the Court observed that news media reports are not unquestionably accurate, *U.S. v. Baker*, 641 F.2d 1311 (9th Cir. 1981). In *Rogstad v. Rogstad*, 74 Wn.2d 736, 446 P.2d 340 (1968), the Washington Supreme Court stated that a high degree of indisputability is the essential prerequisite for a court to take judicial notice of material. It is the Council's understanding that a considerable degree of scientific controversy remains over the subject of global warming and greenhouse gas emissions and the effectiveness of mitigation measures to control or compensation for these emissions. Although the CFE has cited the articles in dispute as "illustrative authorities," they serve as part of his rationale for his



request that the Council require greenhouse gas mitigation measures as a condition of site certification for the Chehalis Generation Facility.

Provisions of RCW 34.05.252(5) and WAC 463-30-230(2) and of Rule 201 (b) do not support CFE's suggestion. The materials in question do not constitute common knowledge, are not subject to ready and accurate determination by authoritative sources and are not indisputable in the sense contemplated in *Rogstad*. The Council cannot consider them in its deliberations.

**3. Response of the Critical Issues Council.** The CIC's ("Surrebuttal Brief") includes a discussion about the admissibility of Ms. Blomstrom's testimony. According to the CIC, it believed that Ms. Blomstrom's testimony had been entered into evidence by the CFE although it provides no basis for that belief. Transcript records clearly indicate that Ms. Blomstrom's testimony was not introduced by any counsel attending the hearings.

The CIC observes that the Council has not accepted the stipulation agreement between the Department of Ecology and the applicant. It argues that because the stipulation agreement has not yet been accepted, the withdrawal of the testimony that was one of the express provisions of the stipulation agreement should also not be acquiesced to by the Council. In further support of its argument, the CIC cites *Application of Wilmington Suburban Water Corp.*, 58 Del. 8; 203 A.2d 817 (1964), in support of the proposition that no testimony should be withdrawn because Courts are entitled to a full record to review.

While superficially appealing, the CIC's position ignores several important facts: 1) the Department of Ecology itself agreed to withdraw Ms. Blomstrom's testimony pursuant to a stipulation agreement it voluntarily entered into with the applicant; 2) aside from the submittal of Post-Hearing Briefing materials and various motions, the record for this proceeding was closed on the last day of adjudicative hearings, September 21, 1995. If the Department of Ecology did not believe the stipulation agreement was in the agency's and the public's interest, it would not have entered into it.

The CIC's approach would leave the record open indefinitely, subject to possible offers of evidence and arguments as per its "Post Hearing Reply Brief Response." It also fails to acknowledge the legal requirement that the Council must have a complete, closed record for deliberation. The CIC did not raise concerns or questions about Ecology's stipulation agreement at the appropriate time.

The CIC's reliance on the *Wilmington*, case is inappropriate. This case involved two water utilities that had entered into a stipulation agreement with an attorney or attorneys of the Delaware Public Service Commission itself - not between two parties to the proceeding. After the stipulation was entered, (it provided that the two water companies would be entitled to a 6 per cent rate-of-return), the Commission did not follow the stipulation and instead decided to grant the companies lower returns. The two companies challenged the decision as inconsistent with the stipulation agreement. The Delaware Supreme Court faulted the Commission for varying from the stipulation agreement and establishing a different, lower rate-of-return on the basis of no evidence in the record. The court found that the record was devoid of any other

competent evidence upon which the Commission could make a proper finding on the rate-of-return.

The Council is in a very different situation from that facing the Delaware Public Service Commission. Neither Council staff nor the Council itself entered into a stipulation agreement regarding the Chehalis Generation Facility. The stipulation agreement in dispute here was entered into voluntarily between one of the litigants in the case, the Department of Ecology, and the applicant.

**4. Rejection of the "Critical Issues Council Surrebuttal Brief.** As noted above, Council procedures, rules, and hearing guidelines make no provision for the filing of "Surrebuttal Briefs." The parties had an adequate opportunity to present argument, testimony, witnesses, cross-examine witnesses and otherwise develop the record of this proceeding in the hearings themselves and the post-hearing briefs. The Council will not consider the material entitled "Post Hearing Reply Brief Response" that constitutes the second segment of the CIC's "Surrebuttal Brief."

**Order.** The Council hereby grants the Chehalis Power's Motion and orders the reference to Ms. Blomstrom's testimony stricken from the Department of Ecology's Post Hearing Brief, on page 4, sentence at lines 1-5 and footnote 1 on that same page. It also orders the references to newspaper and other articles in the CFE's Post Hearing Brief on page 29, line 14 ("As ...") through line 22, page 30, line 8 through line 11 (...1993.)" and Page 32, line 4 ("Several . . .") through line 19 (. . .environmental impacts.") stricken from CFE's brief. The Council further strikes the "Post Hearing Reply Brief Response" from the CIC's "Surrebuttal Brief."

DATED and effective this 4th day of March, 1996



Fred Adair, Chair

Attest:

  
Jason Zeller, EFSEC Manager