

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

In the Matter of the Application of:

Scout Clean Energy, LLC, for
Horse Heaven Wind Farm, LLC,

Applicant

DOCKET NO. EF-210011

ORDER IN RESPONSE TO
THE YAKAMA NATION’S
“PETITION FOR RECONSIDERATION”
OF COUNCIL ORDER NO. 888

Procedural Background:

On September 25, 2023, the Yakama Nation filed a “petition for reconsideration” of Council Order No. 888, *Order Denying Request to Call WDFW Employees for Cross Examination*. Council Order No. 888 was issued on September 15, 2023 and signed by EFSEC Chair Kathleen Drew.

Discussion and Analysis:

The Yakama Nation’s request is premised on the mistaken conclusion that Chair Drew acted unilaterally in issuing Order 888. In fact, Chair Drew signed Order 888 on behalf of the Council as a whole as authorized by statute¹ and as is routinely done for Council Orders.²

Counsel for Yakama Nation was clear during the adjudicative cross-examination hearings that her request was for a decision “of the presiding officer, the Council,” and “the Council, itself, as a body” on whether to call Mr. Fidorra and Mr. Watson to testify.³ Consequently, when the undersigned ALJ verbally transmitted the Council’s decision on that request to the parties, and when describing the Council’s written version that would be forthcoming, the ALJ made clear that the decision was that of the Council.⁴ All Council members (except the Department of

¹ RCW 80.50.360(1) states “[t]he chair of the council or the chair’s designee shall execute all official documents, contracts, and other materials on behalf of the council.”

² See, e.g., Order 887, *Denying Request for Public Comment Hearing* in this adjudication, Docket No. EF-220011; Order 886, Docket No. EF-220355 Wautoma Solar, *Order Finding Project Inconsistent with Land Use Regulations*; Order 885, Docket No. EF-220212 High Top and Ostrea Solar, *Order Granting Expedited Processing*. All such orders are only entered after due deliberation and decision by the Council.

³ Tr. 1275;12-18; Letter of August 24, 2023 from Shona Voelckers to Energy Facility Site Evaluation Council, p. 1; Tr. 1512:3-7; Tr. 1739:10-19.

⁴ “We had a little bit of a consultation over the lunch hour with Council on some procedural matters, and . . . I think the general decision, and rather than have you wait for a response letter, we could just take care of it here. I've been asked to transmit it. The Council doesn't really think -- EFSEC doesn't think it's appropriate or necessary to call either of those wildlife biologists.” Tr. 1509:22 – 1510:6. “And, again, I'm simply transmitting the decision that was made by the Council and as I'm not, under the APA, the presiding officer. The Council is. . . . I expect you will get a written decision.” Tr. 1513:3-6.

Agriculture) were present when ALJ Torem verbally stated the Council’s decision to the parties on the record, explaining he had consulted with Council members over the lunch break.⁵

Council Order 888 states that it is a decision of the Council. In no way does it state it is the decision of only the Chair.⁶ Council Order No. 888 was issued following a further *in camera* conference of Council members on the afternoon of Friday, August 25, 2023, after the cross-examination hearings. The Council is not required to deliberate or take a voice vote in an open meeting when deciding matters pertinent to an adjudication.⁷ During that conference, the basis for the written decision was reiterated and discussed between legal counsel and Council members. No Council member indicated a need to call the Department of Fish and Wildlife biologists for their own questioning as part of the adjudicative cross-examination hearings.

In this adjudication, the Council has responded with its own orders to timely-made requests by the parties for review of this ALJ’s procedural rulings, as well as to requests that the ALJ deemed best responded to by the Council in the first instance. The Council, as presiding officer and as a body, has already issued its decision on this Yakama Nation request. There is no general allowance in the Administrative Procedure Act (APA) or in the Council’s rules for parties to petition the presiding officer to reconsider its interlocutory orders,⁸ nor does Yakama Nation’s filing present any special circumstance that would justify the Council responding to such a request in this instance.

The Yakama Nation styles its filing a “petition for reconsideration” of a “final order” under RCW 34.05.470. That provision of the APA does not apply here. The ruling at issue was interlocutory and not the “final order” in this adjudication.⁹ The Council has not issued its adjudicative order containing its findings of fact and conclusions of law on the arguments raised

⁵ Tr. 1297 (listing appearances of Council members on August 24, 2023); Tr. 1509:16 – 1514:8 (ALJ transmitting decision of the Council).

⁶ “In this Order, the Council provides the reasoning for its conclusion . . .” Council Order No. 888, p. 1; “[T]he Council concludes that there is not sufficient cause to allow the Yakama Nation to call the WDFW employees for cross examination.” *Id.* at 2.

⁷ The Open Public Meetings Act provides that it “shall not apply to: . . . [m]atters governed by chapter 34.05 RCW, the Administrative Procedure Act.” RCW 42.30.140(3). In addition, RCW 34.05.455(1)(a)(i) provides that, “[w]here the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding.”

⁸ An interlocutory order is an agency order issued during an adjudication that merely decides a point or an issue, rather than the entire controversy. *Samuel’s Furniture v. Dep’t of Ecology*, 147 Wn.2d 440, 453, 54 P.3d 1194 (2002). In other words, interlocutory orders are “preliminary steps” in the adjudicative process. *Lewis County v. Pub. Emp’t. Relations Comm’n*, 31 Wn. App. 853, 862, 644 P.2d 1231 (1982). As the court described in *State v. Brown*, 64 Wn. App. 606, 617, 825 P.2d 350 (a non-APA case), “Interlocutory appeals are the antithesis of judicial efficiency and economy.”

⁹The test for finality is whether the contested action “imposes an obligation, denies a right, or fixes a legal relationship.” *Dep’t of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29–30, 523 P.2d 1181 (1974). *See also* *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 678, 86 P.3d 1169 (2004); *Evergreen Wash. Healthcare Frontier, LLC, v. Dep’t of Soc. and Health Servs.*, 171 Wn. App. 431, 449, 287 P.3d 40 (2012); *Wells Fargo Bank*, 166 Wn. App. at 356. This usually occurs at the end of the case when all issues have been resolved. *See Durland v. San Juan County*, 174 Wn. App. 1, 13, 298 P.3d 757 (2013) (discussing the meaning of “final” for purposes of the Land Use Petitions Act).

by the parties to the adjudication. Nor has the Council issued its report and recommendation to the Governor.

Under the APA, the opportunity to petition for judicial review, like the opportunity to petition for reconsideration, follows the final agency order in an adjudication.¹⁰ EFSEC's governing statute, RCW 80.50, provides that only the final decision of the Governor, either granting or denying an application for site certification, is subject to a petition for judicial review.¹¹ The applicable EFSEC rule, WAC 463-30-335, affords the opportunity for a petition for reconsideration of the Council's recommendation to Governor. Neither the APA nor EFSEC's rules allow what the Yakama Nation has requested in this instance.

Decision

In Council Order No. 888, the Council already decided and declined Yakama Nation's request to call Mr. Fidorra and Mr. Watson for cross-examination. There is no legal requirement or regulatory allowance for the Council to respond again to the Yakama Nation's second request for the same relief. The Council has spoken. It need not do so again.

For the reasons set out herein, the Yakama Nation's "petition for reconsideration" is denied.

DATED and effective at Olympia, Washington, on the 27th day of October, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge

¹⁰ See RCW 34.05.542(2) ("A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.")

¹¹ RCW 80.50.140(1).