

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of)
Application No. 2006-2)
DESERT CLAIM WIND POWER, LLC) Prehearing Conference
DESERT CLAIM WIND POWER PROJECT) Pages 1 - 20
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A prehearing conference in the above matter was held on Thursday, April 23, 2009, at the Hal Homes Community Center, 209 North Ruby Street, in Ellensburg Washington at 1:30 p.m., before the Energy Facility Site Evaluation Council members.

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DESERT CLAIM WIND POWER, Karen McGaffey, Attorney at Law, Perkins Coie, LLP, 1201 Third Avenue, Suite 4800, Seattle, Washington 98101.

COUNSEL FOR THE ENVIRONMENT, H. Bruce Marvin, Assistant Attorney General, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100.

KITTITAS COUNTY, Neil Caulkins, Deputy Prosecuting Attorney, 205 West 5th Avenue, Suite 213, Ellensburg, Washington 98926-2887.

ECONOMIC DEVELOPMENT GROUP, Ron Cridlebaugh, Executive Director, P.O. Box 598, Ellensburg, Washington 98926-0598.

1 APPEARANCES (Cont'd)

2 COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, Mark
3 Anderson, Lay Representative, P.O. Box 42525, Olympia,
4 Washington 98504-2525.

5 ROGER OVERBECK, Pro Se, 5160 Lower Green Canyon
6 Road, Ellensburg, Washington 98926.

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8 JUDGE WALLIS: This is a prehearing conference in
9 the matter of Revised Application 2006-2 before the
10 Washington State Energy Facility Site Evaluation Council.
11 This is a matter of Desert Claim Wind Power, LLC's revised
12 application for certification of a proposed site in Kittitas
13 County, Washington.

14 This conference is being held on April 23, 2009 in
15 Ellensburg, Washington before the Energy Facility Site
16 Evaluation Council whose chair is James Luce, and I would
17 like at this time for the Council members who are present
18 here to introduce themselves by stating their name and the
19 jurisdiction that they represent.

20 MR. BYERS: Dick Byers from the Washington
21 Utilities and Transportation Commission.

22 MR. FRYHLING: Dick Fryhling from the Department
23 of Community Trade and Economic Development.

24 CHAIR LUCE: Jim Luce, Governor's office.

25 MS. McDONALD: Mary McDonald, Department of

1 Natural Resources.

2 JUDGE WALLIS: Seated next to me is Kyle Crews who
3 is Assistant Attorney General to the Council.

4 My name is Robert Wallis and I'm the presiding
5 Administrative Law Judge for this proceeding.

6 At this time I would like to begin with
7 appearances by the parties and those who seek intervention
8 in this docket, beginning with the Applicant.

9 MS. MCGAFFEY: Karen McGaffey and Kelly Mosier
10 representing the Applicant and with us today is Project
11 Director David Steeb.

12 JUDGE WALLIS: Counsel for the Environment.

13 MR. MARVIN: Bruce Marvin, Assistant Attorney
14 General, Counsel for the Environment.

15 JUDGE WALLIS: The Department of Community Trade
16 and Economic Development.

17 MR. ANDERSON: Mark Anderson. I'm sitting in for
18 Tony Usibelli today.

19 JUDGE WALLIS: Kittitas County.

20 MR. CAULKINS: Good afternoon, Your Honor. Neil
21 Caulkins, Deputy Prosecuting Attorney, representing Kittitas
22 County.

23 JUDGE WALLIS: Economic Development Group of
24 Kittitas County.

25 MR. CRIDLEBAUGH: Ron Cridlebaugh, the Executive

1 Director to the Economic Development Group.

2 JUDGE WALLIS: Is there any other person present
3 in this proceeding that wishes to participate as an
4 intervenor?

5 MR. OVERBECK: I do.

6 JUDGE WALLIS: Would you stand and announce the
7 name of the interest that you represent and your name and
8 position.

9 MR. OVERBECK: My name is Roger Overbeck. I'm a
10 landowner and I represent several of the other landowners in
11 that geographical area.

12 JUDGE WALLIS: Are you an attorney?

13 MR. OVERBECK: Not in this state, no.

14 JUDGE WALLIS: You're appearing pro se?

15 MR. OVERBECK: Yes.

16 JUDGE WALLIS: And does the court reporter have
17 the spelling of your name? Could you spell it for us.

18 MR. OVERBECK: O-v-e-r-b-e-c-k.

19 JUDGE WALLIS: Very well. All but by Mr. Overbeck
20 have submitted documents explaining the nature of their
21 desired participation in this proceeding. Let me ask if
22 there are objections to any of those indications of
23 participation?

24 From the Applicant?

25 MS. MCGAFFEY: We have no objection, Your Honor.

1 JUDGE WALLIS: The other parties?

2 MR. MARVIN: No objection.

3 MR. ANDERSON: No objection.

4 MR. CAULKINS: No objection, Your Honor.

5 MR. CRIDLEBAUGH: I believe no objection, Your
6 Honor.

7 JUDGE WALLIS: I understand there is an objection
8 to one of the proposed participants by Mr. Overbeck in the
9 group that he represents; is that correct?

10 MR. OVERBECK: That's correct, Your Honor.

11 JUDGE WALLIS: So the first thing I would like to
12 take up is Mr. Overbeck's right to participate in this
13 proceeding. Mr. Overbeck, did you file a petition for
14 intervention?

15 MR. OVERBECK: No, Your Honor. It was not timely
16 in the mailing to me.

17 JUDGE WALLIS: Could you describe the
18 circumstances, please.

19 MR. OVERBECK: Your Honor, I was in Arizona and
20 that's the reason why I'm back here today. I called the
21 State of Washington and their department forwarded me all
22 the documentation for it, but I have not had the opportunity
23 because it was only a day and a half in order to file a
24 petition which would have been timely.

25 JUDGE WALLIS: What is the nature of your interest

1 in your proposed participation?

2 MR. OVERBECK: Kittitas County to become an
3 intervenor would be a conflict of interest for the general
4 public.

5 JUDGE WALLIS: Do you desire to participate and to
6 present evidence in this proceeding?

7 MR. OVERBECK: Not today, Your Honor.

8 JUDGE WALLIS: At all during the proceedings?

9 MR. OVERBECK: Yes, during the proceedings. I
10 felt that I would have to do it at seven o'clock tonight
11 because I wasn't made available to be an intervenor at this
12 time.

13 JUDGE WALLIS: Did you wish to be present during
14 the hearing, cross-examine testimony of others? Is that
15 correct?

16 MR. OVERBECK: Yes, Your Honor.

17 JUDGE WALLIS: Very well. Is there objection to
18 participation at this point?

19 MS. MCGAFFEY: Your Honor, I'm not sure we object,
20 but I guess we have some questions. Mr. Overbeck said that
21 he's a landowner in the geographic area, and he says that he
22 represents other landowners in the geographic area and I
23 guess I'm not sure what that means.

24 JUDGE WALLIS: Mr. Overbeck, could you respond.

25 MR. OVERBECK: Yes, Your Honor.

1 JUDGE WALLIS: Mr. Overbeck, could you come
2 forward to counsel table and perhaps bring a chair up and
3 can we have the microphone passed over to Mr. Overbeck so
4 that people can have a better opportunity to hear what he's
5 saying.

6 MR. OVERBECK: Yes, Your Honor. I have been here
7 for a lot of years. I live at 5160 Lower Green Canyon Road
8 which is approximately one mile south of the proposed site,
9 and that geographical area we'll call little sections, and
10 it would be an adverse impact upon our operations in that
11 area.

12 JUDGE WALLIS: Ms. McGaffey.

13 MS. MCGAFFEY: Your Honor, I think the Applicant
14 does object to intervention. This is a proceeding that has
15 been going on for quite some time. Notices have been placed
16 in the newspaper, information is available on the internet.
17 People who have been interested have been able to keep up in
18 what's going on and there's been quite a lengthy period
19 allowing for intervention. We're somewhat caught by
20 surprise today only hearing five minutes before the hearing
21 that Mr. Overbeck was interested in intervening. Even if he
22 had not found out until after the intervention deadline, one
23 would have thought he would have been able to contact us and
24 we could have discussed his interest in a little more
25 detail.

1 As he has not filed a formal petition for
2 intervention, we're not exactly clear what interest that he
3 purports to represent unlike the other petitions which
4 identify particular issues that the intervenors plan to
5 pursue. We don't really have the benefit of that
6 information here to decide. It also strikes me that if what
7 Mr. Overbeck is interested in is providing comments to the
8 Council, as you are aware there are a number of
9 opportunities throughout the process, including tonight at
10 the SEIS meeting in which to do that short of actually being
11 an intervenor. Thank you.

12 JUDGE WALLIS: Does any other party wish to be
13 heard, party or petitioner?

14 Mr. Overbeck, as you indicated earlier you have
15 not filed a timely petition to intervene in this proceeding,
16 and I'm going to suspend a ruling upon your request until
17 you have the opportunity to file a late-filed petition and
18 specify in that petition for the circumstances why you were
19 unable to file it earlier and the precise nature of your
20 participation and the issues that you wish to raise. What
21 kind of time frame would be suitable for you in which to
22 make that filing?

23 MR. OVERBECK: To complete it, Your Honor, would
24 be 30 days, Your Honor, to complete it.

25 JUDGE WALLIS: Other parties wish to comment?

1 MS. MCGAFFEY: Your Honor, I guess that brings up
2 our general concern with the lack of timeliness of the
3 petition potentially being a foreshadowing for further
4 delays in the process, and you may recall the initial
5 invitation for intervenors was only a 21-day process so I
6 don't see any reason why Mr. Overbeck would get longer than
7 that. And given that he is late to the game as it is, I
8 would suggest something more like seven days would be more
9 appropriate.

10 JUDGE WALLIS: How long would the parties desire
11 to respond to that petition?

12 MS. MCGAFFEY: Seven days.

13 JUDGE WALLIS: Very well. Under the
14 circumstances, Mr. Overbeck, we do believe a one-week time
15 frame for your submission to file a petition would allow you
16 the full opportunity to present your information and
17 arguments to the Council, and any party that wishes to
18 respond to that petition may do so within an additional
19 seven days. So the Council will then consider your petition
20 and make a written ruling upon that petition.

21 MR. OVERBECK: Thank you, Your Honor.

22 JUDGE WALLIS: There being no objection to the
23 petition for intervention of the Economic Development Group
24 of Kittitas County, that petition is granted. The
25 indications of the Department of Community Trade and

1 Economic Development and Kittitas County that they wish to
2 participate are acknowledged and in as much as they are
3 statutory parties to the proceeding should they so desire
4 their participation is proper in this proceeding.

5 Next on our agenda is a review of hearing
6 procedure and schedule. I understand that the Applicant has
7 provided a proposed schedule for the adjudicative process,
8 and let me at this time ask if all of the participants have
9 a copy of that schedule. The Applicant has proposed this
10 schedule.

11 Ms. McGaffey, would you like to outline the
12 presentation, please

13 MS. MCGAFFEY: Sure. Thank you, Your Honor. I
14 think our schedule is pretty straightforward. We tried to
15 move the process along, but at the same time make sure that
16 there was adequate amount of time for everyone to do the
17 various steps in the process. It's laid out specifically in
18 the memo, but generally things start out with the Applicant
19 filing its prefiled written testimony on May 11. At that
20 same time intervenors would submit a list of the issues they
21 intend to pursue so that the Council and the Applicant would
22 have a general sense of the issue to be addressed during the
23 hearing.

24 Then a month later the intervenors would have
25 their deadline for filing prefiled testimony and about three

1 weeks after that Desert Claim would file its rebuttal
2 testimony. We then envision that there would be another
3 prehearing conference where if there were settlements or
4 stipulations they could be presented and other kind of
5 procedural matters prior to the hearing be addressed.

6 Then we propose to have the adjudicatory hearings
7 in Ellensburg the week of July 13th. We have proposed as
8 Council did in the previous wind project that there be an
9 evening public hearing both in Ellensburg and one on the
10 west side. Whether that's Seattle or Olympia we're
11 indifferent, as long as we believe that there should be one
12 on the west side. We suggest that perhaps that would be a
13 week before the hearing, and, of course, we'd do the
14 Ellensburg public hearing sometime during the adjudicatory
15 hearing here.

16 We then propose that post-hearing submissions
17 would occur simultaneously. In other words, all parties
18 would file their post-hearing briefs at the same time. I
19 think that's about two to three weeks after or about two
20 weeks after the end of the hearing.

21 JUDGE WALLIS: Very well. Responses?

22 MR. MARVIN: Yes, Your Honor, Bruce Marvin.

23 JUDGE WALLIS: Could we ask that the microphone be
24 passed down.

25 MR. MARVIN: Bruce Marvin, Counsel for the

1 Environment.

2 JUDGE WALLIS: Mr. Marvin.

3 MR. MARVIN: I do have some concerns with regard
4 to this process, the application process, and the
5 preparation of the Final Environmental Impact Statement.
6 I'm assuming that we won't have a Final Environmental Impact
7 Statement issued by May 11. Given that I'm Counsel for the
8 Environment, I don't feel like we would have accurate or
9 complete understanding of the impacts until that statement
10 was issued.

11 I think the other issue or concern that I have is
12 that this project has changed over time. If we look at the
13 original FEIS that this Supplemental EIS will be adding to
14 we note that there's been significant changes in the
15 project, its location, and the mitigation that was proposed.
16 Then we do have a 2006 application which reduced multiple
17 parcels of land to two parcels of land, again a relatively
18 significant change. My understanding is that the SEIS was
19 scoped off of that application. Now, we have yet another
20 application that's been submitted with the project that has
21 gone a little bit -- well, actually it's expanded a little
22 bit from the 2006 project and has moved. There still
23 continues to be some overlap.

24 But as Counsel for the Environment, I wasn't here
25 when the initial EIS was performed so I haven't had an

1 opportunity to participate in that process. As you'll
2 recall that was conducted by the Kittitas County folks, and
3 EFSEC and the Counsel for the Environment were not involved
4 at that time.

5 Under all those circumstances, the fact that we
6 have essentially three different iterations of the same
7 project, we have a scoping that appears to have been
8 developed in 2007 before the latest application has been
9 submitted, and given the importance of the environmental
10 issues that I see being raised in this case, I feel that it
11 would be appropriate to delay consideration of the
12 application until such time as the Final EIS has been
13 completed and we have comments and a complete picture in
14 terms of what this project will -- the kind of impact and
15 the appropriate mitigations that will be available for this
16 project. Thank you.

17 JUDGE WALLIS: Very well.

18 MR. ANDERSON: Mark Anderson with CTED. Just
19 listening to this we do have some concerns as well about the
20 environmental impacts, but that's not our area of expertise
21 so I'm going to stand back on that. We are prepared to go
22 ahead and deal with the issues of our concern and can do it
23 on the schedule provided, but again the environmental
24 aspects are not ones which we are dealing with.

25 MR. CAULKINS: Neil Caulkins for the record for

1 Kittitas County. The County would concur with the concern
2 as to the timing with the EIS. I have a concern with the
3 simultaneity of the submission of intervenors' issues on the
4 same time as the Applicant submitting prefiled testimony as
5 that we'll be asked to submit our issues in the absence of
6 knowing what that is and there may be other issues that come
7 up as a result of it. So those coming on the same day
8 concern me.

9 MR. CRIDLEBAUGH: I'm fine with the timeline as
10 far as the issues we're concerned with the Economic
11 Development Group.

12 JUDGE WALLIS: Very well. Back to the Applicant
13 for responses.

14 MS. MCGAFFEY: Yes, if I could address some of
15 those issues. I guess let me address what I think is
16 probably the easiest one which is the one Mr. Caulkins just
17 mentioned about the simultaneous presentation of issues on
18 May 11.

19 My proposal is that intervenors submit lists of
20 their general issues to inform the Council and the
21 Applicant, but I did not intend that to be a binding list
22 that would preclude them from addressing other issues that
23 arose in light of testimony submitted by the Applicant,
24 rather they be a good faith indication of what issues they
25 plan to pursue. We'll know exactly what issues they plan to

1 pursue when they file their direct testimony on June 11 so I
2 think that would address that concern.

3 With respect to the issue raised by the Counsel
4 for the Environment and Kittitas County about the timing of
5 the Final Supplemental EIS, it's been a longstanding
6 practice of the Council to issue the Final SEPA document
7 after the adjudicatory hearing is held. It allows that SEPA
8 document to take into account information that's generated
9 through the adjudicatory process which I think makes sense
10 or else you have the Final SEPA document issued that doesn't
11 take into account all the information that's in front of the
12 Council.

13 By the same token, the Council has consistently
14 followed the practice of issuing the Draft SEPA document
15 prior to the adjudication which allows members of the
16 public, other participants in this process to get a lot of
17 additional information about the project and its
18 environmental impacts, and I think that sequence provides an
19 appropriate balance of giving the public notice while at the
20 same time allowing the Final SEPA document to include the
21 best available environmental information.

22 I guess before leaving that topic I also want to
23 take issue somewhat with the description of the evolution of
24 this project over time. It is clearly true this project has
25 been under consideration for many years. It went through an

1 extensive process at the county level. The Applicant then
2 made changes to try to address concerns raised at the county
3 level and trying to make a better project. The Applicant
4 then had an opportunity to acquire some additional property
5 to further address concerns, increase setbacks, do other
6 things that we think improves the project.

7 While those changes I think are significant in
8 terms of addressing the concerns that were raised, they
9 don't significantly change the nature of the project. Much
10 of the land area remains the same. It's the same kind of
11 habitat out there, it's the same kind of project. So the
12 initial Environmental Impact Statement which the County
13 actually produced we believe is still a good and informative
14 document, and although the initial scoping on the
15 Supplemental EIS began 2007, there's been ongoing discussion
16 with staff and with the staff's independent or the Council's
17 independent environmental consultant about the scope of the
18 SEIS that went out for public comment. And that document is
19 the document that addresses the current project proposal,
20 and I think provides the public and the parties to this
21 proceeding all the information they need to be able to
22 participate on the schedule that we outlined. I think
23 that's all.

24 JUDGE WALLIS: Let me request Mr. Fiksdal who is
25 the Council Staff Director what the proposed schedule is for

1 issuance of the Draft Supplemental.

2 MR. FIKSDAL: Well, the Draft Supplemental has
3 been issued and is out for comment right now, and the end of
4 the comment period is --

5 MR. POSNER: May 4th.

6 JUDGE WALLIS: May 4th is the end of the comment
7 period.

8 In light of the discussions that we have heard at
9 this session and in light of the nonexclusive nature of the
10 identification of issues list by intervenors, the Council
11 believes that it is appropriate to adopt the schedule that
12 has been proposed. This does not foreclose any of the
13 parties to proceeding from raising scheduling issues at a
14 later time to the extent they're not anticipated right now,
15 but for the purpose of scheduling we do adopt the proposed
16 schedule that the Applicant has presented.

17 Let me ask if there are any other matters relating
18 to scheduling or to the procedure of this adjudication that
19 the parties wish to raise at this time?

20 I believe that concludes our discussion of
21 scheduling issues.

22 I will ask Mr. Overbeck as you prepare your
23 late-filed petition for intervention this week that you take
24 a look at the Council's requirement for intervention and
25 address any issues that you may identify in that demonstrate

1 in your petition that you will be satisfying the
2 requirements for your intervention. That will assist the
3 Council and the parties in reviewing your petition and
4 ruling upon it.

5 MR. OVERBECK: Thank you, Your Honor.

6 JUDGE WALLIS: One other matter that we had
7 identified on the agenda for today's session is protocol for
8 the site visit that is to take place this afternoon. We had
9 identified a proposed process for that site visit that
10 included the opportunity for all parties and members of the
11 public to participate in the site visit so long as the
12 nature and volume of participation does not disrupt the
13 purpose of the site visit which is to view the proposed
14 site, proposed location of the facilities on the site, and
15 the immediate environment on the site.

16 Communications among the participants will be
17 limited to identification of the location of the site and
18 where on the site proposed facilities would be located.
19 Communication about the project or its facilities that
20 constitutes advocacy or a discussion of project detail
21 beyond those necessary to understand the location of the
22 site and the facility may be considered ex-parte
23 communications and they are forbidden. Any inadvertent
24 communications of that sort must be disclosed on the record
25 at the proceeding and other parties must be given the

1 opportunity to respond. This is governed by RCW 34.04.455.

2 Now, we did invite parties to comment on this and
3 let me ask if there are any comments about the protocol for
4 the site visit.

5 MS. MCGAFFEY: Perhaps just by way of explanation,
6 I have after we conclude here I'll hand out to everyone we
7 have a map showing the project configuration and the route
8 for our little tour today. We've identified it looks like
9 six spots where we would stop along the way and people can
10 get out of their cars and Mr. Steeb will point out and try
11 to orient you, although I hope the picture will help. I also
12 have a set of directions that tell you how to get from where
13 we are here to where this picture is. So I'm assuming that
14 we'll probably kind of parade out together and no one will
15 get lost. But if you do, you have directions. So I'll hand
16 those out afterwards to people who would like them.

17 JUDGE WALLIS: Very well. Is there anything
18 further to be considered at this prehearing conference?

19 MR. MARVIN: No, Your Honor.

20 MR. ANDERSON: No, Your Honor.

21 JUDGE WALLIS: Let the record show that there is
22 no affirmative response and this conference is concluded.
23 Thank you all.

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25 (Prehearing conference adjourned at 2:01 p.m.)

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In re: Desert Claim Wind Power Project

A F F I D A V I T

I, Shaun Linse, CCR, do hereby certify that the foregoing transcript prepared under my direction is a full and complete transcript of proceedings held on April 23, 2009, in Ellensburg, Washington.

Shaun Linse, CCR 2029