BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01

of

WHISTLING RIDGE ENERGY, L.L.C.

for

WHISTLING RIDGE ENERGY PROJECT

JOINT MOTION OF INTERVENORS
FRIENDS OF THE COLUMBIA GORGE
AND SAVE OUR SCENIC AREA TO
REOPEN THE ADJUDICATIVE RECORD
FOR LIMITED PURPOSE

INTRODUCTION

Intervenors Friends of the Columbia Gorge ("Friends") and Save Our Scenic Area ("SOSA") (herein referred to collectively as "Intervenors") move to reopen the adjudicative record in the above-captioned matter to receive the attached supplemental testimony and exhibits of Dr. Robert J. Michaels regarding the new Interim Environmental Redispatch and Negative Pricing Policies (hereinafter "new policies") of the Bonneville Power Administration ("BPA"), which were issued on May 13, 2011.

As discussed below, the BPA’s new policies bear directly on the issues of need and demand for the proposed Whistling Ridge Energy Project ("WREP"), as well as integration of the facility into the BPA electrical grid. The Council previously admitted substantial testimony on these issues, which are highly relevant to the Council’s review of the application. Receiving the proposed materials into the adjudicative record will provide the Council and the Governor with the best available and most current information to make a decision.
ARGUMENT

A. Statutory Authority to Reopen the Record

The Council has statutory authority to reopen the adjudicative record. RCW 80.50.090 requires the Council to hold at least one “public hearing, conducted as an adjudicative proceeding” prior to the Council’s recommendation to the Governor. RCW 80.50.090(3). The statute further provides that “[a]dditional public hearings shall be held as deemed appropriate by the council in the exercise of its functions.” RCW 80.50.090(4) (emphasis added). Finally, the statute authorizes the Council to reopen the “adjudicative proceeding for the purposes of receiving additional evidence.” RCW 80.50.100(2).

In a prior, similar matter, the Council decided to reopen the record on general principles of “law and equity, and pragmatism.” Council Order No. 758 at 3 (May 16, 2001) (upholding decision to admit a revised application into evidence after the adjudicative record closed). In that matter, one of the Council’s primary reasons for reopening the record was that “RCW 80.50.100, which governs the Council’s responsibilities to the Governor, contemplates that the Council’s recommendation should be based on the best information available to the Council concerning the project.” Council Order 757 at 11 (April 20, 2001) (emphasis added).

The Council’s prior decision in Order No. 757 is consistent with the standards for introduction of new evidence under the Washington Administrative Procedure Act (“WAPA”). The WAPA authorizes courts to remand to the agency for further fact finding when

(i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency.
RCW 34.05.562. These factors are instructive for the Council’s determination on whether to reopen the adjudicative record and receive the proposed materials.

B. Overview of the BPA’s New Policies.

On May 13, 2011, the BPA issued its new Interim Environmental Redispatch and Negative Pricing Policies. Under the new policies, the BPA is requiring third-party generators, including wind generators, to curtail production during high-flow events in the Columbia River system. Ex. 30.27 (BPA Record of Decision) at 14.

According to the BPA, the new policies are necessary to allow the BPA to meet its environmental and other statutory obligations during high-flow events. During periods of high flow, the BPA must run the generators in its dam system to avoid disposing of too much excess water via spill. Id. at 7. Failure to run its generators would result in high levels of dissolved gas in the Columbia River system that would harm fish protected under the federal Endangered Species Act and violate water quality standards under the federal Clean Water Act. Id. at 5. At the same time, transmission capacity in the energy grid is limited. During high flow events, the grid cannot handle both hydroelectric generation and energy from other sources at the same time without sacrificing system reliability. Id. at 7. The BPA simply cannot accept all third-party generation during high-flow events.

The BPA’s new policies have in large part been necessitated by the “dramatic surge” of wind development within the BPA’s Balancing Authority Area—a surge that has outpaced demand here in the Pacific Northwest. Id. at 11; see also id. at 8 (explaining that “generation has increasingly been developed by private parties independent of load requirements and sold outside the balancing authority area where generation resides.”). Major causes of this surge have been federal production tax credits and state renewable energy credits; these credits provide wind
developers a major incentive to build and operate as much as possible regardless of load. Id. at 8. The BPA’s new policies help protect the aquatic environment and maintain system reliability by “signal[ing] to wind developers that building more and more wind primarily for export outside the Northwest in a small geographical area cannot be sustained without more capital investment in transmission, storage or other solutions that address the unintended cost shifts of well-intended legislation.” Ex. 30.29 (BPA, Policy Issues on Environmental Redispach) at 4.

The BPA has explained that conflicts between its environmental obligations and wind generation will only grow in the future. For example, the BPA explains that each year, there will be a one-in-three chance that the region will re-experience high-flow events equal to or greater than in spring 2010. Id. at 10. That event severely strained the BPA’s balancing capabilities and spurred the BPA to adopt its current policies. Id. at 9–11. In the future, high-flow events will likely require the agency to cut off wind generation for several hours to several weeks at a time. Ex. 30.27 at 16. And even in the short period from the BPA’s May 18, 2011 announcement of its new policies to the present, the BPA has already had to curtail wind generation twenty-two different times on sixteen different days to protect the environment and maintain system reliability. Ex. 30.28 (BPA, Emergency and After-Hours Information, http://info.bpa.gov/afterhours.aspx, visited June 3, 2011).

C. The Council should reopen the record to receive the best information available.

In order to provide the Council with the best available, most current information to investigate the sufficiency of the application, and to provide the Governor with the best information to make a decision, the Council should reopen the adjudicative record to receive the supplemental testimony and exhibits of Dr. Robert J. Michaels.
One of the Council’s express functions is to “receive applications for energy facility locations and . . . investigate the sufficiency thereof.” RCW 80.50.040(5) (emphasis added). The Council has a “comprehensive mandate” to balance a proposed project’s environmental impacts with the broad interests of the public. Council Order No. 843 at 8 (Nov. 16, 2009) (applying RCW 80.50.010); see also SOSA Principal Br. on Adjudication at 19–24; Friends Br. at 4–5; SOSA Resp. Br. on Adjudication at 8–15. The Council must also determine whether proposed energy facilities would provide the region with “abundant power at reasonable cost.” See RCW 80.50.010(3); WAC 463-14-020(3).

Dr. Michaels explains in his supplemental testimony that the BPA’s new interim policies are highly relevant to the Council’s ultimate task to balance the impacts of the proposed facility with the broad interests of the public. Ex. 30.26 at 3–5. For example, on May 26, 2011, the BPA concluded that “building more and more wind primarily for export outside the Northwest in a small geographical area cannot be sustained” without more investment in infrastructure. Ex. 30.29 at 4. This corroborates Dr. Michaels’s prior testimony that the difficulties of integrating the region’s recent surge of wind development into the electrical grid cannot be accomplished without further technological investment. See Ex. 30.00 at 30:3–5.

Dr. Michaels also explains that the BPA’s new policies make the WREP’s expected benefits even more speculative than before. In his prior testimony, Dr. Michaels concluded that the WREP’s small, incremental, and variable output would provide the region with little benefit. Ex. 30.00 at 15:17–23. Now, with BPA having to cut off wind generation for lengthy periods of time, Dr. Michaels explains that the expected public benefits of the WREP are even smaller. Ex. 30.26 at 4–5.
The Applicant has made repeated statements regarding the alleged need and demand for its proposed facility and regarding the facility’s ability to meet load in the Portland/Vancouver area and in the Pacific Northwest. See, e.g., Amended Application at I-1, I-2, 2.1-6, 2.19-1, 2.19-2, 2.19-6. But the BPA’s new policies cast doubt on those assertions by concluding that the majority of wind development within the region will not be serving those markets. See Exs. 30.27 at 8, 30.29 at 4.

BPA adopted its new policies after the adjudicative record closed. Therefore, Intervenors could not have discovered the policies in time to submit them for the adjudicative record. The Council has not yet begun deliberations, nor reached a recommendation. Nor would it disrupt the Council’s deliberations to receive this small amount of new information. It is both equitable and pragmatic to reopen the adjudicative record for this limited purpose.

CONCLUSION

The BPA’s new policies are highly relevant to the Council’s deliberations, and the policies represent the best and most current information available by which to make a decision. Intervenors request that the Council reopen the adjudicative record for the limited purpose of receiving the supplemental testimony and exhibits of Dr. Michaels.

Dated this 3rd day of June, 2011.

Respectfully submitted,

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