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2
3 BEFORE THE STATE OF WASHINGTON
4 ENERGY FACILITY SITE EVALUATION COUNCIL

5 In the Matter of Application No. 2009-01

6 of

7 WHISTLING RIDGE ENERGY, L.L.C.

8 for

9 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

10
11 **INTRODUCTION**

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

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

1
2 **ARGUMENT**

3 **A. Statutory Authority to Reopen the Record**

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

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

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

21 (i) new evidence has become available that relates to the validity of the agency
22 action at the time it was taken, that one or more of the parties did not know and
23 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.

1 RCW 34.05.562. These factors are instructive for the Council's determination on whether to
2 reopen the adjudicative record and receive the proposed materials.

3 **B. Overview of the BPA's New Policies.**

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

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

18 The BPA's new policies have in large part been necessitated by the "dramatic surge" of
19 wind development within the BPA's Balancing Authority Area—a surge that has outpaced
20 demand here in the Pacific Northwest. *Id.* at 11; *see also id.* at 8 (explaining that "generation has
21 increasingly been developed by private parties independent of load requirements and sold outside
22 the balancing authority area where generation resides."). Major causes of this surge have been
23 federal production tax credits and state renewable energy credits; these credits provide wind

1 developers a major incentive to build and operate as much as possible regardless of load. *Id.* at 8.
2 The BPA’s new policies help protect the aquatic environment and maintain system reliability by
3 “signal[ing] to wind developers that building more and more wind primarily for export outside
4 the Northwest in a small geographical area cannot be sustained without more capital investment
5 in transmission, storage or other solutions that address the unintended cost shifts of well-intended
6 legislation.” Ex. 30.29 (BPA, Policy Issues on Environmental Redispatch) at 4.

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

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

19 In order to provide the Council with the best available, most current information to
20 investigate the sufficiency of the application, and to provide the Governor with the best
21 information to make a decision, the Council should reopen the adjudicative record to receive the
22 supplemental testimony and exhibits of Dr. Robert J. Michaels.

1 One of the Council's express functions is to "receive applications for energy facility
2 locations and . . . *investigate the sufficiency thereof.*" RCW 80.50.040(5) (emphasis added). The
3 Council has a "comprehensive mandate" to balance a proposed project's environmental impacts
4 with the broad interests of the public. Council Order No. 843 at 8 (Nov. 16, 2009) (applying
5 RCW 80.50.010); *see also* SOSA Principal Br. on Adjudication at 19–24; Friends Br. at 4–5;
6 SOSA Resp. Br. on Adjudication at 8–15. The Council must also determine whether proposed
7 energy facilities would provide the region with "abundant power at reasonable cost." *See* RCW
8 80.50.010(3); WAC 463-14-020(3).

9 Dr. Michaels explains in his supplemental testimony that the BPA's new interim policies
10 are highly relevant to the Council's ultimate task to balance the impacts of the proposed facility
11 with the broad interests of the public. Ex. 30.26 at 3–5. For example, on May 26, 2011, the BPA
12 concluded that "building more and more wind primarily for export outside the Northwest in a
13 small geographical area cannot be sustained" without more investment in infrastructure. Ex.
14 30.29 at 4. This corroborates Dr. Michaels's prior testimony that the difficulties of integrating
15 the region's recent surge of wind development into the electrical grid cannot be accomplished
16 without further technological investment. *See* Ex. 30.00 at 30:3–5.

17 Dr. Michaels also explains that the BPA's new policies make the WREP's expected
18 benefits even more speculative than before. In his prior testimony, Dr. Michaels concluded that
19 the WREP's small, incremental, and variable output would provide the region with little benefit.
20 Ex. 30.00 at 15:17–23. Now, with BPA having to cut off wind generation for lengthy periods of
21 time, Dr. Michaels explains that the expected public benefits of the WREP are even smaller. Ex.
22 30.26 at 4–5.

1 The Applicant has made repeated statements regarding the alleged need and demand for
2 its proposed facility and regarding the facility's ability to meet load in the Portland/Vancouver
3 area and in the Pacific Northwest. *See, e.g.*, Amended Application at I-1, I-2, 2.1-6, 2.19-1, 2.19-
4 2, 2.19-6. But the BPA's new policies cast doubt on those assertions by concluding that the
5 majority of wind development within the region will not be serving those markets. *See Exs.*
6 30.27 at 8, 30.29 at 4.

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

12 CONCLUSION

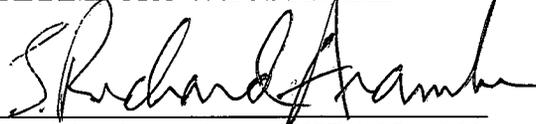
13 The BPA's new policies are highly relevant to the Council's deliberations, and the
14 policies represent the best and most current information available by which to make a decision.
15 Intervenors request that the Council reopen the adjudicative record for the limited purpose of
16 receiving the supplemental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

17 Dated this 3rd day of June, 2011.

18 Respectfully submitted,

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