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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT
LLC

for

WHISTLING RIDGE ENERGY PROJECT

RESPONSE OF SAVE OUR SCENIC
AREA TO PETITIONS FOR
RECONSIDERATION

(Oral Argument Requested)

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7 Abbreviations Employed

8 In the course of this motion the following terms will be used:

- 9 Council: Energy Facilities Site Evaluation Council.
10 EFSLA: Energy Facilities Site Location Act, ch. 80.50 RCW
11 FCRTS: Federal Columbia River Transmission System.
12 GMA: Growth Management Act, ch. 36.70A RCW
13 I-937: Initiative Measure 937 codified as ch. 19.285 RCW
14 Recommendation Package: Orders 868, Order 869 and Draft Site Certification
15 Agreement
16 Whistling Ridge: The project requested for approval by EFSEC.
17 WRE: Whistling Ridge Energy Project, LLC, wholly owned by S.D.S. Co, LLC,
18 is the project applicant.

1 **I. INTRODUCTION.**

2 This is a response of Save Our Scenic Area (SOSA) to petitions for
3 reconsideration filed by the following parties to this proceeding:

- 4 1) The applicant Whistling Ridge Energy LLC (WRE)
- 5 2) Skamania County and the Klickitat County Economic Development
6 Authority (jointly referenced herein as Skamania County)
- 7 3) Seattle Audubon
- 8 4) Friends of the Columbia Gorge (Friends)

9 Significantly, other intervenors have not sought reconsideration, including the
10 Washington State Department of Commerce, the Skamania County Economic
11 Development Council, the Port of Skamania County, the Association of Washington
12 Businesses.

13 SOSA will address two of the matters presented by the WRE and Skamania
14 County. First, related to WRE’s motion, whether the presence or absence of economic
15 viability is an appropriate issue before EFSEC, and if so, whether there is evidence in the
16 record to support such a claim. Second, related to Skamania County’s motion, whether
17 the Whistling Ridge project is a cure for Skamania County’s claimed economic problems
18 and whether county zoning permits the Whistling Ridge proposal. Other claims related to
19 wildlife and scenic issues are presented, but are addressed in Friends’ Petition for
20 Reconsideration and Response, in which SOSA joins.

21 In this response, SOSA first provides an executive summary, encapsulating its
22 positions regarding issues on reconsideration. Next, SOSA discusses the claims of WRE
23 that the Council’s mitigation of adverse impacts renders its project economically
24 unviable. Following that discussion, SOSA responds to Skamania County’s claim that
25 this project must be approved to provide economic benefits to Skamania County. This
26 response ends with a conclusion that those petitions for reconsideration should be denied
27 and that the petitions for reconsideration by SOSA and Friends should be granted.

1 **II. EXECUTIVE SUMMARY**

2 The Petitions of both WRE and Skamania County should be denied for the
3 following reasons.

4 1) WRE claims that the removal of fifteen turbines from its project makes the
5 project economically unviable are without merit because:

6 a) EFSEC regulations and applicable caselaw demonstrate that economic
7 viability is not an issue before this Council;

8 b) WRE repeatedly objected to any consideration of economic viability
9 during the course of the hearing;

10 c) the record has no substantial evidence to support WRE’s claim that its
11 project is not economically viable because it offered no factual evidence to support it and
12 objected (successfully) to any inquiry into the subject.

13 2) Skamania County’s arguments regarding zoning and economic
14 development should not be accepted.

15 a) The County argues that the land use planning process specifically
16 approved of WRE’s project. However, neither its comprehensive plan nor its zoning
17 code regulate wind turbines at all, despite the County’s preliminary review of this very
18 project before its 2007 Comprehensive Plan was adopted. That plan makes clear that the
19 area in which this project is proposed is set aside as a “conservancy” area to protect
20 commercial timberlands.

21 b) The County argues that this Council should approve the WRE project
22 because it will be its economic salvation. However, this Council does not approve
23 projects based solely on economic stimulation and the record shows potential economic
24 benefits are wholly exaggerated.

25 The overall balance between the need for power and the adverse aesthetic and
26 environmental consequences is decisively struck against this project. The
27 Reconsideration Petitions of SOSA and Friends should be granted and the project denied.

1 **III. CLAIMS OF LACK OF ECONOMIC VIABILITY ARE NOT A BASIS**
2 **FOR RECONSIDERATION OF APPROVAL OF THE WHISTLING**
3 **RIDGE PROJECT**

4 WRE claims that mitigation of the project by removing 15 turbines should be
5 reconsidered because the modified project would not be economically viable. This claim
6 is made straight faced, even though it was WRE that claimed, throughout these
7 proceedings, that economic viability was not an issue that EFSEC could consider. As
8 will be described herein, WRE was right the first time: economic viability of a project is
9 not an issue before EFSEC. But in addition, WRE is estopped from making this
10 argument because they repeatedly objected to inquiry by SOSA and Friends into their
11 claims regarding the output and specifications of this project. Finally, even if the
12 foregoing is not accepted, there is a lack of competent evidence to support its claims,
13 largely because WRE objected to any inquiry into issues of the output and configuration
14 of the project. These issues will be considered seriatim in this response.

14 3.1 Economic Viability is Not an Issue for Consideration Before EFSEC.

15 Though WRE referred to it continually during the hearing, absent from discussion
16 of economic viability in its Petition is the one case that deals with the economic viability
17 issue, the Supreme Court decision in *Residents Opposed to Kittitas Turbines v. State*
18 *Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 321, 197 P.3d 1153,
19 1176 (2008)(hereinafter the “KV” case). In that case, the Supreme Court affirmed this
20 Council’s decision to not consider economic viability.

21 However, EFSEC determined that it would not require Horizon to disclose
22 such information because economic analysis was beyond its expertise.
23 EFSLA requires EFSEC to develop environmental and ecological
24 guidelines regarding energy facility siting. RCW 80.50.040(2). As
25 economic analysis does not relate to environmental or ecological concerns,
26 we believe EFSEC was within its authority to refuse to review the
27 economic viability of the KVWPP.

28 165 Wn.2d at 321. Yet WRE had quoted this precise language at page 54-55 of its
Adjudication Brief. In fact, the same lawyers that represented the wind developer in the
KV case now represent WRE, but they now claim that the Council should reconsider its

1 decision here based on claims that:

2 In fact, extensive testimony in the record evidences that the recommended Project
3 likely is *not* economically viable.

4 WRE Petition at 2:3-4 (emphasis in original).

5 Before the hearings began, SOSA and Friends asked WRE to produce information
6 and background data relating to “financial analysis, revenue projections or other analysis
7 that support the [WRE’s] conclusion that the site must have an installed capacity of 75
8 MW to be feasible.” See letter of July 16, 2010 attached as Attachment A to the “Motion
9 of Friends of the Columbia Gorge and Save Our Scenic Area to Require the Disclosure of
10 Documents from the Applicant” filed on September 28, 2010. WRE vigorously objected
11 to the disclosure of any information related to the feasibility of the project, based on
12 claims that such information was “highly confidential” and not relevant to the Council’s
13 decision. This was literally a drum beat in WRE’s opposition to Friends/SOSA’s motion
14 to the Council to review this information. See Applicant Whistling Ridge Energy LLC’s
15 Response to Friends of the Columbia Gorge and Save Our Scenic Area’s Motion to
16 Require Disclosure of Documents (hereinafter “WRE Disclosure Response”) dated
17 October 4, 2010. Here is a sample of the position and authority cited by WRE in its
18 Response.

19 *Much of what SOSA/FOCG seek to obtain from Applicant, such as meteorological*
20 *data, power production estimates, confidential contract terms, and return on*
investment, goes to the economic viability of the project. This is irrelevant to the
Council’s siting decision.

21 Page 3, Lines 3-7 (emphasis supplied).

22 *RULES OF DISCOVERY, EVIDENCE, AND EXISTING PRECEDENTS*
23 *REGARDING EFSEC AUTHORITY PROHIBIT DISCOVERY REGARDING*
ECONOMIC VIABILITY IN SITING DECISIONS.

24 Page 7, Lines 15-17 (emphasis supplied).

25 *The ROKT court confirmed EFSEC’s interpretation, holding that “[a]s economic*
26 *analysis does not relate to environmental or ecological concerns, we believe*
EFSEC was within its authority to refuse to review the economic viability of the
27 *KVWPP.” Id.*

28 Page 9, Line 24 through Page 10, Lines 1-3 (emphasis supplied).

1 A developer's ability to construct a project and earn a reasonable rate of return
2 on its capital investment is simply beyond EFSEC's authority. . . . [T]he ultimate
3 responsibility for determining the economic viability of a privately financed for
4 profit undertaking must remain in the hands of the proponent.

5 Page 11, Lines 2-4 (emphasis supplied).

6 EFSEC refused to allow Intervenors to conduct discovery on the subject of project
7 costs and economic viability in an effort to advance their argument for turbine
8 removal to address resource and aesthetic concerns. EFSEC held that economic
9 viability assessment to minimize the size of the project was beyond the scope of its
10 authority.

11 Page 27, Lines 20-24 through Page 28, Line 1 (emphasis supplied).

12 "As economic analysis does not relate to environmental or ecological concerns,
13 we believe EFSEC was within its authority to refuse to review the economic
14 viability of the KVVPP." [KV,] 165 Wn.2d at 321. See also Council Order No.
15 831.

16 Page 28, Lines 16-18 (emphasis supplied).

17 WRE's arguments were very persuasive to the Council: it did not allow Friends
18 /SOSA to review any of the requested information. See Council Order 855 (Prehearing
19 Oder 11), October 19, 2010.

20 But then, during the first day of hearing, the project spokesman and president of
21 SDS Lumber, Jason Spadaro, decided to make a statement concerning the project during
22 his cross-examination by SOSA's attorney. See Tr. 73-75. In this statement, Mr.
23 Spadaro said:

24 I would stipulate at this point before this Council that 2-megawatt
25 machines or larger would be used for this project.

26 Tr. 73:20-22.¹ But, he went on to say, essentially, "that is it," we can't reduce the project

27 ¹This stipulation was completely untimely. Council regulations limit amendments to pending
28 applications to 30 days prior to the commencement of a adjudicative hearing under WAC
29 463-60-116(2):

30 (2) Amendments to a pending application must be presented to the council at
31 least thirty days prior to the commencement of the adjudicative hearing, except
32 as noted in subsection (3) of this section.

33 This stipulation was not made thirty days before the hearing and there was no modification to the
34 application. In addition, if there were application amendments that were described during the
35 hearing, the rule is clear the applicant has 30 days after the conclusion of the hearing to submit
36 "application amendments" under WAC 463-60-116(3):

37 (3) Within thirty days after the conclusion of the hearings, the applicant shall
38 submit to the council, application amendments which include all commitments

1 any further:

2 Any further downsizing though of the project we still need in order to get
3 38 machines, we still need to have the same start point and the same end
4 point along these ridges and along the turbine corridors. Dropping or
5 starting the start point farther north or pushing the end point farther south
6 reduces the total size of the project, and we cannot accept that; otherwise,
7 it kills the project. That's the end of my remarks.

8 Tr. 74: 18-25. In questioning about his statement, he said he had no drawings or plans as
9 to where these 38 turbines would be. Tr. 76:2-5.² Neither had he determined the sizes of
10 the various turbines that might be installed. Tr. 79:2-13. In fact, when we asked about the
11 number of turbines in each "turbine corridor" the applicant repeatedly said they were only
12 corridors and the number of turbines had not been decided³:

13 [Mr. Aramburu] Q. Now, how far apart do those turbines to the new
14 turbines have to be in comparison to the turbines that are modeled on
15 Exhibit 1.11, the drawing on the board?

16 [Mr. Spadaro] A. Again, this is somewhat mischaracterizing what is
17 shown in it says Figure 2.1, it's the foam board on the wall there. That was
18 a hypothetical number of turbines for a visual simulation. To state that that
19 is the distance apart between turbines that would based on a 1.5-megawatt
20 layout or just for me to state, for me to be able to state that using a
21 2-megawatt layout would be Y instead of X, I cannot do that. Final
22 micro-siting of wind turbines is based -- I'll state it again. It's based on a
23 great number of factors.

24 Tr. 99:4-17 (emphasis supplied). Mr. Spadaro declined to discuss spacing between

25 _____
26 and stipulations made by the applicant during the adjudicative hearings.
27 (Emphasis supplied.) Again, WRE did not submit any application amendments within 30 days
28 from the close of the hearing. Accordingly, the surprise stipulation of Mr. Spadaro should not be
considered.

29 ²In fact, Mr. Spadaro seemed to make up his stipulation regarding the turbines on the fly. He
30 never told his lead consultant (Ms. Chaney) that he was agreeing to a minimum turbine size of 2
31 MW; she heard it for the first time during Mr. Spadaro's testimony. (Tr. 202:12-18). Nor did he
32 tell his wind consultant Mr. Nierenberg about his stipulation. Tr. 102:20-23. Indeed, none of the
33 other consultants were told either; they came into the hearing assuming there would be 1.5 MW
34 turbines.

35 ³As noted above, WAC 463-30-116(3) requires that the applicant follow up any stipulations
36 made during the adjudicative hearing by submitting "application amendments" within 30 days of
37 the hearing. However, no application amendments were submitted by the applicant within 30
38 days of the hearing or at any other time. If application amendments had been filed, presumably
the Council, staff and intervenors would be informed of the detail of the new plan and issues of
distance between turbines.

1 turbines:

2 So I really cannot -- that's how you determine spacing within rows and
3 then spacing between rows going in the upwind and downwind direction. I
4 can't really state what change would occur by going to 2.0 and larger
5 megawatt wind turbines.

6 Tr. 100:5-9 (emphasis supplied). Accordingly there is no support in the record for claims
7 made in WRE's reconsideration motion that: "the testimony evidences that thirty 2.5 MW
8 turbines cannot physically be sited in those remaining turbine corridors." WRE
9 Reconsideration Petition at 2:18-20.⁴

10 When questioned about the details of his statements that no further reductions are
11 possible because the applicant had to have 75 MW, the applicant objected that this was
12 "proprietary" information:

13 [Mr. Spadaro] A. The components of our cost are proprietary to our
14 project. I do not wish to release any information about, specific
15 information about the cost of our project, the capacity factor of our project,
16 or any other specific details of that nature.

17 [Mr. Aramburu] Q. Mr. Spadaro, this is your testimony. You said you can't
18 get by with anything less than 75. You just testified to that. Now I want to
19 know what goes into that decision beginning with what's the cost of
20 building that substation for your 75-megawatt project.

21 MR. McMAHAN: I'm going to object to that. We've been through this with the
22 Siting Council at length during the discovery process. The information that Mr.
23 Aramburu is seeking to request has been determined to be confidential and
24 proprietary data.

25 Tr. 81:2-16. In response to this objection, counsel for SOSA indicated that since the
26 testimony of Mr. Spadaro claimed that 75 MW was the minimum for the project, SOSA
27 was entitled to inquire into that statement:

28 _____
⁴The applicant cites to the FEIS as the only support for this statement. However, there was no
discussion in the FEIS regarding turbine size or spacing. The FEIS simply copied the DEIS in
explaining the project size: "The Project would consist of up to 50 wind turbine generators that
likely would range in size from 1.2 to 2.5 MW each." FEIS at page 2.5. Though Mr. Spadaro
made the 11th Hour stipulation regarding the size of wind turbines on January 4, 2011, the FEIS
issued on August 23, 2011 did not mention, much less analyze, the proposal to install 38 turbines
at a minimum of 2 MW each. Indeed, Figure 2-1 showing "Proposed Project Elements" continues
to show 50 turbines including Turbine Corridors A1 -A7. C1 - C4 and C5 - C8. All drawings in the
FEIS showed 50 wind turbines with each turbine assigned a number. See FEIS at Figures 3.1-3
(Soil Classification), 3.1-4 (Landslide Hazard Areas), 3.7-1 (Noise Level Contours), 3.9-1
(Locations of Simulation View Points).

1 (By Mr. Aramburu) He volunteered this information, and he presumably wants
2 you to make a finding that 75 megawatts is the minimum size that can be
3 permitted here. If he wants to make that statement, then we're entitled to ask him
4 how he got there.

5 Tr. 82:9-13. Eventually, the Council sustained the objection and did not allow SOSA's
6 counsel to inquire into the "75 MW or bust" claim by Mr. Spadaro:

7 JUDGE WALLIS: The Council has ruled in this proceeding as it has in at
8 least one prior proceeding that the financial viability, which is the
9 underlying issue to which the witness made reference, is not something
10 that the Council will consider. So the Council is not bound by his
11 testimony, and the Council could approve a facility that provided less
12 capacity, and then it would be up to the Applicant to determine whether or
13 not to proceed. That is my understanding of the Council's ruling, the
14 Supreme Court ruling. That's sustained because of the Council's
15 interpretation and how the Council under those circumstances would
16 address that question.

17 Tr. 82:20-25 to 83:1-6. The applicant, relying on the *KV* case and prior Council authority,
18 objected to any questions about economic or financial viability.

19 Thus the applicant, at every turn, has relied on the *KV* case and other prior Council
20 rulings to not only keep any discussion of economic viability out of the record, but also to
21 keep SOSA and Friends from making any inquiry into these matters. Based on the
22 foregoing the Council properly ruled that it would not consider economic viability.⁵

23 3.2 There is Insufficient Evidence in the Record to Support the Applicant's
24 Claim that the Council's Removal of Two Turbine Strings Makes the
25 Project Economically Unviable.

26 As described above, the controlling caselaw, and this Counsel's prior rulings
27 indicate that EFSEC does not consider economic viability in its considerations. Moreover,
28 the applicant continuously relied upon this authority to deny SOSA/Friends access to any
information relative to economic viability and also successfully convinced this Council to
deny inquiry into these matters at the hearing. Though it is clear that economic viability is

⁵As well, the WRE argument regarding economic viability (to some extent echoed by Skamania County) is based on entitlement: if an applicant files an application for site certification they are entitled to their project. That certainly is not the case and the Council can recommend disapproval of the project. Under the authority given, this Council has the statutory authority to reject an application under RCW 80.50.100(1)(a): "(1)(a) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification" (Emphasis supplied.)

1 not an issue, even if it was, there is no substantial evidence in the record to support the
2 claim that the applicant must have a 75 MW project.

3 The applicant claims in its petition for reconsideration that “extensive evidence in
4 the record evidences that the mitigated Project likely is *not* economically viable.” Petition
5 at 2:3-4 (emphasis in original). However, the only source for this “extensive evidence” is
6 statements of the project promoter, Mr. Spadaro. See Petition, 2:5-21.⁶ But his testimony
7 does not establish any background or expertise in wind energy projects. See Spadaro
8 testimony at Exhibit 1.00 at page 2, where his background and education is shown to be in
9 forestry and management of business matters for the SDS lumber company.

10 Indeed, though some testimony was provided regarding the different turbine sizes,
11 it was apparent that Mr. Spadaro was relying on his wind energy consultant, Mr. Ron
12 Nierenberg, on these matters:

13 [Mr. Spadaro] When I speak about the need for flexibility, we need to be
14 able to select a turbine that fits our site and allows it to be economically
viable.

15 [Mr. Aramburu] Q. So Mr. Nierenberg testified here. He's a wind expert.
Has he told you that you could put in a 2.5 or 3-megawatt turbine?

16 A. No, he has not.

17 Q. Did you ask him?

A. Yes, I have.

18 Q. What did he say?

MR. McMAHAN: Your Honor, I object to that on grounds of
confidentiality and we have discussed that previously.

19 Tr. 97:222-25 and 98:1-9. This objection was again sustained. Tr. 98:20-21.

20 Later, in Mr. Spadaro’s cross examination, the issue of turbine spacing came up
21 again, as noted in the Reconsideration Petition at page 2. But it was again apparent that
22 Mr. Spadaro was relying on his expert, Mr. Nierenberg:

23 [Mr. Aramburu] Q. So it would be possible to have a 2-megawatt turbine
24 that wouldn't require any distance, any additional distance between them
than the 1.5-megawatt turbines?

25 A. No, I don't believe you can get a 2-megawatt turbine with a 77-meter
rotor diameter.

26 Q. How do you know that?

27 ⁶There was an attempt to rely on statements in the FEIS but these did not deal with the issues
28 as described in Footnote 4 above.

1 A. That's my opinion. I don't know that for a fact, but that's my belief and
2 opinion.
3 Q. So have you looked at the turbine brochures that turbine manufacturers
4 put out?
5 A. No, I rely on consultants to provide advice as to what turbines might be
6 the best suited for our project.
7 Q. Please tell me whose those consultants are.
8 A. Ron Nierenberg who is a witness to the hearings.
9 Q. So I can ask him about those things?
10 A. Yes.

11 Tr. 101:22-25 to 102:1-11.⁷ Mr. Spadaro relied on his consultant on these matters, not on
12 his personal knowledge, and indicated questions about turbine selection should be directed
13 to his consultant. At the time, Mr. Nierenberg had submitted written testimony (proposed
14 Exhibit 15.00R and 15.01R) and was scheduled to be a witness. However, WRE abruptly
15 withdrew the Nierenberg testimony just before he was to be called for cross-examination.⁸

16 In essence, “the Emperor has no clothes.” There is no support in the record for the
17 claim that WRE must have a 70 or 75 MW project other than the say-so of the project
18 applicant. No effort was made to provide any analysis as to why 75 MW was the
19 minimum viable project size.

20 The other reason there is insufficient evidence in the record is that WRE worked
21 aggressively to keep it out. It argued continuously that its business model and background
22 information on the wind project were proprietary and essentially no one else’s business.
23 The information about the details of the project were claimed to be “highly sensitive and

24 ⁷The chief consultant for the project, Ms. Katy Chaney testified that Whistling Ridge was “a
25 commercially viable wind resource, but on cross examination, she indicated that the sole source
26 of this information was Mr. Spadaro and that she had never spoken to Mr. Nierenberg. Tr. 205:5-
27 13.

28 ⁸Another example of WRE’s unsupported claims is found at page 2, line 5 of its
Reconsideration Petition: “The A1-A7 turbine corridor has a robust wind resource. . . .” The only
citation supporting this statement comes from Mr. Spadaro. The wind expert Mr. Nierenberg did
not support the claim and no data was provided by the applicant to support it. Indeed, when
SOSA asked for meteorological data , WRE objected, stating that: “Data used in analysis of the
wind resource, including meteorological records prepared by the Applicant, is proprietary in nature
. . . .” WRE Disclosure Response at 17:1-5. As noted above, the objection to disclosure of these
records was upheld by the Council.

However, information provided by the intervenors shows that the A1-A7 corridor actually has
the worst wind potential of the entire project. See Exhibit 24.09.

1 confidential business information [which] would put it (WRE) in a distinct and unfair
2 disadvantage in competitive bidding situations.” WRE Discovery Response, page 14.
3 Similarly, they cited to WUTC proceedings to claim “protection of proprietary and highly
4 confidential information and data related to power production and costs, including . . .
5 project productivity . . .” WRE Discovery Response at 15. When Mr. Spadaro was asked
6 on cross examination “what goes into the decision” that 75 MW was the absolute
7 minimum (Tr. 81:7-11), an objection was made by WRE’s counsel that: [T]he information
8 that Mr. Aramburu is seeking to request has been determined to be confidential and
9 proprietary data.” Tr. 81. In short, WRE jealously guarded information about its turbines
10 and economic feasibility of its project, at least until the Council’s decision was issued.
11 Then WRE decided to change its position about whether economic feasibility was
12 relevant.

13 Skamania County joins with WRE’s arguments about economic viability. In a
14 kind of equitable claim the County says:

15 It is hard for this County, facing such difficult economic conditions, to
16 fathom how expensive this project has been and how long permitting has
17 taken, to approve a Project so limited it is not viable, when local
18 regulations authorize the Project.

19 Skamania County Petition at 11:18-20. The County goes on to say that: “This is perhaps
20 the most expensive project for an applicant in EFSEC history” with a footnote that the
21 Applicant “must reimburse EFSEC for permitting costs.” Skamania County Petition at
22 12:4-5. Skamania County wants the Council to ignore the public interest in favor of the
23 private interests of the applicant because of the time and money that WRE has put in.

24 But the long standing rule in Washington is that the mere expenditure of money is
25 insufficient to trump the public interest. As stated in *Eastlake Community Council v.*
26 *Roanoke Associates, Inc.*, 82 Wn.2d 475, 484-485, 513 P.2d 36 (1973):

27 We cannot find that a litigant has any right to be a beneficiary of unlawful
28 administrative conduct where the public’s interest will suffer, by the mere
assertion that extensive financial investment is in the balance. Defendant
started the project with full awareness that there were multiple, serious
legal obstacles and cannot now claim relief simply because money was

1 expended in the face of an awareness it might not have a legal right to
2 proceed.

3 Similarly here, with the help of experienced legal counsel, WRE applied to EFSEC
4 knowing the significant concerns regarding scenic and wildlife impacts. Indeed, Mr.
5 Spadaro was so concerned about the visual impacts of the project that he offered a last
6 minute stipulation to go with 2 MW turbines. Tr. 74:2. This was after submitting
7 extensive testimony regarding visual impacts and wildlife impacts during the hearing. It is
8 certainly not the job of EFSEC to guarantee financial return either for the applicant or the
9 county.

10 Indeed, it was WRE itself that said, in its Discovery Response, that: “It is beyond
11 the province of EFSEC to independently determine whether a wind resource is adequate to
12 support a private developer’s investment in an energy facility, . . .” WRE Discovery
13 Response at 17:10-12. In response to the County’s claims that the Whistling Ridge project
14 is needed for economic development in the County, WRE clearly stated that EFSEC
15 should not : “become a super agency regulating, through its siting decisions, matters such
16 as . . . stimulation of economic development . . .” WR Discovery Response at 22: 17-18.

17 3.3 Conclusion Regarding Economic Viability.

18 Early on in these proceedings, WRE drew its line in the sand: economic viability of
19 its project was not relevant to the outcome of this dispute. Inquiry into the subject was off
20 limits and questions about why 75 MW was the minimum project size were objectionable.
21 Though the reason for intervenors’ inquiry was not to show economic viability but
22 questions of need for the project, nonetheless WRE prevailed and the Council assiduously
23 denied intervenors access to the information.

24 Now faced with a condition to reduce the number of turbines, WRE suddenly does
25 an about-face and wants to make economic viability an issue. But WRE was right the first
26 time: the rulings of the Council and the Supreme Court are clear that economic viability is
27 not an issue before the Council.

28 Even if the Council was to decide to get into the nitty-gritty of economic

1 feasibility, there is no substantial evidence to support the claim. By virtue of WRE's
2 constant objections, the record has now been swept clean of any substantial evidence that
3 75 MW should be the minimum project permitted. The record contains only the
4 unsupported claims of the project sponsor, the same witness that said he relies on his
5 consultants to provide this information. Economic viability of the project should not be
6 considered.

7 **IV. SKAMANIA COUNTY'S CLAIMS THAT WHISTLING RIDGE IS**
8 **CONSISTENT WITH LOCAL ZONING AND PROVIDES ECONOMIC**
9 **SALVATION SHOULD BE DISMISSED.**

9 Skamania County claims that the Council has exceeded its jurisdiction and
10 statutory authority because it declined to approve the whole project proposed by WRE. Of
11 the several claims made, SOSA will focus on two: whether county "zoning" permits the
12 project and whether this Council should approve the project to provide economic benefits
13 to the community.

14 4.1 County Zoning Expressly Excludes this Project.

15 Skamania County argues that local zoning permits the project to be built with no
16 fuss; all that is required is a building permit and the whole process can be completed in a
17 day. No worries about objectivity, SEPA or other laws.

18 SOSA's Petition on Reconsideration has addressed the zoning issues and that
19 discussion will not be repeated here. See pages 21-29. Suffice it to say that the applicable
20 Comprehensive Plan (2007) did not mention or discuss wind turbines and plainly called
21 for conservation of the area. The existing zoning ordinance, adopted two years before the
22 new comprehensive plan also says nothing about approval of wind turbines.

23 Though SOSA has thoroughly addressed the zoning issue, a brief response to some
24 comments by Skamania County is appropriate.

25 a. *The Applicant is legally entitled to rely upon this zoning (Brief at 2), the Project*
26 *is vested (Brief at 4).*

27 The County now states that the applicant has a vested right to proceed with the
28

1 project. The County claims that this Council’s inquiry ends if it determines that the
2 project is consistent with local zoning. This is not the case.

3 WAC 463-14-080 describes the EFSEC “deliberative process.” The process does
4 include the consideration of laws that may be preempted, but
5 it must also: “ (1) Evaluate an application to determine compliance with chapter 80.50
6 RCW and chapter 463-60 WAC; . . .” Indeed RCW 80.50.100 places specific
7 responsibilities on the Council:

8 (2) If the council recommends approval of an application for certification, it
9 shall also submit a draft certification agreement with the report. The
10 council shall include conditions in the draft certification agreement to
11 implement the provisions of this chapter

The “provisions of this chapter” include the balancing test found in RCW 80.50.010:

12 It is the policy of the state of Washington to recognize the pressing need
13 for increased energy facilities, and to ensure through available and
14 reasonable methods, that the location and operation of such facilities will
15 produce minimal adverse effects on the environment, ecology of the land
16 and its wildlife, and the ecology of state waters and their aquatic life.

17 It is the intent to seek courses of action that will balance the increasing
18 demands for energy facility location and operation in conjunction with the
19 broad interests of the public. Such action will be based on these premises:

20 (1) To assure Washington state citizens that, where applicable,
21 operational safeguards are at least as stringent as the criteria established by
22 the federal government and are technically sufficient for their welfare and
23 protection.

24 (2) To preserve and protect the quality of the environment; to enhance
25 the public’s opportunity to enjoy the esthetic and recreational benefits of the
26 air, water and land resources; to promote air cleanliness; and to pursue
27 beneficial changes in the environment.

(Emphasis supplied.) The Council is specifically tasked with representing the state-wide
28 interest in its decision making and not just local wishes.

29 *b. Local jurisdictions have planned for renewable energy and have identified*
30 *locations where it should be sited. Skamania County, by retaining this unmapped zoning,*
31 *has identified the limited portion of the County where wind development is appropriate. . .*
32 *.(Brief at 12).*

This statement asks that the Council suspend disbelief. The County would have

1 this Council believe that setting aside lands as “unmapped” was really part of a grand and
2 complex plan to create a special preserve for wind turbines. If this was so, it was cleverly
3 disguised and known only to a select few. Those few did not include the County Planning
4 Director, who never said the unmapped areas were to be a special place for wind turbines.
5 Commissioner Pearce remained silent about it. In fact, the Skamania County Hearing
6 Examiner said that wind turbines were not even considered for inclusion during the 2007
7 Comprehensive Plan process. See Exhibit 1.17C, Finding 18, page 8: “The 2007
8 Comprehensive Plan did not contemplate the type of energy facilities that are described in
9 the Planning Commission Recommended Draft.”

10 In fact, SDS Lumber, the parent of WRE, approached Skamania County with this
11 very project before the 2007 Comprehensive Plan was adopted. The Lead Consultant for
12 WRE in the EFSEC hearing, Katy Chaney, had approached Skamania County well before
13 the 2007 Comprehensive Plan was done. See Tr. 197-200. She testified that:

14 A. Prior to the application to the Energy Facility Site Evaluation Council the
15 Applicant initiated proceedings with Skamania County starting with a SEPA
16 checklist and a conditional use permit application for those portions of the turbines
that would require conditional use permit which is primarily in the lower portion of
the A-string.

17 [Mr. Aramburu] Q. What was the time frame of that work?

18 A. Oh, I don't recall. Prior to 2008, maybe 2005, maybe 2006.

19 Q. Was a complete SEPA checklist and conditional use permit application
prepared?

20 A. I know we had at least prepared a draft. I don't recall if those documents were
ever actually submitted to the county.

21 Q. Did you consult with staff at Skamania County concerning those projects?

22 A. I recall at least a pre-application process that involved various departments at
the county to determine what they would want to see in the SEPA checklist and to
get the permit application for the conditional use permit.

23 Q. Did you recall meeting Ms. Witherspoon who is the planning director for
Skamania County?

24 A. Yes, at least in a pre-application conference, yes.

25 Tr. 197:25 to 198:22. Ms. Chaney's testimony is collaborated by the Skamania County
26 Hearing Examiner who found, though no formal application had been filed:

27 However, SDS Lumber has approached Skamania County on multiple
28 occasions over the past several years to discuss a possible large-scale wind
energy project (Saddleback Project) on its property within the County. Ms.
Witherspoon (the County Planning Director) met with representatives of
SDS and entities such as the Bonneville Power Administration on two or

1 three occasions for “pre-application meetings” to discuss permitting
2 requirements for the project. Multiple pre-application meetings have been
3 held because of changes in the development team. The project, if
4 developed, would consist of at least 40 wind turbines.

5 Exhibit 1.17C, Finding 36, page 13.

6 Accordingly, County planning staff - the County department responsible for
7 preparation of the comprehensive plan in 2007 - was well aware of the interest of SDS in
8 developing a wind turbine project. The exclusion of any discussion of wind turbines in the
9 comprehensive plan shows that there was no attempt to “identify a limited portion of the
10 County where wind development is appropriate” as claimed in Skamania County’s
11 Petition at 12.

12 4.2 Contrary to the County’s Claims, the Whistling Ridge Project Will Not Be
13 the Economic Savior for Skamania County.

14 Skamania County’s claims regarding economics are particularly shrill. The County
15 claims that denial of the project will result in economic calamity. Laid at the feet of the
16 Council (and those that question the project) is the responsibility for domestic violence,
17 childhood hunger and closed schools. In short, it will be Apocalypse right now if
18 Whistling Ridge is not approved.

19 As will be discussed below, the hyperbole of the county is surprising given the
20 modest output of the project, especially where most of the work will be installing large
21 wind turbines manufactured by foreign companies. Indeed, most of the construction
22 workers (65-70%) would simply commute from the Portland/Vancouver area, adding very
23 little to the local economy.⁹ When the construction is complete, there would be only 7 or 8
24 permanent jobs, some of which may be only part time. Notwithstanding the overheated
25 nature of the County’s position, this project is not a new 737 assembly line where
26 construction workers build buildings and this construction is parlayed into hundreds of

27 ⁹The applicant is required to include the "cost of the facility" in its application under WAC
28 463-60-145. The estimate is \$150 million (Amended Application at 2.3-12). However, the vast
majority of that cost is in the turbines themselves, which are manufactured elsewhere and merely
assembled on site.

1 high paying, permanent manufacturing jobs.

2 It certainly appears that the County position has much more to do with personal
3 relations rather than economic merit. It is apparent that a close working relationship exists
4 between the County Commissioners and SDS, as evidenced by the numerous private
5 conversations between them. Indeed, it was the County Commissioners that told WRE, in
6 a private conversation, to come to EFSEC. Tr 1343:16-25. This was confirmed both by
7 Mr. Spadaro and County Commissioner Pearce. Indeed, Mr. Spadaro stated that "it was at
8 Skamania County's suggestion that WRE came to EFSEC." Tr. 87:22-88:1.

9 The economic benefits of this project have been discussed in detail in SOSA's
10 Adjudication Brief at pages 28 to 32. Based on the expert testimony of Professor Michaels,
11 it is concluded there that the WRE proposal's economic benefits are overstated due to the
12 following factors:

- 13 1. Most of the construction workers would commute from Portland/Vancouver,
14 spending their wages in their home communities;
- 15 2. There would be few long term jobs, only 8-9 part or full time jobs;
- 16 3. The studies prepared are deliberately skewed to show positive benefits;
- 17 4. The studies prepared for the site greatly exaggerate wages for construction
18 workers; and
- 19 5. Census and other figures do not show excessive unemployment and hardship
20 beyond what is found in other parts of the state of Washington.

21 In summary, the Petition for Reconsideration from Skamania County should be
22 denied. First, Skamania County's comprehensive plan and zoning ordinances have no
23 provisions for wind turbines and certainly have no areas identified for their development.
24 The failure of the County's land use planning to address wind turbines is especially
25 striking when its planning department was undertaking pre-application review of this
26 project before the 2007 Comprehensive Plan was adopted. Second, claims that the project
27 should be approved because of economic stimulus for the County should be rejected.
28 Though the economic impact of the project is overstated, WRE itself has said that the
responsibility of this Council is not a "super agency" charged with the "stimulation of

1 economic development.” WRE Discovery Response at page 2:1-2.

2 **V. CONCLUSION.**

3 For the reasons stated herein, the Reconsideration Petitions of WRE and Skamania
4 County should be denied and the Petitions of SOSA and Friends granted.

5 Respectfully submitted,

6 ARAMBURU & EUSTIS, LLP

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8 J. Richard Aramburu, WSBA 466

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