

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

PREHEARING ORDER NO.1
COUNCIL ORDER NO. 842

PREHEARING ORDER GRANTING
PETITIONS FOR INTERVENTION;
ESTABLISHING SCHEDULE FOR
STATEMENTS OF LEGAL POSITIONS

Nature of the Proceeding:

This matter involves Application No. 2009-01, submitted by Whistling Ridge Energy Project LLC (“Applicant”) to the Washington State Energy Facility Site Evaluation Council (“Council”) on March 10, 2009. Applicant seeks certification of a site in Skamania County, Washington on which to construct and operate the Whistling Ridge Energy Project (the Project). The Project, as defined in Applicant’s filing with the Council on March 10, 2009, involves the construction and operation of up to 50 wind-powered generating turbines and associated facilities.

Procedural Setting:

The Council convened a prehearing conference pursuant to due and proper notice to all interested persons at 1:30 p.m. on July 28, 2009, in Olympia, Washington. The Conference was held before Council Chair Jim Luce and Council members Richard Fryhling (Department of Commerce), Jeff Tayer, Department of Fish and Wildlife; Richard Byers (Utilities and Transportation Commission), Mary MacDonald (Department of Natural Resources), and C. Robert Wallis, Administrative Law Judge.

Participants:

The following persons appeared before the Council during the prehearing conference: ¹

Applicant:

Whistling Ridge Energy, LLC, by Timothy McMahan, attorney, Vancouver, Washington, and Darrell Peeples, attorney, Olympia.

Counsel for the Environment:

H. Bruce Marvin, Assistant Attorney General,

¹ Contact information for the parties’ representatives and others requiring service are listed in Appendix I to this order.

Olympia.

Council Member Agency Appearing as Party: **Washington Department of Commerce**² by Mark Anderson, Agency Staff, Olympia.³

Petitioners for Intervention:⁴

Association of Washington Business, by Chris McCabe, attorney, Olympia.

Friends of the Columbia River Gorge (FOCG), by Gary K. Kahn and Nathan Baker, attorneys, Portland, Oregon.

Klickitat and Cascade Tribes of the Yakama Nation, by Chief Johnny Jackson (Cascades), Underwood, Washington and Chief Wilbur Slokish, Jr. (Klickitat), Wishram, Washington.⁵

Klickitat County Public Economic Development Authority, by Michael Canon, Executive Director, Goldendale.

Save Our Scenic Area (SOSA), by Mr. Kahn
Seattle Audubon Society, by Shawn Cantrell, Seattle, Executive Director.

Skamania County Agri-Tourism Association, by Mr. Kahn

Skamania County Economic Development Council, by Peggy Bryan, Executive Director, Stevenson, Washington.

Skamania County Public Utility District No. 1, by Robert Wittenberg, Manager, Carson, Washington.

Participation of right:

² Representatives of Council member agencies act as judges of matters being adjudicated in an application proceeding. In particular, when an agency chooses to participate as a party in an adjudication, the agency must provide total separation between the council member and persons involved in advocacy of a position. See, RCW 34.05.455. The Department of Community, Trade and Economic Development filed its notice of appearance on July 10, 2009. On July 27, it officially became the Washington State Department of Commerce pursuant to a law enacted in the 2009 legislative session. The parties agreed that the Department could be referenced by its new, now-current name throughout this proceeding.

³ Alice Blado, Asst. Attorney General, Olympia, will represent the Department. Mr. Tony Usibelli, Director of the Department's Energy division, may also represent the agency in future proceedings.

⁴ The Notice for the prehearing conference specified that parties and petitioners would not be heard by telephonic appearance. The following petitioners did not enter an appearance: **City of White Salmon, Columbia River Gorge Commission**, and **Port of Skamania County**. At least one petitioner's representative stated an intention to listen to the conference on the Council's conference bridge line. For reasons beyond the Council's control, however, the bridge line was not operational during most of the conference. No objection was stated to these petitions for intervention, and the petitions were granted.

⁵ The Tribes filed a joint petition for intervention.

Counsel for the environment, Mr. Marvin, is a statutory party to the proceeding under RCW 80.50.080. The Washington Department of Commerce, a Council member pursuant to RCW 80.50.030, stated its intention to participate as a party. Commerce has a representative on EFSEC for this proceeding and it is thereby entitled to party status in the Council's adjudicative proceedings as a matter of right. WAC 463-30-050 and 463-30-060.

Petitions for Intervention:

The Applicant did not object to granting any of the 12 petitions for intervention; the petitions each appear to state a valid interest in the subject matter of the proceeding and a risk to such interest that supports its participation as a party. Each petition is granted.

The Applicant asked for a statement of the interests of SOSA and FOCG with particularity, as required by law and rule. Mr. Kahn⁶ answered, acknowledging that the petitions made identical statements of issues that did not identify the particular interests of each petitioner. Applicant was granted leave to make a request in writing, seeking greater particularity, on the schedule set out below.⁷ If Applicant does make the request, the Intervenors will respond at the time set for responsive submissions, as set out below.

The Applicant also asked clarification of the interests of the Seattle Audubon Society, as to whether its concerns are limited to matters affecting birds and avian habitat. Mr. Cantrell responded that such was the Society's interest, but clarified at the conclusion of the conference that the Society's interests also include climate change and carbon emission issues. If the Applicant is not fully satisfied with the responses, it may seek further information on the schedule indicated below.

Finally, the Applicant noted that the petition of the Skamania County Agri-Tourism Association presented a straightforward statement of interests, but no statement of issues. Mr. McMahan indicated his understanding that the Association's principal issues would be visual and tourism impact involving the "A" string of turbines, which in the proposal would be placed in locations particularly visible from points in the Columbia Gorge. The Council asks that the Association present a statement of its issue or issues, on the schedule set out below.

Motion to Consolidate Interventions:

The Applicant filed a motion prior to the conference, asking that the Council require SOSA and FOCG to consolidate their presentations, use a single lead counsel, and otherwise make a unified presentation. The Applicant observed at the conference that the language of the two petitions for intervention is nearly identical in most significant regards, and that the petitions pledged to pursue identical issues.

⁶ Mr. Aramburu, SOSA's counsel, was unable to attend the conference and Mr. Kahn spoke on behalf of both parties.

⁷ The Council also asks below that the intervenors present revised or supplemental petitions that, consistent with Mr. Kahn's representations, clearly reflect the interests of the membership of the two Intervenors and accurately state the limits of their issues.

Mr. Kahn responded, noting several matters. First, he stated that the language was similar, if not identical, partly because he assisted in preparation of the documents. He represented that in practice, the groups would not pursue all identical issues. He also represented that even when approaching the same issue, the focus of the groups differs: SOSA is composed principally of local members and its concerns relate principally to local effects of the project, while FOCGs' membership base has a broader geographical representation and looks at issues from that broader perspective. He noted that even when pursuing the same issues, SOSA would be looking at different aspects, related to local perspectives, than FOCG.

Mr. Kahn further represented that he and Mr. Aramburu, SOSA counsel, have both been involved in other matters on behalf of their clients, and that they worked diligently to avoid duplication. He pledged that they would engage in that practice in this matter, giving examples of coordination and cooperation to avoid duplication. On the basis of the representations in these discussions, the Council denied the motion to require consolidation. The Council made its decision on the basis of representations that there will be no duplication between the parties' presentations, including their cross examination of witnesses of adverse parties as well as the presentations of their cases in chief. As clarified in an exchange between Mr. Kahn and Chair Luce, FOGC's interests involve a global perspective, cumulative effects, and concerns with the National Scenic Act and the Columbia River Gorge, while SOSA's interests are particular, more specific to the project itself and its effects on local persons. The Council asks, as a formality, that Mr. Aramburu affirm his agreement with the representations at the hearing and the understandings expressed on the record and this order, on the schedule for initial submissions. The Council also asks that the intervenors present revised or supplemental petitions that, consistent with Mr. Kahn's representations, clearly reflect the interests of the membership of the two petitioners and accurately state the limits of their issues.

It was noted that the other intervenors addressed issues similar to each others' and that duplications could contribute to delay resulting from objections and other procedural responses as well as from duplication in the testimony and exhibits. The parties were strongly encouraged to coordinate to eliminate duplication.

Focusing the arguments on legal issues.

Some petitions for intervention allude to legal issues related to such matters as jurisdiction and applicable law. The parties were asked to state their legal issues clearly, and to state clearly the party's position on the issue.

To the extent the petition for intervention identifies a legal issue, the party should clearly state the issue; state its position on the issue, and define its legal argument clearly and concisely, using outline format to the extent needed for clarity. The Council is particularly interested in jurisdictional issues, but invites explication of other legal issues as well.

This is not briefing in the traditional sense. The Council does not at this juncture want extended argument or citations with detailed analysis of law and precedent. However, it wants to know *with precision* the scope of the legal arguments and of the disagreement among the parties on the legal issues identified to date, and wants to ensure that parties can speak clearly and concisely to

each others' arguments in the course of future process. The Council expects that the presentations will enhance its focus on the parties' issues and its ability to define them clearly for briefing or other procedural exercise.

The Council also recognizes that it is too early to define evidence-based issues, and does not ask parties to refine any identified legal issue that will require information not yet available to the record, such as environmental or economic data or studies.

Filing schedule:

Initial filings identified in the text of this order, above, are due no later than August 21, 2009; responses must be filed no later than September 4, 2009. It is not anticipated that surresponses will be necessary, but parties may request leave to respond, stating reasons why it is necessary.

Upon reviewing the filings, and as the environmental work proceeds, the Council may require briefing of the arguments, or other process by which to address the legal issues.

Filing and Service of litigation documents. PLEASE NOTE: The parties are required to circulate case-related documents by electronic mail to all other parties and to Council staff and members, unless a party waives such receipt by notice to the Council and all parties.

Under RCW 34.05.010, official service may be made only by physical delivery of documents by mail or commercial delivery service, or by personal delivery. RCW 34.05.050 provides that parties may waive provisions in the APA that protect their interests. Any party who wishes to waive physical service of documents may do so by filing a waiver of the service provisions promptly, in writing, with a copy to other parties.

Please note: Waivers of *service* requirements do not affect requirements for *filing* documents with the Council. Unless otherwise noted, a stated **filing** deadline is the date on which a document must reach the Council, and a stated **Service** deadline is the date on which it must be sent via mail or other permissible vehicle, and sent to other parties and the Council by electronic mail. Filing dates determined by the Council require that submitted materials reach the Council offices no later than the close of business on the date specified, unless the deadline is extended by the Administrative Law Judge or the Council Manager. The Council requires an original plus **twelve (12)** physical copies of each filing, unless other arrangements are made. The Council also requires parties to provide the documents electronically on disk with the paper filing, *and* to provide the documents by electronic mail to the Council and to persons identified on the attached service list.

PLEASE ALSO NOTE: Parties that do not file electronic documents in a format compatible with Word are asked to submit at least one copy of each pleading in a format compatible with Word, stripped of metadata, to Ms. Talburt by electronic mail. Presentations in this format help to ensure accurate statements of parties' arguments without the need to re-key text, and help to facilitate study and review of the matters stated.

Any party or petitioner for intervention who has not already done so must also submit complete contact information, including telephone and electronic mail, to the Council for update of a service list. If a party does not waive physical service of documents, please identify only one legal representative of a party and one person, such as an officer or similar person, on behalf of the party, to receive paper copies of documents.

Notice to Parties:

Unless modified, this prehearing conference order shall control further proceedings in this matter. In accordance with WAC 463-30-270(3), any objections to this order must be filed with the Council and served on parties within ten days after the date of service of this order.

Dated at Olympia, Washington, and effective this 4th day of August, 2009.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

/s/

C. Robert Wallis, Administrative Law Judge