

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. 11
COUNCIL ORDER NO. 855

Prehearing Order on Discovery

Introduction

During a prehearing conference in Stevenson, Washington on June 17, 2010, parties indicated agreement with the use of informal discovery in lieu of application of the Washington Civil Rules for discovery, CR 26. In clarification, the Council stated that, in the event of a disagreement, parties would be free to cite the civil rules and ask the Council to apply them (Prehearing Order No. 6 at page 6).¹

Intervenors Save Our Scenic Area (“SOSA”) and Friends of the Columbia Gorge (“Friends”) asked to discover certain information from Whistling Ridge Energy Project LLC (“Applicant”). When the Applicant objected to certain of the requests, SOSA and Friends (referred to in this order as “Intervenors”) asked for a discovery conference at which they could request an order to require the Applicant to provide the information. The parties briefed the issues and a discovery conference was convened on October 12, 2010, before Council Chair Jim Luce (by telephone), Member Dennis Moss and Administrative Law Judge C. Robert Wallis. SOSA (by J. Richard Aramburu) the Applicant (by Timothy McMahan and Darrell Peeples) and Counsel for the Environment, Bruce Marvin, attended in person; Friends (by Gary K. Kahn and Nathan Baker) attended by telephone.

Of the ten discovery items asked (plus an eleventh described on the record of the conference), the majority were resolved prior to conclusion of the conference and it appears that only four remain in dispute. We will not further discuss the matters that appear to be resolved by the parties but commend them for a responsible approach to settling these issues.

¹ This is the result, in any event, under the law: the Administrative Procedure Act (APA) provides in RCW 34.05.446 that agencies “may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used”; the Council has adopted WAC 463-30-190, which gives the presiding officer the discretion to permit discovery and to conduct it in accordance with the APA provision.

Analysis of discretionary authority

Discovery under the Civil Rules

The civil rules for superior court allow broad discovery, with parties allowed to seek not only evidence that is admissible but also evidence that is “reasonably calculated” to lead to the discovery of admissible evidence.² Mr. Aramburu summarized the civil standard informally in stating that “The standard for discovery is a liberal one: discovery is allowed unless there’s some very good reason not to.” The result is that discovery in complex litigation can be a very time-consuming process, with thousands of documents copied for examination, motions to compel production of documents, and exhaustive examination on the documents. Superior Court judges have the authority to enter and enforce protective orders that safeguard data from public disclosure when that is necessary for adequate protection of the interests affected.

Discovery under the APA

The drafters of the Washington State Administrative Procedure Act (“APA”), Chapter 34.05 RCW, wisely determined that discovery as practiced in the civil rules is ill-suited to much administrative litigation, which often involves few parties, limited issues, and short time frames for reaching decisions. The APA therefore allows agencies to determine by rule what forms of discovery, if any, will be permitted in litigation before the agency. RCW 34.05.446; *see*, WAC 480-04-095.

Discovery at the Utilities and Transportation Commission (UTC)

Mr. McMahan provided samples of UTC documents that address the handling and management of confidential information at that agency. It deals with the economic regulation of utility companies whose data required for setting rates often could be extremely valuable to investors, competitors, litigants, speculators and large customers in search of inside information. The UTC has several mechanisms that assist it in gaining and protecting that information.

First, the Legislature has enacted RCW 80.04.095, which allows any document in the possession of the Commission that is labeled “confidential” to be sequestered for ten days from the time of any request for its production under Chapter 42.56 RCW, the Public Records law. The law allows persons claiming to be adversely affected by release of the document to obtain a court order barring its release. The statute, applicable only to documents filed with the Commission or the Attorney General and not to documents filed with EFSEC, and it appears to be unique in the State for the protection of agency-held data.

² CR 26b, Washington Civil Rules for Superior Court

Second, the Commission has promulgated seven separate rules, some of them lengthy, governing the discovery process (WAC 480-07-400 through -425). Two of those rules govern the issuance of protective orders, practice pertaining to those orders and other aspects of handling and relying upon confidential information. WAC 480-07-420 and -423. The UTC also has extensive experience regarding the use of protective orders and confidentiality agreements. The eight exhibits included in Mr. McMahan's response to the motion for discovery illustrate the comprehensive and detailed nature of the agency's discovery practice regarding confidential information.

Third, parties to UTC proceedings tend to be "regulars," having experience with and sensitivity to the processes for maintaining confidentiality – often having their own confidential data and a keen awareness of the consequences of the release of confidential data – resulting in motivation to comply.

Discovery at the Council

The Council has exercised its rulemaking authority to allow the presiding officer to determine whether to allow discovery, as provided in the APA. WAC 453-30-190 consists of only one sentence. We found no record of any prior request to the Council for an order permitting discovery of confidential data. The Council has no rules protecting confidential information or governing its handling, no regulations governing the preparation of prefiled testimony or the conduct of hearings for the protection of confidential data, and no statutory avenue of judicial review prior to release of public records containing confidential information.

We take from the brief review above that the Council should grant requests for discovery of valuable commercial information very carefully. Based on the arguments we have heard and our review of the filings and cited resources, the appropriate level of care requires that we limit the grant of such requests to those that are (1) very likely to produce information that is unavailable elsewhere and highly relevant to the matter in litigation, (2) unlikely to impose the reasonable likelihood of harm to the owner of the information, and (3) unlikely to be obtained from other sources. In addition, (4) the parties and the agency should have ample time to fashion protective mechanisms adequate for reasonable certainty that the agency can comply with public information, open meeting and public hearing laws while causing no unreasonable risk of harm to the owner of the data.

In other words, the Council should exercise its discretion to allow discovery when the request is likely to produce relevant admissible information; when the need is great for the information to

resolve significant matters at issue, when the burden or possible harm from its release is low, and when the discovery is not likely to interfere with a timely hearing.³

Review of the contested discovery requests

Request No. 1. This request seeks all meteorological records prepared for the Whistling Ridge site, including information supporting Applicant's claim that the site has a proven, robust, wind resource." The result would presumably be an indication⁴ of availability of the "fuel" that would power the turbines that produce electricity.

Intervenors say that they need the information to test representations in the application that the site offers "robust" wind conditions that make it commercially attractive, and to assist in weighing the benefit of the facility against any environmental costs that are shown by the record to be imposed on the community where it is proposed.

Applicant responds that the information is proprietary and commercially sensitive, and that it is relevant not only to the quality of the site but to competition among sites and to the economic viability of the site, which latter the Council will not consider.

Request No. 2. Intervenors' second request seeks applicant's predictions, calculated from the meteorological data, of the Project's average daily and annual production. Again, Intervenors argue that the information allows quantification of benefit from the Project, which they assert is useful and necessary for measuring the balance of benefit against environmental costs. The Applicant responds that the information is highly confidential and essential to protect for competitive reasons.

Request No. 3. This request seeks communications, contracts or agreements with utility companies or other possible purchasers. Intervenors argue that this information, as the prior request, would inform the record about need for and value of the Project. Applicant responds that it is critically sensitive business information whose release would severely damage the Project's ability to compete for energy sales.

Request No. 6. This request seeks a financial analysis to support Applicant's representation in the draft environmental impact statement and the application that 75 megawatt capability is the minimum for the project's economic viability. Intervenors urge its production to test the representations; applicant responds that the information is critically sensitive business

³ We do not propose this as a checklist, but it comprises a group of significant factors that must be collectively weighed to produce the result most consistent with the public interest.

⁴ It is, of course, a matter of common knowledge that weather patterns one year will not be repeated identically in any future year.

information and consists entirely of financial viability information that has been excluded from consideration.

Analysis and conclusions

All of these items requested relate integrally with the Project's economic viability; all of them constitute confidential information and some are critically confidential information.

All of the Items have at best a limited direct relationship with issues other than the financial viability of the project. Pursuant to the Council's decision in Application 2003-01 of Sagebrush Power Partners, LLC for Kittitas Valley Wind Power Project ("KV" in this order) and the Supreme Court decision on its appeal, in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*,⁵ that issue of financial viability is not considered by the Council or the Governor in evaluating siting applications. Intervenor's citations to prior orders in the Council's *Chehalis*⁶ and *Sumas*⁷ decisions are questionable because of intervening rulemaking and decisions in other proceedings.

The requested information items are also confidential or highly confidential and for protection would require formulation of one or a series of protective orders whose viability would require research, which would require additional time. Some of the proposed uses, including use in direct evidence and in cross examination, could be very difficult to accomplish without extraordinary procedural measures that could require, at the least, rulemaking. The application has been available for some time, and the framework for discovery was agreed at the prehearing conference on June 17, 2010. It appears now to be too late in the process for reasonable certainty that information could be adequately protected.⁸

Intervenors argue that the requested meteorological and financial data could lead to a more precise value of the completed resource, so as to aid in a financial formulation of relative value between the energy resource and any costs its construction and operation might impose on the environment. Such information, in non-confidential forms adequate for the Council's evaluation, appears to be available from other sources that will not compromise the Applicant's proprietary interests. For example, during the argument Mr. Baker cited references in Council Order No. 826 to expert testimony on weather resource quality; Mr. McMahan responded that the cited testimony made no mention of met data in its evaluation.

⁵ *Residents Opposed to Kittitas Turbines, et al., v. the State Energy Facility Site Evaluation Council, et al.*, 165 Wn.2d 275, 197 P.3d 1153 (2008)

⁶ Application 94-2 of Chehalis Power Generating, Limited Partnership

⁷ Application 94-01 of Sumas Energy 2, Inc.

⁸ Because of the legal framework, it remains questionable that even such efforts could provide reasonable assurance of protection.

We respect and agree with the concern of Mr. Marvin, Counsel for the Environment, that the application and hearing processes should be transparent. Here, the Council hearing and all of the evidence is expected to be transparent and open to the public. We aim to restrict from discovery only information that we find confidential and needful of protection from public scrutiny. As noted above, the data sought also appear from the record to be of limited or no relevance, or to be available in non-confidential forms.

In conclusion, much of the requested information appears to have little direct relevance to the issues in the proceeding. It is extremely sensitive proprietary information. We see little likelihood that the requested information would lead to the discovery of admissible information; while some may be unavailable from other sources, the risk of damage by disclosure is great if it is provided, as statutes, rules and agency practice do not appear to ensure reasonable protection even if parties and the Council take time to formulate protective orders. On balance, we decline to exercise our discretion to allow discovery.

The motion for an order requiring discovery of items 1, 2, 3 and 6 is denied.

One additional procedural matter warrants attention. Two parties made post-conference submissions to expand on their presentations at the conference, the second to object and respond another party. A somewhat similar event earlier in the proceeding drew an objection and an admonition. It must be made clear to everyone that this is a formal proceeding with rules applicable to all parties. It is also complex litigation in which it is the administrative law judge's task to ensure for all parties that the record is both complete and coherent. Unapproved random submissions are disruptive of the process. The submissions following the discovery conference are not considered. All parties' cooperation is expected and appreciated.

Dated at Olympia, Washington and effective this 19th day of October, 2010.

/s/

C. Robert Wallis, Administrative Law Judge

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL