

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

OBJECTION OF INTERVENORS FRIENDS
OF THE COLUMBIA GORGE, INC. AND
SAVE OUR SCENIC AREA

On October 6, 2011, the Energy Facility Site Evaluation Council (“EFSEC” or “Council”) voted on a final Adjudicative Order Resolving Contested Issues (“Council Order No. 868” or “Adjudicative Order”) and an Order and Report to the Governor Recommending Approval of Site Certification in Part on Condition (“Council Order No. 869” or “Recommendation Order”) in the above-captioned matter. Pursuant to RCW 80.150.140(2), Intervenors Friends of the Columbia Gorge, Inc. and Save Our Scenic Area (collectively referred to as “Friends” or “Intervenors”) file this objection to a portion of the process resulting in the two Council Orders referred to above.

Pursuant to RCW 80.50.030(4), Skamania County appointed Doug Sutherland as its representative to the Council. Unlike all other council members, pursuant to WAC 463-30-093, Mr. Sutherland’s participation in the adjudicative process is limited:

WAC 463-30-093 Participation by county, city and port district representatives. In any adjudicative site certification proceeding, designated council members representing local jurisdictions may discuss and, if authorized, vote only on issues affecting their jurisdictions. Issues shall be separated for purposes of discussion and voting.

This provision requires the Council to separate issues affecting Skamania County from issues not affecting Skamania County. The County's representative, by law, may discuss and vote only on issues affecting the County.

Despite this requirement, there is nothing in either of the Council Orders, nor in the Council's oral presentations or votes regarding the Orders, that reflect any attempt by the Council or Mr. Sutherland to comply with this requirement.

At the conclusion of the Council meeting on October 6, Council Member Fryhling moved to adopt Adjudicative Order No. 868 and Recommendation Order No. 869. Mr. Sutherland voted in favor of the motion. Both Council Orders include issues not affecting Skamania County. By not separating those issues out, Mr. Sutherland has acted in violation of WAC 463-30-093 by voting on issues not affecting Skamania County.

The final votes by the Council followed a lengthy deliberative process, entailing several meetings over several months. These meetings were closed to the public and there is no transcript of the proceedings. Thus, Intervenors cannot state with any level of certainty the content of the discussions. However, nothing in the voluminous record indicates any attempt by the Council to segregate the issues for compliance with WAC 463-30-093. Because Mr. Sutherland voted on the two orders in their entirety, Intervenors can only presume that he also participated in the discussion of all issues addressed in the Orders.

Both Council Orders address issues not affecting Skamania County. Intervenors will provide several examples below, but these examples are not intended to be exhaustive. In violation of WAC 463-30-093, it appears that the Council never addressed which issues are, and are not, appropriate for discussion and voting by Mr. Sutherland.

For example, the Adjudicative Order discusses a statewide need for the proposed project and whether the project conforms with applicable state law. Order No. 868 at 15. The Order acknowledges the Council's obligation to consider whether the project will produce a net benefit after balancing the legislative directive to provide for abundant energy at a reasonable cost with the impact to the environment and the broad interest of the public. *Id.* These are statewide issues that do not affect Skamania County.

Similarly, many of the issues pertaining to the environmental impacts of the proposed project do not affect Skamania County. One of the more contentious issues involved the project's scenic impacts. A large portion of this issue involved scenic views from the State of Oregon, as shown in Table 1 of the Order. Other issues involved whether the proposal complies with federal and state laws and guidelines for the protection of wildlife resources. These issues do not affect Skamania County, yet there is no indication that Mr. Sutherland was precluded from discussing them.

The Council's Recommendation Order also contains discussion and approval of issues not affecting Skamania County. For example, the Order includes a discussion as to the interests of the State as expressed in RCW 80.50.010. Council Order No. 869 at 5. Obviously, this does not affect Skamania County. The Order acknowledges the uniqueness of the Columbia River

Gorge and its importance to the citizens of the entire United States. *Id.* at 13 (Findings/Conclusion No. 12); *see also id.* at 7. The Order acknowledges the importance of Chemawa Hill to the Yakama Indian Nation, an issue that does not affect Skamania County. *Id.* at 8. The Order discusses a statewide need for the project and its ability to meet statewide requirements. *Id.* at 18 (Findings/Conclusions Nos. 43 and 44). These issues do not affect Skamania County. Yet there is no evidence to indicate that Mr. Sutherland was precluded from being involved in discussing and voting on these topics.

During the Council meeting on October 6, Mr. Sutherland himself indicated there was no limitation on his involvement: “[E]ach of us had equal opportunity to participate . . . without any kind of interference between the thinking and the deliberative process.” Transcript, Oct. 6, 2011, evening session, p. 8. This implies that Mr. Sutherland fully participated in the deliberations, without regard to WAC 463-30-093.

Further, as set forth in the attached Declaration of Gary K. Kahn, in a telephone conversation between Mr. Kahn, counsel for Intervenor Friends of the Columbia Gorge, Inc., and Kyle Crews, counsel for EFSEC, Mr. Kahn asked Mr. Crews as to what steps were taken to comply with WAC 463-30-093. Mr. Crews responded to the effect that no steps had been taken to limit Mr. Sutherland’s participation to only those issues affecting Skamania County because compliance with WAC 463-30-093 “did not come up.”

Based on the foregoing, it appears as if the Council completely disregarded the requirements of WAC 463-30-093. Because Mr. Sutherland has apparently discussed and voted

on issues not affecting the County in violation of the Council's rules, the deliberation process and voting occurred in violation of applicable law, and therefore the results should be void. The Council should reinitiate deliberations and conduct the voting consistent with the applicable rules.

Dated this 27th day of October, 2011.

REEVES, KAHN, HENNESSY & ELKINS

/s/ Gary K. Kahn

Gary K. Kahn, WSBA No. 17928
Attorney for Intervenor Friends
(503) 777-5473
gkahn@rke-law.com

FRIENDS OF THE COLUMBIA GORGE, INC.

/s/ Nathan J. Baker

Nathan J. Baker, WSBA No. 35195
Staff Attorney for Intervenor Friends
(503) 241-3762 x101
nathan@gorgefriends.org

ARAMBURU & EUSTIS LLP

/s/ J. Richard Aramburu

J. Richard Aramburu, WSBA No. 466
Attorney for Intervenor SOSA
(206) 625-9515
rick@aramburu-eustis.com

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In the Matter of Application No. 2009-01
of
WHISTLING RIDGE ENERGY, L.L.C.
for
WHISTLING RIDGE ENERGY PROJECT

DECLARATION OF GARY K. KAHN IN
SUPPORT OF OBJECTION OF
INTERVENORS FRIENDS OF THE
COLUMBIA GORGE, INC. AND SAVE
OUR SCENIC AREA

1. I am the attorney for Friends of the Columbia Gorge, Inc., one of the Intervenors in the above-captioned adjudication.

2. On July 26, 2011, I had a telephone conversation with Kyle Crews, counsel for the Energy Facility Site Evaluation Council, pertaining to the adjudication.

3. I specifically asked Mr. Crews whether the Council had complied with the requirement of WAC 463-30-093, requiring the local jurisdiction's representative to discuss and vote only on issues affecting Skamania County.

4. Mr. Crews's response indicated that the Council had taken no measures to limit Mr. Sutherland's participation, stating that compliance with WAC 463-30-093 "did not come up".

I declare under penalty of perjury that the foregoing is true as I verily believe.

Dated this 27th day of October, 2011.

/s/ Gary K. Kahn

Gary K. Kahn