BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Whistling Ridge Energy, LLC's September 13, 2023 Request to Extend the Term of the 2012 Site Certification Agreement for the Whistling Ridge Energy Project In the Matter of Whistling Ridge Energy, LLC's September 13, 2023 Application to Transfer the 2012 Site Certification Agreement for the Whistling Ridge Energy Project to Twin Creeks Timber, LLC as the New Parent of Whistling Ridge Energy, LLC	FRIENDS OF THE COLUMBIA GORGE AND SAVE OUR SCENIC AREA'S REPLY IN SUPPORT OF APPLICATION FOR AN ADJUDICATIVE PROCEEDING

I. INTRODUCTION

On April 25, 2024, Friends of Friends of the Columbia Gorge ("Friends") and Save Our Scenic Area ("SOSA") filed with the Council an Application for an Adjudicative Proceeding ("Application") requesting that the Council commence an adjudicative proceeding in the above-captioned matters involving the Whistling Ridge Energy Project ("WREP" or "Project").[1] On May 8, 2024, Twin Creeks Timber, LLC ("TCT") and Whistling Ridge Energy, LLC ("WRE") (collectively, "Respondents") filed a Response to Friends and SOSA's Application. Friends and SOSA hereby reply to TCT and WRE's Response.

In the Application, Friends and SOSA ask the Council to commence an adjudicative proceeding pursuant to the Washington Administrative Procedures Act ("WAPA"), under both the mandatory path prescribed by RCW 34.05.413(2) and the discretionary path prescribed by

[1] This Reply applies to both of the above-captioned matters, whether or not they are consolidated.

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RCW 34.05.413(1). In other words, the Council *must* commence an adjudication pursuant to RCW 34.05.413(2), and it *should* commence an adjudication pursuant to RCW 34.05.413(1).[2]

For the mandatory path for an adjudication, TCT and WRE attempt, but fail, to distinguish controlling law. RCW 34.05.422(1)(c) expressly requires the Council to commence an adjudication in these matters: "an agency may not . . . modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding." And the WAPA's very definition of "adjudicative proceeding" at RCW 34.05.010(1) requires such a proceeding where "an opportunity for hearing before that agency is required by statute[3] . . . before or after the entry of an order by the agency," where "a license is . . . modified," and where "the granting of an application is contested by a person having standing to contest under the law"—all situations that apply here.

TCT and WRE argue that the Council's Rules somehow "supersede" the statutory requirements of the WAPA itself. These arguments fail. TCT and WRE offer no evidence that the Council had any intent here to try to supersede the statutory requirements adopted by the Washington Legislature, and even assuming *arguendo* that the Council had the authority to do so, it would have needed to state within its rules that it was doing so. The Council did nothing of the sort. An opportunity for an adjudicative proceeding is required here by the plain language of the WAPA, and nothing about the Council's Rules supersedes or creates an exception to the WAPA's requirements.

For the discretionary path for an adjudication, Friends and SOSA have provided a "preliminary, non-exclusive list of some of the many issues that can and should be resolved through an adjudicative proceeding in these matters." (Application at 15–21.) TCT and WRE

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[2] If the Council were to adopt a Resolution confirming that the SCA has expired by operation of law and by its own terms (just as the Council did with the Cowlitz Generation Project in 2004 (*see* Council Resolution No. 308 (Mar. 1, 2004)), then all other pending items in both matters, including WRE's Extension Request, WRE's Transfer Application, Friends and SOSA's Application for an Adjudicative Proceeding, Friends' Motion (and Renewed Motion) to Consolidate Matters, and Friends' Objections to Hearings Process and Scheduling Motion, will all be moot. The Council should adopt such a Resolution.

[3] The relevant statute here is RCW 34.05.422(1)(c).

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unconvincingly argue that "[n]one" of these dozens of issues warrant an adjudicative proceeding. (Resp. at 5.)

Despite what TCT and WRE would have the Council believe, there are numerous disputed evidentiary, legal, and policy issues here that are conducive to resolution in the formal setting of a trial-like proceeding, so that the issues may be fully vetted by the parties and ultimately resolved by the Council (with the assistance of an administrative law judge). These include, but are not limited to, issues involving the legal and factual status of the Project; its environmental impacts, especially given that the SCA has expired and therefore the Project and its impacts cannot proceed but for the Council's approval of the Extension Request; the exact nature of the complex relationships between the many corporations involved in these matters; the ownership of the Project and the SCA; TCT's financial, technical, and legal capability to assume all requirements under the SCA; whether and how to apply changes in law, technology, and environmental conditions over the past twelve years since Governor Gregoire issued the SCA; what types of changes to the terms and conditions of the SCA may be necessary; which, if any, alternatives to the requested actions are available; and the implications of WRE and TCT's disclosure that they seek a four-and-a-half-year extension on top of the ten years that were already allowed[4] in order to allow for a Project with "taller wind turbine generators and associated facilities" (Extension Request at 5). All of these categories of complex issues (and more) must and should be resolved by the Council in these proceedings through an adjudicative proceeding.

WRE's two pending requests are *not* run-of-the-mill proposed amendments to an SCA, as TCT and WRE would apparently have the Council believe. This unprecedented situation, with

[4] The SCA expired on March 5, 2022, ten years after its "effective date," per WAC 463-68-030, -080(1), and -080(2). On September 12, 2023, more than eighteen months after the SCA's expiration date, WRE filed the Extension Request, seeking an extension of the SCA's term to November 1, 2026. (*See* Extension Request at 1.) That requested new date is nearly four years and eight months after the March 5, 2022 expiration.

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numerous complex issues that are solely of TCT and WRE's own making,[5] is tailor-made for an adjudication.

An adjudicative proceeding is the only way to fully inform the Council on the merits, accuracy, and veracity of the disputed issues. Moreover, Friends and SOSA will be severely prejudiced if denied any opportunity to obtain relevant evidence through discovery.

It is also surprising that WRE and TCT oppose the Council holding the required adjudication, given that WRE and TCT would probably stand to benefit the most from it. Without an adjudication, the Council must judge the merits of WRE and TCT's proposals based solely on the incomplete, vague, unsubstantiated, unsworn, and unsponsored application materials signed and submitted by their attorney in September 2023 (*i.e.*, the Transfer Application and Extension Request). These are the materials described in EFSEC's hearing notice as the pending "requests" that the public is being asked to comment on. So long as the Council's processes for reviewing these requests will not include an adjudication, WRE and TCT are barred from bolstering their requests with any further evidence or argument. Otherwise, the Council will need to reopen the record(s) and hold another round of hearings for the public to comment on any new material.

Meanwhile, TCT and WRE are ignoring the elephant in the room: by operation of law, the SCA expired on March 5, 2022, ten years after its "effective date." WAC 463-68-030, -080(1),

[5] Never before has a certificate holder filed a request for an extension of the term of an SCA after the term has expired. Never before has a certificate holder asked the Council to restore "all rights" under an SCA after they have been lost. Never before has a certificate holder waited more than eleven and a half years after the effective date of an SCA to seek any amendments to the SCA. Never before has a certificate holder taken zero steps to pursue any of the required surveys, studies, plans, reports, and specifications for a project under an SCA, only to admit more than twelve years later that construction of the project is still not contemplated, and yet still ask for an extension of the SCA's term. Never before has a certificate holder vaguely disclosed, without providing details, that an extension is sought to pursue "taller wind turbine generators and associated facilities." Never before has an SCA and the certificate holder company itself been unlawfully transferred to a new parent company prior to Council approval, only to have the certificate holder and new parent seek retroactive approval of the transfer. Never before has a certificate holder announced immediately upon approval of a project that the project is not economically viable, only to ask for an extension of the SCA term more than twelve years later (after taking no steps to pursue the project). WRE, with its extraordinary and unprecedented approach, is entirely responsible for forcing all of these issues on the Council and the public.

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and -080(2). In addition, "all rights" under the SCA were lost at the latest on November 18, 2023, ten years after WRE executed and agreed to the document. (WREP SCA at p. 8, § I.B.)

WRE and TCT were warned of these deadlines in advance.[6] Now that the deadlines have passed, the SCA has expired by operation of law and under its own terms. The SCA's expiration moots out all other issues, since the Council lacks authority to amend an SCA that has expired.

Yet TCT and WRE soldier on, pretending that the deadlines were not real deadlines, and they persist in asking the Council to miraculously revive and extend the term of the SCA after it has expired, and to retroactively and belatedly approve its transfer (and the transfer of WRE) to a new owner—despite WRE's consistent public concessions that the Project has never been commercially viable and that WRE has never had any intentions of actually constructing and operating the Project as approved by the Governor in 2012.

Simply put, WRE and TCT are wasting everyone's time. The Council should swiftly and efficiently put an end to this fool's errand by summarily adopting a resolution confirming that the SCA expired and that all rights under the SCA have been lost, just as the Council did with the Cowlitz Generation Project in 2004. (*See* Council Resolution No. 308 (Mar. 1, 2004).)

Otherwise, the Council should grant Friends and SOSA's Application for an Adjudicative Proceeding in order to sort out the tangled mess of complicated issues foisted upon the Council and the public by WRE and TCT. An adjudication is required by law and is also necessary to resolve the many disputed evidentiary, legal, and policy issues involved in these matters. Unless the Council quickly confirms that the SCA has expired and that all rights under the SCA have been lost, any failure to (or decision not to) commence an adjudicative proceeding will violate WAPA and the appearance of fairness doctrine.

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[6] *See, e.g.*, Nov. 16, 2018 Letter from Friends and SOSA to EFSEC (copied to EFSEC's Service List for the Whistling Ridge Energy Project).

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II. RESPONSE TO WRE AND TCT'S STATEMENT OF FACTUAL BACKGROUND

Friends and SOSA reject WRE and TCT's statement of factual background, and respond as follows.

A. The "effective date" of the WREP SCA was March 5, 2012, and the "binding" date was November 18, 2013. An SCA is both a permit and a contract. In the sense that the WREP SCA is a permit, it expired on March 5, 2022. In the sense that the SCA is a contract, all rights ceased under the SCA on November 18, 2023.

Respondents allege that "[o]n November 18, 2013 . . . , [WRE] and the Governor executed a Site Certificat[ion] Agreement for the Whistling Ridge Energy Project." (Resp. at 2.) This assertion is misleading at best; it does not tell the whole story of when and how the SCA was executed by whom, and it completely ignores the facts and law involving when and how the SCA was *issued* and made *effective* (as distinguished from the *execution* of the SCA), and the legal implications of these dates followed by WRE's chronic failures to either commence construction or timely apply for and obtain an extension of the SCA's term.

The Governor executed the SCA on March 5, 2012, and also expressly made the SCA "effective" on that same date (WREP SCA at 42), in conformance with RCW 80.50.100(3)(b) ("Within 60 days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application") and WAC Chapter 463-64 ("issuance of a site certification agreement").

Thereafter, WRE defiantly withheld its signature from the SCA for more than twenty months, until November 18, 2013. (WREP SCA at 42.)

A site certification agreement is both a permit and a contract. In the sense that it is a permit, the "effective date" of this SCA was March 5, 2012, as indicated above the Governor's signature on the SCA (WREP SCA at 42 ("Dated and *effective* this 5th day of March, 2012.") (emphasis added)), and consistent with the Governor's deadline for taking action and certifying the Project under RCW 80.50.100(3)(b), and with the procedures for the "issuance of a site certification agreement" pursuant to WAC Chapter 463-64.

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March 5, 2012 was the "effective date" of the SCA as that term is used in EFSEC's Rules. *See, e.g.,* WAC 463-68-030 ("[C]onstruction [of a project] may start any time within ten years of the *effective date* of the site certification agreement.") (emphasis added); WAC 463-68-080(1) ("If the certificate holder does not start or restart construction within ten years of the *effective date* of the site certification agreement, or has canceled the project, the site certification agreement shall expire.") (emphasis added); WAC 463-68-080(2) ("If commercial operations have not commenced within ten years of the *effective date* of the site certification agreement, the site certification agreement expires unless the certificate holder requests, and the council approves, an extension of the term of the site certification agreement.") (emphasis added).

March 5, 2012 was also the date the SCA was "in effect" and the "date of certification" pursuant to EFSLA, which defines "[c]ertification" in pertinent part to be "in effect as of the date of certification." RCW 80.50.020(6). Here, the "date of certification" was March 5, 2012, the date the Governor approved the application for the Project, issued the SCA, executed the SCA, and made the SCA "effective"—all of which occurred in the context in which the SCA serves as a permit. March 5, 2012 was also the date of "issuance" consistent with the procedures in WAC Chapter 463-64: the Council submits a "draft site certification agreement" to the Governor pursuant to WAC 463-64-020, and then the Governor decides within sixty days whether to issue the draft certificate agreement pursuant to WAC 463-64-030, in which case (and at which time) it becomes final.

Again, an SCA is also a contract. *See* RCW 80.50.020(6) (defining "[c]ertification," in pertinent part, to mean "a binding agreement between an applicant and the state"), 80.50.100(3)(b) ("The certification agreement shall be binding upon execution by the governor and the applicant."). And in that sense, the "binding" or "fully executed" date of the WREP SCA was November 18, 2013, the date that WRE finally signed the SCA. That was the date when WRE agreed to and became bound by the terms of the SCA. But it does not change the fact that the SCA was issued and made "effective" on March 5, 2012, the "date of certification." It just

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means that WRE did not agree to be bound by the terms and conditions of the SCA until November 18, 2013, the "binding" or "fully executed" date.

Usually, the effective date and binding date for an SCA will be very close in time—often the same day, or only a day or two apart. Here, WRE deliberately chose to make the "binding" date for this SCA twenty months after its effective date. But WRE's delay in signing the SCA did not, and could not, change the SCA's "effective" date.

Pursuant to RCW 80.50.020(6) and WAC 463-68-030, -080(1), and -080(2), the SCA for the Whistling Ridge Energy Project expired on March 5, 2022, ten years after the "effective date" of the SCA. And pursuant to section I.B of the SCA, "all rights" ceased under the SCA on November 18, 2023, ten years after the SCA's binding date: "If the Certificate Holder does not begin construction of the Project within ten (10) years of the execution of the SCA, all rights under this SCA will cease." (WREP SCA at p. 8, § I.B.)

B. The Council is required to hold *both* an adjudicative proceeding *and* public hearings.

Respondents misunderstand the nature and context of the Application for an Adjudicative Proceeding, as well as the applicable law governing these proceedings. Specifically, Respondents assert that "[a]fter EFSEC granted Friends['] request for separate public hearings . . . , Friends (and SOSA) [are] now asking the Council to *instead* initiate an adjudicative proceeding." (Resp. at 1–2 (emphasis added).) The word "instead" in that sentence is not accurate.

Both an adjudicative proceeding *and* public hearings are required. The Council is required to commence an adjudicative proceeding pursuant to WAPA (RCW 34.05.010(1), .413(2), .419, .422(1)(c)), is also authorized to commence an adjudicative proceeding pursuant to WAPA (RCW 34.05.413(1), .419), and is required to hold OPMA public hearings[7] pursuant to the Council's Rules (WAC 463-66-030, -100(4)).

[7] TCT and WRE selectively quote from Friends' first Scheduling Motion in an effort to twist Friends' words into somehow opposing an adjudicative proceeding. According to TCT and WRE, "Friends itself has recognized that a public hearing is 'required by law for each of these matters,' not a 'full-blown adjudicative proceeding.'" (Resp. at 4.) But review of Friends' first Scheduling Motion shows that the context was the OPMA public hearings required by WAC 463-66-030 and -100(4), and that *these*

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Friends do not seek the commencement of an adjudicative proceeding *in lieu of* public hearings. Rather, both an adjudicative proceeding and public hearings must be held.

C. Respondents mischaracterize the status of the proposed transfer.

WRE and TCT imply that ownership of WRE has not yet been transferred to TCT: "TCT has been making timely payments on the SCA, *without the transfer in place*." (Resp. at 3 (emphasis added).) This contradicts the statements of WRE (by and through its attorney Timothy L. McMahan) in the Transfer Application that "[TCT] acquired ownership of [WRE] . . . in November 2021. TCT is now the sole owner of [WRE]." (Transfer Application at 1.)

In this latest pleading, WRE and TCT now hide the fact that the transfer in ownership already took place over two years ago—in fact, with the words that the transfer is not "in place," they state or imply the opposite. (Resp. at 3.) Perhaps they do so because they are aware that they have violated EFSEC's Rules, and in the process lost standing to apply for a transfer, by prematurely transferring the Project, the rights under the SCA, and the parent ownership of WRE, to a new sole owner, TCT: "No site certification agreement, any portion of a site certification agreement, nor any legal or equitable interest in such an agreement issued under this chapter shall be transferred, assigned, or in any manner disposed of (including abandonment), either voluntarily or involuntarily, directly or indirectly, through transfer of control of the certification agreement or the site certification agreement owner or project sponsor *without express council approval of such action*." WAC 463-66-100 (emphasis added).

As noted in the Application for an Adjudicative Proceeding, WRE and TCT's deliberate choice to violate the Council's Rules, along with related issues such as the true identity of the former parent company (S.D.S. Co. LLC or SDS Lumber Co.), should be resolved through discovery and a full adjudication. (Appl. for Adjudicative Proceeding at 9 n.7 & 18–20.)

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required public hearings need not be full-blown adjudicative proceedings. (Friends' Scheduling Mot. at 4–5.)

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III. ARGUMENT IN REPLY

A. WAPA requires the Council to hold an adjudicative proceeding.

As explained in the Application for an Adjudicative Proceeding, WAPA requires the Council to hold an adjudicative proceeding, because RCW 34.05.422(1)(c) provides, in pertinent part, that "[a]n agency may not . . . modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding in accordance with this chapter or other statute," and because the WAPA's definition of "adjudicative proceeding" at RCW 34.05.010(1) requires such a proceeding where "an opportunity for hearing before that agency is required by statute[8] . . . before or after the entry of an order by the agency," where "a license is . . . modified," and where "the granting of an application is contested by a person having standing to contest under the law"—all situations that apply here. Accordingly, "upon the timely application of any person, an agency shall commence an adjudicative proceeding." RCW 34.05.413(2).

The proposals in the Extension Request and Transfer Application would modify the SCA, which is a license. (*See* Appl. for Adjudicative Proceeding at 10.) Furthermore, these proposals are contested by Friends and SOSA (*see id.* at 13–14), and Friends and SOSA have filed a formal Application for an Adjudicative Proceeding. Therefore, EFSEC is required to commence an adjudicative proceeding pursuant to RCW 34.05.413(2).

In their Response, TCT and WRE use legerdemain to try to get the Council to reach the false conclusion that the Council's Rules "supersede" the WAPA statute itself. They do this by first noting that the Council's Rules for adjudicative proceedings (at RCW Chapter 463-20) do not incorporate all of Washington's model rules of procedure for adjudicative proceedings (at RCW Chapter 10-08). WAC 463-30-010 ("The purpose of this chapter is to set forth procedures by which adjudicative proceedings are to be conducted before the [C]ouncil under chapter 34.05 RCW. Except as indicated herein, the uniform procedural rules set forth in chapter 10-08 WAC shall not apply to adjudicative proceedings before the [C]ouncil.") (cited in Resp. at 5). According to Respondents, this means that the Council's Rules for adjudicative proceedings

[8] The relevant statute here is RCW 34.05.422(1)(c).

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"supersede the WAPA's general rules." (Resp. at 5.) But contrary to that assertion, the truth is that some of the model rules at RCW Chapter 10-08 apply to EFSEC proceedings, while others do not. This is not an instance of the Council's Rules "superseding" either the WAPA statute or any rules promulgated thereunder, but rather an instance of the Council determining which model rules to incorporate into its own process for adjudications.

Moreover, WAC 463-30-010 is completely irrelevant here. That rule, by its own terms, governs the "procedures by which adjudicative proceedings are to be *conducted* before the [C]ouncil" (emphasis added). The question here is not how an adjudicative proceeding is to be *conducted*, but rather the threshold question of whether an adjudicative proceeding must be (or should be) *commenced in the first place*. WAC 463-30-010 is irrelevant.

Respondents make confusing arguments that the public hearings required by WAC 463-66-030 and -100(4) are the only process required here pursuant to WAC 463-30-010. (Resp. at 5.) But again, WAC 463-30-010 is irrelevant, and the public hearings required by WAC 463-66-030 and -100(4) are not part of any adjudicative proceeding, but rather are OPMA public hearings (technically, also public meetings) under OPMA and WAC 463-18-050. The Council's Rules at WAC 463-66-030 and -100(4) merely set forth requirements to conduct these public hearings, separately and independent of any adjudicative proceeding. Importantly, nowhere do the Council's Rules state that these required hearings are the "only" process required, or that the requirements to hold hearings under WAC 463-66-030 and -100(4) somehow supersede the WAPA statute or any rules adopted thereunder.

Respondents further argue that the phrase "[u]nless otherwise provided by law" at the beginning of RCW 34.05.422(1) means that an agency need not hold an adjudicative proceeding if another law mandates otherwise. (Resp. at 4.) That part of Respondent's arguments is correct. But Respondents go on to erroneously assert that the Council's Rules somehow provide such a carve-out from the requirement under RCW 34.05.422(1)(c) to "give[] notice of an opportunity for an appropriate adjudicative proceeding." (Resp. at 4.) The Council's Rules do no such thing.

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Rather, as discussed above, the Council's Rules simply require the Council to hold public hearings under OPMA. WAC 463-66-030, -100(4). Nothing in these Rules state that these required public hearings are in lieu of an adjudication, or supersede the requirements to hold an adjudication, or are the "only" process required for proposed amendments to and transfers of site certification agreements. Yet Respondents ask the Council to insert the word "only" into the Council Rules where it does not exist: "Here, EFSEC rules provide that *only* a public hearing on the Requests is required by law." (Resp. at 4 (emphasis added) (citing WAC 463-66-030, -100(4).)

In order for WRE and TCT to be correct in their arguments that the public hearings required by WAC 463-66-030 and -100(4) are somehow an instance "otherwise provided by law," and therefore an exception to the requirements under RCW 34.05.422(1)(c) to give notice of an opportunity for an adjudicative proceeding, there would need to be some indication that the Council so intended. Yet they cite no evidence of any such intent. Moreover, nothing in the Council's Rules reference RCW 34.05.422(1), nor were WAC 463-66-030 and -100(4) promulgated pursuant to RCW 34.05.422(1),[9] nor do any of the Council's Rules state that the required public hearings are the "only" process required or allowed, nor do any of the Council's Rules state that the public hearings required by WAC 463-66-030 and -100(4) satisfy the APA's requirements, nor do any of the Council's Rules state that adjudicative proceedings are not available or required for proposed amendments to and transfers of site certification agreements.

To be sure, there are other situations (not applicable here) where another law may apply and waive or delay the requirement to hold an adjudicative proceeding under RCW 34.05.422(1)(c). The most obvious example is under RCW 34.05.422(4), which involves emergencies, and which provides that "[i]f the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other

[9] The "Statutory Authority" sections for WAC 463-66-030 and -100 indicates that these Rules were adopted pursuant to RCW 80.50.040, .040(1), and .040(12).

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action. These proceedings must be promptly instituted and determined." Other examples of such exceptions include RCW 18.210.030, 18.220.160, 18.280.130(1), and 67.16.020(2), which allow the Board of Registration for Professional Engineers and Land Surveyors, the Geologist Licensing Board, the Home Inspector Advisory Licensing Board, and the Washington Horse Racing Commission, respectively, to "immediately suspend" licenses of persons who are not in compliance with child support orders, and which state that the procedures of the State Department of Social and Health Services at RCW 74.20A.320 are the "exclusive administrative remedy" and "satisf[y] the requirements of RCW 34.05.422." But all of these examples are obvious or express exceptions to the requirements of RCW 34.05.422(1)(c). That is not all the case here for the public hearings required by WAC 463-66-030 and -100(4).

Moreover, all of these examples involve other *statutes*. Despite extensive research, Friends and SOSA have been unable to find any agency rule anywhere in the Washington Administrative Code that constitutes an express exception to the requirements of RCW 34.05.422(1)(c) to provide notice of an opportunity for an adjudicative proceeding. The Council should resist WRE and TCT's entreaties to go out on a limb by interpreting the Council's Rules to somehow carve out an exception to RCW 34.05.422(1)(c), when the Council's Rules say nothing of the sort and no precedent has been cited authorizing the Council or any other agency to do so.

In sum, despite Respondents' efforts to misconstrue the Council's Rules, nothing in those Rules creates any exception to, or supersedes, the plain language of the WAPA. The Council is required here to provide notice of an opportunity for an adjudicative proceeding, and now that Friends and SOSA have proactively filed their Application for an Adjudicative Proceeding without waiting for that notice, the Council is required to grant our Application and commence an adjudication.

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B. The Council should commence an adjudicative proceeding pursuant to RCW 34.05.413(1).

Friends and SOSA have provided a "preliminary, non-exclusive list of some of the many issues that can and should be resolved through an adjudicative proceeding in these matters." (Application at 15–21.) TCT and WRE count "46 issues" in Friends and SOSA's preliminary list, but they have apparently simply counted the number of bullet points in the list. (Resp. at 5.) Many of those bullet points contain multiple issues, so Friends and SOSA's preliminary list actually includes many more than 46 issues.

Also, as noted in the Application, that was just a preliminary list. Other potential issues to be resolved in an adjudication include the following:

Procedural Issues

- Whether the Council is authorized under OPMA to conduct "remote" or "virtual-only" public hearings or meetings in these proceedings.
- Whether EFSEC has properly notified all persons known to have interests in the Whistling Ridge Energy Project and the WREP SCA regarding the Extension Request, the Transfer Application, and EFSEC's review processes for these requests.
- Whether EFSEC has "fairly and sufficiently apprise[d] those who may be affected by the proposed action of the nature and character of the [proposed action] so that they may intelligently prepare for the hearing." *Barrie v. Kitsap County*, 84 Wn.2d 579, 584–85, 527 P.2d 1377 (1974) (citing *Glaspey Sons, Inc. v. Conrad*, 83 Wn.2d 707, 711, 521 P.2d 1173 (1974)).
- Whether EFSEC is "serv[ing] the welfare of the entire affected community." *Save a Valuable Environment v. City of Bothell*, 89 Wn. 2d 862, 869, 576 P.2d 401 (1978).

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- Whether the Council should commence its review of WRE's requests before WRE prepares and submits SEPA environmental checklists and before the EFSEC Director prepares and issues SEPA threshold determinations.

SCA Expiration

- Whether the Council should adopt a Resolution confirming that the WREP SCA expired and that all rights under the SCA have been lost, just as the Council did with the Cowlitz Generation Project in 2004 (*see* Council Resolution No. 308 (Mar. 1, 2004)).

Status of and Compliance with the SCA

- Whether WRE has ever "report[ed] to the [C]ouncil its intention to proceed or not with the project" as required by WAC 463-60-060, and if not, whether or not WRE so intends now.
- Whether WRE seeks an "unlimited 'build window'" in contravention of Council policy as expressed in Council Order No. 860 regarding the Grays Harbor Energy Center (*see* Council Order No. 860 at 13 (Dec. 21, 2010)).
- Whether any "technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed" (Council Order No. 860 at 13).
- Whether and how the use of "taller turbines" would increase the total energy production capacity for the Project.
- Whether the use of "taller turbines" would change the grading, road-building, development, and forest practice conversions needed to construct haul roads to accommodate larger wind turbines, including whether this would require development review in the Columbia River Gorge National Scenic Area—an issue

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that was expressly referred to EFSEC by the Columbia River Gorge Commission, *Drach v. Skamania County*, CRGC No. COA-S-10-01, at 8–9 (Aug. 24, 2010).

- The current and anticipated future "market demand" for the Project and the current and anticipated future "project need" (for both the previously approved wind turbine height limit of 430 feet and with taller turbines), and whether WRE has "provide[d] a compelling demonstration of need to justify the ten[-]year expiration" for the Project, in light of the Council's evaluation of these factors in Council Resolution No. 348 involving the Grays Harbor Energy Center (*see* Council Resolution No. 348 at 9 (Dec. 15, 2020).

By WRE and TCT's count (based on bullet points), those are another twelve issues that Friends and SOSA have identified for resolution via an adjudicative proceeding, bringing the total to well over fifty issues. But as discussed above, these are merely fifty-plus *bullet points*; the actual number of *issues* is multiple times that number. Never before has a proposed amendment to a site certification agreement been so deserving of an adjudicative proceeding.

WRE and TCT incorrectly assert that the Council "has already resolved . . . consolidation" in these matters. (Resp. at 5–6.) No, the Council has not. As WRE and TCT note, two separate hearings have been scheduled. However, as for whether the two above-captioned matters are otherwise consolidated—for example, in terms of whether the Council will keep a consolidated administrative record or two separate administrative records, that has not yet been decided, and Friends' original Motion to Consolidate (found within its Scheduling Motion dated September 18, 2023) and Friends' Renewed Motion to Consolidate Matters (dated April 16, 2024) remain pending. For example, when the interested public submits written comments directed at both pending matters, it is unclear whether they should submit two copies of each such comment, or whether a single copy will suffice.

WRE and TCT state that "the proposed deadline for the extension" is "clearly provided in" the Extension Request, citing page 1 of the Extension Request. (Resp. at 6.) But rather than

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requesting a date certain, the Extension Request requests an extension "to November 2026." (Extension Request at 1.) Friends has interpreted this to mean November 1, 2026, while EFSEC staff has previously interpreted it to mean November 18, 2026. Although the discrepancy may seem minor, it is a potentially disputed issue to be resolved in the adjudication.

WRE and TCT state that the Project's impacts "have already been litigated and fully resolved." (Resp. at 6.) To the contrary, the Washington Supreme Court held the exact opposite. In its judicial opinion, the court held that "even once the project is approved, the SCA can impose additional studies and ongoing requirements" and that the submission of WRE's application was only "the starting point of a longer process and [that] more specific decisions are addressed throughout the process." *Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 336, 310 P.3d 780 (2013). The Court also held that EFSEC's decisional standards in WAC 463-62 did not apply to the review of the Project prior to the Governor's decision; rather, the Court held that these standards will apply to future decisions, as construction and operation standards. *Friends v. EFSEC*, 178 Wn.2d at 340. The Court also endorsed EFSEC's approach of deferring review of and decisions on the Project's forest practices components to a later date. *Id.* at 347–48. Finally, the Court noted that "the final size and location of the site is not known . . . , making a full discussion of specific mitigation measures" premature until Project details are finalized. *Id.* at 339.

In short, the Washington Supreme Court held that multiple issues—including the final project details and impacts, compliance with the standards in WAC 463-62, forest practices, and appropriate mitigation—remain unresolved. The Court also held that these issues are not yet "ripe" for public review. *Id.* at 342–43 & n. 17, 348. The Court also acknowledged EFSEC's and the Governor's arguments that the public will be allowed to participate in the decision-making process for unresolved and deferred issues. *Id.* at 336, 343, 347–48.

In short, EFSEC's review of the Project circa 2009 through 2011 was only the beginning of the review process. Dozens of issues involving the Project's environmental impacts have not been resolved. Not to mention the fact that numerous criteria for amending SCAs require

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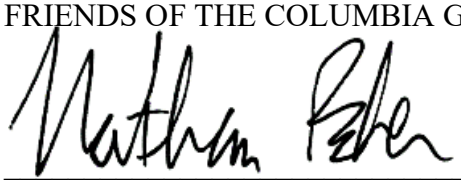
revisiting each project's environmental impacts; the original intentions of the SCA; the public health, safety, and welfare; and changes in laws, technology, and environmental conditions. *See generally* WAC chs. 463-66, -68. And on top of all of that, WRE has disclosed that the purpose of the requested extension is so that it may build "taller turbines" than were approved in 2012, which necessarily changes the Project's impacts. (Extension Request at 5.) All of these issues and regulatory factors are appropriate for resolution in an adjudicative proceeding prior to a Council decision on the merits of WRE's requests.

VI. CONCLUSION

For the reasons stated above and in Friends and SOSA's Application for an Adjudicative Proceeding, the Council should commence an adjudicative proceeding (or proceedings) to review the pending Transfer Application and Extension Request.

RESPECTFULLY SUBMITTED this 10th day of May, 2024.

FRIENDS OF THE COLUMBIA GORGE, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing FRIENDS OF THE COLUMBIA GORGE AND SAVE OUR SCENIC AREA'S REPLY IN SUPPORT OF APPLICATION FOR AN ADJUDICATIVE PROCEEDING on each of the persons named below via email:

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