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. 12 COUNCIL ORDER NO. 856 Prehearing Order on Review of Prehearing Order No. 11

The Council convened a discovery conference on October 12, 2010, before Council Chair Jim Luce (by telephone), Member Dennis Moss and Administrative Law Judge C. Robert Wallis to hear arguments regarding a discovery dispute. Intervenors Save Our Scenic Area (SOSA) and Friends of the Columbia Gorge (referred to as "Intervenors" in this order), are represented respectively by J. Richard Aramburu, and by Gary K. Kahn and Nathan Baker. The Applicant is represented by attorneys Tim McMahan and Darrell Peeples. Counsel for the Environment Bruce Marvin, Assistant Attorney General, also participated.

The Administrative Law Judge entered a prehearing conference order on October 19, 2010, denying the four disputed discovery requests. Intervenors filed objections to the order on October 25, 2010, and Applicant responded on November 1.

Intervenors raise a number of issues and the Applicant presents a comprehensive response. The Council will respond first to objections relating to the order's observations of circumstances surrounding the discovery request, then to the exercise of discretion in refusing the requests.

Basis for determining need for confidentiality. Intervenors argue that because the Applicant presented no affidavit to support the objection, the record contains no support for the Order's conclusion that the subjects of the four requests at issue are confidential in nature. That supposition is not correct. The Applicant submitted a number of attachments to its pre-argument brief, demonstrating in considerable detail that the confidentiality of such data is recognized by the state Utilities and Transportation Commission, which considers such data to be highly confidential and closely protects its confidentiality. The answer

included documents demonstrating the reasons for confidentiality. Intervenors voiced no opposition to this position prior to or during the argument. In addition, the Council's siting and regulatory activities require and provide it with a basic understanding of how elements in the power industry work together.[1] The contention that the information sought in the disputed requests is not confidential is not valid.

Lack of document inventory and lack of *in camera* review. Intervenors argue denial of their request is improper because there is no inventory of documents within the purview of their request, and they object to the lack of *in-camera* review of the information. The Applicant represents that documents in question fall within the discovery motion's descriptions. Intervenors were content to argue the matter on the basis of Applicant's response and did not ask for an inventory of documents or an *in-camera* review.[2] There is no error.

Public interest in disclosure. Intervenors assert that because the subject of the Council's inquiry is a matter of public interest and concern, the need for transparency requires disclosure beyond that afforded in private civil litigation. The Council acknowledges that such measures as the Public Disclosure Act require transparency in government. However, the Council also observes that the legislature has specifically limited the applicability of Civil Rule 26 relating to discovery in administrative proceedings to make it discretionary with presiding agencies. In addition, the legislature in establishing the Council and determining its jurisdiction, has established a one-year statutory limit on the length of EFSEC proceedings. RCW 80.50.100(1). There is no legislative provision requiring or urging the allowance of discovery to or beyond the extent permitted in the Civil Rules in this administrative proceeding.

Application of legislative policy. Intervenors urge that Applicant's statement[3] that the proposed facility complies with the legislative intent in creating the Council[4] requires the Council to evaluate the volume and cost of power anticipated from proposed facilities. The Council disagrees strongly. The RCW section in question is a statement of the legislative

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[1] *See,* RCW 34.05.461 (5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

[2] The parties agreed to informal discovery processes. Appendix to Prehearing Order No. 4 states, "We encourage informal calls, in advance, when they might be helpful to define the information sought, or after a request when they might distinguish between identified material that is, or is not, relevant. *Counsel are expected to resolve such matters consistently with their implicit recognition at the conference that a rule of reason should apply.*" (Emphasis added)

[3] Statements cited in the request for discovery were drawn from the Draft Environmental Statement, which the Council has ruled will not be considered in this adjudicative proceeding. The SEPA process has its own statutory process for review, which is presently underway.

[4] RCW 80.50.010 states the legislature's intent in the enactment "to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises: . . . (3) To provide abundant energy at reasonable cost."

intention in enacting the law. It announces the purpose and intent of the Act's operative provisions. The State Supreme Court has upheld the Council's refusal to consider economic issues in its review of a proposed merchant plant (*see below).* The Council's jurisdiction includes the power to evaluate ecological and environmental issues. It will not receive evidence concerning costs, prices or volume of power of merchant plants, which are market-driven and rely on markets to determine need and prices.

Characterization of the Supreme Court decision in *Residents Opposed to Kittitas Turbines (ROKT).*[5] Intervenors allege that the order misrepresented this recent Supreme Court decision. They cite the following passage in the decision to support their interpretation of the Order:

> EFSLA requires EFSEC to develop environmental and ecological guidelines regarding energy facility siting. RCW 80.50.040(2). As economic 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 KVWPP.[6]

However, Intervenors attempt to discredit this clear statement of law by citing other passages in the judicial decision that note evidence (or lack of it) in the record of that proceeding. Those facts do not affect the decision's holding regarding the Council's authority. In this proceeding, as in the KVWPP proceeding, the Council declines to consider the economic attributes of the proposed facility.[7]

Public use of the data. Intervenors challenge the order's reliance, in part, on difficulties in formulating adequate protective orders, saying that Intervenors' counsel as members of the bar can be relied on not to disclose confidential information. Intervenors in briefing and counsel for SOSA in argument appear to have indicated that the Intervenors would use the information in their clients' public presentation. In addition, all parties earlier in the proceeding agreed to share all discovery information with the other similarly situated parties. The order's concern is clearly not illusory.

Production, revenue, and economic benefit. Intervenors seek to discover potential economic benefits to the operator of the facility. They have alluded to a desire to weigh such benefits against asserted economic losses by others. As noted above, strictly economic concerns are outside our jurisdiction. Such an argument, with financial data, would be analogous to a claim of inverse condemnation. That is certainly beyond the Council's charter. The Council is empowered to consider arguments regarding the ecological and environmental effects of a proposed project, which may produce many different effects on such matters as employment and on enjoyment of the vicinity. The Council is also empowered to recognize such effects and consider means to ameliorate adverse effects in its

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[5] *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 197 P.3d 1153 (2008).
[6] *Ibid.*, at 321.
[7] We have so far faced the issue of economics only in applications involving "merchant" plants, whose use and pricing are market-driven; these facilities will not be built unless contractual obligations exist to purchase the power that is produced.

balancing of public interests. Those actions, consistent with the admonition in RCW 80.50.010(3) that a purpose of the statute is "To preserve and protect the quality of the environment . . .," are empowered by provisions in RCW 80.50.040(2). However, the Council is neither empowered nor equipped to make a mathematical determination of possible financial consequences in terms of economic costs and benefits.

II. The exercise of discretion regarding discovery

Having discussed issues relating to the character of documents and circumstances relating to the request for discovery, we now turn to issues relating to the exercise of discretion in granting or denying the requests.

The statutory basis for discovery in administrative proceedings. RCW 34.05.446 allows discovery in administrative proceedings only in the discretion of the presiding officer. The statute reads in part as follows:

> The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

Intervenors contend that the judge failed to consider these factors and that he established criteria for discovery outside the limits of the statute.

The prehearing order made the following conclusion:

> 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 judge determined properly that, in general terms, the requested information was of little or no relevance to the proceeding or was available in non-confidential forms,[8] and that it was

[8] During argument Mr. McMahan identified expert testimony on wind resource in the KV proceeding that he represented, without contradiction, provides information about the quality of that resource without need to refer to meteorological data.

highly confidential. Counsel for SOSA stated that granting the discovery request would require a delay in the filing of certain evidence to include discovered information, and review of an order allowing discovery would further extend that time. The order's concern for problems and delays in devising protective provisions reflected in part the presence in the proceeding of a number of non-attorney representatives.[9] The discussion in the order demonstrated consideration of the interests of justice and the orderly and prompt conduct of the proceeding. Rather than announcing new standards for the exercise of discretion, as Intervenors claim, the factors identified in the prehearing order merely state circumstances of this proceeding that populate the statutory statement of general factors governing use of CR 26 in administrative proceedings.

An exercise of discretion under this statute entails "wide discretion." *Lang v. Dental Quality Assurance Comm'n*, 138 Wn. App. 235, 254, 156 P.3d 919 (2007). An abuse of discretion occurs when a decision is "manifestly unreasonable or based on untenable grounds or reasons." *State v. Stenson*, 132 Wn. 2d 668, 701, 940 P.2d 1239 (1997). The judge did not apply the wrong legal standard, rely on unsupported facts, or adopt a view that no reasonable person would take, which are the tests for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Conclusion. We find that the decision in Prehearing Order No. 11 is well-reasoned and proper, that it is wholly consistent with the statute, and that it does not abuse the discretion in the Council's rule or in the statute. The Council adopts the content of the order, as described and discussed herein, as the decision of the Council.

We deny the objections to Prehearing Order No. 11.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

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

/s/

James O. Luce, Chair, on behalf of the Council

[9] Earlier in this proceeding, the parties other than the Applicant agreed that responses to any party's discovery request to the Applicant would be shared with all other parties. No exception to that provision was suggested during briefing or argument on the discovery motion.