

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Docket No. 096000

WHISTLING RIDGE ENERGY LLC

WHISTLING RIDGE ENERGY
PROJECT

COUNCIL ORDER NO. 893

ORDER DENYING APPLICATION FOR
TRANSFER AND REQUEST FOR
EXTENSION OF SITE
CERTIFICATION AGREEMENT;

DECLARING SITE CERTIFICATION
AGREEMENT EXPIRED

Summary

In this Order, the Council:

- (1) Denies Twin Creeks Timber LLC's (TCT's) application for approval of transfer of control of the Whistling Ridge site certification agreement from SDS Lumber Company.
- (2) Denies TCT's request for an extension of the site certification's expiration date and declares the SCA expired.
- (3) Denies as moot Friends of the Columbia Gorge's petition for an adjudicative proceeding on TCT's transfer and extension requests.

Background

Governor Christine Gregoire signed the Whistling Ridge SCA on March 5, 2012, consistent with the Council's recommendation after an adjudicative hearing and issuance of an environmental impact statement. The Whistling Ridge Site Certification Agreement authorized Whistling Ridge Energy LLC (WRE) and its "parent companies, and any and all assignees or successors approved by the Council" to "construct and/or operate" the Whistling Ridge Energy Project, a wind powered generation facility to be located in Skamania County. According to the March 10, 2009, application for site certification WRE was a subsidiary of S.D.S. Co., LLC, which was an affiliate of SDS Lumber Company. The president of S.D.S. Co., LLC and of WRE was Jason Spadaro.

The Governor's approval of WRE's application for site certification of the Whistling Ridge Wind Energy Project was challenged on various legal grounds by Friends of the Columbia Gorge (Friends) and Save our Scenic Area (SOSA). Approximately twenty months after the Governor signed the SCA, following a final decision by the Washington Supreme Court upholding the Governor's decision, Mr. Spadaro signed the SCA on November 18, 2013.

Friends and SOSA filed another legal challenge in September of 2015, this time to the Bonneville Power Administration's decision granting the Whistling Ridge Energy Project interconnection to BPA's transmission system. That appeal was decided in WRE and BPA's favor by the federal Court of Appeals in July of 2018.

On October 15, 2018, Mr. Spadaro came before the Council at its monthly open meeting and made a short presentation for purposes of compliance with WAC 463-68-060. That rule requires the certificate holder to report to the Council if construction under an SCA has not commenced within five years. In essence, Mr. Spadaro stated there were no changes to the project and no changes in environmental conditions requiring supplemental evaluation. Friends submitted a letter to the Council arguing that WRE was late with its report, contesting WRE's interpretation of the effective date of the SCA, and raising a number of other issues with WRE's filing and presentation. No action was requested by WRE and WAC 463-68-060 allows, but does not require, any action by the Council in response to such a report. Consequently, the Council issued no decision regarding the presentation.

Thereafter, according to TCT, from 2018 to 2021 SDS Lumber Co. (parent company of WRE) fell into internal conflict and dissolved as a company. TCT represents SDS Lumber Co. assets were sold to other companies.

TCT says it acquired a substantial portion of the SDS timberland assets, as well as all membership interests in Whistling Ridge Energy LLC¹ and the property on which the project was to be built, in November of 2021.

WRE (now under the ownership and control of TCT) applied, on September 13, 2023, for approval from the Council for the indirect transfer of control of the SCA. EFSEC rules require such approval when a certificate holder business entity changes ownership.

TCT also requested, preliminarily on March 2, 2022, and finally on September 13, 2023, an extension of the SCA's deadline for start of construction—which WRE argues was November 18, 2023—for an additional three years. TCT counts the ten year expiration from the date that Mr. Spadaro signed the SCA, which was approximately 20 months after Governor Gregoire signed the SCA on March 5, 2012. Friends argues that the SCA expired March 5, 2022, ten years after the Governor's signature and decision to approve the application. TCT submitted its preliminary request for an extension of the WRE SCA to EFSEC just before the SCA would have expired under Friends' theory.

On April 25, 2024, Friends submitted an application for an adjudicative proceeding on TCT's SCA transfer application and extension request.

TCT is an owner and manager of timber lands and not itself a developer of energy projects. It states in its transfer application that it is "developing a memorandum of understanding" with

¹ There is no indication that the WRE business entity has any active business operations. However, it is the entity listed as holder of the site certification agreement. A search of the Washington Secretary of State's corporations filing system shows that Whistling Ridge Energy LLC is and has been duly registered since 2009 and that its current governor is Twin Creeks Timber, LLC.

energy project developer Steelhead Americas to “potentially take a leading or controlling interest in the Project and its further development.” If an initial review shows the project to be feasible, TCT and WRE (or a subsequent certificate transferee) would “propose the installation of fewer but taller wind turbine generators and associated facilities within the designated and approved micro-siting corridors” and would “update natural resource studies including season-specific data (e.g., avian nesting surveys) and new visual simulations from key viewing areas (KVAs) within the Columbia River Gorge Scenic Area.” However, TCT admits that it would need to “fully review the financial and environmental feasibility of constructing the facility prior to commencing any studies.” TCT admits the project would not be ready to be built within the three year extension it has requested and that an additional extension of the SCA’s expiration date would be needed to present an amendment to the SCA to authorize new turbine design.

Analysis

1. TCT’s request for the Council’s approval of transfer of control of the SCA fails to meet the requirements of WAC 463-66-100(4).

WAC 463-66-100 provides that no site certification agreement may be transferred, including indirectly through transfer of control of the site certification agreement owner, without Council approval. If the SCA is to be acquired by a change in corporate ownership—as was the case here—the successor in interest must apply to the Council for approval to continue activities under the certificate.

An informational hearing is required on the application, after which the Council may approve the application for transfer of the site certification agreement if the applicant provides an appropriate description of its organization and affiliations, provides adequate financial assurance for site restoration costs (if yet required), demonstrates that it is entitled to possession of the facility or site described in the SCA, agrees to abide by all of the terms and conditions of the SCA, and “has demonstrated it has the organizational, financial, managerial, and technical capability and is willing and able to comply with the terms and conditions of the certification agreement being transferred.” WAC 463-66-100(4).

EFSEC rules state that the Council shall issue a formal order either approving or denying the application for transfer of the site certification agreement. If the Council denies the request, it shall state the reasons for its denial. WAC 463-66-100(5).

In this case, because construction of facility has not yet begun, the sole consideration for the Council is whether TCT “has demonstrated it has the organizational, financial, managerial, and technical capability and is willing and able to comply with the terms and conditions of the certification agreement being transferred.” WAC 463-66-100(4).

TCT’s application fails to demonstrate that TCT itself has the organizational, managerial, and technical capability to construct the Whistling Ridge Energy project. Instead, TCT represents that if the project proves financially viable based on input from a development consultant to be hired by TCT, then the project could be taken over by a project developer like Steelhead Americas.

TCT also essentially concedes its inability to comply with the terms and conditions of the certificate agreement that is proposed to be transferred to its control. First, TCT admits that the project will not be ready for construction even within three years of the already expired ten year deadline for starting construction—thereby necessitating the present request to extend SCA’s expiration date and a further request again in three years. Second, TCT admits that the SCA would need to eventually be amended to allow for taller but fewer turbines. Given the history of this project, taller turbines could very well represent a substantial change requiring the governor’s approval. The Council already recommended conditioning the project to remove strings of shorter turbines that would have impacted views from the Columbia Gorge Scenic Area. Numerous public commenters, including Friends and SOSA, expressed concern about the potential for greater visual impacts from taller turbines.

Under these circumstances, the Council finds that the transfer request should be denied.

2. Even if the Council were to grant the request to transfer control of the SCA, TCT has failed to provide a compelling basis for extending the SCA’s expiration date for start of construction.

WAC 463-68-080 (site certification agreement expiration) provides that:

(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.

(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.

(3) Upon a request to extend the term of the site certification agreement, the council may conduct a review consistent with the requirements of WAC 463-68-060 and 463-68-070, and other applicable legal requirements.²

The most logical reading of this rule is that a certificate holder may request an extension of the ten year deadline for start of *commercial operations*, as stated in subsection (2). But subsection (1) does not expressly allow a certificate holder to request an extension of the expiration date imposed under that subsection based on a failure to even *start construction* within ten years.

SCAs have a ten year termination date because the original environmental review is likely to become outdated within that timeframe, and the original public comment and adjudication topics may not reflect the current concerns of the community. Although environmental impact

²Consistent with this, WAC 463-68-030 states: “Subject to conditions in the site certification agreement and this chapter, construction may start any time within ten years of the effective date of the site certification agreement,” and the Whistling Ridge Energy SCA provides: “If the Certificate Holder does not begin construction within ten (10) years of the execution of the SCA, all rights under this SCA will cease.”

statements can be supplemented with new information, at some point, to honor the public input requirements of RCW 80.50, it is necessary to start the application process anew.

The Whistling Ridge SCA is based on a now twelve year old decision of the Council and the Governor, and EFSEC rules plainly state that an SCA shall expire if construction has not begun within ten years of an SCA's effective date. Although in some circumstances an agency can decline to follow its own rule, it must be able to "explain[] the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency." RCW 34.05.570(3)(h).

There is a dispute about when the Whistling Ridge SCA became "effective," and therefore when the SCA's ten year expiration period began to run.³ This question is academic at this time because under Friends' interpretation, the SCA expired March 5, 2022, and under WRE's interpretation the SCA expired November 18, 2023. In either case, the SCA expired without the certificate holder starting construction.

An unusual aspect of this SCA is its allowance that *completion of construction* and initiation of operations (called "Substantial Completion") need not be achieved until ten years after exhaustion of appeals of necessary state and federal permits. In essence, the SCA provides what amounts to an automatic extension of time for the *completion* of construction and commencement of operations following state and federal permit appeals, while nonetheless retaining the ten year expiration date for failure to *start* construction. This provision about when construction must be completed is not particularly relevant here, because the certificate holder has not met the ten year deadline for starting construction.

This Council did recently decide that there were valid reasons to grant the holder of the Desert Claim Wind Power Project SCA an extension of deadline to start construction.⁴ But in that case, the Project had undergone a public comment process and EFSEC had prepared an addendum to the Supplemental Environmental Impact Statement for a 2018 SCA amendment that authorized the Project's redesign. In addition, the certificate holder was able to represent that it had actively been competing in requests for proposals for power purchase contracts, and was ready and able to proceed with construction as soon as it could secure a power purchase contract.

Without a compelling justification such as this, the Council finds that even if it were to approve transfer of control of the SCA, the extension request should be denied on its merits and the SCA declared to have expired. Expiration of the SCA does not preclude the filing of a new application for site certification for the same or similar project at this site if a new developer should conclude that such a project is viable.

³ Although common sense suggests the SCA was effective when signed by the Governor, there is an argument based on the statutory text that the SCA did not become effective, and the ten year expiration date did not begin to run until the applicant's president signed the document twenty months after the Governor signed. Friends argues that "effective date" refers to the date of the Governor's signature of the SCA, while WRE argues that "effective date" and "execution" refer to the date the applicant signs the SCA, following the Governor's signature.

⁴Council Resolution No. 353, Amendment No. 2 to the Desert Claim Wind Power Project Site Certification Agreement, Extension of Term (Oct. 18, 2023).

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

- (1) Whistling Ridge Energy, LLC's Application to Transfer Site Certification Agreement for the Whistling Ridge Energy Project to Twin Creeks Timber, LLC, as the new Parent of Whistling Ridge Energy is denied.
- (2) Whistling Ridge Energy, LLC's Request to Extend Term of Site Certificate Agreement Pursuant to WAC 463-68-080 is denied.
- (3) The Whistling Ridge Energy Project Site Certification Agreement is declared expired, but without prejudice to filing of a new application for site certification for a project at the site.
- (4) Friends of the Columbia Gorge's petition for an adjudicative proceeding in the above-captioned matters is denied as moot.

DATED at Olympia, Washington and effective on 17th day of July, 2024.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Kathleen Brew