

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

LORELEY DRACH, TOM DRACH,)
JOYCE EASTWICK, MIKE EASTWICK,)
CHARLIE GUTHRIE, REBECCA)
MAXEY, WIRT MAXEY, ALEXANDER)
MECL, CHERYL PARK, VICKI PRYSE,)
DAN RAWLEY, JEANNIE RAWLEY,)
JULIE REGOS, LASZLO REGOS,)
ADRIENNE RUDERMAN, GLENDA)
RYAN, MATT RYAN, FRIENDS OF)
THE COLUMBIA GORGE, INC, and)
SAVE OUR SCENIC AREA,)
)
Appellants,)
v.)
)
SKAMANIA COUNTY,)
)
Respondent,)
)
and)
)
WHISTLING RIDGE ENERGY, LLC,)
)
Intervenor-Respondents.)
_____)

CRGC No. COA-S-10-01

Skamania County Resolution No. 2009-54

FINAL OPINION AND ORDER

This case involves an appeal by Loreley Drach and several others of Skamania County Resolution No. 2009-54, entitled, "Certification of Land Use Consistency for the amended application for the Whistling Ridge Wind Energy Project. This resolution repeals Resolution

2009-22 in its entirety.” The Columbia River Gorge Commission met on June 8, 2010 to hear oral argument and deliberate to a decision. We do not disturb Skamania County Resolution 2009-54.

I. PARTIES

The parties in the appeal were:

- Loreley Drach, Tom Drach, Joyce Eastwick, Mike Eastwick, Charlie Guthrie, Rebecca Maxey, Wirt Maxey, Alexander Mecl, Cheryl Park, Vicki Pryse, Dan Rawley, Jeannie Rawley, Adrienne Ruderman, Glenda Ryan, and Matt Ryan, represented by Erin C. Madden, Cascadia Law P.C., Portland, Oregon.
- Friends of the Columbia Gorge, represented by Nathan Baker, Staff Attorney, Portland, Oregon, and Gary K. Kahn, Reeves, Kahn & Hennessy, Portland, Oregon.
- Save Our Scenic Area, represented by J. Richard Aramburu, Aramburu & Eustis, Seattle, Washington
- Skamania County, represented by Peter S. Banks, County Prosecutor, Stevenson, Washington.
- Whistling Ridge Energy, LLC, Timothy L. McMahan, Stoel Rives LLP, Portland, Oregon.

II. PRELIMINARY ISSUES

Conflicts of Interest

Commissioner Walt Loehrke stated that he attended a meeting of the Washington Energy Facility Site Evaluation Council in March 2009 as a community member and testified about his interest in wind and attending hearings for wind projects in Coos Bay, and that the proposed project would maintain a connection between the Skamania County power system and BPA. Mr. Loehrke stated that he did not believe that attending the meeting and giving the statements developed any conflict.

Ex Parte Communications

No Commissioners reported any ex parte communications.

Record

Skamania County submitted an administrative record in this matter, and no party objected to it. As well, appellants and respondents each submitted lengthy appendices and no party objected to each other appendices.¹ Page 74 of the original record states that it is a placeholder for Whistling Ridge's amended application to the Washington Energy Facility Site Evaluation Council (EFSEC), and states that the amended application is available at EFSEC's website. The record does not contain a physical copy of the amended application. Because of the transient nature of electronic documents on web sites, we are disinclined to accept such documents into a record by mere reference. A better approach would be to provide the Commission with the precise documents on a CD, USB drive, or other medium for transferring electronic documents.

In this case, however, we will accept that the amended application is part of the record. The document is easily identifiable (although the placeholder reference to the EFSEC website should have given the precise web address of the precise document), and the web site that houses the document is a reliable government agency web site which will continue to house the document for the duration of our review.

Exhibits

Intervenor-Respondent, Whistling Ridge, Energy, LLC showed PowerPoint slides during their oral argument. Whistling Ridge provided copies of the slides for respondents, the commissioners and for the record of the Commission's hearing. No party objected to the slides.

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¹ Appellants did submit a motion to file a supplement to its appendices and respondents objected. The Chair of the Commission denies the motion, and the supplemental appendices are not part of the record of the Commission's decision.

Scope of Appeal

Appellants briefed two assignments of error, but prior to oral argument withdrew their first assignment of error. We did not consider the first assignment of error.

Rulings on Objections and Motions

Respondents objected to a reference by the appellants to the Draft Environmental Impact Statement the EFSEC has issued, but is not part of the record in the matter. The Chair allowed the reference. Subsequently, respondents referred to evidence outside the record in answering a question from one of the commissioners about the amended application. Appellants did not object, and the Chair allowed the reference.

All rulings made on objections and motions prior to and during the hearing are hereby affirmed. Any objections or motions not ruled upon prior to or during the hearing are hereby overruled.

Hearing Procedure

The Chair reviewed the procedures for the hearing, which are contained in Commission Rule 350-60 and included in the Notice of Hearing. The Commission adhered to the hearing procedures.

III. STANDARD OF REVIEW

The issues presented are both factual and legal in nature. Our review of factual issues focuses on whether the findings are sufficient to support the decision and whether the decision is supported by substantial evidence in the whole record. Commission Rule 350-60-220(1)(e) and (f).

The appellants did not make any legal arguments relating to Skamania County Resolution 2009-54. The respondents, however, strongly argued that the Commission does not have

jurisdiction to consider this appeal for several reasons. Our decision thus includes discussion of legal issues that do not relate to the correctness of Skamania County’s decision.

IV. FACTS

Whistling Ridge Energy, LLC proposes to locate a number of wind turbines in Skamania County. The wind turbines themselves would not be in the National Scenic Area, but Whistling Ridge wants to use public roads in the Scenic Area to transport the turbines to their locations. Whistling Ridge submitted a site certification application to the Washington Energy Facility Site Evaluation Council (EFSEC) for approval. The Council manages a one-stop permitting process, whereby it gathers all of the information and makes a recommendation to the Governor about whether the project complies with all local and state permitting requirements.² The Governor then issues a site certification agreement, which gives permission to construct the project. As part of its fact-finding process, EFSEC solicits a certification from the local government where a project would be located regarding compliance with local ordinances. Skamania County staff prepared a Land Use Consistency Staff Report, which stated that no National Scenic Area review would be needed. Rec. 24. The Skamania County Board of Commissioners adopted the staff report in Resolution 2009-54. Rec. 2–3.

The appellants identified one fact that they believe is in dispute—whether Whistling Ridge would need to make road improvements to roads in the Scenic Area to transport the turbine components to the project site. Alternative 1 in the amended application states that road improvements would be necessary. Alternative 3, which first appeared in the amended

² The EFSEC process is not mandatory. Applicants for energy facility projects can choose whether to seek approval through EFSEC’s one-stop permitting process, or seek approval of the necessary permits from all of the state and local agencies individually.

application, states that no road improvements would be necessary.³ Alternative 3 is the applicant's preferred alternative.

Alternative 3 includes use of the SR-14/Cook-Underwood Road intersection. The original application stated that this intersection would require road improvements, but the amended application deleted this discussion of the need for road improvements at this intersection. Nothing in the record explained this change; however, at the hearing, the Chair of the Commission allowed Whistling Ridge to explain. Whistling Ridge explained that there was new information between the time of the original and amended application that demonstrated that road improvements were already planned and would not be caused by the Whistling Ridge energy project; thus the EFSEC application requirements did not require Whistling Ridge to include the road improvements in its application.

V. JURISDICTION

The parties dispute whether the Commission has jurisdiction to hear this appeal. The appellants argue that the resolution is a land use decision as defined in the Commission's rules (350-60-040(8)). Respondents argue that the resolution is not a final action pursuant to 16 U.S.C. § 544m(a)(2), which states:

Any person or entity adversely affected by any final action or order of a county relating to the implementation of [the Scenic Area Act] may appeal such action to the Commission * * *.

We conclude that there is not a final action of Skamania County for us to review and thus we lack jurisdiction to hear this appeal. We reach this conclusion based on the context of Skamania County's resolution and the relationship between the appellants' claims and the Scenic Area Act.

³ The amended application deleted alternative 2.

We start our analysis by noting that both parties assured us at oral argument that there is no preemption issue vis-à-vis the Scenic Area authorities and that should the project require road construction in the Scenic Area, then there would need to be an amendment to the site certification application, or to the site certification agreement.⁴

With that understanding, we turn to the specific reasons why Resolution 2009-54 is not a final action reviewable by the Commission. As noted above, we base our reasoning on the context of Skamania County's resolution and the appellants' claim there would be road construction in the Scenic Area.

Here, Whistling Ridge's application stated that no road improvements would be necessary. Skamania County considered the application as Whistling Ridge presented it, and noted that no part of the project would be within the National Scenic Area. Appellants ask us to conclude that Skamania County's adoption of Whistling Ridge's statement is related to the implementation of the National Scenic Area Act, but we disagree that it is.

First, not all statements that mention the National Scenic Area are an implementation of the National Scenic Area Act pursuant to 16 U.S.C. § 544m(a)(2). Here, once Skamania County chose to draft a certificate of consistency in accordance with WAC 463-26-090 (cited below), it addressed the applicability of its Scenic Area Land Use Ordinance as evidence that it considered all of its ordinances. If the proposed energy proposal were located in northern Skamania County, far away from the National Scenic Area, Skamania County would have similarly had to demonstrate that it addressed the applicability of all of its county ordinances. Such a statement is not, by itself, a final action pursuant to 16 U.S.C. § 544m(a)(2).

⁴ See e.g., Audio Recording of hearing before the Commission at 9:49:49–50:00; 9:55:17–26; 10:27:54. The Commission briefly discussed the relationship between the the Scenic Area authorities and the EFSEC regulations, but ultimately tabled the issued and did not decide the question.

Second, we do not believe that an adjudication before the Commission is the place to determine the questions that the appellants propose because the appellants' arguments relate to application or interpretation of two administrative rules of the Washington State Energy Facility Site Evaluation Council. The first rule, WAC 463-26-090 states:

This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

The second rule, WAC 463-60-372(2) states:

The application shall describe roads, estimate volume, types, and routes of vehicular traffic which arise from construction and operation of the facility. The applicant shall indicate the applicable standards to be utilized in improving roads * * *.

The appellants' arguments ask the Commission to: (1) conclude that Skamania County should have reviewed the road activity identified in alternative 1, and (2) conclude that alternative 3 would actually require road construction.

The appellants' first argument, relating to alternative 1, raises a legal question of whether WAC 463-26-090 requires only a consideration of the applicant's preferred alternative or of each of the alternatives that the applicant presented. This is a question of law that is appropriately raised to EFSEC. The only link between this question of law and the National Scenic Area is the fact that alternative 1 would require road construction in the Scenic Area. That link is too tenuous for us to conclude that Resolution 2009-54 is a final action relating to implementation of 16 U.S.C. § 544m(a)(2).

The appellants' second argument, relating to alternative 3, raises a mixed question of law and fact. The factual issue concerns whether the project would actually cause the need for road construction along the alternative 3 route. At the hearing, the Commission heard that this factual

question is currently pending before EFSEC. The legal issue asks us to determine whether Whistling Ridge's application for site certification complied with WAC 463-60-372(2) without a description of road improvements along the alternative 3 route. The completeness of Whistling Ridge's application is appropriately raised to EFSEC. Again, the only link between this mixed question of law and fact and the National Scenic Area is that the road construction, if it would be necessary, would occur in the Scenic Area. And, again, we believe this link is too tenuous for us to conclude that Resolution 2009-54 is a final action relating to implementation of 16 U.S.C. § 544m(a)(2).

VI CONCLUSION

Because Resolution 2009-54 does not present a final action relating to the implementation of the Scenic Area Act (as required in 16 U.S.C. § 544m(a)(2)), we do not reach the merits of appellants' assignment of error.

IT IS SO ORDERED this 24 day August 2010.



Joyce Reinig
Chair

NOTICE: You are entitled to seek judicial review of this Final Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the Scenic Area Act, P.L. 99-663.

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of August 2010, I served a true and correct copy of the foregoing FINAL OPINION AND ORDER by first class mail, postage prepaid to the following persons:

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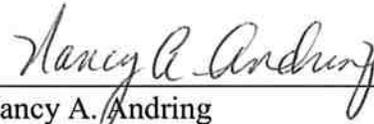
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