

CONCURRING OPINION OF CHAIRMAN JAMES LUCE

September 14, 2011

For reasons explained below, I concur with the Council's recommendation.

This case is a microcosm of how well-intentioned, incrementally developed, Federal and State law can have significant, unintended consequences for both our existing energy system and our environment.

Because these are important subjects with far reaching consequences beyond this case, I take judicial liberty to comment on actions that I believe could better serve to protect this system and the environment. My comments are drawn from a lifetime of public service in the energy area, first as senior counsel for the Bonneville Power Administration and for the past ten years as Council Chair. And they bear directly upon our Council's future, and the region's need to better plan for a renewable resource future.

What is needed is a new commitment; a commitment that will allow us to thoughtfully plan where renewable resources should be developed, and where they should not, and to provide expeditious siting with clear and uniform standards across all political subdivisions.

At the outset, all will agree that we seek low cost, abundant, and clean energy. It is good for our economy and for our environment. Our goal should be to protect what we have, and to get more of it.

Energy efficiency is low cost, abundant, and clean, and testimony confirms that eighty five percent of our needs can be met with energy efficiency.¹ Certainly that is consistent with our goal. And we are also in a "surplus" condition. Nothing could be lower cost than having "a surplus."² But energy efficiency is finite, and surplus does not last forever.

We are now in a time of transition; transitioning to a future of renewable resources, in this case wind power. And transition presents both opportunities and challenges.

Wind power has much to commend it. There are no fuel costs, and no air emissions. And it furthers our state's energy policy, with which the Council is committed to act consistently. Wind projects, nevertheless, present challenges. They can cause avian mortality, impact wildlife habitat, leave a long lasting footprint on the landscape, in this case the Columbia River Gorge,ⁱⁱⁱ and complicate the operation of our most valuable, and already existing renewable resource, the Federal Columbia River Hydro System.^{iv}

Turning to the instant case, the Council is challenged by the fact that it has no rules for siting renewable resources.^v This fact, coupled with our requirement to provide an adjudicatory hearing,^{vi} has, in my opinion, contributed to an unnecessarily lengthy and costly proceeding where a comprehensive Environmental Impact Statement might well have sufficed.^{vii}

For guidance, we look to our previous decisions, organic statutes and regulations developed primarily for thermal projects.^{viii} And we use our best judgment to "balance" competing considerations. Our laws and regulations presuppose a compelling need for energy resources, tempered by a requirement that the resource enhance the esthetic and recreational opportunities available to the public while providing abundant power at reasonable cost.^{ix} All of this is to be done "in the public interest."^x And yet what is "the public interest?" Absent rules, the Council proceeds on a case-by-case basis and our decisions inevitably leave room for questioning whether the correct result was reached.^{xi}

Whistling Ridge is just such a case. The Council recommends approval of 35 wind turbines just outside the boundaries of the Columbia Gorge National Scenic Act (NSA). The NSA is one of only two such "National Scenic Areas" authorized by Congress;^{xii} its relevance to this case speaking primarily to the fact that the Gorge is recognized as an environmental wonder.^{xiii} The applicant is a well-respected steward of the land, seeking to diversify its business and provide employment to

the community. Skamania County will benefit from increased tax revenues, as much as \$700,000 yearly.^{xiv} These are legitimate and reasonable aspirations.

On the other hand, tens of thousands visit the Gorge yearly to recreate and enjoy the beauty of a natural landscape, a landscape also treasured by many who live in the area and oppose this project. Wind turbines are not part of the natural landscape. That landscape will now be altered during the day by 430 foot towers,^{xv} and by night with warning lights required by the Federal Aviation Administration. How many visitors will be dissuaded from coming if this project is built, or how many may now be attracted by it, is unknown. Some local residents may chose to relocate, while others may welcome positive economic benefits. But there is no question that there will be a significant impact in this environmentally sensitive area, especially to its unparalleled viewsapes and possibly to its avian and other wildlife populations.

As concerns the Council's "balancing directive," I cannot say that this project "enhance [s] ... esthetic and recreational opportunities...." It is, as modified by the Council's Order, at best arguably neutral in this regard. And, as earlier noted, the Legislature's directive to the Council to assure "abundant power at reasonable cost" seems somewhat less forceful when the region has an existing surplus. However, the economics of a particular project are not an appropriate subject for Council inquiry and, for reasons explained below, the "esthetics" issue is not determinative .

Nor is it the Council's role to say to the developer "find a different site" or "start an energy efficiency business." We are a siting Council, charged by law with the responsibility to act on the application before us.

So considered, the Council's recommendation reduces or eliminates viewscape impact from the vast majority of important viewing areas within the NSA. It is consistent with and in some respects exceeds the Council for the Environment's recommendations. Moreover, there is no assurance that these protections would occur if the project were sited locally, and Skamania County has asked the

Governor, acting through the Council, to make the decision. Finally, the project furthers our state's strong policy and legal commitment to renewable resources, which in turn reduces our carbon footprint. These factors, for me, support a recommendation of approval.

As for the future, and as noted above, there are critical issues regarding the Council's role and the region's ability to effectively plan for continued renewable resource development.

First, as to the Council's role.

Reasonable questions can be asked regarding the Council's siting role, beginning with but not limited to renewable resources, and the requirement that the Council's public hearing be conducted as an adjudicative proceeding under the Administrative Procedure Act (APA).^{xvi}

As exemplified by this case, the Council is currently little more than a renewable resource forum of "last resort."

Jurisdiction is the major issue. It is important to understand that the law does not confer jurisdiction on the Council, but on the developer. The developer can "opt in" to the EFSEC process initially, or after local jurisdictions deny siting, or project opposition materializes. A developer can even "opt in" after a Court of competent jurisdiction upholds the denial of a project by a local governing body. See Desert Claim Wind Power LLC v. Kittitas County, No. 05-2-00243-6, slip. Op at 11(Kittitas Cty Super Ct. November 4, 2005). This means that the Council reviews only a small fraction of the total number of wind projects licensed in our state.^{xvii}

In practice, initial "opt in's" don't happen.^{xviii} The Council is used only "if all else fails," and only then because a Council license preempts all other state and local law and provides expedited review by the Supreme Court.^{xix}

Stated bluntly, the resources that currently have the greatest impact on our state's energy future and environment are, for all practical purposes, not subject to state siting review.^{xx} The same is increasingly true of non-nuclear thermal resources.^{xxi}

Second, as to the region's role.

Continued development of renewable resources is likely.^{xxii} And as earlier noted, these projects will need to be carefully integrated into an existing resource base. So considered, a comprehensive plan would seem appropriate. Such a plan could take a programmatic approach considering reasonably foreseeable impacts associated with such development. The plan could assess renewable resource sites and prioritize their potential for development. Potential esthetic, wildlife, and cultural resource impacts, all of which may bear upon site selection, and related issues, such as the need for new transmission, could be examined.

Currently no such plan exists. Our Council lacks authority to either undertake or fund such a plan,^{xxiii} and our state's Growth Management Act has not been used for this purpose. In any case, because renewable resource development is regional in scope, it would seem that a regional plan would be appropriate.

The Bonneville Power Administration (BPA) and the Northwest Power and Conservation Council (NWPCC), working in partnership, are the logical entities to undertake this task. They have regional responsibility and, as described below, they have previously developed an effective plan in an analogous situation.

BPA has the financial means and the operational interests to do this job. The renewable resource industry's growth is a significant factor in driving Bonneville's multi-billion dollar transmission program, and in addressing issues related to integrating wind projects with the existing Federal Columbia River Hydro Power System. And the NWPCC is responsible for the regional Power Plan which guides Bonneville actions.

Such a plan would "bank" potential renewable resource sites and designate "protected areas" for environmentally sensitive locations. Absent such protection, such sites are likely to be developed if the economics warrant.

A "site banking" plan successfully protected anadromous fish in the mid-1980's.^{xxiv} Relying on the plan, the Council and BPA adopted "protected areas" to discourage small hydro development that threatened this resource. Developers who chose to build small hydro facilities in "protected area" streams were unable

to access BPA transmission.”^{xxv} Denial of transmission access because of environmental impacts is within BPA’s authority.

In summary, renewable resource development is likely to continue its robust growth. The Whistling Ridge project, as modified, should be approved. The Council’s siting role and the need for the adjudication process deserves discussion. And to provide a regional structure which could assist Council’s such as ours in future cases, I look to those with authority to consider a “site banking” plan to designate appropriate renewable resource sites, and adoption of “protected areas” to discourage development of those not so designated. Absent such a plan, admittedly not easy and not without controversy, economic considerations will be paramount and the broader public interest in protecting the environment could finish second. This is in no one’s interest, least of all renewable resource developers.

ⁱ Testimony of Howard Schwartz, a senior Department of Commerce employee and energy policy analyst for the Northwest Power Planning Council, January 7, 2011, hearing transcript on pages 1025-1026 and 1044. Exhibit 35-02 from the Council’s Sixth Power Plan also concludes that, “The plan finds enough conservation to be available and cost-effective to meet 85 percent of the region’s load growth for the next 20 years. If developed aggressively, this conservation, combined with the regions past successful development of energy efficiency could constitute a resource comparable in size to the Northwest federal hydroelectric system...” Implicitly recognizing that it is state mandates that are the driving force behind wind projects, the Council’s Program Summary continues, “Aggressive pursuit of this conservation is the primary focus of the power plan’s actions for the next five years. Combined with investments in renewable generation as required by state renewable portfolio standards...”

ⁱⁱ Id.

ⁱⁱⁱ The project is located in the Columbia River Gorge. The Gorge is a natural wonder created through millennium by the repeated great Glacial Lake Missoula floods beginning 12,000 years ago. It has sheltered Native American peoples, and served as the gateway to the Pacific for Lewis and Clark and homesteading pioneers. Today it is the destination for tens of thousands of visitors who hike, ski, fish and recreate within its majestic boundaries. Recognized as an environmental treasure by Congress’s passage of the National Scenic Act, 16 U.S.C. 544, the Gorge in 2009 was ranked 6th internationally and 2nd in North America for sustainable destinations by the National Geographic Society’s Center for Sustainable Destinations, which called it “the USA’s Rhineland.” <http://traveler.nationalgeographic.com/2009/11/destinations-rated/north-america-text/18>

^{iv} See Bonneville Power Administration’s Interim Environmental and Negative Pricing Policy http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf. See also, Memorandum of April 28, 2011 prepared by Steve Kern of the Pacific Northwest Utilities Conference Committee

(PNUCC), "Capabilities of Electric Power Resources" The PNUCC was formed in 1946 as a voluntary, informal group of Northwest public and private utilities to assess power and power planning needs.

^v A Council notice of proposed rulemaking was issued in January 2009 but withdrawn in April 2009 because of limited stakeholder support and because under the existing "opt-in" jurisdiction EFSEC receives so few applications for siting wind projects <http://www.efsec.wa.gov/rulerev.shtml#Alt>.

^{vi} RCW 80.50.090(3).

^{vii} My experience as Council chair convinces me that the adjudicatory process is not always needed when an EIS is prepared.

The original language for a public hearing conducted as an adjudicatory hearing under the Administrative Procedure Act dates to 1970 and was intended to cover thermal power plants, especially nuclear plants that were being planned by Energy Northwest. The original language in RCW 80.50.090(3) stated, "(3) Prior to the issuance of a council recommendation to the governor under section 10 of this act a public hearing, conducted as a contested case under chapter 34.04 RCW, shall be held. At such public hearing any person shall be entitled to be heard in support of or in opposition to the application for certification." That section of RCW 80.50.090(3) was amended in 1989, chapter 175, to the language that presently exists.

The State Environmental Policy Act (SEPA) and its requirement for preparation of an Environmental Impact Statement (EIS) when a project may have "significant impact" came later. SEPA (Senate Bill 545, 1971, 1st Ex Sess. Chapter 109) was signed into law on May 19, 1971.

^{viii} See WAC Chapter 463-62

^{ix} See RCW 80.50.010 and WAC 463-14-020.

^x *Id.*

^{xi} This is particularly true with respect to viewscape. See prefiled testimony of Dean Apostol, Exh. 21.00. Applicant used the Federal Highway Administration model which was designed for visual assessments of "highway projects." Testimony highlighted three models for evaluating aesthetic impacts: The Federal Highway Administration, the Forest Service; and the Bureau of Land Management. All have merit.

^{xii} See 16 U.S.C. 544. The Columbia River Gorge National Scenic Act. See also Lake Tahoe Basin Act of 1980 (94 Stat. 3383). The NSA also recognizes that there are boundaries beyond which its restrictions are not relevant, as well as the fact that it is in many ways a developed landscape supporting industry and commerce for its residents.

^{xiii} See iii, *supra*.

^{xiv} Testimony of Eric Hovee, Exhibit 41.02.

^{xv} Measured ground to turbine blade tip. See section 1.4.1.1. Environmental Impact Statement for Whistling Ridge Energy Project.

^{xvi} See vii, supra.

^{xvii} The Council has approved three wind projects, totaling 563 MW. Of these only 373 MW are on line. By comparison, Washington wind projects online, under construction, or with transmission access rights total more than 7,000 MW, with 2,357 MW online. In other words, the Council's role is minimal. See American Wind Association "Energy Facts" for Washington State. Percentage
<http://www.awea.org/learnabout/publications/upload/1Q-11-Washington.pdf>

Currently online: 2,357 Megawatts (MW)

Added in 2011: 151 MW

Added in 2010: 297 MW

Under construction: 343 MW

Wind projects in queue: 5,831 MW

Washington currently ranks fifth in total overall wind power installation.

^{xviii} The Council has considered four wind projects, three in Kittitas County and the current case in Skamania County. In the Kittitas County cases, preemption was sought because of County Commission opposition to the project or final decisions. In the current case, preemption is sought because the County is challenged by intervenors in its local land use planning and zoning.

^{xix} RCW 80.50.110 (1)(2) provides that EFSEC licenses govern and supersede all other State laws and regulations while RCW 80.50.140 allows for direct review by the Washington State Supreme Court.

^{xx} See footnote xv, supra.

^{xxi} The 350 MW threshold triggering Council jurisdiction frequently appears to form the basis for developers planning power plants that fall just below this threshold. Energy Northwest (ENW) is currently planning a combined cycle natural gas facility in Kalama, Washington. Council correspondence with ENW evinces its intent to size the plant as 346 MW. The Clark County's River Road plant, sized at approximately 248 MW when the Council's jurisdiction was 250, is another example.

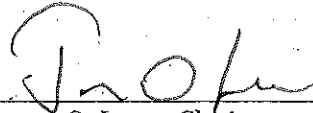
^{xxii} See xvii, supra

^{xxiii} RCW 80.50.071.

^{xxiv} See section II, "Site Ranking and Protected Areas," PROPOSED WORK PLAN, PACIFIC NORTHWEST HYDRO ASSESSMENT STUDY, PREPARED BY THE NORTHWEST POWER PLANNING COUNCIL, 700 S. W. Taylor, Portland, Oregon 97205, August 1984. The plan affirmed the fact that site banking and protected areas designations were important to allow hydro development while protecting important fisheries. The analogy is clear: wind and renewable resources are important but should be prioritized and protect important environmentally sensitive areas, whether for viewscapes, wildlife, or otherwise. See
<ftp://ftp.streamnet.org/pub/streamnet/ProtectedAreas/Documents-Other/Background/ProposedWorkPlanPNWHydroAssessment.pdf>

^{xxv} Id.

DATED and effective at Stevenson, Washington, this sixth day of October, 2011



James O. Luce, Chair