



Oregon

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To: Energy Facility Siting Council

From: Sarah Esterson, Senior Policy Advisor

Date: December 4, 2020

Subject: Agenda Item F (Action Item):
Summit Ridge Wind Farm, Request for Amendment 5 –
Council Review of Request for Amendment 5 to Transfer Certificate Holder
Ownership of the Summit Ridge Wind Farm Site Certificate for the December
18, 2020 EFSC Meeting

Attachments: Attachment 1: Draft Final Order on Request for Amendment 5 of the Summit
Ridge Wind Farm Site Certificate (Forthcoming)
Attachment 2: Transfer Hearing Comments

STAFF RECOMMENDATION

The Oregon Department of Energy (Department) recommends the Energy Facility Siting Council (Council) consider comments received on the record of the Summit Ridge Wind Farm Request for Amendment to Transfer (Request for Amendment 5, RFA5) Transfer Hearing and determine that of the issues raised, those related to Council's limitation to modifying conditions through an amendment to transfer were valid.

The Department recommends Council evaluate whether the recommended condition amendments are within the scope of the two standards applicable to an amendment to transfer, Organizational Expertise (OAR 345-022-0010) and Retirement and Financial Assurance (OAR 345-022-0050). If determined to be within the scope of the relevant standards, Council should evaluate whether the recommended amended conditions are required in order to ensure the proposed new owner has demonstrated an ability to satisfy the applicable requirements. If affirmed, Council may direct the Department to process the amendment under Type A amendment review, or Type B amendment review if requested and justified by the certificate holder. If the Department's previously recommended amended conditions are rejected by Council, Council may review RFA5 and draft Final Order, removing all previously proposed condition amendments, and take action to approve or deny the transfer request.

BACKGROUND

On September 14, 2020, the Department received RFA5, jointly submitted by Summit Ridge Wind LLC (certificate holder) and Aypa Power LLC, a subsidiary of Blackstone Energy Partners

(new owner). Prior to submittal of RFA5, on August 21, 2020, the certificate holder provided notice to the Department, pursuant to OAR 345-027-0400(2), of a transfer of ownership of the certificate holder.¹ On September 30, 2020, the Department issued Public Notice of the Request for Amendment to Transfer to all persons on the Council's general mailing list, the special mailing list established for the facility, an updated list of property owners supplied by the new owner, and reviewing agencies as defined in OAR 345-001-0010(52). The notice included a request for comments and established a tentative comment deadline and transfer hearing date of November 20, 2020; as described in the notice, the Department confirmed the comment deadline and transfer hearing date, updated from November 20 to November 19, 2020, on October 30, 2020 via the project webpage.²

On the record of RFA5, Council received comments from two commenters. Written comments were received on November 19, 2020 on behalf of Friends of the Columbia Gorge, Oregon Wild and Central Oregon LandWatch (collectively, Commenters) and orally at the November 19, 2020 transfer hearing from Commenters and Irene Gilbert (see Attachment 2 of this staff report). An evaluation of comments received is provided below for Council review.

EVALUATION OF TRANSFER HEARING COMMENTS

Substantive comments were received from Commenters related to RFA5. Commenters raised four discrete issues, which are evaluated below.

1. The RFA5 is incomplete and must be denied because Aypa failed to include in the RFA5 "the expected date of the transaction" for the transfer of the parent ownership from Pattern to Aypa, as required by OAR 345-027-0400(4).

Commenters assert that because RFA5 does not include "the expected date of the transaction," Council must deny the request to transfer ownership of the certificate holder from Pattern Renewables 2 LP to Aypa Power LLC. The Department disagrees that denial of the amendment request is the remedy.

OAR 345-027-0400(4) requires that the new owner "submit a written request" that includes, "if known, the expected date of transaction." In this instance, the transaction occurred on August 3, 2020, prior to submittal of RFA5, as documented in RFA5 Attachment 3 in letters of written consent executed by Aypa Power LLC. The Department was informed of the expected transaction on July 8, 2020, via conference call, and received written notification of the transaction on August 21, 2020 from the certificate holder's Special Counsel, Sarah Stauffer-Curtiss of Stoel Rives LLP. The Department agrees that RFA5 does not specifically state that the expected date of transaction was August 3, 2020, but that the information provided in RFA5

¹ Site Certification 2.10 of the site certificate requires that the certificate holder, prior to any transfer of ownership of the facility or ownership of the certificate holder, inform the Department of the proposed new owners.

² Ms. Gilbert raised issues related to confusion over public comment period, date of transfer hearing and accuracy of information presented in the Department's staff report and draft Final Order related to the tentative dates provided in the Public Notice. Clarification on procedural history of RFA5 is presented in the draft Final Order to resolve the expressed issue.

Attachment 3 can reasonably be used to inform the reader that the transaction occurred on August 3, 2020. The Department recommends Council reject Commenters recommendation that the transfer be denied on the basis that RFA5 did not expressly state the date of transaction.

2. Because Aypa was prohibited by OAR 345-027-0400(3) from constructing the Project before an amended site certificate approving the proposed transfer becomes effective, construction of the Project could not have been, and was not, lawfully commenced. As a result, the Site Certificate has expired and must be terminated.

Commenters assert that because the transfer occurred on August 3, 2020 and construction is documented as having commenced on August 6, 2020, that the new owner fails to comply with OAR 345-027-0400(3), which states, "The new owner may not construct or operate the facility until an amended site certificate as described in section (10) of this rule or a temporary amended site certificate as described in section (11) of this rule becomes effective." Commenters assert that therefore the site certificate has expired and must be terminated. The Department disagrees that it was the new owner that initiated construction of the facility and therefore disagrees that there are any OAR 345-027-0400(3) compliance issues.

All documentation related to facility construction commencement demonstrates that preconstruction and construction has and is being conducted by the existing certificate holder, Steve Ostrowski of Summit Ridge Wind LLC, and current certificate holder owner, Pattern Renewables 2 LP. Pattern Renewables 2 LP remains the certificate holder owner until approved otherwise by Council. For these reasons, the Department recommends Council reject Commenters recommendation that the site certificate be terminated.

3. Because Aypa has failed to demonstrate "a reasonable likelihood of obtaining a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition, as required by OAR 345-022-0050(2), the RFA5 must be denied.

Commenters assert that the new owner's financial assurance letter obtained from Royal Bank of Canada does not provide sufficient evidence because it does not address, or make specific reference to, an agreement to utilize Council's preapproved letter of credit or bond forms. Commenters also assert that the financial assurance letter makes no reference to the quarter and year of the calculated decommissioning amount and therefore, based on inflationary increases between 4th Qtr 2018 to current dollars, is not sufficient for representing a reasonable likelihood of the new owner's ability to secure a bond or letter of credit in an amount and form satisfactory to Council. Commenters suggest Council deny RFA5 due to the evidentiary issues identified. The Department disagrees.

As is typical in Council review, letters from financial institutions provided as supportive evidence for Council to find that a certificate holder or new owner demonstrates a reasonable likelihood of securing a bond or letter of credit under the Retirement and Financial Assurance standard are comfort letters. There are no specific statements that have to be included in the

comfort letters, such as an affirmation to use a preapproved form. Comfort letters are often provided and referenced in support of Council findings of compliance, but are not the sole or primary basis for findings of compliance. Additionally, the Department does not consider the fact that the Royal Bank of Canada letter provided in RFA5 Attachment 6 references only the bond amount, without reference to 4th Qtr 2018 dollars, to represent a significant deficiency because, based on the Department's analysis, the inflated value in 4th Quarter 2020 dollars is approximately \$12.355 million, equivalent to an approximately 3 percent increase. This difference is hardly one that would nullify the evidence represented by the comfort letter.

In addition to the comfort letter, as required under OAR 345-027-0400(4), RFA5 Attachment 1 provides a certification that the new owner agrees to abide by all terms and conditions of the site certificate currently in effect. Council's mandatory condition under OAR 345-025-0006(8) requires that a certificate holder submit a bond or letter of credit in a form and amount satisfactory to Council. This mandatory condition is reflected in Condition 14.1 of the Summit Ridge Wind Farm Site Certificate, which requires that the certificate holder submit a bond or letter of credit based on an approved amount of \$12.019 (4th Qtr 2018 dollars) or adjusted based on final design by applying previously approved units and general costs, further adjusted for inflation. Based on the comfort letter and the certification to abide by all terms and conditions of the site certificate, the Department recommends Council reject Commenters recommendation that the transfer be denied.

4. The Council is prohibited by OAR 345-027-0400(9) from adopting the Draft Final Order and from approving the Draft Fifth Amended Site Certificate

Commenters assert that Council is prohibited under OAR 345-027-0400(9) from amending site certificate conditions through the amendment to transfer process, and asserts that the Department's proposed condition amendments as presented in a November 16, 2020 draft Final Order are beyond the scope of the transfer process. The Department agrees that OAR 345-027-0400(9) prohibits Council from changing site certificate conditions through the transfer process. The Department believes the majority of the language it had recommended constituted clarifications rather than changes to existing conditions relevant to Council's Organizational Standard. However, the Department acknowledges that reasonable minds could differ as to whether the recommended language constituted a clarification or a "change." (The Department also agrees that some of the recommended condition language was not directly related to the standards the Council reviews when analyzing a transfer request). The Department believes the new owner has provided sufficient evidence to support Council's approval of the transfer under OAR 345-027-0400(8)(a) (i.e., that the new owner complies with 345-022-0100, 345-022-0500) without including any of the condition language the Department suggested prior to the November Council meeting. However, if the Council believes that the condition language the Department previously suggested or any changes to site certificate conditions or terms is necessary in order for Council to make the findings required by under OAR 345-027-0400(8), the Department recommends the appropriate process would be the Type A or B amendment process.

The Department provides an evaluation of the previously recommended condition language in Table 1 below and recommends Council evaluate whether any revisions identified as appropriately within the scope of the applicable standards are *required* in order to ensure compliance [Emphasis added]. If Council affirms that any recommended amended conditions are required, Council may direct the Department to coordinate with the certificate holder and new owner on processing the transfer request through the Type A or B amendment process, as appropriate.

Table 1: Department's Evaluation of Previously Proposed Condition Language and Recommended Action

Condition Number	Proposed Condition (Nov 16 Staff Report)	Was Proposed Condition Language Related to Organizational Expertise or Retirement and Financial Assurance Standard?	Recommended Action	If Council Determines Any Proposed Condition Language is Required (Amendment Required)
2.10	Before any transfer of ownership of the facility or ownership of the site certificate holder, the certificate holder shall inform the Department of the proposed new owners. The requirements of OAR 345-027-04100 apply to any transfer of ownership that requires a transfer of the site certificate.	No, language administrative in nature and not directly related to RFA5.	Disregard proposed condition language because it is not required for new owner to satisfy the standard.	NA
5.1	Before beginning construction of the facility, facility component or phase, the certificate holder shall provide notify to the Department of the identity and qualifications of the major design, engineering and construction contractor(s) for the facility. The certificate holder shall select contractors that have substantial experience in the design, engineering and construction of similar facilities in Oregon and a demonstrated low rate of job incidence and injury rates. The certificate holder shall report to the Department any change of major contractors.	Language re: timing of condition not directly related to applicable standard. Language related to limited information provided related to new owners ability to design, construct and operate the facility in a manner that protects public health and safety; however, while the proposed language clarified the intent of the condition but the changes are not required for the new owner to demonstrate compliance with the standard.	Disregard proposed condition language because it is not required for new owner to satisfy the standard.	Disregard introductory changes and adopt recommended amended condition as follows: Before beginning construction, the certificate holder shall <u>provide</u> notify to the Department of the identity and qualifications of the major design, engineering and construction contractor(s) for the facility. The certificate holder shall select contractors that have substantial experience in the design, engineering and construction of similar facilities in Oregon and a <u>demonstrated low rate of job incidence and injury rates</u> . The certificate holder shall report to the Department any change of major contractors.
5.2	The certificate holder shall contractually require all construction contractors and subcontractors involved in the construction of the facility to comply with all applicable laws and regulations and with the terms and conditions of the site certificate. <u>The certificate holder shall provide to the Department documentation of contractual provisions</u> . Such contractual provisions shall not operate to relieve the certificate holder of responsibility under the site certificate.	Language related to limited information provided related to the ability of the new owner, as an entity, to design, construct and operate the facility in compliance with site certificate conditions and other applicable requirements; however, while the proposed language clarified the intent of the condition, it is not required for the new owner to demonstrate compliance with the standard.	Disregard proposed condition language because it is not required for new owner to satisfy the standard.	Condition amendment as proposed.
6.1	The certificate holder shall: (a) Prior to construction of the facility, facility component or phase, notify the Department of the identity, telephone number, e-mail address and qualifications of the full-time, on-site construction manager. Qualifications shall demonstrate that the construction manager has experience in managing permit and regulatory compliance requirements and is qualified to manage a <u>utility-scale wind facility construction project in Oregon</u> . (b) Prior to operation, notify the Department of the identity, telephone number, e-mail address and qualifications of the full-time, on-site operations manager. Qualifications shall demonstrate that the operations manager has experience in managing permit and regulatory compliance requirements and is qualified to manage operation of a <u>utility-scale wind facility in Oregon</u> . (c) Prior to facility retirement, notify the Department of the identity, telephone number, e-mail address and qualifications of the personnel or entity responsible for facility decommissioning and restoration activities. Qualifications shall demonstrate that the identified personnel have experience in managing permit and	Language re: timing of condition not directly related to applicable standard. Other language is related to limited information provided related to ability of new owner, as an entity, to design, construct and operate the facility in a manner that protects public health and safety; however, although the proposed language clarified the intent of the condition the Department does not believe it is required for the new owner to demonstrate compliance with the standard.	Disregard proposed condition language because it is not required for new owner to satisfy the standard.	Disregard introductory changes and adopt recommended amended condition as follows: The certificate holder shall: (e) Prior to construction, notify the Department of the identity, telephone number, e-mail address and qualifications of the full-time, on-site construction manager. Qualifications shall demonstrate that the construction manager has experience in managing permit and regulatory compliance requirements and is qualified to manage a <u>utility-scale wind facility construction project in Oregon</u> . (f) Prior to operation, notify the Department of the identity, telephone number, e-mail address and qualifications of the full-time, on-site operations manager. Qualifications shall demonstrate that the operations manager has experience in managing permit and regulatory compliance requirements and is qualified to manage operation of a <u>utility-scale wind facility in Oregon</u> . (g) Prior to facility retirement, notify the Department of the identity, telephone number, e-mail address and qualifications of the personnel or entity responsible for facility decommissioning and

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	<p>regulatory compliance requirements and are qualified to decommission a <u>utility-scale wind facility in Oregon</u>.</p> <p>(d) The certificate holder shall notify the Department within 72-hours upon any change in personnel or contact information provided to satisfy Condition 6.1(a) through (c).</p>			<p>restoration activities. Qualifications shall demonstrate that the identified personnel have experience in managing permit and regulatory compliance requirements and are qualified to decommission a <u>utility-scale wind facility in Oregon</u>.</p> <p>The certificate holder shall notify the Department within 72-hours upon any change in personnel or contact information provided to satisfy Condition 6.1(a) through (c).</p>
6.31	<p>During facility construction and operation, the certificate holder shall report to the Department, within 7 days, any change in the corporate structure <u>such as changes within Board of Directors, President or Chief Executive Officer of Aypa Power LLC, Aypa Power Canada LP or Blackstone Energy Partners Pattern Renewables 2 LP, Pattern Energy Group 2 LP (the sole limited partner), and Pattern Energy Group LP</u>. The certificate holder shall report promptly to the Department any change in its access to the resources, expertise, and personnel of <u>Aypa Power LLC, Aypa Power Canada LP or Blackstone Energy Partners Pattern Renewables 2 LP, Pattern Energy Group 2 LP (the sole limited partner), and Pattern Energy Group LP</u>.</p>	<p>Yes, language related to the certificate holder's reliance on the experience of its parent company to satisfy the standard and administrative changes to reflect new owner name.</p>	<p>Condition amendment as proposed. replacing the names of the former owner entities with the new owner entities should not be considered a change to a site certificate condition subject to the prohibition of changes in OAR 345-027-0400(9).</p>	<p>Condition amendment as proposed.</p>
5.2	<p><u>Before beginning construction of the facility, facility component or phase, the certificate holder shall provide to the Department documentation that contractually require work contracts include provisions requiring that all construction contractors and subcontractors associated with construction of the facility, facility component or phase involved in the construction of the facility to comply with all applicable laws and regulations and with the terms and conditions of the site certificate. Such contractual provisions shall not operate to relieve the certificate holder of responsibility under the site certificate.</u></p>	<p>Introductory language re: timing of condition not directly related to applicable standard.</p> <p>Other language related to limited information provided related to new owners ability to design, construct and operate the facility in compliance with site certificate conditions and other applicable requirements; however, while the proposed language clarified the intent of the condition but it is not required for the new owner to demonstrate compliance with the standard.</p>	<p>Disregard proposed condition language because it is not required for new owner to satisfy the standard.</p>	<p>Disregard introductory changes and adopt recommended amended condition as follows:</p> <p>The certificate holder shall <u>provide to the Department documentation that contractually require work contracts include provisions requiring that all construction contractors and subcontractors involved in the construction of the facility to comply with all applicable laws and regulations and with the terms and conditions of the site certificate. Such contractual provisions shall not operate to relieve the certificate holder of responsibility under the site certificate.</u></p>
5.4	<p><u>Before beginning construction of wind turbines and meteorological towers, the certificate holder shall submit a Notice of Proposed Construction or Alteration to the Federal Aviation Administration (FAA) and the Oregon Department of Aviation identifying the proposed final locations of turbine towers and meteorological towers, and shall provide to the Department copies of a Determination of No Hazard for all turbine towers and meteorological towers or an equivalent determination to confirm that the structures comply with applicable FAA and Oregon Department of Aviation air hazard rules. The certificate holder shall promptly notify the Department of the responses from the FAA and Oregon Department of Aviation.</u></p>	<p>Language related to whether the new owner has sufficient experience to understand how or when the condition would apply, that could affect their ability to comply with the condition, however, Department agrees the condition, while originally imposed under Organizational Expertise, does not appear directly connected to the standard.</p>	<p>Disregard proposed condition language because it is beyond the scope of review.</p>	<p>NA</p>
4.6	<p>(a) <u>Prior to construction of the facility, facility component or phase, the certificate holder shall provide to the Department a list of federal, state and local permits including any third-party permits related to facility or facility component siting; and a schedule for obtaining identified permits.</u></p>	<p>Introductory changes to timing of condition not directly related to applicable standard.</p> <p>Other language related to limited information provided for the ability of the</p>	<p>Disregard proposed condition language because it is not required for new owner to satisfy the standard.</p>	<p>Disregard introductory changes and adopt recommended amended condition as follows:</p> <p>(a) <u>Prior to construction, the certificate holder shall provide to the Department a list of federal, state and local permits including any</u></p>

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	<p>(b) Certificate holder shall provide copies of all permits required for facility siting once obtained. The certificate holder shall obtain all necessary federal, state, and local permits or approvals required for construction, operation, and retirement of the facility or ensure that its contractors obtain the necessary federal, state, and local permits or approvals.</p>	<p>new owner, as an entity, to design, construct and operate the facility in compliance with site certificate conditions and other applicable requirements; however, while the proposed language clarified the intent of the condition it is not required for the new owner to demonstrate compliance with the standard.</p>		<p>third-party permits related to facility or facility component siting; and a schedule for obtaining identified permits. (b) Certificate holder shall provide copies of all permits required for facility siting once obtained. The certificate holder shall obtain all necessary federal, state, and local permits or approvals required for construction, operation, and retirement of the facility or ensure that its contractors obtain the necessary federal, state, and local permits or approvals.</p>
10.4	<p>Prior to construction of the facility, facility component or phase within habitat areas, the certificate holder shall:</p> <p>(a) Select qualified specialists (wildlife biologist/botanist) that have substantial experience in creating, enhancing, maintaining, and protecting habitat mitigation areas within Oregon;</p> <p>(b) Notify the Department of the identity and qualifications of the personnel or contractors selected to implement and manage the habitat mitigation area;</p> <p>(c) Acquire the legal right to create, enhance, maintain and protect a habitat mitigation area, as long as the site certificate is in effect, by means of an outright purchase, conservation easement or similar conveyance;</p> <p>(d) Develop and submit a final Habitat Mitigation Plan (HMP) for approval by the Department in consultation with ODFW, based upon the draft amended HMP included as Attachment G of the <i>Final Order on Amendment #2</i>. <u>The final HMP shall include an agency consultation process to review results of the predisturbance habitat mitigation assessment of the site and habitat mitigation area, paired monitoring and reference locations, monitoring plan and ongoing agency coordination following annual reporting.</u> The Council retains authority to approve, reject or modify the final HMP and any future amendments; and,</p> <p>(e) Improve the habitat quality, within the habitat mitigation area, as described in the final HMP and as amended from time to time.</p>	<p>Language related to whether the new owner has sufficient experience to demonstrate an ability to satisfy complex site certificate conditions, including long-term habitat mitigation obligations, however, Department agrees the condition is not directly related to the Organizational Expertise standard.</p>	<p>Disregard proposed condition language because it is beyond the scope of review.</p>	<p>NA</p>

RECOMMENDED COUNCIL ACTION

The Department recommends Council review the draft Final Order, as corrected by the Department removing previously recommended condition amendments, and with bolstered findings related to the individual past experience of Aypa Power LLC employees.

Based on the draft Final Order provided in Attachment 1, the Department recommends Council approve the Final Order, approving the transfer request, and issue an amended site certificate identifying Aypa Power LLC as the new owner and certificate holder owner.

ATTACHMENTS:

Attachment 1: Draft Final Order on Request for Amendment 5 of the Summit Ridge Wind Farm Site Certificate (Forthcoming)

Attachment 2: Transfer Hearing Comments