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August 22, 2022

Via Electronic Mail

OED_OAH_Referral@oregon.gov

Kate Triana, Administrative Law Judge
c/o Oregon Department of Energy Siting Division
Attn: Kathleen Sloan 550 Capitol Street NE
Salem, OR 97301

RE: Nolin Hills Wind Power Project Contested Case Hearing on Application for a Site Certificate – Petition for Party Status of Umatilla County

Dear Ms. Triana:

This firm represents Umatilla County, the petitioner for Party Status in the Nolin Hills Wind Power Project (Project) contested case hearing on the Application for a Site Certificate (ASC). Petitioner, a local government agency, requests participation as a party in this contested case proceeding pursuant to OAR 345-015-0080 (Participation by Government Agencies) and OAR 345-015-0016 (Requests for Party or Limited Party Status in Contested Cases on Applications for a Site Certificate).

Per OAR 345-015-0016(5), a petition to request Party Status in a contested case on an ASC must include:

“(a) The information required under OAR 137-003-0005(3);

“(b) A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding; and

“(c) A reference to the person’s comments at the public hearing showing that the person raised the issue or issues at the public hearing.”

Each of these requirements is addressed in turn below.

OAR 345-015-0016(5)(a): The information required under OAR 137-003-0005(3).

OAR 137-003-0005(3) requires that the petition include:

“(a) Names and addresses of the petitioner and of any organization the petitioner represents[.]”

Petitioner’s name, address and additional contact information is:

Umatilla County
Attn: Doug Olsen, County Counsel
216 SE 4th St.

Pendleton, OR 97801
Tel: (541) 278-6208
Email: doug.olsen@umatillacounty.gov

“(b) Name and address of the petitioner’s attorney, if any[.]”

Petitioner’s attorney’s name, address and additional contact information is:

Wendie L. Kellington, OSB #832589
Kellington Law Group PC
P.O. Box 2209
Lake Oswego, OR 97035
Tel: (503) 636-0069
Email: wk@klgpc.com

“(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought[.]”

This request is for participation of Umatilla County as a Party to the contested case proceeding.

“(d) If the petitioner seeks to protect a personal interest in the outcome of the agency’s proceeding, a detailed statement of the petitioner’s interest, economic or otherwise, and how such interest may be affected by the results of the proceeding[.]”

It does not appear that this provision applies. To the extent it does, Umatilla County submits the following: Umatilla County represents the public’s interest in the outcome of this proceeding. The Nolin Hills Wind Power Project is proposed to be sited entirely within Umatilla County. Umatilla County has a strong institutional interest in ensuring that the project complies with the County’s land use regulations, including its requirements for the siting of wind power generation facilities codified at Section 152.616(HHH) of the Umatilla County Development Code (UCDC). This interest is affected by the results of the contested case proceeding because the proceeding will determine whether Umatilla County’s legislative determination by its governing body that wind power generation facilities must comply with particular standards are “applicable substantive criteria” that that state will apply to the proposed Project.

“(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner’s qualifications to represent such public interest[.]”

The Project is proposed to be sited entirely within Umatilla County. Umatilla County, through its governing body and delegated agents, represents the public interest of the citizens of Umatilla County. Umatilla County’s governing body adopts local legislation to further the health, safety, and welfare of its citizens. Among the legislative regulations that the County governing body adopts are the UCDC (also referred to herein as “Regulations”). The County

governing body has adopted these Regulations pursuant to its authority and responsibility to do so under its Charter, as well as state constitutional and statutory law. The State of Oregon Land Conservation and Development Commission (LCDC) has “acknowledged” that Umatilla County’s Regulations, including the ones at issue, comply with all statewide planning goals. Umatilla County’s Regulations express the County’s public health, safety, and welfare interests on the topics they cover. UCDC 152.002 confirms this and states that its “purpose” is to “promote the health, safety and general welfare” and to “carry out” “the Statewide Planning Goals.”

In the public’s interest, the Umatilla County governing body adopted Regulations specifically governing the siting of wind power generation facilities. These Regulations apply to the Project and are codified at UCDC 152.616(HHH). LCDC has acknowledged that UCDC 152.616(HHH) complies with all statewide planning goals.

Umatilla County has a strong public interest in ensuring that its acknowledged Regulations, to include UCDC 152.616(HHH), are correctly and consistently applied to all applications for land uses within the County. The Proposed Order incorrectly takes the position that UCDC 152.616(HHH) is inapplicable to the Project. Umatilla County has a strong interest in reversing that determination, to ensure that the Project complies with the County’s Regulations and is not exempted from them as the Proposed Order contemplates. This County public interest is directly affected by the results of the contested case proceeding because the proceeding will determine whether Umatilla County’s legislative determinations by its governing body that wind power generation facilities must comply with particular health, safety and welfare standards are “applicable substantive criteria” that that state must apply to the proposed Project.

Umatilla County is qualified to represent this public interest because it is the entity with local planning authority within the County.

“(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (3)(d) or (e) of this rule.”

Existing parties to the proceeding cannot adequately represent the interests identified in subsections (3)(d) and (e) because no other party has the authority to represent the health, safety, and welfare of the citizens of Umatilla County to include with respect to land use matters in the County. Rather, only the County, through its governing body and its delegated agents, has authority to represent the interest of the citizens of Umatilla County regarding the scope and application of County Regulations to the Project. Further, the Umatilla County governing body adopted the Regulations at issue and is in the best position to interpret them, apply them, to express the public interests at stake and identify and explain the statewide planning goals that the County’s Regulations implement. Finally, only Umatilla County has the institutional knowledge of the County’s land use regulations, their legislative history and how they apply to the Project

OAR 345-015-0016(5)(b): Short and plain statement of issues petitioner desires to raise.

Petitioner Umatilla County desires to raise the issues that (1) the County's acknowledged land use regulations in UCDC 152.616(HHH), specifically UCDC 152.616(HHH)(6)(a)(3) requiring a two-mile setback between wind turbines and rural residences on EFU-zoned land, are "applicable substantive criteria" within the meaning of OAR 345-022-0030(3) that apply to the Project and that the Project does not comply with UCDC 152.616(HHH)(6)(a)(3); and (2) the Project is required to obtain a conditional use permit from the County.

OAR 345-015-0016(5)(c): Reference to petitioner's comments at the public hearing showing that petitioner raised the issues at the public hearing.

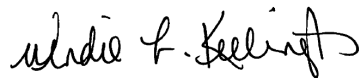
Petitioner Umatilla County raised these issues in written comment submitted for the record of the May 26, 2022, public hearing, to include the below:

- Proposed Order on ASC Attachment C: Comments on DPO – Table (Exhibit 1): Comments by Umatilla County Director of Department of Land Use Planning, Robert Walder, May 26, 2022: "Expresses disagreements with the Department's interpretation of applicability of 2-mile setback for EFSC jurisdictional facility; and, requests that EFSC include in a condition a requirement that developer obtain conditional use permit."
- Proposed Order on ASC Attachment C: Comments on DPO – Email from Robert Walder, dated May 26, 2022 (Exhibit 2): County's acknowledged comprehensive plan and land use regulations are "applicable substantive criteria" within meaning of OAR 345-022-0030(3) and UCDC 152.616(HHH)(6)(a)(3) must be applied to the Project; Project requires County conditional use permit.

CONCLUSION

It is respectfully submitted that Umatilla County's request for Party status in the contested case hearing on the Nolin Hills Wind Power Project ASC should be granted.

Very truly yours,



Wendie L. Kellington

WLK:wlk

Enclosures: Exhibits 1 & 2

CC: Kathleen Sloan (kathleen.sloan@energy.oregon.gov)

Doug Olsen (doug.olsen@umatillacounty.gov)

Attachment C: Index/Summary of Comments Received on the Record of the DPO

Date Received	Commenter Name	Organization	Comment Scope/Topic
4/27/22	Samuel J. Ramos	Public; Property owner	Does not support the project, because as represented in the site boundary map, would cross two tax lots, his and the Margaret West/West Family Trust. Indicates comments provide sufficient specificity for the Contested Case proceeding.
5/24/22; 5/26/22; 6/15/22; 6/24/22	Matt Martin, Tim McMahan, Steve Corey	Applicant, Capital Power Corporation	Requests for consideration of all proposed facts and analysis related to the Department's evaluation of the Goal 3 exception request; expresses disagreement with Department applied contingencies to decommissioning estimate. Provides information from Exhibit K (re: goal exception). Provides letter from VP affirming Capital Power is financially responsible and supports development of the project.
5/26/22	Robert Waldher	Director, Umatilla County Department of Land Use Planning (SAG)	Expresses disagreement with Department's interpretation of applicability of 2-mile setback for EFSC jurisdictional facility; and, requests that EFSC include in a condition a requirement that developer obtain conditional use permit.
5/26/22	Council members (K. Howe; H. Jenkins; C. Condon)	EFSC; Vice Chair	Expresses dissatisfaction over site specific reasons analysis for Goal 3 exception request. Requests additional facts/evidence to support conclusion of law for Organizational Expertise standard.
5/26/22	Dixie Echeverria	Public; ELH LLC	Describes that UEC transmission line location/route would negatively impact her farming operation. Asks that the transmission line avoid any property owned by ELH, LLC; requests for utilization of single pole for minimum space requirements of a 230 kV transmission line, anywhere near ELH, LLC property or adjacent properties.

ESTERSON Sarah * ODOE

Subject: Umatilla County Planning Department Comments - Nolin Hills DPO

From: Robert Waldher <robert.waldher@umatillacounty.gov>

Sent: Thursday, May 26, 2022 4:15 PM

To: ESTERSON Sarah * ODOE <Sarah.ESTERSON@energy.oregon.gov>; SLOAN Kathleen * ODOE <Kathleen.SLOAN@energy.oregon.gov>

Subject: Umatilla County Planning Department Comments - Nolin Hills DPO

Hi Sarah and Kate -

Thank you for the opportunity to do a quick tour of the site today and for the opportunity to provide comments on the DPO. I look forward to working through these comments with your Department as part of the SAG process. Please let me know if you have any questions.

Umatilla County Planning Department, as a reviewing agency for the Nolin Hills Project, provides the following comments related to the Draft Proposed Order (DPO):

Comment Related to Land Use and 2-Mile Setback Requirement

Umatilla County Development Code (UCDC) Section 152.616 (HHH)(6)(a)(3) establishes a required 2-mile setback from a turbine tower to a rural residence. Based on the Planning Department's review, rather than recommending that the Energy Facility Siting Council (Council) find that the proposed facility is required to comply with the local substantive criteria found in UCDC Section 152.616 (HHH)(6)(a)(3), the DPO recommends that the Council find that the proposed facility would nevertheless comply with the applicable statewide planning goals, as allowed by ORS 469.504(1)(b)(8).

Pursuant to OAR 345-022-0030 (3), "applicable substantive criteria" are criteria from the affected local government's acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application. If the special advisory group (SAG) recommends applicable substantive criteria, as described under OAR 345-021-0050, the Council shall apply them. If the SAG does not recommend applicable substantive criteria, the Council shall decide either to make its own determination of the applicable substantive criteria and apply them or to evaluate the proposed facility against the statewide planning goals.

Umatilla County Planning Department interprets this provision of the Administrative Rule to imply that the local government is required by the statewide planning goals to have an acknowledged comprehensive plan and land use ordinances. These documents are considered the "applicable substantive criteria" that Umatilla County provided to the Oregon Department of Energy (Department) through the SAG process. Therefore, the Council shall apply the applicable substantive criteria (i.e. 2- mile setback), rather than evaluating the proposed facility against the statewide planning goals.

In addition, Umatilla County does not agree that just because the "applicable substantive criteria" (i.e. 2-mile setback requirement) is not explicitly "required" by the statewide planning goals, that the project is compliant with the applicable statewide planning goals. Counties are required, pursuant to state statute, to operate under an acknowledged comprehensive plan and implementing ordinances. A project that is not compliant with the local applicable substantive criteria of the comprehensive plan and implementing ordinances can't be compliant with the statewide planning goals.

Comments Related to Local Land Use Permits

The DPO suggests since the Council is making the land use decision for the proposed Wind Power Generation Facility and Associated Transmission Line that the applicant is not required to obtain the Conditional Use Permit (generation facility) and Land Use Decision Permit (transmission line). This would be contrary to how previous permits have been processed. Past precedence has been for the applicant to still obtain permits, including conditional use permits and land use decisions, through the County Planning Department after the project site certificate has been issued by the Department. Umatilla County Planning Department requests a condition of approval requiring the applicant to obtain local land use permits prior to commencing project construction.

The DPO does not appear to recommend any conditions related to obtaining local land use permits for concrete batch plants and aggregate sources associated with construction of the proposed project. Umatilla County Planning Department requests a condition of approval requiring the applicant to obtain local land use permits prior to establishment of any aggregate site(s) and concrete batch plant(s) associated with the project.

Respectfully -

--

Robert Waldher, RLA

Director

Umatilla County Department of Land Use Planning

Tel: 541-278-6246 | Fax: 541-278-5480

216 SE 4th Street | Pendleton, OR 97801

<http://www.umatillacounty.gov/planning>



Please Be Aware - Documents such as emails, letters, maps, reports, etc. sent from or received by the Umatilla County Department of Land Use Planning are subject to Oregon Public Records law and are NOT CONFIDENTIAL. All such documents are available to the public upon request; costs for copies may be collected. This includes materials that may contain sensitive data or other information, and Umatilla County will not be held liable for its distribution.