



Oregon

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To: Energy Facility Siting Council

From: Sarah Esterson, Senior Policy Advisor

Date: November 8, 2023

Subject: Agenda Item G (Information Item): Sarah Esterson, Senior Policy Advisor.
Review of evidence and analysis conducted under the Organizational Expertise standard for the November 17, 2023 EFSC Meeting

Attachments: Attachments 1 and 3: Example Parent Company Letters
Attachment 2: Council-approved Performance Guarantee Form

PURPOSE AND BACKGROUND

The purpose of this agenda item is to evaluate the evidentiary threshold under the Organizational Expertise standard, and the effectiveness of the analysis being conducted for the standard in determining whether an applicant or certificate holder has the necessary financial and organizational expertise to meet the requirements of the site certificate; design, construct and operate the facility in a manner that protects public health and safety; and has the ability to restore the site to a useful, non-hazardous condition at the end of the facility's useful life.

The standard does not establish specific criteria or minimum qualifications necessary for compliance, instead it generally requires the Energy Facility Siting Council (Council) to consider the overall expertise, qualifications, and history of applicant/certificate holder and any other person it will rely upon to design, construct, and operate the facility, obtain all necessary permits and approvals, and maintain compliance with the conditions of the site certificate.

The type and amount of experience that an applicant/certificate holder relies upon to demonstrate compliance with the standard and whether they rely on technical expertise of another entity (e.g., parent company) may vary according to the type of business that is proposing to construct and operate a proposed facility.

This agenda item is the third presentation¹ to Council on the Organizational Expertise standard and will incorporate input received from Council during the prior presentations, and the resulting process/policy changes that have been implemented to date.

¹ Staff provided presentations on the Organizational Expertise standard at the July 23, 2021 and June 1, 2023 EFSC meetings.

INFORMATION REQUIREMENTS

The Council's determination of compliance with a standard is based on "the preponderance of the evidence" on the record of the proceedings on the Application for Site Certificate (ASC) and subsequent Requests for Site Certificate Amendment (RFA). The record of the proceeding(s) includes, but is not limited to, the Notice of Intent (NOI), ASC and subsequent RFAs prepared by an applicant or certificate holder, any public comments or testimony provided during public comment periods or hearings, and the Draft Proposed Order and Proposed Order prepared by the Department.

In the NOI, the applicant must provide sufficient information about the proposed site and the characteristics of the facility for the Department to prepare its Project Order, which establishes the statutes, administrative rules, Council standards, local ordinances, ASC information and analysis requirements. Relevant to the Organizational Expertise Standard, NOI Exhibit A must include basic information about the applicant and other participating persons, including:

- Contact information for the applicant and identification of any co-owners of the proposed facility. OAR 345-020-0011(1)(a)(A)
- Identification of and contact information for any other persons, including the applicant's parent company, that the applicant will rely upon for permitting or compliance with standards. OAR 345-020-0011(1)(a)(B)
- Information about the legal status and business structure of the applicant and proof of its registration to do business in Oregon. OAR 345-020-0011(1)(a)(C)-(H)

ASC Exhibit A must also contain the above-referenced information. In ASC Exhibit D, the applicant must provide their organizational expertise related to the ability to construct and operate the proposed facility, including:

- The applicant's previous experience, if any, in constructing and operating similar facilities, or a demonstration that it can secure the necessary expertise. OAR 345-021-0010(1)(d)(A) and (E).
- The qualifications of personnel who will be responsible for constructing and operating the facility, if known. OAR 345-021-0010(1)(d)(B).
- The qualifications of any architect, engineer, major component vendor, or prime contractor the applicant will rely on for constructing and operating the facility, if known. OAR 345-021-0010(1)(d)(C).
- The applicant's regulatory and compliance history. OAR 345-021-0010(1)(d)(D).
- A description of any certified quality assurance or environmental management program that will apply to the proposed facility. OAR 345-021-0010(1)(d)(F).
- Evidence that the applicant can successfully complete any proposed mitigation activities needed to demonstrate compliance with standards. OAR 345-021-0010(1)(d)(G).

The applicant must identify and describe any permits and also provide information about any federal, state and local government permits related to the siting of the proposed facility, and evidence that the applicant is likely to either be able to obtain the permit itself or to secure a contract with a third-party that has, or will obtain, the permit.

SUBSTANTIVE REQUIREMENTS

The Organizational Expertise Standard requires the Council to find “that the applicant has the organizational expertise to construct, operate and retire the proposed facility in compliance with Council standards and conditions of the site certificate.” The standard further elaborates:

“To conclude that the applicant has this expertise, the Council must find that the applicant has demonstrated the ability to design, construct and operate the proposed facility in compliance with site certificate conditions and in a manner that protects public health and safety and has demonstrated the ability to restore the site to a useful, non-hazardous condition. The Council may consider the applicant’s experience, the applicant’s access to technical expertise and the applicant’s past performance in constructing, operating and retiring other facilities, including, but not limited to, the number and severity of regulatory citations issued to the applicant.” OAR 345-022-0010(1).

IMPROVEMENTS OF EVIDENTIARY THRESHOLD

Implemented Improvements

Oregon Department of Energy (Department) staff continuously strive to improve both process and substance in the Council’s siting process by evaluating Council and public comments on information provided in ASCs, RFAs and during rulemaking proceedings. The Department also evaluates experiences working with certificate holders during construction and operation compared to the experience during siting (hypothetical compared to actual), to determine whether there are gaps in understanding and relevant information.

Council has made continuous progress in providing the Department direction and guidance on evidence expected to be provided in Exhibit D (Organizational Expertise) by applicants and certificate holders during the siting process, specifically when the applicant/certificate holder is a project-specific limited liability company (LLC) without prior experience or assets/financial resources. In these instances, the applicant/certificate holder requests that the Department and Council rely on the technical and financial resources of its parent company. If a site certificate is approved and issued by the Council, the contractual obligations of the site certificate are between the State of Oregon and the certificate holder, not the parent company. Therefore, to minimize risk to the State of Oregon in relying on the technical and financial resources of a parent company not bound to the site certificate, the Council has identified additional evidence necessary during and post permitting process.

ASC and RFA Exhibit D materials for a project-specific LLC typically include representations that the applicant or certificate holder has the ability to obtain financial and technical resources from its parent company. The Council directed staff to ensure that ASC or RFA Exhibit D materials include a signed statement from the parent company that affirms any representations made by the applicant. In addition to this certified (or similar) statement, the Council has explored requiring a parent company guarantee that assures full and prompt payment and performance of all obligations the LLC may have under the site certificate.

Table 1 below presents a summary of projects where the Council and Department have shifted the evidentiary threshold for the standard, consistent with the above-summary.

Table 1: Evidentiary Threshold Improvements for Organizational Expertise Standard

Project (Date Approved)	Procedural History of Evidentiary Shift	Process Outcome
Nolin Hills Wind Power Project (August 30, 2023)	<p><u>June 24, 2022</u>: During review of the Draft Proposed Order (DPO) on the ASC, Council raised questions about the validity of representations made by the applicant on the parent company’s behalf.</p> <p>Prior to the close of the record of the DPO, the applicant submitted a letter signed by the parent company’s Senior Vice President and Chief Legal, Development and Commercial Officer affirming Exhibit D representations (see Attachment 1 of this staff report).</p>	<p>For applicant’s that are project-specific LLCs, analysts are requesting that Exhibit D include a certified (or similar) statement from the parent company affirming the representations/commitments referred to by the applicant of the parent company’s ability to provide financial and technical resources throughout the permitting process.</p>
	<p><u>June 24, 2022</u>: During review of the DPO on the ASC, Council requested that a mechanism be in place to ensure that the parent company’s attestations of financial and technical support were legally binding, from pre-construction through facility retirement.</p> <p><u>August 30, 2023</u>: Council imposed a preconstruction condition requiring that the certificate holder provide a performance guarantee, signed by the parent company, that assures full and prompt payment and performance of all obligations the LLC may have under the site certificate (see Attachment 2 for Council-approved performance guarantee form).</p>	<p>Two paths implemented (further detailed below):</p> <ol style="list-style-type: none"> 1. In some Project Orders, the Department established a requirement that Exhibit D should include a signed performance guarantee. 2. In some site certificates, the Council imposed conditions requiring ongoing evaluation of a certificate holder’s compliance with site certificate conditions to determine whether the decommissioning bond needs to increase to address uncertainty in the certificate holder’s ability to operate, maintain and decommission the facility in compliance with condition requirements and/ongoing compliance issues that may contribute to increased site restoration cost.
West End Solar (March 24, 2023)	<p><u>June 30, 2022</u>: During review of the preliminary ASC, the Department requested that the applicant provide a</p>	<p>The applicant agreed to provide a parent company guarantee, however, when given the guarantee template</p>

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Project (Date Approved)	Procedural History of Evidentiary Shift	Process Outcome
	parent company performance guarantee, or similar conveyance, that it will, through contracts, secure the necessary expertise to construct and operate the facility and provide financial assurance to the applicant for the construction, operation and retirement of the facility.	to complete, the entity they proposed as the guarantor was not the same as the parent company upon whom the applicant had indicated it would rely. Before pursuing that further, based on concerns expressed by Avangrid Renewables, LLC during the permitting process of Oregon Trail Solar Amendment 1 (see row below), the Council modified its approach, and instead of a parent company guarantee, imposed two conditions requiring that the Department evaluate the certificate holder’s compliance with site certificate conditions to determine whether the decommissioning bond needs to increase at any time during operations to address uncertainty in the certificate holder’s ability to operate, maintain and decommission the facility in compliance with condition requirements and/ongoing compliance issues that may contribute to increased site restoration cost.
Oregon Trail Solar, Request for Amendment 1 (March 24, 2023)	<p><u>October 12, 2022</u>: During review of preliminary Request for Amendment 1 (pRFA1), the Department requested that the certificate holder provide a parent company guarantee or similar conveyance demonstrating that Avangrid Renewables, LLC continues to provide financial and technical expertise for the construction and operation of the facility.</p> <p><u>November 9, 2022</u>: Certificate holder expressed serious concerns with the Department’s request for a parent company guarantee and stated that providing such documentation would “weaken the corporate</p>	For this project, Council acknowledged and validated its prior findings of compliance under the standard (in prior final orders for site certificates with the same parent company) for project-specific LLCs relying on the same parent company for two other EFSC facilities; and, made findings of fact that a power purchase agreement with the LLC and power purchaser would secure necessary financial resources for the LLC.

Table 1: Evidentiary Threshold Improvements for Organizational Expertise Standard

Project (Date Approved)	Procedural History of Evidentiary Shift	Process Outcome
	ownership structure, increase the cost of the project, complicate financing and tax equity arrangements and render the project non-competitive..”	
Stateline Wind Project, Amendment 8 to Transfer (December 16, 2022)	<p><u>October 27, 2022</u>: The Department issued a determination on an Amendment Determination Request (ADR) that a site certificate amendment was not necessary to allow facility assets to be assigned to a new LLC owned by NextEra Energy Resources. The determination was based, in large part, on a letter signed by both the new LCC and NextEra Energy Resources (certificate holder parent company) verifying that the parent company would continue to retain ownership, possession and control of the new LLC – the same relationship acknowledged for the existing certificate holder.</p> <p><u>October 28, 2022</u>: During discussion of the Department’s determination that an amendment was not required for a proposed change in certificate holder, where an LLC-certificate holder owned by NextEra Energy Resources proposed to assign assets to a newly formed LLC owned by NextEra Energy Resources, Council expressed concerns on the Department’s reliance on the parent company.</p>	<p>The Department recommended and the certificate holder agreed to file a Request to Transfer to allow formal review of the new LLC, its access to existing facility assets and financial resources and its relationship with the parent company.</p> <p>Changes in project-specific LLCs, once a site certificate is issued, will be evaluated through the Council’s transfer process.</p>
Wagon Trail Solar (Not yet approved)	<u>November 7, 2022</u> : During review of the preliminary ASC, the Department requested that the applicant provide a signed letter from an authorized representative of the parent company and the	The applicant provided the requested authorized letter. This letter will be presented to the Council as part of the evidence evaluated under the standard (see Attachment 3 of this staff report).

Table 1: Evidentiary Threshold Improvements for Organizational Expertise Standard

Project (Date Approved)	Procedural History of Evidentiary Shift	Process Outcome
	applicant affirming the parent company’s commitment to providing technical and financial resources to the applicant for the design, construction, operation and retirement of the facility.	
Cascade Renewable Transmission (Not yet approved)	<u>July 25, 2023</u> : In the Project Order, the Department established that the ASC must include a guarantee that one or more parent companies with financial and organizational expertise will assure the applicant’s obligations under the site certificate and that it indemnifies the Council against costs and expenses it may incur because of site certificate enforcement.	pASC not yet filed with the Department.
Summit Ridge Wind Farm, Request for Amendment 6	<u>October 10, 2023</u> : During review of preliminary Request for Amendment 6 (pRFA6), the Department requested that the certificate holder provide a parent company guarantee or similar conveyance demonstrating that Blackstone continues to provide financial and technical expertise for the construction and operation of the facility. During review of pRFA6, the Department requested that the certificate holder develop a site certificate matrix and include the certificate holder’s plan for implementation, including a detailed breakdown of requirements of all mitigation plans, a forecasted budget and evidence that the certificate holder can obtain the funds necessary to implement and adhere to the requirements of all preconstruction, construction and operational conditions.	Responses not yet received.

Potential Additional Improvements

Under the Organizational Expertise standard and associated OAR Chapter 345 Division 21 information requirements, limited information is required to evaluate the financial strength of a project-specific LLC or its parent company. The Department offers two options for Council discussion that could bolster the evidence relied upon:

Option: The Organizational Expertise standard requires the Council to find that the applicant or certificate holder can design, construct and operate the facility in a manner that protects public health and safety; and, in compliance with site certificate conditions. While access to experienced technical resources is critical, the financial security of a project-specific LLC and its parent company is also crucial in ensuring that the facility is constructed safely, and that site certificate compliance is achieved.

As implemented with Summit Ridge Wind Farm pRFA6 (see Table 1), Council could direct staff to initiate a process for requesting specific information during preliminary ASC or RFA review requiring that applicants/certificate holders develop a compliance plan and associated budget for requirements of the site certificate, and that evidence be provided of their ability to obtain funds equivalent to the proposed budget. An example of such evidence could be current, audited financial statements. Similarly, Council could direct staff to request similar information (scope, budget, evidence of ability to obtain funds equivalent to the budget) for the cost of design, construction and operation of the facility.

Option: When filing a pASC with the Department, an applicant must execute a Cost Reimbursement Agreement (CRA) covering the expenses associated with evaluating and processing an ASC, and remit funds based on a Department-prepared cost estimate, typically ranging between \$300,000 – 500,000. The funds obtained by the Department and executed CRA could be an element, not the totality, of evidence considered when evaluating a project-specific LLC and parent company's ability to secure financial resources. Council could direct staff to request or incorporate this information into the record of the relevant proceedings.

CONCLUSION

As presented in Table 1, the Department and Council have been implementing shifts in the evidentiary threshold for the Organizational Expertise standard for the last three years. The shifts include requiring a: signed parent company letter affirming representations made in Exhibit D (Organizational Expertise); performance guarantee signed by parent company; evidence obtained through condition compliance, where such conditions require the Department's ongoing review of site certificate compliance for the purpose of Department/Council review of the adequacy of the decommissioning bond; and, forecasted plan, budget and evidence of financial ability to obtain funds equivalent to the budget for site certificate compliance.

Review of the Organizational Expertise standard and associated OAR Chapter 345 Division 21 information requirements is on the rulemaking agenda for 2024. There are many benefits to

evaluating process and substantive changes through the rulemaking process, including ensuring regulatory certainty and supporting consistency; and thorough evaluation of the impacts of evidentiary threshold changes. As is shown in Table 1, the Department has received mixed feedback from applicants and certificate holders regarding the implications of requiring a parent company guarantee.

The Department recommends Council consider the evidentiary shifts described in Table 1 and additional options outlined in this staff report and provide direction to staff on changes they would like to see implemented in the process or that they would like to be included in the initiation of the upcoming rulemaking process.