



STATE OF WASHINGTON  
Capital Projects Advisory Review Board

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**RE: CHAIR'S PRELIMINARY RULING ON MOTIONS  
– CPARB Enloe Hydroelectric Project Appeal**

On Friday, May 19, 2017, during a telephonic prehearing conference of the parties, Appellant Columbia River Bioregional Education Project ("Columbiana") renewed a request for a preliminary ruling by the CPARB Chair on two motions currently pending before the Capital Projects Advisory Review Board (CPARB). The Chair understands the two motions to be:

1. Petitioner's [Columbiana] Motion to Convert Proceedings, file April 25, 2017
2. Columbiana's request for a preliminary stay of the Project Review Committee's approval of the Design-Build alternative public works contracting method for the Okanogan Public Utility District's Enloe Hydroelectric Project

The CPARB Chair declines to grant either motion, for the reasons set forth below.

**A. BACKGROUND**

This matter is an appeal, pursuant to RCW 39.10.290, from the approval by the Project Review Committee (PRC) of the use of the Design-Build alternative public works contracting method for the Okanogan Public Utility District's Enloe Hydroelectric Project.

**1. OPUD Request for Certification**

On October 31, 2016, the Okanogan Public Utility District No. 1 (OPUD) submitted an application, under RCW 39.10.280, with CPARB's PRC for approval of use of the Design-Build alternative public works contracting procedure in relation to the proposed Enloe Dam Hydroelectric Project.

As provided by RCW 39.10.240(3), the PRC appointed a panel to hold a hearing on the application. Notice of the meeting was posted on the PRC's website and published in the Seattle Daily Journal of Commerce (Journal) more than 20 days before the December 1, 2016 hearing. At the open public meeting to consider the application, the panel approved use by OPUD of the Design-Build contracting method for the Project. The PRC issued a letter with the same date confirming the approval.

Following the hearing, a series of motions, appeals and court actions ensued challenging the adequacy of the publication of notice for the PRC meeting. On March 15, 2017 the parties reached a settlement to the Kubiak appeal and court action. Under the Settlement, approval for OPUD to utilize the Design-Build alternative contracting procedure for the Enloe Hydroelectric Project was withdrawn pending a new project review hearing, set for **April 27, 2017**. A new 20-day notice was published in local papers and posted on the PRC website. The appeal, court action and other challenges to notice were withdrawn and dismissed.

## **2. The motion to convert PRC proceeding to an adjudication**

On April 25, 2017 – two days before the rescheduled PRC hearing – the Columbia River Bioregional Education Project (aka Columbiana) filed their Petitioner's Motion to Convert Proceedings, requesting CPARB and the PRC *"to convert the upcoming April 27, 2017 meeting of the [PRC] . . . to an adjudicative proceeding pursuant to RCW 34.05.070."* The Motion argues that *"an adjudicative proceeding is necessary, in the public interest, and is the more appropriate procedure to resolve the issues affecting the participants in this Project"* and *"to ensure that the PRC has all the relevant information available before making its decision on this highly controversial Project."* Specifically, Columbiana seeks the right to call witnesses under oath, conduct cross examination of witnesses, submit briefs and conduct "discovery" on various issues. The motion also questions the adequacy of the evidence previously presented to the PRC to support granting OPUD certification.

## **3. PRC's Second Approval and Columbiana's Notice of Appeal**

The PRC panel went ahead with the scheduled hearing on April 27, 2017, conducting it as an open public meeting, without formally ruling on the motion to convert. At the end of the meeting, the PRC panel again approved certification of OPUD's use of the Design-Build contracting method for the Enloe Hydroelectric Project. The PRC granted its approval pursuant to RCW 39.10.280 and confirmed this action in a letter dated May 3, 2017.

On May 3, 2017 Columbiana filed Notice of Appeal to CPARB. Columbiana states that *“this appeal constitutes an application for an adjudicative proceeding pursuant to RCW 34.05.413(2) and includes a request for an adjudicative hearing.”* In addition, the appeal alleges that OPUD has not demonstrated that it has the necessary experience or a qualified team and will not provide a substantial fiscal benefit as required by RCW 39.10.280, and the PRC’s approval was not supported by an adequate environmental review under the State Environmental Procedures Act (“SEPA”), RCW 43.21C.

Columbiana seeks to have CPARB reverse the Design-Build approval for the Enloe Dam Project and remand to the PRC to re-open consideration of OPUD’s application as an adjudicative process, and to suspend the PRC’s approval pending the outcome of the Columbiana appeal to CPARB.

#### **4. CPARB Regular Meeting and Interim Appeal Policies**

On May 8, 2017 a letter was emailed to attorneys for Columbiana and OPUD notifying them that the CPARB would consider the motion to convert at its next regular meeting on May 11, 2017. OPUD filed a brief in opposition to the motion to convert dated May 10, 2017.

On May 11, 2017 CPARB discussed and adopted, as one of the posted agenda items, procedures to be followed by the Board and its staff in conducting appeals under RCW 39.10.290, and in particular the appeal of the Enloe Dam Project approval. Columbiana and OPUD appeared at the meeting and addressed the Interim Policy as well as issues relating to the pending appeal. Columbiana addressed both the motion to convert the appeal to an adjudicatory hearing, and the motion for a temporary stay of the PRC approval of the use of the Design-Build alternative public works contracting method for the OPUD Project. OPUD argued against these requests. The Board adjourned the meeting without deciding either motion.

#### **B. AUTHORITY OF CHAIR TO MAKE PRELIMINARY RULINGS**

In making preliminary rulings in an appeal under RCW 39.10.290, the CPARB Chair is acting pursuant to the authority delegated by the Board. Under the CPARB Bylaws adopted November 15, 2015, the CPARB Chair *“will establish the agenda and conduct the meetings, and will be the primary spokesperson for the board.”* CPARB Bylaws, Article II, Section 2. In addition, as provided in the Interim Policy on Appeals under RCW 39.10.290 adopted by CPARB at their regular meeting on May 11, 2017, the Chair is delegated authority to *“schedule a special meeting of the Board to hear and consider the appeal”* and *“to the extent necessary to facilitate the orderly hearing of the appeal,”* to *“establish briefing schedules and make procedural rulings and orders subject to confirmation by the Board.”* Interim Policy on Appeals, Nos. 4 & 5. The Chair does not see this delegation as granting the Chair authority to usurp the role of the Board in determining the merits of an appeal. In addition, all determinations of the Chair under this delegated authority are ultimately subject to review and approval or disapproval by the Board.

### C. MOTION TO CONVERT

Columbiana's April 25, 2017 motion, asks CPARB *"to convert the upcoming April 27, 2017 meeting of the [PRC] regarding the [Project] to an adjudicative proceeding."* OPUD opposes on grounds that the statutes governing the PRC do not require formal adjudicatory hearings, that Columbiana's request to convert was untimely and now is moot, and that requiring a third PRC would substantially prejudice OPUD due to pressing permit deadlines.

The Chair declines to make a preliminary ruling on this motion and leaves the decision as to whether an adjudicatory hearing is required, permitted or appropriate in this case to the Board. First, it is unclear to the Chair whether this motion was properly addressed to the PRC or CPARB. Also, filing the motion only two days before the PRC meeting raises questions as to its timeliness, and it appears, since the PRC has already met and decided on its approval, that the motion is somewhat moot. But most important, it appears that the request for relief in the Motion and the requested relief in the subsequent appeal now pending before CPARB are closely intertwined. Given that a hearing on this appeal is scheduled for June 6, 2017, the Chair sees no need to make a preliminary ruling which may conflict with the Board's determination on the merits.

### D. THE MOTION FOR PRELIMINARY STAY PENDING APPEAL

Columbiana's May 3, 2017 appeal requests that CPARB *"temporarily suspend the PRC approval of OPUD's application until this appeal is resolved."* Counsel for Columbiana renewed this motion at the May 11, 2017 regular Board meeting, arguing that completion of OPUD's selection process for a Design-Build contractor was nearing its end and that announcement of the successful bidder was imminent. OPUD opposed the motion for a stay citing the same reasons that it opposes the motion to convert.

Assuming without deciding that the Chair has been delegated authority to stay a PRC approval pending appeal, I deny the preliminary stay. A motion for a preliminary stay is discretionary. In this case a stay is not appropriate. First, the procedural arguments made by Columbiana are novel, and appear to conflict with the statutory procedures set out in RCW 39.10.260 and .280. It is unclear that these arguments will ultimately prevail before the Board. A further preliminary stay on a Project that has received approval by two independent panels of the PRC is not warranted.

Second, hearing on the merits has been set for June 6, 2017, and the Board intends, if possible, to comply with the 45-day deadline under RCW 39.10.290 for resolving this case. This makes the need for a preliminary stay minimal. Even if granted, it is not clear to the Chair that staying the PRC approval would preclude OPUD from selecting a successful Design-Build contractor now to perform the project later if the alternative public works contracting method is ultimately approved. It would simply preclude OPUD from proceeding to start work until the approval is granted. Under RCW 39.10.290 OPUD *"shall comply with the determination of the Board,"* and the Chair presumes that OPUD will do so.

Finally, a preliminary stay pending appeal may cause prejudice to OPUD and others involved in the Project. As OPUD notes in its brief in opposition to the motion to convert, it must start work on the Project by July 9, 2017 or its Federal Energy Regulatory Commission permit to proceed with the project will expire. OPUD argues reasonably that being required to sit on its hands while the appeal proceeds will hamper its ability to meet this deadline and will put the whole project in jeopardy.

Also, the statutory scheme for approval of alternative public works contracting methods is intended to be speedy, streamlined and involve minimal delay. Once an application is filed, the PRC must meet to consider it within 60 days or it is deemed approved. The PRC "*shall, if practicable, make its determination at the public meeting during which a submittal is reviewed*" and a written determination must be provided "*within ten business days.*" RCW 39.10.280(3), (4), (5). An appeal from a PRC final determination must be filed within seven days and the appeal resolved within 45 days. RCW 39.10.290. In this case, OPUD's application was originally filed on October 31, 2016 and 207 days have now passed without a complete resolution. A stay pending appeal in this case conflicts with the intention of the statute that public bodies get speedy resolution of their applications.

Sincerely,



William J. Frare, Chair  
Capital Projects Advisory Review Board (CPARB)  
(360) 407-8239

CC: Mark Lyon, AAG