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CAPITAL PROJECTS ADVISORY REVIEW BOARD
FOR THE STATE OF WASHINGTON

COLUMBIA RIVER BIOREGIONAL
EDUCATION PROJECT,

Petitioner,

RESPONDENT OKANOGAN PUD'S
OPPOSITION TO COLUMBIANA'S
APPEAL

v.

STATE OF WASHINGTON CAPITAL
PROJECTS ADVISORY REVIEW BOARD;
PROJECT REVIEW BOARD COMMITTEE,
and OKANOGAN COUNTY PUD NO. 1

Respondents.

I. INTRODUCTION

Respondent Okanogan County PUD No. 1 (PUD) opposes the appeal filed by Petitioner Columbia River Bioregional Education Project (Columbiana) and requests that the Board affirm the decision of the Project Review Committee. The PRC, composed of industry professionals well versed in public works projects and the design build process, followed its statutorily required procedures, carefully considered public comment, and unanimously approved PUD's project. Contrary to Columbiana's arguments, it is not entitled to a trial-like adjudicative proceeding on appeal, and PRC is a proper party to this appeal to address issues concerning its own procedures. Columbiana waived its contention that PRC's approval was "illegal" under the State Environmental Policy Act, Chapter 43.21C RCW (SEPA), and its request for a stay is

1 unsupported by legal authority. Finally, the PRC complied with the requirements of Chapter
2 39.10 RCW in approving PUD's application.

3 II. STATEMENT OF FACTS

4 PUD's application to use the alternative procurement method provided in chapter 39.10
5 RCW has now been approved twice by the PRC. In December 2016, PRC approved PUD's
6 application. Following allegations regarding the procedural process, PUD resubmitted its
7 application to PRC, and PRC scheduled and noticed a second public meeting to consider PUD's
8 application for April 27, 2017. After submitting its own comments and waiting until just two
9 days before that hearing, Columbiana filed a "Motion to Convert Proceedings," relying on a
10 provision of the Administrative Procedures Act, ch. 34.05 RCW to request PRC conduct a trial-
11 like hearing complete with discovery, live testimony, and cross examination of witnesses.

12 Despite Columbiana's untimely filing, PRC proceeded with its public meeting, reviewed
13 extensive public comment, confirmed consideration of the public comment on the record, and
14 approved PUD's application to proceed with a design-build procurement method. Record at 845.
15 Each PRC member completed a "Project Evaluation Criteria" form, verifying that each of the
16 criteria under chapter 39.10 RCW was met. Record at 819-826.

17 Following the PRC's approval, the Board adopted rules governing appeals under RCW
18 39.10.290. In enacting these rules, the Board specifically rejected Columbiana's proposal that the
19 rules provide for a stay.

20 The sole issue decided by PRC, and to be decided by the Board in an appeal from a PRC
21 determination, was whether PUD is entitled to use this alternative public works procedure for the
22 project. Contrary to the arguments raised by Columbiana, the PUD's authority to proceed with
23 the project has already been established, including in the Federal Energy Regulatory
24 Commission permit approval process. FERC's approval and the decision of the PUD's
25 commissioners to proceed with the project should not and cannot be supplanted by any
26 arguments improperly raised in this venue.

1 PUD went through an “arduous” and “complex” process to obtain FERC’s approval, and
2 FERC’s license contains “500 prevention mitigation enhancements
3 that PUD is “responsible for currently during construction and for the life of the license.”
4 Record at 830. Under FERC’s order, PUD must begin its design and construction services by
5 July 9, 2017, or risk losing FERC’s licensing approval. Public Utility Dist. No. 1 of Okanogan
6 County, Washington, Proj. No. 12569-001 (FERC July 31, 2015) (Order Granting Extension of
7 Time);¹ Record at 831, 835. Columbiana is aware of this date and the consequences of PUD’s
8 failure to meet it. If PUD does not begin its design and construction services by this date, it risks
9 losing its FERC license for the project and the millions of dollars it has invested in licenses, the
10 design-build process, and honorarium fees. Record at 833. PUD has already encountered
11 significant delays due to the challenge to the December 2016 PRC approval.

12 III. ARGUMENT

13 Columbiana’s appeal should be rejected. Because the APA does not apply, neither the
14 PRC nor the Board is authorized to conduct an APA adjudicative hearing. Chapter 39.10 RCW
15 provides appropriate procedures given the limited nature of the alternative public works
16 contracting approval, and PRC is a proper party to this appeal to permit it to address
17 Columbiana’s procedural contentions. The Board should reject Columbiana’s legally
18 unsupported request to stay PRC’s decision, as well as Columbiana’s SEPA argument, which
19 was not raised before the PRC. Columbiana’s substantive arguments about the PUD’s
20 qualifications and merits of the project are not supported by the record.

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25 ¹[https://www.okanoganpud.org/sites/default/files/pdfs/environmental_generation/enloe_dam_pro](https://www.okanoganpud.org/sites/default/files/pdfs/environmental_generation/enloe_dam_project/FERC%20Order%20Granting%20Two%20Year%20Extension%20July%2031%2C%202015.pdf)
26 [ject/FERC%20Order%20Granting%20Two%20Year%20Extension%20July%2031%2C%202015.pdf](https://www.okanoganpud.org/sites/default/files/pdfs/environmental_generation/enloe_dam_project/FERC%20Order%20Granting%20Two%20Year%20Extension%20July%2031%2C%202015.pdf).

1 **A. Because the APA does not apply, neither PRC nor the Board has authority to**
2 **conduct a formal adjudication under the APA.**

3 **1. Chapter 39.10 RCW sets out the required procedures.**

4 Columbiana requests a formal adjudication complete with discovery, live testimony, and
5 cross examination. Nothing in Chapter 39.10 RCW requires an adjudicative proceeding under the
6 APA either before the PRC or before the Board on appeal.

7 Chapter 39.10 RCW requires the PRC to consider a public body's design-build
8 application at a properly noticed public meeting; to provide an opportunity for written and oral
9 public comment; and to make a written determination within ten business days. RCW 39.10.260;
10 RCW 39.10.280(4). The legislature established criteria and provided for the appointment of
11 experts to sit on the board and committee. *See e.g.*, RCW 39.10.220(2)(a) (describing board
12 membership); RCW 39.10.280 (establishing criteria). And while it allowed for public
13 participation and transparency, it created an expedient process to balance the need for public
14 input with prompt and efficient review. RCW 39.10.280(3) (PRC must consider public
15 comment); RCW 39.10.280(5) (if committee fails to meet within 60 days of application,
16 application deemed approved).

17 Under the plain language of these statutes, a formal adjudicative process with discovery
18 and cross examination of witnesses is neither contemplated nor required. *HomeStreet, Inc. v.*
19 *State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009) (statute clear on its face
20 must be accorded plain and unambiguous meaning). *See also See State ex rel. Eastvold v.*
21 *Maybury*, 49 Wn.2d 533, 539, 304 P.2d 663 (1956) (quoting *State ex rel. State Bd. of Medical*
22 *Examiners v. Clausen*, 84 Wn. 279, 282, 146 P. 630 (1915) (“[W]here a ... board is charged by
23 law with a specific duty, and the means for its performance are appointed by law, there is no
24 room for implied powers, and the means appointed must be followed.”)) (emphasis added).
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1 Moreover, when the legislature enacted Chapter 39.10 RCW, the legislature was well
2 aware of the APA. *Leonard v. City of Bothell*, 87 Wn.2d 847, 853, 557 P.2d 1306, 1310 (1976)
3 (“when a legislature enacts a law, it is presumed to be familiar with its prior enactments”). In
4 choosing what procedures the PRC and Board would follow, the legislature could simply have
5 cross-referenced the formal adjudicative proceedings of the APA. *See e.g.*, RCW 43.21C.110(1)
6 (granting rulemaking authority to Department of Ecology and expressly referencing APA). It did
7 not. Instead, it tailored a public-hearing process to decide the narrow question of whether a
8 public body may use an alternative contracting procedure. It entrusted this question not to an
9 ALJ, but to a panel of industry experts. RCW 39.10.220(2)(a) (Board’s “appointed members
10 must be knowledgeable about public works contracting procedures” and include representatives
11 from general contracting, architectural profession, construction trades labor organizations). The
12 procedures prescribed by the legislature are entirely appropriate given the limited scope of the
13 question, the experts to which the legislature entrusted the decision, and the timeline required for
14 the necessary public projects the PRC addresses. Columbiana’s request for a formal adjudicatory
15 hearing attempts to contravene the legislature’s express command.

18 **2. Because procurement decisions are exempted from “agency action,” the APA**
19 **does not apply.**

20 Procurement and public works decisions are expressly excluded from the ambit of the
21 APA. The APA excludes decisions regarding procurement and public works from the definition
22 of “agency action:”

23 "Agency action" means licensing, the implementation or
24 enforcement of a statute, the adoption or application of an agency
25 rule or order, the imposition of sanctions, or the granting or
26 withholding of benefits.

 Agency action does not include an agency decision regarding (a)
contracting or procurement of goods, services, public works, and
the purchase, lease, or acquisition by any other means, including

1 eminent domain, of real estate, as well as all activities necessarily
2 related to those functions . . .

3 RCW 34.05.010(3) (emphasis added). Decisions excluded from the definition of agency action
4 are exempt from “the purview of judicial review.” *State Owned Forests v. Sutherland*, 124 Wn.
5 App. 400, 408, 101 P.3d 880, 884 (2004). *See also* William R. Andersen, *The 1988 Washington*
6 *Administrative Procedure Act--an Introduction*, 64 WASH. L. REV. 781, 788 (1989) (“There are a
7 number of specific exclusions from the definition of agency action, each removing specific
8 functions of particular agencies from the operation of some parts of the Act. Thus, agency action
9 does not include certain procurement functions, certain labor dispute determinations, and certain
10 activities in connection with the management of public lands.”) (emphasis added).

11 Here, the PUD’s use of an alternative contracting procedure is excluded from the APA’s
12 definition of “agency action.” Because Columbiana relies solely on APA provisions to support
13 its requests for a formal adjudication, RCW 34.05.070, RCW 34.05.413, the Board should deny
14 its requests.

15 **3. Requiring a full adjudicative proceeding under the APA is inconsistent with**
16 **the legislature’s express intent, the purpose of Chapter 39.10 RCW, and**
17 **public policy.**

18 As explained above, requiring an adjudicative proceeding complete with the formal APA
19 procedures is inconsistent with the plain language of Chapter 39.10 RCW. It is also inconsistent
20 with the purpose of Chapter 39.10 RCW, and sets a dangerous precedent for future PRC and
21 CPARB proceedings.

22 The legislature explicitly found that the alternative public works contracting procedures
23 of Chapter 39.10 RCW “may best serve the public interest if such procedures are implemented in
24 an open and fair process based on objective and equitable criteria.” RCW 39.10.200.

25 If Columbiana’s request for a formal APA adjudication is granted, it will transform the
26 expedient and transparent process the legislature created into a trial-like proceeding. The APA
provides for subpoenas, discovery, and protective orders, RCW 34.05.446; it provides standards

1 for the admissibility of evidence, RCW 34.05.452(1); and it envisions live testimony of
2 witnesses under oath, RCW 34.05.452(3). These procedures will not only slow PRC and Board
3 functions, they will also serve as a disincentive for public bodies to seek approval for design-bid
4 or GC-CM contracting procedures. Part of the appeal of the design-bid alternative process is that
5 it can be faster than a traditional design-bid-build process, and the efficiencies of the alternative
6 process can save public entities money. If each PRC approval requires a drawn-out legal
7 proceeding, there will be a chilling effect as public entities will rethink their cost-benefit analysis
8 before pursuing approval for an alternative contracting procedure. Ultimately, it is taxpayers
9 who will foot the bill for the increased costs.

10 There is nothing inherently unfair about denying Columbiana's request: local government
11 public works decisions are routinely made without adjudicative proceedings and without APA
12 review. The default method local governments use for public works projects, design-bid-build, is
13 not subject to formal adjudication. RCW 39.04.010. And local governments are not subject to the
14 APA at all. RCW 34.05.010(2) ("agency" means "any state board, commission, department,
15 institution of higher education, or officer").

16 Columbiana's request for an adjudication is an attempt to shoehorn local government
17 public works decisions into the APA. The time for public comments has passed, and the Board
18 should affirm PRC's approval of PUD's application.

19 **4. Even assuming the APA applies, Columbiana's arguments lack merit.**

20 Even assuming the APA applies, Columbiana is not entitled to an adjudication.

21 *a. Requiring an adjudication at this late stage would substantially prejudice*
22 *PUD.*

23 Columbiana requested the Board convert the PRC proceeding into a formal adjudication
24 under RCW 34.05.070. RCW 35.04.070(3) provides, "Conversion to a replacement proceeding
25 shall not be undertaken if the rights of any party will be substantially prejudiced." Requiring a
26 third public hearing to approve PUD's application would substantially prejudice the agency. If

1 PUD does not begin its design and construction services by July 9, 2017, it risks losing its FERC
2 license for the project and the millions of dollars it has invested in licenses, the design-build
3 process, and honorarium fees. Record at 831, 833, 835. PUD has already encountered significant
4 delays due to the challenge to the December 2016 PRC approval. Because conversion to a formal
5 APA adjudicative proceeding would substantially prejudice PUD, granting Columbiana's motion
6 would have been improper.

7 *b. Columbiana's arguments are moot, untimely, and unsupported.*

8 In addition, Columbiana's arguments regarding the PRC proceeding are both moot and
9 untimely. Having been aware of the PRC's December 2016 approval of the PUD's application
10 and the subsequent challenge in superior court in February 2017, Columbiana had ample
11 opportunity to request conversion before its April 25, 2017 Motion to Convert Proceedings.
12 Columbiana's own public comments, making the same points made in its Motion to Convert
13 Proceedings, were submitted on April 17, 2017. Columbiana's request to convert the PRC
14 proceeding into an APA adjudication is moot. Whether a PRC proceeding can be converted to an
15 adjudicative hearing under RCW 35.04.070 is a purely academic question at this point. *Grays*
16 *Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968) (court is not
17 required to pass on "purely academic" questions).

18 In any event, Columbiana has not demonstrated it was prejudiced by the procedures PRC
19 used. The substantive arguments it makes regarding the Chapter 39.10 RCW criteria were all
20 raised in the ample public comments submitted regarding the PUD's application, including
21 Columbiana's own comments. Record at 89-94, 502-504. The PRC thoroughly considered the
22 public comments it received, Record at 845, and ultimately rejected Columbiana's arguments. At
23 the close of the hearing, the PRC Chair Gimmestad stated:

24 I want to make sure that we all considered the public comment that
25 we have read and been provided to us in the written format and
26 then considered as public comment that we have heard here
publicly today. I would like everyone to acknowledge that by
saying yes. All panel members responded with a 'yes.' Is there

1 anybody who that did not take that into consideration? There was
2 no response.

Record at 845.

3 c. *The Board should decline Columbiana's invitation to conduct an*
4 *adjudicative proceeding on appeal.*

5 Columbiana's request that the Board conduct an adjudicative proceeding on appeal and
6 take new evidence should be rejected. On appeal, the Board reviews the record before the PRC
7 and issues a written determination. RCW 39.10.290. The Board's rules governing appeals limit
8 the Board's review to the record before the PRC:

9 Review of Record before the PRC. In conducting an appeal under
10 RCW 39.10.290 the Board will limit its review to facts and
11 arguments presented to the Project Review Committee. The Board
12 shall consider the whole record or such portions of it as may be
13 cited by the parties.

*Capital Projects Advisory Review Board, Policy on Appeals under RCW 39.10.290.*²

14 Even under the APA, the Board would review a closed record. Under the APA, the Board
15 would be a "reviewing" body which reviews a closed record does not take additional evidence.
16 RCW 34.05.464(5) ("The reviewing officer shall personally consider the whole record or such
17 portions of it as may be cited by the parties."); *Towle v. Washington State Dep't of Fish and*
18 *Wildlife*, 94 Wn. App. 196, 205, 971 P.2d 591 (1999) (RCW 34.05.464(5) "does not provide that
19 the reviewing officer may go outside the record or take additional evidence.").

20 **B. PRC is a proper party to this appeal.**

21 Because PRC has an interest in preserving the integrity of its decision-making process, it
22 is a proper party to this appeal. The entity making an initial administrative decision may be a
23 proper party to the appeal of that decision in certain circumstances. *Snohomish Cty. v. Hinds*, 61
24 Wn. App. 371, 377, 810 P.2d 84, 86 (1991) (noting "practice has been to include boundary
25 review boards as parties" on appeal). Where the agency has interest "in preserving the integrity
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² <http://www.des.wa.gov/sites/default/files/public/documents/About/CPARB/2017Meetings/5-May/InterimPolicyOnAppeals.pdf>.

1 of their decision-making process,” the agency has authority “to appeal decisions regarding the
2 agency’s procedures.” *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d
3 776, 782, 854 P.2d 611, 614 (1993). PRC’s participation is appropriate to the extent
4 Columbiana’s appeal raises issues regarding the PRC’s own procedures.

5 **C. RCW 39.10 does not authorize a stay during the Board’s review.**

6 At its May 11, 2017 meeting, the Board rejected Columbiana’s request to include a
7 provision authorizing a stay in the Board’s rules. Despite this Board’s rejection of Columbiana’s
8 arguments, Columbiana again seeks to obtain a stay. Nothing in Chapter 39.10 RCW authorizes
9 the Board to stay the PRC’s approval. Columbiana requests a stay without legal authority, and
10 without the procedural safeguards and hurdles that ordinarily accompany a stay, including a
11 bond. Even assuming that the APA applied, that statute provides that orders are effective when
12 entered, RCW 34.05.473, and that whether to grant a stay under the APA is entirely within the
13 discretion of the agency, RCW 34.05.467.

14 In any event, even if this procedural mechanism were available, Columbiana’s request for
15 a stay should be denied due to the significant prejudice to PUD and the remote likelihood of
16 Columbiana’s success. *Cf.* RCW 34.05.550(3) (conditioning court’s stay of agency action on
17 whether applicant is likely to prevail, whether applicant will suffer irreparable injury, and
18 whether stay will “substantially harm” other parties). As explained above, time is of the essence.
19 PUD cannot afford further delay for this important public project.

20 **D. The Board lacks authority to rule on Columbiana’s SEPA contention.**

21 Columbiana contends the PUD’s 2012 issuance of a Determination of Nonsignificance
22 (DNS) violates the State Environmental Policy Act, Chapter 43.21C RCW.

23 Because this issue was not raised below, it cannot be considered by the Board. *See Policy*
24 *on Appeals under RCW 39.10.290* at ¶ 6.³ Even if this issue had been raised below, this Board

25
26 ³ <http://des.wa.gov/sites/default/files/public/documents/About/CPARB/2017Meetings/5-May/3-InterimPolicyOnAppeals.pdf>.

1 does not have authority to determine whether SEPA was violated. *Fahn v. Cowlitz Cty.*, 93 Wn.
2 2d 368, 374, 610 P.2d 857 (1980) (“administrative agency is limited to the powers and authority
3 granted to it by the legislature”). Chapter 39.10 RCW limits the board’s authority to questions
4 within its particular expertise, namely, the suitability of alternative contracting procedures on
5 public works projects. Moreover, the limited decision at issue here, over the form of contracting
6 authorized, is not an action requiring review under SEPA. WAC 197-11-704(2)(a)(i) (“project
7 actions” are those that “directly modify the environment”); WAC 197-11-800(14) (exempting
8 procurement of services).

9 **E. The PRC did not violate Chapter 39.10 RCW.**

10 While Columbiana alleges PUD’s application was insufficient, its contentions are not
11 supported by the record.

12 *a. Standard of review*

13 Regardless of the standard of review the Board applies to the PRC’s determination, it
14 should affirm the PRC’s approval of PUD’s project. RCW 39.10.290 provides that the Board
15 hears appeals from decisions of the PRC, but does not provide a standard for reviewing that
16 determination. The Board’s policy on appeals provides that the “Board will limit its review to
17 facts and arguments” before the PRC and “shall consider the whole record or such portions of it
18 as may be cited by the parties.” *See Policy on Appeals under RCW 39.10.290* at ¶ 6. While the
19 APA does not apply, the provision of the APA governing agency officers reviewing initial
20 agency decisions permits those officers to make their own findings of fact as long as those
21 findings are supported by substantial evidence. RCW 34.05.464(5); *Northwest Steelhead and*
22 *Salmon Council of Trout Unlimited v. Wash. State Dep’t of Fisheries*, 78 Wn. App. 778, 785,
23 786, 896 P.2d 1292 (1995).

24 Whether or not the Board must defer to the PRC’s factual findings or legal conclusions,
25 the Board should affirm the PRC’s approval. The PUD’s application clearly satisfies the
26 statutory criteria, and Columbiana’s arguments are not supported by the record.

1 b. *PUD provided proof that its team had the necessary experience under*
2 *RCW 39.10.280(c) and (d).*

3 Columbiana contends PUD did not establish that it had the required experience under
4 RCW 39.10.280(c) and (d). These provisions require the PRC to find that the “public body has
5 the necessary experience or qualified team to carry out the alternative contracting procedure” and
6 that “public body personnel or consultants are knowledgeable in the design-build process and are
7 able to oversee and administer the contract.” RCW 39.10.280(c), (d).

8 The PUD established these criteria. Record at 5-7. RCW 39.10.280(2) provides an owner
9 can establish the required experience through the use of consultants. RCW 39.10.280(2)(c)
10 (“necessary experience or qualified team”); RCW 39.10.280(2)(d) (for design-build projects,
11 “public body personnel or consultants are knowledgeable”) (emphasis added). *See* Record at 844
12 (PRC Member Beaudine noting that Ms. Parkinson and Mr. Christensen have D-B experience).

13 Columbiana’s contention that PUD does not have the experience necessary with design-
14 build project is contradicted by the record. As PUD stated in written responses to PRC questions:

15 *The PUD meets the requirements of RCW 39.10.280(c) because it*
16 *has hired a qualified team of consultants with extensive design-*
17 *build experience. Christensen Associates, and specifically John*
18 *Christensen, have extensive experience managing similar hydro*
19 *power projects on a design-build basis. One of the PUD’s*
20 *consultants is Robynne Parkinson who is a frequent speaker and*
21 *educator on design-build delivery and is the vice chair of DBIA*
22 *National Education Committee. Ms. Parkinson is currently one of*
23 *the primary instructors for the DBIA Certification Workshop*
24 *courses and has been developing and instructing the DBIA courses*
25 *since 2004. As part of the preparation process for developing the*
26 *procurement and the contract, Ms. Parkinson has spent significant*
 time educating the PUD on design-build project delivery.

Record at 22-23 (emphasis added). PRC members were fully aware of this issue and questioned
PUD on its team experience during the hearing. Record at 833 (PRC Member Riley-Hall stating
that PUD can establish D-B experience “as long as you do bring on consultants that have that
experience”).

1 While Columbiana contends Mr. Christensen and Mr. McCreedy did not list any design-
2 build experience in the past five years, Notice of Appeal at 4, this is not a requirement of RCW
3 39.10.280. *Compare* RCW 39.10.270(2) (certification statute requiring management of design-
4 build project within past five years) *with* RCW 39.10.280 (project approval statute containing no
5 such requirement). In any event, the PRC thoroughly considered the experience of the PUD
6 team. PRC Member Riley-Hall specifically addressed this in her comments:

7 Although [Mr. Christensen's] experience was finished in 2012, it
8 doesn't mean his experience or his knowledge of Design-Build
9 went away. And so, I still feel that he has adequate experience on
the four projects that they presented that he has done Design-Build
on.

10 Record at 843. The PRC considered public comment and the record. Columbiana's mere
11 dissatisfaction with the PRC's conclusion does entitle it to supplant its own judgment for that of
12 a board of construction experts.

13 *c. PUD provided sufficient information of substantial fiscal benefit under*
RCW 39.10.280(2)(a).

14 Columbiana contends PUD failed to show the design-build process would provide a
15 substantial fiscal benefit. Notice of Appeal at 4. Under RCW 39.10.280(2)(a), the PRC must
16 determine that the "alternative contracting procedure will provide a substantial fiscal benefit or
17 the use of the traditional method of awarding contracts in lump sum to the low responsive bidder
18 is not practical for meeting desired quality standards or delivery schedules[.]"RCW
19 39.10.280(2)(a). PUD provided information on the substantial fiscal benefit of the design-build
20 process. PUD's answers to PRC's questions, submitted to the PRC in writing, state that the
21 design-build process would achieve a number of efficiencies, including reducing the number of
22 engineering drawings and size of technical specifications needed, "through value engineering
23 executed by the engineer, equipment supplier and contractor working as a team," reduced risk of
24 "costly disputes, claims and litigation between multiple parties," and decreased staffing costs to
25 the District. Record at 28.
26

1 The PRC members carefully considered this criterion and concluded it was met, given the
2 complexity of the project and the need to control costs and timing. PRC Member Warnaca stated,

3 Based on the complexities of the project, I would have a hard time
4 believing that a Design-Bid-Build delivery method would offer a
5 greater fiscal benefit than Design-Build especially in a Progressive
6 Design-Build delivery method where all the specifications,
7 performance criteria, and long term operations of the plant to be
8 considered collectively before a contractor (contract) is made.

9 Record at 843. And PRC Member Riley-Hall stated that with a design-bid-build method, “you
10 wouldn’t get the benefits that you would using the alternative delivery method and having a
11 contractor involved from the very start of the design phase and going through that process.”

12 Record at 843. PRC Member Lebo agreed: “Having been involved in many complex,
13 challenging projects, contractor involvement [and] designer involvement early in the process
14 benefits the project, particularly when you look at things like risk associated with costs and
15 schedule.” Record at 844. Lastly, PRC Chair Gimmestad agreed with PUD’s assertion about
16 controlling for risk: “I can’t imagine trying to figure all the risks associated with the project like
17 this in Design-Bid-Build, as it’s almost impossible. . . I think the Design-Build procurement
18 model allows the opportunity to eliminate or at least identify those risks and put a plan in place
19 before you do the work associated with that.” Record at 845.

20 *d. The overall merits of the project is a question for the PUD’s elected
21 governing body.*

22 Columbiana also contends that the project is “fundamentally economically flawed,” and
23 speculates about the ability of the dam, when completed, to provide power to the region in a
24 cost-effective way. Notice of Appeal at 5. This question—about the merits of the project as a
25 whole—is beyond the scope of the Board’s authority. This is an attempt to override a decision of
26 PUD’s board of commissioners. The legislature’s express intent in enacting Chapter 39.10 RCW
is “to authorize the use of certain supplemental alternative public works contracting procedures,
to prescribe appropriate requirements to ensure that such contracting procedures serve the public

1 interest, and to establish a process for evaluation of such contracting procedures.” RCW
2 39.10.200. It was not to second-guess the decisions of elected officials.

3 In short, each of the concerns raised by Columbiana have either been properly considered
4 by the PRC or simply have no bearing on the issue of whether PUD may use design-build
5 contracting procedures for this project.

6 IV. CONCLUSION

7 Columbiana’s appeal and its request for a formal adjudication should be rejected. Neither
8 the PRC nor the Board has authority to conduct a full adjudication under the APA. None of the
9 concerns raised in Columbiana’s public comments, Motion to Convert Proceedings, and Notice
10 of Appeal raise real questions about PUD’s entitlement to use the design-build alternative public
11 works delivery method. Moreover, the time and place to raise such concerns has passed. The
12 Board should not entertain attempts to delay this important project any further.

13 DATED this 30 day of May, 2017.

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