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CAPTIAL PROJECTS ADVISORY REVIEW BOARD
FOR THE STATE OF WASHINGTON

COLUMBIA RIVER BIOREGIONAL)	
EDUCATION PROJECT,)	No.
)	
Petitioner,)	PETITIONER COLUMBIANA’S
)	RESPONSE BRIEF
v.)	
)	
STATE OF WASHINGTON CAPITAL)	
PROJECTS ADVISORY REVIEW)	
BOARD; PROJECT REVIEW)	
COMMITTEE; and OKANOGAN)	
PUBLIC UTILITY DISTRICT)	
)	
Respondents.)	
)	

I. ARGUMENT

The Columbia River Bioregional Education Project (“Columbiana”) has been denied its due process rights by the Project Review Committee (“PRC”), which erroneously approved the Okanogan Public Utility District’s (“OPUD”) design-build application for the Enloe Hydroelectric Project (“Project”).

A. The Administrative Procedures Act applies.

The PRC is governed in part by the Washington Administrative Procedures Act (“APA”). See RCW § 34.05.010(2) (defining “agency” as “any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct

1 adjudicative proceedings. . .”). Neither OPUD nor the PRC offer any authority to assert that the
2 PRC does not fall within this definition.¹

3 The APA exemption under RCW 34.05.010(3) does not apply here. *See* RCW
4 34.05.010(3) (providing exemption for “agency decision[s] regarding (a) contracting or
5 procurement of goods, services, public works . . .”). The PRC’s decision to permit OPUD to
6 utilize the design-build process on this Project is an agency decision to allow a public entity to
7 use a certain project delivery system. It is not an agency decision to enter into a contract or
8 procure goods. Also, while the applicant, OPUD, is a public utility district, the PRC’s decision to
9 allow design-build is unrelated to public works. The APA applies in this case, and its prescribed
10 adjudicative procedures should have been utilized by the PRC upon Columbiana’s Motion to
11 Convert the proceedings. PRC’s failure to follow the mandated procedures is a fatal deficiency.
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14 **B. Columbiana is entitled to due process.**

15 Columbiana and its members have a property interest protected by procedural due
16 process in this case, but the PRC denied Columbiana its due process rights. The Due Process
17 Clause of the Fourteenth Amendment prohibits the State from depriving “any person of life,
18 liberty, or property, without due process of law.” U.S. Const. amend. XIV. “[P]roperty interests
19 protected by procedural due process extend well beyond actual ownership of real estate, chattels,
20 and money.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972).
21

22 Courts have made clear that a third party, such as Columbiana, challenging an agency
23 action can have a property right giving rise to a due process claims. *Crown Point I LLC v.*
24 *Intermountain Rural Elec. Ass’n*, 319 F.3d 1211, n.4 (10th Cir. 2003); *see also Shanks v. Dressel*,
25 540 F.3d 1082 (9th Cir. 2008). That property right arises where an underlying statute contains
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29 ¹ OPUD simultaneously argues that the provisions of the APA do not apply, but that the APA provides the standard of review for CPARB. See OPUD’s Opposition to Petitioner’s Appeal at 4-6, 11. OPUD cannot have it both ways.

1 “specific, mandatory, and carefully circumscribed requirements” which constrain the agency’s
2 discretion to issue its decisions. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 71-72 (2014) (quoting
3 *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)). No property right exists
4 where the agency has unfettered discretion to approve or deny applications. *Id.* (internal citation
5 omitted).

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7 Here, Chapter 39.10 RCW provides the PRC with “specific, mandatory, and carefully
8 circumscribed requirements” constraining its ability to approve the use of design-build and
9 conferring due process rights to Columbiana. *See e.g.* RCW 39.10.280(1), (2) (describing what a
10 public body *must* include in its application to the PRC and what the committee *shall* determine in
11 considering that application). The PRC did not afford Columbiana any of the procedural due
12 process rights to which it is entitled, and thus, its decision should be voided.²

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14 **C. Columbiana is entitled to an adjudication.**

15 Satisfying Columbiana’s due process rights by requiring an adjudicative hearing would
16 not prejudice OPUD. OPUD cites to its looming July 9, 2017 deadline imposed by the Federal
17 Energy Regulatory Commission (“FERC”) as the reason it cannot suffer further delays. An
18 impending deadline is not a justification for non-compliance with the law. OPUD must comply
19 with the statutory requirements of Chapter 39.10 RCW, regardless of any impending deadline.
20 Moreover, OPUD’s potential inability to meet the impending deadline is self-inflicted. OPUD
21 has held its FERC license since 2013. *See* Bates No. 0000002. It has had four years to begin
22 construction and has not done so. The additional delay that would be caused by requiring the
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27 ² “Essential elements of procedural due process include notice and a meaningful opportunity to be heard. A
28 meaningful opportunity to be heard means ‘at a meaningful time and in a meaningful manner.’” *Morrison v. Dep’t of*
29 *Labor & Indus.*, 168 Wash. App. 269, 277 P.3d 675 (2012). Columbiana’s opportunity to be heard was not
meaningful, as it was permitted only to submit public comment. Rather, Columbiana should have been afforded the
adjudicative hearing procedures outlined in the APA, as argued in Columbiana’s Motion to Convert. *See* Motion to
Convert, Section IV.

1 PRC to conduct an adjudicative hearing as required is inconsequential in comparison to OPUD's
2 own four-year delay.

3 Columbiana, on the other hand, was prejudiced by the lack of due process before the
4 PRC. Columbiana was permitted to submit comments, but it was not permitted to cross examine
5 the parties present for the PRC. While RCW Chapter 39.10 does not set forth adjudicative
6 procedures, the Supreme Court has recognized that, "the very nature of due process negates any
7 concept of inflexible procedures universally applicable to every imaginable situation." *Stanley v.*
8 *Illinois*, 405 U.S. 645, 650 (1972). "What procedures due process may require under any given
9 set of circumstances must begin with a determination of the precise nature of the government
10 function involved as well as of the private interest that has been affected by governmental
11 action." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).
12 Here, as argued in Columbiana's Motion to Convert, the procedures accompanying an
13 adjudicative process were necessary and appropriate. *See* Motion to Convert, Section IV.
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17 **D. SEPA applies to the PRC's decision.**

18 The decision by the PRC to authorize the use of the design-build process is an action
19 requiring review under SEPA under WAC 197-11-704. This decision is the "underlying
20 governmental action" triggering the ability for Columbiana to challenge the SEPA analysis
21 because the PRC's decision starts the ball rolling by allowing OPUD to begin construction.
22 OPUD could not have begun construction on this Project until it received the PRC's approval to
23 use design-build. There cannot be any reasonable dispute that this Project "directly modifies the
24 environment." Additionally, as stated in Columbiana's Opening Brief, this appeal is the first
25 venue in which it is procedurally proper for Columbiana to raise the SEPA issue, as the issue was
26 not ripe until the PRC made its final decision. *See* Petitioner's Opening Brief at 9, n.1
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CERTIFICATE OF SERVICE

I, Alyssa Englebrecht, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on June 2, 2017, I caused the foregoing Response Brief to be served on the following in the manner indicated:

Capital Projects Advisory Review Board CPARB@des.wa.gov Talia.baker@des.wa.gov MarkL1@atg.wa.gov Tpcef@atg.wa.gov RobertH3@atg.wa.gov DanielleO@atg.wa.gov SarahS7@atg.wa.gov	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) x E-mail
Project Review Committee DawnC@atg.wa.gov Nancy.Deakins@des.wa.gov Tpcef@atg.wa.gov BaileeR@atg.wa.gov angelaB@atg.wa.gov	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) x E-mail
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DATED this 2nd day of June 2017, in Seattle, Washington.

s/Alyssa Englebrecht
Alyssa Englebrecht