

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT
LLC
for

WHISTLING RIDGE ENERGY PROJECT

PREHEARING ORDER NO. 14
COUNCIL ORDER NO. 858

Prehearing Order Denying Objection
To Proposed Witness Wiley

The circumstances. Save Our Scenic Area (SOSA) and Friends of the Columbia Gorge (“Friends,” collectively “Intervenors”) indicated relatively early in the proceeding that they were seeking authority to present a witness from the National Park Service. Intervenors on November 17, 2010 learned of the availability of Mr. Dan Wiley, employed by the Park Service, and on November 24, 2010, notified the Council and other parties of his likely appearance.

The arguments. On November 30, 2010, the Applicant submitted an objection to the witness, arguing (1) that no prehearing order approved the presentation of live direct testimony except that of members of the public; (2) that the proposed subjects are not treated in the Application or prefiled evidence, so the matters to be addressed are beyond the scope of the hearing, (3) that the proposal appears to be a challenge to the Draft Environmental Impact Statement (DEIS), which process has been ruled beyond the scope of the adjudicative hearing, and (4) that the time for presenting prefiled evidence has passed, so the proposed witness should be rejected.

Intervenor responded on December 1, arguing that presentation of the witness is no surprise; that this potential witness, along with others, was disclosed early in the adjudicative process; that obtaining consent from the federal agency involved takes a considerable length of time; that Intervenor has prefiled exhibits that this witness will address; that Intervenor responded and notified other parties quickly after receiving consent for the witness’s appearance, that the witness addresses the adjudicative issues and not the EIS process, and that his appearance would be timely if presented on the schedule of rebuttal witnesses.

The decision. Prehearing Order No. 13 in this matter did address a process for making known the identity of witnesses to appear under subpoena, but did not authorize such witnesses nor speak to possible objections. This witness is no surprise to the Applicant, having been mentioned (by agency name) without objection in earlier stages. The issue addressed appears to be within those of the adjudicative hearing, and the circumstances of timing appear not to unduly prejudice the Applicant.

No provision has been made for presentation of live witnesses whose direct evidence has not been prefiled. Considering that there is still time for presentation of the transcript of a deposition,¹ for a transcript of questions and answers, or for prepared testimony, the Council will permit the filing of the witness's direct evidence, no later than the time for filing rebuttal testimony. The witness will not be allowed to testify without sufficient prefiling of his direct evidence.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

Dated at Olympia, Washington and effective this 8th day of December 2010.

/s/

C. Robert Wallis, Administrative Law Judge

¹ The Council's preference is for a deposition, although we recognize that availability of counsel on short notice may be impossible.