

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of)
Application No. 2009-01) Prehearing Conference
WHISTLING RIDGE ENERGY, LLC.) Pages 1 - 32
WHISTLING RIDGE ENERGY PROJECT)
_____)

A prehearing Conference in the above matter was held on Tuesday, July 28, 2009, at the PUD Association, 212 Union Avenue S.E., Olympia, Washington at 1:30 p.m., before the Energy Facility Site Evaluation Council.

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WHISTLING RIDGE ENERGY, LLC, Tim McMahan, Attorney at Law, Stoel Rives, LLP, 805 Broadway Street, Suite 725, Vancouver, Washington 98660; and Darrel Peeples, Attorney at Law, 325 Washington Street N.E., No. 440, Olympia, Washington 98506.

COUNSEL FOR THE ENVIRONMENT, H. Bruce Marvin, Assistant Attorney General, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100.

DEPARTMENT OF COMMERCE, Mark Anderson, Lay Representative, Energy Division, P.O. Box 43173, Olympia, Washington 98504-3173.

REPORTED BY:

SHAUN LINSE, CCR

CCR NO. 2029

1 APPEARANCES (Cont'd):

2 FRIENDS OF THE COLUMBIA GORGE, Gary K. Kahn,
3 Attorney at Law, Reeves, Kahn & Hennessy, P.O. Box 86100,
4 Portland, Oregon 97286-0100; Nathan Baker, Staff Attorney,
5 522 West S.W. 5th Avenue, Suite 720, Portland, Oregon
6 97204-2100.

7 SKAMANIA COUNTY PUBLIC UTILITY DISTRICT NO. 1,
8 Robert Wittenberg, Jr., Manager, 1492 Wind River Highway,
9 P.O. Box 500, Carson, Washington 98610.

10 SKAMANIA COUNTY ECONOMIC DEVELOPMENT COUNCIL,
11 Peggy Bryan, Executive Director, 167 N.W., 2nd, P.O. Box
12 436, Stevenson, Washington 98648.

13 ASSOCIATION OF WASHINGTON BUSINESS, Chris McCabe,
14 Attorney at Law, 1414 Cherry Street, S.E., P.O. Box 658,
15 Olympia, Washington 98501.

16 SEATTLE AUDUBON SOCIETY, Shawn Cantrell, Executive
17 Director, 8050 35th Avenue N.E., Seattle, Washington 98115.

18 SAVE OUR SCENIC AREA (SOSA), Thomas Drach, Lay
19 Representative, P.O. Box 41, Underwood, Washington 98651.

20 KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT
21 AUTHORITY, Michael Canon, Executive Director, MS-CH-6, 127
22 West Court Street, Goldendale, Washington 98620.

23 KLICKITAT TRIBES OF THE YAKAMA NATION, Wilbur
24 Slockish, Jr., Chief of Klickitat Tribes, P.O. Box 84,
25 Wishram, Washington 98673.

1 APPEARANCES (Cont'd):

2 CASCADE TRIBES OF THE YAKAMA NATION, Johnny
3 Jackson, Chief of Cascade Tribes, P.O. Box 190, Underwood,
4 Washington 98651.

5 * * * * *

6 JUDGE WALLIS: This is a prehearing conference
7 before the Washington State Energy Facility Site Evaluation
8 Council in the matter of Application 2009-01 of Whistling
9 Ridge Energy, LLC, for certification of a site for
10 construction of the Whistling Ridge Energy Project. This
11 conference is being held pursuant to due and proper notice
12 to all interested parties at Olympia, Washington on July 28
13 of the year 2009.

14 My name is Robert Wallis and I am the Council's
15 Administrative Law Judge for this proceeding. This hearing
16 is being held before the Council which consists of the
17 following members. I'm going to ask each of you to raise
18 your hand so that everyone in the room can see who is each
19 individual Council Member.

20 First, Jim Luce, Council Chair. Hedia Adelsman,
21 Department of Ecology.

22 MR. FIKSDAL: She's not present.

23 JUDGE WALLIS: She is not present. Jeff Tayer,
24 Fish and Wildlife; Mary McDonald, Department of Natural
25 Resources; Dick Byers, Utilities and Transportation

1 Commission; and Judy Wilson, Skamania County, and she
2 apparently is not present at the moment either. I'd also
3 like to --

4 MR. FRYHLING: Missed me.

5 CHAIR LUCE: The Department of Commerce.

6 JUDGE WALLIS: And, of course, the Department of
7 Commerce Department.

8 MR. FRYHLING: Dick Fryhling.

9 CHAIR LUCE: The distinguished representative from
10 the Department of Commerce Dick Fryhling.

11 JUDGE WALLIS: We also have Council staff present.
12 Allen Fiksdal is the Council Manager. Steven Posner and Jim
13 La Spina in the back of the room are staff, and Tammy
14 Talburt is the Administrative Assistant that assists us in
15 keeping things together.

16 I would like at this time to get appearances from
17 counsel who are here representing the parties and the
18 petitioners for intervention. As I identify the party, I
19 would like lead counsel to speak up and state an appearance;
20 that is, the name of the party, the name of the
21 representative, the role of the representative, and for this
22 proceeding only I would like you to state your contact
23 information. If there are other counsel associated with
24 you, I would like to identify those counsel, but if they
25 have additional contact information you need not state that

1 for the record at this time.

2 So let's begin with the Applicant with Whistling
3 Ridge Energy, LLC.

4 MR. McMAHAN: Tim McMahan.

5 JUDGE WALLIS: Could you please pick up the
6 microphone.

7 MR. McMAHAN: I'm already violating the microphone
8 rule.

9 Tim McMahan, Attorney with Stoel Rives Law Firm,
10 lead counsel for Whistling Ridge Energy. To my right is
11 Jason Spadaro, and I will be along with my colleague Darrel
12 Peeples representing the Applicant throughout the
13 proceedings. My office is at 805 Broadway, Suite 725,
14 Vancouver, Washington.

15 JUDGE WALLIS: Counsel for the Environment.

16 MR. MARVIN: I've got my card this time. H. Bruce
17 Marvin, Assistant Attorney General, appearing as Counsel for
18 the Environment in this matter. My address is 1125
19 Washington Street S.E., P.O. Box 40100, Olympia, Washington
20 98504.

21 JUDGE WALLIS: And for the Department of Community
22 Trade and Economic Development I believe on the statement of
23 the appearance.

24 MR. ANDERSON: Great. Mark Anderson. Our counsel
25 is Alice Blado. She is on annual leave and I'm standing in

1 for Tony Usibelli, who is Director of the Energy Division
2 and what is now the Department of Commerce. We had an
3 official name change on July 27 and so while our initial
4 pleading is Department of Community Trade and Economic
5 Development we are now Commerce which is located at the same
6 place, 906 Columbia Street S.W., in Olympia, Washington.

7 JUDGE WALLIS: Is there any objection to referring
8 to that department as the Department of Commerce throughout
9 the remainder of this proceeding?

10 Let the record show that there is no objection and
11 we will make that designation. Those three are parties as
12 of right. Counsel for the Environment is a statutory party
13 and the Department of Commerce as a member agency of this
14 Council has the right by Council rule to participate.

15 The following are petitioners for intervention.
16 I'm going to take them in alphabetical order of the way that
17 names were presented in the petitions beginning with the
18 Association of Washington Business.

19 MR. McCABE: Good afternoon. Thank you, Judge
20 Wallis. My name is Chris McCabe. I'm legal counsel for the
21 Association of Washington Business, a petitioner in this
22 matter for intervention, and our mailing address is 1414
23 Cherry Street S.E., Olympia, Washington 98501.

24 JUDGE WALLIS: The City of White Salmon. Is the
25 city represented?

1 Very well. The Columbia River Gorge Commission
2 is the commission represented?

3 We'll let the record show that there's no
4 response.

5 Friends of the Columbia Gorge.

6 MR. KAHN: Gary Kahn, Reeves, Kahn & Hennessy.
7 I'll be lead counsel for Friends of the Columbia Gorge. My
8 contact address is P.O. Box 86100, Portland, Oregon 97206.
9 To my left is Nathan Baker, Staff Attorney for Friends of
10 the Columbia Gorge. To my right is Orion Nessly, a
11 representative of Friends of the Columbia Gorge.

12 JUDGE WALLIS: The Klickitat and Cascade Tribes of
13 the Yakama Nation.

14 MR. SLOCKISH: Wilbur Slockish, Jr., P.O. Box 184,
15 The Dalles, Oregon 97058 and to my right is Chief Johnny
16 Jackson.

17 MR. JACKSON: Chief Johnny Jackson, P.O. Box 190,
18 Underwood, Washington. The Cascade Tribes phone number is
19 541-993-0252.

20 JUDGE WALLIS: Thank you.

21 The Klickitat County Economic Development
22 Authority.

23 MR. CANON: I'm Michael Canon. I'm Executive
24 Director of the Klickitat County Public Economic Development
25 Authority and Director of Economic Development for the

1 County of Klickitat County. The address is 127 West Court
2 Street, Goldendale, Washington 98620. I think you wanted a
3 telephone. It's 509-773-7060. Thank you, sir.

4 JUDGE WALLIS: The Port of Skamania county. Let
5 the record show there is no response.

6 Save Our Scenic Area.

7 MR. KAHN: Judge, this is Gary Kahn. I am not
8 their counsel. Their Counsel is unavailable today and I'm
9 here to represent their interests. Oh, and Tom Drach a
10 representative of Save Our Scenic Area is on his way and
11 should be here shortly.

12 JUDGE WALLIS: Very well. Thank you.

13 Seattle Audubon Society.

14 MR. CANTRELL: My name is Shawn Cantrell. I'm the
15 Executive Director with Seattle Audubon Society. You need
16 my address too?

17 JUDGE WALLIS: Yes, please.

18 MR. CANTRELL: 8050 - 35th Avenue N.E., Seattle,
19 Washington 98115.

20 JUDGE WALLIS: Skamania County Agri-Tourism
21 Association?

22 MR. KAHN: Again, Your Honor. Counsel for that
23 organization could not be here as well and I am here to
24 represent their interest in today's proceeding only, Gary
25 Kahn.

1 JUDGE WALLIS: Thank you, Mr. Kahn.
2 Skamania County Economic Development Council.

3 MS. BRYAN: My name is Peggy Bryan. I am the
4 Executive Director for the Skamania County Economic
5 Development. My address is 167 N.W. Second Street
6 Stevenson, Washington and my phone number is 509-427-5110.

7 And I don't know if it's appropriate to mention
8 that the Port of Skamania County has their regular meeting
9 today and there were some very important business that had
10 to be attended to and so that is why they're not represented
11 here today.

12 JUDGE WALLIS: Thank you.
13 Skamania County Public Utility District No. 1.

14 MR. WITTENBERG: My name is Bob Wittenberg, and
15 I'm the manager of Utility No. 1 Skamania County. Our
16 address is P.O. Box 500, Carson, Washington 98610.

17 JUDGE WALLIS: Very well. As to each of these
18 petitions for intervention let me inquire whether the
19 Applicant has any objection and if so to state those
20 objections.

21 MR. McMAHAN: Thank you, Your Honor. Tim McMahan,
22 again for the record. I would like to address several of
23 these, and I'll get to the motion that we filed in just a
24 second. But as to both Save Our Scenic Area and Friends of
25 the Gorge we have some concerns about whether their

1 interests are stated with particularity as defined by your
2 rule and under the APA. I think it's typical and
3 appropriate to ask who the memberships are and what the
4 scope, full scope of the interests are. Part of the issue
5 here is the alignment of issues with interest seems a little
6 bit disparate. The interests of both these organizations
7 are fairly consistently stated as dedicated to protecting
8 and enhancing environmental and scenic resources in the
9 Columbia River Gorge.

10 I promise I will slow down, Shaun. I have to
11 remind myself of that.

12 But then when one looks through the statement of
13 issues from both of these, which is indicated on our motion,
14 are mirror images almost entirely. There are a number of
15 things here that seem a bit decoupled from that statement of
16 interest, including and I'm just right now looking at the
17 SOSA petition. No. 25, challenging the need for the
18 facility and the nameplate capacity of the project,
19 intermittent power source, etc. No. 26, which is we note in
20 our motion this alternative to facility issue which has been
21 previously addressed by the Siting Council. And then just
22 looking at the Friends' petition, Friends of the Gorge
23 petition No. 10, noise impacts to wildlife and surrounding
24 communities. No. 12, cultural resource issues which is
25 also -- and these in the Friends' petition are also stated

1 in the SOSA in the petition. We have two tribal
2 representatives here dealing with cultural resource issues.
3 Adverse impacts by and nearby land uses, economic impacts
4 and benefits to the project. Both set forth this issue on
5 public health and safety concerns and risk, including
6 turbine ice throw from turbine blade, tower collapse, the
7 traffic access, etc. No. 18, impacts to communications and
8 utility facilities whether they're adequately evaluated.
9 No. 25, again this nameplate capacity and intermittent
10 generation issue.

11 The reason I want to just focus on those again is
12 the rule requires a statement of particularity interest.
13 Particularity has a meaning. It means very specifically
14 what are your interests in the proceeding and then under the
15 law you need to hold up the issues along with the interests
16 as stated with particularity to determine whether these are
17 appropriately stated interests.

18 Some of the Siting Council will remember in the
19 Wild Horse case Mr. Lathrop in that case, the Kittitas
20 County or excuse me the Wild Horse case, Mr. Lathrop
21 indicated this broad interest to represent all the
22 interested of Kittitas County, etc. His intervention motion
23 was narrowed down to those that were more specifically his
24 own interests. I understand from the Creston case that an
25 issue was confronted with a poor alignment between the

1 interests as defined by the petitions and the issues that
2 were raised. So there is some precedent for the Siting
3 Council to at least ask the intervenors to be more clear in
4 how they are lining up and appropriately stating their
5 interest in a way that we can all understand who you
6 represent, who are your members, what are your real
7 interests, and should you be allowed to proceed on a shock
8 and blast of issues which we really have on these two
9 petitions. So I would ask the Siting Council to inquire
10 about those issues and hold these two parties to an
11 appropriate burden of proof to sustain what they're required
12 to do under both the APA and the Siting Council's own rules.

13 Then, secondly, we have filed a motion. I'm not
14 going to talk much about it. You have it. I think it's
15 fairly clear. There's really no light, no air between these
16 two petitions and the interests as stated and the issues
17 that have been stated by the two parties.

18 So for in the interests of economy of the
19 adjudicative proceedings, I think it is appropriate to ask
20 that they file one brief, not two. That cross-examination
21 proceed with one lawyer, not two piling on. That we all
22 since they are identical issues, virtually identical issues
23 that it be treated as one co-petitioner or co-intervenor
24 versus two in order to most economically administer these
25 proceeding. So that's those two. I have just very limited

1 comments on a couple of the others.

2 JUDGE WALLIS: Could we stop at that point --

3 MR. McMAHAN: Yes.

4 JUDGE WALLIS: -- and allow SOSA and the Friends
5 to respond. But, first, I would like to clarify whether you
6 are opposing these petitions for intervention or whether you
7 are saying essentially as you understand it they appear to
8 have an issue, you're not opposing the petition but you're
9 asking for a remedy relating to the petition.

10 MR. McMAHAN: It is the latter.

11 JUDGE WALLIS: Very well.

12 MR. KAHN: As to the -- I'll take Friends of the
13 Columbia Gorge first. As to the issues of concern to
14 Friends of the Columbia Gorge, it's an organization that's
15 been in existence since 1980. Its mission is to protect and
16 conserve the resources of the Columbia River Gorge, not just
17 the Columbia River Gorge National Scenic Area, but the
18 entire Columbia River Gorge, all the resources, and under
19 the National Scenic Area Act that includes cultural
20 resources. It's one of the four specific resources that are
21 named on what Mr. McMahan questioned why our interest was
22 there.

23 Each one of the issues -- let me back up. As we
24 understand prior precedent in decisions by this body on
25 intervention motions in many cases the intervenor had been

1 limited to the issues listed in the petition for
2 intervention. As my client as well as SOSA has a very broad
3 perspective on the issues involving all the resources,
4 whatever they are, as listed in our petition, we would like
5 to be involved and have the opportunity to provide input on
6 all of those issues. It's one of the largest state-wide
7 groups, regional groups in the area. It is the sole -- I
8 take that back. It is the significant watch dog over the
9 resources of the Columbia River Gorge. It seeks to be
10 involved in many, if not most, if not all, legal proceedings
11 involving the resources of the Columbia River Gorge, and
12 that's why the listed issues are as broad as they are
13 because all those issues can come up during this proceeding,
14 all of which pertain to the interest of the Friends of the
15 Columbia Gorge and its 5,000 members.

16 With respect to SOSA, it is a much smaller group.
17 In fact, it was formed exclusively because of this project.
18 It is made of local -- it's made up of local members with
19 local residents in the Underwood area. Those people will be
20 most directly affected by this project. They have the same
21 concerns of the breadth of the issues that Friends of the
22 Columbia Gorge does. As Mr. McMahan pointed out and as is
23 evident in their petition, SOSA's petition was very, very
24 similar to Friends of the Columbia Gorge's petition. That
25 does not mean the two groups walk in lockstep or have the

1 same interests. It's just out of expediency. Richard
2 Aramburu, the attorney for SOSA, just cut and pasted is
3 really what he did for the most part the Friends of the
4 Gorge petition. That isn't because the two groups are
5 aligned. It was just for expediency.

6 Did you want me to address the motion at this
7 point as well, the motion that Mr. McMahan referred to?

8 JUDGE WALLIS: My preference would be to defer
9 that until later in the proceeding.

10 MR. KAHN: Okay.

11 JUDGE WALLIS: Very well. In as much as there is
12 no objection to the petitions themselves but only concerns
13 about the breadth of the interest and the nature of the
14 concerns of the membership, I would grant the petitions for
15 intervention at this time but give leave for the Applicant
16 to state with clarity and particularity in a motion to limit
17 the nature of the participation to be allowed under those
18 interventions. And counsel, of course, will have the
19 opportunity to respond to that, and let's set the schedule
20 for that later in this session.

21 Very well. Mr. McMahan.

22 MR. McMAHAN: Mr. McMahan again. Just a couple
23 quick notes on a couple of the petitions. On the Seattle
24 Audubon Society's petition for intervention it's I think
25 fairly clear in setting forth the interests for the Seattle

1 Audubon I would just request that the Council's order
2 clarify the scope of the issues. It appears to be
3 predominantly relating to avian and habitat issues relating
4 to the project. With that understanding there is no
5 objection to that petition unless Mr. Cantrell can further
6 elaborate on that. I do think that that's what they're
7 after, but that issue is not stated with any particularity
8 in that petition and then finally on Skamania County --

9 JUDGE WALLIS: Excuse me. Why don't you just let
10 Mr. Cantrell respond.

11 MR. CANTRELL: Thank you, Your Honor. Your
12 assumption is correct. We're interested in the avian issues
13 and the habitat associated with those avian species.

14 MR. McMAHAN: No objection on those grounds.

15 JUDGE WALLIS: Very well.

16 MR. McMAHAN: Then finally on the Skamania County
17 Agri-Tourism Association petition, there again I think that
18 the statement of interest is relatively straightforward from
19 that petition. There is no statement of issues that's
20 discernible. I'm gathering from that that their issue,
21 their predominant reason for participating in the proceeding
22 relates to the visual and I guess tourism impact of the "A"
23 Strings only. So I would just request that the order be
24 very clear about that so that we have what is set forth in
25 their petition very clearly indicated with the issues for

1 the proceedings.

2 JUDGE WALLIS: Very well. In as much as -- well,
3 I think counsel is representing those interests, aren't you?

4 MR. KAHN: Just for today, yes.

5 JUDGE WALLIS: Mr. Kahn.

6 MR. KAHN: I believe the petition application
7 speaks for itself. The issues that they're concerned about
8 are listed in here, and I don't think we would have any
9 opposition to limiting their participation to those issues
10 as long as all of those issues are included.

11 JUDGE WALLIS: Very well. So are there objections
12 to any of the other petitions for intervention?

13 MR. McMAHAN: Not from the Applicant, thank you,
14 Your Honor.

15 JUDGE WALLIS: Very well. On that basis the
16 petitions for intervention are granted and those parties are
17 now parties to this proceeding. With the number of
18 intervenors in this proceeding, I am going to encourage the
19 intervenors who have some similar interests to work with
20 each other as the case goes forward. This is entirely
21 voluntary on your part, but I would suggest that it may be
22 very helpful for your positions if you do so. It would
23 avoid unnecessary duplication in the presentations and in
24 the arguments. As we go through the adjudicative proceeding
25 and receive evidence if there are duplicating questions or

1 grounds for objection to those, it actually can distract
2 from the functions and the issues rather than assist those
3 issues to have that duplication. So again as we go forward
4 I will ask that the parties certainly consider cooperation
5 among parties with similar interests to avoid unnecessary
6 duplication.

7 Now, Mr. McMahan indicated that there has been a
8 motion filed for consolidation and coordination for
9 consolidation of two of the petitions.

10 Mr. McMahan, do you have anything to add to the
11 statement regarding that motion?

12 MR. McMAHAN: Just to be clear, we're not
13 indicating that only one lawyer gets to participate. Our
14 request is that these be -- the rules allow and I think, of
15 course, Council to consider where they have those absolute
16 identification of issues that they be required to cooperate
17 together to designate a lead. In my opinion that could be a
18 lead for briefing, a lead for cross-examination. It
19 certainly could move through the proceedings, and in my mind
20 given what Mr. Kahn himself indicates it's a cut and paste
21 between the two petitions, it would greatly economize the
22 proceedings if that were required.

23 JUDGE WALLIS: Mr. Kahn.

24 MR. KAHN: Yes, thank you. As noted earlier, the
25 petitions are very similar and I used the word cut and paste

1 as Mr. McMahan just did, but that's where the interest for
2 the most part differ. While the listed issues are the same,
3 that was out of concern for limiting the participation of
4 the groups to specific issues. So although both groups have
5 the same or almost the same list of issues, the concerns we
6 have as to how those issues should be addressed, how the
7 impacts should be evaluated, and how negative impacts should
8 be mitigated if allowed at all are vastly different.

9 Friends of the Columbia Gorge has a much broader
10 approach than SOSA does. It is concerned about not only
11 this wind power project but other wind power projects that
12 have been and will be proposed for the areas in and near the
13 National Scenic Area within the Columbia River Gorge.

14 As I mentioned at the outset, SOSA was formed and
15 Mr. Drach is here to answer any questions on that as a
16 representative of SOSA, but SOSA was formed specifically for
17 this project. It is concerned predominantly about this
18 project, perhaps if other projects arise nearby they might
19 be interested in that as well. So one big difference is
20 while the broad issues certainly overlap how we view the
21 issues vastly differ, and it would be unfair to eliminate
22 one of the two approaches if you consolidate the appeals.

23 A second major distinction is that members of SOSA
24 all live very near the project. They will have different
25 level of impacts, different significance of impacts than

1 Friends of the Columbia Gorge will to be honest. Some of
2 our members live in the area, but all SOSA's members do. In
3 fact, some of SOSA's members live along the industrial haul
4 route on which the turbines and the nacelles and the rest of
5 the equipment will be brought. They have a much more
6 localized interest than Friends of the Columbia Gorge.

7 The groups themselves are different. Friends of
8 the Columbia Gorge has been around since 1980, SOSA since
9 2008 I believe. Friends of the Gorge is much more concerned
10 about cumulative impacts than SOSA is. SOSA is concerned
11 about this project as is Friends of the Gorge, but we have a
12 much broader concern as well. Friends is a regional
13 organization and has a bistate concern. SOSA's concern is
14 limited to its geographical area. Each of the organizations
15 has a different level of expertise.

16 The counsel representing SOSA, Richard Aramburu,
17 who's not here today is somewhat of a recognized expert in
18 Washington land use law. Friends of the Columbia Gorge as
19 an organization and me personally as an attorney have become
20 somewhat experts in National Scenic Area law. So our
21 interests and our expertise are different as well.

22 If you look at the applicable rule that
23 Mr. McMahan cited, WAC 463-30-092, it has a couple of parts.
24 First of all, it states that it should be the policy of the
25 Council to allow any intervenor broad procedural latitude.

1 That's number one. So you err on the side of accommodating
2 intervenors. Then it goes on to say that the Council can
3 actually limit, can condition intervention on requiring a
4 party whose interests are aligned with the Counsel for the
5 Environment to be represented by the Counsel for the
6 Environment. The way that sentence is worded it would be
7 over the objections of such a party.

8 The next sentence which I believe Mr. McMahan is
9 focusing on talks about how intervenor status may also be
10 conditioned upon allowance of other parties to act as lead
11 parties where appropriate. The words upon allowance implies
12 to me that would mean the parties have to agree. That the
13 Council does not have the authority to force a party to
14 become a lead party against the interest of the two parties.
15 We could not find any prior decisions that elucidated so
16 that's how we interpret it.

17 Having said all that, SOSA and Friends of the
18 Columbia Gorge while we do not want to be consolidated as
19 one and we do not want to be forced to have one lead
20 petitioner or one lead brief writer, one lead examiner, one
21 lead cross-examiner, I pledge to you that we will work
22 together to avoid duplication. This was evidenced to some
23 degree at the hearing in Underwood a few weeks ago where we
24 incorporated and adopted some of Mr. Aramburu's comments
25 rather than repeating them and we would purport to do the

1 same thing here. Where our argument or briefing is
2 identical, we will not duplicate it. You won't get two sets
3 of briefs that say the same thing much like you did the two
4 petitions. That was a different situation. You will also
5 not get two attorneys that ask the same questions of the
6 same witnesses. Mr. Aramburu and I have both been
7 practicing for years. We both have been involved in similar
8 cases where we've had similar interests with other parties
9 and have been successful in working together to coordinate
10 so as not to unduly delay or prejudice parties.

11 I might also add that of the comments that the
12 Council received from the hearing, the land use consistency
13 hearing, 92 percent of those were opposed to the project.
14 You only have four petitions to intervention from the
15 organizations opposed to the project. You have eight
16 petitions to intervene in support of the project so it's a
17 one-to-two ratio when you had 92 percent of the comments
18 opposing, and so we don't think it's necessarily unfair or
19 prejudicial to the Applicant to allow Friends of the
20 Columbia Gorge and Save Our Scenic Area to be separate
21 appellants, separate counsel acting on their own. But again
22 I would pledge to you as Mr. Aramburu would that we'll
23 coordinate to avoid undue duplicative efforts or delay.
24 Thank you.

25 MR. McMAHAN: Just one point. I do want to

1 clarify what the rules state and, of course, you have the
2 rules in front of you. But the rule is prescriptive in WAC
3 463-30-092. The Council has a great deal of discretion and
4 it indicates in the very last sentence which was not read:
5 The Council reserves the right to prescribe other
6 limitations and conditions where appropriate.

7 And really the authorities also derive from the
8 APA section as quoted in our motion under 334-05-443(c) that
9 authorizes the Council to require two or more intervenors to
10 combine their presentations of evidence in argument,
11 cross-examination, discovery, and other participation in
12 proceedings. The Council certainly does have that authority
13 vested in it and does not require the consent of the parties
14 to do that.

15 I have heard a great deal I think frankly in
16 support for the economy of doing it the way we're asking
17 Mr. Kahn has indicated they have participated together
18 throughout the proceedings. It strikes me that that
19 participation can be more formally addressed by
20 consolidating under the APA requirement, particularly as we
21 head into the adjudicative proceedings. Thank you.

22 JUDGE WALLIS: Very well. The Council will take a
23 brief recess now and we'll consider the arguments on the
24 motion. Let's be off the record.

25 (Recess taken from 2:03 p.m. to 2:15 p.m.)

1 JUDGE WALLIS: The Council has deliberated upon
2 the motion for consolidation and denies that motion based on
3 the representations of Mr. Kahn pointing out that the
4 interests and the membership of the groups are different,
5 and that counsel for the two groups will consolidate and
6 coordinate without a mandate to do so. Of course, if it
7 does get to the point where it appears that there are
8 duplications that are unnecessary, then the Council may
9 reconsider this ruling.

10 MR. KAHN: Thank you.

11 CHAIR LUCE: Your Honor, just to clarify what I
12 believe was the consensus of the Council.

13 Mr. Kahn, you referenced your interest as being
14 the I'll use my words big picture National Scenic Act, not
15 just within the National Scenic Act area but the Columbia
16 River Gorge and the cumulative impacts. So what we're
17 looking for from the Friends is to address those issues.

18 SOSA, on the other hand, has indicated issues
19 particular to this project. So what we're looking for from
20 SOSA is a discussion of issues particular to this project,
21 and I don't think that there's any need to overlap those
22 two.

23 If there is, I would like to hear more about it,
24 Your Honor.

25 MR. KAHN: When you say overlap are you --

1 CHAIR LUCE: I'm referring specifically, Mr. Kahn,
2 to the list of 26 or 27 items that dealt with, well, the
3 alphabet from A to Z. You represented here today
4 persuasively so that your interest, the Friends of the Gorge
5 interest, is the impacts on the National Scenic Area and the
6 Columbia River Gorge of these wind projects. I think maybe
7 to paraphrase you a big picture perspective or a global
8 perspective, and on the cumulative impacts that may be
9 associated with additional wind projects being sited within
10 the Columbia River Gorge, including the National Scenic Act.
11 That's I think how the Council sees your issues and your
12 interest as you've described them.

13 Your and SOSA's interests overlap. SOSA's
14 interest as you said and I believe as Mr. Thomas Drach would
15 agree are particular, more specific to the project itself.
16 So that's what I'm looking for and I think that's the
17 consensus of the Council in agreeing to allow both parties
18 to intervene.

19 MR. KAHN: I think we can certainly live within
20 that. I would just add that if there's a particular sort of
21 localized or site specific issue that is not addressed by
22 Mr. Aramburu and SOSA, I would like the Friends to still
23 have the opportunity to address that without any significant
24 overlap. We don't intend to submit cookie-cutter briefs
25 that mirror each other by any means. Mr. Aramburu and I

1 have already spoken and we are going to try to avoid
2 duplication, if necessary, incorporating arguments from the
3 other parties without repeating them. So I don't have any
4 problem with that.

5 CHAIR LUCE: But you do understand the cumulative
6 impacts are -- I know you understand that.

7 MR. KAHN: Sure.

8 CHAIR LUCE: And your interest of your membership
9 being global if you will --

10 MR. KAHN: Yes.

11 CHAIR LUCE: -- and specific to the Columbia River
12 Gorge.

13 MR. KAHN: I think we're comfortable with that.

14 CHAIR LUCE: All right.

15 JUDGE WALLIS: Very well. One matter remains for
16 discussion and that is the concern of the Council that the
17 parties offer some precise explanation of their approach to
18 and position on legal issues that are related to such
19 matters as jurisdiction and applicable law. Rather than ask
20 for complete briefing on those topics, what the Council
21 would like to see is to the extent your petition for
22 intervention identifies a legal issue, please clearly state
23 the issue, state your position on the issue, and define your
24 legal argument clearly and concisely using an outline format
25 to the extent needed for clarity. We are particularly

1 interested in jurisdictional issues but invite explication
2 of other legal issues as well. The Council does not want
3 extended argument or extensive briefing at this juncture.
4 It wants to know the scope of the disagreements and wants to
5 ensure that upon briefing the parties can speak clearly and
6 concisely to each other's arguments. This will enhance the
7 Council's focus on your issues and the Council's ability to
8 define them clearly for and upon briefing.

9 We recognize that it is too early to define
10 environmental issues and don't ask you to refine or present
11 any issue you've identified that will require information
12 that is not yet available to the record such as
13 environmental or economic study results.

14 We propose the following time frame for the
15 presentations. The intervenors making initial filings no
16 later than August 21, 2009 and the Applicant responding no
17 later than September 4 of 2009. Then upon reviewing the
18 filings and as the environmental work proceeds the Council
19 may require briefing, that is a full briefing, of the
20 arguments or other procedural processes by which those
21 issues may be addressed.

22 So let me ask if there are questions about your
23 assignment at this time.

24 MR. KAHN: Yes, I'm still I have to say a bit
25 unclear. You're asking for briefing on jurisdictional-type

1 issues under this schedule?

2 JUDGE WALLIS: We're asking for an outline of your
3 arguments on those issues. We are not asking for briefing
4 in the traditional full sense of legal briefing.

5 MR. KAHN: Are we going to discuss what those
6 issues are today or are we to just submit?

7 JUDGE WALLIS: We are not planning to discuss what
8 those issues are.

9 MR. KAHN: And then if you have intervenors'
10 briefs due August 21 and then the Applicant September 4, if
11 the Applicant raises a new issue that wasn't addressed by
12 the intervenors, do we not have an opportunity to respond?

13 JUDGE WALLIS: Again, I'm reluctant to call this
14 briefing, but I trust that if the intervenors are surprised
15 by something the Applicant presents that a request to
16 respond would be looked upon favorably.

17 MR. KAHN: Thank you.

18 JUDGE WALLIS: All right. Are there any other
19 questions?

20 Mr. McMahan.

21 MR. McMAHAN: Well, maybe getting to this, Judge
22 Wallis, just I would assume that all this is being
23 formalized in an order that will be issued by the Council in
24 short order?

25 JUDGE WALLIS: Yes.

1 MR. McMAHAN: Thank you.

2 JUDGE WALLIS: Very well. Is there anything
3 further to discuss today?

4 MR. CANTRELL: Yes, Your Honor. Again, Shawn
5 Cantrell, Seattle Audubon. I just wanted to clarify two
6 points that were raised, one by Mr. McMahan and one by Mr.
7 Kahn making sure that Seattle Audubon's position is clear.
8 Mr. McMahan had asked about our interest in focusing on
9 avian issues and habitat, and after I responded that, yes,
10 that was it, I did remember that we also specifically had
11 highlighted climate change and carbon-related issues, and I
12 would not want to leave that out of our set of interests.

13 And then the second, Mr. Kahn had mentioned that a
14 certain number of intervenors were opposed to the project,
15 that a certain number supported. I'm not sure where he put
16 my organization, but we have not yet taken a position for or
17 against so I just wanted to not have it somehow assumed that
18 we were in favor or opposed to this project at this time.

19 JUDGE WALLIS: Thank you.

20 Is there anything further? It appears that there
21 is not. I want to thank everyone for assisting us in going
22 through a great deal of material in perhaps a record time
23 for the number of participants.

24 Mr. McMahan, you have a worried look and a raised
25 hand.

1 MR. McMAHAN: One dangling issue that you
2 mentioned earlier and I'm not sure after just being better
3 informed about the position of the parties we'll proceed
4 with this, but you had left us leave to file a motion to
5 limit intervention by the Friends and SOSA. And, again, I'm
6 not sure we'll avail ourselves of that, but I would like to
7 at least have that schedule, if you will.

8 JUDGE WALLIS: Would you repeat that, please.

9 MR. McMAHAN: Yes, during argument on those two
10 petitions we argued both this motion for consolidation and
11 then greater clarification on the issues.

12 JUDGE WALLIS: Right, yes.

13 MR. McMAHAN: And you indicated particularly sort
14 of a standing request, standing issue.

15 JUDGE WALLIS: Very well. Can we handle that on
16 the same schedule that we set earlier? That is August 21
17 for the initial filing and September 4 for the response.

18 MR. McMAHAN: That's fine and then I would be the
19 opening brief?

20 JUDGE WALLIS: Yes.

21 MR. McMAHAN: That is fine.

22 JUDGE WALLIS: Very well.

23 CHAIR LUCE: Your Honor, maybe we dealt with that
24 to some extent by noting that the Friends' petition which
25 had been granted was to address the big picture perspective,

1 the National Scenic Act issues and the Columbia River Gorge
2 and the cumulative impacts associated with wind projects
3 therein, and that Sosa we look to Sosa to draw their
4 expertise and such as they might present on the particular
5 issues. So I think to some extent we have substantially
6 dealt with that.

7 MR. McMAHAN: As I've indicated, I don't know that
8 we'll avail ourselves of that request based upon what I've
9 learned today. I would say that if that's formalized at
10 least to some degree in the order, it would help me feel
11 better about not having to file that motion.

12 CHAIR LUCE: I would assume it would be formalized
13 in the order.

14 JUDGE WALLIS: Yes.

15 MR. McMAHAN: Thank you.

16 JUDGE WALLIS: Very well. Is there anything
17 further?

18 Let the record show that there's no response and
19 this conference is concluded. Thank you all.

20 * * * * *

21 (Whereupon, the prehearing conference was
22 adjourned at 2:27 p.m.)

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In re: Whistling Ridge Energy Project

A F F I D A V I T

I, Shaun Linse, CCR, do hereby certify that the foregoing transcript prepared under my direction is a full and complete transcript of proceedings held on July 28, 2009, in Olympia, Washington.

Shaun Linse, CCR 2029