Service Date: October 15, 2010

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. 10 COUNCIL ORDER NO. 854 Prehearing Order on Admission to the Adjudicative record of Documents by Reference

One objection was raised to Prehearing Order No. 8. Intervenors Save Our Scenic Area (SOSA), Friends of the Columbia Gorge ("Friends"), and others objected to a portion of the order indicating that copies of documents that are part of the SEPA or Land Use hearing records should ordinarily be submitted in hard copy for the adjudicative record, rather than submitted merely by reference to the administrative file. The question arose in the context of a proposal to submit into evidence a large number of documents, including comments to the draft EIS.

The administrative law judge ruled that documents should ordinarily be submitted to the record as paper copies for the convenience of parties, counsel and the Council, but identified possible exceptions.

The objection reads as follows:

> Paragraph A6 of the PHO holds that parties must resubmit previously filed SEPA documents, including filing and service of the filing and service of the required number of paper copies. Not only will this likely require the recirculation of tens of thousands of pages of duplicate material, it serves little purpose, because the participants in the matter already have ready access to these documents via the EFSEC web site. * * * The documents are already part of the administrative record....[quoting the following passage from 1995 Order 688 as authority]: "[T]he Council has determined that the SEPA documents should be part of the record" . . . It defies reason that the same material should need to be submitted twice, to the same agency, simply to again become part of the record. Moreover, the SEPA documents are not only already part of the record, they are also all publicly posted on the EFSEC web site.

There are two basic responses to the objection, based on the character of the documents:

1. Documents that have a direct and significant connection with the Adjudication, as opposed to the SEPA process, such as documents directly relevant to the testimony of adjudication witnesses or examination of experts. Such documents should ordinarily be submitted as hard copies. The purpose of the adjudicative record is not to provide casual reading, where references to outside sources may be common and appropriate. Instead, directly relevant documents may be the subject of questions during the adjudicative hearing and may be used and referenced in drafting of briefs, orders and recommendations. Parties, Council members and the Governor need to have them in hand for reference as questions are asked and answered and to understand the complete story of the witnesses. The assumption that a complete and organized record is unnecessary for complex litigation is incorrect.

2. Documents from SEPA or other records that may or may not be associated with this proceeding, that have little or no weight in the adjudication, that are duplicative, that are aimed at supporting or discrediting SEPA documents or conclusions (not a part of this record), or that are desired merely "to have them in the record." These could balloon the size of the record without benefit to the adjudication. Moreover, they would likely confuse and burden the record, making it more difficult to identify and work with exhibits that do have a significant relationship with directly relevant matters. If they are not worth providing clearly identified copies to the parties and deciders for easy reference and for a specific relevant purpose, they seem unlikely to contribute enough to the record to warrant admission.

In addition, the request calls for inclusion of documents that may not be easily referenced or found. For those documents, we note the following.

3. Contrary to the assertion in the objection, the SEPA record at this point is incomplete and preliminary and it is *not* in the evidentiary record. In the adjudication, some documents have been numbered for identification for presentation but **no** evidentiary documents are now in the adjudicative record. As has been repeatedly pointed out, the two tasks (SEPA and adjudication) are **not** now included in a single record. *Whether they eventually "should" or will comprise a single record is yet to be determined.* The claim that unmarked and unsponsored documents are already in the administrative record is correct, but they are not in the adjudicative record and cannot be received en masse for both legal and practical reasons.

That said, as was indicated at the prehearing conference, if a party demonstrates that a document is relevant or important to its position, that it qualifies for admission in the adjudication, that it has some impediment to inclusion in the record such as size or copyright restrictions, that it is so well-known or significant that parties and Council members have ready access to it, or some

other reason exists for reference rather than inclusion, the Council will consider record references on a case-by case basis and a party seeking such treatment may inquire of the Administrative Law Judge (copy to parties with the opportunity for parties' comment) or present the question formally. We do not believe that it will be necessary to make tens of thousands of copies to obtain an orderly review of relevant and probative information.

Dated at Olympia, Washington and effective this 15th day of October, 2010.

/s/

C. Robert Wallis, Administrative Law Judge

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL