

BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION  
COUNCIL

COUNCIL ORDER NO. 848  
PREHEARING ORDER NO. 4

In the Matter of Application No. 2009-01 of

WHISTLING RIDGE ENERGY PROJECT LLC

PREHEARING ORDER SETTING  
ADJUDICATION SCHEDULE; RULING  
ON MATTERS PRESENTED FOR  
DETERMINATION

for

WHISTLING RIDGE ENERGY PROJECT

The Washington State Energy Facility Site Evaluation Council ("Council") convened a prehearing conference in this matter at Stevenson, Washington on June 17, 2010, before Council members Jim Luce, Richard Fryhling, Jeff Tayer, Mary McDonald, Dennis Moss and Judy Wilson, and Administrative Law Judge C. Robert Wallis.

The following parties appeared:

Whistling Ridge Energy Project LLC, Applicant, by Tim McMahan, attorney, Vancouver, Washington, and Darrell Peeples, attorney, Olympia; Counsel for the Environment, H. Bruce Marvin, Asst. Attorney General, Olympia; Department of Commerce, by Dorothy H. Jaffe, Assistant Attorney General, Olympia; Friends of the Columbia Gorge, by Gary K. Kahn and Nathan Baker, attorneys, Portland; Save Our Scenic Areas and Skamania County Agri-Tourism Association, by Mr. Kahn; Skamania Public Utility District No. 1, by Humaria Falkenberg, Project Manager, Carson, WA; Seattle Audubon Society, by Shawn Cantrell and Matt Mega, Seattle; Culture Committee of Cultural Resources Program of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Culture Committee" in this order) by Warren Spencer, Tribal Council Member, and Jessica Lally, Archeologist, Toppenish.

The following topics were addressed and resolved at the conference:

**EXHIBIT NUMBERING:** The parties agreed to a numbering format for prefiled exhibits and asked that an example be provided; see Appendix 1 to this order for the example.

**SCHEDULE:** The parties engaged in considerable discussion regarding scheduling. Applicant presented a proposal prior to the conference, based on schedules in prior Council proceedings.

Other parties noted that the prior proceedings had neither the number of parties nor the degree of potential differences among parties that appear to characterize this proceeding. In particular, concern was expressed that the Applicant proposed to make its initial prefilings before the close of the period for comments to the draft Environmental Impact Statement

(DEIS) and that time should be allowed for discovery. Mr. Kahn suggested a schedule beginning after the close of the DEIS comment period and allowing time for discovery.

The parties agreed at the conference that Applicant's prefiling should not be scheduled prior to the close of the environmental comment period. The Council strongly agrees. In particular, counsel acknowledged public comments at the June 16 public comment session that identified potentially serious errors in, or omissions from, the draft EIS. The Council expects that the Applicant will incorporate into its direct presentation any information needed to address asserted significant flaws in the DEIS. The applicant may consult with Council Staff if it has questions regarding matters that may warrant attention in this manner. It will be unacceptable for the Applicant to place the burden on other parties to identify such matters and then to respond in its rebuttal to the concerns; that could require a delay for the opportunity for surrebuttal, an extension of the hearing schedule, and significant additional burdens on the parties. The schedule proposed below would therefore not be disrupted if a supplemental DEIS is needed.

Parties agreed that periodic status conferences could be helpful to keep the proceeding on track. The schedule adopted provides for such conferences and additional conferences may be held if needed.

The Council establishes the following schedule for the proceeding. Status conferences will be convened to monitor progress and discuss issues that may arise during preparatory phases of the proceeding.

First status conference:	September 1, 2010
Applicant's prefiling deadline:	September 15, 2010
Second status conference:	September 22, 2010
Other parties prefiling deadline:	October 27, 2010
Third status conference:	November 5, 2010
Rebuttal and cross-rebuttal <sup>1</sup> deadline:	November 24, 2010
Prehearing Conference in Olympia to mark exhibits for the record and discuss any other procedural matters	December 2, 2010
Hearing, in or near Stevenson, Washington, not exceeding 10 hearing days, beginning	December 8, 2010
Briefing schedule	To be determined at hearing

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<sup>1</sup> "Cross-rebuttal" is the opportunity for parties other than the applicant to respond to each others' evidence.

**DISCOVERY:** The parties agreed that an informal discovery processes would be appropriate. This order sets out guidelines for informal discovery procedures in Appendix II.

**TRIBAL PARTICIPATION:** Concerns have been raised by tribal participants that other tribal participants might not have full authority to represent the interests of the Yakama Nation. The Council addressed this concern in part when it responded to the petition for intervention of the Yakama Cultural Committee. Mr. Slockish and Mr. Jackson represent their own interests and those of any members of the two Tribes they have identified who agree with the positions the two named persons are taking. They have not contended, and we do not rule, that they represent any legal or formal entities of the named tribes. Similarly, the Cultural Committee represents the interests of the Committee; it has not shown by official action of the Yakama Nation that its positions or representations are those of the legal entity comprising the Nation. EFSEC seeks to be inclusive and to encourage participation exploring diverse, authentic cultural viewpoints.

The Cultural Committee expressed a desire to work collaboratively with the Council in the preservation of culturally significant sites. Washington's RCW 34.04 precludes Council members from working with one party outside of the hearing process. The Council suggests that the Committee work with the Applicant, with participation as appropriate from Council Staff, to identify and suggest preservation or remediation for such resources. Agreements with the Applicant should be presented to the Council for approval. The agreements may be subject to confidentiality under law to the extent necessary for protection of sites. To the extent the issues are not resolved, they may be presented to the Council for action, again subject to such procedural and confidentiality measures as required or allowed by law.

**TIMING OF FINAL EIS:** Mr. Kahn suggested that the Council complete and issue the Final EIS prior to the adjudicative hearing session. The Council declines to proceed in that manner. The environmental review and the application review proceed on parallel tracks until the conclusion of the process. Doing so allows the Council, in simultaneously making final decisions on each track, to preserve the integrity of both processes while ensuring consistency in the results. Issuing the final EIS prior to hearing could compromise the result of the adjudicative hearing.

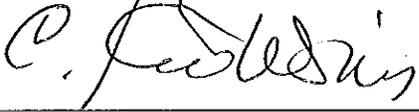
**ECONOMIC VIABILITY:** Parties also engaged in a discussion during the conference about the relevance and admissibility of information relating to the applicant's costs and potential revenues and their relationship with what might be called the "economic viability" of the project. The Council has ruled, and the Washington State Supreme Court affirmed, that such economic issues are not matters that the Council is empowered to consider.<sup>2</sup> Absent some demonstration that the current proceeding presents a matter to which the prior rulings would not apply, any such evidence from any party would presumably be rejected in the adjudication.

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<sup>2</sup> *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d. 255 (2008)

It is so ordered.

Dated at Olympia, Washington, and effective this 29th day of June, 2010.



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C. Robert Wallis, Administrative Law Judge

Opportunity for Review: Parties may seek review of this order within ten days following the date of service pursuant to WAC 463-30-270(3) by filing an objection with the Council and serving a copy on the service list for this proceeding. Answers, if any, should be filed and served within five days after service of the objection.

**Appendix I, Designation of Prefiled Exhibits.** The parties agreed to the use of prefiled testimony and exhibits and asked that the Council provide a format for labeling the documents. In the upper right-hand corner of the first page, each document must be labeled as follows:

[Name of Party]

[Name of Witness]

[Label of document] *e.g.* Prepared Testimony; CV; or other description

Exhibit No. [#], assigning "1" to the witness's testimony.

The Council will reserve exhibit numbers 1-99 for documents not sponsored by a party, such as the draft and final environmental impact statements. Applicant's first witness's direct testimony will take Exhibit No 101 and subsequent numbers, in series (102, 103, etc.), for other exhibits. Applicant's second witness will thus take a subsequent series of ten beginning with 1 (*e.g.*, 121) as determined at the September 1 status conference. Exhibits on cross examination will be assigned sequential numbers.

Other parties will be assigned a series of 100 numbers to be marked in a similar fashion and with the series based on the parties' agreed order of presentation, to be determined at the September 22 status conference.

**Appendix II, Process for informal discovery.** The parties have waived formal discovery as provided in WAC 463-30-190 and RCW 34.05.446.

The lead representative of record for each party is the presumed person to make and receive data requests at any time, unless the party designates another. Parties may make informal written or oral requests for discovery, and are encouraged to exchange information, at any time in the process.

Any party may no later than seven days after receiving another party's prefiled evidence request relevant information referred to in the evidence or related to its production or presentation. Information commonly and publicly available need not be provided. Production of private or proprietary compilations or analyses of such publicly available material may be required.

A rule of reason will apply, recognizing the short time frame of the hearing and the professional stature of counsel. We encourage informal calls, in advance, when they might be helpful to define the information sought, or after a request when they might distinguish between identified material that is, or is not, relevant. Counsel are expected to resolve such matters consistently with their implicit recognition at the conference that a rule of reason should apply. Any disagreements between representatives may be brought to the Administrative Law Judge with an electronic mail request<sup>3</sup> for a telephone conference.

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<sup>3</sup> Telephone numbers and email addresses may change between the date of this order and the timing of the hearing due to the pending transfer of administrative responsibilities for the Council from the Department of Commerce to the Utilities and Transportation Commission. Parties will be advised of appropriate contact information prior to expected need, or the information will be available from Council staff.