

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE, )  
INC.; SAVE OUR SCENIC AREA; )  
LORELEY DRACH; TOM DRACH; )  
JOYCE EASTWICK; MIKE EASTWICK; )  
CHARLIE GUTHRIE; ALEXANDER )  
MECL; CHERYL PARK; VICKI PRYSE; )  
DAN RAWLEY; JEANNIE RAWLEY; )  
ADRIENNE RUDERMAN; GLENDA )  
RYAN; and MATT RYAN, )  
)  
Appellants, )  
)  
vs. )  
)  
SKAMANIA COUNTY, )  
)  
Respondent, )  
)  
and )  
)  
WHISTLING RIDGE ENERGY, LLC, )  
)  
Intervenor-Respondent. )  
)

CRGC No. COA-S-09-01

Skamania County Resolution No. 2009-22

APPELLANTS' BRIEF ON WHETHER  
THE APPEAL IS MOOT

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## I. INTRODUCTION

This appeal involves a Skamania County Decision to authorize the Whistling Ridge Energy Project (“Project”), and specifically, the portions of the Project within the National Scenic Area. The Applicant, Whistling Ridge Energy, LLC (“WRE”), has proposed, and Skamania County has approved, the construction and use of an industrial “haul route” within the General Management Area (“GMA”), over which WRE would haul wind energy turbine components and construction materials for several miles in areas zoned and used for residential, agricultural, forest practices, and open space purposes. Because the Scenic Area Act and rules prohibit the establishment and expansion of industrial uses within the National Scenic Area,<sup>1</sup> Appellants filed this appeal.

On October 7, 2009, the Commission temporarily abated this appeal and called for briefing from the parties as to whether the appeal is moot. WRE then made adjustments to its Application. The changes neither resolve nor obviate the fundamental legal issues involved in this appeal. Nor has the County made any changes to the challenged Decision, which still authorizes the Applicant to construct and use an industrial haul route in the GMA. Because both the underlying dispute and the County’s Decision remain in effect, the appeal is not moot.

Although the appeal is not moot, the County’s Decision is expressly based on a specific route that has been formally eliminated from consideration. The Commission should remand the appeal to the County, so that the County may review the changes to the Application for consistency with Scenic Area requirements.

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<sup>1</sup> SCC §§ 22.04.010(88)(d), 22.10.020(A); 16 U.S.C. § 544d(d)(6).

## II. ARGUMENT

### A. The Applicant still proposes to construct and use an industrial haul route in the National Scenic Area, and the County's Decision still authorizes this proposal.

In an October 1, 2009 letter to the Commission and an October 12, 2009 letter to the Washington State Energy Facility Site Evaluation Council (“EFSEC”), the Applicant stated that, because of its changes to the Application, “no roadway improvements will be required to roads within the Scenic Area.” But in a subsequent letter to the Commission dated November 6, 2009, the Applicant backed off that statement, now stating that the Project will “avoid the use or modification of *private* roads within the Scenic Area” (emphasis added) and that the Applicant has not yet determined whether improvements to *public* roads are necessary.<sup>2</sup>

A close examination of the amended Application shows that (1) the Applicant still proposes to use an industrial haul route within the National Scenic Area, and (2) road construction to enable oversized and heavy trucks to navigate this route remains on the table, including on both private and public lands.

For example, the original Application proposed two alternative routes through the Scenic Area, both of which would require construction within the Scenic Area. (Original Application at § 2.19.5.) The Amended Application expressly eliminates one of these alternatives (Route 2)<sup>3</sup> because it would require construction within the National Scenic Area, and replaces this alternative with a new alternative (Route 3). (Amended Application at § 2.19.5.) In contrast,

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<sup>2</sup> The Applicants’ November 6, 2009 letter also characterizes the appeal as focusing “predominantly” on the “modification or improvement of *private* roads within the Scenic Area.” To the contrary, the Appellants have never made a distinction between private and public roads, nor focused predominantly on private roads. Appellants object to the construction and use of an industrial haul route within the National Scenic Area on both private and public roads. *See* Apps.’ Br. at 2–3, 12–17.

<sup>3</sup> The County’s Decision expressly states that it is based on Route 2 (Apps.’ Br. at App. B-11).

Route 1 remains in the Application as a potential haul route, even though “road improvements to this route would be required [within the Scenic Area] for access to construct the wind energy facility and for ongoing Operations and Maintenance traffic.” (*Id.*) Although Route 3 is the new “preferred” alternative, this “preference” could change at any time, allowing the Applicant to proceed with Route 1.

Moreover, even Route 3, the new “preferred” alternative, could entail road construction within the Scenic Area. The Applicant is apparently unwilling to definitively and formally rule out construction within the GMA for this route, including but not limited to road improvements at the east intersection of SR-14 and Cook-Underwood Road, and at a bridge over the Little White Salmon River, to enable industrial uses by oversized and/or heavy loads.

In addition to the construction issues discussed above, the Applicant still proposes to *use* one or more haul routes in the National Scenic Area for industrial purposes—namely, for the construction and maintenance of a new commercial energy facility. Although the exact route within the Scenic Area may have changed, the nature of the use has not.

Finally, the County’s Decision remains in effect, and has not been rescinded or modified since the changes to the Application. The Decision still authorizes the construction and use of an industrial haul route within the National Scenic Area as part of this Project. *See* Apps.’ Br. at App. B-18.<sup>4</sup>

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<sup>4</sup> However, the County’s Decision states that it is based on Route 2 (Apps.’ Br. at App. B-11), which has subsequently been formally deleted from the Application. *See* footnote 3 and accompanying text. To allow the County to review the amendments to the Application, the Commission should remand this matter to the County. The need for a remand will be further discussed in the Conclusion (Part III) below.

**B. The appeal is not moot.**

The Applicant's November 6, 2009 letter to the Commission asserts that the Applicant's amendments to the Application would render the appeal moot. If the Applicant still contends that the appeal is moot, then the Applicant has the burden to demonstrate mootness. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to [occur] lies with the party asserting mootness."). As will be explained below, the Applicant has failed to meet this burden of proof.

An appeal is moot if it presents purely academic issues and it is not possible for the court to provide effective relief. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn. 2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1994) (citing *Sorenson v. City of Bellingham*, 80 Wn. 2d 547, 558, 496 P.2d 512 (1972)). Neither factor is present here. The appeal still involves a dispute over whether WRE may construct and use an industrial haul route within the General Management Area. The recent changes to the Application do not change this fundamental dispute. Nor has the County changed or rescinded its approval of an industrial haul route. See *Davis v. City of Bandon*, 28 Or LUBA 38 (1994) (LUBA appeal was not moot as long as the local government's decision remained in effect).

Here, the Gorge Commission can provide effective relief by holding that the County erred in determining that WRE may construct and use an industrial haul route within the GMA. The appeal is not moot and should not be dismissed.

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### III. CONCLUSION

Based on the foregoing, the appeal is not moot and should not be dismissed. But because the Applicant has amended the Application, both the County's Decision and the parties' briefing on the merits are based on an obsolete version of the Application. The Applicant's new "preferred" haul route has never been evaluated by the County for consistency with the Scenic Area Act and rules. Given the changes to the Application, the Commission should remand the matter to the County. This will allow the local decision-makers the opportunity to review the changes via the local public process, rather than allowing these changes to be reviewed for the first time by the Commission on appeal.<sup>5</sup>

In the event that the Commission decides to evaluate the changes to the Application instead of remanding the appeal, the Commission should first allow the parties an opportunity to replace or supplement their Briefs to address the modified proposal. Otherwise, the Appellants will have been allowed to brief only whether the changes render the proposal moot, and not the merits of the changes (*i.e.*, whether the proposal as modified is consistent with the Scenic Area Act and rules).<sup>6</sup>

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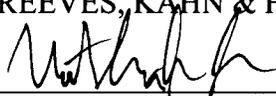
<sup>5</sup> The Gorge Commission is the appellate body in this matter. It does not have original jurisdiction to review Skamania County land use applications or changes thereto for consistency with the Scenic Area rules. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn. 2d 30, 36, 49–50, 26 P.3d 241 (2001) (“When the Gorge Commission approved [Skamania County’s] Ordinance as consistent with the Management Plan, the [land use review] authority that the Gorge Commission had . . . was transferred to the County, with the Gorge Commission retaining only the right to comment on land use applications, the right to appeal the [County’s] decisions . . . , and final appellate authority over all final county decisions.”); 16 U.S.C. § 544e(b) (authorizing counties to adopt Scenic Area ordinances), 544e(c)(2) (“Upon approval of a [county] land use ordinance by the Commission it shall supersede any regulations for the county developed by the Commission . . . .”); Revised Management Plan at 8 (“The . . . counties . . . implement the [Management Plan] by ordinance.”).

<sup>6</sup> The Order Abating Appeal states that the mootness briefs must not include legal argument on any issue other than mootness.

If the appeal goes forward, the only other outstanding legal issue (other than those discussed above) is whether Commissioner Loehrke should be recused from participation in the appeal to avoid violating the Appearance of Fairness Doctrine, given his public advocacy in support of the Project.

Dated: December 16, 2009.

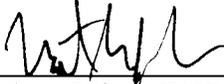
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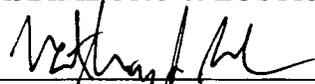
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