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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of  
Application No. 2009-01

WHISTLING RIDGE ENERGY, L.L.C.

WHISTLING RIDGE ENERGY PROJECT

Application No. 2009-01

APPLICANT'S RESPONSE TO  
INTERVENORS' STATEMENTS OF  
LEGAL ISSUES

15 COMES NOW the Applicant, Whistling Ridge Energy, LLC, by and through its  
16 attorneys of record Stoel Rives, LLP and Darrel L. Peeples and in accordance with Energy  
17 Facility Site Evaluation Council ("Council") Prehearing Order No. 1 (Council Order No. 842),  
18 submits this response to Intervenor's Statements of Legal Issues. The Applicant continues to  
19 reserve its right to address and seek limitations on the scope of Intervenor's participation in  
20 particular issues involved in this proceeding.

21 **A. Environmental Issues**

22 **1. Effects on the Environment**

23 A number of the legal issues identified by Intervenor's implicate the Project's asserted  
24 effect on the environment. *See, e.g.*, Seattle Audubon Society's Legal Issue A (concerning avian  
25 impacts). These issues "will be addressed in both the Council's State Environmental Policy Act  
26 (SEPA) review and the Council's adjudicative hearing. . . . [T]hey are outside the scope of the

1 Council’s land use decision[.]” Council Order No. 828, Page 3 of 6. Consequently, and as the  
2 Council appropriately recognized by not asking the parties to refine legal issues requiring  
3 unavailable information, consideration of such evidence-based issues is premature at this stage.

4 **2. Whether SEPA requires consideration of the environmental impacts of**  
5 **building wind turbines on adjacent land owned by the Washington**  
6 **Department of National Resources (“DNR”).<sup>1</sup>**

7 The inclusion of these environmental impacts is not required, because the Applicant is  
8 not proposing to expand the Project onto DNR-owned land and the DNR is no longer even  
9 considering leasing this land for wind energy development. SEPA requires an analysis of  
10 impacts that are “likely, not merely speculative.” WAC 197-11-060(4)(a). Impacts that “merely  
11 have a possibility of occurring, but are remote or speculative,” need not be considered.  
12 WAC 197-11-782. Given that the DNR is no longer even considering leasing this land for wind  
13 energy development, the environmental impacts of such development are clearly remote,  
14 speculative, and not subject to review under SEPA.

15 **B. Columbia River Gorge National Scenic Act (“Scenic Act”) Issues**

16 **1. Whether the Scenic Act applies to land outside the Columbia River Gorge**  
17 **National Scenic Area (“Scenic Area”).<sup>2</sup>**

18 As a matter of federal statutory law, the Scenic Act does not apply to land uses outside  
19 the Scenic Area. Congress could not have more clearly expressed that the Scenic Act did not  
20 “establish protective perimeters or buffer zones around the scenic area or each special  
21 management area.” 16 U.S.C. § 544o(a)(10). Congress enacted this prohibition with full  
22 knowledge of the transmission facilities and other uses that are clearly visible from the Scenic  
23 Area. Consequently, the Scenic Act cannot regulate land use outside the Scenic Area even  
24 though such land uses can be seen from inside the Scenic Area. Furthermore, using the

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26 <sup>1</sup> Raised by Save Our Scenic Act (“SOSA”) as Legal Issue 3.2.  
<sup>2</sup> Raised by Association of Washington Business, Friends of the Columbia Gorge (“FOCG”) as Legal Issue  
A.3, Klickitat and Cascade Tribes of the Yakama Nation as Legal Issue 2, Klickitat County Public Economic  
Development Authority, and Skamania County Economic Development Council.

1 environmental review required under SEPA to buffer the Scenic Area from certain land uses  
2 would nullify Congress’ clearly expressed statutory prohibition on the creation of buffers and  
3 would establish a far-reaching precedent imperiling the use and development of every kind on  
4 hundreds of square miles of land in proximity to the Scenic Area.

5 **2. Whether the Council or the Columbia River Gorge Commission (“Gorge**  
6 **Commission”) has jurisdiction over the Project’s proposed improvement and**  
7 **use of existing roads in the Scenic Area.<sup>3</sup>**

8 The Council has jurisdiction over the Project’s proposed improvement and use of existing  
9 roads in the Scenic Area, because the Energy Facilities Site Locations Act (“Act”) preempts all  
10 county land use and environmental regulations. Skamania County Code (“SCC” or “County  
11 Code”) Title 22 is the applicable local Scenic Area land use and environmental regulation. The  
12 land use decisions made pursuant to SCC Title 22 are Skamania County (“County”) land use  
13 decisions, not Gorge Commission decisions. The Gorge Commission has no original decision-  
14 making role but rather serves as one of several appellate bodies for SCC Title 22 land use  
15 decisions. The Act preempts *all* county land use permitting processes and any appellate review  
16 by vesting sole land use review authority in the Council, decision making authority in the  
17 Governor, and appellate review in the Washington Supreme Court. RCW 80.50.110, 80.50.120,  
18 80.50.140. Consequently, the Gorge Commission has no jurisdiction over the proposed  
19 improvements and use of existing roads in the Scenic Area.

20 **C. Land Use Consistency Issues**

21 **1. Whether the proposed use of existing roads in the Scenic Area constitutes an**  
22 **“industrial use” prohibited by SCC Title 22.<sup>4</sup>**

23 The proposed use of existing roads in the Scenic Area does not constitute an “industrial  
24 use” prohibited by SCC Title 22, because these existing roads will not be “primarily involved” in  
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26 <sup>3</sup> Raised by the Gorge Commission, FOCG as Legal Issue A.1, and SOSA as Legal Issue 3.4.

<sup>4</sup> Raised by FOCG as Legal Issue A.2, Klickitat and Cascade Tribes of the Yakama Nation as Legal Issue 3, and SOSA as Legal Issue 3.4.

1 the production of electric power for commercial purposes. SCC 22.04.040. Instead, they will  
2 continue to be primarily utilized for the public’s varied and numerous transportation needs and  
3 for commercial forestry operations. Furthermore, even if these existing roads were to be  
4 “primarily” used for the production of electric power for commercial purposes, SCC Title 22  
5 regulates the road improvements themselves, not the end-uses for which the improved roads will  
6 be used.

7 The County has determined that the Project is consistent with applicable land use plans  
8 and zoning ordinances. This determination constitutes “*prima facie* proof” of land use  
9 consistency and compliance. WAC 463-26-090. The Council has also demonstrated that it is  
10 primarily focused on site certification applications’ consistency with “the overall goals and  
11 policies” in local land use regulations and the “controlling purpose and intent” of local zoning  
12 ordinances. Council Order No. 826, Pages 16 & 75 of 76. Consequently, the Council should  
13 give considerable deference to the County’s land use consistency determination when the County  
14 has clearly indicated that the Project conforms to the land use regulations that the County  
15 enacted to protect public health, safety, and general welfare.

16 **2. Whether the County Code or comprehensive plan controls.**<sup>5</sup>

17 The County Code controls over the “blueprint guidance” offered by the County’s  
18 comprehensive plan. Because the County is not a Growth Management Act county, its  
19 comprehensive plan is simply a “blueprint” and is considered no more than a “guide” to the later  
20 development and adoption of controlling zoning ordinances. *Barrie v. Kitsap County*,  
21 93 Wash. 2d 843, 848-49 (1980). Furthermore, even if the Council found that the Project is  
22 inconsistent with the comprehensive plan despite the County’s *prima facie* consistency  
23 determination, the Council’s preemption authority can resolve any inconsistency. The Act  
24 anticipates that the imposition of appropriate conditions is the principal tool to resolve any  
25 inconsistency. Here, where the County itself has made a determination of consistency and

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<sup>5</sup> Raised by FOCG as Legal Issue C.1.

1 pursuant to the recent Washington Supreme Court adjudication of the Kittitas Valley Wind  
2 Power Project, the Council should reconcile any minor inconsistency with the County's  
3 comprehensive plans and the County Code through preemption and appropriate conditions of  
4 approval.

5 **D. Conclusion**

6 The issues pending before the Council at this time relate exclusively to consistency with  
7 local land use plans and ordinances. The Council should resolve these issues in accordance with  
8 the legal framework presented in this Response.

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10 DATED this 2nd day of September, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of September, 2009, I served a true copy of the foregoing *Applicant' Response to Intervenors' Statements of Legal Issues* on the following named person(s) by the following method:

- Mailing/ U.S. first-class postage prepaid
- Hand delivery

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