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AUG 17 2009

**ENERGY FACILITY SITE  
EVALUATION COUNCIL**

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of )  
Application No. 2009-01 )  
WHISTLING RIDGE ENERGY, LLC )  
 )  
 )  
WHISTLING RIDGE ENERGY )  
PROJECT )  
\_\_\_\_\_ )

**COLUMBIA RIVER GORGE  
COMMISSION'S STATEMENT  
OF LEGAL ISSUES**

On August 4, 2009, the Energy Facility Site Efficiency Council (Council) ordered intervenors to clearly state legal issues, state clearly the party's position on the issue, and define its legal argument clearly and concisely. The Council stated that it is particularly interested in jurisdictional issues, but invites explication of other legal issues as well.

The Columbia River Gorge Commission (Commission) complies with this order to the extent that it can do so without violating its' responsibility under the Columbia River Gorge National Scenic Area Act, the Columbia River Gorge Compact, and its administrative rules to provide a fair appeal hearing in *Friends of the Columbia Gorge, et al. v. Skamania County*, COA-S-09-01 (filed May 29, 2009), which is currently pending before the Commission and involves legal issues relevant to the Whistling Ridge Energy Project. The appellants also include

Save Our Scenic Area, which, like Friends of the Columbia Gorge are intervenors in this matter before the Council.

The Commission sits in a quasi-judicial role in this appeal. The commission must therefore not conduct outside research, subject itself to ex-parte communications and potential conflicts, or take a position on any issue related to the matter before it until it disposes of the appeal.

As of the date of this submittal, the Commission has received the appellants' brief. The appellants raise the following legal issues:

- Whether Skamania County's Resolution adopting the certification of land use consistency for the Whistling Ridge Energy Project is a land use decision appealable to the Commission;
- Whether the Commission has jurisdiction to hear an appeal of the Resolution;
- Whether the appellants have exhausted all of their administrative remedies; and
- Whether road improvements on the proposed haul route through the National Scenic Area are prohibited by the Scenic Area Act and implementing regulations.

The respondents' briefs in the appeal before the Commission are due August 16, 2009 and may raise additional legal issues.<sup>1</sup> Based on prior correspondence from Skamania County, the Commission expects one or more of the respondents to raise the issue of whether the Commission has jurisdiction to decide any legal or factual questions in a matter that is pending before the Council.

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<sup>1</sup> The Commission's Counsel will be on vacation and out of telephone and electronic contact August 17-21, 2009. The Commission thus cannot provide the Council with a list of the issues that the Respondent's raise in their briefing prior to the August 21, 2009 due date for this statement of legal issues.

The commission has set October 13, 2009 for oral argument in the appeal, and the commission will issue a final written decision shortly after that date.

With this background, the Commission addresses the Council's order:

**Clear Statement of Legal Issues, Including Jurisdiction**

The Commission limited its intervention in this Council matter to the legal question of whether the Council has legal authority to include portions of the project within the National Scenic Area in its adjudication process. That is, does the National Scenic Area Act, 16 U.S.C. §§ 544–544p, permit the Council to review the portions of the project within the Columbia River Gorge National Scenic Area for consistency with the National Scenic Area Act, the Scenic Area Management Plan, and the Skamania County land use ordinance that administers the Management Plan?

This is a jurisdictional question.

**Commission's Position on Legal Issue**

The Commission is unable to provide the Council with its position on this legal issue because the Commission expects it will need to address this or substantially related issues in resolving the currently pending appeal noted above. As the Commission noted in its Petition to Intervene, the Commission will be in a position to fully participate in assisting the Council to resolve this legal question after it has disposed of the appeal, which at this time, the Commission estimates would likely be in November, 2009.

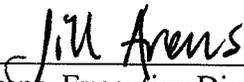
The Commission urges the Council not to try to address this question without the Commission's assistance. This is a complex legal question, and the Commission and its legal counsel have unique expertise in resolving potential conflicts between the Scenic Area Act,

Columbia River Gorge Compact, Scenic Area implementing regulations, and requirements of state law.

**Clearly Defined Legal Argument**

For the same reasons that the Commission cannot provide the Council with its position on the legal issue it identified in its Petition to Intervene, the Commission cannot, at this time, provide legal argument relating to its position.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of August 2009

  
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Jill Arens, Executive Director  
Columbia River Gorge Commission

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on this 13<sup>th</sup> day of August 2009, I served the COLUMBIA RIVER GORGE COMMISSION'S PETITION TO INTERVENE by first class mail, postage prepaid to all of the parties listed in the attached Service List as of 7-29-09:

  
\_\_\_\_\_  
Nancy Andring, Administrative Secretary  
Columbia River Gorge Commission

Service List

Whistling Ridge Energy Project Application No. 2009-01

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<sup>1</sup> PLEASE NOTE: Allen Fiksdal new email address.

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<sup>2</sup> PLEASE NOTE: New email address for Tony Usibelli

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