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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

SAVE OUR SCENIC AREA'S
AND FRIENDS OF THE
COLUMBIA GORGE'S
SUPPLEMENTAL OBJECTIONS
TO PREHEARING ORDER NO. 4

On July 8, 2010, Save Our Scenic Area (SOSA) and Friends of the Columbia Gorge (Friends) filed objections to certain provisions of the Pre Hearing Order #4 (PHO#4) dated June 29, 2010. SOSA and Friends file this supplemental objection regarding provisions of the PHO concerning discovery.

Appendix II, page 5 of the PHO, is entitled "Process for informal discovery."

The text of that appendix states in part that:

The parties have waived formal discovery as provided in WAC 463-30-190 and RCW 34.05.446.

SOSA and Friends do not believe that that any party "waived" formal discovery rights accorded by EFSEC rules and statute. There was discussion at the pre-hearing conference that informal discovery might suffice in most instances, but no "waiver" of formal discovery was expressed.

1 RCW 34.05.446 makes provisions for discovery under the Washington
2 Administrative Procedures Act (WAPA) as follows:

3 (1) The presiding officer may issue subpoenas and may enter
4 protective orders. A subpoena may be issued with like effect by the
5 agency or the attorney of record in whose behalf the witness is
6 required to appear.

7 (2) An agency may by rule determine whether or not discovery is to
8 be available in adjudicative proceedings and, if so, which forms of
9 discovery may be used.

10 (3) Except as otherwise provided by agency rules, the presiding
11 officer may decide whether to permit the taking of depositions, the
12 requesting of admissions, and all other procedures authorized by
13 rules 26 through 36 of the superior court civil rules. The presiding
14 officer may condition use of discovery on a showing of necessity and
15 unavailability by other means. In exercising such discretion, the
16 presiding officer shall consider: (a) Whether all parties are
17 represented by counsel; (b) whether undue expense or delay in
18 bringing the case to hearing will result; (c) whether the discovery will
19 promote the orderly and prompt conduct of the proceeding; and (d)
20 whether the interests of justice will be promoted.

21 (4) Discovery orders and protective orders entered under this section
22 may be enforced under the provisions of this chapter on civil
23 enforcement of agency action.

24 This statutory provision is implemented by EFSEC in the following rule:

25 WAC 463-30-190 Discovery practice.
26 Discovery is available when permitted by the presiding officer and
27 shall be conducted in accordance with RCW 34.05.446.

28 EFSEC thus essentially incorporates by reference the discovery provisions
of WAPA, and allows discovery as appropriate and when permitted by the presiding
officer.

The WAPA and EFSEC rules do not automatically allow the parties to
engage in the usual means of discovery practice as in Superior Court. Rather, the
usual means of discovery are allowed only in the sound discretion of the Presiding
Officer, subject to the requesting party showing "necessity and unavailability by
other means." RCW 34.05.446(3). As the PHO states, it is likely that in most
instances, informal discovery will be sufficient. However, SOSA and Friends do not

1 wish to eliminate, in appropriate instances, the possibility of traditional discovery.

2 SOSA and Friends request that the PHO be modified to clarify that the
3 parties have not waived traditional discovery, and that the parties may seek
4 traditional discovery as permitted by RCW 34.05.446(3).

5 DATED this 9th day of July, 2010.

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12 DECLARATION OF SERVICE

13 I am an employee in the law offices of Aramburu & Eustis, LLP, over
14 eighteen years of age and competent to be a witness herein.

15 I hereby certify that on the date below written I caused delivery of one
16 original and 12 copies plus an electronic copy on CD by first-class mail and a
17 copy by email to EFSEC, and sent by email and first-class mail to each of the
18 parties of record on the attached service list a true and correct copy of the
19 foregoing document.

20 Dated: This _____ day of July, 2010.

21
22 _____
23 Carol Cohoe, Secretary
24 Aramburu & Eustis, LLP
25
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Service List

Whistling Ridge Energy Project Application No. 2009-01

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¹ Mr. Slockish requested that his mail be sent c/o Whistling Ridge Energy.