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

PREHEARING ORDER NO. 20
COUNCIL ORDER NO. 865

Council Order Affirming Restriction
against Incorporations by reference into
Briefs

After the adjudicative hearing in this case, the Council directed Administrative Law Judge Wallis
to establish maximum briefing page lengths for land use and adjudicative hearing issues. This
was done by Judge Wallis after discussion with and among parties at a post-hearing conference
January 20, 2011. No party objected to the established page limitation, and the limitation was
incorporated in Council Order 863 on March 4, 2011.

Friends of the Columbia Gorge (Friends) and Save Our Scenic Area (SOSA) sought to
incorporate by reference the contents of each others’ briefs as well as other documents.

Judge Wallis entered an order on March 4, 2011 ruling, among other things, that the
incorporation was improper and would not be received. Friends objects to the ruling, “to
preserve its rights on appeal,” but citing no authority in support of its position. Applicant
responds, citing numerous authorities that incorporations by reference are improper.

The Council sustains the order which clearly states that attempted incorporations by reference
violate the page limitations. They would have resulted in briefs the equivalent of nearly 100
double-spaced pages in length. Particularly troubling is Friends’ acknowledgment that its
incorporations by reference are made expressly to avoid the Council’s briefing limitations, to
which it had agreed at the January 20 post-hearing conference.

The “incorporation by reference” device also puts an unfair, unanticipated burden on other
parties, particularly the County, who may feel obligated to respond to the “incorporated”
material within the established page limitations.

To be clear: (1) It is reasonable to set out passages from exhibits or laws or other citable
material, and to refer to exhibits and other appropriate documents as authority or as the source of
cited material but (2) unreasonable to hamper Council efforts to provide procedural fairness by
seeking to circumvent the Council’s procedural order limiting briefing page limitations in the manner sought by Friends and SOSA.

For the reasons stated herein, the Council affirms the procedural order of March 4, 2011 and strikes the “incorporated by reference” material from SOSA’s and Friends’ briefs.

For the Council,

James O. Luce, Chairman

Olympia, Washington

March 21, 2011