

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL**

In the Matter of)	
Application No. 2009-01)	
)	COLUMBIA RIVER GORGE
WHISTLING RIDGE ENERGY, LLC)	COMMISSION'S PETITION
)	TO INTERVENE
)	
)	
WHISTLING RIDGE ENERGY)	
PROJECT)	
_____)	

I. INTRODUCTION

The Columbia River Gorge Commission (commission) files this petition to intervene pursuant to RCW 34.05.443 and WAC 436-30-091, and the Notice of Opportunity to Intervene, dated June 23, 2009. The commission's interest relates to scope of the Council's permitting process, specifically, whether portions of the project within the Columbia River Gorge National Scenic Area may be reviewed by the Energy Facility Siting Council for consistency with the Columbia River Gorge National Scenic Area Act, the Management Plan for the Columbia River Gorge National Scenic Area, and the county land use ordinances that administer the Scenic Area Management Plan.

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At this time, there is a pending appeal before the commission relating to portions of the project within the National Scenic Area. *Friends of the Columbia Gorge, et al. v. Skamania County*, CRGC No. COA-S-09-01 (filed May 29, 2009). The appeal is based upon the record and 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. Nevertheless, the commission files this petition to intervene to preserve its ability to participate in the adjudication and assist the Council once it has disposed of the appeal.

II. POINTS AND AUTHORITIES

WAC 463-30-091 requires a petition for intervention to adequately identify the petitioner, and establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded.

A. Identification of the Petitioner

The petitioner in this motion is the Columbia River Gorge Commission, a bi-state agency created by Washington and Oregon through the Columbia River Gorge Compact with the consent of Congress. 16 U.S.C. § 544c(a)(1)(A); RCW 43.97.015; ORS 196.150.

The Commission's contact information is:

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B. The Gorge Commission's Interest in the Whistling Ridge Energy Project

1. Introduction to the Columbia River Gorge National Scenic Area Authorities.

The Columbia River Gorge National Scenic Area Act ("Act") governs all land use within the Columbia River Gorge National Scenic Area. 16 U.S.C. § 544-544p. The Act authorized Washington and Oregon to enact an interstate compact to establish the bi-state Gorge Commission to administer the Act. 16 U.S.C. § 544c; RCW 43.97.015, ORS 196.150 (Washington and Oregon's codification of the compact). The Act requires the Commission and U.S. Secretary of Agriculture to prepare a management plan specifying land use designations and means of protecting and enhancing the scenic, cultural, natural, and recreation resources of the Scenic Area. 16 U.S.C. § 544d. Counties then adopt land use ordinances to administer the management plan. 16 U.S.C. §§ 544e(b); 544f(h). The Commission must find these county ordinances are consistent with the management plan. 16 U.S.C. §§ 544e(c); 544f(i).¹

Once the commission finds a land use ordinance consistent with the management plan, the county becomes the entity authorized to administer the Scenic Area land use regulations through that ordinance. Appeals of county actions relating to implementation of the Scenic Area Act must be filed with the commission. 16 U.S.C. § 544m(a)(2). Persons adversely affected by the commission's decision on appeal may seek judicial review of the commission's decision. 16 U.S.C. § 544m(b)(4). In describing this process, the Ninth Circuit stated, "Under the Act, and the resulting Compact, all land use

¹ The U.S. Secretary of Agriculture must also concur with the commission's finding of consistency for portions of land use ordinances relating to special management areas identified in the Act. The commission understands the portions of the project located with the National Scenic Area are not within a special management area.

within the Columbia River Gorge Scenic Area, whether private, federal or local, will be consistent with the management plan developed by the Commission." *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 112 (9th Cir. 1992).

One of the conditions of Congress's consent to the Gorge Compact was that the states must provide state agencies the authority to carry out their respective functions and responsibilities in accordance with the Gorge Compact and the federal Scenic Area Act.

16 U.S.C. § 544c(1)(B). The states did so, enacting identical language:

The governor, the Columbia River Gorge commission, and all state agencies and counties area hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the compact executed pursuant to RCW 43.97.015, the Columbia River Gorge National Scenic Area Act, and the provisions of this chapter.

RCW 43.97.025(1); ORS 196.155.

2. Interest of the Gorge Commission

As the principal land use planning agency for the Columbia River Gorge National Scenic, the commission has an interest in ensuring that any land use permitting within the National Scenic Area uses a process authorized by the Scenic Area Act. The Commission has more expertise than any other party or potential party to advise and assist the Council in determining whether it has authority to include portions of the project within the National Scenic Area under the Council's adjudication process. At this time, the commission takes no position as to process because the appeal relating to the project pending before the commission raises this issue.

The appeal pending before the commission complicates the commission's meaningful participation before the Council at this time. While the commission wishes to assist the Council and parties in determining the appropriate scope of the Council's

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review, and how the Council may comply with RCW 43.97.015 and its authorizing statutes and administrative rules, the commission is unable to do so until it disposes of the appeal. The commission has set October 13, 2009 for oral argument in the appeal. The commission will issue a final written decision shortly after that date.

WAC 463-30-091 specifies that the Council will consider whether intervention by a petitioner would unduly delay the proceeding or prejudice the rights of the existing parties. Here, the commission urges the Council to allow the commission's petition even though it cannot participate at this time. Determining the scope of the Council's review relating to portions of the project in the National Scenic Area is fundamental to the Council's proceeding. The commission's petition does not unduly delay the proceeding because the Notice of Prehearing Conference noted issues unique to this proceeding and suggested that the Council might establish a schedule for submission of briefs on those issues. That schedule could run concurrently with the commission's appeal process, thus not delaying the process.

C. Intervention is Necessary to Protect the Commission's Interest

This petition for intervention is necessary in this proceeding to protect the commission's interest in ensuring the proper scope of the Council's process and the Scenic Area process. The federal government and the states created the commission specifically to ensure compliance with the Scenic Area Act; no other party can represent the interest of the commission because no other party has the same regional concern or expertise with the Scenic Area Act and assisting state agencies to compact with the Act.

Without assistance from the commission, the Council might engage in an *ultra vires* process that would impair the commission's interest in ensuring that actions within

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the National Scenic Area are consistent with the Scenic Area authorities. As well, a challenge to the process from such an *ultra vires* act could delay the project—a delay that could be avoidable by hearing from and working with the commission after the commission disposes of the pending appeal.

III. CONCLUSION

The Columbia River Gorge Commission requests that the Council grant this petition to intervene. The scope of the Council's review and the Scenic Area review is fundamental to the Council's proceeding, and the commission is the entity best-suited to assist the Council in determining the scope of this proceeding.

RESPECTFULLY SUBMITTED this 16th day of July 2009

Jill Arens
Jill Arens, Executive Director
Columbia River Gorge Commission

VERIFICATION

JILL ARENS declares as follows:

I am the Executive Director of the Columbia River Gorge Commission, the party seeking intervention in this petition for intervention. I have personal knowledge of the facts in this declaration and am competent to testify to those facts.

I have read the foregoing petition for intervention, I verify that the statements in the petition for intervention are true, and request that the petition for intervention be granted.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at White Salmon, Washington, this 16th day of July 2009.

Jill Arens
JILL ARENS

SUBSCRIBED AND SWORN to before me this 16th day of July 2009.

Nancy A. Andring
Nancy A. Andring,
Notary public in and for the State of
Washington.
My appointment expires 11-19-2011



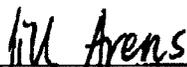
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REQUEST TO FILE PETITION TO INTERVENE BY FAX

WAC 463-30-120(1)(c) authorizes filing by fax upon request by a party and the authorization by the council manager or designee.

The commission requests to file this Petition to Intervene by fax due to a lengthy time researching and considering whether it is appropriate for the commission to file a petition to intervene while there is an appeal relating to the project pending before the commission. The commission follows this fax filing with the original by first class mail to the Council. The commission also serves this petition by fax and first class to all of the parties listed in the Notice of Proceeding.

RESPECTFULLY SUBMITTED this 16th day of July 2009.



Jill Arens, Executive Director
Columbia River Gorge Commission

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 16th day of July 2009, I served the COLUMBIA RIVER GORGE COMMISSION'S PETITION TO INTERVENE by fax and by first class mail, postage prepaid to all of the parties listed below:

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Jill Arens, Executive Director
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