

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of)
Application No. 2009-01) Prehearing Conference
WHISTLING RIDGE ENERGY, LLC.) Pages 1 - 19
WHISTLING RIDGE ENERGY PROJECT)
_____)

A prehearing conference in the above matter was held on Monday, January 3, 2011, at the Skamania Lodge, 1131 S.W. Skamania Lodge Way, in Stevenson, Washington at 10:13 a.m., before the Energy Facility Site Evaluation Council with C. Robert Wallis, Administrative Law Judge, presiding.

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WHISTLING RIDGE ENERGY, LLC, Tim McMahan, Attorney at Law, 900 S.W. Fifth Avenue, Suite 2600, Portland, Oregon 97204; and Darrel Peeples, Attorney at Law, 325 Washington Street N.E., No. 440, Olympia, Washington 98506.

COUNSEL FOR THE ENVIRONMENT, H. Bruce Marvin, Assistant Attorney General, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100.

REPORTED BY:

SHAUN LINSE, CCR
CCR NO. 2029

1 APPEARANCES (Cont'd):

2 DEPARTMENT OF COMMERCE, Dorothy H. Jaffe,
3 Assistant Attorney General, Office of the Attorney General,
4 P.O. Box 40109, Olympia, Washington 98504-0109.

5 FRIENDS OF THE COLUMBIA GORGE, Gary K. Kahn,
6 Attorney at Law, Reeves, Kahn & Hennessy, P.O. Box 86100,
7 Portland, Oregon 97286-0100; Nathan Baker, Staff Attorney,
8 522 S.W. 5th Avenue, Suite 720, Portland, Oregon 97204-2100.

9 SAVE OUR SCENIC AREA (SOSA), J. Richard Aramburu,
10 Attorney at Law, Aramburu & Eustis, LLP, 720 Third Avenue,
11 Suite 2112, Seattle, Washington 98104-1860.

12 SKAMANIA COUNTY ECONOMIC DEVELOPMENT COUNCIL, and
13 PORT OF SKAMANIA COUNTY, Bradley W. Andersen, Attorney at
14 Law, Schwabe, Williamson & Wyatt, P.C., 700 Washington
15 Street, Suite 701, Vancouver, Washington 98660; and
16 Bryan-Miller, Executive Director, 167 N.W. 2nd, P.O. Box
17 436, Stevenson, Washington 98648.

18 SEATTLE AUDUBON SOCIETY, Shawn Cantrell, Director
19 of Conservation, 8050 35th Avenue N.E., Seattle, Washington
20 98115.

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22 JUDGE WALLIS: Let's be on the record, please.

23 This is a prehearing conference in the matter of
24 EFSEC Proceeding No. 2009-01 involving an application for
25 Whistling Ridge Power Project. This conference is being

1 held in Skamania, Washington on January 3 of the year 2011.

2 Let's begin by introducing the bench. My name is
3 Robert Wallis, and I'm the presiding Administrative Law
4 Judge for this proceeding, and I am going to ask the Council
5 Members and advisers at the bench to introduce themselves
6 beginning with Mr. Moss

7 MR. MOSS: I'm Dennis Moss with the Washington
8 Utilities and Transportation Commission.

9 MR. CREWS: Kyle Crews with the Attorney General's
10 Office.

11 CHAIR LUCE: Jim Luce representing the Governor's
12 office.

13 MR. FRYHLING: Dick Fryhling here representing the
14 Department of Commerce.

15 MR. SUTHERLAND: Doug Sutherland designee from
16 Skamania County.

17 JUDGE WALLIS: Thank you and let's move to counsel
18 now, and I will read the name of the party and ask that the
19 representative this morning, the lead representative to
20 introduce herself and himself and any other attorneys who
21 are appearing on behalf of that party beginning with the
22 Applicant Whistling Ridge Wind Power.

23 MR. McMAHAN: Good morning, Your Honor, Members of
24 the Council, Tim McMahan Stoel Rives Law Firm -- is this on?
25 It is. Okay -- here on behalf of Whistling Ridge Energy.

1 With me is Darrel Peeples, my able assistant. There will be
2 two other lawyers who will be coming and going through the
3 week. Erin Anderson will be here Wednesday through Friday
4 probably and my partner Stephen Hall, an energy lawyer from
5 my office, will be here likely on Monday. Thank you. And
6 Mr. Spadaro is seated right there, the Applicant who is
7 funding this good time.

8 JUDGE WALLIS: Thank you.
9 Counsel for the Environment?

10 MR. MARVIN: Yes, Members of the Council, Bruce
11 Marvin appearing on behalf of Counsel for the Environment.

12 JUDGE WALLIS: Department of Commerce?

13 MS. JAFFE: Good morning. Dorothy Jaffe,
14 Assistant Attorney General, representing the Department of
15 Commerce.

16 JUDGE WALLIS: Friends of the Columbia Gorge?

17 MR. KAHN: Good morning. Gary Kahn with Reeves,
18 Kahn & Hennessy representing Friends of the Columbia Gorge.
19 With me on my left is Nathan Baker also representing Friends
20 of the Columbia Gorge, and at some times during this
21 proceeding there might be another gentleman who is in the
22 office right now whose name is Rick Till who may be joining
23 us at counsel table.

24 JUDGE WALLIS: Skamania County Public Utility
25 District No. 1?

1 MR. ANDERSEN: Brad Andersen from Schwabe,
2 Williamson & Wyatt. Ken Woodrich is the PUD's attorney, but
3 he's I think pursuant to some pretrials the understanding is
4 he's not going to be here at the time the PUD is going to
5 testify so I am the pitch hitter for him. Since I'm up
6 here, if it's okay, I'll be representing the Skamania Port
7 as well as the Skamania County Economic Development Council.
8 The only client I have here today is Peggy Bryan who was
9 formally the executive director for the EDC, and she is
10 going to be providing testimony on Friday.

11 JUDGE WALLIS: Thank you.

12 Save Our Scenic Area?

13 MR. ARAMBURU: Richard Aramburu representing Save
14 our Scenic Area.

15 JUDGE WALLIS: The Association of Washington
16 Business?

17 Seattle Audubon Society?

18 MR. CANTRELL: Shawn Cantrell, Seattle Audubon.

19 JUDGE WALLIS: City of White Salmon?

20 Klickitat County Public Economic Development
21 Authority?

22 MS. DRUMMOND: Good morning, Your Honor. Susan
23 Drummond representing Klickitat County Public Economic
24 Development Authority and also Skamania County.

25 JUDGE WALLIS: Klickitat and Cascade Tribes of the

1 Yakama Nation?

2 The Port of Skamania County, Mr. Andersen.

3 The Confederated Tribes and Bands of the Yakama
4 Nation?

5 Skamania County, Ms. Drummond.

6 All right. Thank you very much.

7 The items that I have on my agenda for discussion
8 this morning include the seating arrangements for counsel,
9 the exhibit list with last minute corrections. You have a
10 draft copy of the latest draft to which we acknowledge that
11 some changes are necessary, and I'm going to ask staff to
12 pass that around now so that counsel have it.

13 Objections to exhibits on cross-examination. Let
14 me ask if any counsel do have objections to exhibits
15 proposed for cross?

16 I see none. Very good.

17 MR. McMAHAN: Well, Your Honor, Tim McMahan on
18 behalf of the Applicant. There are several exhibits for
19 cross-examination for Mr. Spadaro which we would like at
20 least to inquire as to their relevance before they are
21 admitted into evidence. I'd just as soon take that up, if
22 you would like to do, when the testimony commences. The
23 other -- I remember I need to slow down, Shaun.

24 The other thing is, of course, there are some
25 other cross-examination exhibits coming this morning for

1 rebuttal witnesses, and we will have an objection to the
2 Smallwood errata which I would prefer to take up at the time
3 Mr. Smallwood testifies, if at all possible.

4 JUDGE WALLIS: Very well. That and order of
5 cross. Is there any other items that parties would like to
6 address?

7 MR. KAHN: Yes, Your Honor, Gary Kahn. We were
8 going to address the Smallwood errata sheet, but I guess
9 we'll deal with that when it comes up with Mr. McMahan.
10 There are also some exhibits that we would request that the
11 Council take official notice of pursuant to your rule. I
12 don't know if this is the right time to address that or not.

13 JUDGE WALLIS: My suggestion would be that counsel
14 wait for that request until a topic is being addressed and a
15 witness is being questioned that we would have reference to
16 those documents.

17 MR. KAHN: Okay. And then the other issue is this
18 the appropriate time to distribute our cross-rebuttal
19 exhibits?

20 JUDGE WALLIS: Very well.

21 MR. KAHN: We have one binder that includes both
22 SOSA's and Friends of the Columbia Gorge's cross-rebuttal
23 exhibits.

24 JUDGE WALLIS: Very well. Are there any other
25 cross exhibits to come this morning?

1 MR. McMAHAN: Yes, Your Honor.

2 MS. TALBURT: Your Honor, is it okay for staff to
3 put dividers into the binders for you or do you want them
4 right away?

5 JUDGE WALLIS: I don't believe that would be
6 necessary right away.

7 MR. TALBURT: Okay. We'll put dividers in them.

8 MR. ARAMBURU: One other prehearing matter,
9 Mr. Wallis.

10 JUDGE WALLIS: Mr. Aramburu.

11 MR. ARAMBURU: During our most recent prehearing
12 conference there was discussion about the timing of the site
13 visit which I understand would intend to be included not
14 only a visit to physically the site but also to some of the
15 key viewing areas, the KVAs. I note from my looking at the
16 Portland weather forecast this morning that tomorrow is
17 scheduled according to the National Weather Service to be a
18 clear day. So I raise that early on and then following that
19 take judicial notice of the weather I guess. But following
20 that we are due for a period for inclement cloudy, rainy
21 weather for the Pacific Northwest so I raise that point now.

22 JUDGE WALLIS: Very well. Thank you. While
23 everyone is paying rapt attention, I would like to ask all
24 of the counsel, all of the audience, and all of the Council
25 Members to turn off your cell phones.

1 Okay. Let's begin with seating arrangements. In
2 an earlier prehearing conference I inquired whether parties
3 would like to have a podium, and I have set one up for
4 possible use on cross-examination, and I'd like to get some
5 feedback from counsel on whether you think that's an
6 appropriate arrangement or whether you would rather
7 cross-examine from your chairs.

8 MR. KAHN: This is Gary Kahn. I'll take the lead
9 on that. I prefer to cross-examine sitting here with my
10 information in front of me.

11 JUDGE WALLIS: Any other?

12 MR. McMAHAN: Same assuming we get a microphone.

13 MR. ARAMBURU: You should have made arrangements
14 in advance. That would be fine with us too.

15 MR. PEEPLES: Your Honor, I assume the witness is
16 going to be at this podium; is that right?

17 JUDGE WALLIS: We have a table for the witness up
18 here.

19 MR. PEEPLES: Okay.

20 JUDGE WALLIS: Okay. In that event, I don't hear
21 anyone clamoring for that arrangement so what I'm going to
22 suggest is that we have staff take the podium away, and
23 those seats would be available for counsel. You can see
24 from the arrangements that some of the seats may be less
25 than perfect for a view of everything and everyone, and

1 people who would like to take advantage of those seats right
2 now you're welcome to move, if you would like. We do have a
3 microphone on the front table back there or back table
4 depending on your perspective. I will ask that the
5 microphone stand be returned to staff. We did settle on six
6 as a minimum number of microphones that we would need, and
7 what we're going to have to do is pass those around so that
8 the person speaking is able to use a microphone.

9 Let's move to the exhibit list now. There were
10 several items that have been identified in recent
11 correspondence as requiring a change from the latest
12 iteration of that list which is titled draft exhibit list
13 December 31, 2010. Let me if ask everyone who needs one has
14 a copy of that list?

15 Very well. Let's go through it and see which
16 items still require attention.

17 MR. McMAHAN: Your Honor, Tim McMahan here. The
18 first question is this one looks like the same version you
19 sent on Saturday; is that correct?

20 JUDGE WALLIS: Yes.

21 MR. McMAHAN: Okay. Good. One clarification for
22 Spadaro 1.06r, the letter from Yakama Nation withdrawing
23 cultural survey results. We had as part of our
24 understanding with the Yakama Nation agreed to withdraw any
25 rebuttal exhibits from Mr. Spadaro.

1 JUDGE WALLIS: Very well. So we will cross that
2 off the list.

3 MR. McMAHAN: The second question I have we still
4 have Sarah McDaniel scheduled to come to the hearing. We
5 were going to ask the parties whether that was necessary or
6 not. I understand the Siting Council may have questions as
7 well so we need to respect that. I just want to pose
8 whether or not she needs to come here given the fact that
9 the tribe has stipulated to her not coming and don't intend
10 to ask her questions.

11 JUDGE WALLIS: Mr. Kahn.

12 MR. KAHN: Gary Kahn, Friends of the Columbia
13 Gorge. At this point we have no questions for Ms. McDaniel,
14 but I'm not sure it's appropriate to excuse witnesses
15 because the Council may have questions.

16 JUDGE WALLIS: Let me ask if there are any Council
17 Members present who would have question for Ms. McDaniel?

18 It does not appear so, and with that understanding
19 I believe it would be safe to remove Ms. McDaniel from the
20 witness list.

21 MR. ARAMBURU: We may have a question or two for
22 her, and so I want to confer with counsel about that. I
23 don't think she's scheduled until later on in the week.
24 We'll let you know by noon on that if we do have a question
25 or two.

1 JUDGE WALLIS: Very good.

2 MR. McMAHAN: Your Honor, my understanding on that
3 similar to what has occurred in other proceedings, she would
4 still be a witness in the proceeding but just by sworn
5 stipulation, in a sense sworn affirmation of her filed in
6 writing.

7 MR. ARAMBURU: So she's not being withdrawn as a
8 witness?

9 MR. McMAHAN: Correct.

10 JUDGE WALLIS: Very well.

11 MR. McMAHAN: The other question I have is the
12 rebuttal testimony of Mr. Raschio was responsive to a
13 document whose admissibility has not yet been determined,
14 and that is the transmission study that I think is a
15 cross-examination exhibit for Mr. Spadaro. Should that
16 study -- and we put Mr. Raschio in when a lawyer had offered
17 in essence testimony through declaration about that
18 transmission study. So it's responsive to that transmission
19 study. He is an expert in that arena. So I want to just
20 flag that. If that study doesn't come in one way or
21 another, I see little reason for Mr. Raschio to come to
22 testify.

23 JUDGE WALLIS: Very well.

24 MR. McMAHAN: And then the only other I think the
25 last thing I had was I think there was a mistake. It's on

1 page 7 under Hovee. I don't believe the rebuttal testimony
2 was filed by Mr. Hovee or if I missed something.
3 Mr. Andersen is representing the EDC, and I don't believe
4 that was prepared.

5 MR. ANDERSEN: You're right. I think you're
6 right.

7 JUDGE WALLIS: Very well. Any other matters?

8 MR. McMAHAN: Not from the Applicant.

9 MS. DRUMMOND: Susan Drummond for Skamania County,
10 quick question. Similarly to Mr. McMahon's question, Chuck
11 Covert I don't believe there's any cross-examination
12 scheduled for him as well.

13 JUDGE WALLIS: Ms. Drummond, I'm having a little
14 trouble hearing you so I suggest that we pass that mic down
15 to your chair, and that way you will be able to speak from
16 the comfort of your own chair.

17 MS. DRUMMOND: Yes, Susan Drummond for Skamania
18 County. Similar question with regard to Chuck Covert. I
19 don't believe there's cross-examination from the other
20 parties for Friends and SOSA or anybody else for him. I'm
21 assuming he does not need to be here in person. His
22 testimony, of course, is filed, but he does not need to
23 appear.

24 JUDGE WALLIS: What was the witness name?

25 MS. DRUMMOND: Chuck Covert. He appears for

1 Klickitat County Economic Development Authority.

2 JUDGE WALLIS: That's direct testimony designated
3 49?

4 MS. DRUMMOND: Correct, yes.

5 JUDGE WALLIS: Very well. Are there any further
6 changes or corrections?

7 Mr. Baker, I think you drew attention to one or
8 two. Have those been covered?

9 MR. BAKER: I believe so. I believe we renumbered
10 Shawn Smallwood's exhibits to his rebuttal exhibits to
11 22.00r. I think there was an exhibit that was labeled as an
12 Apostol exhibit that was actually a Smallwood exhibit. That
13 would be 24 -- no, 21.09 is actually a Smallwood exhibit, a
14 Smallwood cross-examination rebuttal exhibit. So it looks
15 like there was a repeat 22.08c is also labeled 21.09c so
16 there is no 21.09c.

17 JUDGE WALLIS: So the documents on this list
18 that's shown as 21.09c should be in the Smallwood list?

19 MR. BAKER: It is as 22.08c.

20 JUDGE WALLIS: Very well.

21 MR. BAKER: That's all I can recall from my list.

22 JUDGE WALLIS: Okay, very good. Thank you very
23 much. Very well. My understanding is that counsel would
24 prefer to voice objections on exhibits on cross at the time
25 the witness comes forward; is that correct?

1 MR. McMAHAN: From the Applicant's perspective, we
2 haven't even read what we just received from the Friends and
3 SOSA which is quite extensive so we're not capable of doing
4 it right now.

5 JUDGE WALLIS: Very well.

6 MR. KAHN: Same thing from our end.

7 JUDGE WALLIS: Any objection to that?

8 It appears that there are none.

9 One other matter was raised being the schedule of
10 a site visit based on the weather. Do any other parties
11 wish to be heard on that?

12 MR. McMAHAN: I'm sorry, Your Honor. I was
13 talking to my client and I missed your question.

14 JUDGE WALLIS: Is there any objection to or are
15 there any comments to the proposed change of schedule that
16 would set a site visit for tomorrow?

17 MR. McMAHAN: Well, I think we need to understand
18 what happens to the witness schedule so we can help
19 witnesses get here, and I would like -- maybe we need to
20 reserve this, but I think we need discussion about the
21 protocols of the site visit because we have some serious
22 concerns about how it's going to be conducted.

23 JUDGE WALLIS: That's understood. Very well.
24 What I am going to suggest is that the Council take that
25 under advisement, and we'll have a chance to consult with

1 the Council Members about their preferences and with staff
2 about logistical issues, and I believe we will be prepared
3 to respond when we take up the afternoon session.

4 MR. McMAHAN: As to the site, the project site
5 itself, it's my understanding the road is not plowed, and
6 I'm not sure it can be plowed this week. Potentially later
7 this week but not today, and even when plowed at least at
8 this point in time a vehicle can still get stuck if the
9 road's plowed but they're not the right vehicles.

10 JUDGE WALLIS: Very well. Okay. Is there
11 anything else that the parties would like to cover now?

12 MR. KAHN: Your Honor, back to the site visit.
13 Even if the site is not accessible today, we think it's
14 pretty important that the Council see what the site would
15 look like from a number of the key viewing areas. Even if
16 we can't do the site visit tomorrow, we think tomorrow
17 should be used to look at key viewing areas and other
18 viewpoints.

19 JUDGE WALLIS: Very well.

20 MR. PEEPLES: Your Honor, I have a comment on
21 that. I mean the term site visit is used. I'm assuming
22 this is going to be a view in the judicial sense.

23 JUDGE WALLIS: Yes.

24 MR. PEEPLES: Okay. So I guess my preference is
25 we refer to it as a view and concentrate on that. The other

1 comment I have, and I know it's kind of we're maybe in a
2 no-win situation, but we have had a series of witnesses that
3 have locked into their schedule, and it is going to have
4 some significant effect on some witnesses to change that
5 schedule I mean I guess for whose convenience, but I just
6 hope -- I personally don't care, but I think the witnesses
7 that will be coming down the line are going to care.

8 JUDGE WALLIS: Very well. What I would suggest on
9 that we're going to break here shortly and the Council can
10 consult. Mr. Aramburu and Mr. Baker have been involved in
11 the suggestion and the scheduling and perhaps parties can
12 consult on the effect that would have on witness
13 appearances, and then we'll hear from you later on that. In
14 the meantime we will endeavor to consult with staff and with
15 Council Members so that we can come together with a better
16 understanding of the implication and the practicalities of
17 doing that.

18 Very well. Is there anything further to be
19 discussed at the present?

20 Let the record show there is no response. I thank
21 you for participating. We will be off the record. We will
22 take up at eleven o'clock this morning and hear opening
23 statements from the parties.

24 Mr. McMahan.

25 MR. McMAHAN: Your Honor, would you remind us of

1 the time limit for opening statements. Since you do have
2 the written opening statements what is your anticipation of
3 time limit expected of the lawyers?

4 JUDGE WALLIS: Ten minutes per party.

5 MR. KAHN: Your Honor, did you say we're going to
6 resume at 11:00?

7 JUDGE WALLIS: Yes.

8 MR. KAHN: Not 1:00. Okay.

9 JUDGE WALLIS: Yes.

10 MR. ARAMBURU: You said ten minutes per party?

11 JUDGE WALLIS: Very well. Thank you.

12 For the Council Members who are present here we do
13 have a break room in 459, and why don't we go on up to that
14 room and take up the site visit issue along with staff.

15 So we will be back at eleven o'clock, and we will
16 at that point hear the opening statements of parties.

17 * * * * *

18 (Whereupon, the prehearing conference was
19 adjourned at 10:35 a.m.)

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In re: Whistling Ridge Energy Project
Application No. 2009-01

A F F I D A V I T

I, Shaun Linse, CCR, do hereby certify that the foregoing transcript prepared under my direction is a full and complete transcript of proceedings held on January 3, 2011, in Stevenson, Washington.

Shaun Linse, CCR 2029