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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application No. 2009-01:
WHISTLING RIDGE ENERGY LLC
WHISTLING RIDGE ENERGY PROJECT

APPLICANT’S REPLY TO FRIENDS OF
THE COLUMBIA GORGE AND SAVE
OUR SCENIC AREA’S MOTION TO
TAKE OFFICIAL NOTICE OF A
“COMMISSIONER’S AGENDA ITEM
COMMENTARY” AND SKAMANIA
COUNTY ORDINANCE NO. 2011-08

COMES NOW the Applicant, Whistling Ridge Energy LLC (“Whistling Ridge”), by and through its attorneys of record Stoel Rives LLP and Darrel L. Peebles and submits this reply to Intervenor Friends of the Columbia Gorge (“FOCG”) and Intervenor Save Our Scenic Area’s (“SOSA”) (collectively, “Opponents”) motion to take official notice under WAC 463-30-230 of a “Commissioner’s Agenda Item Commentary” and Skamania County Ordinance No. 2011-08.

A. Commissioner’s Agenda Item Commentary

Opponents’ motion convincingly demonstrates one thing—Opponents have truly taken to heart the old adage “If at first you don’t succeed, try, try again” (even if the law does not support you), because Opponents have unsuccessfully attempted to introduce eleven documents after the adjudicative record closed.¹ FOCG even unsuccessfully attempted to introduce a different

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¹ These eleven documents include written surrebuttal testimony from Opponents’ witness, a Bonneville Power Administrative (“BPA”) informational document, a BPA record of decision, a BPA webpage, a Scenic Area book excerpt, an exhibit that the Council had previously “rejected” during the adjudicative hearing, a Cowlitz County Superior Court decision, another “Commissioner’s Agenda Item Commentary,” altered excerpts of a documents pertaining to a Wyoming wind energy project, the Coyote Crest Final Environmental Impact Statement, and purported briefing submitted to a Skamania County Hearings Examiner.

1 “Commissioner’s Agenda Item Commentary” with its petition for reconsideration.² See FOCG
2 Pet. for Rec. at 9 n.21, Ex. B.

3 Opponents now ask the Council to take official notice of the Commissioner’s Agenda
4 Item Commentary under WAC 463-30-230. However, WAC 463-30-230(2) clearly requires that
5 parties “be notified *either before or during [the] hearing*, or by reference in preliminary reports
6 or otherwise, of the material so noticed.” (Emphasis added.) The hearing and record have long
7 since closed. WAC 463-30-230(2) also clearly requires that parties “be afforded an opportunity
8 to contest the facts and material so noticed.” Whistling Ridge has not had the opportunity to
9 contest anything contained in this Commissioner’s Agenda Item Commentary. As the Council
10 has previously held,

11 The problem with considering any such submission is that it is
12 offered after the record is closed and the factual material has not
13 been subjected to the scrutiny of cross-examination. Other parties
14 would no doubt (indeed, they have informed us that they would)
15 appeal any such process as a violation of due process and as illegal
16 procedure in violation of our own rules.

17 Order No. 757 at 11.

18 The Council should not take official notice of this Commissioner’s Agenda Item
19 Commentary and should strike it from the record. The record is closed, the Council’s
20 recommendation has been reported to the Governor, and Opponents’ frivolous argument lacks
21 any legal basis. In order that there be no question about what is in the record, the Council would
22 be well advised to clearly state that all of the documents outside the record that Opponents
23 attached and/or cited to in their petitions for reconsideration are not part of the record. See
24 WAC 463-30-335(2) (limiting petitions to reconsideration “to the evidence in the record”).

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² Multiple parties objected to that attempt and asked the Council strike that “Commissioner’s Agenda Item
Commentary” from the record. Whistling Ridge Res. to Pets. for Recons. at 4:8-16; Skamania County and Klickitat
County Public Economic Development Authority Res. to Pets. for Recons. at 12:7-16.

1 **B. Skamania County Ordinance No. 2011-08**

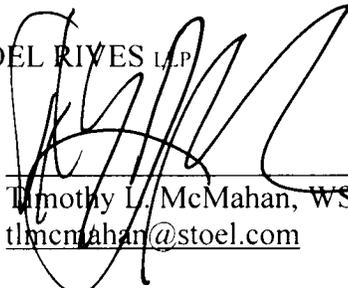
2 Whistling Ridge does not oppose consideration of Skamania County Ordinance
3 No. 2011-08, because an earlier moratorium ordinance appears as Ex. 1.15c.³ As Opponents
4 correctly state, the County’s moratorium ordinance has been the subject of extensive argument in
5 this proceeding. In fact, in its order concluding the adjudicative process, the Council concluded
6 that Opponents’ arguments concerning the moratorium ordinance were “irrelevant.” Order
7 No. 868 at 11. Opponents reiterated these arguments in their petitions for reconsideration, and
8 the Council found them, among other issues, “to be without sufficient merit to warrant
9 discussion.” Order No. 870 at 3 n.5. If the Council wants to include the current version of an
10 “irrelevant” ordinance in the record, it is free to do so.

11 **C. Conclusion**

12 For the reasons set forth above, Whistling Ridge asks that the Council deny Opponents’
13 motion to take official notice of the Commissioner’s Agenda Item Commentary and strike it
14 from the record.

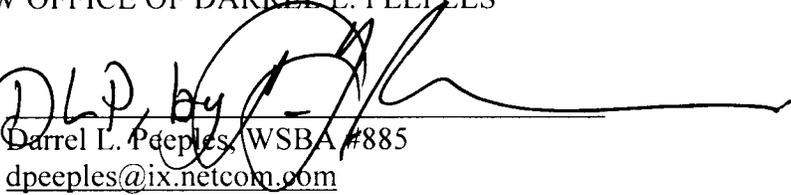
15 DATED: January 3, 2012.

16 STOEL RIVES LLP

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24 Attorneys for Applicant Whistling Ridge Energy LLC

25 ³ Whistling Ridge similarly did not object to FOCG’s citation to and attachment of Skamania County
26 Ordinance No. 2011-03 to its petition for reconsideration. See Whistling Ridge Res. to Pets. for Recons. at 4:8-12.