

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 - 44
 WHISTLING RIDGE ENERGY PROJECT)
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A prehearing conference in the above matter was held on Wednesday, September 22, 2010, at the Washington PUD Association, 212 Union Avenue, First Floor, in Olympia, Washington at 10:00 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, Stoel Rives, LLP, 805 Broadway Street, Suite 725, Vancouver, Washington 98660; 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,
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4 Washington 98504-0109.

5 FRIENDS OF THE COLUMBIA GORGE, Gary K. Kahn,
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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,
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12 SKAMANIA COUNTY AGRI-TOURISM ASSOCIATION, John
13 Crumpacker (via bridge line), Board Member, P.O. Box 100,
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15 SKAMANIA COUNTY ECONOMIC DEVELOPMENT COUNCIL,
16 Peggy Bryan (via bridge line), Executive Director, 167 N.W.
17 2nd, P.O. Box 436, Stevenson, Washington 98648.

18 CONFEDERATED TRIBES and BANDS OF THE YAKAMA
19 NATION, (via bridge line) George Colby, Attorney at Law, and
20 Jessica Lally (via bridge line), Archeologist, P.O. Box 151,
21 Toppenish, Washington 98948.

22 KLUCKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT
23 AUTHORITY, Michael Canon, Executive Director, MS-CH-26, 127
24 West Court, Goldendale, Washington 98620.

25

1 APPEARANCES (Cont'd):

2 SKAMANIA COUNTY PUBLIC UTILITY DISTRICT NO. 1,
3 PORT OF SKAMANIA COUNTY, and CITY OF WHITE SALMON, Ken
4 Woodrich, Attorney at Law, P.O. Box 510, 40 S.E. Cascade
5 Avenue, Suite 110, Stevenson, Washington 98648.

6 * * * * *

7 JUDGE WALLIS: This prehearing conference will
8 please come to order. This is a prehearing conference
9 before the Washington State Energy Facility Site Evaluation
10 Council in the matter of Application No. 2009-01 of
11 Whistling Ridge Energy, LLC, for the Whistling Ridge Energy
12 Project.

13 This conference is being held on September 22,
14 2010 in Olympia before Administrative Law Judge C. Robert
15 Wallis and Council Members who may be present.

16 Let me ask to start off are there any Council
17 Members on the bridge line?

18 Let the record show that there's no response.

19 Let's get the appearances of the parties. I would
20 like to go through the appearance list from the last
21 proceeding as a guide beginning with the Applicant.

22 MR. McMAHAN: Tim McMahan and Darrel Peeples here
23 on behalf of the Applicant.

24 JUDGE WALLIS: Counsel for the Environment?

25 MR. MARVIN: Bruce Marvin, Assistant Attorney

1 General here.

2 JUDGE WALLIS: Department of Commerce?

3 MS. JAFFE: Dorothy Jaffe, Assistant Attorney
4 General.

5 JUDGE WALLIS: Friends of the Columbia Gorge?

6 MR. KAHN: Gary Kahn and Nathan Baker.

7 JUDGE WALLIS: Save our Scenic Areas?

8 MR. ARAMBURU: Richard Aramburu representing SOSA
9 and Tom Drach, a board member of SOSA is present for the
10 hearing today. Thank you.

11 JUDGE WALLIS: Skamania County Agri-Tourism
12 Association?

13 MR. CRUMPACKER: John Crumpacker appearing as a
14 board member of the association.

15 JUDGE WALLIS: Skamania County Economic
16 Development Council?

17 MS. BRYAN: Executive Director.

18 JUDGE WALLIS: Ms. Bryan, thank you.
19 Seattle Audubon Society?

20 Klickitat County Public Economic Development
21 Authority?

22 MR. CANON: Michael Canon.

23 JUDGE WALLIS: Mr. Canon.

24 Wilbur Slockish, Jr., and Johnny Jackson?

25 The Yakama Nation, the Yakama Cultural Resource

1 Program?

2 MR. COLBY: George Colby and Jessica Lally.

3 JUDGE WALLIS: Thank you.

4 Association of Washington Business?

5 The Columbia River Gorge Commission?

6 The Port of Skamania County?

7 MR. WOODRICH: Ken Woodrich, Your Honor, appearing
8 on behalf of the Port of Skamania County.

9 JUDGE WALLIS: Mr. Woodrich, are you an attorney
10 or are you an officer of the Port?

11 MR. WOODRICH: I'm an attorney. In fact, Your
12 Honor, I'm appearing on behalf of three of the intervenors:
13 the Port of Skamania County, Skamania County Public Utility
14 District No. 1, and the City of White Salmon.

15 JUDGE WALLIS: Is your contact information of
16 record?

17 MR. WOODRICH: No, Your Honor. I do intend to
18 file a notice of appearance as soon as we're done here
19 today.

20 JUDGE WALLIS: Very well. Could you state your
21 business address and telephone number for the record,
22 please.

23 MR. WOODRICH: Yes, Your Honor. The mailing
24 address is P.O. Box 510. The street address is 40 S.E.
25 Cascade Avenue, Suite 110, and it's in Stevenson, Washington

1 98648. Telephone number 509-427-5665.

2 JUDGE WALLIS: Do you have an e-mail address?

3 MR. WOODRICH: Yes, Your Honor. It's
4 ken@woodrich.com.

5 JUDGE WALLIS: Very well, thank you.

6 MR. WOODRICH: Thank you.

7 JUDGE WALLIS: We did earlier ask for memorandum
8 of authorities on a question involving the susceptibility of
9 discussion of matters relating to the SEPA process and only
10 Mr. Aramburu filed a document that he refers as to
11 memorandum of authorities.

12 Mr. Aramburu, do you wish to make an oral
13 statement in support of your position?

14 MR. ARAMBURU: I think pretty much our position is
15 summarized in the materials. Let me just briefly address
16 the issues as I understand them from Prehearing Order No. 7.

17 First, there was an issue regarding discovery, and
18 we have some issues regarding discovery later, but it
19 appears there may have been some discussion about discovery
20 versus public disclosure under the Public Records Act. We
21 are engaging as has been the subject of other prehearing
22 conferences in informal discovery procedures between the
23 parties to gather information that would be useful to the
24 parties and to the Council in making its decisions.

25 There has been also some requests for information

1 directed to the Council concerning its processes regarding
2 SEPA and the processes that were involved with preparing the
3 Environmental Impact Statement, and those matters are not
4 necessarily covered by discovery procedures but are governed
5 by the public records provisions. So there has been some
6 requests that have been made I think both to the Council or
7 to really technically I guess the responsible official by
8 Friends and also some information requested from BPA.

9 So we think on that subject it's perfectly
10 appropriate to secure information on the EIS from the
11 agency. There may be objections to that or some other
12 questions that will arise later, but we don't see that there
13 would be sort of a preemptive ruling on that issue.

14 The second issue as we understood was presented by
15 Prehearing Order 7 had to do with discovery concerning the
16 Environmental Impact Statement. We don't know what the
17 Environmental Impact Statement is going to be at the
18 hearing, and I do request that, Mr. Wallis, that you do
19 inquire as to the timing on this impact statement process.
20 We understand that there may be some problems with the
21 November 24 date that's been anticipated in the prehearing
22 orders to date. So we'd like some clarification about that,
23 and that's the subject of objection that we've raised.

24 But with respect to the EIS, we consider the EIS
25 as any other exhibit that would be presented in these

1 proceedings. There may be questions about the manner of
2 consultation, the manner of work that has been done, the
3 weight to be given that document in the proceedings. So we
4 think that it's appropriate for inquiry to be made regarding
5 the EIS that to the extent appropriate that EFSEC employees
6 or their consultants be available for testimony during the
7 course of these proceedings regarding the process.

8 We particularly pointed out that this is a little
9 bit of a different situation because a lot of the material
10 that's apparently in the EIS has come from the Applicant and
11 hasn't been independently generated by EFSEC or its
12 consultants. So that raises a question of whether or not
13 we're simply getting the Applicant's information wrapped up
14 in a different form. That is of concern to us and so some
15 inquiry of that nature might be appropriate.

16 We've also pointed out that this is also a little
17 bit of a different kind of hearing because we have prefiled
18 testimony, and obviously as intervenors we can't get
19 prefiled testimony except from our own witnesses. So if
20 when we see the Draft Final EIS, whenever that's going to
21 be, we may have some questions of the preparers of that
22 document, and we would request -- and we don't know. There
23 may not be any questions about it, but there's likely to be.
24 So we would request the opportunity to call witnesses who
25 were involved in the drafting of the EIS at the January 5

1 hearing. Of course, we're asking that may not be a feasible
2 date, but whenever the hearing is that we would be given the
3 opportunity to question persons who prepared the EIS.

4 So I think that summarizes our position. Some of
5 this, of course, is dependent on what EIS we're going to be
6 talking about and when, and I don't know that we have good
7 answers to that yet. So do you have any questions from us,
8 Mr. Wallis?

9 JUDGE WALLIS: I do but I would like to respond to
10 the extent of my knowledge regarding the schedule for the
11 EIS; that is, Mr. Posner identified a schedule. My
12 understanding is that the Bonneville Power Administration,
13 its staff or consultants and EFSEC staff and consultants are
14 still working on that schedule and nothing has happened
15 immediately that would change that schedule.

16 MR. ARAMBURU: Okay.

17 JUDGE WALLIS: You indicate that the EIS should be
18 treated like any other exhibit. Do you have any judicial
19 statutory or regulatory authority for that proposition?

20 MR. ARAMBURU: I don't know that there is
21 something specific regarding that. The previous prehearing
22 orders have indicated that the document is to be available
23 during the course of these hearings. In other hearings that
24 we have been involved in the question of environmental
25 impacts is always a part of the hearing as it is here and

1 therefore questions may arise concerning the content of the
2 EIS. So we think that under those circumstances it's
3 appropriate for the Council to consider testimony regarding
4 the contents of the EIS during the course of the hearings.
5 Obviously many people consider the EIS to be an important
6 document and in many proceedings it is.

7 I would be remiss as a lawyer that if I thought
8 there were some serious concerns about the contents of the
9 EIS that those should be brought into question before the
10 Council, and so it would be appropriate therefore to have
11 persons who were involved in that process to potentially
12 give testimony. Again, I haven't seen this new document,
13 and it may be that there's going to be nothing to ask about
14 it because it's going to be very well done and satisfactory
15 to us, but I don't know that at this point. So I want to
16 make sure that we're alerting people to those concerns.

17 JUDGE WALLIS: The SEPA statute regulations set
18 out a process for publication of the draft and receipt of
19 comments and responses to comments. Why is that process
20 inadequate for your purposes in this proceeding?

21 MR. ARAMBURU: Well, the EIS is to accompany the
22 proposal through the existing agency review process, and the
23 EIS would be used as one of the bases for conditioning or
24 denying a proposal, and therefore because it's a part of the
25 agency process the review of that document and its use in

1 the hearings would be essential to the decision that's done.

2 Now as well certainly there is the review process
3 that's involved in commenting on the Draft EIS. We have
4 asked several times as to whether this procedure for a Draft
5 Final EIS will be one that would involve the opportunity for
6 comments by the parties and the public. I don't know that
7 we've ever gotten an answer, a firm answer to that, but we
8 would understand that probably that as we understand this
9 Draft Final EIS would not be the subject of comments. So we
10 think it ought to be, and if it's not then we should have
11 the opportunity if we don't like the contents of that and
12 believe that there are errors in it to bring those errors to
13 the attention of the decision maker because when it becomes
14 a final there's no further review of the document.

15 MR. COLBY: Colby here for the Tribe. Can I
16 interrupt?

17 JUDGE WALLIS: Mr. Colby.

18 MR. COLBY: Judge, while we're talking about EIS
19 information topics that Mr. Aramburu has brought up can I
20 agree we just need to wait to see what it says, but we're
21 concerned that we on the behalf of the tribe that we're
22 going to have to track two separate things if the BPA isn't
23 a part of this EIS process in regards to the
24 interconnectivity to the grid between the Applicant's
25 project because it doesn't -- obviously we all know that the

1 windmills aren't going to sit there without any ability to
2 do anything, and has anybody addressed that issue so that we
3 don't get caught having to go down through two separate
4 gauntlets in regards to an EIS for BPA and an EIS for this
5 process or are there any talks on that?

6 JUDGE WALLIS: My understanding is that the
7 agencies have chosen to cooperate in the preparation of the
8 environmental impact statement documents, but that each may
9 recede after the review process which is now underway to
10 adopt its own final. That's my understanding. It is not a
11 technical understanding. Parties are free, of course, to
12 raise concerns regarding process in each of the processes.

13 MR. ARAMBURU: I don't want to interrupt the
14 person on the phone.

15 JUDGE WALLIS: Mr. Colby?

16 MR. COLBY: Okay.

17 JUDGE WALLIS: I'm sorry, Mr. Colby?

18 MR. COLBY: Colby is done.

19 MR. ARAMBURU: He said he's done.

20 JUDGE WALLIS: Thank you. Very well.

21 MR. ARAMBURU: Did I understand you to say,
22 Mr. Wallis, that there may be two final EISs, two different
23 ones? Maybe I misunderstand what you said.

24 JUDGE WALLIS: I am not --

25 MR. COLBY: Colby again. You know, on behalf of

1 the tribe we're also responding on these exact same things
2 to Andrew Montano, the environmental protection specialist
3 for Bonneville Power Administration, in regards to what are
4 they doing in regards to an environmental impact study. If
5 Whistling Ridge Project is approved, then you have a
6 completely separate issue of the transmission lines that go
7 to the project. It's a completely separate issue and we
8 just want everybody on the same page to know that hopefully
9 we only have to go through this once, not twice.

10 JUDGE WALLIS: Very Well.

11 MR. COLBY: If I'm wrong please correct me.

12 JUDGE WALLIS: My understanding is that the
13 agencies are cooperating and the review process is a single
14 process. Beyond that I will have to refer the question to
15 the responsible official for EFSEC for further response and
16 I will do so.

17 MR. COLBY: Thanks, Judge.

18 JUDGE WALLIS: Mr. McMahan, you had your hand
19 raised there a minute ago.

20 MR. McMAHAN: Thank you, Your Honor. I would just
21 like to make a few short responses to SOSA's counsel
22 presentation.

23 First of all, I understood the question to have
24 been in the order, one, as to discoverability in discovery
25 of public documents, and I also profess, confess to a little

1 bit of confusion about the order because I too believe that
2 if the issue is whether or how information would be
3 discovered from the public agency that the Public Records
4 Act is the appropriate venue and not here.

5 However, I think we've moved significantly beyond
6 this exposing. I think where the issue really may lie which
7 is an intention apparently to call as witnesses in the
8 adjudicative proceeding involving the merits of the
9 application agency staff to testify as to the EIS, and it's
10 signaling that perhaps those individuals would be subject to
11 cross-examination in some prehearing discovery would need to
12 occur in some formal way as if the state, the responsible
13 official were a party to these proceedings.

14 Your Honor, I agree with you the SEPA rules are
15 complete, comprehensive, holistic in and of themselves as to
16 the SEPA process. We keep talking about how -- we keep
17 talking, we keep expressing our concern about these
18 processes line up together in a way that has never occurred,
19 shouldn't occur, and it concerns us a great deal if that
20 happens because we're as an applicant then obligated somehow
21 to proffer in testimony having to do with the merits of the
22 EIS which is not our business. So I can tell you we will be
23 very much opposed to a process that would involve agency
24 officials as witnesses in this proceedings. In my 25 years
25 of doing this I've never seen that before. I think it would

1 be unprecedented and a very dangerous and bizarre path to
2 walk down. So I want to right here and now say I've got
3 real, the Applicant has a real problem with that as a matter
4 of state law, as a matter of these proceedings.

5 The other observation I would make is we also
6 continue to have a certain navigation into NEPA issues for
7 these proceedings and I'm very concerned about the intention
8 of making a record in these proceedings having to do with
9 NEPA questions. This whole red herring, if I might
10 characterize it as that, about objectivity of the
11 preparation of the EIS and the Applicant's role in that
12 process and whether somehow BPA should have for the last
13 eight years been deploying all the surveyors on the sight
14 for biological information or something to that affect, that
15 is to the extent it's an issue at all it is a NEPA issue.
16 It is not a SEPA issue. This Council's rules are quite
17 clear that an applicant prepared EIS is absolutely
18 sufficient and the law is very clear that were that to
19 occur, which it did not, that that would be sufficient.

20 So to indulge an opponent in a process of again
21 putting witnesses on the stand from agencies to somehow
22 prove through this process a deficiency under NEPA causes me
23 great concern and again we will be very much opposed to it.

24 So let's bring this back to where we were which is
25 an issue of discovery about the preparation of the EIS and

1 the public documents of the same. I think that's easily
2 resolved here simply by referring to the Open Public Records
3 Act and being done with that.

4 This other procedural issue clearly it's going to
5 be a matter of ongoing debate, and I think at the right
6 point in time we may need to have legal briefing from the
7 parties on that. I certainly am not prepared to do that
8 having just received these objections from SOSA's counsel
9 and Friends of the Gorge the other day.

10 I would also observe that the two filings in
11 front, both an objection to the prehearing order, and we
12 seem to be in a proceeding where there will always be
13 adjudicating of prehearing orders redundantly through
14 objections, these were two separate filings. I think
15 they've just been argued together, and I think we could be
16 done with those questions. And I would just respond as to
17 the objections to the prehearing order that we have been
18 through already, and it has been adjudicated already what
19 the SEPA process will be. And to the extent that SOSA
20 continues to have concerns about how testimony is prepared
21 and the issues of objectivity on the EIS that is for another
22 day. The prehearing order is fine as is, and I don't see a
23 need to revisit this yet again per the objections of SOSA.
24 Thank you.

25 JUDGE WALLIS: Thank you.

1 MR. KAHN: I'd like to comment. Gary Kahn
2 representing Friends of the Gorge. The two documents
3 submitted by Mr. Aramburu earlier this week were also on
4 behalf of Friends of the Gorge. We have taken to heart your
5 concerns that we not duplicate processes, and we've
6 attempted to do that.

7 I do have a few comments though, and like both of
8 the prior counsel I'm a little bit confused as well. I took
9 the language in Prehearing Order 7 seeking additional
10 briefing on the issue of discovery of the process of the
11 preparation of the EIS. Earlier this morning in a question
12 to Mr. Aramburu, Your Honor, you asked whether the EIS
13 process as a separate process wasn't that adequate enough
14 for us to submit our concerns about that? And if by that
15 you were saying that the EIS then is not an issue in the
16 adjudicative proceeding at all, I think that's inconsistent
17 with your prior decisions as well as your rules.

18 In Prehearing Order 4, you indicated that the
19 Applicant will incorporate into its direct presentation any
20 information needed to address assertive significant flaws in
21 the DEIS. That obviously puts the content, not the process
22 of developing it, but the content of the EIS into play. In
23 Prehearing Order 6, you indicated that the environmental
24 record, referring to the EIS, is received in evidence. Its
25 information is available to the parties and the public

1 during the adjudicative hearing. If that's the case what
2 would be the point of it being as evidence available to the
3 public if we could not submit evidence, comments, testimony,
4 exhibits, whatever, challenging its conclusions.

5 Furthermore, comments on the EIS are directed to EFSEC, the
6 staff, the manager being Mr. Wright, not to the Council. So
7 this would be the only process by which we could insert our
8 concerns about the EIS itself.

9 Finally, your SEPA rules, specifically WAC
10 463-47-110, puts forth an overriding policy of the Council
11 as to consider environmental impacts. It's tied into SEPA.
12 We believe that that also requires that to be an open target
13 for us to submit testimony, evidence, exhibits, whatever we
14 would want to in the context of the adjudicative hearing.
15 With respect to the timing of the release of the EIS, I'm
16 not going to repeat what we have said before and what
17 Mr. Aramburu has said before but we heartily concur.

18 If the point of this is the EIS is suppose to
19 accompany the process, if your policy is to avoid making
20 adverse environmental decisions that have adverse
21 environmental impacts, we need to know what the final
22 version of the analysis is before we can submit testimony.

23 Just one point of repeat repetition. If the EIS
24 is out November 24, yes, there is a rebuttal opportunity due
25 December 16, but that rebuttal will be to information that

1 is submitted on November 1. The only information that's
2 going to be submitted on November 1 is for the most part
3 going to be some supporting information from some of the
4 other parties supporting the application but predominantly
5 the opposition material from SOSA and Friends of the
6 Columbia Gorge. Certainly Whistling Ridge will have had an
7 opportunity to review our testimony, review the FEIS, and
8 submit rebuttal testimony, but we have kind of an empty
9 opportunity there because we're going to be rebutting our
10 own testimony.

11 Theoretically if nobody else submits anything
12 other than SOSA and Friends of the Gorge on November 1 -- I
13 will suppose I could rebut SOSA's and SOSA could rebut mine,
14 but that's probably not going to be too common of an
15 occurrence -- we will have had no meaningful opportunity to
16 submit anything substantive after the FEIS is released. So
17 we believe that just prejudices our ability and puts the
18 Applicant in a very favorable position because they will
19 have both the final analysis and our comments and our
20 testimony submitted on November 1 is going to be at a
21 document that won't exist on November 24. We don't know
22 what it's going to look like. If it's identical to the
23 current draft then, yes, maybe it's not a problem. But
24 we're assuming given the number of comments pointing out
25 problems with the draft that the final is going to be

1 sufficiently different, and we will have had no opportunity
2 to submit any testimony pertaining to the final as part of
3 the prefiled testimony. If we can't introduce new testimony
4 at the hearing we will have had no opportunity whatsoever to
5 challenge any of the analysis, content, or discussion in the
6 FEIS. Thank you.

7 MR. BAKER: Your Honor, this is Nathan Baker.
8 Just to add very briefly to Mr. Kahn's statements, we
9 believe that WAC 463-47-110 supply standards that apply to
10 the Council during the adjudication, and as Mr. Kahn stated
11 it says the overriding policy of the Council is to avoid or
12 mitigate adverse environmental impacts from the Council's
13 decisions. We would be severely prejudiced if we could not
14 supply information as to whether the Council is meeting that
15 obligation. So the environmental impacts and the substance
16 of the environmental analysis is certainly relevant. Thank
17 you.

18 JUDGE WALLIS: Thank you very much for your
19 comments. Is there anything further?

20 Let the record show there is no response. We will
21 take these comments on advisement.

22 I have a couple housekeeping matters on the
23 agenda. First, we have asked as parties submit documents
24 electronically also to submit the documents in a form
25 compatible with Microsoft Word. It is very difficult if we

1 want to quote large portions of your submissions to have to
2 rekey that and it is a big help to us. That need not be in
3 Word itself as long it is compatible with Word in a
4 relatively simple document, folks have converted it to text
5 and submitted in that manner.

6 We are not interested at all in any metadata that
7 might be associated with that and whatever process you use
8 to clean a document of metadata is fine. What we do ask for
9 is a version that will allow us to cut and paste so that we
10 can best use your submissions. So if you could work with
11 your staff to assist us in that regard. The Word compatible
12 document may be separately sent to Ms. Talburt who will then
13 see that it's available to us.

14 MR. ARAMBURU: Did we do that right or wrong? We
15 sent some material in. If it's directed at our submission
16 did we not do it correctly?

17 JUDGE WALLIS: I'm not aware that we received Word
18 compatible copies. It may be that we have, but I'm not
19 aware that we have, and I'm just calling it to everybody's
20 attention in outlining the process so that we're all on the
21 same wavelength here.

22 MR. KAHN: If we do that, in the event that we
23 haven't somehow cleansed all of our metadata, am I safe in
24 assuming that the version we will send to Tammy will not be
25 distributed to other parties?

1 JUDGE WALLIS: It will not be distributed to other
2 parties.

3 Along with that we've had some questions addressed
4 to staff that really are beyond the staff's abilities to
5 answer such as whether an extension of time can be granted.
6 We've indicated earlier that Mr. Wright or I are people who
7 would be in a position to respond to inquiries of that sort.
8 If there is a broadcast mailing to other parties, there's no
9 ex-parte issues. That will help us focus on questions when
10 they come up and avoid delay in finding an answer. If it is
11 a simple question such as what is the time frame for this
12 response, does not involve discretion, then staff may be
13 inquired of. But as we've explained before given the move
14 that the Council has been involved and other matters that
15 the Council is involved in and the small number of staff
16 people available to us, sometimes that can be a bottleneck
17 that will prevent you from getting a quick answer.

18 MR. ARAMBURU: May I ask on Thursday I believe it
19 was requested that there be a modest waiver of the rules so
20 that we could file our objection and our statement of
21 authorities by e-mail. I directed that to Ms. Talburt.
22 Would that have been better directed, should that be
23 directed to you?

24 JUDGE WALLIS: That would have been better
25 directed to Mr. Wright and/or and to me.

1 MR. ARAMBURU: Okay. Good. I'll do that in the
2 future then.

3 JUDGE WALLIS: Thank you.

4 Interparty discovery is a matter that we want to
5 inquire into. How is that process appearing to work on
6 behalf of the parties?

7 MR. ARAMBURU: That is one of the subjects that we
8 want to bring to the Council's attention. We have engaged
9 in informal --

10 MR. COLBY: Who's talking?

11 MR. ARAMBURU: Oh, this is Richard Aramburu
12 representing SOSA. In our previous orders we have agreed to
13 engage in informal discovery process that did not involve
14 the Council, and following that process on I believe it was
15 on the 20th of August we sent some requests for information
16 to the Applicant, and just I think it was September 13, a
17 letter we received on September 16 in our offices we
18 received a response to that informal discovery. However,
19 there has been a refusal to provide information. It came
20 with an explanation of why the information was not being
21 provided. However, we think that the information that we're
22 requesting is reasonable and appropriate to the hearing, and
23 more than that it's very important to the presentation of
24 our case to the Commission.

25 Therefore, what we would like to arrange with the

1 Commission is a procedure for us filing requests of the
2 Applicant to provide this information or request to compel
3 by an analogy to the civil rules, civil Rule 37 in
4 particular. You don't have any of this material, and I'm
5 not going to belabor with our argument on the material at
6 this point because you haven't seen it. What we request
7 that you do is to set up an expeditious schedule so that we
8 can resolve the question of whether or not this is
9 information that ought to be provided to us. And the reason
10 I say expeditious is that we have some people that are in
11 need of this information, and we have a very short time
12 coming before the deadline for our prefiled testimony which
13 is November 1, about five to six weeks from now.

14 So what we would request is that you entertain a
15 motion to compel the production of this. We would file a
16 motion concerning that and have that to you very soon. I
17 would say probably Tuesday of next week we could get that
18 motion ready. Mr. McMahan and Mr. Peoples I think have
19 explained their position, and they should be able to get a
20 response fairly quickly. I'll defer to them as to when that
21 might be, and then a very brief rebuttal opportunity for us
22 and then perhaps a schedule either for expeditious review of
23 that and a decision or potentially the opportunity for some
24 oral argument if you would entertain that on the motion.

25 Again, we feel that the information here that

1 we've requested is reasonable and very important to the
2 preparation of our case. So we request that a schedule be
3 set up on this motion and that we do so expeditiously so
4 that as I would hope that we would be successful in our
5 motion and the material would be given to us. But we need
6 some time with that material before November 1 so we request
7 that be speedily done.

8 JUDGE WALLIS: Does any other party wish to speak
9 in support of that request?

10 MR. KAHN: Friends of the Columbia Gorge does for
11 the exact same reasons. We were going to share the
12 discovery rather than submit identical requests.

13 JUDGE WALLIS: Thank you.

14 Mr. McMahan.

15 MR. McMAHAN: Yes. Again, I think I will follow
16 Mr. Aramburu's course not getting into the specifics of
17 what's at issue here other than to say these kinds of issues
18 have been adjudicated previously by the siting council. I
19 agree if there needs to be some effort to compel the
20 information we should handle this quite expeditiously. I
21 would also add that we did copy Mr. Kahn and Mr. Aramburu to
22 make sure that this was fully in play. I also would say
23 that we have two or three requests I believe outstanding
24 that we will be responding to. Unfortunately it requires me
25 to gather data from electronic files of consultants who long

1 ago may or may not have had communications which has been a
2 somewhat challenging task.

3 So I will again repeat my commitment to get that
4 too, and we don't object to those items. We just haven't
5 had the opportunity to get it from the consultants. But as
6 to some rather more material issues involving proprietary
7 information and confidentiality, yes, we will have to have
8 an opportunity to argue that.

9 MR. ARAMBURU: We appreciate the courtesy of
10 counsel in getting those materials to us in advance of when
11 it was actually due. So we appreciate that.

12 JUDGE WALLIS: Very well. You propose to make a
13 submission to the Council on Tuesday next?

14 MR. ARAMBURU: Yes.

15 JUDGE WALLIS: And what kind of a response?

16 MR. McMAHAN: Seven days I think.

17 JUDGE WALLIS: Is that adequate, Mr. Aramburu?

18 MR. ARAMBURU: Well, it's their period of time.
19 If they think it's adequate, it's fine. We'd probably need
20 three days after that. Again, we're very interested in
21 getting these decisions made promptly.

22 JUDGE WALLIS: Mr. McMahan, you appear to be
23 anticipating the response that you would get or the material
24 that you would get. Would a shorter period allow you the
25 opportunity to prepare an adequate response?

1 MR. McMAHAN: The challenge I have I mean we are
2 very clear in our position on this particular issue which is
3 all very vague to you, of course, because you don't know
4 what the heck we're talking about. I realize this is
5 difficult in a vacuum. We're very clear about our response.
6 However, if I get 20 pages of arcane briefing, I'll need
7 some time for that. We provided a very streamlined and
8 basic explanation with our response that was in my view
9 complete.

10 But, you know, I mean if we get an arcane briefing
11 about civil rules of procedure, I don't want to commit to
12 seven days.

13 JUDGE WALLIS: Very well. May I have a commitment
14 that if it does not require seven days you will file it
15 earlier?

16 MR. McMAHAN: Absolutely. We promise to get
17 working on it right away and not wait until Monday the
18 following week.

19 JUDGE WALLIS: Very well. In terms of the
20 rebuttal to that would oral rebuttal be adequate or do you
21 want the opportunity to submit something in writing?

22 MR. ARAMBURU: I would request the opportunity to
23 submit something in writing. We could do that within --

24 JUDGE WALLIS: Three-day return?

25 MR. ARAMBURU: That would be fine.

1 JUDGE WALLIS: Very well. We will look at the
2 calendar after this prehearing conference, and we'll
3 identify a time for oral arguments on the issues that may be
4 done in person or by telephone. Do you have a preference?

5 MR. ARAMBURU: As long as there is not another
6 crash on I-5 going southbound as there was this morning, I
7 think it would be my preference to come to the Council's
8 office and do that in person.

9 JUDGE WALLIS: Mr. McMahan?

10 MR. McMAHAN: That's fine.

11 MR. ARAMBURU: Do I understand so that we can
12 structure our motion better, I understand that there would
13 be no objection to the Council ruling on a motion to compel?
14 So I don't have to spend time arguing about whether you have
15 that authority; is that correct? I don't want to get into
16 the arcane issues of Civil Rule 37, and so if I would
17 understand, yes, that's a matter you will entertain and rule
18 on then I will skip that in my brief.

19 MR. McMAHAN: A new one on me I will confess. I
20 would assume that this is being conducted in accordance with
21 the Administrative Procedures Act, and as long as we're
22 talking about that framework, I would not anticipate
23 resisting a motion to compel. I mean there is information
24 if compelled that I would want to have some in-camera review
25 and a protective order to cover. So you can anticipate that

1 from me if we end up in this territory, and I'm anticipating
2 arguing that even if the judge is somewhat inclined to
3 compel the information that I would like an in-camera review
4 and a protective order before it's disclosed.

5 MR. ARAMBURU: That's understood. That's not a
6 problem. I understand his position.

7 JUDGE WALLIS: Very well. We did earlier discuss
8 the APA provisions regarding discovery and the latitude that
9 it grants to the Administrative Law Judge. We are now as
10 parties have alluded to earlier approaching some of the
11 crunch times for development and presentation of testimony.
12 I wanted to follow up on inquiries that were made earlier
13 regarding potential procedural motions, regarding objections
14 to evidence, motions to exclude, and so forth. Have the
15 parties given any additional thought to such motions,
16 timing, and process?

17 We do have a procedural prehearing status
18 conference set shortly before Christmas, and in regards to
19 Mr. Aramburu's earlier comment at one of these sessions I
20 have found it in complex litigation very effective to have
21 objections raised outside the actual hearing calendar either
22 in a single prehearing session or in morning sessions before
23 the day begins so that we're not taking up hearing time in
24 the discussion of objections. If parties have no objection
25 to that process it would be my intention to schedule for the

1 December status conference the opportunity for parties to
2 present that kind of objection to the documents.

3 Another housekeeping matter related to exhibits --

4 MR. ARAMBURU: Richard Aramburu again for people
5 on the telephone. When would you --

6 JUDGE WALLIS: Is someone in the Gorge?

7 MR. ARAMBURU: One of the questions, one of the
8 procedural issues that was raised is the deadline for filing
9 objections to testimony and to exhibits and you haven't
10 discussed that. Our proposal subject to what other parties
11 opinions are would be to submit any objections we have to
12 the prefiled testimony of the Applicant at the same day we
13 submit our direct testimony. That is November 1. Then your
14 procedure would be that we would rule on those objections
15 and possible objections I think from other parties on the
16 December 22 date.

17 JUDGE WALLIS: Is that acceptable to the parties?

18 MR. McMAHAN: Tim McMahan for the record. That's
19 as to any potential objections to the testimony the
20 Applicant's filed that's fine by me. I don't know that
21 given the time crunch that I would want to be bound by a
22 similar restriction if we find need to object to rebuttal
23 testimony filed before Thanksgiving by the intervenors. In
24 other words, I would be inclined to file objections prior to
25 filing our rebuttal testimony if we feel such objections are

1 necessary and such objections are appropriate because it may
2 shape what we end up wanting to do with our rebuttal
3 testimony.

4 JUDGE WALLIS: Very well.

5 MR. ARAMBURU: So that we're clear, our testimony
6 at the present time is due November 1, and I think there
7 would be a reasonable period of time for objections from
8 other parties I take it and from the Applicant to be
9 received within a reasonable period of time after that. And
10 you can pick the time because we would like to know what
11 those objections are in sufficient time to respond to them
12 at the December 22 conference.

13 I do recognize that the cross-rebuttal testimony,
14 of course, would be another opportunity for objections to be
15 filed, and we probably need to have a date as to when those
16 objections would be filed.

17 JUDGE WALLIS: My recollection is about five days
18 from the filing deadline until the prehearing conference.
19 Would it be satisfactory for such objections to be presented
20 at the conference?

21 MR. KAHN: And to be argued at this point by --

22 JUDGE WALLIS: Yes.

23 MR. KAHN: It might be kind of difficult, for
24 example, if Mr. McMahan were to file an objection at the
25 conference that we don't know anything about and no

1 opportunity to prepare in order to argue it.

2 MR. McMAHAN: Let me be clear. What I'm
3 suggesting is that if after the November filing, rebuttal
4 filing, we find need to object it would be very much in our
5 interest to get that objection in as rapidly as possible so
6 that we have an adjudicative prior to filing our testimony.
7 So I am not going to sit and wait for the last minute to
8 file an objection to testimony. That doesn't serve the
9 interest of my client and that's not my intention.

10 If you want, if we want to impose a deadline on
11 that for a couple weeks after submittal of the rebuttal
12 testimony that's fine with me. That would be our intention.

13 MR. ARAMBURU: We would support that.

14 JUDGE WALLIS: Very well. It is also getting to a
15 time when we need to get a handle on the number of parties
16 who are intending to present affirmative evidence and to
17 develop a schedule for those presentations.

18 Mr. Aramburu, Mr. Kahn, do you have an idea yet of
19 the number of witnesses you will be presenting and on what
20 topics?

21 MR. KAHN: For Friends of the Columbia Gorge we
22 anticipate somewhere between two and four. We don't have it
23 all nailed down yet. The topics will include landscape-type
24 issues, scenic issues, as well as wildlife issues. We
25 reserve the right to supplement that list with other

1 potential witnesses that we are working on.

2 MR. ARAMBURU: And we're coordinating as per your
3 directive, Mr. Wallis, on our testimony so that the
4 testimony would be a coordinated set of testimony without
5 duplication. We do intend to call an expert in electric
6 power to address questions of whether or not the subject
7 proposal was one that is consistent with the balancing
8 required under the EFSEC statute to talk with the nature of
9 this variable energy product and to address issues of the
10 production and capacity at this site. So we will likely be
11 having evidence of that nature.

12 JUDGE WALLIS: So the total then for the two
13 parties would be three to five witnesses anticipated?

14 MR. KAHN: I think that's fair.

15 JUDGE WALLIS: For current purposes that's
16 adequate.

17 MR. KAHN: Yes.

18 JUDGE WALLIS: Mr. Marvin?

19 MR. MARVIN: At this point we have one witness
20 that we would be recommending, and I suppose we may add to
21 that list, but at this point it's one definite.

22 JUDGE WALLIS: I'm sorry?

23 MR. MARVIN: We may add to that, but at this point
24 it's one.

25 JUDGE WALLIS: Department of Commerce?

1 MS. JAFFE: At this time I anticipate one witness
2 also.

3 JUDGE WALLIS: Are there any parties on the bridge
4 line that expect to be offering witnesses to the proceeding?

5 MR. COLBY: Judge, this is George Colby from
6 Yakama Nation. It wouldn't be anymore than two people, and
7 I wouldn't be able to let you know until after our October
8 Tribal Council Meeting. So that I would assume that when I
9 get my responding pre-filing to you on or before November 1
10 we'll add a little caveat that obviously everybody is going
11 to get a copy of who our proposed witnesses would be and
12 their topics.

13 JUDGE WALLIS: Very well. Any other party?

14 MS. BRYAN: Peggy Bryan with the Economic
15 Development Council and we expect to have one witness.

16 JUDGE WALLIS: Any others?

17 MR. WOODRICH: Yes, Your Honor, Ken Woodrich on
18 behalf of the Port District, White Salmon, and the Skamania
19 County PUD. I would expect we'll need a witness related to
20 economic development issues as well as a witness related to
21 energy viability of service for the PUD.

22 JUDGE WALLIS: Thank you.

23 Any other parties?

24 MR. CRUMPACKER: Your Honor, John Crumpacker for
25 Skamania County Agri-Tourism Association. We don't

1 anticipate any witnesses. We're planning to submit
2 documentary exhibits along the lines of what's been
3 submitted by the association already; however, we would like
4 to reserve the right to potentially add a witness depending
5 on what goes on with the other intervenors. And I'm
6 assuming that we're going to get some kind of witness, brief
7 witness summaries that will help us determine whether we
8 need to do that so it's not duplicative. At this point our
9 issues are reserved to mitigation of economic impacts and if
10 we were to call someone it would be on that issue and I
11 don't know at this point.

12 JUDGE WALLIS: Very well.

13 If you are planning to present documentary
14 exhibits, if the other parties are not willing to receive
15 that without some support from a live witness, you may in
16 order to have those admitted be in a situation where you
17 would need to present a witness to authenticate them and
18 respond to questions about them. I'm not saying that that
19 will not necessarily happen, but you need to be aware that
20 that possibility exists.

21 MR. CRUMPACKER: I am and I'm assuming that the
22 procedure at some point will give way to stipulations.
23 Primarily what we'd be submitting would be U.S. Government
24 study information which I'm assuming would somewhat probably
25 be acceptable to most parties.

1 JUDGE WALLIS: Very well.

2 MR. COLBY: This is Colby here.

3 JUDGE WALLIS: Mr. Colby.

4 MR. COLBY: This raises a question that you're
5 talking about right now and one of the other parties talked
6 about stipulations. While we have everybody on the phone
7 clearly the Yakama Indian Nation asserts its interest here
8 because this area that we're talking about is within the
9 ceded area of the Yakama Indian Nation pursuant to the
10 Treaty of 1855, 12 Stat., 951. Is anybody going to raise an
11 objection about that issue or do we have to prove it?

12 MR. McMAHAN: Tim McMahan for the Applicant.
13 Until I see what we're talking about it's a little hard for
14 me to respond to that to the extent that's targeted in the
15 Applicant's direction. I certainly haven't anticipated need
16 to challenge the authority of the Yakama Nation comment in
17 areas in its ceded territory, and I do recall, I'm not
18 positive, but I recall that it's in an area ceded by the
19 Nation. Notwithstanding that we have raised some issues
20 about the authority and the delegation of certain parties
21 from the Nation commenting in the proceedings and we just
22 need to see how this plays out.

23 I will also add that it is our commitment and it
24 is in fact our practice to try our very best to resolve
25 issues with the Yakama Nation. We are continuing to do so.

1 MR. COLBY: Thank you.

2 JUDGE WALLIS: Very well. What I believe I will
3 do in the prehearing order on this matter is to set out a
4 proposed order of presentation with the estimated number of
5 witnesses we have now and try to get confirmation from
6 parties going forward that it is at least a ballpark
7 estimation.

8 MR. McMAHAN: Mr. Wallis.

9 JUDGE WALLIS: Mr. McMahan.

10 MR. McMAHAN: If I might just weigh in here a
11 little bit. Obviously we have prefiled testimony out there.
12 I cannot tell you whether additional witnesses will be
13 offered in rebuttal. For example, if we're talking about
14 integration of the resource into the grid, we have no
15 witness identified on that. We would likely do so. Going
16 forward we may also find a need to put forward, proffer an
17 additional witness dealing with economic response to
18 allegations concerning economic effects, you know, perhaps
19 regarding tribal issues. I just don't know right now. So I
20 just want to make sure you understand that we could be
21 expanding the list beyond what you've seen so far.

22 JUDGE WALLIS: Yes, I understand that to be the
23 case, and the same goes for other parties in the cross
24 rebuttal.

25 MR. ARAMBURU: And as well Richard Aramburu --

1 MR. COLBY: Who's talking?

2 JUDGE WALLIS: Mr. Aramburu.

3 MR. ARAMBURU: This is Rick Aramburu talking. We
4 have also indicated to you in our previous discussions today
5 that we may be calling witnesses or requesting to call
6 witnesses from EFSEC regarding the process on the EIS. I
7 understand we're going to have some kind of ruling from you
8 on that issue, but we do want to reserve the right once
9 we've seen the Draft Final EIS, whenever that's going to be
10 to call witnesses. So on that subject. And those of
11 necessity as I indicated have to be live witnesses.

12 MR. COLBY: George Colby again.

13 JUDGE WALLIS: Mr. Colby.

14 MR. COLBY: The previous speaker within the last
15 two speakers raised the issue that I kind of let slip by,
16 but I did raise it at the very beginning, and that's in
17 regards to the fact that the Tribe may want to be involved
18 in calling people from BPA in regards to their issues that
19 affect this process too, but I just don't know. But since
20 you're wanting to know about the potential witnesses clearly
21 one or two people from BPA we know and Andrew Montano that's
22 the one we're corresponding with in regards to a separate
23 track that we want to reserve the right if we need to make
24 sure that we haven't overlooked that aspect also. Thank
25 you.

1 JUDGE WALLIS: Very well. Thank you. Are there
2 any matters that the parties wish to raise at this time?

3 MR. KAHN: Yes, Gary Kahn with Friends of the
4 Columbia, just for another housekeeping matter. There have
5 been a number of documents submitted in hearings in
6 connection with this. There's been the land use hearing
7 about a year ago in Skamania County. A number of documents
8 were submitted and there have been comments and documents
9 submitted in the EIS process. If we want to use those in
10 the adjudicative process as well, do we have to submit them
11 again or can we refer to the prior submission and
12 incorporate them by reference?

13 JUDGE WALLIS: What I would like to do I believe
14 is get a little bit more information from you in writing
15 with the opportunity for other parties to respond so we know
16 a little bit more precisely what question we're looking at.

17 MR. BAKER: For the people on the phone this is
18 Nathan Baker with Friends of the Columbia Gorge. Some
19 examples would be at the land use hearing in Underwood over
20 a year ago Friends submitted several exhibits I think to
21 Mr. Kahn's testimony and Mr. Rick Till's testimony. We
22 believe it would be efficient and save paper to not have to
23 resubmit that. Other examples would be we filed extensive
24 comments on the Draft EIS with multiple exhibits. Again all
25 that is public record. It's already posted on EFSEC's

1 website. So again we would prefer to not have to resubmit
2 that material when we submit our exhibits rather
3 cross-reference it.

4 MR. McMAHAN: Tim McMahan for the record in
5 response. I can understand particularly the documentation
6 as I recall it was voluminous submitted at the land use
7 hearing and I can understand that. However, knowing what
8 he's talking about which I do concerning what was submitted
9 at the Draft EIS, to the extent that is information provided
10 by real or purported experts that information needs to be in
11 my opinion attached to testimony so it's subject to
12 cross-examination. It needs to be part of the adjudicative
13 record.

14 MR. BAKER: Again, Nathan Baker. We have had two
15 experts submit testimony or comments in the EIS process.
16 Our intention would be that both of those experts would
17 participate again with new written materials, but we would
18 also like to attach their prior comments as exhibits or not
19 attach but cross-reference as I mentioned earlier.

20 MR. McMAHAN: Tim McMahan here. I guess one way
21 or the other it doesn't matter a whole lot because that
22 information was previously submitted by both experts. We
23 can grab it out of the EIS record, and we'll use it for
24 cross-examining. So one way or the other I suppose the
25 information comes forward. I'll leave it to the judge to

1 determine how best to handle the volume of documents that
2 are about to flow his way.

3 JUDGE WALLIS: In the abstract my preference in
4 order to provide a complete record for the Governor for the
5 State of Washington on whatever decision the Council
6 recommends would be to have actual physical copies of those
7 documents for purposes of the record. Whether people will
8 waive the right to additional copies, I think would be up to
9 the parties and we can put that question to the parties.
10 Does that respond adequately?

11 MR. KAHN: Would that then also require the 12
12 copies of all of that to be submitted as per your rules?

13 JUDGE WALLIS: That's something I will have to ask
14 the Council Members about.

15 MR. KAHN: Okay.

16 MR. COLBY: Colby. If we can figure out a way not
17 to cut down anymore trees that would be helpful.

18 JUDGE WALLIS: We understand and support that.

19 I have one brief scheduling matter to identify;
20 that is, I am scheduled to be out of the country beginning
21 October 21 and returning on November 4. It is not certain
22 that I take that trip. The location that I'm visiting is
23 somewhere between second and third world. I have previously
24 been able to use Skype communications for telephonic
25 communication relatively easily given the locations, and to

1 the extent that anything is going on during that period I
2 would do my best to make myself available. As I say it is
3 not certain that I in fact will be taking that trip. I just
4 wanted to give you a heads up. Whatever happens we will do
5 our best to be accessible for concerns on which the parties
6 need resolution.

7 MR. KAHN: Just out of curiosity, I'm a little bit
8 familiar with Skype. Would that allow the use of some sort
9 the conference call if we do have a matter that we need to
10 bring before you with multiple people?

11 JUDGE WALLIS: Yes.

12 MR. KAHN: I'm just familiar with it on the one to
13 one.

14 JUDGE WALLIS: Yes, in theory, and I know people
15 who have done it.

16 All right. Is there anything further?

17 Thank you all for our participation today. Your
18 comments have been very helpful in assisting us to
19 understand and clarify, and we will enter an order at the
20 earliest reasonable time.

21 MR. SPADARO: Your Honor, Jason Spadaro here. I
22 just wanted to reflect in the record I arrived around 10:30
23 and have been listening in.

24 JUDGE WALLIS: Very well. Mr. Spadaro, thank you.

25 MR. SPADARO: Yes, Jason Spadaro for the

1 Applicant.

2 JUDGE WALLIS: Very well.

3 * * * * *

4 (Prehearing Conference adjourned at 11:12 a.m.)

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1 In re: Whistling Ridge Energy Project
2 Application No. 2009-01
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8 I, Shaun Linse, CCR, do hereby certify that the
9 foregoing transcript prepared under my direction is a
10 full and complete transcript of proceedings held on
11 September 22, 2010, in Olympia, Washington.
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Shaun Linse, CCR 2029
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