

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 - 43
 WHISTLING RIDGE ENERGY PROJECT)
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A prehearing Conference in the above matter was held on Wednesday, September 1, 2010, at the Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., Room 206, in Olympia, Washington at 10:00 a.m., before the Energy Facility Site Evaluation Council.

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WHISTLING RIDGE ENERGY, LLC, Tim McMahan, (via bridge line) 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
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1 APPEARANCES (Cont'd):

2 DEPARTMENT OF COMMERCE, Dorothy H. Jaffe,
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6 bridge line), Attorney at Law, Reeves, Kahn & Hennessy, P.O.
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10 SAVE OUR SCENIC AREA (SOSA), J. Richard Aramburu,
11 Attorney at Law, Aramburu & Eustis, LLP, 720 Third Avenue,
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13 SKAMANIA COUNTY AGRI-TOURISM ASSOCIATION, Isa Anne
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16 SKAMANIA COUNTY ECONOMIC DEVELOPMENT COUNCIL,
17 Peggy Bryan (via bridge line) , Executive Director, 167 N.W.
18 2nd, P.O. Box 436, Stevenson, Washington 98648.

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

21 CONFEDERATED TRIBES and BANDS OF THE YAKAMA
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24 Toppenish, Washington 98948.

25

1 APPEARANCES (Cont'd):

2 KLUCKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT
3 AUTHORITY, Michael Canon, Executive Director, MS-CH-26, 127
4 West Court, Goldendale, Washington 98620.

5 KLUCKITAT and CASCADES TRIBES OF THE YAKAMA
6 NATION, Wilbur Slockish, Jr.(via bridge line), Chief, and
7 Johnny Jackson (via bridge line), Chief, Whistling Ridge
8 Energy, LLC, P.O. Box 266, Bingen, Washington 98605.

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10 JUDGE WALLIS: This prehearing conference will
11 please come to order. This is a prehearing conference of
12 the Washington Energy State Facility Site Evaluation
13 Council, and it is a status conference regarding the
14 Whistling Ridge Energy Project adjudication. Today is
15 September 1, 2010, and we are physically located now in the
16 hearing room of the Washington Utilities and Transportation
17 Commission, 1300 South Evergreen Park Drive S.W., in
18 Olympia.

19 I would like to start off by saying that we did
20 promise folks copies of the contact information for staff.
21 We did explain that we are in the process of moving from
22 another building into a building adjacent to this one, and
23 one of the things that disappeared during the moving process
24 was the contact information list. We will distribute that
25 by electronic mail to all of the parties in this proceeding.

1 I would like to start with the appearances. We're
2 going to begin with the people who are in this room, and as
3 we take appearances I would like to make sure that our
4 information is accurate, and that we have complete contact
5 information and appropriate contact information for each of
6 the parties who are participating. I will be going down the
7 service list and then giving everyone else a chance who may
8 be here to pipe up beginning with the Applicant.

9 MR. PEEPLES: Darrel Peeples and Erin Anderson.

10 JUDGE WALLIS: Could you speak up a little bit,
11 please.

12 MR. PEEPLES: Darrel Peeples and Erin Anderson.

13 JUDGE WALLIS: I'm not sure your microphone is on.

14 MR. PEEPLES: Darrel Peeples and Erin Anderson.

15 JUDGE WALLIS: Very well, and Mr. McMahan is on
16 the bridge line.

17 Would each of the parties I'm going to ask for the
18 name of a person associated with the party for purposes of
19 service. The Administrative Procedure Act requires us to
20 provide service to the party as well as counsel for the
21 party. Mr. Spadaro is listed. Is he the appropriate person
22 to receive service on behalf of the party?

23 MR. PEEPLES: Correct.

24 JUDGE WALLIS: Very well.

25 MR. SPADARO: Sir, I'm on the bridge line as well,

1 Jason Spadaro.

2 JUDGE WALLIS: Mr. Spadaro, thank you.

3 Counsel for the Environment?

4 MR. MARVIN: Yes, sir.

5 JUDGE WALLIS: Bruce Marvin.

6 Department of Commerce? Is there anyone here
7 representing the Department of Commerce?

8 MS. JAFFE: Yes, Dorothy Jaffe, Assistant Attorney
9 General.

10 JUDGE WALLIS: Ms. Jaffe, we have Mr. Usibelli's
11 name as the person associated with the Department. Is he
12 the appropriate person for service?

13 MS. JAFFE: Yes, he is.

14 JUDGE WALLIS: Very well.

15 Friends of the Columbia Gorge?

16 MR. BAKER: Good morning, Nathan Baker. That
17 appropriate person for service would be Kevin Gorman.

18 JUDGE WALLIS: Could you spell that for me,
19 please.

20 MR. BAKER: K-e-v-i-n G-o-r-m-a-n.

21 JUDGE WALLIS: Could tap your microphone and let's
22 see if it's on.

23 MR. BAKER: Okay. There we go.

24 JUDGE WALLIS: Give that name again.

25 MR. BAKER: The appropriate person for service is

1 Kevin Gorman, K-e-v-i-n G-o-r-m-a-n. We also have two
2 people on the phone as well.

3 MR. KAHN: Your Honor, Gary Kahn, counsel for
4 Friends' of the Columbia Gorge. I'm on the phone line, and
5 with me is Friends staff member Rick Till, T-i-l-l.

6 JUDGE WALLIS: And could you give me Mr. Gorman's
7 title, please, Mr. Baker.

8 MR. BAKER: Yes, he's the executive director.

9 JUDGE WALLIS: And the address we have is 522 S.W.
10 Fifth Avenue in Portland.

11 MR. BAKER: That's all correct.

12 JUDGE WALLIS: Very well.

13 Save our Scenic Area?

14 MR. ARAMBURU: Good morning, Mr. Wallis. This is
15 Richard Aramburu representing SOSA. I think you have my
16 correct information. The party representative for purposes
17 of service will be Mr. Tom Drach who is seated next to my
18 right at the counsel table.

19 JUDGE WALLIS: Could you spell that name for me,
20 please. Tom I take it is T-o-m.

21 MR. DRACH: It is indeed. D-r-a-c-h.

22 JUDGE WALLIS: Is that P.O. Box 41 in Underwood?

23 MR. DRACH: That's correct. I would to like add
24 an e-mail address would be sosa@gorge.net.

25 JUDGE WALLIS: Thank you. Skamania County Public

1 Utility District No. 1. Is there any representative here on
2 behalf of the public utility district?

3 Skamania County Economic Development Council.

4 MS. BRYAN: Yes, this is Peggy. I am on the line,
5 the bridge, B-r-y-a-n.

6 JUDGE WALLIS: Thank you. And you are an attorney
7 or are you a person associated with the group?

8 MS. BRYAN: I'm the Executive Director for the
9 Economic Development Council for Skamania County.

10 JUDGE WALLIS: Very well. Thank you.

11 Skamania County Agri-Tourism Association?

12 MS. TAYLOR: This is Isa Taylor. I have been the
13 attorney for the association until this point, but I would
14 like to submit my withdrawal as an attorney. I understand I
15 could do this verbally looking at the rules. It looks like
16 that would be okay. Would you also like that in writing to
17 be served to everyone?

18 JUDGE WALLIS: My preference would be that it be
19 served to everyone. We've already run across a party that
20 is not present today, and if we have a piece of paper come
21 in it will be easier for staff, especially in light of the
22 move that we're engaged, to make sure that the information
23 gets into the right place. Will you be representing the
24 group today?

25 MS. TAYLOR: Actually I understand that

1 Mr. Crumpacker is on the phone and he is of the association,
2 and he would like to be the representative. Is he on the
3 phone?

4 JUDGE WALLIS: Mr. Crumpacker?

5 MS. TAYLOR: It appears he is not so I will stay
6 on as representative for the purposes of this phone call,
7 and we will submit my withdrawal and his request to be a
8 representative for the association in writing promptly.

9 JUDGE WALLIS: Very good. Thank you.

10 The Association of Washington Business? Is
11 Mr. McCabe on the line?

12 The Seattle Audubon Society.

13 MR. CANTRELL: Yes, Shawn Cantrell. I'm the
14 Executive Director representing the parties. I am not the
15 counsel.

16 JUDGE WALLIS: Thank you, Mr. Cantrell.

17 Columbia River Gorge Commission?

18 The Port of Skamania County?

19 MS. BRYAN: This is Peggy Bryan again. Actually
20 the Port's attorney and the PUD planned on being on the line
21 representing both the Port and PUD. I don't know if he is
22 having trouble connecting, but I did talk to him this
23 morning, and he did plan on being on the line, the bridge
24 line so I'm not sure why that hasn't happened.

25 JUDGE WALLIS: Very well. Just based on an

1 informal count of beeps as we were coming in it appears that
2 we should have ports open. So, Ms. Bryan, thank you for
3 that information, and we'll look forward to either joining
4 us at some point.

5 The City of White Salmon?

6 Klickitat County Public Economic Development
7 Authority?

8 MR. CANON: I'm here. Michael Canon.

9 JUDGE WALLIS: Mr. Canon, could you step up to
10 counsel table. There's a spot over here with a microphone
11 available. It's very important because we have people on
12 the bridge line that people in the room talk into a
13 microphone.

14 MR. CANON: Thank you. I'm Michael Canon and I
15 represent Klickitat County Public Economic Development
16 Authority.

17 JUDGE WALLIS: Thank you very much. You are the
18 executive director; is that correct?

19 MR. CANON: Yes, I am.

20 JUDGE WALLIS: The Klickitat and Cascade Tribes of
21 the Yakama Nation, Mr. Slockish?

22 MR. SLOCKISH: Yes, I'm here. Wilbur Slockish,
23 Jr.

24 JUDGE WALLIS: Very well.

25 MR. JACKSON: Johnny Jackson for the Cascade

1 Tribe.

2 JUDGE WALLIS: Very well. Thank you.

3 Confederated Tribes and Bands of the Yakama
4 Nation?

5 MR. COLBY: George Colby, attorney for the same by
6 the bridge phone with Jessica Lally of the Cultural
7 Resources Program. Our person for service would be Harry
8 Smiskin, S-m-i-s-k-i-n, Chairman of the Yakama Indian
9 Nation, P.O. Box 151, Toppenish, Washington 98948.

10 JUDGE WALLIS: Thank you.

11 Are there any other parties present today and
12 represented?

13 Let the record show that there is no response.
14 Let's proceed. Counsel contact information I've indicated
15 that that information will be forthcoming.

16 I did want to spend some time this morning talking
17 about procedural rules and the filing and service of
18 documents. In the materials distributed for today's session
19 I have set out some of our rules. I know many of the people
20 representing parties are not attorneys, and even for the
21 attorneys this information is different from agency to
22 agency. So I wanted to make sure that everyone is pretty
23 much on the same wavelength.

24 In particular, we had some earlier concerns about
25 the deadlines for filing and service. The Administrative

1 Procedure Act governs in these situations as well as agency
2 rules, and for filing of a document we are required under
3 the APA except in limited circumstances to receive a hard
4 copy of the document by the deadline of service. So whether
5 it's brought in physically or whether it is sent to be
6 received by the close of business on the deadline day.

7 On the other hand, service when you send copies to
8 other parties the requirement is only that they be mailed or
9 otherwise dispatched appropriately on that day. Most
10 parties find it most convenient to do everything on the same
11 day and they have everything completed. If there is a
12 problem with service in an individual case, there is
13 sometimes some latitude to deal with that. And if that
14 happens to you in this proceeding, you can talk with
15 Mr. Wright, the Council Manager, about that or you can talk
16 with me about that, and I will provide numbers where I can
17 be reached.

18 MR. ARAMBURU: Mr. Wallis, may I?

19 JUDGE WALLIS: Mr. Aramburu.

20 MR. ARAMBURU: Thank you. On behalf of SOSA
21 Richard Aramburu for the record. We find it very convenient
22 for the parties to communicate particularly on matters such
23 as these conferences through the e-mail. I notice that's
24 the way you reached us with supplemental information.

25 JUDGE WALLIS: Yes.

1 MR. ARAMBURU: I would like to inquire whether or
2 not it would be possible to adopt the e-mail communications
3 for matters such as the prehearing conference communications
4 related to that as opposed to having physical documents be
5 brought? I think most of the parties do have access to
6 e-mail. I know at least the principal parties that I have
7 communicated with have that. Certainly the filing of
8 evidence, those kind of things, I understand that the
9 parties will need hard copies. We don't have any objection
10 to that, but for status conferences, communications
11 respecting procedural issues would seem to me that using the
12 e-mail would be a simpler process, and we would like to
13 propose that that would be done.

14 JUDGE WALLIS: We did discuss that early on in
15 this proceeding, and there were either some parties who did
16 not have access to electronic mail or that would not agree
17 to the use of electronic mail for exchanging information
18 among parties. I think there is a distinction between a
19 matter that must be filed with the agency as opposed to
20 supplementary communication.

21 For example, we did serve on all of the parties
22 the official notice of the prehearing conference and then
23 followed that up with some additional information which did
24 not change the time and place of the conference or the
25 purpose of the conference by electronic mail, and I have no

1 problem with that. I have no problem with parties
2 exchanging information to the extent you wish to do so
3 without going through all the faldederal of mailing, but when
4 it comes to documents that must be filed with the Commission
5 and must be served on parties for legal reasons, then my
6 instinct is to hold to the requirements that we follow the
7 provisions in the APA and in the Council's rules.

8 MR. ARAMBURU: Thank you. We'll I think we'll
9 adopt the procedure for the informal communications.

10 JUDGE WALLIS: Are there any questions from other
11 parties about that?

12 MR. PEEPLES: I just have one comment and this is
13 just generally. As soon as EFSEC gets the filings by the
14 next day it's usually on their website. So even though if
15 it's mailed, it's usually on the website within 24 hours.

16 JUDGE WALLIS: The staff certainly does its best
17 to keep up with things. Sometimes staff is overwhelmed.

18 All right. We wanted to talk now about
19 consolidation or coordination. I did provide a copy of WAC
20 463-30-093 which indicates that parties are urged to
21 consolidate or to coordinate their presentations with
22 parties that have like interests, and my understanding just
23 from hearing discussions is that people are doing that on an
24 informal basis. To the extent that you wish to do that in
25 terms of coordinating your presentations, your arguments, we

1 certainly would encourage that because of the number of
2 parties to avoid unnecessary repetition and to give every
3 party the opportunity to have an effective say in the
4 proceeding.

5 Now we want to talk about status of the
6 proceeding. Mr. Posner, could you step forward.

7 Mr. Posner is the staff person who is responsible
8 for assisting the Council with the Environmental Impact
9 Statement process.

10 Mr. Posner, could you give us a brief rundown of
11 the status of the EIS process.

12 MR. POSNER: Certainly. Good morning, Judge
13 Wallis, Stephen Posner, EFSEC staff. As you should know,
14 the public comment period for the Draft EIS closed on
15 Friday. At this point we're up to 538 comments that we've
16 received so far, and I believe we're close to the end of
17 numbering them so I think that's a pretty accurate number at
18 this point. We may have a few more that are coming in late
19 that haven't been numbered yet because we are accepting
20 comments that are date stamped on the 27th which was the
21 last day to file.

22 We're currently numbering and logging in those
23 comments into our database. We have met with BPA,
24 representatives of BPA. We have scheduled weekly conference
25 calls or meetings to share information. Our plan is to once

1 we finish numbering and logging in all of the comments we
2 will start organizing them according to subject area so
3 we'll have a better idea at that point what resources we're
4 going to need to adequately respond to the comments. Some
5 of the comments we've received are quite lengthy so we're
6 expecting that it's going to acquire a fair amount of
7 resources to adequately respond to those comments.

8 We have discussed with BPA the target date for the
9 Draft Final EIS, and we are certainly going to do everything
10 we can to meet that date.

11 So that's pretty much the update at this point.
12 If you have any questions, I would be happy to try to answer
13 them.

14 JUDGE WALLIS: The target is the Wednesday before
15 Thanksgiving; is that correct?

16 MR. POSNER: November 24, yes.

17 JUDGE WALLIS: Are there questions for Mr. Posner?
18 Mr. Aramburu.

19 MR. ARAMBURU: Thank you.

20 JUDGE WALLIS: Mr. Aramburu, could you pull that
21 microphone a little bit closer to help for those of us who
22 are hearing challenged.

23 MR. ARAMBURU: As am I, thank you.

24 Mr. Posner, I've read some of these comments, and
25 we certainly submitted comments on our own. I guess I would

1 like to know how realistic this November 24 date is. The
2 next item on the agenda is some of the concerns that we're
3 going to express about the hearing schedule in connection
4 with that. So I just from my own observation see that as a
5 substantial task that not only involves the agency
6 coordination but the drafting of additional information and
7 then just the printing process that's involved with doing
8 that.

9 So is this really realistic? It does not seem to
10 me to be realistic, but that's a concern that I have.

11 MR. POSNER: Well, we have discussed it and we
12 believe it is, but we certainly recognize that some of the
13 comments now that we've received them are very extensive,
14 and we don't really have a good sense at this point, you
15 know, if we have to go beyond that date, if we're going to
16 go beyond the 24th.

17 Like I said, we're still actually in the early
18 stages cataloging and numbering the comments, although we're
19 getting close to the end of that, and I have looked at some
20 of the extensive comment letters. I have talked to our
21 independent consultant, and they're aware of the November 24
22 date that we're shooting for, and they've assured me that
23 they have the resources to assist us to do everything
24 humanly possible to get to that date. But at this point I
25 can't offer you a guarantee that we're going to get to that

1 date. That's what we're shooting for.

2 MR. ARAMBURU: When might the parties know if
3 there is to be a slippage in that date?

4 MR. POSNER: Well, I think that as we move further
5 along within the next week or two. Next week we're going to
6 have another conference call with BPA and Entrex and we will
7 have essentially all the comments in a database so we can
8 take a look at them and see what the extent of them is, and
9 I would say within the next couple weeks we would have a
10 pretty good idea of whether or not we're going to have to
11 request more time or if we feel we're going to need more
12 time to adequately respond to the comments.

13 MR. ARAMBURU: I appreciate that and I appreciate
14 your hard work on this project. Thank you.

15 MR. POSNER: Thank you.

16 JUDGE WALLIS: Are there other questions?

17 MR. PEEPLES: I just have a comment as a
18 counterpoint to Mr. Aramburu. The Applicant thinks the
19 schedule is doable and, you know, we're very concerned of
20 additional slippage.

21 JUDGE WALLIS: Very well. Does anyone else wish
22 to be heard on the topic?

23 Yes.

24 MR. CANTRELL: Shawn Cantrell, Seattle Audubon. I
25 guess the question that I had is I've read some not all of

1 those comments that have been posted, and while our comments
2 did not ask for basically redoing the Draft EIS, I saw that
3 at least one other if not multiple have suggested that it
4 needs to start over. Assuming that you meet this November
5 24 date is that a judgment that you won't be starting over
6 then?

7 MR. POSNER: I don't believe that we are planning
8 on starting over, no.

9 JUDGE WALLIS: Any other questions or comments?

10 MS. BRYAN: Peggy Bryan, from Skamania County
11 Economic Development Council.

12 JUDGE WALLIS: Ms. Bryan.

13 MS. BRYAN: I wanted to just submit that the EDC
14 considers its prefiled testimony at the earliest date
15 possible a priority, and so we would urge there would be no
16 deviation from the amended schedule that was circulated on
17 August 30.

18 JUDGE WALLIS: Thank you.

19 Let us turn now to the proposed hearing schedule.

20 Mr. Posner, thank you very much for your
21 assistance today.

22 We've provided a proposed schedule with a
23 comparison of the proposed schedule to the additional
24 schedule that was published. Many of the parties had very
25 little concern with the original schedule with a couple of

1 exceptions, one of which was that receipt of the Draft Final
2 Environmental Impact Statement. The schedule is set out on
3 the materials that were circulated. Let me ask if there are
4 any parties apart from the comments that have already been
5 made that would like to comment on the schedule?

6 Mr. Aramburu.

7 MR. ARAMBURU: You anticipated my comments,
8 Mr. Wallis. We do have some basic concerns with the
9 schedule and we are handing out to the participants in the
10 room here a proposal to revise that schedule. Let me
11 address a couple of the particular concerns before I
12 describe our proposed revisions.

13 First of all, we've expressed this concern in our
14 objections to the prehearing order that the Environmental
15 Impact Statement be available to the parties in advance of
16 the preparation of their prefiled testimony. We're
17 concerned about that because as citizen groups the resources
18 we have are not comparable to those of the Applicant or
19 others, and we may rely on the Environmental Impact
20 Statement as potentially substitute or a strong supplement
21 to any testimony that we might have.

22 We've raised comments in our materials about some
23 of the deficiencies that we found in the EIS, and we hope
24 that those will receive favorable treatment by Ms. Posner
25 and others who are doing the Draft Final EIS, but we do feel

1 strongly that the Draft Final EIS should be available to us
2 in sufficient time to incorporate that within our principal
3 presentation to the Commission, and therefore we've asked
4 the change in the schedule that's been outlined to you which
5 is that our prefiled testimony not be required to be
6 submitted until a period of approximately six weeks after
7 the EIS comes out.

8 This I hope will prevent duplication in testimony
9 and will allow a clear presentation by witnesses for SOSA
10 and Friends who are carefully cooperating in all proceedings
11 that are here, and I think would allow a cleaner set of
12 presentation to the Commission and not potentially having to
13 go back with experts on particular subjects such as impacts
14 on bird life to provide one set of testimony and then read
15 the EIS and provide a different set of testimony.

16 So what we've proposed on the agenda here is no
17 change in the deadlines up until the anticipated release of
18 the EIS on November 24, and I really don't know if we're
19 going to meet that or not. But assuming that's correct a
20 period of six weeks for our responding prefiled testimony
21 and additional status conference and that would be
22 January 10. In fact, because there's a number of people
23 that aren't here and can't read this let me explain what
24 I've proposed.

25 The anticipated DFEIS release is November 24. We

1 propose that the respondents' prefiling or responding
2 prefiling be due January 10, 2011, a status conference
3 shortly thereafter, rebuttal deadline a period of four weeks
4 after receipt of the responding prefiling testimony, further
5 status conference on February 22, and then the hearings
6 scheduled for March 1 to 10 in or near Stevenson. I believe
7 we have cleared those dates. There was some questions about
8 conflicts of the schedules of counsel, but we cleared those
9 dates at least for purposes of Friends and SOSA.

10 So we think this is a good and fair schedule. It
11 involves some slippage in the schedule proposed by EFSEC
12 staff, but we do think that it's fair. We think it really
13 would involve an expedited, more coordinated kind of
14 presentation by the parties. We do have very much of a
15 concern with the schedule that was originally presented that
16 would only allow us a very brief time to look at the FEIS
17 between the time rebuttal material would come in, and this,
18 of course, is smack dab in the middle of the holidays, and
19 getting people to respond through the Thanksgiving vacation
20 and all these other things is a concern.

21 So we think this is a fair schedule. There is
22 some bit of slippage here, but I think it's going to result
23 in a more efficient hearing, less confusion about the
24 materials that would come in, less need to have the rebuttal
25 testimony discuss or otherwise review the DFEIS that comes

1 out which would anticipate is going to be a substantial
2 document given there's already been 538 comments and many of
3 those are extensive. So that would be our proposal to
4 modify your schedule. I hope I've read these numbers off
5 sufficiently for those on the bridge line to understand our
6 proposal.

7 JUDGE WALLIS: Thank you, Mr. Aramburu. I do want
8 to assure you that I'm neither presentiment or able to read
9 minds, and I did notice you reaching for the microphone
10 which caused me to call on you.

11 Are there comments on Mr. Aramburu's presentation,
12 and let me start off by asking if there are comments from
13 people who support that proposal.

14 MR. KAHN: Your Honor, this is Gary Kahn
15 representing the Friends of the Columbia Gorge. In light of
16 everybody's request that we coordinate when we have similar
17 issues, we did submit our own schedule, but this was
18 coordinated with Mr Aramburu on the Friends of the Gorge
19 behalf and we totally support it.

20 MR. BAKER: Thank you. Your Honor, this is Nathan
21 Baker. As Mr. Kahn stated we do join in support of this
22 proposal, and just to briefly reiterate our major concern,
23 we have limited resources and much of the expert testimony
24 will be involving the content of the EIS. We believe that
25 will be a major issue, and really in effect the EIS will be

1 the primary exhibit for the proceedings for all parties. We
2 heard Mr. Posner say that the entire EIS is not going to be
3 thrown out and started over today; however, many of the
4 comments have recommended substantial changes to the EIS and
5 we anticipate or we believe that should happen. Our concern
6 is that under the current schedule our experts will be
7 commenting and critiquing on the EIS that will very likely
8 be obsolete at a later date. That has an impact on our
9 resources, and we would prefer to have the EIS available
10 prior to our initial filing. Thank you.

11 JUDGE WALLIS: Thank you, Mr. Baker.

12 Are there other people who wish to support the
13 proposal?

14 MS. TAYLOR: Yes. This is Isa Taylor on behalf of
15 Skamania County Agri-Tourism Association, and for the
16 reasons previously stated by the previous three parties we
17 would support the delayed schedule as well.

18 MR. COLBY: Judge, this is George Colby for the
19 Yakama Nation and we concur for the adding of more time for
20 the reasons stated.

21 JUDGE WALLIS: Thank you.

22 Any other persons?

23 Very well. Is there anyone who wishes to speak in
24 opposition to this suggestion?

25 Mr. Peeples.

1 MR. PEEPLES: The Applicant, yes. This was
2 originally suppose to have been heard in December, and I
3 think the Applicant is willing to let it go to January but
4 no more. EFSEC is under a policy directive from the
5 legislature to get these done in a reasonably timely manner
6 as stated in the statute one year. This is simply déjà vu.
7 I hate to remember how many times I've heard this, and I
8 don't say this with rancor, but all intervenors that are
9 opposing a project want to delay it as long as possible and
10 probably the other side the Applicant is always saying go,
11 go, go right away. I don't see any positive things coming
12 out of this proposed schedule. We agree with the schedule
13 set, and the proposed alternative schedule would simply
14 delay the process. I find it, I want to note that we still
15 have to provide our testimony on the 15th of September which
16 we are ready to do, but they now have given themselves a
17 huge amount of time after that before they have to do
18 anything.

19 We believe they have seen the DEIS. The
20 assumption is it's going to be fairly close to that when it
21 comes out in PDEIS form. They will have our testimony by
22 the 15th and we should go with the January date.

23 MS. ANDERSON: Yes, Your Honor, very briefly, Erin
24 Anderson for the Applicant. I would again reiterate or
25 encourage the Court's consideration of the assertion of

1 Mr. Posner that he is going to meet the deadline. He has
2 been very candid with this Council and with the judge that
3 he is doing everything he can. He has significant resources
4 at his disposal to meet that deadline. It's already been
5 extended once. You heard him affirm the additional
6 resources that he's bringing to bear on this, and I would
7 not find it compelling that yet again there are suggestions
8 here that the EIS is going to have to be rewritten. That is
9 not the case.

10 And simply because there are comments in there
11 urging that it be thrown out that is not unusual to any
12 Environmental Impact Statement. That is nothing new here.
13 This document has been out once. It's going to come out in
14 refined form in November. We remain committed to meeting
15 the schedule established for prefiling our testimony on the
16 15th to two weeks from today. There is ample time for the
17 responding parties to respond. The schedule has been set
18 out and broadcast in advance by the Council. There is
19 nothing new here.

20 In addition to that, you heard Mr. Peeples say
21 that the Applicant would be willing to push the hearing date
22 out to January 5, but we would remind the Council the
23 state's policy is to process these in expedited fashion.
24 We're already pushing that margin. The Council is an
25 experienced the council, the counselors to the parties are

1 also experienced in EFSEC proceedings, environmental
2 proceedings, complex proceedings. We're capable of doing
3 this.

4 JUDGE WALLIS: Thank you very much. Is there
5 anything further?

6 MS. BRYAN: Peggy Bryan once again for Skamania
7 County Economic Development Council.

8 JUDGE WALLIS: Ms. Bryan.

9 MS. BRYAN: I would like to reiterate my support
10 of staying with the amended schedule that has already been
11 presented. The economic downturn has worsened and it's
12 impacting an already fragile economy in Skamania County, and
13 this application represents private investment and new
14 infrastructure and jobs in a very, very critical time in
15 Skamania County, and I think delaying the schedule further
16 will only worsen that condition and cause hardship for
17 Skamania County.

18 JUDGE WALLIS: Mr. Canon.

19 MR. CANON: Yes, Klickitat County Public Economic
20 Development Authority. In discussions yesterday with our
21 county commissioners we expressed our support for this EFSEC
22 amended schedule. There's already been slippage. We feel
23 very much in agreement with Ms. Bryan that the economic
24 situation is such we don't want to see further slippage.
25 Our county supports the Whistling Ridge Project. We would

1 like see it proceed on its normal schedule and not slip
2 further behind. Thank you.

3 JUDGE WALLIS: Thank you.

4 Anyone else?

5 It appears there is not.

6 Mr. Aramburu.

7 MR. ARAMBURU: Yes, just a brief response raising
8 two items. First of all, if the Applicant wishes to change
9 their prefiling deadline from September 15 to another date
10 we don't express an opinion on that. If they'd like to do
11 that, then we would certainly not have an objection to that.
12 And the Applicant does raise issues of timing, and we agree
13 that there has been an extended period of time, but it was a
14 year between the time that we had our scoping conference
15 that you were at and all of us were at down in Skamania
16 County in early May of 2009. It was a year until the Final
17 EIS came out and that was an extended period of time. We're
18 not responsible for those delays. We're very much concerned
19 that we have an efficient hearing, that resources are used
20 to their best available manner, and that the intervenors
21 have the best opportunity to present a coordinated and
22 efficient case. Thank you.

23 JUDGE WALLIS: Thank you.

24 Very well. Let's move on to 4(c) under the agenda
25 and progress toward preparation of prefiled evidence. The

1 Applicant has indicated that it is willing to meet the
2 deadline, and I'm assuming from that that the preparation of
3 prefiled evidence is underway; is that correct?

4 MR. PEEPLES: That's correct.

5 JUDGE WALLIS: Very well. I would like to talk a
6 little bit about -- well, let me back up and say that in
7 light of the conversations, my assumption is that the
8 parties are not, other parties are not preparing prefiled
9 evidence at this time but intend to do that at a later time
10 when there's something to shoot at. Is that basically
11 correct?

12 I hear no disagreement with that.

13 Progress toward process for exhibit identification
14 and marking. In a complex hearing I have experienced
15 processes in which alternative approaches have been used,
16 and in some proceedings the parties have marked their
17 documents independently perhaps by the witness's name. In
18 other proceedings the marking has been done in an organized
19 fashion in which the exhibit numbers are given series,
20 witnesses are given a series of numbers, and those are based
21 in part on the expected order of presentation in which the
22 witnesses will appear.

23 I wanted to plant that seed for thought to those
24 of you who are responsible for the preparation of multiple
25 parties, and at the next status prehearing conference I

1 would like to make that a topic of discussion. The copy
2 requirements for exhibits are set out in WAC 463-30-120, and
3 for this proceeding the Council will require the original
4 plus 12 copies and will require evidence to be printed on
5 both sides of a sheet of paper, each sheet of paper. The
6 filing and service requirements are set out. We touched on
7 that briefly before, and I want to call the parties'
8 attention to it to ensure that everyone knows what the
9 process is going to be. If you have any questions about
10 that, you can raise those questions now or you can raise
11 them individually with us or with staff or bring them up at
12 the next prehearing conference. Are there any questions
13 about the evidentiary process?

14 Let the record show that there is no response.

15 Mr. Peeples.

16 MR. PEEPLES: With regard to we're planning to
17 file on the 15th, and I was planning to mark our testimony,
18 you know, as exhibits as we had done in the last two cases,
19 and that was a method that was developed by Irina Makarow.
20 So when we file our testimony on the 15th do you want us to
21 have any designation stated or put on that testimony?
22 Because they're usually filed as exhibits or that's what I
23 was planning to do.

24 JUDGE WALLIS: I'm not familiar with Ms. Makarow's
25 process. Inasmuch as it is only the Applicant that would be

1 involved in initial marking, perhaps we can have that
2 discussion off record.

3 MR. PEEPLES: Okay.

4 JUDGE WALLIS: And then take it up in detail at
5 the next prehearing conference.

6 MR. PEEPLES: Fine.

7 JUDGE WALLIS: Discovery is the next item. I'm
8 wondering if parties are seeing a potential need for
9 discovery, and whether there are any process or
10 implementation issues involving discovery?

11 Mr. Aramburu.

12 MR. ARAMBURU: Thank you, Mr. Wallis. We have
13 last week consistent with the directive of the Council to
14 engage in informal discovery as opposed to formal discovery,
15 we sent a letter to Mr. McMahan last week requesting that
16 certain information be provided to us. We asked that
17 material be provided within 30 days or so, and I think right
18 at the moment that is the extent of our discovery. Now it
19 may be that upon receipt of the Applicant's prefiled
20 testimony and exhibits there may be some additional
21 questions that we might have, and we would intend to
22 continue to follow as much as possible the idea of informal
23 discovery between the Applicant and us.

24 Now I don't know, I did not when I wrote the
25 letter to Mr. McMahan requesting information I didn't copy

1 everyone on that. I'm presuming that informal discovery
2 goes on between the parties and need not be filed with the
3 Council nor submitted to other parties. Am I correct about
4 that?

5 JUDGE WALLIS: Let me give my reaction first and
6 then ask for comments. I see no reason that Council needs
7 to be advised of discovery issues. On the other hand,
8 because this is a multiparty proceeding and many parties may
9 be looking toward discovery if the requests are circulated
10 that would have a couple of benefits. It would avoid the
11 need for other parties to make the same kind of requests,
12 and it would allow parties to monitor what's going on in
13 terms of discovery so that if they wanted to, if another
14 party wanted to raise a discovery issue that he would have a
15 format to follow. So that's my thought.

16 Are there any other thoughts about that?

17 MR. ARAMBURU: We're certainly prepared to do
18 that, and we will do that immediately after the hearing to
19 circulate that to the other parties, sir.

20 MR. PEEPLES: We received the discovery request I
21 think it's dated the 25th. I first saw it Friday or maybe
22 Saturday. Mr. McMahan is up in Canada. We will have a
23 response well within that 30-day period.

24 JUDGE WALLIS: Very well. Any other questions or
25 issues?

1 Mr. Marvin.

2 MR. MARVIN: I just want to concur in the Court's
3 observations that circulating discovery requests would be
4 beneficial, and I think perhaps the protocol should be that
5 if you submit discovery you can circulate it and copy it to
6 the other parties, and then if the other parties would like
7 to be included in the disclosure they can contact the
8 Applicant. That way we don't end up I mean generating
9 copies for every intervenor whether they like it or not, and
10 at the same time we ensure that the Applicant isn't being
11 buried in duplicative requests.

12 JUDGE WALLIS: Thank you.

13 MR. PEEPLES: Just one other observation. In KV
14 we did have a request from Kittitas Valley and that was
15 handled between us and Kittitas Valley. I don't think
16 anything went to the Council on that that I recall. I don't
17 know if Council Members can recall anything about that. I
18 think it was just between us.

19 MR. MARVIN: No, it doesn't need to involve the
20 Council. I think it's just something that can be done
21 between the attorneys.

22 JUDGE WALLIS: Very well. Do parties have any
23 problems or concerns with the process?

24 Let the record show that I hear no response.

25 Discussion of the procedural rules. I did want to

1 call it to your attention as parties that stipulations and
2 similar agreements among the parties can avoid the need for
3 contested presentations. If you agree with another party
4 that a document or kind of evidence should be presented to
5 the Council, it would be unnecessary for multiple parties to
6 present it and unnecessary to spend hearing time if the
7 stipulation is accepted in arguing whether the evidence
8 should be received or not.

9 Hearing schedule and rules of evidence are
10 identified in the Council's rules in 463-30-300 and 310
11 respectively, and so insofar as feasible and appropriate the
12 Council asks the parties to follow those rules. And in the
13 last section 310, I have identified in bold type some of the
14 provisions that are most helpful to the Council and whose
15 failure to observe tend to be more problematic. So I'm not
16 sure we need to spend any time with any of these unless
17 there are questions and certainly we will entertain
18 questions.

19 MR. ARAMBURU: Yes, I do. We're following the
20 protocol here of prefiled testimony, and in many
21 administrative proceedings I've been in the parties would
22 offer motions to strike either testimony or exhibits for
23 various reasons and not wait until the hearing to do that.
24 I don't know which protocol, I don't know that it makes an
25 awful lot of difference to us but probably that protocol

1 ought to be discussed.

2 JUDGE WALLIS: Are there comments from other
3 parties?

4 MR. PEEPLES: I believe that the hearing examiner
5 in the KV case did have a procedure for that set out. I
6 can't recall what it was though. I really don't. But I
7 think for guidance I think we can check an order, a
8 prehearing order that might have been done that way.

9 JUDGE WALLIS: Very well. I have been involved in
10 proceedings in which that process is followed, and I
11 strongly favor it because if we wait until the exhibit is
12 offered during the hearing, then we have Council Members and
13 other parties who are tied up during the period of argument
14 on that and that can be done quite efficiently if a separate
15 time is allotted for that.

16 MR. ARAMBURU: As a practical matter, Mr. Wallis,
17 the issue is going to come before us fairly soon if we stick
18 with the filing date of September 15, 2010. Would it be
19 appropriate to set a time by which objections or motions to
20 strike would be filed? Would that be appropriate? It would
21 seem to me, and I don't know that you would necessarily be
22 ruling on those in advance of the hearing. I guess that
23 would be another procedural question that we would have. I
24 think perhaps the deadlines for doing that and how those
25 motions would be handled by the Commission would be an

1 appropriate matter of discussion.

2 JUDGE WALLIS: Very well.

3 MR. PEEPLES: I guess my suggestion if we want to
4 talk about that, we have a status conference on the 22nd. I
5 would really like to review what was done in KV before I
6 comment today on it. That might be good guidance for
7 everybody.

8 MR. ARAMBURU: That's not a problem with us as
9 long as we have some lead time to know what we're suppose to
10 do and when we're suppose to do it and who's going to rule
11 it.

12 JUDGE WALLIS: Very well. Let's make that a line
13 item for the agenda for the next prehearing and status
14 conference.

15 MR. PEEPLES: Fine.

16 JUDGE WALLIS: Very well. We have gone through my
17 list of items to discuss today. Do any of the parties have
18 any other matters that you would like to raise at this time?

19 MR. ARAMBURU: I did have two matters. Perhaps
20 one I should have raised to Mr. Posner. I am presuming,
21 although I don't know, that the Draft Final EIS will not be
22 subject to public comment. Our request would be that
23 because it remains a draft document that it be subject to
24 comment, but Order No. 850 didn't describe how that was
25 going to be done and whether or not public comment would be

1 available to that.

2 I do understand, of course, the parties in these
3 proceedings will have an opportunity to comment on the
4 content of that document, but I don't know what the plan is
5 for public comment and a period of circulation to the
6 parties. We particularly filed comments on the Draft EIS.

7 JUDGE WALLIS: Thank you. You said you had two
8 items. Is there another?

9 MR. ARAMBURU: There are. We briefly discussed
10 discovery matters. We may have requests of the Council or
11 of BPA regarding the information that they may have. To
12 some extent that can be done under the Freedom of
13 Information Act or the public records provisions of
14 Washington statutes. I guess I would tend to treat those
15 requests probably as we would discovery, and if we have
16 questions or requests for information to BPA or the Council
17 that we circulate those to all of the parties.

18 JUDGE WALLIS: Very well. Are there responses to
19 either of Mr. Aramburu's points?

20 MR. PEEPLES: I don't believe EFSEC should ever
21 allow discovery of itself in a proceeding that it is
22 conducting. I think that also came up in the KV case so I
23 can't remember for sure, but I know there was a lot of
24 sparring around that issue. My recollection is the Council
25 said, no, you cannot have discovery on us. They can make

1 whatever PVC request they may want, but I would be totally
2 opposed for discovery against any agency who is conducting
3 an adjudicative proceeding. With regard to the Draft Final
4 EIS, it would be clearly the Applicant's position that there
5 would not be additional public comments; that if there's any
6 issues that goes up with the appeal.

7 MR. BAKER: This is Nathan Baker with Friends of
8 the Columbia Gorge. On Mr. Aramburu's first point I guess I
9 presumed a little differently. I presumed that there would
10 be public comment on the Draft Final EIS. When I've seen
11 Draft Final EIS's in other proceedings there has been public
12 comment and that's logical to use it. It is a draft
13 document. Again we do, Friends and other parties have
14 requested substantial changes to the content of the EIS. We
15 believe that's necessary. If that does happen then in all
16 fairness the public should be able to comment on the new
17 contents.

18 That would also in terms of our requests for
19 having our filing, our initial pre-filing date after the
20 Draft Final EIS our intent with our proposed schedule is to
21 have that time period run concurrently with the public
22 comment period. Thank you.

23 MR. PEEPLES: I'm real concerned about getting in
24 a Möbius loop. I believe that's what you call it. It will
25 just encourage an additional delay. I don't blame the

1 opponents for wanting that because it will provide delay.
2 We'll never get over that.

3 MS. ANDERSON: Briefly, Your Honor, Erin Anderson.
4 I think it does set a dangerous precedent if every time you
5 issue a Draft Final EIS it is reopened for comments. Using
6 Mr. Baker's argument that there may be new issues that come
7 up, I concur with Mr. Peeples. There will always be
8 somebody who will have some kind of comment and that doesn't
9 justify keeping that comment period open. It's a cycle that
10 will never end.

11 JUDGE WALLIS: Very well. I see no more hands
12 raised at this point.

13 MR. COLBY: I would have a comment. Colby here,
14 if you're still taking comment.

15 JUDGE WALLIS: Very well, Mr. Colby, certainly.

16 MR. COLBY: George Colby on behalf of the Yakama
17 Nation. Number one, thank you and EFSEC for giving us some
18 consideration in regard to the time constraints that we have
19 and how the Yakama Nation government works. We appreciate
20 that and we just want that to be a part of the record,
21 and -- are you still there?

22 JUDGE WALLIS: Yes, thank you, Mr. Colby.

23 MR. COLBY: I don't quite, you know, I assume as a
24 judge you want to know if there's any red flags that may be
25 flying in the wind. I assume. Two days ago Judge Shea in a

1 case of the Yakama Indian Nation and Hawaiian Waste Systems
2 which was shipping garbage from Hawaii to the Roosevelt
3 Landfill ruled in favor of the Yakama Indian Nation as well
4 as the Friends of the Columbia River Gorge, and we're
5 analyzing that preliminary injunction that he granted to see
6 if there is any applicability to the case herein. I'm not
7 saying that there is. I'm just saying that there is a
8 federal court order regarding the Yakama Nation's treaty
9 status on the land that we're talking about that the
10 Applicant is working on on the Whistling Ridge Energy
11 Project since it's within the seated area of the Yakama
12 Nation. Thank you, Judge.

13 JUDGE WALLIS: Thank you. Anything further for
14 the good of the order?

15 MS. ANDERSON: Your Honor, I too on behalf of
16 Whistling Ridge am aware of what Mr. Colby is referencing
17 and we will be reviewing that and prepared for that.

18 JUDGE WALLIS: Very well. Thank you.

19 Yes.

20 MR. CANTRELL: Shawn Cantrell, Seattle Audubon.
21 Just recognizing that the questions before you on the
22 potential changes to the schedule wondering when you would
23 anticipate sharing with us your decisions and ruling on
24 that?

25 JUDGE WALLIS: We will issue a further prehearing

1 order as soon as practicable given the hoops that we have to
2 jump through in preparing such documents, and my take on it
3 in light of the schedule is that it will not be critical for
4 the parties, at least in the immediate future as much as the
5 Applicant bears laboring oar of producing evidence, and that
6 schedule appears to be satisfactory to the Applicant. It is
7 after the presentation of the Applicant's evidence that
8 concerns will be heightened for other parties. So we will
9 do the best we can for a prompt and complete response to the
10 issues that have been raised.

11 MR. CANTRELL: Thank you.

12 MR. ARAMBURU: Are we going to have a second
13 status conference here or someplace like this on the 22nd?

14 JUDGE WALLIS: I have not verified the
15 availability of this particular facility, but it is head and
16 shoulders above most of the others that we have used and we
17 certainly aim for that.

18 MR. ARAMBURU: Thank you.

19 JUDGE WALLIS: On the bridge line?

20 MR. COLBY: The time for September 22?

21 JUDGE WALLIS: We will aim for ten o'clock, but
22 there will be a notice of hearing on that that we will
23 distribute that will set a definite time frame.

24 MR. CANTRELL: Shawn Cantrell for Seattle Audubon.
25 Would you anticipate there would be a bridge line for

1 September 22?

2 JUDGE WALLIS: Yes. Yes, we'll aim for having
3 both this facility and bridge line available to us. There
4 may be some necessary jogging of dates. We'll certainly do
5 our best to accommodate the interests of parties, and if it
6 proves that the target date that we identified is not
7 feasible, then we will pass the word, even if it might be
8 before we have a formal notice of hearing to circulate.

9 Okay. Last call anything further?

10 MR. FRYHLING: Judge Wallis, this is Dick
11 Fryhling, Council Member Fryhling.

12 JUDGE WALLIS: Ah, Mr. Fryhling.

13 MR. FRYHLING: I just want the record to show that
14 I have been on the bridge line since ten o'clock listening
15 to the entire proceeding.

16 JUDGE WALLIS: Thank you, Mr. Fryhling.

17 Are there other Council Members that have been
18 with us on the bridge line?

19 Let the record show that there's no response. I
20 believe that concludes today's session.

21 MR. MOSS: Judge Wallis for the record I'll note
22 my presence at the bench. I'm Dennis Moss from the
23 Utilities and Transportation Commission and I'm a member of
24 the Council.

25 JUDGE WALLIS: Mr. Moss, thank you.

1 MR. MOSS: Thank you.

2 JUDGE WALLIS: This matter is adjourned.

3 * * * * *

4 (Prehearing Conference was adjourned at 11:08

5 a.m.)

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

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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 September 1, 2010 in Olympia, Washington.

Shaun Linse, CCR 2029