

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application

Docket No. EF-220011

Scout Clean Energy, LLC,
Horse Heaven Wind Farm, LLC,
Applicant

Council Order No. 887

**ORDER DENYING REQUEST
FOR PUBLIC COMMENT
HEARING**

On August 23, citing an article published in the Tri-City Herald on August 21, counsel for Tri-Cities CARES (TCC) requested by email and during cross examination hearings that the public comment hearing scheduled for that evening be continued “to provide adequate notice to impacted parties.” Judge Torem denied the request.

On August 29, counsel for TCC again emailed Judge Torem to “ask if any further decision on renoticing and holding an additional public hearing has been made based upon my objection below and that made verbally at the adjudication session the afternoon of August 23.” The following day, Judge Torem responded to relay the decision of the Council in their capacity as presiding officer that no further public comment hearing would be scheduled or held.

TCC counsel sent a further email on September 1 requesting, on behalf of TCC “that the record reflect its objection to the failure of the Council to hold a second public hearing.” The email stated that:

The record is clear that only about 115 prior commenters were informed of their opportunity to submit testimony, while more than 1000 person had previously commented and were eligible to speak at the hearing, but not provided notice. Public reports indicate that clerical errors were made by EFSEC staff in noticing the hearing. No harm or prejudice to the applicant is identified, or claimed, by it and the holding of a second hearing, after notice to all eligible to testify, is does not involve material delay to these ongoing proceedings, with a decision deadline of January 31, 2024.

Having reviewed the facts regarding public notice of the August 23 public comment hearing, the Council has concluded that there is not sufficient cause to afford another oral public comment opportunity specifically for the adjudicative record in this matter. The public received ample, clear notice of the opportunity to speak at the public comment portion of the adjudication and the notice was not limited to 115 people.

EFSEC issued three public notices regarding the August 23, 2023, public comment hearing portion of the adjudication, and all three notices were posted on EFSEC's website, published to EFSEC's project mailing list, general mailing list, and the August 8th public comment meeting notice was published as a legal ad in two regional newspapers; the Tri-city Herald and the Yakima Herald.

- The Dec. 15, 2022, Order Commencing Agency Adjudication
- The Aug. 8, 2023, Notice of Adjudicative Hearing and Public Comment Hearing
- The Aug. 11, 2023, Supplemental Notice of Adjudication and Public Comment Hearing

The Dec. 15, 2022, Order Commencing Agency Adjudication stated:

During the course of the adjudication, the Council will set a time for public comment in accordance with RCW 80.50.090(4)(a). Any member of the public wishing to speak at this public comment hearing in support of or in opposition to the ASC must file their written comment with the Council raising one or more specific issues no later than January 31, 2023.

The Aug. 8, 2023, Notice of Adjudicative Hearing and Public Comment Hearing stated:

Members of the public who filed a written comment with the Council prior to January 31, 2023, raising one or more specific issues may speak in support or opposition to the proposed Horse Heaven Wind Farm during the Public Comment Hearing session of the adjudication.

RCW 80.50.090(4)(a) provides that, at the adjudicative hearing "any person shall be entitled to be heard in support of or in opposition to the application for certification by raising one or more specific issues, provided that the person has raised the issue or issues in writing with specificity during the application review process or during the public comment period . . . prior to the start of the adjudicative hearing." Consistent with this, the December 15, 2022, Order Commencing Agency Adjudication stated that:

During the course of the adjudication, the Council will set a time for public comment in accordance with RCW 80.50.090(4)(a). Any member of the public wishing to speak at this public comment hearing in support of or in opposition to the ASC must file their written comment with the Council raising one or more specific issues no later than January 31, 2023.

If you are unable to attend the meeting, please submit your comment to the comment database at <https://comments.efsec.wa.gov/> or send your comment in writing to comments@efsec.wa.gov or P.O. Box 43172, Olympia, WA 98504-3172

The Aug. 11, 2023, Supplemental Notice of Adjudicative Hearings and Public Comment Hearing included all of the foregoing text from the Aug. 8, 2023, Notice and then added this additional and revised text in place of the last sentence above:

To verify you are eligible to speak at the public meeting, please search for your previously submitted comment on EFSEC's website here: <https://bit.ly/HHAdjCommentsReceived>. To sign up to speak after verifying you are eligible, please call (360) 664-1345 or email at efsec@efsec.wa.gov before 5:00pm on August 23. If you cannot find your comment or need assistance please call the number above.

If you are eligible to comment but are unable to attend the meeting, please submit your comment in writing to the comment database at <https://comments.efsec.wa.gov> or send your comment in writing to comments@efsec.wa.gov or P.O. Box 43172, Olympia, WA 98504-3172. Non-eligible comments received will not be included in the adjudicative record but will be saved to the general project comments instead.

The linked list of comments included the 115 people who had submitted public comments after issuance of the Order Commencing Agency Adjudication through the January 31, 2023, deadline set out in that order. It did not list written comments received by EFSEC on the project prior to the Order Commencing Agency Adjudication. This was despite EFSEC's policy that people who submitted a written comment raising one or more specific issues prior to the Order Commencing Agency Adjudication should be eligible to make oral comments on the adjudication record, even if they did not also submit another written comment after the Order Commencing Agency Adjudication. Consistent with that interpretation, the Supplemental Notice stated that:

Members of the public who filed a written comment with the Council prior to January 31, 2023, raising one or more specific issues may speak in support or opposition to the proposed Horse Heaven Wind Farm during the Public Comment Hearing session of the adjudication.

And the Supplemental Notice stated that:

If you cannot find your comment or need assistance please call the number above.

EFSEC staff received calls and/or emails from 38 individuals, 33 of which staff confirmed to be eligible based on prior submission of a written comment. Four of those calling/emailing were not eligible because they had not previously commented on the project. One of those calling/emailing was not eligible because they had not previously commented on the project by the January 31, 2023 deadline.

The Tri-City Herald then ran an article on August 13, 2023, ten days before the public comment hearing, that said "To see the 115 comments received by the deadline, go to bit.ly/HHAdjCommentsReceived. Or you can call 360-664-1345 to determine if you previously commented and are eligible to comment again."

Then, by way of correction, on August 21, two days before the hearing, the Tri-City Herald ran a first page article that said:

"Far more people are eligible to speak at a public hearing next week on the proposed Horse

Heaven wind farm just south of Kennewick and Benton City than the 115 people a state agency originally said. . . . Now the agency says anyone who commented on one or more specific issues for the Horse Heaven no later than Jan. 31, 2023, may sign up to speak at a public hearing 5:30 to 8 p.m. Wednesday, Aug. 23. That would make more than 1,000 people eligible to comment.

The majority, but not all, of those comments can be found at bit.ly/HorseHeavenComments under “Comments Received.””

By linking to the list of 115 comments in the Supplemental Notice, it is perhaps possible that some who qualified to be heard during the adjudication public comment hearing might have decided not to take the step of calling to confirm their eligibility to comment orally at the adjudicative hearing and from signing up to do so. The newspaper article of Aug 13 may have contributed to that possibility to a degree. However, the front page August 21 article provided clarification that there was a larger pool of people potentially eligible to make an oral comment on the adjudication record. And the August 8 and 11 notices both encouraged people to call and check if they didn’t find their names on the list and many did so.

Finally, making an oral comment during the public comment hearing held during the adjudication was and is by no means the only way for members of the public to express to EFSEC their objections to, or support for, the proposed project. There have been two other previous oral public comment opportunities—during the public informational meeting and the DEIS comment meeting—and written comments have been accepted regardless of date received into the general comments record. Comments received by the council in writing, and live before a court reporter at prior comment opportunities will be considered along with those made during the public comment hearing portion of the adjudication, consistent with RCW 80.50.100(1)(b).

Given all of the foregoing, the Council concludes that there is not sufficient cause to afford another oral public comment opportunity specifically for the adjudicative record.

DATED at Olympia, Washington, and effective September 7, 2023.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL


KATHLEEN DREW, Chair