

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITING EVALUATION COUNCIL

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In the Matter of the Application of:  
  
Scout Clean Energy, LLC, for Horse Heaven  
Wind Farm, LLC,  
  
Applicant.

DOCKET NO. EF-210011  
  
APPLICANT’S MOTION TO STRIKE  
PRE-FILED DIRECT TESTIMONY OF  
TRI-CITIES C.A.R.E.S. WITNESSES  
RICK DUNN, PAUL KRUPIN, DAVID  
SHARP, AND RICHARD SIMON

**I. INTRODUCTION**

Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC (“Applicant”) respectfully moves to strike certain direct testimony filed by Tri-Cities C.A.R.E.S. (“TCC”) in the above-captioned proceeding. Not only does this testimony go well beyond the scope of TCC’s limited intervention and the established disputed issues in this adjudication, it also violates multiple evidentiary standards.

In addition to the applicable evidentiary principles discussed below, this Motion is based on Applicant’s understanding of Judge Torem’s Second Prehearing Conference Order (“Order”), which limited the issues that Parties could raise. This Motion is further based on the June 12, 2023 order overruling objections to that Order, and specifically addressing “Issues to be Adjudicated,” at 3–4. In the June 12, 2023 order overruling objections, the Administrative Law Judge (“ALJ”) was clear in implementing his prior Order, holding:

It is also within the Council’s discretion to restrict the use of hearing time against arguments about the extent to which a wind or solar energy facility may or may not offset greenhouse gas emissions over its operational lifetime. Speculation about the eventual purchasers of the proposed facility’s electrical output once connected to BPA’s transmission system or about the undesirability of certain uses of electricity are beyond the scope of EFSEC’s inquiry. These arguments are not germane to impacts at the proposed site or conditions that can be included in a site certificate agreement. Nor can Council ignore or second guess RCW 80.50.010’s premise of encouraging the development and integration of clean energy sources, or the various

1 other state laws mandating the transition to alternative energy resources . . . .  
2 Arguments about the wisdom of these policies are better directed to the  
3 Legislature.

4 As a threshold matter, Applicant has concerns about the outcome of the Adjudication  
5 Discovery Conference held on July 2, 2023: specifically, whether the Order and the order  
6 overruling objections to the Order will continue to shape the conduct of these proceedings.  
7 Moreover, no party should have concerns regarding whether sanctions could be imposed for  
8 *any party* making good faith efforts to advocate for the rights of their clients, most  
9 specifically when such rights are based on the clear language of prehearing orders and other  
10 procedural orders and requirements. Such loose threats of sanctions have a potential chilling  
11 effect on the development of an adequate record for these proceedings, with serious  
12 ramifications related to the overall outcome of the Energy Facility Site Evaluation Council’s  
13 (“Council” or “EFSEC”) and the Governor’s consideration of the Application for Site  
14 Certification (“Application”). These threats of sanctions do nothing to “cool down” the  
15 rhetoric of legal counsel—quite the contrary.

16 Notwithstanding Applicant’s trepidations regarding the conduct of these proceedings,  
17 Applicant requests that in accordance with the applicable prehearing orders noted above, the  
18 Council strike the following direct testimony filed by TCC in the above-captioned  
19 proceeding:

- 20 - EXH-5200\_T through EXH-5210\_T: Pre-Filed Direct Testimony of TCC  
21 Witness Rick Dunn
- 22 - EXH-5300\_T through EXH-5304\_T\_REVISED: Pre-Filed Direct  
23 Testimony of TCC Witness Paul Krupin
- 24 - EXH-5400\_T through EXH-5402\_T\_REVISED: Pre-Filed Direct  
25 Testimony of TCC Witness David Sharp
- 26

1 - EXH-5500\_T through EXH-5502\_T: Pre-Filed Direct Testimony of TCC  
2 Witness Richard Simon<sup>1</sup> (together, “Witnesses”).

3 The testimony from these Witnesses is inadmissible and inappropriate for several  
4 reasons. First, the testimony is irrelevant and exceeds the scope limitations placed by Judge  
5 Torem in the Order and the June 12, 2023 order overruling objections to that Order.<sup>2</sup> The  
6 testimony of each of these Witnesses hinges on attacking the “need” for the facility, which is  
7 categorically not required of the Applicant, pursuant to RCW 80.50.010, and specifically,  
8 WAC 463-60-021: “RCW 80.50.010 requires the council to recognize the pressing need for  
9 increased energy facilities. For that reason, applications for site certification need not  
10 demonstrate a need for the energy facility.” WAC 464-60-021 (internal quotations omitted).  
11 The prohibition against considering “need” for the facility is amplified by the clear legal  
12 direction and policy mandates found in RCW 80.50.010, which unmistakably bars all of this  
13 testimony pursuant to the 2022 legislative amendments. Second, the testimony contains  
14 numerous instances where the Witnesses speculate about matters that they have no expertise  
15 on and no factual foundation to support. Finally, Paul Krupin and David Sharp make  
16 conclusions about issues in which they have no qualifications or apparent expertise.

17 To be sure, the presiding officer in an EFSEC adjudication is afforded discretion in  
18 making evidentiary rulings in the proceeding. See RCW 34.05.452; WAC 463-30-310. But  
19 in exercising that discretion, the ALJ must apply the Council’s evidentiary authorities and, to  
20 the extent not inconsistent with RCW 34.05.452(1), the Washington Rules of Evidence.

21 \_\_\_\_\_  
22 <sup>1</sup> We believe it is important to note that during Applicant’s review of the direct testimony submitted by Mr.  
23 Simon, we learned that his testimony was based on confidential proprietary data owned by Applicant. This  
24 apparent misappropriation is contained on pages 1 and 3 of Mr. Simon’s direct testimony. At this time, we are  
investigating the matter further and may take legal action under Washington’s Uniform Trade Secrets Act,  
RCW Title 19, Chapter 108. Further information is provided in the attached Declaration of Timothy McMahan  
in Support of Applicant’s Motion to Strike T.C. C.A.R.E.S. Testimony.

25 <sup>2</sup> Applicant notes the ALJ acted well within his authority to limit TCC’s intervenor status. See RCW  
26 34.05.443(2); WAC 463-30-092; WAC 463-30-020.

1 RCW 34.05.452(2). For the reasons that follow, admitting this TCC testimony would not  
2 only be violative of those authorities; it would also run counter to the operative prehearing  
3 orders in this adjudication, leaving the parties uncertain about which aspects of those orders  
4 are or are not enforceable moving forward in this proceeding.

5 **II. ARGUMENT**

6 **A. The Witnesses’ testimony is irrelevant and immaterial because it is outside the  
7 scope of the disputed issues list and the applicable Site Certificate criteria.**

8 The Order clearly states which issues are disputed—and thus within the scope of this  
9 adjudication—and which are not. Order at 2-3. TCC’s pre-filed direct testimony brings in  
10 evidence outside the scope of the disputed issues list, Order at 2-3, or the inquiry before  
11 EFSEC, and is irrelevant and immaterial to this proceeding. Such testimony is improper and  
12 should be excluded. RCW 34.05.452(1) (“The presiding officer may exclude evidence that is  
13 irrelevant[ or] immaterial”); Washington Rule of Evidence 402; *see State v. Atsbeha*, 142  
14 Wash. 2d 904, 920 (2001) (affirming under Washington rules of evidence exclusion of expert  
15 testimony that was neither relevant nor helpful to trier of fact).<sup>3</sup>

16 Richard Dunn’s testimony should be stricken because the Clean Energy  
17 Transformation Act (“CETA”) and Washington’s State Energy Strategy are not issues in  
18 dispute, and for good reason. The legislature clearly set the state’s policy of promoting  
19 renewable energy development when it enacted CETA. That policy explicitly directs EFSEC  
20 “[t]o encourage the development and integration of clean energy sources” and “[t]o provide  
21 abundant clean energy at reasonable cost.” RCW 80.50.010(3), (4). That legislative policy  
22 is binding on EFSEC. WAC 463-14-020. Any debate about its purpose and impact is best  
23 left to the political sphere, not this adjudication. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 390,  
24 36 P.3d 1014 (2001) (“This court should resist the temptation to rewrite an unambiguous

25 <sup>3</sup> The Second Prehearing Conference Order became effective when entered. RCW 34.05.473(1). Thus,  
26 beginning on May 19, 2023, all parties, including TCC, were required to follow the Order’s provisions. *See*  
Order at 5. The statute does not provide an exception to this requirement when there are pending objections to  
an order. *See* RCW 34.05.473(1)(a)-(c).

1 statute to suit our notions of what is good public policy, recognizing the principle that the  
2 drafting of a statute is a legislative, not a judicial, function” (internal quotation marks and  
3 citation omitted)).

4 Paul Krupin’s testimony covers issues expressly excluded from the adjudication in  
5 the Order. Order at 3. It also includes discussion of the accessibility and readability of the  
6 Application which has nothing to do with any potential impacts of the project. EXH-5300\_T,  
7 Pre-filed Direct Testimony of Paul Krupin, at 4-15. For example, the publishing, the  
8 mapping technology used, and the proposed alternatives or lack thereof in the Application are  
9 not a part of this adjudication. *Id.* at 6-8 (publishing), 8-11 (mapping technology used), 19-  
10 20 (proposed alternatives). For one, none of these complaints identify potential impacts of  
11 the project or propose any mitigation measures. Paul Krupin also argues that the project  
12 must show it can mitigate impacts from climate change, *id.* at 16-17, contrary to RCW  
13 80.50.010’s clear legislative purpose. While it is possible that kernels of Mr. Krupin’s  
14 testimony could be relevant, such is not clear to the applicant, and it is up to Mr. Krupin, not  
15 the Applicant, to decipher the relevant from the immaterial. But without question, this  
16 testimony disregards the issues excluded in the Order.

17 David Sharp states that his “primary concern is that the project is using a nameplate  
18 capacity that far exceeds what the BPA can accept.” EXH-5402\_T, Pre-filed Direct  
19 Testimony of David Sharp at 1. Mr. Sharp’s testimony fundamentally speculates and tries to  
20 make the case that the power from the Project is not needed, will not serve Northwest  
21 customers, cannot be accommodated by the transmission system, and is generally  
22 inconsistent with Northwest power needs. *Id.* at 26-31.

23 Similarly, the testimony of Richard Simon challenges the project’s economic  
24 feasibility, and speculates about and grid availability based on “long-term average wind  
25 speeds.” EXH-5201\_T, Pre-filed Direct Testimony of Richard L. Simon at 4-7. Mr. Simon’s  
26 testimony is wholly speculative, stating his unscientific opinion that the project “may not be

1 desirable.” *Id.* at 10. The commercial viability of the project, including the feasibility of  
2 connecting to the grid, does not fit into any of Judge Torem’s disputed issues which focus on  
3 land use consistency and impacts on various resources. Order at 2.

4 There is a good reason that commercial viability is not on the disputed issue list.  
5 Under RCW 80.50.010, EFSEC is required to take action that balances “the increasing  
6 demands for energy facility location and operation in conjunction with the broad interests of  
7 the public,” in particular, the impact on the quality of the environment, and welfare and  
8 protection of Washington State citizens. RCW 80.050.010; *see also* WAC 463-14-020. This  
9 mandate directs EFSEC to focus on citing projects based on impacts, not commercial  
10 viability. RCW 80.050.010.

11 **B. The Witnesses’ testimony is speculative because it is based on assumptions about  
12 various elements of the project that are not relevant to the proceeding.**

13 The evidence presented by all four Witnesses is riddled with speculation, which  
14 independently supports striking the testimony. *See Miller v. Likins*, 109 Wash. App. 140,  
15 149, 34 P.3d 835, 840 (2001) (affirming exclusion of expert testimony where statements  
16 lacked “adequate factual basis” or explanation of how expert had knowledge to support  
17 opinion); *Curtiss v. Young Men's Christian Ass'n of Lower Columbia Basin*, 82 Wash. 2d  
18 455, 466 (1973) (affirming exclusion of expert testimony “offered to show what might have  
19 happened without the facts in the record to support the hypothesis”). The ALJ has already  
20 ruled that speculation, and particularly speculation about electrical output, electricity  
21 purchasers, and interconnection is outside the scope of this proceeding. See June 12, 2023  
22 order at 4 (“*Speculation about the eventual purchasers of the proposed facility’s electrical*  
23 *output once connected to BPA’s transmission system or about the undesirability of certain*  
24 *uses of electricity are beyond the scope of EFSEC’s inquiry*). These arguments are not  
25 germane to impacts at the proposed site or conditions that can be included in a site certificate  
26 agreement.” (emphasis added).

1 For example, David Sharp’s testimony uses interconnection requests made to  
2 Bonneville Power Administration (“BPA”) to speculate that BPA cannot handle the project’s  
3 capacity. EXH-5402\_T, Pre-filed Direct Testimony of David Sharp, at 14-20. Richard  
4 Simon similarly speculates that “BPA has expressed a lack of enthusiasm for more wind with  
5 [Horse Heaven’s] seasonal profile,” without citing any support for such a statement. EXH-  
6 5201\_T, Pre-filed Direct Testimony of Richard Simon, at 9. Not only are these statements  
7 irrelevant to this adjudication, but the Witnesses also speculate about matters that the  
8 Witnesses have no personal knowledge of or expertise in. Improper speculation is present  
9 throughout each Witness’s pre-filed direct testimony.

10 **C. Paul Krupin’s and David Sharp’s pre-filed direct testimony is unqualified and**  
11 **outside the scope of their purported expertise.**

12 Nothing in the Washington Administrative Procedure Act, the EFSEC rules, or the  
13 Order indicates the standards that guide expert qualification. However, Washington Rule of  
14 Evidence 702 states that “[i]f scientific, technical, or other specialized knowledge will assist  
15 the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified  
16 as an expert by knowledge, skill, experience, training, or education, may testify thereto in the  
17 form of an opinion or otherwise.” “Where there is no basis for the expert opinion other than  
18 theoretical speculation, the expert testimony should be excluded.” *Simmons v. City of*  
19 *Othello*, 199 Wash. App. 384, 394 (2017) (affirming exclusion of expert testimony that did  
20 not “stay[] within the area of” experts’ expertise or knowledge). The determination of  
21 qualifications of expert witnesses and the admissibility of their evidence is a matter at the  
22 discretion of the trial court, or in this case, the ALJ. *Harris v. Robert C. Groth, M.D., Inc.*,  
23 *P.S.*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983).

24 Paul Krupin is a retired “environmental protection specialist” and lawyer who worked  
25 primarily on nuclear waste management facilities. EXH-5301\_T, Pre-Filed Direct Testimony  
26 of Paul Krupin, at 1-2. However, his testimony discusses the failures of the visual impacts  
analysis completed by the Applicant, despite having no expertise in evaluations of viewshed

1 impacts. TCC has proffered a purported “expert” in visual impacts. Assuming that witness  
2 can sufficiently demonstrate qualifications for his testimony, there is no need for non-experts  
3 to offer unsubstantiated opinions.

4 David Sharp is an engineer and plant director who worked primarily at large multi-  
5 unit generating stations. EXH-5401\_T, Pre-Filed Direct Testimony of David Sharp, at 1.  
6 This expertise does not extend to evaluating the nameplate capacity of this project or the  
7 logistics of turbine development, placement, and visual impacts. And as noted, other than  
8 visual impacts, this witness does not offer any material or relevant testimony as framed in the  
9 Order.

### 10 III. CONCLUSION

11 The Witnesses’ pre-filed direct testimony fails to stay within the bounds of the  
12 disputed issue list and EFSEC criteria, calls for speculation, and is outside the scope of their  
13 expertise. We respectfully request that the Council strike the following exhibits in whole.

- 14 - EXH-5200\_T through EXH-5210\_T: Pre-Filed Direct Testimony of TCC  
15 Witness Rick Dunn
- 16 - EXH-5300\_T through EXH-5304\_T\_REVISED: Pre-Filed Direct  
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21 Witness Richard Simon (together, “Witnesses”).

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DATED: July 5, 2023.

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3 In the Matter of the Application of:  
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DOCKET NO. EF-210011

8 **CERTIFICATE OF FILING AND SERVICE**

9 I hereby certify that on July 5, 2023, I filed the foregoing APPLICANT’S MOTION  
10 TO STRIKE PRE-FILED DIRECT TESTIMONY OF TRI-CITIES C.A.R.E.S.  
11 WITNESSES RICK DUNN, PAUL KRUPIN, DAVID SHARP, AND RICHARD SIMON  
12 with the Washington Energy Facility Site Evaluation Council through electronic filing via  
13 email to [adjudication@efsec.wa.gov](mailto:adjudication@efsec.wa.gov).

14 I hereby certify that I have this day served the foregoing document upon all parties of  
15 record in this proceeding at the email addresses listed on the attached Service List.

16  
17 DATED: July 5, 2023.

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