

1 II. ARGUMENT

2 **A. A motion to dismiss is not an authorized motion in EFSEC proceedings.**

3 TCC provides no legal support that a motion to dismiss is even allowed in an EFSEC
4 proceeding, especially during the dynamic application review and recommendation process.
5 Nor can it. Because nothing in the statute, rules, or Council precedent suggests such a
6 procedural mechanism is available. See RCW 80.50; WAC ch. 463-30.

7 Moreover, allowing the Council or an ALJ to “dismiss” an application because it is
8 “incomplete” is contrary to RCW 80.50’s and WAC ch. 463’s structure. Under the
9 applicable authority, the Council makes a recommendation on an application (including as to
10 its completeness), but only the Governor can make a final decision on the application for site
11 certification. RCW 80.50.100(1)(a); WAC 463-30-345. To be sure, EFSEC takes factors
12 like water availability into account when making its recommendation, but the ultimate
13 decision-making authority of an application is with the Governor. RCW 80.50.100(1)(a).

14 Dismissal of the ASC would contravene the very purpose of this adjudicative
15 proceeding. This adjudication is not a forum to reject the application for incompleteness.
16 Rather, it is to “allow any person desiring to be heard to speak in favor of or in opposition to
17 the proposed site.” WAC 463-14-030(3). Even if, during the adjudication, the ALJ or
18 Council were to determine that the ASC lacked sufficient information in some area, the
19 appropriate remedy would be to seek that information during the adjudicative proceedings—
20 not to throw out the entire ASC that has been in development for several years. While the
21 parties may be able to “speak in opposition” to the proposed site, neither the Council nor the
22 ALJ has the authority to dismiss the ASC.

23 **B. The Washington Supreme Court has expressly held that WAC ch. 463-60 does**
24 **not require strict compliance and cannot authorize dismissal of an application.**

25 TCC argues WAC 463-60-165 somehow supports its motion. This provision
26 describes information about a proposed project’s water supply and lies within WAC ch. 463-

1 60. Importantly, an en banc Washington Supreme Court has held that such provisions are
2 mere “guidelines” informing what information the Council will consider, and when
3 substantially complied with cannot support dismissal of an application for site certificate.
4 *See Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178
5 Wn.2d 320, 335-36(2013) (hereafter, “*Whistling Ridge*”).

6 Indeed, in *Whistling Ridge*, the Supreme Court expressly rejected the argument TCC
7 asserts in its motion. There, an opposition group invoked various provisions of WAC 463-
8 60, “essentially challeng[ing] the completeness of the application by quoting several
9 regulations that provide that the application ‘shall’ include certain information.” *Id.* at 335.
10 Like TCC’s asserted deficiencies here, “many of the alleged omissions” raised in *Whistling*
11 *Ridge* were “rather technical and ignore[d] the broader framework of the application
12 process.” *Id.* The Court flatly rejected the challenge and declined to invalidate the
13 application, explaining that WAC 463-60 is merely “intended to provide guidelines as to
14 what information will be considered, with the overall goal of providing EFSEC with enough
15 information to proceed.” *Id.* (internal quotation marks omitted). Accordingly, despite that
16 some WAC 463-60 provisions require that an applicant “shall” submit certain information,
17 an “application need only substantially comply with the regulations, and ultimately, it is
18 within EFSEC’s purview to determine when it has sufficient information to proceed.” *Id.* at
19 335-36. Under this framework, “the application is the starting point of a longer process.” *Id.*
20 at 336. And “[a]ny minor deficiencies in the application itself are to be expected and do not
21 warrant reversal” or dismissal. *Id.*

22 Like the opponent in *Whistling Ridge*, TCC misinterprets WAC 463-60-165 as
23 requiring strict compliance. Instead, like the applicant in *Whistling Ridge*, Scout must simply
24 “substantially comply” with WAC 463-60-165, which, as described below, it has done.

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1 **C. Even if a motion to dismiss were permissible, the ASC provides sufficient**
2 **information as to authorized water supply.**

3 Applicant has submitted extensive information about its proposed water supply and
4 use. *See* ASC, Sec. 2.6 and Appendix J. EFSEC has had the opportunity to request
5 additional information on these points and has chosen not to. To the extent there is any
6 question as to the sufficiency of water supply for the Project, Applicant expects that,
7 consistent with the Environmental Impact Statement, the ensuing site certificate may include
8 a condition addressing specific water supply confirmation.

9 Applicant has provided confirmation that it will be able to obtain the full amount of
10 water necessary for the Project. As detailed in Appendix J, Applicant plans to obtain water
11 from the Port of Walla Walla Wallula-Dodd Road Water System, and has received and
12 submitted confirmation of such from the Port. Contrary to TCC’s contentions in its motion,
13 the fact that the Port notes that the ultimate water transaction will include execution of a
14 “water supply agreement”¹ does nothing to undermine the adequacy of the water right or
15 availability of the supply. Rather, as the Council is aware, a water supply contract is a
16 routine contract used to memorialize the parties’ obligations and practical logistics of the
17 transfer. If anything, it would be premature to negotiate and execute at this juncture, before
18 the final site certificate is issued and its conditions finalized.

19 Water availability letters like that from the Port have been considered sufficient to
20 support a recommendation to the Governor in other applications. *See, e.g., Whistling Ridge*
21 *Energy Project Application for Site Certification* § 2.5-3 (Mar. 10, 2010) (“[W]ater needs
22 related to construction would be purchased by the contractor from an off-site vendor with a
23 valid water right and transported to the site in water-tanker trucks.”),
24 https://www.efsec.wa.gov/sites/default/files/096000/02563/20090310_Apl.pdf; *Kittitas*
25 *Valley Wind Power Project Application for Site Certification* § 2.5 (Jan. 12, 2003) (“Water

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¹ TCC repeatedly refers to this contract incorrectly as a “water service agreement.” *See* TCC
Motion at 2, 3.

1 will be obtained from a domestic well that will be installed by a licensed installe[r]. The
2 Applicant will seek and obtain approval for the new well from Kittitas County
3 Environmental Health Department and Washington Department of Ecology.”),
4 https://www.efsec.wa.gov/sites/default/files/180298/00016/20030112_Apl.pdf.

5 EFSEC is aware of the water supply information in the ASC, has reviewed the same,
6 and has not requested any additional information on this topic. As noted in *Whistling Ridge*,
7 EFSEC has the sole discretion to determine whether it has sufficient information to make a
8 recommendation to the Governor.

9 Finally, to the extent that any uncertainty remains regarding Applicant’s ability to
10 obtain water for the Project, that uncertainty may be addressed through conditioning of the
11 Site Certificate. For example, the Draft Environmental Impact Statement proposes imposing
12 a condition under which Applicant would provide “an executed agreement to EFSEC that
13 identifies the source and quantity of the water intended to be supplied to the Project prior to
14 its construction, operation, and decommissioning.” DEIS Executive Summary, ES-34 (Dec.
15 2022). Such a condition would ensure Applicant has sufficient water before construction
16 begins.

17 III. CONCLUSION

18 Applicant recognizes the importance of providing EFSEC sufficient information to
19 inform its recommendation to the Governor. To that end, it has provided ample information
20 on water supply in the ASC. To the extent the Council desires any additional information,
21 Applicant is happy to provide that information during the adjudicative proceedings. For the
22 foregoing reasons, Applicant respectfully requests that the ALJ deny TCC’s Motion to
23 Dismiss.

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DATED: July 14, 2023.

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1 **CERTIFICIATE OF FILING AND SERVICE**

2 I hereby certify that on July 14, 2023, I filed the foregoing SCOUT CLEAN
3 ENERGY, LLC’S OPPOSITION TO TRI-CITIES C.A.R.E.S.’S MOTION TO DISMISS,
4 dated July 14, 2023, with the Washington Energy Facility Site Evaluation Council
5 through electronic filing via email to adjudication@efsec.wa.gov.

6 I hereby certify that I have this day served the foregoing document upon all parties
7 of record in this proceeding by electronic mail at the email addresses listed on the attached
8 Service List.

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10 DATED: July 14, 2023.

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