



1 **II. ARGUMENT**

2 **A. TCC’s New Visual Analysis, EXH-5906\_R, Constitutes Late, New Evidence**  
3 **Necessitating Rebuttal Evidence from Scout’s Visual Expert.**

4 Under the APA, the presiding officer over a hearing “shall afford to all parties the  
5 opportunity to respond . . . and submit rebuttal evidence, except as restricted by a limited  
6 grant of intervention or by the prehearing order,”<sup>2</sup> to facilitate “full disclosure of all relevant  
7 facts and issues.” RCW 34.05.449(2). Admission of rebuttal evidence is particularly  
8 appropriate, and important, when an opposing party submits *new* evidence late in a case.  
9 See, e.g., *State v. White*, 74 Wash.2d 386, 394, 444 P.2d 661 (1968) (affirming trial judge’s  
10 admission of rebuttal evidence that was “in reply to new matters presented” by the opposing  
11 party, noting a party “is not allowed to withhold substantial evidence . . . in order to present  
12 this evidence cumulatively at the end of [it]s case”). The ALJ in this case applied these same  
13 authorities earlier in the adjudication when he permitted rebuttal testimony from County land  
14 use witness Michelle Cooke, despite that Ms. Cooke had already testified earlier in the  
15 hearing. After testimony from Scout witness Chris Wiley raised new agricultural impact  
16 issues, Ms. Cooke was given the full opportunity to respond. *See also* Order Granting SCE’s  
17 Motion to Submit Supplemental Testimony of Kobus, Docket EF-210011 (Aug. 16, 2023)  
18 (allowing supplemental testimony on new fire suppression standards because it was “helpful  
19 to EFSEC Councilmembers and assist them in more fully understanding” that issue).

20 EFSEC’s rules of evidence for adjudicative hearing provide that evidence “offered  
21 during the hearing . . . be submitted to the presiding officer and to the other parties  
22 *sufficiently in advance to permit study and preparation of cross-examination and rebuttal*  
23 *evidence.*” WAC 463-30-310(2)(a) (emphasis added). Despite that rule, at 5:30pm the day  
24 before Scout’s visual expert, Brynn Guthrie, was scheduled to testify at 9:00 am, TCC  
25 submitted to the presiding officer and parties EXH-5906\_R, which provides a completely

26 <sup>2</sup> Here, no prehearing order or limited intervention grant restricts Scout’s ability to present  
rebuttal testimony.

1 new visual analysis, including a detailed map and quantitative table, purportedly intended to  
2 evaluate visual mitigation. The exhibit contains extensive technical analysis, all of which  
3 could have been submitted weeks earlier, but was not.<sup>3</sup> These documents are the type of  
4 material that require careful expert review to determine their validity. Submitting the  
5 material less than 16 hours before the visual testimony was not “sufficiently in advance to  
6 permit study and preparation of cross-examination” or rebuttal related to the new visual  
7 analysis and precluded Ms. Guthrie or Scout’s counsel from having adequate time to respond  
8 to the material.

9 This, despite that Dean Apostol had ample opportunity to perform such an analysis  
10 and submit it as part of his written pre-filed testimony. Dean Apostol submitted multiple pre-  
11 filed testimony documents responding to the methodology in the Visual Impact Assessment  
12 performed by the Applicant. See EXH-5102\_T (describing the purported deficiencies of the  
13 SWCA Environmental Consultants analysis prepared for the DEIS); EXH-5103\_R  
14 (responding to direct testimony filed by Brynn Guthrie); EXH-5104\_R (criticizing the  
15 application of the BLM VRM methodology used by the Applicant in the Application for Cite  
16 Certification). In none of those submittals did Mr. Apostol conduct an additional  
17 independent visual impact analysis like the one provided in EXH-5906\_R, despite having  
18 clear opportunity to do so.

19 Over Scout’s strong objection during the hearing, EXH-5906\_R was admitted, and  
20 Mr. Apostol testified at length about the new analysis. But absent sufficient time to review  
21 and analyze the materials, Scout’s attorneys were unable to meaningfully cross-examine Mr.  
22 Apostol about the materials, and Ms. Guthrie was unable to provide live rebuttal testimony  
23 about its accuracy or relevance. Under the APA, EFSEC adjudication rules, and established  
24 case law, Scout respectfully requests the ability to submit supplemental rebuttal testimony

25 \_\_\_\_\_  
26 <sup>3</sup> TCC’s attempt to defend its late submission by arguing the new analysis responds only to  
turbine location changes discussed in the Aug. 9 “Moon Memo,” is belied by the exhibit  
itself, which clearly analyzes the *entire* project layout, not just the 13 turbines addressed in  
the memo.

1 from Ms. Guthrie to respond to the new visual analysis in EXH-5906\_R and to disclose to  
2 the Council all relevant facts and issues related to the project's visual impacts and mitigation.  
3 RCW 34.05.449(2); WAC 463-30-310(2)(a); *White*, 74 Wash.2d at 394.

4 **B. The Supplemental Testimony of Ms. Guthrie Responds Directly and Narrowly to**  
5 **EXH-5906\_R and is Relevant Information That Should Be Provided to the**  
6 **Council.**

6 Supplementing the record with the attached testimony will provide the Council with  
7 the best information regarding analysis and mitigation of visual impacts and allow it to  
8 appropriately weigh EXH-5906\_R. As described in her pre-filed direct testimony, EXH-  
9 1000\_T, Ms. Guthrie is the Applicant's visual expert who sponsored the visual and aesthetic  
10 portions of the ASC. She has conducted numerous visual impact assessments, under various  
11 methodologies, and thus, is best positioned to address the new information provided by  
12 EXH-5906\_R. Specifically, if admitted, Ms. Guthrie's supplemental testimony identifies  
13 methodological problems and factual inaccuracies in the exhibit, and highlights what the  
14 industry best practices are for mitigating visual impacts, including the Applicant's proactive  
15 mitigation by removing 13 turbines as described in EXH-4014\_X (Moon Memorandum).  
16 This technical rebuttal is critical for the Council to be able to accurately assess the value and  
17 relevance of EXH-5906\_R, which, as Ms. Guthrie testifies, is low.

18 **III. CONCLUSION**

19 The visual impact of the project and appropriate mitigation for that impact is a key  
20 issue for the Council to consider in this adjudication. The late-filed new visual analysis in  
21 EXH-1065\_R gets to the heart of that issue. Were Scout not able to provide supplemental  
22 rebuttal testimony to respond to that analysis, the Council would be denied disclosure of all  
23 relevant facts, and Scout would be severely prejudiced as a result. Accordingly, Applicant  
24 respectfully requests that the Council supplement the record with Attachment A, the  
25 supplemental testimony of Scout visual expert Brynn Guthrie. If added to the record, the  
26 exhibit can be labeled EXH-1065\_R. In addition, while the Applicant does not request

1 additional live examination, Ms. Guthrie is available to sit for live cross-examination if the  
2 other parties or the Council so requests.

3

4 DATED: September 5, 2023.

STOEL RIVES LLP



---

TIMOTHY L. MCMAHAN  
tim.mcmahan@stoel.com  
WILLA B. PERLMUTTER  
willa.perlmutter@stoel.com  
ARIEL STAVITSKY  
ariel.stavitsky@stoel.com  
EMILY K. SCHIMELPFENIG  
emily.schimelpfenig@stoel.com  
Telephone: (503) 294-9517

*Attorneys for Applicant*

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on September 5, 2023, I filed the foregoing MOTION TO  
3 SUPPLEMENT THE TESTIMONY OF BRYNN GUTHRIE, dated September 5, 2023, with  
4 the Washington Energy Facility Site Evaluation Council through electronic filing via email to  
5 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.

9  
10 DATED: September 5, 2023.

STOEL RIVES LLP



---

TIMOTHY L. MCMAHAN  
tim.mcmahan@stoel.com  
WILLA B. PERLMUTTER  
willa.perlmutter@stoel.com  
ARIEL STAVITSKY  
ariel.stavitsky@stoel.com  
EMILY K. SCHIMELPFENIG  
emily.schimelpfenig@stoel.com  
Telephone: (503) 294-9517

*Attorneys for Applicant*

**STOEL RIVES LLP**  
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
Main 503.224.3380 Fax 503.220.2480

Service List

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

AAG Sarah Reyneveld  
Attorney General’s Office  
800 Fifth Avenue, Suite 2000 (TB/14)  
Seattle, WA 98104-3188  
sarah.reyneveld@atg.wa.gov  
julie.dolloff@atg.wa.gov  
CEPSeaEF@atg.wa.gov

*Attorney for Counsel for the Environment*

Kenneth W. Harper  
Aziza L. Foster  
Menke Jackson Beyer, LLP  
807 North 39th Avenue  
Yakima, WA 98902  
kharper@mjbe.com  
zfoster@mjbe.com

*Attorneys for Benton County*

J. Richard Aramburu  
Law Offices of J. Richard Aramburu, PLLC  
705 2nd Ave, Suite 1300  
Seattle, WA 98104-1797  
rick@aramburulaw.com  
carol@aramburulaw.com

*Attorney for Tri-Cities C.A.R.E.S.*

Ethan Jones  
Shona Voelckers  
Jessica Houston  
Yakama Nation Office of Legal Counsel  
P.O. Box 151  
Toppenish, WA 98948  
ethan@yakamanation-olc.org  
shona@yakamanation-olc.org  
jessica@yakamanation-olc.org

*Attorney for Confederated Tribes  
and Bands of the Yakama Nation*