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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITING EVALUATION COUNCIL

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

DOCKET NO. EF-210011  
  
APPLICANT’S OPPOSITION TO TCC’S  
MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS

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**I. INTRODUCTION**

For the reasons set forth more fully below, Scout Clean Energy (“Applicant”) respectfully requests that the Administrative Law Judge (“ALJ”) deny the motion of the Intervenor Tri-Cities C.A.R.E.S. (“TCC”) to compel the production of documents.

In the weeks and months leading up to the filing of TCC’s motion, the parties had been engaged in a back-and-forth regarding a number of requests for production that TCC propounded back in May, with the apparent goal of collecting materials and data that might form a basis for challenging the soundness of the Applicant’s business decisions. During that time, the Applicant tried to be as cooperative as it could while still respecting the substantive scope of the adjudication and protecting the confidential information to which it was privy. Indeed, during the period in which the parties were trying to resolve their differences over what could and could not be provided, the Applicant was able to satisfy TCC as to three of seven disputed requests.

TCC filed the instant motion a few minutes before the end of the work week on Friday, July 28. Shortly afterwards, while the Applicant was reviewing the motion and in the earliest stages of planning its response, the ALJ issued an order on a motion to strike testimony that implicitly addresses the Applicant’s concerns regarding TCC’s requests for

1 production, clarifying the issues and effectively instructing both TCC and the Applicant on  
2 how the discovery conflicts should be resolved.

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4 **II. ARGUMENT**

5 **A. Request for Production No. 1**

6 In the first of its requests for production, TCC sought “any and all communications  
7 and documentation of any type by and between the Applicant, [Bonneville Power  
8 Administration] (BPA) or any third parties regarding or concerning” the Project’s generation  
9 interconnection request and the allowable authorized grid injection capacity.<sup>1</sup> The Applicant  
10 objected to providing the requested materials, citing as grounds for its objection that the  
11 request falls outside the established scope of the instant EFSEC proceedings. Even as it  
12 declined to provide the requested documents, however, the Applicant gave TCC an  
13 extensive, detailed explanation of the considerations and requirements pertaining to grid  
14 interconnection.<sup>2</sup>

15 As it turned out, the parties’ colloquy over the discoverability of the requested  
16 materials was overtaken by events. On July 28, after several exchanges between counsel  
17 regarding the requested BPA-related communications, the ALJ issued an Order Granting  
18 Applicant’s Motion to Strike TCC Testimony of Rick Dunn, Paul Krupin, David Sharp, and  
19 (In Part) Richard Simon (“July 28 Order”). In the July 28 Order, the ALJ explicitly and  
20 unambiguously confirmed that “BPA-related interconnection questions are not topics  
21 accepted to be disputed during the adjudicative hearing.”<sup>3</sup> The July 28 Order, and the  
22 ALJ’s supporting analysis, render moot TCC’s demand for documents regarding  
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24 <sup>1</sup> Intervener [sic] Tri-Cities C.A.R.E.S Discovery Requests (“TCC RFPs”), a copy of which  
25 is attached hereto as Exhibit A, RFP No.1.

26 <sup>2</sup> Letter from Willa B. Perlmutter to J. Richard Aramburu dated July 14, 2023 (“Perlmutter  
letter”), a copy of which is attached hereto as Exhibit B, pp. 1-3.

<sup>3</sup> July 28 Order, p. 4; *see also id.*, pp. 4, 5 (striking testimony addressing grid availability).

1 BPA interconnection and grid availability. The Motion to Compel should therefore be  
2 denied as to Request for Production No. 1.

3 **B. Request for Production No. 2**

4 In the second Request for Production, TCC sought the specifications for and the  
5 information gathered from meteorological evaluation (“MET”) towers, apparently for the  
6 purpose of challenging the sufficiency of the Applicant’s wind resource for the Project.<sup>4</sup> The  
7 Applicant declined to provide the requested data, noting that not only was the information  
8 proprietary and commercially extremely sensitive, but also that in a previous case  
9 EFSEC expressly excluded such materials from the proceedings.<sup>5</sup> The Council’s *Whistling*  
10 *Ridge* determination is relevant and informative and should guide the ALJ here.<sup>6</sup> Moreover,  
11 in any event, Request for Production No. 2 was also mooted by the July 28 Order, in which  
12 the ALJ confirmed that “wind resource potential ... [is] not appropriate for this adjudicative  
13 proceeding.”<sup>7</sup> The Applicant respectfully requests that the Motion to Compel be denied as to  
14 Request for Production No. 2.

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17 <sup>4</sup> TCC RFPs, RFP No. 2.

18 <sup>5</sup> Perlmutter letter, p. 3, citing *Whistling Ridge Energy Project*, Prehearing Order  
19 No. 11 (“Whistling Ridge Order”), a copy of which is attached hereto as Exhibit  
20 C, pp. 5-6 (“In conclusion, much of the requested information [specifically including  
21 meteorological information] appears to have little direct relevance to the issues in the  
22 proceeding. It is extremely sensitive proprietary information. We see little likelihood that  
23 the requested information would lead to the discovery of admissible information; while some  
24 may be available from other sources, the risk of damage by disclosure is great if it is  
25 provided, as statutes, rules and agency practice do not appear to ensure reasonable protection  
26 even if parties and the Council take time to formulate protective orders. On balance, we  
decline to exercise our discretion to allow discovery.”).

23 <sup>6</sup> The Applicant would also note that counsel for TCC represented the intervenor that  
24 unsuccessfully sought the meteorological information in that matter as well, and thus  
25 TCC cannot legitimately claim that it was unaware of the Council’s previous ruling.  
Whistling Ridge Order, p. 1.

26 <sup>7</sup> July 28 Order, p. 4 (the topics of wind resource potential, economic feasibility and grid  
availability “boil down to business decisions for the Applicant to make before seeking  
permits to construct a project.”); *see also id.*, p. 5 (ordering stricken testimony that addressed  
or referenced wind resource potential).

1           **C. Request for Production No. 3**

2           TCC also asked the Applicant to produce “any and all reports or studies that assess  
3 the expected production from wind turbines on the site.”<sup>8</sup> The Applicant declined to produce  
4 the requested materials, noting that as a rule, wind turbine manufacturers jealously guard  
5 their power curves as confidential intellectual property. What TCC sought is proprietary to  
6 the manufacturers of the turbines under consideration, and the Applicant must keep any  
7 responsive materials in its possession confidential at the express request of the  
8 manufacturers.<sup>9</sup> Additionally, the Applicant noted, both in writing and at Dave Kobus’s  
9 deposition, that the exact turbine models for the project have not yet been chosen.<sup>10</sup> While  
10 the July 28 Order observed that “[t]he choice of turbine technology (*i.e.*, what types and how  
11 many turbines are proposed)” may be within the scope of the adjudication,<sup>11</sup> the energy  
12 generation and production profiles of turbine equipment options are not germane to those

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16 <sup>8</sup> TCC RFPs, RFP No. 3.

17 <sup>9</sup> Perlmutter letter, p. 4 (“As you may know, the manufacturers of wind turbines only  
18 provide production details for their turbine models with the express, explicit understanding  
19 that those details will be kept confidential. The Applicant is bound by that confidentiality  
20 obligation and cannot disclose anything related to turbine production to third parties without  
21 their prior approval.”).

22 <sup>10</sup> *Id.*; *see also, e.g., Deposition of David Kobus*, pp. 54-55 (“[Mr. Aramburu]. So has a  
23 decision been made now between the 244 smaller turbines and the 150 larger turbines? Is that  
24 a corporate decision made as of now? [Mr. Kobus]. No. We – that will be a last-minute  
25 determination when we go to the turbine supplier and negotiate for the turbine that we desire  
26 to have.”) (July 21, 2023), an excerpt from which is attached hereto as Exhibit D; *see also*  
*Application for Site Certification*, Sec. 2.3.1 (“Turbines and Towers”) (“The final Turbine  
model that would be used for the Project would be a commercial choice based on Turbine  
availability and other factors present at the time of construction, and is not known at this  
time. However, any Turbine model used for the Project would be certified to international  
standards and would be compatible with state-of-the-art grid technology. The impacts  
resulting from the final selected Turbine model would not exceed those presented in this  
ASC”).

<sup>11</sup> July 28 Order, p. 4.

1 considerations.<sup>12</sup> Since data for wind turbine production is proprietary to each prospective  
2 turbine manufacturer, and since at this point no specific turbine has been selected in any  
3 event, the Motion to Compel should be denied as to Request No. 3.

4 **D. Request for Production No. 5**

5 Finally, the Intervenor requested copies of “studies or estimates of the costs to  
6 potential consumers, utilities and/or purchasers of power from this project on a per kilowatt  
7 hour or other basis.”<sup>13</sup> The Applicant objected to providing the requested materials, based on  
8 its understanding that they fell outside the scope of the EFSEC proceeding, among other  
9 reasons.<sup>14</sup>

10 This request, too, is now moot. The July 28 Order expressly noted that commercial  
11 viability and economic feasibility, including “who might purchase the project’s power and  
12 who might use the project’s power,” are outside the scope of this adjudication.<sup>15</sup> The

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14 <sup>12</sup> The Applicant understands that EFSEC is focused on things like the number of units and  
15 where they will be placed, and the impacts the turbines could be expected to have on wildlife,  
16 airspace safety, and the viewshed.

16 <sup>13</sup> TCC RFPs, RFP No. 5.

17 <sup>14</sup> Perlmutter letter, p. 4 (“With all respect, Request No. 5 is not germane to these  
18 EFSEC proceedings. As you know, the Applicant does not sell power directly to ratepayers,  
19 and it has no role in the regulatory processes that set power prices in the Northwest.  
20 Moreover, estimates of the impact the cost of the Project might have on purchasers entail  
21 extremely sensitive commercial information that if disclosed would undercut the Applicant’s  
22 position with the prospective off-takers with whom it is in negotiations. Finally, the  
information you request is both highly speculative and extremely volatile. Even if the  
Applicant were in a position to provide the requested information without jeopardizing its  
business interests, the information would be no more than a single, changeable data point that  
would be essentially meaningless to the EFSEC process.”).

23 <sup>15</sup> July 28 Order, p. 1, n. 1 (citing the Order Overruling Parties Objections to Second  
24 Prehearing Conference Order, “[s]peculation about the eventual purchasers of the proposed  
25 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.”); *see*  
26 *also id.*, pp. 4, 5 (referring to the same Order, and noting that it “excluded testimony  
regarding who might purchase the project’s power and who might use the project’s power as  
‘not germane to impacts at the proposed site or conditions that can be included in a site  
certification agreement.’”).

1 Applicant respectfully requests that the Motion to Compel be denied as to Request for  
2 Production No. 5.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Applicant Scout Clean Energy respectfully requests  
5 that the ALJ deny TCC's Motion to Compel in its entirety.

6  
7 DATED: August 1, 2023.

8  
9 **STOEL RIVES LLP**



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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITING EVALUATION COUNCIL

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

DOCKET NO. EF-210011  
INTERVENER TRI-CITIES  
C.A.R.E.S DISCOVERY  
REQUESTS

**To: Scout Clean Energy, LLC, the applicant referenced above**

**To: Tim McMahan, its Attorney**

In accordance with RCW 34.05.446, WAC 463-30-190 and Civil Rule 33, you are to answer, in writing under oath, each of the following interrogatories fully and serve a completed set of interrogatories and answers upon the undersigned attorney within ten days (10) of the date of service of these interrogatories upon you. You may use the blank spaces provided, inserting additional pages where necessary, and verify your answers on the form provided after the last interrogatory.

These interrogatories are to be treated as continuing. If additional information is discovered between the time of making these answers and the time of trial, these interrogatories are directed to that information. If such information is not furnished, Intervenor Tri-Cities C.A.R.E.S (TCC) will move, at the time of trial, to exclude from evidence any information requested but not provided.

Each interrogatory is required to be answered on the basis of your entire knowledge, including all information in the possession of you, your directors, officers, employees, agents, representatives and attorneys. If any of the following

TCC DISCOVERY REQUESTS - 1

LAW OFFICES OF  
J. RICHARD ARAMBURU, PLLC  
705 2<sup>ND</sup> AVE., SUITE 1300  
SEATTLE 98104  
Telephone (206) 625-9515  
FAX (206) 682-1376  
aramburulaw.com

1 interrogatories cannot be answered in full, you are to answer to the extent possible,  
2 specifying the reason for your inability to answer the remainder, and stating whatever  
3 information or knowledge you have concerning the unanswered portion. If your answer  
4 is qualified in any particular, please set forth the details of such qualification.

5 DEFINITIONS

6 1. "Project." As used herein the word "Project" refers to the application for the  
7 Horse Heaven Wind Project, currently filed with EFSEC.

8 2. "Person." The word "person" shall mean any individual, business, or  
9 government entity including, without limiting the generality of the foregoing, any  
10 individual, sole proprietorship, association, company, partnership, joint venture,  
11 corporation, trust, estate, and government agency, or division thereof

12 3. "Writing" or "Document." As used herein, "writing" or "document" means any  
13 document or writing and includes any printed, typewritten or handwritten matter of  
14 whatever character, including without limitation, letters, memoranda, telegrams, cables,  
15 reports, charts, business records, personal records, accountants' statements, bank  
16 statements, handwritten notes, minutes of meetings, notes of meetings or  
17 conversations, catalogs, written agreements, checks, receipts, invoices, bills, computer  
18 printouts, financial statements, and any other carbon or photographic copies of such  
19 material.

20 4. "Discuss" or "Discussed." As used herein, the term "discuss" or "discussed"  
21 when applied to the content of any writing, or oral conversation or oral argument,  
22 should be understood to apply if that writing, conversation or agreement contains or  
23 contained any reference to, or in any other way deals or relates to the subject matter  
24 described in the interrogatory in which any such term appears.



1           5. "Identify." As used in relation to a person, "identify" shall be understood to  
2 require the name, occupation, employer, business and residence addresses, and  
3 telephone numbers of that person.

4           As used in relation to a writing, "identify" shall be understood to require the  
5 name of the persons who authorized, prepared, and signed the writing, the date on  
6 which it was prepared, the names and business addresses of all recipients of the  
7 original or copies thereof, the name and address of the present custodian of the writing,  
8 and a brief description of its contents.

9           As used in relation to a conversation, "identify" shall be understood to require  
10 the names of the parties to such conversation, the date on which such conversation  
11 took place, the location at which said conversation took place, the identity of each  
12 person present at the time it took place, and a brief description of the subject matter of  
13 the conversation.

14           As used in relation to an object, "identify" shall be understood to require the  
15 name of the persons who authorized and prepared, the date on which it was prepared,  
16 the names and business addresses of all recipients of the original or copies thereof, the  
17 name and address of the present custodian of the object.

18           6. "Identify." As used in relationship to a business or to anything other than a  
19 human being, including, without limitation, a corporation, partnership, joint venture,  
20 association, labor union or other business, social or legal entity of any kind, means to  
21 state:

- 22           (a) Full lawful name, and all other DBA's, names, or styles used, at any time,  
23           and for any purpose whether or not registered.  
24           (b) Principal business address and telephone number.  
25           (c) Registered office and name and address of registered agent.  
26           (d) All business addresses and telephone numbers in this state.  
27           (e) State and date of incorporation.

- 1 (f) Name and address of Washington agent for service of process.  
2 (g) Names of any controlling corporations.  
3 (h) Names of any subsidiary corporations.  
4 (i) Name and address of all persons owning a controlling interest, and a  
5 description of the extent of such interest.

6 7. "You." As used herein shall be understood to mean the party to whom these  
7 interrogatories are addressed, and your attorneys, directors, agents, employees,  
8 officers, representatives, adjusters, investigators, and any other person who is in  
9 possession of, or who has obtained, information on your behalf.

10 **THIS IS ALSO A REQUEST FOR PRODUCTION, PURSUANT TO CIVIL RULE**  
11 **34**, of all photographs, statements, technical reports, investigative reports, drawings,  
12 sketches, studies, memos, letters, e-mails, notes or other documents mentioned in the  
13 answers to Interrogatories or specifically requested in the Requests for Production. It is  
14 requested that you produce these items for inspection and copying at the office of the  
15 undersigned attorney, 705 2<sup>nd</sup> Avenue, Suite 1300, Seattle, Washington, within ten (10)  
16 days after this Request for Production is served on you. This request may be satisfied  
17 by providing copies of those items to the undersigned prior to that date.

18 This request encompasses not only the items in Applicant's possession, but also  
19 those within the possession, custody, and/or control of any agent, officer, servant,  
20 employee, attorney or other representative of the applicant.

21 If any document sought by these requests has been destroyed, and no copy  
22 exists within the applicant's possession, custody or control, please identify the  
23 document, the date of its destruction, the reason for its destruction, the person  
24 responsible for ordering its destruction and produce any policy that called for the  
25 destruction.

26 If applicant believes documents requested to be produced may be withheld on  
27 the grounds of either privilege or work product please provide a list of these documents

1 with a brief description of each document, including: date, title, type of document,  
2 number of pages, subject matter without revealing privilege, and a statement of the  
3 basis for withholding the document.

4 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

5 **INTERROGATORY 1:** Please identify by name, title, address, telephone  
6 number and relationship to defendant each person who prepared or participated in the  
7 preparation of the answers to the following Interrogatories and Requests for Production  
8 as well as the full name, title, address and relationship to defendant of the individual  
9 signing said Interrogatories and Requests of Production on behalf of defendant.

10 ANSWER:

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13 **REQUESTS FOR PRODUCTION**

14 **RFP No. 1.** At pages 2-15, 2-16 and page 2-49 of the “Updated” Application for Site  
15 Certification, there is discussion of communications with the Bonneville Power  
16 Administration (BPA) concerning a “generation interconnection request” and the  
17 “allowable authorized grid injection capacity.” Please provide any and all  
18 communications and documentation of any type by and between the Applicant, BPA or  
19 any third parties regarding or concerning the foregoing matters.

20 **RESPONSE:**

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23 **RFP No. 2.** Concerning meteorological evaluation towers (“MET towers”) described at  
24 pages 2-80 and 2-81 of the Amended Application for Site Certification to “obtain wind  
25 data for performance” of the wind project, or other wind measurement locations and  
26 types, please provide the following information for any and all currently installed MET  
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1 towers or facilities, including those owned and operated by third parties, used to  
2 assess performance of the site for wind turbine installation:

3 A. All tower commissioning documents, including, but not limited to, listing  
4 of locations and coordinates, of sensor types and heights, sensor boom lengths  
5 and orientations from the tower, sensor calibration documents and any available  
6 photographs.

7 B. Any and all meteorological raw data collected from such towers.

8 C. Any and all wind energy assessment studies, including as available  
9 annual wind speed estimates, extrapolations to hub heights, wind roses, extreme  
10 winds, and turbulence information.

11 D. Any third party wind resource reports.

12 **RESPONSE:**

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16 **RFP No. 3.** Any and all reports or studies that assess the expected production from  
17 wind turbines on the site, including the expected production pattern on a time and  
18 seasonal basis, including hourly, daily monthly information.

19 **RESPONSE:**

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22 **RFP No. 4.** Any and all reports, documentation or other information, concerning  
23 wake losses to adjacent wind turbine projects, including the Nine Canyon Project that  
24 might occur due to installation of wind turbines as a part of the proposed project.

25 **RESPONSE:**

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TCC DISCOVERY REQUESTS - 6

LAW OFFICES OF  
J. RICHARD ARAMBURU, PLLC  
705 2<sup>ND</sup> AVE., SUITE 1300  
SEATTLE 98104  
Telephone (206) 625-9515  
FAX (206) 682-1376  
aramburulaw.com

1 **RFP No. 5.** Studies or estimates of the costs to potential consumers, utilities and/or  
2 purchasers of power from this project on a per kilowatt hour or other basis.

3 **RESPONSE:**  
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6 **RFP No. 6.** Any and all communications with publicly owned utilities concerning sale  
7 or transfer of any electric energy from the proposed project.

8 **RESPONSE:**  
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12 **RFP No. 7.** Any and all communications, documentation or data developed or  
13 acquired concerning the impacts of the project on property values, real estate, tourism,  
14 or the local economies.

15 **RESPONSE:**  
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17 **RFP No. 8.** Any information describing the scope of work conducted for the Visual  
18 Assessments in the ASC, the Updated ASC and the DEIS addressing the statements of  
19 work for the contractors who did the work, including the detailed specifications,  
20 personnel, equipment used in the photography, computer and photographic simulations  
21 and Viewshed Analyses including specifications, Autocad and GPS files on the  
22 proposed location of all new facilities; turbines, transmission towers, solar arrays,  
23 substations, buildings (including battery storage).

24 **RESPONSE:**  
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Interrogatories and Requests for Production submitted this 18th day of May  
2023.

/s/  
J. Richard Aramburu, WSBA #466  
Attorney for Tri-Cities C.A.R.E.S.

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CERTIFICATION OF PARTY

I certify under penalty of perjury under the laws of the State of Washington (RCW 9A.72.085) that I am \_\_\_\_\_, the \_\_\_\_\_ of the defendant herein and authorized to make this certificate on its behalf. That I have read the foregoing document, believe that the answers to interrogatories and responses to request for production are true and correct.

\_\_\_\_\_  
Typed Name:

CERTIFICATION OF ATTORNEY

The undersigned attorney for the Applicant has read the foregoing Responses to Interrogatories and Requests for Production and they are in compliance with CR 26(g).

DATE: \_\_\_\_\_

\_\_\_\_\_  
Typed Name:  
Attorney for \_\_\_\_\_

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DECLARATION OF SERVICE

I hereby certify that I have this day served in compliance with WAC 480-07-405 the TRI-CITIES C.A.R.E.S' MOTION FOR STAY PENDING SEPA COMPLIANCE upon all parties of record and staff (not associated with advising the presiding officer in this proceeding) as listed below, by email as authorized method of service pursuant to WAC 463-30-120(3).

Dated at Seattle, Washington this 18<sup>TH</sup> day of May, 2023.

/s/  
Carol Cohoe, Legal Assistant  
Law Offices of J. Richard Aramburu, PLLC

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July 14, 2023

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D. 503.294.9462  
willa.perlmutter@stoel.com

**VIA EMAIL**

J. Richard Aramburu  
Law Offices of J. Richard Aramburu PLLC  
705 Second Ave  
Suite 1300  
Seattle, WA 98104

**Re: Response to July 7, 2023 Letter to Tim McMahan re Discovery Responses (Scout Clean Energy)**

Dear Mr. Aramburu:

This will respond to your July 7, 2023 letter seeking supplemental responses to Scout Clean Energy's May 18, 2023 discovery responses.

As a threshold matter, Scout continues to assert its established right to withhold confidential and proprietary data from disclosure. We understand your position that Gregory Poulos's rebuttal testimony opened the door for TCC to obtain this information, but we respectfully disagree. In his testimony, Mr. Poulos was careful to avoid any references to the confidential information you now seek. While drafting, he intentionally refrained from using materials that are confidential and proprietary and thus the testimony he supplied does not offer TCC an opportunity to seek further information.

Additionally, as you know, EFSEC has previously recognized an applicant's significant interest in protecting confidential information from disclosure. *See, e.g., Whistling Ridge Energy Project*, Prehearing Order Nos. 11 and 12. As discussed more specifically below, the Applicant has a right to protect its confidential data, which holds commercial value that would be lost if the materials become public knowledge.

RFP No. 1

As indicated in Scout's initial responses to your discovery requests, Request No. 1 asked for the disclosure of information that is immaterial to the proceeding, and is not identified or within the scope of any issues as defined by prehearing orders, and it sought information that is confidential and proprietary. We continue to assert those positions. The information you seek is plainly outside the scope of these EFSEC proceedings. As a threshold matter, the commercial viability of the Project, including the feasibility of connecting to the grid, does not fit into any of the disputed issues in the adjudication, which focus on land use consistency and impacts on various resources. Second Prehearing Conference Order, p. 2. Further, as a general matter, we would

note that the existence or non-existence of a Protective Order does not change the fundamental fact that the information TCC seeks goes well beyond the scope of EFSEC's review criteria and the subject matter of this adjudication.

That said, and without waiving those objections, we can provide you with some additional information. The pages you've cited from the revised Application for Site Certification (ASC) do not represent a change from the original ASC. As you know, the Bonneville Power Administration (BPA) is the authority for grid interconnection for the Horse Heaven Clean Energy Center. BPA's Technical Requirements for Interconnection to the BPA Transmission Grid STD-N-000001 REVISION08, as updated on June 7, 2022, require specific interconnection practices for generation and storage with the BPA grid according to established business practice. The intent of the change in the revised ASC dated December 2022 was to establish consistency with the BPA business practice document for limiting the nameplate capacity rating of wind and solar generators. As stated in the Revised ASC, Section 2.3,

The nameplate generating capacity, which is the aggregate nameplate capacity in MW for the Project based on the nameplate rating of each generator at its rated power factor multiplied by the total number of generators installed, was being limited to the aggregate nameplate capacity requested (generation interconnection request) consistent with Bonneville Power Administration (BPA) business practices. BPA has since allowed interconnection requests that facilitate greater installed aggregate nameplate generating capacity, provided the instantaneous generation is controlled to not exceed the grid injection capacity, which is the maximum energy in MW that can be injected into the transmission grid at any instant in time without exceeding the allowable authorized grid injection capacity set by BPA (the transmission provider). Consequently, a generation facility may have a greater nameplate generating capacity than grid injection capacity by installing more Turbines or solar modules. This change by BPA does not alter the facility components proposed for the Project.

The effect of this change was to clarify that the aggregate nameplate capacity rating of installed wind generation in megawatts (MW) can exceed the grid injection capacity, provided the instantaneous generation is controlled to not exceed the grid injection capacity authorized by BPA. As the designated overbuild for the Project relative to a point of interconnection with the electric grid will not add wind turbines to the scope, the design change for this allowance by BPA does not alter the facility components proposed for the Project nor add additional impact.

With respect to solar generation, as stated in the revised ASC dated December 2022, Section 2.3.2,

[t]he nameplate generation capacity of the solar arrays may be greater than the maximum grid injection capacity, but will be limited to the maximum grid

injection capacity as a function of the AC rating of the inverters associated with current interconnection requests. Accordingly, there may be greater direct current (DC) nameplate generation capacity as a function of the optimization in the number of solar modules installed per inverter. However, the actual solar array equipment and layouts selected would not exceed the footprint acreage or impacts described in this ASC.

This change clarified the aggregate nameplate capacity rating of installed solar arrays (also in megawatts) can exceed the grid injection capacity, since the instantaneous generation is controlled by the design rating of the inverters that are the physical interconnection to the electric grid, which in the aggregate cannot exceed the grid injection capacity authorized by BPA. As the designated overbuild for the Project relative to a point of interconnection with the electric grid will not add solar arrays, and their associated footprint impact to the scope, the design change for this allowance by BPA does not alter the facility components proposed for the Project nor add additional impact.

The changes in the ASC are consistent with the Applicant's recognition that EFSEC's review focuses on the environmental impacts of the proposed Project and associated infrastructure, including but not limited to wind turbine generators, solar modules, inverters, electrical collection and access roads, electrical substations, and other Project infrastructure identified in Section 2.0 of the Revised ASC. The generation nameplate rating is fundamentally unique and an important value for generator interconnection as administered by BPA – but distinct from EFSEC process. Documentation associated with interconnection requests submitted to BPA is outside the scope of the EFSEC proceedings.

We hope that this additional detail gives you the clarity you need regarding the manner in which BPA evaluates the nameplate rating of a Project while at the same time underscoring the fact that BPA's consideration is separate and distinct from what EFSEC is addressing.

#### RFP No. 2

As noted at the outset, Mr. Poulos's statements were general and they intentionally avoided implicating confidential data or materials. You have requested meteorological information that is proprietary and extremely sensitive from a commercial perspective, and therefore we must again respectfully decline to provide you with the information you seek. *See, e.g., Whistling Ridge Energy Project*, Prehearing Order No. 11, pp. 5-6 (“In conclusion, much of the requested information [specifically including meteorological information] appears to have little direct relevance to the issues in the proceeding. It is extremely sensitive proprietary information. We see little likelihood that the requested information would lead to the discovery of admissible information; while some may be available from other sources, the risk of damage by disclosure is great if it is provided, as statutes, rules and agency practice do not appear to ensure reasonable protection even if parties and the Council take time to formulate protective orders. On balance, we decline to exercise our discretion to allow discovery.”).

RFP No. 3

Request No. 3 seeks reports or studies that assess the expected production from wind turbines, which is not germane to these EFSEC proceedings. As you may know, the manufacturers of wind turbines only provide production details for their turbine models with the express, explicit understanding that those details will be kept confidential. The Applicant is bound by that confidentiality obligation and cannot disclose anything related to turbine production to third parties without their prior approval. *See also*, General Objection Nos. 2, 5. Additionally, as noted in the application, the Applicant has not yet selected the turbines for the Project. *See*, ASC Section 2.3.1 (“Turbines and Towers”) (“The final Turbine model that would be used for the Project would be a commercial choice based on Turbine availability and other factors present at the time of construction, and is not known at this time.”) We regret that we are unable to provide you with the information you seek in Request No. 3.

RFP No. 4

As you know, wind projects are often built in proximity to other projects. Developers generally do not analyze the effects of a proposed project on projects that may lie downwind. That is true in this case: although the Applicant understands there may be some wake loss if and when the Project comes online, it is the downwind party and not the Applicant that would analyze and if appropriate, take steps to address any wake loss. For that reason, and after diligent search, the Applicant can report that there are no documents in its possession or constructive possession that are responsive to Request No. 4. In addition, we would note that the Project has been designed to minimize the wake impact to a negligible extent.

RFP No. 5

With all respect, Request No. 5 is not germane to these EFSEC proceedings. As you know, the Applicant does not sell power directly to ratepayers, and it has no role in the regulatory processes that set power prices in the Northwest. Moreover, estimates of the impact the cost of the Project might have on purchasers entail extremely sensitive commercial information that if disclosed would undercut the Applicant’s position with the prospective off-takers with whom it is in negotiations. Finally, the information you request is both highly speculative and extremely volatile. Even if the Applicant were in a position to provide the requested information without jeopardizing its business interests, the information would be no more than a single, changeable data point that would be essentially meaningless to the EFSEC process. We respectfully decline to respond further to Request No. 5.

RFP No. 7

TCC has also asked for materials that concern the impacts of the Project on property values and the local economy. On July 12, the Applicant filed the testimony of an expert economic analyst (Morgan Shook) and an expert appraiser (Andrew Lines), who together explain why the current academic literature, and site-specific property value data demonstrate that the Project will cause

July 14, 2023

Page 5

no negative impact to nearby property values. Once you have had a chance to review their testimony you will see that their statements contain detailed information about property value impacts for parcels in the vicinity of the Project. Specifically as to the Project's impact on tourism, we can represent that after diligent search, the Applicant has been unable to locate any documents in its possession or constructive possession that are responsive to Request No. 7.

RFP No. 8

Finally, with regard to Request No. 8, we refer you again to our previous response, which referenced the sections of the ASC pertaining to the viewshed analysis. Additionally, at the time we provided TCC with the Applicant's discovery responses we represented that additional information regarding visual impacts would be included with the Applicant's pre-filed testimony. We have since filed three rounds of testimony from our visual impacts expert, Brynn Guthrie that address the information you seek. See EXH-1000\_T\_REVISED, EXH-1001\_REVISED, EXH-1021\_R, EXH-1036\_R.

We regret that we cannot provide you with more information beyond what is contained herein, but we appreciate that you've given us the opportunity to provide further clarification as to the basis for the Applicant's objections to TCC's discovery requests. As always, if you have further questions or concerns, please don't hesitate to let us know.

Very truly yours,



Willa B. Perlmutter

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of  
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT LLC  
for

WHISTLING RIDGE ENERGY PROJECT

PREHEARING ORDER NO. 11  
COUNCIL ORDER NO. 855

Prehearing Order on Discovery

**Introduction**

During a prehearing conference in Stevenson, Washington on June 17, 2010, parties indicated agreement with the use of informal discovery in lieu of application of the Washington Civil Rules for discovery, CR 26. In clarification, the Council stated that, in the event of a disagreement, parties would be free to cite the civil rules and ask the Council to apply them (Prehearing Order No. 6 at page 6).<sup>1</sup>

Intervenors Save Our Scenic Area (“SOSA”) and Friends of the Columbia Gorge (“Friends”) asked to discover certain information from Whistling Ridge Energy Project LLC (“Applicant”). When the Applicant objected to certain of the requests, SOSA and Friends (referred to in this order as “Intervenors”) asked for a discovery conference at which they could request an order to require the Applicant to provide the information. The parties briefed the issues and a discovery conference was convened on October 12, 2010, before Council Chair Jim Luce (by telephone), Member Dennis Moss and Administrative Law Judge C. Robert Wallis. SOSA (by J. Richard Aramburu) the Applicant (by Timothy McMahan and Darrell Peeples) and Counsel for the Environment, Bruce Marvin, attended in person; Friends (by Gary K. Kahn and Nathan Baker) attended by telephone.

Of the ten discovery items asked (plus an eleventh described on the record of the conference), the majority were resolved prior to conclusion of the conference and it appears that only four remain in dispute. We will not further discuss the matters that appear to be resolved by the parties but commend them for a responsible approach to settling these issues.

<sup>1</sup> This is the result, in any event, under the law: the Administrative Procedure Act (APA) provides in RCW 34.05.446 that agencies “may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used”; the Council has adopted WAC 463-30-190, which gives the presiding officer the discretion to permit discovery and to conduct it in accordance with the APA provision.

## **Analysis of discretionary authority**

### **Discovery under the Civil Rules**

The civil rules for superior court allow broad discovery, with parties allowed to seek not only evidence that is admissible but also evidence that is “reasonably calculated” to lead to the discovery of admissible evidence.<sup>2</sup> Mr. Aramburu summarized the civil standard informally in stating that “The standard for discovery is a liberal one: discovery is allowed unless there’s some very good reason not to.” The result is that discovery in complex litigation can be a very time-consuming process, with thousands of documents copied for examination, motions to compel production of documents, and exhaustive examination on the documents. Superior Court judges have the authority to enter and enforce protective orders that safeguard data from public disclosure when that is necessary for adequate protection of the interests affected.

### **Discovery under the APA**

The drafters of the Washington State Administrative Procedure Act (“APA”), Chapter 34.05 RCW, wisely determined that discovery as practiced in the civil rules is ill-suited to much administrative litigation, which often involves few parties, limited issues, and short time frames for reaching decisions. The APA therefore allows agencies to determine by rule what forms of discovery, if any, will be permitted in litigation before the agency. RCW 34.05.446; *see*, WAC 480-04-095.

### **Discovery at the Utilities and Transportation Commission (UTC)**

Mr. McMahan provided samples of UTC documents that address the handling and management of confidential information at that agency. It deals with the economic regulation of utility companies whose data required for setting rates often could be extremely valuable to investors, competitors, litigants, speculators and large customers in search of inside information. The UTC has several mechanisms that assist it in gaining and protecting that information.

First, the Legislature has enacted RCW 80.04.095, which allows any document in the possession of the Commission that is labeled “confidential” to be sequestered for ten days from the time of any request for its production under Chapter 42.56 RCW, the Public Records law. The law allows persons claiming to be adversely affected by release of the document to obtain a court order barring its release. The statute, applicable only to documents filed with the Commission or the Attorney General and not to documents filed with EFSEC, and it appears to be unique in the State for the protection of agency-held data.

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<sup>2</sup> CR 26b, Washington Civil Rules for Superior Court

Second, the Commission has promulgated seven separate rules, some of them lengthy, governing the discovery process (WAC 480-07-400 through -425). Two of those rules govern the issuance of protective orders, practice pertaining to those orders and other aspects of handling and relying upon confidential information. WAC 480-07-420 and -423. The UTC also has extensive experience regarding the use of protective orders and confidentiality agreements. The eight exhibits included in Mr. McMahan's response to the motion for discovery illustrate the comprehensive and detailed nature of the agency's discovery practice regarding confidential information.

Third, parties to UTC proceedings tend to be "regulars," having experience with and sensitivity to the processes for maintaining confidentiality – often having their own confidential data and a keen awareness of the consequences of the release of confidential data – resulting in motivation to comply.

### **Discovery at the Council**

The Council has exercised its rulemaking authority to allow the presiding officer to determine whether to allow discovery, as provided in the APA. WAC 453-30-190 consists of only one sentence. We found no record of any prior request to the Council for an order permitting discovery of confidential data. The Council has no rules protecting confidential information or governing its handling, no regulations governing the preparation of prefiled testimony or the conduct of hearings for the protection of confidential data, and no statutory avenue of judicial review prior to release of public records containing confidential information.

We take from the brief review above that the Council should grant requests for discovery of valuable commercial information very carefully. Based on the arguments we have heard and our review of the filings and cited resources, the appropriate level of care requires that we limit the grant of such requests to those that are (1) very likely to produce information that is unavailable elsewhere and highly relevant to the matter in litigation, (2) unlikely to impose the reasonable likelihood of harm to the owner of the information, and (3) unlikely to be obtained from other sources. In addition, (4) the parties and the agency should have ample time to fashion protective mechanisms adequate for reasonable certainty that the agency can comply with public information, open meeting and public hearing laws while causing no unreasonable risk of harm to the owner of the data.

In other words, the Council should exercise its discretion to allow discovery when the request is likely to produce relevant admissible information; when the need is great for the information to



resolve significant matters at issue, when the burden or possible harm from its release is low, and when the discovery is not likely to interfere with a timely hearing.<sup>3</sup>

### **Review of the contested discovery requests**

**Request No. 1.** This request seeks all meteorological records prepared for the Whistling Ridge site, including information supporting Applicant’s claim that the site has a proven, robust, wind resource.” The result would presumably be an indication<sup>4</sup> of availability of the “fuel” that would power the turbines that produce electricity.

Intervenors say that they need the information to test representations in the application that the site offers “robust” wind conditions that make it commercially attractive, and to assist in weighing the benefit of the facility against any environmental costs that are shown by the record to be imposed on the community where it is proposed.

Applicant responds that the information is proprietary and commercially sensitive, and that it is relevant not only to the quality of the site but to competition among sites and to the economic viability of the site, which latter the Council will not consider.

**Request No. 2.** Intervenors’ second request seeks applicant’s predictions, calculated from the meteorological data, of the Project’s average daily and annual production. Again, Intervenors argue that the information allows quantification of benefit from the Project, which they assert is useful and necessary for measuring the balance of benefit against environmental costs. The Applicant responds that the information is highly confidential and essential to protect for competitive reasons.

**Request No. 3.** This request seeks communications, contracts or agreements with utility companies or other possible purchasers. Intervenors argue that this information, as the prior request, would inform the record about need for and value of the Project. Applicant responds that it is critically sensitive business information whose release would severely damage the Project’s ability to compete for energy sales.

**Request No. 6.** This request seeks a financial analysis to support Applicant’s representation in the draft environmental impact statement and the application that 75 megawatt capability is the minimum for the project’s economic viability. Intervenors urge its production to test the representations; applicant responds that the information is critically sensitive business

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<sup>3</sup> We do not propose this as a checklist, but it comprises a group of significant factors that must be collectively weighed to produce the result most consistent with the public interest.

<sup>4</sup> It is, of course, a matter of common knowledge that weather patterns one year will not be repeated identically in any future year.

information and consists entirely of financial viability information that has been excluded from consideration.

### **Analysis and conclusions**

All of these items requested relate integrally with the Project's economic viability; all of them constitute confidential information and some are critically confidential information.

All of the Items have at best a limited direct relationship with issues other than the financial viability of the project. Pursuant to the Council's decision in Application 2003-01 of Sagebrush Power Partners, LLC for Kittitas Valley Wind Power Project ("KV" in this order) and the Supreme Court decision on its appeal, in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*,<sup>5</sup> that issue of financial viability is not considered by the Council or the Governor in evaluating siting applications. Intervenor's citations to prior orders in the Council's *Chehalis*<sup>6</sup> and *Sumas*<sup>7</sup> decisions are questionable because of intervening rulemaking and decisions in other proceedings.

The requested information items are also confidential or highly confidential and for protection would require formulation of one or a series of protective orders whose viability would require research, which would require additional time. Some of the proposed uses, including use in direct evidence and in cross examination, could be very difficult to accomplish without extraordinary procedural measures that could require, at the least, rulemaking. The application has been available for some time, and the framework for discovery was agreed at the prehearing conference on June 17, 2010. It appears now to be too late in the process for reasonable certainty that information could be adequately protected.<sup>8</sup>

Intervenor's argue that the requested meteorological and financial data could lead to a more precise value of the completed resource, so as to aid in a financial formulation of relative value between the energy resource and any costs its construction and operation might impose on the environment. Such information, in non-confidential forms adequate for the Council's evaluation, appears to be available from other sources that will not compromise the Applicant's proprietary interests. For example, during the argument Mr. Baker cited references in Council Order No. 826 to expert testimony on weather resource quality; Mr. McMahan responded that the cited testimony made no mention of met data in its evaluation.

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<sup>5</sup> *Residents Opposed to Kittitas Turbines, et al., v. the State Energy Facility Site Evaluation Council, et al.*, 165 Wn.2d 275, 197 P.3d 1153 (2008)

<sup>6</sup> Application 94-2 of Chehalis Power Generating, Limited Partnership

<sup>7</sup> Application 94-01 of Sumas Energy 2, Inc.

<sup>8</sup> Because of the legal framework, it remains questionable that even such efforts could provide reasonable assurance of protection.

We respect and agree with the concern of Mr. Marvin, Counsel for the Environment, that the application and hearing processes should be transparent. Here, the Council hearing and all of the evidence is expected to be transparent and open to the public. We aim to restrict from discovery only information that we find confidential and needful of protection from public scrutiny. As noted above, the data sought also appear from the record to be of limited or no relevance, or to be available in non-confidential forms.

In conclusion, much of the requested information appears to have little direct relevance to the issues in the proceeding. It is extremely sensitive proprietary information. We see little likelihood that the requested information would lead to the discovery of admissible information; while some may be unavailable from other sources, the risk of damage by disclosure is great if it is provided, as statutes, rules and agency practice do not appear to ensure reasonable protection even if parties and the Council take time to formulate protective orders. On balance, we decline to exercise our discretion to allow discovery.

The motion for an order requiring discovery of items 1, 2, 3 and 6 is denied.

One additional procedural matter warrants attention. Two parties made post-conference submissions to expand on their presentations at the conference, the second to object and respond another party. A somewhat similar event earlier in the proceeding drew an objection and an admonition. It must be made clear to everyone that this is a formal proceeding with rules applicable to all parties. It is also complex litigation in which it is the administrative law judge's task to ensure for all parties that the record is both complete and coherent. Unapproved random submissions are disruptive of the process. The submissions following the discovery conference are not considered. All parties' cooperation is expected and appreciated.

Dated at Olympia, Washington and effective this 19<sup>th</sup> day of October, 2010.

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/s/

C. Robert Wallis, Administrative Law Judge

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITING EVALUATION COUNCIL

IN THE MATTER OF THE )  
APPLICATION OF: )  
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SCOUT CLEAN ENERGY, LLC, FOR ) NO. EF-210011  
)  
HORSE HEAVEN WIND FARM, LLC, )  
)  
Applicant. )

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DEPOSITION UPON ORAL EXAMINATION OF  
DAVID KOBUS  
Benton County Public Services Building (Large  
Conference Room)  
102206 E Wiser Parkway  
Kennewick, WA 99336

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FRIDAY, JULY 21, 2023  
11:05 A.M.

TAKEN AT THE INSTANCE OF THE APPLICANT

REPORTED BY:  
MONNA J. NICKESON, RPR, CRR, CCR, CSR CA 14430  
TRI-CITIES COURT REPORTER SERVICE, LLC.  
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MONNA@TRICITIESREPORTING.COM

1 the queue for the 350?

2 A. No. For the 300.

3 Q. Oh, for the 300. Excuse me.

4 A. The extra 300 solar. Every one of  
5 these interconnects is a precise application  
6 document and a precise queue position and, you  
7 know, meets all of Bonneville's tariff  
8 requirements related to it.

9 So they manage the queue. And so if  
10 you put in 300 and then terminate it, it  
11 doesn't affect anything else in the queue. You  
12 just terminated your queue position for that  
13 300 desired injection.

14 Q. Somebody else moves up?

15 A. In this case, anybody could file,  
16 but there wasn't capacity to do it because, as  
17 I said, when we had our feasibility study, it  
18 was determined that the network upgrades that  
19 would be required -- well, I don't want to  
20 repeat myself, so...

21 Q. Network upgrades on the BPA side?

22 A. On the BPA side would be very  
23 expensive, yes.

24 Q. So has a decision been made now  
25 between the 244 smaller turbines and the

1 150 larger turbines? Is that a corporate  
2 decision made as of now?

3 A. No. We -- that will be a  
4 last-minute determination when we go to the  
5 turbine supplier and negotiate for the turbine  
6 that we desire to have.

7 Q. So there's interconnect proposals  
8 that have been made to BPA, am I correct about  
9 that?

10 A. Yeah.

11 Q. For the whole project?

12 A. Yes.

13 Q. And what's the status of those?

14 A. We have -- we're at the E&P  
15 agreement stage for both interconnections,  
16 which means Bonneville is doing engineering and  
17 procurement that we have funded to advance the  
18 design of the projects, culminating in a large  
19 generator interconnection agreement once we  
20 have unappealable permit available.

21 Q. And when do you expect the decision  
22 on the interconnect with BPA?

23 A. At the point we have an unappealable  
24 permit.

25 Q. If you got your permit today, would

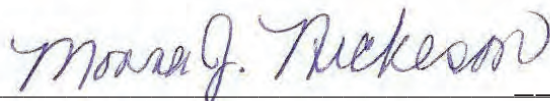
## C E R T I F I C A T E

I, MONNA J. NICKESON, CCR, CSR, CLR, RPR, CRR, the undersigned Certified Court Reporter, authorized to administer oaths and affirmations in and for the states of Washington (3322), Oregon (16-0441), Idaho (1045), and California (14430), do hereby certify:

That the sworn testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that the witness was duly sworn or affirmed to testify to the truth; that the testimony and/or proceedings were stenographically recorded by me and transcribed under my supervision. That the foregoing transcript contains a full, true, and accurate record of all the testimony and/or proceedings occurring at the time and place stated in the transcript.

That I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

IN WITNESS WHEREOF I have set my hand on  
July 26, 2023.



\_\_\_\_\_  
MONNA J. NICKESON, CCR, CSR, CLR, RPR, CRR

1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on August 1, 2023, I filed the foregoing **APPLICANT’S**  
3 **OPPOSITION TO TCC’S MOTION TO COMPEL PRODUCTION OF**  
4 **DOCUMENTS** with the Washington Energy Facility Site Evaluation Council through  
5 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.

9  
10 DATED: August 1, 2023.

11 **STOEL RIVES LLP**



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