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5 BEFORE THE STATE OF WASHINGTON
6 ENERGY FACILITY SITING EVALUATION COUNCIL

7 In the Matter of the Application of:

8 Scout Clean Energy, LLC, for
9 Horse Heaven Wind Farm, LLC,
Applicant.

DOCKET NO. EF-210011

10 TRI-CITIES C.A.R.E.S.
11 OBJECTION TO SECOND PRE-
12 HEARING CONFERENCE
ORDER

(Oral Argument Requested)

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15 TRI-CITIES C.A.R.E.S. objects to the Second Pre-Hearing Conference Order
16 issued on May 19, 2023 (PHO#2) pursuant to WAC 463-30-270(3). This objection also
17 and herein addresses the issues presented by the April 28, 2023, agenda for the Third
18 PHC.¹

19 Our discussion in this objection is not intended to present ranked issues, rather
20 to cover the various matters of importance to the adjudication process.

21 At the outset, it appears that there have been improper *ex parte communications*
22 between the presiding ALJ and EFSEC staff and the EFSEC Chair as discussed below.

23 The Agenda for PHC#3 (issued on April 28, 2023) says:
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26 ¹ TCC has filed a Motion for Recusal of the current presiding ALJ and asserts herein that no further
27 ruling or actions should be taken by him in this matter. Moreover, any prohibited *ex parte*
28 *communications* should be placed of record.

1 Judge Torem and EFSEC Staff consulted with Chair Drew to refine the below list
2 of topics that the parties may choose to address and on which any party may
present expert witness testimony.

3 At the conclusion of the May 2, 2023 Prehearing Conference (PHC), found at page 102,
4 lines 21-26 of the transcript of that hearing, the presiding ALJ stated:

5 JUDGE TOREM:- -- I intend to issue -- I intend to issue a prehearing conference
6 order on Friday, in the late afternoon, likely after I have a conversation with the
7 rest of staff based on how things went today and what I hear from all of you by
close of business on May 4th.

8 (Emphasis supplied.) In fact, this prehearing order was not issued until May 19, 2023,
9 two weeks after the announced deadline. No explanation for this two week delay was
10 provided to the parties.

11 It appears that both the agenda for PHC#3 and comments made during that PHC
12 concerning the anticipated “conversation with the rest of staff” after the PHC, indicate
13 there were extensive *ex parte communications* between the presiding ALJ, the EFSEC
14 Chair Kathleen Drew and EFSEC staff. Such communications have not been placed of
15 record, and apparently continue to occur.

16 A recent email from Assistant Attorney General Jon Thompson (dated May 26,
17 2023 and sent to all parties in this adjudication) indicated that EFSEC staff (and
18 possibly the Chair) are having continuing and undisclosed communications with the
19 Applicant:

20 It's my understanding that Scout has indicated a willingness to agree to an
21 extension necessary to accommodate the scheduled adjudication, plus a
22 reasonable amount of time for follow-on activities such as post hearing briefs,
23 council deliberation on findings of facts and conclusions of law on disputed
issues in the adjudication, council consideration of the EIS, and development of
a recommendation to the governor. EFSEC staff is still assessing how long that
should be. We intend to conclude that soon and then get a proposed agreement
with the applicant before the council for its approval at an open meeting.

24 What conditions or circumstances lead to the Applicant's “willingness” to agree to this
25 undefined extension are not disclosed. This communication shows that the same staff
26 that is consulting with ALJ Torem regarding what issues the parties will be allowed to
27

1 present, is also in direct negotiation with the applicant for concessions for EFSEC
2 decision making. Such negotiations have taken place without notice to the parties or
3 the public.

4 What appear to be extensive *ex parte communications* between the presiding
5 ALJ, the EFSEC Chair and EFSEC staff (including the assigned Assistant Attorney
6 General) clearly violate RCW 34.05.455(1), which prohibits communications between
7 the “presiding officer” and “any person employed by the agency without notice and
8 opportunity for all parties to participate. . . .”² Subsections (a)-(d) of the statute do
9 provide exceptions to this rule, but EFSEC staff and the Chair do not qualify because
10 they are not “subject to the presiding officer’s supervision” and are not employees “who
11 have not participated in the proceeding in any manner.” See Subsection (b) and (c).
12 To our knowledge, no notice or opportunity to participate regarding these matters has
13 been provided to TCC or any other party.³ None of these communications between
14 EFSEC staff and the ALJ have been placed of record as required by RCW
15 34.05.455(5). The *ex parte communications* described herein are equally violations of
16 the Washington Appearance of Fairness Doctrine and RCW chapter 42.36, as local
17 land use decisions and also require “placing the substance of any written or oral *ex*
18 *parte* communication: on the record and providing the “parties rights to rebut the
19 substance of the communications. . . .” RCW 42.36.060.⁴

20 To the extent that the PHO#2 of May 19, 2023, involved any such prohibited
21

22 ² Though EFSEC does not have a specific rule on compliance with RCW 34.05.455, its sister
23 agency, the Washington Utilities and Transportation Commission (WUTC) has adopted WAC
480-07-310, “Ex parte communication,” which mirrors the statute.

24 ³ In reference to RCW 34.05.455 prohibitions, our court has set a high standard: “We agree with the
25 superior court that scrupulous attention must be paid to fairness and the appearance of fairness
26 protected by the *ex parte* contact rules.” *Ferry County v Concerned Friends*, 121 Wn App 850, 858
(2004). (Emphasis supplied).

27 ⁴ Though TCC has not yet received the *ex parte* communications, we reserve our right to request the
28 recusal of Chair Drew from further participation in this adjudication.

1 communications, it should be withdrawn and held to be of no effect. Further, any
2 communication, written or otherwise, between staff and the presiding ALJ should be
3 placed of record and TCC and other parties should be provided the opportunity to rebut
4 such communications under RCW 34.05.455(5) and RCW 42.36.060.

5 The following are our specific objections to the terms of PHO#2.

6 **1. TIME FOR HEARING PREPARATION.⁵**

7 The application for this proposal was submitted to EFSEC on February 21, 2021,
8 more than 27 months ago. The Horse Heaven application is the biggest renewable
9 project ever proposed in Washington state. The cumulative wind turbine strings are
10 about 25 miles long, the distance from downtown Seattle to Tacoma (or from downtown
11 Seattle to North Bend along I-90).

12 Notwithstanding the magnitude of the proposal, the agenda for May 2, PHC#3
13 initially proposed less than 30 days to prepare, file and serve direct testimony. PHO#2,
14 which provided final confirmation of the hearing schedule, was not issued until May 19
15 (at 4:21 pm), setting a deadline for prefiled direct testimony of June 12, only 23
16 calendar days, but only 14 business days (including the Memorial Day state holiday).
17 Given the complexity of the case, the interests of the parties, and the number of
18 impacted residents, this is insufficient time for the parties to prepare testimony, much
19 less accommodate the common elements of an administrative adjudication, including
20 motion practice, conventional discovery and other prehearing matters. This is
21 especially true given the many disputed issues remaining unresolved. The
22 presiding ALJ letter dated January 24, 2023, requested provision of “input from the
23 _____

24 ⁵ As we respond, TCC is mindful of concerns that the identified issues, and compliance with RCW
25 34.05.455, may extend the review period for this application. However, TCC has been diligent in
26 complying with all deadlines established in these proceedings, including full participation in the first two
27 PHCs. TCC filed a detailed list of issues on March 17, 2023, and were fully prepared to discuss these
28 issues, and any additional matters, at the scheduled March 27 PHC, which was abruptly cancelled
March 24, 2023 and not rescheduled until May 2. This unexplained delay, and the delay from PHC#3 to
issuance of PHO#2 on May 19, kept TCC and other intervenors in limbo for two months.

1 parties to the upcoming adjudicative proceeding on scheduling and procedural
2 considerations.” As indicated in the March 1, 2023 letter from Mr. McMahon to ALJ
3 Torem following consultation with the parties, there was consensus that the hearing
4 schedule should reflect the opportunity for supplemental live testimony, in addition to
5 live cross-examination. The provision for such testimony is not included in PHO#2 and
6 the Order should be revised to include it.

7 An additional concern is that the May 19, 2023 PHO#2 required TCC to
8 “coordinate with Benton County” as follows:

9 Therefore, per WAC 463-30-092, TCC shall limit its participation and
10 presentation of evidence on land use topics and coordinate its
concerns with the County who shall be the lead party for that issue.

11 The requirement that TCC “coordinate its concerns” was not on the “agenda” for
12 PHC#3. Placing this new obligation and burden on TCC for unspecified “coordination”
13 of direct written testimony to be submitted only 14 business days later is patently unfair.
14 This is especially for the requirement for a private, public interest, citizens organization
15 (TCC) to need to coordinate with a public agency (Benton County).

16 Further, just on Friday, May 26, 2023, TCC and other parties were informed that
17 EFSEC staff is negotiating with the Applicant for additional time for EFSEC
18 deliberations. See email of May 26, 2023 at page 1. No opportunity has been provided
19 to TCC or other parties to provide input or to participate in such discussions.⁶ It
20 appears that these private negotiations between the Applicant and staff are intended
21 only to provide additional time for the Council itself to review material and make a
22 decision, not to benefit the parties who continue to be severely hobbled in their

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24 ⁶ The Agenda for PHC#3, issued April 28, 2023 stated:

25 EFSEC is working with the Applicant and its pending Third Extension Request which requests an
26 extension through September 30, 2023. EFSEC Staff is considering whether that is a sufficient
27 extension for completion of all reviews.

28 This statement only informed the parties that Staff was “considering whether” a September 30 deadline
was sufficient, not that EFSEC staff and Chair were actually “negotiating” with the Applicant for more
time.

1 preparation time for their written testimony deadline of June 12, 2023.

2 The June 12, 2023 deadline for submission of written testimony is far too
3 condensed for the biggest wind farm proposal ever submitted in this state. Additional
4 time should be allowed for thorough preparation, at least three full months.

5 **2. MOTION PRACTICE.**

6 The schedule for the PHC#3 agenda and PHO#2 do not provide a reasonable
7 opportunity for motions to be filed and resolved in advance of the filing of testimony.
8 Given the potential for several motions on procedural issues, the Judge should provide
9 time for not only the filing of motions, but their disposition, in advance of the filing of
10 testimony, with a schedule that does not conflict with hearing preparation.

11 For PHC#2, the presiding ALJ attached to the agenda an Order Summarizing
12 Issues and Setting Hearing Dates from EFSEC 15-001, the *Tesoro* case. In the *Tesoro*
13 order (at page 2), motions on certain issues were due 90 days before the hearings.
14 This is a reasonable schedule for an equally important project.

15 In this case, similar procedures for motion practice should be adopted. The
16 provision for the SEPA FEIS motions to be resolved on June 2, only 10 days before
17 testimony is due, is clearly unreasonable.

18 There should be sufficient time for motion practice prior to the submission of
19 direct testimony.

20 **3. DISCOVERY.**

21 Though the PHO does allow for discovery, there is in fact no reasonable time to
22 employ it. With only 14 business days before the due date for direct testimony, there is
23 no reasonable time to issue written discovery or set depositions, let alone provide the
24 results of the discovery to expert witnesses. Moreover, there is no time allowed for
25 resolution of possible objections to discovery or motions to compel. As a practical
26 matter, the resolution of discovery issues under this schedule will occur after the
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1 deadline for filing testimony.

2 Discovery, either written (requests for production of documents) or oral
3 (depositions) are an integral part of the administrative process. Due process and the
4 integrity of the administrative process require a fair opportunity for discovery.
5 Discovery limitations inherent in the compressed litigation schedule here serve to only
6 benefit the possessor of discoverable material, here the applicant.

7 In addition, without any motion from the parties, the PHO sets limits on what the
8 parties can discover:

9 The parties' pre-filed testimony shall serve as the chief source of discovering
10 each party's principal position(s) and supporting evidence. Any additional
11 discovery must seek only information that is relevant to the approved issues for
12 the adjudication (e.g., no inquiries into the SEPA process).

13 These are improper limitations.⁷

14 First, discovery is intended to allow the gathering of information in advance of
15 the hearing so that a party may prepare its own case. While it may be useful to see the
16 Applicant's "prefiled testimony," such testimony usually does not include information
17 that is helpful to opposing parties. In any event, with prefiled direct testimony being
18 filed at the same time by all parties, another party's prefiled testimony will not assist in
19 preparing any party's own testimony.

20 Second, limitation of discovery to "approved issues" is inappropriate, especially
21 concerning SEPA.⁸ As described in TCC's recently filed motions, SEPA is an integral
22 part of review by EFSEC and any effort to limit SEPA issues in the adjudication is
23 wholly inappropriate. Though the presiding ALJ has indicated he would rule on the
24 pending motions on June 2, 2023, this is only ten days before the deadline for filing of

25 ⁷ As noted above, it appears that the "approved issues" came, at least in part, from EFSEC Staff and
26 the Chair, as the PHC#3 agenda and transcript reveal.

27 ⁸ Motions have been filed by TCC, the Yakama Nation and Benton County on the announced SEPA
28 process of withholding the FEIS until after the Adjudication. TCC's motion, and reply, are incorporated by
reference herein.

1 direct testimony, providing no opportunity to include SEPA in discovery.

2 **4. DISPUTED ISSUES.**

3 Intervenor TCC submitted its list of disputed issues to the Judge and all parties
4 by email on March 17, 2023, following directions to make reference to other cases,
5 including *Tesoro* as mentioned above. Other parties filed their witness lists as well. As
6 described above, the Judge in *Tesoro* set out the 71 issues offered by the parties and
7 even allowed amendment of the issues prior to the hearing. TCC received no objection
8 to our issues list and accordingly began witness selection and preliminary hearing
9 preparation based on these issues.

10 PHO#2 essentially tells the parties to tear up their lists – lists provided at the
11 direction of the ALJ – and limit themselves to issues imposed by the PHO. Given the
12 disclosure in the agenda for PHC#3, it is difficult to tell why issues lists provided by the
13 parties were discarded, and whether the new issues imposed were imposed by the ALJ,
14 by EFSEC staff or the EFSEC chair.⁹ It is clear that the PHC#3 Agenda, carried forward
15 to PHO#2, was formulated without consultation with TCC or any of the parties.

16 Please provide any and all communications between the presiding ALJ, EFSEC
17 staff and the Chair on the disputed issues.

18 **5. THE FIVE DISALLOWED ISSUES ON THE AGENDA.**

19 The PHC#3 Agenda at page 4 set forth five issues that the Chair and Staff have
20 apparently decided will “not be taken up during the Adjudication unless a party
21 proponent makes a satisfactory offer of proof demonstrating its relevance under
22 EFSEC’s governing RCWs and WACs.”

23 As TCC indicated during PHO#3, we are unclear what an “offer of proof”
24 requires and interpret it as requiring a motion to be submitted. Respectfully, TCC

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27 ⁹ As described in the introduction to this Objection, it appears the list of disputed issues arose from
28 prohibited ex parte communications.

1 disagrees with the characterization of these issues.

2 As we said during PHC#3, TCC has filed a motion on the issue of “Proceeding
3 with Adjudication prior to Issuance of FEIS.” Included within that motion is the
4 challenge to the general exclusion of SEPA issues listed in the PHC#3 Agenda:

5 “! SEPA - Compliance with RCW 43.21C and WAC 197-11 (separate but
6 parallel process)”

7 In addition, the fifth issue listed by the presiding ALJ as “NOT expected to be
8 taken up during Adjudication . . .” (capitalization, underline and italics in original) in the
9 Agenda for PHC#3 is:

10 “! Greenhouse gas emissions reductions analysis (outside scope of
11 EFSEC/might be addressed as part of FEIS).”

12 The reference that this issue “might be addressed as part of FEIS” (emphasis supplied)
13 is missing from PHO#2, leaving the status of this issue uncertain.

14 The necessity to consider whether any greenhouse gas reductions might come
15 from this project was raised by the Counsel for the Environment in her SEPA comments
16 dated February 1, 2023, at page 8, Paragraph 9. In that letter, the CFE stated that the
17 DEIS “notably lacks any analysis of the emission reductions estimated to result from
18 the project” and provides “no estimate of the impact on meeting our statewide energy
19 goals if the project is not developed.” She asked that further review “should include an
20 assessment of how the Project would reduce the State’s greenhouse gas emissions
21 and help to meet the State’s energy mandates.”

22 PHO#2 provides no reason why this key issue should be excluded from the
23 adjudication. This project is a speculative merchant plant, not sponsored or developed
24 by a public or private utility. As such, how and where the power from the project will be
25 used, and whether it would actually reduce greenhouse gases, is unknown without
26 proper analysis. If the project’s output would be exclusively used by a new data center
27 (e.g. Google, Amazon etc), existing greenhouse gas emissions in Washington would
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1 not be reduced at all. Indeed, the construction of that project might actually increase
2 greenhouse gases due to its construction, maintenance and transportation impacts.
3 The exclusion of such issues is entirely unwarranted and tends to entirely favor the
4 applicant and eliminate issues of public concern regarding the project. The ALJ should
5 allow consideration of greenhouse gas emission issues within the adjudication.¹⁰

6 **6. EFSEC DECISION DEADLINES.**

7 Page 2 of the PHC#3 Agenda indicates that “EFSEC is working with the
8 Applicant and its Third Extension Request which requests an extension through
9 September 30, 2023.” TCC believes that the Amendment to the ASC filed by the
10 Applicant on December 1, 2022, contains changes that are sufficiently material and
11 substantive that it triggered a new deadline for Council action.¹¹

12 **7. PUBLIC HEARING.**

13 On page 3 of the Agenda, it is indicated that “public comment . . . will be taken
14 separately during the adjudication.” The date for this public comment and a deadline
15 for written comment should be included in the hearing schedule. The prehearing order
16 should be revised to include the public hearing.

17 **8. SITE VISIT/HEARING VENUE.**

18 TCC understands that a site visit was conducted by EFSEC in November, 2022,
19 prior to the commencement of the adjudication and TCC involvement. We request that
20 an additional site visit be conducted so that parties (other than just the applicant) can
21 address site visit content, scope and procedures.

22 Additionally, we ask that the Council reconsider its decision that declines to hold
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24 ¹⁰ There is particular concern that this limitation of the greenhouse gas analysis came from EFSEC
25 staff or the Chair based on improper ex parte communications. Any such communications should be
26 placed on the record.

27 ¹¹ Whether or not resolution of this issue is a part of the “negotiations” between Staff and Applicant is
28 unknown. TCC requests full disclosure of all communications regarding extension negotiations.

1 any of the adjudication hearings in the local vicinity, i.e. Benton County, and join with
2 the objections of Benton County and the Yakama Nation.

3 **9. LIMITATION ON APPLICANT MATERIALS.**

4 WAC 463-60-116(4), regarding “General—Amendments to applications,
5 additional studies, procedure” limits additional reports or studies from the Applicant as
6 follows:

7 (4) After the start of adjudicative hearings, additional environmental
8 studies or other reports shall be admitted only for good cause shown after
9 petitions to the council or upon request of the council, or submitted as a
portion of prefiled testimony for a witness at least thirty days prior to
appearance.

10 This limitation should be expressed in the prehearing order.

11 **10. CONCLUSION.**

12 PHO#2 should be withdrawn and reissued consistent with the content of this
13 objection by a new ALJ. In addition, EFSEC staff should disclose, and provide to the
14 parties, all communications with the applicant concerning negotiations regarding
15 extension of the deadline for action on the application.

16 Respectfully submitted this 30th day of May, 2023.

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

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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

DECLARATION OF SERVICE

I hereby certify that I have this day served TCC's OBJECTION TO SECOND
PRE-HEARING CONFERENCE ORDER upon all parties of record in this proceeding
listed on the following page(s), by authorized method of service pursuant to WAC
463-30-120(3), simultaneous with electronic filing to adjudication@efsec.wa.gov and to
email for parties as provided.

Dated at Seattle, Washington this 30th day of May, 2023.

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

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