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4 BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL
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6 In the Matter of the Application of:

7 Scout Clean Energy, LLC, for
8 Horse Heaven Wind Farm, LLC,
Applicant.
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DOCKET NO. EF-210011

TRI-CITIES C.A.R.E.S. REPLY TO
APPLICANT'S RESPONSE TO
MOTION TO STAY PENDING
FEIS ISSUANCE

(Oral Argument Requested)
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11 **1. INTRODUCTION.**

12 On May 18, 2023, TRI-CITIES C.A.R.E.S. (TCC), the Yakama Nation, and
13 Benton County each filed with the Council motions requesting a stay of administrative
14 proceedings until the final environmental impact statement (FEIS) is issued.

15 The only reply to these motions was a response from the Applicant, Scout Clean
16 Energy, LLC; no reply was received from EFSEC staff.

17 Scout's response demonstrates that the ALJ's *sua sponte* decision, apparently
18 made after consultation with EFSEC Staff and the EFSEC Chair, to withhold the
19 issuance of the FEIS until after the adjudication is complete, lacks any significant legal
20 support and should be reversed. Further, the ALJ should revise the most recent Pre-
21 Hearing Order (PHO) to defer or stay further proceedings on the pending adjudication
22 until the FEIS is issued and the parties have had a reasonable opportunity to review
23 the document and incorporate its content into possible pre-filed direct testimony. ¹
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26 ¹ On May 25, 2023, TCC filed a motion for recusal of the presiding ALJ, Adam Torem. The content
27 of that motion is incorporated herein. Respectfully, ALJ Torem should not take any part in the decision
and resolution of the pending motions. Moreover, agency staff and the Agency chair should take no part
in the decision on this motion pursuant to the RCW 34.05.455 prohibition against ex parte
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1 **2. CONTROLLING LEGAL AUTHORITY DOES NOT ALLOW EFSEC TO**
2 **SEPARATE SEPA PROCEDURAL COMPLIANCE FROM EFSEC'S**
3 **ADJUDICATIONS.**

4 As stated it in its motion, SEPA and the SEPA Rules require that agencies such
5 as EFSEC “integrate the requirements of SEPA with existing agency planning and
6 licensing procedures and practices. . .” WAC 197-11-030(2)(d).

7 On page 4 of its motion, the Applicant contends that:

8 for over two decades, the Council has implemented a process under which EIS
9 preparation and the adjudication proceed in tandem, with the adjudicative
10 hearing occurring before issuance of the FEIS.

11 For this proposition, the Applicant cites to EFSEC’s website. Tellingly, there is no
12 citation to caselaw or to controlling SEPA rules found in WAC chapter 197-11. The
13 only citation is to past decisions made by EFSEC presiding officers.

14 One citation to a ruling in the *Kittitas Valley Wind Project* (Exhibit C to
15 Applicant’s response) is found on page 5, lines 13-21 of that response. There the
16 presiding ALJ said that separating SEPA from EFSEC review “maximizes the amount of
17 information available to the Council during its deliberations.” How this might occur is
18 not defined, likely because it cannot be legally supported. Indeed, by having the FEIS
19 integrated into the adjudication early on, the parties (including the applicant) can
20 include the content of the FEIS into testimony, which assures the results of
21 environmental review in the FEIS are fully a part of the agency review process as
22 required by SEPA.

23 A more fundamental problem with citation to the *Kittitas Valley* decision in Exhibit
24 C is that it was based on a regulation that was withdrawn fifteen years ago. At page 2
25 of Exhibit C, the ALJ² says:

26 _____
27 communications.

28 ² The ALJ issuing the decision found at Exhibit C in September 2004 is the same presiding officer
that preemptively decided the FEIS should be delayed until the adjudication is complete in this case. As
noted, TCC has filed a motion that the presiding ALJ be recused in this adjudication.

1 Local governments typically issue a Draft EIS, allow commenting, and then issue
2 their FEIS prior to holding an “open record hearing” and announcing a decision
3 on a proposed project. See WAC 197-11-775. EFSEC however, is required by
4 statute to conduct an adjudicative hearing, rather than the open record hearing
5 more commonly found before local governments and their planning
6 commissions. See RCW 80.50.090.

7 However, EFSEC will hold an “open record hearing” in connection with this project, as
8 well as conduct an adjudication. But more importantly for purposes of compliance with
9 SEPA, there is no difference between the adjudication and an open record hearing;
10 having the FEIS available for an existing agency review process is consistent with the
11 statute and SEPA rules.

12 But the ALJ went on to say:

13 However, pursuant to EFSEC rules implementing SEPA, EFSEC does not issue
14 an FEIS prior to the adjudicative hearing on an application. See WAC
15 463-47-060(3).

16 But as TCC pointed out in its motion, this regulation cited by the ALJ was deleted by
17 EFSEC itself in 2007. The applicant’s claim that this regulation is somehow
18 resurrected *sub silentio*, outside the rule-making process, cannot be supported.

19 Moreover, the very process by which the presiding ALJ made his decision to
20 make SEPA “out of bounds” during the adjudication when issuing PHO#2 violates long
21 established SEPA practice. SEPA requires that a “responsible official” be designated
22 by an agency like EFSEC “to undertake its procedural responsibilities as lead agency.”
23 WAC 197-11-788. This is distinction to the agency “decision maker” who “makes the
24 agency’s decision on a proposal.” WAC 197-11-730. Under EFSEC rules, the
25 “responsible official” is the council manager (WAC 463-47-051), not the presiding ALJ.
26 To the extent that the council manager told the presiding ALJ to make the decision on
27 SEPA procedures found in PHO#2, that would be a clear ex parte communication
28 prohibited by RCW 34.05.455.³

³ The conflicts of agency communications with RCW 34.05.455 are discussed in TCC’s objections to PHO#2, which are incorporated herein by reference.

1 **3. REQUIRING THE FEIS TO PRECEDE THE ADJUDICATION DOES NOT**
2 **PREJUDICE THE APPLICANT, CREATE ADDITIONAL APPEALS OR DELAY**
3 **THE PROCEEDINGS.**

4 At page 8 of its response, the Applicant claims that TCC's motion is intended to
5 create "another public comment period." Response at 8, lines 16-18. That is not the
6 case. Having the FEIS available to the parties for the adjudication does not create a
7 new comment period; all it does is allow the parties to include the FEIS contents in the
8 existing agency review process, precisely what SEPA has intended for the fifty years of
9 its existence.

10 Nor is a new appeal process created as claimed at page 9, lines 1-7 of the
11 response. Incorporation of the FEIS into direct testimony is not an appeal, but allows all
12 parties the opportunity to include FEIS content in their testimony, hardly a remarkable
13 or unusual proposition. Perhaps the motivation of EFSEC staff is to have the FEIS
14 issued so late in the process that no one will have an opportunity to comment on it,
15 thus somehow insulating EFSEC decision making. Indeed as noted above, the 2004
16 *Kittitas Valley* decision points out that it is the "local governments [that] typically issue a
17 Draft EIS, allow commenting, and then issue their FEIS prior to holding an 'open record
18 hearing'. . ." This "typical" practice makes the FEIS available to the public for use and
19 comment "prior" to issuing a decision, precisely what SEPA requires and what TCC
20 seeks by its motion.

21 Finally, claims that compliance with SEPA will create "further delays that
22 prejudice the applicant," Response at page 8, lines 7-11 are particularly galling. It is
23 EFSEC staff that has delayed preparation of the FEIS so it will not be available during
24 the adjudication. EFSEC staff and the ALJ have in fact accelerated the schedule for
25 submission of direct testimony to assure the FEIS will not possibly be available before
26 testimony is due. How this elaborate manipulation of a process designed to enhance
27 public participation can possibly advance the public interest is unexplained and
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