

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of the Application of:

Scout Clean Energy, LLC, for
Horse Heaven Wind Farm, LLC,

Applicant

DOCKET NO. EF-210011

ORDER OVERRULING PARTIES
OBJECTIONS TO SECOND
PREHEARING CONFERENCE ORDER

Procedural Background:

On May 30, 2023, Benton County filed its *Objections to Second Prehearing Conference Order (County Objections)*. Later that same day, Intervenor Tri-Cities C.A.R.E.S. (TCC) filed its *Objection to Second Pre-Hearing Conference Order (TCC Objection)*. TCC requested oral argument regarding its *Objection*. Also on May 30, 2023, the Yakama Nation filed its own *Objections to Prehearing Order No. Two (Yakama Objections)*.

Denial of Oral Argument. TCC’s request for oral argument on its *Objection* is denied for reasons previously stated in the June 9, 2023 *Order Denying Motions for Continuance/Stay*.

Overview of Party Objections

Benton County objects to the *Second Prehearing Conference Order* for three main reasons: (a) the *Order* assigns “lead party status” to the County for land use topics in general as well as for recreation and recreational land use; transportation; and roadway safety issues; (b) that being assigned lead party status prejudices the County; (c) the *Order* does not allow sufficient time for the County to prepare for the adjudication.

TCC leads off its objections with allegations that the administrative law judge (ALJ), EFSEC’s Chair, and EFSEC staff are having improper *ex parte* communications. TCC then objects to the *Second Prehearing Conference Order* for nine separate reasons: (a) condensed schedule for preparation; (b) lack of opportunity for motion practice; (c) limitations on discovery; (d) determination of disputed issues for adjudication; (e) disallowed issues; (f) concerns about EFSEC’s decision on the Applicant’s extension request and the Applicant’s amendments to the Application; (g) the scheduling of the adjudication’s public comment hearing; (h) venue and a request for additional site visits; and (i) the *Order*’s lack of reference to WAC 463-60-116(4).

The Yakama Nation raises eight categories of objections: (a) the ALJ failed to issue an order following EFSEC’s second prehearing conference held on March 20, 2023 and did not issue an order after the third prehearing conference held on May 2, 2023 until May 19, 2023; (b) alleged *ex parte* communications between the ALJ, EFSEC’s Chair, and EFSEC Staff; (c) EFSEC’s decision to hold a virtual hearing; (d) determination of disputed issues for adjudication; (e) timing of procedural schedule leading up to adjudicative hearing; (f) supplemental verbal

testimony during adjudicative hearing; (g) absence of provisions for oral argument by parties; (h) scoping of Yakama Nation’s participation as intervenor

As explained further below, each of these objections is overruled as unsupported by statute or rule or as coming within the sound discretion of the Council or ALJ.

Timing of Prehearing Conference Orders

The Yakama Nation correctly points out that the ALJ did not issue a prehearing order directly after the second prehearing conference held on March 20, 2023. WAC 463-30-270 certainly requires as much. Therefore, the *Second Prehearing Conference Order* encompassed the topics and discussions conducted at both the second and third prehearing conferences. As to the timing of the *Second Prehearing Conference Order*, no party was disadvantaged or prejudiced by its date of issuance because all matters contained therein with regard to the adjudication schedule and associated prehearing milestones and deadlines were negotiated and decided during the third prehearing conference. These important dates were reiterated multiple times on the record. The *Order* memorialized what all parties already knew at the close of that prehearing conference.

Participation by Intervenors – Assignment of Lead Party Status

WAC 463-30-092 specifically allows the Council to condition an intervenor’s participation “upon allowance of other parties to act as lead parties, where appropriate” and also reserves the Council’s “right to prescribe other limitations and conditions, where appropriate.” EFSEC’s rules do not specifically define what is meant by “lead counsel” or “lead party.”

As intended in the *Second Prehearing Conference Order*, assignment of lead party status means that party has the greatest interest in the outcome of a particular topic or issue. As such, the lead party is to coordinate the presentation of evidence on that topic. Assigning a lead party to topics where multiple parties have expressed an interest minimizes the possibility of cumulative or redundant evidence being presented during the adjudication. It simply means that, to the extent the coordinating opponent parties agree, they should endeavor to avoid redundancy in witness testimony and cross examination. It does not mean that parties do not have latitude to present differing viewpoints on the issue.

In this adjudication, Benton County is the party with the broadest interest in and is in the best position to coordinate the presentation of land use issues as well as certain issues related to county governance (recreation or recreational land use; transportation; and roadway safety). But for the Applicant’s choice to apply to EFSEC for its site certification, Benton County would be the decision-making body on all these topics.

After considering RCW 80.50.080’s mandate that Counsel for the Environment (CFE) “shall represent the public and its interest in protecting the quality of the environment,” the Council has determined that CFE and Benton County should jointly coordinate presentation of evidence on the topic of visual aspects, light, and glare. This is a topic of direct relevance to the “quality of the environment.” Additionally, county ordinances may also prove relevant to this area and influence the Council’s recommendation to the governor on this topic.

Assignment of lead party status does not unduly burden Benton County and does not preclude TCC or the Yakama Nation from raising their own distinctive issues regarding any topic where Benton County or CFE has been designated as lead counsel. The Council's designation of lead parties is its method of ensuring the adjudication proceeds efficiently. Doing so does not deprive the Yakama Nation of its Treaty-reserved rights.

Time to Prepare for Adjudication

When the Legislature created EFSEC, it was on the premise that the Council's "decisions are made timely and without unnecessary delay."¹ Given that legislative intent, RCW 80.50.100(1) directs that "[t]he council shall report to the governor its recommendations as to the approval or rejections of an application for certification *within twelve months of receipt* by the council of such an application, *or such later time as is mutually agreed by the council and the applicant*" (emphasis added). The ambitious timing adopted by statute governs every EFSEC adjudication. Aside from mutual agreement between the Council and the Applicant, the statute conceives of no other methodology for extending the timing for review and evaluation of an application.

Benton County, TCC, and the Yakama Nation all protest the timing and associated deadlines for pre-filed testimony, discovery, and motion practice set out in the *Second Prehearing Conference Order*. Their concerns are best taken up with the Legislature. The Council's schedule for conducting the adjudication is its best attempt to complete a full consideration of all disputed issues within the timelines dictated by statute with allowance for completion of the environmental impact review proceeding in a parallel but separate process under the State Environmental Policy Act (SEPA). After hearing the parties regarding timing requests on pre-filed testimony, the ALJ finalized the procedural schedule at the close of the second prehearing conference held on May 2, 2023, and granted all parties several additional weeks of preparation time for developing pre-filed testimony than had been previously discussed at prior conferences or set out on the conference agenda. The adopted schedule is as generous as it can be while taking into account the above-noted statutory direction and the schedules of all participants.

The Council recognizes the amount of time and effort required to prepare for an adjudication and the challenges of doing so under a compressed timeline. However, the law is clear. All parties are expected to meet the deadlines set out in the *Second Prehearing Conference Order*.

Issues to be Adjudicated

Several parties complain that the issue statements they submitted were not adopted verbatim by the ALJ and the Council as topics for the adjudication. The *Second Prehearing Conference Order* stated the Council's decision on which disputed issues would and would not be taken up during the adjudication. This decision was reached only after three prehearing conferences were held with all parties and after consideration of the appropriateness of each issue raised in the various written submissions and on-the-record discussions presented by the parties. TCC's disputed issues list was considered, as were those submitted by the Yakama Nation and all other

¹ RCW 80.50.010(5).

parties. WAC 463-30-300 and past Council practice and experience also influenced the ultimate selection of disputed issues to be heard.

The *Second Prehearing Conference Order* does not direct the parties to “tear up their lists” as suggested by TCC. Instead it amalgamates all prior submissions and discussions and instructs all parties as to which issues the Council will and will not take up during the adjudicative hearings set to begin on August 10, 2023. TCC’s requests and suggestions have been given due consideration after consultation with all parties. The Yakama Nation incorrectly asserts that by keeping the issues list “vague” the Council will be precluded from making appropriate findings of fact and conclusions of law after the adjudication. To the contrary, a more generalized issues list allows the parties greater flexibility to present evidence during the adjudicative hearing.

While RCW 80.50.090(4) provides for an adjudicative hearing at which “any person shall be entitled to be heard in support of or in opposition to the application for certification by raising one or more specific issues,” it is within the Council’s prerogative to direct the parties to focus their testimony and cross examination on issues that the Council can actually consider in developing a recommendation to the governor on the application for site certification. Simply put, the Council is empowered to “conduct hearings on the proposed location of the energy facilities” for which it receives applications for site certification² and is doing so in accordance with the applicable statutes, its adopted rules, and experience with past hearings.

The adjudication is not an appeal of the responsible official’s analysis, under SEPA, of the proposal’s likely impacts. Therefore it is appropriate that the available hearing time not be taken up by arguments challenging the sufficiency of the SEPA analysis of the proposed facility.

It also is within the Council’s discretion to restrict the use of hearing time against arguments about the extent to which a wind or solar energy facility may or may not offset greenhouse gas emissions over its operational lifetime. Speculation about the eventual purchasers of the proposed 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. These arguments are not germane to impacts at the proposed site or conditions that can be included in a site certification agreement. Nor can the Council ignore or second guess RCW 80.50.010’s premise of encouraging the development and integration of clean energy sources, or the various other state laws mandating the transition to alternative energy resources, most significantly the Climate Commitment Act’s cap-and-invest program, designed to eliminate or all greenhouse gas emissions in Washington by 2050. Arguments about the wisdom of these policies are better directed to the Legislature.

Other Miscellaneous Objections

TCC raises additional concerns about the timing of the public comment hearing required to be held during the adjudication per RCW 80.50.90(4); EFSEC’s ongoing discussions with the Applicant regarding extending the statutory deadline for a recommendation to the governor and any amendments made to the application; and the venue and number of site visits.

² See RCW 80.50.040(7); see also RCW 80.50.040(3) and Chapter 463-30 WAC.

The Yakama Nation’s additional concerns about venue have already been finally decided by the EFSEC Chair.³ The Protective Order issued on May 24, 2023, was created following input from the Yakama Nation and is designed to help protect the culturally sensitive information that might be presented during the adjudication. The possibility of supplemental live testimony during the adjudicative hearing has not yet been fully decided by the ALJ and can be explored at a future conference after pre-filed testimony comes, all party witnesses have been identified, and the exact scheduling and ordering of testimony is developed accordingly. The Yakama Nation is respectfully asked to raise that question again at an appropriate time next month. Oral arguments have also not been fully foreclosed, but all parties have been invited to file pre-hearing and post-hearing briefs. Additionally, the Council will have the opportunity to ask questions of party witnesses during the course of the adjudication; as party attorneys are not themselves testifying, it would be procedurally irregular for counsel to any party to themselves provide substantive answers to any questions stated by a Council member.

The Council will schedule its public comment hearing in due course. The Council will complete its statutorily-required discussions with the Applicant on its own schedule. The Council has already made its decision on how, when, and where to conduct this adjudication. Further, the *Second Prehearing Council Order* need not restate administrative rules (*i.e.*, WAC 463-60-116) that have previously been adopted by the Council and apply to all applications.

TCC’s and Yakama Nation’s *Ex Parte* Concerns

In addition to its objections to the *Second Prehearing Conference Order*, TCC alleged that the undersigned ALJ, EFSEC Chair Kathleen Drew, and EFSEC staff have had improper *ex parte* communications. This is wholly unfounded and distorts RCW 34.05.455 as well as the Appearance of Fairness Doctrine set out in Chapter 42.36 RCW. TCC’s idea that the ALJ should be precluded from communicating with the EFSEC Chair and EFSEC Staff is a misunderstanding of the *ex parte* communication statute and an unrealistic expectation that, for good reason, has never previously been raised to the Council.

WAC 463-30-020 provides that when EFSEC conducts an adjudication, “[t]he Council is the presiding officer at adjudicative proceedings pursuant to chapters 34.05 and 80.50 RCW.” This same rule allows the Council to rely on an ALJ “to facilitate conduct of administrative hearings and all matters related thereto.” Thus, the ALJ serves as the Council’s procedural facilitator during the course of the adjudication. The Council, as presiding officer, makes the findings of fact and conclusions of law on disputed issues raised by the adjudication parties’ arguments in support of or opposition to the application. The ALJ is part of the presiding officer’s (the Council’s) team of legal advisers and staff assistants, under its supervision, and as such, communications between the Council and the ALJ are not *ex parte* communications. RCW 34.05.455(1)(b). Conversations between the Council Chair and ALJ regarding refinement of the disputed issues list are not improper under the Administrative Procedure Act.

TCC alleges that the Council Chair and ALJ’s conversations with EFSEC staff about adjudication scheduling are improper under the Administrative Procedure Act.

³ The Council’s decision on a virtual venue was reaffirmed by Chair Drew’s letter dated March 28, 2023.

RCW 34.05.455(1) provides that presiding officers “may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as otherwise provided.” Communications regarding adjudication timing and scheduling considerations between the presiding officer, including the Chair, and EFSEC staff are not *ex parte* communications for two reasons. First, discussions of “procedural aspects of maintaining an orderly process” are not prohibited by the APA. *Id.* Second, the APA expressly allows presiding officers to “communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.” EFSEC’s staff is not a party to the adjudication required by RCW 80.50.090(4) and takes no advocacy role in the adjudication. Instead, the state agency advocacy role in the adjudication is assigned to the Assistant Attorney General serving as Counsel for the Environment in accordance with RCW 80.50.080, and to other state and local government agencies with a member on the council that elect to participate in the adjudication as authorized by WAC 463-30-050. These internal agency discussions are not prohibited by RCW 34.05.455 and any discussions had in that regard are not required to be disclosed per the APA or RCW 42.36.060. TCC’s concerns are without basis in law or fact.

TCC also accuses EFSEC of “having continued and undisclosed communications with the Applicant” regarding a pending request to further extend the 12-month statutory deadline associated with the Application for Site Certification. Extension of the deadline within which the Council is required to provide its recommendation on the application to the governor is not an “issue in the [adjudicative] proceeding” and therefore the communications surrounding it are not *ex parte* communications. RCW 34.05.455(1). RCW 80.50.100(1) specifically authorizes such discussions (which can also be characterized as negotiations insofar as the statute requires achieving mutual agreement). TCC’s suggestion of impropriety is groundless.

For all the foregoing reasons, the parties’ objections to the *Second Prehearing Conference Order* are **OVERRULED**.

DATED and effective at Olympia, Washington, on the 12th day of June, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge