

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 RESPONSE IN
OPPOSITION TO MOTION TO STRIKE
APPLICANT’S DIRECT TESTIMONY

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1 On June 16, 2023, the Confederated Tribes and Bands of the Yakama Nation
2 (“Yakama Nation”), Benton County, and Tri-Cities C.A.R.E.S. (“TCC”) (collectively, the
3 “Movants”) jointly moved the Energy Facility Site Evaluation Council (“Council”) to strike
4 all direct testimony filed to date by Scout Clean Energy, LLC for Horse Heaven Wind Farm,
5 LLC (“Applicant”) in this matter. For the reasons that follow, Applicant respectfully
6 requests that motion be denied.

7 **ARGUMENT**

8 The Movants argue that all of Applicant’s direct testimony be stricken, on grounds
9 that (1) the submittals did not contain signed oaths from the witnesses per RCW 34.05.452(3)
10 and (2) the submittals were untimely. Neither of these grounds warrants striking Applicant’s
11 testimony.

12 First, Applicant questions whether RCW 34.05.452(3) applies to written pre-filed
13 testimony in a Council adjudication, given that such documents contain both questions from
14 counsel and responses from witnesses. To be sure, and consistent with past Council
15 adjudication practice, all witnesses are sworn in prior to verbal testimony and cross
16 examination during the adjudication hearing, in accordance with RCW 34.05.452(3) and
17 Washington Rule of Evidence 603. Applicant interpreted that because the written testimony
18 contains content from both counsel and witness, signature and certification by counsel was

1 sufficient. If a different approach is desired for this proceeding, Applicant is happy to
2 provide the Council and parties with written signed oaths from all witnesses whose responses
3 are contained in the testimony submittals.

4 Second, the undersigned counsel acknowledges that Applicant’s direct testimony was
5 filed five and a half hours late, after the 5:00pm deadline set by the Council, due to
6 technological and staffing problems. Counsel apologizes to all parties and the Council,
7 regrets the error, and already has taken steps to ensure these problems will not occur during
8 the next round of filing.¹

9 As discussed in Judge Torem’s June 16, 2023 correspondence to the parties, multiple
10 parties made errors in filing their direct testimony. Those errors include that TCC has had to
11 file several corrected submittals, spanning three days past the filing deadline; and that
12 Yakama Nation did not file unredacted versions of its submittals (including around 50 pages
13 of substantive redacted material) until three days after receiving signed confidentiality
14 agreements, and four days after the filing deadline.²

15 Finally, and most important, ***none of the Movants have been prejudiced.*** The
16 Movants do not claim to have been prejudiced in any way by Applicant filing its testimony
17 several hours late. Nor can they legitimately make any such claim, given the *days*-long
18 timeliness deficiencies in their own filings. Moreover, it is unclear why the Movants wish to
19 strike all of Applicant’s testimony—which provides additional information and explanation
20 about the project and its potential impacts—given their repeated claims that they lack enough
21 project information to participate in this adjudication absent the final environmental impact
22 statement. To argue that there is insufficient information about the project to proceed with
23

24 _____
25 ¹ If a sworn declaration is desired to explain the Applicant’s unique challenges in making this filing, counsel is
26 happy to submit that filing. We are not asking other parties for such declarations to explain their own respective
filing challenges.

² See email correspondence and e-filing from Carol Cohoe to EFSEC and parties, June 14, 2023, 10:15am and
2:48pm; June 15, 2023, 1:31pm; email correspondence and e-filing from Shona Voelckers to EFSEC and
parties, June 16, 2023 3:44pm.

1 the adjudication, while trying to *exclude* such information from the same process, is at best
2 cognitively dissonant and at worst disingenuous.

3 Applicant acknowledges that all parties are working hard to comply with the
4 Council's deadlines in this adjudication. To the extent that other parties have also made
5 filing errors, Applicant extends understanding and professional courtesy to counsel for all
6 parties, and overlooks these discrepancies. The same cannot be said for the Movants.

7 For the reasons stated above, Applicant respectfully requests that the motion to strike
8 Applicant's direct testimony be denied.

9 DATED: June 19, 2023.

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1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on June 19, 2023, I filed an original and one copy of the
3 foregoing **APPLICANT’S RESPONSE IN OPPOSITION TO MOTION TO STRIKE**
4 **APPLICANT’S DIRECT TESTIMONY** with the Washington Energy Facility Site
5 Evaluation Council through 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 at the addresses listed below (with a copy sent via email
8 where an email address is indicated).

9 *Service List Attached*

10
11 DATED: June 19, 2023.

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