

**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 DENYING DISQUALIFICATION
OR RECUSAL OF ADMINISTRATIVE
LAW JUDGE

Procedural Background:

On May 25, 2023, Intervenor Tri-Cities C.A.R.E.S. (TCC) filed a *Motion for Disqualification / Recusal of Presiding Administrative Law Judge (TCC Motion to Disqualify or Recuse ALJ)*. TCC requested oral argument regarding its *Motion to Disqualify or Recuse ALJ*.

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*.

Summary of TCC Assertions

TCC and its counsel, J. Richard Aramburu, argue that Administrative Law Judge (ALJ) Adam E. Torem should recuse or disqualify himself from further participation in this adjudication based on alleged bias, prejudice, and prejudgment of various issues. TCC believes that ALJ Torem will not be able to provide TCC with a fair and impartial adjudication. Mr. Aramburu’s declaration in support of this *Motion to Disqualify or Recuse ALJ*, signed under penalty of perjury, states: “I believe my client cannot receive a fair hearing under Administrative Law Judge Adam E. Torem.”

TCC and Mr. Aramburu specifically allege that ALJ Torem has (1) prejudged important issues TCC believes to be relevant to the adjudication; (2) threatened to sanction parties and attempted to intimidate those parties; (3) improperly set conditions for submission of pre-filed adjudication testimony regarding siting of the proposed project as to the topic of “local concerns, attitudes and opinions”; (4) unduly delayed the prehearing stage of the adjudication without explanation; and (5) had *ex parte* communications with EFSEC Staff.

Law and Definitions

RCW 34.05.425 provides, in relevant part, that

- (3) Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified.

(4) Any party may petition for the disqualification of an individual promptly after receipt of notice indicating that the individual will preside or, if later, promptly upon discovering facts establishing grounds for disqualification.

(5) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

Black's Law Dictionary (Black's) defines "bias" as "[i]nclination; prejudice; predilection" and goes on to describe "judicial bias" as "a judge's bias toward one or more of the parties to a case over which the judge presides. Judicial bias is usu[ally] not enough to disqualify a judge from presiding over a case unless the judge's bias is personal or based on some extrajudicial reason."¹

Black's defines "prejudice" as "(1) [d]amage to one's legal rights or claims" or "(2) [a] preconceived judgment formed with little or no factual basis; a strong bias."² Although Black's contains no definition of "prejudgment," "prejudge" generally means "judge beforehand; judge without knowing all the facts."³

Finally, as might be relevant in this context, Black's defines "interest" as "[t]he object of any human desire; esp., advantage or profit of a financial nature <conflict of interest>."⁴

Washington's Code of Judicial Conduct provides this relevant guidance: "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."⁵

Inapplicability of RCW 34.12.050 to EFSEC

The Energy Facility Site Locations Act (EFSLA) creates the Energy Facility Site Evaluation Council (EFSEC)⁶ and empowers the Council to, among other things, "conduct hearings on the proposed location and operational conditions of the energy facilities under the regulatory authority established in this chapter."⁷ Chapter 34.12 RCW, *Office of Administrative Hearings*, creates a state office of administrative hearings (OAH). Chapter 34.12 RCW, by its own terms, applies to the operating mandate and procedures of OAH.⁸

Nothing in EFSLA adopts the statutory procedures set out in RCW 34.12.050, nor does EFSLA adopt OAH's procedural rules. To the contrary, WAC 463-30-010 precludes application of Chapter 10-08 WAC, the model procedural rules that apply to the conduct of OAH hearings,

¹ Black's Law Dictionary, Ninth Edition (1999) at 183.

² *Id.*, at 1299; alternatively, "prejudice" means an "opinion formed without taking time and care to judge fairly." See Thorndike Barnhart Advanced Junior Dictionary (1965), at 634.

³ Thorndike Barnhart Advanced Junior Dictionary (1965), at 634.

⁴ Black's Law Dictionary, Ninth Edition (1999) at 885. A "financial interest" is defined as "[a]n interest involving money or its equivalent; esp. an interest in the nature of an investment – Also termed pecuniary interest." *Id.* A "conflict of interest" is "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Id.*, at 341.

⁵ Code of Judicial Conduct, Rule 2.11, *Disqualification*.

⁶ RCW 80.50.030.

⁷ RCW 80.50.040(7).

⁸ RCW 34.12.040 requires the assignment of an administrative law judge from OAH only when a hearing is *not* presided over by officials of the agency who are to render the final decision.

unless a specific exception is called out in Chapter 463-30 WAC.⁹ Accordingly, TCC’s assertion that the 34.12.050(1) provides for an automatic disqualification of the ALJ is legally incorrect.

Chapter 34.05 RCW, the Administrative Procedure Act (APA), governs this adjudication. The APA and RCW 34.05.425 do not create any automatic right for a party alleging prejudice to have its first such motion granted. Instead, TCC and Mr. Aramburu must demonstrate that the ALJ can be disqualified or recused “for bias, prejudice, interest” or another cause set out in the APA.

TCC’s Allegations of Predisposition and Prejudgment of Issues are Not Supported by Law

TCC contends that the “ALJ has continuously indicated he has prejudged important issues in this matter” during prehearing proceedings by excluding specific issues from the adjudication. TCC specifically identifies the ALJ’s exclusion of SEPA compliance and greenhouse gas emissions issues as grounds demonstrating bias and prejudice under RCW 34.05.425 and the Appearance of Fairness Doctrine, Chapter 42.36 RCW.

The ALJ assists the Council by working with the parties to identify issues to be litigated during the adjudication. In doing so, the ALJ is empowered to ensure that the parties’ proposed issues fit within the scope of an EFSEC adjudication. The ALJ is not allocated a vote on any of these issues, as that role is reserved to the Council as the presiding officer.¹⁰ Thus, the Appearance of Fairness doctrine, applicable only to quasi-judicial *decisionmakers*, is inapposite.¹¹

TCC’s assertion that the ALJ is biased is not based on any legal definition of the term. Our courts have ruled that “[w]e cannot infer bias merely because the reviewing officer ruled contrary to [the party asserting bias], where those rulings are fairly supported by the record and the law.”¹² As stated in the recent *Order Overruling Parties’ Objections to Second Prehearing Conference Order*, this adjudication is not an appeal of the responsible official’s analysis, under SEPA, of the proposal’s likely impacts. The ALJ properly excluded SEPA compliance issues from the scope of the adjudication. Similarly, the ALJ correctly determined that the extent to which a wind or solar energy facility may or may not offset greenhouse gas emissions over its operational lifetime is not directly germane to EFSEC’s adjudication regarding the Horse Heaven Wind Farm siting recommendation.¹³

TCC’s Assertion that ALJ Torem Threatened Sanctions is Not Disqualifying

TCC and Mr. Aramburu cite to a portion of the “Agenda” published prior to the third prehearing conference held on May 2, 2023 that reminded parties of the provisions of CR 11 requiring all arguments presented to be “made with a firm basis in existing law” and further indicating that

⁹ The only such exceptions are contained in WAC 463-30-085, provisions regarding limited English-speaking and hearing-impaired persons.

¹⁰ WAC 463-30-020.

¹¹ *State v. Finch*, 137 Wn.2d 792, 808 (1999). See also previous EFSEC orders on this topic: Orders 781, 782, and 783 (October 2003) from Kittitas Valley Wind Power Project adjudication; see also Whistling Ridge Energy Project Orders 861 and 862 (December 22, 2010).

¹² *Nationscapital Mortgage Corp. v. Dept. of Financial Institutions*, 133 Wn. App. 723 (2006).

¹³ See also WAC 463-60-021 (“RCW 80.50.010 requires the council to ‘recognize the pressing need for increased energy facilities.’ For that reason, applications for site certification need not demonstrate a need for the energy facility.”).

“[s]ubmissions of evidence or arguments deemed frivolous” would “be stricken and reviewed for any available sanction under the APA.” According to Mr. Aramburu, “[t]his statement amounted to intimidation of TCC and other parties” and had a “chilling effect.”

The ALJ cited to CR 11 and reminded the parties about the existing state of the law because some issues, particularly aspects of SEPA compliance, have been raised in multiple past adjudications and been excluded each and every time.¹⁴ The ALJ’s direction to the parties to refrain from making those same motions was not intimidation but instead an attempt to ensure an orderly and efficient process. As Mr. Aramburu points out, CR 11 is echoed in the Council’s own procedural rules at WAC 463-30-100(3). An ALJ reminding parties that rules apply is not a threat, nor is it an indication of bias or prejudice.

TCC’s Argument that Preconditioning Testimony was Prejudicial

TCC and Mr. Aramburu next focus on ALJ Torem’s requirement in the Second Prehearing Conference Order that:

Any party wishing to present witness(es) on [the topic of] “Local Concerns, Attitudes and Opinions” should justify the witness’ significance as a representative of the local area and ability to speak for the community-at-large and understand they will be subject to cross examination. This category [of pre-filed testimony] is not public comment that will be heard per RCW 80.50.090(4).

TCC and Mr. Aramburu contend this restriction on parties presenting witnesses on this topic during the adjudication has no basis in EFSEC rules or Washington’s Evidence Rules. TCC and Mr. Aramburu rely on the APA’s guidance on admissible evidence¹⁵ and suggests that ALJ Torem’s stated restriction is “so vague that counsel and the parties must guess at its meaning for testimony proposed to be included in the record.”

WAC 463-30-091 allows the Council discretion in approving intervenors subject to limitations that prevent undue delay of the adjudication. While WAC 463-30-092 indicates general EFSEC policy is to allow intervenors “broad procedural latitude,” there is no prohibition on the ALJ setting a threshold for establishing an expert witness’s credential to speak for a community as a whole. Given the need to distinguish between individuals commenting on their own behalf and sharing personal opinions during the public comment hearing (to be held per RCW 80.50.090(4)) and expert witnesses testifying during the adjudicative hearing who are subject to cross-examination, the ALJ provided the above-noted guidance in order to prevent undue delay. TCC incorrectly interprets this limit and direction as somehow amounting to prejudgment and bias.

¹⁴ The ALJ in the Whistling Ridge matter excluded SEPA issues and the question of issuance of the FEIS from that adjudication (*see* Council Order 848 (June 29, 2010)). Additionally, the ALJ in the Vancouver Energy matter also excluded the question of FEIS completion prior to conducting the adjudication (*see Order Denying Motion to Continue Adjudication Until after FEIS is Issued* (June 2, 2016)).

¹⁵ *See* RCW 35.05.452.

TCC's Concerns with Unexplained Delays in Prehearing Process and Progress

TCC and Mr. Aramburu accurately summarize the order of prehearing events scheduled and held in this proceeding. They also point out the cancelation of the third prehearing conference originally set for March 27, 2023 and its rescheduling five weeks later for May 2, 2023. TCC and Mr. Aramburu state that “[n]o explanation for this delay was provided.” That is correct.

TCC and Mr. Aramburu correctly point out that during the third prehearing conference, the ALJ indicated he would issue a prehearing conference order by Friday [May 5, 2023] following review of additional party input with regard to disputed issues to be taken up during the adjudication. In this regard, the undersigned ALJ overpromised and underdelivered as the *Second Prehearing Conference Order* was not issued until May 19, 2023. This delay was not intended to prejudice or otherwise compromise the parties’ abilities to prepare for hearing. If anything, it demonstrates some level of inefficiency in the ALJ’s task management skills and powers of prediction. It does not demonstrate prejudice, prejudgment, or bias. TCC’s and Mr. Aramburu’s speculation regarding the reasoning for canceling the third prehearing conference and the ALJ’s delay in issuing that Second Prehearing Conference Order are not sufficient to demonstrate any actual or potential bias against them.¹⁶

The undersigned ALJ hereby apologizes for missing the mark on when the *Second Prehearing Conference Order* was actually issued. However, despite the two-week delay in issuing the *Second Prehearing Conference Order*, no party was actually disadvantaged in the time allotted to prepare for hearing. All matters contained in that *Order* with regard to the adjudication schedule and associated prehearing milestones and deadlines were negotiated and decided during the third prehearing conference.¹⁷ These important dates were reiterated multiple times on the record.¹⁸ The finalized list of disputed issues did not materially deviate from those discussed during the third prehearing conference. The *Order* memorialized all information the parties already knew at the close of that prehearing conference.¹⁹

TCC's Concerns with Alleged Ex Parte Communications by the ALJ

TCC also raises various allegations that the undersigned ALJ has engaged in *ex parte* communications with EFSEC Staff. This issue has already been addressed in the previous *Order Overruling Parties Objections to Second Prehearing Conference Order* but it is worth repeating some of the points made in that *Order* here.

Per WAC 463-30-020, 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 advisors and staff assistants, under its supervision, and as such, communications between the

¹⁶ See *In re Haynes*, 100 Wn. App. 366, 377 n.23 (2000).

¹⁷ Transcript of Prehearing Conference No. 3, at 58-63 and 66 (May 2, 2023).

¹⁸ *Id.*, at 77 and 86

¹⁹ *Id.*, at 103.

Council and the ALJ are not *ex parte* communications.²⁰ Conversations between the ALJ and EFSEC Staff regarding scheduling and other procedural matters are not improper under the Administrative Procedure Act and are not properly characterized as *ex parte* communications.

RCW 34.05.455(1) explicitly 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. 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 and Mr. Aramburu’s concerns are without basis in law or fact and, insofar as directly relevant to their pending *Motion* seeking disqualification and/or recusal of the ALJ.

DECISION. An ALJ’s firm application of procedural rules and attempts to ensure a timely and orderly adjudication do not demonstrate bias, prejudice, or prejudgment of the issues in this matter. The ALJ has great respect for all parties participating in this adjudication, including TCC and its counsel, Mr. Aramburu. The ALJ is making decisions to keep this adjudication moving forward toward an adjudicative hearing and ultimately toward Council deliberations that will lead to EFSEC’s recommendation to the governor. The ALJ is neutral in all these regards.

The undersigned ALJ respectfully declines TCC’s request to disqualify or recuse himself from further proceedings in this adjudication. TCC’s *Motion to Disqualify or Recuse ALJ* is **DENIED**.

DATED and effective at Olympia, Washington, on the 23rd day of June, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge

²⁰ See RCW 34.05.455(1)(b).