

**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 JOINT MOTION TO
STRIKE APPLICANT’S DIRECT
TESTIMONY; ADMONISHING
APPLICANT AND GRANTING
ALTERNATE RELIEF TO MOVING
PARTIES (AND COUNSEL FOR THE
ENVIRONMENT)

Procedural Background:

On May 2, 2023, Administrative Law Judge (ALJ) Adam E. Torem conducted a Third Pre-Hearing Conference in the above-captioned matter. All parties to the adjudication attended that event. At the point when pre-hearing deadlines were discussed (Agenda Item #4), all parties were given an opportunity for input on the deadline dates for the filing of three rounds of pre-filed testimony.¹ Following that colloquy, ALJ Torem offered to extend the deadline for parties to file their first round of pre-filed testimony out from May 24 or May 31, 2023 to as far as June 12, 2023.²

On May 19, 2023, a *Second Pre-Hearing Conference Order* memorialized, in writing, the above-noted deadline and stated that “[a]ll testimony must be electronically filed and a copy e-mailed to all other parties no later than 5:00 p.m. on the date due as noted above.”

On Monday, June 12, 2023, Benton County, Intervenor Yakama Nation, and Intervenor Tri-Cities C.A.R.E.S. (TCC) filed their testimony and supporting exhibits prior to 5:00 p.m. The Applicant made its filing at 10:22 p.m. via an e-mail that invited all parties to access their testimony via box.com. Counsel for the Environment (CFE) made no filings that day.

Summaries of Party Positions:

On Friday, June 16, 2023, the Yakama Nation, Benton County, and TCC filed a *Joint Motion to Strike Applicant’s Direct Testimony*. The moving parties alleged that the Applicant’s pre-filed testimony was filed after the established deadline and its individual testimonies were neither sworn nor signed by the Applicant’s witnesses.

On Monday, June 19, 2023 (the Juneteenth state holiday), the Applicant filed its *Response in Opposition to the Joint Motion*. Upon request from the ALJ, the Applicant provided a *Declaration of Timothy L. McMahan in Support of Applicant’s Response in Opposition* that same

¹ See Transcript of Third Prehearing Conference (May 2, 2023) at 42:24 – 56:21.

² *Id.*, at 57:2 – 59:9.

afternoon. The Applicant acknowledged its late-filed testimony, indicating it was due to technological and staffing problems. Further, the Applicant indicated its reliance on prior EFSEC experience regarding witnesses adopting their testimony under oath during the adjudication, not signing and swearing in advance with their pre-filed testimonies. The Applicant apologized for its late filing but argued that no other party was prejudiced by its late-filed testimony.

On Wednesday, June 21, 2023, the moving parties filed a *Reply* pleading to rebut the Applicant's *Response*, including supporting *Declarations* from Ms. Voelckers and Carol Cohoe. The *Reply* questions why the Applicant failed to file any portion of its pre-filed testimony at or before 5:00 p.m. and reiterates the requirements contained in RCW 34.05.452(3) for testimony to be made under oath. Ms. Voelcker's *Declaration* points out the Yakama Nation and its witnesses were able to comply with the filing deadline despite it falling on a Treaty Day tribal holiday. Only in their *Reply* do the parties make any allegation of prejudice, but this is only in regard to their efforts to meet the filing deadline, not any consequence of the Applicant's late filing.

Discussion and Analysis:

All parties must be held to the same standard. This includes deadlines. In this adjudication, the established deadline for filing the "Opening Round of Testimony" was Monday, June 12, 2023 at or before 5:00 p.m. The ALJ explained during the Third Prehearing Conference that the opening round of testimony was for each party to file testimony regarding topics for which that party wished to formally participate during the adjudication.³

Applicant's counsel confirmed during the third prehearing conference that the Applicant could and would meet any filing deadlines set by the ALJ.⁴ When the Yakama Nation's counsel spoke about possible filing deadlines, Ms. Voelckers recognized that whatever hearing schedule was set would have "pretty firm deadlines."⁵ Ms. Voelckers was correct. Now, the *Joint Motion* points out that "[a]llowing the Applicant to file its direct testimony after the deadline set by Judge Torem would violate general principles of fairness and due process." However, neither the *Joint Motion* nor Ms. Voelcker's *Declaration* alleged any specific prejudice or harm to the parties.

The *Second Prehearing Conference Order* was an Order, not a suggestion. The deadlines set out in that *Order* can be strictly enforced to the detriment of any party violating the terms of that *Order*. However, that said, missing a prehearing filing deadline is not a jurisdictional matter. If it were, the only choice would be to grant the *Joint Motion*. The ALJ strongly considered striking all of Applicant's pre-filed testimony and forcing it to rely only on Response and/or Reply testimony to make its case-in-chief.

³ See Transcript of Third Prehearing Conference (May 2, 2023), at 51:19 – 52:10.

⁴ Mr. McMahan stated "we can meet the schedule that you have outlined. It's not comfortable, but we can meet those deadlines." See Transcript of Third Prehearing Conference (May 2, 2023), at 59:14-16. Mr. McMahan went on to assure that the Applicant would "accommodate whatever – whatever you set." See Transcript of Third Prehearing Conference (May 2, 2023), at 59:22-23.

⁵ Transcript of Third Prehearing Conference (May 2, 2023), at 50:22.

However, upon further reflection, the ALJ has determined that the Applicant's missed filing deadline is more akin to a discovery violation. Relying on that analogy, it is worthwhile to consider the approach taken by our Supreme Court in *Burnet v. Spokane Ambulance*⁶ before imposing the draconian consequence of striking all of Applicant's direct testimony. In the *Burnet* case, when a party sought to preclude testimony presented by another party, our high court explained that a reviewing tribunal must consider whether failure to comply with a discovery Order was willful or deliberate; whether the discovery violation substantially prejudiced the other party; and whether lesser sanctions would vindicate the purposes of discovery.⁷ Imposing too strong of a sanction (*i.e.*, striking evidence) could be reversible error.⁸

Applying the *Burnet* factors here, the Applicant failed to meet the 5:00 p.m. filing deadline and filed its evidence 5 hours, 22 minutes afterward. Per the Applicant's *Response in Opposition* and Mr. McMahan's supporting *Declaration*, the Applicant's late filing was not intentional, willful, or deliberate but instead happened due to "staffing and technological problems stemming from a new team of administrative and support staff and pre-existing attorney travel commitments." In other words, the Applicant's delay in filing was due to mismanagement rather than malfeasance. The moving parties do not allege otherwise.

The second *Burnet* factor, prejudice to the other parties, is easier to gauge objectively. The Applicant completed its filing slightly after regular business hours at 10:00 p.m. on a Monday night. All other parties (and EFSEC's Council, ALJ, and Assistant Attorney General) were precluded from reviewing the Applicant's testimony for 5 hours and 22 minutes. In the scheme of things, this is not a significant period of time. The Applicant's pre-filed testimony was available to all concerned on the same date due, albeit at a later time. It was certainly available to all interested parties by the start of the next business day.⁹ Notably, the moving parties do not allege any substantive prejudice to their ability to read, review, and assess the Applicant's filings in order to prepare their upcoming filings of responsive or reply testimony and related evidence.

Given the above analysis, the third *Burnet* factor – learning from pre-trial discovery what the other side will say during the adjudication – instructs imposition of a lesser sanction than that requested by the moving parties. In this case, the violated deadline was in timing only. All parties' testimony was due at the end of the business day, and presumptively available at that time or at the opening of the next business day, to read, review, and assess. All parties encountered some errors in the format and labeling of their evidentiary filings, but those are not at issue at this juncture and are of no true consequence. Here, the Applicant's violation was a question of time. The Applicant was late with its first round of pre-filed testimony, yet the moving parties do not attest they were waiting for such testimony after the close of business in

⁶ 131 Wn.2d 484 (1997).

⁷ *Burnet*, 131 Wn.2d at 494.

⁸ See *Csilla Muhl v. Davies Pearson* (unpublished opinion), No. 46602-3-II (October 20, 2015).

⁹ If the delay had been more substantial, a motion for continuance under CR 40(e) would have been appropriate if the moving parties were able to allege that despite their due diligence, they had been unable to secure material evidence needed for trial preparation. The situation presented here by the Applicant's missed deadline does not rise to the level of prejudice necessary to support such a motion. The ALJ will not at this time revisit the parties' earlier motions to stay or continue the adjudication scheduled to begin on August 10, 2023.

order to begin review and response thereto. The moving parties ask for enforcement of form (timing) over substance (alleged or actual prejudice). Therefore, an appropriate solution is to give some amount of time back to the offended parties.

Additionally, the Applicant's late filing without providing any advance warning the deadline on June 12, 2023 likely surprised the other parties and subsequently created a difficult conundrum for the Council and for this ALJ. Although the parties opposing this project were not inordinately prejudiced, if at all, by the 5 hour 22 minute delay in having access to Applicant's pre-filed testimony, but they were forced to take valuable time and resources away from their litigation preparation time in order to file their *Joint Motion*. The Council and ALJ then had another motion to address and rule upon. This entire situation could possibly have been avoided if the Applicant has notified the other parties and the Council of their situation prior to 5:00 p.m. on June 12, 2023. **The Applicant is hereby ADMONISHED** for failing to meet the deadline and provide advance notice of its anticipated failure to do so. The Applicant shall strictly adhere to all upcoming deadlines and provide advance notice of any potential recurrence of the difficulties it encountered earlier this month or any similar circumstance going forward.

The ALJ has crafted the following alternate relief for all other parties to this adjudication: all other parties will be allotted additional time from the upcoming filing deadlines set out in the *Second Prehearing Conference Order* for their second and third rounds of pre-filed testimony. All parties other than the Applicant are granted two additional business days to prepare and file their remaining witness testimony. Although this will allow all other parties to review the Applicant's next two rounds of testimony before filing their own, the ALJ has determined that any prejudice to the Applicant in that regard is minimal. As noted above, this entire episode could have been avoided had the Applicant filed at least a letter describing the "technical" and "staffing" issues before the 5:00 p.m. deadline and in advance of making an untimely filing. The Applicant will simply have to absorb the ALJ's remedy and realize how close it came to losing the opportunity to present its entire case-in-chief due to an unannounced 5 hour, 22 minute delay in filing.

The moving parties also raised an issue with regard to the Applicant's pre-filed testimony not bearing signatures of the witnesses or accompanying oaths swearing to the testimony. The ALJ notes that RCW 34.05.452(3) will be enforced at the adjudicative hearing in August 2023. Swearing to or signing of pre-filed testimony is not strictly required at this stage of an EFSEC adjudication. All witnesses will be required to swear to and adopt their testimony, along with any updates or modifications, under oath, prior to its admission at hearing. The *Joint Motion's* request for relief in this regard is premature.

Decision

The Yakama Nation, Benton County, and TCC all met the deadline for filing their opening round of pre-filed testimony. The Applicant did not. The Applicant did not seek an extension of the established deadline or afford the other parties, the Council, or this ALJ, any indication of its technical difficulties prior to 5:00 p.m. on Monday, June 12, 2023. Professionalism would have dictated such a preemptive communication.

In its *Response* to the *Joint Motion*, the Applicant relied only on “technical difficulties” and “staffing problems.” “Staffing problems” are a challenge for everyone in the era of post-pandemic work and ongoing competition for talent. “Technical difficulties” befall all whose work involves an ever-increasingly complex technological world. Only a generous interpretation of “good cause,” a preference to allow the Council to conduct its adjudication on the merits, and a healthy respect for the *Burnet* factors precluded granting the moving parties’ request for relief. Striking all of the Applicant’s pre-filed testimony is simply too severe an end result to come from only a five hour and 22 minute delay.

Therefore, in accordance with the foregoing and in an attempt to fairly enforce the *Second Prehearing Conference Order*, and recognizing the commendable, and successful, effort made by the moving parties to comply with that *Order*, the deadlines for filing each round of testimony set out on page 3 of the *Second Prehearing Conference Order* are hereby modified as follows:

- Friday, June 30, 2023 – Responsive Round of Testimony – Applicant
- Wednesday, July 5, 2023 – Responsive Round of Testimony – All Other Parties
- Wednesday, July 12, 2023 – Reply/Rebuttal Round of Testimony – Applicant
- Friday, July 14, 2023 – Reply/Rebuttal Round of Testimony – All Other Parties

As before, all testimony must be electronically filed and a copy e-mailed to all other parties **no later than 5:00 p.m.** on the dates due as noted above. Parties unable to meet this 5:00 p.m. timing cut-off on any deadline date due to technical difficulties must file a letter of explanation prior to the deadline passing or may be subject to strict enforcement of the timing/filing deadline.

The *Joint Motion to Strike Applicant’s Direct Testimony* is **DENIED**. The Applicant is **ADMONISHED and ALTERNATE RELIEF is GRANTED**. The filing deadlines for the remaining rounds of pre-filed testimony set out in the *Second Prehearing Conference Order* are modified as noted above, allowing all parties, except the Applicant, two additional business days to make their respective filings.

DATED and effective at Olympia, Washington, on the 26th day of June, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge