

**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 GRANTING TCC MOTION TO
COMPEL ATTENDANCE OF SENIOR
PROJECT MANAGER DAVID KOBUS
AT A DEPOSITION; GRANTING (IN
PART) TCC MOTION FOR SANCTIONS;
DENYING APPLICANT’S MOTION FOR
PROTECTIVE ORDER

Procedural Background and Party Positions:

On May 26, 2023, Intervenor Tri-Cities C.A.R.E.S. (TCC) served a notice to take the deposition of David (Dave) Kobus, Senior Project Manager for the Horse Heaven Wind Farm Project. TCC noted this deposition without coordinating with the Applicant or otherwise confirming that Mr. Kobus would be available on June 5, 2023. On May 30, 2023, the Applicant notified the Administrative Law Judge (ALJ) that Mr. Kobus would be on vacation on June 5, 2023 and indicated the Applicant’s objection to allowing Mr. Kobus to be deposed.

On June 2, 2023, the ALJ confirmed that the *Second Prehearing Conference Order* did not require parties to obtain the ALJ’s advance permission to note a deposition. The ALJ also agreed with the Applicant’s inferences from the *Second Prehearing Conference Order* that formal discovery tools were not the favored method for parties to obtain information in an EFSEC adjudication. The ALJ encouraged the Applicant to “work out an informal resolution to provide TCC with any relevant evidence that Mr. Kobus might know or have regarding a topic germane to the adjudication.”

As of early June 2023, the Applicant had not requested any formal relief with regard to TCC’s stated intent to depose Mr. Kobus. Additionally, TCC did not request any formal assistance from EFSEC in the scheduling of Mr. Kobus’ deposition.

On June 25, 2023, TCC filed its *Motion to Compel Attendance of Senior Project Manager David Kobus at a Deposition and for Sanctions (Motion to Compel)*. This pleading expressly sets out TCC’s reasons for wanting to depose Mr. Kobus; its supporting exhibits detail efforts made to schedule this event with the Applicant’s attorneys. TCC argues the Applicant delayed scheduling this deposition multiple times and improperly sought to limit its scope or to obtain TCC’s questions in advance of any deposition. TCC contends these delays are sanctionable and asks to be compensated in the amount of \$2,400 for the additional time spent filing a motion to address the Applicant’s frivolous actions to delay or condition Mr. Kobus’ deposition.

On June 28, 2023, the Applicant filed its *Opposition to Motion to Compel / Motion for Protective Order*. The Applicant asserts that it was “not refusing to make Mr. Kobus available to be deposed” but only seeking to “establish limitations on what TCC can ask Mr. Kobus at that deposition.” The Applicant’s *Opposition* sets out its belief that without advance limitations of what TCC would be allowed to ask Mr. Kobus, it is unable to prepare Mr. Kobus for the deposition. The *Opposition* also expresses its fear that the deposition would be a “free-for-all” because, in its view TCC has demonstrated a propensity to ignore the ALJ’s rulings in this adjudication. Finally, the Applicant asks for a protective order as contemplated by CR 26(c) to limit the scope of TCC’s deposition “to those matters for which TCC’s involvement has been authorized.”

On July 3, 2023, TCC filed its *Reply to Applicant’s Opposition*. The *Reply* recited the areas of apparent agreement regarding Mr. Kobus’ deposition and asked for an increased amount of monetary sanctions than previously sought in its *Motion to Compel*.

On July 3, 2023, the ALJ conducted a discovery conference with all parties in an attempt to resolve some of the issues in dispute. As a result, TCC and the Applicant agreed that Mr. Kobus would be deposed on Friday, July 21, 2023. Mr. Kobus confirmed he would attend this deposition. TCC also confirmed its intent, but did not limit itself to inquiring into Mr. Kobus’ role in developing the ASC and the recently filed update to the ASC. ALJ Torem indicated he would be available by phone if the parties encountered difficulties during the deposition.

Discussion and Analysis:

TCC is a party to this adjudication. It has the same rights to conduct discovery as any of the other four parties in this proceeding. The ALJ limited the scope of TCC’s intervention to certain topics as set out in the *Second Prehearing Conference Order*. This restriction on TCC’s participation exists to preclude undue delay of the adjudication and avoid multiple parties presenting duplicative evidence. The limitations imposed should also guide TCC’s efforts in discovery. That said, TCC is not precluded from inquiring into background or foundational issues in its attempts to obtain relevant information that it can present at the adjudicative hearing.

The *Second Prehearing Conference Order* encouraged the use of informal discovery procedures to obtain information relevant to the approved issues for adjudication. That *Order* prohibited parties from seeking discovery “that is unreasonably cumulative or duplicative or obtainable from another source that is more convenient, less burdensome, or less expansive.” The *Order* encouraged parties to resolve discovery disputes without involving the Council or ALJ. Finally, that *Order* stated that “[f]iling motions to compel discovery should be a last resort for any party and must show good cause and further demonstrate how and why less formal measures were attempted and refused.”

The Applicant is not calling Mr. Kobus as one of its witnesses in the adjudicative hearing. Therefore, TCC is unable to rely on his pre-filed testimony as its chief source of information about the Application for Site Certification (ASC) and the subsequently filed update to the ASC.

Obviously, the ASC is the foundational document regarding the proposed Horse Heaven Wind Farm Project. Given Mr. Kobus' role as the Senior Project Manager for the proposed Project, he is in a position to provide relevant information about the ASC. As TCC points out, he has been touted as the person who is able to explain the Project to any interested person.

TCC is entitled to depose Mr. Kobus. At the discovery conference, and even in the Applicant's *Opposition*, it became abundantly clear that the delay in scheduling this deposition was based on the Applicant's apprehension that TCC's questions would venture far outside the bounds of its participation as set in the Second Prehearing Conference Order. Much time was frittered away as both parties corresponded and argued about what questions could or couldn't be posed. However, the Applicant cites no authority on which it can demand what it sought from TCC.

There is no need for a protective order to enforce what has already been stated in the *Second Prehearing Conference Order*. The ALJ expects TCC's use of discovery tools to seek information relevant to the topics on which it will present evidence at the adjudication. The *Second Prehearing Conference Order* sets those limits.

Discovery disputes cause unnecessary delays. Parties should be able to communicate and come to agreements and compromises themselves. Not doing so places an undue burden on the judicial officer to read and review pleadings that amount to a "he said/she said" argument. This is why the *Second Prehearing Conference Order* referred to motions to compel discovery as an option of last resort. TCC's *Motion to Compel* was filed after Mr. Aramburu made many attempts to schedule the requested deposition. It took the ALJ's invitation to hold a discovery conference to accomplish the scheduling of the date for this event.

The Applicant's ongoing delays violated discovery rules. Our Washington Supreme Court points out how difficult it can be for a trial judge to decide whether or not to impose sanctions on lawyers for discovery violations.¹ In this case, I find the delays involved in scheduling Mr. Kobus' deposition were mainly due to the Applicant's actions to demand limits that had already been set in the Second Prehearing Conference Order. These delays were unnecessary and cost TCC time and money.

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¹ *Physicians Ins. Exch. V Fisons Corp.*, 122 Wn.2d 299, 355 (1993).

Decision

TCC's Motion to Compel is **GRANTED**. Per the discovery conference, Mr. Kobus will be deposed today, Friday, July 21, 2023. Additionally, TCC's Motion for Sanctions is **GRANTED**. I am imposing sanctions on the Applicant in the amount of \$2,400 as requested in the *Motion to Compel*; the additional monetary sanction requested in TCC's *Reply* is **DENIED**.

The Applicant's Motion for Protective Order is **DENIED**. Mr. Kobus shall answer all questions designed to elicit relevant information that will support TCC's ability to present evidence at the adjudicative hearing that comes within the limitations on its participation set out in the *Second Prehearing Conference Order*. Foundational or background questions are permitted but should be designed to quickly lead to inquiries within the established scope of TCC's role as an intervenor in this adjudication.

DATED and effective at Olympia, Washington, on the 21st day of July, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge