

**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 APPLICANT'S
MOTION TO STRIKE TCC TESTIMONY
OF RICK DUNN, PAUL KRUPIN, DAVID
SHARP, AND (IN PART) RICHARD
SIMON

Procedural Background and Party Positions:

On July 5, 2023, Applicant Scout Clean Energy (SCE) filed a *Motion to Strike Pre-Filed Direct Testimony of Tri-Cities C.A.R.E.S. (TCC) Witnesses Rick Dunn, Paul Krupin, David Sharp, and Richard Simon*. SCE asserts that each of these TCC witnesses' testimony exceeds the scope of TCC's intervention and ventures outside the purview of the disputed issues approved for this adjudication. Additionally, SCE alleges that these witnesses' testimony is speculative. Finally SCE argues Mr. Krupin and Mr. Sharp lack the requisite expertise to support their testimonies.

On July 13, 2023, TCC filed its *Opposition to Applicant's Motion to Strike*. TCC argues that RCW 80.50.010 obliges EFSEC to balance energy need with the broad public interest. On that basis, TCC contends its witnesses may offer testimony regarding the net benefit of any proposed project, to include cost, project performance, and the ultimate value of the project to the grid. TCC also argues the relevance of testimony regarding its concerns with the accessibility and readability of the Application for Site Certification (ASC). Finally, TCC contends Mr. Krupin and Mr. Sharp are fully qualified to present their pre-filed testimonies.

Discussion and Analysis:

The *Second Prehearing Conference Order* issued on May 19, 2023 set out the disputed issues to be litigated in this adjudication. That *Order* specifically stated that certain issues would “*not* be taken up during the adjudication unless specifically authorized by a subsequent order issued following a party's motion supported by a satisfactory offer of proof demonstrating relevance under RCW 80.50 and/or WAC 463. Neither the Council nor the ALJ issued any subsequent order altering that ruling. All parties have now submitted their pre-filed testimony. No party filed any motion seeking admission or consideration of any testimony covering excluded issues.¹

¹ On May 30, 2023, Benton County, the Yakima Nation and TCC each separately filed Objections to the *Second Prehearing Conference Order*. As of that date, no party had yet submitted any pre-filed testimony. The *Order Overruling Parties Objections to Second Prehearing Conference Order* (at page 4) directed “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.” That *Order* went on to explain that “[s]peculation 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.” Finally, that *Order* made it clear EFSEC could not “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” or similar legislatively-adopted policies regarding alternatives to fossil-fuel energy resources.

On June 12, 2023, TCC timely submitted pre-filed testimony from several witnesses, including Rick Dunn,² Paul Krupin,³ Dave Sharp,⁴ and Richard Simon.⁵ As noted in SCE’s *Motion to Strike*, these witnesses provided testimony with regard to issues either specifically excluded from this adjudication or outside the purview of either the allowed issues or their expertise or both.

Rick Dunn’s testimony focuses on the actions of the Benton Public Utilities District (BPUD) and Bonneville Power Administration (BPA) following Washington’s adoption of the Clean Energy Transformation Act (CETA). Mr. Dunn expresses his personal concerns with Washington state’s energy strategy which has CETA as its foundation.⁶ He also argues that wind farms should be low on the list of alternatives for Washington to cost-effectively balance carbon dioxide reductions, grid reliability and land-use impacts.⁷ Mr. Dunn concludes with his opinions on how the proposed Horse Heaven Wind Farm will negatively impact the Tri-Cities region, a short critique of Scout Clean Energy’s choice to pursue permitting through EFSEC, and further derision of both CETA and the Climate Commitment Act (CCA).

None of the topics covered by Mr. Dunn’s testimony and supporting exhibits come within the bounds of the issues approved by the *Second Prehearing Conference Order* to be taken up during this adjudicative hearing. TCC’s *Opposition* contends that it should be able to present evidence pointing out “inconvenient truths inherent in this project,”⁸ but these policy-based arguments are simply not germane to the Council’s siting decisions. Accordingly, SCE’s *Motion to Strike* his testimony and supporting exhibits should be granted. SCE has so far moved to strike only Mr. Dunn’s direct testimony and therefore this ruling applies only to that testimony.⁹

Paul Krupin’s testimony explains his role in leading tours of the Horse Heaven Wind Farm project site and, as a member of the TCC Board, participation in drafting an editorial opposing the project that was published in the Tri-City Herald newspaper. Mr. Krupin’s testimony focuses on his critique of the Application for Site Certification in both style and substance. Mr. Krupin also extensively questions the adequacy of the ASC’s evaluation of visual impacts,¹⁰ and then goes on to discuss the impact of fugitive dust emissions expected to be caused by the project.

The bulk of Mr. Krupin’s testimony fails to address the approved topics set out in the *Second Prehearing Conference Order*. His criticism of the “accessibility” of the ASC has absolutely nothing to do with the siting of this proposed project. In fact, TCC’s *Opposition* brief

² TCC submitted eleven (11) exhibits (EXH-5200 through EXH-5210) covering Mr. Dunn’s evidence, including his qualifications (EXH-5201), testimony (EXH-5202_T) and several supporting exhibits (EXH-5203 through -5210).

³ TCC submitted five (5) exhibits (EXH-5300 through EXH-5304_T_REVISED2) covering Mr. Krupin’s evidence, including his qualifications (EXH-5301), testimony (EXH-5302_T and EXH-5304_T_REVISED2), as well as a supporting exhibit (EXH-5303).

⁴ TCC submitted three (3) exhibits (EXH-5400 through EXH-5402) covering Mr. Sharp’s evidence, including his qualifications (EXH-5401) and testimony (EXH-5402_T, subsequently revised on June 25, 2023).

⁵ TCC submitted three (3) exhibits (EXH 5500 through EXH 5502) covering Mr. Simon’s evidence, including his curriculum vitae (EXH-5502) and testimony (EXH-5501_T, subsequently revised on June 14, 2023).

⁶ See Dunn, EXH-5202_T at 5:1-2; Mr. Dunn explains his concerns in detail in subsequent paragraphs.

⁷ Dunn, EXH-5202_T, 10:17-21

⁸ *TCC Opposition to Applicant’s Motion to Strike*, at 3:15-17.

⁹ TCC submitted two (2) additional exhibits (EXH-5211_R and EXH-5212_R) as Mr. Dunn’s rebuttal evidence.

¹⁰ Mr. Krupin’s testimony on visual aspects of the project is mainly found in EXH-5302_T, pages 21-96, but also continues until the final (117th) page of the exhibit.

undermines its own position by citing a Supreme Court case¹¹ that confirms that an ASC must provide the Council with specified information per WAC 463-60-010, emphasizing that “[t]his information shall be in such detail *as determined by the council* to go forward with its application review.”¹² In other words, the sufficiency of the information contained in an ASC (including its perceived readability or accessibility) is a matter for the council’s staff to determine in deciding whether to commence review of that submission.

Mr. Krupin’s statement of qualifications does not reference any training or education sufficient to make him an expert in the area of visual impacts.¹³ Similarly, his qualifications appear lacking in the discipline of air quality analysis. TCC contends Mr. Krupin is qualified to testify on these topics because of his extensive background in science (environmental biology and hydrology) and “multi-disciplinary regulatory compliance analysis for projects and programs in numerous industries.”¹⁴ However, TCC fails to point to any professional experience Mr. Krupin has ever had in evaluating visual impacts. Allowing Mr. Krupin, unqualified as an expert, to present his lay opinion testimony and then asking the fact-finder to reduce the weight of this evidence in comparison to other qualified expert witnesses is not an appropriate solution. As urged by SCE, I find Mr. Krupin does not have sufficient qualifications to present evidence regarding visual impacts of the project or the potential air quality impacts of fugitive dust.

I note that the *Applicant’s Motion to Strike* grudgingly acknowledges “it is possible that kernels of Mr. Krupin’s testimony could be relevant, . . . [but] it is up to Mr. Krupin, not the Applicant, to decipher the relevant from the immaterial.”¹⁵ I must concur with this evaluation. Individual paragraphs of Mr. Krupin’s testimony might be admissible, but per a much-cited 7th Circuit Court of Appeals ruling, [j]udges are not like pigs, hunting for truffles buried in briefs”¹⁶ or, in this instance, pre-filed testimony. I am unable and unwilling to sift through the voluminous pages offered by Mr. Krupin to identify the potential nuggets of relevant testimony. SCE’s *Motion to Strike* Mr. Krupin’s testimony and supporting exhibits should be granted. This ruling may also later extend to Mr. Krupin’s additional filings submitted as rebuttal testimony if a subsequent motion demonstrates it would be appropriate to do so.¹⁷

Dave Sharp’s testimony takes aim at economic issues and interconnection issues to the region’s electrical grid that may eventually challenge SCE’s proposed project. He also briefly comments on mitigating endangered species impacts but shifts abruptly to recommendations to improve EFSEC’s application process. Mr. Sharp goes on to address utilities’ Integrated Resource Plans (IRPs) and critiques SCE’s ASC for not following IRP principles. He ultimately questions the

¹¹ *Friends of the Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council (FOCG v. EFSEC)*, 178 Wn.2d 320, 335 (2013).

¹² *TCC Opposition to Applicant’s Motion to Strike*, at 5:11-23, quoting back to *FOCG v. EFSEC*.

¹³ EXH-5301 sets out Mr. Krupin’s impressive educational and professional background, but it does not include any showing of specialized training or experience with viewshed impacts, visual simulations, or other skillsets involved in the niche discipline of evaluating visual impacts. Contrast with TCC’s expert in this area, Dean Apostol, and his qualifications as set out in EXH-5001 (specific training and experience in “scenic resource impact assessment” and publication of a “comprehensive book about the visual impacts of renewable energy”). EXH-5301 does not even contain the words “visual” or “view” anywhere within its three pages reciting Mr. Krupin’s qualifications.

¹⁴ *TCC Opposition to Applicant’s Motion to Strike*, at 6:7-18.

¹⁵ Applicant’s Motion to Strike at 5:13-15.

¹⁶ *United States v. Dunkel*, 927 F.2d 955 (7th Circuit 1991).

¹⁷ TCC submitted three (3) additional exhibits (EXH-5305_R, EXH-5306_R, and EXH-5307_R) as Mr. Krupin’s rebuttal evidence.

ability of the Horse Heaven Wind Farm project to offer Washington renewable energy benefits. Toward the end of his testimony, Mr. Sharp offers various personal experiences with the dangers posed by wind turbines and their blades in cold and icy conditions.

As pointed out by the Applicant, commercial viability and BPA-related interconnection questions are not topics accepted to be disputed during the adjudicative hearing. Further, aside from a few mentions of ferruginous hawks and potential ice throw, Mr. Sharp does not directly address “impacts” of the project that could be relevant to a site certification decision by EFSEC. TCC’s *Opposition* argument that BPA interconnection issues are mentioned in the ASC¹⁸ does not mean this topic is proper for the adjudication. Information provided in an application may be for background or context and does not automatically create an issue for the adjudicative hearing. Unfortunately, the snippets of potentially relevant evidence Mr. Sharp might have to offer the Council are hopelessly interconnected with and cannot be easily unbound from the broad swath of the peripheral topics included in his testimony. As noted above, sifting out relevant testimony will not be done here.

Mr. Sharp’s qualifications with regard to wind energy¹⁹ are less problematic than Mr. Krupin’s alleged expertise, but he also is unqualified to address a wind farm’s visual impacts. I find that SCE’s *Motion to Strike* Mr. Sharp’s testimony and supporting exhibits should be granted. This ruling may also be extended to Mr. Sharp’s numerous additional filings submitted as rebuttal testimony if a subsequent motion demonstrates it would be appropriate to do so.²⁰

Richard Simon’s testimony provides a review of the Horse Heaven Wind Farm proposed project from a resource perspective and covers six topics: turbine technology, wind farm size, wind resource potential, economic feasibility, grid availability, and impact on the neighboring Nine Canyon wind farm. Of these topics, wind resource potential, economic feasibility and grid availability are not appropriate for this adjudicative proceeding. Those three topics boil down to business decisions for the Applicant to make before seeking permits to construct a project. EFSEC’s analysis covers impacts of siting a project. It does not necessarily inquire into the economic calculus made by an applicant in deciding where to propose its project.

The remainder of Mr. Simon’s testimony addresses the type of impacts set out in the *Second Prehearing Conference Order*. The choice of turbine technology (*i.e.*, what types and how many turbines are proposed), wind farm size, and impact on a pre-existing neighboring wind farm all come within the bounds of the accepted list of disputed issues and will also enlighten the Council on areas important to their decisions on what to recommend to the governor. Those portions of Mr. Simon’s testimony should not be stricken.

The Applicant’s *Motion to Strike* and supporting Declaration from Timothy McMahan raise allegations that Mr. Simon misappropriated wind data from meteorological towers within the footprint of the proposed Horse Heaven Wind Farm Project. That is a matter for other tribunals.

¹⁸ *TCC Opposition to Applicant’s Motion to Strike*, at 3:21 to 4:3.

¹⁹ See EXH-5401_T. Mr. Sharp’s experience working for investor-owned utilities provides him impressive insight into the wind power industry, but mainly from operational aspects. His statement of qualifications mentions no work evaluating visual impacts of wind turbines.

²⁰ TCC submitted twelve (12) additional exhibits (EXH-5403_R; EXH-5404_R; EXH-5405_R; EXH-5406_R; EXH-5407_R; EXH-5408_R; EXH-5409_R; EXH-5410_R; EXH-5411_R; EXH-5412_R; EXH-5413_R; and EXH-5414_R) as Mr. Sharp’s rebuttal evidence.

If the Applicant presents EFSEC with a court order restraining Mr. Simon from presenting testimony based on SCE's proprietary data or confidential information, the ALJ will comply with that court order's terms and directions. Until and unless another court makes this dispute part of EFSEC's business, it should not again be brought to this Council's attention.

SCE's *Motion to Strike* Mr. Simon's testimony should be granted, but only in part. Those pages of EXH-5501_T_REVISED that address or reference wind resource potential, economic feasibility and grid availability topics should be stricken. With regard to those three topics, this ruling may also extend to Mr. Simon's additional filing submitted as rebuttal testimony if a subsequent motion demonstrates it would be appropriate to do so.²¹

Additional Problematic Evidence Submissions from Tri-Cities C.A.R.E.S. TCC also submitted evidence from a number of other witnesses who testified about their individual concerns, attitudes and opinions regarding the proposed project. The bulk of these submissions contained no indication that the witness could speak as a representative of the community-at-large or offer anything beyond their own personal opinion. The ALJ will issue a separate order addressing the appropriate treatment and disposition of proposed testimony from those community members.

Decision

The witness testimony submitted by TCC from Mr. Dunn, Mr. Krupin, Mr. Sharp, and parts of that from Mr. Simon contained articulate and zealous arguments regarding the unsuitability of the Horse Heaven Wind Farm for Benton County and the Tri-Cities region. However, eloquence and passion do not *ipso facto* create relevant testimony. These TCC witnesses testified regarding issues outside the scope of this adjudication and beyond the bounds of their education, training, and experience in the various disciplines addressed by their proffered evidence. TCC failed to follow the *Second Prehearing Conference Order's* express direction and guidance.

SCE's *Motion to Strike* is **GRANTED** in full with regard to Mr. Dunn, Mr. Krupin, and Mr. Sharp and in part with regard to Mr. Simon. The *Second Prehearing Conference Order* and the *Order Overruling Parties Objections to Second Prehearing Conference Order* made clear that the topics addressed in the testimonies of Mr. Dunn, Mr. Krupin, Mr. Sharp, and Mr. Simon were outside the scope of relevant issues in this adjudication.

The *Order Overruling Parties Objections* devoted approximately a full page discussing the "Issues to be Adjudicated" in this matter.²² That *Order* excluded testimony regarding who might purchase the project's power and who might use the project's power as "not germane to impacts at the proposed site or conditions that can be included in a site certification agreement." That *Order* also made clear that EFSEC's adjudication was not the place to dispute legislative enactments and policies. TCC appears to have ignored that section of the *Order Overruling Parties Objections* (including its own protestations regarding permissible topics).

All pre-filed direct testimony submitted by Rick Dunn, Paul Krupin, and Dave Sharp is hereby stricken from consideration as testimony germane to the issues in this adjudication. Those portions of Richard Simon's pre-filed direct testimony that address wind resource potential, economic feasibility and grid availability are stricken, but the remainder of his testimony shall be

²¹ TCC submitted only one (1) additional exhibit (EXH-5503_R) as Mr. Simon's rebuttal evidence.

²² See also footnote 1, above.

considered. The Appendix to this *Order* specifies the totality of the proposed evidence affected and stricken.

TCC shall submit a revised version of Mr. Simon's testimony in EXH-5501_T in compliance with this *Order* and the guidance provided in the attached Appendix. This revised exhibit must be received by EFSEC no later than Monday, August 7, 2023 at 5:00 p.m.

DATED and effective at Olympia, Washington, on the 28th day of July, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

A handwritten signature in black ink, appearing to read 'Adam E. Torem', is written over a horizontal line.

Adam E. Torem, Administrative Law Judge

**APPENDIX
To
Order Granting Applicant's Motion to Strike TCC Testimony**

The following testimony and exhibits are impacted by this ruling and are stricken:

Exhibit #	Witness	Description of Exhibit	Date Filed
EXH-5200	Dunn, Rick	Witness Statement & Exhibit List	06/12/2023
EXH-5201	Dunn, Rick	Qualifications	06/12/2023
EXH-5202_T	Dunn, Rick	Testimony	06/12/2023
EXH-5203	Dunn, Rick	Att.A Res.2523	06/12/2023
EXH-5204	Dunn, Rick	Att.B PGP carbon summary	06/12/2023
EXH-5205	Dunn, Rick	Att.C NW-Reliability	06/12/2023
EXH-5206	Dunn, Rick	Att.D state CO2	06/12/2023
EXH-5207	Dunn, Rick	Att.E Wind Zones	06/12/2023
EXH-5208	Dunn, Rick	Att.F Global US WA CO2	06/12/2023
EXH-5209	Dunn, Rick	Link1: Capture of website	06/12/2023
EXH-5210	Dunn, Rick	Link2: Capture of website	06/12/2023
EXH-5300	Krupin, Paul	Witness Statement	06/12/2023
EXH-5301	Krupin, Paul	Qualifications	06/12/2023
EXH-5302_T	Krupin, Paul	Testimony	06/12/2023
EXH-5303	Krupin, Paul	Letters	06/12/2023

EXH-5304_T_REVISED2	Krupin, Paul	Statement: Resident PFT with Exhibit List	07/05/2023
EXH-5400	Sharp, Dave	Witness statement & exhibit list	06/12/2023
EXH-5401	Sharp, Dave	Qualifications	06/12/2023
EXH-5402_T_REVISED2	Sharp, Dave	Testimony	06/25/2023
EXH-5501_T_REVISED	Simon, Richard	<p>Testimony – Partially Stricken as follows by section, page and line:</p> <p>Introductory Section</p> <p>Page 1, line 21 through</p> <p>Page 2, line 3</p> <p>Page 2, line 5 – replace the word “six” with “three”</p> <p><i>Wind Resource Potential</i></p> <p>Page 3, line 19 through</p> <p>Page 8, line 9</p> <p><i>Economic Feasibility</i></p> <p>Page 8, lines 10 through 20</p> <p><i>Grid Availability</i></p> <p>Page 9, lines 1 through 17</p> <p><i>Conclusion</i></p> <p>Page 10, line 5, beginning with the words “both from...” and ending at line 8 with the word “basket.”</p>	06/14/2023