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4 BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITING EVALUATION COUNCIL

5  
6 In the Matter of the Application of:

7 Scout Clean Energy, LLC, for  
8 Horse Heaven Wind Farm, LLC,  
9 Applicant.

DOCKET NO. EF-210011

TCC'S RESPONSE TO SCE'S  
OPPOSITION TO MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS

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11  
12 **I. INTRODUCTION.**

13 When applicant Scout Clean Energy (SCE) refused to provide any of the  
14 documents requested by Tri-Cities C.A.R.E.S (TCC) discovery requests, TCC filed a  
15 motion to compel SCE to provide certain documents relevant to the upcoming  
16 adjudication. The timing of TCC's requests and SCE responses are itemized in TCC's  
17 motion.

18 In its opposition to the motion to compel, SCE contends that the materials  
19 requested are confidential and proprietary and continues to refuse to produce them. As  
20 will be described herein, SCE's opposition is fatally flawed for two reasons. First, it has  
21 never filed or requested a protective order that is required before a party can refuse to  
22 produce relevant documents. The rule here is clear:

23 A party must answer or object to an interrogatory or a request for production. If  
24 the party does not, it must seek a protective order under CR 26(c). CR 37(d).  
25 The party cannot simply ignore or fail to respond to the request. "[A]n evasive or  
26 misleading answer is to be treated as a failure to answer." CR 37(d). Hyundai  
27 never sought a protective order under CR 26(c) but ignored or evaded  
28 Magaña's discovery requests, asserting the requests were overbroad and not  
reasonably calculated to lead to the discovery of admissible evidence.

1 *Magaña v Hyundai Motor America*, 167 Wn 2d 570, 584 (2009) (emphasis supplied).  
2 Similarly, if SCE thought there were grounds for a more extensive protective order than  
3 was established by the PALJ, it should have asserted them; instead it continued the  
4 same cat-and-mouse game that characterized the efforts to take Mr. Kobus's  
5 deposition. The PALJ should reject SCE's opposition to these requests on this basis  
6 alone.

7 Second, SCE does not explain why the carefully drafted standard protective  
8 order entered in this proceeding does not resolve concerns about dissemination of  
9 these materials. The materials requested are relevant to these proceedings and will  
10 provide significant information for the Council in making its decisions. The motion to  
11 compel these materials should be granted and SCE be required to provide the  
12 information in an expediated manner, subject to the standard form protective order  
13 used for other evidence in these proceedings.

## 14 **II. ARGUMENT.**

### 15 2.1 BPA Communications.

16 SCE's argument here is twofold. First it claims that it has provided "detailed  
17 explanation of the consideration and requirements pertaining to grid interconnection."  
18 Opposition at 2, lines 10-13. Of course, these explanations are fully hearsay, offered  
19 by a party benefitting from the hearsay's characterization. In addition, explanations  
20 and "clarifications" are not the best evidence of the exchange of communications. Once  
21 again, the best source of this information, and the best evidence, are the  
22 communications themselves. Notably, SCE offers no indication that BPA objects in any  
23 manner to the disclosure of its communications.

24 Though we recognize the content of the Striking Order, TCC is now requesting  
25 reconsideration of that order. As the applicant admits, the "grid injection capacity"  
26 (GIC) limits the maximum amount of electricity that SCE can transmit to any potential  
27

1 customer. That issue has not, to TCC's knowledge, been presented in any prior  
2 EFSEC proceeding; it was certainly not an issue in the *Whistling Ridge* case. Despite  
3 the clear limits imposed by the grid injection capacity (GIC) limits, as discussed at  
4 pages 2-25, 2-16 and 2-49 of the UASC, the Applicant refuses to modify its project and  
5 continues its proposal to construct greater nameplate capacity than can be injected into  
6 the BPA grid. Moreover, the GIC issues will inform the Council when they decide  
7 whether to approve the second phase of the project as part wind, part solar (Phase 2A)  
8 or as only wind (Phase 2B) See discussion of phasing at page 2-100 to 2-102 of the  
9 UASC.

10 The PALJ should grant the motion to compel production of the BPA  
11 communications and order their delivery immediately given the short time before the  
12 commencement of hearings.

13 2.2 MET Tower information.

14 SCE claims the the meterological tower information (MET Towers) should not be  
15 provided because it is not relevant to the proceeding. Other than engaging in  
16 hyperbole ("the information [is] proprietary and commercially extremely sensitive") SCE  
17 fails to explain why this material cannot be provided to TCC. TCC has engaged an  
18 experienced and highly qualified expert in wind farm evaluation and MET Tower data  
19 (Rich Simon). Contrary to SCE's assertions, the PALJ expressly allowed Mr. Simon to  
20 testify, as follows:

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

Striking Order at 4 (emphasis supplied). MET Tower data will be used by Mr. Simon to  
help determine which turbines might be less productive and thus better candidates for

1 removal to achieve other objectives for EFSEC, including visual impact reduction,  
2 wildlife and hawk issues, fire fighting and cultural concerns of the Yakama Nation.

3 Indeed, SCE admits at Footnote 12 in its Opposition (page 5) that:

4       The Applicant understands that EFSEC is focused on things like the number of  
5       units and where they will be placed and impacts the turbines could be expected  
6       to have on wildlife, airspace safety and the viewshed.

7 Since it is probable that “all turbines are not created equally,” MET Tower information  
8 will be very useful in the Council’s decision on the number and placement of turbines.

9       Per Exhibit 5502-T, Mr. Simon has 45 years professional experience, with a  
10       “background, with emphases in wind energy, air pollution, climatology, managing field  
11       programs, basic and applied research, and expert testimony for litigation.” He has  
12       personally sited or performed formal due diligence on “more than 35,000 MW of  
13       operating wind turbines around the world and nearly 15% of the installed capacity in  
14       the United States.” He has provided research and expert witness testimony in  
15       approximately 150 cases concerning wind impacts. Mr. Simon knows the ropes, is  
16       experienced with confidentiality agreements and accustomed to review of sensitive  
17       data.

18       Significantly, SCE did not seek a special protective order prior to its refusal to  
19       provide this information and has still not requested a special protective order for this  
20       information. Keep in mind that the data requested is commonly used to evaluate wind  
21       projects and is business information, not personal information subject to greater  
22       scrutiny.<sup>1</sup> Though it cites the *Whistling Ridge* case, SCE fails to acknowledge that that  
23       project was tiny compared to the HHWP proposal (75 MW v. 1150 MW) and that there  
24       was no GIC imposed by BPA as in this case.

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26       <sup>1</sup> As the PALJ noted in his May 24, 2023 Protective Order, RCW 42.56.645 (1)(c), “(c) “The  
27       information is being released as part of a judicial or quasi-judicial proceeding and subject to a court's  
28       order protecting the confidentiality of the information and allowing it to be used solely in that proceeding;”

1 Solid and specific provisions are in place to protect this information from  
2 disclosure through carefully adopted protective orders and it will be handled by a  
3 witness experienced in administrative and legal proceedings. The PALJ should issue  
4 an order compelling the delivery of this information forthwith.

5 2.3 Reports on Production of Wind Turbines.

6 TCC has also requested reports or studies that assess wind turbine production.  
7 SCE claims these materials are propriety and confidential and thus should not be  
8 produced. TCC's discussion of these issues in Section 2.2 of this brief addresses  
9 these issues and is adopted in this section. Again, SCE did not request a special  
10 protective order for this information, and instead simply refused to provide it. A prompt  
11 request for a protective order would have allowed a timely adjudication of these issues;  
12 dragging the issue out prejudices TCC in preparation of its case and witnesses.

13 SCE interjects a variation on its confidentiality argument here; i.e. that it has a  
14 contract with the turbine producer not to disclose this information, which SCE claims  
15 "wind turbines manufacturers jealously guard." Opposition at 4, lines 3-5. Jealousy or  
16 not, SCE cannot make discoverable items immune from review just because a contract  
17 is signed, especially where neither the contract nor pertinent excerpts are provided in  
18 support of counsel's assertions. This kind of voluntary disablement should not be  
19 allowed, especially for a \$2B project. Moreover, Mr. Kobus, the project manager for  
20 HHWP, says in his deposition that SCE does not have a contract with GE, the turbine  
21 manufacturer (Deposition at 29, lines 1-14), only an "exclusive agreement" to buy  
22 turbines from them. Deposition at 28. Such an arrangement does not support refusal to  
23 supply this important information.

24 Once again all parties will be completely protected by the May 24, 2023  
25 protective order. The PALJ should issue an order compelling the production of this  
26 information.



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DECLARATION OF SERVICE

I hereby certify that I have this day served the foregoing upon the parties of record in this proceeding (listed below my signature block) by authorized method of service pursuant to WAC 463-30-120(3) to the email addresses for parties as provided.

Dated at Seattle, Washington this 7<sup>th</sup> day of August, 2023.

/s/  
Carol Cohoe, Legal Assistant  
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