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August 15, 2023

Energy Facility Site Evaluation Council v.

EF-210011

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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the)
Application of:)
)
)
Scout Clean Energy, LLC, for) Docket No. EF-210011
Horse Heaven Wind Farm, LLC,)
)
)
Applicant.)

ADJUDICATIVE HEARING
VERBATIM RECORD OF PROCEEDINGS

VOLUME 2 (EXCERPT)

ORAL RULING ON TCC MOTION TO COMPEL PRODUCTION

August 15, 2023

Lacey, Washington

Reporter: John M.S. Botelho, CCR, RPR

1 APPEARANCES

2 Energy Facility Site Evaluation Council Members:

3 Kathleen Drew, Chair

4 Elizabeth Osborne (NOT PRESENT)
5 Department of Commerce

6 Eli Levitt
7 Department of Ecology

8 Mike Livingston
9 Department of Fish and Wildlife

10 Lenny Young
11 Department of Natural Resources

12 Stacey Brewster
13 Utilities & Transportation Commission

14 Derek Sandison (NOT PRESENT)
15 Department of Agriculture

16 Ed Brost
17 Benton County

18 Administrative Law Judge:

19 Adam E. Torem (*)

20 For the Applicant:

21 TIMOTHY L. McMAHAN
22 EMILY K. SCHIMELPFENIG
23 ARIEL STAVITSKY
24 Stoel Rives
25 760 Southwest Ninth Avenue
Suite 3000
Portland, Oregon 97205
503.224.3380
503.220.2480 Fax
tim.mcmahan@stoel.com
emily.schimelpfenig@stoel.com
ariel.stavitsky@stoel.com

1 APPEARANCES (Continuing)

2 For Benton County:

3 KENNETH W. HARPER
4 AZIZA L. FOSTER
5 Menke Jackson Beyer
6 807 North 39th Avenue
7 Yakima, Washington 98902
8 509.575.0313
9 509.575.0351 Fax
10 kharper@mjbe.com
11 zfoster@mjbe.com

12 Counsel for the Environment:

13 SARAH M. REYNEVELD
14 Washington State office of the
15 Attorney General
16 800 Fifth Avenue
17 Suite 2000
18 Seattle, Washington 98104
19 206.389.2126
20 206.587.4290 Fax
21 sarah.reyneveld@atg.wa.gov

22 For the Confederated Tribes and Bands of the
23 Yakama Nation:

24 SHONA VOELCKERS
25 ETHAN JONES
JESSICA HOUSTON
Yakama Nation Office of Legal Counsel
PO Box 150
401 Fort Road
Toppenish, Washington 98948
509.969.8201
shona@yakamanation-olc.org
ethan@yakamanation-olc.org
jessica@yakamanation-olc.org

1 APPEARANCES (Continuing)

2 For Tri-Cities C.A.R.E.S. (Community Action for
3 Responsible Environmental Stewardship):

4 J. RICHARD ARAMBURU
5 Law Offices of J. Richard Aramburu
6 705 Second Avenue
7 Suite 1300
8 Seattle, Washington 98104
9 206.625.9515
10 206.682.1376 Fax
11 aramburulaw@gmail.com

12 Council Staff:

13	Sonia Bumpus	Andrea Grantham
14	Ami Hafkemeyer	Lisa Masengale
15	Joan Owens	Alex Shiley (*)

16 EFSEC Legal Advisor from the Washington State Office of
17 the Attorney General:

18 Jonathan C. Thompson

19 (*) indicates the participant is appearing in
20 person in Lacey, Washington, with the Court
21 Reporter. All other participants are
22 appearing remotely via Microsoft Teams.
23
24
25

1 BE IT REMEMBERED that on Tuesday,
2 August 15, 2023, at 621 Woodland Square Loop Southeast,
3 Lacey, Washington, at 8:30 a.m., before the Washington
4 Energy Facility Site Evaluation Council; Kathleen Drew,
5 Chair; and Adam E. Torem, Administrative Law Judge, the
6 following proceedings were had, to wit:

7
8 <<<<<< >>>>>>

9
10 (Excerpt begins at 8:35 a.m.)

11
12 JUDGE TOREM: On the motion to
13 compel -- I'll move to the next item on my list -- I
14 wanted to give you essentially an oral ruling on that
15 rather than spend the time writing. And if you're
16 going to take notes, this is a good time to start on
17 this, the motion to compel filed by Tri-Cities Cares.

18 My notes indicate that on July 28th, Mr. Aramburu
19 filed the motion to compel certain documents to be
20 produced by the applicant. The motion was based on an
21 impasse that was reached during discovery. And in
22 quick summary, the documents and the motions he's
23 trying to compel production of are meteorological data;
24 information about the applicant trying to do their
25 interconnections with BPA, the Bonneville Power

1 Association, and -- or Administration; and the
2 estimated production of the various turbines, and
3 essentially was questioning some of the commercial
4 viability aspects of the proposed project. And it may
5 have been seeking proprietary data, some indication of
6 that being discussed during testimony prefiled by a
7 Witness Poulos, P-o-u-l-o-s.

8 That was on a Friday afternoon. And the following
9 week, on Tuesday, August 1st, the applicant filed its
10 opposition. And the applicant indicated there were
11 four requests for production that they opposed. And
12 they were: No. 1, based on the July 28th order that
13 took BPA interconnection topics essentially off the
14 table for this adjudication.

15 They also, under RFP No. 2, cited to the Whistling
16 Ridge case and the same order that I just referenced
17 that I issued on July 28th. That particular RFP was
18 looking for wind resource potential, and the applicant
19 contended that I had made that not a topic for
20 adjudication in the previous order.

21 And looking at the Whistling Ridge previous
22 prehearing conference order that was issued in that
23 matter, making these kind of inquiries essentially
24 not -- it's a business decision, and it'd be based on
25 proprietary information.

1 Request for Production No. 3 was opposed because
2 it went into energy production of the turbines, and the
3 applicant asserted again proprietary information there.

4 And, finally, for the Request for Production
5 No. 5, the applicant said that looking for a cost per
6 kilowatt hour on what the savings or cost to the
7 consumer might be was another commercial viability
8 issue and not within the realm of EFSEC's mission or
9 jurisdiction.

10 I looked at the Residents Opposed to Kittitas
11 County and EFSEC matter that came out from the supreme
12 court, otherwise known as the ROKT case, R-O-K-T, and
13 it ruled according to 80.50.040, Sub 2, that under that
14 statute, the economic viability of a proposed project
15 was not relevant. And the quote that I found
16 persuasive there in favor of the applicant's arguments
17 was as follows:

18 "As economic analysis does not relate to
19 environmental or ecological concerns, we" -- being the
20 supreme court -- "believe that EFSEC was within its
21 authority to refuse to review the economical viability
22 of the Kittitas Valley Wind Power Project."

23 In the Whistling Ridge case, Administrative Law
24 Judge Bob Wallis, on behalf of the Council, took the
25 same approach. His Prehearing Order No. 11, which is

1 also labeled as Council Order No. 855, took a fairly
2 careful and conservative approach to discovery,
3 particularly of confidential and sensitive information.

4 And in the Whistling Ridge case, that order
5 followed the Kittitas Valley precedent from the supreme
6 court and denied discovery based on the relevance of
7 that information to the adjudication and the
8 sensitivity of the proprietary data and information.

9 So my ruling denying the motion is that I won't
10 break with the precedent established by the ROKT court
11 or the ruling more recently in the Whistling Ridge
12 matter.

13 My prehearing orders in this case have already
14 indicated that certain economic viability information
15 is not germane or helpful to Council members or their
16 work to develop a recommendation to the governor. The
17 discovery of BPA interconnection issues, wind resource
18 potential data, and energy production and cost or rate
19 analysis data is not authorized in this matter. So,
20 therefore, Mr. Aramburu, the TCC motion to compel those
21 documents is denied.

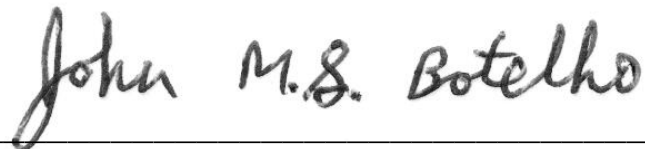
22
23 (Excerpt concluded at
24 8:40 a.m.)
25

1 STATE OF WASHINGTON) I, John M.S. Botelho, CCR, RPR,
2) ss a certified court reporter
3 County of Pierce) in the State of Washington, do
4 hereby certify:

5 That the foregoing proceedings were taken in my
6 presence on August 15, 2023, and thereafter were transcribed
7 under my direction; that the transcript is a full, true and
8 complete transcribed excerpt of the said proceedings, and
9 was transcribed to the best of my ability;

10 That I am not a relative, employee, attorney or counsel
11 of any party to this action or relative or employee of any
12 such attorney or counsel and that I am not financially
13 interested in the said action or the outcome thereof;

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 16th day of August, 2023.

16 

17 John M.S. Botelho, CCR, RPR
18 Certified Court Reporter No. 2976
19 (Certification expires 5/26/2024.)
20
21
22
23
24
25

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emily.schimelpfenig@stoel.com
2:23

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ETHAN 3:17

ethan@yakamanation-olc.org
3:21

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zfoster@mjbe.com 3:7