

**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 (IN PART) TCC'S
MOTION FOR RECONSIDERATION OF
ORDER STRIKING TESTIMONY OF
PAUL KRUPIN AND DAVID SHARP
AND DENYING TCC'S MOTION FOR
RECONSIDERATION AS TO
RICK DUNN AND RICHARD SIMON

Procedural Background and Party Positions:

On July 28, 2023, the Administrative Law Judge (ALJ) entered an *Order Granting Applicant's Motion to Strike (Order to Strike)* the pre-filed testimony of TCC witnesses Rick Dunn, Paul Krupin, David Sharp and (in part) Richard Simon. On August 2, 2023, Tri Cities C.A.R.E.S. was given leave to request reconsideration of the *Striking Order*.

On August 7, 2023, TCC filed its *Motion for Reconsideration of Order to Strike*. TCC cites to the Administrative Procedure Act (APA) and its relaxed standards for admission of evidence. TCC also relies on the 2022 legislation that updated EFSEC's purpose statute that directs the Council to conduct its public process "with particular attention to overburdened communities" while "encouraging meaningful public comment and participation" in EFSEC's decisions. TCC's *Motion for Reconsideration* asserts the updated Application for Site Certification (ASC) itself would not survive the screening standards applied to TCC witnesses in the *Striking Order*.

TCC's *Motion for Reconsideration* then sets out specific arguments as to why the totality of each impacted witness's pre-filed testimony should have been admitted. The pleading is helpful in its breaking out specific subject matter areas of each witness's pre-filed testimony and providing targeted arguments regarding each section's supposed acceptability under the *Second Prehearing Conference Order*.

On August 9, 2023, Applicant Scout Clean Energy (SCE) filed its *Response to TCC's Motion for Reconsideration of Order to Strike*. SCE first contends that TCC failed to raise any specific grounds for reconsideration as required by CR 59. SCC next points out that the "overall size and scope" topic regarding the project should not be considered a "catch-all" provision to admit otherwise irrelevant or immaterial evidence. Finally, SCC argues that TCC's *Motion for Reconsideration* is simply a rehash of the previous arguments offered in its rebuttal pleading prior to entry of the original *Striking Order*.

Discussion and Analysis:

The *Order Granting TCC's Request for Leave to File Motion for Reconsideration* recognized that the *Striking Order* had rejected broad swaths of what TCC believed to be relevant and

material evidence for this adjudication. Therefore, TCC was permitted to re-submit portions of witness testimony from Paul Krupin, David Sharp, or any other witness impacted by the *Striking Order*. The APA permits an ALJ to exclude irrelevant, immaterial and unduly repetitious evidence. Although TCC is correct that administrative hearings proceed under significantly relaxed rules of evidence, the *Second Prehearing Conference Order* set out a list of allowed and prohibited topics. That *Order* governs this proceeding. Further, the recent statutory revisions regarding EFSEC's application review process did not somehow qualify "meaningful public comment" as formal evidence to be taken up for cross-examination in the adjudicative hearing.

SCE's contention that the ALJ should strictly apply CR 59 to the *Motion for Reconsideration* is noted but rejected. The promised liberal reconsideration promised by the ALJ at various times since entry of the *Striking Order* would be undermined by any strict application of this rule to TCC's filing. On the other hand, SCE is absolutely correct in pointing out that the "overall scope and scale" topic set out in the *Second Prehearing Conference Order* is not a "catch-all" topic for any and all opinions on the proposed Horse Heaven Wind Farm to come into the adjudicative hearing. The public comment hearing is much better suited for consideration of personal observations, opinions, and statements about the project.

As further detailed below, TCC's *Motion for Reconsideration* does a commendable job of justifying reconsideration of portions of Mr. Krupin's testimony. Likewise, TCC's *Motion for Reconsideration* provides valid reasons to allow admission of a very limited segment of David Sharp's pre-filed testimony. However, TCC makes no legally sufficient or persuasive arguments to alter the original exclusionary ruling with regard to the pre-filed testimony of Rick Dunn or the previously stricken portions of Rich Simon's pre-filed testimony. In that regard, SCE is correct that TCC's *Motion for Reconsideration* is a rehash of what has come before.

Paul Krupin's pre-filed testimony was stricken for including numerous topics outside the scope of those approved in the *Second Prehearing Conference Order*. The *Motion for Reconsideration* provides additional information regarding Mr. Krupin's qualifications and separates his pre-filed testimony out into discrete topical areas. Mr. Krupin's updated statement of qualifications still does not establish him as a visual impact expert. However, the *Motion for Reconsideration* provides a more detailed "Position Description" from Mr. Krupin's work for the Department of Energy where he had some technical experience with air quality issues.

TCC provided sufficient arguments in favor of allowing those portions of Mr. Krupin's pre-filed testimony that contain fact-based photographs showing various views of the proposed project and his calculation of the number of impacted residences as compared to other wind projects in Washington. TCC also clarified why Mr. Krupin's analysis and critique of potential fugitive dust impacts on air quality by should be admitted. Additionally, upon further consideration, the set of articles and letters showing community support of TCC's opposition to the project contained in Exhibit 5303 may be admitted to demonstrate Mr. Krupin's role as a sort of self-appointed local spokesperson.

Dave Sharp's pre-filed testimony was stricken for its impermissible focus on economic and interconnection issues as well utility resource planning. The *Striking Order* noted that his

experience and opinions with regard to the potential dangers of ice throw could be relevant to the Council's evaluation of potential mitigation required in its site certification recommendation. The *Motion for Reconsideration* sifts this material out from the immaterial bulk of testimony offered by Mr. Sharp. A second look at the latter pages of Mr. Sharp's testimony shows they can indeed be considered testimony reasonably within the scope of the recreational impacts topic.

Rick Dunn's pre-filed testimony was stricken as not germane to the Council's siting decisions. TCC's *Motion for Reconsideration* did not change the nature of Mr. Dunn's pre-filed testimony.

Richard Simon's pre-filed testimony had portions stricken as outside the scope of topics allowed in the *Second Prehearing Conference Order*. TCC's *Motion for Reconsideration* failed to offer new information or persuasive arguments with regard to admitted the previously stricken parts.

Decision

TCC's *Motion for Reconsideration* is **GRANTED** in part. The following portions of TCC witness Paul Krupin's pre-filed testimony will be admitted to the record when Mr. Krupin appears to adopt them and is made available for cross-examination:

- EXH-5301, page 1 through page 3, line 11
- EXH-5302_T, page 1, lines 1 through 21; page 33, line 18 through page 37, line 20; page 38, lines 7-17; page 40, lines 13 through page 41, line 23; page 50, lines 4-22; and page 96 through page 105, line 14
- EXH-5303 (*in full*)

The following limited portions of David Sharp's testimony will be admitted to the record when Mr. Sharp appears to adopt it and is made available for narrowly tailored cross-examination:

- EXH-5402_T, page 1, lines 1-15; page 36, line 11 through page 44, line 22

The original *Striking Order's* ruling remains fully effective as to TCC witnesses Rick Dunn and Richard Simon.

Counsel for TCC shall submit appropriately reformulated versions of the above-noted exhibits labeled with their original numbering but with the new suffix "_RECON" as soon as possible.

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

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge