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August 22, 2023

Horse Heaven Wind Farm 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 5 (EXCERPT)

ORAL RULING ON APPLICANT'S MOTION TO STRIKE
TCC RESPONSE AND REBUTTAL TESTIMONY

August 22, 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
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5 Eli Levitt
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7 Mike Livingston
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15	Joan Owens	Alex Shiley (*)

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17 the Attorney General:

18 Jonathan C. Thompson
19 Jennifer Slocum

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

1 BE IT REMEMBERED that on Tuesday,
2 August 22, 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 continued, to wit:

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

9
10 (Excerpt begins at 11:55 a.m.)

11
12 JUDGE TOREM: So my ruling on this,
13 Mr. McMahan and Mr. Aramburu, is as follows.

14 I've looked at the applicant's motion to strike
15 the rebuttal and reply testimony of four witnesses.
16 That was filed on August 1st. Tri-Cities C.A.R.E.S.
17 filed their opposition to that motion on August 7th.
18 And just last week, I was able to get you -- maybe it
19 was just yesterday -- the order on reconsideration of
20 Tri-Cities C.A.R.E.S.' prefiled testimony that was
21 originally stricken on July 28th, I believe it was.

22 I want to apply the same standards here to the
23 rebuttal and reply testimony that I included in
24 yesterday's order, and so let's take a look at the
25 exhibits in order.

1 Rick Dunn of the Benton County PUD had all of his
2 testimony stricken originally, and by the rebuttal or
3 the reconsideration, that ruling was upheld by me, and
4 nothing was changed as to Rick Dunn's testimony.

5 Here he's resubmitted Exhibit 5211 and 5212. As
6 much as TCC suggests that the testimony is relevant to
7 the scope and scale of the product -- of the project
8 and to rebut Mr. Poulos's testimony, Mr. Dunn's
9 testimony continues to focus on the net benefits of the
10 project as alleged under CETA. He continues to focus
11 on global CO2 and greenhouse gas emissions. And for
12 those reasons, the testimony is not within the scope of
13 the -- those topics allowed for the adjudication, so
14 I'm striking his rebuttal and reply testimony inclusive
15 of both 5211 and 5212.

16 Shifting to Mr. Paul Krupin, he -- as I said in
17 the motion on reconsideration order, he does -- he
18 remains not a visual expert, so the bulk of his
19 testimony and reply and rebuttal will also be stricken.
20 So that includes 5304R and the bulk of 5305. I'm going
21 to ask Ms. Masengale if she has Exhibit 5305 handy to
22 put up on the screen so it's -- I can indicate to you
23 the portions that are not being stricken.

24 This is Page 2 of Exhibit 5305R. The language
25 that begins with, "The U.S. census data," and

1 everything on from there until the chart on Page 8 is
2 going to be admitted and not stricken. The reason for
3 that is these charts are factual in nature, and they're
4 produced to show the distance between the homes in the
5 affected area and other wind farms. So these charts
6 are helpful, I think, to the Council and the ultimate
7 fact finder.

8 So from that portion of Page 2, starting with,
9 "The U.S. census data," up until this chart about
10 population are not stricken. The words, "The ASC and
11 visual assessments fail to adequately sample," are
12 opinions that begin again to go into Mr. Krupin's
13 thoughts on visual aspects. Those from that point to
14 the end of the document, Page 37, are all stricken.

15 Exhibit 5306 of Mr. Krupin is likewise stricken.

16 Mr. Sharp's testimony: Sticking to the same
17 standards where I allowed Mr. Sharp to testify as to
18 some other impacts of the project, including his
19 thoughts on ice throw and recreation per the
20 reconsideration order. Applying those same standards,
21 then Exhibit 5403 is stricken in its entirety.

22 Exhibit 5404, which I'll ask Ms. Masengale to
23 bring up, on Page 2 there are a limited number of
24 question and answer items critiquing Mr. Poulos's
25 testimony. No. 2 -- sorry. No. 3, No. 4, and No. 5

1 all make valid, within the scope of Mr. Sharp's
2 expertise, observations and critiques. These are
3 factual basis comparing the size of the Tri-Cities area
4 to the other projects Mr. Poulos discusses. So those
5 question and comments, No. 3, 4, and 5, are not
6 stricken from Exhibit 5404, but the remainder of that
7 exhibit is stricken.

8 The bulk of the rest of Mr. Sharp's exhibits are
9 also stricken. That includes 5405, 5406, 5407, 5408,
10 5409. Skipping ahead, also stricken are 5412, 5413,
11 and 5414.

12 The two exhibits I didn't mention as stricken are
13 5410, which is a map showing recreational uses. 5411
14 is the Kioa (phonetic) trail. That also is a
15 recreational aspect. So as you can see, these are
16 clearly labeled on 5410 on your screen as recreational
17 opportunities. And 5411 likewise shows the trail
18 network that is around in the Kioa -- Kiona ridge
19 trail. I misspoke earlier. K-i-o-n-a. Those two maps
20 are not stricken and will be admitted.

21 Finally, we get to Mr. Simon's testimony. I've
22 looked at Exhibit 5503R. And as much as it goes into
23 areas that are not necessarily directly within the
24 scope of the adjudication's allowed issues,
25 Mr. Aramburu makes an excellent point that Mr. Simon is

1 simply referring to and responding to another witness.
2 And in doing so, I think it would be reversible error
3 on my part to exclude those rebuttal critiques of, I
4 think it's Mr. Poulos's testimony.

5 Some of what Mr. Simon ventures into is similar to
6 what Rick Dunn had offered. But, again, I think
7 Mr. Simon, in my estimation, has a different expertise
8 than Mr. Dunn. And even if his over- -- the expertise
9 overlaps under the APA 34.05.452, I'm using my
10 discretion to exclude Mr. Dunn's testimony in these
11 areas as unduly repetitious when taken in context with
12 that of Mr. Simon that is being allowed and admitted.

13 Court reporter's going to make an expedited
14 transcript that will be circulated later today. I hope
15 it was clear as I went through those and asked for Lisa
16 Masengale to put up on there and show you exactly what
17 was going on.

18 So as to the motion for striking the rebuttal and
19 reply testimony, that's all I have on that matter.

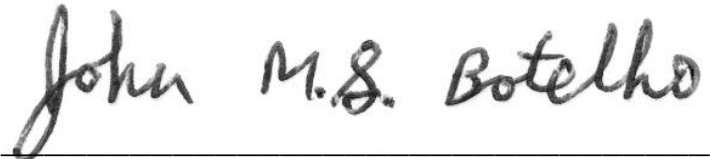
20 (Excerpt concluded at
21 12:02 p.m.)
22
23
24
25

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 22, 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 was
9 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 22nd 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
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