

**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 ON POST-HEARING MOTIONS  
TO SUPPLEMENT RECORD; DENYING  
FURTHER ADJUDICATIVE HEARINGS  
FOR CROSS-EXAMINATION OF  
SUPPLEMENTAL AND REBUTTAL  
WITNESS TESTIMONY

**Procedural Background:**

On September 5, 2023, Scout Clean Energy (SCE) filed a *Motion to Supplement the Testimony of Brynn Guthrie*, one of its visual experts. Ms. Guthrie’s supplemental testimony focused on one exhibit, EXH-5906\_R, a comprehensive visual analysis admitted over the Applicant’s objection on August 24, 2023, during the testimony of Tri-Cities C.A.R.E.S.’ visual expert Dean Apostol.

Also on September 5, 2023, (TCC) filed a *Motion to Allow Supplemental Testimony* from nine witnesses, six of whom had not appeared at or been mentioned during the adjudicative hearing. TCC offered responsive supplemental testimony from Benton County Fire District #1’s Chief, Lonnie Click, who answered several questions raised by EFSEC Chair Kathleen Drew. TCC also presented new testimony from Benton County Fire District #2’s chief, Dennis Bates, as well as from two aerial firefighting experts, David Wardell and Mark Baird. Next, TCC asked its visual expert, Dean Apostol, to prepare supplemental testimony summarizing his responses to Council questions posed during the adjudicative hearing; Mr. Apostol also proposed his own redesign of the project. TCC also offered supplemental testimony from three local farmers: John Christensen, Margaret Hue, and Loren Miller. Finally, TCC offered additional supplemental testimony from Paul Krupin regarding his perspectives on fugitive dust issues.

On September 6, 2023, Administrative Law Judge (ALJ) Adam E. Torem issued a letter advising the moving parties of his overall decision on their proposed supplemental testimony. The letter indicated which proposed supplemental exhibits would be admitted and which rejected. This order explains in more detail the reasoning for the rulings set out in the letter, including:

- (a) why the supplemental testimonies of Brynn Guthrie and Lonnie Click were admitted;
- (b) why the supplemental testimony of Dennis Bates was admitted in part;
- (c) why the submissions from John Christensen, Loren Miller and Margaret Hue were designated as public comments; and
- (d) the basis for excluding TCC’s proffered supplemental testimony from Dean Apostol, David Wardall, Mark Baird, Paul Krupin and the scientific study included with the public comments of Margaret Hue.

## **Analysis:**

EFSEC scheduled ten days of adjudicative hearing time on the Horse Heaven Wind Farm project, including a public comment hearing on the evening of August 23, 2023. Per the parties' joint stipulation, two of those ten days of hearing time (August 10 and August 11, 2023) were stricken. At the close of the adjudicative hearing, the ALJ responded to party requests for additional hearing sessions by asking all participants to hold time on their calendars on Monday, September 11, 2023 and Friday, September 15, 2023 in the case the EFSEC Council found it necessary or desirable to hold additional adjudicative hearings.

EFSEC's procedural rules, where practicable, allow presiding officers to order "all documentary evidence...be submitted...sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence."<sup>1</sup> In this adjudication, the *Second Prehearing Conference Order* (May 19, 2023) established a schedule for the parties' pre-filed testimony and supporting exhibits. Though a series of additional prehearing conferences, the ALJ worked with the parties to schedule submission of additional exhibits to be used during cross-examination of witnesses. Due to the compressed nature of the litigation schedule, several of these cross-examination exhibits were produced only shortly before witnesses appeared before the EFSEC Council.

The Administrative Procedure Act (APA)<sup>2</sup> directs presiding officers to regulate the course of the proceedings and "to the extent necessary for full disclosure of all relevant facts and issues" (emphasis added), all parties are to be afforded "the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence."

In applying the APA and EFSEC's procedural rules, it is important at the outset to acknowledge that due process guarantees the right to a full and fair hearing.<sup>3</sup> However, the process which is due varies according to the type of proceeding. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.<sup>4</sup> Due process is a flexible concept; varying situations can demand differing levels of procedural protections.<sup>5</sup>

It is well established that cross-examination is an integral part of all proceedings, whether criminal or civil.<sup>6</sup> Cross examination is, however, limited by other factors: (1) it must pertain to matters within the scope of the direct examination and matters affecting the credibility of the witness (ER 611(b)); (2) it may be curtailed where the relevance of the evidence is outweighed by the danger of undue delay, waste of time or needless presentation of cumulative evidence (ER 403); and (3) a court has discretion to exercise reasonable control over the mode and order of interrogating witnesses to avoid needless consumption of time (ER 611(a)(2)). When a tribunal precludes all cross-examination on a legitimate issue, it may compromise the factfinding process and subject itself to a closer examination of competing factors; when a court prematurely

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<sup>1</sup> WAC 463-30-310(20(a)).

<sup>2</sup> See RCW 34.05.449(1) and (2).

<sup>3</sup> See *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422 (1973).

<sup>4</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>5</sup> *Id.*, at 334.

<sup>6</sup> *Hannah v. Larche*, 363 U.S. 420 (1960); see also 5 K. Tegland, Wash. Prac., Evidence Law & Practice §245 (2d ed. 1982).

terminates cross-exam of a witness at a pre-determined time simply to complete a trial it commits reversible error.<sup>7</sup>

Upon review of the above-noted proposed supplemental testimony, the ALJ, after consulting the Council, determined that further adjudicative hearing sessions would not be necessary. Instead, the selected supplemental testimony will be admitted without further cross-examination.

*Brynn Guthrie.* TCC produced EXH-5906\_R and its contents for the first time on the seventh and penultimate day of the adjudicative hearing. TCC visual expert Paul Apostol presented this map after the Applicant's expert visual witnesses had already testified, without benefit of ever seeing or having the ability to comment on Mr. Apostol's map. Ms. Guthrie's supplemental testimony focuses on EXH-5906 and Mr. Apostol's testimony regarding that map. TCC has already had the opportunity to cross-examine Ms. Guthrie regarding her pre-filed testimony. Therefore, given the limited nature of Ms. Guthrie's supplemental testimony, per ER 611(a)(2), any additional cross-examination would be a needless waste of the Council's time and resources.

*Dean Apostol.* TCC presented additional testimony from Mr. Apostol which reiterates what he has already told the Council. TCC also sponsors Mr. Apostol's efforts to redesign the Applicant's project (EXH-5106\_S). This proposed evidence is distinguishable from the short and focused rebuttal testimony presented by the Applicant's visual expert, Ms. Guthrie. In her case, she is responding to a late-presented exhibit that she never had the opportunity to critique. TCC and Mr. Apostol had every opportunity to develop pre-filed testimony regarding TCC's opinions and perspectives on the visual aspects of the Horse Heaven Wind Farm as originally proposed and various versions of the project as it evolved (as described in the "Moon Memo" that responded to a data request from EFSEC staff working on developing a final environmental impact statement for this project). Mr. Apostol's supplemental testimony is not appropriate rebuttal evidence. It is cumulative evidence and portions of it, particularly a proposed redesign of the project, cannot be presented to the Council without causing undue delay (due to a need to allow further surrebuttal).

*Benton County Fire Chiefs – Lonnie Click and Dennis Bates.* During the adjudicative hearing, Mr. Click was unable to appear to adopt his pre-filed testimony and be available for cross-exam due to more pressing duties combating a wildfire near Spokane. Chair Drew requested that TCC provide several questions to Mr. Click that he could answer in writing. Mr. Click's supplemental testimony directly responds to Chair Drew's inquiries. Mr. Bates' supplemental testimony comes from a neighboring fire district, offering another local perspective on the proposed project. As such, these supplemental viewpoints are helpful to the Council in evaluating firefighting issues.

*TCC's Aerial Firefighting Experts – David Wardall and Mark Baird.* During the adjudicative hearing, several TCC witnesses referenced potential limitations on aerial firefighting around wind turbines. Councilmembers also posed questions on this topic. TCC went forth to solicit supplemental testimony on the topic of aerial firefighting and tanker operations. Neither of these witnesses indicated they had visited the site of the proposed project. They offered experiences from California wildfires that occurred in forested terrain, not dryland wheat fields. The bulk of

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<sup>7</sup> See *State v. York*, 28 Wn.App. 33 (1980). For additional discussions of rights to cross-examination, see *Little v. Rhay*, 8 Wn.App. 725 (1973) [in context of a habeas corpus case] and *Gourley v. Gourley*, 158 Wn.2d 460 (2006) [in context of one parent seeking one-year protective order against another parent].

their testimony is not tailored to the type of project being considered by EFSEC. Additionally, admission of this sort of late-filed testimony would merit surrebuttal from the Applicant (and perhaps other parties). Given the extent of the record already created in the adjudicative hearings (and the further consideration of this topic anticipated from the SEPA process), the Council will not benefit from considering the expertise and opinions offered by Mr. Wardall and Mr. Baird.

*Paul Krupin.* TCC presented witness Paul Krupin for cross-examination on August 23, 2023. No questions were posed to Mr. Krupin. Nevertheless, TCC now seeks to supplement his testimony with additional information regarding air pollution (small particulates found in dust) and its impact on overburdened communities in the Tri-Cities region.

*TCC's Local Farmers – John Christensen, Loren Miller, and Margaret Hue.* TCC also submitted what it characterized pre-filed testimony from three farmers in the local area. These citizens' views could have been presented during the original timeframe for submitting pre-filed testimony but TCC apparently failed to solicit the views of Mr. Christensen, Mr. Miller, and Ms. Hue prior to the adjudicative hearing. Although potentially responsive to some of the testimony and issues presented during the land use compatibility and visual aspects parts of the adjudication, TCC presented no rationale for why these witnesses were not part of its own rebuttal round of testimony. Further, the record will reflect the Council heard extensive evidence from both County and Applicant witnesses on this topic, both witnesses also having been subjected to cross-examination by TCC's counsel. Given the nature of the submissions from Mr. Christensen, Mr. Miller and Ms. Hue, it is best to follow the same procedure set out in the *Order Designating Certain TCC Testimony as Public Comment* (August 14, 2023) and set these items over for consideration by the Council as public comments, not testimony.

Ms. Hue also included a scientific study with her comments. EXH-5918\_S is offered without any foundation that Ms. Hue is personally familiar with this decades-old study or has any expertise with regard to pesticide drift in the Horse Heaven Hills. Therefore, this document is also rejected as proposed rebuttal or supplemental testimony.

### **Decision:**

The Applicant's *Motion to Supplement the Testimony of Brynn Guthrie* is **GRANTED**; SCE's EXH-1065\_S\_ Revised is admitted.

TCC's *Motion to Allow Supplemental Testimony* is **GRANTED** with regard to the supplemental testimony of Lonnie Click and those portions of Dennis Bates' testimony indicated above; TCC's EXH-5911\_S (*pages 1-5 only*) and EXH-5912\_S are admitted.

TCC's *Motion to Allow Supplemental Testimony* is **DENIED** with regard to the supplemental testimony of Dean Apostol, David Wardall, Mark Baird, Paul Krupin, and the scientific study presented by Margaret Hue. TCC's EXH-5105\_S, EXH-5106\_S, EXH-5907\_S, EXH-5908\_S, EXH-5909\_S, EXH-5910\_S, EXH5913\_S, EXH-5915\_S, and EXH-5918\_S are rejected.

TCC's *Motion to Allow Supplemental Testimony* is also **DENIED** with regard to the submissions from John Christensen (EXH 5914\_S), Loren Miller (EXH-5916\_S), and Margaret Hue (EXH-5917\_S). These submissions are designated as public comments and will be considered as such.

In accordance with the analysis of the process due (above), no cross-examination of Ms. Guthrie, Mr. Click or Mr. Bates will be permitted. No further adjudicative hearings will be scheduled. The evidentiary record for the adjudicative hearing is now closed.

DATED and effective at Olympia, Washington, on the 22nd day of September, 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