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5 BEFORE THE STATE OF WASHINGTON  
6 ENERGY FACILITY SITE EVALUATION COUNCIL  
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8 In the Matter of the Application of:

9 Scout Clean Energy, LLC, for  
10 Horse Heaven Wind Farm, LLC,  
11 Applicant

Docket No. EF-210011

PETITION FOR RECONSIDERATION  
OF ORDER 888

12  
13 **I. Introduction**

14 The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) respectfully  
15 petitions the Energy Facility Site Evaluation Council (“EFSEC” or “Council”) to reconsider barring  
16 Washington Department of Fish and Wildlife (“WDFW”) biologists James Watson and Jason Fidorra  
17 from being called as adjudication witnesses in the above captioned adjudication. *See* EF-210011  
18 Order 888 (September 15, 2023) (“Order 888”). Per EFSEC’s interpretation of its rules and an existing  
19 contract between WDFW and EFSEC, Yakama Nation was prevented from informally gathering  
20 information from WDFW and formally calling WDFW employees to testify as witnesses. *See*  
21 Declaration of Shona Voelckers in Support of Motion to Supplement the Record (July 31, 2023)  
22 (“Voelckers Decl.”). Order 888 compounds this due process error without support in the law or facts.

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24 Under RCW 34.05.470(1), within “ten days of the service of a final order, any party may  
25 file a petition for reconsideration, stating the specific grounds upon which relief is requested.”  
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1 Yakama Nation brings this petition for reconsideration to urge the Council to allow the parties to  
2 directly question Mr. Watson and Mr. Fidorra before post hearing briefs are due in compliance with  
3 the Administrative Procedures Act (“APA”) and its implementing regulation WAC 34.05.449. Such  
4 testimony is critical to developing as complete a record as possible for the Council in this adjudication.  
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## 6 **II. Pertinent Facts**

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8 WDFW publicly expressed concern about the impacts of the Project on wildlife and wildlife  
9 habitat in the State. *See* EXH 4018 at Exhibits 1-2, 6-7. After Yakama Nation was granted intervenor  
10 status to this adjudication, Yakama Nation attempted to communicate with WDFW about its Project  
11 concerns. Voelckers’ Decl., ¶ 3. After counsel for Yakama Nation was denied the ability to speak  
12 informally with WDFW employees regarding the Project, legal counsel for Yakama Nation, WDFW  
13 and EFSEC conferred and concluded that because Mr. Ritter’s EFSEC contract was limited to the  
14 Project’s SEPA analysis, Yakama Nation could depose WDFW employees about the Project so long  
15 as the line of questioning did not discuss the SEPA analysis. Voelckers’ Decl. ¶¶ 4-9.  
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17 Yakama Nation deposed Michael Ritter on May 31, 2023, James Watson on July 14, 2023,  
18 and Jason Fidorra on July 20, 2023. Voelckers Decl. ¶¶ 2-4. Because EFSEC blocked Yakama  
19 Nation’s request to call WDFW employees directly as witnesses, on July 25, 2023 Yakama Nation  
20 moved EFSEC to supplement the record with Mr. Ritter’s, Mr. Watson’s, and Mr. Fidorra’s  
21 deposition transcripts. *See* Motion to Supplement the Record (July 31, 2023). Yakama Nation’s  
22 Motion to Supplement the Record was granted by Judge Torem. *See* Order Granting Motions to  
23 Supplement the Record with Discovery Depositions of Ritter, Watson, Fidorra and Kobus (August  
24 15, 2023). After the depositions concluded, and throughout the course of the adjudication hearing,  
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1 discovery disclosures continued, and Yakama Nation renewed its request to present WDFW  
2 employees as witnesses subject to cross examination. *See* Adjudication Hearing Day 6 Transcript,  
3 pgs. 1273-75. At Judge Torem’s direction, Yakama Nation formalized this request in a letter to  
4 EFSEC. *See* Letter from Shona Voelckers to Energy Facility Site Evaluation Council (August 24,  
5 2023) (joined verbally by Counsel for the Environment August 25, 2023). On September 15, 2023,  
6 EFSEC Chair Kathleen Drew issued an order denying Yakama Nation’s request. Order 888, pg. 1.  
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9 **III. Argument in Support**

10 Order 888 is not supported by the factual record, nor a legal basis. Instead, it was issued  
11 by Chair Drew in excess of her statutory authority and in violation of Yakama Nation’s due process  
12 rights under the APA. The Council should reconsider.

13 ***A. Chair Drew’s Authority to Issue Orders***

14 As a threshold matter, Yakama Nation respectfully disagrees with Chair Drew’s exercise  
15 of authority to unilaterally deny Yakama Nation’s formal request to call WDFW witnesses in this  
16 manner. Under EFSEC’s own rules, the Council is the presiding officer at adjudicative  
17 proceedings – not Chair Drew or any one EFSEC Council Member. WAC 463-30-020. As  
18 Yakama Nation previously raised in its objections to Prehearing Order No. 2, Chair Drew’s *ultra*  
19 *vires* assumption of authority in pre-adjudication procedural decisions has been both concerning  
20 and pervasive. *See* Yakama Nation’s Objection’s to Prehearing Order No. 2 (May 30, 2023). In  
21 this case, WAC 463-30-020 is clear that for purposes of the adjudicative proceedings, the full  
22 Council is the presiding officer. Order 888 was improperly issued by Chair Drew instead of the  
23 full Council and is therefore invalid.  
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1                    ***B. Yakama Nation’s Due Process Rights***

2                    Yakama Nation’s has fundamental due process rights in this adjudication, which include  
3 the right to conduct cross-examination and submit rebuttal evidence. The APA, which governs  
4 this adjudication, requires that “[t]o the extent necessary for full disclosure of all relevant facts and  
5 issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence  
6 and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a  
7 limited grant of intervention or by the prehearing order.” WAC 34.05.449(2). There was no  
8 limitation or restriction of due process placed upon Yakama Nation as an intervening party or in  
9 any prehearing orders.  
10

11                    Whether the Council considers the issue of calling WDFW biologists to testify from a  
12 cross-examination versus a rebuttal standpoint, both avenues are fundamental components of due  
13 process under the APA. As Judge Torem stated in his most recent order “[i]t is well established  
14 that cross-examination is an integral part of all proceedings, whether criminal or civil.” Order on  
15 Supplemental Testimony (September 22, 2023) at 2. While legal precedent allows for the  
16 presiding officer to limit cross-examination, such limitations must be grounded in delineated  
17 reasons, none of which Order 888 references. The ability of all parties to call rebuttal witnesses is  
18 also a fundamental component of due process, one that was already afforded in a different  
19 circumstance to other parties in the adjudication. As legal counsel for the Scout Clean Energy  
20 stated when discussing the recall of witnesses Mr. Wiley and Ms. Cook, “. . . all along we’ve  
21 reserved the right to provide rebuttal witnesses in response to live testimony that we hear today.”  
22 Adjudication Hearing Day 3 Transcript, pgs. 439-40. Yakama Nation reserved that same right  
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1 throughout the adjudication, including during the adjudication schedule workshop process with  
2 Judge Torem and other parties.

3 ***C. Order 888 Violates Yakama Nation's Due Process Rights***

4 Order 888 prejudices Yakama Nation without any factual justification or legal support for  
5 its limitation on Yakama Nation's due process rights under the APA. Yakama Nation moved for  
6 permission to question Mr. Watson and Mr. Fidorra during the adjudication in order to develop as  
7 complete a record as possible for the Council to determine whether or not the Project will sufficiently  
8 avoid, minimize, and mitigate impacts to wildlife and habitat. Order 888 prejudices Yakama Nation's  
9 ability to develop that record and fully advocate to the Council regarding the Project's wildlife and  
10 habitat impacts.  
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12 Order 888 correctly states that WDFW did not elect to participate as a party in the  
13 adjudication; but then erroneously relies upon a contract provision between EFSEC and WDFW  
14 that is *only triggered if WDFW is a party in the adjudication*. See Order 888 1-2. Putting aside  
15 the question of whether or not EFSEC can legally contract its way around APA due process  
16 requirements, the contract at issue simply does not apply to Yakama Nation's request. A plain  
17 reading of the contract at issue shows that the contract has no bearing on any witness participation  
18 if WDFW elects not to participate as a party. Order 888's reliance on this contract provision is  
19 mistaken and should be reconsidered.  
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21 To the extent that Order 888 also relies upon WAC 463-30-200(5), such reliance is unclear  
22 and unsupported by the factual record. There is no evidence in the record that either Mr. Watson  
23 or Mr. Fidorra are independent consultants of EFSEC. The only WDFW employee that may  
24 arguably fall within that category is Michael Ritter, whose testimony is not at issue here and whose  
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1 deposition subpoena was also unchallenged by any party or EFSEC. If EFSEC had a factual basis  
2 to assert otherwise, it chose not to do so when it had an opportunity to file motions to squash the  
3 subpoenas issued by Yakama Nation earlier this year. Order 888 accurately states that Yakama  
4 Nation did not depose Mr. Watson or Mr. Fidorra regarding EFSEC's SEPA review process, but  
5 that is not relevant to Yakama Nation's present motion to call both biologists as witnesses to the  
6 adjudication because the adjudication has likewise been limited to issues unrelated from the  
7 ongoing SEPA review.  
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9 Order 888 prejudicially limits Yakama Nation's due process rights without a legal basis.  
10 Instead, it asks the reader to either: i) infer a tenuous connection to a contract provision that by its  
11 clear terms does not apply; or ii) rely upon the limitation in WAC 463-30-200(5) even though  
12 neither requested witnesses are independent contractors *and* no party to the adjudication  
13 challenged any of the subpoenas issues to WDFW under this provision – including the subpoena  
14 for Michael Ritter's deposition.  
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16 ***D. The Deposition Transcripts Do Not Adequately Replace Adjudication Testimony***

17 Order 888 suggests that the Council does not need additional testimony from Mr. Watson  
18 and Mr. Fidorra because their deposition transcripts have been admitted into the record.<sup>1</sup> This is  
19 a matter of a party's due process rights rather than the decision maker's interest in limiting how  
20 parties can develop their cases. Even so, Yakama Nation respectfully disagrees that the Council  
21 will fully receive the benefit of the WDFW employee's expertise without additional testimony.  
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23 <sup>1</sup> Yakama Nation notes and further objects to the ability of Scout Clean Energy LLC to call Dave  
24 Kobus for adjudication testimony following Scout Clean Energy LLC's late submission of  
25 significant new evidence into the record, and in spite of applicant's refusal to provide direct  
26 testimony by Mr. Kobus or any representative of Scout Clean Energy. Order 888 fails to address  
or reconcile the different procedural treatment of the applicant from other parties seeking to call  
witnesses before the Council for rebuttal or cross examination.

1 See Order 888 at 2. Depositions, used primarily as a discovery tool in legal proceedings, are  
2 naturally limited by the scope of the record at the time that they occur.

3 Mr. Watson and Mr. Fidorra’s depositions were taken before significant portions of the  
4 adjudication record were developed. Both depositions were taken before Mr. Kobus’ deposition,  
5 which is now part of the record as well but was conducted so late as to limit the ability of the other  
6 parties to develop further discovery requests or witness testimony. Despite WAC 463-60-116(2)’s  
7 requirement that the applicant submit application amendments to the Council no less than thirty  
8 days prior to the adjudication hearing, Judge Torem admitted additional design modifications into  
9 the record on the eve of the adjudication. See Adjudication Hearing Day 1 Transcript, pg. 28.  
10 Many of those modifications relate directly to the subject matter expertise of Mr. Watson and Mr.  
11 Fidorra. See EXH\_4014\_X at 2-6. During the adjudication hearing, there was also significant  
12 testimony from applicant’s biologists and Mr. McIvor – as well as many thoughtful questions from  
13 the Council – regarding wildlife impacts that Mr. Watson and Mr. Fidorra carry their own expertise  
14 on. See, e.g., Adjudication Hearing Day 2 Transcript, pg. 379; Day 5 Transcript, pgs. 976-78; Day  
15 6 Transcript, pgs. 1236-37; Day 6 Transcript, pgs. 1242-43. These are just a few examples of the  
16 important factual developments or queries in the record.  
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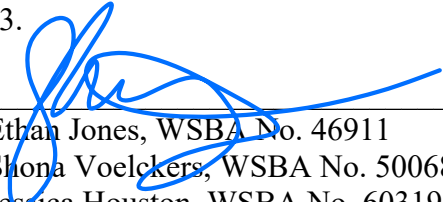
19 Equally important as the record that has already come before the Council is the ability of  
20 all parties to respond to new factual developments or Council queries using the due process tools  
21 provided under the APA. Under WAC 34.05.449(2), testimony with the ability by all parties to  
22 question Mr. Watson and Mr. Fidorra is necessary for “. . .full disclosure of all relevant facts and  
23 issues. . .” Yakama Nation, like the other parties to this adjudication, has the right to “. . . respond,  
24 present evidence and argument, conduct cross-examination, and submit rebuttal evidence. . .” in  
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1 this adjudication. *Id.* This is not a situation where Yakama Nation failed to adequately pursue a  
2 complete factual record earlier in the adjudication proceedings; rather, it was stymied by EFSEC  
3 staff from developing a complete record. Order 888 erroneously compounds this problem and  
4 impermissibly limits Yakama Nation's due process rights under the APA.

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6 **IV. Conclusion**

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8 Yakama Nation respectfully requests that the Council reconsider Order 888 and allow  
9 Yakama Nation to call and question WDFW employees James Watson and Jason Fidorra in this  
10 proceeding.

11 Dated this 25th day of September, 2023.

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25  
26 *Counsel for Yakama Nation*



**CERTIFICATE OF SERVICE**

I, Shona Voelckers, certify that on September 25, 2023 I electronically filed the foregoing document with the Energy Facility Site Evaluation Council (“EFSEC”) at Adjudication@efsec.wa.gov.

I further certify that on September 25, 2023 I served the same upon all parties of record and identified EFSEC staff in this proceeding by electronic mail as follows:

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Dated this 25th day of September, 2023.

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