

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

YAKAMA NATION'S OBJECTIONS TO
PREHEARING ORDER NO. TWO

I. INTRODUCTION

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) objects to Prehearing Conference Order No. 2 (“PHO No. 2”) issued under the signature of Administrative Law Judge Adam Torem (“ALJ”) on May 19, 2023. In accordance with WAC 463-30-270(3), Yakama Nation respectfully requests that the presiding officer in Docket No. EF-210011 amend PHO No. 2 consistent with the objections below. In addition, Yakama Nation requests that the presiding officer establish procedural clarity for how the Energy Facility Site Evaluation Council (“EFSEC”) and ALJ will conduct the remainder of this proceeding to ensure compliance with Chapter 34.05 RCW and WAC 463-30-020.

II. OBJECTIONS

A. Timing Delays and Improper Characterization of Prehearing Order No. 2

Yakama Nation objects to the ALJ’s failure to issue a prehearing order following the second prehearing conference, held on March 20, 2023. *See* Notice of Call-In Procedures for Prehearing Conference, March 20, 2023. Pursuant to WAC 463-30-270, “[f]ollowing the prehearing conference, the presiding officer shall issue an order reciting the action taken at the conference, the amendments allowed to the pleadings, the agreements made by the parties concerning all of

the matters considered and other matters as appropriate.” The ALJ issued no such order after the March 20, 2023 prehearing conference.

Instead, the ALJ waited almost two months after the second pre-hearing conference, and almost two weeks after the third pre-hearing conference to issue PHO No. 2, which states that PHO No. 2 is, in part, “[b]ased on the parties’ inputs and discussions at the [second and third] pre-hearing conferences.” Yakama Nation has been significantly prejudiced by these delays. Instead of addressing the Yakama Nation’s objections to topics discussed during the second prehearing conference in the six weeks between the second prehearing conference and PHO No. 2, Yakama Nation is now forced to address objections to two prehearing conferences during a far more compressed litigation schedule—six weeks more compressed to be exact. While we cannot recover the time lost, we ask that the presiding officer rectify this prejudice by addressing the specific objections listed below.

B. Apparent Violations of Administrative Procedure Act Limits on Ex Parte Communication And Appearance Of Fairness Doctrine

Yakama Nation is concerned that PHO No. 2 appears to have been impermissibly based upon *ex parte* communications and potentially violates EFSEC’s own regulations as an *ultra vires* action by the ALJ and/or EFSEC Chair Kathleen Drew. Given these concerns, Yakama Nation objects in whole to PHO No. 2 and requests clarification regarding the roles of the ALJ, Chair Drew, and the full EFSEC council in the above-captioned proceeding.

With some exceptions, the Administrative Procedures Act (“APA”) contains limitations on *ex parte* communications:

[A] presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate. . .

RCW 34.05.455(1). The exceptions to this rule contemplate communications between members of an agency body, communications between the presiding officer and staff over which the presiding officer has supervisor authority, legal aid to the presiding officer, and communications between the presiding officer and agency employees or consultants who have not participated in the proceeding. *Id.* EFSEC may satisfy most of these exceptions if the full council is in fact exercising its authority as the presiding officer. The only exception that might apply to the ALJ, assuming he is acting as the presiding officer, is the ability for him to receive aid from legal counsel. *See* RCW 34.05.455(1)(b). Because of the lack of clarity regarding which individual or group is exercising authority as the presiding officer at this point in the adjudication, it appears that impermissible *ex parte* communications likely formed the basis of PHO No. 2.

EFSEC's own regulations clearly delineate EFSEC's role as presiding officer under the APA from the ALJ's role:

The council is the presiding officer at adjudicative proceedings pursuant to chapters 34.05 and 80.50 RCW. The council may utilize an administrative law judge provided by the office of administrative hearings to facilitate conduct of administrative hearings and all matters related thereto.

WAC 463-30-020. The plain language of this regulations shows that the ALJ's role is administrative, not decisional.

PHO No. 2, signed by the ALJ, contains substantive provisions regarding the scope of the adjudication and infers decision making authority by the ALJ as the presiding officer instead of EFSEC. This assertion of authority is not only contrary to WAC 463-30-020; it conflicts with the ALJ's own statements that he is not the ultimate authority on multiple topics, both substantive and procedural. *See* First Pre-Hearing Conference Transcript, pg. 16, March 10, 2023; *Id.* at pg. 26 ("I will see what Chair Drew wants to do [about venue], and her decision will be final."); *Id.* at 75;

Id. at 81 (“I’m simply a presiding officer making rulings on the evidence that the council has to consider.”); *See also* Second Pre-Hearing Conference Transcript, pg. 8; Third Pre-Hearing Conference Transcript, pg. 10, 16, 78.

If the ALJ is, in fact, the presiding officer for the adjudication, Yakama Nation objects to his issuance of PHO No. 2 for violating WAC 463-30-020, and objects to all communications the ALJ had with the EFSEC Chair and staff that are not strictly procedural in violation of RCW 34.05.455(1). If EFSEC is the presiding officer, consistent with WAC 463-30-020, Yakama Nation objects to PHO No. 2 because it is not executed by the full council. In addition, if EFSEC’s full council is the presiding offer, Yakama Nation remains concerned about potential *ex parte* communications in violation of the APA.

There is no room in the APA or EFSEC’s own regulations for the ALJ, EFSEC Chair, and EFSEC staff to collaborate on the contents of prehearing orders without allowing the full council to exercise its statutory authority on these critical issues that are the subject of PHO No. 2. Yakama Nation respectfully requests immediate clarification on the identity of the presiding officer in the above-captioned proceeding, the role of the ALJ, and the extent of communications between the ALJ, EFSEC Chair, and EFSEC staff regarding PHO No. 2.

C. Prejudice To Yakama Nation Witnesses Conveying Culturally Sensitive Information Through Virtual Hearing, Rather Than In-Person Hearing

Yakama Nation formally objects to a virtual hearing for the same reasons and concerns articulated in Yakama Nation’s March 23, 2023 and May 4, 2023 letters. A virtual hearing will inhibit Yakama Nation’s witnesses’ ability to effectively communicate sensitive cultural information, prejudicing the Yakama Nation’s abilities to advocate for its rights and interests.

Furthermore, Yakama Nation objects to the process by which EFSEC reached the decision to hold the hearing virtually. Yakama Nation raised concerns about the hearing venue during the

first pre-hearing conference, where the ALJ stated his own preference for an in-person hearing. First Pre-hearing Conference Transcript, pg. 15-16, March 10, 2023. After the ALJ requested written feedback from all parties on the matter, the EFSEC Chair issued a letter on March 28, 2023 explaining her decision to hold the entire hearing virtually. In doing so, the EFSEC Chair decided against the ALJ's and most parties' own preference for an in-person or hybrid hearing, and apparently without the input of EFSEC's full council in violation of WAC 463-30-020.

The EFSEC Chair's decision is now encapsulated within PHO No. 2, but the Chair did not address many of the concerns raised by Yakama Nation and other parties. *See* Letter from Kathleen Drew to the Parties, March 28, 2023. From the earliest stage of this adjudication, Yakama Nation has consistently advised the ALJ on the difficulties that a virtual hearing will create for Yakama Nation's witnesses. First Pre-Hearing Conference Transcript, pg. 18-19 March 10, 2023 ("So that the request is that the Yakama Nation members, elders with knowledge of the oral traditions of the nation that are not comfortable engaging in written testimony, still be able to bring that direct testimony in the hearing itself."); Letter from the Parties to ALJ regarding Procedural Considerations, March 1, 2023; Letter from Yakama Nation to ALJ and Chair Drew regarding Venue, March 23, 2023. Yakama Nation is also concerned about the limitation on its witnesses' ability to effectively use maps in a virtual forum. *Id.* The EFSEC Chair's justification for holding the hearing virtually wholly ignores many of the practical reasons that the parties articulated for having the hearing in-person, especially given its nature as an adjudicative process rather than a routine agency check-in meeting. *See* Letter from Kathleen Drew to Parties regarding venue, March 28, 2023.

Lastly, no party has demonstrated a limitation on their witnesses to participate in an in-person hearing, which the EFSEC Chair cites as the primary reason for holding the hearing

virtually in the interest of fairness. *Id* at 1-2. Instead, the Chair’s decision, now adopted by PHO No. 2, cites to the financial inconvenience that Scout Clean Energy, LLC (“Applicant”) will bear. *Id* at 2. With this decision, the Applicant’s pocketbook has been elevated above the cultural concerns of Yakama Nation’s members, and above witnesses’ ability to effectively communicate their positions. Yakama Nation wholly objects to PHO No. 2’s provisions regarding a virtual hearing because it is prejudicial to Yakama Nation and is an impermissible exercise of the EFSEC Chair’s authority contrary to the ALJ’s position and without concurrence from the full council.

D. PHO No. 2 Improperly Discards The Parties’ Disputed Issues Statements

Yakama Nation’s disputed issues were submitted on March 20, 2023 in response to the ALJ’s verbal and written instructions and consistent with EFSEC precedent. *Compare* Letter from Yakama Nation and Benton County to Judge Torem regarding Joint Statement of Disputed Issues, March 9, 2023, *and* Yakama Nation’s Preliminary List of Disputed Issues, March 20, 2023, *with* PHO No. 2, pg. 2-3; *see also* First Pre-Hearing Conference Transcript, March 10, 2023; Agenda for Pre-Hearing Conference #2, March 17, 2023. PHO No. 2 omits, without explanation, the clear issue statements submitted by Yakama Nation in accordance with the ALJ’s clear direction and consistent with the ALJ’s example issue statements. *See* First Pre-Hearing Conference Transcript, pg. 87-90, March 10, 2023; Pre-Hearing Conference Order 1 at pg. 2, March 17, 2023. This omission is particularly prejudicial to Yakama Nation given the complete lack of objection to Yakama Nation’s issue statements by any party of record. *See* Second Pre-Hearing Conference Transcript, pg. 58-61, March 20, 2023. PHO No. 2 should be amended to include all issue statements submitted by Yakama Nation on March 20, 2023.

The disputed issues list also erroneously omits clear issue statements submitted by other parties that were not objected to by any party and that Yakama Nation was advised by the ALJ that

Yakama Nation would be able to join in this proceeding. *See* Second Pre-Hearing Conference Transcript, pg. 53 (Judge Torem recognized that Counsel for the Environment’s five issue statements got the “first unanimous grouping on something of substance”). EFSEC is required to issue clear findings of fact and conclusions of law as a result of the adjudication. WAC 463-30-320. The vague issue list in PHO No. 2, apparently created through impermissible collaboration between the ALJ, EFSEC Chair, and EFSEC staff, weakens the parties’ ability to advocate for clear findings and conclusions.

E. EFSEC’s Adjudication Schedule Raises Procedural Concerns That Prejudice Yakama Nation In This Proceeding

Yakama Nation objects to the adjudication schedule as unreasonable and prejudicial. EFSEC is not affording sufficient time for the parties to develop a complete record upon which EFSEC will make its ultimate recommendation. Initially, all parties considered a rigid timeline between the first prehearing conference and the ultimate hearing date, but subsequent weeks-long delays by EFSEC and the ALJ have grossly compressed those deadlines. The presiding officer should amend PHO No. 2 to set a schedule that allows all parties adequate time for discovery, direct witness preparation, and responsive testimony. Such a schedule would afford the parties due process and also provide EFSEC with a more complete record upon which to base its recommendation.

Applicant first filed its application for site certification for the Horse Heaven Hills project on February 21, 2021. In the 27 months since the Applicant first filed the application, the Applicant has agreed to a deadline extension twice. EFSEC has not acted on the Applicant’s most recent extension request so there is currently no practical deadline. *See* Pre-Hearing Conference Agenda #3, pg. 2 (“EFSEC is working with the Applicant and its pending Third Extension Request which requests an extension through September 30, 2023.”). EFSEC has declined to provide a

deadline for the environmental analysis it is conducting currently under the State Environmental Policy Act. While the deadline extension is in limbo, PHO No. 2 sets an artificially compressed schedule for witness testimony and, although it allows the parties to conduct discovery, does not include any room for discovery in the adjudication schedule.

Specific to the deadlines for witness testimony, PHO No. 2 gives all parties only 14 business days to prepare, file, and serve direct testimony from its date of publication. PHO No. 2. PHO No. 2 then provides even less time for responsive testimony, which the parties cannot reasonably prepare until they receive the direct testimony that they will be responding to. For this reason, as well as the entire schedule, Yakama Nation renews our objection to the pre-filed testimony deadlines for the same reasons outlined in Yakama Nation's Motion to Continue the Adjudication. Fourteen days is an insufficient amount of time for Yakama Nation or any other party to properly prepare testimony, and the responsive testimony deadline is even less realistic.

F. Scope of Verbal Testimony

Yakama Nation objects to the exclusion of supplemental witness testimony during the August hearing. Counsel for the Applicant memorialized the parties' joint procedural recommendations in a letter to the ALJ on March 1, 2023. Letter from Parties to ALJ re Procedural Considerations, March 1, 2023. Among other topics, the parties agreed to "[s]ubmission of pre-filed witness testimony for direct, reply, and rebuttal testimony, *with supplemental live testimony* (provided it is within the scope of the pre-filed testimony), and live cross-examination of any witness who has submitted written testimony." *Id.* (emphasis added). PHO No. 2 should be amended to include the ability of all witnesses to provide supplemental testimony to EFSEC.

G. Absence of Oral Arguments

Yakama Nation objects to the exclusion of any oral advocacy by the parties's legal counsel. PHO No. 2, pg. 3. This adjudication is the only opportunity for EFSEC to hear directly from all parties regarding the impacts of the Project. PHO No. 2 leaves no opportunity for legal counsel to engage directly with EFSEC's full council on the issues of importance, or for the council to ask any questions directly of legal counsel. All parties should be afforded an opportunity to speak directly to the council and answer questions. PHO No. 2 should be amended accordingly.

H. Scope of Yakama Nation's Participation as Intervenor

Yakama Nation objects to PHO No. 2's provisions limiting the Nation's participation as a party in this proceeding. Up until PHO No. 2 was issued on May 19, 2023, there was no discussion or indication that Yakama Nation would be limited as a party in any way. Although the Applicant objected to the scope of Tri-Cities C.A.R.E.S.'s participation as intervenor, it filed no response or request for limitation on Yakama Nation's participation. And while the Preliminary Order on Intervention issued March 9, 2023 did note that the "[d]etermination of the exact scope of [Yakama Nation and Tri-Cities C.A.R.E.S.'] intervention is reserved", the ALJ went on to clarify that after the first pre-hearing conference, "the undersigned ALJ will establish appropriate conditions and/or limits for the scope of interventions *for Tri-Cities C.A.R.E.S.*" Preliminary Order on Intervention, pg. 1-2 (emphasis added). The ALJ also verbally confirmed Yakama Nation's full participation as intervenor. *See* First Pre-Hearing Conference Transcript, pg. 13, March 10, 2023 ("There was no objection to the Yakama Nation's petition or the scope of intervention."); *id.* at 53 ("Everybody has independent, full-party status . . .").

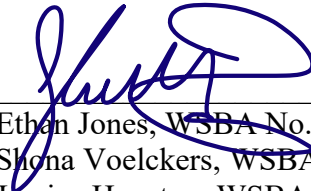
Now, without warning or explanation, the ALJ has impermissibly narrowed the scope of Yakama Nation's intervention by requiring the Nation to:

“(a) coordinate its presentation of evidence related to the visual aspects, light, and glare with the County and Counsel for the Environment who shall jointly take lead party status for the issue and (b) coordinate its presentation of evidence related to recreation or recreational land use; transportation; and roadway safety issues with the County who shall be the lead party on those issues.”

PHO No. 2, pg. 5.

The limitations on the scope of Yakama Nation’s participation as a party in PHO No. 2 is not only objectionable on the basis explained above, it is also prohibited by Yakama Nation’s Treaty-reserved rights. Treaty of 1855 between the United States and Yakama Nation, 12 Stat. 951 [hereafter “Treaty of 1855”], *see* U.S. Const. art. VI, para. 2. Yakama Nation reserved, through the Treaty of 1855, not only the right to hunt and gather its traditional foods, but also the right to access those Treaty-reserved resources. *United States v. Winans*, 198 U.S. 371, 381 (1905). This right of Yakama Nation members to access their traditional gathering locations extends across private lands as well as public. *Id.* Requiring Yakama Nation to coordinate with other parties and take a backseat on factual evidence or arguments which implicate the Nation’s Treaty-reserved rights is improper and prejudicial, and all limitations on the scope to Yakama Nation’s intervention should be removed from PHO No. 2.

Dated this 30th day of May, 2023.



Ethan Jones, WSBA No. 46911
Shona Voelckers, WSBA No. 50068
Jessica Houston, WSBA No. 60319
YAKAMA NATION OFFICE OF LEGAL COUNSEL
P.O. Box 151 / 401 Fort Road
Toppenish, WA 98948
Telephone: (509) 865-7268
ethan@yakamanation-olc.org
shona@yakamanation-olc.org
jessica@yakamanation-olc.org

Counsel for Yakama Nation


CERTIFICATE OF SERVICE

I, Shona Voelckers, certify that On May 30, 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 May 30, 2023 I served the foregoing document upon all parties of record and identified EFSEC staff in this proceeding by electronic mail consistent with the following electronic service list:

Party	Counsel of Record
Scout Clean Energy, LLC	Tim.Mcmahan@stoel.com Ariel.Stavitsky@stoel.com Emily.Schimelpfenig@stoel.com
Benton County	Kharper@mjbe.com Zfoster@mjbe.com Julie@mjbe.com
Counsel for the Environment	Sarah.Reyneveld@atg.wa.gov CEPSeaEF@atg.wa.gov Julie.Dolloff@atg.wa.gov
Tri-Cities C.A.R.E.S	Rick@aramburulaw.com Aramburulaw@gmail.com
EFSEC	AdamTorem@writeme.com Jonathan.Thompson@atg.wa.gov Lisa.Masengale@efsec.wa.gov Sonia.Bumpus@efsec.wa.gov Andrea.Grantham@efsec.wa.gov Alex.Shiley@efsec.wa.gov

Dated this 30th day of May, 2023.



Shona Voelckers, WSBA No. 50068
Counsel for Yakama Nation