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4 BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL
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6 In the Matter of the Application of:

7 Scout Clean Energy, LLC, for
8 Horse Heaven Wind Farm, LLC,
9 Applicant.

DOCKET NO. EF-210011

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12 REQUEST FOR LEAVE TO FILE
13 MOTION FOR
14 RECONSIDERATION AND
15 PETITION FOR
16 ADMINISTRATIVE REVIEW
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I. BACKGROUND.

On July 28, 2023, the PALJ issued his “Order Granting Applicant’s Motion to Strike TCC Testimony of Rick Dunn, Paul Krupin, David Sharp and (in Part) Richard Simon” (the “Striking Order”). This Order indiscriminately strikes pages of testimony and exhibits important to the presentation of TCC. With due respect, the “Order” entered contains multiple errors of law and fact and is inconsistent with previous orders entered in this adjudication of Applicant Scout Clean Energy’s (SCE) Updated Application for Site Certification (UASC). In that application, SCE claims the Project site: “represents a commercially viable wind resource area that is favorable for regional utilities as it is coincident with peak loading demand.” See UASC at page 2-118. Indeed, the testimony stricken addressed one of the “disputed issues approved for presentation of evidence and supporting witnesses,” identified in the “Second Prehearing Conference Order” (May 19, 2023) (PHO#2) at page 2. Among the “approved issues” was “4) Societal/Economic Impacts,” which specifically included: “Overall Scope and Scale of the Horse Heaven Wind Project.” *Id.*

REQUEST FOR LEAVE TO FILE MOTION FOR
RECONSIDERATION AND PETITION FOR
ADMINISTRATIVE REVIEW - 1

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1 On page 3 of PHO#2, there were just four “Issues Excluded from Adjudication”
2 which were (1) preemption of land use plans, (2) GMA compliance, 3) SEPA
3 compliance and 4) greenhouse gas emissions reductions analysis. The Striking Order
4 does not conclude that any of the stricken testimony was included within this list of
5 “excluded issues.”

6 The Striking Order removes significant portions of testimony by TCC relating to
7 SCE’s proposal.¹

8 **II. REQUEST FOR LEAVE TO FILE MOTION FOR RECONSIDERATION.**

9 In ordinary course, TCC would file a request for reconsideration of the PALJ’s
10 expansive order as expressly permitted by the Administrative Procedures Act (APA)
11 RCW 34.05.470. However, TCC is mindful of the provision in PHO#2 (page 2)
12 regarding procedures for striking testimony that, following the decision of the PALJ:
13 “No motions for reconsideration will be entertained.” Given the breadth of the
14 testimony stricken, and the serious issues regarding the Striking Order, TCC
15 respectfully requests that the PALJ allow TCC to file a motion for reconsideration of the
16 recently entered order.²

17 If the Striking Order controls the course of proceedings through the adjudication,
18 the only opportunity for addressing and correcting errors will be during judicial review.
19 With the usual remedy for improper striking of substantial testimony being a new trial or
20 hearing, potential correction of error is critical during this adjudication to assure that
21 hearings, recommendations and the Governor’s action will not have to be repeated.

23 ¹ The Striking Order eliminates 117 pages of Mr. Krupin’s testimony, with documentary, pictorial and
24 graphic evidence, without any attempt to distinguish among the several subjects of his testimony,
25 including the failure of the UASC to describe the Project presented. Exhibit 5303_T, which contains
26 letters from community organizations and is responsive to provisions in PHO#2 regarding “the witness’
27 significance as a representative of the local area” is stricken without discussion.

28 ² As stated in prior motions and responses, this request and motion does not waive the continuing
request that the Presiding ALJ recuse himself filed on May 25, 2023 by TCC.

1 Such result would create significant cost and delay to all concerned, especially to local
2 nonprofit corporations addressing the public interest.

3 TCC respectfully requests that it be permitted to file a Motion for
4 Reconsideration of the Striking Order, subject to timing, procedures and
5 responses/replies as specified by the PALJ in his prospective order.

6 **III. REQUEST FOR REVIEW OF THE STRIKING ORDER. RCW 34.05.464.**

7 The Striking Order appears to be an “initial order” which can be made by the
8 presiding officer, here the PALJ. RCW 34.05.461. The Striking Order does not state
9 whether EFSEC Council, the EFSEC Director or the EFSEC Chair was consulted or
10 advised regarding its content; WAC 463-30-020 makes clear that “the council is the
11 presiding officer at adjudicative proceedings pursuant to Chapters 34.05 and 80.50
12 RCW.” This section indicates that “the council may utilize an administrative law judge
13 provided by the office of administrative hearings to facilitate conduct of administrative
14 hearings and all matters related thereto. Administrative hearings shall be governed by
15 34.05 RCW and this chapter.” This section appears to provide that the presiding ALJ
16 will “facilitate conduct” of hearings, not make substantive decisions of the magnitude
17 found in the Striking Order in the place of the Council itself.

18 Moreover, RCW 34.05.464(1) provides that “initial orders in specified classes of
19 cases may become final without further agency action. . . .” The Striking Order does not
20 state whether it is a final or initial order. The statute further provides that an “initial
21 order” may become final unless “(b) a party to the proceedings files a petition for
22 administrative review of the initial order.” Subsection 4 of the statute provides that: “(4)
23 The officer reviewing the initial order (including the agency head reviewing an initial
24 order) is, for the purposes of this chapter, termed the reviewing officer.”

25 In the present case, it appears that the Striking Order is an initial order under the
26 statute and the structure of EFSEC, made by a presiding ALJ, not the Council itself.

1 Accordingly, TCC requests that this pleading be considered “a petition for
2 administrative review of the initial order” under RCW 34.05.464. This statute provides
3 that the “petition for administrative review” be noticed to all parties and allows all
4 parties to present written argument. Subsections (4) and (6).

5 TCC requests that the “reviewing officer” reverse the decision of the PALJ and
6 order the testimony of witnesses Dunn, Sharp, Krupin and Simon to be included in the
7 record for review and determination by the full EFSEC Council.

8 **IV. CONCLUSION AND REQUESTED RELIEF.**

9 As indicated above, TCC believes that the Striking Order includes serious errors
10 of law and fact, and is inconsistent with prior orders in this proceeding. Accordingly, we
11 request the PALJ to allow modification of PHO#2 and allow TCC to file a motion for
12 reconsideration of the Striking Order. In addition, TCC requests that it be allowed to
13 file a petition for administrative review of the initial order, under procedures to be
14 established.

15 DATED this 1st day of August, 2023.

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17 /s/
18 J. Richard Aramburu, WSBA #466
19 Attorney for Tri-Cities C.A.R.E.S.

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DECLARATION OF SERVICE

I hereby certify that I have this day served the foregoing pleading upon all parties of record in this proceeding (listed below my signature block) by authorized method of service pursuant to WAC 463-30-120(3) to the email addresses for parties as provided.

Dated at Seattle, Washington this 1st day of August, 2023.

/s/

Carol Cohoe, Legal Assistant
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