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7 BEFORE THE STATE OF WASHINGTON
8 ENERGY FACILITY SITING EVALUATION COUNCIL

9 In the Matter of the Application of:

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

DOCKET NO. EF-210011

12 TRI-CITIES C.A.R.E.S.
13 OPPOSITION TO APPLICANT'S
14 MOTION TO STRIKE PREFILED
15 TESTIMONY OF TCC
16 WITNESSES RICK DUNN, PAUL
KRUPIN, DAVID SHARP AND
RICHARD SIMON

17 **I. INTRODUCTION.**

18 Recognizing the import of the testimony from several Tri-Cities C.A.R.E.S. (TCC)
19 witnesses, the applicant has decided not just to file responsive testimony to those
20 important witnesses, but rather to file a motion to strike such testimony. Applicant is so
21 desperate that it even stoops to attempting to intimidate a TCC witness (Mr. Simon) by
22 speculation about a possible improper use of data.

23 Each of these objections should be overruled and the motion to strike denied.¹

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27 ¹This opposition does not waive TCC's continuing request that the presiding ALJ recuse himself from
these proceedings.

1 **II. EACH OF THE PARTICULAR CLAIMS TO STRIKE SHOULD BE DENIED.**

2 2.1 The Motion to Strike Ignores the Responsibility of this Council to Balance
3 Energy Need with the Broad Public Interest.

4 It is quite natural for Scout to object to any testimony that puts into question the
5 value of its project. It claims that TCC witnesses are attacking the “need for the facility”
6 and such testimony is not permitted. While it is true the EFSEC organic legislation
7 recognizes that a need exists for increased energy projects, that legislation carefully does
8 not state that every project, however limited in its energy production and value, gets the
9 automatic approval as applicant would like. RCW 80.50.010 explicitly states:

10 It is the policy of the state of Washington to recognize the pressing need for
11 increased energy facilities, and to ensure through available and reasonable
12 methods that the location and operation of all energy facilities and certain clean
13 energy product manufacturing facilities will produce minimal adverse effects on the
14 environment, ecology of the land and its wildlife, and the ecology of state waters
15 and their aquatic life.

16 The purpose and intent of RCW 80.50.010 makes clear that a balancing test must be
17 applied by this Council:

18 It is the intent to seek courses of action that will balance the increasing
19 demands for energy facility location and operation in conjunction with the
20 broad interests of the public.

21 Another key “premise” for Council decision-making is: “**(4) To provide abundant clean**
22 **energy at reasonable cost.**” (Emphasis added.)

23 Well-documented proof of this balancing of the need for new facilities with other
24 interests is required by case law as well. *Friends of the Columbia Gorge, Inc. v State*
25 *Energy Facility Site Evaluation Council*, 178 Wash 2d 320, 340 (2013):

26 Chapter 463–62 WAC's purpose is to “implement” the legislative policy found in
27 RCW 80.50.010, namely, to balance the need for new energy production with
28 environmental and societal considerations. “The council shall apply these rules to
site certification agreements issued” by the council. WAC 463–62–010(1).

In a more succinct language, the Court pointed out the main issue in EFSEC
adjudication: “Accordingly, it found the main issue to be determining if the project would
create a net benefit after considering the impacts.” *Friends, supra*, 178 Wash 2d at 330

1 (2013).²

2 These criteria show that given the balancing test, an analysis of the performance
3 of this project is a relevant matter for Council review. For example, the applicant concedes
4 the project will involve “overbuilding nameplate capacity,” Poulos testimony at page 16,
5 lines 23-25, and that the BPA grid is capable of absorbing only 850 MW of its claimed
6 nameplate capacity. *Id.* While applicant dismisses these factors, they are important to the
7 overall balancing test and must be appropriately documented and considered.³

8 The motion to strike on this basis is without support and should be denied.

9 2.2 TCC’s Witnesses Appropriately Challenge the Value of the Project and Its
10 Integration into Existing Power System.

11 Several of TCC’s witnesses have questioned the usefulness of the applicant’s
12 proposal. For example, Rick Dunn, the manager of Benton County PUD, notes that while
13 the applicant’s project will produce electricity, it has a very low “Effective Load Carrying
14 Capacity,” i.e. the ability of a project to meet loads, and the project also has low output
15 during the region’s cold snaps that drive peak load events. See Testimony at page 6, lines
16 1-12 (EXH-5202_T). These are the inconvenient truths inherent in this project that must
17 be taken into account in the balancing with the public interest, environmental and social
18 impacts. So too are questions of the cost of the power from this proposal as opposed to
19 other alternatives. While Scout would prefer that the Council put on blinders on these
20 subjects, they are a necessary, crucial and mandatory element of the balancing review that
21 the statute requires and this Council has acknowledged.

22 Similarly, Scout criticizes Mr. Sharp’s testimony because it addresses what BPA can

23 ²This was consistent with the Council Decision in Whistling Ridge in its Order No.868, “Adjudicative
24 Order Resolving Contested Issues.” At page 32, the Council indicated that it was “exercising its duty to
25 balance the state’s need for energy at reasonable cost with the need to protect the environment and the
26 health and safety of the residents of the local area.”

26 ³Indeed, in Order 868, the Council specifically noted:

27 “We do not find support in the record for the assumption that forest lands are by definition more
28 worthy of protection than the shrub steppe land in Eastern Washington.” See page 27.

1 accept in the transmission system (Sharp testimony, EXHIBIT-5402_T at 1). However, that
2 issue is specifically included in the application (added in the Updated Application on
3 December 1, 2022, at pages 2-15 to 2-18). Once again, the applicant complains about
4 every discouraging word about its application and proposal. While this effort is
5 understandable, it is wholly inconsistent with the responsibility of the Council

6 At pages 6-7 of its motion, the applicant objects to speculative testimony. Of
7 course, the applicant's entire submission is speculative. It does not identify any off-taker
8 or destination for the power produced here, it even suggests that the output might go to
9 a large commercial concern like Amazon, Google, etc., which will do nothing to reduce the
10 carbon footprint of the state of Washington. Does the project result in "net benefit" after
11 considering all circumstances? The testimony of TCC's witnesses is relevant to this
12 subject.

13 In any event, the applicant has submitted testimony of Mr. Poulos that purports to
14 directly rebut these witnesses, including Messrs. Dunn and Simon, so these issues are
15 clearly joined for Council review. This Council has been recently directed by the
16 Legislature to assure that its decision-making process incorporate "encouraging
17 meaningful public comment and participation in energy facility decisions" and "conducting
18 a public process that is transparent and inclusive to all" RCW 80.50.010. That
19 direction is clearly not met if the Council throws out testimony from qualified witnesses.
20 EFSEC is experienced in the review of wind proposals, and in the need to balance the
21 elements of the proposal, and thus is accustomed to accounting for competing interests.
22 Especially given the rebuttal provided by applicant's witness Poulos, the Council can sift
23 through the wheat and the chaff in making its decision.

24 2.3 Testimony Regarding the Application is Relevant to this Proceeding.

25 At page 5, the applicant contends that Mr. Krupin's testimony on the application,
26 including its accessibility and readability, "have nothing to do with any potential impacts
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1 of the project.” Motion at page 5, lines 4-6. Mr. Krupin’s comments go to the very heart
2 of the ability of people to get access, read, review, and understand the application for site
3 certification, including the nature, extent and severity of the significant environmental,
4 safety, health and social impacts the project presents. These issues in large part inform
5 EFSEC’s responsibility to achieve the meaningful public comment and participation
6 required by the RCW. The Applicant’s motion only highlights another substantial defect
7 in the applicant’s presentation. Neither the Original nor “Updated” Applications are signed
8 by any representative of the applicant or its legal counsel, nor is there any list of the authors
9 in either application. The applicant cannot insulate its Updated ASC from review or
10 criticism by its refusal to provide a sponsoring witness for it.

11 The court in *Friends, supra*, emphasized the importance of the application:

12 Applications are discussed in chapter 463–60 WAC, which opens with a general
13 “[p]urpose” section. The chapter sets forth guidelines for preparation of applications
[under EFSLA]....

14 The application shall provide the council with information regarding the applicant,
15 the proposed project design and features, the natural environment, and the built
16 environment. ***This information shall be in such detail as determined by the
17 council to enable the council to go forward with its application review.*** WAC
18 463–60–010 (emphasis added). The WACs further state that “[t]he applicant *must*
address all sections of this chapter and must substantially comply with each
section, show it does not apply or secure a waiver from the council.” WAC
463–60–115 (emphasis added).

19 *Friends, supra*, 178 Wn.2d at 335.

20 Testimony about the application is fully a part of these proceedings. If the
21 application is not accessible and readable and lacks required information as Mr. Krupin
22 asserts, the applicant has not met its burden under the caselaw, regulations and the
23 statute.

24 2.4 Witnesses Sharp and Krupin Have Abundant Background and Qualifications
to Submit Their Testimonies.

25 Both of the TCC witnesses are abundantly qualified to submit their testimonies.

26 Though now retired, Dave Sharp graduated in Mechanical Engineering and was a
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1 licensed Professional Engineer in both Wyoming and Washington. See Exh-5401_T. He
2 worked in the electrical utility industry for forty years, including for PacificCorp. He was
3 assigned at a substantial wind project in Eastern Wyoming where his work included
4 assessing the size of wind turbines, the variability of wind energy and a variety of
5 operational issues. *Id.* Mr. Sharp has the kinds of hands-on experience that will inform the
6 Council in its deliberations.

7 Mr. Krupin has a similar extensive background. He has a BA in Environmental
8 Biology (University of Colorado) and a Masters in Physical Geography, with minors in
9 Hydrology and Water Quality from Oregon State. As indicated at pages 2-3 of his
10 qualifications (Exhibit-5301_T) he has long experience as an environmental specialist
11 performing multi-disciplinary regulatory compliance analysis for projects and programs in
12 numerous industries covering air, water, soils, endangered species, hazardous chemicals
13 and radioactive waste, working on permitting activities, environmental impact assessments,
14 and NEPA, including for the USDI Bureau of Land Management, the USDA Forest Service
15 and the US Department of Energy at the Hanford site. His broad technical, program and
16 managerial experience informs his testimony. Moreover, the applicant is free to raise
17 issues concerning his testimony and argue to the fact-finder here that his testimony should
18 be given less weight in the decision making process.

19 2.5 The Applicant's Attempt to Intimidate Witness Simon Should Be Dismissed
20 and Sanctions Applied.

21 The applicant takes the extraordinary step in this adjudication of threatening TCC's
22 witness Rich Simon with litigation over his testimony. At page 3, Applicant's counsel
23 asserts a belief that certain testimony "may be based on confidential proprietary data
24 owned by Applicant." See Footnote 1. The applicant, without any offer of evidence,
25 continues this threat in a Declaration by Scout's lawyer Tim McMahon, stating that his
26 client "is presently reviewing its options to explore legal action against Mr. Simon for the
27 misappropriation." Declaration at 2, lines 2-3. Though these threats are made, there is no

1 request for relief connected to them. Apparently, the applicant seeks to exert the power
2 and influence of a \$750,000,000,000 corporation to compel Mr. Simon to withdraw his
3 testimony and not provide further testimony.

4 Further, counsel for Scout did not disclose, either in his declaration or in the
5 testimony of Scout's witness Greg Poulos, that Mr. Poulos and Mr. Simon were partners
6 in the consulting firm V-Bar, though V-Bar was mentioned by Poulos at page 3, lines 10-12
7 of his rebuttal testimony. Exhibit-1031_R. Nor did Mr. McMahan disclose that Poulos and
8 Simon ended their partnership in early 2016 and divided some clients and shared
9 resources of the company, which included wind resource information.

10 No matter the background, EFSEC does not have jurisdiction to decide the merits
11 of a dispute between these former partners, nor indeed is it asked to. It is not a court of
12 general jurisdiction that can address these issues. While Scout ominously claims it is
13 "reviewing its options to explore legal action against Mr. Simon for his [alleged]
14 misappropriation," that "legal action" does not include orders by the Presiding ALJ or the
15 Council.

16 What should be of concern to the Council is the impact of the use of the information
17 on this adjudication. Even if Mr. Simon used this information, it is precisely the same
18 information that Mr. Poulos (his former partner) plainly has possession of and is using in
19 this testimony. See EXH 1031_R, page 6, lines 20-24. Actually, Scout installed new wind
20 measurement towers after 2016, to which Poulos has access, but not Simon. Mr. Simon's
21 assessment was based only on the earlier 2007-2010 data.

22 Given the responsibility of the Council to be fully transparent, and the purpose of
23 discovery to assure all parties operate with the same information, whatever dispute exists
24 about that information is outside the purview of the Council. Mr. Poulos does not claim in
25 his testimony that the information Mr. Simon has utilized has prejudiced Scout in any
26 manner. The complaint is that Mr. Simon shouldn't have the information, but the
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1 information is certainly pertinent to this proceeding.

2 TCC submitted Requests for Production of all meteorological information
3 concerning the site some time ago, but Scout has to date refused to provide access to any
4 of it. TCC is engaging in a discovery conference with Scout to attempt to resolve the
5 issue, though the issue may result in another motion to compel information.

6 Given this background, Scout has interjected a private dispute into this proceeding
7 with an action that has the clear effect of intimidating a witness, without any evidence of
8 impropriety, made more apparent by the lack of any requested relief related to the claims.
9 Accordingly, sanctions are appropriate.

10 **III. CONCLUSION.**

11 The applicant's motion to strike testimony should be denied. The balancing test
12 required of the Council, and its obligation to keep its proceeding transparent and ensure
13 meaningful public comment and participation is encouraged, indicates the motion is out
14 of order. The testimony presented will be given the weight that it is due during the
15 Council's deliberations.

16 Respectfully submitted this 13th day of July, 2023.

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