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May 4, 2023

Adam Torem
Administrative Law Judge
Energy Facility Site Evaluation Council
PO BOX 43172
Olympia WA, 98504-3172
Delivery to: adamtorem@writeme.com

Dear Judge Torem:

On behalf of Tri-Cities C.A.R.E.S. (TCC), I am pleased to respond to your request for additional input related to preparation of a Prehearing Order (PHO) in the Horse Heaven matter. In this letter, I will address issues discussed during the Third Prehearing Conference (PHC#3) as well as those presented by your April 28, 2023, agenda for this PHC.¹

Our discussion is not intended to present ranked issues, rather to cover the various matters of importance to the adjudication process.

1. TIME FOR HEARING PREPARATION.²

As you know, the application for this proposal was submitted to EFSEC on February 21, 2021, more than 27 months ago. The Horse Heaven application is the biggest renewable project ever proposed in Washington state. The cumulative wind turbine strings are about 25 miles long, the distance from downtown Seattle to Tacoma.

¹Herein I will address you as the "Judge."

²As we respond, TCC is mindful of concerns that the identified issues may extend the review period for this application. However, TCC has been diligent in complying with all deadlines established in these proceeding, including full participation in the first two PHCs. We filed a detailed list of issues on March 17, 2023, and were fully prepared to discuss all the matters set forth herein at the scheduled March 27 PHC which was cancelled March 24, 2023.

Notwithstanding the magnitude of the proposal, the agenda for PHC#3 to be held on May 2, 2023, initially proposed less than 30 days to prepare, file and serve direct testimony. Given the complexity of the case, the interests of the parties, and the number of impacted residents, this is insufficient time for the parties to prepare testimony, much less accommodate the common elements of an administrative adjudication, including motion practice, conventional discovery and other prehearing matters. This is especially true given many disputed issues remain unresolved.

You sent a letter dated January 24, 2023 to the parties to “request input from the parties to the upcoming adjudicative proceeding on scheduling a procedural considerations.” As indicated in the March 1, 2023 letter from Mr. McMahon to you, following consultation with the parties, it was indicated that the hearing schedule should reflect the opportunity for supplemental live testimony, in addition to live cross-examination. The provision for such testimony should be made a part of the August adjudication schedule.

Even with the June 12, 2023 deadline for submission of written testimony, this is still too condensed a schedule for a project of this size. Additional time should be allowed for thorough preparation, at least three full months.

2. MOTION PRACTICE.

The schedule in the PHC#3 agenda, even as adjusted during PHC#3, does not provide an opportunity for motions to be filed and resolved in advance of the filing of testimony. Given the potential for several motions on procedural issues, the Judge should provide time for not only the filing of motions, but their disposition in advance of the filing of testimony.

For PHC#2, the Council attached an Order Summarizing Issues and Setting Hearing Dates, EFSEC 15-001 in the *Tesoro* case to the PHC#2 agenda. In the *Tesoro* order (at page 2), we note that motions on certain issues were due 90 days before the hearings.

In this case, similar procedures for motion practice should be adopted. If it is determined that the time for responses and a reply should be shortened due to the condensed hearing schedule, TCC suggests 10 days for a response and five days for reply from the moving party.

3. DISCOVERY.

The schedule in the PHC#3 agenda does not provide an opportunity for discovery in advance of the filing of testimony. It is critical that a party be able to obtain discoverable information in sufficient time to prepare testimony. Any discovery schedule should include and accommodate the possibility of objections to written

discovery, such as requests for production, or verbal discovery through depositions. Such objections should not be permitted to so extend discovery that the discoverable materials cannot be used for prefiled testimony.

There is some indication in RCW 34.05.446(3) that the presiding officer will decide whether discovery can be undertaken. We think this is an unnecessary, time-consuming step and should not be applied in this proceeding. Please advise whether the parties must apply to the Judge prior to undertaking discovery.

We would request that virtual depositions be permitted if a party so chooses. In accordance with the civil rules, we request that you confirm that depositions may be used for any purpose.

Deadlines for discovery to be submitted to a party should be set. In addition, though 30 days is ordinarily allowed for production of documents and stored information (CR 34(b)(3)), the time schedule established would not allow use of such information in preparation of testimony (currently due on June 12). Accordingly, the Judge should require documents to be produced within 10 days of a request. As above, the process should allow for the possibility of objections, and their resolution, well before testimony is due. The same procedure should be followed regarding the submission of interrogatories in accordance with CR 33.

4. DISPUTED ISSUES.

Intervenor TCC submitted its list of disputed issues to the Judge and all parties by email on March 17, 2023, following directions to reference to other cases, including *Tesoro* as mentioned above. As described above, the Judge in *Tesoro* set out the 71 issues offered by the parties and even allowed amendment of the issues prior to the hearing.

As of today, we received no objection to our issues list and accordingly have begun witness selection and preliminary hearing preparation based on these issues.

Since the issues in the PHC#3 Agenda were formulated without consultation with TCC or any of the parties, we will assume that our list of issues previously filed with the parties can form the basis for our testimony.

5. THE FIVE ISSUES ON PAGE 4 OF THE AGENDA.

The PHC#3 Agenda sets forth five issues that the Chair and Staff have apparently decided will “not be taken up during the Adjudication unless a party proponent makes a satisfactory offer of proof demonstrating its relevance under EFSEC’s governing RCWs and WACs.” As TCC indicated during PHC#3, we are unclear what an “offer of proof” requires and will interpret it as requiring a motion to be

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submitted. Respectfully, TCC disagrees with the characterization of these issues.

As we said during PHC#3, we will be bringing a motion on the issue of "Proceeding with Adjudication prior to Issuance of FEIS." Though not discussed during PHC#3, we will also be bringing a motion on the apparent exclusion of SEPA issues from the proceeding as announced in the Agenda:

"● SEPA - Compliance with RCW 43.21C and WAC 197-11 (separate but parallel process)"

Should EFSEC have legal authority supporting issue exclusion on these matters, we would appreciate citations to it.

In addition, the fifth issue listed by EFSEC as "*NOT* expected to be taken up during Adjudication . . ." (Capitalization, underline and italics in original) is:

"●Greenhouse gas emissions reductions analysis (outside scope of EFSEC/might be addressed as part of FEIS)."

TCC does not understand what is meant by "might be addressed as part of FEIS" (emphasis supplied) and requests clarification on this issue. Particularly because this implicates SEPA, we expect to file a motion on this issue as well.

6. EFSEC DECISION DEADLINES.

Page 2 of the PHC#3 Agenda indicates that "EFSEC is working with the Applicant and its Third Extension Request which requests an extension through September 30, 2023." TCC believes that the Amendment to the ASC that the Applicant filed on December 1, 2022, are sufficiently material and substantive that it triggered a new deadline for Council action. We will include this issue in a motion to be filed next week.

7. PUBLIC HEARING.

On page 3 of the Agenda, it is indicated that "public comment . . . will be taken separately during the adjudication." The date for this public comment and a deadline for written comment should be included in the hearing schedule.

8. SITE VISIT/HEARING VENUE.

TCC understands that a site visit was conducted by EFSEC in November, prior to the commencement of adjudication and TCC involvement. We request that an additional site visit be conducted so that parties (other than just the applicant) can address site visit content, scope and procedures. Additionally, we ask that the Council

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reconsider its decision that declines to hold any of the adjudication hearings in the local vicinity, i.e. Benton County.

9. LIMITATION ON APPLICANT MATERIALS.

WAC 463-60-116(4), regarding "General—Amendments to applications, additional studies, procedure" limits additional reports or studies from the Applicant as follows:

(4) After the start of adjudicative hearings, additional environmental studies or other reports shall be admitted only for good cause shown after petitions to the council or upon request of the council, or submitted as a portion of prefiled testimony for a witness at least thirty days prior to appearance.

This limitation should be expressed in the prehearing order.

Thank you for this opportunity to address hearing procedures as discussed during PHC#3 and the Agenda for that meeting. Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is fluid and cursive, with a large initial "J" and "A".

J. Richard Aramburu

JRA:cc

cc: Tri-Cities C.A.R.E.S.
Parties of Record