BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL

In the Matter of the Application of: Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC, Applicant.	DOCKET NO. EF-210011 REPLY TO APPLICANT'S OPPOSITION MOTION TO COMPEL/MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION.

The Applicant Scout Clean Energy continues its month-long campaign to prevent Intervenor Tri-Cities C.A.R.E.S. from taking the deposition of its Senior Project Manager Dave Kobus and, at the same time, putting TCC to unnecessary cost and expense. Indeed, in a desperate eleventh hour effort to avoid Mr. Kobus' deposition, the Applicant has also filed a frivolous Motion for Protective Order.

Scout's efforts to keep its Senior Project Manager from appearing at a deposition should be rejected, along with its untimely request for a protective order. The presiding ALJ[1] should order Mr. Kobus to appear at a deposition on an expedited basis consistent with the availability of counsel for TCC and TCC should be permitted a reasonable time

[1] TCC continues and reiterates its request that the current presiding judge recuse himself.

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after the transcription of his testimony to submit evidence and testimony based on his deposition testimony. In addition, the Applicant should have sanctions imposed against it in the amount of the $2500 originally sought in the Motion to Compel, an additional $2500 and $1200 in expenses to prepare and file this reply, for a total of $6200 (to be paid within ten days of the date of the PALJ's order).

II. RESTATEMENT OF FACTS.

Before discussing the substance of Scout's objection to Mr. Kobus' deposition, it is important to review what is *not* at issue in this motion.

a) Scout does not object to the use of a notice to compel Mr. Kobus at a deposition, rather than a subpoena. TCC Motion to Compel (Motion) at 16-17, Exhibit C to Aramburu Decl.

b) Scout does not disagree with this description of Mr. Kobus: "While it is rare to find someone who knows it all, Dave prepares himself with up-to-date information on the status of everything related to the HHCEC development." Motion at 3.

c) Scout does not dispute the accuracy of the quote from the deponent Mr. Kobus himself that:

> It took me a long to grasp how energy sources and supply are interrelated, so I understand where people are coming from when they have questions. It's really important to me that I am able to explain this project to anyone, and to demonstrate how exciting this project really is."

Motion at page 3, lines 11-13. Nor does the Applicant suggest Mr. Kobus has changed his mind about how important it is "to explain this project to anyone."

d) Scout does not disagree that Mr. Kobus was an active participant in the preparation of portions of the Amended ASC, as described on page 3 of TCC's Motion, lines 17-22.

e) Scout does not dispute that the Amended ASC is not signed by any representative of the Applicant, that there is no listing of authors of the document nor that Mr. Kobus is the only witness with "up to date information on the status of everything

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related to the HHCEC development." Motion at 9, lines 9-13.

f) Scout does not dispute the reasonableness of the fees requested nor hourly rate of TCC counsel as referenced in the motion.

Indeed Scout states its "sole goal" has "always been to establish limitations on what TCC can ask Mr. Kobus at that deposition." Opposition at 1, lines 15-16. Scout wants "reasonable guardrails" without which "Mr. Kobus would have to sit there and answer every question put to him." Opposition at 4, lines 8-10. But Scout does not define what these "limitations/guardrails" are, in light of the listing of issues in PHO#2, which are to be "broadly construed."

Scout explains that without these limitations and prefiled questions, it "makes preparing Mr. Kobus (for his deposition) nearly impossible and opens the door to a long, rambling and unfocused deposition." Page 2, lines 7-12. Nowhere does Scout provide authority for the proposition that it is entitled to receive deposition questions in advance.

It is certainly understandable that the deposition of a witness that has such a broad knowledge of the project could be uncomfortable; that is no basis for refusing to make him available as will be discussed below.

III. THE REFUSAL TO MAKE MR. KOBUS AVAILABLE FOR A DEPOSITION IS CONTRARY TO EFSEC LEGISLATION, ORDERS ENTERED IN THIS PROCEEDING AND THE CIVIL RULES.

Before reviewing discovery standards generally applicable, it is important to correctly understand the forum in which this disputes arises.

EFSEC proceedings are administrative in nature and governed by a special statute, the Energy Facilities Siting Evaluation Act, RCW chapter 80.50, which, for more than seventy years, has required a public process to consider new energy facilities. Moreover, during its 2022 Session, the Legislature specifically directed that the EFSEC review process be open and transparent when it amended the statute.

First it added a new second paragraph to RCW 80.50.010 as follows:

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> It is the policy of the state of Washington to reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change <u>while conducting a public process that is transparent and inclusive to all</u> with particular attention to overburdened communities.

(Laws of 2022, chapter 183 §1, emphasis supplied). The Legislature also amended the sixth "premise" of the statute as follows:

> (((5))) (6) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay <u>while also encouraging meaningful public comment and participation in energy facility decisions</u>.

Id. (emphasis supplied). As a $750 Billion company, Scout surely is aware the EFSEC forum is public. This is in contrast to the rules that generally apply in Superior Court proceedings, where the dispute is principally between just the litigants.

But even in Superior court, the breadth of discovery is broad, allowing a party to "obtain discovery regarding any matter, not privileged, which is relevant <u>to the subject matter</u> involved in the pending action[.]" CR 26(b)(1) (emphasis supplied).

Though it must be tongue in cheek, Scout says TCC should have brought its motion to compel earlier. Of course, Scout has been working on this project since at least 2016, while TCC and the other intervenors had to scramble to pull together testimony on an inappropriately compressed schedule that did not allow TCC to drop everything to file a motion to compel. Indeed, this appears to be Scout's strategy, to "slow walk" the deposition of Mr. Kobus to so delay its use in the adjudication, while at the same time putting citizen intervenor TCC to unwarranted expense.

There is passing reference that there should be limitations on discovery because TCC should "coordinate its concerns with the County." Opposition at page 3, lines 16-18. However, Benton County counsel Mr. Harper, in an email to Scout Counsel Ms. Perlmutter on June 21, 2023, at 10:53 AM, disputed the preclusive effect of PHO#2 and stated "the County plans to attend the deposition and may ask questions of its own." See Exhibit G, page 3 to Aramburu Decl. Scout does not dispute the settled law identified in *Taylor v.*

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Cessna Aircraft (Motion at 8 lines 19-21) that a defendant cannot unilaterally decide what is relevant in discovery. Nor does Scout provide any caselaw, or other support, that it can withhold discovery without application for a protective order. More importantly, Scout does not cite any authority for the propositions that it can hold its own witness hostage because being subject to deposition makes preparing a witness difficult or that it is entitled to a list of deposition questions in advance. There is no claim of privilege, or embarrassment to the witnesses or that there is some undue burden on the applicant.

TCC is aware of the issues set forth in PHO#2 and is also mindful that the PALJ has determined that these issues will be "broadly construed to allow the parties to present their individual cases for and against the project, subject to motions to strike irrelevant evidence or witness testimony that is clearly outside the scope of EFSEC review process." Why the usual, tried-and-true course of depositions with questions and answers, including objections, is inappropriate, or why this is a special case, is not disclosed.

TCC's Motion to Compel should be granted, with allowance of time to use the results of the deposition in the adjudication.

IV. MOTION FOR PROTECTIVE ORDER SHOULD BE DENIED.

At page 11 of its opposition, Scout seeks a protective order to further complicate proceedings and put TCC to additional expense. Except for a vague reference to CR 26(c), no legal authority is provided in support of its motion.

In our motion to compel, TCC cited the fully settled law regarding protective orders under CR 26(c):

> It is not for the defense to unilaterally decide what is relevant. *Gammon v. Clark Equip. Co., supra.* Cessna's remedy was to seek a protective order, not to withhold discoverable material based upon its interpretation of what Taylor's theories were. CR 26(c); *Gammon v. Clark Equip. Co., supra. Accord, Rozier v. Ford Motor Co.*,573 F.2d 1332, 50 A.L.R. Fed. 914 (5th Cir. 1978)

Taylor v Cessna Aircraft Co., 39 Wn App 828, 836 (1985).

In addition, it is far too late to seek a protective order. TCC served its notice to take

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Mr. Kobus's deposition on May 26; however the motion for protective order was made on June 28th, a month later. Scout cannot string out its opposition, then file a last minute protective order.

The predicate for a CR 26(c) protective order is a court may make an order: "which justice requires to protect a party or person for annoyance, embarrassment, oppression or undue burden or expense, . . ." While the Motion for Protective Order cites these provisions, there are no factual or legal authority supporting application of these criterial Ordinarily, these matters might be found in a supporting declaration from counsel or the deponent, here Mr. Kobus. Though a declaration is submitted by Willa B. Perlmutter, it is silent on any of the required CR 26(c) criteria. Regarding the criteria of "annoyance, embarrassment or oppression," Mr. Kobus has already said that:

> It's really important to me that I am able to explain this project to anyone, and to demonstrate how exciting this project really is.

See Exhibit B to Aramburu Decl. Quite the opposite of "annoyance," "embarrassment" or "oppression," Mr. Kobus has indicated how personally important it is for him to explain the project to anyone, and how excited he is about the project. Regarding "undue burden or expense," Scout identifies itself in the application as an affiliate of a company with $750,000,000,000 in assets, with this project worth $1,750,000,000 alone and it has four lawyers working on this case. It is worthwhile to note that this is the first deposition to be taken of a Scout witness by TCC so discovery cannot be considered excessive or burdensome.

In addition, Scout's motion for protective order:

> further seeks an order that authorizes its counsel where appropriate to instruct Mr. Kobus to refuse to answer questions that fall outside the scope of TCC's identified role as intervenor.

Opposition/Motion at 18-21. Again, this request comes without a citation to any authority or a citation to any facts. Under the circumstances the requested protective order is wholly frivolous.

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Instructions not to answer and responsiveness of witnesses are covered by CR 30(h)(3) and (4).

> (3) *Instructions Not To Answer*. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.
>
> (4) *Responsiveness.* Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.

Again, there is no basis stated under CR 30(b) nor the identification of any kind of a "privilege." Scout asks for something not permitted by the Civil Rules, the unilateral ability to curate questions it does not want its witness to respond to and tell the witness not to answer them. As noted, no authority is cited for this proposition and none exists; the request is wholly frivolous and intended to create delay and expense for TCC.

The motion for protective order should be denied.

V. SANCTIONS AND EXPENSES SHOULD BE IMPOSED HERE.

The record leaves little doubt that the marathon of objections and obfuscation by Scout was intended both for delay and to run up the costs of TCC, a local, public interest organization with a limited budget. TCC's request for the deposition of Mr. Kobus, noted early in the adjudication process, was intended to allow the use of this deposition during the submission of testimony. However, the highly compressed nature of the schedule meant that even a small amount of delay would affect the timing of testimony submission.

In general: "Sanctions are mandatory if the court finds that a party violated the rule [CR 26(g)]. *Fisons*, 122 Wn.2d at 346." *Doe v Gonzaga University*, 99 Wn App 338, 361 (2000). The Court goes on to indicate rules regarding the severity of a sanction:

> In determining an appropriate sanction, the trial court has wide latitude. *Fisons,* 122 Wn.2d at 356. The court must impose the least severe sanction that will be adequate to serve its purposes, but the sanction should not be so minimal that it undermines those purposes. *Fisons,* 122 Wn.2d at 356. The purposes of sanctions are to deter, to punish, to compensate and to educate. *Fisons,* 122 Wn.2d at 356.

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Doe, *supra*, 99 Wn App at 361.

The purpose of sanctions and the fashion of an appropriate remedy is set forth in *In re Firestorm 1991*, 129 Wn 2d 130, 150-51 (1996):

> In *Gammon*, the Court of Appeals affirmed sanctions imposed against a party which failed to disclose pertinent information pertaining to the safety record of a certain type of equipment. The court indicated a unilateral decision by a party on the relevance of data within the scope of a discovery request was inappropriate. *Gammon*, 38 Wn. App. at 281. The court held a trial court sanction of $2,500 against the defendant was insufficient, and ordered a new trial, stating:
>
> > An award of $2,500 is cheap at twice the price in the context of a $4.5 million wrongful death case. Approval of such a de minimis sanction in a case such as this would plainly undermine the purpose of discovery. Far from insuring that a wrongdoer not profit from his wrong, minimal terms would simply encourage litigants to embrace tactics of evasion and delay. This we cannot do.
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> *Gammon*, 38 Wn. App. at 282. See also *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985).

In the present case, the current project is worth $1.7B and if allowed will extend 25 miles on ridge lines along the Horse Heaven hills in Benton County.

Moreover, because Scout has now filed a late and unsupported motion for protective order under CR 26(c), "the provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion [for protective order]." In the present case, TCC served a Notice of Deposition on the Applicant for a deposition on June 5, 2023, and after Scout refused to make the Project Manager available on that date, proposed June 22 or 23 as an alternative deposition date. Again Scout refused the request, delaying TCC's preparation of its case and creating additional expense. Finally, a late motion for protective order was filed without factual or legal support. At any time, the Applicant could have simply agreed to make the witness available for his deposition and all of this additional delay, time and energy would not have been necessary.

As previously discussed, sanctions are appropriate here, the amount of which should be increased due to Scout's continued refusal to make its Project Manager available, which necessitated this reply. It is fully consistent with the foregoing that the

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sanctions should be increased from $2500 to $5000. In addition, the PALJ should award TCC expenses for its opposition to Scout's frivolous motion for protective order in the amount of $1200, four hours at $300 per hour.

VI. CONCLUSION.

As previously requested, the PALJ should compel the Applicant to make its Senior Project Manager David Kobus available for a deposition at a time and place convenient to TCC's counsel. In addition, TCC should be allowed three weeks after Mr. Kobus signs the deposition to prepare and file materials based on the results of the deposition. Finally, the PALJ should impose sanctions on the Applicant for its deliberate and unwarranted refusal to make Mr. Kobus available for the deposition in the amount of $5000, and expenses to TCC in the amount of $1200 incurred in resisting the protective order, payable within 10 days of the date of the PALJ's order.

Respectfully submitted 3rd day of July, 2023.

/s/
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