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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

TCC'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

I. INTRODUCTION.

Following the authorization of the Presiding Administrative Law Judge (PALJ) Torem on May 18, 2023, Intervenor Tri-Cities C.A.R.E.S (TCC) filed discovery requests, including Requests for Production of Documents (RFPs) for certain documents concerning this proceeding. See Appendix A. On May 24, 2023, the PALJ issued his "Protective Order with Provisions Governing Confidential information and Information Exempt from Public disclosure under RCW 42.36." (Protective Order). See Appendix A.1. On June 8, 2023, Applicant Scout Clean Energy (SCE) provided responses to the RFPs and refused to provide any of the requested documents. Appendix B. On June 30, 2023, SCE filled rebuttal testimony of Mr. Gregory Poulos. See Appendix C. July 7, 2023, TCC again requested that SCE provide the requested documents. Appendix D. On July 14, 2023, SCE provided additional responses, but this time informing TCC that it did not have any documents responsive to certain RFPs (including Numbers 4, 7 and 8) or that such information had already been provided in testimony. See Appendix E. On July 19, 2023, a final letter was sent confirming that there was an impasse as to the responses to RFPs 1, 2, 3, and 5 and that TCC would be filing a motion to compel. Appendix F.

1 The foregoing paragraph documents efforts made by TCC to secure information
2 regarding recordings of meteorological information on the site, communications with
3 BPA and estimates of production for wind turbines proposed by SCE. As will be
4 described in more detail below, this information is sought to assist the Council in its
5 obligation to balance power needs with other adverse impacts, including economic,
6 environmental, societal and visual. SCE obdurately refuses to provide this information,
7 claiming that it is propriety. Whether the latter proposition is correct or not, TCC will
8 sign any standard non-disclosure document for any permits or other documentation that
9 might reveal the data. Under these circumstances, the PALJ should issue the
10 necessary orders for production of the requested documentation.

11 **II. MOTION.**

12 Intervenor TCC moves the PALJ for an order compelling the Applicant to
13 produce the documents requested in Requests for Production numbers 1, 2, 3, and 5,
14 found in Appendix A, subject to the delivery of the confidentiality and nondisclosure
15 agreements specified in the Protective Order.

16 **III. DISCOVERY SHOULD BE LIBERALLY ALLOWED SO THAT ALL PARTIES
17 HAVE EQUAL ACCESS TO DATA AND INFORMATION.**

18 As noted, the presiding ALJ has previously authorized discovery measures in
19 the Second Prehearing Conference Order, dated May 19, 2023. In his recent "ORDER
20 GRANTING TCC MOTION TO COMPEL ATTENDANCE OF SENIOR PROJECT
21 MANAGER DAVID KOBUS AT A DEPOSITION; GRANTING (IN PART) TCC MOTION
22 FOR SANCTIONS; DENYING APPLICANT'S MOTION FOR PROTECTIVE ORDER
23 ("Kobus Dep Order"), the PALJ found that TCC "has the same rights to conduct
24 discovery as any of the other four parties in this proceeding." Page 2. Moreover, the
25 Kobus Dep Order confirmed that "TCC is not precluded from inquiring into background
26 or foundational issues in its attempts to obtain relevant information that it can present
27 at the adjudicative hearing." *Id.*

1 In the instant case, even though the PALJ had issued his Protective Order on
2 May 24, 2023, SCE refused to provide the requested documentation, claiming that the
3 discovery requests: “called for the disclosure of information and materials that
4 constitute confidential propriety commercial information and data.” See its objections to
5 the discovery on June 8, 2023,¹ Appendix B, Response at pages 4, 5, 6 and 7. SCE
6 did not explain why the Protective Order of May 24, 2023, did not provide adequate
7 protection of these materials or why these materials should be treated differently.
8 Moreover, SCE did not file a motion for an additional, or more restrictive, protective
9 order than the one in effect at the time of its response. Ordinarily, a party must file for
10 a protective order rather than just refuse to provide information.

11 Though relevancy is ordinarily the basis for refusal to provide documents, the
12 materials requested have been put at issue by SCE itself.

13 Early in these proceedings, SCE contended that the commercial viability of this
14 site and its project were supported by its wind data. In its original ASC (February 8,
15 2021) under “Site Selection,” SCE claimed that:

16 The site represents a commercially viable wind resource area that is favorable
17 for regional utilities as it is coincident with peak loading demand.
18 UASC at 2-118. SCE plainly claims that its site is “commercially viable” and “favorable
19 for regional utilities” based on data and analysis it already possessed. This sentence
20 was not modified in the December 1, 2022 “update” of its earlier ASC. An additional
21 factor here is the vast size of this project: 244 turbines, stretching 25 miles over vistas
22 seen by thousands of local residents in Benton County and costing about \$2 Billion.

23 This contention was further discussed in the rebuttal testimony of SCE’s Gregory
24 Poulos filed on June 30, 2023, a month after the Protective Order was entered. See
25 Appendix C (Poulos Testimony). Mr. Poulos, at pages 1-9, testifies regarding his

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27 ¹ SCE did not object to the terms or sufficiency of the May 24 Protective Order.

1 analysis of the project and makes reference to Meteorological Evaluation Tower
2 ("MET") calculations in assessing the value of the project. See especially pages 4-5.
3 Indeed, Mr. Poulos contends that this information confirms the application statement
4 that the proposal is a "worthy investment." Page 8, lines 22-25. As noted above, Scout
5 already claimed that the site is "favorable for regional utilities as it is coincident with
6 peak loading demand." This is a clear reference that the data from the MET Towers
7 supports wind velocities and durations during peak load times (in the Northwest, winter
8 peaks).

9 Again, the testimony of Mr. Poulos directly references cost issues. Responding
10 to the suggestion from Dean Apostol, TCC's visual impacts witness, that the Council
11 ought to consider mitigation by removing wind turbines along the ridge line, Mr. Poulos
12 says such mitigation "would be highly non-standard and is incompatible with industry
13 practice." Testimony at 13, lines 1-4. He describes "industry practice" as follows:

14 wake losses from a wind farm-atmosphere interaction energy losses are
15 minimized to maximize energy production, within given constraints, and while
seeking the lowest cost of energy.

16 *Id.* at lines 5-8. He goes on to say that:

17 While I agree that visual impacts are unavoidable, it is also true that the area in
18 which wind turbines can be placed is limited to the Project land and the wind
19 speeds within those lands, given the need to create a viable Project. The wind
turbines locations chosen are optimized within those constraints.

20 *Id.* at line 9-13.

21 Mr. Poulos makes his claims based upon wind analysis and data in his
22 possession and not available to other parties. In addition, Mr. Poulos identifies possible
23 alternative project configurations, set out in his testimony at pages 15-16. These
24 include two Phase 2 alternatives to approve: "Phase 2A" with 250 MW each of wind
25 and solar or all-wind "Phase 2B" with 500 MW of turbines. *Id.* The data requested will
26 assist the Council in assessing these alternatives.

1 While Mr. Poulos is entitled to his opinions, he is not entitled to have exclusive
2 possession to the data on which these options are based. Will the project be viable
3 even if some turbines, in some locations, are removed? The answer must be based
4 upon facts and analysis available to all parties, not just SCE.

5 **IV. AN ORDER COMPELLING PRODUCTION OF EACH OF THE FOUR RFPS**
6 **REMAINING SHOULD BE GRANTED.**

7 In the following portion of this motion, TCC will describe why an order to compel
8 is appropriate for each of the four disputed Requests for Production. As to each, TCC
9 agrees to the execution and delivery of confidentiality and nondisclosure agreements
10 as to each person reviewing the materials as set forth in the May 24 Protective Order.

11 4.1 Communications Concerning the Bonneville Power Administration.

12 Request for Production #1 requests the production of communications and
13 documentation between the Applicant and the Bonneville Power Administration (BPA).
14 As indicated in Request for Production #1, this material is related to the various
15 references in the Updated Application for Site Certification (UASC) that discuss
16 “generation interconnection requests” and the “allowable authorized grid injection
17 capacity.” See UASC at pages 2-15, 2-16, 2-49.

18 As the PALJ² is aware, the BPA is a federal agency created by an act of
19 Congress in 1937. BPA markets and provides wholesale energy to customers in
20 Washington and other states from the Columbia River Dams. In addition, BPA
21 transmits power on the Federal Columbia River Power System (FCRPS) from private
22 electrical generators and utilities to purchasers of such power. SCE makes clear its
23 plans to connect to the FCRPS to distribute its power, if the current application is
24 granted.

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26 ² This motion and its request to the PALJ should not be construed in any manner to be a waiver of
27 TCC’s request that the PALJ recuse himself from these proceedings.

1 As a federal agency, BPA is subject to the Freedom of Information Act (FOIA)
2 which “grants the public a judicially-enforceable right to access the records of federal
3 agencies.” See <https://www.bpa.gov/about/who-we-are/freedom-of-information-act>.
4 Though there are several statutory exemptions to information available under FOIA
5 requests, none apply here and none are cited by SCE. SCE does not contend that the
6 BPA considers this information confidential or objects to its disclosure.

7 Request for Production #1 is relevant to information contained in SCE’s UASC
8 and is otherwise public information. The PALJ should issue an order compelling
9 disclosure of this information.

10 4.2 Meteorological Evaluation Tower Information.

11 Request for Production #2 requests information concerning data from
12 meteorological evaluation towers (MET) installed for the project. Again, receipt of this
13 information would be subject to the procedures outline in the Protective Order entered
14 on May 24, 2023, in this proceeding, including the execution and delivery of
15 confidentiality and nondisclosure agreements for those who would review the
16 information.

17 As described above, the MET data is of importance to a determination of which
18 wind turbines may be candidates for removal as part of the balancing process for
19 visual, land use, wildlife, cultural or other environmental or societal impacts referenced
20 in the disputed issues for adjudication. To the extent that data indicates variability in
21 actual production of turbines, it could assist in the selection of which turbines could be
22 removed. Indeed, Mr. Poulos is specific in his representation about wind turbine data:

23 Examination of the on-site wind data for a meteorological tower with five years of
24 data on the escarpment, shows that on the coldest 1% of days, the overall wind
25 speeds are reduced by 10% from the annual average and strong enough to
26 produce energy, and are by no means calm.

27 Poulos Testimony at page 15, lines 8-16. Having actual data will assist in TCC’s
28 response to these unsubstantiated statements.

1 Moreover, the data requested is measurements of natural phenomena not
2 owned by the applicant, i.e. wind speed and direction.

3 The PALJ should order the production of the data gathered from the MET
4 Towers. Once again, concerns about confidentiality are resolved by appropriate
5 confidentiality agreements, as has been done for other aspects of the disputed issues
6 in the matter.

7 4.3 Studies of Expected Production from Wind Turbines.

8 Request for Production #3 requests the production of studies or reports that
9 assess the production of the wind turbines proposed for the site as shown on UASC
10 pages 2-16 to 2-10.

11 Much of the discussion found in Section III of this brief and for Request for
12 Production #2 and applies here. These studies assess the value of the wind turbines,
13 a subject that SCE witnesses describe extensively in its testimony current application
14 and testimony.

15 Once again, the Applicant will be protected by confidentiality and nondisclosure
16 agreements. Under these circumstances, the motion to compel the reporting and data
17 requested should be granted.

18 4.4. Power Costs.

19 Request for Production #5 requests any studies of estimates of the costs of
20 power from the Project to utilities or potential customers. Again, this information relates
21 to the scope and scale of the project and to information and materials discussed above.

22 As described above, Applicant contends that the project represents a
23 “commercially viable wind resource area” and presumably will request a finding on that
24 subject from the EFSEC Council. Moreover, the statutory authorization for EFSEC in
25 RCW 80.50.010(4) sets as a premise for Council “To provide abundant clean energy at
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1 reasonable cost.” Indeed, the Applicant contends that it is “seeking the lowest costs
2 energy” at page 13, lines 10-13 of the Poulous testimony.

3 With a condition of the execution and delivery of confidentiality and
4 nondisclosure agreements, the PALJ should order the production of estimates of cost
5 of power from the project.

6 **V. CONCLUSION.**

7 TCC respectfully requests that the PALJ issue an order requiring the Applicant
8 to deliver the documents and materials requested by Request for Productions 1, 2, 3,
9 and 5 and to do so within five working days of the issuance of the order.

10 DATED this 28th day of July, 2023.

11
12 /s/
13 J. Richard Aramburu, WSBA #466
14 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 upon the 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 28th day of July, 2023.

/s/
Carol Cohoe, Legal Assistant
Law Offices of J. Richard Aramburu, PLLC

PARTIES OF RECORD

Kenneth Harper, Aziza Foster
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima WA 98902
By Email: kharper@mjbe.com;
zfoster@mjbe.com; Julie@mjbe.com

Shona Voelckers
Yakama Nation
shona@yakamanation-olc.org
ethan@yakamanation-olc.org
jessica@yakamanation-olc.org

Ryan Brown
Chief Deputy Prosecuting Attorney
Benton County Prosecuting Attorney
7211 West Okanogan Place, Building A
Kennewick, WA 99336
Counsel for Benton County
By Email:
Ryan.Brown@co.benton.wa.us

EFSEC Staff
lisa.masengale@efsec.wa.gov;
alex.shiley@efsec.wa.gov;
andrea.grantham@efsec.wa.gov;
sonia.bumpus@efsec.wa.gov

Sarah Reyneveld
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Counsel for the Environment
By Email:
Sarah.Reyneveld@atg.wa.gov
CEPSeaEF@atg.wa.gov;
julie.dolloff@atg.wa.gov

Tim McMahan
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Counsel for Scout Clean Energy, LLC
By Email: tim.mcmahan@stoel.com
emily.schimelpfenig@stoel.com;
ariel.stavitsky@stoel.com