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4 BEFORE THE STATE OF WASHINGTON
5 ENERGY FACILITY SITING EVALUATION COUNCIL

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

TRI-CITIES C.A.R.E.S. MOTION
FOR DISQUALIFICATION /
RECUSAL OF PRESIDING
ADMINISTRATIVE LAW JUDGE

(Oral Argument Requested)

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12 **1. MOTION.**

13 TRI-CITIES C.A.R.E.S. (TCC) requests that the Council and/or the presiding
14 Administrative Law Judge (ALJ) enter an order recusing or disqualifying the presiding
15 Administrative Law Judge from further participation in these proceedings based on
16 RCW 34.05.425, RCW 34.12.050 and Washington Appearance of Fairness Doctrine
17 RCW 42.36.

18 **2. BASIS FOR RECUSAL.**

19 As stated in the accompanying Declaration of J. Richard Aramburu, counsel for
20 TCC, and based on the records and proceedings in this adjudication, TCC believes that
21 Adam E. Torem should recuse or disqualify himself from further participation in this
22 adjudication based upon bias, prejudice and prejudgment and that TCC cannot have a
23 fair and impartial adjudication before the presiding ALJ.

24 **3. DISCUSSION.**

25 This motion is served upon and directed to both the presiding Administrative
26 Law Judge (ALJ) in the pending matter pursuant to RCW 34.05.425(3)-(7), the

27
28 TCC MOTION FOR DISQUALIFICATION /
RECUSAL OF PRESIDING ADMINISTRATIVE
LAW JUDGE - 1

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1 Washington Appearance of Fairness Doctrine and RCW 42.36.080, and to the Chief
2 Administrative Law Judge pursuant to RCW 34.12.050. See also RCW 34.05.570(g).

3 ALJ Torem should recuse himself from further participation in these proceedings
4 for the following reasons.

5 3.1 STATE LAW ALLOWS MOTION FOR RECUSAL.

6 RCW 34.12.050 provides as follows:

7 Administrative law judge—Motion of prejudice against—Request for
8 assignment of.

9 (1) Any party to a hearing being conducted under the provisions of
10 this chapter (including the state agency, whether or not it is nominally a
11 party) may file with the chief administrative law judge a motion of
prejudice, with supporting affidavit, against the administrative law judge
assigned to preside at the hearing. The first such motion filed by any
party shall be automatically granted.

12 (Emphasis supplied). This motion of prejudice and for recusal is the first motion for
13 recusal in this matter and should be granted.

14 3.2 PREJUDICE BASED ON PREDISPOSITION/PREJUDGMENT.

15 RCW 34.05.425 provides as follows:

16 3) Any individual serving or designated to serve alone or with others as
17 presiding officer is subject to disqualification for bias, prejudice, interest,
or any other cause provided in this chapter or for which a judge is
disqualified.

18 (4) Any party may petition for the disqualification of an individual promptly
19 after receipt of notice indicating that the individual will preside or, if later,
promptly upon discovering facts establishing grounds for disqualification.

20 The presiding ALJ has continuously indicated he has prejudged important issues in this
21 matter. During pre-hearing proceedings, without a motion or other requests from the
22 parties, ALJ Torem stated, *sua sponte*, that certain matters would be excluded from this
23 adjudication, including the following:

24 ! Compliance with the State Environmental Policy Act

25 ! Greenhouse gas emissions reductions analysis.

1 Such prejudice constitutes bias and prejudice under RCW 34.05.425, RCW
2 34.12.050 and the Washington Appearance of Fairness Doctrine, RCW chapter 42.36.

3 3.3 THREATS OF SANCTIONS AGAINST PARTIES TO THE
4 ADJUDICATION.

5 As a part of the “Agenda” for the prehearing conference held on May 2, 2023
6 (issued on April 28, 2023) the ALJ stated:

7 Hearing Briefs may choose to raise policy and legislative intent issues
8 (i.e., RCW 80.50.010) as each party deems appropriate but within page
9 limits prescribed by presiding officer. Any such arguments should ensure
10 a firm basis in existing law (see CR 11 for guidance) or a good faith
11 argument for extension/modification/reversal of existing law (or the
12 establishment of new law). Submissions of evidence or arguments
13 deemed frivolous will be stricken and reviewed for any available sanction
14 under the APA.

15 (Emphasis supplied.) This statement amounted to intimidation of TCC and other
16 parties, made before any briefing or submission of materials by them. The Council’s
17 rules already provide that party representatives “shall conform to the standards of
18 ethical conduct required of attorneys before the courts of Washington.” WAC 463-30-
19 100(3). The ALJ’s statement indicated bias and the denial of fair hearing, and tended to
20 stifle – and create a chilling effect on – the application of important Washington law
21 and the right to petition the government under the Washington and United States
22 Constitutions.

23 These statements constitute bias and prejudice under RCW 34.05.425, RCW
24 34.12.050 and the Washington Appearance of Fairness Doctrine, RCW chapter 42.36.¹

25 3.4 INAPPROPRIATE PRECONDITION FOR SUBMISSION OF TESTIMONY.

26 In his Prehearing order of May 19, 2023, ALJ Torem placed the following
27 restriction on testimony:

28 Any party wishing to present witness(es) on “Local Concerns, Attitudes and

¹ TCC specifically reserves all rights under 42 U.S.C § 1983.

1 Opinions” should justify the witness’ significance as a representative of the local
2 area and ability to speak for the community-at-large and understand they
3 will be subject to cross-examination. This category is not public comment that
4 will be heard per RCW 80.50.090(4).

5 (Emphasis supplied.) The requirement to “justify the witness’ significance as a
6 representative of the local area” and “ability to speak for the community-at-large” has
7 no basis in EFSEC rules nor in Washington Rules of Evidence. WAC 463-30-091 does
8 provide that “the council shall consider whether intervention by the petitioner would
9 unduly delay the proceeding or prejudice the rights of the existing parties” but provides
10 no limitations or restrictions of this nature.

11 RCW 34.05.452 generally provides that evidence is admissible if it provides that
12 “it is the kind of evidence on which reasonably prudent persons are accustomed to rely
13 in the conduct of their affairs.” Though “the presiding officer shall exclude evidence
14 that is excludable on constitutional or statutory grounds or on the basis of evidentiary
15 privilege recognized in the courts of this state,” there is no requirement that a witness,
16 especially an expert witness, establish their significance or ability to speak for others.
17 Moreover, the ALJ has created a standard for admission of testimony that is so vague
18 that counsel and the parties must guess at its meaning for testimony proposed to be
19 included in the record.

20 These prerequisites, to be applied on a vague and indefinite basis, amount to
21 prejudgment, bias and a violation of the appearance of fairness doctrine under RCW
22 34.05.425, RCW 34.12.050 and the Washington Appearance of Fairness Doctrine
23 RCW 42.36.

24 3.5. UNDUE DELAYS IN PREHEARING PROCEDURE WITHOUT
25 EXPLANATION.

26 Prehearing procedures in this matter were initiated by Prehearing Conference
27 No. 1 (PHC#1) on March 10, 2023, with a second PHC on March 20, 2023. The agenda
28 for that the second PHC indicated further discussion regarding the contested issues,

1 with the following direction:

2 5. Disputed Issues List

- 3 • Specific to Topic / Neutral Tone / Simple List vs Question Format
 - 4 o EFSEC Orders in Kittitas Valley Wind, Whistling Ridge, and Tesoro

5 See Page 2. The parties were request to provide a list of disputed issues and TCC
6 submitted their list on March 17, 2023, which included ten specific issues. There was
7 discussion of issues during the March 20, 2023 PHC, but no resolution.

8 A third PHC was scheduled for March 27, 2023 to address disputed issues and
9 other subjects. However, on March 23, PHC#3 was abruptly cancelled by the PALJ as
10 follows:

11 The third pre-hearing in this matter set for Monday, March 27, 2023 at 2:45 p.m.
12 will NOT be held as previously scheduled. Administrative Law Judge Adam E.
13 Torem will reschedule this conference as soon as reasonably possible in April
14 2023.

15 No explanation for this delay was provided.

16 In fact, PHO#3 was not re-scheduled until May 2, 2023, some 35 days after the
17 original date of March 27, 2023. No explanation for this delay was provided. The
18 agenda for the May 2, 2023 PHC indicated a set of disputed issues which deviated
19 from the lists provided by parties as ordered by the PALJ. At the May 2 PHC, there
20 was considerable concern expressed by the parties regarding which issues would be
21 heard. The Examiner indicated (concerning the disputed issues) that:

22 JUDGE TOREM:- I have got a three-asterisk note to think about that, Mr.
23 Harper.

24 Transcript of May 2, 2023 at page 104, lines 23-25.

25 The PALJ committed to considering those issues; he requested comments from
26 the parties on these matters by May 4, 2023, and committed to issuance of a PHO on
27 May 5:

28 I intend to issue a -- I intend to issue a prehearing conference order on Friday, in
the late afternoon, likely after I have a conversation with the rest of staff based
on how things went today and what I hear from all of you by close of
business on May 4th.

1 May 2, 2023 Hearing Transcript at page 102. TCC submitted a letter (as did other
2 parties) explaining its concerns with discussions at the May 2 PHC. However, no PHO
3 was issued by the PALJ until May 19, 2023, some two weeks after the established date.
4 That order required submission of prefiled direct testimony by June 12, 2023, only 24
5 days after PHO#3 was issued limiting the parties to specific issues. PHO#3 also
6 introduced a specific, additional and new requirement (only 24 days before the
7 deadline for submission of prefiled, written direct testimony) that:

8 Therefore, per WAC 463-30-092, TCC shall limit its participation and
9 presentation of evidence on land use topics and coordinate its concerns with the
County who shall be the lead party for that issue.

10 In all, the delay in issuing a PHO from on or about March 28 until May 19, 2023,
11 delayed preparation by TCC and other parties a total of 54 days, leaving only 24
12 calendar and 14 business days (including the public Memorial Day Holiday) to prepare
13 written direct prefiled testimony.

14 The delays in scheduling PHCs and issuing PHOs by the PALJ amount to
15 prejudice and bias and form the basis for recusal or disqualification of the presiding
16 ALJ under RCW 34.05.425, RCW 34.12.050 and the Washington Appearance of
17 Fairness Doctrine RCW 42.36.

18 3.6 EX PARTE COMMUNICATIONS WITH STAFF.

19 At page 102, lines 20-25 of the transcript of PHC#3, the PALJ states:

20 I intend to issue a – I intend to issue a prehearing conference order on
21 Friday, in the late afternoon, likely after I have a conversation with the
rest of staff based on how things went today and what I hear from all of
22 you by close of business on May 4th.

23 (Emphasis supplied).² This statement indicates that the PALJ anticipated *ex parte*
24 *communications* with members of EFSEC staff. RCW 34.05.455(1) does not allow
25 communications with “any person employed by the agency without notice and

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27 ² The reference to “Friday” was to May 5, 2023, though the PHO was not issued until May 19, 2023.

1 opportunity for all parties to participate” with certain exceptions. As stated, the two
2 applicable exceptions under RCW 34.05.055(1) are as follows:

3 (b) [(ii)] Any presiding officer may receive aid from legal counsel, or from staff
4 assistants who are subject to the presiding officer's supervision; and

5 (c) [(iii)] Presiding officers may communicate with other employees or
6 consultants of the agency who have not participated in the proceeding in any
7 manner, and who are not engaged in any investigative or prosecutorial functions
8 in the same or a factually related case.


9 TCC believes, and therefore alleges, that the “rest of the staff” that the ALJ intended to
10 communicate with were not either “subject to the presiding officer's supervision” or
11 “have not participated in the proceeding in any manner.” The ALJ has not placed any
12 such communication on the record as contemplated by RCW 34.05.455(5).³

13 The ex parte communications by the PALJ to staff as described above amount to
14 prejudice and bias and form the basis for recusal or disqualification of the presiding
15 ALJ under RCW 34.05.425, RCW 34.12.050, the Washington Appearance of Fairness
16 Doctrine, RCW 42.36, and RCW 34.05.455(6).

17 **4. CONCLUSION AND REQUEST FOR RELIEF.**

18 TCC respectfully requests that the presiding ALJ recuse or disqualify himself
19 from further actions in this matter based on the foregoing.

20 Respectfully submitted this 25th day of May, 2023.



21 J. Richard Aramburu, WSBA #466
22 Attorney for Tri-Cities C.A.R.E.S.

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25 ³ RCW 34.05.455(7) also provides:

26 (7) The agency shall, and any party may, report any violation of this section to appropriate
27 authorities for any disciplinary proceedings provided by law. In addition, each agency by rule
28 may provide for appropriate sanctions, including default, for any violations of this section.