

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 96-1
of
OLYMPIC PIPE LINE COMPANY
For Site Certification

PREHEARING ORDER NO. 28
COUNCIL ORDER NO. 729

DISCOVERY ORDER RE APPLICANT'S
MOTION TO COMPEL PRODUCTION OF
TIDEWATER INFORMATION AND
DOCUMENTS

Nature of the Proceeding: This matter involves an application to the Washington State Energy Facility Site Evaluation Council (the Council) for certification of a proposed site in six Washington counties for construction and operation of a pipeline for the transportation of refined petroleum products between Woodinville and Pasco.

Procedural Setting: On or about February 26, 1999, the Applicant filed with the Energy Facility Site Evaluation Council (EFSEC) a Motion to Compel Production of Tidewater Information and Documents. A discovery conference was convened by telephone before the undersigned administrative law judge (ALJ) on March 2, 1999 by agreement of the disputing parties. The Applicant was represented by Joshua Preece, attorney at law. Tidewater Barge Lines, Inc. and Tidewater Terminal Company (Tidewater) was represented by Jay Waldron and Corey Parks, attorneys at law. No other party to the proceeding was present. A protective order was entered applicable to the disputing parties, and the matter was set over for another conference to take place by telephone on March 10, 1999.

The conference was reconvened on March 10, 1999, and the parties entered into certain agreements as to the production of information and documents. Matters not subject to agreement were submitted to the ALJ and resolved as indicated below.¹

¹ The parties discussed issues of timing of discovery and reached certain agreements regarding the dates and times information and documents would be delivered. The parties agreed that best efforts would be made to deliver most of the material by noon on March 11, subject to problems with the messenger service. These matters did not require a ruling by the ALJ and are not set forth herein.

1 **Discussion of Disputed Issues:**

2 **A. Production of Information and Documents**

3 The Applicant seeks discovery of information and documents for purposes of preparing
4 its rebuttal testimony as well as preparing for depositions of opposing witnesses.
5 Included in the Applicant's request for information and documents are documents that
6 Tidewater claims to be confidential in nature and not relevant to the issues raised by
7 Tidewater in its prefiled testimony and exhibits. The Applicant contends that the
8 testimony of Tidewater witness, Ed Whitelaw, Ph.D., claims, as an adverse economic
9 impact of the pipeline project, that the financial condition of Tidewater will be harmed.
10 For this reason, the Applicant seeks information regarding the financial condition of
11 Tidewater.

12 Tidewater responds that Dr. Whitelaw's testimony bases economic impact exclusively on
13 the curtailment of its petroleum barge operations, leading to the projected loss of jobs for
14 eighty-nine (89) Tidewater employees and the consequent economic impact of that job
15 loss on the communities where these employees live and work. Tidewater intentionally
16 declined to assert that the pipeline project would result in an adverse impact on its
17 financial condition to avoid the need to litigate this issue.

18 The ALJ accepted Tidewater's representation that its economic impact testimony shall be
19 deemed limited to the lost employment and consequent economic harm to the
20 communities where the employees live and work. Therefore, even though the protective
21 order would provide some protection to Tidewater's proprietary information, there is no
22 justification to order further discovery regarding the financial circumstances of Tidewater
23 beyond that which Tidewater has agreed to provide voluntarily.

24 An additional issue related to the Motion to Compel was Tidewater's objection to a
25 request for disclosure of contributions made by Tidewater to another intervenor,
26 Columbia Cascade Alliance (CCA). Tidewater contends that such information should be
requested, if at all, from the donee, not the contributor. Tidewater contends the public
record already shows that some contribution has been made by Tidewater to CCA.
Tidewater contends that the level of such contributions is not relevant to the proceeding.

The Applicant responds that the level of financial support between these intervenors
could be used for impeachment purposes and is properly discoverable from Tidewater.

The ALJ agreed with the Applicant and granted the Motion to Compel limited only to the
extent that Tidewater need only submit the sum total of contributions, not the specific
amounts under different categories of contribution. The protective order should provide
sufficient safeguards for confidentiality, and the level of support between limited
intervenors in such a proceeding is a proper subject of discovery for possible
impeachment purposes.

Predicated upon the above-described rulings, the following disputed requests were
resolved:

1. Interrogatory No. 2: Please indicate the number of towboats/tugboats owned, leased or operated by Tidewater, and classify them by usage.

Tidewater contends that the boats are not classified by usage. Tidewater offered
to provide, as to 1997 and 1998, a summary of barge trips and access to the

1 voluminous ship's logs. The Applicant objects to being required to examine
2 voluminous logs to identify the usage of the boats.

3 The ALJ accepted Mr. Waldron's representation that it will provide the existing
4 documents describing the usage of the vessels, which consist of trip summaries
5 and ship's logs. Further discovery was not ordered.

- 6 2. Interrogatory No. 3: For the period 1993-1998, please indicate both the
7 target utilization and the actual utilization of different classes of barges, towboats
8 and tugboats owned, leased or operated by Tidewater.

9 Tidewater again offered to provide summaries of trips for 1997 and 1998.
10 Tidewater does not maintain the target utilization data for this equipment. The
11 Applicant again asks that it be provided anything more usable than the material
12 identified.

13 The ALJ did not order Tidewater to provide more than it has offered on the
14 condition that, should counsel become aware of more usable documents than
15 those indicated, counsel shall supplement its response to provide such data to the
16 Applicant.

- 17 3. Interrogatory No. 4: For the period 1993-1998, please indicate the annual
18 revenue Tidewater received from each customer.

19 Tidewater objects that this is highly confidential information not relevant to this
20 proceeding. However, Tidewater offers to provide, under the protective order,
21 product-by-product revenue figures for 1997 and 1998. Tidewater limits its
22 response to 1997 and 1998 due to the change in the business structure of the
23 company in 1995 and 1996, making prior data misleading. The Applicant
24 contends that it is essential to analyze the impacts of a change in business on a
25 customer-by-customer basis because some customers will leave and some will
26 stay. The Applicant contends that the protective order offers sufficient protection
for Tidewater.

The ALJ accepted Tidewater's stipulation that its proposed evidence is not
intended to raise the issue of financial impact on Tidewater. Any evidence that
might indicate otherwise will be subject to a motion to strike. Therefore, even
though a protective order is in place, there is no justification for requiring
customer-by-customer revenue data. The information offered by Tidewater is
adequate, and no further order to compel discovery will be issued.

4. Interrogatory No. 8: Please indicate the dates and amounts of all
contributions, loans, advances, donations or gifts to Cascade Columbia Alliance
by Tidewater and all affiliates, subsidiaries and shareholders from 1995 to the
present.

As noted above, Tidewater considers this information beyond the scope of
discoverable information under Civil Rule 26(b)(1) and, if discoverable, more
properly requested from CCA. The Applicant contends that each intervenor is
subject to this discovery request. The information may be used for impeachment
purposes.

As noted above, the ALJ ruled that the request calls for discoverable information, but ordered only that Tidewater provide total contributions rather than the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 itemized format as requested by the Applicant. The filing may be made on a
2 confidential basis under the terms of the protective order.

- 3 5. Request for Production No. 11: Please produce all correspondence or
4 documents relating to communications between Sterling Ventures and Tidewater
5 about pipeline matters and/or the impact of the proposed Cross Cascade Pipeline
6 on Tidewater's business.

7 The Applicant agreed to narrow the request for production to "[a]ny
8 correspondence or communications between Tidewater and Sterling in which
9 Tidewater makes representations regarding what will happen to its business and
10 employees if the pipeline is built." Even with this narrowing, Tidewater objects
11 that based upon its stipulation, Tidewater's representations as to the impact on its
12 business is beyond the scope of this proceeding. The Applicant responds that this
13 is the most relevant question of these interrogatories. The Applicant believes
14 Sterling Ventures, as a potential investor, would have inquired of the impact on
15 Tidewater of this pipeline project. The Applicant does not want to rely on
16 Tidewater's counsel to pick and choose what documents or correspondence it will
17 produce. The Applicant suggests that the documents and correspondence be
18 reviewed in camera by the ALJ.

19 The ALJ ruled that certain documents and correspondence from Tidewater to
20 Sterling shall be submitted to the ALJ on a confidential basis for in camera review
21 to assure the Applicant that discoverable material is not being withheld. All
22 documents from Tidewater to Sterling in which Tidewater makes representations
23 regarding the impact of the pipeline proposal on Columbia-Snake River traffic
24 and revenues that have been withheld as "not related to the issue of economic
25 impact on employees and their communities" shall be submitted to the ALJ. The
26 same procedure will be applied in response to Request for Production No. 12.

27 **B. Deposition Timing Issue**

28 An additional issue presented was the timing of a proposed deposition of Tidewater
29 witness, Ed Whitelaw, Ph.D. Due to Dr. Whitelaw's health problems, the best efforts of
30 counsel have been unable to arrange a suitable date for a deposition prior to April 2,
31 1999. With the agreement of EFSEC, the parties proposed that the deposition take place
32 on April 2, 1999, after the discovery cutoff date, and subject to the Applicant's filing
33 revised rebuttal testimony and exhibits to include information disclosed during this late-
34 conducted deposition.

35 Although the discovery schedule established in this case must be honored in the absence
36 of some extraordinary circumstance, the recent health problems of the witness are such an
37 extraordinary circumstance. The agreement to conduct the deposition on April 2, 1999 is
38 reasonable and consistent with the spirit of the prior EFSEC scheduling orders.

39 DATED and effective at Olympia, Washington, this 15th day of March 1999.

40 /s/ Ernest Heller

41 Ernest Heller, Senior Administrative Law Judge

42 **Notice to Participants.** Unless modified, this prehearing order will control the course of the hearing. Objections to
43 this order may be stated only by filing them in writing with the Council within ten days after the date of this order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26