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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. 29
COUNCIL ORDER NO. 730

PREHEARING CONFERENCE ORDER;
ORDER DECIDING MOTIONS;
NOTICE OF PREHEARING CONFERENCE

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: The Council convened a thirteenth prehearing conference session on March 30, 1999, pursuant to due and proper notice, to discuss procedural matters in this adjudication. The conference was held before Ernest Heller, Senior Administrative Law Judge, Council Chair Deborah Ross, and Council members David Black (Kittitas County), Ed Carlson (Department of the Military), Jim Cherry (Franklin County), Helen Fancher (Grant County), Ellen Haars (Department of Health), Dean Judd (Department of Community, Trade, and Economic Development), Gerry Prior (City of North Bend), Jenene Ratassepp (Department of Fish and Wildlife), Gary Ray (Department of Transportation), Donna Smith (Port of Royal Slope), Matt Stone (City of Snoqualmie), Walter Swenson (Department of Agriculture), Maxine Taylor (Port of Othello), C. Robert Wallis (Utilities and Transportation Commission), and Stephanie Warden (King County).

After the conference, the Council convened a deliberative session and reached decisions on various pending motions.

1 **Appearances:** Appearances were entered as follows:

2 Applicant	Joshua Preece, Karen McGaffey, and Charles Blumenfeld, attys., Seattle; 3 Claude Harshbarger, Olympic Pipe Line Company, Renton; and Katy 4 Chaney, Dames & Moore, Seattle
5 Counsel for the Environment	Mary McCrea and Thomas C. Morrill, Asst. Attys. General, Olympia
6 State Agencies	Dept. Of Ecology , by Kurt Peterson, Asst. Atty. General, Olympia, and 7 Brenden McFarland, Dept. of Ecology, Olympia Dept. Of Fish & Wildlife , by William Frymire, Asst. Atty. Gen., 8 Olympia Dept. Of Natural Resources , by Maryanne McGovern, Asst. Atty. Gen., 9 Olympia Parks & Recreation Commission , by Joseph Shorin, Asst. Atty. Gen., 10 Olympia
11 Counties	Grant County , by Stephen Hallstrom, atty., Ephrata 12 King County , by Pete Ramels, atty., Seattle Kittitas County , by James Hurson, atty., Ellensburg 13 Snohomish County , by Dawn Findlay, atty., Everett
14 Water Districts	Cross Valley Water District , by Patricia A. Murray, atty.
15 Federal Agencies	Dept. of the Army , by David McCormick, atty., Arlington, Virginia
16 Tribes	Tulalip Tribes , by A. Reid Allison, atty., Marysville 17 Yakama Nation , by Meredith Bruch, atty., Toppenish
18 Businesses or other 19 organizations	Cascade Columbia Alliance , by David Bricklin and Claudia Newman, attys., Seattle Tidewater Barge Lines, Inc. and Tidewater Terminal Company , by 20 Jay Waldron, atty., Portland, Oregon Washington Environmental Council , by Anne Taylor, atty., Seattle 21

22 **Discussion:**

23 **A. Procedural Matters**

- 24
- 25 1. Statements of Council Members. Dave Somers, Council Member from Snohomish
26 County, provided a written statement in response to Olympic’s continuing objection to
his participation in this proceeding. Any comments, objections, or responses to Mr.
Somers’ statement must be filed with the Council no later than Friday, April 9.

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- 2. Stipulation between the Yakama Nation and Olympic. The Council acknowledged receipt of the stipulation and indicated its intention to convene a stipulation hearing early in the hearing. Counsel for the Yakama Nation indicated that if the stipulation were accepted, the testimony of Mr. Stephen Parker, on fish habitat and water quality, would likely be withdrawn.
- 3. Marking of Exhibits. To minimize time spent during the hearing, the Council will number exhibits outside the hearing sessions and provide weekly updates to the parties. The master list of exhibit numbers will also be posted on the Council’s Internet site (www.efsec.wa.gov). To this end, the Council has numbered the exhibits received to date, using a system that groups exhibits by witness and sponsoring party and allows for later insertion of exhibits to be used on cross of particular witnesses.

The Council distributed the first edition of this list and asked parties to confirm that their witnesses had been accurately listed.¹

- 4. Officially noticed documents and other excerpts. All documents referenced in cross-examination must be marked and offered into the record. If a portion of a larger document is used, the relevant excerpt should be placed in the record, and the entire document should be available at the hearing for reference. If the DEIS is used on cross, it must be properly offered into the record.
- 5. Thursday rule. All exhibits to be used on cross-examination must be filed with the Council on or before the Thursday of the week prior to the week in which they will be used. For example, all exhibits to be used during the opening week of the hearing, the week of April 26, must be filed on or before Thursday, April 22. This will allow Council staff to mark the exhibits and distribute them to Council members in a timely fashion. On Thursdays when the hearing is in session, such exhibits may be delivered to the Council at the hearing in lieu of delivery to the Council’s Olympia office.

If, during cross examination of a particular witness, a party intends to use an exhibit of another witness, the Council requests notification under the “Thursday rule” so that Council members can review the exhibit and bring it with them to the hearing. Documents not yet offered into the record but scheduled to be sponsored may be used subject to correcting motions.

- 6. “Batting order” for cross-examination. Per the Council’s March 19 request, parties should coordinate their cross-examination of each witness. If one party intends a more comprehensive cross examination, that party is encouraged to proceed first, followed by parties whose cross is narrowly focused on a specific topic. The information the parties provide on April 7 will assist the Council in formulating a schedule. Depending on the effectiveness of the parties’ coordination, some limitations on the time allotted to each party for cross-examination of a witness may be necessary.

¹ Additional copies may be downloaded from the Council’s web site or requested from Sarah Blocki, EFSEC staff, at (360) 956-2170. The Council requested clarification of the numbering of Olympic’s Felton/Gallagher exhibits. Olympic noted that the testimony of Katy Chaney incorporates the Revised Application and certain Technical Reports as exhibits. These will be added to the next edition of the Master Exhibit List.

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- 7. Evidentiary motions. The Council prefers to deal with as many evidentiary matters² as possible prior to the opening of the hearing. Following discussion at the conference, the Council extended the due date for evidentiary motions related to Olympic’s rebuttal testimony, filed March 26. These motions are due on April 23, and Olympic’s response is due on April 30.³
- 8. Written Opening Statements. Some parties have suggested and the Council concurs that brief opening statements, summarizing the critical issues and conclusions to be addressed through particular witnesses, would be helpful to the Council. Parties may, but are not required, to submit written opening statements up to twenty pages (double-spaced) by Friday, April 16. The Council does not contemplate hearing oral statements.
- 9. Draft Schedule. The comments of the parties at the conference, together with the written comments received March 29,⁴ will be used to formulate a second draft of the hearing schedule. It will be distributed promptly to the parties.

B. Motion to Strike Washington Environmental Council’s Prefiled Testimony

Procedural background. Washington Environmental Council (WEC) submitted testimony of Mr. Rhys Roth, captioned “purpose and need.” It summarizes recent technological advances in the automotive industry, which, he argues, will reduce the demand for gasoline within the lifetime of the pipeline.

On March 4, 1999, Olympic Pipe Line Company (Olympic) filed a motion to strike this testimony. WEC, People for Puget Sound (PPS), and Counsel for the Environment (CFE) filed responses on March 15, and Olympic replied on March 19.

Olympic’s argument. Olympic argues that the testimony is outside the scope for which WEC was granted intervention in this proceeding. In Prehearing Order No. 3, the Council limited WEC’s intervention to the effect of the project on marine tanker traffic and resultant effects on the environment.⁵ Mr. Roth’s testimony is unrelated to tanker traffic. The Council did not grant WEC the right to present evidence on “purpose and need.”

² Parties may address (without limitation) issues related to admissibility, qualifications of witnesses, authenticity of exhibits, and the scope of testimony vis-a-vis scope of intervention.

³ The Council is aware that its rulings on potential motions related to Olympic’s rebuttal may affect the parties’ need for further discovery. Nonetheless, to assure the effective use of time without signaling any future Council action, the Council encourages the parties to develop a discovery schedule that will allow them to take full advantage of the time remaining prior to the opening of the hearing.

⁴ In addition, the parties at the conference indicated their intention to provide a joint response through Counsel for the Environment by April 2. The Council will consider this response as well.

⁵ Prehearing Order No. 3, August 15, 1996, p. 6, states, “WEC/PPS may intervene, limited to the following issues: (1) whether tanker traffic on Puget Sound and the Strait of Juan de Fuca would be affected by certification of the proposed site, and if so, (2) the environmental impacts of changes in tanker traffic resulting from the pipeline.”

1 Arguments of the respondents. WEC argues that the testimony is within the
2 scope of intervention expressly granted in Prehearing Order No. 3. Although
3 the testimony is captioned “purpose and need,” it presents one effect of
4 increased marine tanker traffic.⁶ Specifically, increased tanker traffic will
5 supply additional crude oil to refineries; in turn, the increased availability of
6 refined products will delay the state’s conversion to alternative fuels and
7 technologies, with detrimental effects on air quality.

8 Further, WEC, PPS, and CFE (the respondents) argue that, whether or not WEC was
9 expressly granted the right to present evidence on “purpose and need,” WEC should be
10 allowed to address the issue. The respondents argue that the determination of need is one
11 of EFSEC’s fundamental charges in this proceeding. Chapter 80.50 RCW directs EFSEC
12 to balance need against the impacts of a project as it formulates its recommendation on a
13 project. If the need for a project is minimal, even “lesser environmental impacts” may
14 outweigh “need” in the balance.

15 In footnote 10 of Prehearing Order No. 17,⁷ the respondents argue, EFSEC indicated that
16 all parties may address such common fundamental issues. Information regarding need is
17 particularly important in light of the paucity of information regarding need in the DEIS.

18 Council’s response. The Council agrees that a determination of need is relevant to its
19 recommendation and believes that this testimony is relevant to that determination.
20 However, the testimony is neither within the narrow scope of intervention expressly
21 granted to WEC in Prehearing Order No. 3, nor within the intent of footnote 10 of
22 Prehearing Order No. 17. The footnote suggests that parties may address “common
23 issues” only insofar as they are inherent in the narrow issues for which they were granted
24 intervention.

25 Accordingly, the Council rules that WEC may not sponsor the testimony of Mr. Roth in
26 the hearing. The Council notes that CFE has indicated that it believes this testimony
should be included in the record and would like time to adjust if WEC is denied the right
to sponsor it. The Council will allow CFE to sponsor the witness. CFE and counsel for
WEC may determine who will handle the witness during the examination.

C. Motions for Reconsideration of Order Denying Intervention to AT&T and WNSI

Procedural background. In Prehearing Order No. 25, dated March 8, 1999, the Council
denied late intervention to AT&T Corp. (AT&T) and Worldcom Network Services, Inc.
(WNSI), stating that the interests of the companies can and will be adequately

⁶ The effect of the project to increase marine tanker traffic is presented in the testimony of Mr. Fred Felleman, which was prepared in cooperation with People for Puget Sound (at EFSEC’s direction in Prehearing Order No. 3), sponsored by PPS, and adopted by WEC.

⁷ Prehearing Order No. 17, December 8, 1998, footnote 10, p. 4, states, “As noted in the Conclusion below and elsewhere in this order, Cascade as an intervenor, may present evidence on issues common to all parties in this proceeding. Our reference... to “intervention” on behalf of specific property interests refers only to Cascade’s ability to present evidence specifically on behalf of and in relation to the interests of individual property owners...”

1 represented by the Parks and Recreation Commission (Parks) in this proceeding. The
2 Council found no justification for late intervention because the companies appeared to
3 have had knowledge of the project during the summer of 1996 and made no inquiry of
4 EFSEC at that time. On March 18, 1999, the Council received timely motions for
reconsideration from both AT&T and WNSI. Oral argument was requested and denied.
Parks also filed an objection to Prehearing Order No. 25.

5 Arguments of the companies. AT&T and WNSI (the companies) argue that (i) their
6 interests cannot be adequately represented by Parks, (ii) Parks has indicated that it does
7 not want to represent the interests of the companies, and (iii) without intervention in the
8 EFSEC proceeding, the companies have no forum to protect their interests.

9 The companies assert three reasons that Parks cannot adequately represent their interests.
10 First, Parks' interests may be in conflict with the companies' interests during the
11 proceeding. Parks has broad duties under its statute and must balance such competing
12 interests as the protection of park lands for recreational use, the protection of easements
13 on park lands, and the need to avail itself of revenue-producing opportunities. In
14 balancing these multiple interests, Parks may take the position that the pipeline does not
15 unreasonably interfere with the companies' easement rights. The companies may take
16 the position that it does.

17 Second, the companies contend that even without a direct conflict of interests, Parks may
18 have reasons not to represent the companies vigorously in this proceeding. Parks may
19 take the position that vigorous representation of the companies' interests in these
20 proceedings may prejudice the Commission in future proceedings between Parks and the
21 companies involving their easements.

22 Third, they argue, Parks lacks the expertise to present technical information on how an oil
23 pipeline affects a fiber optic system.

24 Council's response. The Council is not convinced that the interests of the companies
25 cannot be adequately represented by Parks in this proceeding. Since petitioning for
26 intervention in June 1996, Parks has indicated its intention to protect the John Wayne
Pioneer Trail in this proceeding. Consistent with its obligations under its easements with
AT&T and WNSI,⁸ it has submitted prefiled testimony regarding the effect of the
pipeline on those easements. If further testimony of a technical nature is required, Parks
may confer with the companies to identify competent experts, including representatives
of the companies, to explain the unique technical impacts of the pipeline on the fiber
optic systems. Pursuant to Prehearing Order No. 24, additional testimony related to
public lands must be filed on or before June 25, 1999.

⁸ Iron Horse State Park, John Wayne Pioneer Trail, AT&T Fiber Optics Easement, December 15, 1989, Section 10 states, "Parks agrees not to construct any structure or conduct any activity within the easement area that might interfere with the maintenance and operation of AT&T's facilities without prior approval from AT&T." Iron Horse State Park, Worldcom Network Services, Inc. Fiber Optics Easement No. 96-0404, September 13, 1996, Section 18(c) states, "...new facilities...upon, across and under the use area, ... [or] within the use area...shall not impair or require [Worldcom] to relocate [existing] facilities." "The proposed route traverses lands encumbered by these two easements." Figueroa Testimony at 7-8.

1 The Council never contemplated that Parks act as the attorney or the surrogate for either
2 AT&T or WNSI. Rather, it has stated an expectation that the existing parties to this
proceeding would submit all information relevant to the siting of the pipeline.

3 If the Agencies...have laws...and rules...that they would consider in determining
4 whether the pipeline should be sited on public land, EFSEC's rules require the
5 Council to consider these... [t]he Council directs parties with relevant
6 information on public lands within the study corridor to place that information
7 before the Council so that the Council will have the most complete record
8 possible for its deliberation. Prehearing Order No. 24, March 8, 1999, p. 5.

9 The Council does not believe that this direction puts Parks in an untenable position or
10 requires it to do anything it would not otherwise do.

11 As indicated previously, the Council does not believe that the companies have provided
12 reasonable justification for late intervention. Accordingly, after due consideration, the
13 Council continues to deny intervention to AT&T and WNSI.

14 **D. Motions for Reconsideration of Order on Tidewater Contributions**

15 Procedural background. In Prehearing Order No. 28, dated March 15, 1999, Judge Heller
16 granted Olympic's motion to compel Tidewater to disclose the total amount of its
17 contributions to another intervenor, Cascade Columbia Alliance (Cascade), stating that
18 discovery of evidence that may be used for impeachment purposes is proper. On March
19 24, 1999, both Tidewater and Cascade filed motions requesting reconsideration of this
20 ruling. Olympic responded on March 29.

21 Arguments of Tidewater and Cascade Columbia Alliance. Tidewater and Cascade (the
22 movants) argue that neither the fact nor the amount of Tidewater's contribution is
23 relevant for impeachment purposes. They contend that impeachment is a process of
24 discrediting individual witnesses. An individual witness's knowledge of the identity of a
25 funding source may have relevance for impeachment purposes. However, they argue,
26 when a funding source is confidential and a witness has no knowledge of it, the witness
cannot possibly be biased by that source. Notwithstanding the issue of relevancy,
Tidewater points out that it has stipulated that it does contribute to Cascade. Given the
fact of Tidewater's monetary support, the amount of that support has no additional
relevance in discrediting a witness.

Moreover, the movants argue, Olympic has shown no indication that it intends to use the
information to impeach individual witnesses. They contend that if Olympic had intended
to impeach witnesses during the hearing, it would have laid the groundwork for
impeachment through questions at deposition. It did not do so. The movants surmise
that Olympic may attempt to use the information to draw unjustified conclusions about
the relationship of Tidewater and Cascade.

Finally, the movants contend that discovery (i) would prejudice Cascade by providing
insight into its litigation budget and strategy and (ii) would violate Tidewater's right to
free association.

Olympic arguments. Olympic responds that the amount of Tidewater's contributions to
Cascade is relevant for impeachment of the "positions" of both parties. Olympic submits
that Tidewater's intervention is not motivated by the alleged desire to protect Tidewater
employees, but by its previous owner's desire to receive a sizeable payment from new

1 owners (Sterling Ventures), contingent on the defeat of the project. Olympic asserts that
2 Tidewater created Cascade to oppose the project.

3 Council's response. The Council affirms Judge Heller's ruling that the amount of
4 Tidewater's contribution to Cascade is a proper subject of discovery and must be
5 provided. The Council can envision reasonable impeachment arguments that are not
6 based on the knowledge of individual witnesses. Given that Cascade's total budget is a
7 matter of public record through the Secretary of State, the Council is not convinced that
8 the requested information will provide Olympic with further information regarding
9 Cascade's litigation budget or strategy. Nor has the Council seen any indication that
10 Tidewater's association with Cascade would be chilled by this disclosure.

11 Accordingly, Tidewater is directed to disclose to Olympic the amount of its financial
12 contributions to Cascade from 1995 to the present, no later than April 23, 1999.

13 **E. Motions for Reconsideration of Prehearing Orders Nos. 24 and 27**

14 The Council received objections and/or motions for reconsideration of Prehearing Order
15 No. 24 (Public Lands Issues) from King County, Grant County, Cascade Columbia
16 Alliance, North Bend, Snoqualmie, Counsel for the Environment, the Department of
17 Natural Resources, the Department of Fish and Wildlife, the Parks & Recreation
18 Commission, and the Department of Transportation. The Council received objections
19 and/or requests for reconsideration of Prehearing Order No. 27 (DEIS Issues) from King
20 County, Grant County, Kittitas County, Cascade Columbia Alliance, North Bend,
21 Snoqualmie, Counsel for the Environment, the Yakama Nation, and the Tulalip Tribes.

22 The Council has found no new information in the pleadings that causes it to change its
23 earlier decision, and accordingly affirms its rulings in these orders.

24 **F. Notice of Prehearing Conference**

25 The next prehearing conference will be held April 26, 1999, beginning at 1:00 p.m. at
26 10507-23 Gravelly Lake Dr. S.W., Lakewood, Washington 98499. A map and driving
instructions are enclosed. The purpose of the conference is to discuss procedural matters.

DATED and effective at Olympia, Washington, this 7th day of April 1999.

/s/ Deborah Ross
Deborah Ross, Council Chair

27 **Notice to Participants.** As to issues addressed for the first time in this order, this prehearing
28 order, unless modified, will control the course of the hearing. Objections to this order may be
29 stated only by filing them in writing with the Council within ten days after the date of this order.
30 As to matters submitted on reconsideration of previous rulings of the Council or ALJ, this order
is not subject to further requests for reconsideration.