BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 96-1 of OLYMPIC PIPE LINE COMPANY For Site Certification	COUNCIL ORDER NO. 733 ORDER ON MOTIONS IN LIMINE AND MOTIONS TO STRIKE PORTIONS OF APPLICANT'S MARCH 1999 PREFILED TESTIMONY

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: In its Prehearing Order No. 14, the Council established a schedule for the prefiling of direct and rebuttal testimony in this proceeding. Under that schedule, on September 1, 1998, the Applicant submitted its direct testimony, which incorporated its Revised Application and supporting technical reports. Twenty-two other parties in the proceeding submitted prefiled testimony on February 12, 1999. The Applicant submitted rebuttal on March 26, 1999.

By letter dated March 19, 1999 the Council set April 2 as the due date for evidentiary motions on all prefiled testimony, including rebuttal. After discussion at the March 30 prehearing conference, the Council extended the due date for evidentiary motions related to Olympic's rebuttal testimony. April 23 was set as the due date for motions regarding Olympic's rebuttal testimony; April 30 was set as the due date for Olympic's response.

The parties[1] filed numerous motions to exclude portions of Olympic's rebuttal testimony. As they have completed depositions of Olympic's rebuttal witnesses, the parties have filed additional motions and supplemented their original motions with excerpts of depositions.

[1] Unless otherwise indicated, in this order the term "the parties" will refer generally to the statutory parties and other intervenors in this proceeding, excluding the Applicant.

Olympic has responded to each motion and the subsequent submissions of supporting documentation.[2]

At the April 26, 1999 prehearing conference, counsel for Kittitas County asked the Council to delay the commencement of the hearing until all evidentiary motions had been resolved. Various parties joined in this motion.[3] The Council denied the motion, stating that the hearing would open as scheduled and that the evidence in question would be admitted subject to being stricken after briefing was complete and the Council had deliberated.

This order responds to all evidentiary motions before the Council at this time.

Discussion:

A. Remedies sought

The moving parties seek to exclude specified portions of Olympic's rebuttal testimony that have not yet been admitted in the proceeding and to strike specified portions that have been admitted. In the alternative, the parties request adequate opportunity for surrebuttal if the Council allows the challenged testimony.

B. Major arguments; Olympic's response

The parties raise four major arguments for exclusion of the testimony. First, the designated testimony should be excluded because it is not proper rebuttal; i.e. it is not responsive to "new matter raised by the parties." Second, even if the designated testimony is "responsive," it should be excluded because it could and should have been submitted as part of Olympic's direct

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[2] The parties' motions have been variously styled as motions in limine and motions to strike. In chronological order, the following motions, responses, and supporting documents have been received: Kittitas County Motion to Strike "Rebuttal Witnesses," Motion to Strike Hearing Schedule, and Motion to Continue Hearing, April 21, 1999; The Tulalip Tribes' Motion in Limine, April 22, 1999; Tidewater Barge Lines, Tidewater Terminal Company, and Maritime Environmental Council's Motions in Limine, April 22, 1999; Motion in Limine of City of North Bend, City of Snoqualmie, Franklin County, and Cascade Columbia Alliance, April 22, 1999; King County's Joinder in Motions to Strike Rebuttal Testimony, April 23, 1999; Counsel for the Environment's Motion in Limine, April 23, 1999; Olympic Pipe Line Company's Opposition to Intervenors' Motions in Limine and Motions to Strike, April 30, 1999; Reply in Support of Motion in Limine of City of North Bend, City of Snoqualmie, Franklin County, and Cascade Columbia Alliance, May 3, 1999; Counsel for the Environment's Supplemental Motion in Limine to Strike Testimony of Keith Leffler, May 5, 1999; Submission of Excerpts of Paul Gallagher Deposition in Support of Franklin County, et al.'s Motion in Limine, May 6, 1999; Supplemental Submission of Bennington and Brentson Deposition Excerpts in Support of Motion to Exclude Testimony by Franklin County, et al., May 10, 1999; Olympic Pipeline Company's Designations of Excerpts of Paul Gallagher's Deposition, May 11, 1999; Olympic Pipe Line Company's Opposition to Counsel for the Environment's Supplemental Motion in Limine to Strike Testimony of Keith Leffler, May 13, 1999; and Olympic's Response to CCA's Supplemental Submission of Bennington & Brentson Deposition Excerpts, May 14, 1999.

[3] On April 27, 1999, Mr. James Hurson presented Kittitas County's motion to continue the hearing to the Council orally. Counsel for the Environment, Franklin County, Grant County, King County, the City of North Bend, the City of Snoqualmie, Cascade Columbia Alliance, the Tulalip Tribes, and Tidewater Barge Lines joined in the motion. See Transcript, April 27, 1999, pp. 103-104.

testimony. Third, admission of Olympic's rebuttal testimony at this stage in the proceeding is prejudicial to the parties. Finally, portions of the testimony should be excluded because it purports to be "expert opinion," but is offered by witnesses who do not have the requisite expertise to present "expert opinion."

1. Argument 1: The testimony is not proper rebuttal.

Argument. The parties cite case law for the proposition that genuine rebuttal evidence is not simply a reiteration of a party's case-in-chief but consists of evidence offered in reply to new matters. They point to various prehearing orders in which the Council expressly or implicitly affirms this approach to rebuttal for this proceeding.[4] In these orders the Council states or implies a progressive narrowing of the issues, such that each submission of responsive testimony is limited to specific "new information" introduced in the testimony to which it responds.

The parties claim that Olympic's rebuttal is not narrowly and specifically focused as required by the Council's orders.

Response. Olympic responds that its rebuttal testimony does respond to issues raised by the parties. Many of its rebuttal witnesses were retained specifically to provide direct responses to issues raised by the parties in their prefiled testimony.[5]

2. Argument 2: The testimony could and should have been submitted as part of Olympic's direct testimony.

Argument. The parties cite case law for the proposition that a party "is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case-in-chief merely in order to present this evidence cumulatively at the end of the defendant's case."[6] They point to various prehearing orders in which the Council expressly or implicitly affirms this approach for this proceeding.

The parties argue that much of the testimony that Olympic submitted on March 26 as rebuttal *should* have been submitted on September 1 in Olympic's direct case because it was necessary to support the Application. They argue that the December 1996 issues list[7] was developed after the submission of the original application and was a comprehensive list of the issues requiring resolution before the application could be approved. Through the issues list, Olympic was on notice that any issues not resolved in negotiations prior to the adjudication should be addressed in testimony to support the position taken in the Application.

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[4] The parties cite EFSEC's Prehearing Order No. 13; Prehearing Order No. 14, pp. 4-5; Prehearing Order No. 16, pp. 3-4; and Prehearing Order No. 21, pp. 2-3.

[5] In Appendix A of its Opposition, Olympic provides a list of the specific testimony each of its experts was asked to rebut. See Olympic Pipe Line Company's Opposition to Intervenors' Motions in Limine and Motions to Strike, April 30, 1999.

[6] State v. White, 74 Wn.2d 386, 394 (1968).

[7] Pursuant to Prehearing Order No. 4, pages 8-9, during 1996, each party submitted to the Council a list of the issues that it believed should be resolved as part of the adjudication. Olympic compiled these submissions and distributed a comprehensive list of issues to the parties in December 1996.

Further, the parties argue, much of Olympic's "rebuttal testimony" (necessary to support the Application) *could* have been submitted in Olympic's direct case. Some of the rebuttal witnesses were directly involved in the studies and/or evaluations on which the Application was based. Others, though not directly involved in the preparation of the Application, had been retained, studied the relevant issues, and developed their opinions prior to the date direct testimony was due. Olympic had no good cause to withhold this necessary information until its rebuttal.

If the Council accepts Olympic's March 1999 testimony and does not distinguish between direct and rebuttal evidence, the parties argue, the Applicant will not be required to demonstrate the sufficiency of the Application itself.

Response. Olympic responds that the "case-in-chief" model is not applicable to the EFSEC application process. An applicant to EFSEC does not have a burden to prove the merits of its application in a single presentation, subject to dismissal for insufficiency. Rather, the EFSEC application process is iterative: the Applicant provides a certain level of information, the Council and intervening parties identify areas in which further information is required, and the Applicant continues to provide the desired information until the Council is satisfied that it has sufficient information on which to make a well-informed decision.[8]

In this case, the direct testimony of the five witnesses submitted in August 1998, taken together with the extensive information contained in the Application itself and the technical reports, *was sufficient* to "support the Application."[9] Even if the Dames & Moore rebuttal witnesses had completed their studies prior to September 1998 and even if other potential rebuttal witnesses had been retained to familiarize themselves with relevant issues prior to September 1998, there was no good cause for Olympic to provide this level of detail in its direct testimony. It would have been "intellectually, practically and physically impossible" for Olympic to address every conceivable issue in its direct testimony in the same level of detail in which it addressed specific issues in its rebuttal.[10] Olympic had to wait to see what issues the parties would focus on and then provide additional analysis on these issues in its rebuttal.

3. Argument 3: The late admission of testimony that could and should have been presented earlier is prejudicial to the intervening parties.

Arguments. The parties cite case law for the proposition that fairness and due process require an opportunity to know the claims and evidence of the opposing party and to respond. EFSEC's rules and the Administrative Procedure Act (APA, chapter 34.05 RCW), they argue, provide this opportunity for a fair hearing as follows:

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[8] Olympic cites WAC 463-14-080, which describes the Council's deliberative process: "The council…when fully satisfied that all issues have been adequately discussed…will act on the question of approval or rejection of an application."

[9] Katy Chaney in her direct testimony, Exhibit 12, incorporates the May 1998 Revised Application as an exhibit. It has been marked Exhibit 12.3 in this proceeding. The Revised Application incorporates nine technical reports completed in the preparation of the application. They have been marked as Exhibits 12.4 through 12.12 in this proceeding.

[10] Olympic Pipe Line Company's Opposition to Intervenors' Motions in Limine and Motions to Strike, April 30. 1999, p. 13.

> …the presiding officer may order that all documentary evidence…be submitted to the presiding officer and to the other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence. [The presiding officer may order] that documentary evidence not submitted in advance…be not received in evidence in the absence of a clear showing … [of] good cause…

WAC 463-30-310(2).

The parties argue that the sequence of filings as they have occurred in this proceeding has been highly prejudicial to the parties. First, the parties were required to prepare and present their principal evidence in February 1999 before knowing key components of the proponent's case. As a result, their submissions are necessarily incomplete. Second, since the submission of Olympic's March 1999 testimony, the parties have not had adequate time[11] to (i) evaluate the new testimony, (ii) conduct discovery to test the new testimony, (iii) prepare thorough cross-examination, and (iv) respond to the new testimony (through responsive testimony). Third, the hectic schedule precipitated by the March 1999 filing has frustrated the orderly process created by the Council to lead to a well-informed decision.

The parties argue that this is a deliberate litigation strategy employed by Olympic. If EFSEC proceeds without remedial action, the parties will be prejudiced, and EFSEC will not have the benefit of the parties' expertise in the record in order to reach a fully informed decision.

Response. Olympic responds that the parties have had ample opportunity to discover and evaluate Olympic's position. Informal discovery has been available since the end of 1996, and Olympic has gone to great lengths to provide the information requested by the parties. During periods designated for formal discovery, Olympic has made its experts available for deposition. If the parties do not believe that they have sufficient information to respond to Olympic's position after this amount of time, Olympic cannot be held responsible.

4. Argument 4: Various Olympic witnesses lack the requisite expertise to present "expert opinion" testimony.

Arguments. The parties cite the Washington Rules of Evidence for the proposition that expert opinion testimony is allowed only if the witness is qualified as an expert by knowledge, skill, experience, training, or education. The parties claim that Olympic has not established the necessary level of expertise for some of its witnesses and that some of the witnesses have acknowledged as much in deposition.

Response. Olympic responds that some of its witnesses have dual roles as "factual witnesses" and as "expert witnesses."

A factual witnesses must have personal knowledge of the facts to which [s]he testifies. Opinions of a factual witness may be allowed if they are rationally based and helpful to the trier of fact. To the extent that Olympic's witnesses are "factual witnesses," they have personal knowledge of the facts to which they testify, and any opinions expressed are based upon that knowledge.

[11] Olympic identified and filed voluminous rebuttal testimony of thirty-one witnesses one month before the hearing was scheduled to open. During this month the parties have had to read and evaluate this new testimony, depose numerous of the newly identified witnesses, and, at the same time, complete the usual processes that precede litigation.

An expert witness must have particularized expertise; however, such expertise is not limited to formal training. To the extent that Olympic's witnesses are "expert witnesses," they have particularized expertise, gained either from education or other experiences. Where there is disagreement about the expertise of a witness, the trier of fact should not exclude the testimony, but decide what weight to give it.

C. Council's decision

The Council's prior orders and statements regarding its expectations for the applicant's direct and rebuttal presentations should have been abundantly clear. The Applicant failed to comply with the intentions underlying the Council's instructions regarding the filing of direct and rebuttal testimony. As a result, the Council must revise its processes to ensure that the parties have adequate opportunity to place information before the Council and to ensure that the Council has the information it needs to reach its decision. The Council's response here will set the course clearly for the remainder of this proceeding.

The statute defines this matter as an adjudication; in an adjudication, all parties must make their positions known and advocate them in an adjudicative manner.[12] The standards for a project proponent's presentation to EFSEC are set out in chapter 463-42 WAC. A proponent should provide credible information sufficient to support the application against these administrative standards, to address other challenges it knows to exist, and to allow the Council to resolve these issues. Olympic cannot avoid this responsibility by citing the iterative nature of the application process or by arguing that the Council has the ultimate authority to determine the details and conditions of the project. Insofar as the application process is iterative, the iterative nature does not excuse an applicant from providing the necessary information, when it is available, in support of its application.

Offering a minimum amount of evidence and asking the Council to decide the terms and conditions for the project places a burden on both the parties and the Council to identify and obtain any missing evidence necessary for a decision. In effect, this requires the Council to become the sponsor of the project. The Council is not willing to be placed in this position.

Whether or not Olympic's March 1999 testimony was in some degree "responsive" to the parties' February 1999 testimony, significant portions of the March testimony clearly comprise basic information in support of the application, as required by chapter 463-42 WAC, and should have been filed in Olympic's direct case.[13] Both the Council's express statements and the schedule it established for the filing of testimony clearly showed the Council's understanding

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[12] Olympic has argued that it has no legal burden in this proceeding. The Council disagrees and believes that Olympic has both a burden of going forward and a burden of persuasion. "It is … a fundamental principle of administrative proceedings that the burden of proof is on the proponent of … an order or the party asserting the affirmative of an issue." 73A C.J.S. *Public Administrative Law and Practice* §128 (1983), p. 36. See also Washington Admin. Man. Issue 8 (Lexis Law Pub Parker Div 1998) §9.05.B.3.

However, the Council's decision here is grounded in due process and does not reach the issue of legal burdens.

[13] The Council notes that Olympic chose to support its opening statement, filed April 16, 1999, with numerous references to its March 1999 testimony. Olympic included fifty-eight footnotes citing to evidence in support of its case. These notes included thirty references to rebuttal testimony and twenty-five references to direct testimony. This supports the Council's conclusion that Olympic's case, to a large extent, is presented in its rebuttal filings.

that Olympic would file the basic information necessary to support the application, through persons able to support it, in August 1998.[14]

The Council believes that Olympic knew what was necessary to support the application. The December 1996 issues list added flesh to the requirements of chapter 463-42 WAC. The Council and parties reasonably expected that these issues, having been identified, would require resolution during this application process. From the outset, the Council clearly indicated at prehearing conferences that resolution of these issues prior to the hearing would result in a reduced initial adjudicative presentation.[15] Other than the four stipulations received[16] and generalized periodic reports, the Council received little specific indication that the remaining contested issues had been resolved. To the extent that these issues remained unresolved, the Council reasonably expected Olympic to present sufficient credible information in the adjudication to support its position on these issues as "support for the application."[17]

The Council is extremely concerned about the burden the March 1999 filing has placed on the parties. Parties expecting to go to hearing in four weeks faced the task of analyzing and discovering some 1600 pages of new information from the five original and twenty-six new witnesses in order to prepare cross examination and determine whether additional responses were required. This put the parties in an untenable position. The Council adjusted the schedule and the order of witnesses to accommodate the parties' need for preparation. The Council commends the parties for the considerable and successful efforts they have made, with the limited resources available to them, simultaneously to complete discovery and to prepare for litigation. However, the Council's steps to date are not sufficient to restore the balance of fairness.

The Council finds that further readjustments in process are necessary to reestablish the orderly conduct of this litigation. The Council declines to exclude or strike any of Olympic's March 1999 testimony at this time for any of the reasons that have been presented. However, the Council believes that the parties must have an adequate opportunity to explore and respond to Olympic's evidence. The Council will provide parties an opportunity to respond through "surrebuttal." Further, on a party's request and showing of good cause, the Council will afford an opportunity for additional discovery and/or recall of certain Olympic witnesses for further cross-examination. Based on the information provided by Counsel for the Environment, the Council expects that this may be necessary in the case of Dr. Keith Leffler and potentially others.

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[14] See Prehearing Order No. 13, August 5, 1998, p. 4.

[15] See Prehearing Order No. 13, August 5, 1998, p. 4; Prehearing Order No. 18, December 8, 1998, p. 3;

[16] The Council received the following stipulations: "Settlement Agreement between Washington Utilities and Transportation Commission and Olympic Pipe Line Company," dated March 17, 1998; "Stipulations between Olympic Pipeline and Department of Transportation," dated December 23, 1998; "Cross Cascade Pipeline Project Settlement Agreement," dated December 30, 1998, between the Department of Ecology and Olympic Pipe Line Company; and "Stipulations Between the Olympic Pipeline Company and the Yakama Indian Nation," dated February 11, 1999. These have been numbered as Exhibits 1 through 4 respectively in this proceeding.

[17] The Council notes that Olympic chose to support its opening statement, filed April 16, 1999, with numerous references to its March 1999 testimony. Olympic included fifty-eight footnotes citing to evidence in support of its case. These notes included thirty references to rebuttal testimony and twenty-five references to direct testimony. This supports the Council's conclusion that Olympic's case, to a large extent, is presented in its rebuttal filings.

The Council directs the administrative law judge to convene a prehearing conference to discuss with the parties the need for surrebuttal, its nature (oral or prefiled) and timing, and other relevant details.

Finally, the Council will not exclude any of the challenged testimony based on the qualifications of the witness. Consistent with Olympic's citations of authority, an expert need not have academic credentials, but only such expertise as will assist the trier of fact.[18] The Council will decide what weight to give the testimony based on the qualifications of the witness and the credibility of the information that witness offers. .

DATED and effective at Olympia, Washington, this __th____ day of May, 1999.

Deborah Ross, Council Chair

[18] WAC 463-30-310 states that "all rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of RCW 34.05.452. RCW 34.05.452(2) states that "if not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings. On pages 15-17 of its Opposition to Intervenors' Motions in Limine and Motions to Strike, Olympic has cited cases interpreting Washington Rule of Evidence 702 and supporting the Council's ruling here.