

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. 2
COUNCIL ORDER NO. 700

COUNCIL ORDER DENYING
OBJECTIONS TO PREHEARING
ORDER NO. 1

The Council held a prehearing conference on this matter on June 24, 1996. The presiding officer entered a prehearing conference order on July 11, 1996. One participant, the Cascade Columbia Alliance, filed objections to the order.¹

Cascade raises several questions.

A. Scope of Prehearing Order

Cascade states that some matters² addressed in the prehearing conference order “deviate” from the “model” of a prehearing conference order in that some matters addressed “do not fall squarely within the definition of procedural matters enumerated in WAC 463-30-270 . . .” and that some have been previously decided by the Council.

1. Nature of prehearing conference. WAC 463-30-270 provides for prehearing conferences for specified matters such as settlement and scheduling. RCW 34.05.449 also expressly authorizes the presiding officer to “regulate the course of the hearing” in compliance with rules and any prehearing order. The notice of the prehearing conference specified a range of matters to be addressed at the conference. No objection was interposed to the notice.

At the prehearing conference, all participants had the opportunity to raise matters of concern and some did so. No participant objected to raising or discussing any matter in that context. No participant appears to object to treating such matters in the prehearing conference order.

¹ Cascade stated that the “objections” should “more” be considered to be requests for clarification of the order. The filing will nonetheless be treated as an objection.

² It cites no specific matters. This discussion is consequently stated in general terms, and the discussion or conclusion might vary in the context of specific facts.

The prehearing conference is a functional setting for discussion of matters that relate to procedure. The prehearing conference order is a functional way to achieve resolution of matters. All participants had notice of the conference and an opportunity to participate. All participants have the opportunity to see the order and raise objections to it. In this manner the Council is provided a forum in which to review the contentions of parties and decide issues that are presented.

2. Prior decisions. Cascade questions the propriety of the prehearing order's mention³ of a prior Council decision with reference to the application in the context of a related matter in the adjudication. It does not cite to any bases for impropriety, and we do not understand the nature of the concern.

Reference to a prior decision does not change that decision. Participants at the prehearing conference noted that the Council discussed matters relating to the land use hearing at its June 10 meeting and made a decision. Without the statement of some basis for concern, references in the order are not shown to be inappropriate.

B. Objection Process

Cascade asks clarification of the process for stating objections. As with any other written communication with the Council, objections should be filed with the Council at the Council offices, clearly labeled as to the nature of the document. They may be addressed to the Council Manager. Council staff will see that the documents reach the appropriate persons.

The Council has delegated to the vice-chair the authority to facilitate the hearing on its behalf and to make procedural rulings. The Council remains responsible for the proceeding and considers itself the presiding officer. It participates in decision making and will be fully involved in reconsideration of any decision that has been made under delegated authority.

C. Commencement of the Adjudication

Cascade does not object to the order's conclusion that the land use hearing is not an APA adjudication. It does object to the order's conclusion that the statutory adjudicative proceeding⁴ began April 22, 1996 with the notice of the June 24 prehearing conference. Cascade contends that the adjudication commenced with the notice of a prehearing conference in the land use hearing.

³ It cites no specific matters. This discussion is consequently stated in general terms and the discussion or conclusion might vary in the context of specific facts.

⁴ i.e., the adjudication required in RCW 80.50.090(3).

The Council gathered together many of the interests that were anticipated to participate in the land use hearings shortly before the hearings began, discussed potential procedural matters, and achieved consensus among those participants as to several of those matters. The meeting was called, in part, because Cascade requested it. The Council designated this meeting a prehearing conference because the meeting was scheduled before the land use hearing began, and because it was a meeting in the nature of a conference. This meeting was unrelated to the expected issues in the statutory adjudicative proceeding, preceded notice to the public that the adjudicative proceeding was to commence, did not address matters associated with the adjudicative proceeding, and did not affect the course of the adjudicative proceeding. It appears to be elementary that a conference by whatever name in one process cannot commence a separate adjudication.

D. Certificate of Completeness

1. Mischaracterization of positions. Cascade contends that the order misstates its position regarding a certificate of completeness, describing the position as more extreme than Cascade had argued. It cites only to its written motion and not to any oral comments that it or other participants have made. In its filing, Cascade appears to agree with the standard applied in the order. To the extent that any mischaracterization may have occurred, it was unintentional and had no effect on the order's discussion or the conclusion regarding the issue addressed. The Council will pay particular attention to this in future orders and correspondence, and invites participants to clarify, as Cascade has done, if they believe that the Council has erred in its characterizations.

Cascade's concern does bring up a matter to which the Council is sensitive. That is the need for all of the participants to be fair and objective in characterizing others, the positions of others, and the testimony and written evidence. The Council asks the participants, as well, to be conscious of such concerns and to take pains not to mischaracterize the evidence or the positions or arguments of others. Some shading may be unavoidable, and some selectivity may be appropriate to highlight contentions or differences. But going beyond that narrow permissible range can lead to confusion in the record, anger among participants, and disruption of the proceeding. It can also operate against the speaker's interests by reducing his or her credibility and effectiveness.

2. Determination as to completeness. Cascade contends that the prehearing order fails to reach a conclusion regarding completeness of the application. We believe that the order clearly stated that the Council has made the determination at various stages that the application is sufficient for processing.

Nothing requires the Council to make a "formal" decision. The Council is aware of the status of the application; it is aware of the contentions of the participants; and it is aware of the process going on. It is aware of the parties' contentions regarding insufficiency and has considered them. The Council has allowed processing to continue despite those allegations, as contemplated in chapter 80.50

RCW. Processing of an application is a continuing process, and adopting the requested posture could involve many decisions. The Council has not made formal decisions of the sort requested in prior proceedings⁵ and it need not make a formal decision in this proceeding. The Council has determined through its actions that the application is sufficient at the various stages to date for the processing that is occurring. Cascade's disagreement with the determination has been clearly stated and is noted.

E. Document Index

Cascade contends that the order mischaracterizes its position when it states that the Council staff will act reasonably in maintaining its document log but should not be expected to maintain it on an "hour by hour" basis. Cascade contends that it has not demanded hour-by-hour maintenance. We find no statement or inference in the order's description of the Council's approach regarding any party's position or representations. We instead find that the order is merely describing the nature of the Council's approach and its commitment to reasonable log maintenance, within the staff and other resources that are available to it, so the parties' expectations may be clear.

F. Conclusion

The Council denies the objections to Prehearing Order No. 1 for the reasons stated in the discussion above.

DATED at Olympia, Washington and effective this 15th day of August 1996.

FREDERICK S. ADAIR, EFSEC Chair

⁵ In one instance, involving the Northern Tier Pipeline application, the Council made a determination that the application was not sufficient, although it shortly reversed itself.