

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 96-1

of

OLYMPIC PIPELINE COMPANY

For Site Certification

PREHEARING ORDER NO. 6
COUNCIL ORDER NO. 704

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 third prehearing conference session on October 17, 1996, pursuant to due and proper notice, to discuss procedural matters in this adjudication. The conference was held before Chairman Fred Adair and Council members C. Robert Wallis (Utilities and Transportation Commission), Ellen Haars (Department of Health), Charles Carelli (Department of Ecology), Gary Ray (Department of Transportation), Stephanie Warden (King County), Derald Gaidos (Kittitas County), and Mel Wilson (City of Kittitas). This order sets forth the agreements emerging from this discussion.

A. Hearing Guidelines

Discussion of the hearing guidelines focused on the study group's proposed revisions to EFSEC's model guidelines.¹ Based on its experience in prior proceedings, the Council raised various questions about the proposals. Conference participants resolved a number of these issues; other issues were discussed at length but not resolved. The study group agreed to draft a second proposal, addressing the unresolved concerns.²

¹ The Council thanks the study group for its diligence and commends its efforts to resolve various complex issues raised by the model Hearing Guidelines.

² The group will set a meeting time and invite the parties of record to participate. Subject to availability, the Council offers the use of its bridge line to enable the participation of all interested parties. *Issues to be addressed by the study group are shown in italics in the following text.*

1. Introductory paragraph.

Participants agreed that the Council shall be guided by the Washington State Superior Court Civil Rules regarding discovery and motion practice when related procedural issues are not resolved by the Administrative Procedure Act (APA), EFSEC's administrative regulations, and EFSEC's Hearing Guidelines. However, CR 37 will not apply to these proceedings.

2. Discovery.

The guidelines for discovery, proposed by the participants at the August 22 prehearing conference and summarized in Prehearing Order No. 4,³ will be incorporated into the Hearing Guidelines for this adjudication with minor modification. All provisions will be framed in terms of the "requesting party" and "responding party." To expedite discovery, section (8) will require the "responding party," within 14 days of the receipt of a request for discovery, either to respond in full or to provide the "requesting party" with a "status report," indicating the timeframe necessary for a complete response.

3. Computation of time/deadlines.⁴

Most of the study group's proposed deadlines for motion practice were expressed as a fixed number of days before a specified event. The study group proposed that these deadlines be calculated with reference to CR 6(a).⁵ Consistent with the APA and the Council's rules, the Council will count calendar days in the determination of all deadlines. The Council is aware that, if deadlines are calculated with reference to calendar days, the study group may wish to alter its proposed timeframes.

Council and parties agreed that an acceptable formulation of the guideline will allow time and opportunity for quality responses (by both parties and Council) and sufficient flexibility to deal with last-minute matters. *The study group will incorporate these considerations into its next proposal.*

Parties and Council agreed that if a due date falls on a weekend or holiday, the due date will be moved to the first normal business day following the calculated

³ Prehearing Order No. 4, p. 9.

⁴ This section deals strictly with how the days will be counted. It does not deal with the number of days in specific deadlines.

⁵ CR 6(a) states, "[i]n computing any period of time ... the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. ... When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

due date. Service must be completed by 4:30 P.M. on the designated day, and filing must be completed by 5:00 P.M.

4. Date of filing and service.

The Council will define the date of filing/service consistent with RCW 34.05.010(18).⁶ If service is faxed, the service date will be the date faxed, provided that the document is deposited in the mail on the date of faxing. *The study group will consider and propose deadlines to accommodate the APA definition of the date of service.*⁷

5. Timing of filing and service.

The model Hearing Guidelines require “service ... no later than fil[ing].” The study group suggested “filing ... no later than serv[ice].” It appears that the general intent is to ensure that documents will be received by the Council and parties as contemporaneously as possible. With the adoption of the APA rule for date of service, the most straightforward resolution of this issue is to require filing and service on the same date. *The study group will address this issue in its proposal.*

6. Method of filing and service.

Fax. The study group’s proposal would allow for service by telefacsimile device, in addition to the statutorily accepted means of mail and hand delivery (in person or by messenger). Service by fax is consistent with Council rule WAC 463-30-120, and will be permitted in this proceeding for documents not exceeding 25 pages where originals are mailed simultaneously.⁸ Although filing by fax is not allowed as a matter of course, under unforeseen circumstances, the Council or Council Manager may grant authority to file a document by fax.

E-mail. Consistent with the APA, EFSEC cannot require filing and service via e-mail. However, parties are strongly encouraged to send courtesy copies of documents to the Council and to each other via e-mail.⁹ Some parties asked whether parties could agree to service by e-mail through stipulation with other parties. A party may waive the protections offered by the APA and enter such a

⁶ RCW 34.05.010(18) states, “[s]ervice by mail is complete upon deposit in the United States mail.”

⁷ The Council notes that the APA deals with the time required for delivery by building extra time into the setting of deadlines.

⁸ The Yakama Nation indicated that service by fax was problematic for them. The Council asks parties to make a good faith effort to accommodate the Yakama’s concerns.

⁹ Council staff includes the e-mail addresses of parties on its regularly distributed service list and maintains an updated service list (downloadable) on the Internet at <http://www.energy.wsu.edu/org/efsec/adjud.htm>.

stipulation.¹⁰ *The study group was charged to develop a process through which such a system could work effectively, including a format for the waiver, a process for filing the waiver, and a method for confirmation of service amongst parties.*

7. Oral argument and hearings.

Oral argument may be allowed in the Council's discretion. Parties agreed to the synthesis in the October 11 draft of the Hearing Guidelines, setting the date for oral argument at either the next regularly scheduled Council meeting or at a prehearing conference.¹¹

8. Pleading deadlines for motions (dispositive and non-dispositive).

The study group proposed a timeframe for pleadings, responses, and replies for dispositive motions and one for non-dispositive motions. The Council expressed concern that the suggested timeframes could contribute to unnecessary delay. All agreed that the timeframes should allow both parties and Council sufficient time for careful consideration and quality response at each stage of the motion. *The study group will reconsider the timeframes in light of the APA definition of "service date," the Council's preference to compute deadlines by counting calendar days in all situations, and the Council's desire to conduct an efficient proceeding.*

The Council also expressed a concern that the guidelines must provide the flexibility to shorten established timeframes as needs arise. *The study group will formulate a guideline to address (1) the circumstances under which a motion to shorten time is appropriate, and (2) the procedure to be used to set pleading deadlines for motions to be heard or addressed on a shortened time frame.*

Parties requested clarification of the circumstances under which replies would be allowed. The Council will allow replies to any new matter raised in an answer. A party may request leave to reply, and this request may be filed contemporaneously with the reply itself. The Council will exercise its discretion to grant and deny leave to reply.

B. Issue Identification

1. Preliminary issue identification.

On October 10, 1996, the Applicant distributed a compiled preliminary issues list. If any party is not satisfied with the formulation of its issues on the compiled issues list, that party should contact the Applicant by November 15. The

¹⁰ RCW 34.05.050.

¹¹ Various parties suggested setting aside a specific day of the week, weekly or bi-weekly, for oral argument. There is no indication at present that such a schedule will be necessary.

Applicant will proceed to develop a more “functional list” to serve as a tool in the process of negotiation and issue resolution.

2. Functional issues list.

Synthesis of a “functional issues list” will first require a determination as to whether (1) the issues raised by each party are within the scope of intervention granted that party by EFSEC; (2) the issues raised are within EFSEC’s jurisdiction; and (3) the issues are relevant. The Applicant welcomes the parties’ input on organizational categories which may be useful to them.

3. Use of issues list for resolution of issues.

Although the Applicant has not projected a timeframe in which it intends to address each issue raised by each party, it is meeting with various parties to resolve outstanding issues. After an issue has been settled to the satisfaction of all relevant parties, that issue may be deleted from the list. Agreements reached among some, but not all, parties shall be noted.

4. Updates to issues list.

Parties at the conference requested notification when issues were resolved and removed from the issues list. The Applicant agreed to circulate a monthly update of the issues list if there have been changes during the preceding month. The first synthesized, updated list will be distributed on November 27, 1996, specifically noting any changes from the October 10 list.

C. County/Applicant Stipulation

At the conference, counsel for the counties distributed copies of a draft of a “Stipulation for and Agreement to Commence Negotiation Process as to Land Use Determinations and Project Review” to be executed by the Applicant and the counties. This document establishes the conditions under which the Applicant and counties agree to negotiate. Presentation of the document was for informational purposes and not for Council action or approval. Counsel for the signatory parties agreed to consult with their clients and inform non-signatory parties to this proceeding whether they would share with them the information referenced in the agreement.

D. Sharing Information Amongst Parties

Certain documents recently sent to Council or staff again caused Council staff to raise the question about how parties will be apprised of materials deposited in the Council’s office. Such documents may include technical reports, studies, and other exhibits, which relate to phases of the application other than the adjudication.¹²

¹² The material includes technical studies relating to DEIS and EIS preparation.

Council staff agreed to review means available to make filing activity known to parties. As a result of the review, a log of filing activity will be available on the Internet.¹³

E. Service of Documents

The APA requires that the Council serve its orders on parties and on counsel of record. The Council will send all "other materials," notably notices and procedure-related correspondence, only to counsel of record unless the party notifies the Council in writing of its desire to continue to receive all materials.

F. Notice of Next Prehearing Conference

A continued prehearing conference in this matter will be held on January 29, 1997, beginning at 10:00 A.M., at the Kent DSHS Office, 1313 W. Meeker, Suite 102, Kent, Washington 98032.

Parties may participate by teleconference, subject to the limitations of available facilities. Because a very limited number of ports (7) are available, parties who desire to attend by teleconference must reserve a port with Ms. Joleen Karl of the Council staff at (360) 956-2121 no later than January 27. Reservations will be taken on a first-come, first-served basis and allocated one to a party while they are available. If unused ports remain, parties may reserve a second port on January 28, again on a first-come, first-served basis.

The purpose of the conference will be to discuss matters identified for further discussion in this order and to discuss any other procedural matters relevant to the adjudication that may be raised by parties or by the Council.

DATED and effective at Olympia, Washington, this ___th day of November 1996.

C. Robert Wallis, EFSEC Vice Chair

¹³ The Council's Internet address is <http://www.energy.wsu.edu/org/efsec/>.

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