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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. 18
COUNCIL ORDER NO. 719

NOTICE OF STIPULATION
HEARING (January 14, 1999)

NOTICE OF PREHEARING
CONFERENCE (January 14, 1999)

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 an eleventh prehearing conference session on December 1, 1998, pursuant to due and proper notice, to discuss procedural matters in this adjudication. A significant purpose of the conference was to discuss the organization and structure of the adjudicative hearing, tentatively set to begin in April 1999. The conference was held before Chair Deborah Ross and Council members David Black (Kittitas County), Charles Carelli (Department of Ecology), Ed Carlson (Department of the Military), Helen Fancher (Grant County), Ellen Haars (Department of Health), Dean Judd (Department of Community, Trade, and Economic Development), Gary Ray (Department of Transportation), Donna Smith (Port of Royal Slope), Dave Somers (Snohomish County), Matt Stone (City of Snoqualmie), Walter Swenson (Department of Agriculture), C. Robert Wallis (Utilities and Transportation Commission), and Mel Wilson (City of Kittitas). This order sets forth the results of this discussion.

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

2 Applicant	Joshua Preece and Karen McGaffey, attys., Seattle, and Claude Harshbarger, Olympic Pipe Line Company, Renton
3	
4 Counsel for the Environment	Mary McCrea and Thomas C. Morrill, Asst. Attys. General, Olympia
5	
6 State Agencies	Dept. Of Ecology , by Rebecca McInteer and Kurt Peterson, Asst. Attys. General, Olympia, and Brenden McFarland, Dept. of Ecology, Olympia Dept. Of Fish & Wildlife , by William Frymire, Asst. Atty. Gen., and Gary Sprague, Dept. of Fish & Wildlife, Olympia Dept. Of Natural Resources , by Maryanne McGovern, Asst. Atty. Gen., Olympia, and Dave Weisse, Dept. of Natural Resources, Olympia Parks & Recreation Commission , by Joseph Shorin, Asst. Atty. Gen., Olympia, and Pat Butler, Parks & Recreation Comm., Olympia
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10 Counties	King County , by Michael Sinsky, atty., Seattle, and Randy Sandin, King County Planning Department, Seattle Adams, Kittitas and Grant Counties , by Dennis D. Reynolds, atty., Seattle Snohomish County , by Patrick Downs, atty., Everett
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14 Water Districts	Cross Valley Water District , by Patricia A. Murray, atty.,
15	
16 Federal Agencies	Dept. of the Army , by David McCormick, atty., Arlington, Virginia
17	
18 Tribes	Tulalip Tribes , by A. Reid Allison, atty., Marysville, and Daryl Williams, Tulalip Tribes, Marysville
19	
20 Businesses or other organizations	Cascade Columbia Alliance , by David Bricklin and Claudia Newman, attys., Seattle Tidewater Barge Lines, Inc. and Tidewater Terminal Company , by Corey Parks, atty., Portland, Oregon

21
22 **Discussion:**

23 **A. Administrative Law Judge Ernest Heller**

24 The Council introduced the Hon. Ernest Heller, Administrative Law Judge (ALJ) with the
25 Office of Administrative Hearings. Chief Administrative Law Judge Arthur Wang has
26 appointed Judge Heller to assist the Council with presiding over the evidentiary phases of
the proceeding. The ALJ and the Council will be joint presiders. If Mr. Heller is
required to be absent, the hearing will continue with the Council presiding alone,

1 facilitated by the Chair, the vice chair, or another member designated by the Council.

2 **B. Possible *Ex Parte* Contacts; Time for Response**

3 Several Council members provided written or oral statements regarding possible *ex parte*
4 contacts and/or claims of bias. These included Mr. Stone, Ms. Smith, Mr. Wilson, and
5 Mr. Somers. No party made a comment or raised an objection or response at the
6 conference. Any comments, objections, or responses to matters raised at the conference
7 must be received in the Council's offices no later than the close of business on December
8 18, 1998 to be considered timely.

9 **C. Status of Land Use Negotiations**

10 The applicant and representatives of King, Snohomish, Adams, Grant and Kittitas
11 Counties, the City of Snoqualmie, and the Cross Valley Water District reported on the
12 progress of negotiations.

13 In general, negotiations between the counties and the applicant are proceeding, and the
14 participants report substantial progress toward full or partial settlement. The Council
15 encourages stipulation discussions to continue.

16 Some parties responded that no negotiations were underway because "the other party"
17 to the negotiations had not taken the initiative with the responding party. The Council does
18 not believe that progress in negotiations is a one-sided affair. All parties are expected to
19 be diligent and responsible in negotiations, making progress toward identification and
20 resolution of disputed issues.

21 It is not a sufficient explanation of failure of an endeavor in which all are responsible to
22 blame another and claim excuse for one's own lack of success based upon another's lack
23 of initiative. The Council expects that each party will accept responsibility to make
24 progress toward settlement. The Council is empowering the parties to the proceeding to
25 have an active role in determining its result – subject, of course, to Council review.

26 **D. Status of Other Inter-party Negotiations**

The applicant reported that in addition to its agreement with the Utilities and
Transportation Commission, it is negotiating with agencies including the Departments of
Ecology, Parks and Recreation, Natural Resources, Transportation, and Fish & Wildlife.
Some agencies appear to be negotiating and others not. Again, the Council urges all
parties to negotiate and expects that each will accept responsibility to make progress
toward the settlement of issues or of positions.¹

E. Environmental Review Process

Council Manager, Allen Fiksdal, the responsible official for environmental processes
under SEPA,² reported on the status of the Council's SEPA review.

¹ See footnote 3 below.

² RCW 43.21C.030. WAC 197-11-788 and -910.

1 **F. "Section 401 Certification"**

2 Council Manager, Mr. Fiksdal, reported that the Council intended to undertake the "401
3 Certification" for state water quality issues within the context of the adjudication. The
4 process for doing so will be clearly delineated before the evidentiary hearing sessions
5 begin.

6 **G. The stipulation approval process**

7 The Council has set aside time on January 14, 1999, for review of stipulations. Pursuant
8 to parties' consensus and Council agreement at the conference, the Council will also hear
9 testimony and argument on any comprehensive stipulations between local jurisdictions
10 and Olympic during the time set aside for land use hearings in the following two weeks.
11 The land use hearings will be conducted upon a record that may be used both in the land
12 use determination and in the adjudication, including action on any stipulations that may
13 be reached. A portion of the time reserved for stipulation hearings may be used for the
14 next prehearing conference.

15 Reviewing the parties' comments as to the status of stipulations and the process for their
16 approval, the Council states the following:

- 17 1. Parties entering stipulations want to know whether the stipulation appears to be
18 sufficient, based on the evidence presented in support of the stipulation. The
19 Council will make such a determination.
- 20 2. An approved stipulation means that the Council accepts it based on the state of the
21 supporting record, as binding between the parties and – again based on the
22 evidence supporting the agreement -- as setting an appropriate minimum standard.
23 It does not mean that others are precluded from presenting evidence that the
24 proposal requires a different standard or from responding appropriately to such
25 evidence.
- 26 3. The Council will give appropriate consideration to any additional evidence on the
topic and consider all relevant, properly admitted evidence as to the issues that are
the subject of stipulations, in the same manner that any relevant evidence is
considered for any adjudicative issues. Therefore, objections to stipulations by
nonparticipating parties should be based on whether the stipulating parties have
presented sufficient evidence to support their agreements. Nonparticipating
parties need not devote substantial resources to developing evidence that an
agreement is insufficient at this phase of the case. Some parties' concerns that the
stipulation hearings will be their only opportunity to present evidence in support
of stricter standards is misplaced.
4. As one party noted, an "approved" stipulation will not bind the Council's final
determination, which will be made upon the evidentiary record as a whole. No
stipulation will bind any Council member to cast a ballot to approve or deny the
project. And no stipulation is binding on parties other than the stipulating parties.

This process of reviewing stipulations was determined early in the proceeding with the
consent of all parties and with objection from none. The Council is comfortable in
proceeding and believes that doing so prejudices no party while it offers substantial
protections and benefits to the stipulating parties, to the process, and, therefore, to all
participants.

1 **Notice of deadlines for stipulations:** Unless the Council extends the deadline in
2 individual cases for good cause shown, every stipulation for approval must be filed with
3 the Council and served upon other parties to be received no later than two weeks before
4 the session at which the stipulation is to be offered for approval.

5 **H. Potential Discovery Issue**

6 Mr. Bricklin raised a concern regarding activity of counsel at depositions. All parties
7 participating in the depositions had means to voice objections at the time, and it is not
8 timely to raise them now. If future depositions are held, parties will again be afforded a
9 means to secure rulings upon objections.

10 **I. Organization of the hearing and identification of witnesses**

11 In general, the parties were unprepared to discuss the principal topic for which the
12 prehearing conference was set: the organization of the hearing, the identification of
13 locations where site visits will be asked, and the identification of witnesses.³ As a result,
14 the Council directs each party to respond with the following information no later than
15 December 16:

- 16 • A recommendation for the topical organization of the hearing --that is, the
17 grouping of issues and the order in which topics will be addressed;
- 18 • A recommendation for the location and timing of site visits; and
- 19 • A recommendation for the location and timing of sessions for members of the
20 public to present evidence.

21 In addition, the Council directs each party to present, no later than January 8, 1999,⁴

- 22 • A list of topics that the party will address in its prefiled evidence (scheduled to be
23 filed during the week of February 8, 1999);
- 24 • The identity of the witness who will present testimony on each topic, or, if the
25 witness is not known, the fact that a witness will be presenting evidence on that
26 topic;
- If parties will be coordinating presentations through a single witness, the identity
of all parties for whom the witness is expected to testify. Parties are encouraged
to address topics cooperatively. The Council will use this information not only in
hearing planning but also, if necessary, to begin a determination of whether the
number of witnesses must be limited.

No later than January 13, 1999,

- The applicant must present its list of witnesses for the rebuttal phase; and
- All parties must submit a list of the witnesses or topics that they expect to cross
examine. This list will be used in considering the timing of sessions and to

³ The lack of readiness to discuss the issues was disappointing to the Council. Prehearing Order No. 14 stated that this prehearing conference would discuss “the structure and organization of the hearing sessions” and that “the discussion should include means to assure that the allotted time is sufficient for parties’ reasonable needs and that demands for time do not exceed the time allotted.” The Council therefore expected the parties to be able to provide more meaningful input into this process at this conference.

⁴ The Council notes that stipulations will have been filed by December 30, providing an interim period for parties to determine whether consolidation of witnesses will be possible.

1 determine whether parties should be encouraged or directed to coordinate for
2 purposes of cross-examination.

3 The Council is aware that some parties, particularly the state agencies and others with
4 aligned interests, are engaging in cooperative discussions, are coordinating presentations,
5 and expect to jointly present witnesses. The Council encourages this.

6 The Council is faced with the need to make extensive facilities arrangements for the
7 hearing, which must be completed substantially in advance of the actual hearings. It is
8 also responsible for hearing management. It is essential that matters be accomplished in
9 sufficient time to assure that the hearing proceeds fairly and efficiently, that a rational
10 organization is adopted, and that planning is done sufficiently in advance to assure the
11 presence of all necessary parties, Council members, and witnesses. We are certain that
12 the parties will recognize that this level of advance preparation is not only essential for
13 purposes stated, but useful in achieving the most effective and most economical
14 presentation possible.

15 **J. Notice of Prehearing Conference; Notice of Stipulation Hearing**

16 The next prehearing conference will be held in conjunction with the session previously
17 scheduled for receipt of stipulations.

18 The stipulation hearing is scheduled for January 14, 1999, beginning at 10:00 a.m. at the
19 Kent DSHS Office, 1313 W. Meeker Suite 102, Kent, Washington, 98032. The Council
20 will consider any stipulation that has been filed on or before December 30, 1998.

21 The prehearing conference will be held January 14, 1999, at the Kent DSHS Office,
22 beginning at 10:00 a.m., or as soon thereafter as the matter may be heard, to address
23 procedural matters.

24 Parties may participate by teleconference. Parties who desire to attend by teleconference
25 must make a reservation with Ms. Joleen Karl at (360) 956-2121 no later than January 11,
26 1999.

DATED and effective at Olympia, Washington, this _____ day of December 1998.

C. Robert Wallis, Presiding Officer

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.