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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. 21  
COUNCIL ORDER NO. 722

**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 twelfth prehearing conference session on January 14, 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), Charles Carelli (Department of Ecology), Ed Carlson (Department of the Military), Jim Cherry (Franklin County), Ellen Haars (Department of Health), Nancy Joseph (Department of Natural Resources), Jenene Ratassepp (Department of Fish and Wildlife), Gary Ray (Department of Transportation), Dave Somers (Snohomish County), Matt Stone (City of Snoqualmie), Walter Swenson (Department of Agriculture), C. Robert Wallis (Utilities and Transportation Commission), and Stephanie Warden (King County). This order sets forth the results of this discussion.

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

|    |                                   |   |
|----|-----------------------------------|---|
| 2  |                                   |   |
| 3  | Applicant                         | Joshua Preece and Karen McGaffey, attys., Seattle   |
| 4  | Counsel for the Environment       | Mary McCrea and Thomas C. Morrill, Asst. Attys. General, Olympia  |
| 5  |                                   |   |
| 6  | State Agencies                    | <b>Dept. Of Ecology</b> , by Rebecca McInteer and Kurt Peterson, Asst. Attys. General, Olympia              |
| 7  |                                   | <b>Dept. Of Fish &amp; Wildlife</b> , by William Frymire, Asst. Atty. Gen., Olympia                         |
| 8  |                                   | <b>Dept. Of Natural Resources</b> , by Maryanne McGovern, Asst. Atty. Gen., Olympia                         |
| 9  |                                   | <b>Parks &amp; Recreation Commission</b> , by Joseph Shorin, Asst. Atty. Gen., Olympia                      |
| 10 |                                   |   |
| 11 | Counties                          | <b>King County</b> , by Michael Sinsky and Pete Ramels, attys., Seattle                                     |
| 12 |                                   | <b>Adams, Kittitas and Grant Counties</b> , by Dennis D. Reynolds, atty., Seattle                           |
| 13 |                                   | <b>Snohomish County</b> , by Gordon W. Sivley, atty., Everett   |
| 14 | Water Districts                   | <b>Cross Valley Water District</b> , by Patricia A. Murray, atty., Seattle                                  |
| 15 | Federal Agencies                  | <b>Dept. of the Army</b> , by Stephen Hart, atty., Fort Lewis   |
| 16 | Tribes                            | <b>Tulalip Tribes</b> , by A. Reid Allison, atty., Marysville   |
| 17 |                                   | <b>Yakama Nation</b> , by Meredith Bruch, atty., Toppenish  |
| 18 |                                   |   |
| 19 | Businesses or other organizations | <b>Cascade Columbia Alliance</b> , by Claudia Newman, atty., Seattle  |
| 20 |                                   | <b>Tidewater Barge Lines, Inc. and Tidewater Terminal Company</b> , by Jay Waldron, atty., Portland, Oregon |

21 **Discussion:**

22 **A. Late Intervention of Franklin County**

23  
24 Counsel for Adams, Grant, and Kittitas counties asked the Council whether it would  
25 accept a stipulation from the parties to the proceeding to allow the late intervention of  
26 Franklin County in this proceeding. Counsel was requested to work outside the  
conference to determine whether parties would so stipulate. With this information,  
Franklin County must file a Motion for Late Intervention to establish good cause for  
intervention at this time.

1 **B. Rescheduling of Land Use Consistency Hearings**

2 On the motion of Adams, Grant, and Kittitas counties, the Council continued all six land  
3 use hearings scheduled for January 1999.<sup>1</sup> However, the Council noted that the schedule  
4 during the next months is very tight, and the Council will have little latitude to change the  
5 dates established in Prehearing Order No. 14. Parties are expected to honor the  
6 established due dates and file materials as required by the Council's rules and Hearing  
7 Guidelines for this proceeding.

8 With due consideration to the concerns raised by the parties at the conference, the  
9 Council will reschedule the land use hearings to accommodate logistical and legal  
10 considerations.

11 **C. Discovery**

12 The parties discussed ways to facilitate the next phase of formal discovery, from  
13 February 13 through March 26, 1999. During these six weeks, Olympic intends to  
14 depose some ninety witnesses. The parties may also engage in formal discovery. The  
15 Council and parties alike have a strong interest in a smooth process, to allow the wise and  
16 efficient use of time and to allow completion of the process in a timely fashion. To this  
17 end, the Council expects the parties to cooperate in planning prior to February 13,  
18 including scheduling of depositions and arranging for the prompt availability of working  
19 files, if requested. If parties will be withholding portions of any documents based on an  
20 assertion of privilege, they must let both Olympic and the Council know in advance.<sup>2</sup> As  
21 during the earlier discovery period, either Mr. Heller or Mr. Wallis will be available to  
22 assist the parties in resolving issues that may arise during the depositions.

23 Some parties expressed concerns about the number of rebuttal witnesses that have been  
24 proposed by Olympic. Depending on the nature of Olympic's rebuttal, the parties  
25 indicated that they might request time to depose some of these witnesses.<sup>3</sup>

26 **D. Jurisdictional Issue**

Beginning with parties' comments at the prior prehearing conference, questions have  
arisen regarding the scope of EFSEC's jurisdiction to determine whether a facility should  
be sited on state-owned land. Concerned agencies were invited to submit statements,  
supported by legal authorities, concerning their interpretation of EFSEC's and their own

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<sup>1</sup> Prehearing Order No. 19, January 12, 1999.

<sup>2</sup> All case-related communications should be sent to the Council Manager at the Council office, P.O. Box 43172, Olympia, Washington 98504.

<sup>3</sup> Olympic Pipe Line named thirty-seven (37) potential rebuttal witnesses. See "Olympic Pipe Line Company's Identification of Rebuttal Witnesses and Statement Regarding Cross-Examination Pursuant to Prehearing Order No. 18," January 13, 1999. The Council has repeatedly emphasized that rebuttal must be limited and specifically directed to new matter presented in prefiled testimony.

In Prehearing Order No. 14, the Council stated, "The hearing is projected to begin approximately four weeks after the filing of rebuttal. This allows time for appropriate discovery related to rebuttal." Prehearing Order No. 14, August 21, 1998, p. 5.

1 statutes to assist the Council in clarifying and resolving this issue.<sup>4</sup> Parties at the  
2 conference discussed how preparation for the adjudicative hearings would proceed while  
3 this issue remains unresolved.

4 The Council proposed that all parties prepare as if the Council had plenary authority:  
5 such preparation would result in the best record and would facilitate the best decision.  
6 Various parties suggested that the legal issue should be resolved before the parties were  
7 required to engage in such preparation.

8 The Council allotted two weeks for the parties to evaluate their positions and file any  
9 motions they deem appropriate, on or before January 28, 1999. Responses are due on  
10 February 2, 1999. Parties are requested to fax courtesy copy of their motions and  
11 responses to all other parties on the service list, in addition to service as required by the  
12 Council's rules and Hearing Guidelines.

13 The Council urges the affected agencies to prepare for the EFSEC hearings as if the  
14 EFSEC process has jurisdiction to determine the location of the pipeline on state-  
15 owned/controlled land to the same extent it has jurisdiction on privately owned lands.  
16 Preparation now (prior to resolution of the issue) is an efficient and effective use of time,  
17 regardless of the ultimate resolution. If these issues are heard during the adjudication, the  
18 parties will be prepared to participate fully on the established schedule. If these issues  
19 are removed from the adjudication, the work done now will both prepare the agencies for  
20 their own processes and enhance their participation in the remainder of the Council's  
21 processes.

#### 22 **E. Hearing Structure and Site Visits**

23 The Council distributed a summary of the parties' first responses to Prehearing Order No.  
24 18,<sup>5</sup> containing recommendations for the topical organization of the hearing, the location  
25 and timing of site visits, and the location and timing of public hearings. This summary  
26 will be expanded to include additional issues raised by the parties in their second  
responses. Parties are asked to annotate their prefiled testimony to indicate the issues  
covered in that testimony. Using these responses and the relative emphasis placed on  
issues in the prefiled testimony, the Council will propose a schedule that allows for a  
workable and fair hearing of all the evidence.

This schedule may be refined based on parties' indications of the time needed for cross-  
examination of each witness. Parties are encouraged to combine their cross-examination  
where possible and to submit portions of depositions in lieu of cross-examination on the  
record.<sup>6</sup> The presiding office will survey parties, calling for time estimates for cross-  
examination.

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<sup>4</sup> See December 22, 1998 memo from Ernest Heller, sent to Joseph Shorin and Maryanne McGovern and copied to the service list.

<sup>5</sup> Prehearing Order No. 18 called for three sequential responses from the parties. The first response included parties' recommendations for the topical organization of the hearing. The second response included a more specific listing of topics the party intended to address in its prefiled evidence. Prehearing Order No. 18, December 8, 1998, p. 5.

<sup>6</sup> Prehearing Order No. 14, August 21, 1998, pp. 4-5.

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The Council will use its discretion to determine which of the proposed site visits are necessary in order to reach a fair and informed decision. In most cases, the Council will view sites after all relevant testimony and cross-examination has been presented. This will minimize the need for additional explanation at the site and the concomitant risk of off-the-record discussion or ex parte communication. An exception to this procedure may be warranted if a particular site must be viewed during a particular season of the year. Parties were requested to advise the Council of potential site visits that were time-contingent on or before January 21, 1999.<sup>7</sup>

**F. Other Matters; Notice of Prehearing Conference**

Because of the speed at which case-related events are occurring and the significance and complexity of those events, all parties should provide a courtesy fax or email (at the recipient's election) of any document subject to service, to all parties on the service list. The courtesy copy should be timed to arrive no later than the day the document is filed with the Council.

The next prehearing conference will be held March 30, 1999, beginning at 10:00 a.m. at the Kent DSHS Office, 1313 W. Meeker Suite 102, Kent, Washington 98032. A significant purpose of this conference will be to mark exhibits and to determine the time required for cross-examination of each witness.

DATED and effective at Olympia, Washington, this \_\_\_\_ day of January 1999.

\_\_\_\_\_  
Ernest Heller, Senior Administrative Law Judge

**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.

<sup>7</sup> Given the newly acknowledged jurisdictional issue, counsel for the Department of Natural Resources requested the opportunity to propose site visits on state-owned land that she had not listed earlier. The Council agreed to accept this list on or before January 21, 1999.