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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. 24
COUNCIL ORDER NO. 725

ORDER DENYING MOTIONS FOR
DECLARATORY ORDER;
MODIFYING SCHEDULE FOR
APPLICATION REVIEW

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: Prehearing Order No. 21 allotted two weeks for the parties in this proceeding (i) to evaluate their positions vis-à-vis the Council’s jurisdiction to determine whether a facility should be sited on state-owned land, and (ii) to file any motions they deemed appropriate by January 28, 1999. Responses were due on February 2, 1999. The Council received two motions on January 28, numerous responses to these motions, and various briefs regarding the scope of the Council’s jurisdiction.¹

Parties filed the following motions:

- (i) Motion of King County for Declaratory Ruling and for Continuance and Extension, dated January 28, 1999; and
- (ii) Joint Motion for Continuance and Extension of Time Regarding State Land Real Estate Issues, dated January 28, 1999, filed by the Department of Fish & Wildlife (WDFW), the Department of Transportation (WSDOT), the Washington State Parks & Recreation

¹ The Council also received various motions and responses not related to the jurisdictional issue. To the extent that these motions were not addressed in Prehearing Order No. 22 and are not addressed here, the Council will rule on the remaining issues as expeditiously as possible, within timeframes established by the Administrative Procedure Act (APA), chapter 34.05 RCW.

1 Commission (Parks), and the Department of Natural Resources (DNR). Collectively,
2 WDFW, WSDOT, Parks, and DNR will hereafter be designated as “the Agencies.”

3 In their responses, some parties joined all or part of the joint motion of the Agencies. Parties
4 filed the following responses:

- 5 (i) Counsel for the Environment’s Motion for Declaratory Order, Continuance and Extension
6 of Time Regarding State Land Real Estate Issues, dated January 29, 1999;
- 7 (ii) Response of City of North Bend, City of Snoqualmie, and Cascade Columbia Alliance to
8 Motions for Continuance, dated February 2, 1999; and
- 9 (iii) Olympic’s Consolidated Response to Motions for Continuance, Extension and
10 Declaratory Ruling, dated February 2, 1999.

11 On February 5, 1999, Senior Administrative Law Judge Heller sent a letter to the moving parties,
12 offering interim guidance until their motions were decided. The letter directed the parties to
13 comply with the February 12 due date for the filing of prefiled testimony. Acknowledging that
14 some parties would not submit testimony regarding the siting of the pipeline on publicly-owned
15 lands on February 12, the letter directed those parties to identify their remaining issues and the
16 time required to prepare and file testimony on these issues. The letter also requested the parties
17 to indicate which, if any, of the proposed hearing topics were not affected by the jurisdictional
18 issue and could be heard prior to the pre-filing of evidence regarding siting on publicly-owned
19 lands.

20 On February 12, the Council received the following responses to Judge Heller’s request:

- 21 (i) King County Response to Request for Information Regarding Presentation of Right of
22 Way Evidence;
- 23 (ii) Department of Transportation’s Identification of Issues and Witnesses Associated with
24 State Lands Right-of-Way Issues;
- 25 (iii) Department of Natural Resources’ Prefiled Testimony and Response to Request for
26 Information on Real Estate Issues;
- 27 (iv) Washington Department of Fish & Wildlife’s Response Regarding Real Property Issues,
28 Witnesses, and Preparation Time;
- 29 (v) Washington State Parks and Recreation Commission’s Transmittal of Prefiled Testimony,
30 Statement of Objection, and Response Regarding Additional Real Property Testimony;
31 and
- 32 (vi) Counsel for the Environment’s Prefiled Testimony on Real Estate Issues.

33 **Discussion:**

34 The Council notes that the underlying issue has been variously termed a right-of-way issue, a real
35 estate issue, a real property issue, a state-land issue, and a jurisdictional issue. For purposes of
36 consistency, this order will refer to the underlying issue generally, as either a jurisdictional issue
37 or a public-lands issue. This order will use the term “moving parties” to refer collectively to the
38 Agencies, King County, and other parties who joined the January 28 motions.

1 **A. The Council declines to enter a Declaratory Order at this time.**

2 In their motions for a declaratory order, the Agencies and King County argue that the
3 scope of EFSEC's jurisdiction over publicly owned or controlled land must be resolved
4 before they can submit testimony regarding the siting of the pipeline on the lands they
5 own or manage. They assert that a ruling is necessary to provide guidance on the scope of
6 testimony required. Without such guidance, testimony may be prepared unnecessarily at
7 state and public expense.

8 In its response, Olympic notes that legal uncertainties are not uncommon in adjudicative
9 hearings and trials. Parties routinely prepare to proceed through hearing in the absence of
10 a legal ruling on a disputed issue. Although Olympic did not object to the Council's
11 providing guidance regarding its views on this issue, Olympic was not comfortable with
12 any Council action that may significantly alter the schedule that has been thoughtfully
13 established and carefully maintained.

14 Having considered the interests of all concerned or affected by its decision, EFSEC, after
15 consultation with legal counsel, declines to enter a declaratory order or binding legal
16 ruling on the jurisdictional issue at this time. EFSEC does reserve its authority to enter a
17 declaratory order or otherwise resolve the issue at some later date in this proceeding.²

18 The Council does not believe that a legal ruling is necessary to enable parties to
19 determine the scope of testimony that is necessary to the EFSEC adjudication. As
20 indicated in Prehearing Order No. 21,³ the information that the agencies would use to
21 make their own decisions about whether the pipeline should be sited on state lands
22 includes the identical information that EFSEC would need to make this same decision.
23 Because the information is eventually required for some decision-maker, resources will
24 be spent to develop it at one point or another.

25 **B. EFSEC's understanding of the scope of its jurisdiction**

26 Though declining to enter a declaratory order, the Council here elaborates its
understanding of the scope of its jurisdiction, as defined by chapter 80.50 RCW. The
Council intends that this statement will provide guidance to the parties in the adjudicative
process.

Although the Council derives its authority from chapter 80.50 RCW considered in its
entirety, the Council believes that a review of several sections may be particularly useful
in explaining the scope of its jurisdiction to determine the location of an energy facility
on either private or public land.

The Legislature's intent in creating EFSEC was to provide a process to identify a state
position with respect to proposed energy sites. The Legislature intended a process that
would balance the need of state citizens for energy and the state's interest in protecting

² If the Council later decides to enter a declaratory order, it will provide proper notice to all parties and a full opportunity for briefing.

³ Prehearing Order No. 21, January 25, 1999, p. 4.

1 the quality of its environment. The Legislature created EFSEC to balance these interests
and propose a *state position*. See RCW 80.50.010.

2 Under RCW 80.50.040(8), EFSEC has the power to recommend to the governor whether
3 an energy facility should be certified, and if so, to recommend the terms and conditions of
4 certification. That is, EFSEC recommends to the Governor whether to enter a binding
agreement between the *State* and the applicant concerning the location, construction, and
5 operation of an energy facility. See RCW 80.50.020(5).

6 RCW 80.50.100 indicates that the draft site certification agreement that EFSEC sends to
7 the Governor is to include (i) conditions to protect state/local government and community
interests affected by the facility and (ii) conditions to recognize the purpose of any laws
8 or rules that the state (on EFSEC's recommendation) is authorized to preempt.

9 RCW 80.50.110 defines the scope of the state's power of preemption. It indicates that if
10 any provision of chapter 80.50 is in conflict with any other state or local law, the other
law is deemed superseded. More specifically, "[t]he state [on EFSEC's recommendation]
... preempts ...the certification of the *location* ... of [subject] energy facilities. (emphasis
11 added)"

12 Under RCW 80.50.120, an executed "certification ...bind[s] agencies ... and political
subdivisions ... as to the approval of the site ... of the proposed energy facility." RCW
80.50.120

13 In the present case, EFSEC understands these provisions to give it authority to make a
14 recommendation to the Governor regarding the location of the entire length of the
pipeline. To the extent that the provisions of chapter 80.50 (that give the state authority
15 to determine the location of the pipeline) are in conflict with "other laws" that give the
Agencies/local governments authority to manage designated public lands, the "other
16 laws" are superseded. If the state (on EFSEC's recommendation) approves a site,
including a site on public lands, all state agencies and local governments are bound by
17 that approval. They may not reopen the question of whether the pipeline should be sited
on particular lands they manage. As it is designed, any issue relevant to the location of
the pipeline on such land will already have been considered through the EFSEC process.⁴

18 If individual agencies could reverse the State's approval, the Legislature's intent in
19 creating a body with authority to develop a state position would be frustrated.

20 **C. The Council will require a full record on which to base its decision.**

21 In their motions and responses, the public agencies acknowledge that the testimony filed
22 on February 12 is incomplete with respect to the impacts on public land and request an
extension of time to file such testimony. Based on their perception that impacts to public
23 land were outside the scope of the adjudication,⁵ the parties had not planned to submit

24 ⁴ As discussed more fully in section D below, issues related to the determination of just compensation and the
mechanics of conveyance remain within the authority of the respective agencies or other bodies and are not part of
25 the EFSEC process.

26 ⁵ The parties cite language in Olympic's Revised Application to EFSEC and the draft Environmental Impact
Statement. They also cite the fact that Olympic has submitted easement applications to some agencies and the fact
that until December 1998, EFSEC has been silent regarding jurisdictional issues. The Council does not agree with

1 testimony regarding their proprietary interests in public land. In response to Prehearing
2 Order No. 21,⁶ some parties were able to prepare and file some testimony on public land
3 issues on February 12. Notwithstanding these submissions, the present record is not
4 adequate for an informed decision.

5 Further, an informed Council decision requires a complete record. Because EFSEC has
6 no inherent expertise in land management issues, the Council must rely on the expertise
7 of the Agencies and local governments to gain a full understanding of land management
8 issues. If the Agencies and local governments have laws/ordinances and rules/regulations
9 that they would consider in determining whether the pipeline should be sited on public
10 land, EFSEC's rules require the Council to consider these as well.

11 If EFSEC were to make the decision without complete information, the state and public
12 interests that the agencies have a statutory duty to protect would be prejudiced.

13 The Council is in accord that its decision must be made on the most complete record
14 possible. All parties have acknowledged the significant impact of the project on public
15 lands. Approximately fourteen percent of the proposed route is over state/county publicly
16 owned or managed lands. The applicant and the parties have made extensive references
17 in the pleadings and in their prefiled testimony to the potential impacts of construction
18 and operation on public lands. Thus, the Council cannot make an informed decision on
19 the overall impact of the project, including its environmental, socioeconomic,
20 recreational, and cultural impacts, in the absence of information regarding these impacts
21 on public lands.

22 Accordingly, the Council grants the motion to file additional testimony related to the
23 location of the pipeline on public lands. Through this order, the Council directs the
24 parties with relevant information on public lands within the study corridor to place that
25 information before the Council so that the Council will have the most complete record
26 possible for its deliberations.⁷ This additional prefiled testimony is due on June 25, 1999,
as explained in section D below.

the parties that the Council's position is inconsistent with any prior behavior or with the scope of intervention. Each of the four land-managing state agencies specifically stated concerns over impacts to their ability to protect and manage their lands as within the scope of their intervention. See e.g., Petition for Intervention of State Parks, ("State Parks has an interest in participating in the proceeding to ensure that [recreational, aesthetic, ecological, and cultural resources] on these state assets are appropriately protected."); Petition for Intervention of Department of Fish and Wildlife, ("...the extent to which Application No. 96-1 will directly and indirectly impact resources and interests under WDFW's jurisdiction..."); the Petition for Intervention of the Department of Natural Resources, ("...the extent to which Application No. 96-1 will directly and indirectly impact the value of state land and resources managed by DNR for the benefit of designated trusts..."); and the Petition of the Department of Transportation, ("...potential impacts on the highways of the State of Washington and WSDOT right-of-way.") Further, the parties' assertion that Olympic has been negotiating easement rights with the parties is not in the record of this case and could not have been known by the Council. Neither is it relevant to the location issue the Council is reviewing. (See the discussion below regarding the conveyance issue.) Further, the issues lists submitted by the parties, including the public lands agencies, include numerous issues, identified by those parties, involving location and impacts on state and locally owned lands.

⁶ Prehearing Order No. 21, January 25, p. 4.

⁷ Of course, any party's additional prefiled testimony must be within the scope of intervention granted to that party.

1 **D. Scope of additional prefiled testimony.**

2 In their February 12 responses, the moving parties expressed uncertainty about the extent
3 of testimony the Council would require if it had jurisdiction to decide whether the
4 pipeline should be located on public lands. Although the Council believes that the
5 moving parties are in the best position to evaluate what information is relevant and useful
6 to the siting decision, the following may provide some guidance.

7 First, chapter 436-42 WAC, Applications for Site Certification, contains a comprehensive
8 list of the information relevant to the Council's siting decision. Parties are encouraged to
9 refer to this rule to determine what testimony is relevant.

10 Second, in their responses, the moving parties listed information that they would consider
11 in their own siting decisions. This information included, but was not limited to, (i)
12 environmental impacts and mitigation; (ii) impacts on existing uses (including leases,
13 permits, contracts, and MOUs); (iii) impacts on future uses (including revenue-producing
14 ability and existing agency plans); (iv) compliance with federal, state, and local
15 requirements; and (vi) liability and monitoring/management. If the moving parties would
16 consider this information, the Council, standing in their shoes, should consider this
17 information as well.⁸

18 Third, as a practical matter, the Council views its siting responsibility as determining
19 whether the pipeline should or should not be sited in the study corridor (study area).⁹ If
20 the Council were to approve the project, only in rare instances would the Council
21 envision approving a precise centerline. More likely, the Council would approve a
22 corridor and specify conditions within the corridor, up to and including areas within the
23 corridor where the pipeline could not be sited. This approach would allow the applicant
24 and the agencies some flexibility, within the standards established by the Council, to
25 change the proposed centerline to deal with highly localized or unanticipated
26 circumstances.

Within the limits set by the Council, the applicant will have the responsibility to obtain
the property rights for a workable route. *If the Applicant seeks rights on public land
within an approved corridor, the Council anticipates that the Applicant and the entity
managing that land will negotiate an appropriate instrument of conveyance and
reasonable compensation.*¹⁰

21 ⁸ The moving parties expressed some concern that Olympic has not provided all the information required to analyze
22 these issues. To the extent that additional information is necessary, the Council directs Olympic to work
23 cooperatively with the moving parties to identify and provide this information, so that the schedule outlined in
24 section D of this order can be accomplished.

25 ⁹ The Council will use the definitions in the Revised Application, p. 3.4-1. Specifically, the Council will use the
26 term "study area" to mean a one-half mile corridor centered on the proposed pipeline route.

¹⁰ The Council concurs with the conclusion reached by Judge Heller in his memorandum dated December 22, 1998,
that compensation is not within the scope of EFSEC's jurisdiction. The Council also concurs with the parties'
assertions that an EFSEC certification does not operate to convey title to private or public property. These matters
would either be negotiated or decided in independent proceedings.

1 This conception of the Council's task may be useful to the moving parties as they prepare
2 their testimony. The Council is particularly interested in the parties' most preferred and
3 least preferred alignments. This information will enable it to set appropriate conditions if
4 it approves the project.¹¹

5 **E. Schedule**

6 In their motions and responses, many of the parties requested an extension of time to file
7 testimony related to public lands and a delay in the opening of the adjudication.
8 However, in their February 12 responses to Judge Heller's letter, all parties who
9 addressed point (iv) indicated that the topics listed in the Hearing Organization and
10 Structure document could be heard independently of the issues related to public lands.¹²

11 The Council here modifies the schedule established in Prehearing Order No. 14. The
12 purpose for this modification is to provide for an expeditious and efficient hearing, while
13 providing for a complete administrative record for all issues on which the Council intends
14 to rule pursuant to its statutory responsibilities.

15 The hearing will proceed in two phases with a short break between phases. The first
16 phase will address the issues on which the parties prefiled their testimony on February 12.
17 The second phase will address public land issues, on which the Council has directed the
18 parties to prefile additional testimony.¹³

19 The Council plans for the first phase of the hearing to run from the week of April 26
20 through the week of July 19 (if needed), as previously scheduled. The second phase of
21 the hearing will begin during the week of August 23 and run approximately three weeks
22 as required by the testimony submitted. Land use and public hearings will occur during
23 the second phase as determined appropriate by Judge Heller.

24 Any party that omitted evidence from prior filings on the assumption that it was beyond
25 the Council's jurisdiction may submit additional prefiled testimony regarding the siting of
26 the pipeline on public lands, provided such testimony is within that party's scope of
intervention. This prefiled direct testimony is due on June 25, 1999.¹⁴ Responsive
prefiled evidence is due on August 6. Any rebuttal may be done orally during the second
phase of hearing.

19 ¹¹ This discussion in no way signals a Council decision on the project.

20 ¹² Judge Heller's letter of February 5, 1999, states, "If a party has remaining issues related exclusively to the grant of
21 right-of-way, for which it cannot submit testimony on February 12, that party shall: ... (iv) with reference to the
22 'Hearing Organization and Structure' summary distributed at the January 14 prehearing conference, indicate which,
23 if any, of the hearing topics are not affected by the jurisdictional issue and could be heard prior to the pre-filing of
evidence regarding the grant of right-of-way." As indicated in Prehearing Order No. 21, the "Hearing Organization
and Structure" document is a working document; it is intended neither to limit the parties' issues nor to reflect the
order in which the topics will be addressed.

24 ¹³ On February 12, in response to Prehearing Order No. 21, DNR and Parks filed limited testimony that relates to
25 public land issues. The Council requests DNR, Parks, and any other parties who filed testimony that should be
considered during the second phase of the hearing to identify that testimony by exhibit number by March 19.

26 ¹⁴ As with the February 12 prefiled testimony, the additional testimony should follow the formatting requirements
set forth in the Council's rules and the Hearing Guidelines for this proceeding.

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In short, the modified schedule is as follows:

Date	Phase 1	Phase 2
Week of 4/26/99	Opening of hearing	
6/25/99		Additional PFT due
On or before Week of 07/19/99	Conclusion of Phase 1	
8/6/99		Responses due
Week of 8/23/99		Opening of Phase 2 Opportunity for oral rebuttal
To be scheduled		Land Use Hearings Public Hearings

The remainder of the schedule, including briefing schedules and anticipated Council action will be adjusted accordingly and formally established in a future prehearing order. Adherence to this schedule is in the interests of all stakeholders in this process, including the applicant, parties, and Council members.

DATED and effective at Olympia, Washington, this 8th day of March 1999.

/s/ Deborah Ross
Deborah Ross, EFSEC Chair

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.