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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 WASHINGTON UTILITIES AND )  
TRANSPORTATION COMMISSION, )

4 )

5 Complainant, )

6 )

vs. ) DOCKET NO. PG-080097

7 )

8 CITY OF ENUMCLAW, )

9 )

10 Respondent. )

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12 A prehearing conference in the above matter  
13 was held on March 11, 2009, at 1:30 p.m., at 1300 South  
14 Evergreen Park Drive Southwest, Olympia, Washington,  
15 before Administrative Law Judge PATRICIA CLARK.

16 The parties were present as follows:

17 WASHINGTON UTILITIES AND TRANSPORTATION  
18 COMMISSION, by MICHAEL A. FASSIO, Assistant Attorney  
19 General, 1400 South Evergreen Park Drive Southwest,  
20 Post Office Box 40128, Olympia, Washington 98504;  
21 telephone, (360) 664-1192.

22 CITY OF ENUMCLAW, by MICHAEL J. REYNOLDS,  
23 City Attorney, 329 East Main Street, Auburn, Washington  
24 98002; telephone, (253) 939-4556.

25 Kathryn T. Wilson, CCR

Court Reporter

0002

1 P R O C E E D I N G S

2 JUDGE CLARK: Good afternoon. It's  
3 approximately 1:30 p.m. on March 11th, 2009, in the  
4 Commission's hearing room in Olympia, Washington. This  
5 is the time and the place set for a prehearing  
6 conference in the matter of the Washington Utilities  
7 and Transportation Commission, Complainant, versus City  
8 of Enumclaw, Respondent, given Docket No. PG-080097,  
9 Patricia Clark, administrative law judge for the  
10 Commission presiding.

11 This matter came before the Commission on  
12 February 10th, 2009, and the Commission issued a  
13 complaint against the City of Enumclaw for alleged  
14 violations of the Commission's statutes and rules  
15 governing pipeline construction, maintenance, and  
16 safety. The total violations, if proven, could result  
17 in 11 million dollars in penalties. By the same  
18 document, the Commission set this matter for a  
19 prehearing conference at this time and place.

20 At this time, I'll take appearances on behalf  
21 of the parties, and because this is a first appearance,  
22 if you could please give me a full appearance with your  
23 name, address, phone number, fax number, e-mail.

24 MR. FASSIO: Michael Fassio, assistant  
25 attorney general, representing Commission staff. My

0003

1 address is PO Box 40128, Olympia, Washington,  
2 98504-0128. My phone number is (360) 664-1192. Fax is  
3 (360) 586-5522, and e-mail is mfassio@wutc.wa.gov.

4 JUDGE CLARK: And appearing on behalf of the  
5 City of Enumclaw?

6 MR. REYNOLDS: Michael J. Reynolds, 329 East  
7 Main Street, Auburn, Washington, 98002; Washington  
8 State Bar No. 5795; telephone number, (253) 939-4556;  
9 fax number, (253) 939-4559; e-mail, mjrlaw@hotmail.com.

10 JUDGE CLARK: Thank you, Mr. Reynolds. It  
11 appears that there is no one on the bridge line. I'll  
12 ask again, is there anyone appearing on the bridge  
13 line? I believe that means that the sole appearances  
14 we have this afternoon are Mr. Fassio and Mr. Reynolds.

15 The primary purpose of our prehearing  
16 conference today is to establish a procedural schedule  
17 in this matter, but I'm going to turn to the parties  
18 and see if there are any preliminary matters that we  
19 should address before we begin to discuss a proposed  
20 procedural schedule. Mr. Fassio?

21 MR. FASSIO: I presume you are going to  
22 discuss at some point discovery and those issues as  
23 well after we discuss schedule?

24 JUDGE CLARK: One of the preliminary matters  
25 I have -- I actually have three. One is to inquire

0004

1 whether the parties feel the need to have a public  
2 comment hearing in this proceeding, whether you wish to  
3 have the discovery rules invoked, and whether you feel  
4 any need to have a protective order. Those are the  
5 three preliminary matters that I've identified, and I'm  
6 certainly willing to discuss any others that the  
7 parties wish to address, and I have no preference  
8 regarding the order in which we discuss those.

9 MR. FASSIO: Let me take the discovery first.  
10 I believe Staff's opinion is this a matter which would  
11 be appropriate for discovery under WAC 480-07-400, so  
12 we request an invocation of the discovery rules in this  
13 case. If there is discovery, we would have a rubric to  
14 work under 405 through 425, I think.

15 JUDGE CLARK: 425.

16 MR. FASSIO: And of course, we would work  
17 cooperatively with Enumclaw on exchange of discovery.

18 JUDGE CLARK: Mr. Reynolds?

19 MR. REYNOLDS: No objection.

20 JUDGE CLARK: The Commission will invoke the  
21 Commission's discovery rules at WAC 480-07-400 through  
22 480-07-425, and those rules just provide general  
23 guidelines regarding the deadlines the parties have to  
24 respond to discovery requests and that manner of thing.  
25 If there are any disputes regarding discovery, I'm

0005

1 hopeful that the parties will attempt to informally  
2 resolve those disputes and only bring discovery matters  
3 to the Commission if you are unable to resolve to your  
4 satisfaction. Does anyone have an almost overwhelming  
5 desire to discuss the public comment hearing or a  
6 protective order next?

7 MR. FASSIO: The protective order, I don't  
8 think the parties feel a need to have a protective  
9 order at this time, but I suppose any party may request  
10 one if the need arises.

11 JUDGE CLARK: Any party may request one at  
12 any time. Mr. Reynolds, do you see the need to  
13 disclose any information from the City that the City  
14 would consider designating as either confidential or  
15 proprietary information at this juncture?

16 MR. REYNOLDS: No, Your Honor.

17 JUDGE CLARK: Then I'm not going to issue a  
18 protective order at this time, but if at any time  
19 during the course of this proceeding you discover that  
20 it would be to the City's benefit to have such an  
21 order, you simply need to request that the Commission  
22 issue a protective order.

23 We have a standard protective order that we  
24 initiate in a number of proceedings, and we can issue  
25 that document or another document more tailored to suit

0006

1 your needs. So now that brings us to the issue of a  
2 public comment hearing.

3 MR. FASSIO: This is not something that Staff  
4 has discussed with Enumclaw.

5 JUDGE CLARK: This is something that you  
6 would prefer to discuss with Enumclaw?

7 MR. FASSIO: Yes. I believe Staff's  
8 preference is not to schedule a public comment hearing  
9 on the litigation at this time. We are engaging in  
10 settlement negotiations with the City and are  
11 optimistic that we may be able to reach settlement in  
12 advance of hearing. It may become appropriate at that  
13 point to schedule a settlement or a public hearing on  
14 the settlement, but I believe the City has city counsel  
15 meetings and the like which public comment may be  
16 taken.

17 JUDGE CLARK: How would the Commission obtain  
18 use of any transcript in a city counsel meeting for use  
19 in the evidentiary record in this matter?

20 MR. FASSIO: I believe that the city counsel  
21 meetings are open record online, but Mr. Reynolds might  
22 be able to...

23 MR. REYNOLDS: That's correct, Your Honor.  
24 First of all, we agree with what the attorney general's  
25 office has said, and our proceedings are all public,

0007

1 and they are also live television. On Monday, we did  
2 discuss the ongoing nature of it with the city counsel  
3 of which the public is hearing because it's being  
4 televised.

5 In addition to that, the minutes of the  
6 counsel meetings are available for the public. The  
7 matter was discussed also in executive session, but  
8 predominantly, it was discussed in the open public  
9 meeting.

10 JUDGE CLARK: So that's really not my  
11 question. My question is I understand that that gives  
12 the public the opportunity to comment in the City of  
13 Enumclaw, but how is that information translated into  
14 the evidentiary record in this proceeding?

15 MR. FASSIO: I believe Your Honor has it  
16 correct. Unless either of the parties introduces  
17 public comment record into the proceeding, it would  
18 become part of the record. I believe Commission rules  
19 may allow for the Bench to also request that of the  
20 parties if it's available. I think also in any matter  
21 before the Commission, the public has the opportunity  
22 to submit comments directly to the Commission through  
23 the consumer affairs department.

24 JUDGE CLARK: Yes, the public does have the  
25 opportunity to submit written comments to the

0008

1 Commission. Normally, we set a deadline for such  
2 submitting of comments, or we accept them until the  
3 Commission issues a ruling on the merits of the case,  
4 but that's generally not in lieu of a public comment  
5 hearing but rather in addition to a public comment  
6 hearing.

7           The reason I ask this question is we have a  
8 daily news briefing in our agency, and there have been  
9 a number of newspaper articles regarding this  
10 particular case, so I know it has generated a  
11 significant amount of public interest, and I'm also  
12 aware that the individual who serves as our public  
13 information officer has received inquiry from members  
14 of the public regarding whether or not the Commission  
15 will be conducting a public comment hearing in this  
16 proceeding.

17           So at this juncture, I think it is my  
18 preference to schedule one into the procedural schedule  
19 that we establish today. Please understand that we  
20 will schedule that around the end of this proceeding.  
21 If the parties are able to reach a settlement on the  
22 merits of this particular case, then that public  
23 comment hearing would in essence end up being a report  
24 to the public on the settlement that is reached by the  
25 parties. It isn't necessarily a hearing that addresses



0009

1 any contested issues, which is why my preference to  
2 schedule that at the end.

3 If the parties toward the end of this  
4 proceeding do not feel the need for the public comment  
5 hearing, then we can certainly also cancel that public  
6 comment hearing, but I don't want to be scrambling at  
7 the end looking for a location for such a hearing in  
8 Enumclaw if we decide we want it later on.

9 I've taken a look at the Complaint that's  
10 issued in this case, and there are a number of  
11 violations alleged against the City of Enumclaw. If my  
12 memory serves me correctly, it exceeds 600 violations,  
13 and these violations I view as very serious, and so I  
14 want the parties to understand that the procedural  
15 schedule that we will establish this afternoon will be  
16 an expedited procedural schedule so that we can get  
17 these matters addressed as quickly as possible.

18 The route that the parties take to try to  
19 resolve those issues is, of course, not necessarily  
20 through prefiled testimony and exhibits, and the  
21 Commission always encourages alternative dispute  
22 resolution and encourages the parties to engage in  
23 settlement, but these allegations are very serious and  
24 we need an expedited procedural schedule. Have the  
25 parties had an adequate opportunity to confer regarding

0010

1 a procedural schedule?

2 MR. FASSIO: We've had some opportunity to  
3 confer, but I think it would be appropriate, perhaps,  
4 to go off the record for a few minutes to discuss it.

5 JUDGE CLARK: I'm happy to do that.

6 Mr. Reynolds?

7 MR. REYNOLDS: That's fine.

8 JUDGE CLARK: We will take a few minutes off  
9 record and allow the parties to confer regarding the  
10 procedural schedule. I'm sure that Mr. Fassio is  
11 familiar with the elements that I need in the  
12 procedural schedule commencing with the prefiled direct  
13 testimony of the Commission staff, and of course  
14 responsive testimony from the City of Enumclaw. I  
15 would like to schedule a settlement conference. I know  
16 the parties have been engaging in some informal  
17 discussions, but schedule a settlement conference, and  
18 to encourage to participate in that, I would like a  
19 settlement status report at a date after that  
20 conference to report on how you are progressing;  
21 Commission staff rebuttal testimony; public comment  
22 hearing, and then, if necessary, an evidentiary  
23 hearing. Mr. Fassio, do you have a recent copy of the  
24 Commission's calendar with you?

25 MR. FASSIO: I do not.

0011

1           JUDGE CLARK:  Then we are going to take a few  
2  moments off record, and I'm going to make sure you have  
3  the most current version of the calendar, and then if  
4  you would send someone to my office after you've had  
5  the opportunity to confer on a procedural schedule, we  
6  will go back on the record.  Are there any other  
7  matters we should address before we go off the record?

8           MR. FASSIO:  It might be helpful for Your  
9  Honor to be in the room for at least the initial part  
10 of our off-the-record discussions before you head back.

11          JUDGE CLARK:  Before I search for the  
12 calendar?

13          MR. FASSIO:  After you come back.

14          JUDGE CLARK:  Then we are at recess until  
15 further call.

16          (Recess.)

17          JUDGE CLARK:  Have the parties had adequate  
18 time to discuss a procedural schedule.

19          MR. FASSIO:  We have.

20          MR. REYNOLDS:  We have.

21          JUDGE CLARK:  Do you ever a procedural  
22 schedule you would like to propose?

23          MR. FASSIO:  We do.  We would like to propose  
24 a settlement conference for the week of April 30th, and  
25 we would like to request a mediator from the

0012

1 administrative law judge division to assist with that.

2 JUDGE CLARK: You would like a mediator on  
3 April 30th?

4 MR. FASSIO: Yes, at that settlement  
5 conference.

6 MR. REYNOLDS: Just a point of clarification,  
7 you had indicated the week of April 30th, but it is  
8 April 30th itself, isn't it, so we do have a date  
9 locked in?

10 MR. FASSIO: Yes, that is correct.

11 JUDGE CLARK: What ordinarily happens is the  
12 parties attempt to come up with a settlement and then  
13 seek Commission intervention or assistance if you reach  
14 an impasse, but that's not the route we are taking.  
15 You are asking for a mediator now on April 30th? I'm  
16 not trying to talk you in or out of anything. I just  
17 want to make sure I understand.

18 MR. FASSIO: We actually hope to have a  
19 settlement by that date. If we have not reached a  
20 settlement by that date, it is likely we are at an  
21 impasse, and that is why we would be requesting right  
22 now to schedule that date as a settlement conference  
23 date in the procedural schedule and subject to  
24 availability of a mediator to assist with that  
25 settlement conference at that time.

0013

1           JUDGE CLARK: Okay. So April 30th, you would  
2 like to go ahead and schedule a settlement conference,  
3 and at that conference, you are requesting the services  
4 of an ALD mediator.

5           MR. FASSIO: Yes, that is correct. If an ALD  
6 mediator is not available on that date, we may be able  
7 to work with that schedule to come up with an alternate  
8 date, but we would like to request the 30th.

9           JUDGE CLARK: The next date?

10          MR. FASSIO: A status conference with Your  
11 Honor either in person or telephonically regarding  
12 status of settlement. We propose May 6th.

13          JUDGE CLARK: That can be, as you indicated,  
14 held telephonically. The next procedural?

15          MR. FASSIO: Staff prefiled testimony of May  
16 22nd followed by Enumclaw's response testimony June  
17 22nd; Staff rebuttal testimony July 6th. We would  
18 propose a hearing of July 22nd.

19          JUDGE CLARK: Then the only other deadline  
20 that I advise the parties we want to schedule is a  
21 public comment hearing, and we do not have a location  
22 for a public comment hearing, and if one would be held,  
23 it would be held in the City of Enumclaw to give  
24 citizens an adequate opportunity to come and present  
25 comments, and absent a location, it's somewhat

0014

1 difficult to put that in. So I would say the location  
2 should be determined at a future date, but I think it  
3 would be helpful to work into the schedule, perhaps, a  
4 date for the public comment hearing if the parties are  
5 amenable to doing that.

6 MR. REYNOLDS: Thank you, Your Honor. The  
7 city council chambers, City of Enumclaw at 1339 Griffin  
8 Avenue would be available.

9 JUDGE CLARK: Thank you. 1339 --

10 MR. REYNOLDS: Griffin, Enumclaw, 98022.

11 JUDGE CLARK: Do you have a date that we can  
12 schedule for that?

13 MR. REYNOLDS: If it's a nighttime issue --  
14 our daytime is -- the courtroom is in that facility as  
15 well.

16 JUDGE CLARK: It would be in the evening. It  
17 probably wouldn't commence any earlier than six p.m.,  
18 and it probably would not run any later than 7:30,  
19 possibly eight p.m.

20 MR. REYNOLDS: Monday night is counsel night  
21 and then planning commission.

22 JUDGE CLARK: So Monday is bad?

23 MR. REYNOLDS: Would it be preceding the  
24 hearing, Your Honor?

25 JUDGE CLARK: I'm amenable to doing it either

0015

1 way. We can have the public comment hearing preceding  
2 the hearing or we can have it after the hearing. We  
3 ordinarily hold them before the hearing so that the  
4 absolute last thing other than the parties are really  
5 done and then really you are waiting for a decision.

6 MR. FASSIO: Staff would recommend it be  
7 preceding the hearing, but we don't have a particular  
8 date in mind.

9 MR. REYNOLDS: Our counsel meetings are the  
10 second and fourth Mondays. Therefore, July 20th just  
11 before the hearing would work.

12 JUDGE CLARK: Then why don't we tentatively  
13 schedule it for that day.

14 MR. REYNOLDS: The time, Your Honor?

15 JUDGE CLARK: Six p.m., commencing at six  
16 p.m., and then, of course, if the parties are able to  
17 reach a settlement, one option is to simply present the  
18 settlement at the public comment hearing. The other  
19 option is for the parties to request that the public  
20 comment hearing be vacated, that there is no longer any  
21 need for it.

22 MR. REYNOLDS: Just for Your Honor's  
23 information, in the event, and we hopefully will arrive  
24 at a settlement agreement, we authorize that by a  
25 resolution, which is an act covered by the city counsel

0016

1 which is then done in an open public meeting.

2 JUDGE CLARK: Right. Then I suppose one of  
3 the parties could move to make the transcript or  
4 whatever record there is of that counsel meeting a  
5 portion of the record in this proceeding.

6 MR. REYNOLDS: Correct.

7 JUDGE CLARK: Are there any other matters  
8 that we need to address this afternoon?

9 MR. REYNOLDS: City has known, Your Honor.

10 MR. FASSIO: No, Your Honor.

11 JUDGE CLARK: Thank you very much. We are  
12 adjourned.

13 (Prehearing adjourned at 3:05 p.m.)

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