

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET PG-080097
TRANSPORTATION COMMISSION,)	
)	ORDER 03
Complainant,)	
)	
v.)	
)	INITIAL ORDER APPROVING
CITY OF ENUMCLAW,)	AND ADOPTING SETTLEMENT
)	SUBJECT TO CONDITIONS
Respondent.)	
)	
.....)	

1 **SYNOPSIS.** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of the order. If this Initial Order becomes final, the Settlement Agreement entered into between the City of Enumclaw and the Commission Staff which resolves all issues in the complaint will be approved and adopted, subject to conditions. Approval of the Settlement Agreement is conditioned on the parties filing quarterly written progress reports with the Commission and on achieving compliance with all of the Settlement’s conditions and remediation within 24 months.*

MEMORANDUM

2 **PROCEEDING.** Docket PG-080097 involves a complaint issued by the Washington Utilities and Transportation Commission (Commission) against the City of Enumclaw (City or Enumclaw) for alleged violations of the Commission’s statutes and rules governing pipeline construction, maintenance, and safety. The total violations, if proven, could result in \$11 million in penalties.

3 **APPEARANCES.** Michael A. Fassio, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Commission Staff or Staff).¹ Michael J. Reynolds, City Attorney, represents Enumclaw.

¹ In formal proceedings, such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the

4 **BACKGROUND.** On February 10, 2009, the Commission issued a complaint against the City for a minimum of 651 violations of the Commission’s rules governing gas pipeline construction, maintenance, and safety. The Commission provided notice to the City that the complaint contained only the minimum number of violations because it is likely that violations occurred on earlier dates and continued to later dates than those specifically cited in the complaint. Moreover, the Commission provided notice that many of the violations are continuing in nature from the date the violation occurred. Consequently, the Commission concluded that it could not determine the exact number of violations until after hearing and that the total number of violations may greatly exceed the 651 violations alleged in the complaint. The Commission concluded that the 651 violations could, if proven, result in a maximum penalty of \$11 million.

5 **PROCEDURAL HISTORY.** On February 10, 2009, the Commission issued a complaint and notice of prehearing conference. The City did not file an answer to the complaint. On March 11, 2009, the Commission convened a prehearing conference before Administrative Law Judge Patricia Clark. On March 12, 2009, the Commission entered Order 02, Prehearing Conference Order, establishing a procedural schedule, including an evidentiary hearing and a public comment hearing.

6 On April 30, 2009, the parties filed an Agreement to Mediate their dispute using the services of a Commission assigned mediator. On May 4, 2009, the parties filed a letter advising the Commission that they had reached a settlement, in principle, of all issues in the proceeding but required additional time to reduce the details of the agreement to writing, finalize, and obtain signatures to the settlement. The parties anticipated that they would be able to file the settlement by the last week of June. The parties requested that the status conference scheduled for May 6, 2009, be cancelled.

proceeding. There is an “*ex parte* wall” separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners’ policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

7 On May 5, 2009, the Commission entered a Notice Cancelling Status Conference and Suspending Procedural Schedule. The Commission established June 29, 2009, as the deadline for the parties to file a Settlement Agreement (Settlement). On June 25, 2009, the parties filed a Settlement resolving all disputed issues in this case.

8 On July 2, 2009, the parties participated in a conference call with the Administrative Law Judge during which both parties agreed that the public comment hearing should be cancelled and that they were available for a hearing on the Settlement on July 20, 2009. On July 10, 2009, the Commission issued a Notice Cancelling the Public Comment Hearing and rescheduling the evidentiary hearing to July 20, 2009.

9 The hearing convened, as scheduled, on July 20, 2009. The Commission Staff presented two witnesses in support of the Settlement; Ann Soiza, Director of Pipeline Safety, and David Lykken, Chief Pipeline Safety Engineer. The City presented one witness in support of the Settlement, William Hawthorne, Gas Utility Manager.

10 **SETTLEMENT AGREEMENT.** In this section, the parties' Settlement Agreement, which is attached to and made part of this Order by this reference, is summarized. If there is any inconsistency between this summary and the Settlement Agreement, the express terms of the Settlement Agreement control.

11 According to the Settlement, the City concurs that there were violations of state and federal rules regarding the inspection, monitoring, and maintenance of its pipeline facilities and its records. The parties agree the City is subject to suspended penalties² in the amounts listed below if the City fails to meet the terms in the applicable section of the Settlement.³

- \$1,000,000 suspended penalty regarding failure to comply with Section B-1, Unprotected Services.
- \$500,000 suspended penalty regarding failure to comply with Section B-2, Ninety Day Remediation.

² Each agreed-upon suspended penalty could be imposed in full upon failure to comply with the applicable provision of the Settlement.

³ Settlement, ¶¶ 10 – 11.

- \$75,000 suspended penalty regarding failure to comply with Section B-4, Casings.
- \$150,000 suspended penalty regarding failure to comply with Section B-5, Capacity and Design Requirements.
- \$50,000 suspended penalty regarding failure to comply with each of the following sections of the Settlement: (1) Section B-3, Inspection of Pressure Limiting and Regulation Stations; (2) Section B-6, Records to Demonstrate Compliance; (3) Section B-7, Updating Records; (4) Section B-8, Gas Leak Surveys; or (5) Section B-9, Pressure Test Documentation.
- \$25,000 suspended penalty regarding failure to comply with each of the following sections of the Settlement: (1) Section B-10, Corrosion Control Records; (2) Section B-11, Gas Leak Evaluation and Record; (3) Section B-12, Atmospheric Corrosion Inspection; or (4) Section B-13, Plans and Procedures.

12 The foregoing suspended penalties total \$2,075,000. The suspended penalties could be assessed, in whole or in part, for failure to comply with conditions or remediation in the Settlement.

13 The City agrees that, within 30 days of the date the Settlement is approved, it will submit to Staff a plan to complete all conditions or remediation in the Settlement within the required timeframes.⁴ Each section of the Settlement provides a deadline ranging from three months to three years by which the City must come into compliance with applicable statutes and rules or perform remediation. The parties further agree that they will have quarterly meetings to ensure that the conditions or remediation progress is adequate to meet the required timeframes and the City will provide to Staff quarterly written progress reports of its compliance efforts.⁵

14 **DISCUSSION AND DECISION.** WAC 480-07-750(1) states, in pertinent part, that “[T]he commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with

⁴ Settlement, ¶ 12.

⁵ *Id.*, ¶ 14.

the public interest in light of all the information available to the commission.” The Commission considers settlements under a three-part inquiry which asks whether:

- any part of the settlement is contrary to law;
- any aspect of the proposal offends public policy; and
- the evidence supports the proposed elements of the settlement as a reasonable resolution of the issues at hand.⁶

15 After conducting this three-part inquiry, the Commission must reach one of three possible results:

- approve the proposed settlement without conditions;
- approve the proposed settlement subject to condition(s); or
- reject the proposed settlement.

16 In general, and as discussed below, the settlement terms and conditions proposed by the parties, as conditioned by the Commission, are consistent with law and policy and reasonably resolve the issues in this proceeding. The Commission considers the terms and conditions of the Settlement Agreement in the context of the evidence presented.

17 Since 1993, Staff has conducted safety inspections of the City’s gas plant and related practices and has issued at least 10 notices of probable violations of Commission statutes and rules.⁷ The most recent case was conducted in 2006⁸ and was resolved by the Commission’s acceptance of a settlement that notes repeat violations from the case initiated in 2000.⁹ The parties believe that the current Settlement’s terms, including quarterly compliance meetings and reports combined with suspended

⁶ *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power & Light Company*, Docket UT-080220, Order 05 entered October 8, 2008.

⁷ TR. 22.

⁸ *Id.* Order 01, entered December 13, 2006, in Docket PG-051609, *In re Commission Investigation of the Gas Pipeline System of the City of Enumclaw*.

⁹ TR. 22. Docket UG-000071, was resolved through correspondence between the City and the Commission without a formal heading being designated or formal orders being entered.

penalties, provide sufficient incentive for the City to comply with the Settlement's terms.¹⁰

18 In April 2008, the City hired a Gas Utility Manager, with approximately nine years of experience with gas plants and transmission systems.¹¹ The City has five employees who will complete the work necessary to comply with the terms and conditions of the Settlement without hiring outside consultants.¹²

19 Enumclaw has already undertaken efforts to bring its gas plant into compliance with the terms and conditions of the Settlement. As of the date of hearing, the City has completed many of the Settlement's requirements and has undertaken, although not completed, other Settlement requirements.¹³

20 The City has a history, extending as far back as 16 years, of not complying with the Commission's statutes and rules regarding natural gas safety. This history of repeated noncompliance results in the Commission viewing the current Settlement with some trepidation that the City will now take seriously its responsibility to maintain its pipeline facilities and records in accordance with all applicable statutes and rules. The Commission's concern about actual compliance with the Settlement's terms is considerably assuaged by the City hiring an individual to manage the gas plant who appears to have not only the necessary experience to implement the terms of the Settlement, but an enthusiasm for and commitment to completing all necessary work in a timely manner. This concern is further ameliorated by the City undertaking, even prior to approval of the Settlement, considerable effort to bring its system into compliance and completing approximately 70 percent of the work required by the Settlement.¹⁴

¹⁰ TR 22-23, 28-29, and 34.

¹¹ TR. 23 and 25.

¹² TR 35.

¹³ TR 34 – 49.

¹⁴ TR 49.

- 21 However, the City's completion of approximately 70 percent of the work required by the Settlement also leads to the conclusion that the deadlines established in the Settlement are too lengthy. Given the fact that many of the violations noted in the original complaint are repeat violations and have been ongoing for a number of years, the Commission is interested in having the work completed as quickly as possible. To encourage the City to maintain its current momentum toward bringing the system into compliance, the Commission concludes that the deadlines in the Settlement should be reduced requiring the completion of all the terms and conditions of the Settlement within a maximum of 24, rather than 36, months. Accordingly, approval and adoption of the Settlement is conditioned on reducing the deadline for full compliance with the Settlement's conditions and remediation to 24 months.
- 22 The Commission further believes that the quarterly meeting and monitoring process devised by the City and Staff will ensure that reasonable progress is being made toward achieving the Settlement's requirements. However, the Commission believes that the quarterly progress reports should be filed in the Docket, rather than informally with the Pipeline Safety Director, so that the Commission can also monitor progress. Neither the City nor the Staff objects to filing the reports in the formal record.¹⁵ Accordingly, acceptance and approval of the Settlement is further conditioned on filing quarterly written progress reports with the Commission in this proceeding.

FINDINGS OF FACT

- 23 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated finding of fact and conclusion upon issues and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:
- 24 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the safety of gas plants used to transport natural gas in this state, as well as the related practices of those who own or operate such gas plants.

¹⁵ TR. 28 and 52 -53.

- 25 (2) The City of Enumclaw is located in the state of Washington and owns and
operates a natural gas distribution system that transports natural gas to city
customers for heat, light, or power.
- 26 (3) On February 10, 2009, the Commission issued a complaint against the City of
Enumclaw alleging more than 651 violations of the Commission's rules
regarding gas pipeline safety.
- 27 (4) If proven, the violations of the Commission's rules could result in a penalty of
approximately \$11 million.
- 28 (5) The parties propose to resolve the issues in this proceeding through the
Commission's approval and acceptance of their Settlement Agreement filed on
June 25, 2009, which is attached to and made part of this Order.
- 29 (6) The Commission's approval and adoption of the Settlement Agreement,
subject to conditions discussed in the body of this Order, is in the public
interest.
- 30 (7) The City has completed 70 percent of the conditions and remediation required
by the Settlement.
- 31 (8) The Staff and the City do not object to filing in the formal file in this
proceeding the quarterly written progress reports required by the Settlement.

CONCLUSIONS OF LAW

- 32 Having discussed above all matters material to this decision, and having stated
detailed findings, conclusions, and the reasons therefore, the Commission now makes
the following summary conclusions of law, incorporating by reference pertinent
portions of the preceding detailed conclusions:
- 33 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of, and the parties to, this proceeding. *RCW 80.18.010(2),
RCW 80.04.010, RCW 81.88.010, and RCW 81.88.065.*

- 34 (2) The City of Enumclaw is a “gas company” because it is a city owning, controlling, operating, or managing, gas plant in the State of Washington. *RCW 80.04.010.*
- 35 (3) The City of Enumclaw’s natural gas distribution system constitutes “gas plant” because it consists of real estate, fixtures, and personal property owned, leased, controlled, used or to be used for, or in connection with, the distribution, sale, or furnishing of natural gas for heat, light, or power. *RCW 80.04.010.*
- 36 (4) The Washington Utilities and Transportation Commission adopted, by reference, those provisions of 49 Part 192 of the Code of Federal Regulations. *WAC 480-93-999(1)*. Accordingly, a violation of 49 Part 192 of the Code of Federal Regulations is a violation of Commission rule.
- 37 (5) The Settlement, as conditioned, is lawful, supported by an adequate record, and consistent with the public interest.
- 38 (6) The Commission Secretary should be authorized to accept by letter, with copies to all parties in this proceeding, any filing that complies with the requirements of this Order.
- 39 (7) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS THAT:

- 40 (1) The Settlement Agreement filed by all parties to this proceeding on June 25, 2009, and attached to and incorporated into this Order by prior reference should be approved and adopted, subject to the conditions that all Settlement conditions and remediation are completed within 24 months and that quarterly written progress reports are filed in the formal file in this proceeding.

- 41 (2) The Commission Secretary is authorized to accept by letter, with copies to all parties to this proceeding, any filing that complies with the requirements of this Order.
- 42 (3) The Commission retains jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective August 24, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

PATRICIA CLARK
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or

for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

Attachment

Settlement Agreement