BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **THE BALLARD COALITION** of the adequacy of the Final Environmental Impact Statement, prepared by the Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project	Hearing Examiner File W-17-004 SEATTLE DEPARTMENT OF TRANSPORTATION'S MOTION TO COMPEL

I. INTRODUCTION/RELIEF REQUESTED

The Seattle Department of Transportation (SDOT) requests that the Hearing Examiner compel Appellant Ballard Coalition (Coalition) to immediately provide complete responses to SDOT's First Set of Interrogatories and Requests for Production, propounded upon the Coalition on August 15, 2017 (SDOT's Discovery). SDOT's Discovery consists of only three interrogatories and four requests for production, all of which were narrowly tailored to obtain information and documents pertaining to the identity of, facts known to, and opinions held by the Coalition's expert witnesses pursuant to HER 3.11, and CR 26, 33, and 34. The Coalition has refused to provide complete responses based on the general proposition that "discovery and hearing preparation is ongoing" and that the Coalition is not obligated to designate its expert witnesses until final witness and exhibit lists are due—just ten days before the hearing. Johnson Decl. at pp. 1-2, Exh. B.

The Coalition is not entitled to circumvent its discovery obligations in reliance on the final witness and exhibit list deadline. There is no legal authority for such an approach and, if allowed, it

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will frustrate SDOT's discovery efforts, interfere with trial preparation, and promote unnecessary delay.

II. STATEMENT OF FACTS

On August 15, 2017, SDOT served SDOT's Discovery on the Coalition. SDOT's Discovery include both interrogatories and requests for production of documents all pertaining to the identity and qualifications of the Coalition's expert witnesses, as well as the facts relied upon or opinions held by those witnesses. Johnson Decl. Exh. A. On September 14, 2017 the Coalition responded to SDOT's Discovery (Coalition Responses). The Coalition Responses are replete with boilerplate objections and no documents were provided. Johnson Decl. Exh. B.[1]

The Coalition responded to Interrogatory No. 1, which asks the Coalition to identify its expert witnesses, by referring to its previously filed preliminary disclosure of witnesses and exhibits, which does not include the information sought by Interrogatory No. 1 regarding the substance of facts and opinions to which the expert will provide testimony and a summary of the grounds for such opinions. Johnson Decl. Exh. B at p. 4, Exh. C. The Coalition objected to this and the remaining Interrogatories on grounds that, among other things, the request "seeks information subject to the attorney-client or work product privileges" and "seeks to enlarge the Coalition's obligations under the Civil Rules, the Hearing Examiner's Rules, or the Prehearing Order entered in this matter." *Id* at p. 5. The Coalition's response to each of SDOT's four requests for production of documents incorporates similar objections. *Id*. at pp. 5-7. In response to Request for Production No. 3, which requests documents relied upon by Coalition expert witnesses, and Request for Production No. 4, which requests communications with those experts, the Coalition responded that it "will produce documents that may be responsive [to the request] on or before October 6, 2017."[2] *Id*. at pp. 6-7.

[1] At 3:15 PM on September 22, 2017, just prior to the filing of this Motion the Coalition served counsel for SDOT with supplemental responses to SDOT's discovery. These supplemental responses do not address the issues central to this Motion to Compel.

[2] The Coalition's response to Request for Production No. 43 mistakenly references "October 8, 2017." Johnson Decl. Exh. B at p. 7.

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To date, the Coalition has provided no documents in response to SDOT's Discovery. Johnson Decl., at p. 1.

At the request of SDOT's counsel, on September 19, 2017, counsel for all parties conferred pursuant to CR 26(i) to address the Coalition's failure to adequately respond to SDOT's Discovery. Johnson Decl., at pp. 1-2. The Coalition offered to provide documents in response to Request for Production No. 3, which seeks documents reviewed or relied upon by the Coalition's expert witnesses. *Id.* at 2. Because these include documents previously provided to the Coalition by SDOT, SDOT agreed to consider a list of such documents prior to requiring their production. The remainder of the issues associated with the Coalition's Responses remain unresolved, because the Coalition asserts that it is not required to designate its expert witnesses, and by extension need not produce documents related to those witnesses' opinions and testimony, until the Pre-Hearing Order's deadline for exchange of final witness and exhibit lists on October 6, 2017. The Coalition has taken a similar positon regarding depositions of its expert witnesses, subject to limited exceptions. *Id*.

As a result, absent an order compelling production of the requested information and documents sought by SDOT's Discovery, SDOT will be further delayed in its trial preparation until a t least October 6, 2017, just ten days before the hearing.

III. STATEMENT OF ISSUE

Whether the Coalition is entitled to withhold information and documents relevant to the subject matter involved in this appeal.

IV. AUTHORITY

Hearing Examiner Rule 3.11 authorizes appropriate discovery, as well as motions to prohibit or limit discovery and motions to compel when a party fails to comply with its discovery obligations:

> Appropriate prehearing discovery, including written interrogatories, and depositions upon oral and written examination, is permitted. In response to a motion, or on the Hearing Examiner's own initiative, the Examiner may compel discovery, or may prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or

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> unnecessary under the circumstances of the appeal. Unless provided otherwise by order, the Hearing Examiner should not be copied on discovery documents, or on correspondence and electronic mail about discovery matters.

In addition, Hearing Examiner Rule 1.03 provides that:

> When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance.

Under CR 26(b)(1), parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." More specifically, CR 26(b)(5) governs the discovery of facts known and opinions held by experts and provides that:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.[3]

SDOT's Discovery requests the exact information allowed to be discovered by CR 26(b)(5)(A)(1). As the Appellant in this matter, the Coalition's experts have been reviewing the EIS and preparing their testimony and formulating their opinions. The details of their analyses and their opinions including the bases of their expert opinions are discoverable and must be disclosed when requested by SDOT to facilitate SDOT's hearing preparation. This was not included in their minimal summary of expert testimony in the Coalitions Preliminary List. Johnson Decl., Exh. C. Similarly, any reports, studies, notes or other documents associated with their experts' evaluation of the EIS must be produced in response to SDOT's discovery request, but the Coalition has produced

[3] CR 26(b)(5)(A)(1).

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absolutely no documents in response to SDOT's request. Johnson Decl. at p. 1. To-date, the Coalition has declared it is not required to share any of this discoverable information. *Id.* at p.5.

The Washington State Bar Association Civil Procedure Deskbook emphasizes:

> The rules of discovery are instruments intended to 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'[4] "The purpose of discovery is to allow production of all relevant facts and thereby narrow the issues, and promote efficient and early resolution of claims.'[5]

WASHINGTON CIVIL PROCEDURE DESKBOOK § 26.5 (Wash. St. Bar Assoc. 3d ed. 2014).[6]

There is no authority for waiting until a final witness list is due to respond to a discovery request propounded under the Civil Rules. Such an approach would stand the discovery process on its head. It is apparent that final witness and exhibit lists are intended as a tool to facilitate orderly hearings by informing the tribunal and parties of the scope of the evidence and allowing them to organize their respective cases. Final witness lists do not, however, trump the parties' independent discovery obligations.

In jurisdictions that have adopted a requirement for submission of final witness and exhibit lists, this is clearly not the case. For example, the King County Superior Court Local Civil Rules ("KLCR") provide for issuance of a standard case schedule in every case, including deadlines for disclosure of primary and possible additional witnesses (22 and 16 weeks before trial respectively), discovery cutoff (seven weeks before trial), and exchange of witness and exhibit lists and documentary exhibits (three weeks before trial). KLCR 4(e) & (j); KLCR 26(k). Applying Petitioner's logic to these rules, a party could wait until after the discovery cutoff has passed to designate its testifying experts, thereby circumventing the opposing parties' discovery of those experts.

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[4] *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L. Ed. 2d 1077 (1958); *see also Lowy v. PeaceHealth*, 114 Wn.2d 769, 777, 280 P.3d 1078 (2012).
[5] *Cedell v. Farmers Inc. Co. of Wash.* 176 Wn.2d 686, 698, 295 P.3d 239 (2013).
[6] *See also Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984)

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This is not the intent of the final witness and exhibit list requirement. In fact KLCR 26(e) provides that the rules related to KLCR 26 witness disclosures do "not modify a party's responsibility to . . . comply with discovery before deadlines set by this rule." *See also* Official Comment to KLCR 26 ("The rule is not intended to serve as a substitute for the discovery procedures that are available under the civil rules to preclude or inhibit the use of those procedures.") Similarly, the Official Comment to KLCR 4, including KLCR 4(j) pertaining to exchange of final witness and exhibit lists, provides that disclosure of witnesses with expert opinions known to a party "should not be delayed to the deadlines established by [the] rule."

There is simply no authority for the proposition that a deadline shortly before trial for exchange of final witness and exhibit lists relieves the responding party of its responsibility to timely respond to discovery related to its expert witnesses. To allow this would deprive the requesting party of its right to timely discover facts known and opinions held by experts pursuant to CR 26(b)(5) and to adequately prepare for trial, and would promote unnecessary delay.

The only conclusion to be drawn from the Coalition's refusal to respond to SDOT's Discovery, is that it is part of a deliberate campaign to delay this proceeding. As addressed in SDOT's Response to the Coalition's Motion for Continuance accompanying this motion, the Examiner should not sanction such delay.

V. CONCLUSION

For the foregoing reasons, SDOT respectfully requests that the Hearing Examiner compel the Coalition to provide complete responses to SDOT's Discovery, including, but not limited to, all documents set forth in that request,[7] within five (5) days from the date of the Order.

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[7] With the exception of those documents responsive to Request for Production No. 3, subject to SDOT's review of a list to be provided by the Coalition.

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DATED this 22nd day of September, 2017.

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