BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of OLYMPIC PIPE LINE COMPANY For an Order Authorizing an Immediate Rate Increase	DOCKET NO. TO-011472 MOTION FOR RECONSIDERATION AND DECLARATION OF HOWARD FOX IN SUPPORT

I. INTRODUCTION

1. Olympic Pipe Line Company ("Olympic" or "Company") respectfully moves for an order on reconsideration to increase the interim rates to intrastate shippers to the level originally requested, which would be the same interim rates being paid by interstate shippers. The name and address of Olympic is as follows:

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2. This Motion brings into issue the following statutes and regulations: RCW 81.04.130, RCW 81.04.250, RCW 81.28.010, RCW 81.28.050, and WAC 480-09-810.

3. Because both interstate and intrastate interim rates would be subject to refund, the rates by definition would be fair, just and reasonable. Although the Commission

determined that Olympic met all six factors in the PNB test, the end result in the Third Supplemental Order Granting Interim Relief, In Part ("Order") falls short of what Olympic needs to attract sufficient capital on reasonable terms and unnecessarily diverges from the parallel interstate interim rates, thereby raising avoidable intrastate/interstate legal issues. Until September, 2001, intrastate rates for Olympic did not diverge from interstate rates.

4. The attached Declaration of Howard B. Fox shows that: 1) based on Olympic's actual year-end financials, Olympic continues to be in poor financial condition -- with or without the FERC interstate rate increases; 2) Olympic has a $1.7 million Prudential payment due this month but has only $2.5 million on hand; and 3) Olympic has not received additional loans from BP/ARCO and is being asked for additional information on the implications of the Commission's Order.

II. DISCUSSION

A. Introduction

5. Olympic appreciates the thoughtful review of its financial situation as set forth in the Commission's Order. In particular, Olympic appreciates the Commission's recognition that Olympic is in "dire financial circumstances," (Order at 12) that Olympic has "demonstrated the existence of an emergency," (Id. at 11) that "[f]unding is imminently needed" in order "to maintain and enhance the pipeline's safety," (Id.) and that Olympic's new management faces extraordinary challenges in stabilizing the pipeline's "very poor financial condition." (Id. at 12) The Commission's Order reviews the six factors in the PNB test and finds that Olympic meets all six factors. Unfortunately, the Commission's Order does not grant the requested interim rates in full--even though they would be subject to refund.

6. The Commission's Order emphasizes that this case is unique. Olympic agrees for the reasons identified and for an additional reason: This is the first Title 81 interim rate

case to involve an ongoing parallel federal rate proceeding regarding shared, common facilities. Olympic's proposed 2002 capital budget includes expenditures required by the Office of Pipeline Safety under federal law, as well as expenditures required under state law, by local governments and by BP's own internal safety standards. The capital expenditures will improve the same physical facilities that are shared in common by both interstate and intrastate shippers. Petroleum products moving in intrastate commerce flow down the same pipelines, using the same control centers, communications systems, valves, pumping stations, and related facilities as do petroleum products moving in interstate commerce. The safety expenditures for the pipeline system cannot practically be divided into interstate and intrastate portions.

7. Paragraph 27 of the Commission's Order recognizes that Olympic's pipeline system "transports product in both Washington intrastate and in interstate commerce," and that it "is subject to economic regulation by both this Commission and FERC." Order at 7.

8. The Order then states: "The Company and intervenors ask us to consider events under *federal regulation*. . . ." Id. (emphasis added).

9. Paragraph 48 of the Order notes that "the Company filed its request parallel to its request of the Federal Energy Regulatory Commission, or FERC, for a 62% increase in its interstate rates. The federal agency did allow the request to become effective, subject to refund, or its equivalent." Order at 13

10. The Order then states: "The Company does not contend that the Commission should apply FERC methodology to support the Company request for interim rates. Instead, it asks us not to consider FERC matters at all, and contends that review under the pertinent PNB factors will support its need." Id.

11. It is correct that Olympic believes all six of the PNB factors support its request, and that there was no need to take the time to understand or to apply FERC methodology to interim rates.[1] But, it is not correct that Olympic asked that FERC matters not be considered at all. As noted above, in paragraph 27 of the Order, Olympic did indeed ask the Commission "to consider events under *federal* regulation." (Emphasis added). Order at 7.

B. Olympic Has Consistently Raised the Interstate/Intrastate Issue

12. Olympic has consistently said the Commission should grant the full interim request to provide rates sufficient to attract capital on reasonable terms – and also to avoid a divergence between rates paid by interstate shippers and intrastate shippers.

13. For example, in its Supplemental Memorandum on Bayview dated January 30, 2001, Olympic stated:

> Intervenors wish to turn this interim proceeding—which should have been inexpensive and speedy given the immediate need to borrow $24 million for the undisputed items in the 2002 capital budget—into a virtual general rate case proceeding with testimony on prudency, methodology, capital structure and past rate case matters. The Bayview issues and other such issues should be addressed in the general case. To place additional burdens and add factors beyond the six enumerated PNB factors defeats the essential purpose of an interim proceeding—especially when the rates would be subject to refund.
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> If an additional factor is to be added to the PNB test, it should take into account that 1) Bayview and all of the other segments of the pipeline system have been and will also be used in interstate commerce and that interstate shippers are already paying rates subject to refund that include Bayview, and 2) a FERC order has already been entered making factual findings that Intervenors would not be harmed by

[1] See Bob Batch supplemental testimony, BCB-3T, Attachment A.

> interim rates, but that Olympic would be harmed if those rates were not placed into effect subject to refund. Because this is the first Title 81 interim case, the Commission will address which PNB factors are appropriate in this unique factual setting. *Olympic submits it has met all six PNB factors and that if any factor is added, it should take into account the factual findings in the FERC November 20 order and the potential impact on interstate commerce of a denial of parallel intrastate interim rates that are also subject to refund.* (Emphasis added.)

14. Olympic submitted the November 20, 2001 Order of the FERC as an exhibit to the supplemental testimony of Bob Batch (BCB – 3T) (Exhibit 8). Mr. Batch's testimony quoted the factual findings from that Order. In that order, the FERC made two factual findings that should be binding on Intervenors under principles of administrative efficiency, issue preclusion and comity. Those two factual findings were:

> 1. Olympic would be permanently harmed by a failure to fully grant Olympic's proposed increased rates prior to the general rate case order:
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> Specifically, in this proceeding, Olympic's circumstances of a major interruption in operations due to an explosion, the requirement for increased inspection and repairs, and other increases in operating costs, together with a decrease in the throughput subsequent to the explosion of the pipeline, produced a sharp increase in costs and reduction in revenues. Revenue lost during a suspension period is lost forever.[2] To have suspended the rate increase for several months would have produced a harsh and inequitable result in these circumstances.

Olympic Pipeline Co., F.E.R.C. ¶ 61,210; 2001 FERC LEXIS at 2791, at *7-8 (2001).

> 2. There was no proof any intervenor would be harmed:

[2] Buckeye Pipe Line Co., 13 F.E.R.C. ¶ 61,267, at 61, 594 (1980).

> Tesoro has asserted no anticompetitive circumstances and the Commission has no good reason to believe the rate increase imposed an undue hardship on the shippers. Tesoro's economic interests are fully protected as the entire rate increase is subject to revision at the conclusion of the hearing and it will, to the extent part or all of the rate increase is found to be unjust and unreasonable, receive refunds with interest, as prescribed in the Commission's regulations.

Id. at *8.

15. In its January 31 Order, the WUTC also made the intrastate interim rates subject to refund, and said: "The temporary rates that result from this order are subject to refund and are, with that condition, just, reasonable, and compensatory." (Order, p. 19, ¶ 81.) Thus, both the FERC and this Commission have made findings that because the rates are subject to refund there will be no harm to intervenors and the resulting rates will be fair, just and reasonable.

16. When Olympic addressed the issue of refundability at oral argument, it did so with express reference to the ongoing parallel federal rate proceeding:

> We've looked at this issue some more and thought about it some more, and we believe the rates should be made subject to refund for a couple reasons.
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> One, the FERC rates in effect are subject to refund. This is a parallel that we think probably should be maintained. Thinking about this, we don't want and don't wish the interstate shippers to inadvertently subsidize the intrastate shippers or vice versa. *So making the full amount of this request, which, again, is parallel to the request made at the FERC, if we make it parallel completely and have it subject to refund avoids that potential issue. And I think that's significant.*
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> There's a U.S. Supreme Court case that we've cited talking about how pipelines are financed and whether there are federal preemption issues. [Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).] That's all avoided with making these [interim rates] parallel.

> Second, if the rates are subject to refund, and this is probably most important, they are, by definition, fair, just, and reasonable. And I say that because the Commission has just said that here recently in the Avista case.
>
> I jotted this down from the Avista order that I mentioned before in Docket UE-010395, at page 33. And the Commission, in its order, one of its final points in its findings stated, quote, The rates that result from this order are subject to refund and are, with that condition, just and reasonable rates.

(Transcript, pp. 1230 - 31)

17. Olympic's closing argument also expressly raised the question of what to do when "different jurisdictions are proceeding on a parallel course over common facilities." (Transcript, at. 1289.) Olympic quoted from the November 20, 2001 FERC Order that said 1) "revenue lost during a suspension period is lost forever," and 2) "Tesoro's economic interests are fully protected because the entire rate increase is subject to revision at the conclusion of the hearing." (Id., at. 1290.)

C. Avoiding Constitutional Issues

18. Granting the full interim rate requested would also avoid federal statutory and constitutional questions. In its closing argument Olympic said there are only three potential outcomes regarding interim rates:

> First would be if the full interim rate relief is granted, and then, at the end of the general case, there's no refund required, because everything has been proven and it's considered to be fine. In that case, the rates are fair, just, and reasonable.
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> Second is that the full amount has been, in the interim, has been granted and that some portion of it or all of it is subject to refund. And if the funds are there to do it, then the rates will be fair, just, and reasonable. They'll be paid back in that event.

> The third circumstance would be – and this is where I think we come back to the notion of what are the appropriate standards in an oil pipeline situation – that if interim rates are not granted at the amount requested or at a lower rate and, at the end of the day, it turns out that those rates should have been granted because of what the general rate case is, during that period of time, Olympic has been denied those rates.

Transcript at pp. 1232 - 1233.

19. FERC rates and state rates are subject to the same ultimate constitutional test under the Just Compensation Clause of the Fifth Amendment of the United States Constitution. In the leading case Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1943), the Supreme Court said:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Accord Duquesne Light Co. v. Barash, 488 U.S. 299, 310 (1989).

20. The Duquesne case stands for the proposition that consistency in the approaches to rates is important. In Duquesne, the Court held that there was no taking because at all relevant times the Pennsylvania Commission had applied the same methodology to utilities. Here, for the first time the Commission rate increase will diverge from FERC's interstate rate increase. The increase in interim rates would be significantly lower than the FERC interim rate increase. Unless changed, the effect will be to impose on interstate shippers a higher burden than on intrastate shippers for the same shared common facilities.

Because both intrastate and interstate rates are subject to refund, this rate divergence should be avoided – at least for the interim period.

D. Avoiding Federal Preemption Issues

21. In Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), the United States Supreme Court held that a state law will be pre-empted by a federal law when there is a conflict between the two and "where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress."

> Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248], or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).'" California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, 94 L.Ed.2d 577 (1987), quoting Silkwood v. Kerr-McGee Corp. 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984).

Schneidewind, 485 U.S. at 300.

22. FERC has permitted interim rates that will support the pipeline safety enhancements required by the Federal Office of Pipeline Safety and for other safety measures. FERC recognized that Olympic needs to make safety-related expenditures for pipeline facilities shared by both interstate and intrastate shippers.

23. Washington state's intrastate pipeline rates increases have not, until the Order, diverged from interstate pipeline rate increases. However, the Order sets a rate increase significantly lower than that permitted to go into effect by FERC. This disparity will cause federal ratepayers to bear a disproportionate share of needed expenditures for safety-related

costs and other costs. The cost and burden of attracting sufficient capital for those purposes will fall disproportionately on interstate commerce.

24. Because the intrastate interim rate increase under the Order is significantly less than the federal rate increase, there is also a statutory preemption issue. Section 2 of the Interstate Commerce Act[3] provides as follows:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

25. Congress reserved power over intrastate rates where necessary to prevent unjust discrimination that creates an undue burden on interstate commerce. The FERC has the power to fix intrastate rates if the intrastate rates result in "unjust discrimination against, or undue burden on, interstate or foreign commerce." 49 U.S.C. § 13(4).

26. Courts have determined that every rate which gives preference or advantage to certain persons, commodities, *localities, or traffic* is discriminatory; for such difference prevents absolute equality of treatment among all shippers or all travelers. Nashville, C.& S.

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[3] In 1978, the Interstate Commerce Act was recodified as 49 U.S.C. §§ 10101 et seq. As recodified, the Act does not extend to oil pipelines. 49 U.S.C. § 10501(a)(1)(C). However, § 4(c) of the Recodification Act of 1978, Pub. L. No. 95-473, 92 Stat. 1466, excluded from the general repeal and reenactment transportation of oil by pipeline. FERC therefore continues to make reference to the Interstate Commerce Act as it stood before recodification, and Olympic follows that format in this Motion. See Exxon Pipeline Co. v. United States, 725 F.2d 1467, 1468 n. 1 (D.C. Cir. 1984).

L. Railway v. Tennessee, 262 US 318, 322 (1923). Once FERC determines that a rate is discriminatory, and there is undue or unreasonable advantage, preference or prejudice as between persons *or localities* in intrastate commerce on one hand, and interstate or foreign commerce on other, FERC is empowered to prescribe an intrastate rate which in its judgment will remove such advantage, preference, prejudice, or discrimination, despite any decision or order of any state authority to contrary. Texas v. United States, 84 F. Supp. 791, 793 (W.D. Ok. 1949), aff'd. 337 U.S. 911 (1949).

27. In Florida v. United States, the Court determined that effective operation of the Interstate Commerce Act requires that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate national railway system. Under the holding of this case, if there is interference with the accomplishment of the purpose of Congress because of disparity of intrastate as opposed to interstate rates, the FERC is authorized to end such disparity by directly removing it. See Florida v. United States, 282 U.S. 194, 210 (1931).

28. Such federal/state issues created by an interim rate divergence should be avoided during the interim period, particularly when Olympic has met the PNB test.

III. PRAYER FOR RELIEF

Olympic respectfully requests that the Commission issue an order on reconsideration granting Olympic's original requested interim rate increase, which would be the same interim rate increase being paid by interstate shippers.

DATED this ____ day of February, 2002.

Respectfully submitted

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