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 TOSCO CORPORATION'S ANSWER TO MOTION FOR RECONSIDERATION

I. INTRODUCTION

Pursuant to the Notice filed by Administrative Law Judge Wallis, Tosco Corporation ("Tosco") submits this Answer ("Answer") to Olympic Pipeline Company's ("Olympic's" or the "Company's") Motion for Reconsideration ("Motion"). For the reasons described below, Tosco respectfully requests that the Washington Utilities and Transportation Commission ("WUTC" or "Commission") deny Olympic's Motion.

II. BACKGROUND

Olympic operates a common carrier pipeline, and transports product interstate and intrastate within the state of Washington. As such, Olympic filed for interim and general rate increases with both the Federal Energy Regulatory Commission ("FERC") and the WUTC. On August 31, 2001, FERC issued an order accepting and suspending Olympic's interstate Tariff, subject to refund and conditions. On January 31, 2002, after testimony, briefing, hearings and oral argument, the WUTC entered an order granting an interim rate increase of 24.3 percent for intrastate service, subject to refund. Olympic had asked both FERC and this Commission to grant it an interim rate increase of 62 percent. On February 11, 2002, Olympic filed a Motion for

Reconsideration with the WUTC arguing that the state interim rate increase should be increased to the 62 percent level granted by FERC in order to avoid federal statutory and constitutional questions.

III. ARGUMENT

Olympic has asked for an order on reconsideration to increase the interim rates for intrastate shippers by 62 percent, instead of the 24.3 percent authorized by the WUTC in the Third Supplemental Order. In Re Olympic Pipe Line Co., WUTC Docket No. TO-011472, Third Supplemental Order (Jan. 31, 2002). Olympic is now arguing that the WUTC must raise intrastate rates by 62 percent so that they are equivalent to the interim rates approved by FERC for interstate service. Olympic's Motion completely lacks merit and is not supported by any legitimate legal arguments. Strikingly, Olympic does not even attempt to demonstrate that the WUTC's order granting the pipeline a 24.3 percent increase is deficient or inconsistent with Washington's statutory standard for granting interim relief, or that it results in an undue burden on interstate commerce based on substantial evidence from the extensive record developed in this proceeding. Instead, Olympic weakly asserts that granting the full interim rate requested is necessary to "avoid federal statutory and constitutional questions." Motion at 7. Despite Olympic's general reference to these so called "federal statutory and constitutional questions," Olympic has not cited to any legal authority for the proposition that intrastate rates must be the same as those charged to interstate shippers. In fact, relevant case law on these "federal statutory and constitutional questions" lead to the opposite conclusion.

The Commission should deny Olympic's Motion because: 1) the WUTC's rate determination is fully supported by the record and is a reasonable result based on Washington

law governing intrastate oil pipelines; 2) Olympic has not demonstrated why a 24.3 percent rate increase is inadequate or unlawful; 3) there is no legal requirement that interstate and intrastate rates must be priced the same; 4) Olympic's arguments ignore Congress' careful preservation of the primary authority of states over intrastate rates; and 5) Olympic has made no demonstration based on substantial evidence that the intrastate rates result in undue prejudice against interstate commerce. *See* In Re Cook Inlet Pipeline Co. v. Alaska Pub. Util. Comm'n, 836 P.2d 343 (Alaska 1992); *See also* North Carolina v. United States, 325 US 507, 510-511 (1945).

A. A Disparity Between Interstate And Intrastate Rates Does Not, By Itself, Equate To Unjust Discrimination Against Interstate Commerce

It is without question that a disparity between interstate and intrastate rates does not, by itself, equate to unjust discrimination against interstate commerce. *See* In Re Cook Inlet Pipeline Co. v. Alaska Pub. Util. Comm'n, 836 P.2d 343 (Alaska 1992). Rather, a finding of unjust discrimination against interstate commerce must rest on specific findings, based on substantial evidence, that the intrastate rates are less than compensatory or insufficient to cover the full cost of service, or that they are abnormally low and would fail to contribute a fair share of overall revenue. Id. at 352. While Olympic does not actually allege unjust discrimination in its Motion, it implies that the WUTC order approving a 24.3 percent interim rate increase unjustly discriminates against interstate commerce. However, Olympic has not made any showing that intrastate rates are less than compensatory or insufficient to cover the full cost of service or that they were abnormally low and will fail to contribute to a fair share of overall revenue. On the contrary, the evidence presented in the interim portion of this proceeding supports no more than a 24.3 percent interim rate increase. In fact, the overwhelming evidence provided by Commission Staff and the intervenors support a significantly lower interim rate increase. Thus,

there is absolutely no basis to any claim by Olympic that reconsideration must be granted to avoid constitutional issues.

1. Relevant Case Law Does Not Support Olympic's Position

As stated above, there is no requirement that interstate and intrastate rates must be priced the same. Id. A pivotal case that addresses Olympic's "federal statutory and constitutional questions" is In Re Cook Inlet Pipeline Co. v. Alaska Pub. Util. Comm'n, 836 P.2d 343 (Alaska 1992). On appeal to the Alaska Supreme Court, Cook Inlet Pipe Line Company challenged intrastate crude oil transportation tariffs ordered by the Alaska Public Utilities Commission under the authority of Alaska's Pipeline Act. The dispute centered around the Alaska Commission's use of an "original cost method" for reviewing intrastate tariffs.

The pipeline noted that FERC, which regulates interstate tariffs, used a different rate setting method for the relevant time period. According to the pipeline, use of the different methods resulted in intrastate tariff rates established by the Alaska Commission which were substantially below the interstate tariffs approved by the FERC. Id. The pipeline argued that the Alaska tariff orders were: 1) preempted by federal law; 2) that the Alaska Commission's tariff setting methodology resulted in an unconstitutional taking of property; and 3) that the lower intrastate tariffs resulted in unjust discrimination in violation of the federal commerce clause. Id. at 349. In upholding the decision, the Alaska Supreme Court stated that the pipelines arguments ignored Congress' careful preservation of the primary authority of states over intrastate rates. Id. at 351, n.9 *quoting* North Carolina v. United States, 325 US 507, 510-511 (1945). The court further explained that a finding of unjust discrimination must rest on specific findings, based on substantial evidence, that the intrastate rates are less than compensatory or insufficient to cover

the full cost of service, or that they were abnormally low and failed to contribute a fair share of overall revenue. Id. at 352. The court noted that there has never been a "full hearing" by any regulatory body which resulted in a finding supporting a determination that the 1982 rates the Alaska Commission approved resulted in undue prejudice or unjust discrimination against interstate commerce. Id. Therefore, in upholding the Alaska Commission's decision, the Alaska Supreme Court considered only whether the Alaska Commission's approval of intrastate rates which were lower than the interstate rate, by itself, violates section 13(4) of the Interstate Commerce Act by causing "unjust discrimination against, or undue burden on, interstate Commerce." Id. *See also* 49 U.S.C. 13(4). In summary, the Alaska Supreme Court affirmed the trial court's judgment upholding the Alaska Public Utilities Commission's methodology and tariff order because, among other things, the Alaska Commission's rate determinations were supported by a reasonable basis in law, and the tariff order was not preempted by federal law. Id.

In a different case involving the same pipeline, the Alaska Commission declined to allow an oil pipeline carrier to change from a depreciated original cost rate base methodology to a trended original cost method ("TOC"), even though the TOC method had been advocated by the FERC and more strikingly, the pipeline's operations were almost purely interstate in nature. In Re Cook Inlet Pipeline Co., Alaska Pub. Util. Comm'n, 13 APUC 266 (May 25, 1993). The Alaska Commission held that even if an oil pipeline's operations are overwhelmingly interstate in nature, and thus largely subject to rate regulation by the FERC, the pipeline must comply with the state commission's rate and rate base requirements as to any intrastate service, as there is no necessity for interstate and intrastate shipments to be priced the same. Id. at 270-271. Therefore, although FERC had adopted the use of a TOC rate base methodology, an oil pipeline carrier

having 2 percent intrastate operations was required to abide by the state commission's depreciated original cost rate base method when setting rates for intrastate service. Id.

2. The WUTC's Decision Carefully Weighed The Evidence Presented And Is Supported By A Reasonable Basis In Law

In Olympic's case, the WUTC carefully weighed the evidence presented against the standard for interim rate increases in Washington, the so-called PNB Standard.[1] The Commission's ultimate decision granted Olympic a greater interim rate increase than was recommended by the WUTC Staff or the intervenors. It was clear, however, that the evidence presented to the WUTC during the course of the interim proceeding did not support a 62 percent increase. *See* In Re Olympic Pipe Line Co., WUTC Docket No. TO-011472, Third Supplemental Order (Jan. 31, 2002). Therefore the Commission correctly concluded that there was no showing by Olympic of a need for more than a 24.3 percent increase. Despite Olympic's arguments to the contrary, the WUTC is not required to give Olympic a 62 percent increase merely because FERC granted its full request. *See* In Re Cook Inlet Pipeline Co. v. Alaska Pub. Util. Comm'n, 836 P.2d 343 (Alaska 1992). The WUTC has authority to set a just and reasonable rate for Olympic for intrastate service, regardless of the rate set by FERC for interstate service.

3. Olympic Fails To Cite Any Applicable Case Law To Support Its Position

Olympic relies almost entirely on Schneidewind v. ANR Pipeline Co., 485 US 293 (1988) to support its position, and that reliance is misplaced. Olympic cites to Schneidewind for

[1] WUTC v. Pacific Northwest Bell Telephone Co., Cause No. U-72-30 (Oct. 1972).

the proposition 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." Id. *See also* Motion at 9. However, Schneidewind pertains to the limits on a state commission's ability to regulate the issuance of securities by an interstate natural gas pipeline, which is also regulated by FERC. Under a Michigan statute, a public utility transporting natural gas in Michigan for public use had to obtain approval of the Michigan Public Service Commission ("MPSC") before issuing long term securities. A group of companies, which were natural gas companies within the meaning of the federal Natural Gas Act of 1938, filed suit seeking a declaratory judgment that the MPSC lacked jurisdiction over their security issuances because the Michigan statute was pre-empted by the NGA. The Supreme Court held that the Michigan statute impinged upon a field that the federal regulatory scheme has occupied to the exclusion of state law, and was therefore preempted.

Schneidewind is clearly distinguishable from this proceeding because denying an interstate natural gas pipeline the authority to issue long-term securities would have directly impeded the ability of the pipeline to provide interstate gas services. In contrast, Olympic's recovery of lower rates for intrastate service will have no impact on the Company's interstate operations. The two jurisdictions can and have for years regulated the respective intrastate and interstate rates, and WUTC regulation does not stand as an obstacle to the interstate aspects of Olympic's operations. The fact that the WUTC has applied Washington law to Olympic's request for an interim increase in intrastate rates, and held that the increase will be less than what the FERC granted, does not impede Olympic's ability to provide interstate service and hence is not preempted by federal law.

B. Olympic's Reliance On The Interstate Commerce Act Does Nothing To Bolster Its Position

Olympic argues that because Washington rates are now less than the federal rate increase, there is a statutory preemption issue. Olympic cites to Section 2 of the Interstate Commerce Act ("ICA")[2] which 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.

Olympic also cites to 49 U.S.C. § 13 (4) arguing that Congress reserved power over intrastate rates where necessary to prevent unjust discrimination that creates an undue burden on interstate commerce. Motion At 10 *citing* 49 U.S.C. § 13(4).

A further review of the ICA and legal precedent however, demonstrates that Olympic's statutory preemption argument does not support its position. In fact, the United States Supreme Court has squarely held that as originally enacted, the ICA was not intended to intrude on the power of the states to regulate intrastate commerce. Simpson v. Shepard, 230 US 352 (1913).

In section 13(4) of the ICA, Congress clearly provided for distinct roles of federal and state regulators and provided a remedy where intrastate rates are found to unjustly discriminate

---

[2] In 1978, the Interstate Commerce Act was recodified at 49 USC §§ 10101 et seq. As recodified, the Act does not extend to oil pipelines. 49 USC § 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 Tosco follows that format in this Answer. See Exxon Pipeline Co. v. United States, 725 F.2d 1467 (D.C. Cir. 1984).

against interstate commerce. 49 U.S.C. § 13(4). The United States Supreme Court interpreted the effect of section 13(4) as follows: As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. North Carolina v. United States, 325 US 507 (1945). No such breadth of authority is granted to the Commission over purely intrastate rates. Id. at 510. Neither section 13(4), nor any other congressional legislation, indicates a purpose to attempt wholly to deprive states of their primary authority to regulate intrastate rates. Id. at 510-511. Since the enactment of section 13(4), as before its enactment, a states power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. Id. at 511. When this point is reached, which can be difficult to determine, and not until then, can the Interstate Commerce Commission nullify a state prescribed rate. Id. Olympic has failed to make a showing that demonstrates that intrastate rates are unjustly discriminating against interstate commerce. Olympic's weak assertion that intrastate rates should be increased to the level of interstate rates to avoid constitutional and statutory questions is vague, but more importantly, fails to demonstrate that the approved intrastate rates are an undue burden on interstate commerce. Therefore, the Commission should deny Olympic's Motion.

C. The Washington Commission Prescribed a Just and Reasonable Rate for Olympic

As described above, Olympic's arguments that Washington intrastate rates must be equivalent to interstate rates is not supported by any applicable case law. Similarly, Olympic's arguments ignore the difference between the WUTC and FERC proceedings. The WUTC decided the interim portion of this case on January 31, 2002, after rounds of testimony, briefing, hearings on January 14, 15, 16, 2002, and oral argument. FERC, in contrast, approved interim

rates subject to refund, without ruling on the merits of the proceeding, without taking evidence and without holding hearings. Olympic also ignores FERC's order in this proceeding, which specifically states that based on a review of the filing, FERC finds that Supplement No. 4 to FERC Tariff No. 24 has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or otherwise unlawful. In Re Olympic Pipeline Co., 96 FERC ¶ 61250 (2001). FERC's process for acting on interim rate increase requests is perfunctory in contrast to the WUTC's careful consideration of the interim increase for intrastate service.

The Washington Legislature delegated the WUTC with the authority to prescribe or require just, fair and reasonable rates for pipeline carriers operating in Washington. *See Generally* Title 80 and 81 RCW. Although the legislature recognized that federal regulators had jurisdiction over interstate commerce, the legislature intended to grant the WUTC full power to regulate intrastate rates. *See* Chapter 80.01 RCW. In accordance with this authority, the WUTC's rate determination in this proceeding is fully supported by the record and a reasonable result based on Washington law governing intrastate oil pipelines.

IV. CONCLUSION

For the reasons described above, Tosco respectfully requests that the Commission deny Olympic's Motion for Reconsideration. The Commission should affirm its earlier order and explicitly reject the unsupported claim by Olympic that interim intrastate rates should be increased to the level of rates for interstate service on an interim basis.

Dated: February 25, 2002

Respectfully submitted,

_____

Edward A. Finklea
Chad M. Stokes
Energy Advocates LLP
526 NW 18th Avenue
Portland, OR 97209-0220
Telephone: (503) 721-9118
Facsimile: (503) 721-9121
E-mail: efinklea@energyadvocates.com
cstokes@energyadvocates.com

Of Attorneys for Tosco Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy properly addressed with first class postage prepaid.

Dated in Portland, Oregon this 25th day of February, 2002.

Edward A. Finklea
Chad M. Stokes
Energy Advocates LLP
526 NW 18th Avenue
Portland, OR 97209-0220
Telephone: (503) 721-9118
Facsimile: (503) 721-9121
E-mail: efinklea@energyadvocates.com
cstokes@energyadvocates.com

Of Attorneys for Tosco Corporation