BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION	)	
	)	DOCKET NO. TO-011472
Complainant,	)	
	)	
v.	)	
	)	
OLYMPIC PIPE LINE COMPANY, INC.	)	
	)	
Respondent.	)	
_____	)	

TESORO REFINING AND MARKETING COMPANY'S ANSWER TO OLYMPIC PIPE LINE COMPANY'S MOTION TO RECONSIDER

1 Tesoro Refining and Marketing Company ("Tesoro"), by and through its attorneys, Brena, Bell & Clarkson, P.C., hereby files its Answer to Olympic Pipe Line Company's ("Olympic") Motion to Reconsider ("Motion") pursuant to the Washington Utilities and Transportation Commission's ("WUTC") Notice of Opportunity to File Answer, dated February 15, 2002. In accordance with WAC 480-09-420(3), the name and address of the pleading party is set forth below. Please direct all service and correspondence regarding the above-captioned docket to the following:

Robin O. Brena, Esq.
David W. Wensel, Esq.
Brena, Bell & Clarkson, P.C.
310 K Street, Suite 601
Anchorage, AK 99501
(907) 258-2000 ph
(907) 258-2001 fax
rbrena@brenalaw.com
dwensel@brenalaw.com

2 This motion may bring into issue the following rules or statutes: WAC 480-09-420; WAC 480-09-810; RCW 81.04.130; RCW 81.04.250; RCW 81.28.010; and RCW 81.28.050.

I. Introduction and Summary

3 This Commission has previously recognized the limited grounds upon which it will reconsider an order. In Avista Corporation, Docket Nos. UE-991255, UE-991262, and UE-991409 (April 21, 2000), this Commission held:

> A petition for reconsideration must demonstrate errors of law, or of facts not reasonably available to the petitioner at the time of entry of an order. A petition that cites no evidence that the Commission has not considered, and merely restates arguments the Commission thoroughly considered in its final order, states no basis for relief. RCW 34.05.470; WAC 480-09-810. A petition for reconsideration is not a second opportunity to litigate issues which were fully developed prior to entry of the final order and which were discussed and decided in the final order. The mere fact that a party disagrees with a final order does not state a basis for reconsideration.

4 Olympic does not identify a single "error of law" nor does it identify any facts that this Commission has not already considered. Instead, Olympic's Motion merely rehashes the same arguments that it presented throughout the proceeding. Therefore, Olympic's Motion should be denied.

5 If this Commission is going to reconsider its order, the evidence "not reasonably available at the time of entry of the order" supports denying interim relief altogether, not the increase of the interim relief the Commission ordered. Olympic's Motion does not even raise the only fact that could be argued "was not reasonably available" at the time of this Commission's order: The sale of Sea-Tac assets for $11 million.[1] Eleven million is $3 million more than the entire amount of interim relief requested and $8 million more than the amount of interim relief granted. Thus, the sale of Sea-Tac assets justifies this Commission vacating the current interim rates.

I. *6* This Commission Did Not Make a Single Error of Law.

[1] See Application for Approval of Sale, filed February 12, 2002, Docket No. TO-020169.

Olympic does not argue that this Commission committed an error of law in setting the interim relief. It can not. This Commission did not commit an error of law. Instead, Olympic implies that if this Commission sets a transportation rate for intrastate shipments that is different from that allowed by FERC for interstate shipments it raises "intrastate/interstate legal issues." (Motion ¶ 3) Olympic argues that this Commission must reconsider its decision to "avoid constitutional issues" and "avoid federal preemption issues." (Motion ¶¶ 18-28) It is impossible to avoid legal issues if Olympic decides to waste resources raising meritless arguments. However, this threat is no justification for this Commission changing its decision

7 This Commission has exclusive jurisdiction over the issues that it resolved in the interim proceeding, and none of the general constitutional arguments raised by Olympic have any merit.[2] Though Tesoro continues to believe that Olympic's petition for interim relief should have been denied, it nevertheless respects the fact that this Commission's interim decision was a valid exercise of its jurisdiction and authority.

I. *8* This Commission Is Not Required to Set Intrastate Rates Equal to Interstate Rates.

This Commission has exclusive jurisdiction over setting intrastate rates. Nothing in federal law requires this Commission to ignore its statutory authority and regulatory precedent and set intrastate rates equal to interstate rates.

9 The United States Supreme Court has repeatedly held that a state's power over intrastate rates is exclusive up to the point where its action would violate Section 13(4) of the Interstate Commerce Act. North Carolina v. United States, 325 U.S. 507, 511 (1945); see also Chicago, Milwaukee, St. Paul &

[2]Olympic does not cite a single case on point.

Pacific Ry. Co. v. Illinois, 355 U.S. 300, 305 (1958); Illinois Commerce Comm'n v. Thompson, 318 U.S. 675, 682 (1943); Georgia Pub. Serv. Comm'n v. United States, 283 U.S. 765, 769-70 (1931); Public Serv. Comm'n of Utah v. United States, 356 U.S. 421, 425 (1958); King v. United States, 344 U.S. 254, 271 (1952). In other words, absent a violation of Section 13(4) of the Interstate Commerce Act, a state's power over intrastate rates is exclusive.

10 In North Carolina, *supra*, the United States Supreme Court had occasion to directly address the issue of whether the Interstate Commerce Commission ("ICC") (FERC's predecessor) had the authority to require a state to raise its intrastate railroad rates to an amount equal to the interstate railroad rates. In that case, both the ICC and the North Carolina State Utilities Commission claimed "paramount" authority to determine the intrastate railroad rates. The Supreme Court held that the ICC could not raise the intrastate railroad rates to equal the interstate railroad rates, even though the rates were for identical services. In so holding, the Supreme Court was unequivocal:

> As to interstate regulation, the Commission [FERC] is granted the broadest powers to prescribe rates and other transportation details. [Citation omitted] No such breadth of authority is granted to the Commission over purely intrastate rates. Neither § 13(4), nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intrastate rates. Since the enactment of § 13(4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point--not always easy to mark--is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

North Carolina, 325 U.S. at 511 (bracketed material and underscore added).

11 Moreover, the line of legal precedent supporting the Supreme Court's decision in North Carolina has been clear for over 70 years. See Simpson v. Shepard, 230 U.S. 352, 412-23 (1913) (excellent

overview of the concurrent regulation of commerce by the states and the federal government) (hereinafter referred to as the Minnesota Rate Case); see also Houston, E & W Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (while Congress had the ultimate power to regulate intrastate rates which interfere with interstate commerce, Congress has not exercised that ultimate power); Chicago, Milwaukee & St. Paul Ry. Co. v. Illinois, 242 U.S. 333, 337 (1917) ("The fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States . . . until the authority of the State is limited . . . by Congress [through the exercise] of its paramount constitutional power. . .").

12 For example, when the TAPS Carriers sought to avoid the Alaska Public Utilities Commission's intrastate regulatory power over the Trans Alaska Pipeline System, the FERC simply cited to 49 U.S.C. § 1 and held that, "If that oil travels in intrastate commerce, the APUC has jurisdiction." FERC Opinion No. 171, 23 FERC ¶¶ 61,352 at 61,763 (June 2, 1983). The FERC further held that, "[W]e find this Commission [FERC] does not have jurisdiction over MAPCO's [an intrastate shipper] intra-Alaska shipments through TAPS. That jurisdiction rests with the APUC." 23 FERC ¶¶ 61,352 at 61,764 (bracketed material added). In large part, the FERC based its holding on the observation that:

> It is clear that the States have primary jurisdiction over intrastate transportation under the Interstate Commerce Act. [citation omitted] We [FERC] would require an express preemption of that jurisdiction by Congress before we would take jurisdiction. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

23 FERC ¶¶ 61,352 at 61,765 n.17 (bracketed material and underscore added)

13 Similarly, in Cook Inlet Pipe Line Co., 47 FERC ¶¶ 61,057 at 61,172 (1989), Cook Inlet Pipe Line Company ("CIPL") asked the FERC for a declaratory order holding that its interstate tariff rate was the only proper intrastate tariff rate CIPL could assess under Section 2 of the Interstate Commerce Act. The FERC ultimately determined that it had no power to alter intrastate rates under Section 2. FERC denied

CIPL relief stating that absent a full record under Section 13(4) of the Interstate Commerce Act, it was powerless to prescribe intrastate tariff rates. "[I]t should be emphasized that any attempt to prescribe intrastate rates after a comparison of the intra/interstate rates for the purposes of determining lawful intrastate rates would only be accomplished under Article 13." Order Denying Rehearing and Clarifying Prior Order, 47 FERC ¶ 61,393 (June 16, 1989). Further, it stated that it did not "intend to suggest that the Interstate Commerce Act requires absolute rate parity either for rates for similar interstate services or between rates for similar intra/interstate services." 47 FERC ¶¶ 61,057 at 61,172 (1989).

14 In addition, Congress has restricted the regulatory authority of the FERC to set aside intrastate tariff rates under the Interstate Commerce Act. With the sole exception of Section 13(4) of the Interstate Commerce Act, federal agencies do not have the regulatory authority to determine intrastate tariff rates. 49 U.S.C. § 1(2)(a) (federal agencies have no regulatory authority over "the transportation . . . of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States. . . . ").

15 As noted above, however, with the enactment of Section 13(3) and (4) of the Interstate Commerce Act through the Transportation Act of 1920, 41 Stat. 456 § 416, Congress did grant federal agencies the limited power to regulate intrastate commerce to the degree that the states' regulation was determined to be unreasonably discriminatory or burdensome to interstate commerce. While admittedly providing a mechanism through which an intrastate tariff rate could be set aside, Congress was careful to craft a series of detailed safeguards to ensure against unnecessary and improper intrusion into the states' right to regulate intrastate commerce.

16 The safeguards Congress set forth in Sections 13(3) and (4) of the Interstate Commerce Act, 49 U.S.C. § 13(3), (4), require that before an intrastate tariff rate may be set aside there must be a "full hearing" before the FERC at which it determines that the intrastate tariff rate "injuriously affect[s]" interstate transportation and is not contributing a sufficient amount to meet the maintenance and operating costs and yield a fair return. North Carolina v. United States, 325 U.S. 507, 511 (1945). To be more specific, the only way the Commission's intrastate rate for Olympic may be set aside or not enforced is if the FERC holds a "**full hearing**," at which it is shown to clearly appear that (1) the intrastate tariff rates are abnormally low and are not contributing their fair share of the revenue, (2) the disparity between the interstate and intrastate tariff rates is substantial and operates as a real discrimination against and obstruction to interstate commerce, (3) injury to the interstate shippers has resulted and will continue to result because of the disparity in the tariff rates, (4) the proposed rates are just and reasonable, and (5) a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate tariff rates. E.g., North Carolina v. United States, 325 U.S. 507, 511 (1945) (setting forth the elements listed above); Mississippi Pub. Serv. Comm'n v. United States, 124 F. Supp. 809, 813 (S.D. Miss. 1954) aff'd, Illinois Cent. R.R. Co. v. Mississippi Pub. Serv. Comm'n, 349 U.S. 908 (1955) (setting forth and applying the elements set forth in North Carolina). This required hearing would be impossible at this juncture because Olympic has not even filed a Section 13(4) complaint with the FERC, and even if such a complaint were filed, Olympic would not be able to demonstrate that the existing intrastate, interim rate is abnormally low and not contributing a fair share of the revenue. In fact, such a hearing would probably demonstrate that both the interstate and the intrastate rates are too high. Therefore, there is no legal requirement, statutory or otherwise, that intrastate and interstate rates be the same. And, this Commission's order setting an interim rate for intrastate shipments did not create a legal issue with any merit.

I. *17* **There is no "Federal Preemption" since Section 2 of the Interstate Commerce Act Concerns Discrimination and Preferences Among Interstate Shippers and Cannot be Applied to Intrastate Shippers**

Olympic argues that federal law may preempt this Commission's authority to set an intrastate rate that is different from the interstate tariff rates. (Motion ¶¶ 21-28). This argument confuses those provisions of the Interstate Commerce Act which were intended to regulate interstate commerce (e.g., Sections 2 and 3) from the provision which was intended to regulate intrastate commerce determined to be an unreasonable burden to interstate commerce (Section 13). See generally Wagner, Jurisdiction Over Prejudice Against Interstate and Intrastate Rates, 12 I.C.C. Prac. J. 577 (1945) (good overview of the application of Sections 2, 3, and 13 of the Interstate Commerce Act to interstate and intrastate tariff rates). In effect, Olympic is advocating that this Commission apply Section 2 when reviewing the propriety of an intrastate tariff rate--an argument no court has ever accepted.

18 With regard to the proper scope and application of Sections 1 and 2 of the Interstate Commerce Act, as noted above, Section 1 of the Interstate Commerce Act expressly prevents the application of Section 2 of the Interstate Commerce Act to intrastate tariff rates. Section 1 of the Interstate Commerce Act provides that the "provisions of this chapter . . . shall not apply to the transportation of passengers or property . . . wholly within one state." Justice Hughes, the author of both the Minnesota Rate Case and the Shreveport decisions, explained the importance of this limiting language when he wrote that "Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic." Minnesota Rate Case, 230 U.S. at 418. While only reserving opinion on the applicability of Section 3 of the Interstate Commerce Act to intrastate tariff rates, Justice Hughes was

crystal clear that every other provision of the Interstate Commerce Act could not be applied to intrastate tariff rates.[3] To quote specifically, Justice Hughes stated:

> The question we have now before us, essentially is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. . . .
>
> [Through enacting the Interstate Commerce Act,] Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed [through Section 1], or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States

[3]Of course, the Minnesota Rate Case was decided prior to the Transportation Act of 1920 which added Section 13 to the Interstate Commerce Act granting the Interstate Commerce Commission a limited power to establish intrastate tariff rates after a full hearing. Further, as discussed below, the Supreme Court subsequently held that Section 3 of the Interstate Commerce Act could also not be applied to intrastate tariff rates.

> and the agencies created by the States to deal with that subject.
>
> (citation omitted)

Minnesota Rate Case, 230 U.S. at 420-21 (bracketed material added). No court or regulatory agency has ever applied Section 2 to set, determine, or evaluate the propriety of intrastate tariff rates.

19 A literal reading of Section 2 further supports the conclusion that Section 2 should not be applied to intrastate tariff rates. In relevant part, Section 2 states:

> 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.

(Emphasis added). As can be seen by its terms, Section 2 only concerns the transportation of property "subject to the provisions of this chapter"--which, once again, limits the application of Section 2 to property which has been transported interstate.

20 Other states have dealt with the issue of interstate rates differing from intrastate rates and have determined that there is no necessity for interstate and intrastate rates to be the same and that the regulation of intrastate rates is a matter for the state regulatory body. In Cook Inlet Pipeline Company, the Alaska Public Utilities Commission (the predecessor to the Regulatory Commission of Alaska) held that even if an oil pipeline's operations are overwhelmingly interstate in nature, and thus largely subject to rate regulation by the Federal Energy Regulatory Commission, 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. Accordingly, although the FERC had adopted the use of a trended original cost rate base methodology, an oil pipeline carrier having limited intrastate operations was required to abide by the state commission's depreciated original cost rate base method instead. Cook Inlet Pipeline Co., 1993 WL 839614, P-82-6 (25)/ P-92-5(6) (5/25/93).

21 This decision by the Alaska Commission was upheld by the Alaska Supreme Court in Cook Inlet Pipeline Co., 836 P.2d 343 (Alaska 1992). Cook Inlet Pipeline argued before the court that it could not comply with both the Commission's tariff order and section 2 of the Interstate Commerce Act (ICA) and that because of the conflict with federal law, the intrastate tariff was preempted.

22 Rejecting CIPL's argument, the Alaska Supreme Court ruled:

> [T]he 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 U.S. 352, 418, 33 S.Ct. 729, 748, 57 L.Ed. 1511 (1913). In Simpson, the Court stated, "Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic." Id. Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness.... It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute.
>
> On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject. *Id.* at 420-21, 33 S.Ct. at 749. Section 2 was part of the original ICA of 1887. 49 U.S.C.A. §§ 2 (West 1959). Therefore, we conclude that when it interpreted Congress' intent regarding the regulation of intrastate rates in *Simpson,* the Court rejected the notion that section 2 applied to intrastate rates. [FN7] Because section 2 of the ICA was not intended to apply to intrastate rates, we reject CIPL's argument that section 2 requires the APUC to allow CIPL to set intrastate rates which match interstate rates.
>
> FN7. CIPL also mentions section 3 of the ICA in it arguments. However, the United States Supreme Court has also considered and rejected an argument that section 3 was intended to impose federal control over intrastate rates. *Chicago, Milwaukee & St. Paul Ry. Co. v. State Pub. Util. Comm'n of Illinois,* 242 U.S. 333, 335-37, 37 S.Ct. 173, 174-75, 61 L.Ed. 341 (1917).

Cook Inlet Pipe Line Company v. Alaska Pub. Util. Comm'n, 836 P.2d 343, 350-51 (1992) (emphasis added).

23 Further, the court found that CIPL's only remedy, if it had one, was under Section 13(4). "As discussed above, section 2 of the ICA does not help CIPL. Its remedy, if it has one, must be sought in a section 13(4) proceeding." Id. at 351. The court found, however, that CIPL had expressly disclaimed a Section 13(4) violation, but that even if it had argued that a Section 13(4) violation had occurred, there was

no "full hearing" as required by Section 13(4). It ruled, "To our knowledge, there has never been a 'full hearing' by any regulatory body which resulted in findings supporting a determination that the 1982 intrastate rates the APUC approved resulted in undue prejudice or unjust discrimination against interstate commerce." Id. at 352. It went on to state, "CIPL has not developed any such evidence in this proceeding which supports its claim that interstate shippers suffered unfair prejudice or were otherwise commercially disadvantaged. It chose not to pursue an action before the FERC based on section 13(4), which would have required it to present such evidence." Id. at 353.

24 The Alaska Supreme Court in Cook Inlet Pipe Line Co., summed up by stating:

> If courts found that unjust discrimination violative of the commerce clause resulted every time a state regulatory agency set an intrastate rate which was lower than the federally approved interstate rate for similar services, it would seem that Congress' efforts to respect state power over intrastate rates would have failed. Therefore, in conformity with federal authority, we reject the proposition that a difference between interstate and intrastate tariff rates, by itself, results in unjust discrimination against interstate commerce.

Cook Inlet Pipeline Company, 836 P.2d at 353.

25 In another Alaska case, Kenai Pipeline, the Alaska Commission addressed the issue of disparity between intrastate and interstate rate methodology and ruled:

> With respect to pipelines which are concurrently regulated by the Commission and the FERC, equality between state and federal rates is desirable. However, there is no legal requirement that interstate and intrastate rates for the same service be equal. The mandate in AS 42.06 to set just and reasonable intrastate rates is paramount. If the rates set or accepted by the FERC are not just and reasonable under AS 42.06, they will not be adopted for intrastate purposes.[footnotes omitted].

Kenai Pipeline Company, P-91-2(11)/ P-85-1(19) (12/1/92) at 30.

26 The Alaska Commission in Kenai Pipeline further stated, "This statement is made with full recognition of the fact that inconsistencies in rates may lead to proceedings under Section 13(4) of the

Interstate Commerce Act. If the FERC finds that rates the Commission has found to be just and reasonable constitute unjust discrimination against or an undue burden on interstate commerce, the FERC has the power to set aside the Commission's rates and institute its own rates. The Commission recognizes that the FERC has such authority but, nonetheless, will set rates according to its own principles, not those of the FERC. The Commission must administer its own statute to the best of its ability." Kenai Pipeline Co. at fn. 18.

27 In Alaska, the Commission was mandated by 42.06.370[4] to set just and reasonable, cost-based rates. This Commission has a similar mandate set forth in 81.28.230 [5] Like Alaska, this Commission should set intrastate rates according to its own statutory mandate and make its own determination of what constitutes a just and reasonable intrastate rate for oil pipelines in the state of Washington, without a imposing a requirement that the intrastate rates match interstate rates.

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[4]Alaska Statute 42.06.370 provides: (a) All rates demanded or received by a pipeline carrier, or by any two or more pipeline carriers jointly, for a service furnished or to be furnished shall be just and reasonable; (b) Additional regulations governing determination of a reasonable tariff shall be published by the commission; (c) Rates demanded, observed, charged, or collected by a North Slope natural gas pipeline carrier for intrastate service shall be designed as if that portion of the North Slope natural gas pipeline were a public utility regulated under the provisions of AS 42.05.

[5]RCW 81.28.230 relating to common carriers in Washington provides:

> Whenever the commission finds, after a hearing had upon its own motion or upon complaint, as provided in this chapter, that the rates, fares, or charges demanded, exacted, charged, or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of the common carrier affecting those rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any way are in violation of the provisions of law, or that the rates, fares, or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine and fix by order the just, reasonable, or sufficient rates, fares, or charges, or the regulations or practices to be thereafter observed and enforced. This section does not apply to railroad companies, which shall be regulated in this regard by chapter 81.34 RCW and rules adopted thereunder.

I. *28* **This Commission Already Considered All of the Facts and Arguments Raised in Olympic's Motion.**

Olympic's own Motion for reconsideration illustrates that the arguments and facts that it is "rehashing" have already been raised. Olympic states in several different ways that the arguments that it is advancing have previously been raised in this proceeding. (Motion ¶¶ 11-18). Tesoro agrees. Olympic is not presenting new facts nor raising new arguments. These arguments lacked merit when they were first raised and they continue to lack merit.

29 First, Olympic argues that because interim rates are subject to refund they are by definition fair, just, and reasonable. This argument directly contradicts the emergency standards which all parties to this proceedings, including Olympic, agreed should be applied to determine whether interim relief was justified. Also, this argument ignores common sense. (Motion ¶ 3). As Commissioner Hemstad illustrated when he inquired of Attorney Marshall:

> Well, I'd just make the comment that it doesn't follow, I think, from that statement that, ipso facto, **that if a rate is made subject to refund, it is automatically fair**, just, and reasonable. For example, what if we made -- **raised the rates 10,000 percent subject to refund?** In the meantime, the shippers have to pay it.

Interim Hearing Tr., Vol. 11 (1/24/02), p. 1232, l. 1-7 (emphasis added). In the present case, this Commission balanced between the parties the relative burden of interim relief and set a rate that it thought was fair. None of the arguments raised by Olympic in its Motion for reconsideration justify ignoring the balance that was struck.

30 Second, Olympic argues that, because rates are just, fair, and reasonable, there is no harm to shippers. (Motion ¶ 15). Olympic's argument begs the question. Olympic has made no showing that the

interim rates are just, fair, and reasonable. Moreover, it is not apparent that Olympic will be able to refund overcollected revenues since it is using those revenues in large part to fund one-time expenses due to Whatcom Creek. As Commissioner Hemstad illustrated when he inquired of Olympic's Witness Batch:

> Q. All right. Let's pursue that assumption. Assume we were to grant the interim relief of your request, subject to refund, and in the case in chief you're not able to prove need.
>
> A. Yes.
>
> Q. How will you finance the repayments, then, that would be required?
>
> A. Hopefully, we will be able to attract additional capital on reasonable terms. There are other mechanisms --

Interim Hearing Tr., Vol. 8 (1/14/2002), pp. 719:17 to 720:1. This potential harm was further illustrated when, Commissioner Hemstad inquired of Olympic's Witness Fox:

> Q. Should Olympic Pipe Line reach the point, the note payments aside, where it cannot pay its accounts payable as they fall due, in your opinion, **would Olympic Pipe Line commence a proceeding in bankruptcy**?
>
> A. In the -- I'm not sure if it was the discovery documents or requests for production of documents, but I'm on the Olympic finance committee and I know that **bankruptcy is something we discussed, and we've looked at that as a -- as one potential option**. Would I say there's a high likelihood that would occur? I don't think it's a high likelihood. I think it's something that would probably be considered.

Interim Hearing Tr., Vol. 9 (1/15/02), p. 903, lines 1 through 19 (emphasis added).

31 Also, Olympic's argument ignores the fact that there are many small shippers[6] and depriving any shipper of capital by artificially setting a high interim rate has the potential to harm that shippers' business.

32 Third, Olympic argues that this Commission should "consider events under federal regulation." (Motion ¶ 11). To the contrary, the Commission should set rates based on its own statutory mandate and

[6] "The rates are paid by the four refineries and by more than 65 individual petroleum wholesalers who purchase product from one of the four refineries." WUTC Media Release on Olympic Pipe Line Order, Jan. 31, 2002, ¶ 5.

not based upon the federal statutory mandate. Moreover, at most, Olympic wants selective consideration. For example, the Commission relied upon the methodology utilized by the staff in computing the amount of interim relief to grant. However, Olympic argued in support of ignoring the revenue resulting from the FERC rate increase when it was to its advantage not to have "events under federal regulation" considered.

33 Fourth, Olympic argues that, as a result of setting interim rate relief at a lower rate than FERC, the "cost and burden of attracting sufficient capital for those purposes (capital expenditures) will fall disproportionately on interstate commerce." (Motion ¶ 23). The Commission's statutory responsibility is to set intrastate rates which are just, fair, and reasonable. It is not to regulate interstate commerce. Olympic's argument requests the Commission to consider costs and burdens on interstate commerce – a responsibility under the regulatory authority of the FERC. Moreover, this argument presupposes that the cost and burden of attracting sufficient capital should fall entirely on the shippers. It is the owners of Olympic that should bear the burden of properly capitalizing Olympic and resolving the problems created through excessive dividends and failed investments. Even if shippers were responsible for the cost of attracting capital, Olympic has provided no evidence that the shippers in interstate commerce are burdened in any way.

34 Fifth, Olympic quotes from the routine suspension order of FERC and its denial of reconsideration of this order and concludes that these were findings of fact by FERC. The selective quotes were not findings of fact issued by FERC after consideration of any evidence. FERC was not aware of any of the evidence which was presented in the interim proceeding. Therefore, these conclusions provide no evidentiary support to this Commission in making its decision. Also, the FERC's procedural approach is different from the WUTC and, as such, provides no guidance to this Commission in deciding whether or not to grant interim relief under its clear regulatory precedent.

35 Olympic's reliance upon the routine suspension order of FERC is simply another way of asking this Commission to ignore its own statutory mandate and regulatory precedent. The WUTC is not FERC. FERC operates under a different statutory scheme and has a different regulatory approach than does any state, including Washington. To date, no state has adopted the FERC's regulatory approach to oil pipelines. This should not be surprising considering the fundamental differences between federal and state regulation.

36 Sixth, Olympic attaches a supplemental declaration of Mr. Fox that not only does not present any new facts but raises more questions than it answers. Mr. Fox concludes that based upon actual year end results the company continues to be in poor financial condition. (Motion ¶ 3). But, he does not present any financial statements for January. He does not point out that Olympic would have made a substantial profit in December but for a Whatcom Creek, one-time write off of losses which Olympic has argued should not be considered in evaluating its need for interim relief. Mr. Fox claims that Olympic only has $2.5 million in the bank. (Motion ¶3). But, he does not provide this Commission with a bank statement, an aged listing of the record $30+ million in accounts receivable, and he does not even discuss the $11 million from the Sea-Tac sale. Mr. Fox claims that Olympic's owners are still seeking additional information prior to making further loans. (Motion ¶ 3). This is nothing new. This can hardly be the basis for reconsideration of this Commission's order. What is most disappointing about Mr. Fox's continuing supplements to his testimony is that they add nothing new in the way of facts or evidence and present nothing more than old arguments and conjecture.

37 Finally, Olympic argues that factual findings have been entered at FERC concluding that Olympic would be harmed if it were not granted the full interim rate increase it sought because it would loose the opportunity to earn that revenue. (Motion ¶¶ 13-14). To begin, Olympic is currently overcollecting its

likely revenue requirement. Moreover, this Commission adopted an expedited schedule to help address this very issue. If Olympic was truly concerned about lost revenue, it could have filed for an increase earlier. Instead, it initially filed for a rate increase in June and then withdrew the filing. But for Olympic's own actions, it would have already had permanent rates in place. Finally, Olympic has even filed a new motion to delay this Commission's hearing until next fall. This will further delay a decision.

38 If Olympic believes that it is entitled to the increase it seeks, it would be doing everything within its power to accelerate rather than delay a decision on the merits. Olympic is hardly justified in complaining about the revenue it **may** loose as a result of its own actions. Again, Olympic's Motion raises the same arguments and facts that this Commission already considered in issuing its prior order. There is no justification for this Commission to reconsider its decision.

I. *39* Conclusion

A motion for reconsideration is not a second opportunity to litigate issues which were fully developed prior to entry of the final order and which were discussed and decided in the final order. The mere fact that Olympic disagrees with the final order does not state a basis for reconsideration.

40 Olympic's Motion for reconsideration should be denied. Olympic does not identify a single "error of law." Olympic's Motion also does not identify any facts that this Commission has not already considered. Instead, Olympic's Motion merely rehashes the same arguments that it presented throughout the proceeding. Therefore, Olympic's Motion should be denied

41 If this Commission is going to reconsider its order, the evidence "not reasonably available at the time of entry of the order" supports vacating the Commission's order allowing interim relief. The only new fact that could be argued "was not reasonably available" at the time of this Commission's order is the sale of Sea-Tac assets for $11 million. This is $3 million more than the entire amount of interim relief

requested and $8 million more than the amount of interim relief granted. This new fact alone justifies this Commission vacating it's interim order.

DATED this 25th day of February, 2002.

BRENA, BELL & CLARKSON, P.C.
Attorneys for Tesoro Refining and
Marketing Company

By /S/ ROB
Robin O. Brena, ABA #8410089
David A. Wensel, ABA #9306041

CERTIFICATE OF SERVICE
I hereby certify that on February 25, 2002, a true and correct copy of the foregoing document was faxed, emailed, and mailed to the following:

OLYMPIC PIPELINE COMPANY, INC.
Steven C. Marshall, Esq.
Patrick W. Ryan, Esq.
Counsel for Olympic Pipe Line Company
Perkins Coie LLP
One Bellevue Center, Suite 1800
411 - 108th Ave. N.E.
Bellevue, WA 98004-5584
Fax: 425-453-7350
Email: marss@perkinscoie.com

William H. Beaver, Esq.
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101
Fax: 206-682-7100
wbeaver@karrtuttle.com

WUTC STAFF
Donald Trotter, Assistant Attorney General
Counsel for Commission Staff
Attorney General's Office
Utilities and Transportation Division
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128
Fax: 360-586-5522
Email: dtrotter@wutc.wa.gov

TOSCO CORPORATION
Edward A. Finklea, Esq.
Counsel for Tosco Corporation
Energy Advocates LLP
526 N.W. 18th Avenue
Portland, OR 97209-2220
Fax: 503-721-9121
Email: efinklea@energyadvocates.com

Elaine Houchen