BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION	)	DOCKET NO. TO-011472
Complainant,	)	EIGHTH SUPPLEMENTAL ORDER
v.	)	
OLYMPIC PIPE LINE COMPANY	)	
Respondent.	)	ORDER DENYING RECONSIDERATION

1 ***Synopsis:*** *The Commission denies a request by Olympic Pipe Line Company for reconsideration of the Third Supplemental Order in this docket. The Third Supplemental Order denied the Company's requested interim increase of 62%; the Commission instead authorized an interim increase of 24.3%, or $3,395,000 annually, subject to refund. The Company failed to demonstrate that the Third Supplemental Order reflected any error of fact or law.*

I. PROCEDURAL HISTORY

2 **Proceeding:** Docket No. TO-011472 is a filing by Olympic Pipe Line Company for a general increase in its rates and charges for providing pipe line transportation service within the state of Washington. The Company asked for a substantial – 62% – increase in its rates. In its Third Supplemental Order in this docket, the Commission on January 31, 2002, denied the Company's request, in part, authorizing an increase of 24.3% based on the record in the interim phase of the proceeding.

3 **Petition for reconsideration:** On February 11, 2002, the Company petitioned for reconsideration of the order. The petition argues that the Commission erred in stating that the Company asked the Commission to disregard aspects of a parallel Company rate request before the Federal Energy Regulatory Commission, or FERC. The Company argued that the Commission's failure to allow rates at the same level accepted for interim purposes at FERC violates its rights under the United States Constitution. Finally, the Company also

contended that the amount of the relief might not be sufficient for the Company staff to recommend that the owner who employs them advance additional funds.

4 **Answers to the petition:** The Commission received answers, opposing reconsideration, from intervenors Tesoro Refining and Marketing Co. and Tosco, Inc., and from the Commission Staff. The answers all opposed the petition for reconsideration and argued for the validity of the order.

5 **Appearances.** Representation on the petition and the answers was as follows: For Olympic Pipe Line Company ("Olympic"), Steven Marshall, attorney, Seattle. For Intervenor Tesoro Refining and Marketing Company ("Tesoro"), Robin Brena, attorney, Anchorage, AK, and for Intervener Tosco Corporation ("Tosco"), Edward Finklea, attorney, Portland, OR. Commission Staff appeared by Donald T. Trotter, Assistant Attorney General, Olympia.

II. INTRODUCTION

6 Olympic Pipe Line Company has asked the Commission to authorize it to increase by 62% its rates and charges for providing intrastate transportation of petroleum products by pipeline. It also asked that the request be implemented on an interim basis, pending resolution of the general increase at a later time. The Commission entered an order granting the interim request in part only, to increase rates by 24.3%.

7 Olympic challenges the Commission's order in two respects. It states, first, that the order did not grant it a sufficient rate increase to resolve its financial crisis, and second, that in failing to do so the Commission violated its constitutional obligations and interfered with regulation of pipelines by the Federal Energy Regulatory Commission. It accompanies its petition with an affidavit by Mr. Fox, one of Olympic's witnesses in the interim phase of the rate proceeding, attesting to the Company's poor financial situation and the inadequacy of the Commission's authorized increase.

8 The other three parties to the proceeding, Tesoro, Tosco, and Commission Staff, have answered the petition and oppose it.

9 In this order the Commission addresses the concerns raised in the petition for reconsideration.

III. Olympic's Factual Challenge.

10 **A. Submission of additional evidence.** Olympic argues that the Commission failed to authorize a sufficient increase to allow it to secure financing. It submitted an affidavit of Mr. Fox, the Company's assistant treasurer, in support of this argument.[1] Other parties challenge the affidavit, contending that it is an impermissible attempt to supplement the record without authorization to do so.

11 The Commission finds the Staff and Intervenors' arguments against receiving the proposed evidence to be well-taken. The affidavit was offered to prove the facts contained therein and thus constitutes the proposal of evidence to the record.

12 Commission prior orders make clear that the Commission will consider new evidence after a record is closed only when the late submission was proposed and approved before the record was closed, or in conjunction with a motion to reopen stating reasons and subject to answer by other parties. See, *WUTC v. Washington Natural Gas Co.,* Docket No. UG-940814, Seventh Supplemental Order (May, 1995).

13 **B. Asserted error of fact.** Petitions for reconsideration should identify errors of fact or law. WAC 480-09-810. Petitioner appears to be contending that the Commission made an implicit but erroneous finding of fact that the authorized level of rate increase would be sufficient to meet the Company's asserted needs, when the Company contends that the rate level is insufficient.

14 The other parties challenge this contention. They argue that the order speaks clearly to the element of need and to the appropriateness of the authorized relief.

15 Petitioner points to no error of fact. Petitioner clearly continues to support the factual theories that it advanced at the hearing. But its post-order submission is

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[1] Mr. Fox is an officer of Olympic but is an employee of BP, which supplies management services to Olympic. He is one of the people on whose recommendation BP as successor to ARCO would base a decision to lend Olympic additional money pursuant to a line of credit between Olympic and ARCO. Wearing his Olympic hat, he states in his affidavit that the authorized increase is not sufficient to meet the Company's financial needs. Wearing his BP hat, he states in his affidavit that he would recommend that a loan be made if the full amount were authorized. The statement appears to be consistent with Mr. Fox's testimony at the hearing, which the Commission considered in its order on the interim request.

merely a restatement of its position at hearing. The matter was contested; the Commission considered the Company's factual assertions at hearing; and the Commission declined to accept the Company's position as to certain of the facts.

16 The order explains the nature of the evidence and the basis for the Commission's decision. The Company does not challenge any finding of fact in the order. The Commission reaffirms the result of the order.

17 **C. Asserted error of law.** The Company argues that the Commission erred in not granting it the same level of rates that the Federal Energy Regulatory Commission allowed to become effective pending a hearing at the federal level. It contends that our failure constituted a violation of the Company's constitutional rights.

18 The Company acknowledges that the Commission recognized its contentions under Federal law. "The Company and intervenors ask us to consider events under *federal regulation*. . . ." (Emphasis in petition; Order at paragraph 27, p. 7).[2] It then contends that the Commission committed error in stating, in paragraph 48 at page 13.

> 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.

19 The Company does not find error in our statement that the Company does not contend the Commission should apply FERC methodology.[3] It alleges, "But, it is not correct that Olympic asked that FERC matters not be considered at all."

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[2] The full sentence quoted reads, "The Company and the intervenors ask us to consider events under federal regulation – *the Company points to the FERC process* that has allowed it to collect a rate increase speedily, and the intervenors to the cash flow that the rate increase has generated." (Emphasis added).

[3] The Company stated numerous times on the record, during prehearing conferences and during the hearing, that it was not relying on FERC methodology but rather on the Commission's standards for interim rate relief. This has been the representation of counsel and of the company's witnesses: *Transcript page 583, lines 1-5* :Q. (Trotter) So you're not using this to contend for a different methodology for regulating pipelines versus others? A. (Batch) I don't know that in this interim case that we have addressed the issue of methodology.
Transcript page 731, lines 12-14 : Q. (Hemstad) So that's the FERC relationships which you want applied here? A. (Batch) Not in this interim.

20 Intervenors and Commission Staff argue that there is no error, and that the reference in context is clear in its reference to the FERC methodology. That is the meaning of the reference, and there is no error in the statement.

21 The Company stated in its supplemental memorandum that it relies on the Commission's standards for granting interim rate relief. It added, however, that "*If an additional factor is to be added* to the PNB test, it should take into account that . . . a FERC order has already been entered making factual findings that Intervenors would not be harmed by interim rates, but that Olympic would be harmed if those rates were not placed into effect subject to refund." (Emphasis added.)

22 At oral argument, Mr. Marshall stated on behalf of Olympic,

> 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. (Transcript pages 1230-31)

23 Olympic now specifically contends for the first time that although it purported to exclude any consideration of FERC methodology from its interim presentation, the Commission commits an error frought with Constitutional implications by failing to reach the same result that is obtained under the FERC action allowing the Company's proposal to become effective pending hearing.

24 The Company cites *Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1943)*, *Duquesne Light Co. v. Barash*, 488U.S. 299, 310 (1989), and *Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988)* in support of its petition for reconsideration. It also cites Section 2 of the Interstate Commerce

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Transcript page 971, lines 12-22 :
Q. (Showalter) Does your recommendations...depend on the FERC methodology...in terms of the immediate hearing? A. (Schink) No., it's not contingent on that. I basically have taken the Staff's approach and made what I thought are appropriate adjustments to it. I think the Staff methodology is appropriate.
*Transcript page 972, lines 4-7 :*Q. (Showalter) Okay. But in your view, this Commission doesn't need to elect or endorse one methodology or another in order to grant the company the relief it's requesting? A. (Schink) No, not at all. It has no effect on that.

Act,[4] which prevents rate discrimination, to support its argument that lawfully developed intrastate rates that differ from lawfully derived interstate rates constitute discrimination in violation of the Act. Finally, it cites 49 U.S.C. §13(4) for the proposition that "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.'"

25 Intervenors and Commission Staff all respond that the authorities cited in the Company's petition for reconsideration do not stand for the propositions for which they are cited, and that a proper application of federal law would find the Commission order entirely lawful.

26 Tesoro presents a detailed and thoroughly supported argument in opposition to the petition. As to the application of the Interstate Commerce Act, Tesoro begins:

> 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 & 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).

27 Tesoro states that, absent a violation of Section 13(4) of the Interstate Commerce Act, a state's power over intrastate rates is exclusive. It quotes from *North Carolina*, above (bracketed material and underscore added):

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[4] 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 the transportation of oil by pipeline. Olympic argued that the FERC continues to make reference to the Interstate Commerce Act as it stood before recodification, and Olympic followed that format in its motion for reconsideration.

> As to interstate regulation, the Commission[5] 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, supra, 325 U.S. at 511.

28 Tesoro cites a FERC decision declining jurisdiction over rates for intrastate traffic in the Trans-Alaska Pipeline. *FERC Opinion No. 171, 23 FERC ¶¶ 61,352 at 61,763 (June 2, 1983)*. It also cites *Cook Inlet Pipe Line Co., 47 FERC ¶¶ 61,057 at 61,172 (1989)*, arguing that in that decision the FERC determined that it had no power to alter intrastate rates on the grounds cited.

29 Tesoro acknowledges that the FERC does have power to alter intrastate rates under Section 13(4) of the Interstate Commerce Act. It also notes that the FERC is constrained by requirements in subsections 13(3) and 13(4) of the Act, citing the *North Carolina* decision, above:

> 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'

[5] The decision referred to the Interstate Commerce Commission. FERC appears to be in an analogous position in this matter.

> revenue will result from the proposed increase in the intrastate tariff rates.

30 Tesoro also argues, with citations to authority, that Section 2 of the Interstate Commerce Act applies only to discrimination among interstate shippers and not to asserted discrimination between interstate and intrastate shippers.

31 Tosco notes, citing *In Re Cook Inlet Pipeline Co. v. Alaska Pub. Util. Comm'n, 836 P.2d 343 (Alaska 1992)*, that intrastate pipeline rates may differ properly from interstate rates set by FERC. Olympic has demonstrated only that the interim rates are different, and has not supported any contention that they are discriminatory or that they pose an impermissible burden. Tosco points out that the *Schneidewind* case cited by Olympic has no bearing on this proceeding, as it related to state regulation of company securities rather than state regulation of rates.

32 Commission Staff points out that the authority of FERC to regulate rates is limited by statute to transportation of product between states, 49 U.S.C. §1(1)(b), and that RCW 81.28.230 restricts this Commission's pipeline rate jurisdiction to common carrier transportation "within the state." Commission Staff points out that the dual jurisdiction has existed in parallel for almost 100 years, citing *Simpson v. Shepard,* 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1913), where the Court stated that Congress "expressly provided that [the scope of federal regulation] was not to extend to purely intrastate traffic." 230 U.S. at 418.

33 Staff also notes that Olympic has failed to demonstrate that the cost-based analysis on which the Commission based its decision leads to discrimination in violation of federal law. Staff argues that The *Hope Natural Gas* and the *Duquesne Light Co.* decisions cited by Olympic support the Commission's order, and joins in discrediting Olympic's reliance on the *Schneidewind* case.

Discussion and Conclusion.

34 **Late-filed Evidence.** The Commission finds that the affidavit of Mr. Fox is offered to demonstrate the existence of facts that are not in the record. As it would be improper without prior approval or the demonstration required in WAC 480-09-810(3), which Olympic has not provided, the Commission will not consider it.

35 **Erroneous reference.** The Commission finds no error in its statement of the extent of the Company's reliance on matters at the Federal Energy Regulatory Commission. The reference is clear in its immediate context and in the overall context of the order, which acknowledges the Company's references to the FERC processes.

36 **Conflict with Federal regulation.** The Commission rejects the Company's contention that the Commission's resolution of the issues in the interim decision is a violation of federal law or constitution. The authorities the company cites simply do not support its contentions.

37 The Commission order sets out a cost-based rationale for the Commission's decision. There is no FERC cost-based analysis of the Company's needs. Instead, FERC merely allowed the Company's proposal to go into effect, subject to refund. There is no basis at all for determining with respect to the FERC-condoned rates that the Commission's authorized rates are improper, that they fail to provide the Company relief to the extent of its demonstrated need, or that they improperly discriminate against the Company or its interstate customers in any regard.

38 **Conclusion.** The Commission has defined by rule the bases on which it will grant reconsideration of a final order. It most recently reviewed the pertinent standards in the Fourth Supplemental Order in *WUTC v. Avista Corporation*, Docket Nos. UE-991255, UE-991262, and UE-991409 (April 21, 2000). There, the Commission said:

> 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.

39 Here, while it is clear that Olympic does not agree with the result of the Commission order, Olympic neither identifies an error of law or fact, nor identifies any facts of record that the Commission has not already and properly considered.

40 Olympic's petition for reconsideration should be denied.

ORDER

41 The Commission denies the petition for reconsideration filed by Olympic against the Commission's Third Supplemental Order in this Docket.

DATED at Olympia, Washington, and effective this 29th day of March, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner