BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. OLYMPIC PIPE LINE COMPANY, INC., Respondent.	DOCKET NO. TO-011472 OLYMPIC PIPE LINE COMPANY'S ANSWER TO STAFF MOTION TO DISMISS

1. Olympic Pipe Line Company ("Olympic") submits this Answer to the Motion to Dismiss filed by Commission Staff on March 27, 2002. Olympic hereby requests that the Commission deny the Motion and reject the extreme sanction of dismissal sought by Staff. This Motion does not accurately portray Olympic's compliance with the discovery requests at issue in its Motion, particularly No. 376, which is the main focus of Staff's Joint Declaration. Moreover, Staff's proposed response – dismissal of a rate case for a company that this Commission has recognized is in dire financial condition – is a wholly disproportionate response to the discovery allegations made in the Motion and is not in the public interest. Olympic has had to comply with multiple requests from multiple parties in multiple proceedings in a compressed time frame – one that is three months shorter than that of a traditional utility rate case. A reasonable response on the timing of discovery would be for Staff to support the Company's Motion to Amend Hearing Schedule, filed by the Company on March 21, 2002. This would permit Staff to communicate and work with the Company to generate the information for Staff in the format it desires. However,

rather than call or meet with Olympic to resolve these matters, Staff moved to dismiss – without a conference of counsel, without a motion to compel and without a Commission order on the data requests identified in its motion. Thus, Staff has not met the high standard of proof required for the imposition for an extreme sanction of dismissal and does not meet the prerequisites required for its Motion.[1] The name and address of Olympic is as follows:

Steven C. Marshall
William R. Maurer
Perkins Coie LLP
One Bellevue Center, Suite 1800
411 – 108th Ave. Northeast
Bellevue, WA 98004-5584
Telephone: (425) 453-7314
Facsimile: (425) 453-7350
Marss@perkinscoie.com
Maurw@perkinscoie.com

Robert C. Batch, President
Olympic Pipe Line Company
2201 Lind Ave., S.W.
Suite 270
Renton, WA 98055
Telephone: (425) 235-7736
Facsimile: (425) 981-2525

Bernadette J. Zabransky
Director – Pipeline Tariff & Regulatory Affairs
BP Pipelines (North America) Inc.
801 Warrenville Rd.,
Suite 700
Lisle, Illinois 60532
Telephone: (630) 434-2680
Facsimile: (630) 493-3707
Zabranbj@bp.com

2. This Answer brings into issue the following statutes and regulations: RCW 81.04.130, RCW 81.04.250, RCW 81.28.010, RCW 81.28.050, WAC 480-09-425.

I. FACTS

A. Olympic's Current Status

3. In its Third Supplemental Order Granting Interim Relief, In Part, issued January 31, 2002, this Commission noted:

> *First*, it is clear that the Company is in dire financial straits, in large part due to the need for safety improvements. Its case on this issue is

[1] After this Answer was prepared, Staff indicated on April 2 that Olympic had satisfied Staff Data Request No. 376 after having Olympic's witness walk Staff through the material Olympic had already submitted in response.

> compelling. It has no shareholder equity, as such. It owes substantially more money than the book value of its assets. It has seen its throughput plummet because of mandated closure. Its only means to acquire funding for its operations and needed capital projects are loans or capital investments from its owners, or revenues from transportation rates. The Company is not financially sound and it needs funds.
>
> *Second*, it is equally clear that safety must continue to be a top priority for this Company. It is essential that the Company have the means to buttress its ability to operate safely, to support public confidence that it will operate safely, and to avoid the occurrence of a major event that could precipitate complete financial meltdown and deprive the shippers and the region of an efficient and cost-effective means of transportation.

Interim Order at 3. The Commission went on to note:

> As noted above, the consequences of the Whatcom Creek incident have been severe. They have included the obligation to make certain capital improvements, the obligation to meet certain expenses, and the lack of income for an extended period while the line was shut down and eventually ramped back up. The limitations continue today, at least to the extent that throughput is limited to 91% of capacity, as the line remains obligated to operate at no more than 80% of normal operating pressure pending other improvements.
>
> Irrespective of fault, those factors affect the Company's present circumstances, its ability to obtain financing for capital improvements, and its ability to provide service.

Id. at 6.

4. Olympic's financial condition remains dire. As Olympic witness Howard B. Fox has testified:

> There is no question that Olympic Pipe Line Company is suffering on the financial side of the business. Part of my job function is to model pipeline assets and report them for our long-term plan. I have done so for Olympic, and its future from a financial perspective is not bright. Olympic's operating costs – excluding extraordinary events such as

> Whatcom Creek – have skyrocketed during the 1990's. During the period 1991 through 1997, operating costs increased substantially, resulting in a compounded annual growth rate of over 8% per year. At the same time, revenue per barrel increased at a much lower rate. This situation (coupled with the Whatcom Creek incident) has contributed to Olympic's bleak financial prospects. This financial picture has severely degraded Olympic's ability to attract capital. There are no financial institutions willing to loan money to Olympic on reasonable terms given this outlook. Further, our 10-year forecast indicates the need for additional loans of $150 million if tariffs are not increased. Even with the Staff's recommended increase of 20%, Olympic would still require additional loans of $100 million dollars and the lenders face the high likelihood of little significant repayment of principal by the end of 2011.

Rebuttal Testimony of Howard Fox (HBF-1T) at 2-3.

5. Staff's Motion, if granted, would place Olympic in a worse financial condition than it was when it requested interim relief. Dismissal would deprive Olympic of the interim funds it needs to maintain a minimal level of financial solvency, prevent it from attracting capital, and deprive it of the ability fund needed safety improvements.

B. Olympic Has Complied With Discovery to the Best of Its Ability

6. As discussed in Olympic's Motion to Amend Hearing Schedule, Olympic has had to respond to an overwhelming number of data requests issued by multiple parties in a compressed time frame. At the same time, Olympic has had to respond to other court proceedings. As Olympic stated in its Motion to Amend Hearing Schedule:

> Olympic has 75 employees, only a handful of whom are qualified or knowledgeable enough to assist in data requests or participate in hearings. See Declaration of Bob Batch (Attachment C). The scope and intensity of this proceeding has expanded far beyond what Olympic anticipated, as Tosco and Tesoro have pursued a litigation strategy far more time-consuming and detailed than what is called for by the amounts at issue. The Intervenors' discovery strategy has caused Olympic to produce an enormous amount of data and expend countless hours in response. It

can be anticipated from the depth and detail of the discovery undertaken by the Intervenors that their direct testimony will be complex and detailed. Their testimony will call for a thorough and detailed response from Olympic. But under the proposed schedule, Olympic will have inadequate time for a response.

The hearing schedule for the parallel FERC and WUTC proceedings now overlaps. Olympic cannot meet both schedules at the same time. See Letter to Judge Wallis from Olympic Counsel dated March 11, 2002, attached hereto as Attachment D. For instance, Olympic's rebuttal to FERC Staff and intervenor testimony is due May 20, 2002. Its rebuttal to WUTC Staff and intervenor testimony is due the next day. Hearings at FERC in Washington, D.C. are scheduled to commence less than two weeks after hearings at the WUTC are scheduled to conclude, meaning that Olympic witnesses will be deprived of an opportunity to adequately prepare for the FERC hearings because they will be participating at the WUTC hearings. Briefs would be due at the WUTC as hearings at FERC would be concluding.

At the same time that the two administrative hearings are producing time constraints on the company, a major civil trial involving Olympic is scheduled to begin in April, which will also consume the time and attention of Olympic's management and personnel. See Declaration of Bob Batch (Attachment C) and the March 13 and March 20, 2002, *Seattle Times*. Olympic's personnel must also actually run the company. Even under an amended schedule, the company's resources and personnel will still be strained.

As the Commission itself has found, the company is in dire financial condition. Olympic is struggling to accomplish all that is demanded of it in the prehearing stages of both the FERC and Commission proceedings. Batch Declaration at ¶¶2-8. Simultaneous proceedings involving the same company personnel, occurring three thousands miles away from each other, will deprive the company's ability to present an effective case in either the FERC or Commission hearings. See Batch Declaration at ¶¶2-8.

> Proceeding with hearings prior to the issuance of the FERC ALJ's order will severely interfere with Olympic's ability to prepare for, present, and argue its case before the Commission and before FERC. Olympic's staff has limits to their time and ability to participate in multiple proceedings. Proceeding with the WUTC case on the schedule suggested by Staff would prevent the company from adequately preparing its challenge to the intervenors' arguments. Simultaneously scheduling the WUTC hearing while the FERC proceeding and the civil trial are proceeding would deny Olympic an adequate and fair opportunity to be heard and deprive Olympic of the due process of law to which it is entitled under the State and Federal Constitutions.

Motion to Amend Hearing Schedule at 8-10.

7. The Seattle Times reported on Sunday, March 30, 2002, that Olympic has reached a tentative settlement of the wrongful death lawsuits arising out of the Whatcom Creek accident. See Steve Miletich, Tentative deal of $50 million in suits over pipeline blast, Seattle Times (March 30, 2002). The matter is still in the mediation process and per agreement Olympic is not able to comment on the progress of negotiations. However, even if this matter settles, Olympic must continue to address multiple other court proceedings, including a recently filed lawsuit by intervenor Tosco in King County Superior Court seeking damages of $24 million for breach of contract, breach of tariff negotiations, negligence, and common carrier liability. See Complaint for Damages and Other Relief filed February 8, 2002, attached hereto as Exhibit A. There also exists an administrative hearing scheduled in Washington D.C. beginning on May 14, 2002, regarding the June 2, 2000 Notice of Probably Violation, the FERC hearing scheduled for July 2002, litigation pending in Federal District Court in Seattle with ARCO, Equilon and IMCO over a variety of issues, including ARCO's business interruption claims, three separate major insurer coverage actions pending in King County Superior Court, as well as other litigation.

8. Even with the demands on its time and employees necessitated by the WUTC proceeding, the FERC proceeding, wrongful death lawsuits, other litigation and administrative proceedings, Olympic has produced responses to hundreds of data requests totaling thousands of pages. A discovery status report is attached hereto as Exhibit B.

9. Olympic has made good faith efforts to comply with every data request submitted to it. Olympic was instructed by the Administrative Law Judge that it should not favor the data requests of any one party over those of another. See Fourth Supplemental Order at 3 ("[Olympic] must also address data requests from all parties equitably. It is not tolerable to ignore requests of one or more parties or to favor one or more parties in supplying responses."). Olympic has not willfully refused to produce data that it has in its possession, and it has not attempted to conceal or mislead this Commission, the Administrative Law Judge, Staff, or the Intervenors. It has, in good faith and with clean hands, attempted to do all that has been asked of it. To the extent that it was not able to fully respond to data requests in a timely and complete manner, Olympic has taken steps to develop the information requested and work with Staff and Intervenors to supply them with the information they purport to need.

10. Moreover, Olympic has taken steps to address the purported discovery problems alleged by Staff and Intervenors. Staff contends that Olympic has not objected to any of its data requests, but that is not a fair characterization of the record. The record shows repeated objections by Olympic to the undue burden of the *totality* of data requests here and at the Federal Energy Regulatory Commission. While no single data request is oppressive or unduly burdensome, the combination of hundreds of data requests in a compressed time frame has been unduly burdensome and oppressive.

11. In that regard, Olympic has requested three times that this Commission amend the hearing schedule, which would permit the Company to produce information of the nature and kind

Staff and the Intervenors have requested. Rather than support Olympic's efforts, Staff and Intervenors have opposed Olympic's attempts to arrive at a schedule consistent with the Company's resources and the demands on its time as well as the schedules of Olympic's other proceedings such as the FERC hearing. The totality of the data requests from Staff and Intervenors has pushed the capabilities of the Company to respond in the limited time permitted. Now Staff has moved to dismiss Olympic's case rather than permit a hearing schedule that would permit the Company to produce the information Staff claims it needs in the form requested.

II. ARGUMENT
Staff's Motion Should Be Denied

A. Staff Concerns With Data Request No. 376 Are Not Sufficient to Warrant Dismissal

12. The main focus of Staff's Motion to Dismiss is Olympic's response to Staff Data Request No. 376. See Motion to Dismiss at 2, 3-5. As discussed in the attached Declaration of Brett Collins, Data Request No. 376 sought an update of Olympic exhibit OPL-31 and the schedules attached thereto. OPL-31 is a Cost of Service Schedule for the Base Period (October 1, 2000 to September 30, 2001) and the Test Period (known and measurable changes within the nine months subsequent to the Base Period). Mr. Collins, as discussed in his attached declaration, Exhibit C, believed that Staff sought cost of service calculations that relied on the actual data for the 12-month period ending December 31, 2001. Staff did not call Mr. Collins or anyone else to request such a clarification until *April 1, 2002, four days after Staff filed its Motion to Dismiss.*

13. Olympic replied to Data Request No. 376 on February 21, 2002. Olympic noted that Staff's request required the creation of new material. See Olympic Response to Data Request

No. 376 attached hereto as Exhibit D.[2] On March 8, 2002, Olympic supplemented this response, objecting to the fact that this data request required Olympic to create new records and a new analysis. Nonetheless, Olympic committed to provide the analysis it believed Staff requested at the hearing on March 8, 2002. On March 21, 2002, Olympic submitted schedules reflecting the information it believed Staff requested.

14. Staff contends that "Olympic's response to what Staff requested has still not been received." Motion to Dismiss at 5. But this is not correct. Olympic responded to the data request with the information it believed Staff requested on March 21, 2002. Staff did not call Olympic personnel to explain their concerns with Olympic's response after March 21. Staff did not confer with counsel. Staff did not file a Motion to Compel. Staff did not obtain an order. Nor did they reformulate their request to more clearly define the scope and format of the information requested. Instead, Staff filed its Motion to Dismiss, which mischaracterizes Olympic's response to Data Request 376.

---

[2] Staff states in its Motion to Dismiss that "the complete Company response to Staff Data Request Nos. 376 is not provided" in its exhibits to the Motion. Staff states that "[o]nly a few select pages are provided, which is enough to show the deficiency in the response." Motion to Dismiss at 3. Staff's failure to produce all 69 pages of Olympic's Response to Data Request No. 376 is misleading. As the attached exhibit shows, Olympic's response was thorough and provided a great deal of information to Staff. Staff, as it acknowledges in the Joint Declaration of Mssrs. Colbo and Twitchell, could extract the information they wished from Olympic's response, but this would take "considerable time." Joint Declaration at 5. Olympic submits that it should not be required to make Staff's case for it. Olympic provided the information needed for Staff to perform its analysis. If Staff needed the "considerable time" needed to perform its calculations, Staff could have requested this time from Olympic or supported Olympic's Motion to Amend the Hearing Schedule. Instead, Staff moved to dismiss Olympic's case.

B. Staff Has Failed to Demonstrate That the Extreme Sanction of Dismissal Is Warranted In This Case.

15. The Washington State Supreme Court recently affirmed the standard for consideration of a motion to dismissal for failure to comply with discovery procedures:

> The law is well settled in this state concerning dismissal of a complaint as a sanction for discovery abuse. When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a less severe sanction would probably have sufficed. A party's disregard of a court order without reasonable excuse or justification is deemed willful.

Rivers v. Wash. State Conf. Of Mason Contrs., 41 P.3d 1175; 2002 Wash. LEXIS 121, at *39 (March 7, 2002). In that case, Justice Chambers stressed in concurrence that dismissal is an extreme sanction appropriate only when the court has evidence on the record that a party has willfully failed to comply with a court order without excuse or justification:

> Dismissal of a complaint or answer is an extreme sanction not available merely to encourage compliance with a case schedule. Such a sanction is reserved for discovery violations which are willful or deliberate, when the violation substantially prejudices the opponent, and a less sanction would not suffice.

Id. at *44 (Chambers, J. concurring).[3]

16. Staff has manifestly failed to meet the burden to justify a dismissal of Olympic's case. As an initial matter, there is no order for Olympic to have willfully and deliberately violated in

---

[3] The Commission will "look" to the Rules of Civil Procedure for the Superior Courts as a guide to interpreting its own rules and statute, but that the Commission is not bound by such Civil Procedure Rules. See In re Application P-66283, 1982 Wash. UTC LEXIS 6, at *10 (1982).

this case. As a simple matter of law, the standard set forth in Rivers has not been, and cannot be, met without an order on discovery. Staff's Motion focuses on Data Request No. 376. No such order exists on that data request or the other data requests mentioned in Staff's Motion. As a matter of law, Staff's Motion must be dismissed because it does not meet the legal prerequisites for a motion for dismissal.

17. Staff has also failed to comply with other procedural prerequisites to its Motion: (i) Staff has not moved to compel the responses it feels are inadequate, and (ii) Staff is obligated to confer with Olympic before filing a Motion to Compel, but did not do so.[4]

18. As discussed below, Olympic has not willfully or deliberately defied a discovery order and has, in fact, produced an enormous amount of material and attempted to work with Staff and the Intervenors to address their concerns. Staff's ability to prepare its case has not been substantially prejudiced, as it has only recently made attempts to ask questions about the data contained in Olympic's responses. Finally, it is clear a less severe remedy (i.e., modification of the hearing schedule) will suffice even if Staff had been able to show a willful violation and had shown prejudice – which it has not.

1. Olympic Has Not Willfully or Deliberately Refused to Obey a Discovery Order

a. Staff's Motion Mischaracterizes the Discovery Process in This Case

19. Staff's Motion states that it has provided letters on March 4, 2002 and March 11, 2002, informing Olympic of its need for certain responses. Yet, a prehearing conference was held

---

[4] The Sixth Supplemental Order, Prehearing Conference Order in this docket states at p. 2 that "WAC 480-09-480 . . . requires counsel to consult informally as a predicate to bringing disputes to the Commission. . . Counsel . . . are to use the telephone to discuss disputes with each other and . . . are to be proactive in addressing and resolving disputes."

on March 8, 2002, and Staff failed to provide any notice of any deficiency in Olympic's responses to its data requests at that March 8, 2002 hearing. See Hearing Transcript at 1712.

20. Instead, Staff stated on March 8, 2002 that most of its issues had been addressed and that Staff did *not* need a ruling. The Hearing Transcript states:

> MR. TROTTER: Could I just say on the record that I believe I mentioned off the record this morning that we also spent some time with the company going through our issues. We think we're almost all the way there. I don't believe at this moment we need a ruling from you [referring to Judge Wallis].

Hearing Transcript at 1712 (March 8, 2002).

21. Staff had an opportunity to raise its data request issues before the Commission, but failed to do so. Instead, Staff provided only letters vaguely describing the deficiencies in the responses and did not raise any issues at the March 8 hearing before the Commission. Instead, Staff's counsel indicated to the Administrative Law Judge that "we are almost there" and "we do not need a ruling." After Staff received Olympic's responses on March 21 and 22, 2002 (the dates Olympic said it would provide supplemental responses), Staff did not notify Olympic of any deficiencies to Data Request No. 376. Staff did not file a Motion to Compel either before or after the March 8 hearing. Instead, without any notice, Staff filed a Motion to Dismiss.

22. Staff's attitude towards Olympic's data responses is best described as inconsistent. Olympic's response to Staff's requests, which Staff described as "almost all the way there," does not indicate willful and deliberate disobedience on Olympic's part. In contrast, Olympic has made good faith efforts to comply respond to Staff's Data Requests. See Declaration of Howard B. Fox, attached hereto as Exhibit E. Staff's Motion to Dismiss should therefore be denied because it has failed to meet the first criteria for dismissal under Rivers.

b. Olympic Has Repeatedly Objected to the Discovery Schedule in This Case

23. Staff asserts a number of times in its Motion to Dismiss that Olympic did not object to the disputed data requests. While, with a few exceptions, Olympic has not specifically objected to individual Staff data requests, Olympic has moved to amend the procedural schedule in this case three times in order to provide adequate time for, among other things, responding to the extraordinary number of data requests from all parties here and at FERC. In each of these motions, Olympic made clear that it could not provide responses to the hundreds of data requests it had received within the Commission's compressed time frame for discovery. In each case, Staff opposed amending the procedural schedule. Staff now complains that Olympic has not been able to do what Olympic said it could not do within the time period allotted to it. Staff could have supported Olympic's efforts to amend the procedural schedule to allow for more time for responses to data requests. It did not.

c. Olympic's Responses to Specific Data Requests

24. Staff has incorrectly characterized the sufficiency of certain specific responses offered by Olympic. As demonstrated below, Olympic has made good faith efforts to respond, and has responded, as fully as possible, to the multitudes of data requests (from not only Staff, but also Tesoro and Tosco).

25. **WUTC Staff Data Request No. 376.** Staff's primary focus in its Joint Declaration and the Motion to Dismiss is its contention that Olympic did not provide a sufficient answer to WUTC Staff Data Request No. 376. Motion to Dismiss at 2. Staff alleges that Olympic did not provide a timely response and did not provide a response as to the merits of the request. Id. Staff also states that Olympic did not object to this data request. Motion to Dismiss

at 3. Finally, Staff asserts that they did not receive the information in the manner in which they requested it. Motion to Dismiss at 5. Staff is factually incorrect.

26. As discussed in the attached declaration of Brett Collins, Staff is incorrect in its assertions. First, Olympic's initial response on February 21, 2002 informed Staff that its data request (No. 376) would require the creation of new material and would require significant additional time for a response. (Mr. Collins' Declaration states that the response to Staff on Data Request No. 376 has taken 30 to 40 hours of additional time.) Thus, Staff's complaints regarding Olympic's failure to provide a timely response is incorrect. Further, Olympic provided the information requested via email on March 22, 2002, as Olympic agreed to do at the March 8 prehearing conference. See Hearing Transcript on March 8, 2002.

27. Second, Staff is wrong in stating that Olympic did not object to this data request. In its supplemental response on March 8, 2002, Olympic stated: "A response to this request would require creation of new records and a new analysis and is therefore ***objectionable***. Nonetheless, without waiving its objections, Olympic will undertake this additional analysis . . .." Olympic clearly objected to the scope and the magnitude of this data request. However, Olympic agreed, without waiving its objections, to attempt to answer this time intensive data request for Staff in a good faith effort to assist the Commission and Staff in these proceedings. Thus, Staff has again mischaracterized Olympic's response to this data request.

28. Staff is also inaccurate in stating that Olympic's response was not on the merit and was not in the manner that was requested. Staff's request was:

> Provide for the twelve months ending December 31, 2001 an update to your Exhibit OPL-31 and all the schedules. This information should be in accordance as it was requested during the staff visit of January 17, 2002.

In essence, Staff stated that it had the actual amounts for the period of January to September of 2001. It was now requesting financial data for the entire year of 2001. This financial information has been provided to Staff.[5] As Mr. Collins states in his declaration:

> 3. The main focus of that Declaration [of Mssrs. Colbo and Twitchell] was Olympic's response to WUTC Staff Data Request No. 376. I prepared the response to this data request with Cindy Hammer's assistance. I believe Olympic's response provided Staff with the information it requested and was indeed responsive to Staff's request. There was apparently a misunderstanding about the response I had prepared for Olympic to Data Request No. 376 that could have been clarified before the Motion to Dismiss was filed and now, I believe, has been clarified.
>
> 4. Staff did not call me before the Motion to Dismiss was filed on Thursday, March 27, 2002. But four days later, on Monday, April 1, 2002, Mr. Colbo and Mr. Twitchell called me to ask for a clarification on Olympic's response to Data Request No. 376. I told them that Olympic did provide the information I believed was responsive to Data Request No. 376, and that I would be happy to provide an explanation to the supporting data and schedules to help them understand it.
>
> 5. On Monday, April 1, I also sent to Mr. Colbo and Mr. Twitchell a fax that confirmed what I had told them, namely that Olympic's response to Data Request No. 376 was responsive, and I also provided additional work material to help show Staff how the data in the response that Olympic previously supplied was derived. A copy of that fax is Attachment 1.

Collins Declaration at 1-2.

29. **WUTC Staff Data Request No. 377.** Staff only made general comments in the Overview of its Motion to Dismiss regarding Staff Data Request No. 377. See Motion to Dismiss

---

[5] Since Olympic prepared this Answer, Staff now agrees with Olympic that Brett Collins and Olympic did indeed provide an adequate response on March 22, 2002 to Data Request No. 376.

at 2. Staff only stated that it did not receive Olympic's response until March 22, 2002, which Staff asserted was untimely, and that Olympic did not respond in the manner requested. Olympic's comments with regard to this data request are the same as stated above concerning Olympic's responses to Staff Data Request No. 376. First, Olympic informed Staff that this data request would require additional time. Thus, Staff is inaccurate in accusing Olympic of responding in an untimely manner. Second, Olympic did object to Staff Data Request No. 377 in its supplemental response on March 8, 2002. It objected, but again agreed to attempt to respond to the data request as a good faith effort to assist in the proceedings. Finally, Olympic has provided all information with regard to the data request. In particular, Olympic has provided information regarding the last quarter of 2001 and has provided full information regarding the entire year of both 2000 and 2001. Further, Olympic has provided adjusted schedules regarding total investment, accumulated depreciation and net investment, as requested by Staff. Olympic has specified the particular schedules to review. Olympic had provided the information that Staff requested. Thus, Staff is in error in stating that Olympic has not responded as requested.

30. **Other WUTC Staff Data Requests.** Staff also discussed various issues with some of Olympic's other responses to WUTC Staff data requests. Olympic's responses to each of Staff's specific concerns regarding these data requests are separately discussed in "Attachment 1, Olympic's Other Responses to WUTC Data Requests." In summary, most of the data requests are of the nature of requests for cross-examination materials and are not necessary for Staff to present their direct case. Moreover, Olympic has responded to each request.

2. Staff Have Not Demonstrated That the Disputed Discovery Responses Have Substantially Prejudiced Their Ability to Prepare Their Case

31. Under Washington law, Staff must demonstrate that the disputed discovery responses have substantially prejudiced their ability to prepare their case. See Rivers, 2002 Wash. LEXIS at *39. Staff have not met this burden. Staff only asserts that Staff Data Requests Nos. 376 and 377 were "necessary in order for Staff to prepare its case." Motion to Dismiss at 2. No other data request is identified. As discussed above, and in the attached declaration of Brett Collins, Olympic responded to both these requests on March 22 and provided further explanation of its response when on April 1, Staff called Mr. Collins to ask for assistance after filing its Motion to Dismiss. See Collins Declaration.[6]

32. The joint declaration of Mssrs. Colbo and Twitchell in Support of Staff's Motion to Dismiss does *not* assert that they will be unable to prepare their case without Olympic doing the work to make certain ambiguously requested adjustments to Olympic's data in response to Staff Data Requests Nos. 376 and 377. Rather, they assert that "it will take some time" to do so. See Joint Declaration at 4-5 ("It will take considerable time for use to reconcile the Company's response to Staff Data Request No. 376 to actual calendar year 2001 results."); id. at 5 ("At this time, we cannot estimate the amount of time it will take to evaluate the Company's response to Staff Data Request No. 376, sort out all of the problems it presents, and be in a position to prepare a pro forma and restated results of operations."). Noticeably absent from this Joint Declaration is any assertion that they will be *substantially* prejudiced by their alleged failure to receive the information supplied by Olympic in the desired form. Rather, the Joint Declaration

---

[6] Again, as of April 2, 2002, Staff now agrees that Olympic did indeed provide a sufficient response to Data Request No. 376 on March 22, 2002.

merely alleges inconvenience, and such inconvenience can be addressed by granting Olympic's Motion to Amend the Hearing Schedule.

3. This Commission Has an Obligation to Consider Less Severe Sanctions Before It Dismisses Olympic's Case

33. If this Commission finds that Olympic has disregarded a discovery order regarding data requests mentioned in Staff's motion (which would not be possible because no discovery order has been issued relating to the data requests identified in Staff's Motion), this Commission should impose a less severe sanction. CR 37(b)(2) lists some other sanctions available to the trial court that are less severe than dismissal, such as staying further proceedings until the order is obeyed.

34. In that regard, the Commission can adequately address Staff's concerns in this case by granting Olympic's Motion to Amend the Hearing Schedule. Staff recognizes that absent an order dismissing the case – which the Commission cannot issue under the criteria laid out in Rivers – extending the schedule in this case is appropriate. See Commission Staff's Answer to Olympic Pipe Line's Motion to Amend Hearing Schedule, at 1 ("If Staff's motion [to dismiss] is not granted, some accommodation to the schedule is now required, if this case is to go forward.").

B. Staff Is Attempting to Compress a Complex Utility Rate Case Into the Seven Month Schedule for Common Carriers

35. At its base, the cause for any dispute between Staff and Olympic is over the schedule in this case. The Legislature has established different time frames for examining the proposed tariff changes of electric utilities and common carriers. Utility rate cases allow three additional months in a rate case schedule. Pursuant to RCW 80.28.060, thirty days' notice to the Commission and publication under RCW 80.28.050 are required to change an electric utility's filed tariff. In consideration of the tariff change, the Commission may suspend the changes in rates

within thirty days of the filing. Under RCW 80.04.130, the period of this suspension may not exceed ten months. Pursuant to RCW 81.28.050, common carriers must provide similar thirty days' notice to the Commission and publish as required by RCW 81.28.040. However, the Commission may not suspend the effectiveness of a common carrier's tariff change for more than seven months unless the common carrier consents. RCW 81.04.130.

36. In this matter, a compressed time frame is not workable for a matter that is as complex if not more complex than a utility rate case. Issues of methodology, overlapping jurisdictions and proceedings, as well as the unique nature of Olympic's circumstances, mean that a seven-month common carrier schedule is not feasible.

III. PRAYER FOR RELIEF

Based on the foregoing, Olympic respectfully requests that the Commission issue an order denying Staff's Motion to Dismiss and modifying the case schedule.

DATED this ____ day of April, 2002.

Respectfully submitted,

PERKINS COIE LLP

By _____
Steven C. Marshall, WSBA #5272
William R. Maurer, WSBA #25451