

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

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| 3 | WASHINGTON UTILITIES AND |) | Docket No. TO-011472 |
| 4 | TRANSPORTATION COMMISSION, |) | Volume XVII |
| 5 | Complainant, |) | Pages 1722 to 1811 |
| 6 | vs. |) | |
| 7 | OLYMPIC PIPELINE COMPANY, |) | |
| 8 | INC., |) | |
| 9 | Respondent. |) | |

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11 A prehearing conference in the above matter

12 was held on April 4, 2002, at 1:30 p.m., at 1300 South

13 Evergreen Park Drive Southwest, Room 206, Olympia,

14 Washington, before Administrative Law Judge ROBERT

15 WALLIS and Chairwoman MARILYN SHOWALTER and Commissioner

16 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.

17 The parties were present as follows:

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1 PROCEEDINGS

2 JUDGE WALLIS: This is a pre-hearing
3 conference in the matter of Commission Docket Number
4 TO-011472, which is nominally a complaint by the
5 Commission against the Olympic Pipeline Company
6 involving a proposal that the company has made for an
7 increase in its rates and charges for providing service
8 within the state of Washington. This conference is
9 being held upon due and proper notice in Olympia,
10 Washington before Chairwoman Marilyn Showalter,
11 Commissioner Richard Hemstad, and Commissioner Patrick
12 Oshie of the Washington Utilities and Transportation
13 Commission. My name is Robert Wallis, and I am serving
14 as the Administrative Law Judge.

15 I would like to begin by asking parties to
16 state an appearance, asking only lead counsel to respond
17 and to state your name and the name of the client that
18 you're representing in this proceeding.

19 MR. MARSHALL: I'm Steve Marshall
20 representing Olympic Pipeline Company.

21 MR. TROTTER: Donald T. Trotter and Lisa
22 Watson for Commission Staff.

23 MR. BRENA: Robin Brena for Tesoro.

24 JUDGE WALLIS: If the button is up, your mike
25 should be on.

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1 MR. BRENA: Robin Brena for Tesoro Refining
2 and Marketing.

3 JUDGE WALLIS: We understand that Mr. Finklea
4 on behalf of Tosco was endeavoring to come and to arrive
5 early. His absence is not explained at this point. We
6 suspect that there may have been a traffic problem on
7 the road between Portland and Olympia that is detaining
8 him, but in light of our limited time schedule and the
9 ground that we have to cover, we will proceed at this
10 point.

11 I would like to begin this afternoon with
12 discussions upon the motion to dismiss, and I would like
13 to ask the Commission Staff to lead off stating in a
14 very summary fashion the reason for the motion. Then we
15 would like to have the company respond and then the
16 interveners comment and conclude with remarks by
17 Commission Staff.

18 Mr. Trotter, are you ready to proceed?

19 MR. TROTTER: Yes, I am, Your Honor, thank
20 you.

21 MR. STOKES: Your Honor, this is Chad Stokes,
22 Ed Finklea is stuck in an accident just off the exitway,
23 he should be there shortly. I will have to be on the
24 bridge line representing Tosco in the meantime.

25 JUDGE WALLIS: Very well.

1726

1 MR. STOKES: Apologize for that.

2 JUDGE WALLIS: Thank you, Mr. Stokes, that is
3 as we suspected.

4 Mr. Trotter.

5 MR. TROTTER: Thank you, Your Honor. I am
6 representing the Staff motion at this time. As it is
7 probably clear from the motion we did file, this motion
8 was born of frustration. We had made many attempts at
9 cooperating with the company to get responses to our
10 data requests, as our motion documents, there were
11 repeated written communications. We had a two day
12 conference that went full day, one of them through lunch
13 hour, and then continuing through the afternoon on March
14 6th and 7th. We then had another extended pre-hearing
15 conference on the 8th, and Your Honor ordered all
16 priority data requests to be responded to by March 22nd.
17 You also asked that the parties communicate to the
18 company exactly what those were. We did so, and our
19 March 11th letter is in the materials. And in addition
20 to identifying our priority requests, we identified each
21 and every item that was discussed on the March 5th and
22 6th conferences and the specific deficiencies that we
23 perceived.

24 We received not a single response to a data
25 request between March 8th and March 22nd, but on March

1727

1 22nd I think up until 11 p.m. several came in. One of
2 the main ones that we were interested in from the staff
3 accountants, and both Mr. Twitchell and Mr. Colbo are
4 here and are prepared to comment and testify if
5 necessary, hopefully that won't be the case, but they
6 are here to express their concerns, that was Data
7 Request 376, which basically asked the company to update
8 its Exhibit OPL-31 to the end of 2001. That exhibit is
9 full year through September 30 of 2001. And the reasons
10 are pretty obvious, we wanted an updated test year. The
11 throughput problems with this company are legendary, and
12 we won't repeat those. The company never objected to
13 that request. In their reply, they say they did, but
14 when you read it, they said our request was
15 "objectionable" and then said they would respond.
16 That's not an objection, that's an observation. In any
17 event, they said they would respond.

18 This particular one was specifically
19 negotiated with the company on January 17th before it
20 was issued so that the company knew exactly what we
21 wanted. We kept at it because we didn't get it on a
22 timely basis. We repeatedly communicated with them on
23 that fact, and this was discussed in the March 5th and
24 6th conferences, and they said it would be provided.
25 OPL-31 shows in its first column the actual results

1728

1 through September 30, 2001. It does not contain full
2 year 2000 data. The response that we got in the first
3 column was full year 2000 data, and then they adjusted
4 to the year 2001, but we still did not on that sheet
5 have 2001 actuals for the full year.

6 We wanted that, and every utility that I have
7 ever seen, when you ask for updated through a specific
8 time period, you start with actuals through that time
9 period and you adjust from there. They picked a
10 different time period from a different exhibit, not
11 OPL-1, and adjusted from there. They have never
12 explained why they did that, but we were unable to, with
13 what we had on the 22nd, we were unable to do anything.
14 We could not confirm the actuals, because they didn't
15 provide us the actuals, and the Staff was very, very
16 frustrated.

17 We talked about our options. I talked to
18 Mr. Eckhardt, Mr. Curl, and Ms. Linnenbrink all the way
19 up to the director level to determine what was the
20 appropriate action. The unanimous decision was to move
21 to dismiss. We felt that we gave the company every
22 opportunity to respond in a fair and reasonable way, so
23 we filed a motion. We also communicated with the
24 company and asked for the information, and we finally
25 got it finally through I think just a fax on Monday and

1729

1 discussions on Tuesday of this week.

2 We now have basically the information that we
3 requested with enough information, not in the format we
4 requested, but enough information to enable us to adjust
5 from test year 2001 actuals. So that is our current
6 status on 376. But we firmly believe that the company
7 fully understood what we were asking for. They have not
8 explained why they provided it in the format they did
9 rather than in the format of OPL-31, which is what we
10 asked for. But I felt compelled to defend the Staff
11 appropriately after consultation with the supervisors
12 that this was the appropriate action given the entire
13 context of this case.

14 With respect to the other data requests, we
15 have thoroughly documented those, but let me just pick
16 on a couple here and show you what we think is
17 symptomatic of a continuing problem.

18 CHAIRWOMAN SHOWALTER: Mr. Trotter, we should
19 just interject that Mr. Finklea has come into the room
20 so that his colleague who is listening on the line knows
21 that.

22 MR. STOKES: Thank you very much.

23 MR. FINKLEA: Thank you, Chairwoman.

24 MR. TROTTER: Thank you, Your Honor.

25 Let me focus on Data Request 323. This one

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1 asked for the economic -- samples of economic studies
2 under which the company justifies its projects. As the
3 Commission knows, this company has added a significant
4 amount of plant. We wanted to see the basis for it to
5 make sure that what they're doing is appropriate, so we
6 asked for samples. The response we got, which was late
7 but we did get a response, said some documents don't
8 exist but attached are samples, and these are records
9 that are required under the operating agreement between
10 BP Pipelines and Olympic. Well, there weren't any
11 attachments. And so on March 4th, we wrote to them and
12 said, what we thought was simply an administrative
13 problem, please give us them. We got no response. On
14 March 5th and 6th, we teed this up, they said they would
15 be provided. We identified it in our March 11th letter,
16 we got no response.

17 In their attachment 1 to their motion, they
18 say now that the documents, many of the documents aren't
19 available but all samples, "all samples and documents
20 available to Olympic have been provided in the
21 testimony". They don't cite us to that testimony. We
22 have looked at the testimony, and we can't find them.
23 So what would a motion to compel, they insist that we
24 need to file a motion to compel, what would that
25 accomplish? We have gone over this three times, they

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1 have agreed to provide them, and now they tell us
2 they're in the records somewhere. I mean this is the
3 type of pattern of behavior that we face and have been
4 facing in this case.

5 The other one I want to point out is 341, and
6 Ms. Omohundro testifies on behalf of Olympic that the
7 existence and pricing of substitutes, services like
8 barges and so on, give guidance to how pipeline pricing
9 ought to occur. So we issued a very straightforward
10 data request, give us the pricing of substitutes that
11 you used to support your testimony and the documents.
12 We never received it. We kept at it. March 4th we
13 issued a letter saying we're asking for pricing
14 information. Followed this up on the 5th and the 6th,
15 and we followed it up on the 11th. What we got was a
16 lot of philosophy about pricing and marginal cost and so
17 on, a lot of information we didn't ask for. What we
18 have persistently asked for is simply what pricing
19 information did she rely on for that testimony.

20 The company now says it will send out a
21 further supplemental response on April 3rd. I have not
22 seen that. It does say it can not provide certain
23 specific information that is unavailable. If it's
24 unavailable, they could have answered that back in
25 January, that they don't have any pricing of substitutes

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1 information. But the testimony is very clear that there
2 must have been something. Now I, you know, I'm going to
3 pursue this in deposition, and I'm going to get to it,
4 but to prepare for deposition, I wanted the
5 documentation, and we haven't got it, and we still
6 haven't got it.

7 Now there are many other requests, one that I
8 do want to focus on because it's very critical to the
9 accounting staff is 319, which we asked for the, let me
10 get the exact wording here, supporting documents,
11 calculations, and assumptions to develop federal and
12 state tax expense. Staff needs this in order to do its
13 pro forma results of operations. It needs to understand
14 how the tax calculation is put together. We again
15 pointed out repeatedly, we did receive some numbers, but
16 we never got the calculations or the assumptions
17 underlying them, and we still don't have them.

18 And the company, according to its Attachment
19 1, says that it included a schedule that showed the
20 taxes paid for the year 2001. That's true, but there's
21 not an assumption or a calculation associated with that
22 to explain the basis for it. I don't know what sort of
23 a data request could be asked more precisely than asking
24 for the calculations and assumptions for certain expense
25 calculation. That's how you ask for it, and we still

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1 don't have it. Put another way, in most cases this
2 would be a work paper filed on the first day of the
3 case, you would have the basis for the company's
4 adjustments, and we didn't get it. So at this point --
5 and on the 22nd, and some of this we got very late so it
6 really wasn't until the following week, the Staff was in
7 a state that I have rarely seen in my career in terms of
8 just seeing a basic inability to put a case together.

9 I'm not going to itemize all the other items
10 that I have, but it's very clear that for whatever
11 reason the company has been unable to respond to the
12 specific deficiencies that we have outlined, they were
13 unable to respond to Your Honor's requirement that all
14 priority DRs be responded to by March 22nd. We have
15 made significant attempts, this case has had more
16 pre-hearing conferences than any I have ever been
17 involved in, I think, certainly on discovery.

18 So the question then becomes, what is the
19 appropriate response to this. We initially asked for
20 dismissal. The company points out, well, that's an
21 extreme remedy and under the rules under the civil rules
22 you need to have violated a willful violation of a
23 motion to compel. Well, this isn't like civil
24 litigation. First of all, they can refile unlike in
25 civil litigation where a statute of limitations might

1734

1 run. Secondly, there was an order on March 8th that the
2 Bench required the company to respond. We have done
3 everything we possibly could. A motion to compel would
4 be superfluous at this point.

5 But having said that, you know, pragmatism is
6 often a virtue, and maybe it is in this case as well.
7 The Staff, if we can get a response to Data Request 319
8 and the others that we have highlighted that are still
9 outstanding, if we can get those promptly, we do have
10 376 which gets us a long way down the line, we can
11 prepare our case if we're given another four weeks on
12 the schedule. That allows time for them to respond and
13 iron out more issues, and it's relatively consistent
14 with the new FERC schedule under which the interveners
15 and FERC are I believe required to file by the 22nd of
16 April. So from a pragmatic point of view, it may be
17 best to hang in and keep at it. But we need -- we have
18 had offers of cooperation from the company, we have had
19 pledges of support and attempts to be responsive, but in
20 some of these examples, we just feel like we keep
21 hitting our heads against the wall and to no benefit to
22 anyone.

23 So at this point, although we think dismissal
24 could be justified, it may be as a practical matter not
25 the best approach. We can support an extension of the

1735

1 schedule in the duration I mentioned. We do think that
2 the Commission should entertain discussion, perhaps not
3 here at this time, but regarding sanctions, but we have
4 tried since day one to move this case forward. As this
5 Commission is aware, we filed I think pretty imaginative
6 interim rate relief testimony that the Commission I
7 think found useful. We continue to try to work on the
8 difficult problems that are faced in this case. But we
9 can't do it with the type of responses that we have been
10 getting to some of these rather straightforward
11 requests. But we do realize that if the Commission
12 orders it, perhaps we can move forward.

13 I'm prepared to answer any questions about
14 any specific data request. I'm happy to get into any of
15 the details that have been discussed. We take exception
16 to many of the statements the company has made in
17 response to whether or not they have made an objection
18 and so forth, whether their responses were in fact
19 responsive, but I don't think that is going to advance
20 us here. But if you disagree, I'm happy to get into
21 those details. Thank you.

22 CHAIRWOMAN SHOWALTER: I have two questions.
23 One, I think you have already said it, but I just want
24 to have it clarified that you are, you were I guess you
25 would say seeking dismissal without prejudice, i.e., the

1736

1 company could refile at any time.

2 MR. TROTTER: Yes.

3 CHAIRWOMAN SHOWALTER: The second is, do you
4 have any basis to think that if we extend the schedule
5 for four weeks that you won't just run into the same
6 problems that you have been running into all along? In
7 other words, with what information you have now and
8 assuming that the rest comes in on time, you say four
9 weeks is enough. Do you have a basis to think that you
10 will get that information?

11 MR. TROTTER: Maybe. We had a meeting with
12 Mr. Fox, who you may remember from the interim case, on
13 Tuesday, I believe, to go over some of the problems that
14 we were having, and he expressed concern that the
15 company was not being responsive enough and was
16 wondering why they weren't after we had pointed out that
17 many of these deficiencies had been repeatedly
18 documented. I think he has some clout in the company,
19 and I'm hopeful that if he does that, and I believe he
20 may be taking charge of some of these problems, that
21 there is hope that we will get our responses. So I have
22 some basis for optimism, but that's the basis.

23 CHAIRWOMAN SHOWALTER: And then my third
24 question is, one of the things that distinguishes this
25 case is that there's an interim rate, and normally the

1737

1 interim rate is for an interim that people know at the
2 outset, because the incentive to prosecute the rate case
3 changes when a company gets an interim rate, they no
4 longer have the same incentive, but in the meantime the
5 customers are paying that amount. So if this is
6 extended for four weeks, do you anticipate the entire
7 schedule being extended for four weeks, in which case
8 what happens to the rate payers who are paying the
9 interim rate?

10 MR. TROTTER: In looking at the schedule,
11 it's possible to accommodate a one month slip without
12 substantial change in the schedule.

13 CHAIRWOMAN SHOWALTER: Including our time to
14 draft an order?

15 MR. TROTTER: Yes. The hearing, I think the
16 hearing can still go on as planned. I have to recheck
17 that, but our preliminary look was that that could be
18 accommodated. With respect to the interim rates, they
19 are subject to refund, and we have argued that that's
20 not something that should be focused on because it's the
21 legitimacy of the rate itself that needs to be focused
22 on, but that is a factor. I don't think one month is
23 going to have that substantial of an impact overall.

24 CHAIRWOMAN SHOWALTER: Thank you.

25 COMMISSIONER OSHIE: Mr. Trotter, you made

1738

1 reference to a number of discovery requests that had not
2 been complied to by the company; is that the extent to
3 which the company has not complied to requests made by
4 Staff?

5 MR. TROTTER: There are some others that flow
6 from the ones that are here, and there are some that we
7 just haven't -- that we don't need for distributing our
8 case. But we have asked -- we have identified the ones
9 that we need in order to go to deposition and to prepare
10 our direct case. There were a couple that fed off of
11 376, for example. And just for ease of not complicating
12 the matter, we left those off our list, so there are
13 some like that. But these are the ones that we're
14 focusing on now. There are a few others, but we haven't
15 brought them forth at this point for those reasons.

16 COMMISSIONER OSHIE: Have you prepared at
17 least a draft of what your current proposal might be for
18 a schedule? I'm looking at what I believe is to be your
19 Staff proposal, which you were to file your testimony on
20 April 29th.

21 MR. TROTTER: Right.

22 COMMISSIONER OSHIE: So your proposal would
23 be, under the circumstances, be to extend your filing
24 deadline to approximately 30 days?

25 MR. TROTTER: Yes.

1739

1 COMMISSIONER OSHIE: And then how would that
2 push the other dates? We have Olympic's rebuttal May
3 20th, are you proposing that that be pushed back 30 days
4 as well?

5 MR. TROTTER: Let me see if I can get my
6 schedule here, just a second.

7 I'm having trouble finding it here, sorry.

8 Can we go off the record for a moment.

9 JUDGE WALLIS: Let's be off the record.

10 (Discussion off the record.)

11 JUDGE WALLIS: Mr. Trotter, are you prepared
12 to proceed?

13 MR. TROTTER: Yes, thank you. We hadn't
14 completely thought it out, but we thought that the
15 rebuttal could be moved to June 10th, and that would
16 give the company ten days from, well, I suppose the
17 Staff case could be filed I think on Monday, May 27th,
18 and the company's rebuttal could be June 10th with the
19 hearing on the 17th.

20 MR. BRENA: What would the intervener date
21 be?

22 MR. TROTTER: Ten days before the 27th of
23 May, say the 17th, excuse me, the ten working days, the
24 13th.

25 MR. BRENA: Thank you.

1740

1 COMMISSIONER OSHIE: And the hearing dates
2 you're proposing would remain in place?

3 MR. TROTTER: Yes.

4 COMMISSIONER OSHIE: According to your
5 proposed schedule?

6 MR. TROTTER: Yes.

7 COMMISSIONER OSHIE: Thank you.

8 JUDGE WALLIS: Mr. Trotter, the company has
9 offered a proposal for scheduling, why should the
10 Commission not adopt the company's schedule?

11 MR. TROTTER: Are you referring to the
12 proposal in their motion?

13 JUDGE WALLIS: Yes.

14 MR. TROTTER: Excuse me, but the schedule in
15 their answer, I believe that they refer back to their
16 schedule which calls for starting the hearings after the
17 FERC ALJ issue is heard, proposed order I think on
18 October 22nd. We did file comments on that. The
19 primary reason is that there's nothing to be gained from
20 that. The FERC decision is only a proposed order. It
21 offers nothing to this Commission in terms of any final
22 FERC action, assuming a final FERC action could be
23 useful here. It's also inconsistent with the company's
24 earlier proposal to start the hearings after the FERC
25 hearings are completed sometime in mid July.

1741

1 Mr. Fox's affidavit offers that perhaps we
2 should delay to get 12 months end of June 30, 2002,
3 results, and there may be in a perfect world some merit
4 to that, but now we have done all our work on a prior
5 test year, and now we're shifting to another test year,
6 and we don't know when those data would be available,
7 perhaps, you know, first of August and so on, and we're
8 kind of starting over anyway. So all of those things
9 stirred together, we just think it's best to keep
10 plugging away.

11 JUDGE WALLIS: Very well.

12 MR. TROTTER: If that's what the Commission
13 ultimately desires.

14 JUDGE WALLIS: Thank you.

15 For the company.

16 COMMISSIONER OSHIE: One more question, Your
17 Honor.

18 Mr. Trotter, for Staff to file its testimony
19 on May 27th or by May 27th, what would be the last date
20 that you could receive the responses required of the
21 company for you to formulate the testimony and have it
22 filed on that date?

23 MR. TROTTER: Just one moment.

24 By the end of next week.

25 COMMISSIONER OSHIE: Thank you.

1742

1 JUDGE WALLIS: Mr. Marshall.

2 MR. MARSHALL: Thank you, Your Honor.

3 Olympic, I think it's fair to say, has produced an awful
4 lot of material. I would like to put it in context for
5 just a moment. Some of what we have here on the table
6 are the documents that have been produced in this case.
7 We have produced all of the financial information that
8 Staff needs to have to do its work, with the possible
9 exception of some backup on tax information, and we
10 didn't know that until we received their motion to
11 dismiss, that the schedule we attached was not
12 sufficient.

13 They have asked to update the schedules that
14 we did file in December of 2001 to add an additional
15 three months. That's the Data Request Number 376. Data
16 Request Number 376 is a very voluminous exhibit. It
17 responds to OPL-31, the underlying documents that were
18 filed in December. The handling of the additional three
19 months of data was something that we did say we could
20 have objected to in creating new data, but we didn't
21 because we thought we could do that if we didn't get a
22 lot of other data requests at the same time, and we
23 thought we could do it fairly soon after they had
24 discussions about this 376 with Staff and with the
25 people who would be doing the work.

1743

1 And I should add here that all throughout
2 this discovery, we have made the people at Olympic
3 available to Staff to call up at any time, to meet at
4 any time without attorneys present, and they have been
5 doing that. They did that at the beginning of this
6 discussion on OPL-31, which is why you have an unusual
7 data request. It says, we would like an update to this
8 OPL-31 like we discussed between ourselves on this
9 particular date. It's an odd type of request, but
10 people had a number of conversations throughout that
11 day, and people went away apparently with different
12 views as to what it was that they were going to be doing
13 on this.

14 Mr. Collins, who did the work and whose
15 declaration has been provided, and I will hand to the
16 commissioners an extra copy so I can touch base on just
17 a couple of these if that's okay, Mr. Collins has spent
18 some 30 to 40 hours doing this exhibit. He was as
19 surprised as we were when on the 27th of March, five
20 days after we had submitted this update on OPL-31, the
21 Staff filed a motion to dismiss which centered focused
22 almost entirely on 376. The joint declaration of
23 Mr. Twitchell and Mr. Colbo, five pages long, talked
24 about a single data request, 376, and how they thought
25 that that was not responded to the way that they thought

1744

1 it was going to be responded to.

2 As this declaration of Brett Collins, who did
3 the actual work, states, he thought he gave them exactly
4 what they wanted, and he offered when they called him on
5 April 1st to walk them through it and to explain how it
6 was that they had the data in the format that he thought
7 that they wanted. In any event, they had the data to
8 begin with. That would have been the way we thought it
9 would have happened, that is Staff would have called
10 Mr. Collins first before they filed the motion to
11 dismiss, before they filed their joint declaration
12 saying that it hadn't happened, because that's the way
13 it had worked within all the way up until that time.
14 Mr. Collins offered to walk them through it, offered to
15 provide a fax to show them how that data was responsive,
16 and in fact did. And attached to the declaration is the
17 fax that he sent them that very day.

18 We also had Mr. Fox come out here. And by
19 the way Mr. Fox is another person who Staff freely calls
20 without intervention of attorneys, without having to set
21 up formal times, without having any kind of arrangements
22 ahead of time. We have just made these people available
23 any time Staff wants to call them and talk to them.
24 Mr. Fox came out and said, you know, I have been through
25 this with Mr. Collins, and I think that you have got all

1745

1 the information you need. And, in fact, that day, April
2 2nd, Staff agreed that yes, in fact, they did have the
3 data that they needed for 376. That would have been the
4 preferred way of doing it, but that didn't happen. That
5 was the central focus of Staff's motion to dismiss.

6 They had three others that Mr. Trotter
7 identified that he felt were significant, 323 on samples
8 of studies, and it turns out that the studies that are
9 mentioned in the operating agreement don't have to be
10 written, they can be -- and they don't have to be kept.
11 We have looked for them, we thought that there might be
12 some samples, but, in fact, there aren't any. So I
13 guess the response to that, again, if we had had a
14 conference, is that we have provided a fairly robust
15 answer in terms of what that was in the operating
16 agreement and what that wasn't.

17 The 319 on federal and state taxes, we
18 attached a schedule to that, and there again I think
19 Mr. Fox was more than willing to talk to Staff, as he
20 did, and say, okay, we gave you something on the 22nd of
21 March, it doesn't look like you thought that was
22 sufficient, we'll work through it and we'll give you
23 that. There has been no holding back by Olympic of any
24 information. There has been no willful or deliberate
25 attempt to not comply with any particular order, any

1 order at all. On March 8th, we did have a conference of
2 counsel, and as we quoted from Mr. Trotter in our
3 response, Mr. Trotter thought that the things that we
4 had agreed to were fine. Some were withdrawn. We
5 agreed to provide things on the 22nd of March, and
6 that's what we thought we had done.

7 Olympic thought that it had provided
8 everything that we agreed to produce on the 22nd of
9 March. We did actually send some material to
10 Mr. Trotter on the 21st of March too. We weren't trying
11 to do everything all at once, but it has to go through,
12 you know, a quality control and review process before we
13 get it out, and we did. We not only got out material to
14 Mr. Trotter, but we got out an enormous amount of
15 material to Tesoro, which is another issue.

16 But from the time that we had the pre-hearing
17 conference on the 8th until we produced it, we also had
18 back in Washington D.C. Tosco motions and productions,
19 Tesoro motions and productions. And on top of that, as
20 you probably all have read in the paper, there was an
21 effort that was nearly around the clock to settle a
22 fairly significant pair of wrongful death cases that
23 were scheduled to go to trial in Whatcom County relating
24 to the Whatcom Creek incident. Now that's not to say
25 that we're using that as an excuse, because we're not.

1747

1 We think we have produced everything that people want.

2 Now discovery has ended. We aren't going to
3 be getting any new requests. What I see that we have
4 done here is we have identified just a very small
5 handful, probably less than 1/2 of 1% of all the data
6 requests that have been out here that need to be finely
7 clarified and pinned down. Again, we have received in
8 this case an astonishing number of data requests,
9 probably if you count all the sub parts in excess of
10 950, thousands of pages of documents.

11 In fact, so many documents have been produced
12 that in the Tesoro request for correspondence to and
13 from the Office of Pipeline Safety, we told them back in
14 February, February 22nd and again on February 28th, that
15 they were available for review, because there were many
16 boxes of them, in the law offices of Karr Tuttle in
17 Seattle, come down any time you want, take a look at
18 them. And it's in, of course, the transcript of the
19 March 8th pre-hearing conference, because we hadn't
20 heard from Tesoro. I sent Tesoro a letter on the 22nd
21 of March, said, gee, you were supposed to call
22 Mr. Beaver of Karr Tuttle and look at these eight banker
23 boxes of correspondence, you haven't done that yet, and
24 please go ahead and make those arrangements. So over a
25 month and a half went by, and eight more boxes of

1748

1 material that had been requested of at least one of the
2 parties hasn't been reviewed and looked at.

3 There is just an enormous amount of material,
4 and I think and I could count this up, this
5 misunderstanding on 376, to the fact that there has been
6 so much material being produced. There have been
7 changes in accounting procedures because of the change
8 over to BP and BP Pipelines in the summer of 2000.
9 There has been an enormous amount of other things coming
10 in to this picture that the Commission itself recognized
11 was unique when it issued its interim order, the decline
12 of throughput, the Office of Pipeline Safety issues, all
13 of these things are much different than your ordinary
14 run of the mill case.

15 This case is also in a very compressed time
16 frame, 7 months for a common carrier case rather than
17 the 11 months for a case involving a regulated utility.
18 It's difficult enough to comply in an 11 month period
19 with all the data requests that need to be done in a
20 regulated utility case. When you have 3 months less, 4
21 months less, and when you have not really 1 case but 2
22 depending on which methodology, and you have not just 1
23 forum but 2 if you count the FERC, and then against that
24 you have the background of a company that has been put
25 under a tremendous amount of other litigation burdon --

1749

1 and I'm not going to minimize that, because that burden
2 is there, and Olympic has to deal with it. And again,
3 I'm not trying to use that as an excuse, because I think
4 that Olympic has responded as fully and as completely in
5 the time frames as it could.

6 All of this probably would have been
7 different if we had been less optimistic at the outset
8 on how quickly we could get to the end of this
9 proceeding. We didn't in any of our dreams anticipate
10 getting the volume of requests that we got both here and
11 at the FERC. I think it's fair to say we didn't
12 consider the difficulty in trying to coordinate the two
13 proceedings. There have been duplicate requests, there
14 have been requests that one party thinks another party
15 should have answered. We have been trying to go through
16 and make cross references. All of this has been I think
17 it's fair to say a lot more complicated than we thought
18 it would be.

19 But when it gets right down to it, we think
20 Staff, and I think Mr. Trotter was fair in his analysis,
21 has the material they need to put on a direct case. He
22 has it now, and I think Tosco and Tesoro also have that.
23 They have attached an order from the FERC on some of
24 these document issues, but we have gone through and
25 annotated that and point out that almost every one of

1750

1 those has been answered with one exception, and that
2 exception was basically a new data request that came in
3 on March 27th.

4 Following the March 8th pre-hearing
5 conference here, it was agreed that we would make
6 Mr. Talley available for a technical conference on
7 engineering documents on throughput and capacity, which
8 we did on two separate dates, the last one of which was
9 the 21st of March. And after that, according to the
10 transcript, it was agreed by Tesoro that they would then
11 identify those documents, trying to be as limited as
12 they could, that they would need on throughput and
13 capacity issues. That they didn't do until the 27th of
14 March. We have those now. There are 11 categories of
15 materials that they need in that regard, so that's
16 probably the last thing that we're going to have new to
17 do.

18 So we are here today without having to worry
19 about getting burdened with a whole series of new
20 requests. In the month of February alone, I think we
21 must have gotten over 500 data requests both here and at
22 the FERC. It's I think fair to say that February was a
23 very difficult month for us to work through. And when
24 we got together at the end of that month when we had our
25 pre-hearing, when we had our conferences and then when

1751

1 we had at the end of that week our pre-hearing
2 conference, we had a pretty good plan of what we needed
3 to do to make sure we could respond to the things that
4 were still left open. And again, we think that we
5 responded to everything by March 22nd.

6 It's unfortunate that there was a
7 misunderstanding about 376. I think but for that, we
8 probably wouldn't be here talking about motions to
9 dismiss. But again, Mr. Brett Collins, Mr. Fox, who
10 have reviewed that, believe that we gave the update that
11 they thought would answer the questions and would do
12 what needed to be done with OPL-31. And now Staff
13 agrees too that they have the data in 376. So although
14 there may be an appearance that there are a number of
15 data requests that are still outstanding, we don't think
16 there are. We think that we have complied to the best
17 of the ability with good faith and tried to do
18 everything that Olympic could under very unusual
19 conditions.

20 I mean it's fair to say that there is an
21 awful lot going on and that the few people at Olympic
22 that are able to know the books, know the engineering
23 issues, know the records. You know, it's said that
24 maybe we could draw on everybody at BP Pipelines across
25 North America. Well, not really, you can only depend on

1752

1 the people who know the records, who know the system,
2 who know where to look for this material.

3 As another example, Staff wanted to go down
4 and look at actual books and go through the records,
5 which are located down in Houston, and Olympic made
6 Cindy Hammer available so that they could go down and
7 they could actually look through each of the backup for
8 each of the documents. The documents are kept under a
9 -- the county documents are kept under a system
10 developed by SAP, which is a paperless system, so that
11 if you want a backup invoice, you go into that system
12 and you can double click on a line, and the actual
13 physical image of the invoice will come up, but that's
14 all -- that's where it is. It's not located in a paper
15 form someplace else. So if you want backup data, that's
16 what you must do, you must go down there and do that.
17 At the pre-hearing conference on the 8th, all of the
18 backup material that was being requested was fortunately
19 narrowed to some extent so that we didn't have to do
20 that with all kinds of categories of no interest, and
21 that enabled the company to produce the material as
22 backup to that.

23 So I guess if I had to sum this up, and I'm
24 going to now, I would say that this discovery phase is
25 coming to an end. There are only a handful of materials

1753

1 that are left unresolved. We think that they should
2 have been resolved before, we think they actually were
3 resolved before. There may be one or two on this tax
4 issue, and I should address the pricing of substitutes
5 too.

6 The substitutes for the -- this is what do
7 barge owners, shippers, tanker trucks charge to move the
8 same product from the refineries, and we're a little bit
9 hampered, we've got a little bit of a which comes first,
10 the chicken or the egg issue, because the actual
11 interveners here who ship by barge and ship, and they do
12 a lot, they ship more than half of their product that
13 way, have the long-term contracts, have the pricing data
14 available for large quantities on long terms. All we
15 can get are spot prices, and we have included spot
16 prices in answer to other data requests, and some of the
17 spot prices were in the interim case. I think the
18 Commission may remember those.

19 But we had asked in the interim case for the
20 interveners to produce this information. They objected.
21 And we were informed here in this particular general
22 rate case phase that we weren't to -- Olympic was not to
23 file any data requests of interveners or Staff until
24 they filed their direct cases so that they would have
25 the opportunity to focus on that. So while we would

1754

1 like to get this data ourselves, we can't get that data,
2 so specific pricing information we can't get.

3 What we can get is what Mr. Schink has
4 identified in his direct testimony which is correlations
5 between trends and pricing based on certain factors, and
6 he has done all of that, and then he has laid the
7 intellectual foundation for why this pricing substitute
8 works, and that's what -- that's what we have in the
9 answer on the pricing of substitutes in 341 is a quite
10 sophisticated explanation for what he has done in his
11 direct testimony. But again, I don't think this is
12 essential for Staff to put on their case. It's
13 essential perhaps for them for cross examination, but we
14 will have that pricing data when we can get that from
15 interveners.

16 So apart from 376, samples of the studies,
17 the pricing substitutes, and the taxes which were
18 mentioned here, we think we have covered the ground.
19 And, in fact, we think we covered the ground before, but
20 if there's any question, we're happy to resolve doubt in
21 favor of Staff. Those kinds of things can and have been
22 discussed in the past directly with Olympic. They were
23 discussed on April 2nd with Mr. Fox. Mr. Fox is going
24 to say, look, if you need some additional information on
25 federal and state taxes, I will get it for you, and he

1755

1 has made that commitment and he will.

2 So I think that we're at a point where
3 Olympic rather than being chastised for the handful,
4 literal handful of things that may or may not have been
5 responded to ought to be somehow acknowledged as having
6 produced an enormous amount of material in a very
7 compressed time frame. The first ten years I was out of
8 law school I did aircraft crash litigation for Boeing
9 and worked on 747 cases, and I have to say that we
10 didn't have to produce this much stuff on a 747 crash on
11 behalf of Boeing. This is an enormous amount of
12 material that has been produced, and I think we're -- I
13 think we're finished. I think we're, with a couple of
14 these last bits, I think this -- this is it. We have
15 gotten to the finish line, and I think we got to the
16 finish line on schedule on the 22nd of March. That's
17 all I have to say on that.

18 On the scheduling issue, allowing ten days
19 for Olympic from the time that Staff files its case and
20 Olympic files rebuttal gives zero time for any discovery
21 against Staff. It's a ten day turnaround time. We're
22 not allowed to ask Staff for any information before they
23 file their case. By the time we got it, we couldn't
24 incorporate that into the rebuttal testimony. We
25 wouldn't have the ability to respond effectively to

1756

1 Staff or interveners for that matter with that kind of
2 shortened period.

3 We do think it makes sense to take into
4 account the fact that there is a parallel FERC hearing
5 going on, that if we wait until that's over, we might be
6 able to rely a lot on the -- actually having that in
7 effect be a secondary form of discovery. We can rely on
8 the transcripts of that, we can rely on the testimony, I
9 think we can shorten this proceeding if we do it. Right
10 now those two schedules are virtually on top of each
11 other, as we tried to explain in our motion to amend the
12 hearing schedule. We go from this set of hearings, I
13 think there's a ten day period until the same witnesses
14 go into a second set of hearings in Washington D.C.
15 That to me will result in unnecessary duplication,
16 unnecessary effort and expense.

17 COMMISSIONER HEMSTAD: Mr. Marshall, why
18 didn't you wait to bring this case until the FERC
19 proceeding was done?

20 MR. MARSHALL: You know, this is a good
21 question, because I think this represents one of the
22 basic problems of knowing when to file this case. I
23 think it's fair to say that people have questioned why
24 wasn't the case filed in 1999 when throughput declined.
25 Because by the time throughput declined until the time

1757

1 this case was filed, there was about \$42 Million worth
2 of rates that could have been put into effect given the
3 decline in throughput. Costs stayed fixed. A per
4 barrel charge stays the same, and the number of barrels
5 you put through --

6 COMMISSIONER HEMSTAD: But my point is you
7 are now asking us to wait until the FERC case is done.

8 MR. MARSHALL: And again, I guess the real
9 answer to that is Olympic could not wait to file for
10 additional rates because --

11 COMMISSIONER HEMSTAD: Okay, so then you
12 wanted the interim rate, but you, I understand that you
13 don't think it is sufficient, but you have an interim
14 rate, and now you want a delay until the FERC case is
15 done.

16 MR. MARSHALL: Well, you know, in looking at
17 how to conserve money, which I think the Commission
18 would like Olympic to do given its dire financial
19 straits, and in order to make sure that we have
20 sufficient time to respond completely and not to be
21 deprived of a reasonable opportunity to respond to
22 interveners and Staff, it looks to us like the schedule
23 is so compressed with the FERC hearing that this becomes
24 in the words that we used in our motion an unworkable
25 situation.

1758

1 Now the FERC interim rates, just for
2 comparison purposes, went into effect on September 1st.
3 The interim rates here went into effect on February 1st.
4 There is a timeline there of five months. We could have
5 an extension of five months here and still have a time
6 for interim rates that was basically the same as the
7 period of interim rates at the FERC. The time for
8 interim rates here is very short. The time for FERC
9 interim rates just because they put them into effect
10 subject to refund right away without a time lag started
11 much earlier, and, of course, they started for a higher
12 amount too, but just the timing of it, they started on
13 September 1st. See, that's all of September, October,
14 November, December, and January. They had five months
15 of significant amounts of new revenues coming in that
16 actually helped quite a bit. We're not here to complain
17 about that, we're here to say that that was one of the
18 basic things that helped this company through that bad
19 patch at the end of 2001 and the beginning of 2002.

20 But this company, I don't have to tell the
21 Commission because it's in your order on the interim
22 rates, is facing a significant what the Commission
23 called a dire financial situation. And the reason we
24 filed rates and the reason we asked for interim rates is
25 because without that, the situation continues to

1759

1 deteriorate. And that's what Mr. Fox said about -- on
2 the motion for reconsideration. If we continue on with
3 rates at this low level, it's going to result in more
4 borrowing and less financial stability, and it will
5 continue in a downward spiral. But that's the kind of
6 thing that we will need for rebuttal. And in order to
7 keep this pipeline financially stable and healthy, we're
8 going to need to convince you and we're going to need
9 the time to convince you, the Commission, that we need
10 every bit of what we're asking for in this case.

11 You know, from our standpoint, we're the ones
12 that are paying a penalty by not getting the final rates
13 in effect right away, because we think that the interim
14 rate granted is less than the rate that can be
15 justified, fully justified, by the facts of this case.
16 So we're looking to get not less than the interim rate,
17 not looking to have to give money back, but we're
18 looking for more and not having to give any of the
19 interim rate relief back. But again, if we're wrong on
20 that and we have to give some part of these interim
21 rates back, it is subject to refund and there will be no
22 irreparable harm to the interveners.

23 There will, however, be irreparable harm to
24 Olympic if it is not allowed to have a fair chance, a
25 fair opportunity to have its case heard by this

1760

1 Commission in a way that makes sense economically too,
2 in a way that doesn't compound the added expense.
3 Olympic doesn't have the kind of staff that an electric
4 or gas utility in Washington state does. It doesn't
5 have a tariff department, it doesn't have people set up,
6 it's never had a contested case before, as the
7 Commission is well aware. So all of this is new, and
8 the people that they have, they're not a 2,000 or 3,000
9 person company, they're a company with 75 employees.
10 You have all heard that before, and that's, again,
11 that's no reflection on anything except the fact that
12 they haven't staffed up, they haven't added the expense
13 to try to do all this, because frankly they just can't
14 afford it. They can afford very little right now except
15 trying to get the company through this bad patch.

16 And so that is a full answer to the question,
17 why did we file when we did, and why do we need some
18 additional time to do a fair job of trying to make all
19 the facts known to the Commission so that we can get a
20 fair rate that will create a financially stable
21 pipeline.

22 And, you know, we accept responsibility on
23 communication as much as anything. Maybe we should have
24 reached out more, but we had made our people available
25 at all times, and we will continue to do that without

1761

1 the intervention of attorneys. We think we're making
2 good progress. We thought we were until last week when
3 we got the motion to dismiss. So again, I -- this is a
4 pipeline of value to this state. It's in the public
5 interest to have this pipeline be operated not only
6 because of the alternatives, adding more traffic to an
7 already congested area, but also operated by people who
8 are going to operate it safely.

9 And, you know, we want to stay with it. The
10 people operating Olympic right now want to do the right
11 job for the people of this state. They want to have
12 rates that are fair. They don't even want to be given
13 dividends for -- they know that they're not going to be
14 able to issue dividends for years to come. They haven't
15 since 1997, and they won't. We're probably one of the
16 few utilities that comes in to the Commission and says,
17 don't give us dividends at all for a period of time
18 until we get this more financially stable.

19 Anyway I have taken up more time than I
20 thought, but I do believe that Olympic and its people
21 who I have gotten to know very well, and by the way,
22 Mr. Batch, President of Olympic, is here, and I believe
23 others may be on the phone, they are people of good
24 will, good faith, and are trying their best to do all
25 they can and with the resources that they have and the

1762

1 time permitted for them to do work. I haven't seen any
2 group that has been harder working, more responsive, and
3 more open than this group.

4 CHAIRWOMAN SHOWALTER: Mr. Marshall, it may
5 be implicit in your comments, but are you prepared to
6 proceed on the schedule that Mr. Trotter outlined, that
7 is to keep the hearings schedule but slide these other
8 dates?

9 MR. MARSHALL: If the other dates slide, I
10 don't think we have a fair opportunity to respond in our
11 rebuttal case in that short period of time. If we have
12 ten days to respond to Staff, we can't issue data
13 requests, get them back, and incorporate them into
14 rebuttal testimony in a ten day period. And I just want
15 to be candid with the Commission, I don't think that
16 that is the kind of due process or the kind of time
17 frame that makes -- is workable.

18 I think that, you know, what we have here is
19 we have a fairly complicated case, we have methodology
20 that's at issue. We don't know, I mean we literally
21 don't know which methodology Staff will pick. They say
22 that they have an open mind, they haven't predetermined
23 it, will it be the FERC methodology, a variation of
24 that, a variation of existing UTC methodologies for
25 other types of companies, a combination. We don't know.

1763

1 That's a fairly basic issue that will be joined when we
2 finally get Staff's testimony.

3 CHAIRWOMAN SHOWALTER: Well, you have
4 outlined a number of times the constraints on the
5 company, your size and then the proceedings that you're
6 involved in, and I really do have to wonder why you
7 aren't yourself trying to withdraw this case. Because
8 it seems to me that you simply have too much going on,
9 and it really doesn't matter why. There may be valid
10 reasons why, but nonetheless the burdon is on the
11 company to prove the rate case. We outlined a lot of
12 questions that you will have to answer in our interim
13 order, and you need to be prepared to answer them
14 adequately. And we can't set up a case for the
15 convenience of the company. That's why there are
16 statutory deadlines, and that's why interim rates are
17 just for the interim. We haven't made any final
18 decision on what's a fair, just, and reasonable rate
19 because we don't have the information in front of us.

20 So it is very difficult to say that a company
21 gets to come in, ask for a general rate case, get an
22 interim rate, and then say that it's entitled to an
23 extension when the reason for the extension is this
24 discovery process. I won't -- I don't think it's
25 necessary to assign blame for purposes of this comment,

1764

1 but the burdon is going to be on the company, and the
2 question is, are you ready? Because you don't get to
3 just wait until you're ready.

4 MR. MARSHALL: Well, there's no question that
5 we have done our part on discovery in our view now with
6 maybe just a couple of issues that we need to make sure
7 we pin down. The question, the next question is, can we
8 respond fairly if Staff and interveners file and we have
9 ten days to respond. And I think the answer to that is
10 I don't believe we can. I think that that puts us at a
11 great risk. Can we withdraw this case and have the
12 company survive? I don't think so. I think that --

13 CHAIRWOMAN SHOWALTER: Well, let me ask a
14 question on that. One of the things that occurred after
15 our order was the sale of the SeaTac facility and the
16 money that's coming in from that. You know, we don't
17 have any evidence in front of us on that, but I will
18 pose the question to you, you don't have to answer it
19 with evidence, but does that transaction change the
20 financial condition of the company in the next few
21 months such that it makes it more plausible I suppose
22 for the company to withdraw its case until, and stop the
23 interim rate, until after the FERC order?

24 MR. MARSHALL: No, actually the amounts
25 received by that were already factored into the 2002

1765

1 budget. If that sale had not been proceeding as it was,
2 they would have had even less money to do what they
3 need. The simple fact of the matter is that they're at
4 the end of the line financially. If they were to
5 withdraw and to start the clock over, we would be in an
6 even deeper financial hole. As I say, when throughput
7 goes down and you have a rate that was set when
8 throughput was higher, you are losing money. And
9 between the time the throughput started to decline in
10 1999 until now, the company basically had to absorb by
11 borrowing some \$42 Million.

12 And I know that the Commission has asked,
13 well, how did the company get in the situation where it
14 has so much debt. One of the reasons is that it did not
15 come in in 1999 for rate relief from this Commission.
16 Now why didn't it? Because at that time, things were
17 even more up in the air in terms of what will throughput
18 be next year, what will your expenses be. This, as the
19 Commission recognized in its interim order, is a unique
20 case. It's unique because of things that happened in
21 1999 in part.

22 Now having said that, we're kind of in a
23 catch 22 position. On the one hand, should we have come
24 in earlier? Well, perhaps, maybe that's a legitimate
25 criticism. Now that we have come in, the question is,

1766

1 have we come in too early, and the question to that has
2 to be no. Because if we had waited any longer, the
3 chances are that this would have continued to get to a
4 point where it would be very difficult to retrieve over
5 any extended period of time.

6 So what's our best solution? Our best
7 solution was to file when they did. Actually filed back
8 in May. As you recall, at that time, they anticipated
9 that the throughput wouldn't be very high. They had
10 some results in July, they reduced -- they refiled both
11 FERC and here for amounts requests that were lower.
12 They came in for a 72% increase in May, reduced it after
13 having looked at that to a 62% rate increase when they
14 came back and found that throughput was higher.
15 Throughput has an enormous impact on the percentage of
16 rate increase. It turns out that the throughput
17 estimates were overly optimistic. They aren't as good
18 as they were projected to be in July. But we're not
19 asking for a year's delay or -- we're not asking for a
20 delay that would take us past the time that the FERC
21 interim rates are in effect. We're not asking really
22 for --

23 CHAIRWOMAN SHOWALTER: Well, but wait, I mean
24 we don't just live for the Olympic Pipeline Company. We
25 have a very, very busy year, so we can't schedule

1767

1 ourselves in necessarily just at the moment that you
2 want us to hear your case. We have already moved this
3 case. We had a terribly difficult time scheduling all
4 of the business that we have before this Commission, and
5 having to move things or booking the time in the first
6 place meant that others didn't get in to those slots.
7 And so when the discovery process is drawn out longer
8 and longer, it's not only the very significant time and
9 burdon that that puts on all the parties and our
10 Administrative Law Judge and the Commission, and which
11 is very real, but it affects third parties out there.

12 And so I don't know, I really don't know at
13 this moment, what our own schedule is, but I really --
14 well, I guess the question, put another way, why
15 shouldn't the choice to the company be either stick
16 within the statutory time frame and the schedule that
17 has been set because it's your burdon, or you don't.
18 It's your choice, but you either prosecute the case or
19 you don't, but you don't get to have it both ways.

20 MR. MARSHALL: Well, and I'm very well aware
21 of the burdon that the Commission has had this year in
22 terms of the schedule, and we weren't unmindful of that,
23 and I don't know if things have changed and the schedule
24 has changed some. If it has and that works out to be of
25 help, then that would be fine. And if it doesn't and

1768

1 we're pushed back to a date later on, I think at one
2 point it was mentioned that it might be pushed back
3 until January of next year, that would still be 11
4 months of an interim rate from February to January,
5 maybe 12 months.

6 And I guess what I'm saying is that we're not
7 trying to put a burdon on the Commission. We don't want
8 to. But at the same time, we're trying to figure out
9 what would be in the public interest here to keep this
10 pipeline going for the people of Washington state. And
11 if it takes having a delay and making sure that we have
12 all of the evidence -- and frankly Mr. Fox is correct,
13 if we had from July 2001 to July 2002 of data, we will
14 have a full year's data at the 80% rate pressure for the
15 entire pipeline when it came back. We will actually
16 have, instead of having to estimate what is it likely to
17 be, we will have hard data to do that. And that's --
18 that's frankly the problem. With throughput being as
19 important as it is in terms of trying to set a rate per
20 barrel and that being variable before, but knowing that
21 if we wait until we actually had that pinned down, the
22 company wasn't going to be able to continue to borrow,
23 what was Olympic to do?

24 And I know this is difficult, as it's
25 difficult for Olympic, but I'm sure you -- this has not

1 been an easy course for Olympic to try to navigate as
2 well. But when you weigh all the factors, when you try
3 to do the balancing of what will this mean, will people
4 be put into a hardship situation, will there be any
5 irreparable harm through the interveners, no, we don't
6 believe so. Will there be irreparable harm to Olympic
7 if they have to withdraw or if they're not able to
8 respond in a fair and sufficient way to the material put
9 on? Those are the factors that have to be weighed.

10 And all we can do is commend to your best
11 judgment and looking at all the factors involved
12 including the other litigation, the FERC proceeding, the
13 unusual number of data requests that we did get, to come
14 up with what would work with the least amount of
15 dislocation for Olympic, with the knowledge that what
16 will happen here if we do this right is we will have a
17 stable pipeline system, stable financially, which by the
18 way would benefit the interveners. We attached to our
19 response a case that we got during the pendency of this
20 data request season by Tosco saying that they want
21 millions and millions of dollars because the pipeline
22 wasn't fully up and producing with its full throughput
23 capacity.

24 So the other side of this issue is if this
25 pipeline is not working, it doesn't live up to its full

1770

1 capacity, isn't able to restore itself to financial
2 stability, the cost to the interveners not to mention
3 the general public is much more than the cost in terms
4 of added time for an interim rate. The interim rate I
5 think we showed when we were here for the interim period
6 is a very small amount for the interveners.

7 CHAIRWOMAN SHOWALTER: Well, let me -- what
8 about another option, the interim rate was I think set
9 to expire I don't remember when, August 1 maybe,
10 supposing the case were delayed into next year but the
11 interim rate ended when it was scheduled to end?

12 MR. MARSHALL: That would be another factor
13 that the Commission should weigh. We again would -- I
14 just point out that because the rates are refundable,
15 these interim rates are refundable, there won't be any
16 irreparable harm to the interveners, but the harm done
17 to Olympic during the period that it's not getting
18 interim rates can't ever be made back up.

19 But again, I can only point out the factors.
20 I think that Olympic has to make sure that it has the
21 time to respond adequately. I think that continuing the
22 rates at the level that they are subject to refund for a
23 period of time that's no longer than in a general
24 utility rate, no longer than what will be there at the
25 FERC, is not a solution that seems to us to be out of

1771

1 bounds. It seems like that schedule, fully recognizing
2 the Commission's own schedule, would be a fair schedule.

3 JUDGE WALLIS: Mr. Finklea.

4 MR. FINKLEA: Thank you, Your Honor,
5 Commissioners. We did file a response to the Staff's
6 motion to dismiss, and I have heard the arguments today
7 as well, and so I will only try to add a few things. I
8 think the Chair has put it in the proper context in that
9 I think that the company really had two choices already
10 a month ago, and that was either to really cooperate in
11 the discovery process, knowing that this is a case
12 where, unlike electric and gas companies, this is a
13 shorter statutory period, they know that. I have done
14 cases before this Commission now for 15 years. I have
15 never seen a case bogged down like this in discovery. I
16 share Mr. Trotter's observations on that.

17 So about a month ago it became clear that
18 this company really wanted to put this case behind the
19 FERC case, and we're heretoday being told that our
20 choices are to either let the case go behind the FERC
21 case or the company's position apparently is, well, we
22 really have no choice but to let it go behind the FERC
23 case, and I just find this to be a very frustrating
24 situation that the company has put the Commission and
25 the interveners and the Staff in.

1 I have no idea why discovery had to bog down
2 the way it did. I have never seen discovery bog down
3 the way it did. It was every bit of the way it was like
4 pulling teeth. And now we're told, well, we won't have
5 enough time to put on our rebuttal case if we stick to
6 the current schedule. Well, you know, I have a teen-age
7 daughter, if she tells me the night before the homework
8 is due, well, then I don't have time to do my homework,
9 I generally remind her that she could have done it two
10 or three days ago. It sounds an awful lot like that in
11 this situation, well, gee, now we're really in a bind
12 because we dragged our feet for the last two months.

13 I think the case should either go forward or
14 be dismissed. Those are tough choices. I don't know
15 that either of them is a particularly good choice for
16 the Commission at this point. I do think that the
17 schedule given, and I'm very aware of this Commission's
18 schedule because I'm involved in so many of the other
19 proceedings, I don't know that you have other time
20 slots, and so the time slots in June I think we're
21 probably going to have to stick too unless the company
22 is prepared to dismiss the case.

23 And I understand they don't want to dismiss
24 the case, because they don't want to give up the interim
25 rates. But interim rates are interim rates. They're to

1773

1 be in place for six months. The solution of they expire
2 in August, that's a creative thought, I don't know that
3 that's the right one in this situation.

4 I'm very troubled by the idea that, well, we
5 will just wait until we get 12 months ended June 2002.
6 That's a whole different case. That's a case that they
7 would file in the fall of 2002, not a case that they
8 filed last December.

9 And then I think that the other thing that is
10 particularly troublesome for Tosco as a shipper and for
11 the Commission Staff is what kind of precedent are we
12 setting here if the results of this sort of activity is
13 that ultimately you can leave interim rates in place for
14 many more months than they normally would and a company
15 is essentially procedurally rewarded for putting
16 everyone through a process that seems to be just way out
17 of control and something that was within their control.
18 I understand the argument about, you know, they only
19 have 75 people, and they're working with a very large
20 law firm that has lots of resources. I'm a law firm of
21 three people, we're in every one of these cases. The
22 ability to answer discovery, if it's as important as
23 they have been telling us ever since they filed, then
24 you would think that the job would get done.

25 So we in our piece said that while we don't

1774

1 necessarily want to just have the case dismissed and
2 start all over again because there's expenses and costs
3 associated with that as well, including the fact that we
4 will have to all start over again, but short of that, I
5 think we have to stick to the current schedule. We
6 supported the Staff's original schedule that Mr. Trotter
7 was discussing. I do think that with a tweak here and a
8 tweak there we can meet it. And if the company's
9 troubled by the fact that it's not going to have much
10 time left for rebuttal, then I think it's kind of in the
11 situation where, you know, the teenager who didn't get
12 their homework done and suddenly has to do it the night
13 before it's due.

14 COMMISSIONER OSHIE: Mr. Finklea, does your
15 case or Tosco have outstanding discovery requests that
16 the company has not responded to, and if so, do you have
17 a feel for when those requests will be answered?

18 MR. FINKLEA: The only outstanding discovery
19 that's still going back and forth is in the FERC
20 proceeding, and my understanding is that even there,
21 while it's been slow, it is coming.

22 COMMISSIONER OSHIE: Thank you.

23 MR. FINKLEA: We have to a certain extent
24 relied on the information we have been getting through
25 the FERC proceeding as well as knowing that the Staff

1775

1 was pursuing information that they were pursuing, and we
2 weren't doubling up on them.

3 JUDGE WALLIS: Mr. Brena.

4 MR. BRENA: Good afternoon, I have rarely
5 seen a more beautiful day, so thank you for giving me a
6 reason for coming down to enjoy it with you.

7 JUDGE WALLIS: Is there still snow on the
8 ground in Anchorage?

9 MR. BRENA: There is, there is indeed, and as
10 I watched the boats leave the harbor of Olympia today, I
11 thought of all the things that I would like to be doing
12 here this afternoon.

13 I think that the public interest lies in two
14 areas, and sometimes they conflict. The first area is
15 that you need and should establish just, fair, and
16 reasonable rates for this pipeline carrier. And the
17 second area is that rate filings should be prosecuted
18 judiciously. Now in determining how to move this case
19 forward, while Tesoro supports the motion to dismiss,
20 Tesoro is well aware that lesser sanctions are often
21 considered first. Dismissal doesn't solve all of the
22 problems that Tesoro wants solved. It delays them.
23 There's, to answer the Chairwoman's question, how do you
24 know that you will ever get the discovery, the answer is
25 we don't, and so why put off for six months that answer.

1776

1 There's been adequate time for discovery.
2 The discovery has not been burdensome in this case. I
3 have been in oil pipeline cases for years. It's been
4 less than the normal amount. The operator is BP
5 Pipelines. They're perfectly aware when you come in and
6 file a 76% initial rate increase that you're going to
7 draw some attention to yourself, and you're going to
8 have to cost justify your rate filing. That's a
9 reasoned expectation they should have had in approaching
10 this and in staffing the effort, but they did not.

11 So I guess while dismissal sounds appealing
12 as a sanction, and I think that the Commission would be
13 justified in doing it, I'm not sure that it gets us to
14 those public policy goals of finally determining a just,
15 fair, and reasonable rate or in judiciously prosecuting
16 this matter. Similarly, I don't think delay is the
17 answer, because the company should not be rewarded for
18 the way that it's acted with regard to its nonresponsive
19 discovery.

20 It came before this Commission with a
21 position that it was in dire financial circumstances.
22 It said it needed immediate rate relief, and under the
23 standards that this Commission applies, those are
24 impending financial doom to characterize it broadly. I
25 don't think that the company should be ordered to here,

1777

1 we're entitled to an interim rate immediately based on
2 these dire financial circumstances, but let's just put
3 this off for a year and maybe FERC will help you out a
4 little bit. They shouldn't be able to achieve a
5 tactical goal through delaying their discovery, which is
6 they want to try to impose the FERC model of regulation
7 on this state by getting this Commission to follow what
8 FERC does.

9 This Commission's statutory scheme of
10 authority is not the Interstate Commerce Act. It's the
11 Washington statutes and your regulations, and you should
12 act consistent with those, and you should not accept
13 this invitation of theirs to step in behind FERC.
14 Because that's really what this is about, a tactical
15 decision on the company to tuck this Commission in
16 behind FERC thinking. No state has adopted FERC
17 thinking with regard to oil pipeline regulation, and
18 when we get to hearing, I will be happy to explain many
19 of the reasons why.

20 So delay isn't fair. It isn't fair because
21 we have an interim rate in effect. It isn't fair
22 because it's not serving the public interest of
23 judicially resolving rate filings. It's not fair
24 because we as a shipper don't want to be in a never
25 ending rate case. We have commercial relationships with

1778

1 these people. We would like to get past this. We would
2 like to get this Commission to be able to decide what a
3 just, fair, and reasonable rate is based on the factual
4 record, and we would like to move on with our lives. We
5 don't like rate uncertainty in our business. We don't
6 want the added complexity that delay implies. On top of
7 what is the proper way to set rates within the State of
8 Washington, they want to go and try and superimpose a
9 FERC model. That's just going to add to the complexity
10 and expense of this proceeding ultimately, and it just
11 gives them more arguments and more delay, and we're not
12 sure if we'll ever get the discovery.

13 So Tesoro doesn't favor, you know, if I were
14 a commissioner, I would not dismiss this case, because
15 it doesn't solve the problems. I would not delay this
16 case, because it doesn't solve the problems. If I were
17 a commissioner, what I would do is give them -- adjust
18 the schedule enough so that it's fair to everybody, give
19 them a date to respond to all discovery, which currently
20 on the FERC side is April 12th, and then if it's not
21 completed at that point, allow the parties to step
22 forward and argue lesser sanctions.

23 For example, we have asked for information
24 with regard to their filing they filed in the past with
25 regard to Bayview. They have said that when Bayview

1779

1 comes on line, it will increase their throughput between
2 35,000 and 40,000 barrels a day. That's part of the
3 throughput and capacity information that Tesoro is
4 seeking them to support. If they don't want to provide
5 factual support for the case that they filed, this
6 Commission doesn't need to dismiss, they can find that
7 the throughput capacity when Bayview comes on line is
8 40,000 barrels, and that's the end of that issue. We
9 don't have to sit here and argue all day with them about
10 who has the information, prior operator or not. We can
11 give them a reasonable opportunity, which we have done,
12 to respond, and if they don't, then give us an
13 opportunity to request a lesser sanction. That allows
14 this case to move forward. That allows us to get to
15 hearing. That leaves the responsibility for not
16 offering factual support for their case where it should
17 be, with the company.

18 Like it or not, the company isn't going to
19 learn any more about itself or its cost of providing
20 service by serving discovery on the Staff or Tesoro or
21 Tosco. All of the information that's necessary to set
22 their rate is within their dominion and control. None
23 of it is within Tesoro or Tosco or the Staff's. They
24 keep talking about limitations on their discovery or
25 whether or not they have enough time to serve discovery

1780

1 in their reply case. They have all the information they
2 need, it's their company. What can Tesoro possibly
3 offer them that's going to change what their cost of
4 providing service should be.

5 So Tesoro favors a middle ground, not to
6 dismiss and not to delay, and Tesoro is very concerned
7 about the argument of delay because of the interim rate.
8 You know, the ground has changed under all of us.
9 SeaTac was sold, they collected \$11 Million, three times
10 the amount of interim relief that the Commission granted
11 them, since the Commission's interim relief order. The
12 discovery issues, they haven't been fully responsive to
13 discovery, and now they're asking for months of delay.
14 It's not fair. It's not fair to continue to charge
15 Tesoro an unsupported rate when their financial
16 circumstance is changed in documentable fashion and when
17 they're not participating fully in their own rate
18 proceeding and when they're not judiciously proceeding.
19 They should have that choice that the Chairwoman posed
20 to them. They should forgo interim relief, or they
21 should proceed judiciously. They shouldn't win a
22 continuation of an unsupported rate as a result of their
23 failure to respond adequately to discovery.

24 I would like to -- I would like to briefly --
25 there are outstanding discovery issues, Commissioner

1781

1 Oshie, the audit. We have asked -- we have asked and
2 asked and asked and asked, and we can't get any of their
3 audit information. Their audit story has changed ten
4 times. We finally gave up, we served subpoenas on their
5 auditors, the auditors didn't respond. We served -- we
6 asked them for the audit information February 7th. They
7 did not -- they did not say within five days as required
8 by the Commission's regulation there would be any delay
9 in getting it, they did not object within ten days as
10 required by the Commission's regulations that there was
11 any problems producing it, they just haven't. Now where
12 it is is that they're reviewing it and they're going to
13 provide it by April 12th, and then they will provide a
14 privilege log. That was what they were supposed to do
15 by March 22nd under Judge Wallis's order.

16 And then we don't know -- what we do know is
17 they can not provide a clean audit for the years at
18 issue in a timely fashion so we can incorporate them in
19 our case. We don't know if any of the numbers they have
20 presented are right. There's been no independent third
21 party review of those numbers. So we thought that was a
22 legitimate issue to try to get resolved, so we asked for
23 the auditor's work papers, the information they provide
24 the auditors, so we can take a look at it ourselves and
25 see where it all is. Absolutely nothing.

1782

1 Capacity and throughput, this company has
2 advanced a case at 287,000 barrels a day. In July they
3 ran 310. Bayview can become on line and add another 35
4 or 40, and there's still the pressure restriction,
5 there's probably another 30,000 barrels. In all
6 likelihood, they're going to be on line operating at 360
7 to 380,000 barrels a day within the course of a year or
8 two.

9 Let me point out that operationally a couple
10 of hundred feet of line exploded in June of 1999. We're
11 here in April of 2002 and they're talking about 2004 as
12 being the date when they can get their system up to
13 speed. Five years? They replaced the line within a
14 couple of months. Five years?

15 Capacity and throughput information, where we
16 left that on March 8th with Judge Wallis is that we had
17 asked very broad questions about their capacity, we had
18 asked for a calculation of their capacity, what would
19 your capacity be without the pressure restriction and
20 with optimal drag reducing agent, you know, what would
21 it be if this pressure restriction wasn't lifted. We
22 think it's a legitimate question for discovery, because
23 there's a legitimate question about who should bear that
24 restricted throughput. Is that a company problem, is
25 that a rate payer problem, when is it going to come back

1783

1 on line, do we have a ramp up issue, is there a
2 regulatory issue to address, identify it. On March
3 22nd, we got a response that they're doing calculations
4 that will be provided. Nothing.

5 They also agreed to make their engineer
6 available, Mr. Talley, informally to an informal
7 discovery conference so we could talk with him to help
8 them narrow down the scope of our discovery request.
9 This is typical. I mean typically you have to serve
10 discovery broad to capture everything relevant. The
11 other attorney phones you up, says, you're kidding me,
12 this is going to take months, and then you sit down and
13 you talk about what it is you really, really need in the
14 context of what it is they really, really have, and
15 that's the way these issues get resolved. Mr. Talley,
16 they had moved for a two hour limitation on our informal
17 conference, the Judge denied it. They made him first
18 available Friday afternoon on a snow day down here at
19 3:30 when people had commitments at 5:30. We didn't
20 complete it by 5:30, and so we needed another day.
21 March 21st, the day before their discovery, the drop
22 dead date, was when they made him finally available to
23 complete the conversation with me so that I could focus
24 the discovery. And they have correctly stated it was
25 March 27th when we listed it and detailed out what it

1784

1 was specifically that we wanted. Even now with that and
2 with the April 12th date, we're hearing back we may not
3 be able to provide you everything that's been compelled.

4 He was exactly right with regard to the OPS
5 documents. We asked for their OPS documents. We were
6 told on -- they said they were available in their
7 office. We said copy them and send them up. I believe
8 on March 8th here in the hearing room there was eight
9 boxes of them, and I tried to fit them in that trip, and
10 I wasn't able to. I'm going to try and fit them into
11 this trip or the next trip, I'm going to try to get to
12 them, but he's right regarding the OPS documents, we
13 haven't got to those yet.

14 But to answer Commissioner Oshie's question,
15 there are outstanding issues that are important to the
16 case that have not been fulfilled and do not look like
17 they ever will be, to respond to the Chairwoman's
18 question. So how do you proceed? You proceed with
19 let's just stay with the schedule, modifying it so it
20 doesn't prejudice the interveners, and for those issues
21 that they have not supported or provided adequate
22 discovery in the factual issue, let's just consider the
23 lesser sanctions associated with resolving those issues
24 when someone doesn't step forward with supporting their
25 case.

1785

1 The four weeks is as good as anything. I
2 understand their problem with having a compressed reply.
3 We will have ten days after April 12th in order to file
4 our FERC case. We will have ten days exactly after
5 they're supposed to file finally again their discovery.
6 So my counsel is let's keep this rate case moving. If
7 someone has fallen behind in providing information, they
8 should bear the responsibility for that. Set us a
9 schedule and an opportunity to argue these issues, and
10 let's keep moving on the dates we have, because we want
11 rate certainty, and we think that prudent judicial
12 movement on rate proceedings is in the public interest.

13 CHAIRWOMAN SHOWALTER: Mr. Brena.

14 MR. BRENA: Yes.

15 CHAIRWOMAN SHOWALTER: I understood you to
16 say we should basically keep the schedule Mr. Trotter
17 has proposed with some possible modification of a little
18 bit of tweaking, as Mr. Finklea said. But suppose that
19 is the choice we put to the company and then the company
20 says, can't do it, aren't we sort of back in here for a
21 scenario of it's a dismissed case and we will all have
22 to wait and face these issues later? There may be no
23 alternative, but I --

24 MR. BRENA: Well, I hope not, and I'm
25 sensitive to the procedural due process argument that

1786

1 ten days is not enough, so I'm not saying that that is a
2 time and date that I'm saying satisfies it with regard
3 to that their sole concern. For me in my thinking, that
4 would fall within Mr. Finklea's tweaking.

5 CHAIRWOMAN SHOWALTER: Okay.

6 MR. BRENA: That we keep the hearing dates,
7 that we move forward in this case, that we tweak the
8 equities in the case to make the schedule -- and, you
9 know, I'm very concerned, the interveners are in a worse
10 position than Staff, both on discovery, we file first,
11 and he mentioned the access that Staff has to Olympic's
12 personnel, they're not access my experts have. The fact
13 of the matter is that Olympic treats different parties
14 differently and treats Staff better. So he mentioned
15 flying down to Houston, Tesoro wasn't even made aware of
16 the trip, wasn't given an opportunity to participate.

17 So all of these -- so when you're weighing
18 Staff's frustration level, I would like you to also
19 consider the interveners are in a worse position than
20 Staff and have been throughout this case because of that
21 difference in treatment and because of the procedural
22 requirement that we file first, which I think we should.
23 I'm not arguing against filing first. I think Staff is
24 in an advisory role to the Commission, and I think they
25 should have an opportunity, a non-financially interested

1787

1 party, and they should have an opportunity to see the
2 financially interested parties' positions before they
3 finally formulate their own, so I'm not arguing against
4 that, I'm just saying that interveners are worse off.

5 So I guess to answer your question, you know,
6 let's tweak the schedule to solve that problem, let's
7 address the issues of non-discovery in terms of lesser
8 sanctions, and let's get this case done.

9 CHAIRWOMAN SHOWALTER: On the subject of
10 tweaking, I guess I want to ask everyone but starting
11 with Mr. Trotter, if the discovery were, in fact,
12 complete by April 12th, you had proposed that the
13 testimony, your testimony, be filed May 27th, is it
14 possible to shorten that by a week, May 20th? And I do
15 not mean to be pressuring you into this. I'm trying to
16 see if that is actually realistic. That would give you
17 one less week but the company one more week, and I'm not
18 sure how the interveners fit in that, but is that
19 realistic or not?

20 MR. TROTTER: I would have to -- well, when I
21 made my suggestion, it was based on consultations with
22 our Staff accountants, and I'm sure our consultant would
23 also be able to meet that deadline, but it's primarily
24 Mr. Twitchell and Mr. Colbo's input, and it also depends
25 on when we can get the response to 319, and in talking

1788

1 to Staff here --

2 CHAIRWOMAN SHOWALTER: Well, assume April
3 12th then, if this discovery is not completed by April
4 12th.

5 MR. TROTTER: We did say we needed it by the
6 end of next week to meet the 27th. Could we do it a
7 week ahead? That's going to put a lot of pressure --

8 CHAIRWOMAN SHOWALTER: I'm sure it will, and
9 I really don't mean to --

10 MR. TROTTER: I'm getting indications they
11 just don't think they can do that.

12 CHAIRWOMAN SHOWALTER: All right.

13 MR. TROTTER: And be mindful we would need to
14 fit our deposition schedule in here, and that may add
15 complications to it.

16 CHAIRWOMAN SHOWALTER: All right.

17 One more question, Mr. Brena, you alluded a
18 couple of times to lesser sanctions, I don't really know
19 what you were talking about. We don't have the ability
20 to fine a company or, well, we do for violations but --

21 MR. BRENA: Well, I was thinking --

22 CHAIRWOMAN SHOWALTER: Actually, I suppose we
23 do for a violation of a rule of a WAC.

24 MR. BRENA: Well, let me give some specific
25 examples. I think that you do have the authority to

1789

1 levy lesser sanctions such as issue preclusion.

2 CHAIRWOMAN SHOWALTER: What do you mean by
3 that?

4 MR. BRENA: Well, for example, we're looking
5 for support that when we have asked them for information
6 that supports their representations to this Commission
7 that Bayview would increase throughput 35 to 40,000
8 barrels.

9 CHAIRWOMAN SHOWALTER: I see.

10 MR. BRENA: Now if they don't provide the
11 information, I mean essentially then what I would ask
12 for is I would come before this Commission, I would say,
13 we asked this request, they haven't provided it, we
14 would ask for a finding of fact be established that
15 Bayview will increase throughput when it comes on line
16 to 40,000 barrels. Similarly with capacity and
17 throughput issues, similarly with regard to the audit,
18 perhaps with regard to some of Staff issues, it's the
19 same. The worst of all things is not to determine those
20 facts, not to make them available to the other parties,
21 and then have them come in with a reply case that
22 contains all of those facts and then be dealing with it
23 then in the context of a motion to strike and just have
24 a big mess.

25 So I see specifically identifying each area,

1790

1 each factual area where we have asked for reasonable
2 discovery where it hasn't been provided, and then ask
3 for a factual ruling, just ask the Commission to rule on
4 it so we can move forward with the case because --
5 that's what I meant.

6 CHAIRWOMAN SHOWALTER: I see.

7 COMMISSIONER HEMSTAD: Pursue that. Staff
8 still hasn't gotten, as I understood Mr. Trotter, the
9 information on the documentation calculation of
10 assumptions on the federal and state tax expense. If
11 that is not received, what kind of preclusions would
12 then be appropriate where it is, you know, there's a
13 plug that's got to go in there to deal with the cost?

14 MR. BRENA: Well, it's not always obvious,
15 and I'm not sure that I could just answer that on the
16 spur of the moment. But in the plugs that I have
17 thought through, for example, their increase in costs
18 and salaries, if the Commission determined that they
19 didn't provide adequate discovery on that, then the
20 Commission could determine that the 1998 salary levels
21 were normalized level of salaries. So I haven't thought
22 through that particular one, but I think that if the
23 company doesn't plug the numbers that are necessary for
24 a cost of service, and it can't or isn't willing to for
25 whatever reason, the Commission still has to, so let's

1791

1 just address that up front. And if that information is
2 not available to us, then let's just -- let's take it on
3 and figure out our plug figures that we're all working
4 with, let's not continue to argue figures on which there
5 is no factual basis from here until forever, let's set
6 the rules.

7 JUDGE WALLIS: Mr. Brena, Mr. Marshall
8 indicated that there was no harm to the interveners as
9 shippers from a continuation of interim rates beyond the
10 period that was contemplated when the rates were
11 authorized. Do you agree with that statement?

12 MR. BRENA: No, I do not, and that statement
13 can be summarized as, if it's refundable, let's let us
14 charge what we want as long as we want. Refundability
15 does not solve the problem that they're collecting
16 uncost-justified rates. It does not solve the problem
17 of the additional complexity or expensive delay. It
18 does not solve the problem associated with
19 non-responsive discovery. And it does not solve the
20 problems associated with trying to price your product
21 with uncertain cost levels. You know, there is a strong
22 public interest in judicially prosecuting the rate
23 proceedings. The Commission statutory and regulatory
24 scheme recognizes that public interest, and Tesoro is
25 asking -- and keep in mind, we even -- we even resisted

1792

1 the one month extension in the first place, we said
2 let's do it in the period.

3 So no, I don't think the fact that something
4 is refundable means that they have a right to take it
5 from my client any more than I think that their rates
6 should be lowered on a refundable basis back. I mean
7 it's just to me refundability is something that helps
8 but doesn't get there, and particularly doesn't get
9 there in this situation because the basis for their
10 interim relief is dire financial need at the same time
11 they're arguing the exact opposite, that let's just put
12 off considering this for months at a time. Those are
13 completely in opposition to each other, and we do not
14 think that it's good public policy to allow someone to
15 come in, get an interim rate, and under dire financial
16 emergency, and then delay it on purpose for tactical
17 reasons, and then say, well, it's all refundable. That
18 is not an adequate response.

19 COMMISSIONER HEMSTAD: Well, I just had the
20 additional thought, the issue quickly becomes very
21 complex to the extent that shippers pass through costs
22 to end users. Of course, that ultimately to that extent
23 may not harm the shipper, but it harms the end user, and
24 that's not recoverable at all. That's simply a cost
25 that's passed through into the economic system.

1793

1 MR. BRENA: I agree with that observation.

2 JUDGE WALLIS: Mr. Trotter.

3 MR. TROTTER: Just a few comments and then
4 maybe an overview of some partial solutions to this
5 thorny problem. It is very true that the company filed
6 an aggressive and complex case, two test periods, one of
7 which is split, an equity premium based on competition,
8 rate methodology issues were presented, and that's in
9 addition to the panoply of issues associated with this
10 filing, and then they asked for interim rate relief in a
11 statutory scheme with a seven month suspension period.
12 I think the amount of discovery is directly proportional
13 to the complexity of the filing and our attempts to try
14 to make sense of it. I think Mr. Marshall made some
15 remarks that suggested that we should have done more,
16 requested conferences and so on. We had two days of
17 same, and we have had other conferences throughout this
18 process. We have done everything we can. We did not
19 get a response to our Data Request 376 on March 22nd, we
20 did by this week, and that's why we think there is at
21 least some merit in trying to move forward.

22 May I suggest the following ideas, and one is
23 to have Olympic commit that its responses to the
24 outstanding data requests would be produced by next
25 Monday or Tuesday. That might shave a few days off of

1794

1 -- give us -- excuse me, let me start over. Our
2 suggestion for a May 27th distribution date was based on
3 getting responses by next Friday. If they can commit to
4 providing responses earlier, then the corresponding
5 number of days can be added to their rebuttal time.
6 Second, we could have a shorter response time for data
7 requests issued to Staff and interveners, five days, six
8 working days, something of that nature. Those are
9 things that might work.

10 Now another more extreme perhaps, I will just
11 throw it out here, is that to the extent that the
12 Commission's schedule causes problems, that we can turn
13 this case into a case where the commissioners don't sit,
14 and have Judge Wallis issue the proposed order and go
15 through that process. I don't recommend that, but I
16 just say that that's certainly an arrow in your quiver
17 that you can think about if it's something you think is
18 desirable. I'm not recommending it, because I think
19 that you three add a lot to the process, but when push
20 comes to shove and drastic measures need to be taken,
21 that's at least one that you can think about.

22 We have struggled since the first day of this
23 case to get on top of it and to try to produce to you
24 the type of analysis that you expect from us and you
25 deserve, and we're continuing on that effort. We have

1795

1 made more efforts than I have ever made to get there,
2 ever found necessary to get there I should say, and
3 we're still not there, but we think we're -- we have
4 some reason to be cautiously optimistic.

5 So those are all of my comments. I'm not
6 going to give a tit for tat response to Mr. Marshall. I
7 disagree with many of his representations, but we're
8 focused on the goal, so hopefully our proposals will be
9 considered by you and a just result obtained.

10 CHAIRWOMAN SHOWALTER: Mr. Marshall, can the
11 company get its discovery completely done by noon
12 Tuesday?

13 MR. MARSHALL: I think with respect to
14 Staff's discovery, and I think that the issues that
15 Mr. Trotter mentioned on the tax issue, now that we
16 understand that the information we did give them they
17 want more backup for we could do. I think 376 is done.
18 I made some notes on what the other ones were, the
19 pricing of substitutes, we're not going to have any more
20 information on the pricing of substitutes until we can
21 get discovery from Tosco or Tesoro, so that would be our
22 answer. I think the answer that we have is as good as
23 we can get until we're able to get more facts. And the
24 samples of studies --

25 COMMISSIONER HEMSTAD: By the way, I just

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1 might break in here, there is, of course, as I
2 understand it, that's part of the company's direct case.

3 MR. MARSHALL: Correct.

4 COMMISSIONER HEMSTAD: And presumptively you
5 would have had information to back up those factual
6 assertions --

7 MR. MARSHALL: What we --

8 COMMISSIONER HEMSTAD: -- and a remedy may be
9 simply to consider a motion to strike that portion of
10 the testimony.

11 MR. MARSHALL: What we had and what we
12 continued to put in the answer is that Mr. Schink did an
13 economic analysis using the time at which the Whatcom
14 Creek accident occurred, the pricing that went up from
15 that time, and then in three months the pricing
16 stabilized, then followed West Coast trends. What he
17 was doing was or his testimony was taking pricing data
18 using trends.

19 COMMISSIONER HEMSTAD: I don't want to get
20 into the details --

21 MR. MARSHALL: Yeah.

22 COMMISSIONER HEMSTAD: -- of the issues.

23 MR. MARSHALL: And I was just going to add
24 that in additional support of that pricing trend data
25 that he did, we also wanted to get actual pricing data.

1797

1 While we think that the testimony we have submitted is
2 supported already, we would like to get more to bolster
3 that, of course, but if we can't get that, we can't get
4 it. We would like to get it from the people who
5 actually pay it, which are the two interveners here.

6 MR. TROTTER: I just want to note for the
7 record, our discovery request was not directed to
8 Mr. Schink's testimony.

9 MR. MARSHALL: Right, it was Ms. Omohundro
10 who was picking up from Mr. Schink and relying on that,
11 so I think it's --

12 MR. TROTTER: Well, we will argue about that.
13 But the other thing too is I didn't highlight every
14 single one that's on our list. They are in our motion.
15 Those are what we would expect to have as soon as
16 possible.

17 COMMISSIONER HEMSTAD: Well, what about the
18 information that the interveners are asking for?

19 MR. MARSHALL: Well, that I understand that,
20 first of all, I don't know if you read -- first of all,
21 I guess Tosco doesn't have anything outstanding here to
22 this Commission, so it's just Tesoro, and Tesoro
23 attached to its motion or its papers in response to
24 Staff an order from the Federal Energy Regulatory
25 Commission. I don't know if the commissioners have that

1798

1 attachment or not.

2 COMMISSIONER HEMSTAD: Again, I'm not
3 concerned about the detail, I'm just asking a question
4 about your ability to respond to the request.

5 MR. MARSHALL: That was resolved by having at
6 the FERC the materials to be produced on April 12th, and
7 I'm not sure without conferring with those folks whether
8 we could do it any sooner than April 12th. I do note
9 for the record that I have gone through the FERC order,
10 and I think that there are very few outstanding requests
11 that haven't been responded to except for this
12 throughput and capacity issue, which is, as of the 27th
13 of March, it has 11 elements to it, it is very detailed
14 and very burdensome. My guess is that we couldn't
15 respond to that by next Tuesday, and I don't know
16 because we don't have control over the audit work
17 papers, the auditors do, whether all of those have been
18 gathered.

19 But I would point out that with regard to the
20 value of the financial records that we have in here, all
21 the parties have been able to do whatever spot checks
22 and whatever detailed backup work that they need to do
23 to assure that the records, the financial records we
24 have, are good and accurate records. There is no
25 regulatory requirement for audited financial statements

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1 for integrated pipeline companies. It's not, as Mr. Fox
2 testified in his declaration, a common industry norm to
3 have audited financial statements. So the fact that
4 this company doesn't have audited financial statements
5 should not be held against it or be used as an issue of
6 preclusion, because other financial data is there and
7 the backup at whatever level is needed to go through and
8 check.

9 JUDGE WALLIS: That's the kind of
10 information, Mr. Marshall, that appears could be
11 relevant at some later point. I'm not sure that it's
12 responsive to the Commissioner's question.

13 MR. MARSHALL: Right, I was just trying to
14 identify the couple of things that I don't know because
15 I know enough about this that could be produced by next
16 Monday or Tuesday.

17 COMMISSIONER HEMSTAD: Well, Mr. Brena, we're
18 talking about that response date, the intervener
19 testimony at least was proposed would be due on I
20 thought May 13th. Could you receive the information you
21 were asking somewhat later still with sufficient time to
22 prepare your testimony?

23 MR. BRENA: This will all work for Tesoro.
24 By the way, the motion to compel on the FERC level was
25 uncontested, and they represented that they're going to

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1 provide this information on April 12th. Okay, provided
2 that they provide the information on April 12th, May 13
3 works fine. In fact, our case is due on the federal
4 level ten days after that, but the judge has made very
5 clear that if it's not responsive discovery that she's
6 not going to delay anything, she's going to go in and
7 levy appropriate sanctions.

8 JUDGE WALLIS: Very well, we would like to
9 take a recess at this juncture. The Commission will
10 deliberate, and we will resume the proceedings when it
11 is appropriate to do so later this afternoon.

12 (Recess taken.)

13 JUDGE WALLIS: The commissioners have
14 deliberated on the question of the motion to dismiss and
15 will not grant the motion at this time.

16 In terms of scheduling, the Commission
17 believes that it is important for fairness to the
18 parties and to the public to adopt with minor
19 modifications the schedule that Commission Staff has
20 proposed. The Commission will direct the respondent to
21 reply to the Commission Staff's data requests no later
22 than noon on Tuesday the 9th and the interveners
23 requests no later than the FERC established date of
24 April 12th. The timing for the filing of testimony will
25 be May 24th for the Commission Staff, and rebuttal

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1 testimony June 10th for the company. The hearing will
2 take up on June 17th and go through the 20th, will take
3 up again on the 25th and go through the 28th. That is
4 only eight days, and at least one of those days is a
5 partial day. We will aim to complete the hearing within
6 that period. If it appears that that is not feasible,
7 we will address the issue at that point. I think that
8 the parties demonstrated in the interim that they have
9 the ability to conduct a hearing very creditably within
10 a limited time frame, and I'm confident that that will
11 happen again. The Commission does intend to enter an
12 order, a written order, in which it expresses this
13 decision.

14 Commissioners have anything to add at this
15 juncture?

16 COMMISSIONER HEMSTAD: Well, I would like to
17 make a couple of comments. I consider this a very
18 serious issue, one of the most serious matters that I
19 have had to face since I have been a commissioner now
20 for nine years. I do not recall any time when there has
21 been so much turmoil, if that's the way to put it, with
22 regard to discovery.

23 And to the company I would say, my tentative
24 view prior to commencing the hearing today after reading
25 all of the materials was to grant the motion to dismiss,

1802

1 and I think there was ample basis for that, and then we
2 would have had to confront the issue of what to do about
3 the interim rates that had been paid. And one
4 consequence of that may well have been to require the
5 company to repay the shippers those interim rates and as
6 much as we could go back to the status quo ante and
7 start all over again.

8 As a result of the discussion here today and
9 the comments of the parties, it seems prudent and
10 workable to do everything we can to make this work, and
11 I don't want this hearing to end with sort of an
12 attitude or with the parties going away and saying, oh,
13 well, never mind, it was just a tempest in a teapot. It
14 was not. This is a very serious issue. And speaking
15 for myself, and I'm sure my colleagues agree, we fully
16 expect the company to comply with their discovery
17 obligation so that we can get on promptly and
18 expeditiously with this proceeding.

19 CHAIRWOMAN SHOWALTER: I concur in those
20 remarks. The company has made much of the fact that
21 it's small and has a lot of duties, and I'm sure it
22 does. I know that the company has made much of the fact
23 of how committed to safety it is, and that is good. But
24 the company is also a financial entity and a regulated
25 body and has an absolute obligation to conduct itself

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1 really like the big sophisticated company it is, and it
2 can't expect to plead to us that, you know, we have to
3 bail the company out.

4 The burdon of proof is on the company. The
5 burdon of going forward is on the company. And the
6 statute is there to protect aptly both the company and
7 the rate payers and the public interest in general, and
8 the company should think about its ability to go forward
9 with this case, because so far it hasn't been very
10 promising. And so we fully expect that if the company
11 elects to proceed that it will have the sufficient
12 evidence in front of us to prosecute its case.

13 I wanted to say one more, you know, another
14 word about the brief that came in today citing a recent
15 case for the proposition of what the elements are that
16 the court would have to find in order to dismiss a case,
17 and arguably these have been met. But the first
18 question, of course, I ask myself is, well, was this a
19 case that's, and I'm referring to Rivers v. Washington,
20 State Conference of Masons Contractors, March 7th, 2002,
21 in our State Supreme Court, obviously the first question
22 anybody would ask is was this a case of dismissal with
23 prejudice or without prejudice. The brief doesn't say.
24 So I took it off the Internet and find out it's
25 dismissal with prejudice. Well, that's obviously a

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1 different case, a different circumstance than this.
2 That's the kind of thing you have an obligation to
3 provide. If you don't, it weakens the position of the
4 company. And I think that the apparent conduct in
5 discovery has much the same effect.

6 I haven't been here on the Bench as long as
7 Commissioner Hemstad, and I haven't been around as long
8 as some of the people here, but I believe them when they
9 say this is the most egregious case of discovery
10 problems that they have seen. It certainly is in my
11 little short history. You have an obligation to come
12 forward with the evidence that proves your case, that
13 backs up your case. You have an obligation to provide
14 it to the stakeholders, and it's simply not an excuse to
15 say, well, we have a lot going on. If you have a lot
16 going on, don't bring the case here.

17 COMMISSIONER OSHIE: I would just like to add
18 that I agree with both the comments of Chairwoman
19 Showalter and Commissioner Hemstad. I'm also very
20 concerned with the company moving forward with its case
21 on the basis of unaudited financial statements. And we
22 do understand that those audits will be completed at
23 some time, but it certainly goes to the weight of the
24 evidence and the weight that we give those financial
25 statements if they are unaudited. And I would encourage

1805

1 the company to move forward as expeditiously as possible
2 to complete the audits that it has, and we have an
3 expectation that they would be completed if not before
4 the rate case, as soon as possible.

5 And just one other thing, I would like to add
6 that I don't believe that Judge Wallis made note of the
7 intervener testimony filing date in his original
8 statement, which I believe would be May 13th.

9 JUDGE WALLIS: Mr. Trotter.

10 MR. TROTTER: Yes, thank you, could you also
11 set a schedule for depositions, and I would say because
12 the rule requires depositions to be taken pursuant to a
13 pre-hearing order, the week of the 22nd of April. So I
14 would request that the Commission in its order set that
15 date subject to comments of counsel.

16 JUDGE WALLIS: Is there any objection to that
17 schedule?

18 MR. MARSHALL: I won't be available until
19 Wednesday. We need to find out when our witnesses might
20 be available, if they would be, the witnesses would be
21 direct testimony, and if we could do that that later
22 part of that week and if necessary the next part of that
23 following week, that would be -- I think -- I'm sure if
24 we had spread over a two week period, we can get
25 everybody scheduled in mesh with that.

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1 MR. BRENA: Excuse me.

2 JUDGE WALLIS: Mr. Brena.

3 MR. BRENA: Is it my understanding that your
4 proposal would be that the depositions would be
5 completed that week?

6 MR. TROTTER: Yes.

7 MR. BRENA: Because I would just point out
8 that May 13th is rapidly coming up, so assuming that the
9 depositions were completed in that time frame, then that
10 would be acceptable to us.

11 JUDGE WALLIS: Mr. Trotter.

12 MR. TROTTER: An alternative would be to
13 start them on the 18th and go from there. Also, you
14 know, we will do our best, it's possible we don't need
15 to depose every single witness. I mean we can certainly
16 do our best to streamline it as much as we possibly can.

17 COMMISSIONER HEMSTAD: I might ask
18 Mr. Marshall, if you're not going to be available, could
19 other counsel in your office be available the first part
20 of the week?

21 MR. MARSHALL: Perhaps, and because I'm sure
22 that these are going to be coordinated with FERC, we
23 might be able to have, maybe it's even preferable to
24 have FERC counsel do that as well. They're the same
25 witnesses in both proceedings, but I'm not sure how that

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1 meshes with the FERC schedule.

2 JUDGE WALLIS: Could we direct that
3 depositions be begun on April 18th and continue until
4 concluded subject to agreement of the parties?

5 MR. MARSHALL: It would be better --

6 JUDGE WALLIS: Or do you want something more
7 specific --

8 MR. MARSHALL: Actually, it would be
9 better --

10 JUDGE WALLIS: -- than that?

11 MR. MARSHALL: -- if they could start the
12 Monday that Mr. Trotter originally suggested and then
13 finish up when they could be finished up that week.

14 MR. TROTTER: The 22nd?

15 MR. MARSHALL: Right.

16 MR. TROTTER: That's fine.

17 MR. FINKLEA: From the interveners'
18 perspective, it's the end date that's as important as
19 anything because of the testimony date if we're going to
20 meet the 13th. So if we finish by the 26th, that's two
21 full work weeks after. And I know there will be some of
22 the people that are working on the FERC testimony that
23 will be very busy the 18th and 19th, because the FERC
24 testimony is due the 22nd.

25 MR. BRENA: Yeah, it doesn't work well to

1808

1 start on the 18th when our case is due for FERC on the
2 22nd. It would be very difficult --

3 JUDGE WALLIS: Very well.

4 MR. BRENA: -- to meet that schedule. The
5 other point that I would like to make is whether or not
6 we want an additional witness aside from the witnesses
7 that filed direct testimony. We will not know until we
8 see the rest of the discovery, so I don't want this
9 conversation to foreclose in any way our ability to call
10 an additional witness. I have perhaps one or two in
11 mind but no more than that.

12 JUDGE WALLIS: Very well.

13 MR. TROTTER: Your Honor, I would just ask
14 that the Commission set that schedule with the idea that
15 they would -- the goal that they would be completed by
16 the 26th.

17 JUDGE WALLIS: Yes.

18 MR. TROTTER: That the parties would work
19 toward that end.

20 JUDGE WALLIS: Very well, that will be done.

21 Would the parties like us to schedule a
22 pre-hearing conference during the week of April 8th?

23 MR. BRENA: Your Honor, I would like the
24 opportunity if the discovery is not responsive on April
25 12th to bring the issue of what the appropriate

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1 regulatory response to that nonresponsive discovery
2 should be in a very expedited fashion, so I would like
3 the Commission to consider setting a schedule, perhaps
4 we'll never need to use the schedule, perhaps we would,
5 but I would like that to be addressed now if there are
6 remaining discovery issues as of the 12th. And be
7 reminded it will take us a day or two to sort through
8 that, then we will need to get to what we need to get to
9 as soon as we can get to it.

10 JUDGE WALLIS: Would the 16th work?

11 MR. BRENA: Yes, it would.

12 (Discussion on the Bench.)

13 JUDGE WALLIS: 17th?

14 MR. BRENA: Yes, it would.

15 JUDGE WALLIS: Let's pencil that in for the
16 17th then. The order will include a notice of hearing
17 or a notice of pre-hearing conference. I would ask the
18 parties to be prepared at that point to discuss other
19 procedural aspects of the proceeding such as the
20 scheduling of a pre-hearing conference for the purpose
21 of housekeeping, marking exhibits, and to begin
22 discussing a post hearing process. At least two counsel
23 that I'm aware of have other matters pending that we
24 will take up shortly after the conclusion of the
25 hearing. The Commission understands that there are a

1810

1 number of complex issues in this docket, and we will
2 rely on the parties for briefing on those issues. There
3 is going to be a schedule challenge, and I would like us
4 to be addressing that at the earliest possible time.

5 Is there anything further to come before the
6 Commission at this time?

7 (Discussion on the Bench.)

8 JUDGE WALLIS: We will set it in the morning
9 on the 17th. And if there are no discovery issues, then
10 I believe that the other matters may be handled by means
11 of teleconference. If there are discovery issues, I
12 think we need to have people here in person. It's much
13 better for the commissioners and for the parties when
14 that's the case. So perhaps we can make that
15 determination prior, at least one day prior.

16 MR. BRENA: If I could ask for a little bit
17 of flexibility if there are limited discovery matters,
18 because, of course, our case is due five days from that
19 pre-hearing date.

20 JUDGE WALLIS: Yes.

21 MR. BRENA: So for me to take two days to
22 travel right then would hurt.

23 JUDGE WALLIS: Yes.

24 All right, is there anything further to come
25 before the Commission at this time?

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1 This conference is adjourned, and the matter
2 will continue on the schedule that we have outlined.
3 Thank you very much.

4 (Hearing adjourned at 4:25 p.m.)

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