

**BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

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

**TESORO REFINING AND MARKETING COMPANY'S  
MOTION FOR SANCTIONS**

1            Tesoro Refining and Marketing Company (ATesoro@), by and through its attorneys, Brena, Bell & Clarkson, P.C., hereby moves the Washington Utilities and Transportation Commission (AWUTC@) to enter an order imposing sanctions against Olympic Pipe Line Company (AOlympic@) for failure to respond to discovery.

2            Tesoro makes its motion pursuant to the WUTC's Notice of Extension of Time to File Response to Discovery, dated April 17, 2002, which extended the time for filing objections to discovery and related requests for sanctions.

**BACKGROUND**

3            Tesoro and Olympic negotiated a settlement of their discovery dispute over requests directed at Olympic's throughput. At the April 4, 2002, prehearing conference, Mr. Marshall summarized this agreement as follows:

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

Prehearing Conf. Tr., Docket No. TO-011472, Vol. XVII, April 4, 2002, Page 1750, l. 4, to page 1750, l. 17.

4 Tesoro identified the throughput and capacity documents it needed from Olympic as follows:

1. The manuals and manufacturer's information addressing the features and advantages of the PASS and batch scheduling software programs.
2. The manual and manufacturer's information address the features and advantages of the SCDA archival software program.
3. The Controller Run Sheets (Green Cards) for 1998 and July 1, 2001 to date.
4. The pumping orders for 1998 and July 1, 2001 to date.
5. A list of the average down time by month for 1998 and July 1, 2001 to date.
6. A list of the average DRA purchased and returned by month for 1998 and July 1, 2001 to date.

7. A list of the strips run by month for 1998 and July 1, 2001 to date.
8. A list of the average throughput by product by month for 1998 and July 1, 2001 to date.
9. A list of the average batch size by product by month for 1998 and July 1, 2001 to date.
10. Worksheets, documentary support, engineering reports, and other documents or information which supports Olympic's claim in its filings before the WUTC that Bayview would increase throughput by 35,000 to 40,000 BPD.
11. Any engineering report or calculation which shows the likely impact to throughput from lifting the pressure restriction.

Email correspondence from Robin O. Brena to Steven Marshall, dated March 27, 2002, attached as Exhibit A.

5 At the April 4, 2002, prehearing conference, Mr. Marshall did not object to Tesoro's requests, and Judge Wallis stated:

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

In terms of scheduling, the Commission believes that it is important for fairness to the parties and to the public to adopt with minor modifications the schedule that Commission Staff has proposed. The Commission will direct the respondent to reply to the Commission Staff's data requests no later than noon on Tuesday the 9th and the interveners requests no later than the FERC established date of April 12th. The timing for the filing of testimony will be May 24th for the Commission Staff, and rebuttal testimony June 10th for the company. The hearing will take up on June 17th and go through the 20th, will take up again on the 25th and go through the 28th. That is only eight days, and at least one of those days is a partial day. We will aim to complete the hearing within that period. If it appears that that is not feasible, we will

address the issue at that point. I think that the parties demonstrated in the interim that they have the ability to conduct a hearing very creditably within a limited time frame, and I'm confident that that will happen again. The Commission does intend to enter an order, a written order, in which it expresses this decision.

Prehearing Conf. Tr., Docket No. TO-011472, Vol. XVII, April 4, 2002, Page 1800, l. 13, to page 1801, l. 13.

6 This Commission issued an order compelling responses by April 12, 2002. To date, most of these materials have not been provided. Olympic has not produced:

5. List of Average Downtime by Month for 1998 and July 1, 2001 to Date.
6. List of Average DRA Purchased and Returned by Month for 1998 and July 1, 2001 to Date.
7. List of Strips Run by Month for 1998 and July 1, 2001 to Date.
8. List of Average Throughput by Product by Month for 1998 and July 1, 2001, to Date.
9. List of Average Batch Size by Product by Month for 1998 and July 1, 2001, to Date.
10. Materials and Information Supporting Olympic's Claim Before the WUTC that Bayview Would Increase Throughput by 35,000 to 40,000 BPD.
11. Any Engineering Report or Calculation Showing Likely Impact on Throughput of Lifting Pressure Restriction.

In fact, the only communications that Tesoro has received on this issue were from Olympic's FERC counsel, Lawrence Miller.<sup>1</sup> There had been no contact with Olympic's WUTC counsel with

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<sup>1</sup> In that letter, Olympic ignores its agreement to provide the lists and information which were  
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respect to this issue until immediately prior to filing this motion.<sup>2</sup> This issue is still outstanding at the FERC but, because Tesoro's testimony in the FERC proceeding was due less than 10 days after the date the response was due, there was insufficient time to file the appropriate motion prior to filing testimony. Nevertheless, Olympic's counsel in both proceedings have made it clear that the FERC proceeding is separate.

### **ARGUMENT**

7 Although it is the general policy of Washington courts not to resort to dismissal lightly, in appropriate cases a court may determine that a party's failures are so critical that dismissal is warranted. Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 129-30, 896 P.2d 66 (1995); CR 37(b)(2)(C). When a court chooses such a severe remedy, the record must demonstrate that: (1) the party acted in willful and deliberate disregard of reasonable and necessary court orders; (2) the party's action substantially prejudiced the opponent's ability to prepare for trial; and (3) a lesser sanction probably would not have sufficed. Woodhead, 78 Wn. App. at 130; Peterson v. Cuff, 72 Wn. App. 596, 601, 865 P.2d 555 (1994); White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 175-76, 810 P.2d 4 (1991). The court's reasons typically should be clearly stated on the record so that meaningful review can be held on appeal. @ Burnet, 131 Wn.2d at 494.

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ordered. Instead, Olympic wants to simply provide the controller sheets.

<sup>2</sup> That communication came only after Tesoro notified Olympic on Tuesday, April 23, 2002, that it intended to file a motion for sanctions. In that letter, Mr. Maurer offered to summarize a few months of the controller sheets, and indicated it would take a few weeks. However, this is only part of what Olympic was ordered to provide, and even if it were provided, it would arrive too late to be helpful in preparation of Tesoro's testimony .

8

Olympic's strategy is designed to prejudice Tesoro. Olympic's failure to produce the compelled information has prevented Tesoro from addressing these issues within its testimony to this commission. Olympic knows that only its staff can readily interpret these controller sheets. In fact, even Mr. Talley, in his deposition, had difficulty interpreting these controller sheets to provide the information Tesoro requested. In addition, Olympic is trying to increase the burden and expense to Tesoro by simply producing the copies of the controller sheets for Tesoro to copy at its expense. Because these copies are oversized with colored pencil handwriting on them, the copying costs alone have been estimated to be over \$8,000. See email correspondence from William Beaver, Jr. to Elaine Houchen, dated April 19, 2002, attached as Exhibit B. Then, after they are copied, employees of Olympic will have to teach Tesoro's experts how to interpret the data that is recorded on these controller sheets, adding further costs to the project. Finally, Tesoro's experts will attempt to analyze these controller sheets. This is the most expensive and least reliable approach. In addition, it does not provide this Commission with the best information available. Finally, this is not what was ordered. Olympic agreed to provide the information requested in Mr. Brena's email on March 27, 2002. To date, that information has not been provided and sanctions are appropriate.

9

In the present case, a lesser sanction will suffice. Olympic was put on notice that unless it produced the throughput information, Tesoro would request a sanction establishing throughput. At the April 4, 2002, prehearing conference, Mr. Brena gave an example of the type of sanction Tesoro would be seeking if Olympic did not respond:

For example, we have asked for information with regard to their filing they filed in the past with regard to Bayview. They have said that when Bayview comes on line, it will increase their throughput between 35,000 and 40,000 barrels a day. That's part of the throughput and capacity information that Tesoro is seeking them to support. If they don't want to provide factual support for the case that they filed, this Commission doesn't need to dismiss, they can find that the throughput capacity when Bayview comes on line is 40,000 barrels, and that's the end of that issue. We don't have to sit here and argue all day with them about who has the information, prior operator or not. We can give them a reasonable opportunity, which we have done, to respond, and if they don't, then give us an opportunity to request a lesser sanction. That allows this case to move forward. That allows us to get to hearing. That leaves the responsibility for not offering factual support for their case where it should be, with the company.

Prehearing Conf. Tr., Docket No. TO-011472, Vol. XVII, April 4, 2002, Page 1778, l. 23, to page 1779, l. 17. That is precisely the type of sanction that Tesoro is requesting--a lesser sanction than dismissal.

10 Olympic has intentionally failed to provide the discovery that it was ordered to provide. Olympic is in sole possession of this information. Olympic is in sole possession of the expertise necessary to analyze its operational data and make the calculations necessary to determine the average batch sizes, average downtime, average throughput, strip runs, and important throughput information this Commission needs in order to make its decision. If Olympic is not going to provide this information, then this Commission should, by way of sanction, determine the throughput based upon historic pre-accident averages.

11 Throughput is one of the most difficult issues facing this Commission. It is unusual for a pipeline to ask a regulatory commission to set its tariff rate based upon an artificially low throughput.

The potential for a windfall to the pipeline is apparent. Where a pipeline's capacity is over-nominated (such as Olympic's) the owners will enjoy a substantial windfall simply by waiting until after their rate is set in order to increase throughput.

12 Olympic and its owners have complete control of when Olympic finishes the tests necessary to return to 100% operating pressure. Almost 3 years have passed since the accident, and Olympic claims it still has not conducted the tests necessary to return to 100% pressure.

13 This Commission should be concerned. Olympic's owners are some of the largest multinational corporations in the world. They had the resources to perform these tests (and any resulting repairs) prior to filing this rate proceeding. Olympic argues safety to support its extraordinary rate filing, yet it has not even completed safety testing on its pipeline three years after the Whatcom Creek incident. A prudent operator would finish the tests and repairs as soon as it could and then sort out the rate relief that is appropriate (if any). Olympic and its owners have not provided the throughput discovery ordered because it will allow this Commission to make an informed decision on the merits instead of rhetoric and the artificial limitations resulting from delayed safety testing.

14 The issue before this Commission is whether or not it is going to take the action necessary to encourage Olympic's owners to perform these tests (and any resulting repairs) in the immediate future. The simplest way to encourage Olympic to complete its testing and return its pipeline to normal operating conditions is to set the throughput equal to the throughput which underlies Olympic's current permanent rates, or 121,349,000 BPY. This is also an appropriate sanction

given Olympic's failure to produce throughput information which could help establish any other appropriate throughput level.

15           If this Commission imposes the sanction requested, it will resolve one of the most difficult and time-consuming issues it faces. It will shorten the hearing. It will encourage the safety tests that have been outstanding for almost three years. And, it will render justice for Olympic's action in ignoring the Commission's order to compel.

16           Recently, Olympic's counsel informed the parties that it was planning to change its throughput assumptions (by way of supplemental testimony). A party should not be allowed to file its testimony, ignore Commission orders, fail to provide the discovery necessary to test its throughput assumptions, and then be allowed to change its testimony at the last minute.

17           This Commission has recognized the prohibition of the presentation of a Moving target which arises when a company attempts to present information in its rebuttal case which supplements, revises, or alters information that it presented in its direct case. Washington Util. & Transp. Comm'n v. The Washington Water Power Co., 1985 Wash. UTC LEXIS 89 (Jan. 10, 1985). The same logic would apply where a party attempts to modify its prepared direct testimony in one proceeding after it has reviewed the opposing party's opposition testimony in another proceeding.

This Commission should impose the sanction requested.

DATED this 25<sup>th</sup> day of April, 2002.

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By

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2002,  
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