

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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TRANSPORTATION COMMISSION

Complainant,

v.

OLYMPIC PIPE LINE COMPANY, INC.,

Respondent.

DOCKET NO. TO-011472

OLYMPIC PIPE LINE COMPANY'S
MOTION TO STRIKE

1. Olympic Pipe Line Company ("Olympic") submits this Motion to Strike portions of Tesoro's testimony referring to, or based on, criminal allegations against Olympic. The name and address of Olympic is as follows:

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

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

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

2. This Answer brings into issue the following statutes and regulations: Amend. V of the United States Constitution; Article I, § 3 of the Constitution of the State Washington; WAC 480-09-425.

I. FACTS

3. Tesoro makes the following references to criminal allegations in its Testimony: Testimony of John F. Brown, Exhibit No. __; JFB-1T:

Page 16, lines 8-9: “Olympic and certain of its former employees have been criminally charged”

Page 52, lines 18-20: “Criminal charges have been brought against Olympic and certain of its employees for their role in the Whatcom Creek incident.”

4. Based in part on these allegations, Mr. Brown draws certain conclusions. In the hearings on Olympic’s request for interim rates, Tesoro sought to introduce a criminal indictment against Olympic as Exhibit 43. See Transcript, vol. VIII, p. 656. Olympic objected to the introduction of such unproven allegations. Id. at 659. Olympic made the following points:

These are nothing but allegations. They have not been proven. They probably never will be proven. They are, in the essence of federal and state rules of evidence, highly prejudicial. We don’t know who made these allegations, with what evidence, we have no foundation for any of the allegations in this case. I objected to it in a timely way during cross-examination, and it was said that we could look at the front sheet of this. But it was not inquired in further in any of the details of the indictments and we didn’t want the cross-examination to go into this arena.

Mr. Brena elicited from Mr. Batch, over our objections in this area, the question and answer that he made. He can’t open the door by himself on his own exhibit here, which, again, is nothing but a collection of prejudicial allegations. So I most strenuously object to this. I don’t say strenuously very often, but this one is beyond the pale.

Tr. Vol. X, pp. 1204-05. Exhibit 43 was not entered into evidence in the Interim proceeding. See Attachment A, the Exhibit List of the Interim proceeding, which clearly indicates, on page 3, that the indictment was rejected as an exhibit.

5. In the Third Supplemental Order in this proceeding, the Commission was careful to avoid reference to any criminal allegations against Olympic. Compare, Third Supplemental Order at p. 5 (“The [Whatcom Creek] incident has generated considerable litigation. More than 40 lawsuits are pending.”), with JFB-1T, p. 16, lines 8-10 (“Olympic and certain of its former employees have been criminally charged, and there are over 20 lawsuits pending as the result of their role in the Whatcom Creek incident.”). The referenced allegations are not scheduled to go to trial until early next year.

II. ARGUMENT

References to Unproven Criminal Allegations Should Be Stricken

6. The Commission should strike references to unproven criminal allegations as prejudicial, inflammatory, and without proof. Allegations are not evidence of wrongdoing, culpability, or fault. The allegations Mr. Brown refers to are unproven and will remain unproven. The allegations Mr. Brown refers to should not form the basis for factual findings or conclusions in this proceeding. The referenced allegations will not even go to trial until well after this Commission renders its decision in this proceeding.

7. The use of criminal allegations in an administrative proceeding is highly prejudicial and inconsistent with constitutional protections. See ER 403 (evidence may be excluded if it results in unfair prejudice). “The law presumes one so accused to be innocent until his guilt has been established in a court of competent jurisdiction, by legally admissible evidence, beyond reasonable doubt.” Lundberg v. Baumgartner, 5 Wn.2d 619, 623 (1940) (discussing the consequence of an arrest). The Washington Rules of Evidence, for example, only permit a witness to be impeached

upon evidence of *conviction* of a crime, and then only when certain other prerequisites are met. See ER 609.

8. Tesoro's second attempt to introduce criminal allegations in this proceeding violates the basic tenets of American law and Olympic's rights under the Fifth Amendment to the United States Constitution and Art. I, § 3 of the Washington State Constitution. Tesoro attempts to impose a legal consequence on Olympic without such charges having been "established in a court of competent jurisdiction, by legally admissible evidence, beyond reasonable doubt."

9. The Washington Administrative Procedure Act requires that evidence that contradicts a party's constitutional rights must be stricken. "The presiding officer *shall* exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state." RCW 34.05.452(1) (emphasis added).

10. As it did at the Interim proceeding, this Commission should reject Tesoro's attempt to impose a legal consequence on Olympic arising from unproven criminal allegations.

III. PRAYER FOR RELIEF

Olympic respectfully requests that the Commission issue an order striking those portions of Tesoro's testimony referencing criminal allegations against Olympic.

DATED this ____ day of May, 2002.

Respectfully submitted,

PERKINS COIE LLP

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

