[Served on June 3, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION	)	DOCKET NO. TO-011472
Complainant,	)	THIRTEENTH SUPPLEMENTAL ORDER
v.	)	
OLYMPIC PIPE LINE COMPANY	)	ORDER RECOMMENDING PENALTY SANCTIONS FOR VIOLATIONS OF COMMISSION ORDER
Respondent.	)	

Synopsis: *This order recommends the assessment of penalties in the amount of $30,000 for clear violations of Commission order or rule pertaining to discovery.*

I. Background.

1 This proceeding is a proposal by Olympic Pipe Line Company (Olympic) for a 62% increase in its rates and charges for transporting refined petroleum products within the state of Washington.

2 Discovery issues have challenged this docket. The Commission on April 4, 2002, denied a motion by Commission Staff to dismiss the proceeding for Olympic's failure to comply with discovery orders, but left open the possibility of other sanctions – including dismissal – for future violations. The Commission directed Olympic to complete the production of responses to data requests posed by Tosco Corporation (Tosco) and Tesoro Refining and Marketing, Inc., (Tesoro) by April 12, 2002. Tesoro on April 25, 2002, filed a motion for sanctions alleging violation of the commission order and asking as sanction for the violation that the Commission limit its consideration of evidence in finding the proper level of throughput (transportation volume) to be used in calculating Olympic's rates.

3 The Commission denied the motion for policy reasons but directed the administrative law judge to inquire into the details of the asserted violations, to determine whether violations of rule or order occurred, and to recommend whether sanctions should be imposed as a consequence for violations.

4 The Commission convened a conference on May 21, 2002, before Administrative Law Judge C. Robert Wallis to facilitate the inquiry. At the conference, Robin Brena, attorney, Anchorage, Alaska, represented movant for sanctions Tesoro Refining and Marketing Company (Tesoro); Steven A. Marshall and William Maurer, attorneys, represented Olympic Pipe Line Company (Olympic), respondent to the motion; Charles Stokes, attorney, represented intervenor Tosco Corporation; and Lisa Watson, assistant attorney general, represented Commission Staff.

II. Facts relevant to the decision on sanctions.

5 Discovery in this proceeding has proved to be a tortuous process. Discovery issues in this docket are of a number, of a nature, and of a persistency that has been rare in Commission litigation. In addition to passing mentions, the Commission has been on the record no less than[1] 30 hours, consuming over 900 pages of transcript (over half the record to date), and devoted 11 orders in part or in full to discovery issues. The Commission has heard motions to compel and a motion for sanctions.

6 Olympic is a company with a small staff, and the discovery requests have been substantial. The Commission has been especially cognizant of the burdens of extensive discovery, while noting that the company appears to have resources available to it to supplement its assigned staff. It has patiently discussed parties' responsibilities in discovery matters, has illustrated in the result of its rulings and patiently pointed out from the bench and in orders that WAC 480-09-480(6)(v) requires reasonable efforts to comply and specific kinds of behaviors that are aimed at resolving problems.

7 To accommodate Olympic's professed needs, the Commission has directed other parties to limit and prioritize their data requests, so those needed soonest could be given priority in responses; has directed the parties to coordinate with each other and with their counterparts in a parallel proceeding before the Federal Energy Regulatory Commission, has ruled with the parties' consent that requests for the same

[1] Informal conferences were held on two additional occasions with a tape recorded record. Due to a technical malfunction, no tape is available of one or both of those sessions.

information may be presented by one party with like effect as though presented by another, and that any party may move to compel the answer to another party's data requests, and directed Olympic to organize its records of requests and its responses. In short, the Commission has been exceptionally patient with Olympic's inability to satisfy other parties that it has fully complied with requests, rules, and orders relating to discovery.

8 The failures have two aspects, as the descriptions of counsel[2] and relevant orders[3] have repeated. First is Olympic's inability to provide information that has been requested. Much of the information requested during discovery phases of this proceeding has been provided late. But the more problematic failure has been the failure of the Company, through its counsel, to comply with terms of the Commission's rule on discovery and terms of relevant orders that require communication about pending requests and to demonstrate its commitment to provide the information that the parties need to present their cases.

9 The Commission limits discovery more strictly than do the civil rules, as permitted by the state Administrative Procedure Act.[4] Discovery under WAC 480-09-480 is different in character from that provided under the civil rules, because the needs of the Commission's proceedings are different. Many Commission dockets, including this one, are conducted within a statutory time frame that would be astonishing for a proceeding of similar financial consequence in Superior or Federal courts.

10 In this proceeding, for example, the statutory suspension period is seven months. RCW 81.04.130. That means that within a minimum of eight months of a proposed tariff's filing,[5] the Commission must determine whether to suspend it, must set it for hearing, must allow discovery, will allow for the preparation of prefiled evidence, must conduct an evidentiary hearing, must allow parties the opportunity to brief or

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[2] *See, e.g.*, Assistant Attorney General Don Trotter's descriptions during the Conference on Motion to Dismiss, TR pp. 1730-1735.

[3] Second Supp. (Dec. 4, 2001) paragraph n7; Fifth Supp. (Dec. 13, 2001) p.1; Sixth Supp. (December 21, 2001), paragraph 5; Fourth Supp. (Feb. 26, 2002), paragraph 8 , and Tenth Supp. (April 8, 2002) paragraphs 9 and 11.

[4] RCW 34.05.446(3) grants agencies the right to limit discovery options to that provided in agency rules. The Commission has promulgated WAC 480-09-480.

[5] Under RCW 81.28.050, proponents of a rate increase must file it at least 30 days prior to its effective date. If during that 30 days the Commission decides to suspend the proposal, it must make its decision within seven months after the stated effective date. Here, Olympic has twice granted one-month extensions of the suspension period. The Commission's deadline for entering an order is now September 1, 2002.

argue the result of the evidentiary hearing, and must prepare and serve an order that rationally discusses and resolves the issues presented.

11 Consequently, there is simply not sufficient time to engage in the same depth of discovery, or to achieve the same process, that is afforded to litigants in Superior Court or federal trials.

12 By rule, the Commission has limited discovery to subpoenas and the presentation of data requests.[6] The rule mandates that persons to whom a request is directed respond within the time established by rule with the information requested, with an objection to the request, or with an explanation of why the information cannot be provided, and a statement of when the information can be provided.[7] Parties are directed by the rule[8] and have been directed in this docket both on the record[9] and by order[10] to be proactive, to initiate explanations of delays, to explain the inability to respond and to discuss information that is available, and to ask for clarification if a request is unclear, in sufficient time to provide the information within the deadline of the rule or within a reasonable time, given the party's ability to respond. These responses are essential in a timely manner because a refusal to produce information triggers a decision whether to seek an order to compel, and a realistic schedule for responses assists parties in scheduling their resources. It is not acceptable to raise objections for the first time in response to a motion to compel if the time set by rule or by the bench for responses has passed. Standards and litigation processes other than those in the rule could require time for discovery longer than the entire suspension period. That is simply unacceptable if the Commission is to meet its statutory time constraints as well as the parties' needs for the statutory and Constitutional process to which they are entitled.

13 This proceeding has generated numerous data requests. In fairness to the parties, it has been very difficult for all of the parties to accomplish discovery of large volumes of material, along with accomplishing all of the other tasks required in litigation, in the limited time frame available for the litigation. Some of the requests have been sweeping and broadly inclusive. Some have been limited by rulings on motions to compel, at the direction of the bench, or by parties voluntarily. Others might have been so limited had Olympic asked for limitation. The record and the orders in this

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[6] WAC 480-09-480.
[7] WAC 480-09-480(6)(v).
[8] *Id*.
[9] *See, e.g.*, TR 1335, line 24, through TR 1354, line 16, of the February 16, 2002 conference.
[10] See, e.g., the Second Supp. Order (Dec. 4, 2001), paragraph 7; Fifth Supp. Order (Dec. 13, 2001), paragraph 5; and the Fourth Supp. Order (Feb. 26, 2002), paragraph 8.

docket demonstrate that Olympic has repeatedly failed to respond to data requests with the data requested, or to supply information about the status of Olympic's response, or to state objections.

14 It is against this background that we review the motion for sanctions to determine whether violations occurred and to assess the appropriateness of sanctions.

III. Requests for sanctions.

15 Tesoro states seven asserted failures of discovery, argues that they are violations of a Commission order, and asks that sanctions be imposed for the violations. The circumstances of the Tesoro data requests and the Olympic responses are, briefly, as follows.

16 Tesoro has stated for some time that it wanted information about the pipeline company's capacity and throughput.[11] It asked to speak with Mr. Talley, an engineer for the pipeline, to discuss the issue and to narrow the scope of its request. After achieving that meeting, Tesoro on March 27, 2002, presented Olympic a list of eleven items that it wanted Olympic to collect or prepare.

17 The list was presented in an electronic mail message addressed to Mr.Marshall. Of the eleven items, four have been the subject of adequate responses and the following seven are at issue in the motion for sanctions:

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.

[11] *See, e.g.*, TR 319, Dec. 17, 2001 conference.

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.

18 The Commission convened a discovery conference on April 4, 2002 to consider Commission staff's motion to dismiss the proceeding. At the conference the status of discovery arose, and the question of need for an order compelling production. Olympic's counsel did not object to the eleven data requests. He acknowledged the eleven items and said (transcript page 1750, lines 14-17):

> 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.

19 At TR 1798, Commissioner Hemstad and Olympic's counsel engaged in a dialogue concerning whether discovery responses must be concluded by Tuesday, April 9, five days following the conference. Mr. Marshall stated,

> [T]here are very few outstanding requests that haven't been responded to except for this throughput and capacity issue, which is, as of the 27th of March, it has 11 elements to it, it is very detailed and very burdensome. My guess is that we couldn't respond to that by next Tuesday, ...

20 The Commission accommodated Olympic's concerns. It allowed additional time and ordered on the record, reiterating the ruling in a written Tenth Supplemental Order on April 8, 2002, that the Company must provide all outstanding information requested by the intervenors no later than the deadline for production of discovery in the FERC proceeding, on April 12, 2002.

21 On April 4, 2002 -- on the same day Olympic's Washington State counsel made the representations above - Olympic's FERC counsel wrote to Tesoro, stating that Olympic would not provide the requested lists. Tesoro by letter from Mr. Wensel on

April 5, responded with an acknowledgment of the denial, and asked what other information was available.

22 Olympic voiced no objection or argument against the order compelling production of the information on April 12, did not ask for review of the order, did not speak further with Tesoro about the requests prior to April 12, and did not provide any of the information requested, either on April 12 or subsequently.

23 The parties agree that Olympic failed to provide the information specified in the seven requests on the date directed in the Commission order. Tesoro contends that today, more than six weeks later, Olympic has not provided adequate information in response to seven of the eleven requested responses.

IV. Tesoro's Motion

24 On April 29, 2002, pursuant to an extension of the schedule agreed by the parties and ordered by the presiding judge, Tesoro filed a motion for sanctions. It said,

> 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. (p. 6). 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. (pp. 8-9).

25 The Commission denied the sanctions advocated by Tesoro in the Twelfth Supplemental Order. The Commission referred the matter to the administrative law judge for an analysis of whether a violation or violations occurred and, if so, whether and what sort of sanctions would be appropriate. The discovery conference was held on Tuesday, May 21, 2002.

V. Determination of the Existence of Violations.

26 We believe that Olympic has violated the clear terms of the Commission order and the terms of WAC 480-09-480 in its failure to supply the requested information in response to six of the seven data requests by the time specified in the order.[12]

27 Olympic discussed the requests at the conference. It is clear that Olympic was aware of them and what they sought. Olympic did not object to them. It did not say it was unable to produce the information, nor did it object on the basis of burden so the issue could be explored on the record. Instead, counsel merely "guessed" that Olympic might not be able to respond by the following Tuesday. When the schedule calling for answers was determined, Olympic did not argue that it could not meet that schedule,[13] refuse to provide the information, say when it could provide the information, or discuss the matter further.

28 When the time for production specified in the Commission order came, Olympic did nothing. It did not tell Tesoro the status of the request, did not say it was working on production in compliance with the Commission order, did not say when it would provide the information. Its only response described in the record is the April 4, 2002, message from Olympic's FERC counsel that some of the information would not be provided because Olympic did not prepare or maintain the requested information.[14]

29 Olympic violated the terms of the Commission order. It did not accomplish substantial compliance by producing some of the information, followed by the remainder as it was reasonably produced, on a schedule made clear to the parties. It did not accomplish substantial compliance by producing all of the information soon after the deadline, on a schedule made clear to the parties. Olympic and its Washington counsel did not even respond to the data requests on the order. It simply did nothing. In doing nothing, it clearly violated the requirements of the order.

30 Olympic contends that it should not be responsible for sanctions for a number of reasons.

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[12] Olympic stated as to item No. 10 seeking information supporting the company's representations to the Commission that its Bayview facility would enable a 35,000 to 40,000 barrel per day increase in throughput, that it had conducted a good faith search and that no such documentation exists to the best of its knowledge. We accept that response at face value, but ask Olympic to specify exactly what it did to implement its search.

[13] Olympic's president, Mr. Batch, was present in the hearing room. Counsel had easy access to Company staff regarding its ability to comply.

A. Relevance or "mootness" of the requested information.

31 Olympic's first contention appears to be that Olympic need not comply with the Commission order because the requested information is not the best evidence on the subject it relates to.

32 The information that Tesoro seeks relates to operations at full pressure prior to the explosion and to a facility (the Bayview terminal) that Olympic had earlier represented to the Commission could increase its daily throughput substantially by allowing the combination of loads.

33 The company's pipeline experienced a tragic and disruptive explosion during 1999. The line was partially shut down during repairs and reassessment of the integrity of the ruptured portion and other portions of the line. Olympic is running the line at reduced (80%) pressure pending resolution of safety issues. In addition, Olympic has constructed but has not put into full service the Bayview facility.

34 Tesoro presumably would use the information in its quest to estimate the realistic future throughput to be expected when the rates decided in the docket will be in effect, after line returns to full pressure.

35 Olympic contends that the Commission will be better able to judge the Company's future throughput by using actual information about the Company's reduced recent throughput than by using actual information about its full operations prior to the explosion.

36 This argument offers no basis to justify failure to comply with an order compelling the production of information or to support an objection to proposed discovery. The argument will not support an objection to discovery.[15] What is at issue is the Company's failure to comply with a Commission order, not whether an objection might be made to questions on cross-examination, to the offer of evidence or to arguments as to the weight that should be accorded facts and circumstances of record.

B. <u>Compilations of data.</u>

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[14] Letter of April 4, 2002, to Mr. Brena.

[15] The scope of allowable discovery includes information relevant to the issues, which the requested information clearly is, and inadmissibility is not grounds for objection. WAC 480-09-480(6)(vi).

37 Olympic now argues that it is not obligated to manipulate data – i.e., that it is not required to prepare lists or compilations of raw information that is within its possession. It cites, the Fourth Supplemental Order in Docket No. UT-970766 (October 15, 1997), an order in which the Commission ruled that a telephone company need not create a cost study, nor run another party's cost study, in response to Public Counsel's request.

38 The narrow response to this objection is that it is inconsistent with Olympic's representations and actions at the hearing on April 4and it is specifically foreclosed by WAC 480-09-480 (3)(c). Olympic could have presented its intentions to refuse to comply with the requests at the hearing. Instead it said, at TR 1750, lines 14-17 (April 4, 2002),

> 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.

39 Olympic continued, stating that it couldn't complete the responses by the following Tuesday. It offered no objection to the date that was established. It waived its objection.

40 Moreover, we believe that Olympic reads too much into the order that it cites. That order excused U S WEST from preparing a complex cost study in the time frame of discovery or running another party's cost study. It does not stand for the proposition cited, which is that a company need never do more in response to discovery than turn over information already in its possession. The Commission's discovery rule, WAC 480-09-480 (3)(c), specifically authorizes data requests that seek

> ...an analysis, compilation or summary of extant documents into a requested format, or a narrative explaining a policy, position or document.

41 As noted above, discovery in Commission proceedings is not a clone of discovery in civil litigation.

42 The administrative law judge stated as much on the record in an early discovery conference, while refusing the request then at issue:

> [T]he Commission in some instances in approaching general rate increases has required the production of documents that are not in existence.[16]

Olympic argues that it knows of no order in which a company has been directed to manipulate data in its possession. We have so ordered Olympic in this proceeding consistent with WAC 480-09-480 (3)(c). Olympic has agreed to produce such documentation in this proceeding, and Olympic has not appealed any such order. We find Olympic's excuse in the Federal proceeding to be completely without merit in this proceeding.

43 It is often the case that a company is in possession of all significant data relating to its performance, or has prepared studies that relate to its case. The Commission may direct persons holding data to perform sorts, or runs, or printouts, other manipulations of data when the result is reasonably related to the matters at issue, when the holder of the data is in the best or only position to accomplish the results, when time permits or requires this approach, when need for the documents is demonstrated, and when the requested action is not unduly burdensome.

44 Olympic acknowledged the burdens of the requests at the April 4 hearing on the dismissal motion, but did not object to those burdens at the hearing – or state the objection stated in the letter served on the day of the hearing -- when it had the opportunity to do so and when the Commission could have ruled. At the hearing it represented that it was engaged in preparing the information. Prior actions in this docket, including the statements of our view of the Commission's policies, Olympic's voluntary production of documents that did not exist, our directions to comply and Olympic's compliance, all demonstrate that in this docket Olympic knew and abided by rulings that it must manipulate the form of information as required by the rule, that the decision was made on a case-by-case basis, that it had the right to raise this objection, and that by failing to tell this Commission about the objection when production was at issue but instead indicating that it was producing the requested information, it has waived its objection.

C. Interplay between Washington and FERC production and communications.

[16] Transcript page ("TR") 148, line 21, through TR 149, line 2, December 6, 2001. It is clear from this ruling that there is no blanket exception, but that matters are taken on a case-by-case basis.

45 We have discussed above our view of Olympic's response in the FERC litigation. Because it is inconsistent with Olympic's behavior at the Washington hearing on April 4, and because it fails to mention the provision of Commission rule that forecloses the objection,[17] we find that it is not in any way persuasive in this docket as to any of the matters raised therein.

46 We are very concerned about Olympic's use of FERC counsel work product in the FERC proceeding to justify its failure to comply with a Washington State order to compel that was based significantly on representations of Washington State counsel. FERC counsel are not within our jurisdiction, are not appearing before us, and have no responsibility to us. We have directed Washington State counsel to coordinate with FERC counsel, and FERC counsel entered an appearance at a prehearing conference in furtherance of that direction, for the sole purpose of enhancing coordination. Olympic's FERC counsel did not enter an appearance for the purpose of representing Olympic in the Washington State proceeding.

47 Olympic's Washington State counsel was the recipient of the eleven-part data request and was well aware of it. Discussions about it, or positions adopted, on the federal side of the litigation cannot be used to avoid the obligation to produce information that the Commission order imposes.

48 There is a disagreement as to whether counsel for Olympic agreed with a statement of Mr. Brena's which could be interpreted to represent that Olympic's Washington counsel agreed that Olympic would provide the information. Events at the April 4 hearing have superseded any disagreement and this concern has nothing to do with the matters now at issue. At the Washington State hearing on April 4, Olympic acknowledged the eleven requests, represented that it was working to produce answers to the requests, and voiced no objection to an order to produce the requested information. It did not challenge that order.

49 The inclusion of these requests in a FERC order to compel cannot be independently enforced in Washington, as according such an effect to a federal order in another proceeding on what may be other standards would constitute unlawful delegation of the Commission's authority.

D. Waiver in letter.

[17] Counsel for Olympic acknowledged the attendance of Mr. Batch. Olympic's president, at the April 4 hearing.

50 Olympic contends in effect that a letter from Tesoro's co-counsel, dated April 5, 2002 to Olympic's FERC counsel, constituted a waiver of Olympic's obligation to respond further. In the letter, Mr. Wensel acknowledged Olympic's refusal to produce the requested information and asked for the source documents from which Olympic contends the requested information can be calculated.

51 We disagree with Olympic's argument. The letter – again – responded to Olympic's position in the FERC proceeding and merely acknowledged Olympic's refusal to provide the information and to ask for whatever information Olympic was willing to provide. We do not read it as capitulation to Olympic's refusal, which in any event would not excuse violation of a Commission order. The letter is entirely consistent with a desire to proceed with as much information as reasonably possible, independent of a pursuit of recourse on the underlying issue. The letter does not specifically mention the Commission order to compel responses and does not waive any rights to pursue, or continue to pursue, discovery or other remedies.

E. Waiver of the issue by failure to state a request for sanctions.

52 Olympic argues in effect that Tesoro's failure to press Olympic after April 12 for the information or to make an early decision as to pursuit of sanctions for the disputed information constitutes a waiver of sanctions for failure to comply with the order to produce. Olympic contends that it asked Tesoro several times whether Tesoro intended to press for sanctions, but that Tesoro did not share its intentions. Olympic says, in effect, if it had known Tesoro still wanted the information it could have compiled and produced it.

53 We find no excuse for Olympic's noncompliance in Tesoro's timely decision to press for limited sanctions on limited issues. Olympic was ordered to produce the information; it told Tesoro it would not produce the information, and it made no effort to produce the information. Tesoro was clear from the time of an early discovery conference that it sought capacity and throughput information. Olympic cannot now avoid its failure to comply with the Commission order by blaming Tesoro for failing to press for the information or to state its decision on sanctions prior to the deadline for filing its request for sanctions.

F. Tesoro's asserted failure to examine or to demand information or seek a resource other than Mr. Talley to interpret information.

54 Olympic asserts in effect that it is freed from an obligation to comply with the Commission order by two failures on Tesoro's part – failure to examine and inquire into information held for it in Olympic's Renton offices, and failure to demand a resource other than Mr. Talley (a person at Olympic who is responsible for pipeline operations).

55 We fail to see any excuse in the asserted failures, which have no relevance to the Company's failure to comply with the order. As to the failure to inspect the documents, it is clear that Tesoro did not inspect them until a relatively short time after they were first offered for inspection. Mr. Brena did attend a technical conference on March 8 at the Renton offices. He had asked in advance that Mr. Talley be made available to discuss the documents. Mr. Talley, however, left before other matters were concluded without announcing his departure; the hour became late; the weather was inclement; and the matter was not pursued on that date. Discussions on the topic between Tesoro and Mr. Talley were held in March, and the data requests at issue were presented on March 27. We see no link between the length of time for inspection, and any issue before the Commission.

56 In his deposition, Mr. Talley foundered when asked to explain how the derivation of the needed information could be derived from the source documents. He was unable to provide the information. It appears that this spurred the request for Olympic to perform the calculations, inasmuch as Olympic had earlier supported a witness with comparable information about a month with high throughput.

57 Now Olympic says that Mr. Talley is a manager, and does not have sufficient familiarity with day-to-day operations to explain how the green sheets can be interpreted. Olympic argues that it has no obligation to comply with the order because, on learning that Mr. Talley could not answer its questions, it became Tesoro's obligation to ask Olympic to supply someone else to explain the green sheets.

58 This argument is difficult to understand. Tesoro asked for, and Olympic provided, Mr. Talley as the person to explain the green sheets and other technical information. Had Mr. Talley been able to respond, the matter might have been resolved in a timely way. When Mr. Talley was unable to do so, we do not find it unreasonable that Tesoro's next step was to submit its eleven data requests for information, including those that Olympic had earlier contended could be derived from the green sheets.

59 In any event, the question to be resolved here is whether Olympic should be sanctioned for failure to produce information in response to a Commission order, and Olympic's contention about the background of the underlying request has little relevance to that decision.

60 **G. Conclusion as to violations.**

61 We conclude that Olympic violated the Commission's oral order at the April 4 hearing, which was memorialized in the Tenth Supplemental Order, by failing to produce the information requested in items numbers five through nine, and eleven.

62 We do not accept FERC counsel's April 4 letter stating Olympic's refusal to provide the information in the FERC proceeding as notice that Olympic would not comply with the Washington Commission's order. FERC counsel are not representing Olympic in this docket, have no responsibility toward the Commission, and are not shown to have been aware of the Washington Commission order. FERC counsel's letter is inconsistent with the representations of Washington State counsel at the hearing on April 4, 2002.

63 We conditionally accept FERC counsel's April 12 letter as satisfying the terms of the Commission order, provided that Olympic through its Washington counsel timely offers it as its response to the Commission order and that it describe exactly what steps it took in its search.

VI. The motion for sanctions.

64 Tesoro continues to pursue sanctions for Olympic's failure to comply with the Twelfth Supplemental Order. It cites only the seven points identified above as violations and as support for its requested sanctions.

65 It again asks as pertinent sanctions that the Commission find that throughput prior to the 1999 pipeline explosion should be adopted as the pertinent facts on which to set pipeline rates in the pending proceeding. Commission Staff suggests that if the Commission views the violation as serious, it should impose other sanctions, possibly including dismissal.

66 The Twelfth Supplemental order appears to resolve the matter of issue preclusion (forbidding Olympic from offering evidence contrary to Tesoro's proposed assumptions about the throughput), stating that precluding full Commission deliberation would in this instance be contrary to the public interest.[18] The order, however, asked for a recommendation on sanctions.

A. Analysis of alternative sanctions.

67 We see the principal alternative sanctions available to the Commission as either dismissal of the proceeding or the assessment of penalties pursuant to RCW 81.04.380 or RCW 01.04.405. *See*, WAC 480-09-480(7).

B. Dismissal.

68 The Commission has already addressed dismissal, and -- albeit with difficulty – determined not to dismiss the pending rate request. The Commission noted Commission Staff's reluctance to pursue dismissal, and it also cited safety concerns as a principal reason for denial of dismissal. No party is now actively advocating dismissal. The Commission has expressed a desire for an expeditious hearing so questions regarding Olympic's rates may be resolved and Olympic may plan its financial future. However, the circumstances displayed here, particularly with regard to the nature of the Company's representations at the April 4 hearing and its total lack of compliance in any regard with the Washington order,[19] could persuade a reasonable Commission to adopt dismissal as an appropriate sanction.

C. Assessment of Penalties.

[18] We note that the Commissioners will be able to evaluate all of the facts and the argument of record, and to accord whatever weight that evidence warrants under those circumstances. The circumstances relating to the change of company management; the production of evidence; the credibility of witnesses; and the absence of evidence that the Commission might consider relevant or significant, all may constitute factors in the Commission's evaluation of the evidence and its findings of the facts that will determine the outcome of the proceeding. It may well have the discretion to adopt the finding that Mr. Brena urges, but will exercise its discretion after hearing all of the evidence.

[19] As noted above, the Company did not tell Tesoro in the Washington State proceeding that it would not be providing the required response, but relies on its response by FERC counsel in the FERC proceeding.

69 RCW 81.04.380 provides for a penalty of $1,000 per violation, and the RCW 81.04.405 provides for a penalty of $100 per violation. Both are applicable to regulated companies and to their officers, employees, and agents (here, presumably including attorneys) who violate or assist in the violation of Commission orders, directions, or rules. The penalty established in RCW 81.04.405 is by terms of that statute in addition to all other penalties provided by law.

70 The Commission has the flexibility, therefore, to see the failure to comply with the Commission order as a single violation or as seven; and to see each as a one-time violation or as a continuing violation for the nearly 60 days that Olympic has been out of compliance with the order. The Commission also has the flexibility to apply the $100 penalty, the $1,000 penalty, or both, for each occurrence or for each day of each continuing occurrence.

D. Evaluation of alternative sanctions.

71 Given the history leading up to the motion for sanctions, we believe that application of the $100 penalty would trivialize the behavior that has proved so problematic. Olympic's unwillingness or inability to respond to discovery requests, and its refusal to comply with directions and orders that it comply with WAC 480-09-480, appear to call out for a more significant penalty than RCW 81.04.405 provides.

72 Looking at the costs that discovery issues alone have imposed on the Commission – the delays and burdens on its advocacy staff and consultants, the time of its attorneys, the time of the Commissioners and the advisory staff spent on preparing, hearing and researching discovery matters, the costs of transcripts and court reporters to memorialize conferences and hearings, the time in research and order preparation, as well as the changes to schedules necessary to accommodate discovery failures -- the cost of discovery issues alone in this docket are substantial. Add in the costs imposed on other parties and on Olympic itself, including appearances, travel, preparation, and review, and we suspect the total triples. The smaller $100 penalty seems clearly to be inappropriate.

73 The next question is whether to set the penalty for a single violation or as multiple violations. In the message listing the requests, eleven separate items were sought. Each item is individual and could have been (and some were) independently complied with. Olympic did provide responses to four of the requests and its FERC counsel provided the reason why Olympic would not provide a response in the Federal docket

to a fifth element of the eleven. We should regard each of the eleven items as an individual request for specific information and see each failure as a separate violation.

74 The final question is whether to assess a penalty for each violation, and for each day's continuation of the violation. As of May 31, the total for each violation would be nearly $50,000 and the total thus could reach nearly $350,000 in penalties for six violations for each day of continuing violation.

75 We think that there is some equivalence between the costs imposed by Olympic's repeated discovery failures on the parties, as noted above, and this level of penalty. We believe that such a penalty could be warranted in this docket and believe that the Commission, on review of this recommendation, could with the full support of the record and in the exercise of sound judgment, impose a penalty of this level.

76 However, we are cognizant that the Commission has not previously imposed penalties for discovery failures. The Commission exercised great patience with Olympic on numerous occasions, choosing to encourage a collegial approach required in the rule and to believe continuing Olympic's representations that it would provide information. While Olympic repeatedly promised production of information and the initiation of communication that it made little apparent effort to follow through on, we recognize that Olympic's discovery performance did improve from the first to the most recent statements.

77 We also recognize that the sanctions imposed for these violations are, in fact, imposed for these specific violations and not for other events that could have constituted violations and on which penalties could have been imposed but were not. These penalties do arise in the context of repeated and continuing violations that have caused serious harm to other parties. These penalties are not to be imposed as punishment for unclaimed sanctions on other violations but are to be limited to these six violations. Finally, we recognize the Commission's policy that penalties' principal purpose is to provide incentive for future compliance.

E. CONCLUSION

78 For all of these reasons, we recommend a penalty of $1,000 for each of six violations, plus $1,000 for each violation for each of four days' continuing violation on those six violations for failing to comply with the order. The total recommended penalty as to

those violations is therefore $30,000, which is about a tenth of the possible penalty under this statute.

79 As to the seventh violation, addressed to Olympic's failure to comply with the Washington State order by responding to Tesoro in this docket, we recommend no penalty, subject to the confirmation specified above. Olympic is apparently not a continuing barrier to access to information and we consequently believe on the circumstances of this record no penalty is appropriate..

80 The total recommended penalty is therefore $30,000.

81 The total recommended penalty is undoubtedly minuscule in comparison with the Company's costs of preparing and litigating its rate case, likely minuscule when compared with its costs of litigating discovery issues alone, and truly minuscule in comparison with the financial consequences that failure to comply with discovery orders and rules has caused to the Commission and to the parties. We think that the proposal is large enough, however, to provide incentive for future compliance.

82 We reiterate that the Commission has discretion in determining the statute under which to assess penalties, discretion in determining how many violations to find, and discretion in determining the extent of sanctions. We look at the seriousness of the harm, the pervasiveness of the behavior involved in the violation, the critical need of the Commission and all parties for communication and cooperation in discovery matters to enable timely completion of proceedings under statutory deadline, and the threat to the foundations of the system when parties fail to meet the obligations of rules and orders.

83 There are other reasonable analyses that would provide rational and objective support for the nature of sanctions, the amount of any penalties, and the basis of calculation. The parties may have views on the subject, and the Commission will exercise its discretion independently on review.

FINDINGS OF FACT

84 (1) The Commission conducted a hearing on discovery matters in Olympia on April 4, 2002, at which the Commission denied, as confirmed in its Tenth Supplemental Order, a motion for dismissal of the proceeding for violation by Olympic Pipe Line Company of rules or orders relating to discovery.

85 (2) The Commission ordered on the record and reiterated in its Tenth Supplemental Order, after discussion among the parties on the record, and without objection from Olympic Pipe Line Company, that Olympic, *inter alia*, produce information in response to all of intervenors' outstanding data requests no later than April 12, 2002, including responses to eleven specific requests from Tesoro for information relating to pre-1999 throughput (that is, the volume of product transported by the pipeline) and the effect on throughput of certain other factors.

86 (3) Olympic did not seek review of the Tenth Supplemental Order or of the obligations placed upon it in the order.

87 (4) Olympic provided information in response to four of the eleven items. It stated through FERC counsel in response to a FERC order to compel production of documents, but not through Washington State counsel in the Washington State proceeding, that it had conducted a search and failed to find any information that would be responsive to a fifth item. It refused to provide information in response to the remaining six items. As to those items, Olympic stated through a letter from its FERC counsel in the FERC proceeding, served on the day of the Washington State hearing on the issue, that it would not provide the information because it did not prepare or maintain compilations of the requested information in the form requested. Olympic did not otherwise communicate with Tesoro on or before April 12, 2002, regarding the status of or progress toward producing the information requested and ordered to be produced in the Washington State proceeding.

CONCLUSIONS OF LAW

88 (1) The Commission has jurisdiction over this matter pursuant to the provisions of Chapters 81.04, 81.28, 81.88 and 34.05 RCW and 480-09 WAC.

89 (2) The Commission may impose penalties of $1,000 per violation of a Commission order, rule, or directive under RCW 81.04.380 and may impose penalties of $100 per violation of a Commission order, rule, or directive under RCW 81.04.405. The penalties are appropriate sanctions for violations of WAC 480-09-480, as stated therein. The terms of each statute provide that

the penalty may be applied independently for each day of a continuing violation.

90 (3) Olympic Pipe Line Company violated the direction and the order of the Commission expressed on the record of the April 4, 2002, hearing on discovery issues and as expressed in the Tenth Supplemental Commission Order in this docket by refusing to provide answers to six data requests. The violations occurred on April 12, 2002, the deadline established in the order for compliance, when Olympic failed to respond to outstanding data requests with the requested information. The violation was repeated, and the penalty may be independently imposed, for each day on which Olympic continued to refuse to comply with the Commission order.

91 (5) A penalty of $5,000 per each of six data requests, listed as items five through nine and item eleven, recognizing the failure to provide the information when due and four days' penalty for each continuing violation, will connote a measure of the seriousness of Olympic's violations and will provide incentive for Olympic to make timely responses to case-related data requests in the future.

92 (6) No penalty should be recommended for the failure to provide the information requested in item No. 10, relating to the Bayview facility, provided Olympic through its Washington counsel reaffirms its response and identifies the exact steps it took to find the information, no later than the time specified for comments on this order.

93 (7) The Commission should impose a penalty of $30,000 on Olympic pursuant to RCW 81.04.380 as a sanction for Olympic's refusal to comply with the Commission's Tenth Supplemental Order to produce documents in response to discovery data requests pursuant to WAC 480-09-480 and its failure to respond in this docket as to the status of its obligations under the Tenth Supplemental Order.

ORDER

94 The undersigned administrative law judge finds that violations have occurred with regard to six individual data requests, in that the Commission's Tenth Supplemental Order directed Olympic to produce the information on April 12, 2002, and in that

Olympic failed to produce the information on April 12, or thereafter, as required by the terms of the order.

95 The undersigned respectfully recommends that the Commission impose penalties in the amount of $30,000 against Olympic Pipe Line Company for its refusal to comply with the Commission's Tenth Supplemental Order in this docket, and recommends that no penalty be assessed with regard to item 10 subject to the provisions set out above.

Dated at Olympia, Washington and effective this 3rd day of June, 2002.

C. ROBERT WALLIS
Administrative Law Judge

NOTICE TO PARTIES: This order is entered pursuant to the Commission's Twelfth Supplemental Order of May 7, 2002, asking for the recommendation of the administrative law judge as to the existence of violations and the nature of sanctions, if any, to be imposed. Parties may present comments to the Commission about this order and the recommendations herein. Those comments will be timely if filed with the Commission no later than 3:00 p.m. on Monday, June 10, 2002, and responses filed and served no later than 5:00 p.m. on Wednesday, June 12, 2002. Comments may be presented via telefacsimile by that time provided the transmission is complete by the stated deadline; courtesy copies are sent via electronic mail no later than the time of service; and hard copies are filed and sent to other parties to be delivered before 11:00 a.m. on the following day.