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1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION  
3 WASHINGTON UTILITIES AND            ) Docket No. TO-011472  
4 TRANSPORTATION COMMISSION,        ) Volume XVIII  
                                      ) Pages 1812 to 1952  
5                   Complainant,        )  
                                      )  
6                   vs.                    )  
                                      )  
7 OLYMPIC PIPELINE COMPANY,         )  
8 INC.,                                 )  
                                      )  
9                   Respondent.         )  
                                      )  
                                      )  
                                      )

10                   A hearing in the above matter was held on May  
11 21, 2002, at 8:30 a.m., at 1300 South Evergreen Park  
12 Drive Southwest, Room 206, Olympia, Washington, before  
13 Administrative Law Judge ROBERT WALLIS.

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15                   The parties were present as follows:  
16                   THE COMMISSION, by LISA WATSON, Assistant  
17 Attorney General, 1400 South Evergreen Park Drive  
18 Southwest, Olympia, Washington 98504-0128, Telephone  
                                      (360) 664-1186, Fax (360) 586-5522, E-mail  
                                      lwatson@wutc.wa.gov.

19                   OLYMPIC PIPELINE COMPANY, INC., by STEVEN C.  
20 MARSHALL and WILLIAM R. MAURER, Attorneys at Law,  
21 Perkins Coie, 411 - 108th Avenue Northeast, Suite 1800,  
22 Bellevue, Washington 98004, Telephone (425) 453-7314,  
23 Fax (425) 453-7350, E-mail marss@perkinscoie.com.

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25 Joan E. Kinn, CCR, RPR  
Court Reporter

1813

1                   TESORO WEST COAST COMPANY, by ROBIN O. BRENA,  
2                   Attorney at Law, Brena, Bell & Clarkson, 310 K Street,  
3                   Suite 601, Anchorage, Alaska 99501, Telephone (907)  
4                   258-2000, Fax (907) 258-2001, E-mail  
5                   rbrena@brenalaw.com.

6                   TOSCO CORPORATION, by CHAD STOKES, Attorney  
7                   at Law, Energy Advocates, LLP, 526 Northwest 18th  
8                   Avenue, Portland, Oregon 97209, Telephone (503)  
9                   721-9118, Fax (503) 721-9121, E-mail  
10                   efinklea@energyadvocates.com.

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1 MR. MAURER: Bill Maurer on behalf of Olympic  
2 Pipeline.

3 JUDGE WALLIS: Other parties.

4 MR. STOKES: Chad Stokes, Tosco.

5 MS. WATSON: Lisa Watson for Commission  
6 Staff.

7 JUDGE WALLIS: Very good.

8 MR. MARSHALL: And Steve Marshall for Olympic  
9 Pipeline.

10 JUDGE WALLIS: Very well, thank you.

11 Let's begin with brief opening statements  
12 from Tesoro and from Olympic, and Mr. Brena.

13 MR. BRENA: Thank you, Your Honor. I would  
14 like to begin by first identifying what the problem is.  
15 The problem is trying to determine what a representative  
16 level of throughput will be for Olympic Pipeline during  
17 the period in which the rates that will be set at this  
18 hearing will be in effect. That's the throughput issue.  
19 Olympic has proposed various and sundry throughput  
20 models and amounts. In their initial filing requesting  
21 a 76% rate increase with this Commission, they used one  
22 throughput level. In the subsequent filing with a 62%  
23 rate increase, they used a second throughput number.  
24 And as I understand it, they intend to try to change  
25 their case at this late date in order to adopt yet a

1816

1 third throughput volume.

2           It's a very important issue in this  
3 proceeding, because as all the parties are aware, this  
4 line is not operating under normal operating conditions  
5 and as to -- it's unclear and will be unclear as to when  
6 it's likely to return to normal operating conditions.  
7 Stated differently, this line's throughput is  
8 artificially constrained, and for what period of time is  
9 currently unknown. So the challenge is to try to figure  
10 out or obtain discovery that indicates what normal  
11 operating throughput will be and that allows us to put  
12 on a case that demonstrates what a representative level  
13 of throughput should be during the period in which the  
14 rates are in effect.

15           There have been several changes to this  
16 language impact throughput. We have gone through a  
17 tremendous amount of effort and time to try to learn how  
18 this system works and what factors play into the  
19 determination of throughput. We know that the  
20 artificial constraint currently, the largest one just to  
21 cite an example is down time. They have an unusually  
22 high level of projects because they are adding to their  
23 rate base, and their line will be out of service a good  
24 deal, and they are in effect attempting to use that  
25 period as a representative level of throughput into the

1817

1 future.

2                   The discovery, and I won't go through because  
3 Your Honor asked that this statement be brief, the  
4 entire tortured history of trying to get throughput  
5 information out of Olympic, but in relevant part, I had  
6 asked in the first technical conference for Mr. Talley  
7 to be made available.

8                   JUDGE WALLIS: I'm wondering if it might be  
9 better to defer that to your argument, and then the  
10 facts would be tied to your proposal for responsibility.

11                   MR. BRENA: Well, I intend for these to be  
12 very broad and general comments.

13                   JUDGE WALLIS: Very well.

14                   MR. BRENA: Rather than specific, Your Honor,  
15 if I may.

16                   JUDGE WALLIS: Please proceed.

17                   MR. BRENA: And he was not made available  
18 during that first technical conference. We asked for a  
19 second technical conference at which he could be made  
20 available, and we asked to sit down with him in person  
21 with the documents there, and he was not made available  
22 on that sort of basis. He was made available to me in  
23 Alaska on a couple of hours notice.

24                   Now when we finally did sit down with  
25 Mr. Talley, we learned a great deal about the line and

1818

1 about what's important, and he listed out what the  
2 factors are that impact the throughput on the Olympic  
3 Pipeline system. And we talked with him in this  
4 technical conference concerning what sorts of  
5 information may be available so that we could gauge what  
6 the representative level of throughput should be on this  
7 line. We asked for that information, it was ultimately  
8 memorialized in an E-mail that I sent to Mr. Marshall.

9           The E-mail is 11 points, and this is  
10 essentially over their compliance with those 11 points.  
11 I would note that with regard to each of those 11  
12 points, they agreed to provide the information, that it  
13 was compelled by this Commission as well as FERC that  
14 they do comply this information, and I would note for  
15 the record that we haven't had a single response from  
16 Olympic's Washington counsel with regard to a single  
17 point on this list. We did get a letter from their  
18 Washington counsel indicating that with regard to  
19 documents that their responses would incorporate the  
20 documents of FERC's counsel. And I would like to just  
21 read just one brief part of that letter. It says:

22           Our response of the WUTC will refer to  
23           the documents attached in the FERC  
24           responses.

25           So in their letter to us, they said first

1819

1 they were going to respond, and that but in order to  
2 avoid duplication of records that they would just refer  
3 to those documents produced. As we go through these,  
4 there hasn't been -- I would ask Your Honor to ask the  
5 question, please show me the WUTC response to this data  
6 request in which they have either objected to it or any  
7 response.

8           The legal standard here I think is very  
9 flexible, allows Your Honor a lot of flexibility with  
10 regard to it. I read the Commission's 12th order as not  
11 wanting to determine throughput, but not foreclosing the  
12 opportunity for factual findings with regard to the  
13 failure to provide relevant discovery. Without this  
14 discovery, there will be no record, and there will be no  
15 record as to what a representative level of throughput  
16 will be on this line. They have not presented a  
17 representative level of throughput. They have not  
18 presented the discovery to any party so that they can  
19 test whether or not the throughput which will be their  
20 third or fourth that they intend to come up with next  
21 actually represents a representative level of throughput  
22 for the future periods.

23           I guess I would like to briefly just respond  
24 to three of the things that they have said in their  
25 various pleadings that we have not had an opportunity to



1820

1 really respond to. The first has to do with that there  
2 was some sort of modification to this agreement. We  
3 have never agreed to modify the terms of this. I have  
4 had one conversation that was with FERC counsel at which  
5 I indicated a willingness to consider instead of a full  
6 year of 1998 the last six months of 1998 and the last  
7 six months of information with regard to 2001 in order  
8 to make it easier for them to comply with this.

9 I have read implicitly in many of their  
10 filings that somehow there would be a burdon associated  
11 with the compilation of the information that they agreed  
12 to compile and that they were compelled to compile. All  
13 I can say is that they were aware in the technical  
14 conferences, they were well aware that they would need  
15 to compile this information before they agreed to  
16 provide it. And it's disingenuous at this point to go  
17 back and say, well, we need to compile this information,  
18 we don't have it. Of course they need to compile the  
19 information, that is what we understood when we made the  
20 request. And Mr. Talley's deposition is directly on  
21 point, and I asked him in his deposition:

22 So when I sent this request, I  
23 understood that the information would  
24 need to be calculated from those  
25 sources, and that's what you represented

1821

1                   to me in the technical conference,  
2                   correct?

3                   To which he responded, uh-huh.

4                   So there's no doubt that they knew that what  
5 they needed to do was go out and compile information and  
6 provide it to the parties so that we would have a  
7 representative gauge with which to test all the parties'  
8 proposed throughputs.

9                   I also want to focus on, you know, what that  
10 leaves us with as an intervener or any party or what the  
11 Commission is left with. What we have proposed in our  
12 case is that the Commission merely adopt the normal  
13 operations as represented by Olympic in their last  
14 approved rate filing by this Commission. They  
15 represented to the Commission that that was normal  
16 operations. They have not suggested any evidence that  
17 would suggest that that would not be true. We think  
18 that that's the way that this should go, that we  
19 shouldn't be in a situation where the only witnesses  
20 that are available are allowed to pontificate with  
21 regard to the representativeness of their throughput  
22 while at the same time not producing information so  
23 those opinions can be tested.

24                   Finally, I would like to address the issue of  
25 the source documents. They have suggested that the

1822

1 green sheets are somehow source documents for their  
2 compilations. I do not believe that they are. I don't  
3 think that, we asked their witness in deposition, and  
4 his deposition is attached to our supplemental material,  
5 we asked him to go through just very simple calculations  
6 with those green sheets to show us how we would go about  
7 doing those compilations, and he was effectively unable  
8 to do so. If we're in a situation where what they're  
9 claiming to be source documents their own engineer can't  
10 divine the information from them, then it's improper to  
11 refer to them as source documents whatsoever.

12 More importantly from my perspective, you may  
13 or may not recall on March 8th I made the point that  
14 their July throughput was very, very high and that I  
15 thought that that was good evidence that the  
16 representative level of throughput should be much higher  
17 than they indicated, because in July Mr. Talley  
18 represented to me that they had given people time off,  
19 and so it represents a normal level of throughput  
20 without all of these capital projects ongoing. That was  
21 on the 8th. My first technical conference with  
22 Mr. Talley was on the 15th. It ran late into the day on  
23 the 8th, and there was a weekend intervening. He had  
24 available to him detailed information with regard to  
25 that month that included product composition, that

1823

1 included the use of DRA, that included strips, that  
2 essentially he had available to him in three days from  
3 his products movement group all the information he  
4 needed to sit in a deposition and defend that month as  
5 non-representative and to explain why. Now, you know,  
6 it just can't be that Mr. Talley can get on the phone to  
7 his product movements group and create a month's worth  
8 of information in probably a half a day or a day's worth  
9 of work on their part, but somehow that that information  
10 could not be available to the other parties or similar  
11 information can be.

12           With regard -- there's been much made about  
13 the failure to consult on this point. There's nothing  
14 much to consult about when there's nothing produced. I  
15 mean the order was unbelievably clear, that they were to  
16 compile and produce this information. They did not.  
17 The Washington counsel did not respond at all. And yet  
18 they in their blame the victim fashion have made a big  
19 issue of our failure to consult. When we were aware  
20 that it was inadequate, and I waited to make that  
21 judgment for a certain amount of time until we had an  
22 opportunity to determine what the scope of the sanctions  
23 motion would be, we informed Washington counsel of our  
24 intention ahead of time to file the motions for  
25 sanctions. All I can say is that there's never been an

1 offer to provide the information. There's only been  
2 justification for why it shouldn't be produced. And I  
3 don't know how much clearer these can be. The, you  
4 know, provide a list with down time by month, I don't  
5 know how that can be any clearer. It's a perfectly  
6 clear question to which there's absolutely no response.

7           So with regard to these issues, there's no  
8 modification, we needed the information, we were forced  
9 to file both of our cases without it. The Commission is  
10 not going to know what, an adversarial context, what a  
11 representative level of throughput could be. It's  
12 whatever their opinions are that could be offered can  
13 not effectively be challenged with facts from their  
14 system. And this is after they sat here and after --  
15 there's a long history to discovery in this, the  
16 Commission also dismissed this, and within that context,  
17 that is the context in which they said they would  
18 compile and produce that information and have not.

19           You know, I have reviewed the case authority  
20 with regard to sanctions, and my goodness, you know,  
21 they have just failure to comply with a routine  
22 discovery order at which you disclose the information  
23 with regard to the substance of an expert opinion or  
24 refuse to provide information on that substance, on the  
25 expert's opinion, routinely they disallow that expert.

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1 We will get into the sanctions I'm assuming as a  
2 separate topic, and we'll have an a opportunity to  
3 discuss them, but my review of the case authority in  
4 this area suggests that even the failure to comply with  
5 a routine discovery order is sanctionable by expert  
6 witness preclusion and has been deemed willful when it's  
7 -- when there is not a good excuse for why it is that  
8 they did not. And the Western Sea cases is the one that  
9 I think goes the most to the point.

10           So I guess in summary, you know, discovery  
11 has been very difficult in this case. Staff has  
12 represented that in 20 years of practicing, they have  
13 never been across a case like this, that the regulatory  
14 process would grind to a halt if this sort of discovery  
15 practice were continued. The Commission expressed grave  
16 concerns. Commissioner Hemstad indicated that in his  
17 nine years of practicing as a commissioner that he had  
18 -- this is one of the most serious issues that he had  
19 ever seen. And that was when -- that was in the hearing  
20 at which they were compelled to produce these 11 items,  
21 for which more than half of which they have had no  
22 response at all. So I guess from Tesoro's perspective,  
23 enough is enough. And we argued against dismissal  
24 because we didn't think it got to the issues, but we'll  
25 also continue to argue for a fair hearing, at which it

1826

1 just simply is not fair for them and there is no excuse  
2 for them not to have compiled and produced information  
3 that would demonstrate whether the level of throughput  
4 they're proposing is truly representative or not.

5 Thank you.

6 JUDGE WALLIS: Mr. Maurer.

7 MR. MAURER: Thank you, Your Honor.

8 On February 1st, Tesoro issued Data Request  
9 Number 102-C to Olympic:

10 Produce all engineering studies and  
11 documents, and discuss the design  
12 capacity of the pipeline system.

13 Olympic responded in full consistent with  
14 Civil Rules 33(c) and 34 of the Washington state rules  
15 of procedure and replied:

16 The engineering drawings,  
17 specifications, and design information  
18 on capacity for Olympic's 400 mile  
19 system are so voluminous, bulky, and  
20 expensive to reproduce that Olympic will  
21 make them available at its offices in  
22 Renton.

23 These documents, including the green sheets,  
24 were available to Tesoro and its experts for inspection  
25 and copying since February 22nd. On February 27th,

1827

1 Tesoro writes a letter to Olympic's counsel identifying  
2 problems with Olympic's data responses. Tesoro doesn't  
3 mention 102-C. On March 8th, for the first time in this  
4 proceeding, Tesoro comes up with a problem with 102-C.  
5 None of the documents they had submitted to us before  
6 had mentioned 102-C, they had not mentioned it in their  
7 motion to compel, and Tesoro's counsel admitted that  
8 during the proceeding.

9           So they bring up 102-C in the course of the  
10 March 8th hearing. Your Honor presided over that and  
11 recalls what occurred there. Tesoro says, there's just  
12 too darn many documents. There's a representation in  
13 their information that they filed with Your Honor that  
14 the further discussions on 102-C were meant to benefit  
15 Olympic. If Your Honor were to review the March 8th  
16 hearing, you would see that Mr. Brena repeatedly asked  
17 for the narrowing of the scope, not for any reason to  
18 benefit Olympic, it would be noticeable by its  
19 inconsistency, but what they wanted to do was they said,  
20 well, we want a narrowing of the documents, there's just  
21 too darn many documents, Tesoro's counsel says. So they  
22 say, we want to get into the room with the engineer and  
23 figure out what Olympic's got and then ask them to  
24 produce stuff. Essentially what they wanted was for us  
25 to take the universe of documents that we had first made



1828

1 available to them on February 22nd, they wanted to sit  
2 down with Bobby Talley or a similar person at Olympic's  
3 headquarters, go over which documents would be  
4 responsive to their requests, and have those documents  
5 produced. Well, Tesoro's counsel represented that he  
6 didn't want a bunch of stuff that wasn't responsive to  
7 his request, so we said, sure, we can have Mr. Talley  
8 available. But the important thing to remember is that  
9 this was done because Tesoro said that our initial  
10 response produced too darn many documents.

11           During that hearing, Your Honor, you may also  
12 recall that Tesoro agreed to E-mail Olympic a list of  
13 questions that they wanted Mr. Talley to address and to  
14 have documents prepared that would be responsive, not  
15 prepared, but to find documents that would be -- would  
16 give them information regarding specific inquiries that  
17 they might have, not to create new documents, not to  
18 create new lists, not to create new averages. Tesoro  
19 never did that.

20           On March 15th and March 21st, Tesoro doesn't  
21 come down to meet with Mr. Talley to discuss the  
22 documents that are available. They hold conference  
23 calls. Now I'm not quite sure how one reviews documents  
24 without actually seeing them, but this apparently was  
25 the case. This was essentially the same story with the

1 OPS documents that Olympic has made available to Tesoro  
2 during this proceeding. When we make documents  
3 available to them, we have to continually and repeatedly  
4 ask them, when are you going to come and see them.

5           At the hearing, at the conferences, the  
6 technical conferences with Bobby Talley, Mr. Talley  
7 explains to Tesoro that Olympic doesn't keep summaries  
8 of batch size, average down time, strip runs, and  
9 throughput. This information can be found on green  
10 sheets, pump records, invoices, and other sort of  
11 day-to-day operational information that the company  
12 keeps in its business practice. Mr. Talley explained  
13 this to Tesoro. And if you refer to the declaration of  
14 Bobby Talley, which is Tab P in the materials I sent to  
15 you yesterday, Your Honor, you will see the precise  
16 level of information communicated to Tesoro during these  
17 technical conferences.

18           12 days, 12 days after the first conference  
19 with Tesoro, Tesoro sends an E-mail, not a proper data  
20 request, not anything that would be, you know, not a  
21 supplement to an earlier data request, nothing referring  
22 to 102-C, they send an E-mail to Olympic's WUTC counsel.  
23 They ask for lists and averages despite Mr. Talley  
24 having told them that the material would not be -- does  
25 not separately compile this information. And it's

1830

1 important to remember at this point, Your Honor, that by  
2 March 27th when this E-mail had arrived, the documents  
3 that Tesoro had initially asked for had been available  
4 to them and their experts since February 22nd. They had  
5 made no effort to actually come down and review those  
6 documents in Renton.

7           On April 1st, the FERC ALJ issues an order  
8 compelling Olympic to produce certain items by April  
9 12th. Now it's not clear to me from the statements on  
10 the record, and I refer to this in my answer, what  
11 exactly the parties agreed to. At some point, Mr. Brena  
12 says that we have agreed to produce these lists. It's  
13 not clear to me who this we is. I believe that  
14 Mr. Miller thought he was talking about Mr. Marshall.  
15 Mr. Marshall never agreed to make any such  
16 representation. And if you refer to Mr. Marshall's  
17 declaration at Tab N, you will see that. So it's  
18 unclear. To clear up any of the confusion, on April 4th  
19 Olympic's FERC counsel sends a letter to Tesoro, and  
20 this is a key document. In that document, Mr. Miller  
21 says, we want to give you -- we want to make clear, it  
22 says:

23           We believe that it is useful at this  
24            juncture to advise you of what Olympic  
25            is able and is not able to produce in

1831

1 response to your E-mail, with respect to  
2 both information that may be contained  
3 in the green sheets and to information  
4 that may not be contained the green  
5 sheets.

6 And here's the key phrase, Your Honor:  
7 So that we can both make informed  
8 decisions as to how to proceed well  
9 before the drop dead date of April 12th,  
10 2002, agreed to at the discovery  
11 conference oral argument on March 28th,  
12 2002.

13 And he's referring to the discovery  
14 conference at FERC.

15 JUDGE WALLIS: What's the citation for this  
16 document, Mr. Maurer?

17 MR. MAURER: It's Attachment D to my answer,  
18 and it also is --

19 JUDGE WALLIS: Is that B as in baker?

20 MR. MAURER: I'm sorry, D as in David.

21 JUDGE WALLIS: Thank you.

22 MR. MAURER: And it is also Tab K in the  
23 material that I had sent to you yesterday.

24 JUDGE WALLIS: Thank you.

25 MR. MAURER: In that letter, saying that we

1832

1 want to make sure what -- we want to be clear with you  
2 what is going to be produced so we can proceed before  
3 the drop dead date on April 12th. Mr. Miller says with  
4 regard to the request for lists, lists that Olympic has  
5 never prepared before, has always told Tesoro that they  
6 don't compile and doesn't have, Mr. Miller quite rightly  
7 says no such list, for each of these requested lists:

8           No such list is prepared or maintained  
9           by Olympic, although such a list can be  
10          compiled from the green sheet that you  
11          have requested by your consultants.

12          Now this is key, because not only had these  
13 materials been available to Tesoro's consultants since  
14 February 22 and they have been sitting gathering dust in  
15 Renton, but Mr. Miller makes clear that, you know,  
16 there's no lists that we have. We can't produce lists  
17 that we don't have. You can take the green sheets that  
18 have been available to you since February 22nd and  
19 compile the lists. It's also consistent with what Your  
20 Honor ordered us to do on March 8th, which is allow  
21 Tesoro to confer with Olympic engineers, narrow the  
22 scope of documents available to them, and then produce  
23 the documents that have so been narrowed.

24          Now the important thing, another key point,  
25 is what happens next. On April 4th, Tesoro receives

1833

1 this letter. There's no ambiguity in the letter, Your  
2 Honor. Mr. Miller says we want to be able to make  
3 informed decisions on how to proceed well before the  
4 drop dead date of April 12th, inviting them to engage in  
5 a discussion about these issues. It says we don't have  
6 any lists, we're not going to produce lists because we  
7 don't have them. Tesoro responds on April 5th with Mr.  
8 Wensel's letter, which is Tab L in your notebook,  
9 responding to the invitation of Mr. Miller and the  
10 statement that we want to be clear on how we're going to  
11 proceed before the April 12th drop dead date.

12 Mr. Wensel, Tesoro's counsel, responds:

13           It appears that this summary data which  
14           would be responsive to Tesoro's  
15           discovery requests is not available.

16           Please confirm with us as soon as  
17           possible whether or not Olympic intends  
18           to compile the summary data in lieu.

19           That's a key phrase.

20           In lieu of producing the source  
21           documents. If Olympic doesn't intend to  
22           compile such summary information, then  
23           we will have to arrange for the source  
24           documents to be copied.

25           So in response to Mr. Miller's letter, Tesoro

1834

1 writes back and says, look, either give us the source  
2 documents or give us the lists. On April 8th, Olympic's  
3 FERC counsel, Ms. Marcil, responds and says, we're going  
4 to produce the source documents. I should note as well  
5 that on April 4th or on April 5th, Tesoro did not file a  
6 motion to clarify at FERC, didn't file a motion to  
7 compel at FERC. They knew exactly what Olympic intended  
8 to do on April 4th but didn't make any efforts at FERC  
9 to produce the information that they say they so  
10 desperately need now. So Ms. Marcil sends a letter to  
11 Tesoro's counsel on April 8th and says in effect, well,  
12 you said take option A or option B, we take option B,  
13 we're going to produce the source documents. No  
14 objection from Tesoro, no E-mails, no motions, nothing,  
15 nothing at FERC, nothing here, no response at all. In  
16 fact, we don't hear anything from Tesoro until April  
17 23rd where Olympic's counsel has approached Tesoro and  
18 asked are you going to file a motion for sanctions, and  
19 I will get to that discussion in a few minutes.

20           So at this point, it's their lack of action  
21 at FERC, their lack of communication to Olympic, their  
22 lack of action here after Olympic had been in the April  
23 4th hearing in front of Your Honor and the Commission  
24 regarding discovery issues here, you know, I would say  
25 that there was a ripe field for them to be able to say

1835

1 that if there was a discovery violation, they would be  
2 able to get some sort of action to fix that discovery  
3 violation.

4           On April 12th, the deadline that Your Honor  
5 set in the April 4th hearing, comes and goes. Now by  
6 this time, Tesoro knew since April 4th that no lists  
7 were going to be forthcoming because we don't have any.  
8 Again, they don't file anything. They knew at 12:01.  
9 On April 12th, they knew at 12:01 on April 4th, April  
10 5th, that we weren't going to produce a list that we  
11 didn't have.

12           On April 15th and 16th, Tesoro finally makes  
13 the effort to review the green sheets, which have been  
14 available to them since February 22nd. Instead of  
15 sending an expert or a consultant or someone who is  
16 familiar with pipeline operations, they sent an  
17 attorney. Not surprisingly, he has a difficult time  
18 deciphering green sheets. As a personal aside, I have  
19 worked on cases where I have been handed large amounts  
20 of highly technical documents, medical records, electric  
21 line drawings, things like that, it's usually not  
22 incumbent on the lawyer to figure out how exactly a  
23 toaster works or a blender or how a particular medical  
24 device works. You get an expert to come in, take a look  
25 at it, and figure out what that means.



1                   On April 16th, Mr. Marshall and I called  
2 Tesoro's counsel and asked them if there's any  
3 outstanding discovery issues that we can address. At  
4 this point, Tesoro had known since April 4th that no  
5 nonexistent lists were going to be forthcoming. We get  
6 -- we don't get the response that yes, produce the lists  
7 or we're going to file a motion. We don't get any  
8 response at all. Tesoro's counsel says that he hasn't  
9 finished reviewing the documents that have been  
10 produced. And Your Honor may recall that you were on  
11 the line as well during the discussion of the need for  
12 an extension. On April 17th, they move for an  
13 extension. In their motion, they say, quote, they say  
14 they can't tell:

15                   Whether a motion for sanction is  
16                   appropriate or necessary until they have  
17                   completed the review of Olympic's recent  
18                   discovery productions.

19                   They have known at this point for 13 days  
20 that we're not going to produce any lists, and they  
21 agreed on April 5th that production of the green sheets  
22 is sufficient, as demonstrated by Mr. Wensel's letter.  
23 They also say at this point that they're going to confer  
24 with -- discuss inadequacies with Olympic's counsel  
25 prior to filing a motion to dismiss.

1                   On April 22nd at the hearing, I'm sorry, at  
2 the deposition, Mr. Marshall asks Tesoro's counsel if  
3 there's any outstanding discovery issues that we can  
4 address. This is April 22nd, we're still making efforts  
5 to make sure that everything is as we perceived it to  
6 be, that we have complied with -- fully with the  
7 discovery requests made to us when we submitted our  
8 material on April 12th. We don't hear anything from  
9 Tesoro's counsel.

10                   On April 23rd, I asked Tesoro's counsel if a  
11 motion is forthcoming. There's been a representation  
12 here this morning that we were informed that a motion  
13 was coming and somehow that this was an attempt to give  
14 us an opportunity to address the -- address creating the  
15 lists before April 25th when the deadlines were due.  
16 That's not quite how it occurred. I asked Tesoro's  
17 counsel. We weren't approached. Tesoro's counsel and  
18 Olympic's counsel had been sitting in a room together at  
19 that point for, you know, two or three days, and we had  
20 heard nothing from Tesoro about discovery issues. When  
21 we had had that discussion on April 23rd regarding the  
22 motion for sanctions, that is the first time since April  
23 5th that we had heard anything about lists. We hadn't  
24 heard a single thing since April 5th about any lists.

25                   And in his deposition on April 23rd, Bobby

1838

1 Talley takes Tesoro's counsel through the green sheets  
2 and explains to them how they work. There's been  
3 repeated representations that somehow Mr. Talley had a  
4 difficult time with the going through the green sheets.  
5 I have read through the transcript, Mr. Marshall was  
6 there, I think the only difficulty that Mr. Talley had  
7 was he didn't have a calculator with him. And if you  
8 would go through the transcripts as well, Your Honor, of  
9 the deposition, you will see that Mr. Talley doesn't  
10 have a difficulty with any of this information. He just  
11 needs a calculator. One wasn't available to him or one  
12 wasn't made available to him at the time.

13           And then inexplicably the discussion on the  
14 green sheets stops. It just comes to an end. They  
15 could have kept Mr. Talley there for quite some time  
16 going through the green sheets. We didn't limit the  
17 deposition. But for some reason, Tesoro's counsel just  
18 stopped. They also didn't ask to depose the people who  
19 compile the green sheets every day. Mr. Talley is the  
20 vice president of Olympic. He has a good deal of  
21 knowledge about the green sheets, but he's not the  
22 person who lives with them day in and day out.

23           Now there's also been a representation in the  
24 motion for sanctions and in the further documents filed  
25 by Tesoro that we're trying at the last moment to insert

1839

1 some new information into this case. Olympic has always  
2 been -- always made it clear that we intended to update  
3 the information on throughput with actuals when they  
4 became available, when the entire pipeline was up and  
5 running at 80%. On April 12th, we produced this to  
6 Staff and to the interveners.

7 JUDGE WALLIS: Could you describe that for  
8 our record, please.

9 MR. MAURER: I have a handout as well of that  
10 information.

11 MR. MARSHALL: I think that is March 22nd  
12 that the supplement was made, and the original material  
13 was produced back in December, January through the  
14 earlier period. It was then supplemented on March 22nd  
15 for January, February, and March throughput, actual  
16 throughput numbers. But you may recall during the  
17 interim rate case hearing, Mr. Grasso, an expert for  
18 Tesoro, used a chart showing the actual throughput  
19 numbers that we had produced in December and January for  
20 a long period of time leading up to the incident of  
21 1999, following the incident, and as much information as  
22 we had to that point, which also included, by the way,  
23 the July of 2001 data, which became a subject that  
24 Mr. Grasso talked about at some length in the interim  
25 rate case hearing. This is a supplement adding three

1840

1 additional months that we presented later.

2 MR. MAURER: Thank you.

3 The important thing is that Olympic, I mean  
4 Tesoro had this material available to it well before the  
5 depositions of Olympic personnel that took place the  
6 week, I believe, of April 21st. They didn't ask a  
7 single question about actual throughput numbers during  
8 that entire time. So the representation that somehow we  
9 were trying to create a moving target by updating our  
10 information at the last minute, we have always made it  
11 clear since March 22nd and April 12th that we intended  
12 to update our throughput information when we had  
13 actuals, a sufficient number of actuals to be able to  
14 get some idea of what throughput was at 80% pressure  
15 with the entire line up.

16 And this kind of brings me to my final point  
17 in my presentation, and then I will address some of the  
18 points that Tesoro's counsel has brought up, is that  
19 this information that Tesoro now seeks is largely moot.  
20 The best evidence available to the Commission as to what  
21 the entire pipeline capacity, I'm sorry, what the entire  
22 pipeline can do at 80% pressure on throughput is the  
23 actuals of the months when the pipeline has been  
24 operating at 80%, the full pipeline has been operating  
25 at 80% pressure. I think the Commission recognized this

1841

1 or it recognized the principle of this in its 12th  
2 Supplemental Order when it said we're not going to set,  
3 we can't determine rates based on sanctions, it's  
4 inconsistent with our statutory obligation to set rates  
5 that are fair, just, reasonable, and sufficient.

6           And in that regard, basing throughput as a  
7 determinate of rates on Olympic's last filing when the  
8 entire system was up and running at 100% maximum  
9 operating pressure is just not representative of what's  
10 going to be going on with the Olympic Pipeline during  
11 the rate year. What's also not representative was the  
12 actuals that occurred on throughput during the test  
13 period, because the pipeline wasn't fully up and running  
14 at that time. Throughput numbers were extremely low  
15 during the test period, and because of that we took, for  
16 purposes of moving ahead, we took the July 2001 numbers  
17 and performed some adjustments to them.

18           But we made clear as early as we could that  
19 we were going to be relying on actual throughput  
20 numbers, and I think that this is the best evidence  
21 available to the Commission, it's the best evidence  
22 available to the interveners. They had an opportunity  
23 to ask questions during the deposition of Olympic's  
24 witnesses on this point, but they didn't. And I think  
25 that, you know, the bottom line is that it's just the

1842

1 best evidence available to the Commission.

2 JUDGE WALLIS: We understand that that will  
3 be your argument on the merits in the general rate case.

4 MR. MAURER: Well, I mean that's an important  
5 point, Your Honor, is that Tesoro continued in their  
6 informational filing to request that throughput be set  
7 through the motion, on the basis of the motion for  
8 sanctions. The Commission has clearly said that they're  
9 not going to do that. They have indicated that they  
10 don't think monetary sanctions are appropriate. They  
11 indicated at the April 4th hearing they don't think  
12 dismissal is appropriate. So I'm not really sure what  
13 sanctions they're looking for now. The one sanction  
14 that they're seeking is simply not available to them.

15 JUDGE WALLIS: We will have the opportunity  
16 to address that topic later this morning.

17 MR. MAURER: Finally, I should note that also  
18 during the March 8th hearing, Tesoro's counsel  
19 repeatedly talked about the importance of having actual  
20 numbers regarding capacity and throughput, said it was  
21 the most important issue in the case. And we have  
22 responded by producing the numbers representative of the  
23 pipeline capacity at 80% for the full 100% of the  
24 pipeline. And in addition, we also have, Olympic has  
25 also made available to us, and we will be supplementing

1843

1 the data requests to produce this information as well,  
2 Olympic has just made available to us the April numbers  
3 as well.

4 As Mr. Marshall mentioned, Mr. Talley had  
5 information regarding the July time frame because of the  
6 interim proceeding. It was an issue in the interim  
7 proceeding, and it was a discussion during that. That's  
8 why that information was available.

9 JUDGE WALLIS: Could you explain that,  
10 please.

11 MR. MARSHALL: Yes, Mr. Brena mentioned that  
12 Mr. Talley somehow in --

13 JUDGE WALLIS: Yes, we recall that.

14 MR. MARSHALL: -- was able to come up with  
15 the July numbers. In fact, the July issue had been an  
16 issue since the hearing back in January for the interim  
17 rate case where Mr. Grasso testified on a chart that he  
18 had prepared that this was an unusual situation, this  
19 July seemed to be a very high number, 310,000 barrels  
20 per month. We then went back and asked Mr. Talley,  
21 well, what went on there. And, of course, Mr. Talley  
22 was asked in his deposition, what about July of 2001.  
23 And Mr. Talley said, well, there were a number of odd  
24 circumstances then, we had come off of a large number of  
25 down time, we told all of our crews to go away so that



1 we weren't doing any repair or other work on it, we had  
2 unusual fungibility in batching so that there was a  
3 uniform product mix, which meant you could pump a lot  
4 more without having to do it in batches, and he added  
5 several other factors that were unusual for July. When  
6 asked, how do you know they were unusual, Mr. Talley  
7 explained in his deposition that you know because you  
8 hear reports from the field, and 24 hours of down time  
9 in a single month is highly unusual, kind of like  
10 traffic around here, is it unusually bad or not, you  
11 gain that by experience. But July was not a  
12 representative month because of the unusual factors.

13           July was the basis upon which Cindy Hammer  
14 presented her original rate case filing, and all of the  
15 numbers on throughput were based on adjustments to that,  
16 trying to make adjustments based on what down time might  
17 ordinarily be. Because by that time, by the time the  
18 FERC filing was made in August, all we had was one month  
19 of July throughput at 100% of the system being up  
20 although at 80% pressure. Since that time, and as we  
21 discussed in the interim rate proceeding and as we have  
22 produced hundreds of documents on what actual throughput  
23 was, and Your Honor may remember we produced them by  
24 segment, by -- we did it by Tosco, Tesoro, Arco, and  
25 Equilon, we did it by destination, we have produced by

1845

1 December hundreds of documents on throughput even though  
2 the throughput was not an issue for the interim rate  
3 case proceeding. We then proceeded to supplement that,  
4 and at every turn we said this further proves that the  
5 July numbers were an unusual set of numbers.

6           Mr. Talley also testified in his deposition  
7 that these factors on batch size, down time, product  
8 mix, and so forth vary so tremendously that there's no  
9 average that you can divine. There's no kind of  
10 standard that you can have. You just go by experience.  
11 Sometimes a refinery like Tesoro will nominate product  
12 to be moved, and then they won't ship, and so you don't  
13 have throughput because refineries just fail to put  
14 product in the pipeline.

15           But the actual course of actual throughput  
16 once you have 10 months, as we do now, is the best way  
17 to obtain an average. If you want average down time,  
18 you look back 10, 12 months if you have that  
19 information, and you can calculate what's the average  
20 throughput. And the average throughput is a product of  
21 all of the factors that affect it, including batch size,  
22 down time, DRA, and so on.

23           So Mr. Talley in preparation for his  
24 deposition revisited, of course, the issue that  
25 Mr. Grasso had first raised in January. And he came

1846

1 prepared, as you might expect, to address the issue that  
2 had been already highlighted back in January, why was  
3 July 2001 an odd unusual month. And that explanation,  
4 that deposition testimony, is on the record, Mr. Talley  
5 explained that. So the idea that we had -- that Olympic  
6 had just a day and a half or four days to go through and  
7 compile that information is not correct.

8           Mr. Talley, and I was there for the  
9 deposition of course, was very forthcoming in looking at  
10 these green sheets. The first thing he noticed was that  
11 the green sheets were in two parts and that counsel for  
12 Tesoro had transposed the two. So the initial  
13 difficulty he had with the green sheets was that one  
14 segment was put to the right when it should have been  
15 put to the left. He corrected that. And then he went  
16 down and he proceeded to say, well, if you look at these  
17 red numbers, here's how you determine the batch size.  
18 And when you have a gap in this, it means there's down  
19 time. When you have this, you have that. And Mr. Brena  
20 asked, well, can you determine how much jet fuel. And  
21 he said, well, I would need the code sheet for that, and  
22 no code sheet was provided then. A second time asked  
23 about code sheets, and Mr. Talley said I need to have a  
24 code sheet for that. Third time the code sheet which  
25 Olympic had provided through FERC counsel was made

1847

1 available, and then inexplicably Tesoro didn't ask any  
2 further questions about what amount of jet fuel or some  
3 other type of product using the codes. There's no  
4 question about, Mr. Talley, now you have the codes, can  
5 you determine for us what batches were here and what  
6 batches were there.

7           You do need a calculator to sit down and go  
8 through this, and you have to go through each day, and  
9 each day has multiple entries. But this is nothing that  
10 a Tesoro expert such as Mr. Grasso or somebody else  
11 familiar with this could not have done back in February  
12 of this year when the green sheets were first made  
13 available. They could have sat down and done these  
14 calculations. There's no declaration from any Tesoro  
15 expert that they could not derive the information on  
16 down time, batch size, and so forth from these green  
17 sheets, that they had the time to do it, none  
18 whatsoever. In fact, there's no statement by Mr. Talley  
19 that he couldn't do it at the deposition had Mr. Brena  
20 wanted to continue on with the deposition. And the one  
21 part of the deposition that Mr. Brena quotes about  
22 Mr. Talley acknowledging that he was going to prepare  
23 this information for him is simply taken out of context.  
24 Mr. Brena asked:

25           Question: And if I asked about average

1848

1           batch size, the information would have  
2           to come off the green sheets or the  
3           pumping orders?

4           Answer: Correct.

5           Question: Okay, so when I sent this  
6           request, I understood that the  
7           information would need to be calculated.

8           That's in the passive voice, would need to be  
9           calculated.

10           From these sources, and that's what you  
11           represented to me in the technical  
12           conference, correct?

13           And Mr. Talley in his declaration says just  
14           that. Yes, I told Mr. Brena that you could calculate  
15           this. There's no -- there's no volunteering by  
16           Mr. Talley either at the technical conference or in the  
17           deposition that he was going to do it. He was simply  
18           affirming that you, Tesoro with your experts, can do  
19           this. And they could have, they could have starting on  
20           February 22nd. They could have in the deposition. They  
21           could have -- they could have during the exchange of  
22           information on April 4th and 5th, days before the April  
23           12th deadline, have brought this to somebody's attention  
24           and said, this isn't what we meant, we meant that we  
25           wanted you guys to do this compilation. There's a

1849

1 disconnect here. We better get this clarified.  
2 Instead, the clarification, it's quite clear from  
3 Mr. Wensel's letter, he said, okay, we know that you're  
4 not agreeing to produce this information.

5 JUDGE WALLIS: Mr. Marshall, could you use  
6 the portable microphone or else grab one of the mikes.

7 MR. MARSHALL: I will just sit down.

8 It's the April 5th letter from Tesoro's  
9 counsel where this came up. And again, it was on April  
10 8th, again four days before the April 12th deadline,  
11 Lori Marcil from Olympic's FERC counsel says, you're  
12 right, Mr. Wensel, we're going to take the option B,  
13 we're going to give you the source documents from which  
14 you can derive the information. All Mr. Talley has done  
15 in his deposition and his declaration is to affirm that  
16 yes, indeed, if you took the green sheets and the other  
17 information, pumping orders, DRA invoices, because there  
18 are invoices on the DRA stuff showing how much was put  
19 in to the system at any given time. You can just look  
20 to see how much we bought and understand how much DRA  
21 was put in there. But batch sizes, product mix, how  
22 much down time there was, those can be calculated from  
23 the green sheets. It just takes a long time to do.  
24 Tesoro had that long time if they had come down to  
25 Renton on February 22nd and zeroed in on this type of

1850

1 document.

2           The Civil Rules are quite clear when you have  
3 voluminous documents that are difficult to produce, and  
4 there's no question that these are voluminous, difficult  
5 to produce. They cost \$7.50 a page to do the color  
6 copying, and they're in two segments, so we weren't  
7 making up information about are these voluminous, just  
8 these alone. This doesn't account for the hundreds of  
9 thousands of other design documents showing how the  
10 pumps were situated, you know, the diameter of the  
11 pipes, and all of these other things, which we thought  
12 102-C actually referred to when we gave the initial  
13 representation. Today there's been no Tesoro person who  
14 has come down to Renton to inspect or copy these  
15 documents as the Civil Rules provide for. We had to ask  
16 Mr. Brena about the Office of Pipeline Safety documents.  
17 There were eight banker boxes of those. And it was well  
18 over a month before anybody came to take a look at  
19 those. And I don't see any -- I don't see any reference  
20 in the testimony to the Office of Pipeline Safety  
21 documents either.

22           This whole thing about compliance with an  
23 order is compliance with a FERC order. Our Commission  
24 piggybacked on the FERC order and piggybacked on the  
25 FERC deadline date of April 12th. The entire question

1851

1 here revolves around did Olympic comply with the FERC  
2 order on producing documents that it had available, and  
3 that's why the correspondence exchange between Olympic's  
4 FERC counsel and Tesoro's counsel is pertinent. Today  
5 we have absolutely no indication that FERC views what  
6 Olympic did as any kind of a violation of its order.  
7 There's been no motion at FERC to compel documents, no  
8 motion at FERC for sanctions, no motion at FERC to  
9 preclude issues, even though FERC will take into account  
10 more than two thirds of the revenue requirement in this  
11 proceeding. There is no evidence of any violation of a  
12 FERC rule. So we've got the cart before the horse.  
13 We're trying to determine what a FERC order said and did  
14 without any kind of a FERC motion or proceeding.

15           And the exchange again between Mr. Brena's  
16 associate, Mr. Wensel, Mr. Miller, and Lori Marcil, is  
17 absolutely clear. We had two options, and we took the  
18 option that we thought that they could absolutely make  
19 their determinations from, which is produce the green  
20 sheets. To this day, I don't know why Tesoro stopped  
21 asking Mr. Talley questions about the green sheets.  
22 They say we didn't make an expert available to go  
23 through the green sheets. Mr. Talley was. He was not  
24 in his own mind perhaps the best expert, but he was  
25 better than anybody that I can think of other than maybe



1852

1 one other person there at Olympic. And if Mr. Talley  
2 had gotten stuck on some particular calculation that  
3 Mr. Brena wanted, we don't know that that would have  
4 happened, there's no -- there would have been no problem  
5 in having somebody else come in too. We haven't limited  
6 Mr. Brena on that.

7           So the solution to this was well within  
8 Tesoro's hands. They could have come on February 22nd,  
9 looked at the documents. Didn't do it. They could have  
10 clarified this whole issue before the deadline of April  
11 12th. They didn't do it. They could have taken the  
12 green sheets and asked the experts, Mr. Talley and  
13 others, to interpret it for them if they couldn't do it.  
14 They didn't do that. And they haven't produced any  
15 evidence by way of declaration or affidavit that their  
16 experts are incapable of doing the calculations that the  
17 green sheets require them to do.

18           The best evidence of actual throughput has  
19 been produced. Green sheets, actual throughput records  
20 by the hundreds, it's all there. Mr. Brena and Tesoro  
21 would rather have a determination based on throughput  
22 from 1998-1999, because that would produce a very low  
23 revenue number, very low price per barrel. That's why  
24 we're here. In 1999 throughput declined significantly  
25 from what it had been set in the prior tariff.

1853

1 MR. BRENA: Your Honor.

2 MR. MARSHALL: If there had been an automatic  
3 adjustment mechanism to --

4 MR. BRENA: If I may, please, my  
5 understanding of this process was is that it was to be  
6 brief statements on both sides. I have listened to full  
7 arguments by both counsel for Olympic, and so I would  
8 request an opportunity, a brief opportunity, to respond  
9 to some of the things that they're saying.

10 JUDGE WALLIS: I think that our brief  
11 statements of what we were going to demonstrate did from  
12 the outset get into an actual demonstration of what we  
13 were going to demonstrate, so I find it difficult to  
14 constrain Olympic's counsel.

15 I will note again that the issue of whether  
16 the actual 98-99 data or whether the actual 2001-2002  
17 data are appropriate for measuring throughput actually  
18 is a matter for the Commission to determine upon  
19 evidence, and I would ask that we not argue that now but  
20 merely acknowledge that Mr. Brena thinks one set of data  
21 is appropriate, you believe another set of data is  
22 appropriate. When we get to the hearing, you will each  
23 present the information that you have, and the  
24 Commission will decide that.

25 MR. MARSHALL: I guess my point is that in

1854

1 addition to the green sheets where you can derive  
2 specific information about what's happening with batch  
3 size or down time and so on, the actual throughput  
4 numbers represent a compilation of all the factors. And  
5 so it isn't just the green sheets from which you can  
6 determine what's going on with the throughput, but it's  
7 from all the other records that we have been producing  
8 since the November-December time frame and that  
9 Mr. Grasso and others have had since that time. So if  
10 anybody needed to get behind any particular month and  
11 take a deposition and say, okay, why was February the  
12 way it was or March or give us some more explanation for  
13 why this number is at this level, that could have been  
14 done, and that wasn't done either.

15           So the -- Olympic has produced and has had  
16 available since at least February 22nd, if not before,  
17 all documents that it has in its possession regarding  
18 throughput, down time, DRA, everything available in  
19 Renton. It's only because Tesoro never came to Renton  
20 to look at this that we have an issue. Never had its  
21 experts take a look at this stuff. As far as we know,  
22 none of Tesoro's experts have even looked at the green  
23 sheets to make a determination on their own whether they  
24 could derive this information. No declaration, no  
25 evidence of that.

1855

1                   I did take up more of your time, but it was  
2 because of that interim rate case proceeding that we  
3 began to focus on this issue for Mr. Grasso, and that's  
4 what I started out to discuss, and I went longer than I  
5 thought.

6                   JUDGE WALLIS: Does that conclude Olympic's  
7 presentation?

8                   MR. MAURER: We had specific responses to  
9 some of the things that Tesoro made in their opening  
10 statements, but if Your Honor prefers, I can defer that  
11 until later. It's really up to you.

12                   JUDGE WALLIS: I think to capitalize on the  
13 momentum that we have going for us and still allow  
14 Mr. Brena to make his points and respond to yours, it  
15 would be appropriate to take those now.

16                   MR. MAURER: Okay. Just very quickly, Your  
17 Honor, Tesoro's counsel represented that there was no  
18 modification to the agreement regarding production of  
19 the lists that don't actually exist. The April 5th  
20 letter very clearly says produce the summaries or  
21 produce the documents, the green sheets. In the April  
22 5th letter, they refer to the green sheets as "source  
23 documents". In their information that they filed with  
24 the Commission on Friday, they called them "alleged  
25 source documents". Today they say that they're not

1856

1 source documents. So I think you're beginning to get a  
2 little of the flavor that we deal with when we're  
3 discussing this issue.

4 Tesoro's counsel said that they do not feel  
5 that they should have the burdon of compiling the  
6 information. I would point out to Your Honor the order  
7 from the U.S. West case in 1997 that's cited in our  
8 answer where U.S. West was asked by Public Counsel to  
9 produce cost studies that it had not made, and the order  
10 clearly says you don't have to produce something you  
11 didn't do. If you have the cost studies, produce them.  
12 If you didn't do it, don't produce them, you're not  
13 obligated to produce them. And in addition, Tesoro was  
14 aware by March 15th that, as Mr. Talley states in his  
15 declaration, that there was going to be no summaries,  
16 that we were not going to compile the information.  
17 Mr. Marshall already discussed the statement during  
18 Mr. Talley's deposition where Mr. Brena asked him in a  
19 passive voice, do these things need to be calculated,  
20 and Mr. Talley said yes, and Mr. Marshall has already  
21 made that point.

22 Tesoro's counsel also represented that they  
23 needed the extension of time to file their motion for  
24 sanctions because they needed to come up with the  
25 appropriate sanction to ask for, because they had

1857

1 already known since April 4th that there was going to be  
2 no list produced because no list existed. At the April  
3 4th hearing, I specifically remember this occurring, and  
4 Your Honor may wish to take a look at the transcript,  
5 Tesoro's counsel recommended this sanction during the  
6 April 4th hearing, so that the idea that they needed  
7 another week to decide something that they had already  
8 decided on April 4th doesn't make a whole lot of sense  
9 to me. So with that, I will just stop.

10 JUDGE WALLIS: I have a couple of questions.  
11 How do you now compile the information that is presented  
12 on the end up document, page 1 of 1. I'm not asking for  
13 a detailed technical step by step analysis, but a  
14 general description of where these numbers come from and  
15 how they came to appear on this sheet.

16 MR. MARSHALL: I can probably speak to that,  
17 because this came up back in December, January when we  
18 were trying to compile that information. They come from  
19 mostly from the invoices sent to the customers, the  
20 shippers. So you compile everything that the shippers  
21 ship, and that becomes the basis. When you bill, you  
22 have to bill by the barrel, and so you -- once you know  
23 how many barrels that you have shipped by which shipper,  
24 all you do then is just add them all up, and you get  
25 that. And that, you know, you're obviously trying

1858

1 because you have a vested interest in making sure that  
2 you capture every barrel that you're shipping. To do  
3 that and do that correctly, it has to withstand any  
4 challenge that a shipper might make, and that's where  
5 they come from.

6           And that was an issue that was discussed in  
7 the interim proceedings, you know, how did we derive  
8 that information. Mr. Talley also talked about that  
9 too. He talked about not only can you get some of this  
10 information from green sheets, but he said shipper  
11 invoices do this too. You can learn down time from  
12 shipper invoices if you had add them all up and then you  
13 figure out what you have. And if somebody nominated  
14 something and they couldn't ship during that time, you  
15 know that that was because there was not capacity in the  
16 system.

17           JUDGE WALLIS: Do you have comparable  
18 information for the period for which Mr. Brena is asking  
19 information?

20           MR. MARSHALL: Yes, and we produced that,  
21 Mr. Grasso's chart. You may remember the spikes, and I  
22 pointed out when it was in 2000, June of 2000 that BP  
23 Pipelines came in as the operator. And there was quite  
24 a bit of information on the level of throughput month by  
25 month prior to that time. And I pointed out on a line

1859

1 where Olympic came in and then where -- or where BP  
2 Pipelines came in and then where BP bought out the GATX  
3 shares. We could identify that by month. So all of  
4 those monthly statistics were produced way back as far  
5 as I believe that Tesoro has ever asked for. And those  
6 monthly numbers have been in this case since at least  
7 December going back.

8           The only thing we didn't have, of course, in  
9 January is we didn't have the, by the time of the  
10 hearing, we didn't have the January, February, or March  
11 numbers because that hadn't happened yet. But as soon  
12 as they did, I think we were asked by Commission Staff  
13 to supplement our throughput numbers, actual throughput  
14 numbers, as soon as we got them, and we agreed to do  
15 that. And also in a discussion of that supplementation,  
16 we were asked, well, how do you derive those, and it was  
17 -- it was stated that we derive them largely through the  
18 invoices.

19           JUDGE WALLIS: Why is not the information  
20 that you have a source from which you could respond to  
21 Mr. Brena's requests for information?

22           MR. MARSHALL: Well, the green sheets do have  
23 -- I mean all of these documents that have been  
24 available since February 22nd, if you want to determine  
25 any particular issue on let's say what type of product



1860

1 you're moving, did you move it in jet fuel that month or  
2 not, you could look at the green sheets and make that  
3 determination. Back in February, we didn't know, what  
4 do they want from this. They just said produce  
5 everything that you have on design capacity and  
6 throughput. So we said here it is, come and take a look  
7 at it. If you wanted to figure out -- each one of these  
8 factors has an impact on how much the throughput will  
9 be, you know, whether it be down time or batch size or  
10 somebody -- some shipper just not having the product to  
11 be shipped, but there's no separate breakout of those.  
12 Olympic does not keep separate records saying, okay,  
13 this month the throughput number was at -- let's take  
14 February, you can see that the throughput on the barrels  
15 per day was 255,749 barrels per day.

16 JUDGE WALLIS: Do you continue to claim that  
17 these numbers are highly confidential and protected?

18 MR. MARSHALL: They are.

19 JUDGE WALLIS: Then you may wish to merely  
20 point to the number rather than reciting it into the  
21 record.

22 MR. MARSHALL: I should do that.

23 So one question might be why, why would you  
24 have that number in February versus another number say  
25 in December that would be, you know, significantly

1861

1 higher. Well, first, February is a shorter month.  
2 Second, you could have had changes in the product mix,  
3 you could have had less fungible products going through  
4 the pipeline. You could have had shippers that failed  
5 to ship. You could have had more down time than normal.  
6 But the point that Mr. Talley made in his technical  
7 conference was that we don't -- Olympic does not break  
8 out each of these separate factors in a separate way.

9           If Tesoro wanted to address a specific  
10 factor, and we may or may not know why they want to do  
11 that, let's say they wanted to focus on what type of  
12 product was through, they can do that from the green  
13 sheets. They can also determine from the green sheets  
14 and from the invoices and from the pump orders down time  
15 for a particular month. That's just not the way it's  
16 done at Olympic. And in order to make those  
17 compilations, in order to take that time, as Mr. Talley  
18 pointed out in his declaration and during the technical  
19 conference, would take a lot of time.

20           Now we -- Tesoro had that time if they had  
21 started to do this in February. In fact, we might have  
22 been able to help them out in February. But by the time  
23 they came to Mr. Talley in his deposition, and remember  
24 there was -- there was nothing prior to Mr. Talley's  
25 deposition or prior to the filing of the motion that

1862

1 said, gee, the letter from Mr. Wensel's associate, by  
2 the way, we've got that wrong, we really do need you to  
3 make these lists. They never said that. In fact, when  
4 we were on the phone with Your Honor talking to  
5 Mr. Brena on the 16th of April, there was no mention  
6 that, gosh, these lists really do need to be compiled  
7 and we have a real problem here. By the time the  
8 depositions took place -- and by the way, we hadn't even  
9 gotten the motion to compel during the depositions. The  
10 motion to compel came after the depositions. So what's  
11 happened to us is that they have taken away all the  
12 runway. In fact, I think by the time the motion to  
13 compel that Mr. Brena has made here in this case, Tesoro  
14 had already filed its FERC testimony regarding  
15 throughput, so they didn't even file a motion to compel  
16 to derive the numbers that they needed to file their  
17 testimony at the FERC.

18 JUDGE WALLIS: What I would like to focus on  
19 now is the kind of information that Olympic has. You  
20 have presented your view of the time line and how the  
21 parties exercised their responsibilities to secure and  
22 provide the data. Does your marketing staff have any  
23 information of the sort that Mr. Brena is requesting?

24 MR. MARSHALL: No, the only -- the product  
25 movement group keeps the green sheets. The billing

1863

1 people keep the invoices for shippers who have been  
2 billed. The pumping orders are kept by the product  
3 movement group. All of those are documents that have  
4 been made available. But again, if you want to try to  
5 figure out what the average down time is for a month or  
6 the total down time for the month, you would have to go  
7 through the green sheets in particular to try to derive  
8 that number from the green sheets. It's a time  
9 consuming process.

10 JUDGE WALLIS: Does the product movement  
11 group have the responsibility of scheduling shipments?

12 MR. MARSHALL: They get nominations from the  
13 shippers, and then they do schedule the amounts from  
14 each shipper. Sometimes the shippers don't ship the  
15 product, but they're the ones that -- I think they're  
16 the ones that do the scheduling. Mr. Talley's  
17 deposition goes into that in some detail.

18 JUDGE WALLIS: How do they accomplish  
19 scheduling without information of the sort that  
20 Mr. Brena is asking? Is that information not integral  
21 to the scheduling process?

22 MR. MARSHALL: No, it isn't, because it's not  
23 known sometimes whether you're going to have down time  
24 or not. Down time can result from things beyond your  
25 control. Sometimes you can schedule down time if you

1864

1 know that there's going to be a major segment of the  
2 pipe that has to be removed, then you might know that  
3 then. But you don't necessarily know when the down time  
4 is going to occur, because other things, pumps may fail,  
5 you have other outages, you have concerns about an  
6 anomaly that's been reported, a surge in pressure. So  
7 you really can't say based on scheduling what kind of  
8 down time that you're going to expect.

9           What you can figure out from all of the  
10 information here on the amounts that have actually been  
11 moved, generally speaking what you're dealing with in  
12 terms of your limit. And, you know, the average is what  
13 it is, and that kind of sets the tone for trying to  
14 figure out what's going to be the maximum that you can  
15 reasonably expect to get out of the system in a  
16 particular month. But there's no -- there's no kind of  
17 prescheduling where people have to figure out ahead of  
18 time, are we going to have, try not to use a number  
19 here, are we going to have 20% less than we had the  
20 month before or not.

21           JUDGE WALLIS: So it comes down to reading  
22 end trails?

23           MR. MARSHALL: No, it comes down to reading  
24 the green sheets which show the product movement after  
25 the product is moved. And it really is an after the

1865

1 fact situation. It's kind of like traffic on 405 or I-5  
2 on a day, is it going to be bad, well, it's always bad,  
3 but is it going to be really bad, well, it depends, is  
4 there an accident that day. That's a throughput system  
5 too, how many cars can you put through in a given day in  
6 a given number of hours, and there is capacity limit  
7 because there are only so many lanes. And we have that  
8 situation here, and the pressure is kind of like the  
9 speed limit. The speed limit has been reduced, so  
10 you're going to have fewer cars being able to be moved  
11 through. So you have a general sense for the  
12 limitations on the system.

13           But any given day you can have things that  
14 will throw you off. And if you have enough of those in  
15 a month, you're going to have reduced throughput. And  
16 that then gets reflected in the invoices and it gets  
17 reflected in the green sheets. So you can do that on an  
18 after the fact basis. And if you have enough  
19 information over enough months of time, you can say,  
20 well, we've got a pretty good representative sample of  
21 what's been happening and therefore what's likely to  
22 happen in the future.

23           JUDGE WALLIS: Very well. I would like to  
24 break now, but before I do, I would like to ask Tosco  
25 and Commission Staff if you have any comments at this

1866

1 juncture, understanding that we're going to go back to  
2 Mr. Brena for a further exposition and response.

3 MS. WATSON: Not at this time.

4 MR. STOKES: I have nothing to add, Your  
5 Honor.

6 JUDGE WALLIS: Very well, let's take a 15  
7 minute break.

8 (Recess taken.)

9 JUDGE WALLIS: Let's be back on the record  
10 following a morning recess. Mr. Brena, the ball is back  
11 in your court at this time.

12 MR. BRENA: Thank you, Your Honor.

13 Let me begin --

14 JUDGE WALLIS: Before we proceed, let me say  
15 that we have an outer limit of 1:00, and in order for  
16 people to do necessary things before 1:00, it's a  
17 practical limit of about noon, which gives us about an  
18 hour and a half. So our coach will turn into a pumpkin  
19 in about 90 minutes, and please time your arguments  
20 accordingly.

21 MR. BRENA: Thank you, Your Honor.

22 Well, let me begin by what wasn't addressed  
23 at all, and I'm reading from the Commission order of  
24 April 4th.

25 The Commission will direct that the

1867

1           respondent to reply to the Commission  
2           Staff's data request no later than noon  
3           on Tuesday the 9th and intervener's  
4           request no later than the FERC  
5           established date of April the 12th.

6           That is the language in which the Commission  
7           compelled them to produce the compilations which are at  
8           issue here. They didn't. We can go through the blame  
9           the victim endlessly, they didn't. I have a suggestion,  
10          a rather novel idea, of how they could have avoided this  
11          entire motion for sanctions, complied with the  
12          Commission's order to compel. Can't be cleaner, can't  
13          be simpler.

14          They have not directed Your Honor to a single  
15          thing filed at the WUTC or in response to the discovery  
16          that was served on them at the WUTC. Their only letter  
17          indicates, our response at the WUTC would refer to the  
18          documents attached in the FERC responses. They are  
19          trying somehow to incorporate objections of their FERC  
20          counsel or positions of the FERC counsel in a separate  
21          proceeding. When it's been to their advantage to  
22          distinguish those two, they have. But now it's not,  
23          because they did not send a single letter, they did not  
24          send a single response, they did not respond to a single  
25          thing that the Commission ordered them to compel that's



1868

1 at issue today. And now they're here trying to blame  
2 Tesoro for that failure.

3           The factual representations of the timeline  
4 that they laid forward even in their attempt to blame  
5 the victim are false. They have indicated that since  
6 January they were aware of the July issue, which is  
7 true, but they were -- they suggested and implied that  
8 somehow that some time between now and -- January and  
9 now it took Mr. Talley to put the information together.  
10 That is directly contradicted in two places in  
11 Mr. Talley's deposition. I asked him:

12           Question: Okay, and so in that day and  
13 a half of work time, the products  
14 control group produced for you  
15 information relevant to the evaluation  
16 of July, correct?

17           Answer: That's right.

18           End of answer. That's in his deposition on  
19 page 83 and 84. Later, after a break:

20           Question: Okay, that's the process your  
21 products movement group went through in  
22 a day to do all of July?

23           Answer: That's my understanding. I  
24 don't think it was a day. I looked at  
25 your letter again, and it looks like we

1869

1 met on Friday and Thursday, so I asked  
2 for the information after I talked with  
3 you the first time, so it looks like  
4 there was the weekend and four days  
5 between our conversations.

6 It is patently false that Mr. Talley has been  
7 doing anything with regard to these issues since  
8 January, and in two different places he confirms that.

9 They suggest that the green sheets were made  
10 available to Tesoro since February 22nd. That is false.  
11 In their response to 102-C, they indicated that the  
12 schematics for the pipeline were available in Renton.  
13 Nobody mentioned the green sheets until we finally got  
14 Mr. Talley in a technical conference. Bear in mind,  
15 Your Honor, and you were there, when I asked  
16 specifically that Mr. Talley be made available prior to  
17 the February 22nd discovery so that we could go through  
18 with him the throughput information, he was not made  
19 available notwithstanding we sat up in Renton for two  
20 days. He was not available to meet that discovery date.  
21 When he finally did become available, and the first date  
22 was March 15th, that's the first time we ever heard that  
23 the green sheets could conceivably be source documents.  
24 So somehow they're trying to bootstrap on them offering  
25 us schematics of the pipeline a month earlier. That is

1870

1 false.

2           There was never a mention that the green  
3 sheets would be made available, nor was there any reason  
4 to be, because there was no indication as to what the  
5 relevance would be of the green sheets. They completely  
6 misinterpreted our data request and interpreted that to  
7 mean here are the schematics, the engineering schematics  
8 of the pipeline, when we were asking for calculational  
9 throughput information. We have no interest in looking  
10 at every schematic of every pipeline. It doesn't matter  
11 to the case. Of course nobody showed up. It would have  
12 been a complete waste of our time.

13           Next, somehow, even assuming the  
14 correspondence with FERC counsel is relevant to whether  
15 or not they complied with this Commission's order -- and  
16 let me just stop there. FERC counsel has not appeared  
17 in a representative capacity to this Commission.  
18 Olympic's counsel are before the Commission. They did  
19 nothing, not a little bit, but with regard to the issues  
20 that are before Your Honor, they did nothing. But even  
21 assuming that the correspondence with the FERC counsel  
22 can somehow be used to their advantage in a separate  
23 proceeding, which I do not concede, which is false, they  
24 have separately answered all through this proceeding,  
25 then Mr. Wensel's letter is made to say something it

1871

1 doesn't say. They sent us a letter on April 4th, and in  
2 the letter they have left out some very important parts,  
3 and I'm reading:

4 Olympic agreed to provide and the  
5 presiding judge compelled Olympic to  
6 provide among other things materials and  
7 information responsive to the request  
8 you made in your E-mail to Steve  
9 Marshall dated March 27th, 2002,  
10 pertaining to Olympic's capacity and  
11 throughput.

12 There is an affirmative judicial  
13 representation that the things in my E-mail to  
14 Mr. Marshall they agreed to provide and were compelled.  
15 That's the way the letter starts. Then they say, we  
16 believe that it's useful at this juncture, days before  
17 the FERC testimony is due, to advise you what FERC is  
18 able and is not able to produce, and they go through and  
19 list what Olympic is able and not able to produce.  
20 There was no negotiation, as I mentioned, with FERC  
21 counsel. We had one conversation at which I agreed in  
22 principle to the limiting of this information to the  
23 last six months of '98 and the last six months of 2001,  
24 subject to both of our checks. They sent us a letter  
25 saying they weren't going to produce what they were

1872

1 compelled to produce. Mr. Wensel's letter is in  
2 response to that affirmative statement by Olympic, we're  
3 not going to do it, it's not available to us. And what  
4 did he say. And the sentence that they left out of his  
5 letter is, if Olympic doesn't intend to compile such  
6 summary information, then we will have to arrange for  
7 the source documents to be copied.

8 MR. MAURER: May I interrupt at that point  
9 and state that we, in fact, did reference that sentence  
10 in our presentation this morning to Your Honor.

11 MR. BRENA: Okay.

12 Mr. Wensel's letter, which Olympic's counsel,  
13 it wasn't correspondence to them, it wasn't even  
14 correspondence in this proceeding, had nothing to do  
15 with their obligations to comply with this Commission's  
16 order to provide the information and was after a letter  
17 where Olympic said it wasn't going to. And let me point  
18 out that Olympic's counsel in this proceeding went  
19 through the informal conferences of Mr. Talley at which  
20 it was well known that they didn't keep these records,  
21 that he would have to compile them. That's critical.  
22 So FERC counsel wasn't there. So at the time that it  
23 was compelled, they knew that they had to compile this  
24 information, but they refused to compile it even though  
25 they knew they would have to prior to agreeing to

1873

1 provide it. And WUTC counsel sat in the room and knew  
2 what Mr. Talley had to say, and yet still they're trying  
3 to bootstrap on FERC's counsel's misunderstanding of  
4 what happened at the technical conference. Mr. Wensel's  
5 letter can only be understood as facing the fact that  
6 Olympic was again refusing to produce information and so  
7 to get as quickly as we could to what they represented  
8 to us to be source documents.

9           Now there's several representations with  
10 regard to whether or not even Mr. Talley can divine any  
11 information out of these green sheets. When Your Honor  
12 reads his deposition which is attached, you can reach  
13 your own conclusions. And they have made a mystery out  
14 of why we quit asking this witness questions after the  
15 code sheet was provided. First of all, Mr. Talley  
16 organized the green sheets in the wrong order, not  
17 counsel for Tesoro, and then later acknowledged his  
18 mistake and corrected it. He didn't even know which  
19 side of the sheet went on which side. Secondly, the  
20 code sheet that Mr. Marshall has represented when it  
21 appeared counsel for Tesoro quit asking questions didn't  
22 allow Mr. Talley to answer any of the questions. And,  
23 in fact, Mr. Marshall represented that Mr. Talley could  
24 have determined the jet fuel from that sheet. That  
25 sheet is attached to our supplemental information and

1 contains none of the codes necessary to break out the  
2 products on the green sheet.

3           In the informal conference, Mr. Talley, and  
4 in the deposition, qualified his answer time after time  
5 with regard to what information was available. He kept  
6 referring to the products movement group. So when Your  
7 Honor reads through his deposition, it seemed like there  
8 must be some better way to get this information. And  
9 Your Honor's question, perhaps Your Honor's last  
10 question, how can you schedule a line if you don't know  
11 this kind of information, goes to the heart of our -- of  
12 how incredible their whole position is.

13           I have with regard to their nomination  
14 process, and they send these out every month, a June  
15 nomination detail at which they announced all of their  
16 shippers for June of 2002, that the line will be shut  
17 down for five days in June. They not only keep track of  
18 it off the green sheets, but they notify their shippers  
19 with regard to some of the information. This is down  
20 time, scheduled down time. Mrs. Hammer in her  
21 deposition sat down with Mr. Talley, and her -- and the  
22 relevant parts of her deposition are in there, and they  
23 calculated scheduled down time for the next year. Now,  
24 Your Honor, this is so important because these actual  
25 throughput numbers, the question isn't whether or not

1875

1 they're actual. For the purposes of this argument,  
2 let's assume that they are actual. The question is, do  
3 they represent -- are they representative of what's  
4 likely to occur in the future, or as we suspect, are  
5 there disproportionate amount of projects being  
6 undertaken so that the down time skews these numbers  
7 entirely. So not only do they have a pressure  
8 restriction, but they're scheduling all of their  
9 projects in the period in which they're trying to change  
10 their case.

11                   And I say change because there's no updating  
12 to it. Their theory of calculating throughput has  
13 changed. They are changing the base numbers. And they  
14 suggest that they have been forthright with that, and  
15 Your Honor will see a motion to strike when they try to  
16 change their very theory of throughput under the guise  
17 of updating. You will see a motion to strike on that  
18 point.

19                   JUDGE WALLIS: Again, I would suggest that we  
20 best reserve matters that may arise in the general  
21 proceeding to be heard in that proceeding.

22                   MR. BRENA: Fine, Your Honor, I would just  
23 point out that the first time that they mentioned their  
24 intention to change their case was over counsel for  
25 Tesoro's objection on redirect of Mr. Talley. Nobody



1876

1 asked Mr. Talley a single question about the last nine  
2 months of actuals. Mr. Marshall on redirect brought up  
3 the facts that he intends to change his case, his theory  
4 of throughput to. And then they say to us, we had an  
5 opportunity to get discovery on that change because he  
6 brought it up in redirect. That is a complete change in  
7 theory and less than -- less than fair. And I might  
8 point out that he brought that up over my objection as  
9 outside of the scope of cross. So of course there was  
10 no questions answered, nobody had a clue what he was  
11 doing.

12           The core of the issue here is how do we know  
13 what throughput numbers are representative of what  
14 happens in the future. Now from 1998 to now, this line  
15 has changed, the way it's operated has changed, and  
16 Mr. Talley goes into some of those changes in the  
17 technical conference and in his deposition. They  
18 changed because since 1998 they started stripping more.  
19 They changed because since 1998 they have new batching  
20 software that they rely on that allows bigger batches to  
21 flow through this line. They changed because in 1998  
22 there was a representative level of throughput, of down  
23 time, and today there is not. And what Tesoro hoped to  
24 do is to take this simple information to say you're  
25 saying that throughput, current throughput or whatever

1877

1 their theory of throughput is for that particular  
2 period, that that is representative. But, in fact, the  
3 numbers that you're advancing have five times as much  
4 down time than may be expected under operations as soon  
5 as you're done with these projects, and therefore your  
6 throughput will be significantly higher.

7           And in the deposition, you see us ask  
8 Mr. Talley these questions. You see us ask him about  
9 all of these changes and how they should -- why aren't  
10 they operating at higher throughput now, and doesn't --  
11 doesn't these changes suggest -- well, in the question  
12 in the deposition on page 101:

13           Well, in most of these things compared  
14 to the historic use, the use of larger  
15 batches, the use of software, the use of  
16 Bayview as a batching facility, all of  
17 these would tend to indicate that your  
18 throughput in future years would be  
19 higher than historically, correct?

20           There are a lot of variables involved in  
21 that, so it would be very hard to say  
22 exactly how much.

23           I say that because there's no dispute that  
24 the historic throughput is artificially low even taking  
25 into consideration the pressure restriction, as is their

1878

1 current throughput. And the question is, what's the  
2 right number, and there's no way to answer that question  
3 without the discovery that we asked be compiled and was  
4 not.

5 I have attached a copy of a green sheet for  
6 Your Honor, and I have attached their code that they  
7 sent, and let me give you just one brief example. The  
8 way that they suggested on Exhibit 5 of our supplemental  
9 material is the information that they're directing us  
10 to, and with regard to down time, they say:

11 Down time can be recognized by searching  
12 for disparities in the net received  
13 hourly totals at the origin column.

14 And they list them on sheet labeled one.  
15 Example, 6,000 barrels per hour would be  
16 typical, so an hourly receipt of 3,000  
17 barrels would represent one half hour of  
18 down time. A gap of several hours no  
19 entry would indicate that the line has  
20 been down for several hours.

21 Okay, well, first of all, there isn't a net  
22 received column on the green sheet anywhere. It's  
23 labeled entirely different. And secondly, this can't  
24 possibly be how they calculate down time. They want us  
25 just to assume some random number is typical and then

1879

1 look for discrepancies in the flow of fluid.

2           They announced it a month ahead of time. You  
3 know, I'm tired of being sent on wild goose chases by  
4 this company that are nonresponsive to our requests. If  
5 there is some way to divine this information out of  
6 there, you will see in the deposition that Mr. Talley  
7 didn't have a clue, and neither would anybody else. And  
8 interestingly, Mr. Talley doesn't say that green sheets  
9 are the only source of information. He also refers to  
10 shipper invoices as a source of the information. So  
11 they have sent us to what is a control document,  
12 counsel's own representations with regard to the -- to  
13 controller documents indicate that it wasn't -- it  
14 wasn't prepared and isn't intended to produce this kind  
15 of information, for information that they routinely  
16 announce ahead of time and are on the invoices.

17           Now when all we asked them to do was compile  
18 it, they have the expertise, they know their system, the  
19 only purpose for any of these other documents was as a  
20 spot check to be sure their compilations would be  
21 correct. So you can't get there. They sent us down a  
22 false path. You can't get there from there, and you  
23 will see that Talley couldn't get there from there. And  
24 as a result, we don't have information with which to  
25 test the representativeness of any of the three or four

1880

1 different throughputs that they have proposed or any  
2 other historic or other number, and that's where we are.  
3 And so the Commission's going to be left with  
4 non-representative numbers during the historic period of  
5 adding 25% to gross rate base and all the projects and  
6 down time, and they want to use that in order to set  
7 future rates. That should not be allowed to happen.  
8 And we're not looking for -- I mean this is well beyond  
9 information. We filed our case, and the sanctions  
10 should be appropriate to that problem.

11 Now I would like to just go through these one  
12 at a time and talk about them because -- and I'm  
13 referring to the -- our supplemental information that we  
14 filed where I go to characterize Olympic's responses on  
15 page 8 of 12, and response to Request Number 1 and --  
16 oh, I would like, before we go on, I would like you to  
17 have this a month in advance scheduled down time sheet  
18 that they notified certain shippers of.

19 MR. MAURER: Are there any copies for  
20 counsel?

21 MR. BRENA: Yes, there are.

22 MR. MAURER: This is down time for next  
23 month, correct?

24 MR. BRENA: For June.

25 MR. MAURER: For June, 2002?

1881

1 MR. BRENA: Correct.

2 And bear in mind that the way that we would  
3 find that out would be to pay \$5,000 to copy unrelated  
4 information and look for volume entry throughput based  
5 on the assumption that 6,000 barrels per day would be  
6 typical and any fluctuation should be attributable to  
7 down time. That's ridiculous.

8 Response to Data Request Number 1, PASS  
9 manuals. And if you take a look at our Exhibit Number  
10 3, page 1 of 3, it has an OP12785 number on it, now it  
11 says this is their scheduling software program that they  
12 put in place in 2000 on which their entire line  
13 operates, which allows them to throughput higher levels  
14 of throughput because they're putting bigger batches  
15 through of similar products.

16 MR. MAURER: Excuse me, Your Honor, I think  
17 this is a totally inappropriate level of inquiry. In  
18 their motion for sanctions, Tesoro did not identify this  
19 as material that has not been produced. If we're going  
20 to start talking about things that -- I mean this is  
21 unfortunately typical of the kind of hide the ball  
22 tactics we have been having to deal with. He doesn't  
23 mention these manuals in his motion for sanctions. Now  
24 all of a sudden it's a problem. Did we have an  
25 opportunity to address this, no. So I think that any

1882

1 discussion about these manuals should be stricken and  
2 foreclosed.

3 MR. BRENA: Well, we pointed out that they  
4 didn't comply with our E-mail, with the requests on it,  
5 in our motion for sanctions, and we listed out the  
6 entire E-mail. And I would like to point out that their  
7 position is on the most important scheduling software in  
8 the entire company that they don't have a manual. And  
9 further, and if you read Mr. Talley, if you read the  
10 letter that they send, and this is they meaning FERC  
11 counsel in the FERC proceeding, they say that we will  
12 produce this when we get this information available to  
13 us, and they never have.

14 MR. MAURER: Your Honor, I would like to  
15 direct your attention to Paragraph 6 of Tesoro's motion  
16 for sanctions. They say quite clearly, Olympic has not  
17 produced the following, 5, 6, 7, 8, 9, 10, 11, none of  
18 which mentions the PASS manuals.

19 MR. BRENA: Well, Your Honor, I would like to  
20 point out that the motions for sanctions that he's  
21 referring to was denied and that the Commission issued  
22 an order at which they asked specifically for what  
23 answers, what discovery requests and what responses were  
24 nonresponsive, and we listed this, and I'm reading from  
25 the list of this. So I mean -- and what's going on here

1883

1 is the reason we wanted the manual is so we could see  
2 what kind of reports it could produce. Because the  
3 bottom line is that we're into controller documents that  
4 are impossible to copy, impossible to interpret even for  
5 their own lead engineer. And we believe that these  
6 manuals -- that this software can produce a report. I  
7 mean I have never heard of software that can't produce  
8 relevant reports. And they haven't produced the manual  
9 that would go to the heart of providing this information  
10 easiest. And yet they continue to represent that when  
11 they want information like for July they can get it in a  
12 couple of days, but when we want information, then the  
13 sky has fallen on this process.

14 MR. MARSHALL: This was specifically  
15 addressed in Mr. Talley's deposition. The question was  
16 asked about whether you have a manual, and Mr. Talley  
17 said, no, we do not. So the question has already been  
18 asked and answered. If we had had fair notice that this  
19 was going to be an issue, we would have pointed to page  
20 93 of Mr. Talley's deposition.

21 MR. BRENA: Your Honor, if I may --

22 MR. MARSHALL: It's Exhibit 2, and he asked,  
23 Mr. Brena asked:

24 Back on the record, Mr. Talley, I would  
25 like to address your attention to



1           Exhibit 4.  Is it your understanding  
2           that Olympic does not have manuals for  
3           the pipeline automatic scheduling  
4           system?

5           Answer:  That's correct.

6           MR. BRENA:  What page are you on, please?

7           MR. MARSHALL:  I'm on page 93.  And so this  
8           is an example of how at the depositions these issues  
9           could have been probed and, in fact, were probed.  We  
10          can't produce what we don't have, and Mr. Talley on the  
11          record under oath answered Mr. Brena's question about do  
12          we have these manuals, the answer is no.  Then he says  
13          well, how do you operate without these manuals.  The  
14          answer is you don't need the manuals to operate.  Once  
15          you get these people up and running, you don't need to  
16          keep the manuals around.

17          MR. BRENA:  Your Honor --

18          MR. MARSHALL:  So this particular set of  
19          documents doesn't exist, there's no way to create it.  
20          We don't have it, and Mr. Brena knows we don't have it  
21          because he asked the question.

22          MR. BRENA:  Because Mr. Talley doesn't know  
23          that it exists, Mr. Talley doesn't know a great deal  
24          about the products movement group.  I don't know whether  
25          or not it exists.  What I know is the software is the

1885

1 most important change in the throughput in the system,  
2 was put in place in the year 2000, and you can not train  
3 people unless you have a manual. What I also know is  
4 that they have represented to me that they would get the  
5 manual from the manufacturer and produce it, and they  
6 have not.

7 JUDGE WALLIS: Can you tell me exactly when  
8 you made this request and when the company responded  
9 that it would provide the information from the  
10 manufacturer?

11 MR. BRENA: All of these requests relate back  
12 to the E-mail that FERC and this Commission required  
13 that they agreed to comply with, and that was -- and  
14 they agreed to and they were compelled to provide. With  
15 regard to their answer, the answer that they would get  
16 us the manuals was in their April 4th letter that has  
17 been referred to earlier.

18 MR. MAURER: May I ask who is the we that we  
19 keep referring to?

20 MR. BRENA: Could I please --

21 JUDGE WALLIS: Let's let Mr. Brena complete  
22 his thought, Mr. Maurer.

23 MR. MAURER: I'm sorry, Your Honor.

24 MR. BRENA: I thought how we were going to  
25 proceed was is that I would have an opportunity in each

1886

1 category to say what I wanted to say, they would have an  
2 opportunity to respond. I'm afraid that there's been an  
3 overlap in that system. I would like the opportunity to  
4 take this one and complete it and then give them an  
5 opportunity to say whatever it is that they want to say.

6 JUDGE WALLIS: Very well. It would be very  
7 helpful if all of the parties stripped their comments  
8 down to factual information about what happened. I  
9 understand that there are disagreements about motives,  
10 there are disagreements about how people want to use  
11 this information, disagreements about what the  
12 Commission might be able to do with that information,  
13 but what I'm concerned with today and what we need to  
14 focus on if we're going to meet our time restriction and  
15 get through this discussion is exactly what happened.  
16 Where was the request, when was the response, and what  
17 ensuing interchanges between the parties affect whether  
18 or not this constitutes a violation and what the  
19 Commission should do with it.

20 So with that, Mr. Brena, you may proceed. I  
21 do think that Mr. Maurer's most recent question, that is  
22 who is we, could help clarify and help us to understand  
23 your presentation.

24 MR. BRENA: Okay. Let me just start, and I'm  
25 again on, of the requested supplemental information, I'm

1887

1 on page 8, I'm on item 2 that goes to Olympic's  
2 responses, and I'm just going to go through these one at  
3 a time and characterize what their responses were.

4 Response to Request Number 1, that is a  
5 request to the E-mail Number 1. All of these numbers  
6 here, Request Number 3, 5, 7, all relate back directly  
7 to the E-mail that they were compelled to comply with.  
8 Let me say that first of all there was no response  
9 whatsoever in this proceeding to any of these, and so  
10 anything that I say that assumes that Olympic responded  
11 to, what I'm doing is talking about a different  
12 proceeding. I'm giving them the benefit of that even  
13 though I do not think for the purposes of determining  
14 sanctions that this Commission should allow them to  
15 stand completely silent.

16 JUDGE WALLIS: There was an agreement, was  
17 there not, that in order to avoid the need to duplicate  
18 responses in both proceedings, both requests for  
19 discovery and responses, that the parties would consider  
20 the information requests and responses in the FERC  
21 proceeding to be applicable here? Am I recalling that  
22 incorrectly?

23 MR. BRENA: In part. With regard to these  
24 specific data requests, the agreement was that documents  
25 produced on one side could be used on the other side.

1888

1 They have independently objected to and responded to  
2 discovery with a few rare exceptions. My point with  
3 regard to the FERC on this matter is that they indicated  
4 that they would respond in their letter to me but that  
5 the documents that were produced at the FERC side, that  
6 they would just simply refer to those rather than  
7 duplicate those. And that is in their April 11th  
8 letter. If you have a copy of that letter, it would be  
9 helpful. And it says, our response at the WUTC would  
10 refer to the documents attached to the FERC. And they  
11 point out, in order to avoid duplication, we propose to  
12 provide documents to Tesoro in the FERC proceeding and  
13 will not provide a duplicate set in the WUTC. So with  
14 regard to documents in these requests, Tesoro has agreed  
15 to accept those documents. With regard to a response,  
16 we did not, and they did not propose one. In fact, they  
17 suggested in their letter that their response was going  
18 to be separate by saying that our response to the WUTC  
19 would refer to the documents produced on the FERC side.

20 MR. MARSHALL: Your Honor's recollection is  
21 correct. When the Commission set two deadlines, one of  
22 April 9th to respond to the WUTC Staff's data requests  
23 and then the other of April 12th to respond to the FERC  
24 order, there was a clear understanding that what we were  
25 doing here is setting two separate deadlines so that

1889

1 whatever responses were to be made at FERC would be the  
2 responses made here. It doesn't make any sense to try  
3 to separate out any of the issues regarding the  
4 production of these documents one from the other. The  
5 whole thing was left up to FERC counsel to deal with the  
6 FERC order, and our Commission simply adopted the FERC  
7 order saying that you would comply with that. So  
8 whatever that means, whatever the FERC order is is a  
9 matter that FERC counsel had talked about and discussed,  
10 the whole background of what was to be produced, how it  
11 was to be produced, under what circumstances. We wanted  
12 to avoid all the duplications. We simply left it for  
13 Olympic's FERC counsel to deal with that FERC order  
14 while we out here handled the April 9th production of  
15 the materials for the WUTC Staff.

16 JUDGE WALLIS: How do you respond to the  
17 point that the language talks about another response in  
18 the WUTC docket and the contention that there never was  
19 a response in the WUTC docket?

20 MR. MARSHALL: That was our response, to say  
21 that we were going to abide by whatever was produced  
22 there at the FERC. That's what that was intended to  
23 mean. Maybe it wasn't perfectly clear, but by this time  
24 it was, I think. I mean the exchange of letters and the  
25 issues were all being handled by the FERC counsel, and

1890

1 the documents were produced there, not out here.

2 JUDGE WALLIS: Thank you.

3 MR. BRENA: One follow up on that. They have  
4 never done that. Any time they have intended to  
5 incorporate a response other than the document, they  
6 have specifically done that in their response to our  
7 request in this proceeding. There was no agreement to  
8 the contrary. And let me make a distinction between our  
9 agreement to allow documents to be taken into  
10 consideration in the proceeding versus a response or an  
11 objection to a response. These are separate  
12 proceedings, and they required a separate response, and  
13 they have never done what they said they did, what they  
14 said they intended that letter to do, and that letter  
15 says just the opposite.

16 MR. MAURER: May I suggest, Your Honor, that  
17 the idea that somehow the April 4th hearing and the  
18 resulting order here at the WUTC could be read to say  
19 you can produce the documents at FERC but your  
20 responsive answer is not going to be sufficient to  
21 answer Mr. Brena's data requests, I think that that's a  
22 rather absurd reading and seemed to be duplicative. The  
23 question is what information did Tesoro get and when did  
24 they get it. Now we have told them that in some cases  
25 the documents they have requested we don't have. The

1891

1 idea that somehow we would have to produce a document  
2 that we don't have at the WUTC when at FERC we're saying  
3 we don't have any documents, it's -- I mean it can't be  
4 read that way. I mean it's just -- it's an absurd  
5 reading.

6 MR. BRENA: Your Honor, this is not the first  
7 time this has happened in this proceeding where WUTC  
8 counsel have refused to object and refused to produce  
9 information. It's happened before multiple times.

10 JUDGE WALLIS: And I think we understand the  
11 parties' positions now.

12 MR. BRENA: Okay, let me go to the issue  
13 here. Their representation is they don't have a manual,  
14 but they would go get one.

15 MR. MARSHALL: Well, if --

16 MR. BRENA: Olympic is attempting to obtain  
17 materials and information that explains the PASS  
18 program. Olympic does not have in its possession  
19 documentation. Well, Your Honor, you know, this reminds  
20 me of the AFEs, you know. The first time AFEs came up,  
21 they didn't even know what they were, they never had  
22 them, they never heard of them, they didn't know what  
23 they were. About two months later, they produced all  
24 the AFEs but the Whatcom Creek AFEs, and then about a  
25 month or two after that, they finally got Whatcom Creek



1892

1 AFEs. It is not possible that they are operating this  
2 system that's just two years old and they don't have  
3 manuals that indicate it.

4           And the reason we asked for this so we could  
5 confirm the information that they were giving us that  
6 the products movement group, because of Mr. Talley's  
7 limited knowledge, that the products movement group, in  
8 fact, didn't have a software program where they could  
9 just push a button and give us this information, because  
10 they did it too darn fast for him. So we wanted to  
11 independently confirm that. So they haven't produced  
12 that. They produced three pages that they typed up, and  
13 those three pages are attached as the first three pages.  
14 And I would ask you not to be confused by what follows  
15 the three pages, which is a different software program.

16           And they identify it, the PASS system is  
17 integral to the most essential operations of Olympic  
18 Pipeline, including scheduling operations and  
19 accounting. That is the master program that integrates  
20 all of this information. Well, if they don't have a  
21 manual, maybe that's why they can't figure out how to  
22 get this information out of their system. Maybe that  
23 would explain it. But it is just -- it is beyond the  
24 call that this company does not know what products flow  
25 through its line in what proportions and when this line

1893

1 is down. And we're sitting here, I mean that is what  
2 they do, and we're sitting here quibbling over details  
3 of everything else. And their most important software  
4 program that they touted as improving their throughput  
5 they can give no guidance into, when they knew that we  
6 requested to so we could confirm whether or not reports  
7 could be generated from it.

8 JUDGE WALLIS: Does that complete your  
9 argument on that item?

10 MR. BRENA: It does.

11 MR. MARSHALL: There's no question that all  
12 of these documents that we do have have been made  
13 available in Renton since February 22nd. This material  
14 that Mr. Brena just now pointed to was produced  
15 separately after trying to obtain it from an outside  
16 consultant. All of the reports that this PASS system  
17 produces, and it does accept nominations from shippers,  
18 maintains a working schedule for the pipeline, produces  
19 schedule reports, makes the day-to-day scheduling  
20 operations of the pipeline possible, all of those  
21 documents are available. They just haven't been  
22 requested by Mr. Brena. Those specific documents that  
23 PASS produces haven't been examined by his experts,  
24 haven't been even addressed or looked at. Questions  
25 weren't asked of Mr. Talley about any of these things

1894

1 even though these three pages were produced on April 9th  
2 before Mr. Talley's deposition. He could have been  
3 asked, do you have a working schedule for the pipeline,  
4 and Mr. Talley would have said yes, it's in Renton,  
5 you've had access to it since February 22nd.

6           The fact is that there is no manual that the  
7 company has. This system works the way it works, and  
8 it's been working for a couple of years. But we did  
9 have a description of what it's supposed to do and what  
10 it produces. The fact that they have not gone and asked  
11 for the documents and gone and looked at them, inspected  
12 them and copied them as the rules permit, is no fault of  
13 Olympic. Those have been made available. Everything  
14 has been made available that relates to throughput and  
15 design capacity since February 22nd. Nobody from  
16 Mr. Brena's office or his consultants have come to  
17 Renton to take a look at any of these documents of this  
18 PASS system or the batch scheduling program.

19           There's a batch scheduling software program  
20 also that's referred to would produce. And the  
21 invoices, there again to schedule an invoice with a  
22 predicted down time of five days for June, all of those  
23 documents have been available too. There's been no  
24 mystery, there's been no withholding of them, they  
25 simply haven't -- there's rooms full of these documents.

1895

1 There simply hasn't been an effort by Tesoro to take the  
2 steps to go and have access to the things that have been  
3 made available for inspection and copying.

4 JUDGE WALLIS: Very well.

5 MR. MAURER: Let me --

6 MR. BRENA: Your Honor, just --

7 MR. MAURER: I'm sorry.

8 MR. BRENA: I'm not used to arguing --

9 JUDGE WALLIS: Mr. Maurer.

10 MR. BRENA: I'm not used to arguing over two  
11 counsel at the same time on the same motion on the same  
12 point. Is that -- so I would ask that typical practice  
13 be followed and they decide who the counsel is. We have  
14 limited time, and they can consult.

15 MR. MAURER: Your Honor, the reason that  
16 there's two counsel here today is because I have been  
17 the one who has been most active in responding to  
18 Tesoro's motion, and I have been the one who wrote the  
19 letter on May 17th, I have been the one who put together  
20 a lot of this information. Unfortunately, I'm a late  
21 comer to this proceeding. I do not have personal  
22 knowledge or much background in what occurred prior to  
23 when I started working on the case, which is why  
24 Mr. Marshall is here, to assist with some of the factual  
25 issues that have come up, but if -- I think we have

1896

1 addressed the past issue fairly well.

2           The sole point I wanted to make was that  
3 there's a difference between, as Mr. Brena represents in  
4 his filings, no documents being produced and a statement  
5 that no documents exist. I can ask for, you know an  
6 original copy of the Ten Commandments from somebody, and  
7 under Mr. Brena's calculation, if they don't hand it to  
8 me, I'm not responsive, because no documents have been  
9 produced. I think there's a big difference between no  
10 documents being produced and no documents exist. And on  
11 a number of these, we have indicated to them that no  
12 documents exist. And to say that somehow we should be  
13 at fault because we haven't produced documents that  
14 don't exist seems once again to be a rather large  
15 stretch of our discovery responsibilities under the  
16 Commission's rules.

17           JUDGE WALLIS: Very well, I'm going to ask  
18 that counsel for Olympic choose which lawyer will  
19 respond to a given item from this point forward. I do  
20 think it would help make things go a little faster.

21           MR. BRENA: Your Honor, you know, his last  
22 point that if a document doesn't exist, it doesn't  
23 exist, is a well taken point, and that's what I heard  
24 the first four times about the AFEs.

25           And I don't believe that the PASS manual

1897

1 doesn't exist. It's been there for two years, they had  
2 to train their people, they had to have materials. They  
3 indicated that they would gather information. It would  
4 take one phone call to the manufacturer to get a manual.  
5 It's the most important software program for scheduling  
6 on a pipeline line, and they don't even have software  
7 telling them how to run it. That's, you know, that may  
8 be.

9           And I just wanted to clarify that, you know,  
10 we're not asking for all of those reports. We looked  
11 for those manuals so we can see whether or not the  
12 things that would be represented to us were available.  
13 What I have just heard is that volumes and volumes of  
14 reports from this software are available. Well, if  
15 that's true, then what are we looking at controller  
16 green sheets for in order to get this information from.  
17 Why is it that it's so difficult to compile this  
18 information. Perhaps that's how the products movement  
19 group does it.

20           But all I would ask is, you know, it's -- I  
21 mean they can say no documents exist, and all I can say  
22 is I have heard it before, and I have gotten the  
23 documents. And on this point, it's so critical to this  
24 case, the idea that they don't have the manual or the  
25 materials, that's just unbelievable, and, well, it's --

1898

1 it is unbelievable.

2                   In response to Request Number 3, green cards,  
3 I think we have discussed those enough, and I won't --  
4 they have offered to make those green cards available.  
5 They don't contain the information that they're  
6 represented to contain, and it's not -- it's not  
7 apparent that anybody can take that information off of  
8 there no matter how much time is -- and so the green  
9 cards, they have made those available, and I put those  
10 in here, but they have tried to comply with that, so I  
11 have nothing further on that.

12                   JUDGE WALLIS: Are green cards the same as  
13 the green sheets?

14                   MR. BRENA: Yes.

15                   With regard to --

16                   MR. MARSHALL: Before we leave that, the one  
17 observation we need to make on the green sheets is that  
18 there is absolutely no declaration, affidavit, or  
19 statement from Tesoro's experts that the data that  
20 they're asking for in summary form later on can not be  
21 obtained from these controller run sheets, the green  
22 sheets. Mr. Talley has said that they can be derived  
23 from that. The letters that have been exchanged between  
24 Mr. Brena's office and FERC counsel have said that they  
25 can. There's only a representation by Mr. Brena,

1899

1 counsel for Tesoro, that this information can not be  
2 derived from the green sheets. There has been no  
3 contradiction, it's undisputed that these green sheets  
4 have been available for weeks and weeks, since February  
5 22nd if they wanted to come down and take a look at all  
6 the materials that we had. And there's been no dispute  
7 that since April 4th and 5th that this was going to be  
8 it for the production. And at no time after that was  
9 there any effort to clarify is that what this was, no  
10 effort when we were on the phone to Your Honor on the  
11 16th of April that this is not sufficient. The green  
12 sheets, there's no testimony that the green sheets can  
13 not derive the list of strips, the average down time,  
14 the average batch size, nothing but argument of counsel  
15 for Tesoro. All the sworn testimony and all the other  
16 exchanges have been that you can derive this information  
17 from the green sheets.

18 JUDGE WALLIS: Very well.

19 MR. BRENA: And, Your Honor, I would just add  
20 to that that take a look at Mr. Talley's deposition  
21 where he tries to and is unable to, that speaks for  
22 itself.

23 But, you know, central to the point is that  
24 whether or not, and this goes to Response Number 5, 7,  
25 8, and 9, my next arguments, you asked if certain



1900

1 arguments could be grouped, those can be grouped I  
2 believe, with a few exceptions. But down time list,  
3 strips list, products list, and batch size list.

4 MS. WATSON: Can I ask for a quick  
5 clarification, what pages to that deposition were you  
6 referring to a few moments ago?

7 MR. BRENA: The relevant pages of the  
8 deposition are attached to my Tesoro information  
9 document.

10 MS. WATSON: Okay.

11 MR. BRENA: I didn't copy the entire  
12 deposition, just the parts where we go through that.

13 MS. WATSON: Okay.

14 MR. BRENA: With regard to all of these, now  
15 let me make just a common sense observation. You know,  
16 we had some cases that we had to put, on some  
17 information we needed to analyze, very, very tight  
18 schedule. Now Olympic agreed and was compelled to  
19 compile this information. Your Honor has earlier ruled  
20 in this case that a party may be requested to compile  
21 information, and here is a case where what they're  
22 saying is, it's undisputed. It is undisputed that they  
23 agreed to provide this information. If you take their  
24 representations, they can compile it off the green  
25 sheets. It's undisputed they were compelled to do that.

1901

1 They haven't. Instead they want to just give us some  
2 green sheets, some ambiguous orders, and let us work for  
3 months to try and figure out things that their product  
4 movement group could probably get some other way. So as  
5 Mr. Talley suggests through their invoicing of shippers  
6 they can get the information, or as Mr. Talley did. I  
7 don't know, his products movements group can get it  
8 relatively efficiently.

9 I mean let's look at this in practical terms.  
10 Somebody has to get this information and compile it or  
11 we don't know what's representative. Who's in the best  
12 position to do this, Olympic. Who agreed to do this,  
13 Olympic. Who was compelled to do this, Olympic. Why  
14 are we sitting here talking about whether or not Tesoro  
15 retained experts to go out and do it. That was what  
16 they were compelled to do. They didn't argue any of  
17 this. They said, yes, we'll do it. It wasn't even an  
18 argued point. And so now to come back and say, well,  
19 they can figure it out somehow, well, you go through  
20 that green sheet, and you go through their instructions,  
21 and I have gone through down time, can't be done.  
22 Talley couldn't do it. It's not going to be done by  
23 anybody anytime soon. What better evidence do you know  
24 that it can't be done than when Talley can't do it.

25 With regard to all of these, I mean how can

1902

1 there be an issue here. The Commission said compile it,  
2 they said that they could do it, they have done it for  
3 one month in a couple of days, where is it, how does it  
4 get simpler than that. And that even takes into  
5 consideration their FERC information. But again, there  
6 was no response to anything with regard to any of these  
7 four points, okay.

8           Let me just summarize these four points  
9 again, okay. They say they can compile it, and  
10 apparently they have more sources than just the sources  
11 that are provided to us, you know, us spending endless  
12 hours in Renton, which I did show up in Renton, I did  
13 ask for Mr. Talley to be made available, he was not made  
14 available. With regard to these things, where is the  
15 compilation. It's just that simple. They either did it  
16 or they didn't do it. Why do we need to argue about one  
17 other single fact in this case. They said they would,  
18 they were compelled to, and they didn't. How clear can  
19 a sanctionable conduct be. How far can they get away  
20 with blaming the victim for what they didn't do. And  
21 that applies to all of these. And without these  
22 compilations, there is no practical way to access this  
23 information. Your Honor can look at it, Your Honor can  
24 read Talley's deposition where he struggles to find it,  
25 can't be done, and they can do it in a couple of days.

1903

1                   Now let's say we did go out and hire experts  
2 and paid, you know, paid \$5,000 a copy in costs and went  
3 out and hired experts for \$35,000 in order to divine  
4 this information off of that, what would they have to  
5 do. We would come in and say, you're using throughput  
6 that's not representative. What would they have to do?  
7 They would go ask their products movement group to take  
8 a look at what we did and to do their own compilation.  
9 So apparently what they want to do is keep this  
10 information, is not honor their agreement, not honor  
11 either Commissions' motion to compel, force our experts  
12 to spend days up there in Renton compiling the  
13 information that they could do in a snap, and then  
14 they've got to go do it anyway, because they have no way  
15 of rebutting our case unless they do. That is  
16 ridiculous, that is a ridiculous process to ask for an  
17 intervener to go through when they're sitting here  
18 swearing in and telling you that they can do this  
19 information and when they have done it in a few days and  
20 when they were compelled to do it in a few days. We  
21 want it, we needed it for our case, we can not test the  
22 representative without it, we don't have it. What else  
23 need be said. You know, Tesoro and its experts can only  
24 take so much blame for them not doing what they say  
25 they'll do.

1904

1                   JUDGE WALLIS: Is that a closing argument for  
2 your review of the individual items?

3                   MR. BRENA: Those four. There are more. You  
4 asked for grouping.

5                   JUDGE WALLIS: Yes.

6                   MR. BRENA: That would be my grouping, that  
7 would be my closing comment on Request Number 5, Number  
8 7, Number 8, and Number 9. And, you know, and let me  
9 just -- down time list, and I have shown Your Honor that  
10 they keep track of scheduled down time, they didn't  
11 provide any of that to us. Hammer's testimony indicates  
12 36 to 40 days scheduled in advance. This isn't rocket  
13 science when that line is going to shut down. They have  
14 to keep records of it. You don't have to go through and  
15 look for pressure variations in the line to figure out  
16 when the line is going to be shut down because someone  
17 is going to do that. That's ridiculous. Strips list,  
18 okay, you know, how much they're stripping off, that  
19 would be on invoices. Product list, you know, what are  
20 they shipping through their line. I mean, you know, you  
21 don't have to go through controller sheets to figure  
22 out, you know, he knew when he met with me in that  
23 technical conference and he has acknowledged this in his  
24 deposition, he knew to the percentage point every  
25 product that flowed through that line and what

1905

1 percentage for the whole month of July, 31 days, he knew  
2 it in a couple of days. So, you know, they're sitting  
3 here saying go look at the controller sheets and don't  
4 blame us if you can't figure it out. Batch size list,  
5 there's been a change in the historic use of this line  
6 to larger batches and different products. We're trying  
7 to understand that. They have suggested 97-98 and now  
8 they're going to come in with the last nine months'  
9 actuals, we don't think either are representative of  
10 what they're likely to do in the future. And without  
11 this information, we can't tell that.

12 MR. MARSHALL: What he just said is  
13 interesting. He's saying we want you to tell us what  
14 the average down time is on all of these months for  
15 which you have past actual data. We have given them the  
16 past actual throughput data. I mean all of that's  
17 there, and it's been there for a long time. The only  
18 question is to break it out into different categories  
19 that they want to have it broken out in. At the end of  
20 the day, what you have, what you're left with is you're  
21 left with average throughput, you're left with whatever  
22 it is. And it is lower than it's been, it's lower than  
23 it's been for a number of reasons, all of which have  
24 been examined.

25 Now let me go back to the genesis of how we

1906

1 got to where we are in the course of this. First --

2 JUDGE WALLIS: What I would prefer here is  
3 factual information about the request and the response.  
4 I know that you have made representations during the  
5 course of the morning, and I would ask you not to repeat  
6 those, and I will ask Mr. Brena not to repeat now  
7 arguments and factual representations that he has made.

8 MR. MARSHALL: The statement that Olympic  
9 agreed to compile and create new information when it had  
10 not created information before is incorrect. If the  
11 Talley declaration at Item P at Paragraph 5 is looked  
12 at, Mr. Talley on the two occasions, March 15th and  
13 March 21th, wanted to have Olympic do these things,  
14 Mr. Talley said we're not going to do these things. The  
15 next question was at FERC after -- and by the way, the  
16 E-mail that Tesoro talks about wasn't done right after  
17 the technical conference with Mr. Talley. The first one  
18 was on March 15th, and the E-mail wasn't dated until  
19 March 27th. But in that E-mail, Mr. Brena asks for a  
20 number of things. There was no agreement that we would  
21 provide those things in the technical conference, and  
22 Mr. Talley's declaration is the only sworn testimony  
23 that addresses what we agreed to do and didn't agree to  
24 do.

25 Then you had to go and look at the FERC order

1907

1 of April 1st, and what the FERC order does is require  
2 Olympic to produce certain documents. Now production of  
3 documents is only production of the things that you  
4 have. There is no order requiring Olympic to compile,  
5 to create new documents. There's no word in the FERC  
6 order that says compile or create a new document or do  
7 something new. That part where Mr. Brena says is  
8 absolutely clear that there was an agreement it's  
9 undisputed that we were to compile and we agreed to  
10 compile, there is no evidence from Mr. Talley's  
11 declaration and no evidence in the FERC record that  
12 anything other than the production of materials that we  
13 had would be done.

14           Now that's where we come to the letters  
15 between the FERC counsel. If there was any ambiguity at  
16 all about what was being required in the FERC order of  
17 April 1st, by the 4th and 5th of April, the parties had  
18 sorted out and had created their own legislative history  
19 of what it was that we were to do, and Mr. Wensel's  
20 letter quite clearly gives two options, produce these  
21 new documents, these summary documents, or produce the  
22 source documents, the green sheets, in which to do it.  
23 No objection. If this is true that this was a violation  
24 of everything and it was so clear, if you assume that  
25 that's the starting point, then Tesoro would have raised



1908

1 this issue immediately after the 12th of April.

2           Now the letters were quite clear from Olympic  
3 on the 4th of April, we need to get this clarified and  
4 resolved before the drop dead date of April 12th, we  
5 need to have an understanding about what we're supposed  
6 to do here, because we don't want to have a situation  
7 like we're all faced with here in this room where  
8 there's a dispute about what we're supposed to do and  
9 what we're not supposed to do. So it was clarified  
10 then. And at no time between then and April 25th when  
11 there was a motion to compel did we hear anything about,  
12 well, you agreed to produce these new documents, to  
13 create these now documents. It wasn't done on April  
14 16th when we were on the phone with Your Honor, it  
15 wasn't done in depositions, it wasn't done at any point.  
16 There was no statement by Tesoro that it was undisputed  
17 that you agreed to do this. What we did do was what we  
18 agreed to do in the letters prior to April 12th, prior  
19 to the time of the deadline.

20           The only real question now is do they really  
21 need this information by these different categories. Is  
22 it sufficient just to have the overall actual  
23 throughput. Where does it get them to do that they  
24 aren't already there and able to do. This again is all  
25 historical information. This is not a prediction about

1909

1 what's going to happen in the future. This is all past  
2 stuff. If we want to argue about what's going to happen  
3 in the future, that will be an argument that will be  
4 made from the documentation on actual throughput in the  
5 future. What is that? Well, a lot of it depends on are  
6 we going to have the money, are we going to have the  
7 loans to be able to continue any of the work to get the  
8 100% pressure. That may or may not happen. The future  
9 throughput is going to depend not on any of these four  
10 items here, but it's going to depend on other factors.

11           The question then becomes one of if this work  
12 needs to be done, who is going to go through the green  
13 sheets and do it. Again, there's no declaration from a  
14 Tesoro expert that they can not do it. The Talley  
15 declaration on the other hand states that, look, this  
16 would take a lot of time, and our product movement  
17 specialist is currently managing and supporting other  
18 things. If we were to take somebody off at this point  
19 of all of the duties that that person has, and by the  
20 way there are only two of these people that do this,  
21 that would be at this point a very difficult thing to  
22 try to schedule.

23           There's no question that you have to go  
24 through, and I know that Mr. Brena has now narrowed his  
25 request for how many months he wants to have this done,

1910

1 but there's no question that this will take a  
2 significant amount of time with a calculator to sit down  
3 and do. But there's no question it can be done. I mean  
4 it's undisputed from what Mr. Talley has said, and  
5 there's no contrary declaration from Tesoro. There's no  
6 contrary declaration to show that the letters that were  
7 exchanged provide that we're required to do the summary  
8 sheets and create those instead of producing the source  
9 documents.

10                 So we stand behind what we said, we will  
11 produce all the materials that we have, and we have, not  
12 only the green sheets, but every other thing including  
13 the historical throughput numbers and everything else  
14 that Mr. Brena might want by way of existing documents.  
15 He had every right to ask for them, and if we had them,  
16 we would give them to him, and we did. There's no  
17 question that those four items, Mr. Talley said at the  
18 technical conference, Olympic does not perform these  
19 analyses and does not do them in the regular course of  
20 business. Mr. Brena says, well, that's incredible, I  
21 can't believe that you don't keep track of this.

22                 The list of strips run historically is really  
23 that's -- that's history, that's gone, that's over and  
24 done with. List of average down time, whether it's  
25 scheduled or unscheduled, that's history. And what it

1911

1 does is if you have enough months, you can begin to see  
2 a pattern, but if you take individual months, you can't.  
3 It's the overall list of the throughput that you have  
4 month by month that's really the important factor, which  
5 they have had at least since January for everything up  
6 to December and since March 22nd for everything  
7 thereafter. The list of average batch size by product  
8 for month for 1998 and July 1st, 2000, to date, you  
9 wonder whether that makes any difference on a going  
10 forward basis.

11 JUDGE WALLIS: Mr. Marshall, I still don't  
12 think that whether that information makes any difference  
13 or not is not a question we need to address here. I  
14 think the question we need to address here is, was there  
15 a violation, and if so, what do we do about it. There  
16 has been no objection voiced to these requests that I'm  
17 aware of that they are not proper objects of discovery.  
18 We're going into it I think with the assumption that  
19 they are proper objects for discovery, assuming that  
20 they exist, and I would suggest in order to finish on  
21 schedule that we not address whether or not they are  
22 important.

23 MR. MARSHALL: In terms of whether they were  
24 objected to or not, whether they were disputed, I think  
25 I have covered that by saying Mr. Talley said we don't

1912

1 do that, the letters say we weren't going to do that, we  
2 were going to produce what we had. There's no --

3 JUDGE WALLIS: We understand that, yes.

4 MR. MARSHALL: -- to do a compilation. And  
5 then the related question is could the Tesoro experts  
6 have done this from the material provided, and all of  
7 the undisputed evidence is that they could have.  
8 There's nothing in the record to show from their experts  
9 that they could not have done this.

10 JUDGE WALLIS: We understand that that's your  
11 argument.

12 MR. BRENA: Your Honor, if I could just -- I  
13 want to make one thing just absolutely crystal clear  
14 here. At the technical conference, in Mr. Talley's  
15 deposition, I asked him about what happened at the  
16 technical conference. And I say, when I made and when I  
17 sent this request, and I'm quoting from page 84, to you  
18 in Number 3 asking for average down time by month for  
19 1998 and July 1, 2001, isn't it fair to say that we both  
20 understood that that would be a list that would need to  
21 be generated based on a review of the green sheets,  
22 because that was what he represented. And then his  
23 answer is, yes. And we go through each of these. It is  
24 absolutely clear prior to serving this discovery that  
25 they agreed to provide, that they would have to go out

1913

1 and do the work. Mr. Talley said that they would have  
2 to go out and do the work, and they agreed to go out and  
3 do the work. And then what they're trying to do is  
4 invoke some sort of unilateral change in the  
5 Commission's order through some ambiguous reading of  
6 some orders. Baloney.

7           Here is what the FERC order says, it is  
8 agreed that these 11 items shall be produced, and the  
9 list with average down times was one of those 11 items.  
10 They agreed to do it, they were compelled to do it,  
11 everybody knew they had to go do some work. So to now  
12 say, well, you know, we only have to produce what we  
13 have, we don't produce them in the normal course,  
14 everybody knew that. Everybody but the FERC counsel  
15 knew that. WUTC counsel knew that, Mr. Talley knew  
16 that, we knew that when we gave the request.

17           And so I would just refer you to where I go  
18 through this and ask Mr. Talley, didn't we understand  
19 that, and he said, yes, we understood that we had to go  
20 do the work to do it. And that was before they agreed  
21 to do it, before they were compelled to do it. So now  
22 to be standing here arguing somehow, oh, well, we  
23 shouldn't have to do it, well, they agreed to do it.  
24 Whether they should have had to have done it is an  
25 argument that is improper at a sanction hearing. It's

1914

1 an argument they should have raised and Mr. Marshall  
2 should have raised when he -- before he agreed to go do  
3 it.

4 JUDGE WALLIS: We understand that that's your  
5 argument, and I do believe that we're now getting into  
6 multiple iterations of what appears to be the basic  
7 issue between the parties, and I think we understand,  
8 because both Mr. Brena and Mr. Marshall and I think also  
9 Mr. Maurer have also reiterated their clients' position  
10 on this issue.

11 Mr. Maurer, did you wish to say something?

12 MR. MAURER: Just very briefly, Your Honor.  
13 We have already talked about the fact that Mr. Brena  
14 asked Mr. Talley in the passive voice, do you -- do the  
15 -- would you need to -- would these calculations need to  
16 be done. The answer is yeah, they do need to be done.  
17 Mr. Talley answered the question that was asked of him.  
18 That's what every lawyer tells their witness when they  
19 go into a deposition.

20 It seems to me that Mr. Brena likes to fall  
21 back on the FERC requirements when he needs them and  
22 then say when it comes time to for Olympic to respond to  
23 them, somehow we can't rely on what transpired between  
24 FERC counsel and Mr. Brena. What happened here very  
25 clearly was Mr. Talley had told Tesoro's counsel that we

1915

1 could not produce, we would not be producing or creating  
2 any new lists. On March 27th, he sends on E-mail asking  
3 for the lists. Mr. Miller at the hearing hears that,  
4 "we have agreed to produce the lists". Once again, we  
5 have asked Mr. Brena, who is we, and we still haven't  
6 gotten an answer to that question. And as soon as Mr.  
7 Miller realizes the current actual state of what  
8 happened and what we had agreed to, he sends the April  
9 4th letter. And Tesoro's counsel responds saying either  
10 give us the summaries or give us the lists. So we have  
11 all gone over that 100 times.

12 MR. BRENA: Yes, we have.

13 JUDGE WALLIS: At least six.

14 MR. MAURER: But I will note also that in the  
15 April 4th hearing, Mr. Marshall specifically said, and  
16 this is referenced in our answer, that we would not be  
17 able to get any lists to them by April 12th. So if we  
18 keep hearing that we agreed, we agreed, we agreed, no  
19 identified who we are, the only thing on the record that  
20 we have to look at is what Mr. Marshall said at the  
21 April 4th hearing, which is that we can't get you any  
22 lists by April 12th, which is true, we couldn't have  
23 gotten any lists by April 12th. And by April 5th,  
24 Tesoro itself had made the point moot by saying, well,  
25 give us either the summaries or give us the source



1916

1 documents. That's in a nutshell what happened in this  
2 case, Your Honor.

3 JUDGE WALLIS: Very well.

4 MR. BRENA: I won't just repeat myself, I  
5 agree, I think it's been at least six times.

6 Bayview throughput documentation. Nothing  
7 produced.

8 MR. MARSHALL: We did, however, respond to  
9 that by saying we can't find any material that would  
10 show that Bayview would increase by 35,000 to 40,000  
11 barrels per day. It does not appear we have -- there's  
12 plenty on the record showing the inquiries that have  
13 been made. We don't believe that Bayview could increase  
14 the throughput.

15 MR. BRENA: Your Honor, I mean counsel's  
16 belief as to the impact of Bayview is not the issue  
17 here. The issue is whether or not there are documents  
18 that exist that have not been produced that are  
19 responsive with regard to Bayview.

20 MR. MARSHALL: And the answer is all the  
21 documents that we have been able to locate have been  
22 produced. And then we have gone further and we have  
23 made inquiry of the people who were at Equilon at the  
24 time that were in charge of compiling some of this  
25 information, and we find that they did not have any

1917

1 worksheets or summary. We have gone beyond the Olympic  
2 documents to try to reach into the prior manager, and I  
3 believe that that's documented too. We have sent  
4 letters indicating what we have done to try to find the  
5 Bayview documents.

6 I would only further state that it doesn't  
7 look like that statement about that kind of throughput  
8 increase by Bayview is supportable at all. It's going  
9 to probably be a much smaller number, and I think  
10 Mr. Talley even talked about that in his deposition. He  
11 was asked about Bayview and about whether there were any  
12 documents, and I don't think it's part of material that  
13 you have here in front of you, but it could be, but I  
14 think that he himself has gone through and tried to  
15 locate any further documentation on the Bayview number.

16 Now Bayview does, because it adds a whole  
17 bunch of storage tanks, increase the ability to make up  
18 for shipments that a shipper has nominated but doesn't  
19 have product to move. It helps to aggregate batches.  
20 It will increase throughput. There's no doubt that it  
21 will. But 35,000 to 40,000 barrels per day is not --

22 JUDGE WALLIS: Again, Mr. Marshall, you will  
23 have ample opportunity to argue your case.

24 MR. MARSHALL: Right, I'm just pointing out  
25 that --

1918

1                   JUDGE WALLIS: The question here is the  
2 availability of the documents and not what the documents  
3 will show.

4                   MR. MARSHALL: Right. And what I think we  
5 will be able to do in testimony is to show that there is  
6 a -- this number is --

7                   JUDGE WALLIS: Mr. Marshall.

8                   MR. MARSHALL: -- not supportable, and there  
9 are no documents for that. There are other calculations  
10 that can be done to show a different benefit from  
11 Bayview.

12                   MR. BRENA: Your Honor, I would just -- there  
13 are documents that exist that support the Bayview  
14 calculation, and we have them.

15                   MR. MARSHALL: Those have been produced.

16                   MR. BRENA: But they were not produced in  
17 response to this. They were -- we had to go back into  
18 the document presentations that were made to the boards  
19 at the time, and they are incomplete. And so if you  
20 would like, if it would be helpful, I could produce for  
21 you the information that we have gleaned through the  
22 board packages that do provide document support for  
23 Bayview's calculation with throughput that we know  
24 about.

25                   Now you have just heard once again, no

1919

1 documents, nothing. In fact, it's wrong, and I can and  
2 I would ask for leave to supplement this to include  
3 those portions of the board packet that we have  
4 discovered that do go directly to the heart of this  
5 issue that show the graphic increases due to Bayview.  
6 So I have, you know, I have sat here and listened to the  
7 no documents, no documents, no documents, here is one we  
8 have them, they just aren't complete, and they haven't  
9 produced any of them.

10 JUDGE WALLIS: Very well. I'm going to deny  
11 the request to submit additional documentation. I think  
12 that the parties have had an exceptional opportunity to  
13 support their arguments, and I think we do have to come  
14 to closure on this.

15 MR. BRENA: Okay, well, then I would just say  
16 that, you know, this is back to the former operator  
17 issue, that this was a tariff filing. These  
18 representations that they made were a tariff filing that  
19 went into effect for the rate in 1999. That's just a  
20 few years ago. And in that tariff filing, they made  
21 these representations, and they provided to the Staff  
22 calculational spreadsheets of it. It's one of those  
23 things where if you close your eyes, you can't find  
24 anything, but if you're really looking for something,  
25 you can. And this hurts them, and they are unable to

1920

1 produce it, and the documents exist.

2 MR. MARSHALL: We have produced the -- the  
3 tariff filings were part of the Talley deposition.  
4 Mr. Trotter asked about the tariff filings. He also  
5 showed Mr. Talley a copy of the board presentation  
6 minutes that were produced earlier. The question is, do  
7 we have any further documentation to support those  
8 calculations of the 35,000 to 40,000 barrels per day,  
9 and the answer is no, there aren't any workpapers or  
10 other backup material that we have been able to locate.  
11 We don't believe that that number is supportable, and  
12 that's what Mr. Talley also said. He said it's going to  
13 be less. But that part of the deposition isn't here.  
14 We have tried, we would like to believe that a thorough  
15 study was done by the prior operator to show how they  
16 came up with a 35,000 barrel number. All Mr. Brena is  
17 talking about is that there were filings and there was a  
18 presentation about the conclusion, but not about the  
19 backup documents. We have looked for it, we can not  
20 find it. It doesn't hurt our case, I don't believe, but  
21 the fact of the matter is we have produced everything  
22 that we can, and Mr. Talley confirmed that, and other  
23 letters here in the files confirmed that we have  
24 produced everything that we could find on that.

25 JUDGE WALLIS: Thank you, Mr. Marshall.

1921

1                   Mr. Brena.

2                   MR. BRENA: Just to be clear, when they say  
3 that they don't exist, not that they have produced them  
4 all, and if counsel continues to make factual  
5 representations that they do not exist, then I would  
6 again ask for leave to demonstrate that they, in fact,  
7 do exist. That's a factual, you know, I have no idea  
8 what representations counsel would make in this  
9 proceeding, but --

10                   JUDGE WALLIS: I think counsel has now  
11 acknowledged the existence of the documents that you  
12 mentioned.

13                   MR. BRENA: I did not hear that.

14                   MR. MARSHALL: The overall conclusion  
15 documents and the filing documents we have. The backup  
16 worksheets and how those -- that number, conclusory  
17 number was derived, we don't. And if I misspoke before,  
18 I will correct that now. It's not that we don't have  
19 any documents about the 35,000 to 40,000. Obviously  
20 with a tariff filing and with the presentation materials  
21 that we have produced earlier, that's not what we are  
22 meaning. We meant anything further that's supportive of  
23 that conclusory number. We have looked, and those are  
24 not available.

25                   JUDGE WALLIS: Thank you, Mr. Marshall.

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1                   Mr. Brena, is there just one item remaining?

2                   MR. BRENA: There is. The pressure  
3 restriction calculation. Well, again, this is one of  
4 those there isn't anything out there but we will update  
5 it some day kind of responses. It is inconceivable that  
6 a pipeline with a pressure restriction doesn't know what  
7 its normal operations are going to be after that  
8 pressure restriction is lifted. And they have -- they  
9 have based their direct case on throughput on two cycles  
10 in July of 2001. And, well, you know, I don't know what  
11 to say, this stuff is routinely modeled, and it goes to  
12 the heart of showing what an incredible step up in  
13 throughput is going to occur right after their tariffs  
14 are approved. And, you know, it's once again it's a  
15 situation where they can't find any information. The  
16 only information that they find is helpful to their case  
17 or based on actual -- this actual throughput chart is a  
18 perfect example. It's with a pressure restriction. It  
19 is with projects and huge down time. It doesn't take  
20 into consideration batching or impacts.

21                   And so all I would say is, you know, if they  
22 don't have to support, and they haven't, they haven't  
23 supported and they haven't produced information, so any  
24 party to this proceeding, I mean, you know, every party  
25 for this proceeding is going to have a different

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1 throughput number. Tosco has one, Tesoro has one,  
2 Olympic Pipeline has three, and Staff will have one, and  
3 none of them are the same.

4 JUDGE WALLIS: Well, again, Mr. Brena, it  
5 does address the issues in the general proceeding and  
6 not the availability of the documents.

7 MR. BRENA: Yes.

8 JUDGE WALLIS: And the reasons for our being  
9 here.

10 MR. BRENA: Yes, and all I would say is that  
11 engineering reporter calculations which shows a likely  
12 throughput, I mean they have said none is available, and  
13 it's not clear whether or not they can calculate one,  
14 but they haven't tried, they haven't advanced one, and I  
15 just don't believe that.

16 MR. MAURER: Judge Wallis.

17 JUDGE WALLIS: Mr. Maurer.

18 MR. MAURER: Thank you. We answered this  
19 question as Attachment D to 102-C and 133. I'm growing  
20 a little weary of Mr. Brena's representations about what  
21 he does and does not believe. The question here is what  
22 have we produced. We have answered the question. They  
23 asked for a calculation, we gave them a calculation. If  
24 Mr. Brena doesn't like that, I'm very sorry.

25 JUDGE WALLIS: It is our intention to confine



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1 the consideration of these issues to the factual  
2 representations about what actually happened and not on  
3 the relevance or the use of these documents in the  
4 general rate case. We understand that the parties have  
5 different views on credibility, and to the extent that  
6 credibility is an issue in this discussion, then that  
7 will be considered.

8 MR. BRENA: Your Honor, if I may, their  
9 response to 102-C occurred before this was given, before  
10 the technical conferences, and so I mean it's -- it  
11 wouldn't be correct to say that an earlier response was  
12 intended to respond to a later request after a technical  
13 conference and after there had been detailed  
14 conversations about this topic. So the fact of the  
15 matter is is that they agreed to produce any engineering  
16 report or calculation, and the idea that they're now  
17 relying on an earlier response is no response at all.

18 JUDGE WALLIS: Very well.

19 Mr. Maurer.

20 MR. MAURER: I don't have anything.

21 JUDGE WALLIS: Very well.

22 MR. MARSHALL: Do you have the engineering  
23 response in of front you, Your Honor? The prior  
24 response starts out:

25 An engineering calculation which shows

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1           the potential increase in the throughput  
2           caused by removal of the current OPS as  
3           well as 80% maximum operating pressure  
4           restriction may be approximated by using  
5           the relationship between --

6           JUDGE WALLIS: Try to slow down a little bit,  
7 please.

8           MR. MARSHALL: Yes.  
9           Relationship between pressure and flow  
10          following basic pipeline hydraulic  
11          principles.

12          We then go through a lengthy set of how that  
13 calculation can be done, and that is the answer. And  
14 that wasn't gone into in any detail with Mr. Talley in  
15 the technical conference where he was asked, well, do  
16 you have anything other than this. This is it in terms  
17 of what the engineering calculation would be if you  
18 remove the pressure restriction, which is exactly the  
19 question. This response could not be more responsive to  
20 that particular one. There's nothing more to be added  
21 or said.

22          MR. BRENA: If I may just look at that  
23 briefly. Where is it you're reading from?

24          JUDGE WALLIS: Could you point me to the tab.

25          MR. MAURER: Yes, Your Honor.

1926

1 MR. MARSHALL: It's in two places.

2 MR. MAURER: It's both in Tab B, at the end  
3 of attachment B, and in Tab C, 102-C and 133.

4 MR. MARSHALL: And I know for a fact that  
5 this wasn't discussed at the technical conference with  
6 Mr. Talley. He wasn't walked through any of the details  
7 of this particular calculation, engineering calculation  
8 showing what would happen if the pressure restriction is  
9 removed.

10 MR. BRENA: And I stand by my earlier  
11 comments.

12 JUDGE WALLIS: Very well.

13 MR. BRENA: That completes the specific  
14 points. I would like to address the issue of sanctions.

15 JUDGE WALLIS: Let me ask if Olympic has any  
16 additional responses that you have not previously made.

17 Thank you.

18 Mr. Brena.

19 MR. BRENA: Your Honor, it's too late in the  
20 day to just ask for the information, and it's too off  
21 the point to talk about a monetary fine. The most  
22 important single issue in this proceeding is what's  
23 going to happen with throughput. It's uncontested that  
24 the line is operating under artificially constrained  
25 circumstances today and that those circumstances will be

1927

1 lifted at some point in the future. The information  
2 that we have requested goes right to the heart of that  
3 issue and allows us to put on our case to demonstrate  
4 that the throughput that they're proposing for future  
5 years is not representative of what those future  
6 operations are likely to be. Well, it may be helpful,  
7 for example, in cross-examination, but the point is our  
8 cases are behind us, and our time is limited, and there  
9 is no way to clarify this record, and that's where we're  
10 at. None of the parties here can say with any  
11 certainty, including Olympic, that the throughput that  
12 they're proposing, whether it's actual, what I  
13 understand their case is going to evolve to become,  
14 whether it's based on two cycles, based on July of 2001,  
15 or whether it's based on original filing, none of the  
16 parties can say with any certainty whatsoever that those  
17 throughputs are representative. So on the most  
18 important single element in the case, we have nothing  
19 that we need to assess Olympic's claim that their  
20 throughput should be changed.

21           And bear in mind Tesoro's position is that  
22 normal operating conditions based on their prior  
23 representations to the Commission should be used, and  
24 they're proposing a change in their throughput for  
25 tariff purposes to be reduced to these artificially

1928

1 constrained circumstances. We have asked for specific  
2 factual findings that fall short of issue preclusion.  
3 We think that on this case that the Commission could  
4 exclude any testimony on their part from experts. We  
5 think that they have not allowed the discovery necessary  
6 for the proper cross-examination of their experts on the  
7 throughput issue. We think that consistent with  
8 Washington law that that portion of the experts'  
9 testimony should be excluded.

10           We also believe that there are specific  
11 factual findings that can be made short of determining  
12 throughput, and we have put those in our brief with  
13 regard to recommended sanctions that they have failed to  
14 demonstrate in their case that their proposed throughput  
15 is representative of future operations. They have  
16 failed to give the information necessary so we can test  
17 that proposition that is central to their case, and  
18 therefore what are we left to do. We're left with a gap  
19 in the factual record because of their unilateral change  
20 in what was clear and compelled and understood to be  
21 information they needed to compile and present. So  
22 while it may or may not be helpful to have that  
23 information for cross-examination, it's way past the  
24 time when that would be a sufficient sanction. Money  
25 does not respond. The Commission has indicated an

1929

1 unwillingness to go all the way to issue preclusion in  
2 that it would set throughput. I understand the  
3 Commission's frustration with wanting to do that, with  
4 hesitating to do that, and I can only say that that  
5 frustration is going to be enhanced as we move forward  
6 and not made smaller.

7           So there's things that we need to decide  
8 here. You know, is there a sufficient record that  
9 there's representative throughput? No. Why isn't  
10 there? Because they haven't produced the information  
11 necessary to show whether or not their throughput is  
12 representative. What's the obvious thing to do? To say  
13 that, just to say that, to make that factual finding on  
14 the record. And the factual findings are set forward in  
15 my recommended sanctions. Olympic's throughput as set  
16 forth in Olympic's direct case has not been supported as  
17 representative of its throughput during the period.  
18 That goes right to the heart of the issue that this  
19 information was intended.

20           You know, the law, the relevant law in  
21 Washington, wouldn't even -- there wouldn't even be a  
22 hiccup in the giddy-up if you didn't allow discovery on  
23 an expert on the basis for an expert opinion to disallow  
24 that expert and to disallow the entire claim if that is  
25 necessary. That would happen in a heartbeat. It's the

1930

1 only fair and right thing to do here. Olympic's current  
2 throughput has not been supported as representative of  
3 its throughput during the period in which the rates will  
4 be in effect, that's the second thing that we have asked  
5 for. The third thing is Olympic has not demonstrated a  
6 factual basis on which to alter the throughput estimate  
7 underlying the current permanent rate. And then we go  
8 on to say, such other appropriate sanctions which  
9 recognize the true impact to the factual record of these  
10 violations.

11 I think that these violations are  
12 unbelievably clear, and I have fought from day one to  
13 get throughput information. Bear in mind we couldn't  
14 even get actual throughput when we started this, and now  
15 we're down to testing representative throughput, we have  
16 no measure to test it. So the sanction has to respond  
17 to what they have taken out of the case by their failure  
18 to compile the information necessary to test the  
19 representativeness for any of the parties. I don't know  
20 what other sanction is even relevant other than the  
21 issue of preclusion, which would be appropriate, to set  
22 the throughput. That would be entirely appropriate  
23 under these circumstances or to dismiss the case.

24 Because the Commission is going to be in a  
25 situation where all of the evidence that Olympic's

1931

1 entitled to rely on is behind us, they have filed their  
2 direct case, we have filed our direct case, they don't  
3 have a right to come in on the reply case and change  
4 their case. They have don't have a right on the reply  
5 case to come in with information to sand bag us and put  
6 it in behind us. It's all on the table. The Commission  
7 has all the evidence it's ever going to have on this  
8 issue that it should properly consider, and it has none  
9 of the information it needs to, nor can it expect it  
10 through cross-examination because of its failure to  
11 comply with very, very simple straightforward discovery  
12 requests.

13 JUDGE WALLIS: Is that something that the  
14 Commission can or should consider when evaluating the  
15 evidence before it in the proceeding?

16 MR. BRENA: When you say -- what are you  
17 referring to specifically, please?

18 JUDGE WALLIS: The circumstances relating to  
19 discovery.

20 MR. BRENA: I think that there's a pattern  
21 and a history, and my review of the case law suggests  
22 that when you have a pattern of discovery abuse like  
23 what we have had in this case, I think the Commission  
24 should take it into consideration. Do you know that we  
25 had more discovery requests served on us as an



1932

1 intervener than we have served on them. I mean this  
2 entire discovery process from the get go, and the  
3 Commission has recognized it in its comments in almost  
4 dismissing this, I mean I think the Commission would be  
5 justified to dismiss this case outright because of the  
6 sanctionable conduct. You know, we went through all of  
7 that. You know, they had a last chance. You know, the  
8 Commission expressed grave concerns about Olympic's  
9 responsiveness, and they sat here in the hearing and  
10 agreed to produce 11 items and were compelled to do it,  
11 and then they have turned around and the counsel that  
12 represented that they would do that didn't.

13           And they haven't sent a word to us, and they  
14 haven't produced the information, and now they're  
15 arguing after the fact relevancy, burdon, everything but  
16 what it is that they were compelled to do. I mean I  
17 would have asked for this to be dismissed at the time  
18 and would have taken a different position had I known  
19 that they had no intention of compiling this information  
20 and presenting it, because I understand its importance  
21 to the case, and I understand that nothing in the record  
22 can substitute. So I think to go through this, that the  
23 Commission would be justified to dismiss this entire  
24 thing. I think they would be justified for issue  
25 preclusion and at a minimum the factual findings that we

1933

1 have requested, because they have taken away our ability  
2 to make these factual findings.

3           And as I read the law in Washington, if you  
4 do not provide discovery relevant to the cross  
5 examination of your expert or if you're late even, that  
6 that is sufficient to exclude that witness's testimony  
7 all together. And I think that that would be an  
8 appropriate step too, but it -- but I would acknowledge  
9 that the Commission if it does go forward with the case  
10 would -- I mean the case is going to be empty of  
11 throughput information that's relevant, and so excluding  
12 it may or may not be appropriate, so these factual  
13 findings would be more appropriate I feel.

14           But the idea of monetary sanctions, I mean  
15 these are clear violations, clear violations. They said  
16 they would do it, they send some letters saying that  
17 they're not going to do it, and then they come in here  
18 saying that somehow we agreed to that. Well, that, you  
19 know, and all of those are in a different proceeding.

20           So I think that yes, to answer your question  
21 directly, yes, the pattern of discovery abuse in this  
22 case I think is very clear, and I think the Commission  
23 has recognized it, and I think the Commission should  
24 take that into consideration in weighing whether or not  
25 -- I mean these guys avoided the dismissal of this

1934

1 entire proceeding and in part based on the  
2 representations that they would produce this, compile  
3 and produce this information that we needed. At the  
4 last minute, they didn't. The time for forgiveness is  
5 past, and that's why Tesoro requested sanctions, and  
6 that's what I told their counsel. I said, yes, we're  
7 going to apply for sanctions, you said you would produce  
8 it, you didn't produce it, and how clear can it be, so  
9 we're going to ask for sanctions with regard to  
10 throughput. And so we have. So we would ask for Your  
11 Honor to fill the gap that's been created in this record  
12 no matter how we proceed that's caused by their failure  
13 to do what they have agreed and what they were compelled  
14 to do.

15 JUDGE WALLIS: Thank you, Mr. Brena.

16 MR. MARSHALL: The basic question here is  
17 what evidence is there of throughput that will be going  
18 onward in the rate year following this case, and the  
19 sanction that Mr. Brena has asked for is we just take  
20 the throughput that was in effect prior to the pressure  
21 restrictions, prior to all the other issues that we know  
22 have occurred. If we do that, then there's just no  
23 question that the rates, the tariffs will be  
24 insufficient to do any of the work to get to 100%  
25 pressure. It's a chicken and egg issue. We'll have 80%

1935

1 pressure forever, and the best evidence of 80% pressure  
2 is what has the system been doing for the last ten  
3 months at 80% now that the entire system is back up and  
4 operating with that restriction. We can make all kinds  
5 of guesses as to individual factors that might affect  
6 that, but --

7 JUDGE WALLIS: Mr. Marshall, isn't the issue  
8 here whether there are violations and what sanctions  
9 should be applied?

10 MR. MARSHALL: And it's also, of course, the  
11 sanction that they want to impose, which is what I'm  
12 trying to address, is to say let's just pretend that you  
13 have throughput equal to the amount that you had  
14 operating at 100% pressure. There's no question that  
15 we're not operating at 100% pressure. So the question  
16 is, well, what throughput do you have at 80% pressure,  
17 and then there will be some questions that can be taken  
18 up by the Commission in the hearing about when could you  
19 get to 100% pressure, can you, how long will it take.  
20 Those are all issues that are fair for cross-examination  
21 and fair for speculation, fair for experts to opine on.

22 But what's very clear is that when we looked  
23 at the test year, the year prior to the filing, the  
24 actual throughput was incredibly low. We didn't use the  
25 test year figures. We used the figure for July 2001 and

1936

1 then made adjustments, because that was the only figure  
2 that Olympic had when they filed at the FERC. It had to  
3 make some assumptions about adjustments on down time and  
4 so on. And it turned out that that month was an unusual  
5 month. Every other month since that time has shown how  
6 unusual that month was. Mr. Brena says, well, we have  
7 changed our theory at the deposition, we didn't have  
8 fair notice. And in answer to Tesoro Data Request  
9 Number 133, in the supplemental response, and that's at  
10 Tab C, we said very clearly at page 2:

11           It should be noted that Olympic's direct  
12           testimony is based on a level of  
13           throughput that has proven to be higher  
14           than levels expected. Olympic will  
15           perform additional calculations based on  
16           actual levels that will be more  
17           representative of product movement for  
18           rate setting purposes.

19           So all of the information that we have  
20           produced, and we have produced an enormous amount of  
21           actual throughput data, all of the historical data that  
22           has been available to Tesoro from the beginning and was  
23           -- everything else that he could have wanted about  
24           throughput was made available on February 22nd. The  
25           only remaining question is who was supposed to do

1937

1 additional work on three or four areas of trying to get  
2 summaries and compilations based on green sheets to show  
3 some specific things that Tesoro wanted to look at that  
4 are factors that determined throughput. Those factors  
5 are all historical, by the way. They're not indicative  
6 of what might occur in the future except if you take a  
7 enough months then you might have a representative group  
8 of months.

9           But each individual item the record is clear  
10 can be derived from the green sheets. And the only  
11 question is, who was supposed to do the work. And the  
12 touchstone on who was supposed to do the work is in the  
13 Talley declaration and in the letters between FERC  
14 counsel for Olympic and Tesoro. If there had been any  
15 question that we were violating any kind of order by  
16 saying that we could not produce documents and we  
17 weren't going to produce documents we didn't have, and  
18 that's what the letters show quite clearly, then it  
19 could have been raised at that time and something could  
20 have been done before April 12th, the deadline. That  
21 was the whole purpose of the April 4th letter, let us  
22 know before the drop dead date.

23           Our Commission adopted the same drop dead  
24 date as FERC did, April 12, adopted the same FERC order  
25 of April 1st on April 4th. So in order to understand

1938

1 what our Commission has ordered, we have to figure out  
2 what went on at FERC, and the best evidence of that is  
3 in the letters where there was no complaint from Tesoro  
4 at that time that this was an unacceptable way of going.  
5 It could have been raised so that we had enough time to  
6 do something before April 12. It could have been raised  
7 even on the 16th of April when we were on the phone with  
8 Your Honor, and that was the deadline by which Tesoro  
9 had to file a motion. Not a word then to any of us that  
10 this wasn't in compliance. All of this data can be  
11 derived it's undisputed from the green sheets. There's  
12 nothing, and I have said this before, no Tesoro expert  
13 declaration that they can't derive the information that  
14 they have been given, that they can't compile it on  
15 their own, that these source documents are not  
16 sufficient to do it.

17           So all in all, the sanction is not  
18 appropriate, because the way to determine throughput is  
19 through thousands of records that have been produced  
20 showing actual throughput for the period in the test  
21 period, and then we have to do what are known and  
22 measurable changes to the test period. Known and  
23 measurable are the actual throughput numbers that we  
24 have that we produced here. That's known and  
25 measurable. So if there's going to be any adjustment to

1939

1 the test period, where the throughput was variable, then  
2 it has to be based on something known and measurable.

3 Now maybe there will be arguments and  
4 speculation by Tesoro's experts that your throughput  
5 will be higher than it was for the last ten months. I  
6 don't know how they can say that, because unless you can  
7 get the pressure up to 100%, that's --

8 JUDGE WALLIS: Mr. Marshall, I really don't  
9 think we need to argue that question now.

10 MR. MARSHALL: Yeah, but it does relate to  
11 this whole sanction that they have asked for, which is  
12 to stick with a throughput level that was in effect at  
13 the time of the last tariff filing, not for the test  
14 period, not for known and measurable changes that can be  
15 adjusted for the test period. And we did say in this  
16 133 response that we will be relying on the actual  
17 throughputs for the last 10 months. That's the single  
18 best evidence. Tesoro keeps saying, we don't have any  
19 evidence, we've got this gap, we can't determine what to  
20 do because we don't have any throughput information.  
21 They have throughput by segment, by shipper, by  
22 destination. They have had all that, it's been  
23 supplemented over and over, they have plenty of that.  
24 That's why Olympic is in the bind that they  
25 are, their tariff revenues dropped dramatically



1940

1 following the pressure restrictions, by the way that  
2 were imposed because of this ERW seam failure. It  
3 wasn't -- what we're working with is we're working with  
4 TFI and other test runs that are looking at the  
5 longitudinal wells of these pipes, and the longitudinal  
6 wells were not involved in Whatcom Creek. All of that  
7 work has to be done, all of that expense has to be  
8 incurred, all of the changes in repairs have to be made,  
9 and the earliest the testimony shows that any of that  
10 could be done would be sometime in 2004 supposing that  
11 we have --

12 JUDGE WALLIS: Mr. Marshall, you really do  
13 not have to argue your general rate case here.

14 MR. MARSHALL: Okay.

15 JUDGE WALLIS: I'm interested in hearing your  
16 comments on the proposed sanction and why that is or is  
17 not appropriate, but you do not need to go beyond that  
18 to explore the issues that may or may not be present in  
19 the rate case.

20 MR. MARSHALL: I was trying to address  
21 Mr. Brena's argument that there is a gap in the  
22 information. There is no gap. Even if you assume that  
23 they didn't even have green sheets, there would be no  
24 gap.

25 Now we did produce green sheets, and it's

1941

1 undisputed that you can determine these four things that  
2 Mr. Brena wants from the green sheets. It takes time to  
3 do it. They had time from February 22nd onward. The  
4 question of who was to do it is best sorted out by  
5 looking at what was said prior to April 12th, the  
6 deadline, between counsel, and how that was worked out  
7 and the fact that up until April 25th there was not one  
8 word from Tesoro that the April 12th production at the  
9 FERC was somehow not in compliance with that background  
10 and that understanding of the order. And there were  
11 plenty of opportunities with Your Honor on the 16th and  
12 on occasions during the depositions where we asked  
13 directly, are we all okay on all of this discovery. We  
14 knew that we had a background on a lot of discovery in  
15 this case and a number of discovery disputes. We were  
16 anxious to find out from that call that Your Honor was  
17 on and during the depositions, is there anything that we  
18 need to do. Not one word until the 25th of April that  
19 this was somehow not in compliance with the FERC order,  
20 with the understandings that were the FERC order, and  
21 then by piggybacking the Commission order here.

22           Now one final point, if this was so clear,  
23 why hasn't there been a motion filed with the FERC.  
24 After all, this is a FERC order that our Commission  
25 adopted by reference, and the same arguments apply

1942

1 there. Either they have enough information to carry on  
2 that case at the FERC or they don't.

3 MR. BRENA: Objection, relevance, Your Honor.

4 MR. MARSHALL: There's been no --

5 JUDGE WALLIS: Your objection is noted.

6 MR. MARSHALL: There has been no motion, no  
7 argument, and no claim that the FERC order has been  
8 violated. In fact, again, the letters, particularly the  
9 letter from Mr. Wensel, shows that the understanding was  
10 clear, we had an option to produce the source documents,  
11 the green sheets, instead of those summaries, to compile  
12 summary documents. If there had been anything other  
13 than that, if we had been informed that that wasn't  
14 compliance, that was the time to say it, not now, and  
15 not after the deadline that went on April 12th.

16 JUDGE WALLIS: Is it your representation that  
17 there is no other means of compiling the information  
18 that's been requested, no other means than to go to the  
19 green sheets?

20 MR. MARSHALL: That's what Mr. Talley said  
21 during the technical conferences, that's my  
22 understanding, that's what he said in his declaration.  
23 There are some other documents that are supportive of  
24 that like invoices to shippers, but the green sheets  
25 would be the source documentation for the things that he

1943

1 has listed there. Not on DRA, DRA are separate  
2 invoices, but on the four or five points that -- I think  
3 Mr. Talley addresses that in his declaration.

4 JUDGE WALLIS: Thank you, Mr. Marshall.

5 Does Tosco have any thought to present at  
6 this time?

7 MR. STOKES: No.

8 JUDGE WALLIS: Commission Staff?

9 MS. WATSON: We have just a few, Your Honor.

10 JUDGE WALLIS: Please proceed.

11 MS. WATSON: First of all, I would like to  
12 point out once again that this has been a most difficult  
13 process in terms of discovery, and obviously I don't  
14 have the experience, but my client and my co-counsel  
15 have indicated that this has been the most difficult  
16 proceeding in their history of 20 to 30 years. And the  
17 difficulties that we have had in discovery has impacted  
18 negatively the Staff's ability to produce its case.

19 So now what do we do with that? It was  
20 indicated earlier that the Commission wasn't or that the  
21 Commission had indicated that monetary sanctions weren't  
22 appropriate and that they weren't willing to dismiss the  
23 case, but that's not entirely true. Because in the 12th  
24 supplemental order in Paragraph 13, the Commission  
25 states that:

1944

1           Because discovery has been a reoccurring  
2           issue in this docket, and if we find  
3           that violations occurred, we are  
4           prepared to consider the assessment of  
5           monetary penalties, dismissal of the  
6           proceeding, or other sanctions.

7           So those are certainly options that are still  
8   open according to the order. So we can seek or they can  
9   issue monetary penalties as under RCW 81.84.405 against  
10  counsel, the company, or the company's officers and  
11  employees.

12           In terms of what to do with the throughput  
13  issue, there are several ways to deal with that, and  
14  these are all things that the Commission needs to  
15  decide, and setting them as a sanction isn't necessarily  
16  appropriate. Various ways of dealing with throughput is  
17  to set a number, to use a surcharge or a tracking  
18  device, and there may be other options as well, but  
19  those are the things that the Commission needs to  
20  decide, and the other sanctions would be more  
21  appropriate.

22           JUDGE WALLIS: Does Staff have a view as to  
23  whether violations have occurred?

24           MS. WATSON: Well, the throughput DRs, we  
25  weren't really involved with those. We know that it has

1945

1 been an extremely difficult process, so we don't really  
2 have anything substantive to say in terms of whether or  
3 not a violation occurred.

4 JUDGE WALLIS: Very well.

5 MR. BRENA: If I may.

6 JUDGE WALLIS: Mr. Brena.

7 MR. BRENA: Just briefly reply. The first  
8 thing that I would like to say is that with regard to  
9 their attempt to unilaterally modify their commitment to  
10 produce this compiled information is that the letter we  
11 got on April 4th said:

12 We believe it's useful at this juncture  
13 to advise you of what Olympic is able  
14 and not able to produce in response to  
15 your E-mail.

16 They just said what they were going to do.  
17 You know, Mr. Wensel's letter recognized the reality of  
18 that. They didn't ask, they said. There was no phone  
19 us up and let's talk about it, we're having difficulty,  
20 do you want us to compile it. They said, this is what  
21 we will do, this is what we don't do. We dealt with  
22 that reality, okay. And that was on the FERC side. We  
23 did not hear that from WUTC counsel. We had no response  
24 whatsoever with regard to WUTC counsel. So with regard  
25 to what position they were likely to take, throughout

1946

1 this proceeding their objections have not been the same  
2 as the FERC proceeding, and we have had -- we have had  
3 no objections on the WUTC side routinely where we have  
4 had objections on the FERC side and visa versa. So the  
5 idea somehow that we're supposed to take this  
6 representation, which was a declaration of what they  
7 would and would not do, and first that's a false  
8 representation, and secondly, with regard to that being  
9 that we should have known that that's what they intended  
10 to do for the first time in this proceeding was rely on  
11 FERC counsel's objections, that would have been a change  
12 too.

13                   You know, with regard to the green sheets,  
14 Your Honor, I asked Mr. Talley to calculate one day the  
15 information from the green sheets, and I'm asking him a  
16 question, and I'm reading from his deposition on page  
17 79:

18                   Question: Excuse me, all I want you to  
19 do is tell me for one day, July 1st, how  
20 much jet moved through the system. How  
21 am I supposed to determine that?

22                   Answer: I think I just told you,  
23 Mr. Brena, that I'm not familiar with  
24 the batch codes, which were not  
25 provided, so if I don't know what the

1947

1           batch code means, I can't tell you what  
2           jet is.

3           Question: Okay, can you tell me how  
4           much down time there was this day?

5           Answer: Not based on what I'm just  
6           seeing right here.

7           Question: I believe I understood you to  
8           say the green sheets.

9           Answer: I believe you were supplied  
10          with a code or a log.

11          Question: I was. Would you like for me  
12          to find that, and would that help you?

13          Answer: I don't know.

14                 I mean you just, you know, at some point, I  
15          would have to read it, your data request was put  
16          together by the products movement group, at some point,  
17          you just have to read what Mr. Talley said and let it  
18          speak to you itself rather than have people characterize  
19          it. Here is the chief engineer on Olympic Pipeline  
20          unable to tell me one single bit of information for one  
21          day in one year from these green sheets. That's what  
22          the deposition's going to show you. I didn't ask for a  
23          week. I didn't ask for a month. I asked for a day, and  
24          I didn't get it. He made some references with regard to  
25          the Data Request 133.



1948

1 Steve, do you have that available?

2 MR. MAURER: It's in the material I gave you  
3 this morning.

4 MR. BRENA: If you have it handy.

5 MR. MAURER: Yeah, it's Tab B, it's towards  
6 the end.

7 MR. BRENA: Do you have it right there,  
8 Steve?

9 MR. MAURER: It's about --

10 MR. MARSHALL: Actually Tab C.

11 MR. MAURER: 133, I'm sorry.

12 MR. MARSHALL: Here you go.

13 MR. BRENA: Okay.

14 MR. MAURER: It's the third page of Tab C.

15 MR. BRENA: You know, and Your Honor will  
16 have an opportunity to address and respond with whether  
17 or not Olympic should be able to change their case on  
18 throughput a third time after we filed our direct case,  
19 but let me just say that the language that he read, the  
20 language that he read doesn't indicate that they're  
21 going to change their direct case at all.

22 MR. MARSHALL: Well, actually, it does.

23 MR. BRENA: No, and I'll read it. It says:  
24 It should be noted that Olympic's direct  
25 testimony is based on a level of

1949

1 throughput that's proven to be higher  
2 than levels experienced. Olympic will  
3 perform additional calculation based on  
4 actual level that will be more  
5 representative of product movement for  
6 rate setting purposes.

7 Now this is in response to what's 100%  
8 operating pressure. And all I can tell you is that they  
9 refer us back:

10 Capacity projections upon return to 100%  
11 maximum operating pressure are expected  
12 to achieve those averages posted for the  
13 calendar years 1997 and 1998.

14 Their data request refers back directly to  
15 1997 and 1998 as representative of 100% throughput, and  
16 they talk about additional calculations not based on  
17 100% throughput, but they have never produced those  
18 additional calculations as of today. And now he somehow  
19 is arguing that the 1997-1998 information that they  
20 direct us to, that that somehow doesn't matter, that  
21 somehow they're not relying on that. The fact is that  
22 without the information that we requested, interveners,  
23 Staff, and this Commission will be unable to determine  
24 what a representative level of throughput should be for  
25 this line. And it's because of their failure to compile

1950

1 and produce the information that they agreed to and were  
2 compelled to.

3           Mr. Marshall mentioned a sole sanction. I  
4 certainly hope Your Honor didn't hear me as proposing a  
5 sole sanction. I did not. And I have made it clear  
6 from the beginning that I think that the Commission  
7 would be -- it would be entirely proper to dismiss this  
8 entire action, and the Commission indicated that it  
9 would consider that, so I would ask the Commission to  
10 consider that.

11           I have indicated that I think that the  
12 throughput should be set based on this issue of  
13 preclusion. I think that I have lost that issue, and  
14 Staff disagrees with that and made its position known  
15 again on that particular one.

16           Short of that and short of dismissal, I have  
17 asked for factual findings that they did not demonstrate  
18 the representative level for these different things, and  
19 I have set forth the exact factual findings. These do  
20 not have the effect of determining throughput in this  
21 proceeding. These have the effect of recognizing that  
22 Olympic did not produce the information that was  
23 necessary to test the representativeness of the numbers  
24 that it has advanced, and therefore there should be a  
25 factual finding that it has not done that, that it has

1951

1 not demonstrated that the various throughputs that  
2 they're proposing be used are representative. That is a  
3 simple factual finding that goes to the heart of the  
4 issue and would be helpful and doesn't determine the  
5 issue, and it doesn't fall afoul of what Staff and the  
6 Commission's concerns were in not being able to get the  
7 record, it just makes the factual representation that  
8 they didn't do it, because they didn't, because they  
9 can't.

10                   And one of the things Mr. Marshall said, and  
11 Your Honor cut him off, but because, and I don't mean  
12 that any way negative, but he said that it went to the  
13 ultimate issues, and he said he doesn't know how we  
14 could possibly say that the actual throughput wasn't the  
15 correct number, and you said that's an ultimate issue.  
16 Well, he's right, how can we possibly say that what  
17 they're proposing is a wrong number. We can't. Why  
18 can't we? Because they didn't produce the discovery  
19 that we needed to say that. That's the whole point.

20                   You know, so they want to stand up and say  
21 actual throughput, bring it in, let's use actual  
22 throughput, and they want to shift their case to actual  
23 throughput for representative when, by the way, when  
24 they filed their case in this proceeding they had five  
25 months of actual throughput and now they're going to

1952

1 propose nine I guess at some point in the future, they  
2 had five months of actual throughput, they didn't do it,  
3 they didn't use five months, and now they're trying to  
4 come back and use actual throughput. How can we  
5 possibly say that whatever case they put on isn't  
6 representative of a future case? Darn good point,  
7 Mr. Marshall. That's the reason we're here today,  
8 because you didn't give us the information we needed so  
9 that we could.

10 Thank you.

11 JUDGE WALLIS: Is there anything else before  
12 we adjourn?

13 Let the record show that there's no response.  
14 Thank you all very much for coming this morning. It's  
15 been very helpful to me to run through the information  
16 that the parties have provided and to hear the parties'  
17 arguments. I will be entering an order that proposes a  
18 recommendation to the Commissioners, and they will  
19 review that. Parties will have an opportunity to  
20 respond to that.

21 Let's be off the record for a brief  
22 administrative discussion.

23 (Discussion off the record.)

24 (Hearing adjourned at 12:40 p.m.)

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