BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

TESORO REFINING AND MARKETING COMPANY=S COMMENTS ON THE RECOMMENDATION FOR SANCTIONS

i. Introduction.

Tesoro Refining and Marketing Inc. (ATesoro@) hereby submits its comments pursuant to the Administrative Law Judge=s Order (Thirteenth Supplemental Order) Recommending Penalty Sanctions for Violations of Commission Order. Tesoro supports the Administrative Law Judge=s opinion that Olympic Pipe Line Company (AOlympic@) be sanctioned for its blatant disregard of this Commission=s order compelling discovery relevant to throughput. Tesoro respectfully notes, however, that the proposed sanction does not adequately address the prejudice and harm caused by Olympic failure to produce the discovery.

ii. The Throughput Issue.

A central issue before the Commission is what throughput level to use when setting Olympic=s rates. In fact, the Commission=s resolution of the throughput issue will have the single

largest financial impact on Olympic=s intrastate rates among all the matters at issue in this proceeding. The throughput may impact the intrastate rates as much as 20 percent.[1]

Throughput on the Olympic system is the result of an interplay of several factors. When compared with the throughput actually realized from normal operations prior to the Whatcom Creek tragedy, Olympic=s current throughput is impacted by (1) the Office of Pipeline Safety=s (AOPS@) imposition of a pressure restriction, (2) the unusually high levels of downtime as the result of nonrecurring capital projects and testing, (3) the Bayview terminal being taken out of service, (4) the changes in the coordination of shippers= transportation schedules, (5) the changes in efficiencies due to the deployment of new scheduling and batching programs and procedures, (6) the changes in the use of drag reducing agent (ADRA@), (7) the changes in stripping (taking off product at intermediate points to optimize throughput), (8) the changes in the product mix being transported, and (9) the changes in the average batch size.

Many of these impacts to throughput are temporary in nature and may not reasonably be expected to continue during the period in which the rates at issue will be collected. For example, the pressure restriction will soon be lifted, Bayview may be put back in service, and downtime will be less as nonrecurring capital projects and testing are completed.

Many of these impacts suggest that Olympic will be able to operate during the period in which the rates at issue will be collected at higher throughput levels than ever before. For example, the pressure restriction lifted, Bayview may become fully operational, increased coordination of

[1] Tosco is advocating throughput be set at over 130 MBPD while Olympic is advocating throughput be set at approximately 105 MBPD. Tesoro and the Staff are between these two throughput suggestions.

shippers= transportation schedules, new and more efficient scheduling and batching programs and procedures, increased use of stripping operations, greater optimization of product mixes, and increases in the average batch size.

iii. Relevance of Discovery.

Through its direct case, Olympic proposed that an artificially constrained and unsupported throughput calculation be used to set rates. Through its reply case, Olympic has announced its intention to change its approach to throughput and use its actual but artificially constrained throughput over the last nine months.[2] If Olympic is successful in having its rates set on artificially constrained throughput levels, Olympic will realize windfall profits as it returns to normal operations--perhaps at throughput levels higher than ever before realized.

Tesoro has worked hard to obtain discovery relevant to throughput. Its efforts are detailed by Judge Wallis and will not be repeated here. Ultimately, Tesoro requested and this Commission compelled discovery which goes to the very heart of the throughput issue. The Commission compelled Olympic to provide information on downtime, strips, product mix, average batch size, the impact of lifting the pressure restriction, and Bayview. This information was requested to be provided for both a period prior to the Whatcom Creek incident and for the current period so that the throughput of Olympic=s system under normal operations could be compared with its current operations. This discovery would have allowed Tesoro and the Commission to have a factual basis

[2] In the event Olympic does change the calculation of throughput it set forth in its direct case through its rebuttal case, the Commission may anticipate a motion to strike such a change. Fundamental principles of fairness in administrative proceedings prevent a party from either supplementing its direct case or changing its position through rebuttal testimony. At some point, and that point is well past in this proceeding, Olympic should have to live with the direct case it filed.

from which to determine whether the throughput calculation Olympic advocated in its direct case or the new throughput calculation Olympic is expected to advocate in its rebuttal case fairly represent the throughput likely to be realized during the period in which the rates at issue are to be collected. This discovery would have allowed Tesoro to confirm its own calculation of expected throughput set forth in its answering case.

To cite one of many examples, Olympic=s current throughput is not representative of future operations due to the unusually high levels of downtime on the system resulting from nonrecurring capital and maintenance projects as well as extensive and nonrecurring testing of its system. So, on the one hand, Olympic intends to change its position on rebuttal to advance its current throughput as representative while, on the other hand, refusing to provide the discovery which would test whether or not its current throughput is truly representative. Olympic has not provided discovery demonstrating a representative level of downtime under normal operations. Olympic has not provided discovery indicating the amount of downtime embedded within its current throughput. Olympic is just making unsupported throughput allegations while, at the same time, disregarding the Commission=s order to compel discovery which would prove those allegations wrong.

iv. The Problems Caused By Olympic=s Disregard of This Commission=s Order to Compel Throughput Information.

Olympic has the information necessary to assess whether the various throughput calculations it has advanced are truly representative of its future level of throughput. It has disregarded this Commission=s order compelling that information be provided to Tesoro and the

other parties. Without that information, the various throughput calculations advanced in this proceeding may not be properly tested to determine if they fairly represent future operations or not. Without that information, Tesoro may not properly prepare cross examination of Olympic=s throughput witness.

v. Olympic=s Violations of This Commission=s Order to Compel Came After Being Put on Clear Notice Further Discovery Violations Would Not be Tolerated.

The Commission compelled Olympic to provide this information during a prehearing conference in which the WUTC=s Staff=s argued to dismiss Olympic=s rate filing outright due to its pattern of discovery abuse. While the Commission determined at that time not to dismiss Olympic=s rate filing, each Commissioner expressed grave concerns with Olympic=s failure to comply with discovery.

Commissioner Hemstead spoke first and summarized his concerns by saying. Commissioner Taken as a whole, Olympic was on clear notice in the Commission=s strongest possible terms that it should comply with future discovery.

> COMMISSIONER HEMSTAD: Well, I would like to make a couple of comments. I consider this a very serious issue, one of the most serious matters that I have had to face since I have been a commissioner now for nine years. I do not recall any time when there has been so much turmoil, if that's the way to put it, with regard to discovery.
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> And to the company I would say, my tentative view prior to commencing the hearing today after reading ll of the materials was to grant the motion to dismiss, and I think there was ample basis for that, and then we would have had to confront the issue of what to do about the interim rates that had been paid.

* * *

[I] don't want this hearing to end with sort of an attitude or with the parties going away and saying, oh, well, never mind, it was just a tempest in a teapot. It was not. This is a very serious issue. And speaking for myself, and I'm sure my colleagues agree, we fully expect the company to comply with their discovery obligation so that we can get on promptly and expeditiously with this proceeding.

CHAIRWOMAN SHOWALTER: I concur in those remarks.

* * *

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

COMMISSIONER OSHIE: I would just like to add that I agree with both the comments of Chairwoman Showalter and Commissioner Hemstad. I=m also very concerned with the company moving forward with its case on the basis of unaudited financial statements.

Motion to Dismiss Hearing Tr. (4/4/02) Vol. 17, pp. 1801-04 (emphasis added).

Given each Commissioner=s clear and unequivocal statement of concern during the prehearing conference at which the dismissal of Olympic=s rate filing due to its failure to comply with discovery was argued, it seems inconceivable that Olympic would go on to completely disregard the

Commission=s subsequent order compelling Olympic to finally provide throughput information. As the Staff has aptly stated, AIf all public service companies acted this way, the agency=s regulatory process would grind to a halt.@ Staff Motion to Dismiss at 10.

Simply stated, the worse case of discovery abuse the Commissioners and their staff had ever seen subsequently got worse after a clear warning to Olympic to comply. Moreover, the discovery abuse did not just get worse on an inconsequential issue in the proceeding, but on the single issue which will impact the intrastate rates greater than any other single issue in the proceeding. The Commission should fashion a sanction which makes clear that it will not countenance Olympic=s continued abuse of the discovery process.

vi. Olympic Has Not Accepted Any Responsibility for its Abuse of the Discovery Process.

The Commission should also consider that Olympic=s response to its clear violations of this Commission=s order has not been to assume responsibility for its actions, but has been to Ablame the victim.@ Olympic has wasted tremendous resources going back to revisit every conceivable fault for every party but itself. To be fair, much of Judge Wallis=s order is concerned with addressing the various faults Olympic finds in other parties for Olympic=s failure to do or produce the discovery it was compelled by this Commission to produce. The Commission should weigh its complete failure to assume any responsibility for its own prior and continuing abuse of the discovery process before this Commission.

vii. Sanctions Should, at a Minimum, Solve the Problems Caused by Olympic=s Disregard of the Commission=s Order to Compel.

An appropriate sanction should, at a minimum, resolve the problems caused by the violation of the Commission=s order. The imposition of a monetary sanction of $30,000 will not address or resolve the problems caused by Olympic=s blatant violation of the Commission=s order. In this regard, in addition to a monetary sanction, Tesoro respectfully requests the Commission (1) dismiss Olympic=s rate filing outright, or, in the alternative, (2) hold that Olympic has failed to carry its factual burden to demonstrate that its proposed throughput is representative of future operations.

viii. Monetary Sanctions Should Be Substantial Enough to Set an Clear Example and Dissuade Such Violations of the Commission=s Orders.

Monetary sanctions should be substantial enough to set a clear example and dissuade Olympic and other public service companies from such violations of the Commission=s orders and regulations. In this regard, Tesoro agrees with Judge Wallis=s observations. Judge Wallis stated:

> The final question is whether to assess a penalty for each violation, and for each day=s continuation of the violation. As of May 31, the total for each violation would be nearly $50,000 and the total thus could reach nearly $350,000 in penalties for six violations for each day of continuing violation.
>
> We think that there is some equivalence between the costs imposed by Olympic=s repeated discovery failures on the parties, as noted above, and this level of penalty. We believe that such a penalty could be warranted in this docket and believe that the Commission, on review of this recommendation, could with the full support of the record and in the exercise of sound judgment, impose a penalty of this level.

Thirteenth Supplemental Order, Docket No. TO-011472, AOrder Recommending Penalty Sanctions For Violations of Commission Order@ at 18 (emphasis added).

While Judge Wallis goes on to recommend far less, the logic he employed in his recommendation would suggest a substantially greater monetary sanction than $30,000. A monetary sanction of $30,000 is inconsequential for Olympic=s failure to produce discovery on the most financially important single issue in this proceeding. Olympic stands to gain millions over time from its attempts to low ball throughput in this proceeding.

ix. The Commission has the Authority to Grant the Sanctions Requested by Tesoro.

This Commission has broad authority to issue a variety of sanctions. WAC 480-09-480 provides:

> If a party fails or refuses to comply with a commission order or an administrative law judge's order that is not reviewed resolving a dispute under this section, or a letter from the secretary resolving such a dispute, the commission may impose sanctions including but not limited to dismissal, striking of testimony, evidence, or cross-examination, or monetary penalties as provided by law.

The regulation specifically allows the Commission to strike testimony, evidence and cross examination as appropriate sanctions. These types of sanctions mentioned in the regulation all relate to eliminating substantive portions of a party=s case as a consequence to violating a commission or judge=s order. This is exactly the type of sanction that Tesoro is requesting.

x. Conclusion.

Tesoro respectfully requests Olympic=s rate filing be dismissed or, in the alternative, the Commission enter a finding that Olympic has failed to support its factual burden to demonstrate that its proposed throughput is representative and provide a substantial monetary sanction as discussed above.

DATED this 10th day of June, 2002.

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