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 ANSWER TO OLYMPIC=S PIPE LINE COMPANY=S MOTION TO STRIKE PORTIONS OF TESTIMONY REFERRING TO CRIMINAL ALLEGATIONS AGAINST OLYMPIC

1 **i. Introduction.**

Tesoro Refining and Marketing Company (ATesoro@), by and through its attorneys, Brena, Bell & Clarkson, P.C., hereby answers and opposes Olympic Pipe Line Company=s (AOlympic@) Motion to Strike.

2 Administrative proceedings are governed by the best evidence rule. RCW 480-09-750 provides, ASubject to the other provisions of this section, all relevant evidence is admissible that, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard to its necessity, availability, and trustworthiness.@ RCW 34.05.452 provides AEvidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The

presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state.@ In the present proceeding, Olympic seeks to strike testimony of Mr. Brown concerning the operational imprudence of Olympic which lead to the Whatcom Creek accident on the ground that it is unfairly prejudicial. [See Motion to Strike, page 4].[1] The proper application of the best evidence rule entitles Tesoro to advance the evidence Olympic is attempting to strike.

ii. The Evidence Olympic is Attempting to Strike is Probative to the Issues in This Proceeding.

[1] Olympic also seems to allege that the testimony somehow violates Olympic=s constitutional right against self-incrimination or to be presumed innocent. Neither argument makes much sense in the present administrative proceeding and no authorities are cited for this unique position. Olympic witness= testimony raised an issue. Mr. Brown=s testimony contradicted it. Olympic raised the issue by the positions it took in its cost of service. It should not now be heard to complain.

3 In this proceeding, Olympic has included both direct and indirect costs associated with the Whatcom Creek accident within its total cost of service. As to direct costs, notwithstanding its claims to the contrary, Olympic has included personnel costs which had direct oversight over Whatcom Creek matters as well as the direct costs associated with the remediation of the petroleum products actually spilled during the Whatcom Creek accident.[2] As to indirect costs,

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[2] Ms. Hammer confirms that Olympic also included in its costs of service the remediation costs of purifying the ground water that was contaminated by the accident.

> Q. Now as I understood your earlier testimony, do I understand correctly that the $2.6 million in Bellingham has to do with remediation of oil which was spilt in the stream as a result of the Whatcom Creek incident?
> A. No, it has to do with the ground water treatment.
> Q. The ground water treatment of oil that was spilt as a result of the Whatcom Creek incident?
> A. Of -- yeah, as a result of the Whatcom Creek, that's my understanding.
> Q. Okay. You have included in the rate case in the test period approximately how much relating to that?
> A. In the test period?
> Q. Yes.
> A. It would have been -- I think we inadvertently picked up the 2001 column instead of the 2002 column.
> Q. So your best memory is that $492,000 associated with the ground water remediation from the Whatcom Creek spill are included in the rate filing?
> A. That's correct.
> Q. You do not consider that $492,000 to be a direct cost associated with Whatcom Creek?
> A. The way it's explained to me, it's treatment of water or ground water, and it's a process that just like any of these other sites that we would go through if there was a spill.

Hammer Depo., Vol. II, p. 202, l. 10-25, and p. 203, l. 1-12.

Olympic has even judicially admitted it has not tracked or accounted for the indirect costs associated with the Whatcom Creek accident.[3] Exhibit 1. Tesoro does not agree that either the direct or the indirect costs associated with the Whatcom Creek accident should be included within Olympic=s cost of service. The testimony Olympic seeks to strike is evidence of Olympic=s operational imprudence as to the events leading to both direct and indirect costs which Olympic has included within its total cost of service. Olympic=s ratepayers should not be asked to pay those costs. Tesoro should be entitled to advance evidence to support its position that such costs should not be included within Olympic=s cost of service.

4 In addition, Olympic is also requesting that this Commission set rates based on throughput which is artificially constrained due largely to Olympic=s own operational imprudence. Olympic=s current throughput is restricted by the Office of Pipeline Safety (AOPS@) to 80% of the system=s maximum operating pressure. This pressure restriction was imposed on critical parts of Olympic=s system as a direct result of the Whatcom Creek accident. This pressure restriction was expanded to other parts of Olympic=s system as the result of a testing failure when conducting testing required by the City of Bellingham as a direct result of the Whatcom Creek accident. Olympic=s current

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[3] MR. MILLER: That's right. We don't account for indirect costs associated with Watcum Creek as a category. It's not something that we define. It's not something that we could figure out. It's not something that we account for.
PRESIDING JUDGE: So in other words, there just is nothing else to produce with respect to, or in response to that request?
MR. MILLER: I think that's essentially correct, yes.

Docket No. IS-01-441-003, Prehearing Conference Tr. (3/28/02) at 82:14-23

throughput is also restricted by the unusually high levels of downtime resulting from the nonrecurring capital and maintenance projects required as a direct result of the Whatcom Creek accident. Again, the testimony Olympic seeks to strike is evidence of Olympic=s operational imprudence as to the events leading to artificial throughput constraints on its system. Olympic=s ratepayers should not be asked to pay for the financial consequences of Olympic=s operational imprudence. Tesoro should be entitled to advance evidence to support its position that Olympic=s operational imprudence resulted in the artificial throughput constraints.

5 In this regard, WUTC Staff has acknowledged the importance and linkage between Olympic=s operational impudence and the throughput issue in this proceeding. In deposing Mr. Elgin, he responded to relevant questions as follows:

> Q. Do you think a ratepayer should have to pay in their rates for operational imprudence?
>
> A. No. Ratepayers should only pay rates based on prudent management and a sound and efficient operation.
>
> Q. Do you think ratepayers should have to pay the financial consequences for criminal acts?
>
> A. No.
>
> Q. For environmental fines?
>
> A. No.
>
> Q. If it's demonstrated in the rate proceeding that the pressure restriction was imposed as a result of operational imprudence, then shouldn't the shareholders, instead of the ratepayers, be asked to bear the financial consequences of that?
>
> [Objections by counsel and argument by Mr. Marshall deleted]
>
> * * *
>
> THE WITNESS: Yes, in fact, the ratemaking adjustment would be to attempt to determine, under prudent management, what would be the operating pressure and the throughput and base rates on that. And that would be the way to hold owners

> responsible for that imprudence or that inefficient operation or however you want to characterize that.

Elgin , Kenneth L. (6/5/2002), (Pages 130:11 to 131:17) (emphasis added)

6 Moreover, Olympic has put on evidence in its direct case to suggest that Olympic was not responsible for the Whatcom Creek accident, but instead the accident was the fault of some third party. Olympic=s witness Mr. Beaver testifies that AOlympic has numerous claims against other entities that it believes may be responsible for the accident.@ Testimony of Mr. Beaver at 5. He goes on to detail all of Olympic=s assertions of fault for every party but Olympic. He also notes Aerrors@ in the OPS Notice of Probable Violation issues on June 2, 2000. Id. at 4. He also notes with great emphasis that there has not been a final adjudication of fault relating to Whatcom Creek and goes on to selectively note the references to third parties contained in the investigatory reports. Testimony of Mr. Beaver at 3-6. On the one hand, Olympic wants to claim innocence for the Whatcom Creek accident, but, on the other hand, to strike testimony relating to its own fault. Such a double standard clearly should not be permitted. Olympic has opened the door through its claims of innocence to proof of its fault. Tesoro should be entitled to advance evidence of Olympic=s fault.

7 There has rarely been a clearer example of operator imprudence than the events leading to Whatcom Creek. Olympic was, in fact, even charged with crimes for those events. The criminal charges and factual basis underlying those charges is direct and probative evidence of Olympic=s operational imprudence. Tesoro should be entitled to present such evidence in support of its position that (1) all direct and indirect costs associated with Olympic=s operational imprudence should be excluded for the cost of service and (2) the proper throughput to use in setting rates

should be normal operating throughput rather than the restricted throughput Olympic is now experiencing as the result of its operational imprudence. Finally, Tesoro should be entitled to respond directly to the assertions in Olympic=s own direct case. Olympic has suggested the accident was not the result of operator imprudence and has asked this Commission to set rates and throughput based on that assumption. Tesoro disagrees and should be entitled to put on an appropriate case to that effect.

iii. Evidence Supporting Operator Imprudence Resulted in the Whatcom Creek Accident

8 In considering whether to grant the motion to strike, the Commission should consider the overwhelming evidence suggesting that operator imprudence resulted in the Whatcom Creek accident. The only prejudice which may result from the Commission=s review of this evidence is the prejudice which arises whenever fact meets fiction. Olympic is attempting, in relevant part, to create the fiction that operator imprudence was not a contributing factor to the Whatcom Creek accident. Olympic creates this fiction for the purposes of shifting the financial consequences from its own imprudent operation of its pipeline onto its ratepayers. Tesoro is attempting to have Olympic=s fiction meet the facts. The facts are that Olympic=s imprudence is so extreme that it has been charged with criminal acts. At a minimum, the facts underlying the criminal indictment demonstrate operational imprudence, and Tesoro should be entitled to advance the indictment and the underlying facts as support for its positions in this proceeding.

9 The Commission should not begin to strike probative evidence of Olympic=s operational imprudence. Some of this evidence is summarized below for the Commission so that it is clear that Tesoro=s use of the probative evidence Olympic is seeking to strike denotes the beginning of an attempt by Olympic to avoid this Commission=s consideration of its operational imprudence.

10 First, state and federal agencies have fined Olympic for the accident. On June 5, 2002, the Washington Department of Ecology fined Olympic $7.86 million for the accident. An Ecology Department investigation found that employees were poorly trained, did not properly monitor the pipeline, and that management at Olympic and Equilon tolerated design problems at a nearby pumping station [Bayview]. Department officials said it was Athe largest fine Ecology has ever levied.@ [See AState fines pipeline companies $7.86 million each for Bellingham rupture.@ Rebecca Cook, The Seattle Times, June 5, 2002. Exhibit 2. See also attached orders, Exhibits 3 & 4. This followed a decision on June 2, 2000, by the U.S. Department of Transportation=s (ADOT@) Research and Special Programs Administration (ARSPA@) in which it proposed the largest civil penalty ever against a pipeline operator in the history of the federal pipeline safety program. The $3.05 million civil penalty, from RSPA=s OPS, against Olympic Pipeline, was for the following safety violations:

- AOlympic failed to conduct adequate damage prevention efforts. Specifically, Olympic failed to ensure that a company representative was present during third-party excavation near its pipeline. Proposed fine: $25,000.

- Olympic employees discovered an unsafe condition during internal testing and continued to operate the pipeline after testing without correcting the problem. Proposed fine: $500,000.

- Olympic failed to ensure that the employees on duty at the time of the pipeline failure were trained in accordance with federal pipeline safety regulations. Proposed fine: $500,000.

- Olympic=s Supervisory Control and Data Acquisition (SCADA) system, the computer system the operator uses to control the pipeline, performed irregularly. Olympic took action to shut down the pipeline, then restarted the pipeline without ensuring that it could operate safely. Proposed fine: $25,000.

- Olympic failed to modify its operations, maintenance and emergency plans when it added a new facility, the Bayview Products Terminal. Proposed fine: $500,000.

- Olympic failed to adequately test relief valves at the Bayview Products Terminal (about 15 miles south of Bellingham) to ensure the safety and proper functioning of the valves. Proposed fine: $500,000.

- Valves at the Bayview Products Terminal shut down several times unintentionally, an event which indicates an abnormal situation. Olympic failed to respond to, investigate and correct those shutdowns. Proposed fine: $500,000.

- Olympic failed to maintain the required daily operating records that record the discharge pressure at each pump station and any abnormal events. Proposed fine: $500,000.

[See attached Press Release, June 2, 2000, U.S. Department of Transportation, Office of Public Affairs.] Obviously, if the accident had not been Olympic=s fault, then these agencies would probably not have imposed approximately $10 million in fines on Olympic.

11 Second, the OPS issued a Corrective Action Order (and amendments) (ACAO@) that required Olympic to basically fix the problem that caused the accident. This CAO had numerous corrective actions that Olympic was ordered to implement. See attached Corrective Action Orders, Exhibits 6, 7 & 8. Obviously, if the accident had not been Olympic=s fault, then the OPS

would probably not have issued any order imposing corrective actions upon Olympic in order to prevent future accidents.

12 Third, Olympic has been sued by many private individuals for Olympic=s negligence in this accident. Olympic was sued in the following actions: King v. Olympic, No. 99-2-1467-3, Super. Ct. Wa. (July 27, 1999); Dalan v. Olympic, No. 99-2-01468-1, Super. Ct. Wa. (Nov. 7, 2001); Jackson v. Olympic, No. 01-2-556-8, Super. Ct. Wa. (Mar. 13, 2001); Burrell v. Olympic, No. 01-2-01069-3, Super. Ct. Wa. (June 7, 2001); Bounds v. Olympic, Super. Ct. Wa. (June 7, 2001). Many of these suits included very specific allegations regarding Olympic=s role in the accident. For example, in Jackson v. Olympic, Super. Ct. Wa. Case No. 99-2-01467-3, the plaintiffs alleged:

> Upon information and belief, it appears that Defendants were aware of the damage to the pipeline years before the explosion. Defendants were ordered by the State to dig up the pipe in the area of the rupture to inspect and repair it. Defendant Richard Klasen was assigned this job. Unfortunately, the pipe was not dug up, inspected or repaired as ordered before the rupture and explosion that killed three boys and injured many others, including the plaintiffs.

Id., 2nd Amd. Complaint at && 3.10. Olympic settled most of these suits for $75 million. See AFamilies Say $75 million settlement will help push pipeline safety.@ Mike Carter, The Seattle Times, April 11, 2002, Exhibit 9. Obviously, if the accident had not been Olympic=s fault, it is doubtful that Olympic would have settled these suits for $75 million.

13 Fourth, the United States of America has sued Olympic seeking to impose $18 million in fines arising from the accident. See USA v. Shell and Olympic, No. 02-1178 (W.D. Wa., May

25, 2002), Exhibit 10. Many of the allegations in this suit are quite specific. For example, the following factors caused or contributed to the Incident:

> A. Failure to supervise, inspect, or monitor construction activity near the pipeline adequately to prevent or detect physical damage to the pipeline near the location of the rupture.
> B. Failure to detect and repair physical damage to the pipeline near the location of the rupture.
> C. Inadequacies in the design, construction, maintenance and operation of a facility on the Pipeline System known as the Bayview Station and equipment located at or near the Bayview Station.
> D. Inadequacy of the computer system used to monitor and control the Pipeline System.
> E. Inadequate operator training.
> F. Operator error on the day of the rupture.
> G. Management decisions related to these factors.

USA v. Shell and Olympic, No. 02-1178, (W.D. Wa., May 25, 2002) & 36.

> Olympic=s actions and inaction related to the Incident, and the factors that caused or contributed to the Incident, constituted gross negligence or willful misconduct within the meaning of ' 311(b)(7)(D) of the CWA, 33 U.S.C. ' 1321(b)(7)(D).

USA v. Shell and Olympic, No. 02-1178, (W.D. Wa., May 25, 2002) at & 59. Obviously, if the accident had not been Olympic=s fault, it is doubtful the United States Government would be suing Olympic.

15 Finally, a federal grand jury reviewed evidence presented by the United States Attorney. The grand jury heard witness testimony and reviewed exhibits in rendering this decision. For example, on the issue of the Ainadequacy of the computer system used to monitor and control the

Pipeline System, the grand jury considered the reports of independent experts. See Grand Jury Exhibits attached, Exhibits 11 & 12.[4]

16 An indictment may issue only upon the grand jury's finding of probable cause. U.S. v. Hondras, 176 F. Supp.2d 858, (E.D. Wis. 2001). See also U.S. v. Calandra, 94 S.Ct. 613, 617, 414 U.S. 338, 343 (1974). The grand jury concluded, after reviewing the evidence, that there was probable cause that Olympic violated federal law and, thus, issued an indictment. Exhibit 13. This indictment included very specific allegations regarding Olympic=s role in the accident. For example, the indictment alleges

> Although personnel of OLYMPIC and its Operator were notified that this third party intended to perform extensive excavations to install various water pipelines above and below OLYMPIC=S pipeline, OLYMPIC=s personnel established no permanent presence at the site, failed to establish a regular and documented schedule for visiting the site to observe excavations in the area of the pipeline, and relied upon notifications from the third party concerning the dates and times of excavations and backfilling around OLYMPIC=s pipeline.

USA v. Olympic, et al., US Dist. Ct. Case No. CR01-338R, Indictment at & 9 of Count I.

> In 1997, during a review of the data from these two internal inspections, OLYMPIC=s engineering assistant reviewed records showing that water pipelines crossed OLYMPIC=s pipeline in the general location of the anomalies near the Bellingham Water Treatment Plant. OLYMPIC=s engineering assistant also learned that these possible anomalies and defects were not seen during a previous internal inspection of this pipeline segment conducted in 1991. OLYMPIC=s engineering assistant further knew that the pipeline did not incorporate a Awrinkle bend,@ that is, a designed bend in the pipeline, at the location indicated.

[4] These were the only exhibits that were provided in discovery even though one of the exhibits is labeled No. 279, which implies that there are at least 278 other exhibits.

USA v. Olympic, et al., US Dist. Ct. Case No. CR01-338R, Indictment at & 10 of Count I

> OLYMPIC and its Operator undertook preparations to excavate and visually inspect the four possible anomalies and defects identified by the internal inspections performed in 1996 and 1997. Specifically OLYMPIC authorized funds to excavate the suspected anomalies on the Ferndale segment, and OLYMPIC=s engineering assistant prepared Adig sheets@ directed OLYMPIC personnel responsible for excavations to this site. . . . Notwithstanding, sometime thereafter, OLYMPIC=s Manager, FRANK HOPF, JR., met with the engineering assistant and canceled the excavation and visual inspections of these anomalies and defects.

USA v. Olympic, et al., US Dist. Ct. Case No. CR01-338R, Indictment at & 11 of Count I

> On or about December 16, 1998, personnel from OLYMPIC and EQUILON discovered that the small pilot valves that sensed pressure and actuated the main pressure surge relief valves were delivered with incorrect pressure settings. OLYMPIC personnel thereafter failed to replace all of the parts required by the manufacturer to make the pilot valves operate at the significantly higher pressure setting actually specified for the Bayview Products Terminal. Although an OLYMPIC employee received information that OLYMPIC needed to replace specific parts in the pilot valves to make them operate at the higher setting, these instructions were not followed. OLYMPIC personnel also attempted to establish a pressure setting for the pilot valves that was above the maximum set point prescribed by the manufacturer and above the maximum set point listed for surge relief valves in OLYMPIC=s own specifications for the Bayview Products Terminal. Before operating the Bayview Products Terminal, OLYMPIC personnel isolated and tested the pilot valves, but did not test the main pressure surge relief valves under conditions approximating actual operations to ensure that they opened at the correct pressure set point.

USA v. Olympic, et al., US Dist. Ct. Case No. CR01-338R, Indictment at & 13 of Count I

> Despite repeated shutdowns of the pipeline and the Bayview Products Terminal due to high pressure between December 18, 1998, and June 10, 1999, which shutdowns were either unscheduled or uncommanded by the Control Center, OLYMPIC and EQUILON continued to operate the pipeline without correcting the cause of the repeated shutdowns.

USA v. Olympic, et al., US Dist. Ct. Case No. CR01-338R, Indictment at & 14 of Count I

> The grand jury proceedings, including the testimony and exhibits, are confidential. Nevertheless, these factual assertions are based upon the evidence presented to the grand jury. If the accident had not been Olympic=s fault, it is doubtful that a federal grand jury would have indicted Olympic and its employees.

This is the type of information that Olympic doesn=t want the Commission to consider.

iv. No Need to Filter the Evidence the Commission Considers

17 Striking probative evidence based on its potential prejudicial impact on the proceeding is rarely done under these circumstances. The Commissioners are all attorneys and are also all experts with regard to ratemaking matters. There is no improper prejudice which would result from the Commission=s consideration of the evidence Olympic is intending to strike. The Commission routinely considers evidence of operational imprudence when setting rates. There is no need to begin to draw what will become a very contentious line through the body of evidence suggesting Olympic=s operational imprudence resulted in the Whatcom Creek accident. Olympic would like its ratepayers to pay for the financial consequences of its operational imprudence. Its ratepayers should be entitled to demonstrate that Olympic should be held responsible for the financial consequences of its own operational imprudence. The Commission may be expected to use its considerable judgment and does not need Olympic to begin to filter the evidence in this proceeding.

18 **v. Conclusion.**

The allegations in the indictment are specific and from a reliable source after a thorough investigation and that is why Olympic seeks to strike them. These allegations are not much different from the allegations in the civil complaints that gave rise to Olympic=s payment of $75 million in damages, the administrative investigations that gave rise to $10 million in fines and a corrective action order, and the civil proceeding where the United States is seeking $18 million in fines. The reason Olympic wants to strike the indictment is because the allegations are specific, are based

upon evidence presented at the grand jury proceeding, and contradict Olympic=s position in this proceeding.

19 The Commissioners are experienced in evaluating evidence, determining its weight, and making their decision. All probative evidence is prejudicial to the opposing party. That is why it is presented. That is not a reason to strike it. Olympic had the burden to allege and establish specific and substantial undue prejudice resulting from the evidence. The motion is silent as to how Olympic expects this evidence to unfairly impact the Commission=s decision. Olympic also cites no cases where a similar decision was reached even though the existence of contemporaneous civil and criminal proceedings involving the same issues are common with federal and state agencies. In short, Olympic has taken a position that benefits it and is seeking to restrict the other parties= ability to test that position and contradict it. Olympic=s motion to strike should be denied.

DATED this 11th day of June, 2002.

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