BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. OLYMPIC PIPE LINE COMPANY, INC., Respondent.	DOCKET NO. TO-011472 OLYMPIC PIPE LINE COMPANY'S ANSWER TO TESORO REFINING AND MARKETING COMPANY'S FIRST MOTION FOR SUMMARY DETERMINATION AND TO STRIKE TESTIMONY

SUMMARY

1. Olympic Pipe Line Company ("Olympic") submits this Answer to Tesoro Refining and Marketing Company's First[1] Motion for Summary Determination and to Strike Testimony filed on June 6, 2002 (the "Motion").

2. Olympic's response is divided into two parts: (1) procedural, and (2) substantive.

3. On the procedural issues, Tesoro's motion for summary determination should be rejected because (1) it relies on facts and materials outside of Olympic's direct testimony and is in the nature of a motion for summary judgment; as a result Olympic is entitled to have the

[1] Tesoro fashions its pleading as its "First Motion for Summary Determination." Pursuant to the Eleventh Supplemental Order in this proceeding, the deadline for filing dispositive motions in this case was June 6, 2002. Tesoro's "First Motion" is therefore its only motion for summary determination. Olympic was not served with any other dispositive motion from Tesoro besides the "First Motion" prior to the June 6 deadline.

Commission consider all of its rebuttal materials; (2) Olympic requests a continuance under Rule 56(f) for needed affidavits to respond to Tesoro's motion; (3) because Tesoro waited six months to bring this motion it is not in the public interest to grant its motion on the eve of the hearings after all of the time and expense in preparing for the hearings, the hearings are scheduled and the exhibits are marked; (4) Tesoro's delay will prejudice Olympic ; (5) Tesoro had six months to file its motion and Olympic only has had six days to respond. This is insufficient and a denial of due process, particularly given all of the other obligations in the same time period to prepare for the hearings and to file rebuttal testimony; (6) Tesoro confuses the Commission's rulemaking procedures and policy determinations on oil pipeline methodology with its fact-finding role. The choice of methodology for oil pipelines in Washington state is a matter of policy that should be reviewed in light of all of the facts, including rebuttal testimony, and the Commissioners should have an opportunity to question all of the witnesses and review all of the policy factors. Since 1983 the Staff has recognized that the choice of methodology for oil pipelines is a policy matter that needs to consider the unique history and nature of the oil pipeline business.

4. On substantive issues, Olympic will show (1) even if Tesoro had filed a timely motion based only on Olympic's direct case (which it did not) Olympic should prevail; (2) Olympic may rely on unaudited financial statements in its initial case filing; (3) Olympic has presented sufficient evidence and policy arguments to justify use of the methodology it used; and (4) Tesoro's motions to strike are not well taken and should be denied; and (5) Tesoro's Motion is contrary to the public interest.

I. THE PUBLIC INTERST

5. "Unlike a court of general jurisdiction, the Commission is obligated to regulate 'in the public interest.' RCW 80.01.040(2)." Twelfth Supplemental Order at 2, ¶ 10. This is the Commission's paramount responsibility. As this Commission stated in response to Tesoro's efforts

to have the Commission determine a key fact in this proceeding by issue preclusion, "[t]he public interest would not be served by resolution of this significant matter irrespective of the Commission's determination of the actual facts. A Commission order on the merits could thereby result in a decision that failed to allow Olympic an opportunity to earn a fair return, or that allowed Olympic a windfall return at the expense of ratepayers." Id. That same concern should guide the Commission here.

6. Tesoro's Motion ignores the public interest. As the Commission stated in the Third Supplemental Order:

> *First*, it is clear that the Company is in dire financial straits, in large part due to the need for safety improvements. Its case on this issue is compelling. It has no shareholder equity, as such. It owes substantially more money than the book value of its assets. It has seen its throughput plummet because of mandated closure. Its only means to acquire funding for its operations and needed capital projects are loans or capital investments from its owners, or revenues from transportation rates. The Company is not financially sound and it needs funds.
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> *Second*, it is equally clear that safety must continue to be a top priority for this Company. It is essential that the Company have the means to buttress its ability to operate safely, to support public confidence that it will operate safely, and to avoid the occurrence of a major event that could precipitate complete financial meltdown and deprive the shippers and the region of an efficient and cost-effective means of transportation.

Third Supplemental Order at 4, ¶¶ 9-10 (footnote omitted).

7. This is the first case in which this Commission has substantively addressed a request for rate relief where the Commission's pipeline safety responsibility has become an issue, and, indeed, is one of the most important issues in this case. See RCW 81.88 *et seq*. The Commission must assure itself that this pipeline will have the ability to attract capital on reasonable terms so that it can continue its capital program so that Olympic can accomplish its safety-related

responsibilities. As Bobby Talley, Larry Peck and Howard Fox testify in rebuttal, there is little hope Olympic will be able to obtain the further loans needed to finance $66 million in capital expenditures when the rate relief Olympic requests is granted.

8. Olympic will have audited financial statements by the end of July. The record should remain open until then or the Commission should grant Olympic's Motion for a Continuance (attached). Olympic's Motion addresses the audit issue.

II. TESORO'S MOTION IS NOT TIMELY

9. Olympic filed its direct testimony in this case six months ago on December 13, 2001. Tesoro had six months to move to dismiss on the basis that this direct testimony was not sufficient. During these six months, other evidence, other hearings, and now rebuttal testimony, has been filed and is available to the Commission to consider. All of this was produced at considerable expense. Tesoro should be barred by laches from making a motion it could have made last December. In fact, Tesoro could have made such a motion after the hearings on the interim rates in January, but it did not. If Tesoro believed that Olympic's case did not meet the standard for a prima facie case, it had an obligation to this Commission and the other parties to this proceeding to seek to have the case dismissed before this money and effort had been expended.

10. Tesoro's Motion, if granted at this late date, would substantially prejudice Olympic. Had Tesoro acted in a timely manner and the Commission dismissed the case then, Olympic could have refiled its case in January or February and begun collecting just, fair, reasonable and sufficient rates at the end of the statutory suspension period. As it is, should Tesoro's request be granted, Olympic will have unnecessarily gone six months without collecting a just, fair, reasonable and sufficient rate, and then wait another seven months while its next rate case proceeds to its conclusion. The prejudice caused by this is compounded by the fact that, during

this time, Olympic has collected interim rates that Tesoro would undoubtedly demand Olympic refund.

III. STANDARD OF REVIEW

11. Tesoro's Motion is a "Motion for Summary Determination." It does not meet the standards for dismissal because it introduces other evidence outside of Olympic's direct case. Pursuant to WAC 480-09-426, a motion to dismiss is to be considered under the standards for consideration of motion made under CR 12(b)(6) or CR 50, as applicable, of the civil rules for superior court.[2] The standard for consideration for motions under either CR 12(b)(6) and CR 50 is the same:

> In ruling on a motion for a motion for a directed verdict or judgment notwithstanding the verdict, the court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. . . The evidence must be viewed in the light most favorable to the nonmoving party. . . The court may grant the motion only where there is no competent evidence or reasonable inference which would sustain a verdict in favor of the nonmoving party. If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.

Lockwood v. A C & S, Inc., 109 Wash.2d 235, 243 (1987) (discussing the standard for motions under CR 56) (citations omitted) (quotation marks omitted); see also Lawson v. State, 107 Wash.2d 444, 448 (1986) (For purposes of a CR 12(b)(6) motion, the plaintiff's factual allegations are presumed to be true and an action may only be dismissed if it appears beyond a

[2] The other standard listed in WAC 480-09-426, CR 12(c), is not applicable in this case. CR 12(c) concerns motions for judgment on the pleadings "[a]fter the pleadings are closed. The pleadings in this proceeding have not been closed and CR 12(c) therefore does not apply.

doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief).

12. With regard to a motion for summary determination under WAC 480-09-426, that rule states that a party requesting summary determination must show that "the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor." The Commission considers motions for summary determination under "the standards applicable to a motion made under CR 56 of the civil rules for superior court." Id. The civil rules provide:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). The moving party bears the burden of demonstrating an absence of any material fact and entitlement to judgment as a matter of law. Greater Harbor 2000 v. Seattle, 132 Wn.2d 267, 279 (1997). A material fact is one of such nature that it affects the outcome of litigation. Morris v. McNichol, 83 Wash.2d 491, 494 (1974).

IV. OLYMPIC HAS MADE ITS PRIMA FACIE CASE FOR A GENERAL RATE INCREASE

A. Olympic Is Not Obligated to Proceed on Alternative Case Theories in Olympic's Case-in-Chief

13. A central question raised in this proceeding is whether Olympic's intrastate rates should continue to be based on and accepted on the same basis as interstate rates or whether to use a methodology that would produce a different result. Since 1983, the WUTC tariffs for Olympic have been filed at the same time and on the same basis as interstate rates filed at the

FERC. While the Commission has the right and power to make policy determinations on methodologies for oil pipeline companies, Olympic has the right to file on the same basis as it has since 1983, absent a formal policy determination for oil pipeline companies to the contrary.

14. When Olympic commenced this docket on October 31, 2001, it requested that the sequence in this docket be to determine the appropriate rate making methodology first and then to proceed with the submission of testimony and exhibits in conformance with whatever methodology was selected. ("Petition of Olympic Pipe Line Company for a Policy Statement and Order Clarifying Oil Pipeline Rate Methodology," filed October 31, 2001.) On November 26, 2001, the Commission "committed to address the issue of methodology in the context of the general rate proceeding," and decided not to address the methodology issue as a first step. (Third Supplemental Order, Order Granting Interim Relief, In Part, at 2, ¶ 4.) The Commission has carefully stated that it has not made a policy determination on rate methodology in this matter. However, at this point in the proceeding, parties other than Olympic have the burden to establish that a deviation from past Commission practice is appropriate in establishing a new rate for Olympic. Olympic has filed a prima facie case that a general rate increase is appropriate under federal methodology.[3]

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[3] If the other parties offer evidence that Olympic's financial data are inaccurate, or that under DOC methodology, a different rate increase might be justified, Olympic may properly introduce additional evidence in rebuttal thereto.

> Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. . . . Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense,

B. The Standard of Review Applicable to Tesoro's Motion

15. The proper standard the Commission considers when deciding Tesoro's Motion is as follows.

> Commission pleadings are similar, but not identical, to pleadings in civil litigation. A party filing a civil complaint makes allegations of fact, which it represents that it will prove by evidence submitted at trial. In reviewing a motion to dismiss under CR 12(b)(6), the court asks whether the allegations may be proved by any competent evidence. Documents initiating these Commission dockets include a proposed tariff and proposed accounting order, and "prefiled" evidence--documents including the written testimony of witnesses--that the Company represents that it would offer at hearing to prove its need for the requested relief. In reviewing a motion under WAC 480-09-426(1), the Commission uses the prefiled evidence to define the pleadings originating the proceeding.
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> The situation is also analogous to CR 50, which allows dismissal of a proceeding at the conclusion of the plaintiff's presentation if, taking the evidence in the light most favorable to the respondent, the evidence is insufficient to support the complaint. A company seeking a rate increase has the burden of coming forward with sufficient evidence to support its request.
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> In Commission proceedings, prefiled evidence *is* a party's evidence supporting its case. Prefiled evidence serves an essential regulatory function. The Commission resolves complex, high-stakes, multiparty litigation within time frames from start to completion that are often shorter than the civil courts can schedule and hold a trial. Prefiled evidence is one

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> however, is a difficult matter at times. Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief. Therefore, the question of admissibility of evidence on rebuttal rests largely on the trial court's discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion

State v. White, 74 Wash.2d 386, 394-95 (1988) (citations omitted); see also Tegland, Washington Practice, Vol. 5A, § 611.16, p. 451 (West 1996).

> of the means by which this efficiency is accomplished. Other parties rely on the prefiled evidence as the basis for preparing their cross examination of witnesses and in formulating their responsive evidence. If there is no cross examination and no responding evidence--as may happen, for example, in the event of a settlement--a party has no absolute right to provide additional evidence in support of its position.
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> Therefore, in reviewing the motions and the arguments for and against the motions, the Commission asks whether, putting the prefiled evidence in the light most favorable to the Company, the Commission would grant the requested relief. . . .

WUTC v. Puget Sound Energy, Inc., Docket No. UE-011163, 2001 Wash. UTC Lexis 334, at *8-10 (Oct. 2001).

16. According to the Washington Practice and Procedures Manual, when considering a motion to dismiss under 12(b)(6):

> While the factual allegations of the complaint must be accepted as true for the purposes of a 12(b)(6) motion [Dennis v. Heggen, 35 Wn. App. 432, 667 P.2d 131 (1983)], the motion will only be granted if it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle plaintiff to relief. [Orwick v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984).] Thus, any hypothetical fact situation that is legally sufficient to support plaintiff's claim and is conceivably raised by the complaint will defeat a 12(b)(6) motion. [Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978).]

Kelly Kunsh, Washington Practice Vol. 1, Methods of Practice, § 6.2, pp. 79-80 (West 1997).

> Rule 12(c) provides that a litigant may file a motion for judgment on the pleadings after the pleadings are closed but within such time so as not to delay the trial. A motion for judgment on the pleadings differs from a motion under Rule 12(b) [see section 6.2] in that the latter may be made and ruled upon before an answer is filed. A motion for judgment on the pleadings differs from a motion for summary judgment under Rule 56 [see section 6.7] in that in ruling on the latter, the court may examine matters or affidavits outside the pleadings. If extrinsic matter is considered in

> connection with a Rule 12(c) motion, the court will treat the motion as one for summary judgment. If the movant is entitled to judgment under either rule, it is immaterial which one the trial court relies upon. [Loger v. Washington Timber Products, Inc., 8 Wn. App. 921, 509 P.2d 1009 (1973).]
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> For a court to render judgment on the pleadings, the allegations in the pleadings will be construed strictly against the movant, and only where it appears that the matter can be determined upon the pleadings (i.e., there are no fact issues requiring trial and the issues can be determined as a matter of law) can such a motion be granted. [Hodgson v. Bicknell, 49 Wn.2d 130, 298 P.2d 844 (1956).]

Kelly Kunsh, Washington Practice, Methods of Practice, I § 6.4, pp. 81-82 (West 1997). Thus, Tesoro's motion must be assessed against Olympic's case alone, viewed in the light most favorable to Olympic, with all inferences resolved in Olympic's favor.

> The motion to dismiss for failure to state a claim on which relief can be granted [CR 12(b)(6); see Section 6.2] and the motion for judgment on the pleadings [CR 12(c); see Section 6.4] test the legal sufficiency of the pleadings, accepting as true the allegations of the non-moving party. A motion for summary judgment [CR 56], on the other hand, allows the court to look beyond the pleadings to test the potential for proof of the allegations and the existence of any genuine issues of material fact. If no such issues of fact exist, the court may render summary judgment. If controverted facts do exist, the issues must be tried.
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> The rationale underlying summary judgment is the elimination of trials where only questions of law remain to be determined. [Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983).] . . . .
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> The Washington courts have taken the traditional position that summary judgment is not proper if there is any doubt about the existence of a triable issue. [Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 682 P.2d 960 (1984).] The moving party has the burden of clearly demonstrating the absence of a genuine issue of fact. [Spurrell v. Bloch, 40 Wn. App. 854, 701 P.2d 529 (1985).] The party

> against whom the motion is made is entitled to the favorable inferences even from undisputed evidence. [Halligan v. Pupo, 37 Wn. App. 84, 678 P.2d 1295 (1984).]

Kelly Kunsh, Washington Practice Methods of Practice, I § 6.7, pp. 83-85 (West 1997) (citations provided in part).

C. Olympic's Filing Constitutes a Prima Facie Case

17. Olympic has satisfied the requirements for establishing a prima facie case.

> It is generally said that when ruling on a motion for judgment as a matter of law, the moving party's evidence will be disregarded and the nonmoving party's evidence and all reasonable inferences therefrom will be accepted as true. [See, e.g., Davis v. Early Construction Co., 63 Wn.2d 252, 386 P.2d 958 (1963).] Further, it has been said that the nonmoving party is not bound by his or her own unfavorable evidence and "is entitled to have his case submitted to the jury on the basis of the evidence which is most favorable to his contention." [Spring v. Department of Labor and Industries, 96 Wn.2d 914, 640 P.2d 1 (1982), appeal after remand 39 Wn. App. 751, 695 P.2d 612 (1985).]

Orland & Tegland, Washington Practice, Vol. 14, § 262, pp. 536-37 (West 1996).[4]

D. For Purposes of This Motion, Olympic's Use of Unaudited Financial Information In Its Direct Case is Proper

18. On March 21 and June 13, Olympic asked for a continuance of to enable the audit work to be completed. At the April 4, 2002 hearing, Commissioner Oshie, said:

> And we do understand that those audits will be completed at some time, but it certainly goes to the weight of the evidence and the weight that we give those financial statements if they are unaudited.

Hearing Transcript, Vol. XVII, at 1804 (April 4, 2002).

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[4] Tesoro's use of deposition testimony in the motion is unfair and improper. At this stage, the Commission must assess Olympic's case alone, viewed in the light most favorable to Olympic.

19. There is no regulatory requirement for audited financial statements for integrated pipeline companies. See, e.g., Title 81 RCW; Chapter 480-09 RCW. Olympic witness Leon P. Smith also testified on rebuttal to the following:

> Q. What are the problems with Mr. Brown's assertion that audited financial data must be used for the test period?
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> A. Many components of an oil pipeline's cost of service are drawn from the carrier's Form 6 Report (e.g., operating expenses). It is my understanding that the Commission also relies on the Form 6 for oil pipeline ratemaking. The Form 6 is not an audited financial statement. Likewise the projections used for the pro forma adjustments, by their very nature, cannot be based on audited financials, but they represent the best estimates of management. Mr. Brown's assertion that data for oil pipeline rate filings must be drawn from audited reports is not accurate. Based on my experience, rates for oil pipelines were rarely, if ever, based directly on audited financial statements.
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> Q. What are the problems with Mr. Brown's assertion that "budget" estimates "do not provide a proper basis for development of test period (pro forma) costs because those costs are not based on actual costs incurred during the base period." (Ex. JFB-1T at 12)
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> A. As I have stated above, the FERC's regulations for oil pipelines require that the test period be forward-looking. From reading the Commission regulations, it is my understanding that the FERC's concept of a test period correlates to the Commission's concept of pro forma adjustments. Accordingly, it has been my experience that budget forecasts are frequently relied on for determining test period amounts. Indeed, it is not possible to generate the type of forward-looking numbers envisioned by the FERC's test period concept without relying on the type of forecasts that budgets normally contain. While there may be legitimate differences of opinion concerning the appropriate dollar amount for a particular item, Mr. Brown's wholesale rejection of budget estimates and his proposed adjustments to operating expenses are not consistent with the FERC's standards for the test period. Pipeline companies develop budgets for management's financial and operation purposes based on their best internal

> projections. It is appropriate for the FERC and the Commission to rely on projections contained in the managerial budget reports as the carrier's best estimate of future operating costs for ratemaking purposes.

Exhibit No. __ (LPS-1T) at 20-21.

20. The financial evidence submitted by Olympic in its direct case, standing alone and viewed in the light most favorable to Olympic, is sufficient to establish a prima facie case that the rate proposal in Olympic's tariff revision No. 22 is fair, just, reasonable and sufficient.

21. It is only after Tesoro submitted 31 references to depositions, four references to interim rate case exhibits and a transcript reference to the interim case that Tesoro can make its Motion. Olympic is entitled to submit all of its rebuttal testimony in response to what is in fact Tesoro's motion for summary judgment based on the records outside the direct case.

E. Olympic Need Not Prove Why the Commission Departure From Past Practice Would Be Wrong in Olympic's Case-in-Chief

22. At this stage of the proceeding, and in the context of Tesoro's Motion, Olympic is entitled to the presumption that the Commission will find the federal methodology that Olympic used as the basis for all past filings continues to be appropriate in setting a fair, just, reasonable and sufficient rate for Olympic. Olympic does not advocate such a departure, and has no burden to go forward with it or establish that no departure should occur.

> The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them. The courts so require. A good case is Atchison, Topeka & Santa Fe R. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973), asserting that an agency has a "duty to explain its departure from prior norms." Only four Justices joined in the statement, but no other Justice expressed himself on the subject. Atchison has been cited for that proposition hundreds of times. A more appealing formulation of the same idea is Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971): "[A]n agency changing its course must supply a reasoned analysis

> indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."
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> In its unanimous opinion in INS v. Yang, 519 U.S. 26, 32 (1996), the Court provided a particularly useful description of the "unexplained departures" branch of the arbitrary and capricious test:
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> Though the agency's discretion is unfettered at the outset, if it announces and follows--by rule or by settled course of adjudication--a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious, [or] an abuse of discretion" within the meaning of the Administrative Procedure Act.

Richard J. Pierce, Administrative Law Treatise, Vol. II, § 11.5 at 817 (4th ed. 2002). The Commission's own regulations, e.g., WAC 480-09-330(2)(b), acknowledge this standard by requiring an applicant seeking to justify such a departure to explain why it is appropriate and what result would obtained if past practice were maintained. There is no requirement that the applicant file assessments of methodologies that would deviate from past filing requirements or on a basis that the applicant does not advocate.

23. If Olympic proposed to calculate actual or proforma adjustment in a manner differing from the method that the Commission most recently accepted for Olympic, Olympic would be obligated to present a work paper demonstrating how the adjustment would be calculated under the methodology previously accepted by the Commission.
WAC 480-09-330(2)(b). In this case, however, Olympic proposes that the Commission again accept the federal methodology (as the Commission has in each of Olympic's general rate increase filings over the past quarter century) rather than apply "deferred cost of service" methodology. Olympic's filing is not deficient because Olympic has failed to assess alternative theories it does not advocate that would be inconsistent with prior Commission practice.

F. Motions to Strike

24. Tesoro's motions to strike are likewise inappropriate:

> A party may move under Rule 12(f) to strike any "redundant, immaterial, impertinent or scandalous matter" [CR 12(f)] from any pleading, motion, or other paper before a responsive pleading is filed. In practice, the scope of these motions is extremely limited. A motion to strike should not be used merely to deny an allegation or assert its falsity because this only raises a factual allegation to be determined at trial.

Kelly Kunsh, Washington Practice, Methods of Practice, I § 6.6, p. 83 (West 1997).

25. As a subsidiary matter, although Olympic had no burden to do so, it did offer Ms. Omohundro's testimony in its case-in-chief describing rate regulation and public policy reasons why is it in the public interest not to change pipeline rate-making methodologies at this time. This testimony is relevant to this proceeding, and Ms. Omohundro need not be familiar with the details of FERC methodology to testify why it would be in the public interest that the Commission continue to accept consistent methodology with federal agencies and past Commission practice in proceedings establishing Olympic's intrastate rates in these particularly trying times for the Company. In addition, Mr. Collins' testimony that he "was asked to prepare a 154(b) cost of service presentation for Olympic" and that "[a]s of this point, I have not been asked that, given that assignment [to look into or examine whether or not that would be the appropriate methodology for the Washington Commission to adopt]," which Tesoro characterizes as "remarkable," actually reflects Olympic's straightforward application of WAC 480-09-330. Olympic does not propose to vary from federal methodology -- the method that the Commission most recently (and for the past quarter-century) accepted for Olympic. Even though Olympic may not be "constitutionally entitled" to a particular rate methodology, it is entitled to prepare its direct case assuming that the

Commission would accept the same methodology in this case as it has in past cases, rather than departing from past Commission practice.

G. Conclusion

26. Tesoro raises a number of objections to various aspects of the case Olympic has filed. However, applying the standards the Commission has established for assessing a motion for summary disposition at this stage of the proceedings, Tesoro's Motion fails. The Commission has reserved the right to determine what methodology will be applied in this proceeding. However, Olympic has filed a case requesting a rate increase based on the federal methodology. It has provided the same type of financial information to support such a rate increase as it has in the past. In assessing the Motion, questions as to the accuracy of the financial data must, as must all other questions, be resolved in Olympic's favor--i.e., at this stage of the proceeding, the data must be accepted as accurate. Further, because Olympic proposes to follow the methodology that the Commission has applied in assessing Olympic's rate increase filings since 1983, other parties to the proceeding (or the Commission) are obligated to establish why such a departure from past practice would be appropriate. At this stage in the proceeding, questions as to the appropriate methodology must be resolved in Olympic's favor - i.e., it must be presumed at this stage of the proceeding that the federal methodology is appropriate. Finally, because Olympic had not yet filed its rebuttal case on June 6, it would be inappropriate for the Commission to consider aspects of Tesoro's opposition case (such as the deposition snippets Tesoro has filed with its First Motion) in assessing the appropriateness of various assumptions Olympic's witnesses have made in their direct testimony. Therefore, Tesoro's mischaracterizations of the purpose, scope, relevance and credibility of certain witnesses' testimony offered by Olympic should not deflect the Commission's attention in considering Tesoro's motion for summary disposition at this stage of the proceedings.

V. THE COMMISSION SHOULD REJECT TESORO'S MOTION FOR SUMMARY DETERMINATION BECAUSE THERE ARE MATERIAL FACTS AT ISSUE

A. The Motion Fails to Meet the Standard for Summary Determination

27. As noted above, summary determination, judged by this Commission under the standard for motions for summary judgment, is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). Tesoro has the burden of proving that there is no genuine issue of material fact in dispute that could influence the outcome of the hearing. Hartley v. State , 103 Wash.2d 768 774 (1985). Summary judgment is proper only if, after considering all facts in the light most favorable to the nonmoving party, Olympic, reasonable persons could reach but one conclusion. Wilson v. Steinbach , 98 Wash.2d 434 (1982); Harstad v. Frol , 41 Wn. App. 294 (1985); Goodpaster v. Pfizer, Inc. , 35 Wn. App. 199 (1983).

28. Moreover, summary judgment may not be granted if there is a genuine issue of material fact or if the facts are subject to reasonable conflicting inferences. State Farm General Insurance Company v. Emerson , 102 Wash.2d 477, 480 (1984); Southside Tabernacle v. Pentecostal Church of God , 32 Wn. App. 814, 821 (1982).

29. Tesoro has not presented facts showing that it is entitled to summary determination. Tesoro's motion for summary judgment includes numerous factual misstatements, mischaracterizations of the record and Olympic's position, and statements that are wholly unsupported by the record or Olympic's prefiled testimony. Such unsupported conclusory statements of fact are insufficient to support Tesoro's claims. Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 359-60 (1988); Cluff v. CMX Corp., 84 Wn. App. 634, 639 (1997). Further, these statements entirely ignore the facts submitted by Olympic. It is not sufficient for the

opposing party simply to raise issues as to the credibility of the evidence. Summary determination is inappropriate here, and must be denied, because considering all facts in the light most favorable to Olympic, genuine issues of material fact exist.

B. Genuine Issues of Material Fact Exist

1. Challenges to Cindy Hammer's Testimony

30. Tesoro challenges Olympic's direct case by challenging Cindy Hammer's underlying knowledge of what it terms "underlying cost items," "outside services," "one time expenses," and "regulatory principles." Tesoro Motion at 12. Tesoro also faults Ms. Hammer for her alleged unfamiliarity with what Tesoro terms are "one-time maintenance costs." Id. at 13. Finally, Tesoro also faults Ms. Hammer for using test period adjustments with which it disagrees. Motion at 15.

31. With regard to Tesoro's allegation that Ms. Hammer could not demonstrate knowledge of certain costs, as mischaracterized as Tesoro, Olympic notes that Ms. Hammer's title is Senior Financial Analyst. She is not involved in pipeline operations, nor is she an expert in regulatory accounting. Ms. Hammer does not manage projects or set spending levels; her job is to capture data. Olympic witnesses Bobby Talley and Bob Batch submitted direct testimony regarding Olympic's capital projects and recurring expenses. See Exhibit No. __ (BJT-1T) at 6-10 and Exhibit No. __ (BCB-9) at 11-15, and the exhibits referred to therein. Mr. Talley also testified regarding Olympic's outside services. Exhibit No. __ (BJT-1T) at 12-14. Mr. Talley rebuts all of Tesoro's characterization of its capital budget and maintenance expenses in his rebuttal testimony. Exhibit No. __ (BJT-11T). Mr. Talley explains that these maintenance projects are representative of expected future cost levels. The evidence produced by Olympic in its direct case, and further developed in its rebuttal case in response to the arguments of Staff and Intervenors,

demonstrates that Olympic has both produced evidence to support a prima facie case and raised material issues of fact appropriate for consideration at hearing.

32. Olympic has asserted that it should be permitted to recover certain ongoing and reoccurring costs involved with its safety-related maintenance and operations costs. Tesoro disagrees with Olympic's characterization of those costs and Olympic, in turn, disagrees with Tesoro's position and its characterization of the nature of these projects. In and of itself, this demonstrates that these issues are appropriate to go to hearing because these material facts are disputed by the parties.

33. Further, Tesoro alleges that Olympic's test period adjustments are not based on Olympic's actual expenditures during the base period. Motion at 13. This is a legal argument appropriate for posthearing briefing. However, Olympic notes that it filed its direct case based on the Trended Original Cost (TOC) methodology used by the Federal Energy Regulatory Commission and accepted by this Commission for pipeline tariffs for almost twenty years. The TOC methodology contemplates forward looking test periods for cost of service rate filings and it is a common practice for oil pipelines to base cost of service filing on budget data. Leon Smith rebuts Tesoro's argument in his testimony on this topic. Tesoro has established no basis to believe that budgeted expenses will not be spent or will be deferred to later years. Thus, the matter is disputed by the parties and appropriate for hearing.

34. Olympic also notes that the order relied upon by Tesoro for its argument on this point, WUTC v. Wash. Water Power Co., U-81-15, 1981 Wash. UTC LEXIS 3 (1981) was entered *after* a hearing on the merits in the case, a point that Tesoro fails to mention in its Motion.

2. Rate Methodology Issues

35. Tesoro next challenges Olympic's arguments regarding the correct methodology. Motion at 15. Tesoro notes, but does not heed, this Commission's explicit statement that the

Commission has determined to address the question of applicable "ratemaking methodology in the context of the adjudication." Complaint and Order Suspending Tariff Revisions at 3.

36. These are policy matters upon which the Commission should have a full record, including rebuttal testimony and answers to the questions for the Commission at the hearing. Nevertheless, the treatment of deferred return used by Olympic in its direct filing is consistent with the TOC methodology adopted by FERC in Order 154-B and Olympic's filing was based on TOC methodology. If this Commission adopts the FERC methodology, the deferred return is a fundamental component of the rate base, and its inclusion is not optional under application of that methodology. The basis of the deferred return in Olympic's direct filing is the application of the 154-B methodology.

37. Tesoro also challenges Olympic's use of a starting rate base write-up. Olympic's inclusion of a starting rate base write-up is consistent with the TOC methodology. The position urged by Tesoro has been considered and rejected by FERC. Lakehead Pipe Line Co., 71 F.E.R.C. ¶ 61,338, at 62,311-12 (1995). However, the question of whether this Commission will include the starting rate base write-up is a question the Commission has indicated it will decide "in the context of the adjudication."

3. Testimony of Christy Omohundro

38. Tesoro initially seeks to strike Ms. Christy Omohundro's prefiled testimony because she is not an expert in the FERC methodology at issue in this case. Tesoro mischaracterizes Ms. Omohundro's direct testimony. Ms. Omohundro's direct testimony questioned whether a decision by the Commission to switch Olympic's rates from the current trended original cost methodology to the depreciated original cost methodology, resulting in lower rates, is in the public interest for both Olympic and the citizens of Washington.

39. Ms. Omohundro did not represent that she is an expert in FERC methodology because she is not. Ms. Omohundro, however, is a seasoned state regulatory expert. With her experience in the realm of regulations before this Commission, Ms. Omohundro offers testimony as to policy and the potential consequences of the regulatory decision this Commission must face. Ms. Omohundro has relied on the Staff's prior studies and calculations of those who are experts in the FERC methodology at arriving at her opinion that Olympic must obtain a significant rate increase to (i) make the necessary safety improvements, (ii) restore its throughput to 100%, and (iii) have sufficient funds to cover operating expenses and attract capital.

40. In the alternative, Tesoro seeks to strike Ms. Omohundro's testimony as irrelevant. The Commission, however, must be guided by the public interest and the end result test. Tesoro's position regarding the legal relevancy of the methodology used in establishing Olympic's rates is unfounded, particularly when this Commission established that a decision regarding the correct rate methodology is an important issued to be determined in "the context of the adjudication" in this proceeding.

41. Further, Tesoro mischaracterizes Ms. Omohundro's direct testimony by implicitly claiming that Olympic has a vested interest in the trended original cost methodology. Ms. Omohundro never made such an assertion. In fact, in Ms. Omohundro's rebuttal testimony in this proceeding, she explicitly recognizes that the Commission may use any methodology it wishes as long as the end result is fair, just, reasonable, and sufficient. Instead, Ms. Omohundro, in her direct testimony, testifies to the negative consequences that may occur if the Commission were to switch methodologies given Olympic's current situation.

4. Payments to BP Pipelines

42. Tesoro argues that Olympic's payments to BP Pipelines were unreasonable. It offers no evidence to support this claim, and this Commission is to view the evidence in the light most favorable to Olympic in response to Tesoro's pleading.

43. The reasonableness of Olympic's payments to BP is an issue to be considered at the hearing. Olympic has provided evidence in its direct case that these are business expenses incurred during the rate year. The reasonableness of such payments are not appropriate for summary determination under WAC 480-09-426.

VI. AUDITED FINANCIAL STATEMENTS

44. Yesterday, Olympic moved for a continuance of this proceeding to permit Olympic to secure and present to the commission an audited financial report. This evidence is necessary to Olympic's opposition to Tesoro's motion for summary determination. The audited financial statement will raise genuine issues of material fact and will be available by the end of July.

45. As noted above, in considering a motion for summary determination, the commission is guided by the standards applicable to a motion made under CR 56. WAC 480-09-426(2). The civil rules permit continuance of a summary judgment motion based on a demonstrated need for additional evidence. CR 56(f) provides as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A motion for relief under CR 56(f) should be liberally applied. See Coggle v. Snow, 56 Wn. App. 499, 508 (1990) ("the primary consideration in the trial court's decision on the motion for

continuance should have been justice"). The Ninth Circuit takes a similar approach with respect to Federal Rule of Civil Procedure 56(f). In Visa International Service v. Bankcard Holders, 784 F.2d 1472 (9th Cir. 1986), the Ninth Circuit states:

> The cases construing 56(f) suggest that denial of a 56(f) application is generally disfavored where the party opposing summary judgment makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.

Id. at 1475.

46. Olympic meets the requirements of CR 56(f). Olympic has stated precisely what evidence it needs--the audited financial statements--and has offered a good reason for the delay in presenting that evidence. Olympic made its motion for a continuance for this purpose yesterday, on June 13.

47. In its Motion, Olympic waived its collection of the interim rates for the period this case will be continued. Indeed, the ends of justice would not be served by denying Olympic's motion. Accordingly, Olympic respectfully requests that the commission grant a continuance to August 5.

PRAYER FOR RELIEF

Olympic respectfully requests that the Commission issue an order denying Tesoro's Motion for Summary Determination.

DATED this ____ day of June, 2002.

Respectfully submitted,

PERKINS COIE LLP

By _____
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