BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. OLYMPIC PIPE LINE COMPANY, INC., Respondent.	DOCKET NO. TO-011472 ANSWER ON BEHALF OF COMMISSION STAFF TO OLYMPIC'S MOTION FOR EXTENSION OF TIME TO RESPOND TO STAFF'S ANSWER TO TESORO'S MOTION

1 On June 14, 2002, Olympic Pipe Line Company filed a Motion seeking additional time to respond to Staff's Answer to Tesoro's Motion for Summary Disposition. Olympic does not request a specific time for filing its response, so Staff cannot respond to that issue.

2 On the other issues raised in Olympic's Motion, Staff responds as follows:

3 Olympic persists in its assertion of fact that all Olympic tariff filings since 1983 have used FERC methodology (Olympic Motion at 2). As we stated in our Answer to Tesoro's Motion, Olympic's direct case contains no witness with testimonial knowledge of that fact;

4 Olympic argues the Commission's decision on appropriate ratemaking methodology requires both a "full factual record" and "full exploration of all the policy reasons both for and against use of a particular methodology" (Olympic Motion at 7). As we stated in our Answer to Tesoro's Motion, Olympic failed to file a direct, *prima facie* case that provided either a "full factual record" on that issue or a complete "exploration of policy

reasons" related to that issue. Olympic's Motion cites to its rebuttal case for that evidence. That is not the proper role of rebuttal.

5 Finally, the theory underlying Olympic's Motion justifies dismissal of the instant docket.

6 Regarding the last point, Olympic attempts to excuse its failure to provide a direct case on ratemaking methodology. Olympic says "a policy determination by the Commission is not in the nature of proof of fact, but is in the nature of the Commission's rulemaking authority, which is not limited to Olympic's direct testimony, or the rebuttal testimony, but should more properly a matter of general rulemaking principles…" (Motion at 3). In short, Olympic contends the choice of ratemaking methodology "a rulemaking choice…" (Motion at 6), and as such, it must be accomplished under the rulemaking provisions of the Administrative Procedure Act (chapter 34.05 RCW)("APA"). (*Id.*).

7 Olympic relies on *D/O Center v. Department of Ecology*, 119 Wn.2d 761, 837 P.2d 107 (1992) and *Simpson Tacoma Craft Co. v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992) for its position. (Motion at 6). *Simpson Tacoma Craft* stands for the proposition that when rulemaking is required, adjudication is not appropriate. In that case, the court nullified an agency standard apparently developed through adjudication, on the grounds that APA rulemaking procedures were required to be followed. The *D/O Center* case does not resolve a similar issue. That case dealt with issues of standing, primary jurisdiction, and exhaustion of administrative remedies. Olympic warns the Commission that its Staff is "inviting the Commission to err fundamentally on this issue." (Motion at 6).

8 Olympic is wrong. Indeed, if the choice of a ratemaking methodology is "a rulemaking choice" requiring adherence to APA rulemaking procedures, then it is Olympic who is

inviting the Commission to err by continuing this adjudication. That is because FERC ratemaking methodology has not been adopted by Commission rule,[1] and the Commission has not followed statutory rulemaking procedures in this docket. If the adoption of an oil pipeline ratemaking methodology is a "rulemaking choice," then *D/O Center v. Department of Ecology* and *Simpson Tacoma Craft Co. v. Department of Ecology* prohibit that choice to be made in an adjudication that does not follow APA rulemaking procedures.

9 In sum, there is no way to defend continuation of the instant adjudication under Olympic's theory.[2] If the theory Olympic now advances is correct, this docket should be dismissed. A rulemaking would then be required to be convened.

10 From Staff's perspective, the Commission should disregard Olympic's Motion. It is based on a flawed legal theory. The Commission should be able to address the appropriate ratemaking methodology for Olympic in the context of an adjudication, properly presented by the party with the burden of proof. But should the Commission

[1] In the 1983 matter to which Olympic refers in its Motion (*e.g.* at page 3), the Commission did not suspend Olympic's filing, so it went into effect by operation of law. That is not rulemaking. Nor is it adjudication. Olympic refers to a Staff memo prepared in the context of that 1983 Olympic tariff filing. A Staff memo is not a Commission rule, rulemaking, or adjudication. Nor can a Staff memo dictate Commission action in any form.

[2] Olympic suggests elsewhere in its Motion that a "new policy" for an oil pipeline ratemaking methodology requires rulemaking. (*e.g.* Motion at 2). If rulemaking is required to establish a "new policy," it follows that the same procedures were also required to establish the "prior policy" (which Olympic apparently believes is the use of the FERC methodology).

Ultimately, Olympic's argument proves too much. If Olympic is correct that the FERC methodology is the applicable methodology, and that methodology cannot be changed except by rulemaking, then Staff and Intervenor cases using a different methodology would have to be stricken. Olympic does not seek that result.

In any event, Olympic is wrong on the facts and the law. Olympic has offered no direct evidence, supported by witnesses with testimonial knowledge, that every Olympic tariff filing since 1983 was in fact based on FERC methodology. And even if Olympic could prove that fact, when the Commission allowed those uncontested Olympic tariff filings to go into effect without suspension, that did not constitute a Commission rule, an adjudication, or a formal policy decision of any nature by the Commission.

agree with Olympic, the proper result is to dismiss, and to promptly convene a rulemaking proceeding.

Respectfully submitted this 17th day of June, 2002.

CHRISTINE O. GREGOIRE
Attorney General

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Donald T. Trotter
Senior Counsel
Attorney for Commission Staff
(360) 664-1189