

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	Docket No. TO-011472
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	
)	TOSCO CORPORATION'S
v.)	MOTION TO STRIKE
)	REBUTTAL TESTIMONY
)	
OLYMPIC PIPE LINE COMPANY, INC.,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Pursuant to Washington Administrative Code (“WAC”) § 480-09-420(8), Tosco Corporation (“Tosco”) hereby submits this Motion to Strike portions of Olympic Pipe Line Company’s (“Olympic” or “the Company”) Rebuttal Testimony in the above-captioned proceeding. Olympic has inappropriately changed fundamental aspects of its case and has raised issues for the first time through rebuttal that leaves Staff and Intervenors without the opportunity to respond.

Olympic has the burden to establish its case-in-chief through its direct case and not through its rebuttal testimony. *See generally State v. Swan*, 790 P.2d 610, 652-53 (1990) *quoting State v. White*, 444 P.2d 661, 667 (1986) (holding that the purpose of rebuttal evidence is to answer new material presented by the opposing party). Once Olympic presents its direct case, its position is fixed and may not be changed. *See WUTC v. Harbor Water Co.*, Docket No. U-87-1054-T, 1988 Wash. UTC Lexis 68 at *37 (May 7, 1988) (“...the company’s positions must be made clear in order for the other parties to respond to those positions. That point is prior

to rebuttal. The parties in a rate case should not have to constantly respond to a moving target.”). However, Olympic ignores this fundamental rule of fairness and seeks to change its position the week before hearings are scheduled to begin. *See generally* State v. Olson, No. 24218-4-II, (consolidated), No. 24247-8-II, 2000 Wash. App. Lexis 726 at *23 (Wash. Ct. App. May 5, 2000) (holding that the prosecution should not be allowed to withhold essential evidence from its case-in-chief in order to present the evidence at the end of the defendant’s case). This leaves Staff and Intervenors unable to respond to Olympic’s *new* case and *new* arguments. The Washington Utilities and Transportation Commission (“WUTC” or “Commission”) should not permit Olympic to change its case on the eve of trial. If Olympic’s direct case is deficient, Olympic is free to withdraw its filing and refile with the Commission. Olympic may not, however, present a new case one week before hearings are scheduled to begin to the detriment of Staff, Intervenors and the public interest.

While Tosco files this initial motion to strike, Olympic’s rebuttal testimony is so voluminous that Tosco is unable at this point to address all Olympic’s rebuttal testimony that should properly be stricken in this proceeding. Therefore, Tosco reserves the right to object to Olympic’s rebuttal testimony in the course of the hearings.

A. The Commission Should Strike Portions of Dr. Schink’s Testimony

In his Direct Testimony, Dr. Schink did not establish or address the link between the current financial condition of Olympic and the appropriate return on equity (“ROE”). Dr. Means, on behalf of Tosco Corporation, did not respond to nor raise for the first time any such link. Only now in his Rebuttal Testimony has Dr. Schink attempted to justify his proffered ROE and risk premium adder based on a financial risk analysis. For this reason, and for the reasons

offered below, the Commission should strike these aspects Dr. Schink's Rebuttal Testimony from this proceeding.

Specifically, in his Direct Testimony Dr. Schink recommended a risk premium adder of 0.75 percent based on competition from water-borne transportation. In his Rebuttal Testimony, he has changed both his recommendation and the argument supporting it. He now states that "Olympic is a relatively high-risk pipeline due to the waterborne [sic] competition it faces and to its risk of financial failure. Based on these two factors, I have determined that a risk premium adder of .95 percent is appropriate for Olympic." Exhibit No. 201-T (GRS-4T) at page 4, lines 2 – 7.

Dr. Schink's Direct Testimony presented extensive evidence regarding the alleged competitive risk faced by Olympic from water-borne transportation. This included a 14-page discussion entitled "An Assessment of Olympic's Business Risk," and a 60-page Appendix entitled "Demonstration of the Effectiveness of Olympic's Waterborne Competition." See Exhibit No. 223 (GRS-2) at pages 7 – 21 (business risk); *Id.* at Appendix B (water-borne competition). In that testimony, Dr. Schink did not contend that Olympic's allowed return on equity or capital structure also should be influenced by the pipeline's financial condition or other non-competitive risks, nor did he suggest that the Commission should depart from a proxy group analysis and use a financial condition analysis in determining Olympic's allowed rate of return on equity ("ROE").

In his responsive Direct Testimony on behalf of Tosco, Dr. Means addressed Dr. Schink's testimony regarding the alleged competitive risk of water-borne competition. Exhibit No. 2201-T (RCM-1T) at pages 11 – 19. Dr. Means also addressed Dr. Schink's proxy-group analysis of ROE, and he recommended a rate of return similar to the rate which Dr. Schink

derived using the FERC's normal median ROE from the proxy group. Id. at pages 6 – 10. He did not discuss Olympic's financial risk or the relevance of that risk to its return on equity because those issues had not been discussed by Dr. Schink.

In his Rebuttal Testimony, Dr. Schink responded to Dr. Means on the issue of competitive risk. Exhibit No. 201-T (GRS-4T) at pages 26 – 30. However, he has also introduced the entirely new theory that the Commission should provide Olympic with an equity return which will compensate its investors for the risk of bankruptcy caused by the pipeline's precarious financial condition. Exhibit No. 201-T (GRS-4T) at pages 9 – 13, 30 – 35, 59 – 61, 94 – 96. This new financial risk testimony did not respond to any discussion of financial risk or potential bankruptcy contained in the prepared answering testimony of Tosco or any other party. Nor did Dr. Schink's financial risk testimony counter or rebut any other points raised in the answering testimony of Tosco or any other party.

As the testimony submitted in this case amply demonstrates, issues relating to the current financial condition of Olympic and to responsibility for that condition are complex and hotly disputed. In his Direct Testimony, it would have been entirely proper for Dr. Schink to attempt to link those issues to the issue of return on equity. Witnesses for Tosco and Tesoro then could have responded to that attempt in answering testimony, and Dr. Schink could have had the last word by addressing their response in his rebuttal testimony. By waiting until the rebuttal stage of the case even to raise the issue, however, Dr. Schink seeks to have not just the last word on the issue, but the only word.

Dr. Schink also fundamentally changes other aspects of Olympic's case through his rebuttal testimony. For example, he has adjusted the throughput for the company from 105.9 million barrels in his initial testimony to 103.14 million barrels in his rebuttal. Exhibit No. 201-

T (GRS-4T) at page 107, lines 4 – 5, and at page 109, lines 17 – 19. Dr. Schink also changes his proposed equity ratio from 82.92 percent in his direct case to 86.85 percent in his rebuttal and the equity rate of return from 13.23 percent in the direct case to 14.15 in rebuttal. *See* Exhibit No. 201-T (GRS-4T) at page 6, line 10, and at page 91, line 17, through page 92, line 8 and page 95, line 3, through page 96, line 9 (equity ratio); Exhibit No. 201-T (GRS-4T) at page 4, line 7, and at page 61, line 8, through page 65, line 5 (equity rate of return). These changes should also be stricken from the record.

In sum, the Commission should strike the following portions of Dr. Schink’s Rebuttal Testimony (Exhibit No. 201-T (GRS-4T)):

- a) “The Asymmetric Risk of Olympic’s Potential Failure” (page 30, line 17 through page 33, line 7).
- b) “The Equity Risk Premium Adder for Olympic” (page 59, line 17, through page 61, line 5).
- c) “Capital Structure” (page 91, line 17, through page 92, line 8; page 95, line 3 through page 96, line 9).
- d) “Issues with Olympic’s Throughput” (page 107, lines 2 – 5; page 109, lines 17 – 19).
- e) “Summary of Testimony” (page 4, line 7; page 6, line 10).
- f) “Capital Structure” (page 92, lines 4 – 8; page 95, line 3, through, page 96, line 9).
- g) “Olympic’s Update Cost of Common Equity” (page 61, line 8, through page 65, line 5).

B. The Commission Should Strike Portions of Brett Collins’ Rebuttal Testimony

Mr. Collins’ rebuttal testimony inappropriately adjusts the base and test periods. Mr. Collins’ justifies these changes by asserting that the base and test period amounts provided in his direct testimony were merely estimates. Thus, he adjusts these figures in his rebuttal testimony

to reflect the actual data. However, Mr. Collins' rebuttal testimony substantially alters Olympic's case. Mr. Collins' data may reflect the actual data, but permitting this change at this stage of the process would prejudice Staff and the Intervenors. The Commission has made it clear that a company's position must be made clear in order to allow opposing parties the opportunity to respond. WUTC v. Harbor Water Co., Docket No. U-87-1054-T, 1988 Wash. UTC Lexis 68 at *37 (May 7, 1988). Therefore, the following portions of Mr. Collins' testimony should be stricken (Exhibit No. 701-T (BAC-6T)):

- a) "Summary of Testimony" (page 1, lines 11 – 16).
- b) "Updates to Cost of Service Calculations" (page 3, line 23, through page 4, line 13; page 4, line 22 through page 6, line 12; page 8, lines 3 – 7; page 8, line 14, through page 9, line 9).

CONCLUSION

Olympic has changed numerous fundamental aspects of its case through its rebuttal testimony. In fact, the changes are so numerous, Tosco is still in the process of sorting out exactly what Olympic's case has become. This is simply unacceptable. The Commission should not condone Olympic's behavior by allowing rebuttal testimony that drastically changes its case. Therefore, Tosco respectfully requests that the Commission strike the above referenced portions of Olympic's case and allow Tosco leave to supplement this Motion to Strike Rebuttal Testimony during the hearings.

Dated: June 17, 2002

Respectfully submitted,

Edward A. Finklea OSB # 84216
Chad M. Stokes OSB #00400
Energy Advocates LLP
526 N.W. 18th Avenue
Portland, OR 97209-2220
Telephone: (503) 721-9118
Facsimile: (503) 721-9121
E-Mail: mail@energyadvocates.com

Of Attorneys for Tosco Corporation