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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 WASHINGTON UTILITIES AND)
4 TRANSPORTATION COMMISSION,)
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6 Complainant,)
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10)Docket No. TO 011472
11)Volume 21
12)Pages 2067 to 2206
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9 A hearing conference in the above matter was held on
10 June 18, 2002, at 1:30 p.m., at 1300 South Evergreen Park
11 Drive Southwest, Room 206, Olympia, Washington, before
12 Administrative Law Judge ROBERT WALLIS.

13 The parties were present as follows:

14 THE WASHINGTON UTILITIES AND TRANSPORTATION
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23

24

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Court Reporter

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PROCEEDINGS

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JUDGE WALLIS: Let's be on the record,

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please. This is a session in the matter of Commission

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Docket TO 011472. This proceeding is a complaint by the

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Washington Utility and Transportation Commission against

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Olympic Pipeline Company, Inc., related to rates and

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services that the pipeline seeks to implement in tariffs

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for the transportation of petroleum products within the

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state of Washington.

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This session has been noticed for the purpose

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of receiving argument on motions, and we have motions

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today of three general sorts. We have determined to

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split the argument into three phases, one of which there

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will have two parts.

16

We will begin with arguments on Olympic's

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motion for continuance, then we will treat a portion of

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Tesoro's motion for summary determination and to strike

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the testimony of certain witnesses. And then we will

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conclude with an argument on all of the motions to

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strike, split into two parts: one argument directed to

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matters common to the motions, and one part directed to

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witness specific elements.

24

I would like to begin today's session by asking

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for appearances. When I ask for appearances, if you

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2 would please, as lead counsel, introduce yourself and
3 any co-counsel who are present, and the name of the
4 client for whom you are appearing today. I believe all
5 counsel have appeared before, so it's not necessary to
6 repeat the contact information.

7 Let's begin with the proponents of the proposed
8 rates, Olympic Pipeline Company.

9 MR. MARSHALL: Steve Marshall for Olympic
10 Pipeline Company, and with me is Bill Beaver.

11 JUDGE WALLIS: Thank you, Mr. Marshall.
12 For Tesoro.

13 MR. BRENA: Good afternoon. My name is Robin
14 Brena, and I am here on behalf of Tesoro Refining and
15 Marketing. And if I may introduce corporate counsel
16 Charles McGee, and my legal assistant, Elaine Houchen to
17 my left, and Mindy Lewis immediately behind us.

18 JUDGE WALLIS: Thank you.

19 MR. FINKLEA: I am Edward Finklea on behalf of
20 Tosco Corporation. I have previously appeared, and my
21 associate Chad Stokes will be appearing during the
22 course of hearings, but he's not here today.

23 MR. TROTTER: Donald Trotter and Lisa Watson,
24 assistant attorneys general for Commission Staff.

25 JUDGE WALLIS: We have determined to begin

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1 with arguments for Olympic's motion for continuance.

2

3 Let me say as to documents that are available today,
4 they have been distributed to the Commissioners, and the
5 Commissioners have read all that are available to them.

6 So let's begin with the argument on Olympic's motion,
7 and begin with a presentation for Olympic.

8 Mr. Marshall.

9 MR. MARSHALL: Thank you very much.

10 JUDGE WALLIS: Let's be off the record for
11 a minute.

12 (Discussion off the record.)

13 MR. MARSHALL: Thank you very much.

14 There's two facts that we can all agree on in
15 this case, because it's already been determined by the
16 Commission that those two facts which I have up on the
17 poster board from the interim rate case, or the third
18 supplemental order in this case.

19 The first fact is that it's clear that the
20 company, Olympic Pipeline, is in dire financial straits.
21 And secondly, it's equally clear that safety must
22 continue to be the top priority for this company. It's
23 essential that the company have the means to buttress
24 its ability to operate safely, to support public
25 confidence that it will operate safely, and to avoid the

1 occurrence of another major event that could shut the
2 pipeline down permanently.

3

4 Olympic faces an emergency and dilemma. The
5 emergency is getting revenues to account for the drop in
6 through-put, and the increase in costs. The dilemma
7 was, and we faced this from the outset, is safety had to
8 be the continuing top priority.

9 And at the time the through-put dropped on an
10 80 percent basis in September of 1999, earlier from
11 Whatcom Creek, but it has been at a low level since 1999.
12 50 million dollars has been lost because Olympic has not
13 come in to increase rates to adjust for the decline in
14 through-put.

15 But it focused on safety first, and it didn't
16 focus, I will have to admit -- and I will be the first
17 to say -- on keeping paperwork the way that other
18 utilities are keeping paperwork day in and day out to
19 present a utility rate-making case in Washington State.

20 This has been as frustrating to us as it has been
21 to anybody else. The history of how the transition was
22 made, the status of the records, is something that you
23 will be hearing about in the case.

24 Back on March 21st Olympic moved for a
25 continuance, because part of the financial record issue

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1 could be solved if we had -- questions could be solved
2 if we had audited financial statements. That would
3 be preferable, not required by law, but because
4
5 questions were asked, it would have been desirable to
6 have that.

7 And at that time we put out in a memorandum a
8 declaration from Mr. Fox the schedule that that would be
9 completed by November or December. We asked for a
10 continuance on March 21st in order to be able to have
11 that. The other thing that was a problem is that at
12 that time, March 21st, the Commission's schedule was
13 jammed for the next few months, and the earliest this
14 could be heard, a motion for continuance, was sometime
15 in January or February. For those two reasons, the
16 Commission decided that this case should proceed,
17 largely because it believed if Olympic needed the money,
18 it ought to get the money more quickly and there ought
19 to be some finality to this.

20 Two things have changed since March 21st.
21 First, as we have described, there will be an audited
22 financial statement by July 21st. It will be of the
23 test year period, which for Staff is the year 2001. And
24 that necessarily, when you get an audited financial
25 report about the opinion of the financial records, takes

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1 into account the status of the financial records that
2 preceded that.

3 So we will have all of the audit done for those
4 test year amounts, and the beginning balances for that
5
6 period of time. And it will be a statement, as Mr. Mach
7 and Mr. Fox described, based on independent audit that
8 will ratify the financial books. We're not saying that
9 the financial records that we have are not adequate.
10 FERC form 6 and the other things we have presented in
11 our direct case, we believe, support the rates.

12 But because questions were asked afterward,
13 including during the interim rate case hearing which
14 followed our testimony on December 13, we think it would
15 save a lot of time for all the parties to have that
16 audit done.

17 The second thing that has changed, of course,
18 is there are at least two settlements that are
19 proceeding, and I don't think either one has been
20 approved. But there may be an opportunity for this
21 Commission, because of those schedule changes, to hear
22 this before January and February.

23 The Washington Administrative Code on granting
24 trial continuances is WAC 480-09-441, and continuances
25 may be granted when it's in the public interest. We

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1 believe it's in the public interest, not only because
2 there will be audited financial statements by August 5,
3 but a full year of through-put.

4 Through-put has been a contentious issue.

5 We will have a full year of through-put from July of
6
7 2001 at the 80 percent level for the entire system. To
8 the extent that changes need to be made to through-put
9 to adjust the test year, and everybody agrees they need
10 to be made, this will be the actual known and measurable
11 amount. So this will, in large part, remove that issue.

12 Questions will be, well, what will happen to
13 through-put in later years? Can it go up if you stop
14 doing all the work? We have also proposed a through-put
15 judgment mechanism, too, to automatically adjust that.

16 Second, we have also waived the statutory
17 period. We have waived the interim rate during this
18 period, so there won't be any financial harm to any of
19 the interveners for this period.

20 This will also help on this motion for summary
21 determination. Much of that goes to the issue of having
22 additional information. We believe our rebuttal case
23 answers all of those questions, but we are now faced
24 with 58 data requests on our testimony.

25 At the same time we're to begin this, we're

1 faced with multiple other demands. The schedule was
2 compressed. Unlike public utilities, we didn't have an
3 11-month, 12-month period. We only had a 7-month
4 period, which we have extended.

5 If we had this additional time, those issues
6 pertaining to how we can complete discovery, how we can
7
8 effectively and efficiently run the hearing will be
9 taken care of. We will hear a lot in the next motion,
10 motion for summary determination, well, what about this?
11 What about that fact that you haven't proven?

12 We think we have proven it all in the direct
13 case, and in the rebuttal case. But what we think we
14 agreed to do is make sure we run this efficiently.
15 There's a question, for example, about what should be
16 the public policy on methodology. Is that a fact issue,
17 or is it an issue of policy? Well, we will get into
18 that later, but if we had more time we could not only
19 shorten the hearing, but the final point I would like to
20 make is that we also have, then, time for settlement
21 discussions.

22 And settlement discussions, although I'm not
23 going to go into the details, are a real possibility in
24 this case. But without the additional time that
25 probably won't be possible to happen.

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1 Final point, this will also enable the parties
2 to organize for other hearings, and other things. Both
3 Tesoro and others have said they are being jammed
4 because of the schedule that they have with the next
5 proceeding. That's a minor point, but I do believe we
6 have the time to do this. There will be an audited
7 financial statement for through-put, and opportunity for
8
9 thorough discovery on all of the issues related to the
10 data request and the testimony.

11 So with that, I will reserve five minutes,
12 whatever it is.

13 JUDGE WALLIS: Two minutes -- five minutes,
14 excuse me.

15 MR. BRENA: Good afternoon. The people I did
16 not introduce are my expert witnesses who are in the
17 hotel room ten minutes from here ready to proceed with
18 this proceeding. There is nothing that Mr. Marshall
19 argued that couldn't have been argued months ago. They
20 knew they were going to have 12 months of actual
21 through-put on a certain date five years ago. That's
22 certainly not a reason to come in the day before hearing
23 and argue for continuance.

24 And the point that I made in my briefing that I
25 would like to emphasize here is that through-put will be

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1 an issue in this proceeding no matter how long it is
2 delayed. Their current through-put is simply not
3 representative of the through-put that is likely to be
4 collected during the period in which these tariffs are
5 at issue.

6 And we believe that this Commission should set
7 the through-put based on normal operating conditions,
8 because operator prudence is the reason for the
9
10 restriction, and the reason why it's not back up to
11 normal operating conditions today. Through-put isn't
12 going anywhere. You could delay it a month, a year, two
13 years, through-put isn't going anywhere.

14 The audited financial statements, I have lost
15 track of how many representations have been made to this
16 Commission with regard to audited financial statements.
17 He cannot represent that they will -- that he will have
18 an unqualified auditor's letter. Olympic is not Enron.
19 I mean, the auditors may find several things wrong.

20 So certainly putting that off doesn't solve the
21 problem, as does -- even if they came in with an
22 unqualified auditor's letter, that does not solve the
23 problem with their financial books and records. Their
24 regulatory records are not in order. They could have
25 perfectly clean financial records, but not translate

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1 those into the proper cost of service categories
2 necessary for rate making purposes.

3 CHAIRWOMAN SHOWALTER: I ask a question. I
4 notice the Staff said they would accept audited -- the
5 unqualified audit, or whatever the audit is -- as a late
6 filed exhibit in their memo opposing continuance. And I
7 am wondering what your position on that is?

8 MR. BRENA: We would not -- we would want to
9 explore, perhaps have a deposition of the auditors and
10
11 discuss different issues, and ask if he considered those
12 issues or not. Just a piece of paper doesn't change
13 this issue. And we have spent a lot of resources trying
14 to penetrate their books, and if they can somehow get an
15 auditor to do that in a month or two, I would be curious
16 to know how.

17 So, no, that would not settle it for the
18 records, nor would it settle it for rate making, which
19 is two steps removed from that.

20 CHAIRWOMAN SHOWALTER: And I didn't want to
21 characterize the Staff as accepting the substance of the
22 audit. I didn't take it that way. I took it that they
23 would not object to it being a late filed exhibit.
24 That's all I meant by the question.

25 MR. BRENA: I understand. We would object

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1 without an opportunity to explore the basis for it.

2 The legislature's wisdom setting seven months
3 to set rates is becoming overwhelmingly apparent to me.
4 It shouldn't be. We have spent a lot of resources in
5 trying to understand their case, but their continuance
6 is a request so they can come in and change their case
7 and offer the eighth cost of service study, and the
8 fourth through-put methodology.

9 At some point they have to decide what their
10 case really is. At some point we should be able to
11
12 answer it, and go to hearing on it. That point was
13 three cases ago, which you will hear in a little while,
14 in my estimation. And a continuance to allow them to
15 change their case again doesn't make any sense.

16 If there is a continuance, there would need to
17 be not just their filing, there would be need to be
18 additional discovery, an additional answering case,
19 there would need to be an additional reply case. You
20 can't just put off the hearing and let them put in a
21 bunch more evidence, and then ignore the parties' rights
22 and privileges to explore that evidence and put on an
23 answering case.

24 So it just doesn't make sense. We're here.
25 We're ready to go. The settlement conversations we have

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1 had months and, of course, I can't mention anything with
2 regard to settlement conversations within the context of
3 this case, but it's not appropriate to hold out the
4 olive leaf that there's likely to be a settlement in
5 this case to somehow tempt the Commission with that
6 olive leaf.

7 We wouldn't be here if we thought that was a
8 practical alternative. It is not. So we would ask you,
9 let's have a hearing. Let's set some rates. And let's
10 move on. Thank you.

11 MR. FINKLEA: Thank you, Commissioners. I am
12
13 Ed Finklea for Tosco. I don't want to be redundant. We
14 have a long afternoon ahead of us. Just a couple of
15 additional observations. I think policy issues dominate
16 this case. At this point there are certainly some
17 issues about what is the right number, but I think the
18 dominant issues for the Commission are going to be
19 policy issues about not what the right number is, but
20 what the right policy for purposes of rate making should
21 be, what kind of cap structure, what kind of rate of
22 return.

23 Those are issues that we need an audited set of
24 books on. So I believe a lot of those issues are ready
25 for hearing, and we should go forward.

1 Tosco does support going forward, and does
2 oppose the continuance. This is, we note, the last of a
3 series of attempts to delay the hearing. This has
4 become an expensive and complex proceeding already. My
5 clients are fearful that if it drags on, it just becomes
6 more complex and more expensive to participate in.

7 I concur with Mr. Brena that the through-put
8 issue will be there no matter how many months you go
9 down the line, because the question is what is the right
10 through-put for rate making purposes, not how many
11 barrels moved last week, or last month, or over the last
12 12 months.

13

14 Tosco is supporting an adjustment mechanism.
15 That's not the same as the one the company has put
16 forward, but part of what we will explore in the hearing
17 is whether an adjustment mechanism is proper. And if
18 so, what kind of adjustment mechanism on through-put.

19 We note that they say they will waive the
20 interim rates during the delay, but frankly, the
21 uncertainty will remain anyway as to what the prices are
22 going to be. As a shipper, just the uncertainty about
23 what you are paying, or what you will be paying does
24 have an impact on business.

25 I have -- my clients called me last week trying

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1 to figure out how to price product. Given the
2 uncertainties regarding settlement discussions, we're
3 all here for the next two weeks. If this hearing is
4 really going to go that long, I think we can pull --
5 multi-task. If people are serious about settling, I've
6 seen things settle at night that were tried during the
7 day.

8 And then finally I think with regard to the
9 financial records the question that you asked, we would
10 ask -- we would accept the audited records as financial
11 records, but I don't think that answers the question of
12 what is the proper rate making treatment for the
13 figures.

14

15 So my sense of that financial audit is similar
16 to Staff's on that. We think we should go forward. We
17 will -- we're all here. It's been a long process
18 getting ready to be here, and I don't think delay is in
19 the public interest.

20 MR. TROTTER: Good afternoon. My name is
21 Donald T. Trotter. I am one of the assistant attorneys
22 general assigned to represent the Commission in this
23 case.

24 We filed a motion to this case opposing the
25 request for continuance. This motion needs to be taken

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1 in some context. As the Commission will recall, Staff
2 filed a motion to dismiss this filing based on discovery
3 issues some time ago, and it was very clear, the
4 directive from the Bench, that the Company needed to
5 proceed with its case. And if it wasn't ready, it
6 should withdraw and refile.

7 And that's why -- one of the reasons why Staff
8 thinks we need to proceed. We agree that having a full
9 year of through-put data is not all that critical.
10 You don't set electricity rates on actual weather. I
11 don't think we should set pipeline rates on actual
12 through-put. You need to look at it and make reasonable
13 adjustments with respect to a collaborative process.

14 And settlement, we're always open to that. We
15
16 try -- I gave some reasons why I'm -- or I think I said
17 "hopeful, but not optimistic." There's some real
18 economic drivers, which I stated, that makes it
19 unlikely, but we are hopeful, and will spend whatever
20 time necessary this week, if required, to deal with
21 that.

22 With respect to financial statements, the Staff
23 has provided testimony that is concerned about the lack
24 of audited financial statements. Chairwoman Showalter,
25 you correctly stated that we would accept the late filed

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1 exhibit. That doesn't end the issue, because there are
2 other problems with how the books are kept that are
3 unrelated to audited financial statements. So we don't
4 see that that advances us -- having it or not having it
5 advances us too far.

6 The Staff did file its case, and believed that what
7 it filed was what it could file. And it's resting on
8 that despite the lack of financial statements.

9 The one area, of course, where the Company has
10 pointed out, is the ability to conduct discovery on a
11 rebuttal case. You saw the case. You know how large it
12 is, and we are working hard on it. And we will continue
13 to work hard on it. And that is a consideration that is
14 left to your discretion.

15 But we think on balance, we should proceed
16
17 ahead. Let's make the decision. There is a hardship
18 here on all sides, so let's just -- in balancing the
19 factors, everyone is not going to be satisfied by any
20 decision you make. So on balance, the Staff is urging
21 you to exercise your discretion by denying the motion,
22 and I would be happy to respond to any questions.

23 (No response.)

24 MR. TROTTER: Thank you.

25 JUDGE WALLIS: Let's be off the record for

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1 a moment.

2 (Brief recess.)

3 JUDGE WALLIS: Let's be back on the record,
4 please.

5 Mr. Marshall, checking my watch again, you have
6 six minutes.

7 MR. MARSHALL: Thank you. Mr. Trotter brought
8 up a point that I think is worth emphasizing. A short
9 time ago when we had our motion for continuance on March
10 21st there were a number of discovery issues, and we
11 still face discovery issues. We're a small company.
12 Records that have not, frankly, been kept by the prior
13 operator in a way we would have liked to have had them
14 kept. And it goes back to the two points that we talked
15 about here. The company is in a dire financial situation,
16 and safety has been their top priority.

17

18 This is a unique case because this company
19 has been challenged to try to produce all the materials
20 in response to all of the requests. We have a large
21 rebuttal case because, frankly, we were pressed on every
22 issue, including every accounting issue imaginable.
23 There were challenges raised by what accounting system
24 did you use? Well, we used a system of accounting that
25 was required by this Commission when it ordered all oil

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1 pipelines in the oil pipeline section to use FERC form 6
2 for annual reports. FERC form 6 incorporates a uniform
3 system of accounting.

4 There are a huge number of accounting issues
5 that have arisen because of Staff and interveners'
6 confusion about what that is, SAF 71, and a whole host
7 of the accounting issues. Those issues will, I think,
8 largely be put to rest when we have an audited
9 financial statement.

10 Tesoro is not willing to accept a late audited
11 financial statement. It will object. That's the
12 dilemma we face. We face an immediate need for revenue,
13 and that gets to what Mr. Trotter said. He said, if you
14 had problems with discovery, why don't you just withdraw
15 and refile? That's the dilemma. Our emergency is
16 clear. The dilemma is if you withdraw and refile you
17 lose the seven months of revenues that you would get.

18
19 We're now being put to the test in this series
20 of motions for summary determination throughout the
21 entire case, refile again. This company, with
22 additional time, can have audited financial statements,
23 can address the issues that have been raised in
24 discovery on rebuttal, rebuttal that we had to do
25 because of all of the challenges of Staff, by Staff,

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1 Tesoro, and Tosco. But we're going to be challenged in
2 doing that discovery. I can hear it now. I can hear it
3 two days from now. Poor Olympic, they had all of their
4 witnesses, and they couldn't respond to the discovery
5 request. What do we do? They are not responsive again.

6 I have to say that the people that I have
7 gotten though to at Olympic have been people that
8 have been working extremely hard to try to respond to
9 all of the data requests. And there have been a few
10 areas where we have had issues. But those areas, I
11 think, were all areas where everybody tried to do their
12 best.

13 Now we're faced with this issue. Do we
14 withdraw and refile? Do we have summary determination?
15 Can we put the best case on, or do we wait until August
16 5, make sure we have a case that answers the accounting
17 issues to the satisfaction of the Commission? The
18 Commission did raise this after we filed the direct
19
20 case. What are you going to do when you don't have
21 audited financial statements? We couldn't go back and
22 file in our direct case audits that we hadn't done.

23 But again, we couldn't withdraw the case and
24 lose that revenue. We have already lost over 50 million
25 dollars from September of 1999 to the end of December by

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1 not having come in before. That is certainly not in the
2 public interest to have. If it's a choice between a
3 continuance and having to withdraw and refile for
4 summary determination, the public interest is served by
5 having that small amount of additional time for a
6 continuance.

7 We have pointed out that now we do have the
8 opportunity. We didn't have it in March. We pointed
9 out we will have these audited financial statements, and
10 if we don't have that, the Commission can hold us to it.
11 But we have gotten Mr. Fox to make sure that these folks
12 are doing it.

13 Despite all the accounting problems that are
14 around the country, we have gotten people in Ernst and
15 Young to focus on this, and get this done. It has been
16 a challenge. It's been a challenge because of the way
17 the records have been kept.

18 But the public interest will be served by a
19 brief continuance to August 5. There is a time to do
20
21 it, and the alternatives, withdrawal, summary
22 determination, lengthier proceedings, inability to do
23 all of the discovery, lack of complete information on a
24 full year of through-put, all of those can be solved.

25 It is in the public interest to grant a brief

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1 extension. Brief extensions of time are not unusual in
2 court proceedings or other proceedings. There won't be
3 any financial disadvantage to the shippers in this case,
4 only two of the 70 of which are here, by the way.

5 CHAIRWOMAN SHOWALTER: Mr. Marshall, one point
6 of clarification. You mentioned the shorter statutory
7 time frame for this type of case, but didn't you file
8 your rate case July 1 of last year?

9 MR. MARSHALL: No. Actually we had a rate case
10 filed earlier, but that had to be withdrawn. It was
11 filed at the FERC at the time. And frankly, the reason
12 for that is they used a number for the through-put that
13 appeared to be far too high based on the full month of
14 July. They tried to take the full month of July, which
15 was a period in which all of the system was back up,
16 although at 80 percent pressure. And then the Company
17 tried to make adjustments to that one month of data, and
18 filed at the FERC. We filed here on October 31st.

19 CHAIRWOMAN SHOWALTER: So I was getting those
20 two mixed up. And then you filed in May, but the one
21
22 we're sitting on was filed October 1?

23 MR. MARSHALL: Right. And the one in May
24 was -- there's an issue there of what standard do we
25 file? Do we file under the previous standard that

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1 we have used, the FERC basis, for supporting data, which
2 we had used all the way through the past, and which the
3 Commission has accepted, but not formally ordered.

4 The question was an issue of, well, what public
5 policy was there on the rate methodology to be used, and
6 that took a little while to sort out, too.

7 But, again, the main point is any further delay
8 here will jeopardize the two points that we're all in
9 agreement on. The company is in dire financial straits,
10 and it needs to make public safety its first priority.

11 Those, I think, are overwhelming considerations
12 given -- on the other side of the balance, if you
13 balance the dire financial emergency, and the public
14 safety factors against waiting until August 5, I submit
15 that the balance is tipped heavily in favor of trying to
16 help solve, for this Company's financial condition in a
17 way that would help public safety. It's not going to
18 have any comparable benefit or harm on the other side of
19 the scale. The scales just don't balance out. The
20 scales are heavily tipped to having a continuance.

21 JUDGE WALLIS: Very well. Let's be off the
22
23 record for a moment.

24 (Discussion off the record.)

25 JUDGE WALLIS: Let's be back on the record,

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1 please.

2 Mr. Brena is prepared to proceed to argue his
3 motion for summary determination. Mr. Brena.

4 MR. BRENA: Thank you, Your Honor. Time after
5 time I hear Olympic say that it's somehow an exception
6 as a public service company. It's not and should be
7 held to the same standards with regard to rate increases
8 as every other public service company in the state of
9 Washington.

10 They simply have not put on a prima facie case
11 supporting any rate increase whatsoever. And in
12 Mr. Twitchell's deposition I asked him, "In your 30
13 years of experience, Mr. Twitchell, how does the case
14 for Olympic stack up with the other cases you have
15 reviewed and worked on?" And he said, "For a company
16 this size, this is the weakest case I have ever seen."

17 Well, he's been around a long, long time, and
18 he's looked at a lot of cases. And that was his
19 assessment of the case. And I share it with him.

20 To go right to the heart, they have not
21 advanced in their direct case a methodology for
22 regulatory policy. Witness -- none. There is not a
23
24 single witness that supports the use of the methodology
25 that they are proposing this Commission adopt. There

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1 isn't a single witness that says a single word in their
2 entire case that says that that is the appropriate
3 methodology this Commission should adopt. It's
4 unsupported.

5 Mr. Collins does a calculation. That's all he
6 does, a calculation. There is no methodology witness in
7 their direct case. None. I can't get past that.

8 And in fact, Staff joined in the motion to
9 dismiss the case for that very reason. You know, when
10 you are encouraging this Commission to adopt for the
11 first time a regulatory methodology, and you don't
12 advance a methodology witness, your case fails. That's
13 the end of your case.

14 In addition to that, I go into my briefing and
15 I point out the other witnesses in their case. I don't
16 have a lot of time. We have a lot to do this afternoon.
17 I won't go through all of it.

18 But their test period adjustments are based on
19 prior budgets. They previously budgeted an amount for
20 the base period. They didn't spend it. They used the
21 base period actual spending, and then came in and
22 adjusted it as a test period expense to add it on what
23 the prior budget was for a base period. Amounts
24
25 budgeted and unspent have become test period

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1 adjustments. That certainly shouldn't be the law in the
2 state of Washington.

3 They don't have a witness that's familiar or
4 can verify their financial books and records or
5 accounts. They haven't put on a case in their direct
6 case. They have chosen, as we will argue a little
7 later, to put it on in the rebuttal case where no one
8 has an opportunity to respond to it. They have not put
9 on a direct case.

10 I would like to turn away from the general to
11 the specifics --

12 CHAIRWOMAN SHOWALTER: Can I stick you on the
13 general for just a minute?

14 MR. BRENA: Certainly.

15 CHAIRWOMAN SHOWALTER: This Commission has
16 granted motions to dismiss at the outset of a direct
17 case. Perhaps it's also granted motions to dismiss on
18 the day before hearing. But in addition, we have
19 granted motions to dismiss after the hearing, and I will
20 cite to you our AT&T complaint, which was cause No. UT
21 991292.

22 That was a complaint by AT&T against US West,
23 and a motion for summary determination was brought to us
24 before hearing. We did not grant it at that time. We

25

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1 went forward with the hearing, but we ended up granting
2 the motion for summary determination after the hearing.
3 And I am just wondering if you considered that
4 alternative. For example, maybe you were turning to the
5 specifics, but you put in your motion Ms. Omohundro's
6 lack of expertise. But it appears it's based on
7 questions you asked her in depositions that are actually
8 not in front of us at this time.

9 On the other hand, were we to proceed, she
10 would be on the stand, you would ask your questions,
11 we would, I am sure, hear a motion after that colloquy
12 to exclude her testimony. Maybe we would; maybe we
13 wouldn't. Maybe we would carry that.

14 The point I am trying to make is that a motion
15 for summary determination may still be timely even after
16 the end of a hearing, and yet it could be definitive at
17 that time. One aspect of that is -- and I am now just
18 speaking from experience in the other case -- is that
19 all the parties actually did have an opportunity to
20 present their witnesses. The Commission was informed of
21 the issues.

22 In effect, we did hear more evidence that was
23 present in the direct case, or in that case a complaint.
24 But our final determination was informed much more
25 deeply than it would have been beforehand.

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1

2 MR. BRENA: I appreciate your comments. And
3 let me say that I am not familiar with the case that you
4 have raised.

5 Let me suppose that, perhaps, it's a motion for
6 summary judgment, which the appropriate standard that
7 may have been used, a summary judgment standard of
8 whether or not there's material issues of fact.

9 And there is some confusion in my motion, and I
10 think one of the better arguments that has been raised
11 against the motion is what standard should apply? So
12 let me clarify that.

13 I agree with their argument that in deciding
14 whether or not they have advanced a prima facie case
15 this Commission should look only to the direct case.
16 And to the degree that my motion confuses that issue and
17 introduces deposition testimony, and to the degree that
18 has confused the concepts that I am arguing, I agree
19 with your concerns.

20 With regard to testing the sufficiency of the
21 prima facie case, nothing but their prima facie case,
22 nothing but their direct case is appropriate to
23 consider. So with regard to what I intend to be in my
24 motion, which is testing the sufficiency of their prima
25 facie case, it's their obligation to present the prima

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1 facie case. It's appropriate to look only to their

2

3 direct case to test that. I agree with that.

4 Now, if we were talking about a motion for
5 summary judgment, I also agree that the issue is, is
6 there an issue of material fact? And with regard to
7 solving such a motion as that, it would make sense to
8 expand the scope of the factual inquiry to include
9 hearing and to decide it after the fact.

10 I am asking this Commission at this point to
11 test the prima facie basis to see if it stands or fails
12 on a stand-alone basis. To the degree that my motion
13 suggests or introduces evidence outside of that direct
14 case, then I would withdraw those parts, because that
15 is not what I am intending to do. And they made a very
16 good point, and I agree with their point.

17 So with regard to testing the sufficiency of
18 the prima facie case, it does not make sense to allow
19 any other evidence to be considered, including evidence
20 at hearing, or to delay the consideration of the motion.
21 It should be granted or denied based on whether they
22 have met the prima facie elements in support of their
23 rate case.

24 Now, let me turn --

25 COMMISSIONER HEMSTAD: Just pursuing the point

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1 one more step, from your perspective as a party, of
2 course I understand you would like the case to go away.

3

4 But I am just offering the additional query, were we to
5 carry the motion with the case and look at the case when
6 done, and then decide, assuming for the purpose of this
7 discussion, deciding that -- contrary to the position of
8 the Company, on the evidence that's presented, that,
9 would it not, would obviate the opportunity for an
10 appeal of our order dismissing the proceeding?

11 MR. BRENA: With all due respect, I believe
12 there's going to be an appeal of your order regardless
13 of what it is, or when it's entered.

14 I agree that generally letting in more makes
15 the likelihood of upholding any position that you take
16 greater as a general proposition, so I agree with that.
17 I also agree that -- I also believe that public service
18 companies should put on a case that justifies their rate
19 filing. And if they don't, they ought to be bounced out
20 of here, and they ought to come in here and put one on
21 right. They should not come in here and spend millions
22 of dollars of all the parties' money on a case that
23 doesn't meet the statutory standards.

24 So are we going to change the rules? The rule
25 is the direct case has to present a prima facie case. I

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1 believe that's the appropriate rule for this Commission
2 to apply for all the reasons that every Court that I
3 have read has set it forward to the rules.

4

5 Parties invest a huge amount of resources in
6 these cases, so this is one way to test it. In fact, in
7 a similar case -- so, well, I would just say that if you
8 take the point that you made to us, the logical
9 extension, you would never grant a motion because of a
10 failure, and I don't believe that's appropriate. If
11 their case fails, it fails, and we ought to move on.

12 I would like to turn to the specifics where I
13 think their case has failed. The affiliated payments,
14 and there is a statute. And it says, The Commission
15 shall disallow the payment to affiliates in the absence
16 of satisfactory proof that it's reasonable in amount.

17 There are 22 million dollars in affiliated
18 payments associated with the cost of service filing in
19 this case, and there is no proof whatsoever that the
20 amounts paid were reasonable in amount. None. Zero.
21 Affiliated payments, the highest standard.

22 Now, it goes on to say that the Commission may
23 disapprove the affiliated payment if it's not
24 demonstrated what the cost of the affiliate rendering
25 the service was. Well, they haven't done that either.

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1 They have treated their affiliated payments in this case
2 just like third party payments, and have not met the
3 statutory standard for inclusion in rates as a matter of
4 law.

5

6 What else is there to talk about? What other
7 evidence is there to be considered on that point? There
8 is none.

9 JUDGE WALLIS: Mr. Brena, you have three
10 minutes of the time, you have indicated, for your
11 direct.

12 CHAIRWOMAN SHOWALTER: And I want to be clear
13 on that last point. Does this go to the motion to
14 dismiss, or is it a motion to strike certain portions of
15 the case, or both, because you are adding them up?

16 MR. BRENA: Both. It goes to both. I think
17 that the statutory responsibility of the Commission, if
18 someone files a case with affiliated payments that
19 doesn't support it, it says "shall disallow." It's a
20 mandatory language. It's not discretionary. It's
21 mandatory language in the statute.

22 I think that unless they can show in their case
23 that they provided reasonable support for that, I think
24 that the statute mandates it.

25 Deferred return write-up, they have added

2101

1 millions of dollars to the rate base based on returns
2 from prior periods, and have not advanced a single
3 witness that said, A, that there was any deferred
4 returns, B, that the calculation is appropriate to
5 apply.

6

7 That is a complete failure of their direct
8 case. I mean, they can't add 26 million dollars to rate
9 base and not put on someone to say -- not put on someone
10 to support the adjustment.

11 So with regard to that adjustment, that should
12 be disallowed. It should be disallowed now, because of
13 the failure of their case. Their obligation to present
14 a prima facie case goes to every element of their case,
15 they have failed.

16 Starting rate base write-up, they want to add
17 to their rate base another rate base write-up. There is
18 nobody in their testimony that supports that adjustment.
19 Nobody. They do the calculations. Nobody supports it.
20 That's correct. So affiliated payments, deferred
21 earning write-up, and starting base write-up, they
22 should be out of this case now.

23 It was their -- and you know, it couldn't have
24 been any clearer that these were issues in this
25 case. I think the first time I came to this Commission,

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1 Commissioner Oshie's first day, I think I raised these
2 issues then. And I raise them every time I get a
3 chance. There's no hiding the ball on what should be in
4 the direct case. They didn't support -- they didn't
5 support huge rate base adjustments.

6 Are these the kinds of cases you are going to
7
8 accept from public service companies? Somebody comes in
9 with 26 million dollars of adjustments with no witness,
10 and you can take it to hearing?

11 JUDGE WALLIS: Mr. Brena, your time has
12 expired. Do you want to use some of your reply time?

13 MR. BRENA: I do. Thank you, Your Honor.

14 I have mentioned the pre-base period of
15 transition costs. I want to focus on that. We went
16 from one operator to another. They spent 2.2 million
17 dollars, and they are trying to get their costs back
18 from us.

19 First, it's an affiliated cost. It's an
20 affiliated cost. And they haven't put on any evidence
21 at all as to what a reasonable amount would be. They
22 haven't filed their contract as the statute requires
23 them to file with this Commission for pre-approval of an
24 affiliated contract. They haven't supported the
25 affiliated contract any way that's required, and there

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1 is no testimony whatsoever in their case that those --
2 that the transition from one operator to another had
3 anything to do with the service that Tesoro receives, or
4 any other shipper.

5 There was a change in ownership pending, and so
6 they went forward and changed it. Well, absent a
7 demonstration of a reasonable amount for an affiliated
8
9 payment, absent -- most of it was incurred prior to
10 their rate base. This would be retroactive rate making.
11 And then no testimony relating -- even indicating that it's
12 related to service in their direct case, well, you
13 just -- with regard to that issue, I think to go to
14 Chairwoman Showalter's point, it supports dismissal of
15 all of it.

16 But if you don't accept that argument, if you
17 are not going to dismiss this case on the eve of
18 hearing, and I would understand the policy reasons why
19 you wouldn't do that, you shouldn't allow these
20 individual issues to go forward that are so obvious that
21 they need support, which your statute requires support
22 for, which they completely failed to provide.

23 The transition rate base issue, the deferred
24 earnings issue, the affiliated payments issues, those
25 are not secrets. They have never been secrets. They

2104

1 should be out of this case because they didn't put on a
2 case in any way supporting them.

3 And when they come up, the thing I want to hear
4 from them is where in their case they provided that
5 evidence. If they can't say that, then I ought to win
6 this thing.

7 JUDGE WALLIS: You have three minutes
8 remaining.

9

10 MR. TROTTER: Donald T. Trotter, assistant
11 attorney general for Commission Staff.

12 Staff's answer supports Tesoro's motion in a
13 couple of key respects. And when it came down to it,
14 our position on that issue required us to support the
15 motion to dismiss.

16 I will focus on one issue, and then move to the
17 methodology issue, which is the fundamental point of our
18 answer.

19 Mr. Brena is correct. The statute does require
20 evidence of cost to the affiliates with regard to proof
21 of the adequacy of affiliated interest payments, and
22 that information simply has not been provided.

23 We indicated in our answer that if that came in
24 in rebuttal, then maybe that would be okay. It didn't.
25 So we agree that that is a problem.

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1 CHAIRWOMAN SHOWALTER: Can I just ask you,
2 though, if maybe if we had been doing these motions in
3 the reverse order, it would be more clear. But if we do
4 not allow that information -- well, you are saying the
5 information is simply not there. If the information is
6 not there, what does that do, in your opinion, to the
7 sufficiency of the case?

8 MR. TROTTER: I don't think that would go to
9 the sufficiency of the entire case. It would go to the
10
11 sufficiency of that payment.

12 The real issue I want to argue before you today
13 is the methodology issue. And there we do agree that
14 the Company did not file a prima facie case. If you
15 look at their case, many of their witnesses have a
16 couple of pages of testimony wherein they adopt their
17 FERC testimony.

18 The appropriate methodology before FERC is not
19 an issue before FERC, but that's how they have treated
20 it here. It's just a mirror image, or the same
21 essential filing that they filed before FERC.

22 Now, I did quote transcripts in my pleading,
23 but I reviewed them as it was going on. But they were
24 all to the knowledge, the personal knowledge of the
25 witness, Ms. Omohundro, on the subject matter which she

2106

1 testified.

2 And let me take a simple example. She
3 testifies that the Commission has always used the FERC
4 methodology in every rate filing since 1983. Then
5 technically speaking the Commission has allowed tariff
6 filings to go into effect since 1983, I don't think the
7 Commission has accepted or formally adopted any
8 particular methodology. It has allowed tariffs to go
9 into effect. But she said that was the methodology that
10 was used.

11

12 So I asked her, what methodology was used in
13 the specific filing related to the Sea-Tac terminal? I
14 think it was in 1996. She said, You will have to ask
15 Mr. Collins. I don't know.

16 Well, when we scratched beneath the surface of
17 her knowledge, she didn't have the facts. And I do
18 believe in that particular filing the Commission did not
19 use the FERC methodology.

20 CHAIRWOMAN SHOWALTER: But here's where I am a
21 little confused. I have read your motions, and it
22 contains portions of the depositions with Ms. Omohundro,
23 so I assume they occurred. But they haven't been
24 introduced, or have they? Maybe that's -- for our
25 purposes here today, entertaining a motion to dismiss,

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1 can we, or may we not, take notice, or have in front of
2 us that dialogue between you and Ms. Omohundro?

3 MR. TROTTER: I think you can, as to the
4 testing of her personal knowledge, because --

5 CHAIRWOMAN SHOWALTER: It's not attached to the
6 motion.

7 MR. TROTTER: Yeah, I did. I attached
8 excerpts.

9 CHAIRWOMAN SHOWALTER: Okay. All right. I take
10 that back.

11 MR. TROTTER: And we will be offering the
12
13 complete deposition into evidence. But the point is
14 this last summer this company filed a rate case in June.
15 In July they moved to withdraw it. And in that motion
16 they said that in light of the apparent rejection of the
17 FERC methodology to support Olympic Pipeline's increase,
18 Olympic believes that it's in all parties' interest,
19 unquote, to go forward and take a look at the UTC
20 methodology, and so forth.

21 It took them four months to file that rate
22 case. When they did they filed a petition where they
23 acknowledged that it appears that the Commission has not
24 made a formal policy determination on the appropriate
25 methodology for intra-state pipeline rates, unquote.

2108

1 Just quoting from the materials I provided to you.

2 The Commission suspended that tariff filing
3 that they filed on October 31st, and gave the Company to
4 December 13th to file a direct case. Well, they should
5 have filed a direct case on rate methodology.

6 There have been questions of timeliness. Why
7 did it take so long? Well, first of all, we were thrust
8 immediately into the interim rate case. Methodology was
9 not the issue. We didn't get depositions until April
10 22nd, I believe, and then it took us a while to evaluate
11 it in the context of everything else that was going on,
12 particularly in our personal lives.

13

14 But in any event, it did take some time. But
15 when we took a look at it and saw Tesoro's motion, we
16 took a hard look at it and thought we should support it.
17 The Company was on notice that the issue was important,
18 that they needed to address it. Those are their own
19 words. They knew they needed to address it.

20 And when I look at their direct case, there's
21 no support. They filed the methodology without
22 explaining why it's appropriate.

23 Now we're getting it in rebuttal, and that will
24 be subject to the next round of motions. But that puts
25 a lot of pressure on you, and on us. And it's something

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1 they could have avoided by heeding their own words, and
2 filing a direct case that they should have filed.

3 CHAIRWOMAN SHOWALTER: I have another question.

4 Assume for the purposes of this question that Olympic
5 has not demonstrated a prima facie case. If that were
6 the case, is it your view that this Commission is
7 required, legally, to grant the motion, or is it a
8 policy or discretionary decision by us that we would
9 weigh the various factors, many of which have been
10 stated today, but there are some on the other side, such
11 as the value of going through a hearing and allowing
12 people and witnesses and issues that have been -- that
13 are on the cusp of being presented to us to be

14

15 presented. What is your view on whether we are required
16 or not to grant the motion?

17 MR. TROTTER: That's a question I probably have
18 not fully considered. But I know that a trial court
19 makes similar decisions all the time, and they are
20 subject to judicial review. And I think it is -- I
21 think it depends on the nature of the decision, whether
22 it's a decision that's based on law or based on fact.
23 So you probably have some discretion in that area.

24 I think in this particular case, given the
25 circumstances of the Company on notice that it needed to

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1 file a case on methodology and not doing so, and
2 producing witnesses that don't have testimony and
3 knowledge of key points, they have the responsibility
4 for that.

5 CHAIRWOMAN SHOWALTER: What distinguishes us
6 from a Court is that we have a duty to regulate in the
7 public interest. The court doesn't. The court is
8 merely adjudicating a matter between two or more
9 parties. And I would think that that changes the
10 context considerably; that is, if the Company had not
11 shown a prima facie case, we would surely be entitled to
12 grant the motion to dismiss, but not required, depending
13 on the wide array of factors that usually form a public
14 interest responsibility.

15

16 MR. TROTTER: You may be right. I haven't
17 looked into that thoroughly enough to respond
18 definitively. In this particular case, given the
19 motions you are going to hear shortly, I think the
20 public interest factors may shift the other way.

21 It is a situation, the Company does have
22 financial difficulties, though they are willing to waive
23 interim rates for several weeks, but -- through their
24 other motion for continuance.

25 But by the same token, the parties have worked

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1 hard. Rules have been set down. We tried to follow
2 them to the best of our ability. And at some point
3 there needs to be recognition that this is a legal
4 procedure that needs to follow basic rules of fairness.

5 COMMISSIONER HEMSTAD: Does the fact that we
6 have entered an interim order granting interim relief --
7 or an order granting interim relief color this picture
8 at all? But in any event, were we to grant Tesoro's
9 motion to dismiss, it would follow that refunds would be
10 required.

11 MR. TROTTER: This Commission said that the
12 refund would be conditioned on the final order, the
13 rates determined in the final order in this case. That
14 would seem to suggest that the refunds would be
15 required. I am not going to tell you that you lack
16
17 discretion in revisiting that decision based on these
18 circumstances, because these were not foreseen at the
19 time. But certainly the terms of that order would
20 require it.

21 COMMISSIONER HEMSTAD: Does our initial order
22 in that regard color, at all, the decision on the issue
23 of granting the motion to dismiss?

24 MR. TROTTER: I am sorry. Can you rephrase
25 that?

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1 COMMISSIONER HEMSTAD: Well, the fact that the
2 company is receiving an interim rate of, what is it, 26
3 percent, or 24 --

4 MR. TROTTER: 24.

5 COMMISSIONER HEMSTAD: -- color at all the
6 issues on the merits of whether we should proceed to
7 hear the case?

8 MR. TROTTER: No, I think you need to take this
9 issue on its own merits. But that is certainly a
10 collateral effect that would have to be considered. And
11 perhaps you may want to revisit that order and determine
12 whether, in light of all the circumstances, you deem it
13 necessary to follow through on that.

14 But I think the direct case rises or falls
15 regardless of what relief you may or may not have
16 granted on an interim basis.

17
18 COMMISSIONER OSHIE: Mr. Trotter, assuming
19 we would grant your motion, or Tesoro's motion for
20 summary determination which you have supported, and the
21 Company turns around and refiles very quickly, what is
22 the difference between that outcome or that scenario and
23 the Company's motion for a continuance until August 5th?
24 Is it just a little longer delay between now, or the
25 time of filing and the hearing on the merits?

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1 MR. TROTTER: I don't think so. First of all,
2 continuing the case doesn't change their direct case.
3 It's the same direct case. So it wouldn't change that.
4 I guess that would be the fundamental difference. I
5 think it's a matter of principle here.

6 Taking a look at what they filed, it doesn't
7 stack up. They can refile and presumably file a much
8 more complete case, and we can move forward. As the
9 Bench ordered a few months ago, if you are prepared to
10 move forward with your direct case, do so. If you are
11 not, then consider withdrawing and refileing.

12 So it is an unfortunate spot we find ourselves
13 in. But when we took a look at the motion and took a
14 look at the filing, it appeared to be justified on the
15 basis that we argue. And we do take exception to some
16 of the points Tesoro has made in some of the cost items.

17 CHAIRWOMAN SHOWALTER: If this motion had been
18
19 brought immediately after Olympic filed its direct case,
20 and that was all the Commission had in front of it, then
21 we would be looking at that body of evidence and making
22 a decision to go forward or not, let's say in month
23 three or four or five.

24 But here we have all of the parties' evidence
25 and witnesses ready to go. And what I am wondering is

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1 if Olympic has not proven a prima facie case, but the
2 Commission has in front of it sufficient evidence taken
3 all together, Staff witnesses, Olympic's witnesses, for
4 that matter, but also the other witnesses, Tesoro's, to
5 make a reasoned determination of what the rate should
6 be, after two weeks of hearing in your view, is that a
7 permissible action?

8 I am not arguing whether it's the wise thing to
9 do, and the wrong signal to send. I am just wondering
10 what you think about that. In other words, the whole
11 issue has been joined with all of the evidence that has
12 been filed --

13 MR. TROTTER: The statute is very clear that
14 the burden of proof is on the Company, and that is the
15 burden of coming forward with evidence, it's the burden
16 of persuasion. At some point that burden shifts. That
17 burden shifts on the basis of a prima facie case. If
18 they don't produce it, the Staff technically -- we're
19
20 not going to do it, but technically could just not show
21 up, not offer our evidence, and you would have, in
22 theory, no choice but to dismiss.

23 So I think it bears right off of 81-04-130, I
24 believe, which sets up the burden of proof. And I think
25 that's where it flows from -- from which it flows.

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1 JUDGE WALLIS: To follow up on that
2 question briefly, is the timing of the motion adequate
3 now, either as a matter of law or as a practical matter?
4 Does the water that's flowed under this bridge over the
5 past several months during the discovery, during the
6 preparation of the responding cases, during the
7 preparation of the rebuttal case now, as a practical
8 matter, bring up the question of rolling and rate shift,
9 and the question of how the Commission should proceed in
10 light of this issue?

11 MR. TROTTER: I don't think so, because this is
12 the time to test the Company's burden of proof. The
13 thoroughness of their direct case, as I said in some of
14 the evidence that we have addressed here, we didn't know
15 that there really -- their only witness that discusses
16 methodology was Omohundro.

17 We didn't know, No. 1, that she didn't purport
18 to be an expert on FERC methodology. She didn't purport
19 to have any knowledge of the specific filings that were
20
21 made before the Commission since 1983. We were led to
22 believe to the contrary, based on her written testimony.

23 So we did need to have that testing, and we
24 weren't able to do that until the depositions were
25 scheduled. It's been a rough grind from day one right

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1 up to the interim case, and so on.

2 So you should consider those factors as well.

3 And on balance, this is an appropriate time to --

4 certainly not too late to address that to you.

5 JUDGE WALLIS: Thank you, Mr. Trotter.

6 Are there any other questions?

7 (No response.)

8 JUDGE WALLISS: Mr. Trotter, we have

9 consumed all of your time.

10 MR. TROTTER: Thank you.

11 JUDGE WALLIS: Mr. Marshall.

12 MR. BRENA: I believe Tosco is next, Your

13 Honor.

14 JUDGE WALLIS: I am sorry. Mr. Finklea.

15 MR. FINKLEA: Commissioners, in the interest of

16 time I will be very brief. But we limited our support

17 for summary determination to the issue that you have

18 just been discussing with Mr. Trotter on the federal

19 versus the state methodology. We do think there is a

20 total failure of proof on Olympic's part in the direct

21

22 case, and that they should not be allowed to try to

23 salvage that through rebuttal.

24 If you are not inclined to grant summary

25 determination on all issues, and I am not opposing

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1 Mr. Brena's motion, but if you are not inclined to grant
2 it on all issues, we do think, for the reasons you have
3 been discussing with Mr. Trotter, that the federal
4 versus state methodology question is right for a summary
5 determination prior to hearing.

6 It's very clear from the deposition testimony
7 that Mr. Trotter attached to his materials that Ms.
8 Omohundro did not have any expertise to truly support
9 her recommendation of a federal methodology. And this
10 is a kind of question that is a straight policy and
11 legal question.

12 So it's one where I don't think there will be
13 that much more gained by a hearing. I understand the
14 chair's concern that there certainly is no harm in
15 letting it go forward and then making a determination
16 then. I just think in the interest of administrative
17 efficiency, this is the kind of issue that you should
18 dismiss; make a determination prior to hearing that in
19 this proceeding, Olympic's rates will be set using the
20 state method.

21 CHAIRWOMAN SHOWALTER: I just wanted to
22
23 clarify, when you said there is no harm, I recognize the
24 cost that would be required to go through.
25 It's really -- my policy question was, recognizing those

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1 costs, are there -- question -- benefits to going
2 through with the proceeding despite those costs.

3 MR. FINKLEA: I understand.

4 JUDGE WALLIS: Thank you, Mr. Finklea.

5 Now, Mr. Marshall.

6 MR. MARSHALL: Let me turn to the methodology
7 issue first. This was an issue that we turned to first
8 when we filed, because we filed a separate petition for
9 a determination of methodology from order to declare the
10 public policy, and also for clarifying an order. And
11 that was filed on October 31st.

12 And I am going to have Mr. Beaver hand out to
13 the Commissioners and the parties a copy of that,
14 because it was fairly extensive. We asked the
15 Commission to take judicial notice of its own records,
16 which we quoted in this petition. It was part of our
17 direct case. It's been ignored by the parties, and
18 their motions here on what is the appropriate
19 methodology to use.

20 We point out at pages -- beginning at page 5
21 that since 1983, "The evidentiary materials supplied by
22 Olympic in support of their proposal, and the underlying
23
24 books and records from which they were drawn have been
25 reviewed by the Staff. Such material was in the form

2119

1 of" --

2 JUDGE WALLIS: Mr. Marshall, slow down a
3 little bit, please.

4 CHAIRWOMAN SHOWALTER: Mr. Marshall, I would
5 like to interrupt you, because if you are going to start
6 arguing the merits or not of the FERC methodology, I
7 think this is the inappropriate time.

8 The question is, do you have, in your direct
9 case somewhere, please point to it, sufficient evidence
10 in your view of --

11 MR. MARSHALL: Of compliance with the FERC
12 methodology?

13 CHAIRWOMAN SHOWALTER: Well, excuse my
14 inarticulateness -- evidence that you are entitled to
15 the rate that you request under that FERC methodology.

16 MR. MARSHALL: I think you heard judicial
17 admissions here today that our case exactly mirrors the
18 case that was filed at the FERC --

19 CHAIRWOMAN SHOWALTER: I am asking in this case
20 can you point us to that evidence?

21 MR. MARSHALL: Certainly. What I am saying is
22 that this case is identical to the case filed at FERC which
23 is identical to following the federal methodology. If
24
25 you decide to follow the federal methodology, this case

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1 has been submitted at the FERC in connection with that
2 same methodology, and the parties here agreed to admit
3 that.

4 CHAIRWOMAN SHOWALTER: But wait a minute. Wipe
5 from your mind for a moment what is in front of FERC.
6 Tell us what is in front of us that you have submitted
7 in your direct case or briefs, or other legal argument,
8 something that shows that you are entitled to receive
9 the rate you requested under the FERC methodology.

10 MR. MARSHALL: Each of our witnesses in their
11 testimony has said that the material that they have
12 filed is identical to the material filed at the FERC, in
13 the same form that is required by the FERC. It's a
14 matter of connecting up the law on what the federal
15 methodology is, which is known.

16 There shouldn't be any real discussion about
17 that. And if there is a question about, did we follow a
18 starting rate base, or not in the appropriate way, which
19 questions have been asked, and Mr. Smith answers. We
20 have answers to all of Tesoro's.

21 But it's clear that what we have done based on
22 all of the witnesses' testimony, is we filed in
23 accordance with the FERC methodology. And the petition
24 we filed here shows that this Commission has accepted,

25

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1 time after time, and we put it in the petition, our
2 filing based on the records and the data that support
3 the FERC filing.

4 We did the same thing again. And there's a
5 provision in the Washington Administrative Code that says
6 you are entitled to file the same way you have been
7 filing before. And there's a recognition by the Staff
8 that we have always filed the same supporting data, the
9 same information as required at the federal level.

10 CHAIRWOMAN SHOWALTER: But let's say there's a
11 FERC methodology that FERC uses, and you file documents
12 A through J at FERC. Are you saying that just because
13 you filed documents A through J here that means you have
14 met the prima facie case? What about the substance of
15 what A through J is?

16 MR. MARSHALL: We not only say the substance,
17 and we not only say that this complies with the FERC
18 legal form and the methodology that ought to be
19 accepted, but we also can point to all the schedules we
20 have filed in all the previous filings, and point out
21 that the same kinds of schedules that have been filed
22 previously, are the ones that have been filed here
23 again.

24 Let's say the policy determination was made by
25 the Commission, that you accepted FERC methodology

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1

2 as the appropriate methodology to use. Then the only
3 question is, did this filing that we made conform with
4 the FERC methodology. And you have several bases to
5 draw from on that.

6 First of all, you have the statements in each
7 of the witnesses' testimony that, yes, this is exactly
8 what they filed at the FERC, and therefore, on a prima
9 facie case, reading all the inferences in favor of the
10 person against whom the motion is being made, you have
11 to say, that's a pretty good inference. How can you
12 have two cases filed on the same day, December 13, 2001,
13 one at the FERC and one here, and then have any kind of
14 question as to whether that was filed in conformance
15 with that? So the inference there --

16 CHAIRWOMAN SHOWALTER: But it's not the -- why
17 should we assume that what is filed at FERC meets a
18 prima facie case? We have cases filed here -- let's
19 take the Puget case, where we did dismiss. A company
20 can file a case here. The fact that they file it here
21 under the methodology we're currently using in this case
22 doesn't mean they met a prima facie case.

23 MR. MARSHALL: But, again, the standard is
24 there. The filings have been made in the same way as in
25 the past.

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1 You can take the format for what you have to
2
3 prove at the FERC, and look at what has been proven.
4 It's just like saying, I went out and I ran a red light.
5 Somebody is going to say, here's the standard. Did you
6 meet that? People will say, yes, I did. Because why?
7 Because you have the proof that you ran the red light.

8 We have filed all the supporting data that is
9 sufficient to meet all of the legal standards the FERC
10 has made.

11 Again, they want to take Christy Omohundro's
12 testimony and say she doesn't know what she's stating.
13 That's, by the way, incorrect. We have had testimony by
14 each witness that what they are filing is in conformance
15 with what FERC requires, and each of the schedules that
16 has been required to be filed with the FERC.

17 There's past orders here that show -- there's
18 certain schedules, we have schedules A through G that we
19 filed. Those are files those are filed here.

20 The other point I would like to make is if this
21 were the case, if we had not filed a prima facie case,
22 this would have been known on December 13. We went
23 through an interim rate case hearing. Not a peep was
24 raised about this.

25 Six months later -- more than six months later

1 Staff doesn't even make a motion on this. They make
2 their point in connection with an answer to Mr. Brena's
3
4 motion. So the length of time and the harm here weigh
5 against all the inferences that have to be drawn in
6 favor of a prima facie case.

7 To make a prima facie case, you can't start
8 out as Tesoro did by quoting Maurice Twitchell off the
9 record. That quote doesn't appear anywhere in these
10 proceedings. You can't quote 31 deposition statements,
11 as Tesoro has done. You can't use all of that evidence.

12 What you do is look at the filing we made, plus
13 the petition that we filed, which was in connection with
14 the filing, and you have to ask, are all reasonable
15 inferences, and every fact in there taken as true, and
16 taken in the light most favorable to the nonmoving
17 party?

18 You have to take Christy Omohundro's testimony
19 as true. If you want to open the door and let in
20 deposition testimony to try to set the stage and say,
21 well, they haven't really done it, or they don't really
22 know what they are doing, then it opens the door to all
23 of the rebuttal testimony that we filed. Every bit of
24 it.

25 Any time that they -- and Mr. Brena was quite

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1 candid when he said, I have confused this motion. This
2 motion is confused. Is it based on a prima facie case
3 where you look at all the inferences favorable to us,
4
5 and you don't look at any other evidence, or do you look
6 at summary judgment where we get to put in everything we
7 can, including all of the rebuttal testimony?

8 They fail under either standard. Either they
9 accept the statements that we have made at face value,
10 and all the inferences, including what Christy Omohundro
11 said and all the witnesses did, because they did file at
12 the FERC. That fact alone, the inference, the
13 permissible inference from that is that that meets the
14 FERC standards. They actually tested that at FERC, as
15 you recall. There's an order out there where they ask
16 FERC to throw out that case, and FERC declined. That's
17 in the record, too.

18 So they tested it and found that they couldn't
19 throw it out, the very same testimony that we have here
20 now.

21 If we go into the details about methodologies,
22 they make a number of points about starting rate base.
23 They say, you shouldn't have used that. Mr. Smith says,
24 no, we used the right thing. You have methodologies
25 wrong.

1 If there are questions on methodology on how it
2 works, they can raise it, and they have. And we will
3 respond to it, which we have, too.

4 They said we don't support deferred return.

5

6 Deferred return is a fundamental attribute that's
7 credited to original cost. Mr. Smith addresses that.

8 Each of the separate issues that they have
9 raised about the methodology, and they have raised it in
10 this motion, we have addressed separately.

11 So, again, either you take our case, including
12 the petition, all the records of the Commission on file,
13 and you look at all of the inferences, and you use that
14 most favorably, or you take and open the door to all the
15 rebuttal testimony. And all the rebuttal testimony
16 answers.

17 The basic fact here is the public interest says
18 they waited until the rebuttal testimony was here in
19 order to argue this motion. It's here. If there's any
20 question about is this in conformance with the FERC
21 methodology, that's been answered. It's been answered
22 in, we think, originally. We certainly think it's been
23 answered now.

24 Could they have raised this back in December?

25 Well, sure. Did they have an obligation to raise this

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1 before we made detrimental reliance on the interim rates
2 that were granted? They should have. We were
3 here for a week. Not a word was raised about this in
4 January. It should have been raised then. Because it
5 wasn't raised then, the detriment or alliance is great.

6

7 And I think that what the chair has suggested,
8 that we just go through and hear the evidence, is exactly
9 what should be done in the public interest. There's no
10 requirement that this case be thrown out. I don't think
11 the facts support that.

12 And one final point. We asked for a motion for
13 continuance to respond to Staff, because we had exactly
14 one day to respond because they filed their papers as an
15 answer to what Tesoro had done.

16 That motion to add was granted. I think we got
17 one extra day to respond to Tesoro, no extra time to
18 respond to Staff.

19 Our motion for a continuance to Staff has been
20 made to this Commission, and I urge you to read that,
21 too. I think on balance, all of the equities and the
22 whole purpose behind a motion for summary determination on
23 a prima facie case is to save time. Here, in order to
24 save time, it would have had to have been brought
25 certainly before the interim rate case hearing was

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1 heard, and it was not.

2 The underlying merits of it, we disagree, are
3 true either. But we didn't have the opportunity to
4 respond in detail to what the Commission Staff had done.
5 We think the issue of policy is one not of fact, but of
6 policy and rule making for the Commission to decide what
7
8 is the appropriate methodology. We think that the
9 Commission ought to ask all of the witnesses that speak
10 to that on cross examination, what do you mean by that?
11 What is the advantage of doing this versus that?

12 We pointed out in our petition for a policy
13 statement that there are seven reasons that we ought to
14 do this. That's true. If the public policy is that we
15 should be granted rates in accordance with the filing we
16 have made, then denial of that would work against public
17 interest. Again going back --

18 JUDGE WALLIS: Excuse me --

19 MR. MARSHALL: Am I out of time?

20 COMMISSIONER HEMSTAD: No. I was going to ask
21 a question. If a hypothetical party filed a rate case
22 with its case based on astrological theory, and all its
23 witnesses filed their testimony on that same set of
24 premises, would that establish a prima facie case?

25 MR. MARSHALL: Well, fortunately, the FERC has

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1 a series of regulations, laws, cases, and filings that
2 this Commission could look to. And I think at the end
3 of the day you have to decide whether a different
4 approach is better than the FERC approach.

5 But the FERC approach is an approach that has
6 been adopted, is well known. 154 B, the current
7 methodology, is out there for everybody to see. How you
8
9 meet that is very easy to determine. That's why I say,
10 the inference you can make -- you have the standard.
11 It's clear. You have the facts.

12 It's a question, really, of a legal question.
13 And it's a question of law, not of fact. Do those
14 facts, if you accept them all as being true, meet that
15 test. Did you go through a red light or not? If it's a
16 crime to go through a red light, and you did -- but I
17 think astrological theory and FERC is an interesting
18 concept.

19 But we will have testimony that will show that
20 it makes sense for oil pipeline industries to use a
21 methodology that fits the history, both in how the
22 industry was formed, and the way it's been financed, and
23 the regulatory history. It is different, significantly
24 different than other kinds of utilities.

25 And we think the approach that has been

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1 accepted for filing here since 1983, and all of the data
2 and supporting data that has been accepted for filing,
3 as our petition shows, is the right way of going. We
4 have been -- Olympic has been doing it, filing in
5 accordance with the data that it has been filing with
6 the FERC at that time.

7 I have in front Mr. Beaver the workpapers that
8 we found in depositions of Mr. Colbo from 1983. It's a
9
10 stack that thick. It goes through all of the reasons it
11 would be a good idea to have this policy adopted.

12 The Commission, as we pointed out, has before
13 in its own files, a 1983 memo which says this is a
14 policy determination to be made. And in each time from
15 1983, as we quoted in the petition, each time Olympic
16 filed, it filed the data and supporting things in
17 conformance with that. And the Staff said that. The
18 Staff's evaluation was it did.

19 We have heard nothing from Staff that said they
20 didn't file in accordance with the FERC methodology.
21 That would have been the first thing that they said,
22 because that's the first thing they always say when they
23 look at this. There's no evidence.

24 So, again, I think the reasonable inference is
25 that this has been filed, not only here but at the FERC

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1 in full conformance with that methodology, which is a
2 fact. And you don't have to prove a fact of federal
3 law. It is what it is.

4 Again, I think that the time for making this
5 kind of a motion, as interesting as it may be
6 academically, would have been in December of last year.
7 It would have saved us all an enormous amount of time,
8 and we wouldn't have been put to the burden of refunding
9 rates, and having to wait for a refiling. That harm is
10
11 significant.

12 There's no reason advanced why it took so long
13 for people -- except they try to say if you go
14 beyond the record, if you look at inferences that are
15 against Olympic, if you look at things beyond the
16 record, beyond the face, then maybe you can make a
17 decision that this thing was not, on its face -- that's
18 what prima facie means -- on its face acceptable.

19 So I may have gone on at length here in terms
20 of getting more emotional than I thought I would, but
21 it's clear that this company, in the financial
22 circumstances as it is, should have been known by the
23 parties to say, look, if we have a problem, let's raise
24 it right away. Let's get it up and get it decided.

25 So having that opportunity disappear, I think

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1 the word batches is one, equity is another, but public
2 interest is the best description.

3 The public interest says, we have come this
4 far. There's every answer to every issue in the
5 rebuttal case to everything that has been brought up by
6 Tesoro. They are now going to go through each of these
7 testimonies and say we ought to strike this, we ought to
8 strike that. They are wrong. These all go to questions
9 that were raised by their own witnesses. It's a bulky
10 rebuttal case --

11

12 CHAIRWOMAN SHOWALTER: Let's get to that later
13 on another motion.

14 MR. MARSHALL: In any event, I just wanted to
15 repeat that this case is a case that has been filed in
16 accordance with the federal methodology, the same way,
17 case after case has been filed with the supporting data
18 since 1983.

19 All the inferences should be read in favor of
20 Olympic, because that is in the public interest and
21 that's the law on prima facie case. We met it, and we
22 met it with our petition, our testimony of all the
23 witnesses, Ms. Omohundro. And the fact that it took
24 them more than six months to find that out is also an
25 inference that you are able to take into account and say

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1 it shouldn't have taken that long, that we're clear.

2 JUDGE WALLIS: Mr. Marshall, to your
3 knowledge, has the Commission ever accepted the FERC
4 methodology in a contested case?

5 MR. MARSHALL: There's never been a contested
6 case, so the answer to any question about a contested
7 case is no.

8 JUDGE WALLIS: So is it true that if, to
9 the extent the Commission has a pattern, that pattern
10 was broken when it decided to suspend your filing and
11 announced that it wished to examine the issue of
12
13 methodology?

14 MR. MARSHALL: Well, as we pointed out in the
15 1983 memo, and I have a blow-up here, of the discussion
16 and recommendations, the Commission was given a clear
17 choice as early as 1983, if you accept this, if you are
18 willing to accept the FERC guidelines and to rely on
19 that, then go ahead and accept this and allow this to go
20 into effect.

21 If you are not, then what you need to do -- and
22 it says it's recommended that the filing be suspended
23 and set down for hearing unless voluntarily withdrawn.

24 The very next action -- and you will see that
25 in the handwritten note at the bottom of the 1983 memo,

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1 was the Commission accepted the filing and allowed it to
2 go into effect.

3 They were given a choice, the Commission was
4 given a choice. And I know we weren't around in 1983.
5 And the choice it made was to accept the federal filing.
6 The filing was done under methodology that is changed,
7 but it's still the federal methodology. So decisions
8 are made by choices, and the reliances that people are
9 entitled to have are made by a long history.

10 And what the petition pointed out is that there
11 are at least five or six tariffs that were filed using
12 FERC data, FERC type forms. And this Commission has
13
14 to -- this Commission uses FERC form 6 for reporting
15 requirements. It uses the FERC accounting for a lot of
16 things. So it's not as though there were any time
17 before this case from the Commission itself, any
18 indication that they would not prefer to use an oil
19 pipeline methodology that had been used in the past and
20 accepted in the past.

21 The most I can say is that this Commission has
22 accepted and allowed the tariffs. I am not telling you
23 here that the Commission had a hearing or had a
24 contested proceeding, but I am saying there's been
25 a long history of review by the Staff, and decisions by

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1 the Commission where a choice has been made. And the
2 choice has been a very clear one. Between using the
3 federal approach and the supporting data or using a
4 different state approach, and each time the decision was
5 made to use the federal approach.

6 JUDGE WALLIS: Thank you, Mr. Marshall.

7 Mr. Brena, you have three minutes remaining.

8 CHAIRWOMAN SHOWALTER: And I have a question I
9 would like you to address, first.

10 Mr. Marshall essentially said that since FERC
11 didn't throw their case out at FERC, there must be a
12 prima facie FERC case there. And on the assumption that
13 what was filed here should incorporate what was filed
14
15 there, why wouldn't that answer the argument that they
16 have met a prima facie case on FERC methodology?

17 MR. BRENA: I think you correctly identified the
18 issue, and the standard when you asked Mr. Marshall
19 where in the direct case do you indicate that this is
20 the appropriate methodology to apply in this proceeding?
21 He didn't have an answer.

22 CHAIRWOMAN SHOWALTER: But let's say that the
23 question of the appropriate methodology is a legal one,
24 and there is, you know, there's legal authority, briefs,
25 their petition, legal information about FERC methodology

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1 on part A. And part B is a body of evidence that was
2 just like what was filed at FERC apparently. Why
3 doesn't that meet the test?

4 MR. BRENA: There's no showing in their direct
5 case before this Commission that the methodology,
6 whether it's consistent or not consistent with the FERC
7 methodology, is the appropriate methodology for this
8 Commission to apply. There is no showing in their
9 direct case that they have had with regard to the
10 elements that they have had deferred earnings, or that a
11 calculation of deferred earnings is appropriate to
12 include in their rate base. There's no showing in their
13 direct case that a write-up to starting rate base based
14 on investment that they didn't make is appropriate for
15
16 this Commission to use.

17 And bear in mind, no state -- every state to
18 consider those adjustments, those rate base rights to
19 date, Wyoming and Alaska are two that come to mind, have
20 rejected them. So it is their affirmative obligation in
21 their direct case to support their methodology and
22 calculations.

23 And what I heard them do is quote from
24 Mr. Smith who is a witness on rebuttal, and a quote from
25 a 1983 memo. There is -- he did not advance a single

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1 fact set forth in their direct case that supports the
2 rate base write-up in either case.

3 Let me address -- let me back up. The timing
4 of the motion, we filed the motion the day it was due.
5 If the Commission would have preferred to hear
6 dispositive motions earlier, we would have been happy
7 to file them earlier. We filed them within the
8 schedule that this Commission set for this proceeding.

9 The suggestion in any way, shape, or form that
10 complying with this Commission's procedural schedule to
11 dispositive motions, somehow he invokes latches
12 rejudice to other parties, what kind
13 of dispositive motion were they thinking about us filing
14 before they filed their rebuttal case on that date?
15 Motions to strike their direct case, or motions for
16
17 summary disposition or motions -- I mean, these motions,
18 these were the motions that that date was set for.

19 So I dismiss out of hand the suggestion that
20 Tesoro, complying with the procedural order, raises any
21 issue whatsoever with regard to the appropriateness of
22 timing.

23 What he didn't say is more important than what
24 he did say. Did he say anywhere in his direct case that
25 they provided any evidence whatsoever of affiliated

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1 payments? No. Why are we going to hearing on that
2 issue of affiliated payments? I mean, should they have?
3 Of course they should have. Everyone who participates
4 in a rate proceeding understands that affiliated
5 payments are held to a higher standard.

6 Chairwoman Showalter, you asked to what degree
7 the public interest concept interfaces with these.
8 Well, it is an overall policy to regulate in the public
9 interest. That does not trump the statutory standards
10 that establish the burden of proof. You can't shift the
11 burden of proof onto Tesoro in the public interest.

12 There are certain standards that the
13 legislature has decided this Commission should apply in
14 applying the public interest to public service
15 companies. One of them is who carries the burden of
16 proof. One of their obligations is to put on a prima
17
18 facie showing. If they fail in that showing, that is a
19 decision that the legislature has made as a matter of
20 policy that their case should fail, and that is the
21 directive that they have given this Commission. So
22 public interest can't be used to trump statutory
23 standards.

24 CHAIRWOMAN SHOWALTER: Mr. Brena, I agree with
25 you that the Company carries the burden of proof. But I

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1 guess the more specific question is, can we put them to
2 that burden -- which, of course, we would -- at the end
3 of the case, or must we -- must we legally dismiss the
4 case if they haven't met that burden at the outset?
5 That's really one of the issues.

6 MR. BRENA: I believe that part of the burden
7 is to establish a prima facie case. If you determine
8 that they have failed to establish a prima facie case in
9 support of their rate increase on the general level,
10 then you must dismiss their filing. If you determine --

11 CHAIRWOMAN SHOWALTER: Just tell me on the
12 statute, we're talking about two things here. One is
13 the burden of proof which rests with the company. The
14 other is, what you are citing is the burden to establish
15 a prima facie case -- and can you cite me the statute --
16 that requires that that be done on penalty of dismissal?

17 MR. BRENA: Right. No. And I appreciate that
18
19 point. The case authority I have cited is extensive
20 with regard to what the burden of proof means. Part of
21 what the burden of proof means is the burden on your
22 direct case to establish a prima facie case.

23 As far as I am aware, that's the law. That's
24 the law that every regulatory agency and the courts
25 apply. It's the appropriate law to apply, and that is

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1 what the burden of proof on the company -- that is part
2 of what the burden of proof on the company means
3 judicially as a matter of law. But let me --

4 JUDGE WALLIS: Mr. Brena, your time has
5 expired.

6 MR. BRENA: If I may finish with one statement.
7 Let me just suggest to you that you may well determine
8 not to dismiss the higher case. I heard your hesitancy
9 with regard to, here we all are. Let's get the evidence
10 and set some rates. And those are similar to the
11 arguments I made against the Staff's motion to dismiss
12 not too long ago. So let me acknowledge the legitimacy
13 of that as a matter of --

14 CHAIRWOMAN SHOWALTER: You mean the more
15 recently, a few minutes ago, against the motion to
16 continue.

17 MR. BRENA: Indeed, I did. So at the risk of
18 being consistent, which I hate to run that risk, I
19
20 acknowledge that hesitancy. But let me also say that
21 that would be a sufficient reason to allow the overall
22 case to go forward, but with regard to the individual
23 elements, with regard to the affiliated payments, they
24 have not put on a factual showing with regard to the
25 affiliated payments. There's no reason for that to go

2141

1 to hearing. With regard to the deferred earnings, they
2 have not put on a direct case that shows they had
3 deferred earnings, or shows that that rate base
4 adjustment is appropriate to do. That should not go to
5 hearing.

6 With regard to the starting rate base, that
7 should not go to hearing as well, and there is nothing
8 in their direct case that justifies or supports any of
9 those adjustments in any way.

10 So let me just conclude by saying that I
11 understand your hesitancy to stop the train right before
12 it gets to the station, but you don't have to get to
13 my motion. Their prima facie burden goes to their
14 overall case. You could well determine they put on a
15 sufficient showing of prima facie, so this should go to
16 hearing. But with regard to these individual elements,
17 you cannot ignore that their case completely fails and
18 they should not be in the hearing, and they should not
19 be allowed to use their rebuttal in order to bootstrap
20
21 them in.

22

23 JUDGE WALLIS: Very good. Let's take a
24 brief recess.

25

(Brief recess.)

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1 JUDGE WALLIS: Let's be back on the record,
2 please.

3 The final set of motions today is related to
4 the topic of the rebuttal testimony of witnesses and
5 motions to strike. This discussion will be split into
6 two parts. The first part will be matters of general
7 applicability, and will begin with Tesoro with an
8 allocated time of 10 minutes.

9 Mr. Brena.

10 MR. BRENA: Thank you, Your Honor. I would
11 like to first start out with just a brief description of
12 what I think the appropriate legal standards this
13 Commission should apply to resolving this issue. A
14 direct case should include all of the evidence -- and I
15 underscore all the evidence -- they intend to rely on in
16 their case in chief. It should include evidence of a
17 prima facie case, and evidence rebutting the reasonably
18 foreseeable claims of adverse parties.

19

20 Let me go on to say what rebuttal testimony is
21 not. Rebuttal testimony may not add to a direct case.
22 You can't supplement your direct case through rebuttal
23 testimony. It may not consist of anything which could
24 have been offered in the case in chief. If you saw it
25 coming, or you are going to rely on it then, and it

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1 could have been offered in your case in chief, then it
2 has to be in your direct case. It has to be a direct
3 reply for contribution of material evidence. It has to
4 be evidence offered in reply to new matters.

5 It should not consist of testimony which might
6 have been included in the case in chief. What Olympic
7 has done on rebuttal, a week before hearing, is file a
8 case that is twice the size of their direct case
9 originally, advancing 16 rebuttal witnesses, nine of
10 which were new.

11 Since that time they have withdrawn three
12 witnesses, and since that time they have substituted
13 rebuttal testimony for two other witnesses. You know,
14 at some point the parties are entitled to know what the
15 case is that they are litigating.

16 In their rebuttal case -- well, to date, prior
17 to their rebuttal case, they have had two different rate
18 filings before this Commission. They have filed seven
19 different cost of service cases, and they have advanced
20
21 three different -- entire different ways of calculating
22 through-put since they have -- since the beginning.

23 In their rebuttal case they added that. And I
24 would like to draw your attention specifically to page
25 14 of my motion where I just lay out side by side by

2144

1 side all these changes. You know, the idea when I make
2 a rate filing, and concept is you make a rate filing,
3 you have your numbers in order at that point. Your rate
4 filing indicates a certain number. You file a direct
5 case that supports that rate filing. Someone files an
6 answering case that points out what is wrong with that
7 direct case. And then in rebuttal, you answer the
8 contradictions to your case.

9 Rebuttal is not an opportunity to advance three
10 new cases. And that's what they have done. So there's
11 been no discovery. There's been no opportunity to take
12 depositions on new witnesses. We have six new witnesses
13 a week before trial, none of which have offered a proper
14 rebuttal case. This is just not playing by the rules
15 and it goes right to the integrity of the processes
16 before this Commission, and you simply should not allow
17 this.

18 We should be able to litigate the case they are
19 representing to use to support their rates. And that
20 case is case two of their direct case. We should
21
22 not be here a week before hearing with no discovery, all
23 of their updated numbers with them applying a new
24 capital structure, with them applying a new rate of
25 return, with them using a new cost of debt, with them

2145

1 using a new cost of the equity, with them changing the
2 way they calculate remediation, with them changing the
3 way they calculate fuel and energy costs, with them
4 changing the fundamental methodology they are applying
5 to determine through-put, and then with them putting in
6 a bunch of numbers that nobody has had an opportunity to
7 review, depose anybody on, or search for.

8 This should just not be allowed. How am I
9 supposed to cross examine these people? I have no
10 discovery. We're headed into a rate case where we just
11 take their word for their numbers.

12 Now, given the status of their financial and
13 regulatory books and records, that would cause me great
14 concern. As a Commissioner, to have them come in and
15 file an all new case, and when you set this procedural
16 schedule, when you set this procedural schedule they
17 acknowledged and you determined that a week would be
18 sufficient, assuming the scope of rebuttal was proper.

19 This whole procedural schedule has been set,
20 assuming everybody plays by the rules. They are not,
21 and so we need your help to make any sense of this

22

23 hearing at all. I don't even know which case to cross
24 them on. I have four choices right now.

25 CHAIRWOMAN SHOWALTER: Can you answer the

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1 question, what is the line between rebuttal coming in
2 and correcting an error in the direct, or perhaps
3 responding to the response saying, Oh, there they are
4 right about something. We adjust our figure to "X"
5 versus something that is new and different? How do you
6 make that distinction?

7 MR. BRENA: If it's something that could have
8 been in on direct, then it's over the line.

9 But to give you some specific examples, we're
10 not objecting or asking them to strike the portion
11 related to Sea-Tac. Sea-Tac is a terminal that has been
12 sold. At the time of filing the direct case the
13 information was not available to them with regard to
14 what the actual numbers of the sale should be. The
15 numbers of the sale actually changed. We agree that
16 it's appropriate for them to correct their case to
17 represent that reality. There's no gamesmanship in it.
18 There's no -- people have had an opportunity to explore
19 it. That's within the limits.

20 But there's a far line between correcting a
21 case for mistakes that you see, and putting in a whole
22 new case with whole new methodologies and whole new cost
23
24 calculations, and a whole new set of numbers from a
25 whole different period. And that's what they have done.

2147

1 They are not even relying on the same
2 calculation for operational expenses. They have
3 interposed a whole new calculation.

4 So I know sometimes it's hard to find the line
5 between what is like an update that is fair to consider,
6 and what is a whole new case. This isn't close. This
7 isn't close. This is a rebuttal case. This thing is
8 starting out with 16 witnesses with three different
9 whole new costs of service.

10 And they put on a DOC case. How could you not
11 put on a DOC case in your direct? How clear could
12 this Commission or the parties have been that the DOC
13 was an issue in this proceeding? Should it have been in
14 their direct? Could it have been in their direct?
15 Absolutely.

16 So now they get to put in a DOC case behind us,
17 and we don't get to explore through discovery anything.
18 And now they come up with a methodology witness in Leon
19 Smith who comes in and says, yeah, this is how we should
20 do it. And now they have Mr. Collins for the first time
21 say, yeah, this is what should be done before this
22 Commission, and they do it all behind us. That's not
23 even close.

24

25

1 So I think as a theoretical matter when you
2 draw that line, and what principles you apply are
3 sometimes difficult and fuzzy. But in this case, it's
4 not even close.

5 JUDGE WALLIS: Mr. Brena, you are just
6 about out of time.

7 MR. BRENA: Oh. I had ten minutes, and she
8 just told me 20 minutes.

9 JUDGE WALLIS: By my watch.

10 MR. BRENA: Okay. I have to watch the time
11 keepers. Thank you.

12 MR. TROTTER: Donald T. Trotter, assistant
13 attorney general for Commission Staff.

14 We filed a motion to strike certain testimony
15 in the rebuttal case. It's very focused on the
16 methodology issue, and it's probably not complete. We
17 did this as promptly and expeditiously as we can, and we
18 probably overlooked some opportunities.

19 Part of this answer is a copy of what we filed
20 in the answer on the motion for summary determination
21 where we point out Olympic knew what the issue was,
22 they were on notice of what the methodology was in the
23 case. They admitted the Commission had never formally
24 adopted a methodology that cried out for a direct case
25 on rate making methodology.

1

2

3

4

5

They filed a FERC methodology, but they never said it was correct. They never said it was right. And they never said it was appropriate.

6

7

8

9

10

In the prior argument the company said we filed a petition. There's all sort of things in there. Well, that petition was denied by the Commission, and it's not in their direct evidence testimony nor exhibits in this case. It's simply not part of their direct case.

11

12

13

14

15

Judge Wallis asked a question of Mr. Marshall regarding the impacts of suspension. I didn't hear an answer to that question. The correct answer is, yes, emphatically, the act of suspension, both in July and October, broke the chain.

16

17

18

19

20

21

Also, I am constrained to point out that the company is correct. There is no order in a contested case, or an uncontested case, for which the Commission has adopted a methodology. The company is relying on handwritten notes of Commission Staff to tell you what you did. That's not right.

22

23

24

25

When a company files a tariff, you suspend it, you allow it to go into effect, or you reject it. Rejection is pretty limited, because it's usually only rejected if it's invalid on its face as a matter of law.

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1 But the act of allowing a tariff to go into effect is
2 not a substantive decision on the merits of the
3
4 underlying theories supporting that filing.

5 Now they can quote from Staff memos all they
6 want, but that's not what you, as the Commission -- of
7 course, you weren't here at that time, but that is not
8 what the Commission itself did, and that is not
9 appropriate to use a Staff memo to characterize a
10 Commission act. A Commission acts by orders, and they
11 have no order in which the Commission adopted rate
12 making methodology.

13

14 So this issue was clearly teed up. They knew
15 it, and they had three weeks from the denial of this
16 position to put their case together, and instead we're
17 getting it all on rebuttal.

18 The definition of deferred methodology is
19 through Mr. Smith, and there's no reason he shouldn't
20 have been a direct witness of the company.

21 So that is in substance the problem we have.
22 They knew the issue, they knew there was no formal
23 adoption of the rate making methodology, in their own
24 words. They were given ample time to file the case.
25 They didn't file it, and now it's in on rebuttal. So

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1 that's why we move to strike.

2

3 CHAIRWOMAN SHOWALTER: On the point of what the
4 Commission has done in the past, this is adding, I
5 suppose, to your arguments. But strictly speaking,
6
7 isn't what the Commission did is take no action; that is
8 by taking no action, a tariff goes into effect?

9 MR. TROTTER: That is absolutely correct. Now,
10 some people call that approval, some people call that
11 acceptance, some people may call that all sorts of
12 things. But the law calls it allowing it to go into
13 effect by operation of taking no action whatsoever.
14 Because the statute says unless you suspend it, it goes
15 into effect. That's exactly correct.

16

17 And if you keep that principle in mind
18 throughout this case, you will be able to sift through a
19 lot of the noise on this issue that is going to come at
20 you. So that's the foundation for our motion, and we
21 will have some time a little later to talk about some of
22 the specifics. Thank you.

23 COMMISSIONER HEMSTAD: If I can pursue the
24 point, Company's argument is that it has filed its case
25 based on the FERC methodology, and whether rightly or

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1 wrongly on the argued historical pattern of how they
2 filed in the past. The Staff's case, I believe,
3 witnesses attack that position and say, no, you can't do
4 it that way, and now here's more elaboration from the
5 company on rebuttal. Could it be argued the issue is
6 joint?

7

8 MR. TROTTER: Not quite. I think what the
9 Staff is saying -- I think if you read Mr. Twitchell's
10 testimony, he says the company did support the propriety
11 of what they were doing, and I think we said that in our
12 summary memorandum, cited all the points where
13 Mr. Twitchell noted that.

14

15 This gets back to what is a prima facie case,
16 what should they have filed. I think the issue is joint
17 in the sense that it's in the case now. But the issue
18 is, should it have been in the case sooner, in their
19 direct case in order for them to now come, and for them
20 to now come in and do it on rebuttal is simply not
21 appropriate.

22

23 COMMISSIONER HEMSTAD: Then a following
24 question, in view of Mr. Twitchell's testimony and the
25 reaction to the company's case, now the rebuttal
testimony is -- you can only speak for Staff -- is the

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1 Staff harmed by putting -- by being put at a
2 disadvantage of being able to cross examine Mr. Smith?

3

4 MR. TROTTER: Well, yes. Any time you put
5 forward an expert witness with the length of testimony
6 he filed one week before hearing when it could have been
7 filed October 31st of last year, that's inherently
8 prejudicial. Thank you.

9 JUDGE WALLIS: Thank you, Mr. Trotter.

10 Mr. Finklea.

11

12 MR. FINKLEA: Thank you. Commissioners, I
13 continue to have the advantage of going after my two
14 esteemed colleagues. I am going to try to answer just a
15 couple of quick questions.

16

17 What's the difference between an update and a
18 brand new case? Let me use one that is relevant in this
19 situation. Parts of their operating costs are electric
20 rates. They had to make a guess at what Puget's rates
21 were going to be at the time they filed, so they based
22 then on what Puget filed. Puget's case is moving toward
23 settlement -- isn't accepted yet, but we're moving
24 forward to a settlement.

25 For Olympic to come in on rebuttal and say now

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1 we have a good number, before we had an estimate, now
2 we have a good number so we updated the case. We have
3 seen this for years. You get a better number, so you
4 update the number. And in rebuttal you still have an
5 opportunity, as an intervener, to test the accuracy of
6 that number.

7

8 That is in stark contrast to one of the areas
9 specifically that we moved to strike on rebuttal. It
10 has to do with Dr. Schink, their rate of return expert,
11 who in his original testimony says the risk premium for
12 this company ought to be 75 basis points. Then on
13 rebuttal says it really ought to be 100.

14

15 That's not the same thing as saying Puget's
16 rates were a nickel and now they are six cents. This is
17 a whole new theory that we have to get ready for. And
18 we're ready to cross him on, why was it .75 right, and
19 now we have a whole new theory on why there's other
20 reasons why they should have an even higher risk
21 premium. That's changing the rules, in our opinion, and
22 that kind of rebuttal isn't appropriate.

23

24 The colloquy over the methodology is the other
25 one where I will use an example of rate of return. If a
utility filed -- to make up a number -- 12 percent rate

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1 of return on equity, and the original case is just
2 occasion for 12 percent, because the senior vice
3 president said we have always gotten 12 percent, and I
4 looked in the Wall Street Journal and a lot of other
5 companies are getting 12, so I want 12.

6 That's a fairly weak case for a 12 percent
7 return, but it would be a case. Well, if, suddenly on
8 rebuttal, they bring in a PhD. economist from Columbia
9 who gives 48 pages on why 12 percent is a reasonable
10 number, then a week before hearing, instead of crossing
11 an executive on why 12 percent is reasonable based on
12 looking in the Wall Street Journal, you are suddenly
13 thrust into having to cross examine a PhD.
14 economist, it's a whole different case. That's not
15
16 fair. That's part of what the rulings of this are meant
17 to do is give all the parties a fair opportunity to
18 prepare their case.

19 There is so much in this rebuttal -- as we said
20 in our motion, there's so much in this rebuttal we can't
21 figure out what all we ought to be striking. But we
22 know the things we have asked to be stricken should be
23 stricken. And the general comments my colleagues have
24 made go right to the point, that we are now looking on
25 the eve of a hearing at a whole different case than we

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1 were looking at ten days ago even. Questions?

2 (No response.)

3 JUDGE WALLIS: Thank you, Mr. Finklea.

4 Mr. Marshall.

5 MR. MARSHALL: We would have liked to have had
6 more time for rebuttal as well. We had a very
7 compressed time from the time we got the case from
8 Tosco, Tesoro, and Staff to prepare rebuttal. I know,
9 because in that period of time I had a daughter who got
10 married on June 8, and the testimony was due on June 11.
11 As I told our Administrative Law Judge, and this has
12 been a particularly interesting time to try to go
13 through all of the testimony that we had from
14 interveners and Staff and make sure that we got the
15 rebuttal testimony pulled together to answer their
16
17 questions, their facts, their theories.

18 We think we have done that. We think we have
19 presented a fair rebuttal case from all of the things we
20 had from the three parties opposing this. Each of the
21 areas that people have talked about are fair rebuttal
22 areas, starting rate, because their witnesses just got
23 it wrong. Mr. Smith will explain how they got it wrong.
24 Use of return of original cost, they got it wrong.
25 Accounting issues, Mr. Kermode is just confused about

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1 the actual standard.

2 This Commission has said to use the uniform
3 system of accounts that is used to bolster FERC form 6
4 reporting requirements. We go through that, we provide
5 a background for why it is that they were confused,
6 because you just don't say they are wrong and then leave
7 it at that, and let people guess at why do you say they
8 are wrong. So at every point we have tried to tie in
9 exactly a rebuttal to what has been the position of
10 Staff or interveners.

11 There are a couple of other areas where clearly
12 this case has moved on beyond what we filed on December
13 13. For example, Tesoro wants to strike the testimony
14 of Mr. Fox because he purports to answer the questions
15 that the Commission put to the parties in the 3rd
16 supplemental order at page 10, the eight questions.

17

18 Mr. Elgin of course answers those questions,
19 sets them out, and Mr. Fox says we were asked to answer
20 those, too, and we're responding to Mr. Elgin.

21 Clearly they are confused about what we are
22 responding to. We are responding to things that have
23 come up since the direct case, because we have had, as
24 Administrative Law Judge Wallis said, a lot of water
25 under the bridge. They are confused about a lot of

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1 other areas that have come up.

2 But rebuttal testimony, under the
3 Administrative Procedure Act 34.05.449, subsection 2 is
4 what we meet to the extent necessary for full disclosure
5 of all relevant facts and issues the presiding officer
6 shall afford to all parties the opportunity to respond,
7 present evidence and argument, conduct cross
8 examination, and submit rebuttal evidence except as
9 restricted by a limited grant of intervention, or by the
10 prehearing order.

11 We're in a mode of trying to find the facts,
12 trying to find the truth, and we think that the rebuttal
13 testimony that we provided will enable you all as fact
14 finders and truth seekers to do that.

15 Admittedly these are complicated areas.
16 Admittedly that oil pipeline regulation is not something
17 that this Commission has had to look at before.

18
19 And admittedly it's different. It's different
20 because there are lots of transition issues. In the
21 past there's a lot of regulatory history. There's a
22 whole set of different expectations and capital
23 structures that have developed because of the historical
24 ownership interests. All of those things are different
25 and all of those things are susceptible to being

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1 gathered wrong.

2 COMMISSIONER HEMSTAD: What has changed in the
3 capital structure picture from your original case until
4 your rebuttal case?

5 MR. MARSHALL: The only thing that has
6 changed there is the capital structure of the parents is
7 generally used rather than any other type of
8 hypothetical structure. I mentioned that only because
9 it's just another example. It's gone up like three
10 percent from what it was when we filed the original
11 case. But that's because, generally speaking, when an
12 oil pipeline company is owned by its owners, the FERC
13 has used the capital structure of the owners because the
14 owners are the ones upon whose credit they rely.

15 COMMISSIONER HEMSTAD: Why wasn't that point
16 made in your direct case?

17 MR. MARSHALL: It, in fact, was in the direct
18 case, and all we have done is updated that number. But
19
20 when questions are asked about why do you use that
21 instead of the 20 percent that Mr. Wilson uses, well,
22 the 20 percent Mr. Wilson uses just didn't work for this
23 industry. So you have to explain where Mr. Wilson is
24 wrong. Testimony about why do we have testimony about
25 the effect of the Staff and intervenor's recommendation

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1 on rates? Their recommendation is zero. A zero rate
2 increase is much different than, say, a 25, 45, 50
3 percent rate increase.

4 The impact -- the circumstances around the
5 consequences of a zero rate increase have to be
6 addressed in rebuttal in a different way than you would
7 a 50 percent recommendation.

8 COMMISSIONER HEMSTAD: I am looking at page 14
9 of Mr. Brena's brief, and I am taking any point. And I
10 am looking at item No. 5. You may not have it in front
11 of you, but it deals with amortization of AFDUC. And in
12 your direct case that amount is, in case one, was 181.
13 And direct case No. 2 was 204. Now in the rebuttal case
14 there are three different -- 204, 255, and 255. Why
15 would those figures change?

16 MR. MARSHALL: Well, on AFDUC, I would have to
17 defer to Mr. Smith. But AFDUC, I know that Mr. Colbo
18 tried to address that and got that wrong. Case one, by
19 the way, is a case you can ignore. We don't oppose any
20
21 motion to strike that. It was a -- case two is the case
22 that was presented. Case 1 was a comparison in the
23 original testimony. We had a case one and case two in
24 the direct testimony.

25 COMMISSIONER HEMSTAD: But my question is taking

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1 case two as 204, now it's become 255. Is there some new
2 unknown information that was only discovered since the
3 direct case?

4 MR. MARSHALL: On that specific issue, I would
5 have to defer to Mr. Smith. One of the things we want
6 to point to is, for example, on the motion by Staff to
7 strike, we received that yesterday. This fax is dated
8 5:13, or it's dated in the afternoon. We haven't had
9 time to even review half of these motions to strike. We
10 are coming in here today and we've had this discussion
11 earlier trying to get up to speed, so we can give these
12 explanations. And our position would be that at the
13 time a particular witness' testimony is being the
14 subject of a motion to strike, that is the time when
15 that witness can explain better why did you do this.
16 Well, it was an answer to Mr. Colbo.

17 COMMISSIONER HEMSTAD: But normally what would
18 occur is there is a -- staff filed its case or
19 interveners, and then the company comes back on rebuttal
20 and concedes certain points, and therefore, for example,
21
22 adopts the numbers that Staff has used, acknowledging that the
23 f analysis is the better number. But here the number
24 gone up, not down.

25 MR. MARSHALL: Well, I suppose that happens, too. But I

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1 don't see anything wrong with that if circumstances change,
2 because what we're after is the truth. If a fact happens to
3 change --

4 COMMISSIONER HEMSTAD: That's the point.

5 MR. MARSHALL: If a fact has changed --

6 COMMISSIONER HEMSTAD: Did circumstances change? This
7 goes to Mr. Finklea's point, did circumstances change so that
8 you have new information not known at the time, or did your
9 theories change?

10 MR. MARSHALL: Two things: No. 1 on AFDUC, this was
11 clearly in response to the testimony of another witness so --

12 CHAIRWOMAN SHOWALTER: That mike has gone off.

13 COMMISSIONER HEMSTAD: Let's go off the record for a
14 moment.

15 JUDGE WALLIS: Let's go off the record for a
16 minute.

17 (Brief recess taken.)

18 MR. MARSHALL: I am at a disadvantage in talking about
19 AFDUC, only except on a couple of points. One, this is a very
20 minor point to this case. Two, it is in response to testimony
21 that was filed, direct testimony filed by Staff for interveners.

22

23

24 Third, if somebody challenges you on a number, just
25 like a court can support the decision of a lower court on any

1 theory, our witnesses, I think, if they are being pushed to
2 challenge, can support their original testimony on anything,
3 including any new information that they might have.

4 I don't think that anybody is shifting theories, to
5 get to your point. There's no attempt to say, well, we're
6 shifting theories.

7 For example, on the DOC, DOC is a way of illustrating
8 that compared to the methodology that we were using and
9 supporting, here's the comparison. It's not -- we're not trying
10 to say adopt DOC. That's not our new theory. We're not saying
11 we're abandoning the theory that we have. We're saying, if you
12 apply DOC, here's the number that you get, and it's not that
13 different from the number we have in these circumstances.

14 So I think the context of the rebuttal testimony is
15 very important, and it's kind of a broad brush approach where
16 people say, well, we have a lot of testimony, so therefore some
17 of it must not be true rebuttal. My general comments are that
18 that is not true. We have tried to fashion all of this to be
19 directly responsive in an explanatory way that's understandable
20 and useful.

21 The key here is what is going to be useful to get to
22 the truth to set a rate that is fair, just, reasonable and
23
24 sufficient for a company that is in dire financial need, and has
25 a public safety function. And if we were looking at a strict

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1 court case where we said wait a minute, you said this crash was
2 caused by a kid running in front of the car, and now you are
3 saying it was caused by something else, we can't allow that to
4 happen. This is a whole different background and set of
5 standards that we need to look at, and we think it's been fairly
6 met.

7 As I say, there's a lot of confusion about what we're
8 responding to. The witnesses themselves can answer that if
9 there's a question, and it merely goes to the weight. If the
10 Commission is convinced that we have imported some brand new
11 theory that some witness is on the stand, and that witness is
12 cross examined and says, haven't you come up with something
13 brand new and you are not responding to anybody at all, I think
14 the Commission could fairly say maybe we ought to strike that
15 testimony.

16 But I think going in the abstract, and certainly
17 asking me without the benefit of having my witness here with me
18 to say what is it that we're trying to get at, strikes me as a
19 procedure that's going to be unavailed. I can give you my best
20 explanation having been involved with most of the witnesses'
21 testimony, but not all of them.

22 COMMISSIONER HEMSTAD: I don't want to pursue it any
23 further.

24

25 JUDGE WALLIS: Mr. Marshall, your time is expired.

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1 Let's move on to the next part of this discussion, and Tesoro
2 has a presentation of 15 minutes.

3 CHAIRWOMAN SHOWALTER: Can you make clear to us what
4 part B is, since I think --

5 JUDGE WALLIS: Part B is motions to strike and
6 addressing specific witnesses. Part A was motions to strike
7 matters that are general across the board, and applicable to all
8 or many of the witnesses. We did change the microphones, and I
9 believe the one up there now has fresh batteries.

10 MR. BRENA: Could I ask you to start my time from now,
11 please?

12 JUDGE WALLIS: Yes.

13 MR. BRENA: I want to reserve -- I could have used
14 some of this time for my reply, so I want to use one minute of
15 it for reply.

16 CHAIRWOMAN SHOWALTER: That's not working very well.
17 Maybe if you speak right into it.

18 MR. BRENA: Okay. I suppose I lost that time. I
19 think that the core of this is what Commissioner Hemstad was
20 saying, is this information that was available to you at the
21 time you filed your direct? Have you changed your theory or
22 methodology, or as circumstances change, so that you need to
23 bring it to the Commission? That's the core of it.

24 Commissioner Hemstad, with regard to AFDUC, they went
25

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1 back and related the capital structure and rate of return all
2 the way back to 1983, and came up with new AFDUC numbers. But
3 let me point out with regard to Witness Schink, we have not
4 moved to strike that portion of his testimony where he updates
5 his case based on current publicly available financial
6 information. We have not moved to strike that.

7 He goes on to change his methodology in the next
8 section. We have moved to strike that. So that's where we drew
9 the line.

10 A very similar place, the information wasn't available
11 to him before, but when he -- when he starts changing
12 methodology and advancing alternative methodologies on rebuttal,
13 that we have no opportunity to address or respond to, that's
14 where we filed the motion to strike.

15 So the answer to your question is the theories and
16 methodologies have changed dramatically. So dramatically that
17 it's almost impossible to ferret through the alternative
18 cases.

19 CHAIRWOMAN SHOWALTER: But you do grant that there's
20 some information theoretically that a party has at the outset of
21 its case, but it doesn't put in until rebuttal simply and only
22 because it responds appropriately to the response that it got
23 from the other parties? I mean, isn't there such a thing --

24 MR. BRENA: No. Supplemental direct is not
25 permissible rebuttal.

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1

2 CHAIRWOMAN SHOWALTER: But if you disagree with your
3 proponent's position or theory or facts, and you point that out,
4 it might be something that you had in your head at the outset,
5 but maybe didn't reasonably anticipate. Wouldn't that be a
6 case?

7 MR. BRENA: Yes. If it's beyond the reasonable
8 anticipation, then I agree with -- if you have no idea the issue
9 is likely to be raised, and it's not available to you, or if
10 it's not available to you in your direct, I follow your
11 reasoning and agree with it.

12 These cases aren't close to that, though. And I would
13 like to turn to page 15 of my motion, and go through it a
14 witness at a time, if I may.

15 Witness Schink is one of the -- Schink is one of the
16 witnesses, and he said this -- sets forth the basic regulatory
17 frame work for Olympic's case. Now what about the basic
18 regulatory frame work was not available to Olympic in its
19 direct? It was absolutely available in its direct.

20 And what they have done through witness Schink is put
21 on for the first time the regulatory frame work, policy and
22 legal interpretation that they want applied to their direct
23 case.

24 The question isn't can they find one of our witnesses
25 that said something about regulatory policy. The question is,

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1 should they have put it on in their direct case. And the answer
2
3 is yes, if it was available to them, they should have let their
4 position be known on their direct case.

5 As to what the regulatory frame work is, we shouldn't
6 be finding out the basic regulatory frame work for this
7 Commission to decide this proceeding on rebuttal. That should
8 be struck.

9 Water-borne competition, he goes into water-borne
10 competition. If he had something to say about water-borne
11 competition, he should have done it on direct. He didn't. He
12 shouldn't be able to supplement what he said on direct with
13 regard to that point.

14 And I have made an additional point. They have not
15 proposed or requested competitive based rates, and it doesn't
16 matter what it cost to freight something out of here for the
17 purposes of setting a rate. We're here to discuss a cost basis
18 rate, so it shouldn't be there either way.

19 On page 16, I go pages 36 to 39, he goes through a
20 general description of both FERC and WUTC approaches to the cost
21 of capital, and a detailed analysis of legal authority. Why is
22 that on rebuttal? What wasn't available about that? Clearly it
23 should have been direct. We shouldn't find out his perspective
24 on the different regulatory approaches on the rebuttal case when
25 we have no opportunity to cross examine.

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1 COMMISSIONER HEMSTAD: You mentioned 36 to 39. I
2 don't see that in here.

3

4 MR. BRENA: Yes, it's on page 16. And if you look, I
5 have bracketed information at the beginning of paragraphs.

6 COMMISSIONER HEMSTAD: That's 39 to 49.

7 MR. BRENA: Yes. Did I say something different? 39
8 to 49. On the next page, 17, this is where he changed the
9 underlying FERC methodology to determine the cost of the capital
10 in his direct case, and he puts forward an alternative case. He
11 asks a couple of things. We haven't objected to him updating
12 his information based on publicly available information, but
13 when he changes the case, we think it should be struck.

14 Go down two paragraphs, pages 59 to 61, a new
15 alternative method for calculating risk premium additer for
16 Olympic. He comes up with a whole new theory for risk, and then
17 applies it to the case. Should be struck.

18 To switch over to page 18, Larry Peck, he makes the
19 point on rebuttal, Olympic may not be able to attract capital
20 unless it gets that rate increase. What about that position
21 wasn't available to him on direct? Why is it that we have to
22 know Mr. Peck's position of what BP's position may or may not be
23 with regard to attracting capital for this pipeline on rebuttal?

24 All of that was available on direct. They chose to
25 sit it out, and come in with a witness who questions it all. No

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1 discovery. No opportunity to oppose them. No opportunity to
2 cross examine.

3

4 Bob Batch, on the bottom of 18. They come in and say,
5 we can't do our capital improvements without the rate increase,
6 and they set forth a number of 66 million dollars. What about
7 that isn't available? We argued for zero rate increase in the
8 interim proceeding.

9 I mean, clearly, Tesoro has argued for lower rates.
10 Clearly it's within the reasonable anticipation of their direct
11 case of what happens if you don't get the rate increase. This
12 supplemental direct and should not be allowed for rebuttal.
13 ins puts on three new cost of service cases in
14 is rebuttal. Turning over to page 20, with all new financial
15 and regulatory information, some of which, based on financial
16 information that's never been discovered, others have changed
17 the whole different methodologies and theories of the case.
18 Shouldn't be allowed.

19 To give an example, Olympic has changed its method for
20 test period adjustments. In the old case they used budgeted
21 information from the prior year carried forward from July 2000.
22 In the new case for their test period adjustments, they rely
23 upon October 1, 2001 through October 30, 2002, actual expenses,
24 plus two months' forecast for May and June, annualize it, and
25 apply it back. The whole way they calculate operating expenses

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1 in their case has changed. The whole way they think about it.
2 This isn't just you updating numbers. It's a whole different
3
4 period, a whole different calculation, and whole different
5 methodology. Shouldn't be allowed.

6 Oil losses, they have changed their methodology for
7 calculating oil losses. Fuel and power numbers, expenses, they
8 have changed their methodology for determining that. Mediation,
9 they have changed their methodology for determining that. New
10 capital, new cost of debt, and new rate of return. They have
11 come up with their fourth way of calculating through-put in this
12 case. The fourth way.

13 In fact, their new rates don't even support their rate
14 filing. They come in at 59 and a half percent. Their rate
15 filing was 62. Their own new cases don't even support their
16 rate filing anymore.

17 These new alternative cases should not be allowed.
18 Nobody has had any opportunity to do this. It's just not fair.

19

20 Going to page 22, Ms. Hammer, she's the one that
21 provides this new information in these different regulatory
22 numbers and theories.

23 CHAIRWOMAN SHOWALTER: Can you be a little more
24 specific? When you say a whole new methodology for calculating
25 through-put, for example, what do you mean by a whole new

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1 method?

2 MR. BRENA: The way that they calculated through-put
3 in case two of the direct case, which is the case they represented
4
5 to the parties and Commission that they intended to use to
6 support some rates filing, that was the representation that we
7 relied on in putting our case together. Our entire case is
8 based on that representation in that they used two cycles in
9 July for through-put, and then used a calculation that they set
10 forward based on those two cycles in July.

11 They had, at the time, they had five months available
12 of actual information. That could have gone to actual
13 information. They didn't. Now they are using or trying to use
14 nine months of actual. And the whole point is that's a whole
15 different approach to through-put.

16 So to answer your question specifically, it's not that
17 they said, let's use actual in their direct case, in case two of
18 their direct case, and now they are saying, well, here's new
19 actual numbers. They have also changed the periods. They have
20 changed periods from outside of their basis period.

21 There isn't anything about the methodology for
22 calculating through-put. They have changed their underlying
23 theory of how it should be advanced.

24 Cynthia Hammer sets forth the new numbers. No
25 opportunity to depose her on them. No opportunity to explore

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1 them. Not all right.

2 James Mach on page 23, he's the Ernst and Young guy.
3 He comes in and says we will have our audit done soon. Why
4 isn't that something they could have put on the direct case? Is
5
6 there any secret that this Commission wanted to know when the
7 audit should be done? The time to do it would have been direct.
8 We would have had an opportunity to explore why he's saying what
9 he's saying, let me do it that way. His entire testimony should
10 be struck. It was -- it's supplemental direct.

11 Leon Smith is the best pure example. They have come up
12 with a methodology guy in their rebuttal case. He goes through
13 the broad regulatory policy and principles relating to FERC's
14 approach to regulation of oil pipelines, and from those argues
15 that this Commission should apply those.

16 What is wrong with that being in the direct case so we
17 could respond to his points in the case? That's as clear an
18 example as I can conceive of of what their direct case should
19 have been.

20 And if you recall back to the motion to strike and
21 motions to dismiss, it goes to the complete lack of a witness
22 that did that. Well, it isn't that they didn't recognize the
23 need to do it, they did. It goes to the heart of their case.
24 They just did it in rebuttal behind us a week before hearing.

25 Omohundro applies a whole new set of regulatory

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1 principles and policies to adjust Olympic's direct case. She
2 has a whole new analysis of the public interest. She's goes
3 into a detailed analysis of Hope. She has all kinds of legal
4 analyses and new factors that this Commission should consider.
5 She's not defending what she said in her direct case. She's
6
7 putting forward a whole different regulatory frame work for this
8 Commission to adopt in her rebuttal.

9 Dan Cummings, he points out new federal regulations,
10 new state regulations, local regulations, franchise agreements,
11 pending public interest analysis, all of that was available in
12 the direct. All of it is put in behind us. None of it did they
13 rely on for their numbers. None of it.

14 CHAIRWOMAN SHOWALTER: So none of those particular
15 items were adopted or changed after the direct case?

16 MR. BRENA: All of it is new.

17 CHAIRWOMAN SHOWALTER: Well, no, I mean were the
18 regulations and laws that Mr. Cummings refers to the same today
19 as they were on the date the direct case was filed?

20 MR. BRENA: As a broad brush, the answer would be,
21 yes. There may be --

22 CHAIRWOMAN SHOWALTER: Do you agree if there were some
23 new ones, especially laws that -- well --

24 MR. BRENA: Well, the appropriate mechanism would have
25 been to file a motion for supplemental direct and to file the

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1 supplemental direct so we had an opportunity to file answering
2 testimony, not now bring it in and sandbag it and put it in in
3 rebuttal where no one has the opportunity to address it.

4 So that would have been the appropriate mechanism for
5 him to use for those types of changes.

6 Tom Wicklund, high consequence areas analysis, well,
7
8 nobody put on any testimony even about high consequence areas,
9 so it wasn't only information that was available or reasonably
10 available, or everybody saw coming down the pike. I mean, they
11 have been talking about this for months. It could have come in
12 then, but there isn't even any testimony in the answering case
13 about it, and they don't rely on it to support their numbers.

14 They are trying to say, look at all of these things,
15 therefore, give us a higher rate. They can say that as long as
16 they say it in their direct case. They can't say that.

17 When it comes to their direct case, Bob Talley, he
18 comes in and goes to the 66 million over the next three years to
19 make improvements. We don't have any evidence or discovery
20 supporting that number or whether they can or cannot. If they
21 had a problem with not getting the rate increase that went to
22 whether or not they could make future improvements, they
23 should have said so in direct.

24 CHAIRWOMAN SHOWALTER: I have a question. Supposing
25 there is a new regulation or law that takes effect, or whose

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1 effect was known only after the direct case, and the company
2 failed to bring it to our attention until rebuttal. Where is
3 the appropriate place for the company or the Commission to take
4 into account that new law or regulation?

5 MR. BRENA: First let me say that's not what is
6 happening here on a global scale. But in terms of responding to
7 a hypothetical like that, I believe that if there's really a
8
9 ground shift, then with regard to something which they haven't
10 relied on for their case, even in rebuttal they don't quantify
11 any costs. So -- in this case they don't even quantify costs
12 that go to the issue.

13 But, you know, then, what you have to do, if you want
14 to change the rules midstream, if you want to allow a rebuttal
15 case to come in, that's either not available then, what you have
16 to do is allow us an opportunity for discovery, God forbid. And
17 then what we have to do is have an opportunity to answer it, and
18 go through the process. If it's really that significant, or
19 that's what happens, that doesn't mean in trying to reach
20 fairness for the company that we're ignored. Then you have to
21 balance it and say, okay, the ground has changed; therefore,
22 let's give everybody a shot at it.

23 Again, the ground hasn't changed so it justifies that
24 kind of delay and expense, and to allow them to come in and
25 change their case for the eighth time --

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1 JUDGE WALLIS: Mr. Brena, your time has expired.

2

3 MR. BRENA: And with regard to Fox -- and I will end on
4 this point. He proposes to answer the Commission's change
5 questions in its interim rate order, and Mr. Marshall was right.
6 That should be struck. The Commission asked the company
7 specific questions in its interim order, said it had concerns.
8 So not only -- and they didn't address them. And now because
9
10 the Staff does, they say, well, the Staff did; therefore, we
11 should be able to respond to that. Not correct.

12 That is -- those are answers they should have supplied
13 under direct. So instead of Staff responding to them, Staff
14 could have responded to them and commented. And their response
15 to them should be struck. Thank you.

16 MR. TROTTER: Donald T. Trotter, assistant attorney
17 general for Staff. Our motion to strike is more limited due to
18 time to prepare and we have focused in on the methodology issue
19 almost exclusively. If you determine, as I think you should, that
20 this company should have defended the methodology they filed for
21 all the reasons that they have stated, then certainly it's
22 improper in rebuttal for them to do that for the first time.

23 We believe that's exactly the situation here, so,
24 therefore, certain testimony needs to be stricken. First is Mr.
25 Leon Smith in its entirety. He goes through and in great detail

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1 a basis for the company's use of the FERC methodology. That's a
2 direct case issue.

3 Mr. Schink -- and there may be more places that Mr.
4 Schink, we should have moved to strike, but the one we're
5 focusing on is where he defends the FERC methodology. Again,
6 Olympic made the choice to file identical items of Mr. Schink at
7 FERC and here at WUTC. He didn't have to defend the
8 methodology. He just had to apply it. Well, here you have to
9 defend the methodology.

10

11 CHAIRWOMAN SHOWALTER: Can you speak louder or closer
12 to the microphone?

13 MR. TROTTER: I shall. Sorry. He also provides for
14 the first time a theory that if you should change methodologies,
15 you owe the company a transition payment in order to do so. We
16 think that's wrong as a matter of law.

17 But, again, the Company knew that a change of
18 methodology was possible in this case even under their own
19 theory that the Commission had adopted one, namely the FERC
20 methodology. So that certainly was an issue they could and
21 should have been addressed in their direct case. But we don't think
22 it's lawful anyway, and it is a bit frustrating when you have a
23 utility say, Oh, well, you can't change, because, or if you do,
24 you owe us a lot of money.

25 I challenge you to find in any of the filings that you

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1 will be treated to over the next two weeks, perhaps, any case of
2 the Company making that claim. I suggest if they had made that
3 claim you might have suspended that one.

4 The other two testimonies that were -- we were
5 striking are portions of witnesses that refer to witness Smith
6 and Schink. So there's really nothing to add other than it just
7 follows by matter of logic. So that's the basis for our motion
8 and the reasons why.

9 COMMISSIONER HEMSTAD: I have a couple of questions.
10 I believe you began your remarks by saying that you were
11
12 focusing on methodology, because of a block of time. Do I take
13 it from that you are not necessarily disagreeing with Mr. Brena,
14 but you hadn't had time to analyze it?

15 MR. TROTTER: I have looked through many of his -- I
16 would be generally be in agreement with most of them. With
17 respect to Mr. Fox, those issues did come in in an order, the
18 eight questions that did come up in an order that was post-dated
19 December 13 when they filed their case. So the question then
20 becomes, is rebuttal the appropriate place, or should they have
21 asked for supplemental direct?

22 I recall -- well, I know what we did when we saw your
23 order. We immediately issued discovery to the Company asking
24 them to produce evidence on those points, because as of that
25 time we didn't have any. And Mr. Elgin recites that

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1 evidence to you in his testimony to respond to those questions.

2

3 And so I -- it's a good question. Should the Company
4 -- is rebuttal the place for that? If the Staff had said
5 nothing thinking it was the Company's burden, it would have come
6 in on rebuttal and we would have had no chance to discover. But
7 we made a decision to go ahead and take it on.

8 In theory, they probably should have asked for the
9 opportunity to place -- file supplemental direct, because those
10 were specific issues placed into evidence and a direct case
11 would have been appropriate. So I think it's a close question.

12

13

14 One final note, on the issue of regulations, I do
15 think some of the regulations were proposed at the time they
16 filed direct and became final, I think, in January. Might be
17 federal regulations, I don't have them committed to memory.

18 And to some degree, again, is that subject to
19 supplemental direct or not? I think the key point is they are
20 not assigning -- they are not making any adjustments for those
21 regulations, or the impact on the Company. So it's a bit of an
22 issue that doesn't have a lot of concreteness to it.

23 JUDGE WALLIS: Mr. Trotter, your time is up.

24 COMMISSIONER HEMSTAD: I have one other question.

25 Assuming, for the purpose of discussion here, that we do not

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1 grant the motion to dismiss, which then would seem to follow
2 from that that the Company will be able to maintain its position
3 with regard to methodology. Does that affect your view on
4 whether Mr. Smith's testimony should still be stricken?

5 MR. TROTTER: It depends on what you say in your
6 order. But it's very clear to me in reading the direct case
7 that they have not defended the propriety of the details of the
8 methods.

9 Ms. Omohundro says that she isn't an expert in FERC
10 methodology of this, but don't change it. We need more money.
11 That's not defense of methodology. That's defense of the money.
12 And so in that regard, Mr. Smith would not necessarily be proper
13
14 rebuttal in that context.

15 So it depends on the basis of your order. If you
16 think the Company made an appropriate direct case on
17 methodology, and that Staff is criticizing that and suggesting a
18 different one, then it would be proper rebuttal. So it depends
19 on the basis for your decision. Thank you.

20 JUDGE WALLIS: Mr. Finklea.

21 MR. FINKLEA: Our motion to strike is limited to two
22 witnesses. And, again, much like Staff was, in the interest of
23 time, we focused on two areas. One is Dr. Schink's testimony on
24 the risk premium additer, and the second is Mr. Collins.

25 My issues with Mr. Collins are on pages five and six

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1 of my motion to strike from yesterday, and are basically similar
2 to what Mr. Brena talked about. So I am just going to focus on
3 Dr. Schink.

4 And it goes exactly to what I was talking about when I
5 was up here on the general. Our issue with Dr. Schink's
6 testimony on rate of return is he has advanced, now, on
7 rebuttal, two theories for a risk premium, when in his direct
8 case he had one theory.

9 And he has gone from a .75 risk premium based on
10 theory one, to .95 based on the two theories. And his two
11 theories are in rebuttal. The new theory is because the company
12 faces the risk of financial failure, that this is a risky
13 company and it needs a higher return.

14

15 That's something the economists can debate. I have
16 Dr. Means, who's my economist. He put in testimony responding
17 to the issue about the water based transportation as a
18 competitive alternative. That's how these cases go. Somebody
19 puts in a theory, and somebody comes back and says, no, that's
20 wrong because.

21 But we never heard about this other theory until
22 rebuttal last week. Dr. Means doesn't have any opportunity to
23 put in rebuttal now about whether, because this company is in
24 financial difficulty, it should or shouldn't have a higher rate
25 of return than if it wasn't in financial difficulty, or if it is

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1 even in the kind of financial difficulty that would justify it.

2

3 Because it's being raised in rebuttal, there's no
4 opportunity to respond. That's not saying now that Greenspan
5 changed the interest rates four times since December, and
6 therefore we need to update our figures. That's a different
7 issue. We can all go to the same Wall Street Journal and
8 determine what Allen Greenspan has done since December.

9 But to introduce on rebuttal a new theory on why the
10 risk premium should be X, but now it's not just X, it's X plus
11 now, that's not proper rebuttal.

12 So what we have focused on particularly with Dr.
13 Schink is that we have asked that all of that testimony be
14 struck.

15

16 And the other area of testimony of Dr. Schink is on
17 through-put, because he has changed the through-put figures, not
18 just updating but essentially changing the test period that
19 would be used to determine the through-put.

20 And then he has also proposed to change the equity
21 ratio of the company from 82.92 to 86.85. And again, this
22 isn't, in our opinion, just updating figures, but changing
23 theories.

24 So that's the area that we're focused on. Like Mr.
25 Trotter, we have been so swamped that this was two areas that we

1 saw as particularly egregious, and we were aware that Staff was
2 focused on the federal versus the state method of --

3 I agree with Mr. Trotter, and agree with Mr. Brena
4 on his comments in the other areas that ought to be struck. I
5 think we have a very egregious situation on the eve of trial,
6 knowing we had a compressed schedule, that the parties are
7 seeing dramatically new theories being introduced to justify
8 higher figures than what were asked for to begin with.

9 We don't quite understand why, but we know that the
10 way the rules are to be played, this is not the way they are to
11 be played.

12 The other witnesses will not have an opportunity to
13 address these issues, so unless these testimony pieces, like Dr.
14 Schink, are struck, then the only way to address this is going
15 to be through very long laborious cross examination where the
16
17 parties have not really had an opportunity to engage in the kind
18 of discovery and preparation that you normally would, is why you
19 don't put in this kind of stuff in rebuttal.

20 JUDGE WALLIS: Questions?

21 CHAIRWOMAN SHOWALTER: Well, I have a practical
22 question. If we continue the case, or dismiss the case, either
23 one, there's no tomorrow morning, which if we were inclined that
24 way, we could announce that tomorrow morning. We won't be in a
25 position to announce anything today.

1 On the other hand, if we proceed tomorrow morning with
2 the case, how are you going to know what you are preparing for
3 for tomorrow? That is -- and I don't mean this to feed into
4 your arguments. I realize it does. But I have a more practical
5 question.

6 Should we strike portions -- for example, is there
7 a way to proceed? Should we not strike portions? Is there a way
8 to proceed, and might those be different if we do not strike
9 certain portions? Is it appropriate to have them raised later
10 in the process, for example?

11 MR. FINKLEA: Well, we have a witness order that's
12 been established, and I do think that if you decide to neither
13 continue the case or dismiss it in total, or dismiss it in part,
14 that the issues about what is and isn't proper rebuttal --
15 because the hearing is going to go on for two weeks, we don't
16 really have to decide by tomorrow morning every piece of
17
18 rebuttal that should be struck. But the sooner the better so
19 that those of us who are preparing to cross examine can know
20 what we're cross examining on.

21 Of the witness that go -- this is just very practical
22 points at this point. Of the witnesses that go first,
23 fortunately we do have Mr. Hanley and Dr. Wilson for Staff
24 who are also going early, just so we focus on cost of capital.
25 So of the company witnesses, the only one that is up right away

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1 is Dr. Schink.

2 CHAIRWOMAN SHOWALTER: Well, I see Peck and Schink
3 listed here.

4 JUDGE WALLIS: Earlier today the Company explained
5 that Mr. Peck would not be available as they thought he would
6 when they requested this order, and consequently he will be
7 appearing the first of next week.

8 CHAIRWOMAN SHOWALTER: So it really, then, boils down
9 to the first day, anyway, for Schink's testimony, and what is or
10 isn't allowed?

11 MR. FINKLEA: That's correct. If we go out on a
12 rolling 24-hour basis.

13 JUDGE WALLIS: Thank you, Mr. Finklea.

14 Mr. Marshall.

15 MR. MARSHALL: Let me address Chairwoman Showalter
16 about mechanics.

17 CHAIRWOMAN SHOWALTER: Excuse me, Mr. Marshall. Could
18
19 you bring that microphone right up close to you, please?

20 MR. MARSHALL: Sure. We had proposed earlier today
21 that what we do is look at these witnesses as they come up for
22 two reasons. One, it's going to be very hard to go through all
23 of this. For example, Tesoro's motion was received on the 17th
24 of June. That's yesterday. It was received after hours. We
25 haven't had an opportunity to go through the multiple pages of

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1 this 27-page submission with our witnesses to develop any kind
2 of written response, much less an oral response, so it's
3 difficult.

4 And I wanted to preface my comments here on these
5 specific issues to really address them in a fair way for the
6 Commissioners. I think it would be best to take a look at these
7 as these witnesses come up.

8 Now, we're confident that these, as we mentioned
9 before in the broader -- our fair rebuttal of trying to get at
10 the information that was raised by the other side, Staff and
11 interveners.

12 And to the extent that we link all of these things up
13 with these witnesses, I don't have any expectation of a turn-out
14 anything other than that.

15 The problem we have, of course, is one of trying to do
16 those linkages in a fair way. We think they can all be done.

17 The other alternative is we filed our rebuttal last
18 week, exactly a week ago on Tuesday, the 11th. After that we
19
20 filed our motion for a continuance. And in the motion for
21 continuance, we noted that one of the reasons for continuance is
22 what we have heard here today. We haven't had a chance to do
23 data requests on rebuttal. We haven't had a chance to do
24 depositions.

25 Well, that was a consequence of the compressed

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1 schedule. There would be very little time for data requests or
2 depositions. We had very little time for depositions. We
3 wanted to take a number of depositions that we simply had no
4 time to do. The few that we did, those were truncated as well.
5 So we would have enjoyed that opportunity and the way of doing
6 that.

7 The fair way would be to grant the motion for
8 continuance.

9 MR. BRENA: Your Honor --

10 CHAIRWOMAN SHOWALTER: Mr. Marshall, the issue here is
11 whether the motion to strike certain portions of the testimony
12 should be granted, because they are inappropriate rebuttal. And
13 you really need to spend your time on that, otherwise you
14 haven't made an argument.

15 MR. MARSHALL: Again, I think part of what they are
16 saying is they want more discovery. Let me go into the details
17 of this. For example, on Mr. Fox, Mr. Fox did present testimony
18 after the interim case based on questions asked in the interim
19 case. The interim case came more than a month after the direct
20
21 case was filed. It was also in response to just one witness
22 from Staff intervener, Mr. Elgin. None of the other witnesses
23 decided to answer those questions, neither Tosco nor Tesoro. We
24 did, and we think that was proper.

25 On through-put, through-put is going to be a big

1 issue. We had a test period through-put of 83 million barrels a
2 year. That's what Staff says for 2211. That test period had to
3 be adjusted because it was higher. So the question is, what is
4 a known and measurable condition to adjust the test year.

5 Originally we only had one month to look at, July
6 2211, to do the adjustment, or when this case was first filed at
7 the FERC. Now we have ten months that we can use to make the
8 adjustment that's known and measurable.

9 It's a condition that changed. We didn't have ten
10 months of through-put when we filed the direct case. We thought
11 at the time we did the best we could to make an adjustment, but
12 by taking what is known and measurable, you are talking about
13 things like power costs and things, things will change.

14 We have actual data. It is best to use actual data,
15 data we didn't have two months ago. We didn't have last month's
16 data the month before. Now we have a relatively representative
17 year. In fact, if we keep the record open, we would have an
18 entire full year before the Commission has to decide on
19 through-put. That's the best way of handling it. That's what
20 we have suggested.

21

22 We have also suggested in response to complaints by
23 the other side that we do an automatic through-put adjustment
24 mechanism. The concern is this would set the through-put at a
25 low level, and we would actually be able to achieve a higher

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1 level, we are agreeable to doing an automatic through-put
2 adjustment mechanism.

3 So those are the two things that not only fairly
4 responded to what the other side had said, but also used data
5 that is new.

6 On regulations Mr. Cummings does attach to his
7 testimony a regulation that was adopted in final form at the
8 federal level on high consequence areas in January of 2212. It
9 wasn't available to us in a final form in December. We did
10 refer to it, but the whole point of talking about it is that the
11 other side has said, well, your problems all relate to Whatcom
12 Creek.

13 The high consequence areas and the integrity
14 management programs and the federal legislation relate more to
15 the expenses that Olympic has incurred in trying to deal with
16 the ERW weld seam failures. You will hear a lot about the weld
17 seam failures. But there's a consequence. What these
18 regulations require in areas like we are in right now, high
19 consequence with high population, unusually sensitive areas or
20 navigable water ways, you have to spend a lot of money now --
21 all major pipelines in the United States have to do this. And
22
23 Olympic is no different. That cost is a cost that is going to
24 continue to occur.

25 There's a big debate about our one-time costs.

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1 One-time costs we identify as costs that have gone up. They are
2 not one-time costs. They're a new higher level of costs in
3 large part due to the change in regulation at the federal level.

4 We also know there are new state regulations that are
5 in the works. They aren't here yet, but we can guess -- we
6 don't have to guess. We know whatever happens to costs relating
7 to safety they are not going to go down. And that was a fair
8 point to be made about those regulations that are in the
9 pipeline.

10 CHAIRWOMAN SHOWALTER: But for example, on the new
11 high impact area regulations, first of all, weren't they clear
12 as to their content? Well, before they actually took -- but in
13 any event, they took effect January 1; is that correct?

14 MR. MARSHALL: The final rules were January 2212.

15 CHAIRWOMAN SHOWALTER: All right. In that case, why
16 didn't the company file supplemental direct saying here is the
17 new regulation, and it triggered some set of extra expenses so
18 that would be part of the direct case, and the parties would
19 have a chance to respond to it?

20 MR. MARSHALL: Actually we did file the proposed
21 regulations, which were attached to Mr. Batch's testimony on
22
23 December 13. And we described that in detail, and we described
24 what that was going to do.

25 Mr. Cummings says, look, these have now become

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1 permanent, and we know now about what the costs are going to be
2 in the high consequence areas. We know we're going to have to
3 ll of these integrity management programs. There's no
4 let-up. There's no relief. These costs are going to continue at a
5 high plateau, but they had a fair opportunity to ask about it.

6

7 And they are confused, because Whatcom Creek was the
8 result of an ERW weld seam failure. It was a result of a
9 backhoe. We can all agree it wasn't an ERC weld seam failure.

10

11 And these regulations and the cost of these TFI runs,
12 and all of the tests that have been done, we need to show,
13 because it's gotten confused in the case presented by Staff and
14 interveners, as to what were the consequences of certain things
15 and certain events. They are all trying to blame it on Whatcom
16 Creek. This would have happened no matter what.

17 COMMISSIONER HEMSTAD: If I can direct your attention
18 to the rebuttal item of Leon Smith. What is your response to
19 the position of both -- well, all of the parties?

20 MR. MARSHALL: Leon Smith tries to correct a number of
21 errors that have been made by the other parties, Staff and
22 interveners, on starting rate base, on original costs, and on

23

24 basic accounting issues on how this federal methodology gets
25 applied.

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1 The federal methodology is one issue. Confusion on
2 how it's applied is another issue. What accounting records do
3 you need, what kind of adjustments are required by that, what is
4 starting rate base and can you have a deferred return if you are
5 overearning. They claim if you are overearning, you can't get
6 a deferred return.

7 Well, they are just wrong. They just don't understand
8 the basics of how it works based on what is out there, and how
9 it's been in operation, and how it's laid out.

10 So Leon Smith, he talks about how the people -- Mr.
11 Kermode and the others are just wrong in their interpretation.
12 Mr. Kermode things SAF 71 applies. Mr. Smith says no, it
13 doesn't. It can't apply, and gives the reasons why it can't
14 apply.

15 So, again, the trouble with this broad brush approach,
16 and also with our not having been able to go through it, there
17 are answers to every one of these questions. Well, why is Mr.
18 Smith talking about this or that, or this basis of --

19 COMMISSIONER HEMSTAD: Now, let me be quite specific.
20 What is your response to Mr. Finklea's description of the
21 testimony of Mr. Schink in coming up with the new theory on risk
22 premium?

23 MR. MARSHALL: The difference between .75 and .95, as
24
25 I understand it, is question on risk theory. And I have to say

1 that I think Mr. Schink talked about risk theory on water-borne
2 transportation on his direct case in some detail, and he's added
3 data based on a push back from the other side.

4 So on the water-borne competition there's no new
5 information. There's a response to what they have said about,
6 well, you didn't tell us about this or that on water-borne
7 competition. And he does that.

8 He's also, I believe, stating that because of the
9 circumstances Olympic finds itself in, there really is a risk of
10 bankruptcy. A risk premium that should be taken into account
11 for the precarious financial condition that Staff and
12 interveners' recommendations replace the company, and if that
13 risk continues to hang over, and the risk of refund, the risk of
14 all these other things. But Mr. Schink will be here tomorrow
15 and he can be asked about that tomorrow.

16 Part of the issue here is we're being asked to jump to
17 conclusions, a lot of conclusions about, well, is this really
18 rebuttal, and what did you know, and when did you know it?

19 The best thing to do is ask these folks under cross
20 examination. If Mr. Finklea has an issue about a small part of
21 a risk premium, let him ask those questions. But to just
22 peremptorily say it doesn't appear to us that it might link to
23 somebody else's testimony at this stage, when we have had
24 slightly no ability to call other witnesses and ask them to

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1 respond to this pleading that we got after hours last night is
2 -- that is not due process for us to have to try to respond to
3 27 pages of allegations, many of which I think Tesoro has had to
4 admit are wrongly premised.

5 They thought the interim case came before the correct
6 case. They thought Mr. Fox was not responding to Mr. Elgin.
7 These are the kinds of things, if we act without a full record,
8 we're acting to deprive the Commission of valuable information.

9

10 In general terms I would expect and hope and urge that
11 the Commission err on the side of receiving more information
12 rather than less, because the public interest -- it doesn't harm
13 anybody to have more information.

14 COMMISSIONER HEMSTAD: I have one other question,
15 please. What is the Company's position now on which cost of
16 service study it is relying upon? And I am looking again at the
17 summary in Mr. Brena's brief on page 14.

18 MR. MARSHALL: Well, certainly, as I mentioned before,
19 this direct case one is not there. And, you know, I haven't
20 gone through all of this in detail --

21 COMMISSIONER HEMSTAD: But are you relying on multiple
22 theories of the cost of service?

23 MR. MARSHALL: No. For example, on the last column,
24 DOC, we're not urging that this Commission adopt a DOC
25 methodology. We're using that by comparison to show how these

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1

2 numbers work out.

3

COMMISSIONER HEMSTAD: Are you relying on the next
4 column over, the next --

5

MR. MARSHALL: I have to say I don't know where he got
6 these particular columns. He has labeled them with his own
7 labels, and they are argumentative. They are designed to try to
8 show, gosh, you had all of these things out here. Well, no, we
9 don't have a May or July filing. Those have never been part of
10 this case. The direct case No. 1 was not there.

11

COMMISSIONER HEMSTAD: We all agree to that. But I am
12 trying to get a handle on what is the focus of your case going
13 to be at this point, assuming that we deny all the motions and
14 we proceed.

15

Now, which cost of service study are you going to rely
16 upon?

17

MR. MARSHALL: This is Mr. Brena's table. The right
18 person for me to ask that question would be Mr. Collins.
19 But it would be in case 2 corrected, and case 2 revised. Which,
20 for the life of me, I don't know where Mr. Brena came up with
21 corrected versus revised.

22

But we presented case 2 because of various changes,
23 both in things like through-put and capital structure, and some
24 other numbers that do change over the period of time since it's
25 been filed, there will be adjustments. And there should be

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1 adjustments. This only makes sense. If you have better numbers
2
3 on through-put, you use that better number on that. On power
4 you use that.

5 COMMISSIONER HEMSTAD: I understand. I am only trying
6 to get a matter for our own ability to focus.

7 MR. MARSHALL: And there are adjustments to whether we
8 accept what the Staff and interveners have said. So there will
9 be adjustments from the case filed originally in December.

10 COMMISSIONER HEMSTAD: Let me put it this way. We are
11 -- if we're proceeding on a classic rate case proceeding, the
12 Company would put on a direct case, and the parties would cross
13 those witnesses. And I assume if that were the case, you would
14 have probably relied on direct case 2, because having apparently
15 abandoned direct case 1, the Staff would have -- Staff and
16 Interveners would have put on their cases, and then the Company
17 would have rebutted with a revised case of some kind in response
18 to the Staff and Intervener's positions. But we're not doing it
19 that way, I think. We're doing this bull-pen style, aren't we,
20 Mr. Wallis?

21 JUDGE WALLIS: Yes.

22 COMMISSIONER HEMSTAD: So everything is in front of us.
23 And what I'm trying to get to is, what are we going to focus on
24 as your case?

25 MR. MARSHALL: You should focus on the testimony that

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1 Mr. Collins -- this particular table here has come up with the
2 most current numbers for -- which is in his rebuttal testimony.

3

4 He's taken his direct case numbers and he said, wherever
5 adjustments are justified because of changes, we ought to make
6 those changes, even if those changes hurt us.

7 COMMISSIONER HEMSTAD: And then if that's the case, is
8 it your position that neither the Staff nor the interveners are
9 put at any disadvantage with your rebuttal filings in your
10 ability to prepare to cross examine?

11 MR. MARSHALL: Again, I think that every case has,
12 because of the lag, will have rebuttal that will bring in
13 adjustments based not only on new facts, but on issues about
14 what the other side has brought in, too.

15 If there's any disadvantage it's only because the
16 schedule was compressed. We're willing -- again I hate to say
17 it, but we're willing to suspend the statutory period, and to
18 suspend the operation of the interim rates, so that any of that
19 discovery would not operate to disadvantage anybody.

20 We think, frankly, that's the preferable route to take
21 so that we all have -- the thing we need best here is the best
22 evidence, the best facts to set rates for a company that is in
23 financial distress, and does operate in the public interest.

24 You need to have all of the evidence before you, all
25 of the facts, and then to make a full determination and not be

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1 deprived of anything on the basis of a procedural motion that
2 may be based on wrong premises, and incorrect reading of the
3 rules on rebuttal testimony.

4

5 Am I out of time?

6 JUDGE WALLIS: No.

7 CHAIRWOMAN SHOWALTER: You don't have to take it.

8 E WALLIS: There's no obligation on your
9 art.

10 MR. MARSHALL: Thank you, very much.

11 JUDGE WALLIS: Mr. Brena, by my watch, you have
12 eight minutes.

13 MR. BRENA: At some point in the regulatory process
14 their case must be known and set to be fair. That is CAH-4,
15 their case 2 in the direct case.

16 The world changes. It doesn't hold still for any man.
17 But that doesn't mean that we can't set rates. At some point
18 there's always going to be changes. More information doesn't
19 necessarily mean better information. The appropriate response
20 to improper rebuttal is to strike it, and move on.

21 We can't change the rules at this point and say, well,
22 let's just adopt what Mr. Marshall suggested. Let's let it all
23 in and go forward. We haven't had an opportunity for discovery.
24 We haven't been allowed answering testimony on their new
25 theories and methodology and new cases. They haven't been

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1 allowed to discover our answering case. They haven't been
2 allowed reply testimony on our answering case.

3 This will be the eighth time their cost of service
4 will have changed. And bear in mind that with any delay, that
5
6 their proposal is to update again. And then at the end of the
7 day, what is to say that the reply case doesn't come in again
8 with a new case. Why don't we just do this time after time
9 after time?

10 Who is to say that they are ever going to stop and
11 hold still so we can take a shot at their case? This is a
12 classic moving target example. It's not a close case. I don't
13 want more discovery. I don't want more depositions. I don't
14 want to request the Commission for more motions to compel. I
15 don't want test periods changing. I don't want theories
16 changing. I don't want to put on a new answering case.

17 I want to answer the case that they said that they
18 represented to this Commission and the parties they were relying
19 on for their rate filing. I want a chance to litigate it. We
20 go through this whole cycle, and we can let all of this

21

22 Our due process rights are completely compromised.
23 It's not fair to us. They should be committed to the case that
24 they filed, that they said they were going to do. They should
25 be -- they should have to do it. And at the end of the day,

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1 like I said, we're going to have another change. So the
2 question is at what point do we stop the never-ending change,
3 because we live in a world of change?

4 And the answer in this case is they haven't really
5 presented a single reason why their direct case CAH-4 shouldn't
6
7 be the basis for this hearing.

8 With regard to a few specific issues, he mentioned
9 their through-put adjustment. He tried to advance that as an
10 idea. That's a new idea. That's a new idea on rebuttal.
11 That's exactly what I am here to argue about, he said. And by
12 that I don't mean to personalize it in the first person.

13 But counsel for Olympic suggested that they only had
14 one month when they filed their FERC case. That's true. But
15 they didn't file. They filed this case in December. They had
16 five full months of actual through-put information available the
17 day that they filed their case here.

18 CHAIRWOMAN SHOWALTER: Wasn't it October?

19 MR. BRENA: December 13.

20 MR. TROTTER: If I could, Your Honor, the filing was
21 October 31st, 2211. They didn't file direct testimony on that
22 date. That was December 13, 2211.

23 CHAIRWOMAN SHOWALTER: Thank you.

24 MR. BRENA: So they had from July through November of
25 actual through-put information that they could have used for a

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1 rate basis, for their rate filing to this Commission. Doesn't
2 matter when they filed in FERC. They filed in FERC. They had
3 the information available to them. They didn't use it.

4 Now they are coming in saying nine months of
5 information is -- we want to use actual. And then they filed a
6 motion to continue where they said, well, we want to use a full
7
8 year. So they want to change it again.

9 Well, you know, they had a shot. They could have used
10 the actual. They had a shot. They didn't. The regulation --
11 final form of the regulation, the fact is they haven't suggested
12 a cost of service change as a result of these regulations. They
13 just want to put in a bunch of rebuttal testimony about all of
14 the changes in the law. They haven't quantified any of them as
15 to what they should be for the cost of service. It's
16 supplemental direct. It shouldn't be allowed.

17 The weld seam, we haven't moved to strike any of that
18 stuff. Smith -- and I would like to respond to Commissioner
19 Hemstad's question to Mr. Trotter. This is improper rebuttal
20 whether or not you file the motion to dismiss, whether or not
21 you file the motion to extend, no matter what else you do. You
22 don't turn improper rebuttal into proper rebuttal. You can
23 continue it. You can do whatever you want, but it's improper
24 rebuttal and should be struck.

25 If you dismiss the case outright, then the ruling

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1 becomes irrelevant. If you go in and dismiss the parts of it
2 that I have focused on as filing the prima facie case, that
3 doesn't change the case fact that at long last Mr. Smith comes
4 in with regulatory policy arguments for why the FERC
5 methodology, and should be struck regardless. It's improper
6 rebuttal and should be struck for that basis unless the whole
7 case goes away.

8

9 Let's see, he referred to Witness Schink exploring the
10 risk of bankruptcy. His exploration of that in rebuttal isn't
11 appropriate.

12 And finally the timing and the practical concerns of
13 the Chair, I don't want to go through this whole hearing arguing
14 about every witness. I think that the time in taking up hearing
15 time to do that -- their rebuttal case is improper rebuttal. It
16 has overrun this Commission's schedule in this case.

17 They have known for a long, long time that this is what
18 they were going to file on rebuttal. They have known that these
19 issues would come forward. They are not disadvantaged at all.
20 This should be struck and this proceeding should be held on the
21 basis of case 2, and we should know it.

22 I don't think the idea of rolling forward and rolling
23 forward and rolling forward and arguing all through this hearing
24 about what is in and what is out. To me, it's very, very clear
25 what is in and what is out.

1 You should have a general ruling so the parties know
2 and properly prepare for this hearing. Which we don't have
3 enough time for cross examination, even if you strike the
4 rebuttal case, portions of it that are new or could have been
5 added in direct.

6 But if you don't, then we're just going to compress
7 this down. We're going to add arguments in. My suggestion is,
8 take the issues unfairly, take them on with the first few
9
10 witnesses by tomorrow, spend the weekend, take them on with
11 everybody else so the parties can properly prepare as soon as
12 possible. And as exceptions come up as we go through the
13 hearing, take them on a case by case basis.

14 But our motion is intended to be comprehensive. It's
15 intended to strike the concept and new methodology and new cost
16 of the service schedules that are in there.

17 I need to know what the case is. They have put forth
18 seven, they have judiciously abandoned both of their direct case
19 alternatives. This just isn't the way to do business
20 practically.

21 So you need to step in and help us bring this
22 proceeding back into focus and under control. And the way for
23 you to do that is to say that if it's improper rebuttal, it
24 should be struck for all the reasons that were stated, and the
25 Company should be made to go forward on the case that they

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1 represented to this Commission and to the parties that we relied
2 upon that they intended to rely upon, which is their case CAH-4
3 on their direct case.

4 Otherwise it's going to be a mess. I would be happy
5 to respond for any questions.

6 (No response.)

7 JUDGE WALLIS: Thank you very much, Mr. Brena.
8 Let's be off the record for a few minutes,
9 please.

10

11 (Discussion off the record.)

12 JUDGE WALLIS: Let's be back on the record,
13 please. We will convene not at 9:30 but at 10:30. The
14 Commissioners have a number of pressing matters. I think some
15 of them have been referred to in informal discussions, in
16 addition to the issues that have been raised today. And the
17 Commissioners want to study these issues and the arguments of
18 the parties carefully before reaching a decision.

19 So the plan now is to convene not at 9:30 but at
20 10:30, and to take up at the time with the examination of Dr.
21 Schink.

22 CHAIRWOMAN SHOWALTER: Depending --

23 JUDGE WALLIS: Depending, of course, on the
24 Commission's deliberations.

25 Thank you. We're in recess until tomorrow.

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ENDING TIME: 5:30 P.M.

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