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BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND )  
TRANSPORTATION COMMISSION, )  
Complainant, )

)Docket No. TO 011472  
)Volume 29  
)Pages 3286 to 3516

vs. )

OLYMPIC PIPELINE COMPANY, INC., )  
Respondent. )

A hearing in the above matter was held on June 27, 2002, at 9:30 a.m., at 1300 South Evergreen Park Drive Southwest, Room 206, Olympia, Washington, before Administrative Law Judge ROBERT WALLIS, CHAIRWOMAN MARILYN SHOWALTER, COMMISSIONER RICHARD HEMSTAD, and COMMISSIONER PATRICK OSHIE.

The parties were present as follows:

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Court Reporter

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PROCEEDINGS

JUDGE WALLIS: Let's be on the record for the Thursday, June 27, 2002 session in the matter of Commission Docket TO 011472.

We have a couple of administrative matters to attend to this morning, two questions carrying over from yesterday's session, and then a question of scheduling in light of information that was brought to our attention yesterday.

In conjunction with that, let me acknowledge that the Commission has received from Mr. Brena a transcript of an oral argument on Wednesday, June 26, 2002, before the Honorable Jeffie J. Massey, an Administrative Law Judge for the Federal Energy Regulatory Commission.

Olympic has provided copies of an answer in opposition to the motion to disqualify Mr. Beaver, and have has also provided substituted direct testimony for Mr. Beaver.

Mr. Marshall, we left with a couple of questions yesterday relating to the confidentiality discussion. The first was whether the Commission or the company would waive provisions of the protective order barring reference to material that the



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1 Commission has determined not to be confidential  
2 pending a 10-day period for judiciary review.

3 MR. MARSHALL: Yes. With regard to that we  
4 have no desire to multiply proceedings, and we  
5 wouldn't, frankly, have the time to do that. And so  
6 we would waive that as to those two months that we  
7 were talking about with regard to the aggregate and  
8 monthly through-put numbers.

9 JUDGE WALLIS: Thank you. And with  
10 reference to the point to point information, we  
11 asked if you could provide authority to support your  
12 contention that that information is protected by  
13 Federal law.

14 MR. MARSHALL: Right. You will find that  
15 in Chapter 49, section -- I believe it's Section 15,  
16 subpart 13. And I will read it. It was previously  
17 in the record from the last time.

18 It says -- the title is "Disclosure or  
19 Solicitation of Information Concerning Shipments  
20 Unlawful. It shall be unlawful for any common  
21 carrier subject to the provisions of this chapter or  
22 any officer, agent, or employee of such common  
23 carrier, or for any other person or corporation  
24 lawfully authorized by such common carrier, to  
25 receive information therefrom, knowingly to disclose

1 to, or permit to be acquired by any person, or  
2 corporation other than the shipper or consignee  
3 without the consent of such shipper or consignee,  
4 any information concerning the nature, kind,  
5 quantity, destination, consignee or routing of any  
6 property tendered or delivered to such common  
7 carrier for interstate transportation, which  
8 information may be used to the detriment or  
9 prejudice of such shipper or consignee, or which may  
10 be improperly disclosed as business transaction to a  
11 competitor.

12 "It shall also be unlawful for any person  
13 or corporation to solicit or knowingly receive any  
14 such information, which may be so used provided that  
15 nothing in this chapter shall be construed to  
16 prevent the giving of such information in response  
17 to any legal process issued under the authority of  
18 any State or Federal court, or any officer or agent  
19 of the Government of the United States, or any state  
20 or territory in the exercise of his powers, or to  
21 any officer or duly authorized person seeking such  
22 information for the prosecution of persons charged  
23 with or suspected of crime, or information given by  
24 a common carrier to another carrier or its duly  
25 authorized agent for the purpose of adjusting mutual

3296

1 traffic accounts in the ordinary course of business  
2 of such carriers." And then there's a provision for  
3 penalties associated with the violation of that  
4 chapter.

5 What we had done the last time when we  
6 talked about this in November is we believe  
7 disclosure to this body, to this Commission was  
8 appropriate, but making that information public on  
9 any matter concerning the routing of, as I  
10 mentioned, the shipment of, and the destination  
11 points in particular, are that type of information.

12 It's our -- it's Olympic's legal duty on  
13 this, it's your discretion on how to interpret that  
14 legal duty. We're trying to, as we did in the past,  
15 and why we had that information protected in the  
16 original case and this case, simply trying to comply  
17 with this Federal statute.

18 That's all I have to say on that point.

19 JUDGE WALLIS: Mr. Brena.

20 CHAIRWOMAN SHOWALTER: If we're going to be  
21 talking about the statute, can we be provided  
22 copies? There's no way we can comprehend you  
23 reading a statute.

24 JUDGE WALLIS: Why we don't we defer  
25 discussion of this until later when we have copies.

1           MR. MARSHALL: Certainly. I think we have  
2 some transcripts from the last time we talked about  
3 this, and maybe we can make copies as well.

4           We looked through and tried to find where  
5 this had come up before, because we had this  
6 discussion earlier. And there was a resolution  
7 earlier yesterday. I didn't know exactly what it  
8 was, but I think the transcript is the best evidence  
9 of what was discussed and what was decided.

10          JUDGE WALLIS: Very well. Let's engage in  
11 a scheduling discussion. We had some news about the  
12 possible availability of time later, after our  
13 projected close of this proceeding on the current  
14 schedule. And we can discuss with the parties and  
15 the Commissioners their preferences as to schedule,  
16 and make some decisions on the course of this  
17 proceeding. So let's be off the record for that  
18 discussion.

19                           (Brief recess.)

20          JUDGE WALLIS: Let's be back on the record,  
21 please, following a discussion of scheduling.

22           It has been determined that in light of the  
23 availability of time after the 4th of July, the  
24 schedule will be extended; that the Commission will  
25 hear this matter on July 1 and 2, and then go into

3298

1 recess, and take up on Tuesday of the following week  
2 for a session all day Tuesday. The following day,  
3 Wednesday, would begin after the open meeting, and  
4 then a complete day on Thursday of that week.

5 It is expected, because of the availability  
6 of witnesses, that there would be no hearing on  
7 Friday of that week, and evening sessions might be  
8 conducted, if necessary.

9 In addition, in terms of the examination of  
10 witnesses, counsel have committed to reviewing their  
11 cross examination to reduce it to the extent  
12 feasible. And counsel have agreed to instruct their  
13 witnesses to respond to the questions, and avoid  
14 answers that do not respond to the questions.

15 We are more conscious of that issue now,  
16 and will be supporting counsel in the endeavor to  
17 keep the examination of the witnesses well focused.

18 We also recognize the opportunity of  
19 counsel to explore areas on redirect that require  
20 explanation, in your views.

21 Does anyone wish to add anything regarding  
22 scheduling at this point?

23 (No response.)

24 JUDGE WALLIS: Very well. Why don't we  
25 at this point take up the examination of Mr.

3299

1 Collins.

2 MR. MARSHALL: I have this statute to pass  
3 out. Would you like me to do that now, or at some  
4 break?

5 JUDGE WALLIS: Let's do that at the break.

6 MR. BRENA: We have the motion in limine,  
7 and would it be your intention to take that up at  
8 what point?

9 JUDGE WALLIS: We would like the  
10 opportunity to examine the motion and the answers,  
11 and then to determine when arguments should be  
12 scheduled.

13 MR. MARSHALL: In terms of other scheduling  
14 efforts, we're content to rely on the briefing and  
15 waiving oral argument on that point. I think the  
16 briefing is adequate and explains our position. We  
17 wouldn't need to repeat it.

18 JUDGE WALLIS: Mr. Brena.

19 MR. BRENA: We have not had any  
20 opportunity to respond to their answers, so if they  
21 want to waive their oral argument, they may. But I  
22 would like an opportunity to address these issues to  
23 the Commission.

24 COURT REPORTER: Can I please ask you to  
25 all keep your voices up.

3300

1 (Discussion off the record.)

2 JUDGE WALLIS: Mr. Brena, whenever you are  
3 ready.

4 MR. BRENA: Thank you, Your Honor.

5

6 CROSS EXAMINATION

7

8 BY MR. BRENA:

9 Q Good morning, Mr. Collins.

10 A Good morning.

11 Q I think we said we would be out of here in  
12 15 minutes, so I am going to try to do that.

13 First, it would be helpful to my next line  
14 of cross examination if you could have Exhibit 834,  
15 which was designated as Exhibit 4 of Ms. Hammer  
16 available to you.

17 A Okay. I don't have a copy of that.

18 (Passing documents.) I now have that in front of  
19 me.

20 Q 834-C?

21 MR. BRENA: May I ask if the company  
22 intends to maintain confidentiality of this exhibit?

23 MR. MARSHALL: This is data that is now old  
24 enough that we would waive the confidentiality for  
25 2001.

3301

1 JUDGE WALLIS: Very well. So noted.

2 Q BY MR. BRENA: Before we get into the  
3 exhibit, I would like to explore with you the  
4 differences between capitalizing something, and  
5 including it in expenses.

6 Is it fair to say that if you capitalize  
7 something, if money is spent and it should be on a  
8 capital item, then the way that it is recovered is  
9 it's added to rate base and recovered over the life  
10 of the asset?

11 A Yes.

12 Q And with that recovery over that longer  
13 period of time would come a return, and an income  
14 tax allowance associated with it?

15 A Yes.

16 Q And that, compared to an expense, an  
17 expense assumed to recur -- if it's in there as a  
18 pure expense, it's assumed that amount will be spent  
19 every year?

20 A It's assumed that level of expenditure  
21 would occur every year, yes.

22 Q For example, if there's one million dollars  
23 that is an expense item -- if there is one million  
24 dollars that is an expense item, and it's included  
25 in the cost of service, then it would be one million



3302

1 dollars each year that would be collected, correct?

2 A Yes, it's assumed that that would be a  
3 level of cost that is recurring.

4 Q If that one million dollars, instead of  
5 being a recurring cost, instead of being categorized  
6 as a recurring cost, if it should have been  
7 categorized as a capital cost -- well, first, if it  
8 were a capital cost, then it would be added to rate  
9 base at one million dollars, correct?

10 A Yes.

11 Q And then you would collect depreciation on  
12 that over, say, a 30-year period, and then the  
13 return on the tax allowance?

14 A Yes, I think you would recover those  
15 elements. There would also be possibly an element  
16 with if AFUDC, depending on if there was  
17 construction cost.

18 Q Yes. So the impact of, say, over a  
19 five-year period, could you tell me roughly in your  
20 mind if it were expensed, then Olympic would collect  
21 five million dollars over a five-year period as an  
22 expense item. What roughly would Olympic collect if  
23 that million dollars should have been capitalized  
24 over that five-year period?

25 A I couldn't say exactly. But one problem

3303

1 with the premise is you are assuming that you are  
2 recovering that cost. The cost of service, you are  
3 not guaranteed to recover your cost of service, so I  
4 wouldn't agree with that premise.

5 But setting that aside, I couldn't exactly  
6 say, if you are looking at how the cost of service  
7 were varied by year, it would be less if it was a  
8 capitalized item than if it was assumed to be a  
9 recurring level of cost. But I couldn't tell you  
10 specifically how much less.

11 Q If I wanted to figure it out, I would take  
12 that million dollars over, say, 30 years. So there  
13 would be a depreciation component, so one-thirtieth  
14 of a million, correct?

15 A Yes.

16 Q And then with regard to the return that  
17 would be based on the capital structure and cost of  
18 debt and cost of the return with the undepreciated  
19 portion of the million dollars, correct?

20 A Right.

21 Q And then with regard to the equity portion  
22 of the return, there would be an income tax  
23 allowance associated with that, correct?

24 A Yes, there would be an income tax  
25 allowance.

1           Q    Is it fair to say, that if something should  
2   be capitalized as opposed to expensed, the impact of  
3   rates over five years would be that there would be  
4   substantially less collected by the common carrier  
5   of having it capitalized instead of expensed?

6           A    No. I would say that the cost of service  
7   would be less. Again, I was trying to draw the  
8   distinction that you are not guaranteed to recover  
9   that in rates. But the cost of service would be  
10  less. That's a distinction I would draw.

11                    But I would agree the cost of service would  
12  be less if the same of a million dollar item was  
13  capitalized instead of expensed.

14           Q    Now, with regard to major maintenance, or  
15  what were called in case 2 one-time expenses,  
16  setting aside the recurring non-recurring of those  
17  expenses, and focusing on whether or not they are  
18  capital items or expense items, is it fair to  
19  characterize your testimony that you have sought,  
20  for what you consider to be a recurring level of  
21  major maintenance expenses, and included that in  
22  your cost of service?

23           A    Yes. The major maintenance costs that are  
24  included in the test period were not normalized.  
25  They were assumed to represent a recurring level of

3305

1 major maintenance costs.

2 Q And is this 734-C (sic), are these the  
3 major maintenance expense items that were included  
4 within that levelized effort?

5 A I mean, I haven't seen this particular  
6 schedule before. I note at page 4 for the total of  
7 5.615 million does appear to be consistent with, I  
8 think, an assumption, subject to check, of what was  
9 assumed to be major maintenance for the test period.

10 CHAIRWOMAN SHOWALTER: Did you mean 834-C?  
11 You said 734-C.

12 MR. BRENA: I meant 834-C. Thank you,  
13 Chairwoman.

14 Q BY MR. BRENA: So in the question to  
15 determine what may be a recurring level of major  
16 maintenance, this is the basis for determining what  
17 that recurring level would be. Do I have it  
18 correct?

19 A I would not agree with that. I think this  
20 represents what the level of cost was assumed in the  
21 test period. As to the level of recurring cost, I  
22 think that's something that Mr. Talley addresses  
23 regarding what the proposed maintenance activities  
24 are, and so forth. This identifies what was assumed  
25 for the test period.

3306

1           Q    And, again, recurring just slipped out  
2           there.  I am trying to focus on whether or not these  
3           items are expensed, or should be properly expensed  
4           or capitalized.

5                    I would like to draw your attention to that  
6           exhibit, page 2 of 4 of the exhibit.  Let's just  
7           pick out the biggest individual item on the list,  
8           lowering the river over the East Creek required  
9           sustaining \$455,000.  Do you see that?

10          A    Yes, I see that item.

11          Q    Before I ask you specifically about this,  
12          is it fair to say that something that extends the  
13          life of a facility should be capitalized?

14          A    I think Mr. Ganz discusses in his testimony  
15          the nature of how recording of line lowering costs  
16          in this context are appropriate to be treated per  
17          the Uniform System of Accounts.  And that's not  
18          something I speak to in my testimony.

19          Q    I didn't ask about this line, so if we  
20          could stay focused on my question.  And I am asking  
21          you, is it your understanding of what should be  
22          capitalized, is an item should be capitalized if it  
23          extends the life of the underlying facilities.  
24          That's one test that is applied?

25          A    That's not the subject -- I am not

3307

1       testifying on accounting standards. That's not the  
2       subject of my testimony.

3           Q    Are you saying that with regard to the  
4       expenses included in your cost of the service that  
5       you are not offering testimony with regard to  
6       whether the input numbers are correctly expensed or  
7       should have been capitalized, that that is an  
8       accounting issue for me to take up with another  
9       witness?

10          A    Yes. I am relying on the BP accounting  
11       process regarding how items are expensed or  
12       capitalized. I am not offering testimony on that.

13          Q    Do you have any opinion about whether  
14       raising or lowering the pipe is an expense item or  
15       capital item?

16          A    I think it would depend on the nature of  
17       what -- of why that was happening.

18          Q    Give me an example of how changing the  
19       physical configuration of a pipe could be purely an  
20       expense item, one that only affected that year  
21       accounting period?

22          A    Well, again, this is outside the area of my  
23       testimony. But I am familiar -- Mr. Ganz discusses  
24       how line lowering costs in his testimony, and I can  
25       recite my understanding of what he says in his

3308

1 testimony.

2 Q Okay. And I don't want to waste our time  
3 if we're going to go through the same thing. But if  
4 I went through this chart with the purpose of trying  
5 to determine whether or not you should have expensed  
6 any of these items or whether they should all be  
7 capitalized, and did it an item at a time, who  
8 should I ask those questions to?

9 A I can't say who you should ask them to. I  
10 can say that's not something I have addressed or  
11 suggested. It's something I have testified on  
12 regarding appropriate accounting with respect to  
13 capital versus expense.

14 Q Well, first, are we really talking about  
15 accounting treatment, or are we talking about rate  
16 making treatment here?

17 A I understood we were talking about  
18 accounting treatment.

19 Q You understand that the issue of whether  
20 you capitalize or expense an item -- it can be an  
21 accounting matter and it can also be a rate making  
22 matter, can't it?

23 A I understand it to be an accounting matter.  
24 I mean, USOA is an accounting standard applied to  
25 regulated pipelines, but it's an accounting

3309

1 standard. It's not a rate making standard.

2 Q Again, let me ask this, and perhaps it's  
3 been asked and answered. And at the risk of that  
4 objection, I am trying to figure out who I should  
5 test.

6 This is your cost of service, and I am just  
7 trying to figure out who it is that I should test  
8 your input numbers with?

9 A I mean, I can't answer who you should test  
10 it with. I can tell you what I have testified to,  
11 and this is not my cost of service. This is an  
12 exhibit you have given to me. That's the first time  
13 I have seen it.

14 Q Oh, I am sorry. I didn't mean to misspeak.  
15 I wasn't referring to that document. I meant the  
16 input that you used in yours. Okay. Well, I have  
17 gone as far as I can on that.

18 Have you reviewed -- are you familiar with  
19 the methodology that was used in Olympic's 1983  
20 filing before this Commission?

21 A I am very generally familiar with it.

22 Q Did that methodology use a TOC methodology?

23 A I do not believe it did.

24 Q Does the methodology that you are proposing  
25 today have as an underlying theme, a TOC



3310

1 methodology?

2 A The FERC methodology that we have put  
3 forward has an element of trended original cost, or  
4 TOC.

5 Q And the one that Olympic put forward in  
6 1983 did not?

7 A No, not --

8 Q Is the one -- I am sorry. Were you  
9 completed with your answer?

10 A Yes, I am. Sorry. Yes.

11 Q Is the methodology that Olympic put forward  
12 in 1983, does it have any calculations of deferred  
13 earnings from prior periods?

14 A It's somewhat different. I think I would  
15 characterize that as a valuation methodology. And,  
16 again, this is really outside of the scope of what I  
17 have testified to. I believe it looks at  
18 replacement cost, but I don't know that I would call  
19 that -- it's not a trending element.

20 Q So in 1983 the methodology that Olympic  
21 filed with this Commission did not have any deferred  
22 earning calculations from a prior period?

23 A That's correct.

24 Q Did the methodology that Olympic filed in  
25 support of its 1983 filing have a starting rate base

3311

1 write-up?

2 A No, it did not.

3 Q Does the methodology that you are proposing  
4 be used to set rates today have a starting base  
5 write-up?

6 A Yes, it does.

7 Q Does the methodology you are proposing be  
8 used today have a deferred earnings calculation?

9 A Yes, it does.

10 MR. BRENA: I have nothing further.

11 JUDGE WALLIS: Commissioner questions.

12

13 EXAMINATION

14

15 BY CHAIRWOMAN SHOWALTER:

16 Q Mr. Collins, I have put little stickies on  
17 the testimony as I read it, or as you answered  
18 earlier questions. And it may be as I go through  
19 I will realize that my questions have been answered  
20 throughout the course of your testimony. But if you  
21 could turn to page 4 of your rebuttal testimony,  
22 that's Exhibit 701.

23 A (Complies.) I am there.

24 Q All right. I believe you have clarified to  
25 my satisfaction the terminology that FERC uses, and

3312

1 that the UTC uses. And I think it was some source  
2 of confusion as I read the testimony, and I can  
3 reread it now bilingually.

4 But am I correct that the test period, as  
5 FERC uses that term, in the company's case is  
6 October 1, 2002 through September 2003, or is it  
7 beginning September 2002 --

8 A I think you could think of it as October 1,  
9 2001 through September 2002, the 12-month period --  
10 yes, October 2001 would be when you would think of  
11 it beginning, and ending in September of 2002.

12 Q All right. Now I am confused all over  
13 again. Conceptually in the FERC lingo, do you use a  
14 base period in the past, look at it, make some  
15 adjustments, or do some kind of analysis that ends  
16 in a test period year that is a later time than the  
17 base period?

18 A Yes, it's -- I think it's a little  
19 confusing, because the way the regulations talk,  
20 they talk about taking the 12 months of actual data,  
21 as FERC refers to the base period, and making  
22 forward-looking adjustments that would be known and  
23 measurable within nine months.

24 So you are looking forward nine months to  
25 make adjustments, but to the extent you are talking

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1 about a monthly level of cost, if you only look nine  
2 months, you do need some manner to represent an  
3 annual level of costs. So that's why, like I said,  
4 you can think of it as going through October 2002.  
5 But really you are trying to look out nine months  
6 and to look at a full level of costs, and over nine  
7 months that's not a full year of cost, and you have  
8 to adjust that to reflect an annual level of costs.

9 So one way to think of that is going  
10 through the following October, because nine months  
11 would go from October 2001 through June 2002, and  
12 that's the nine months. And then if you were  
13 attempting to reflect an annual period, you are  
14 still missing three months worth of expense levels.

15 Q All right. Does the test period in FERC  
16 thinking occur wholly before rates go into effect?

17 A I would say it's not -- it's supposed to be  
18 forward-looking. It would be the period --  
19 presumably it's supposed to reflect an ongoing level  
20 of costs that will be recurring during the period  
21 when rates are, in effect, going forward.

22 Q But in this case, if -- supposing rates go  
23 into effect October 1, 2002, if that is the case --  
24 or let's take a hypothetical case.

25 A Okay.

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1           Q    Is the test year the year just prior to  
2   that, or does the test year begin October 2002?

3           A    Well, I think looking forward there's no  
4   one that can see the future exactly.  So I think the  
5   test period, no matter what anyone puts down as  
6   their case, when you go back and revisit the actual  
7   costs, they are going to be different.

8                    So the idea is you are trying to get a  
9   reasonable estimate that would be forward-looking.  
10   And it's not only for single period, it's supposed  
11   to be going forward.  And I think you are looking at  
12   trying to look at 12 months of actual data.  They  
13   call it a test period, but then you are making  
14   adjustments.

15                   Using volumes as an example, in the base  
16   period the volumes were less than we're reflecting,  
17   so we have attempted to say what we know within the  
18   next nine months is a reasonable point in the future  
19   to try to project.  And that's just trying to  
20   represent a forward-looking level of costs.

21           Q    Okay.  I just don't understand, and I think  
22   I need to understand in order to understand your  
23   testimony, and maybe other people's testimony.

24                   I understand that the base period, as it's  
25   used, is -- I have forgotten what the starting date

3315

1 is. What is the beginning dates of the base period?

2 A October 2000, and it ends September 2001.

3 Q Now, I understand that. Now, as you are  
4 using the test period, first of all, does the test  
5 period actually have a starting and end date? Just  
6 please answer "yes" or "no."

7 A I don't know that I can say an exact  
8 starting date. I would say, no, it doesn't have an  
9 exact starting date.

10 Q It's an abstract year?

11 A Yes, I think it is supposed to -- yes, I  
12 think it's supposed to represent a forward-looking  
13 level of cost.

14 Q But if it's to represent a forward-looking  
15 level of cost, is it supposed to begin the day that  
16 rates go into effect, or is it supposed to reflect  
17 some prior period, or just an abstract period with  
18 respect to the day rates go into effect?

19 A I think it's supposed to reflect just a  
20 level of costs that we would expect to be recurring.  
21 And maybe this is a little bit -- I am trying to  
22 explain this -- we refiled in December of last year  
23 our direct case.

24 And so at that point we were trying to look  
25 at as current a period as possible. And in

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1 preparing November, and filing in December, the most  
2 recent period we had went through September of 2001.

3 And, you know, we were using just the  
4 adjustments to be forward-looking to show what  
5 representative levels of cost would be in using the  
6 standards in the FERC regulations that say, if you  
7 look out into the future, I think the idea is how  
8 far out can you go out reasonably and project? And  
9 the idea was to look nine months forward.

10 Q Nine months forward from when?

11 A The end of the base period.

12 Q Nine months forward from beginning October  
13 1, 2001?

14 A Correct.

15 Q And ending --

16 A Nine months -- I am sorry.

17 Q Well, when is nine months -- ending June 30  
18 2002?

19 A Correct.

20 Q Then if that's the test period, isn't that  
21 prior? Isn't that a period that you are using that  
22 is prior to rates going into effect?

23 A If they are going to go into effect on  
24 October 2002, yes.

25 Q All right. That was really my first

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1 question. I am just trying to get whether both  
2 periods are in the past with respect to the  
3 effective date of rates.

4 A The adjustments would be in the past. With  
5 respect to if it was going to go into effect in  
6 October of 2002, it would be in the past. The  
7 adjustments would end before that time.

8 Q All right. But then is that test period as  
9 adjusted, then, supposed to represent the reasonable  
10 costs that one would expect the company to incur  
11 beginning October 1, 2002 in this example?

12 A I mean, I think it would. Using like  
13 maintenance activities that we were just talking  
14 about, they have ongoing levels of maintenance they  
15 are going to incur. They are not going to be doing  
16 the exact same activities, but it's trying to  
17 attempt, where the level of cost is similar, to  
18 leave those amounts as they are. Where they are  
19 costs that are not recurring every year, we have  
20 tried to make normalizing adjustments to not reflect  
21 the if you will amount of those costs.

22 But looking forward in the future, you are  
23 trying to estimate something that is going to be  
24 forward-looking.

25 Q All right. It seems as if this involves



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1 two steps, whereas we might use one step in our  
2 system. And I am not claiming to be a true expert  
3 in our way of doing it either, but I believe  
4 we would take a test year and adjust it in certain  
5 ways. In our term a test year is a different thing.  
6 And then get a compilation of reasonable costs that  
7 rates would be based on.

8           Whereas it seems to me that the FERC, they  
9 have a base year and then they have a test year, and  
10 then there's some machinations in between, from  
11 which they then project these reasonable costs. Is  
12 that roughly right?

13           A I am not sure. I mean, I can't speak  
14 exactly to -- but maybe just in terms of  
15 forward-looking costs, maybe if I could provide a  
16 simple example that might be helpful.

17           Let's just think of it, if you had -- you  
18 were paying rent for something. And then your base  
19 period you were paying \$100,000 a month. For that  
20 base period you have a level of cost of 1.2 million.

21           And let's just say the rent went from -- we  
22 knew that after the base period, let's just say  
23 three months after the base period there was a  
24 renewal clause in the rental agreement where it went  
25 from \$100,000 to \$200,000. And you knew that was

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1 going to happen three years out.

2 In the context of what we have done, we  
3 have said, well, we know that we would be paying  
4 rent of \$200,000 a month. And if you look nine  
5 months out, you would be showing paying that rent  
6 for nine months. And if you adjusted for that, you  
7 wouldn't be reflecting that level of rent on an  
8 annual basis.

9 So what we have done is said, gee, we know  
10 this cost is no longer \$100,000 a month, it's  
11 \$200,000. So we're going to be using that  
12 forward-looking adjustment to determine what an  
13 appropriate cost level would be for that rental  
14 expense.

15 Q All right. I think I more or less get it.  
16 Instead of taking the base year and simply saying,  
17 well, compared to the base year of \$100,000 we have  
18 to increase that rent by X amount, because we expect  
19 so much more. Instead of doing that, you are  
20 creating a concept called test year that more or  
21 less does the same thing?

22 A Yeah, I think it's maybe two different ways  
23 to say the same thing.

24 MR. BRENA: Would it be helpful to the  
25 Chairwoman's inquiry to have a copy of the

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1 definition of test period?

2 CHAIRWOMAN SHOWALTER: Yes, I think it  
3 would.

4 MR. BRENA: We have just made a copy of it  
5 and are distributing it.

6 CHAIRWOMAN SHOWALTER: Thank you.

7 MR. BRENA: It's the right-hand column in  
8 the lower part of it, the definition of test period  
9 and base period is the paragraph above that.

10 Q BY CHAIRWOMAN SHOWALTER: I have another  
11 area of questioning. Can you turn to Exhibit 713.

12 A (Complies.) Yes, I am there.

13 Q Page 9, and you are talking about the TOC  
14 trended methodology. My question to you is, is  
15 using the TOC approach independent of capital  
16 structure?

17 A Yes, they are two separate -- I mean, they  
18 are two separate issues. Capital structure is  
19 relevant to a TOC calculations, and it's relevant to  
20 DOC calculations. It's relevant to both, but they  
21 are separate issues.

22 Q So for a given capital structure, you can  
23 either use TOC or DOC, isn't it --

24 A Yes.

25 Q But you need not make the capital structure

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1 decision dependent on which of the two, DOC or TOC,  
2 you are using?

3 A In my mind, I think they would be two  
4 separate choices or decisions.

5 Q And on the next page, page 10, somewhere  
6 here I think you refer to the starting rate base.  
7 Is the starting rate base a one-time event? That  
8 is, is the first time it's used the only time it's  
9 used, or in the next rate case that comes along  
10 under this methodology do you have a new starting  
11 rate base?

12 A No. It's a one-time event. It was an  
13 amount that the FERC used in switching from  
14 methodologies. So the starting rate base for  
15 Olympic would have been defined when order 154B came  
16 out in June of 1985. They would use that same  
17 starting rate base.

18 It gets amortized. It's similar to a  
19 balance of property. There is one amount, and as  
20 you move forward in time, it becomes more  
21 depreciated and decreases. But there's a single  
22 number that is the starting rate.

23 Q And then could you turn to page 7 of that  
24 same exhibit, 713. On lines 11 through 14, the  
25 question is, "Why did the Commission" -- I take it

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1       that means FERC in this instance -- "adopt this  
2       hybrid TOC rate base?" And your answer is, "To  
3       ensure that the equity holder does not benefit from  
4       the write-up of debt financed assets."

5                 Can you explain what the write-up of debt  
6       financed assets means?

7                 A     Again, this is just paraphrasing what the  
8       Commission said. This isn't my explanation. It's  
9       their explanation. But the idea is, if you think of  
10      your rate base and there's a piece of it that is  
11      funded by debt, and the other piece is funded by  
12      equity, the prior methodology -- and again, I am  
13      not -- would adjust that amount of investment based  
14      on a current replacement cost.

15                And that was one of the issues with that  
16      approach. And I think the FERC wanted to transition  
17      to an approach that was more -- well, I mean, they  
18      wanted to modify the approach that would more align  
19      with the costs incurred with -- the costs that were  
20      invested by the pipeline.

21                The problem they struggled with is that  
22      this had been the basis for setting rates in the  
23      past, and so -- and they were going to an approach  
24      that was -- the rates were set at a lower level.  
25      Someone may have as part of the decision bought a

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1 pipeline seeing a certain level of rates thinking  
2 that they were going to be having certain levels of  
3 revenues.

4 So the transition rate base was used  
5 partially as a way to compensate people, the  
6 investors who had relied on this, you know, the  
7 prior approach in terms of what they thought these  
8 equity of these assets were valued at.

9 So what the Commission decided to do is  
10 sort of a way they allowed them a transition rate  
11 base to represent some of this value that they  
12 thought they would have, but they felt it was  
13 appropriate to make this write-up to the extent that  
14 the equity -- the equity portion of the rate base  
15 would be -- we have talked about deferred return, or  
16 the TOC, trended original cost.

17 What they did is instead of taking the  
18 total nominal return, and maybe thinking of it in a  
19 simple sense, not thinking of debtor equity, but if  
20 you have a 12 percent rate of return overall, and a  
21 2 percent rate of inflation, under DOC you would get  
22 to take 12 percent times your rate base and that's  
23 what you recover in your cost of service in that  
24 year.

25 Under TOC, they would say, well, we're not

1 going to give you the full 12 percent this year.  
2 We're only going to give you the real portion, which  
3 is the nominal portion, less the inflation rate. So  
4 that would be 12 percent less 2 percent, or a 10  
5 percent real return that you will earn in the  
6 current year's cost of service.

7 The remaining portion, the other 2 percent,  
8 was deferred, and that's what the trending is. That  
9 deferral is what they talk about the "T" in TOC. So  
10 it would be the 2 percent return that you would have  
11 otherwise gotten, was in a sense, capitalized. And  
12 you could think of it like AFDUC. It's a return on  
13 investment, but instead of collecting it in that  
14 year, it was stored in the rate base and amortized  
15 going forward.

16 So the write-up of the debt financed assets  
17 is getting to the -- they decided to do make an  
18 adjustment to the equity rate of return and trend  
19 that, so you would only get -- my example, the 10  
20 percent portion you would recover in the current  
21 year. The two percent would be deferred. But with  
22 respect to the debt rate base, they just took the  
23 cost of debt as it was. And the respected debt, the  
24 debt portion of the return is consistent between DOC  
25 and TOC. It's a little long-winded but --

1           Q    So if there had been no hybrid, then, in  
2           switching from DOC to TOC, there would have been a  
3           windfall from the write-up of debt financed assets.  
4           Is that what I am to divine?

5           A    Well, I think when it says this was one of  
6           the perceived faults of the evaluation method, that  
7           was prior to 154B.  There initially was a decision  
8           that came out with -- the FERC had written up the  
9           entire rate base, and it went to the D.C. District  
10          Court.  I don't remember the exact -- who ruled on  
11          it, but they said, no, they didn't think that was  
12          appropriate.  And they sent it back to FERC, and had  
13          them reconsider it.  So this was where they came up  
14          with this hybrid to not trend both pieces, but to  
15          trend the equity piece and not the debt.

16          Q    But narrowly speaking, what does write-up  
17          of debt financed assets, just that phrase, what does  
18          that mean?

19          A    The trending of the debt portion of the  
20          rate base.

21          Q    And write-up meaning what is written up  
22          from what to what?

23          A    The inflation in my example, assuming it  
24          was all debt, if you had 12 percent cost of the debt  
25          2 percent inflation, they would say instead of



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1 getting a 12 percent return on debt, you would  
2 take -- you would take a 10 percent return on the  
3 current period, and the remaining 2 percent would be  
4 trended or written up, and recovered in future  
5 periods.

6 Q All right.

7 CHAIRWOMAN SHOWALTER: That's all the  
8 questions I have. Thank you.

9 COMMISSIONER HEMSTAD: I don't have any  
10 questions.

11

12 EXAMINATION

13

14 BY COMMISSIONER OSHIE:

15 Q Mr. Collins, there's a couple of areas that  
16 I would like to have, I guess, clarification on,  
17 questions that were raised by Mr. Brena. And I am  
18 probably going to get this mixed up as well between  
19 what you are calling your base period and test  
20 period.

21 But if you look back on your, I believe  
22 it's 703C, page 49 of 71, schedule 21.

23 A Okay. I am there.

24 Q I am looking now for the line item --  
25 perhaps it isn't here, but it was a line of

1       questioning that Mr. Brena was pursuing. And he  
2       focused on the remediation costs and an adjustment  
3       that was made by you to the remediation costs.

4               And what I want to perhaps have you explain  
5       to me is, as I understand it, you used a different  
6       test period to determine the adjustment for  
7       remediation costs?

8               A    Oh, I am sorry. Go ahead.

9               Q    Or why don't you go ahead -- or why don't  
10       you explain?

11              A    What we did is there was an accrual made  
12       for future remediation cost that was roughly 6.5  
13       million dollars that was booked on the base period  
14       that was an accrual for costs not yet incurred.  
15       They had a schedule, a plan over a six- or  
16       seven-year period how that was going to be spent.  
17       And what they -- they had projections year by year  
18       of what that level of spending was. It was to start  
19       in 2000, so it first started in July of 2001.

20              Q    And that became the basis of -- I mean,  
21       that's what I have in my notes is that your test  
22       period for remediation costs began in July of 2001,  
23       and ended in June 2002?

24              A    That's how I used -- that's the data I used  
25       to develop a test period adjustment.

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1           Q    Now, the test period that was used for the  
2   company filing, as I understand it, was October 2001  
3   through September 2002?

4           A    Yes.

5           Q    And are there any other adjustments that  
6   were made in your determination of the test period?  
7   Maybe let me ask the question a different way.

8                    As you developed the test period expenses  
9   for the company, are there any line items other than  
10  remediation where that figure or that figure that  
11  you used for the remediation adjustment -- are there  
12  any other expense determinations or adjustments in  
13  which you used a test period that was different than  
14  the test period that was used for the company  
15  filing?

16          A    Yes.  The one that comes to mind would be  
17  fuel and power.  And the reason -- would you like me  
18  to go into an explanation?

19          Q    Well, first of all, fuel and power?

20          A    Yes.

21          Q    And that's the only one other than  
22  remediation?

23          A    I think oil losses would also be done in a  
24  different manner.

25          Q    And what was the test period used for fuel

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1 and power?

2 A For fuel and power we looked -- because  
3 fuel and power are directly related to the volumes.  
4 So when we -- what we had done for our volumes was  
5 the system, you know, the 16-inch line segments that  
6 had not been connected, the system became -- we  
7 reconnected in total beginning July of 2001. And  
8 prior to that, the system, the volumes were much  
9 lower.

10 And that's the only time -- well, at that  
11 point we had the system up and running at this 80  
12 percent pressure. So that was the only period of  
13 time we have, from July 1 forward, where you can get  
14 a level of volumes with the system configured as it  
15 was.

16 Q So your through-put volumes were -- your  
17 test period for through-put volumes would be July  
18 2001 to June 2002?

19 A That's correct. And consequently, fuel and  
20 power, which would be the pumping and DRA, would  
21 also be consistent with the same period.

22 Q And oil losses would be the same period?

23 A No. Oil losses, what we had done is we had  
24 taken a recommendation that Witness Colbo had used  
25 where -- because of the changes in Olympic's

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1 operation and how the system was in this transition,  
2 what he had suggested was to take an average of, I  
3 believe it was 1995 through 1999 oil losses.

4 And so we had accepted his adjustment as an  
5 appropriate -- because they had varied quite a bit.  
6 So that was what we had used. So that would also be  
7 different.

8 Q And so the test period will vary in your  
9 filing for remediation costs, fuel and power, oil  
10 losses and, of course, through-put determination?

11 A That's correct.

12 Q Are there any other items or adjustments  
13 that you made, other than those wherein you used a  
14 different test period?

15 A I mean, those are the only ones that come  
16 to mind. And, again, I would say we used the same  
17 test period. But the way we developed an estimate  
18 of cost, it was looking at different periods. But  
19 those were the only items that were adjusted using  
20 data that were not strictly looking for expenses for  
21 October through the following September.

22 Q I guess, let's -- if you used a different  
23 test period, doesn't that change the basis period if  
24 you -- at least from my reading of the FERC  
25 definition, doesn't the test period -- let's start

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1 back one level.

2 Isn't the test period determined by the  
3 base period?

4 A Yeah. I think the regulations -- I have a  
5 copy of them, too. If you look at, it's part 2  
6 under that they explain. And this is in 346. It  
7 was the material that Mr. Brena handed out.

8 It says, "For good cause shown the  
9 Commission may allow reasonable deviation from the  
10 prescribed test period." And here, what we were  
11 struggling with, are the regulations are assuming  
12 that you have a company in steady state. It's more  
13 or less operating now as it was last year. And I  
14 think Olympic's not in that situation.

15 And there's actually, I think below that,  
16 there may be two subparts for pipelines that are new  
17 and how they would set rates. In a sense, Olympic  
18 is not new, but the past -- because part of the  
19 system was down, there are a variety of things that  
20 really wasn't representative.

21 If you look at -- after ii, part 2, it  
22 says, "For a carrier that has less than 12 months of  
23 experience, the test period may consist of 12  
24 consecutive months ending not more than one year  
25 from the filing date." And it says, "Further, for

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1 good cause shown, the Commission may allow  
2 reasonable deviation from the prescribed test  
3 period."

4 And I think for individual items, in some  
5 cases the pipeline wasn't -- I think it was trying  
6 to attempt to get a reasonable level of cost,  
7 because the line -- it's in a dynamic state. It's  
8 now, from last July, it's in what I would say more a  
9 or less a steady state where the full line is up and  
10 running. It's at this 80 percent pressure  
11 restriction, but it's in a state that is intended --  
12 it's likely to be at for some time.

13 The pressure restriction may get lifted at  
14 some point in the future. I, mean that's things  
15 other people addressed in their testimony. But last  
16 July is when the pipeline first got to this steady  
17 state.

18 So I guess, pointing to those two as  
19 looking at sort of what a new line would be like, or  
20 where there's a reason to deviate from that, I think  
21 it's accepted -- or acceptable.

22 COMMISSIONER OSHIE: Thank you. No other  
23 questions.

24 JUDGE WALLIS: Let's take a 15-minute break  
25 now.

3333

1 (Brief recess.)

2 JUDGE WALLIS: Let's be back on the record,  
3 please. Following the morning recess a couple of  
4 administrative matters. Tosco has distributed  
5 copies of substituted Exhibit 724 with some changes  
6 in language to clarify the headings in the table.

7 Is there any objection to the substitution?

8 (No response.)

9 JUDGE WALLIS: Let the record show there is  
10 no objection, and 724, substituted, is received in  
11 lieu of the prior document marked as 724 for  
12 identification.

13 In addition, Mr. Marshall advises that  
14 there has been agreement among the parties as to a  
15 change in schedule for witnesses.

16 Mr. Marshall, do you want to state the  
17 parties' agreement for the record, please.

18 MR. MARSHALL: Yes. The parties have  
19 agreed to have Mr. Ganz go before Mr. Beaver so he  
20 would be able to be finish, and then leave to return  
21 home. In part, that's because we will have  
22 Dr. Means come for sure on Friday, tomorrow.

23 MR. BRENA: And, Your Honor, Tesoro has  
24 not agreed to that yet, but we're willing to  
25 provided that Dr. Ganz is tomorrow. I am trying to



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1 get caught up with the preparation of the cross, and  
2 if that -- what that means is he's on today, then  
3 that won't work for me.

4 JUDGE WALLIS: Very well. We will see  
5 where we are during the day, and talk about that in  
6 terms of an administrative matter, and confirm the  
7 schedule.

8 Are we ready to resume the examination of  
9 Mr. Collins? The process we have adopted has been  
10 parties who have questions based upon the  
11 Commissioners' questions may ask those before  
12 redirect. Are there any such questions?

13 MR. BRENA: I have some, Your Honor.

14 MS. WATSON: We have none.

15 JUDGE WALLIS: Very well, Mr. Brena.

16

17 RE CROSS EXAMINATION

18

19 BY MR. BRENA:

20 Q Mr. Collins, to follow up on Commissioner  
21 Oshie's last line of questions, is it correct to say  
22 that you used actual information from different  
23 periods with regard -- let me rephrase the question,  
24 please.

25 Is it fair to say that you used actual

3335

1 information from different periods for each of the  
2 following: through-put, remediation, oil loss,  
3 transition costs, fuel and power, and then I will  
4 just call it "all other", which was the October 1 to  
5 September 1?

6 A In terms of different periods that they are  
7 each different from each other?

8 Q Yes. Actual information used in their  
9 calculations was from different periods for each of  
10 those six.

11 A I would say that through-put, remediation,  
12 and fuel and power were from the same period, but it  
13 was different from what you have described as all  
14 other and oil losses.

15 Q Chairwoman Showalter asked you a series of  
16 methodology questions. She began by asking you  
17 whether the issues associated with the adoption of  
18 the TOC were different than the capital structure.  
19 Now, are the issues associated with the adoption of  
20 TOC, are they distinct from the issues associated  
21 with the adoption of a starting rate base?

22 A I think they could be.

23 Q Now, just to go back, because I think  
24 different methodologies got confused in the  
25 colloquy. The ICC regulated under what methodology?

3336

1           A    What has been referred to as the valuation  
2 methodology.

3           Q    And do you consider yourself an expert in  
4 valuation methodology?

5           A    I do not consider myself an expert in  
6 valuation methodology.

7           Q    When FERC took over pipeline regulation  
8 from the ICC, what methodology did it first adopt in  
9 154?

10          A    I think it was similar to the valuation  
11 methodology. I am not an expert in that methodology  
12 either. I know 154 they had -- I couldn't say  
13 specifically.

14          Q    Now, you referred to the D.C. Circuit case,  
15 which is the Williams 1 case rejecting 154. Do you  
16 recall referring to that case?

17          A    Yes. I said I was generally familiar with  
18 that.

19          Q    Now, when the D.C. Circuit rejected the 154  
20 methodology, isn't it true, if you know, that D.C.  
21 Circuits said that they should adopt a cost based  
22 methodology without reparation for the past?

23          A    I don't know that.

24          Q    After the D.C. Circuit rejected 154, then  
25 the FERC adopted the 154B methodology; is that

3337

1 correct?

2 A The 154B methodology was adopted subsequent  
3 to the D.C. Circuit Court decision.

4 Q Isn't it true that FERC has regularly,  
5 throughout these orders, indicated that the DOC is a  
6 perfectly appropriate way to regulate oil pipelines?

7 A I can't say. I don't know that I am  
8 familiar with them saying that.

9 Q Do you know the reasons why the FERC  
10 selected a TOC methodology?

11 MR. MARSHALL: Asked and answered in his  
12 direct testimony -- pages 3 through 12 of his direct  
13 testimony, 713.

14 JUDGE WALLIS: The question appears to be  
15 in clarification, and helpful to the record. And  
16 consequently we will let the witness respond.

17 THE WITNESS: Well, I think in my  
18 testimony -- I can't personally know why they did  
19 what they did. I think in the direct testimony I  
20 summarize some of what they put in their order as to  
21 their rationale. So I can direct you to what I have  
22 quoted regarding that, but I can't say why they did  
23 what they did.

24 Q And I would ask you for these. Did you  
25 write those quotes?

3338

1 A Yes.

2 Q Is it fair to say -- is it fair to  
3 characterize that the FERC was concerned with the  
4 front-end loading problem associated with the DOC,  
5 and so chose to adopt the TOC as a methodology for  
6 that reason?

7 A I think they reference front-end load as --  
8 I think on page 9 of my testimony where I am quoting  
9 them, they talked about that as one of the  
10 considerations that they made.

11 Q Without referring to your testimony, are  
12 you aware of other considerations that they have  
13 indicated were the basis for their adoption of a  
14 TOC?

15 MR. MARSHALL: Why would there be a  
16 restriction not to look at his testimony? I guess I  
17 object to the condition imposed by the question.

18 MR. BRENA: I am exploring this witness'  
19 knowledge of the topic he's offering expert advice  
20 on.

21 JUDGE WALLIS: The question is permissible,  
22 and the witness may respond.

23 THE WITNESS: I am sorry. Would you repeat  
24 the question?

25 Q BY MR. BRENA: Other than the front-end

3339

1 issue, would you explain what other factors you  
2 believe caused the FERC to adopt TOC approach in  
3 154B?

4 A I think in my testimony there was also  
5 reference to competitive considerations between what  
6 they were proposing under their TOC methodology  
7 versus DOC. That's one that comes to mind.

8 Q Now, isn't that simply saying the same  
9 thing again? And by that, I mean that the problem  
10 with front-end loading is if a new pipeline is put  
11 in a position to have to compete with the fully  
12 depreciated pipeline, or some other mode of  
13 transportation, that the effect of the front-end  
14 load is it result in higher initial rates that may  
15 not be competitive? So isn't it true that in  
16 addressing the competitive concerns for a new  
17 pipeline, that that is just another way of referring  
18 to the front-end loading problem associated with the  
19 DOC?

20 A I'd say those are -- those two are related.

21 Q Now, subsequent to the adoption of 154B,  
22 has the FERC approved settlements based on the DOC?

23 MR. MARSHALL: Your Honor, I believe  
24 this is beyond the scope of the Commissioners'  
25 questions. And I also believe that what Mr. Brena

3340

1 said about what the FERC does in accepting  
2 settlements is really irrelevant in prior  
3 discussions we have had here.

4 MR. BRENA: Your Honor, this witness and  
5 the Chairwoman had a colloquy with regard to what  
6 the FERC methodology has been. The FERC methodology  
7 isn't a constant, and isn't even one.

8 And so I am exploring with this witness  
9 whether or not FERC continues to use the DOC for the  
10 regulation of oil pipelines, and if he's aware of  
11 that fact. It starts with settlements. It doesn't  
12 end with settlements.

13 And I am also trying to highlight correctly  
14 the Commission's specific concerns in adopting the  
15 TOC approach, and to explore with him whether or not  
16 those concerns have any bearing on Olympic. And  
17 then I will explore with him the specific reasons  
18 the Commission was concerned with the starting rate  
19 base, and whether those have any bearing on this  
20 case. That's what I am doing.

21 JUDGE WALLIS: The questions are  
22 permissible, and the objection is overruled.

23 THE WITNESS: Okay. I didn't really  
24 consider settlements that FERC may have approved. I  
25 am aware that settlements -- you know, they may

3341

1       approve settlements, and there could be a variety of  
2       approaches. There could be a black box, a fixed  
3       rate, maybe a DOC. But I can't -- I have not done  
4       any type of exhaustive type of review as to what  
5       type of settlements the FERC might have done, and  
6       what the underlying methodologies might be for those  
7       settlements.

8           Q     BY MR. BRENA: My question is, are you  
9       aware, or are you not aware, that FERC has approved  
10      settlements subsequent to the adoption of 154B based  
11      on the DOC approach?

12           A     Yeah, I am aware of one settlement.

13           Q     What settlement is that?

14           A     I believe for Endicott Pipeline.

15           Q     Are you aware of the "Badami" case?

16           A     "Badami"?

17           Q     That's actually correct -- Badami,  
18      B-a-d-a-m-i?

19           A     I am generally aware, but I can't recall  
20      specifically the mechanics of the methodology in  
21      that settlement.

22           Q     Are you aware of any initial decisions by  
23      Administrative Law Judges at FERC adopting the DOC  
24      for use, subsequent to the adoption of 154B by the  
25      Commission?



3342

1                   MR. MARSHALL:  Objection, as irrelevant.  
2                   An initial decision isn't the FERC Commission  
3                   decision.  It's getting beyond the scope now as  
4                   being argumentative.

5                   JUDGE WALLIS:  The area appears to me to be  
6                   within the scope, and we will allow counsel some  
7                   latitude.  The witness may respond.

8                   THE WITNESS:  I am aware of one case where  
9                   a FERC ALJ, having ruled that a DOC methodology  
10                  should have been used, subsequently was not the  
11                  basis for setting rates.  It was for Endicott, the  
12                  one settlement that I was aware of that I mentioned.

13                  Q    BY MR. BRENA:  And that was memorialized by  
14                  an initial decision by the ALJ?

15                  A    The FERC Commission never -- well, yes, it  
16                  was an initial decision.

17                  Q    After the initial decision there was a  
18                  settlement of that case that was subsequently  
19                  approved by the Commission based on the DOC  
20                  methodology.  Is that fair to say?

21                  A    I would say that's fair to say.

22                  Q    So when we're talking about the FERC  
23                  methodology here, we're not only talking about 154B  
24                  are we?

25                  A    Well, I would say a settlement -- the FERC

3343

1 isn't embracing a settlement as a methodology. The  
2 FERC has one cost of service methodology for oil  
3 pipelines, the 154B methodology.

4 They approve a variety of settlements that  
5 would use other methodologies, so I can't say that  
6 that is a FERC methodology. It would be like  
7 Kuperuk has a settlement that the FERC approved  
8 where they had a fixed rate of 22 cents a barrel.  
9 So they are all settlements, but the FERC -- when I  
10 review settlements, it looks if the parties agree to  
11 it, they will agree to it.

12 But I don't think they -- by approving a  
13 settlement endorse whatever the underlying basis for  
14 that settlement is. So I wouldn't agree with that  
15 characterization.

16 Q You have read 154B thoroughly, I am  
17 assuming?

18 A I have read it before.

19 Q Isn't it true that the Commission leaves  
20 154B to a determination on a case by case basis?

21 A They do have language to that effect, yes.

22 Q Has the FERC ever -- in adopting 154B or  
23 any other methodology, has the FERC ever rejected  
24 the DOC as an inappropriate methodology to apply to  
25 the regulation of oil pipelines?

3344

1 A I don't know.

2 Q Are you aware of any decision by the FERC  
3 ever saying the DOC is an inappropriate methodology  
4 to apply to the regulation of oil pipelines?

5 A I don't know.

6 Q You are not aware of the decision that does  
7 that?

8 A No.

9 Q Now, turning to the 154B, and returning to  
10 the reasons for the adoption, the front-end loading,  
11 the reason for the adoption of the TOC, you would  
12 agree that Olympic is not properly characterized as  
13 a new pipeline in a competitively sensitive  
14 environment, would you not?

15 A I mean, I would agree that Olympic is not a  
16 new pipeline. I mean, I don't know how to determine  
17 what constitutes competitive or not, so I would  
18 agree with the first part of the question.

19 Q But, I mean, the FERC's concern with  
20 approving the methodology that would not allow a  
21 pipeline to actually realize its return because the  
22 competitive environment would artificially restrain  
23 its rates does not apply to Olympic at all, does it?

24 A I would say that the consideration that is  
25 cited in 154B does not apply to Olympic, because it

3345

1 is not a new pipeline, or was not a new pipeline  
2 when that order was put in place.

3 Q I mean, the whole concept of deferring  
4 return today into the future is a consideration for  
5 those pipelines that can't recover it today, isn't  
6 it?

7 A I am sorry. Are we talking about the 154B  
8 decision, or the mechanics of how 154B is applied?  
9 I am not clear on the question.

10 Q The concept of a TOC methodology applied  
11 for policy reason to a new pipeline in a competitive  
12 environment, what drives that application of a TOC  
13 is the policy concern that you need to defer return  
14 into the future, because the competitive environment  
15 prevents you from collecting rates today that are  
16 equal to what a DOC rate would be. That's the  
17 driver behind the TOC, isn't it?

18 A I think TOC -- it does levelize rates. And  
19 I can't say that that is the only reason why FERC,  
20 when they are making this policy decision, did that.  
21 But it is true, the TOC rates would be lower in the  
22 early years compared to a DOC rate, and they will  
23 be higher in later years.

24 Q I mean, if a pipeline can get its full  
25 return, why burden future rate payers with a

3346

1 deferred return from a prior period? Why increase  
2 the cost of the outer years of the line? I mean,  
3 what is the -- I withdraw the question.

4 Now I want to shift from the TOC aspect of  
5 154B to the starting rate base aspect of 154B. Now,  
6 with regard to the starting rate base of 154B, are  
7 you aware of any court to ever approve a challenged  
8 adoption of a starting rate base?

9 MR. MARSHALL: That assumes that there has  
10 been a challenge to a starting rate base adoption.  
11 That's a fact not in evidence. I object.

12 JUDGE WALLIS: I don't hear the question  
13 that way. I believe that the question is merely  
14 whether the witness is aware of any such.

15 Is that correct, Mr. Brena?

16 MR. BRENA: That's correct.

17 MR. MARSHALL: There really is two  
18 questions in one. Has there ever been a challenge,  
19 and we don't know the answer to that. And second,  
20 if there has been a challenge, what has been the  
21 result?

22 MR. BRENA: Let me rephrase it.

23 Q BY MR. BRENA: As far as you are aware, has  
24 the use of a starting rate base ever been judicially  
25 scrutinized?

3347

1 A I mean, it has before the FERC.

2 Q I mean the court, when I say judicially.

3 A I am sorry. I am not a lawyer. So when  
4 you say "the court" --

5 Q Has any court ever looked at starting rate  
6 base and said this is a proper thing to do in  
7 setting a just and reasonable rate?

8 A Not that I am aware of.

9 Q How much was Olympic's starting rate base  
10 adjustment initially?

11 A Do I still need to do this by memory, or  
12 can you refer to my exhibits?

13 Q I am looking for rough numbers rather than  
14 precise numbers. If you need to refer to your  
15 exhibits --

16 A That would probably facilitate things.

17 Q That would be fine.

18 A Bear with me a second (Looking at  
19 documents).

20 Q Certainly.

21 A (Looking at documents.) Olympic's starting  
22 rate base write-up in 1983 was \$37,510,000.

23 Q Now, that rate base, 37 and a half million  
24 dollars, does Olympic actually invest a penny of  
25 that?

3348

1           MR. MARSHALL: This question assumes that  
2 in order to comply with the starting rate base you  
3 invest. I object to the premise of the question as  
4 being inaccurate and irrelevant and contrary to the  
5 principles.

6           MR. BRENA: I am exploring with this  
7 witness whether or not that's a return of or on  
8 investment, or if it's just a number that has no  
9 relationship whatsoever to the actual investment in  
10 plant.

11           And so my question to him was the 37 and a  
12 half million dollars, has a penny of that actually  
13 been invested by the company. I want an answer to  
14 my question.

15           JUDGE WALLIS: The witness may respond.

16           THE WITNESS: No.

17           Q BY MR. BRENA: What is the current  
18 unamortized amount of the starting rate base  
19 write-up under that portion of 154B?

20           A If we're referring to what I have used in  
21 703, which is it's roughly 5.7 million dollars.

22           Q With regard to the 5.7 million dollars,  
23 it's added to rate base for the purposes of the  
24 calculations of return, correct?

25           A Yes, it is a portion -- it is -- yes.

3349

1 Q So if this Commission approves the starting  
2 rate base, then Olympic will receive a return on 5.7  
3 million dollars that they did not invest, correct?

4 A That's correct.

5 Q They will also recover an income tax  
6 allowance on that portion of the return that is  
7 attributable to equity return, correct?

8 A Yes.

9 MR. BRENA: I have no further questions.

10 JUDGE WALLIS: Mr. Finklea.

11 MR. FINKLEA: I have a very brief line of  
12 questions.

13

14 RE CROSS EXAMINATION

15

16 BY MR. FINKLEA:

17 Q Mr. Collins, in preparing your testimony  
18 before this Commission, did you study any orders of  
19 this Commission concerning what 12-month period this  
20 Commission uses for purposes of establishing rates  
21 for utilities that are regulated by the Washington  
22 Utilities and Transportation Commission?

23 A I maybe looked briefly. I wouldn't say I  
24 studied in detail, orders regarding utility orders.

25 Q And by utility orders, you mean including



3350

1 oil pipelines, or other than oil pipelines?

2 A I was referring to other than oil  
3 pipelines. But I don't believe there are any orders  
4 related to oil pipelines. But I don't think they  
5 are utilities.

6 Q Are you aware of any cases in this  
7 jurisdiction that have used a forward test period  
8 for purposes of establishing rates?

9 A I mean, my understanding of the concept of  
10 making what are called adjustments for the rate  
11 year, are to be making adjustments to reflect  
12 ongoing levels of costs going forward. I mean,  
13 that's, again, my understanding of the general  
14 concept.

15 Q But those adjustments, am I not correct,  
16 are made to figures that are based on actual  
17 historic records?

18 A I wouldn't necessarily agree with that.

19 Q Is an advantage of using historic figures  
20 rather than forward figures that the numbers that  
21 are used are known and measurable?

22 A Historical figures, I would say, are known  
23 and measurable.

24 MR. FINKLEA: I have nothing further.

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

3351

1 a scheduling discussion.

2 (Discussion off the record.)

3 JUDGE WALLIS: Let's take our noon recess  
4 now, and resume at 1:30.

5 (Lunch recess taken.)

6 JUDGE WALLIS: Let's be back on the record,  
7 please. We're asking the witness to identify where  
8 in his materials we can find the current base year  
9 Washington intra-state revenues on which the  
10 Commission would calculate any total revenue  
11 requirement that it finds as a result of this  
12 proceeding according to the company's presentation.

13 THE WITNESS: Okay. I think what you are  
14 asking for, it's in 703, page 64 of 71. And if I  
15 understand, I think the Washington revenues prior to  
16 the increase would be what is shown on line 33 of  
17 14,501,931.

18 MR. MARSHALL: That goes to the revenues in  
19 the base period.

20 THE WITNESS: Those are the revenues prior  
21 to the rate increase, is what I understood it.

22 JUDGE WALLIS: So if the Commission were to  
23 decide a 10 percent rate increase based on this  
24 number, that would be approximately 1.4 plus  
25 million?

3352

1 THE WITNESS: Correct.

2 JUDGE WALLIS: Thank you very much.

3 MR. BRENA: Just a point of clarification,  
4 or confusion, perhaps. Was your question based on  
5 actual revenues? This calculation is based on a  
6 certain assumption with regard to through-put. This  
7 is not an actual revenue number.

8 JUDGE WALLIS: Yes, we understand that.

9 MR. BRENA: One more, just point of -- and  
10 I will let you decide which.

11 If I could just draw the witness'  
12 attention, his revenue numbers are based on a  
13 calculation assuming a 62 percent increase. And you  
14 can see that on the next page, but -- for the test  
15 period, but his case-in-chief is no longer  
16 supporting a 62 percent calculation. It's a 59 and  
17 a half percent calculation. So there is a disparity  
18 in the way he calculated revenue and the way he  
19 calculated costs.

20 JUDGE WALLIS: Yes, very good. We're ready  
21 to proceed.

22 MR. MARSHALL: Thank you.

23

24 REDIRECT EXAMINATION

25

3353

1 BY MR. MARSHALL:

2 Q I would first like to draw your attention  
3 to about the -- to some questions about adjustments  
4 that were made. And I would like you to turn to  
5 706, page 49, schedule 21?

6 A 703, I think.

7 MR. BRENA: 703.

8 THE WITNESS: 703, I think.

9 MR. MARSHALL: Actually, I believe it's  
10 706.

11 THE WITNESS: I think it's 703.

12 CHAIRWOMAN SHOWALTER: The page 49 that we  
13 have been dealing with so much is 703.

14 MR. MARSHALL: Okay.

15 Q BY MR. MARSHALL: We had a number of  
16 questions about base year, and the adjustments to  
17 the base year.

18 A Yes.

19 Q And the base year that you were using was  
20 the 12-month calendar, or the 12-month period  
21 preceding the filing of the testimony, your direct  
22 testimony in December?

23 A Yes. The 12-month period from October 1,  
24 2000, through September 30, 2001.

25 Q Now, when Staff filed its responding case,

3354

1 they used a concept called test year. Are you aware  
2 of that, in general?

3 A Yes.

4 Q And for that they used calendar year 2001.  
5 Is that your understanding?

6 A Yes.

7 Q Was calendar year 2001 available to you  
8 when you filed your testimony on December 13?

9 A No, it was not.

10 Q Both concepts, I think you said, are  
11 basically the same. You are taking a 12-month  
12 period of actual data, expense data, preceding the  
13 filing of testimony, correct?

14 A Yes.

15 Q And then based on what are known and  
16 measurable conditions, you then perform, as Staff  
17 performed, certain adjustments to that 12-month  
18 period?

19 A Yes.

20 Q Now, one of the adjustments that was  
21 referred to was the adjustment for oil loss?

22 A Yes.

23 Q And that's in footnote 6 of page 49?

24 A Yes.

25 Q And that refers back to schedule 21.7?

3355

1 A Yes.

2 Q Were the oil loss adjustments that you made  
3 to your base period the same adjustments recommended  
4 by Staff to its test period?

5 A I believe the adjustments that I had made  
6 to my base period data to arrive at a test period  
7 was the same adjustment that Witness Colbo had used  
8 to develop his adjusted rate period, or his  
9 forward-looking amount for oil losses.

10 Q So when Mr. Colbo adjusted the calendar  
11 year 2001 test period in his testimony, he made  
12 these same oil loss adjustments that you are making  
13 here in your testimony, correct?

14 A Yes.

15 Q Now, let's talk about the practical effect  
16 of this. If you make a change based on a known and  
17 measurable condition to a prior 12-month period,  
18 that will, of course, adjust that prior 12-month  
19 period expense item either up or down?

20 A Yes.

21 Q If the Commission chooses not to accept  
22 that adjustment, either your adjustments or Staff's  
23 adjustments, what then happens?

24 A I am not sure. Absent an adjustment I  
25 would guess they may take the base period amounts

3356

1 and not make an adjustment.

2 Q But the whole idea in putting forward an  
3 adjustment is to make a change that the Commission  
4 can either accept or reject to a period of time for  
5 which there is known and actual historical data?

6 A That's my understanding.

7 Q Now, if the Commission does not accept the  
8 change being recommended, the adjustment that you  
9 have recommended or that Staff has, what would that  
10 do to change the cost of service in this matter?

11 A If they did not accept that adjustment and  
12 left the base period amount unchanged, it would  
13 increase the -- I mean, it would increase the cost  
14 of service by roughly 2.6 million dollars.

15 Q Mr. Brena talked about circular logic here  
16 yesterday. Assuming that all adjustments would be  
17 accepted, if an adjustment like this were not  
18 accepted, there wouldn't be any circular logic,  
19 would there?

20 A I wouldn't have the same mathematical  
21 relationship that he was taking about.

22 Q So the base period is kind of like a safe  
23 base? This is the base you use if there are no  
24 adjustments? Is that a fair statement?

25 A That may be what the Commission would elect

3357

1 to use if they didn't feel it was appropriate to  
2 make a test period adjustment, such as the one I  
3 have made for oil losses.

4 Q And conceptually, that's identical to what  
5 Staff does to its test period. If a proposal is  
6 made to make an adjustment to the test period for  
7 known and measurable conditions, the Commission is  
8 entitled to either accept or reject that proposed  
9 adjustment to the test period that Staff has  
10 presented. Is that a fair statement of the concept?

11 A That's my understanding of the concept.

12 Q Now, let's take a look at another example  
13 on taxes. Can you turn to page 61 of 71 of Exhibit  
14 703?

15 A I am at page 61.

16 Q Does that have your schedule 21.12 relating  
17 to pipeline taxes and an adjustment?

18 A Yes.

19 Q So for the base period you have listed  
20 property tax, franchise tax, and pipeline tax.  
21 Do you see that on that schedule?

22 A Yes, pipeline tax is the sum of the first  
23 two allowances. But on line 6, the total is 1.771  
24 million.

25 Q And then you looked -- in the same way you



3358

1 have looked on some other adjustments to a more  
2 current period for known and actual amounts?

3 A We have.

4 Q That are more recent?

5 A We have made forward-looking projections  
6 for what we expect the level of expense would be for  
7 pipeline and franchise taxes based on what was  
8 described as the seven months of actuals, and two  
9 months of budgets being normalized. So it's kind of  
10 a prospective adjustment.

11 Q If the Commission were to reject that  
12 adjustment, what would be the effect on your cost of  
13 service?

14 A For this item, it would increase the cost  
15 of service by \$53,900.

16 Q And if the Commission decided there was not  
17 enough support for your adjustment, they would  
18 then -- onto the theories that we talked about,  
19 revert back to the base period absent some other  
20 proposal?

21 A That's my understanding of what they may do  
22 if they didn't feel the adjustment -- an adjustment  
23 was appropriate to the base period.

24 Q And if they rejected that adjustment, there  
25 wouldn't be any circularity in any of that logic

3359

1       there either, would there?

2               A     It would not be the mathematical  
3       relationship that Mr. Brena talked about.

4               Q     Has Staff made a series of adjustments to  
5       their test year that you are generally aware of.

6               MR. BRENA:  Objection; this witness was not  
7       asked cross examination with regard to Staff's case,  
8       and now he is being asked to comment on redirect  
9       with regard to running commentary on Staff's case.

10              It's beyond the scope of the cross  
11       examination.  This is the second time he's done it.  
12       He did it before, and I did not object.

13              MR. MARSHALL:  This is generic.  I am not  
14       going to speak to any particular adjustment Staff  
15       has made, but I am, for example, going to talk about  
16       how their adjustments relate from different periods.  
17       There's no consistent period in which they have  
18       boxed their adjustments in, say, from October to  
19       June, because this was the question that has been  
20       asked here about in order to make adjustments,  
21       do you have to use a consistent period of time.

22              And I am simply going to illustrate that  
23       the other parties have not used a consistent period  
24       of time.  They have just taken whatever the known  
25       and measurable data is, and where it's fair to make

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1 an adjustment, they propose an adjustment.

2 MR. BRENA: And I thank him for clarifying  
3 that. And that is beyond the scope of cross.

4 JUDGE WALLIS: The information may be  
5 helpful for the record, and the question is allowed.

6 Q BY MR. MARSHALL: Do you have the question  
7 in mind?

8 A Would you --

9 Q Are you generally aware that Staff has made  
10 a series of adjustments to its test year, the  
11 calendar year 2001?

12 A I am generally aware of adjustments they  
13 have made.

14 Q Are those adjustments confined to any  
15 9-month or 12-month or any other specific period of  
16 time?

17 A I don't believe they are, in total.

18 Q In this oil loss adjustment that they made,  
19 was that confined to any particular period of time?

20 A Well, it related to the years 1995 through  
21 1999.

22 Q And why did they pick that period of time  
23 to determine what to make for a known and reasonable  
24 adjustment to a base period, or test period to set a  
25 date on oil losses?

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1 MR. BRENA: Objection.

2 MS. WATSON: Objection. That calls for  
3 speculation on the part of the witness, and he can't  
4 testify to that.

5 MR. BRENA: If I may, I have an objection  
6 and this is continuing down the road of this  
7 examining this witness with regard to Staff's  
8 witness. And he wasn't asked a single question with  
9 regard to Staff's --

10 JUDGE WALLIS: Mr. Marshall, on both  
11 counts.

12 MR. MARSHALL: On oil losses, the witness  
13 has said he has accepted the Staff's change. And  
14 Mr. Brena inquired on great detail on what the  
15 changes were based on, and why they were based on  
16 theories that may not be in a particular 9-month or  
17 12-month period.

18 JUDGE WALLIS: And you are entitled to  
19 inquire of the witness why he chose to do things,  
20 but -- well, your question did call for speculation  
21 as to why the Commission Staff proposed the  
22 adjustment.

23 MR. MARSHALL: I will rephrase the  
24 question.

25 Q BY MR. MARSHALL: Did you read Staff's

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1 testimony in the area of why they made the  
2 adjustment to oil losses?

3 A Yes, I read that.

4 Q What is your understanding of that  
5 testimony?

6 A Generally, I think Staff witness Colbo felt  
7 the level of losses varied somewhat. And that he  
8 felt that this prior period of time, taking an  
9 average representative, reasonable level of cost  
10 that would be appropriate for that category of  
11 expense.

12 JUDGE WALLIS: Mr. Marshall, again, I think  
13 the prior ruling was that you could inquire into the  
14 witness' view on why he made the adjustment, but  
15 please don't inquire into the basis for the Staff  
16 case.

17 MR. MARSHALL: I thought I asked him if he  
18 had reviewed that basis.

19 Q BY MR. MARSHALL: You made the  
20 determination to adopt Staff's adjustment to oil  
21 losses?

22 A Yes.

23 Q Did that involve a prior period of time  
24 other than this 9-month forward-looking period of  
25 time?

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1 A Yes.

2 Q Why did you think that was appropriate to  
3 do?

4 A I mean, I thought that was reasonable given  
5 the wide variation in the oil loss allowance, you  
6 know, during the 12 months of actuals, what was  
7 projected forward, and even looking back over the  
8 past few years.

9 And so I felt I had taken a period from  
10 1995 through '99, and excluded from that average the  
11 oil loss from the year 2000, which I think -- I  
12 don't remember the exact words, but I think it was  
13 excluded by Witness Colbo because it was fairly  
14 large, so just to take a reasonable snapshot prior  
15 to the disruption of the line as to what the oil  
16 losses were.

17 Q In general terms, when you make adjustments  
18 to what you call the base year, and what Staff calls  
19 the test year, are you looking for known and  
20 measurable amounts that can be used to fairly  
21 reflect what costs are on a forward-looking basis?

22 A I think you are trying to look at known and  
23 measurable changes, and trying to reflect a  
24 reasonable level of costs for setting these  
25 respective rates.

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1           Q    Whether you had data that showed the cost  
2   of service was going up, or whether the cost of  
3   service was going down, did you try to fairly  
4   reflect that principle in your adjustments?

5           A    I believe I did.

6           Q    Did it make any difference whether the  
7   company would be aided or not aided by an  
8   adjustment?

9           A    I tried to reflect adjustments that I felt  
10 reflected representative cost levels going forward.

11          Q    When Staff or Intervenors proposed  
12 adjustments to the cost of service case that you had  
13 advanced in December of last year, did you look at  
14 those in particular, such as the one with oil  
15 losses?

16          A    I looked at that one, yes.

17          Q    Now, let's -- if all of your adjustments  
18 were rejected to your base year, what would that do  
19 to the cost of service conclusions you have made?

20          A    I think if all of them were rejected, they  
21 would make the cost of service higher than -- all  
22 other things being equal, higher than what I  
23 proposed.

24          Q    By what amount?

25          A    Well, if you would -- if you were just

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1 taking the base period amounts at face value, making  
2 no other adjustments, it would be 43 million, making  
3 no adjustments to the base period amounts -- I am  
4 sorry. It would be 10 million approximately.

5 Q Turning to another topic on line lowering,  
6 do you recall the questions that you got on line  
7 lowering?

8 A Yes, I do.

9 Q And there was a specific question about  
10 whether that should be capitalized or expensed?

11 A Yes, I believe it was a hypothetical  
12 question of whether I thought line lowering costs  
13 were appropriate to be capitalized or expensed.

14 Q You refer generally to company records, and  
15 then you refer to Mr. Ganz in his testimony?

16 A Yeah, I refer to the company's accounting  
17 process regarding whether or not the adjustments  
18 were appropriate. With respect to the issue of line  
19 lowering costs, Mr. Ganz I think addressed an  
20 example that was in Witness Kermode's testimony.

21 Q But when somebody, Staff or Intervenors,  
22 asked a specific question about whether it was  
23 appropriate to have an expense capitalized or  
24 expensed, this was one example that was chosen and  
25 you were asked about that, and how you came to a



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1 determination on line lowering.

2 Do you remember being referred to that  
3 exhibit?

4 A I remember. I think it was 834, was the  
5 exhibit.

6 Q Now, when you said that you refer to  
7 Mr. Ganz, there was no follow-up on what the  
8 reference was to Mr. Ganz. Can you explain what  
9 Mr. Ganz has said about what your reliance was?

10 A Yeah. Generally I believe what Mr. Ganz  
11 said was in regard to the adjustment that Witness  
12 Kermode was talking about, that a line became  
13 exposed due to storm water run-off, and that the  
14 money used, you know, for the line lowering was  
15 restoring that line to a preexisting condition.

16 And I think Mr. Ganz says, based on the  
17 Uniform System of Accounts, which is how their --  
18 well, based on the Uniform System of Accounts, that  
19 it is appropriate to expense that amount and not to  
20 capitalize it, because it was restoring the line to  
21 a preexisting condition. It was not an improvement.

22 Q It's a repair, not a replacement or  
23 addition?

24 A Yes.

25 Q The Uniform System of Accounts, you said

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1 when you relied on company books and procedures,  
2 what did you have in mind? Can you further explain  
3 your testimony given earlier?

4 A It's my understanding that BP has a process  
5 in place by which they have -- Exsensure (ph.) does  
6 their accounting. The company has people in place  
7 to review, make determinations to the appropriate  
8 accounting treatments.

9 And I have not reviewed their accounting.  
10 I have accepted their accounting -- accepted their  
11 accounting adjustments and not gone through and  
12 evaluated individual cost items as to whether they  
13 should be expensed or capitalized.

14 Q Is that an accounting system that you are  
15 familiar with in general, in general terms?

16 A Yeah, I think that accounting approach is  
17 what oil pipelines are required to follow under the  
18 Uniform System of Accounts.

19 Q Now, if you assume that -- just bear with  
20 me for a minute. Assume that the Kalama River has a  
21 flood condition, and it suddenly exposes a major  
22 section of pipe, and tons of rock must be brought in  
23 at a cost of \$400,000 after receiving a call from  
24 a United States Senator. Is that going to be  
25 an expense item, or capitalization item?

1           MR. BRENA:  Objection, Your Honor.  This  
2           witness did not indicate that he had any accounting  
3           background, didn't illustrate any ability to  
4           categorize costs as expenses.  He just testified he  
5           relied on the company's books and records for those  
6           categorizations.  So this is certainly beyond the  
7           scope of my cross.

8           MR. MARSHALL:  That's what I was expecting  
9           him to answer, that he would rely on Mr. Ganz for  
10          that type of information, so that's why I asked the  
11          question.

12          JUDGE WALLIS:  I believe that's consistent  
13          with his testimony during Mr. Brena's examination,  
14          and you are certainly welcome to look at that  
15          testimony.

16          Q    BY MR. MARSHALL:  So those categories,  
17          whether something is expensed or something is  
18          capitalization, you rely on the systems in place,  
19          and in particular issues, you rely on Mr. Ganz or  
20          other experts?

21          A    I have relied on the accounting process --  
22          I mean, I've relied on the data provided Ms. Hammer,  
23          which I believe has been recorded, and you are using  
24          BP's control process for accounting.  With respect  
25          to this hypothetical line lowering example, I think

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1 Mr. Ganz addresses that in his testimony.

2 Q Now I am going to turn to another area.  
3 You were asked questions by Tesoro's counsel  
4 regarding whether there are any court decisions  
5 relating to FERC methodology 154B.

6 Are you aware of any court decisions that  
7 rejected 154B?

8 A No, I am not aware of any decision.

9 Q Are you aware of any court decisions  
10 rejecting use of the capital structuring of the  
11 parents in setting rates for oil pipeline companies?

12 MR. BRENA: Objection; he wasn't asking a  
13 question about capital structure during the entire  
14 time.

15 MR. MARSHALL: I believe he was.

16 MR. BRENA: The only question at all was  
17 whether or not there was a relationship, from  
18 Chairwoman Showalter, between capital structure and  
19 TOC, or that was -- this is beyond the scope of that  
20 question.

21 JUDGE WALLIS: I believe that is beyond the  
22 scope, Mr. Marshall.

23 Q BY MR. MARSHALL: Are you aware of any  
24 decision by a court in which it was found that TOC  
25 was appropriate as opposed to DOC?

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1           A    I believe the FERC Commission had addressed  
2   the use of DOC versus TOC in the Lakehead case,  
3   which I think relates -- could be referred to in  
4   orders 397 and 397A.

5           In that case, I think, some of the shippers  
6   were alleging that Lakehead did not face  
7   competition; therefore, DOC was appropriate. The  
8   Commission, its ruling ordered that the issue of  
9   whether Lakehead faced competition was irrelevant,  
10  and affirmed it was appropriate to use the FERC TOC  
11  methodology for Lakehead, though they did not face  
12  competition.

13          Q    Now, you were asked questions about various  
14  settlements that may have used the FERC and DOC  
15  methodology. Do you recall that?

16          A    Yes.

17          Q    Are you aware of settlements in states,  
18  such as Alaska, where settlements have been used  
19  with a toc methodology?

20          A    Yes.

21          Q    Can you explain that?

22          A    In Alaska, I am aware of two settlements  
23  that I believe use a TOC methodology. One would be  
24  the TAP settlement methodology, or TSM. And the  
25  second would be the settlement relating to the Milne

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1 Point Pipeline.

2 Q Once a TOC methodology has been used for  
3 some time, as opposed to a DOC methodology, does  
4 there come a point where changing from one  
5 methodology to the another will result in an uneven  
6 on incomplete recovery?

7 MR. BRENA: Your Honor, if he intends to go  
8 into transitional issues from one methodology to  
9 another, that's beyond the scope of my cross. But  
10 if he's allowed to do it, I would like an  
11 opportunity to ask questions on it.

12 JUDGE WALLIS: Mr. Marshall, I think this  
13 is well beyond the area that the inquiry went into  
14 earlier, and the objection should be sustained.

15 Q BY MR. MARSHALL: Mr. Collins, do you  
16 recall Tesoro's counsel asking you questions about a  
17 1983 tariff that this Commission adopted?

18 A Yes.

19 Q And did he ask you questions about whether  
20 the methodology in 1983 was 154 as opposed to 154B?

21 A Yes.

22 Q Then did he ask you questions about whether  
23 it came about that this Commission used 154B?

24 MR. BRENA: Objection.

25 MS. WATSON: Objection.

1                   MR. MARSHALL: Let me rephrase the  
2 question.

3           Q    BY MR. MARSHALL: Subsequent to that, your  
4 detect testimony points out that there were cases  
5 following the adoption of 154B. Do you recall that?

6           A    Yes.

7           Q    And Mr. Brena asked you questions about  
8 starting rate base. Do you remember those  
9 questions?

10          A    Yes.

11          Q    Your testimony, your direct testimony  
12 addresses starting rate base and the reasons for the  
13 Commission adopting a starting rate base. Mr. Brena  
14 asked you some questions about the reasons for the  
15 starting rate base. Do you recall that?

16          A    Yes. He asked me several questions  
17 regarding that.

18          Q    Once you have adopted a valuation -- by the  
19 way, is 154 an evaluation methodology so that the  
20 1983 tariff would have been a valuation type  
21 methodology?

22          A    I believe you can refer to the 154 -- the  
23 method that was prescribed in the 154 as a valuation  
24 method.

25          Q    What was the purpose of the starting rate

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1 base once you have a tariff in place using the 154  
2 valuation methodology?

3 MR. BRENA: Objection; he's back into  
4 transitional issues between methodologies. That's  
5 where this is leading. I didn't ask about  
6 transitional issues. I am very happy to have him go  
7 into it. I almost invite it.

8 But if he does, I would like the  
9 opportunity to go back through it and ask questions.

10 MR. MARSHALL: May I respond?

11 JUDGE WALLIS: Yes.

12 MR. MARSHALL: Tesoro's counsel said -- and  
13 referring to starting rate base, and asked this  
14 witness questions about whether there was any money  
15 put in for starting rate base.

16 This question goes to the reasons why the  
17 FERC, in moving from a valuation methodology to what  
18 they are using, used a starting rate base. It's a  
19 follow-up on the questions asked by Tesoro on why  
20 you had a change, and why you had a starting rate  
21 base.

22 The questions left at the close of Tesoro's  
23 examination leave it open ended, incomplete, and  
24 frankly, misleading as to what the purpose of  
25 starting rate base was.



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1           I made an objection at the time that the  
2 question was incomplete and misleading, and it was  
3 deferred until redirect.

4           JUDGE WALLIS: Well, apart from the  
5 characterization, I do believe it's true that there  
6 were questions from the bench about the transitional  
7 process, and that you may inquire.

8           Q BY MR. MARSHALL: So let me ask a question.  
9 If you have a 154 methodology as you did in the 1983  
10 tariff, and then 154B is adopted, what is the  
11 purpose of the starting rate base in that situation?

12           MS. WATSON: Objection; assumes a fact not  
13 in evidence. There's no evidence that the  
14 Commission ever adopted a methodology.

15           MR. MARSHALL: I said, once the tariff is  
16 in place, then you move to a different tariff, then  
17 what is the reason for having a starting rate base?  
18 I am assuming the tariff is in place, and you would  
19 have another tariff. And we do. We have a 1983  
20 tariff. That tariff had a valuation basis. Then  
21 you had other tariffs that had different bases.

22           And how they got there is less important  
23 than it is why it is you have the two different  
24 methodologies. I am not trying to suggest this  
25 Commission formally adopted a new methodology.

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1           I am just trying to explore, because the  
2 methodology accepted by the Commission was the FERC  
3 methodology. That's what we're trying to explore  
4 now.

5           MR. BRENA: I have one additional  
6 objection. I attempted to explore with this witness  
7 whether or not there should be any reparation as a  
8 result of the prior acceptance of 154B by FERC. And  
9 I asked if he was aware of one that the D.C. Circuit  
10 directed that there be no reparations for the past  
11 in considering what its new methodology should be.  
12 And he was unfamiliar with the entire portion of the  
13 William's 1 case, and is now about to testify that  
14 the reason for the starting rate base was as a  
15 reparation for the past.

16           So I guess he's already testified that he's  
17 not fully familiar with the issues associated with  
18 whether or not reparations are appropriate when  
19 transitioning from 154 to 154B.

20           But, again, I am happy to withdraw my  
21 objection for one or two questions.

22           MS. WATSON: I just want to make sure our  
23 objection is clear. We're objecting to the fact  
24 that -- well, the question was based on methodology  
25 being adopted by this Commission, and we're

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1       objecting to that assumption because no methodology  
2       has been adopted by the Commission.

3               JUDGE WALLIS:  The company and the staff  
4       have different theories, and I think that the  
5       Commission would like to have a complete record on  
6       which to judge theories regarding the applicability  
7       of the tariffs.  We acknowledge that there are  
8       different views as to what the Commission did in  
9       accepting the tariff.

10              In addition, even though the witness may  
11       not have been familiar with a decision in which  
12       principles were announced, the witness was asked  
13       questions regarding the starting rate base, and I  
14       believe that this question should be permitted and  
15       the witness will have to answer.

16              THE WITNESS:  I am sorry.  Would you  
17       restate the question, please?

18              Q    BY MR. MARSHALL:  Sure.  What was the  
19       recognition by the Commission on moving from a  
20       methodology reflected as the valuation methodology  
21       and also a 1983 tariff to a 154B methodology with  
22       regard to starting rate base?

23              CHAIRWOMAN SHOWALTER:  By "Commission,"  
24       do you mean FERC?

25              MR. MARSHALL:  Yes, I do.

1           THE WITNESS: To make it clear, I am not  
2           advocating use of a transition rate base. I'm  
3           just -- in my testimony, I am just citing to what  
4           the Commission had said in their order. What the  
5           Commission had said was -- I will read it slowly.

6           COURT REPORTER: Thank you.

7           THE WITNESS: I will give you the cite.  
8           "However, the Commission is concerned about the long  
9           reliance of pipeline investors on the previous rate  
10          base method, and as a result, has sought a middle  
11          ground that is fair in light of investor  
12          expectations, but without perpetuating the serious  
13          flaws of the previous method."

14          Q    BY MR. MARSHALL: Would you turn to page 10  
15          of your direct testimony, 713?

16          A    I am there.

17          Q    This was testimony you filed in December of  
18          2001?

19          A    Yes.

20          Q    Do you discuss the basis for the starting  
21          rate base in the beginning of that page?

22          A    I think there's a question about the  
23          Commission's rationale for the starting rate base.

24          Q    Now, were starting rate bases actually  
25          established at a specific point in time by the FERC?

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1           A    Yes.  I think in 154B, which came out in  
2   June of 1985, they had established a starting rate  
3   base value that would be used for a pipeline.

4           Q    And they set forth the method of  
5   calculating that starting rate base for each  
6   pipeline company?

7           A    In this order, and in subsequent orders,  
8   they clarify how that amount -- what that initial  
9   amount was, and how it should be calculated in  
10  subsequent years.

11          Q    And when Mr. Brena asked questions about  
12  how that starting rate base was calculated, did he  
13  ask about that formula?

14          A    I don't recall.

15          Q    Now, when oil pipeline companies file FERC  
16  form 6, do they have references in that FERC form 6  
17  to a rate base that would include a calculation if  
18  you went back through it of starting rate base?

19          A    Yes.  The form 6 has one page, that is page  
20  700, which I believe was required to be filed as  
21  part of the form 6 beginning in 1995.

22                 And on page 700 they require several pieces  
23  of information.  It includes the rate base, total  
24  rate base, rate of return, overall rate of return,  
25  cost of service elements, including deferred return,

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1 operating expenses, return on taxes, and then  
2 computes cost of service. So the rate base amount  
3 and the cost of service would reflect that starting  
4 rate base as a component of the rate base.

5 Q So if you had an overall rate base, to use  
6 a hypothetical of 100 million dollars, and 20  
7 million of that was starting rate base, if you took  
8 out the starting rate base, you would then have 80  
9 million dollars?

10 A In a very simple sense, yes.

11 Q And is there anything in the FERC form 6  
12 that computes the deferred part of the trended  
13 original cost?

14 A No, there is not.

15 Q Is the trended original cost composed of a  
16 couple of parts?

17 A The trended -- I am sorry. Could you  
18 restate that question, please?

19 Q The trended original cost, was that also  
20 meant to be a transition?

21 A The trended portion of the cost of service  
22 calculation, which I think is referred to as the  
23 deferred return, is something that is separate from  
24 the starting rate base write-up and is not -- the  
25 deferred return calculation began once 154B came

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1 out.

2 And it was a calculation of deferred return  
3 from that point forward. There was nothing related  
4 to transition associated with the deferred return.

5 Q Assume that rates here in Washington, at  
6 the FERC had been set for a period of time based on  
7 trended original cost, instead of depreciated  
8 original cost.

9 Does trended original cost have basically a  
10 levelized amount as opposed to a depreciated cost  
11 that has a declining amount?

12 MR. BRENA: Objection; that's -- I have to  
13 define the objection. If he could clarify from what  
14 point in time that would be very, very helpful.  
15 Because the effect of a TOC application now is to  
16 drive up later rates when there was no reduction in  
17 the earlier years, because they used a different  
18 methodology.

19 So if I could just ask for clarification,  
20 at what point the TOC is applied?

21 JUDGE WALLIS: Mr. Marshall.

22 MR. MARSHALL: I am asking general terms  
23 right now, just conceptually. Let's just start from  
24 a given period of time, whatever that period may be.  
25 If you start with a depreciated original cost, the

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1 amounts are higher and then they drop over time.

2 Q BY MR. MARSHALL: Is That basically the  
3 concept?

4 JUDGE WALLIS: Well, let's rule on the  
5 objection. I think that the question is not  
6 internally inconsistent or incapable of  
7 understanding, and I think it should be allowed, so  
8 the witness may respond.

9 THE WITNESS: I would say as a general  
10 trend, the depreciated original cost rate base  
11 declined over time.

12 Q BY MR. MARSHALL: It starts high, and it  
13 goes low as you depreciate?

14 A Yes.

15 Q And the trended original cost is, in  
16 general concept terms, designed to start lower but  
17 be level over a period of time?

18 A I mean --

19 MR. BRENA: Your Honor, if I may, he's  
20 comparing rate trends under the DOC versus the TOC  
21 in the comparative. And, again, I didn't cross on  
22 the comparative.

23 But I would withdraw, and I am happy to  
24 give the Commission the clearest record possible,  
25 but I would appreciate a question or two on that



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1 topic if it's allowed.

2 JUDGE WALLIS: Mr. Marshall.

3 MR. MARSHALL: Again, we're talking about  
4 the concepts between the two. And we're talking  
5 about having to do the comparisons. I think this is  
6 helpful for the Commission to understand how both of  
7 these methodologies work.

8 MR. BRENA: And I believe it's beyond the  
9 scope of cross, and I just ask for a couple of  
10 questions on it.

11 JUDGE WALLIS: The area that we are getting  
12 into, before we get into with both feet, I do  
13 believe is beyond the scope of the questioning that  
14 was engaged in, and really would constitute, to the  
15 extent it's within the witness' direct, just a  
16 restatement of the direct. I'll sustain the  
17 objection.

18 MR. MARSHALL: Okay. I will move on to  
19 another area.

20 Q BY MR. MARSHALL: Are you aware that this  
21 state requires Olympic and other oil pipeline  
22 companies to use FERC form 6 for their annual  
23 reports?

24 A I am generally aware that that is something  
25 that I believe Mr. Ganz discusses in his testimony.

3383

1           Q    You were asked a few questions by  
2   Mr. Finklea regarding various hypothetical  
3   through-put levels.  Do you recall those questions?

4           A    Yes.

5           Q    If a tariff were set at a rate, to use one  
6   of those hypotheticals, at 120 million barrels per  
7   year, and then to use this hypothetical, that amount  
8   of through-put drops to 103 million dollars per  
9   year, what would that do for the financial condition  
10  of the company?

11           MR. FINKLEA:  Your Honor, this goes beyond  
12  my question, so I will object.  We were not asking  
13  about the financial impact on the company.

14           And I also would note, as the Commission is  
15  aware, there's considerable debate about varying  
16  adjustments problems.  And depending on whether  
17  there is or isn't an adjustment mechanism, there may  
18  or may not be an impact on the company.

19           MR. MARSHALL:  I am just exploring what  
20  Mr. Finklea's hypothetical says.

21           I would agree that we have promoted a type  
22  of approach that would have an automatic adjustment  
23  for through-put.  And in that event, Mr. Finklea's  
24  point is not relevant either.  But in the event that  
25  the through-put adjustment mechanism isn't accepted,

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1 this is just exploring the reverse side of what  
2 Mr. Finklea's hypothetical said.

3 JUDGE WALLIS: As Mr. Finklea pointed out,  
4 their question goes beyond the area that he inquired  
5 into, and the objection should be sustained.

6 Q BY MR. MARSHALL: Are oil pipelines  
7 basically characterized by high fixed costs?

8 MR. BRENA: Objection; scope.

9 THE WITNESS: Excuse me. I need a bathroom  
10 break. Could I take five minutes, please.

11 JUDGE WALLIS: Let's take a five-minute  
12 recess.

13 (Brief recess.)

14 JUDGE WALLIS: Let's be back on the record.

15 Mr. Brena has asked for an opportunity to  
16 explore an area in which there could be an  
17 inconsistency between the witness' direct and his  
18 cross examination.

19 Mr. Marshall, do you wish to state for the  
20 record an objection to the inquiry?

21 MR. MARSHALL: Yes. Mr. Brena wants to  
22 explore a factor regarding investor reliance which  
23 was specifically addressed by the witness,  
24 Mr. Collins, at page 10 of his direct testimony  
25 filed in December of 2001.

3385

1           And typically you would ask cross  
2           examination to cover all of the direct testimony,  
3           and there was plenty of opportunity for Mr. Brena to  
4           do that. And he did not do it. So it would be  
5           improper to try to do it on recross.

6           JUDGE WALLIS: Briefly, Mr. Brena.

7           MR. BRENA: I would point out that I  
8           explored in cross examination this witness'  
9           understanding of the underlying policy reasons. He  
10          did not bring that reason forward in my cross  
11          examination of him. He brought it forward on  
12          redirect afterwards. I don't believe it's my  
13          obligation to bring up every factor he lists in his  
14          direct case, and to cross on it in order to preserve  
15          the scope of my cross.

16          JUDGE WALLIS: You may inquire briefly.

17

18                         REXCROSS EXAMINATION (Continuing)

19

20          BY MR. BRENA:

21                 Q     You read from a paragraph in 154B  
22                 concerning investor reliance, is that correct,  
23                 Mr. Collins?

24                 A     Yes.

25                 MR. MARSHALL: Again, I point out for the

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1 record it's right there on page 10, lines 19, 20,  
2 21.

3 Q BY MR. BRENA: Is there any particular  
4 reason you didn't quote the entire paragraph?

5 A In my direct testimony?

6 Q Yes.

7 A Not that I recall today.

8 Q Do you recall how that paragraph ends that  
9 you quoted from, just in concept? I am not looking  
10 for words.

11 A Where it says, fair in light of investor  
12 expectations, or which has been adjusted for  
13 inflation.

14 Q Well, let me ask you this way: is it your  
15 testimony that this is the basis -- that the  
16 investor reliance was the basis for the FERC to  
17 apply the starting rate base generically to all the  
18 oil pipelines that it regulates?

19 A No. I am merely citing what the FERC said  
20 in their order.

21 Q Did FERC intend, or did it in its order, in  
22 your adjustment order, that every pipeline use a  
23 starting rate base based on investor reliance, or  
24 any other factor?

25 A I think that they talked about examining it

3387

1 on a case by case basis, and it would apply only to  
2 pipelines that would have been in service as of the  
3 date of that order.

4 Q Did the Commission end that paragraph with  
5 regard to the starting rate base by pointing out  
6 that it regulates 90 pipelines, and the factual  
7 situation of each can be expected to differ, hence a  
8 participant in a rate case may raise this issue to  
9 in order to prove a particular company is not  
10 entitled to the instant starting rate base?

11 A I don't see the reference to 90 companies,  
12 but I am aware of the issue that a shipper can raise  
13 the issue that a pipeline may not be entitled to the  
14 starting rate base. Which was the issue with  
15 Lakehead, which was something we talked about over  
16 there.

17 Q So 154B does not impose, on any individual  
18 company, the requirement that it adopt a starting  
19 rate base, does it?

20 A I don't believe it imposes a requirement  
21 that the company adopts it.

22 Q And it leaves it open for any party to  
23 raise that in any case that a company is not  
24 entitled to it?

25 A Correct. Again, I am not a lawyer, but I

3388

1 believe any party can raise that it -- that it is  
2 not entitled to that.

3 Q And the concept of investor reliance and  
4 transition, is it clear to you that in order to  
5 transition from methodology A to methodology B, that  
6 there has to be a determination of methodology  
7 establishing A first?

8 A I mean, I don't really speak to  
9 transition -- what about appropriate. I was just  
10 citing what the Commission said. I think what I --  
11 earlier today I was saying that all I was doing here  
12 was just citing what the FERC's reasoning was.

13 And I think Mr. Smith, the central focus of  
14 his testimony is kind of what the FERC was going  
15 through in making these determinations. I am not  
16 representing I have an opinion as to what and how  
17 the transition mechanism should be determined, or  
18 how it should be set.

19 Q Is it possible in your judgment, for an  
20 investor to rely on methodology that has never been  
21 reviewed or adopted by the rate making regulator?

22 A I can't say.

23 Q Do you think it would be a reasonable  
24 investor reliance to rely on a methodology that has  
25 never been adopted by the regulating entity?

3389

1           A    I mean, that's something I thought I just  
2    said.  That's something I have not testified to.

3           MR. BRENA:    Thank you.

4           JUDGE WALLIS:  Anything further of the  
5    witness?

6           MR. MARSHALL:  No, Your Honor.

7           JUDGE WALLIS:  The witness is excused from  
8    the stand.

9           Mr. Brena, have you used any of the  
10   documents you submitted for possible use on cross  
11   examination?

12          MR. BRENA:  I am checking.  I don't believe  
13   so.

14          JUDGE WALLIS:  While Mr. Brena is checking  
15   into that, I have, in getting my paperwork up to  
16   date for this witness, recognized that the document  
17   Tosco submitted earlier as a substituted Exhibit 724  
18   really is a substituted Exhibit 726.

19          MR. FINKLEA:  I believe that is correct.

20          JUDGE WALLIS:  So I will change that  
21   notation.  724 was the errata sheet for Mr. Collins.

22          MR. BRENA:  Your Honor --

23          JUDGE WALLIS:  Excuse me.  While we're  
24   engaging in this colloquy, Ms. Hammer who is to be  
25   the next witness, is welcome to step forward.





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1 728 are received.

2 (EXHIBIT ADMITTED)

3 JUDGE WALLIS: I note that those are  
4 designated confidential. They are not on colored  
5 paper. It would sure make things a lot easier,  
6 administratively, if the company were to have  
7 examined those and decided there is nothing as to  
8 which they wish to continue a confidential  
9 designation.

10 So I am asking, I guess, if the company is  
11 willing to waive the confidential designation on the  
12 deposition and the exhibits.

13 MR. MARSHALL: There were a number of these  
14 exhibits, I believe, that had been marked as Highly  
15 Confidential at the Federal Energy Regulatory  
16 Commission. And as to those, I don't know what to  
17 do, because I think the parties that are parties  
18 there, are parties here. So by waiving the  
19 confidentiality here and allowing them to become  
20 public, are we violating the order at the FERC? I  
21 just ask for guidance in that area, because we don't  
22 want to have that occur.

23 JUDGE WALLIS: I understand the issue, and  
24 I know that counsel have been concerned about that  
25 in this proceeding and would suggest that counsel

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1 give that some thought and be prepared at our next  
2 administrative conference to address it.

3 It would strike me if the company has  
4 designated something as Highly Confidential in one  
5 proceeding, or confidential, and then decides to  
6 waive that, the waiver could apply to both  
7 proceedings. I don't know if any of the other  
8 aspects of these exhibits relate to any of the other  
9 parties.

10 MR. MARSHALL: Right. When Mr. Collins was  
11 up, there were no exhibits marked at the FERC as  
12 Highly Confidential. We didn't have an issue with  
13 that. But there are apparently, either through  
14 Tesoro's or Tosco's exhibits, a number of exhibits  
15 that they put in from that case, apparently not  
16 produced here in this case except by derivation. So  
17 they bear the actual stamp of the FERC as being  
18 Highly Confidential. That's why this has come up  
19 for the first time. And it is separate and apart --

20 JUDGE WALLIS: Very well. What I would  
21 like to do is get on with the examination of the  
22 witness as soon as possible, and let's defer this  
23 discussion to a time when we can focus more readily  
24 on it.

25 In bringing Mr. Collins to the stand, we

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1 failed to walk through the recently distributed  
2 exhibits that parties have provided. And  
3 consequently, there were some corrections that had  
4 to be made to the numbering and identification.

5 What I would like to do now is take a  
6 couple of minutes off the record and make sure that  
7 we have all of the documents that parties have  
8 distributed, and that we get them assigned numbers  
9 in the right order. So let's do that at this time.

10 (Discussion off the record.)

11 JUDGE WALLIS: Let's be on the record,  
12 please. The company has recalled to the stand at  
13 this time Cynthia Hammer, who appeared earlier in  
14 this proceeding.

15 Ms. Hammer, you have previously been sworn  
16 in this matter, and continue your testimony under  
17 oath.

18 Let me note for the record that the company  
19 has predistributed testimony for Ms. Hammer's  
20 appearance that has previously been marked as 801-T,  
21 her rebuttal testimony; 816-T, her direct testimony;  
22 and her Exhibit CAH-2, -3, and -4, which are 817,  
23 18, and 19 respectively.

24 In addition, in conjunction with her  
25 appearance, there has been distributed an errata

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1 sheet, which is marked as Exhibit 866 for  
2 identification.

3 (EXHIBIT MARKED)

4 JUDGE WALLIS: The Commission Staff has  
5 previously distributed documents for possible use on  
6 cross examination, which are designated as 802  
7 through 815. And those documents, as well as the  
8 company's exhibits up through 819 have been  
9 identified on this record at the administrative  
10 conference held on June 13 of this year.

11 In addition, Tesoro has presented a number  
12 of documents, 820-C through and including 858.  
13 Those documents are listed on our Exhibit List, and  
14 I will ask the reporter to copy the designation and  
15 the numbering of those into our record at this point  
16 so that the record is complete.

17 (The following Exhibits were identified:)

18 (Exhibit 820C, CAH - Olympic's response to  
19 Tesoro's DR No. 131 re: forecasted, no service  
20 providers, nature of service, or general  
21 ledger....no monthly accrual to cash schedules -  
22 W001840 (1 page) Confidential (Tesoro); Exhibit  
23 821C, CAH - Olympic's response to WUTC Staff DR No.  
24 29 requesting Bayview account info. (11 pages)  
25 Confidential (Tesoro); Exhibit 822HC, CAH -

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1 Olympic's response to Tesoro DR 125 (3 pages) Highly  
2 Confidential, (Tesoro); Exhibit 823, CAH - Olympic's  
3 response to Tesoro DR 120; Exhibit 824C, CAH -  
4 Olympic's response to WUTC DR 321 re: Whatcom Creek  
5 transaction (1 page) Confidential (Tesoro); Exhibit  
6 825HC, CAH - Olympic's response to Tesoro DR 122 (48  
7 pages) Highly Confidential (Tesoro); Exhibit 826,  
8 CAH - Olympic's response to WUTC Staff DR. No. 380;  
9 Fixed Bid Categories Versus the Recording of Actual  
10 Spending for 2001 W4990-91 (2 pages) (Tesoro);  
11 Exhibit 827C, CAH - Olympic's response to Tesoro's  
12 interrogatory No. 3 requesting Cross-Cascades  
13 expenses \$21,500,000 (1 page) confidential (Tesoro);  
14 Exhibit 828C, CAH - Olympic's response to Tesoro's  
15 DR No. 119; Olympic Pipeline Company Income  
16 Statement Comparative Balance Sheet and Statement of  
17 Cash Flows, May 31, 1999, (Unaudited) (4 pages)  
18 W000350, 351, 352, 353 Confidential (Tesoro);  
19 Exhibit 829C, Financial Statement (CAH) Arthur  
20 Anderson 1998 Audit (OP00112-124) F14204-17 (14  
21 pages) Highly Confidential (Tesoro); Exhibit 830C,  
22 CAH - Olympic's response to WUTC DR 300 - 2001  
23 Financial Statement (2 pages) Confidential (Tesoro);  
24 Exhibit 831C, CAH - Olympic's response to WUTC DR  
25 303 (5 pages) Confidential (Tesoro); Exhibit 832C,

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1 CAH - WUTC DR 308 re: May Conversion (1 page)  
2 Confidential (Tesoro); Exhibit 833C, CAH - Olympic's  
3 response to WUTC Staff DR 315 re: Insurance Costs (2  
4 pages) Confidential (Tesoro); Exhibit 834C, CAH -  
5 OPL response to WUTC DR 307 re: "Outside Services"  
6 with attached "Proposed 2002 Budget" Table (4 pages)  
7 Confidential (Tesoro); Exhibit 835C, CAH - OPL  
8 response to WUTC DR 302 re: "Company Budget 2002  
9 Income Statements (3 pages) Confidential (Tesoro);  
10 Exhibit 836C, CAH - OPL responses to WUTC DR 304 re:  
11 "Salaries and Wages" (9 pages) Confidential  
12 (Tesoro); Exhibit 837C, CAH - OPL response to WUTC  
13 DR 309 (b) re: "Fuel and Power" (9 pages)  
14 Confidential (Tesoro); Exhibit 838C, CAH - OPL  
15 response to WUTC DR 310 re "Utilities and Operating  
16 Fuel and Power for 2001" (7 pages) Confidential  
17 (Tesoro); Exhibit 839C, CAH - OPL response & supp.  
18 response to WUTC DR 311 re: "Oil Loss Calculations &  
19 Assumptions" (3 pages) Confidential (Tesoro);  
20 Exhibit 840C, CAH - OPL response to WUTC DR 312 re:  
21 "Other Expenses Calculations & Assumptions" (2  
22 pages) Confidential (Tesoro); Exhibit 841C, CAH -  
23 OPL response to WUTC DR 317 re: "Average Test Period  
24 Volume Calculations: and "Average planned and  
25 Unplanned Downtime for Major Maintenance and Capital

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1 Related Project Work" (4 pages) Confidential  
2 (Tesoro); Exhibit 842C, CAH - OPL Exhibit B "Normal  
3 Operating Costs" and OPL response to WUTC No. 380  
4 and Schedule 380 re: "Fixed Bid Categories: and  
5 Schedule 304.1 re: "2002 Salaries Calculations" (4  
6 pages) Confidential (Tesoro); Exhibit 843, CAH -  
7 Olympic's response to Tosco's DR No. 25 re:  
8 Remediation Projects/Costs on OPL-31, Sched. 21.1 (2  
9 pages) F11883 & 884 (Tesoro); Exhibit 844HC, CAH -  
10 Olympic's 2001 Capital Projects (revised list  
11 3/21/02) F9433-39 (7 pages) Highly Confidential  
12 (Tesoro); Exhibit 845C, CAH - Olympic's 2001 Onetime  
13 Expense Carryover detail, 2002 Proposed Capital  
14 Expenditures, 2001 Capital Carryover Detail, BOD  
15 Meeting Correspondence, (12 pages) Confidential  
16 (Tesoro); Exhibit 846, CAH - Tesoro's DR 111 and  
17 Schedule 111 (6 pages) (Tesoro); Exhibit 847C, CAH -  
18 Letter to Robin Brena from Lorrie Marcil dated april  
19 11, 2002, w/attachment (outside services schedule  
20 Jan-Dec 2001) RE: \$1,000,500 test year legal and  
21 consulting expenses not assoc. with Whatcom Creek  
22 F1222-24 (3 pages) (Tesoro); Exhibit 848C, CAH - How  
23 to calculate pressure restriction (2 pages)  
24 W000094-95 Confidential (Tesoro); Exhibit 849C, CAH  
25 - Throughput (1) Two throughput charts showing



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1 seasonal fluctuation in throughput; (2) Volume  
2 statistics Jan '95-Dec '99 (OPL 1114289-292) (3)  
3 Response to WUTC Staff DR No. 26; and (4) Systems  
4 throughput schedule (OP18458) (12 pages) Highly  
5 Confidential (last page only) (Tesoro); Exhibit 850,  
6 CAH - Tosco DR 5 re: Operational Capacity (5 pages)  
7 (Tesoro); Exhibit 851C, CAH - CAO's hydrotesting  
8 schedules (named Schedule No. TES 108 and  
9 Interrogatory No. 4 Project Evaluations - W000128 &  
10 W000133 (2 pages) Confidential (Tesoro); Exhibit  
11 852, CAH - Olympic's response to Tesoro's DR No. 127  
12 re: Operating Expenses and the Whatcom Creek  
13 Incident F9258-59 (2 pages) (Tesoro); Exhibit 853,  
14 CAH - Schedules Tilted: Interrogatory No. 4 re: List  
15 of Projects - F9261-67 (OP03149-55) (7 pages)  
16 (Tesoro); Exhibit 854, CAH - Olympic's response to  
17 Tesoro DR. No. 168 re: AFEs. Resp: Attached Olympic  
18 Pipeline & Equilon Pipeline Authority for  
19 Expenditure - W3455-63 - 9pp. and EY 001613-23 -  
20 11pp. (20 pages) Confidential (Tesoro); Exhibit  
21 855HC, CAH - Tesoro DR 108 and Schedule (3 pages)  
22 Highly Confidential (Tesoro); Exhibit 856, CAH - Two  
23 page excerpt from FERC prehearing conf. on 3/28/02  
24 re: Tesoro's DR No. 112(b) re: Whatcom Creek Direct  
25 and indirect costs (2 pages) (Tesoro); Exhibit 857,

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1 Page 700, Olympic Pipeline Company's FERC Form 6 for  
2 December 31, 2001, dated March 31, 2002 (1 page)  
3 (Tesoro); Exhibit 858, Olympic Response to Tosco  
4 Data Request #24 (Tesoro).

5 (EXHIBIT IDENTIFIED.)

6 JUDGE WALLIS: Finally today, or very  
7 recently in conjunction with her appearance,  
8 additional documents have been distributed, and  
9 I will identify those for the record at this time.

10 Marking as 859 for identification, her  
11 deposition, the deposition of Cynthia Hammer on June  
12 24. As 860, a document entitled Hammer Exhibit  
13 No. 1 in conjunction with the deposition. 861 is  
14 Hammer No. 2, workpaper 4.3. And 862 is designated  
15 Hammer No. 3.

16 In addition, Tesoro has distributed for use  
17 with this witness a document consisting of a letter  
18 of June 11, 2002, and a response to that letter.  
19 That's designated as 863 for identification.

20 Tosco has distributed a document, CAH  
21 workpapers 8-1 for possible use. That's 864 for  
22 identification.

23 (EXHIBIT IDENTIFIED.)

24 JUDGE WALLIS: Commission Staff has  
25 distributed a document entitled Olympic Pipeline

3400

1 Company Budget Versus Actual. We're designating  
2 that as 865-C.

3 And I believe those are all of the exhibits  
4 that have been distributed for use with this  
5 witness. I understand there's a change to the  
6 errata sheet, and would ask counsel to identify that  
7 for the record with the introduction of the witness.

8 (EXHIBIT IDENTIFIED.)

9 MR. BEAVER: Thank you, Your Honor.  
10

11 CYNTHIA HAMMER,  
12 produced as a witness in behalf of Olympic Pipeline,  
13 having been previously duly sworn, was examined and  
14 testified as follows:

15

16 DIRECT EXAMINATION

17

18 BY MR. BEAVER:

19 Q Would you please state your full name?

20 A Cynthia Hammer.

21 Q And what is your present position?

22 A Senior financial analyst.

23 Q And is that with Olympic Pipeline Company?

24 A That is with BP Pipelines North America.

25 Q And do you perform that position for

3401

1 Olympic Pipeline Company?

2 A I am responsible for Olympic, yes.

3 Q And are you testifying here on behalf of  
4 Olympic Pipeline Company?

5 A Yes.

6 Q Did you prepare Exhibit Nos. T -- excuse  
7 me, 801-T, 816-T, and supporting Exhibit Nos. 817  
8 and No. 819?

9 A Yes. 801, 816 and 817 were prepared under  
10 my direction. Exhibit 819 was prepared by  
11 Mr. Collins using the information I had provided  
12 him.

13 Q And Ms. Hammer, we previously circulated an  
14 errata sheet for your testimony, which has been  
15 identified as Exhibit 866. Do you have that?

16 A Yes.

17 Q And did you also prepare that?

18 A Yes.

19 Q And is there a correction that needs to be  
20 made on that errata sheet?

21 A Yes.

22 Q And could you indicate where that  
23 correction needs to be made?

24 A For Exhibit 802, line 9.

25 CHAIRWOMAN SHOWALTER: What page?

3402

1 THE WITNESS: The first page.

2 Q BY MR. BEAVER: You mean page 103?

3 A Page 103, line 3. Replace "yes" with "we  
4 may" should be corrected to "we record."

5 Q The correct replacement is to replace the  
6 worth "yes" with, quote, "We record in the month  
7 that it is processed," end of quote?

8 A That's correct.

9 Q And with the changes and additions noted in  
10 Exhibit 866, do you adopt that testimony and those  
11 exhibits as your own?

12 A Yes.

13 MR. BEAVER: We would offer, at this time,  
14 Exhibits 801-T, 816-T, and 817, 819, and 866.

15 JUDGE WALLIS: Any objection?

16 (No response.)

17 JUDGE WALLIS: Let the record show there's  
18 no objection to these documents, and they are  
19 received in evidence.

20 (EXHIBIT ADMITTED)

21 JUDGE WALLIS: Let me also note for the  
22 record that 818 for identification relates to the  
23 company's case 1, which has been stricken. So it is  
24 not being offered at this time.

25 MR. BEAVER: That's correct. And

3403

1 Ms. Hammer is now available for cross examination.

2 CROSS EXAMINATION

3

4 BY MS. WATSON:

5 Q Good afternoon, Ms. Hammer.

6 MS. WATSON: Your Honor, I would like to  
7 move into evidence two depositions. It's one  
8 deposition, but it's taken over the course of two  
9 days, on April 23rd and April 25th, and the exhibits  
10 that went along with those depositions. And those  
11 exhibits are marked 802 through and 815 for  
12 identification.

13 JUDGE WALLIS: Is there objection?

14 MR. BEAVER: No.

15 JUDGE WALLIS: Let the record show there's  
16 no objection, and Exhibits 802 through 815 are  
17 received in evidence.

18 (EXHIBIT ADMITTED)

19 MR. BEAVER: Just for clarification, the  
20 errata sheet does cover 802, which I believe  
21 everybody is aware of.

22 JUDGE WALLIS: Yes, it is noted on the  
23 errata sheet.

24 Q BY MS. WATSON: Ms. Hammer, I would like to  
25 refer your attention to Exhibit 865 for

3404

1 identification.

2 A (Complies.)

3 Q Would you accept, subject to check, that  
4 the numbers in column A are amounts from Olympic's  
5 response to Staff Data Request No. 20?

6 A That is what is reflected on this sheet.

7 Q Would you also accept, subject to check,  
8 that those same numbers appear in Mr. Collins'  
9 workpaper No. 8?

10 A Subject to check.

11 Q And column A contains the budgeted amount  
12 from January 2002, correct?

13 A Yes, that's what is indicated on the sheet.

14 Q Would you accept, subject to check, that  
15 the numbers in column B are amounts from your  
16 workpaper 4.1, provided to the parties last Friday,  
17 June 21st?

18 A Subject to check.

19 Q And column B contains amounts for the same  
20 period, January through April 2002, correct?

21 A Yes, that is what is indicated.

22 Q And your workpaper of 4.1 is found in  
23 Exhibit 728; is that correct?

24 A Could you repeat that?

25 Q Sure. Your workpaper 4.1 -- I am sorry. I

3405

1 withdraw that question.

2 The numbers in column A and column B are  
3 not the same, are they?

4 A No.

5 Q And column C, on Exhibit 865, shows the  
6 difference between columns A and -- or I am sorry,  
7 column A and column B?

8 A Yes.

9 Q And the accumulated difference results in  
10 the actual figures being approximately 1.3 million  
11 dollars less than the budgeted figures; is that  
12 correct?

13 A Yes, that is what is indicated on this  
14 sheet.

15 Q If you look at the column -- or I am sorry,  
16 the line for supplies, maintenance materials under  
17 operating expenses, the number in column B is  
18 approximately a negative 279 percent different than  
19 column A. Would you agree with that math, subject  
20 to check?

21 A Could you clarify that one more time for  
22 me? You said it was a negative?

23 Q Sure. The difference between column A and  
24 column B is a negative 279 percent, meaning that  
25 column B is reduced by -- I am sorry. Let me start



3406

1 that one over -- column B, reflecting a reduction of  
2 279 percent from column A, would you agree with  
3 that?

4 MR. BEAVER: I object, and maybe it's me.  
5 I, frankly, don't understand the question. I mean,  
6 there's a difference of, looks to me, like less than  
7 10 percent. So unless I am not looking at the right  
8 line.

9 JUDGE WALLIS: What line was being  
10 referenced?

11 MS. WATSON: I was referring to the  
12 supplies and maintenance under operating expenses.  
13 It's the first block, so the second asterisk.

14 MR. BEAVER: I will withdraw the objection.  
15 I thought we were looking at the total operating  
16 expenses line.

17 JUDGE WALLIS: Very well.

18 Q BY MS. WATSON: Ms. Hammer, do you have my  
19 question in mind?

20 A Could you repeat the question, please?

21 Q Would you agree that the difference between  
22 column A and column B is approximately 279 percent  
23 for the line showing the supplies and maintenance  
24 materials?

25 A I am not understanding your question. I am

3407

1       sorry.

2           Q    If you divided column B by column A -- I am  
3       sorry.   Okay.

4                    If you take column C and divide it by  
5       column B, the percentage is a negative 279?

6           A    I will accept your calculations on that.

7           Q    Would it be fair to say that budgeted  
8       numbers do not provide known and measurable results?

9           A    No, I don't believe I can say that.

10          Q    Is it your position that budgeted numbers  
11       are accurate on a calendar year basis, rather than  
12       on a monthly basis?

13          A    Budgeted numbers are used as a guideline to  
14       manage a level of spending, and to manage what is  
15       the level of spending that is expected within that  
16       period.

17          Q    And by that period, do you mean a calendar  
18       year?

19          A    If that is what the budget is set up for,  
20       yes.

21          Q    And is Olympic's budget set up on a  
22       calendar year basis?

23          A    Yes, it is set up on an annual basis.

24          Q    Is annual the same as calendar?

25          A    Yes, it consists of 12 months.

3408

1 Q 12 months beginning January and ending  
2 December of the same year?

3 A Yes, for Olympic.

4 Q And Olympic's test year is not a calendar  
5 year; is that correct?

6 A I don't believe I can comment on the test  
7 year. Mr. Collins was the one who prepared that  
8 test year.

9 Q Olympic's base year is not a calendar year,  
10 is it?

11 A It is my understanding that the base year  
12 consists of 12 months.

13 Q And those 12 months come from two different  
14 calendar years; is that correct?

15 A Could you clarify, two different calendar  
16 years?

17 Q Sure. Some of the months come from one  
18 calendar year, 2001, and some of the months come  
19 from year -- let me start all over. I thought I had  
20 it right.

21 But some of the months in that 12-year base  
22 period -- or 12-month base period come from calendar  
23 year 2000, and some of the months come from calendar  
24 year 2001; is that correct?

25 A That would depend on which model you are

3409

1 referring to. And I believe Mr. Collins has already  
2 testified to these base year and test year periods.

3 Q By model, do you mean which case?

4 A Yes.

5 Q Let's refer to the case that Olympic is  
6 relying on that comes from Exhibit 703. That base  
7 period, is it fair to say, that some of the months  
8 in that 12-month period come from calendar year  
9 2000, and some of the months come from calendar year  
10 2001?

11 A Yes, that is my understanding.

12 MS. WATSON: At this time I would like to  
13 move Exhibit 865 into evidence.

14 JUDGE WALLIS: Is there objection?

15 MR. BEAVER: No.

16 JUDGE WALLIS: Does the company waive  
17 confidentiality of the information that is  
18 presented?

19 MR. BEAVER: Yes.

20 JUDGE WALLIS: Exhibit 865 is received in  
21 evidence.

22 (EXHIBIT ADMITTED)

23 JUDGE WALLIS: And the confidential  
24 designation is removed.

25 Q BY MS. WATSON: Ms. Hammer, you provided

3410

1 data to Mr. Collins to use in calculating Olympic's  
2 cost of service; is that correct?

3 A That's correct.

4 Q Did you review the data to see if it had  
5 been properly booked on Olympic's records?

6 MR. BEAVER: I am going to object, because  
7 the question is vague and ambiguous as to what  
8 properly booked means.

9 MS. WATSON: I can rephrase, if you would  
10 like.

11 JUDGE WALLIS: Would you please.

12 MS. WATSON: Sure.

13 Q BY MS. WATSON: Did you review the data  
14 provided to Mr. Collins to see if it had been  
15 properly recorded on Olympics books?

16 A I had reviewed the data for reasonableness  
17 and completeness, yes.

18 MS. WATSON: If I could have just a moment.

19 JUDGE WALLIS: Yes.

20 (PAUSE.)

21 JUDGE WALLIS: Please proceed.

22 Q BY MS. WATSON: In your review of the data,  
23 did you check to be sure that there were items that  
24 were -- I am sorry.

25 Did you check to make sure that the items

3411

1 expensed should not have been capitalized?

2 A I am not sure I understand your question.  
3 If they were expensed, they were not capitalized.

4 Q And did you ensure that they were properly  
5 expensed?

6 A I rely on BP processes and controls for the  
7 accuracy of the information. I don't personally  
8 determine whether it is an expense or capital item  
9 unless I review it.

10 Q And did you make any adjustments to the  
11 data before providing the data to Mr. Collins?

12 A Could you clarify which data you are  
13 referring to that was provided to Mr. Collins?

14 Q The data that you provided. I am not sure  
15 how to make that more clear.

16 A I provided data -- I provided Mr. Collins  
17 with a substantial amount of data.

18 Q It might help if I focus your attention on  
19 the rebuttal case.

20 A I provided full expenditures to Mr. Collins  
21 through April of 2002 with some two months'  
22 estimates for May and June.

23 Q I am not sure if I heard an answer there,  
24 so I am going to try to clarify.

25 Did you make any adjustments to the data --

3412

1 well, to the actual data that you provided?

2 A No.

3 Q And did you calculate any of the  
4 adjustments made to the test period?

5 A Yes. I believe some of the information  
6 used in the test period was from calculations that I  
7 had made.

8 Q And those calculations were for fuel and  
9 power, through-put, and oil losses; is that correct?

10 A That's correct.

11 Q And you were asked questions about the  
12 details of those adjustments during your deposition  
13 on Monday of this week, correct?

14 A Yes.

15 Q Did you make any other adjustments?

16 A Not that I can recall off the top of my  
17 head right now, no.

18 Q And no adjustments were made to account for  
19 any increased costs to comply with state or Federal  
20 safety regulations, either current or proposed; is  
21 that correct?

22 A I don't know the answer to that.

23 Q To your knowledge, do you know if any such  
24 adjustments were made?

25 A No.

3413

1           Q    Ms. Hammer, you are responsible for  
2   calculating the through-put Olympic is proposing in  
3   its rebuttal case, correct?

4           A    Yes, I provided that calculation.

5           Q    And Olympic is asking the Commission to  
6   base its rates on this new through-put level; is  
7   that correct?

8           A    Yes, that's correct.

9           Q    To determine that through-put, you took 10  
10   months of actual data from July 2001 through April  
11   of 2002; is that correct?

12          A    Yes, that's correct.

13          Q    And for May and June of 2002 you used  
14   estimated amounts; is that right?

15          A    Yes.

16          Q    So to summarize, to determine the total  
17   through-put, you added 10 months of actual and 2  
18   months of estimated data for a 12-month period  
19   ending June 2002, correct?

20          A    Yes, that's correct.

21          Q    And this calculation resulted in a  
22   through-put level that is 98 percent of the  
23   through-put level advanced in your direct case,  
24   correct?

25          A    Yes, that sounds reasonable.



3414

1 Q Did the through-put level decrease due to  
2 the sale of Sea-Tac?

3 A No.

4 Q Did you have to adjust through-put due to  
5 the sale of Sea-Tac?

6 A No.

7 Q How much downtime did the 10 months of  
8 actual data that you used in your calculations have?

9 A I don't know.

10 Q How much downtime did you assume in the two  
11 months of estimated data?

12 A The two months of estimated data assumed  
13 the original downtime estimate of 3 percent for  
14 scheduled downtime, and three percent for unplanned  
15 downtime.

16 Q And you did not provide a study on downtime  
17 in your workpapers, did you?

18 A I don't believe so.

19 Q And you did not conduct a study on  
20 downtime, did you?

21 A I did conduct -- or have a conversation  
22 with the engineering manager with Olympic several  
23 months ago when we were developing case 2, I  
24 believe. It was where we had calculated the  
25 downtime on a white board, and came up with an

3415

1 average estimate to use in the calculation.

2 Q And did you apply that for purposes of your  
3 rebuttal case for the 10 months' actual period?

4 A I am sorry. I don't understand the  
5 question.

6 Q The conversation that you had -- I believe  
7 you said with Mr. Talley, is that right, about  
8 downtime?

9 A No, I said the engineering manager.

10 Q I am sorry. Then the conversation that you  
11 had with the engineering manager regarding downtime,  
12 did you use the results of that conversation and  
13 apply that to your rebuttal through-put assumptions?

14 A I still don't know if I am completely clear  
15 on your question. I used the percentages that he  
16 and -- that the engineering manager and I discussed  
17 in the calculations.

18 Q And that was for the two estimated months  
19 that that conversation applied to?

20 A No.

21 Q To the 10 months of actual through-put,  
22 did you apply the 3 percent of actual and 3  
23 percent -- I'm sorry -- planned or unplanned  
24 downtime concept?

25 A No.

3416

1           Q    But you did apply that concept to the two  
2 months of estimated?

3           A    The two months of estimated through-put was  
4 taken from a calculation that had already been made  
5 on the 290, which was presented in case 2.  
6 Primarily what I did to come up with the two months  
7 for June -- or for May and June was to take a  
8 percentage of the original estimate based on current  
9 through-put levels.

10          Q    You testified earlier that the amount of  
11 downtime assumed in the two months of estimated data  
12 was the original 3 percent of planned and 3 percent  
13 of unplanned; is that correct?

14          A    That's correct.  Those percentages would  
15 have already been included in the previous estimate.

16          Q    Did you consider the impact that DRA would  
17 have on through-put?  DRA being drag reducing agent.

18          A    No, I am not an engineer, so I don't have  
19 any knowledge of that.

20          Q    And did you consider the impact on  
21 through-put that new batching software or  
22 enhancement to batching software would have?

23          A    That's not an area that I can comment on.  
24 It's outside of my knowledge.

25          Q    Therefore -- so what you are telling me is

3417

1 you didn't account for the impact that batching  
2 software would have on through-put?

3 MR. BEAVER: I am going to object  
4 at this point. I don't think there's any foundation  
5 for the question. I am not sure what batching  
6 software is that she's referring to, and I don't  
7 believe that's been testified to, at least by this  
8 witness.

9 MS. WATSON: This witness is responsible  
10 for the through-put calculations. I am just  
11 exploring what she considered.

12 JUDGE WALLIS: The questions do appear to  
13 ask not about any batching software or other  
14 elements, but merely to identify what the witness  
15 used when producing the numbers that are under  
16 discussion. So the question, I believe, is  
17 permissible.

18 Q BY MS. WATSON: Do you have my question in  
19 mind?

20 A Could you repeat that, please?

21 Q Is it fair to say that you did not consider  
22 the impact that new batching software or  
23 enhancements to batching software would have on  
24 through-put?

25 A No, I did not consider that. I have no

3418

1 understanding on whether that software has any  
2 impact on through-put or not.

3 Q And did you determine the impact on  
4 through-put that redefining product to make them  
5 more fungible would have?

6 MR. BEAVER: I object; vague and ambiguous.  
7 I am not sure what redefining product means.

8 MS. WATSON: Mr. Talley testified about  
9 redefining product to make them more fungible. I am  
10 not entirely sure what he meant by that, either, but  
11 that was one thing he testified that Olympic was  
12 doing to improve their through-put level.

13 So I am exploring with Ms. Hammer if she  
14 considered that.

15 MR. BRENA: And if I could comment,  
16 generally, I mean, as the greater similarity of  
17 product, they can put through larger batches of  
18 product, and that's one of the things they have  
19 identified in the discovery as improving the  
20 through-put.

21 MR. BEAVER: Obviously, Olympic doesn't  
22 produce the product. But I think asking a question  
23 of the witness that we don't understand, I think, is  
24 unfair. And if she doesn't understand what  
25 redefining product means, I think it is unfair to

3419

1 ask the question.

2 And if it can be asked in a fashion that we  
3 understand the question, then I think it's fair.

4 JUDGE WALLIS: Ms. Watson.

5 MS. WATSON: I can simply ask Ms. Hammer if  
6 she's read Mr. Talley's testimony, and go from  
7 there.

8 JUDGE WALLIS: Please proceed.

9 Q BY MS. WATSON: Ms. Hammer, have you read  
10 Mr. Talley's testimony?

11 A No, I have not read the final version.

12 Q Have you read any version?

13 A I don't recall reading a complete version,  
14 no.

15 Q Ms. Hammer, I am going to ask you to make  
16 an assumption that the process of receiving product  
17 was taken once every six days, and now that -- now  
18 there's a process in place that allows the product  
19 to be taken more often than that.

20 Did you consider the impact that that  
21 process would have on through-put?

22 A No, I am not the expert on when things are  
23 delivered, and how often. I took historical data  
24 and based my assumption on the 10 months' historical  
25 volumes that had currently been moved.

3420

1 MS. WATSON: Thank you, Ms. Hammer. I have  
2 no further questions.

3 JUDGE WALLIS: Mr. Brena.

4 MR. STOKES: Actually, we're going to  
5 start.

6 CROSS EXAMINATION

7

8 BY MR. STOKES:

9 Q Good afternoon, Ms. Hammer.

10 A Good afternoon.

11 Q I wanted to follow up on something Staff  
12 had just asked you. I think you said you had not  
13 backed out Sea-Tac from the values; is that right?

14 A That's correct.

15 Q If I can have you turn to Exhibit 859,  
16 please, on page 70?

17 A (Complies.)

18 JUDGE WALLIS: That's the deposition of  
19 June 24?

20 MR. STOKES: That's right.

21 JUDGE WALLIS: It was page 70?

22 MR. STOKES: Yes, Your Honor.

23 THE WITNESS: I am sorry. What page was  
24 that?

25 MR. STOKES: 70, about halfway down the

3421

1 page.

2 Q BY MR. STOKES: Mr. Finklea had just asked  
3 you a question about the volumes. Do you have that  
4 in front of you?

5 A Yes.

6 Q And he asked you to reconcile two numbers,  
7 one in your workpapers and one contained in Exhibit  
8 No. BAC-8C. And if you can read your answer that  
9 you gave starting on line 17, responding to his  
10 question.

11 A "I can give you my understanding, which is  
12 this information is obtained from the Oil Movements  
13 Group. The difference in the barrels is the Sea-Tac  
14 barrels, which the facility was sold in March."

15 Q And then Mr. Finklea went on to ask you, or  
16 to clarify that the Sea-Tac volumes were taken out  
17 in order to arrive at the 8,795,000 number; is that  
18 correct?

19 A Yes, that's correct. I was comparing two  
20 spreadsheets.

21 Q So then the volumes include Sea-Tac, or  
22 they don't?

23 CHAIRWOMAN SHOWALTER: Which volumes?

24 MR. STOKES: The volumes -- Staff had asked  
25 the question whether or not he volumes contained in



3422

1 her case contained Sea-Tac or not. And I thought I  
2 heard her say they do include Sea-Tac.

3 THE WITNESS: Yes.

4 Q BY MR. STOKES: I am sorry?

5 A They do include Sea-Tac.

6 Q But then how do you explain your answer on  
7 Monday? I guess I am confused.

8 A Mr. Finklea was looking at a spreadsheet  
9 that had been supplied by the Oil Movements Group to  
10 track every barrel that had gone through Olympic,  
11 including terminaling barrels at Sea-Tac.

12 The difference between the spreadsheet I  
13 provided and the one Mr. Finklea was looking at from  
14 the Oil Movements Group is that my spreadsheet did  
15 not include Sea-Tac terminaling barrels. My  
16 spreadsheet includes the actual movement and  
17 delivery to the Sea-Tac facility.

18 Q Well, then, for the volumes that you  
19 assumed -- for your proposed volume for the purposes  
20 of setting rates, does that include the Sea-Tac  
21 volumes?

22 A Yes, it includes the movement to the  
23 Sea-Tac facility.

24 MR. STOKES: If I might have a moment, Your  
25 Honor.

3423

1 (PAUSE.)

2 Q BY MR. STOKES: So does the adjustment you  
3 made from 105.9 million barrels down to 103 have  
4 anything to do with the Sea-Tac terminal?

5 A No.

6 Q If I can now have you turn to Exhibit 819,  
7 also marked as OPL 31.

8 A (Complies.)

9 Q And turn to schedule 22.1 of that exhibit.

10 CHAIRWOMAN SHOWALTER: Can you give the  
11 exhibit and page number one more time?

12 MR. STOKES: Exhibit 819, and it's schedule  
13 21.1 of that exhibit, which is pretty far in the  
14 back. There's actually no page numbers on that.

15 COMMISSIONER HEMSTAD: I don't -- mine goes  
16 from 21.12 to 23.

17 (Discussion off the record.)

18 JUDGE WALLIS: Let's be back on the record,  
19 please. I believe all participants now have a copy  
20 of that document before them.

21 MR. STOKES: Thank you.

22 Q BY MR. STOKES: If I can have you turn to  
23 Exhibit 819, 22.1, that exhibit provides Olympic's  
24 original proposed volumes for purposes of setting  
25 rates established by month; is that right?

3424

1           A    Yes, that's correct.

2           Q    Would you please assume the volumes for  
3   January through May in that schedule, or accept --  
4   would you accept that that totals 43,470,405?

5           A    I will accept your calculation.

6           Q    What has Olympic's actual volume level been  
7   for January through May of 2002?

8           A    I don't have that information off the top  
9   of my head.  It's been provided on other schedules.

10          Q    If you can turn to Exhibit 864, would you  
11   accept that number of 43,445,557 for the actual  
12   lines on that schedule?

13          A    Could you tell me which schedule that is,  
14   again?

15          Q    I am sorry.  It is Exhibit 864.  It's your  
16   workpaper, or at least one of the pages of that.

17                    JUDGE WALLIS:  It's a document that was  
18   distributed very recently, and was identified on the  
19   record at the start of the witness' testimony.

20                    MR. STOKES:  Would you like an extra copy?

21   I have I have one.

22                    JUDGE WALLIS:  Let's be off the record for  
23   a moment, please.

24                                    (Discussion off the record.)

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

3425

1 please.

2 Does the witness have that document before  
3 her?

4 THE WITNESS: Yes.

5 Q BY MR. STOKES: And that is your workpaper,  
6 is that correct, or at least one of the sheets of  
7 it?

8 A Yes, it was a sheet that was provided with  
9 my workpapers of supporting documentation.

10 Q So what has Olympic's actual volume level  
11 been for January through May of 2002?

12 A On this spreadsheet it indicates 43,445,557  
13 barrels.

14 Q So for the first five months of this year,  
15 volume has been essentially the same as the original  
16 test period, is that correct, using your original  
17 filing for the 105.9 million?

18 A It appears to. I have not actually  
19 calculated January through May. I accepted your  
20 calculations.

21 Q Would you agree it's approximately 99.94  
22 percent of the original test year?

23 A I will take your word for it.

24 Q Turning back to schedule 22.1, if you can  
25 add the last two months of the year on that, would

3426

1       you accept, subject to check, that the test year  
2       volume for the seven months of November through May  
3       equals 60,521,372 barrels?

4             A     I will accept that, subject to check.

5             Q     And what has Olympic's actual volume been  
6       for November 2001 through May 2002, turning back to  
7       your workpaper?

8             A     I haven't -- I would have to add that up.

9             Q     I am sorry.  Would you accept, subject to  
10       check, that the answer is 60,998,441 barrels?

11            A     Yes, that sounds reasonable.

12            Q     Then would you agree for the seven months  
13       from November 2001 through May of 2002, Olympic's  
14       actual -- Olympic's volume has been above Olympic's  
15       original test year forecast?

16            A     I am sorry.  Could you repeat that  
17       question?

18            Q     Yes.  Would you agree that for the seven  
19       months from November 2001 through May 2002, actual  
20       Olympic volume has been above Olympic's original  
21       test year forecast -- test period forecast?

22            A     No, I haven't added those up.

23            Q     If you take Olympic's actual volume from  
24       November through May and that equals 60 million,  
25       roughly, and you take the volumes provided on

3427

1 schedule 22.1, which is your original filing, and  
2 you take those same seven months on that, you get  
3 roughly 60 million; is that correct?

4 A Yes, I believe that's what you said  
5 earlier. It's 60 million, and 60 million would be  
6 the same.

7 MR. STOKES: I have no more questions.  
8 Thank you.

9 JUDGE WALLIS: Very well. Mr. Brena.

10

11 CROSS EXAMINATION

12

13 BY MR. BRENA:

14 Q Good afternoon. Your background and  
15 experience is in financial accounting, correct?

16 A Yes.

17 Q Not regulatory accounting?

18 A I am not an expert in regulatory  
19 accounting.

20 Q Rate making?

21 A No.

22 Q Through-put issues.

23 MR. BEAVER: I object. I think through-put  
24 issues is pretty vague and ambiguous.

25 MR. BRENA: I don't think it's vague or

3428

1       ambiguous.

2                   JUDGE WALLIS:  Can the witness answer that  
3       question?

4                   THE WITNESS:  I don't believe I can without  
5       some sort of definition.

6                   JUDGE WALLIS:  Mr. Brena.

7           Q    BY MR. BRENA:  Do you consider yourself an  
8       expert with regard to the capacity or through-put of  
9       the Olympic system?

10          A    No, I don't believe so.

11          Q    Do you know what size batches Olympic runs?

12          A    No.

13          Q    Do you know what the different product  
14       mixes are month to month?

15          A    No.

16          Q    Could you describe the stripping operation  
17       this month?

18          A    No, that's all information that Mr. Talley  
19       has described.

20          Q    Can you tell me what the optimal level of  
21       DRA is?

22          A    No.  As I stated earlier, I am not a DRA  
23       expert.

24          Q    Can you tell me the different processes for  
25       scheduled and unscheduled downtime?

3429

1 A Could you clarify your question?

2 Q Do you know what Olympic's scheduled  
3 downtime has been historically?

4 A No.

5 Q Scheduled or unscheduled?

6 A The scheduled downtime is what is used by  
7 the schedulers when they actually put together the  
8 schedule for the month, and that they use one day a  
9 month for routine maintenance for downtime.

10 Q Do you know whether one day a month is  
11 representative of historic operations or not?

12 A No, I don't know the answer to that.

13 Q So what you did was simply take 10 months  
14 of historic data, and annualize it, and give it to  
15 Mr. Collins based on the through-put, correct?

16 A For the current -- for the latest  
17 information, yes, I took 10 months of actual  
18 through-put and based the May and June estimate on  
19 the current level of through-put, the average level  
20 of through-put that Olympic had been experiencing.

21 Q Are you familiar with the batching software  
22 system?

23 A No.

24 Q Do you know when it was put in place?

25 A No.



3430

1           Q    Do you know they are running bigger batches  
2   today than they used to be able to?

3           MR. BEAVER:  I object.  It assumes facts  
4   not in evidence, and also is vague as to time.

5           JUDGE WALLIS:  Mr. Brena.

6           MR. BRENA:  I think the question has  
7   already been answered.

8           JUDGE WALLIS:  Has the witness responded?

9           THE WITNESS:  No, I don't believe I have  
10  responded.

11          MR. BRENA:  I will rephrase.

12          Q    BY MR. BRENA:  I believe I had asked you  
13  about batching software, and if you knew when it was  
14  implemented, and you said no.  And then I asked, are  
15  you aware or not that they run bigger or smaller  
16  batches today than historically.

17          MR. BEAVER:  And, again, I am going to  
18  object.  Historically this pipeline has been in  
19  existence since 1965.  The question is vague as to  
20  time.

21          MR. BRENA:  She may -- I think the answer  
22  is going to be no, she may define any time period  
23  she likes in her answer.  I don't want to be in a  
24  position of having to define individual words.  I am  
25  trying to ask generically and explore the scope of

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1 her knowledge.

2 JUDGE WALLIS: The witness may respond as  
3 to whether she knows as to any time period.

4 THE WITNESS: No, I am not the expert on  
5 batch sizes, or product going through the line.  
6 That's the oil movements department.

7 Q BY MR. BRENA: Instead of looking  
8 backwards, let's look forward. Do you know what  
9 batch sizes they will run next year?

10 A No.

11 Q Do you know how much downtime will be in  
12 the system next year?

13 A No.

14 Q Do you know what stripping operations are  
15 planned for next year?

16 A No all of these questions should be  
17 directed to Mr. Talley.

18 Q So you have advanced a through-put level  
19 that have you no factual basis whatsoever from which  
20 to offer whether or not that's representative of  
21 next year's operations?

22 MR. BEAVER: And I object. The question,  
23 as phrased, is clearly argumentative.

24 JUDGE WALLIS: Would you rephrase, Mr.  
25 Brena.

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1 MR. BRENA: I would be happy to.

2 Q BY MR. BRENA: Do you have any objective  
3 facts on which you could state that the through-put  
4 recommendation that you have made to this Commission  
5 to set rates is representative of the future  
6 operations of this company?

7 MR. BEAVER: Again, I am going to object.  
8 The question is vague as to time. Future is a very  
9 long period of time.

10 MR. BRENA: Out past the period that she  
11 calculated through-puts for at any point in the  
12 future. Any objective fact. Allow me to rephrase?

13 Q BY MR. BRENA: Would you -- do you have any  
14 objective facts that the through-put that you have  
15 proposed that this Commission use to set rates is  
16 representative of the through-put which will occur  
17 during the period in which those rates may be in  
18 effect?

19 A I am not sure I understand your question.

20 Q Okay.

21 A What do you mean by -- I don't understand.

22 Q Well, let me try to make it more clear,  
23 then. In broad terms you have suggested that they  
24 base rates -- you have recommended to this  
25 Commission that they set rates based on 103 million

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1 barrels going through the line a year, correct?

2 A I have supplied the actual volumes, the  
3 last 10 months, to Mr. Collins.

4 Q Are you aware of how that information has  
5 been used?

6 A I am aware that he used it in his case.

7 Q Do you know how he has used it?

8 MR. BEAVER: At this point I object.  
9 This is clearly beyond the scope of her direct  
10 testimony. Her direct testimony deals with  
11 providing data. Mr. Collins was here to explain how  
12 that data was used.

13 (Discussion off the record.)

14 MR. BRENA: If I --

15 MS. WATSON: Your Honor, if I may,  
16 Ms. Hammer is the person who was responsible for the  
17 through-put calculation, and she also said that in  
18 the deposition that was taken.

19 MR. BRENA: I would like -- I don't want to  
20 play follow the bouncing ball. This is the witness.  
21 Not only did she put the through-put calculations  
22 in, she sponsored the 154B models in the direct case  
23 that used the through-put calculations originally.

24 Mr. Collins didn't. Now, in the rebuttal  
25 case Mr. Collins sponsored the models, and she just

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1 did the information.

2 I don't want to sit before this Commission  
3 and play follow the bouncing ball. She's the  
4 through-put person. She was the through-put and  
5 model person in the direct case, and now she's the  
6 information and through-put person. She supplied  
7 through-put.

8 I am trying to explore whether she has a  
9 clue -- whether she has any information at all that  
10 will would help this Commission reach the future  
11 operations. That is an entirely appropriate line of  
12 cross.

13 MR. BEAVER: This objection was prompted by  
14 Mr. Brena's questioning of this witness to the  
15 effect that presumably she was asking this  
16 Commission to set rates based upon her through-put  
17 calculations.

18 And my objection goes to the fact that  
19 Mr. Collins is the individual who, of course,  
20 testified over two days, who explained how that  
21 information was used.

22 It seems to me clearly appropriate to ask  
23 Ms. Hammer how she calculated the through-put  
24 number. But to go beyond that goes beyond her  
25 testimony, and is inappropriate cross examination.

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1                   MR. BRENA:    I would like to make an  
2                   additional point, too.  And I call it the hard  
3                   question objection.  When we get right to the nips  
4                   of a hard question, is your through-put -- do you  
5                   know whether your through-put -- do you have an  
6                   objective fact to indicate whether the through-put  
7                   you provide is representative of future operations  
8                   can't be more direct.  Can't be more to the heart of  
9                   this case.

10                   Then we sit here for 10 minutes and talk  
11                   about objections.  I would like -- I mean, and none  
12                   of what I call the hard question objections have  
13                   been sustained.  So that's a fair question for this  
14                   witness.  I don't think there's any doubt it's  
15                   a fair question for this witness.  When I ask a hard  
16                   question, that shouldn't be a basis to sit here and  
17                   debate.

18                   JUDGE WALLIS:  I think it is appropriate  
19                   for you to inquire into the subject as you defined  
20                   it in the statement you just made.

21                   I would ask you to be careful about the  
22                   language that you choose in stating your questions  
23                   so that you don't go beyond the purpose for which  
24                   this witness is providing the information, and so  
25                   that you do not characterize the result or the

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1 process in a way that could be construed as  
2 argumentative.

3 MR. BRENA: Thank you, Your Honor. I will  
4 rephrase the question.

5 Q BY MR. BRENA: Ms. Hammer, do you or do you  
6 not know whether or not the through-put information  
7 that you have provided is fairly representative of  
8 the future operations of Olympic Pipeline?

9 A From my understanding with conversations  
10 that I have had with Mr. Talley, it is  
11 representative of the level of through-put that  
12 Olympic would experience over the next couple of  
13 years.

14 Q Now, do you have any objective basis? You  
15 personally. What is the basis for you to say that?

16 A The basis I have to say that?

17 Q Yes.

18 A Olympic is restricted to 80 percent  
19 pressure.

20 Q Okay. Anything else?

21 A That's my knowledge.

22 Q Then do you know whether or not 80 percent  
23 pressure -- let me give you a hypothetical. Let's  
24 say the pressure remains constant and the downtime  
25 is cut in half. Do you know what impact that will

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1 have on through-put?

2 A Not off the top of my head, no.

3 Q Do you know if the Bayview Terminal comes  
4 on line, do you know what impact that will have on  
5 through-put?

6 A No.

7 Q So when you say you believe that it's  
8 representative, that is based solely on the fact  
9 that it will continue to operate at 80 percent  
10 pressure?

11 A Yes. That it will continue to operate at  
12 80 percent pressure, and continue to have the level  
13 of through-put that we have experienced for the last  
14 10 months.

15 Q Now, in your direct case, you didn't use  
16 103, you used 105. Isn't it true that the line was  
17 still operating at 80 percent pressure then?

18 A Yes, that's correct.

19 Q Do you know how all the factors may enter  
20 play to impact through-put other than 80 percent  
21 pressure?

22 A I am sorry. I am not sure I quite  
23 understand your question.

24 Q Well, would you agree that there's a range  
25 of through-puts that are possible even at 80 percent



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1 pressure?

2 A Yes, I will agree to that.

3 Q And how do you know the one you have  
4 selected, 103, is the one that is likely to be  
5 continuing?

6 A Because that is what we're currently  
7 experiencing.

8 Q But my question is, how do you know that is  
9 what you will experience in the future?

10 MR. BEAVER: Objection; I believe  
11 at this point the question has been asked and  
12 answered several times.

13 MR. BRENA: Well, I would ask for a little  
14 bit of indulgence. I spent a lot of time setting  
15 this question up and exploring each potential fact  
16 that impacts through-put, and her only or lack of  
17 knowledge of all of those facts. And then at the  
18 end of that she came up with the idea that her  
19 through-put was representative.

20 So she's not only the through-put witness,  
21 but she's also offering testimony that the  
22 through-put she offered in her calculations is  
23 representative of future operations. So in light of  
24 where she took this, I should be able to explore  
25 quite thoroughly what the factual basis for that

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1 conclusion is, because she didn't stay -- the first  
2 series of objections were that she just gave the  
3 information. But that isn't what she just did.

4 MR. BEAVER: Your Honor, could I respond,  
5 if that's appropriate.

6 JUDGE WALLIS: Briefly.

7 MR. BEAVER: The response that Mr. Brena is  
8 referring to was a response to a question. She did  
9 not voluntarily say anything about through-put and  
10 the future. She was asked a question by Mr. Brena  
11 about whether she thought this might be  
12 representative of the future, and she said, yes,  
13 because that's what we have experienced in the last  
14 10 months.

15 I believe this is -- his last question is  
16 clearly beyond the scope of her direct testimony.

17 MR. BRENA: The scope of --

18 JUDGE WALLIS: The subject is a subject of  
19 considerable concern. The witness is the witness  
20 who's been identified by the company. Her direct  
21 evidence addresses this topic, and we will give  
22 Mr. Brena the latitude to inquire into it.

23 Q BY MR. BRENA: Ms. Hammer, let me go back  
24 to the question. Perhaps aside from your knowledge  
25 of the fact this line will continue to operate at 80

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1     percent pressure, do you personally have any  
2     objective information that at 80 percent pressure,  
3     the line in the future will continue to perform the  
4     way that it has in the past?

5             A     I am not sure I understand what you mean  
6     when you say "objective." I am not sure what you  
7     mean by that. Can you rephrase that?

8             Q     I will try. What is the total factual  
9     basis for your conclusory statement that you believe  
10    that the through-put information that you provided  
11    is representative of future operations on this line?

12            A     Because at the current time, that's the  
13    best information we have.

14            Q     Did Tesoro serve discovery with regard to  
15    downtime?

16            A     Yes, I believe they did.

17            Q     Did Tesoro serve discovery with regard to  
18    stripping operations in the future and past?

19                   MR. BEAVER: I am going to object. Number  
20    one, I think this is beyond the scope. Plus, I  
21    believe this question could be more appropriately  
22    addressed to somebody else who may have been  
23    responsible for responding to discovery.

24                   JUDGE WALLIS: To the extent the witness  
25    knows the answer, she may respond. If the witness

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1 doesn't know the answer, it's okay to say so.

2 THE WITNESS: I don't know.

3 Q BY MR. BRENA: Do you know whether Tesoro  
4 served discovery requesting to know batch sizes,  
5 currently and in the past?

6 A I don't know.

7 Q The degree of the product composition on a  
8 monthly basis?

9 A I don't know.

10 Q When you say it's the best information we  
11 have, are you aware of any information or efforts by  
12 Olympic to try to determine what the future  
13 representative through-put of this line would be?

14 A I am sorry. Could you repeat that?

15 Q When you say it's the best information we  
16 have, has Olympic made any effort at all to  
17 determine what the future through-put may be?

18 A I should probably clarify. When I said  
19 "we," I should have said "I." It's the best  
20 information I have. And, no, I have not made any  
21 calculations for the future.

22 Q Has anybody at Olympic attempted to  
23 determine what the level of through-put is likely to  
24 be, calculationally, during the period these rates  
25 are in effect?



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(EXHIBIT ADMITTED)

JUDGE WALLIS: We are convened to hear Tesoro's motion in limine. We begin with Mr. Brena.

CHAIRWOMAN SHOWALTER: Before you begin, Mr. Brena, are you going to base your motion on the proposed substituted direct testimony?

MR. BRENA: I am going to address both.

MR. MAURER: Your Honor, I would point out we have substituted Mr. Beaver's original testimony, and have withdrawn that and have substituted the substituted testimony, so the original testimony is no longer an issue in this case.

JUDGE WALLIS: Well, I think as a procedural matter, you have filed proposed direct evidence on behalf of Mr. Beaver, and now at this date, you are seeking to amend it.

And I think that would be within the discretion of the Commission to allow that, inasmuch as the testimony that you prefiled was marked for identification and parties had the opportunity to base their cross examination and their other process upon the matter that was prefiled.

So at this point I think it will be sufficient for me to say that I do not agree that have you the absolute right to withdraw that

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1 testimony.

2 MR. MAURER: May I respond?

3 JUDGE WALLIS: Yes.

4 MR. MAURER: I would agree with that  
5 position if we were modifying Mr. Beaver's  
6 testimony, or adding material. What we have done is  
7 taken some of that material out. It should have no  
8 impact to the parties in their cross examination of  
9 Mr. Beaver to have this material removed. I don't  
10 see a harm in removing testimony.

11 And it was my understanding of the  
12 Commission's regulations and its practices that a  
13 party may modify its testimony up until the time  
14 that it is sworn. So I would agree that there has  
15 to be at least a practical consideration when a  
16 party attempts to substantially change or add  
17 material to its original prefiled testimony.

18 But in the situation where there is a --  
19 where the testimony is being shortened, stuff is  
20 being merely cut out -- there's one minor  
21 clarification in the testimony. So I would say that  
22 for purposes of hearing this motion, Olympic's  
23 testimony from Mr. Beaver is the substituted  
24 testimony that we submitted this morning.

25 JUDGE WALLIS: I think at a minimum

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1 at this point we should keep our minds open and we  
2 will allow parties to address the question.

3 MR. BRENA: And I intended to. And I don't  
4 think they preformed their testimony, after the  
5 waiver that it makes a whole lot of difference.

6 And I am ready to proceed.

7 JUDGE WALLIS: Please proceed.

8 MR. BRENA: Let me begin with my  
9 understanding that it's this Commission's practice  
10 that it has adopted the Rules of Professional  
11 Conduct for members of the bar that appear before  
12 it.

13 On that ground alone and on no other ground  
14 you shouldn't allow an attorney to get up from the  
15 examining seat and go to sit over in the witness  
16 seat. I have never been in a proceeding, in any  
17 administrative proceeding where that has ever been  
18 allowed. I have never seen it.

19 It is a violation of our professional rules  
20 of conduct, and should not be a permissible practice  
21 before this Commission.

22 On that ground alone, if you look at that  
23 in a broader context, this is an adjudicatory  
24 process between adverse parties, and area we're  
25 going to open that process up to exceptions where an



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1 attorney leaves this seat and goes to that seat.  
2 The very integrity of the process is called into  
3 question if you permit that, or if you permit this  
4 in this case. The veracity of the witness is  
5 important, his manner in bearing, your ability to  
6 judge what he is saying, to believe what he's  
7 saying, are all matters that are important in  
8 judging the witness.

9           It isn't the position that any attorney  
10 should put himself in with his client before this  
11 Commission that he puts those matters at issue. I  
12 do not believe that an attorney can properly do his  
13 job on this side of the table if he goes over to  
14 that table. I just don't believe it's possible, and  
15 consistent with the ethics that I have tried to  
16 uphold in my practice, and my understanding of our  
17 professional ethics that this Commission has  
18 adopted.

19           So let me first and foremost just say I  
20 think the integrity of the process before the  
21 Commission, based on ethical rules of attorneys,  
22 that practice before it, absolutely bars what they  
23 are trying to do. None of the exceptions apply, and  
24 it doesn't matter how many times they reform their  
25 testimony in an effort to do it. It simply isn't

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1 proper. Aside from that --

2 CHAIRWOMAN SHOWALTER: If you are going to  
3 cover this another place, fine. But you say none of  
4 the exceptions apply, and I gather from the opposing  
5 counsel's brief that they feel maybe subsection A  
6 does apply, "The testimony relates to an issue that  
7 is either uncontested or a formality in the sense  
8 that I think they are making the representation that  
9 the witness, the proposed witness is simply going to  
10 provide us with an update of where all the legal  
11 proceedings are."

12 And what I would like to hear from you on  
13 that question is what your perception of the  
14 proposed testimony is. Is it, in your view, an  
15 account, an objective account of where the  
16 proceedings are, or is it more? And what is the  
17 more, and why is that not a contested issue or  
18 formality?

19 MR. BRENA: It's telling one side of a  
20 story, is how they have advanced Witness Beaver. He  
21 has even, in their reformed testimony -- which what  
22 they have done is they have tried to minimize the  
23 story telling of only one side by deleting a few  
24 provisions in his testimony. But I will give you an  
25 example of how inadequate that truly is.

1           For example, in his reformed testimony on  
2 page 4, they have struck Mr. Beaver's  
3 characterization of Mr. Graham's testimony in which  
4 Mr. Graham testifies that he saw a backhoe hit the  
5 line several times. And he goes on -- it goes on to  
6 the top of page 5.

7           So they take out a few sentences  
8 relating -- that summarize and characterize the  
9 testimony of Mr. Graham in an unrelated proceeding.  
10 But then you will see they leave in the exhibit,  
11 Exhibit OPL 26, which is selective pages of  
12 Plaintiff Graham's videotaped deposition. And that  
13 is set forward in Exhibit 1004.

14           So here they take out a summary of what he  
15 says, and selected parts of his deposition, and then  
16 they turn and they leave in the selective parts of  
17 the deposition.

18           So Chairwoman Showalter, from my  
19 perspective, there is nothing objective about  
20 updating the status of this litigation within the  
21 context of this testimony at all. It is trying to  
22 tell one side of a story, and that side is simple:  
23 that somehow they are not at fault for Whatcom  
24 Creek.

25           And they also have Exhibit 1003, which is

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1 their response and request for hearing with regard  
2 to a notice of violation. So --

3 MR. MAURER: Excuse me. I have been  
4 informed that that is not Olympic's -- something  
5 that was written by Olympic. That is Equilon's.

6 CHAIRWOMAN SHOWALTER: Who provided this  
7 Exhibit 1003?

8 MR. MAURER: We provided the exhibit, but  
9 it's an Equilon document.

10 CHAIRWOMAN SHOWALTER: So who -- pertaining  
11 to whose testimony is 1003 attached?

12 MR. BRENA: It's an attachment to  
13 Mr. Beaver's testimony. With regard to the exhibit,  
14 it matters not technically who it's from. It  
15 matters that the chief legal advisor for Olympic has  
16 parsed through what are multiple pages and multiple  
17 issues for an incident that has resulted in criminal  
18 violations, which has resulted in the largest  
19 environmental fines ever levied by the Office of  
20 Pipeline Safety, which has resulted in multi-million  
21 dollar lawsuits by the Federal government against  
22 this company. He has gone through rules --

23 MR. MAURER: Excuse me. May I --

24 COURT REPORTER: Stop! Both of you, stop!

25 JUDGE WALLIS: All right. Now,

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1 Mr. Maurer.

2 MR. MAURER: Yes. I thought I was  
3 preparing to be chastised.

4 MR. BRENA: I do not have the mike.

5 JUDGE WALLIS: Mr. Brena was engaging in  
6 an argument, and I take it you want to voice an  
7 objection to something he said.

8 MR. MAURER: I have a very strong objection  
9 that regards a motion to strike that Olympic has  
10 filed twice, and Your Honor has ruled on twice in  
11 our favor regarding the mentioning of criminal  
12 allegations.

13 I was afraid this issue was going to come  
14 up during this discussion. Your Honor was quite  
15 clear during the prehearing conference ruling on our  
16 motion to strike the testimony in Tesoro's direct  
17 and answering case regarding criminal allegations.

18 And Your Honor was quite clear that in this  
19 hearing they were not to mention that unless they  
20 could tie it to a particular activities involved in  
21 rate making.

22 And he has just gone ahead and again  
23 violated this order. He does it in his motion in  
24 limine when he references his answer, which is not  
25 nothing but a recitation, page after page after page

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1 of criminal allegations. And attached to which are  
2 criminal allegations.

3 This is unconscionable. How many times do  
4 we have to move to strike this information? How many  
5 times is it going to be before Tesoro complies with  
6 Your Honor's orders?

7 MR. BRENA: Well, Your Honor, I would like  
8 to first argue my case. That's twice I've been  
9 interrupted in mid-argument. I'd like the  
10 opportunity to complete my argument.

11 With regard to Your Honor's motion and my  
12 reference, Your Honor struck the reference in  
13 Witness Brown's testimony to criminal allegations,  
14 and indicated that the criminal indictment would not  
15 be permitted into evidence.

16 I have done absolutely nothing in this  
17 argument to bring into -- I mean, that was struck.  
18 That was evidentiary. Attorney argument is not  
19 evidentiary, and I am perfectly entitled to argue my  
20 motion however I choose to argue my motion,  
21 including the fact that a grand jury has found  
22 criminal allegations with regard to these matters  
23 that they are trying to tell one side of.

24 MR. MAURER: Objection.

25 MR. BRENA: And if I may, his

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1 characterization of our pleading is improper.

2 JUDGE WALLIS: Okay. I would like to stop  
3 the discussion at this point, and say that I heard  
4 you, Mr. Brena, say "criminal violation." Let me  
5 ask if there has been a determination of criminal  
6 liability?

7 MR. BRENA: There has not.

8 JUDGE WALLIS: Then please do not refer to  
9 a criminal violation as though it were a legal fact.

10 Now, in terms of the topic, it is true that  
11 we prevented the parties from offering evidence  
12 relating to the criminal activity insofar as it  
13 related to rate making. However, in this instance,  
14 counsel should, I believe, have a great deal of  
15 latitude in argument related to this particular  
16 issue. It is not evidence in the proceeding, but it  
17 relates to the question of whether the Commission  
18 should or should not receive this information.

19 So I am ruling in favor of Mr. Brena on the  
20 objection, so long as he does not refer to a  
21 criminal violation as though it were an adjudicated  
22 fact.

23 And with that, I would agree that Mr. Brena  
24 does deserve the right to complete his argument and  
25 you will have the opportunity to respond.

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1                   MR. MAURER: Thank you, Your Honor.

2                   MR. BRENA: And I would just like to  
3 clarify that all of the facts set forward in our  
4 motion in limine are not facts from the criminal  
5 indictment. They are facts relating to the civil  
6 fines in civil suits that have been filed. But just  
7 to correct the "page after page." They are repeated  
8 in every forum, so there's no need to do that.

9                   The point that I was making is that please  
10 consider the total context of this situation. They  
11 have just settled the case for 75 million dollars,  
12 the largest fine ever levied by the Office of Oil  
13 Pipeline Safety has been levied against them for  
14 their actions.

15                   There has been a criminal indictment  
16 against Olympic and its former employees with regard  
17 to their operation of the line. They have been  
18 sued. They have 22 lawsuits that are pending out  
19 there. And it is within that context that they  
20 choose to take their chief legal advisor -- and that  
21 is a defined term of art in their management  
22 agreement -- that is the person responsible to  
23 oversee the Whatcom Creek matters. And I would  
24 direct you to that reference. It is section 9.5,  
25 "Advice and Counsel. There shall be chief legal



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1       advisor" --

2                   CHAIRWOMAN SHOWALTER:  Where are you  
3       reading from?

4                   MR. BRENA:  Mr. Beaver's exhibit of the  
5       current management contract, which is Exhibit 1002  
6       on page 14.  "There shall be a chief legal advisor  
7       selected the by the board who will report to the  
8       company's president.  The chief legal advisor will  
9       attend board meetings, draft board resolutions and  
10      meetings, draft and negotiate agreements and  
11      instruments, and supervise litigation and  
12      administrative agency matters related to or made  
13      necessary because of the June 10, 1999 incident."

14                  So within his job description as chief  
15      legal advisor is Whatcom Creek.  He comes before  
16      this Commission in his capacity as chief legal  
17      advisor and tries to tell one side of an  
18      overwhelming story against them.  And what does he  
19      put into evidence?  Selective pages of a videotape  
20      of somebody seeing it being hit, and their side of  
21      the story, Equilon's side of the story in responding  
22      to the notice of violation.

23                  There is nothing objective or uncontested  
24      about what this witness is trying to do, and it  
25      should not be permitted.  It is such an imbalance of

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1 information. He has within him knowledge with  
2 regard to the company's culpability. He gave advice  
3 when they just agreed to pay 75 million dollars to  
4 people, and he's going to come before this  
5 Commission and tell about a backhoe owned by  
6 somebody else, and a contractor owed by somebody  
7 else that hit it five years ago?

8           They just paid 75 million dollars, and that  
9 obviously wasn't the advice he just gave to his  
10 client at all. He obviously gave advice to his  
11 client behind the guise of the attorney-client  
12 privilege that, we better pay 75 million dollars.

13           Now, I don't think -- and let me say, okay,  
14 not only is that -- it's the more important impact  
15 on Olympic Pipeline, and it impacts this case. And  
16 let me explain the impact of this case.

17           Our theory of the case is that shippers  
18 should not have to pay the financial consequences  
19 for imprudent operation of the pipeline. Now, what  
20 that means to us is if they go out and imprudently  
21 operate the line, because of Whatcom Creek and its  
22 consequences, or because they don't test for over a  
23 decade for known pipe that is presumptively  
24 defective, and as a result of those imprudent  
25 operations they have imposed on them a pressure

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1       limitation, the consequences of that pressure  
2       limitation should not be directly flowed through to  
3       shippers as though it is the rate payer's  
4       responsibility to bail them out of the pressure  
5       restriction that was imposed on them because they  
6       can't figure out how to run a pipeline right.

7                So this goes directly to the through-put  
8       issue in this proceeding, and you have sat through,  
9       patiently and courteously, my cross examination of  
10      their witness trying to explore the underlying facts  
11      that provide a more balanced picture to the story  
12      that they have been telling you since this rate case  
13      began, which is third-party damage is what happened,  
14      and we were just standing in the way.

15               Now, they can tell that story, and they can  
16      tell that story with anyone they want. And they can  
17      try to sell that story, and as a litigant it's my  
18      opportunity to bring to you the whole story.

19               But when they put their chief legal advisor  
20      on the stand, and they want him to tell a few bits  
21      and pieces of that story, the most tragic story in  
22      the state of Washington for a decade probably, and  
23      he's going to select -- based on his knowledge that  
24      he's gained, he's going to select two or three bits  
25      of information, and they are going to sit him up

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1       there to tell that side of the story, and when I  
2       start cross examining him he's going to go to the  
3       attorney-client privilege, and he's going to assert  
4       that, and he's going to keep me from exploring what  
5       he really knows, the entire story.

6                 You shouldn't allow that, because it's  
7       wrong to let an attorney before you go up there, and  
8       you shouldn't allow this because there's nothing  
9       uncontested or routine, is the other language in the  
10      ethical rule. There's nothing routine about this.  
11      It goes to the heart of this case. We don't think  
12      we should have to pay rates based on restricted  
13      through-put.

14                We think the shareholders should have to  
15      bear the consequences of not being able to manage  
16      this line right. And if he takes that stand, I want  
17      complete freedom, complete freedom to explore the  
18      rest of the story.

19                CHAIRWOMAN SHOWALTER: Can I ask you a  
20      little bit about that freedom? It would be freedom  
21      to cross examine within the scope of the witness'  
22      direct testimony. So assuming your theory of the  
23      case, and assuming that you are trying to show that  
24      imprudent actions in the past led to reduced  
25      through-put today or near future, that's your theory

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1 of the case.

2 But then here's Mr. Beaver's testimony -- I  
3 am leaping over your first prong for the moment --  
4 and assuming he is up there, then can you outline  
5 for me what, in the testimony -- and let's, for the  
6 sake of this question, use the substituted testimony  
7 simply because it's narrower and it puts the  
8 question more difficultly to you.

9 But if you look at the direct testimony and  
10 whatever exhibits are attached, give me some  
11 examples of questions you would ask within the scope  
12 of the direct testimony that would call for what you  
13 believe would probably be a waiver of  
14 attorney-client privilege, or at least would call  
15 for an open and forthright answer from the witness  
16 whether or not it was a waiver of the privilege.

17 MR. BRENA: First let me suggest that the  
18 scope of my cross would not, in this case, be  
19 limited to his direct examination. I can bring in,  
20 for example, prior testimony of a witness, and I can  
21 seek to impeach his credibility, and explore the  
22 consistency of the opinions he has offered in  
23 different situations and different contexts to  
24 explore whether or not the opinion he is offering is  
25 consistent or inconsistent with those.

1           So before we even get to where the words  
2     are, let me tell you I believe I could ask him about  
3     why it is that they approved a 75 million dollar  
4     settlement if some backhoe operator hit it five  
5     years ago, and they had no fault.

6           And I believe I could explore the nature of  
7     his advice to his client thoroughly and completely  
8     in an effort to demonstrate that what he is saying  
9     before this Commission is a different story than  
10    he's told in a another context, because I am not  
11    only entitled on cross examination to cross examine  
12    on what he chooses to say, but I am also entitled to  
13    cross examine him on whether what he chooses to say  
14    to you is consistent with what he chooses to say in  
15    other forums and contexts.

16           So before I even get to the words I am in.  
17    And when you get to the words, then it becomes a  
18    relatively easy matter to open it up again, because  
19    he is suggesting through his words that they are not  
20    at fault, that it is not imprudent operation. And I  
21    am here to show -- I am here to show and the issue  
22    we have raised is -- and I have never seen a clearer  
23    case of imprudent operation than one that has  
24    resulted in record settlements, and record fines,  
25    and criminal indictments.

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1           I mean, so I would go into the words to  
2 demonstrate that the facts that he's brought forward  
3 to this forum are not the objective whole story.  
4 And the fact is that he's leaving out many of the  
5 stories, and that would lead back to what facts he's  
6 aware of, and what advices he may have given that  
7 are inconsistent with the story that he's telling  
8 before this Commission.

9           So I think -- and I read their -- I read  
10 their authority. I am not suggesting disqualifying  
11 him as an attorney. They cite certain authorities  
12 suggesting that this disqualification of an attorney  
13 shouldn't be done absent compelling circumstances.  
14 I am not suggesting he be disqualified as an  
15 attorney. I am suggesting he should not take the  
16 witness stand, and he should not be permitted to  
17 take the witness stand. And if he does, I should be  
18 permitted proper examination of him.

19           And to me, that would -- this is clearly a  
20 waiver of the attorney-client privilege. He may  
21 have waived it already. And if I were a litigant in  
22 another context, I would assert that he had. I  
23 mean, he's put in testimony before another body with  
24 regard to -- as the chief legal advisor suggesting  
25 third-party culpability for Whatcom Creek.

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1           I can't believe that they don't simply  
2       withdraw him as a witness. And to the degree that,  
3       you know, they suggest -- they suggest he relies  
4       solely on his review of the other public documents,  
5       well, you know, there's no way that in his brain --  
6       I mean, he's the chief legal advisor. They make the  
7       representation that what he is saying is based on  
8       his review of public documents.

9           Well, first, I would suggest that it's not,  
10      and there's no way to determine whether or not it  
11      is. You can't go into someone's mind and determine  
12      why he selected the facts that he did, which is what  
13      I would try to do if he takes the stand.

14          But it's not based solely on that. And  
15      it's based directly within the scope of his assigned  
16      and defined responsibilities as chief legal advisor.  
17      I don't think he should be able to get away with  
18      this.

19          Also the authority that they cite  
20      supports my position. I mean, for example, they  
21      cite this case, "The client's offer of an attorney's  
22      testimony in a cause at large is not waiver as long  
23      as the attorney knowledge has been acquired casually  
24      as an ordinary witness."

25          Well, let me invert that sentence. It is a



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1 waiver if you are not. I mean, this isn't a cause  
2 at large. This is a specific causal event. He is  
3 taking his testimony to say that they are less  
4 responsible, that there's no operator imprudence  
5 involved associated ultimately with the restricted  
6 through-put issue.

7 And he is not -- he didn't like see  
8 something on the street unrelated to his job. He's  
9 not an ordinary witness. He's the chief legal  
10 advisor whose responsibility it is to review all of  
11 this information.

12 So if they wanted to rely on public  
13 documents, and I am not trying to keep anything away  
14 from this Commission, please understand that, but if  
15 it is true, then allow us to supplement the record.  
16 We don't need a witness -- you can take judicial  
17 notice of any of the pleadings, of the notice of  
18 violations. We can do it through judicial notice.  
19 We can put together a full package of all the  
20 pleadings relative to the notice of violations. We  
21 can agree -- we would be willing to stipulate to  
22 both sides of the pleadings with regard to these  
23 major lawsuits.

24 But you don't put their chief legal advisor  
25 up there to put on three bits of information that

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1 they have used in their defense of all of this, when  
2 a week ago they paid 75 million bucks.

3           So there's no reason for this issue to  
4 taint this proceeding. If they want to rely on  
5 public documents, and if this Commission -- it's  
6 certainly our intention to put in -- for example, we  
7 have put in the notice of violations. If they  
8 wanted to -- if they wanted to put in their side of  
9 the story, and the notice of violation, and ask for  
10 a complete set of pleadings, we stipulate to that  
11 stuff routinely all the time. You don't need a  
12 witness, a live witness to do that, nor does this  
13 Commission need a witness at all to do that.

14           So I guess, in short, it's a clear ethical  
15 violation, shouldn't be permitted. No exceptions.  
16 Secondly, it's not fair. It's not fair to this  
17 proceeding or to the information coming to this  
18 Commission.

19           If they get to put on the stand the  
20 principal person with more knowledge of this  
21 incident than probably any other person alive, and  
22 he gets to select what information he shares, and I  
23 don't get to cross examine him on the rest of what  
24 he knows, that simply isn't fair.

25           And, finally, there's no reason to taint

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1       this proceeding with this matter when you don't need  
2       a live witness to put in public documents, and  
3       there's so many other ways to do that.

4                So if they are going to reduce his story,  
5       which I don't believe they have done it -- they  
6       haven't reduced the story down. We have two  
7       lawsuits, and here's the status of them. He  
8       hasn't -- he's gone out and pulled selective  
9       information in.

10               But even if they had done that, then that  
11       could be done in different ways as well. But they  
12       haven't.

13               Those are my themes. That's what I think  
14       is right. Thank you for your patience.

15               JUDGE WALLIS: Commission Staff.

16               MS. WATSON: I will try to keep my comments  
17       brief, given the hour. One thing I wanted to make  
18       absolutely clear is that the rules of professional  
19       conduct absolutely apply to proceedings before this  
20       Commission. In WAC 480.09.710, subsection 3, the  
21       rule states, "Persons appearing in proceedings  
22       before the Commission in a representative capacity  
23       must conform to the standards of ethical conduct  
24       required of attorneys before the courts of  
25       Washington."

1           There is one exception that the Commission  
2       has put forth in the WAC regarding the RPCs, and  
3       that is the license to practice requirement, but  
4       that's the only exception. Therefore, the cases  
5       interpreting the RPCs are certainly applicable.

6           So now we turn to the application of RPC  
7       3.7 which has the prohibition of a lawyer acting as  
8       both a lawyer and an advocate in a proceeding. And  
9       that rule essentially prohibits the lawyer as acting  
10      as an advocate and a witness in the proceeding in  
11      which it is likely that that lawyer will be a  
12      witness.

13          Olympic filed Mr. Beaver's testimony in  
14      December. They have known for a long time that  
15      Mr. Beaver was going to be a witness. Now, I am not  
16      entirely clear when he entered an appearance as an  
17      advocate in the proceeding, but he's very obviously  
18      acting as one now. RPC 3.7 does lay out a couple of  
19      exceptions, four of them, in which an attorney can  
20      act as both an advocate and a witness, and it  
21      appears that none of them apply in this particular  
22      case, as Mr. Brena stated.

23          He went into great detail about pointing to  
24      the deposition and Mr. Beaver's testimony, and by  
25      pointing to that deposition he pointed to a cause

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1 related to the Whatcom Creek incident. And by doing  
2 so, he's not just pointing out all of the actions  
3 against Olympic, he's making -- he's pointing to a  
4 cause of the incident. And by doing that, he opens  
5 the door.

6 So it seems like the cure to this problem  
7 would be for him to withdraw from representation if  
8 he wants to continue to be a witness in the case.

9 Now, RPC 3.7 D talks about when a trial  
10 judge -- I use that term because it's in the rule --  
11 finds that the disqualification of a lawyer would  
12 work to a substantial hardship on the client, I  
13 don't believe we have that situation here. As I  
14 said earlier, they knew for a long time he was going  
15 to be a witness.

16 As Your Honor noted, they have a lot of law  
17 firms working for them in this particular  
18 proceeding. So his withdrawal from the case  
19 shouldn't work as a substantial hardship to Olympic.

20 Moving on to the question of whether the  
21 attorney-client privilege has been waived --

22 CHAIRWOMAN SHOWALTER: Before you leave  
23 that point, isn't the second part of that exception  
24 also not present, because it says the likelihood of  
25 the lawyer being a necessary witness was not

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1 reasonably foreseeable before trial, and here the  
2 decision to have him be a witness was several months  
3 ago?

4 MS. WATSON: Exactly correct. If for  
5 whatever reason his testimony appeared in that  
6 rebuttal case, that would have been a completely  
7 different situation. But it didn't. It was in  
8 their direct case.

9 If the attorney-client privilege has been  
10 waived, it would be a limited waiver. It would be  
11 limited to the issue -- it is limited to the  
12 protected information that he puts at issue in his  
13 testimony.

14 So the inquiry that the other parties can  
15 make into his knowledge would be limited to those  
16 issues. It wouldn't be an exhaustive examination  
17 into all of the information that Mr. Beaver acquired  
18 through his legal representation.

19 The question becomes whether the  
20 substituted testimony that redacts most of the  
21 testimony relating to protected information does  
22 enough to, if you will, close the door to waiving  
23 the privilege. We don't believe that it does,  
24 because like I stated before, he did point to a  
25 cause. And because he did that, it opens the door

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1 to explore his knowledge of any other causes of the  
2 Whatcom Creek incident. So as to that limited area,  
3 the privilege has been waived.

4 JUDGE WALLIS: Does that conclude your  
5 remarks?

6 MS. WATSON: Yes, it does.

7 JUDGE WALLIS: Mr. Maurer.

8 MR. MAURER: Thank you, Your Honor. And  
9 let me begin by apologizing for interrupting  
10 earlier. I do not like to do that, but I figured  
11 this was an area that we were going to get into, and  
12 my fears were realized.

13 And I have a great deal of concern in this  
14 proceeding that Tesoro has taken every opportunity  
15 to poison the well against Olympic, and so I needed  
16 to address that issue when it came up.

17 And in regard to that, Your Honor, I would  
18 like to renew my motion my objection to Mr. Brena's  
19 presentation and to his pleading. And in connection  
20 with that, Your Honor, I would like to read to you  
21 your decision on June 13.

22 CHAIRWOMAN SHOWALTER: I am sorry. But can  
23 we -- before you do that, can we focus on the  
24 argument at hand, and can you raise that later  
25 because I don't want to lose my train of thought

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1 about why or why not Mr. Brena's motion to  
2 disqualify Mr. Beaver is appropriate.

3 MR. MAURER: Of course, Chairwoman. I will  
4 address that first.

5 CHAIRWOMAN SHOWALTER: And while I still  
6 have this in my head, if the testimony that he is to  
7 give is, in your view, all public information, why  
8 is it necessary that Mr. Beaver be the witness to  
9 present it?

10 MR. MAURER: Because Mr. Beaver has  
11 knowledge of the voluminous documents and public  
12 records. He is one of the few people in the world  
13 that has actually spent the time to read these  
14 things. If you look at Evidence Rule No. 1006,  
15 we're permitted to submit summaries of public  
16 documents, and we're doing that through Mr. Beaver's  
17 prefiled testimony.

18 CHAIRWOMAN SHOWALTER: What is the purpose  
19 of the testimony in a substantive sense? What is it  
20 being offered to show?

21 MR. MAURER: It is being offered to show  
22 that there are substantial legal challenges facing  
23 Olympic, and that this material is relevant to the  
24 Commission's considerations of rates during the rate  
25 year.



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1           These are contingencies that the Commission  
2 must be aware of. It's sort of -- the ability to  
3 carry on as a functioning financial entity in light  
4 of the potential exposures is something that the  
5 Commission has to be concerned with in setting rates  
6 that are fair, just, reasonable, and sufficient, as  
7 well as the ongoing vitality of this pipeline.

8           COMMISSIONER HEMSTAD: Well, how do you  
9 respond to the assertion that if Mr. Beaver is on  
10 the stand, and the point of the testimony is to show  
11 the substantial financial risks the company is  
12 facing, how do you respond, then, to the assertion  
13 that opposing counsel can inquire into his  
14 understanding of the background of those issues, and  
15 the prudence of those potential claims?

16           MR. MAURER: My understanding was that  
17 Mr. Brena's concern here was to inquire into  
18 attorney-client communications, and attorney-client  
19 privileged information. Some of what you just  
20 talked about may be attorney-client communications,  
21 and some of it may not.

22           And so to the extent that there is  
23 information that does fall under the attorney-client  
24 privilege, Mr. Beaver will assert the privilege. To  
25 the extent that it does not, it's publicly available

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1 information or is available -- if it's information  
2 that is not the subject of attorney-client  
3 communications, he will so testify.

4 CHAIRWOMAN SHOWALTER: But what if it's --  
5 what if information that was gathered within the  
6 attorney-client privilege is valid cross examination  
7 subject matter?

8 MR. MAURER: If it's attorney-client  
9 communications, Mr. Beaver has the right to assert  
10 the privilege, because the client has not waived  
11 that right.

12 CHAIRWOMAN SHOWALTER: But what about  
13 Mr. Brena's right to ask whatever questions he wants  
14 that he could have asked a witness who was not an  
15 attorney of the company?

16 MR. MAURER: I think the answer to that,  
17 Madam Chairwoman, has to go back to the scope of  
18 Mr. Beaver's testimony, and to the scope of  
19 permitted cross examination under Evidence Rule  
20 611 B.

21 Mr. Beaver's testimony is rather short.  
22 It's seven pages long, and Mr. Beaver testifies to  
23 the existence of certain lawsuits against Olympic.  
24 He doesn't offer any attorney-client privileged  
25 information in his direct testimony. He doesn't

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1 offer anything that could possibly be classified as  
2 attorney-client privileged information.

3 All this information is stuff that is  
4 publicly available. The deposition that Mr. Brena  
5 referred to, Mr. Brena can go and get. You know, if  
6 he feels it's being selectively produced, he can  
7 produce the rest of it.

8 CHAIRWOMAN SHOWALTER: Well, for example,  
9 on page 4 of the proposed testimony says, "After the  
10 notice was issued, deposition testimony was obtained  
11 from a contractor of Mark Graham who was on site  
12 when Olympic's pipeline was likely damaged by a  
13 backhoe in 1994."

14 Isn't that Mr. Beaver saying Olympic's  
15 Pipeline was likely damaged by a backhoe in 1994?  
16 At a minimum, anyway, isn't this an area for  
17 Mr. Brena to say, well, what is your basis for  
18 saying it was likely, or don't you know about other  
19 possible causes, that sort of inquiry?

20 MR. MAURER: The phrase "likely damaged by  
21 a backhoe" is Mr. Beaver's reading of Mr. Graham's  
22 deposition. It's not Mr. Beaver's attorney-client  
23 communications, or it's not -- and it's not his  
24 putting forward of a legal theory. It's a  
25 conclusion that he drew from reading Mr. Graham's

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1 deposition.

2 CHAIRWOMAN SHOWALTER: A couple of other  
3 questions. Well, first, I don't know how we're  
4 going to rule, but if we rule that Mr. Beaver may  
5 take the stand but he will be open to, let's say,  
6 something that may well get into what you think is  
7 attorney-client privilege, what is your position?  
8 Are he going to put him on the stand?

9 MR. MAURER: Are you saying you would  
10 compel his testimony? Let me rephrase that, I am  
11 sorry --

12 CHAIRWOMAN SHOWALTER: Well, it's  
13 hypothetical, but what if there is an area where we  
14 find Mr. Brena has a right to cross examine and ask  
15 a question, and that area would require Mr. Beaver  
16 to answer with privileged information if he were  
17 going to satisfy Mr. Brena's right to ask the  
18 question.

19 MR. MAURER: Mr. Beaver would assert the  
20 privilege. The question comes down to whether there  
21 would be -- whether the Commission would compel him  
22 to answer that question. And as to that situation,  
23 I would like to confer with my client as to what  
24 we would do.

25 One of the possibilities, obviously, is

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1       that we withdraw Mr. Beaver as a witness, or we  
2       withdraw him as an attorney. Both of those are  
3       extremely unattractive alternatives from Olympic's  
4       standpoint, and I have some thoughts on that if the  
5       Chairwoman would like to hear them.

6               CHAIRWOMAN SHOWALTER: Actually not  
7       at this point. I did mean it hypothetically, but I  
8       do have another area. If you just look directly at  
9       RPC 3.7, under what exception are you saying that  
10      Mr. Beaver is an appropriate witness, or are you  
11      saying this doesn't control?

12             MR. MAURER: I can answer that. I have one  
13      point on your previous point. I didn't realize that  
14      the Chairwoman instructed us to try to stick to the  
15      point of your topics.

16             If the Commissioners so desire, and if it  
17      wouldn't it would make the Commissioners' decision  
18      easier, we have no problem withdrawing  
19      Mr. Graham's -- or the excerpts of Mr. Graham's  
20      deposition from Mr. Beaver's testimony.

21             So to the extent that that helps you make a  
22      decision, we're making that offer with regard to  
23      section --

24             CHAIRWOMAN SHOWALTER: Commissioner  
25      Hemstad, do you want to follow up on that point

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1 before we get to another point?

2 COMMISSIONER HEMSTAD: No, let's pursue  
3 yours. I have another point.

4 MR. MAURER: With regard to section 3.7,  
5 there's two points I would like to make. The first  
6 is that if you look at the rule, it applies to  
7 trials. This is not a trial. It's an  
8 adjudication --

9 COMMISSIONER HEMSTAD: And let me break in,  
10 because I was going to ask this. You heard the  
11 comments of Staff counsel and the reference to our  
12 WAC. Are you still adhering to the position that  
13 RPC 3.7 is not applicable to our proceedings?

14 JUDGE WALLIS: And while you are at it,  
15 does not your position require the conclusion that  
16 appearance before the Commission is not the practice  
17 of law?

18 MR. MAURER: I don't understand the process  
19 by --

20 JUDGE WALLIS: The Rules of Ethical Conduct  
21 do not apply to Commission proceedings, as you  
22 appear to be arguing. Is what you are saying really  
23 that appearing before the Commission is not the  
24 practice of law?

25 I am sorry. I didn't mean to step on

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1 Commissioner Hemstad's question.

2 COMMISSIONER HEMSTAD: You are welcome to  
3 it.

4 MR. MAURER: Let me take those in turn, and  
5 start with Commissioner Hemstad's question first.

6 One, you have to look at the purpose of the rule --

7 COMMISSIONER HEMSTAD: And I will break in  
8 again. I read your brief, and you say it's  
9 addressed as juries. Are you suggesting from that  
10 that the rule does not apply to a case tried to a  
11 court?

12 MR. MAURER: I don't believe that we said  
13 that was the sole purpose of the rule.

14 COMMISSIONER HEMSTAD: But that's the  
15 rationale for the rule?

16 MR. MAURER: It's one of the rationales for  
17 the rule. There are other rationales for the rule  
18 as well. That seems to be one of the ones that  
19 simply do not apply in this situation.

20 So I think we were entitled to draw that  
21 out, and pull that out there is no lay trier of fact  
22 here. You are not going to be necessarily more  
23 persuaded by Mr. Beaver --

24 COMMISSIONER HEMSTAD: I was only  
25 suggesting that because we were analogous to judges

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1 in a trial court sitting here. And in fact, we're  
2 subject to the same ethical standards as trial court  
3 judges. I am curious as to why lawyers appearing  
4 before us would not be subject to the same ethical  
5 standards.

6 MR. MAURER: I am not arguing that we're  
7 subject to different ethical standards. I am saying  
8 we have a different proceeding than this rule  
9 necessarily applies to. It is Mr. -- I am sorry,  
10 Judge Wallis -- and I think this gets to his point,  
11 are we not practicing law here. Well, we are, but  
12 we're not practicing law in a trial. We are  
13 practicing law in an adjudicative proceeding.

14 COMMISSIONER HEMSTAD: Then how do you deal  
15 with the WAC that Staff counsel referred to?

16 MR. MAURER: Well, I think that the  
17 Commission has to -- if there's a particular rule of  
18 professional conduct, for instance, it deals with  
19 interactions of the jurors, or something like that.  
20 It simply doesn't apply here. So one answer to your  
21 question, Commissioner Hemstad, may be that this  
22 rule may or may not apply in certain circumstances  
23 in this Commission.

24 I think that to the extent that this  
25 Commission finds that this rule applies, we need to



1 look at the language of the rule, and the purpose of  
2 the rule, and as the Commission is guided by the  
3 Rules of Civil Procedure, we can be guided by this  
4 particular rule of professional conduct in  
5 determining whether Mr. Beaver should be permitted  
6 to act as both an attorney and to testify.

7           Because if you look at the notes to rule  
8 3.7 -- and unfortunately I had to go back to the ABA  
9 model rules. And I would like to point out that the  
10 ABA has recently, as in February 5, 2002, modified  
11 the rule regarding lawyers appearing as witnesses in  
12 this. And I will get to that in a second.

13           But if you look at the notes to the model  
14 rule of professional conduct, No. 3.7, it says, It  
15 is relevant that one or both parties could  
16 reasonably foresee that the lawyer would probably be  
17 a witness.

18           And the issue that they are going to there  
19 is hardship on the client. And I think that that  
20 has to be the Commission's guiding principle in this  
21 case, is that Tesoro has known for six months that  
22 Mr. Beaver was going to be a witness in this  
23 proceeding. Mr. Beaver has repeatedly appeared in  
24 front of this Commission as a lawyer.

25           In fact, I believe it's in the 10th

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1 Supplemental Order, or the Scheduling Order, Mr.  
2 Beaver appeared with me as an attorney for Olympic  
3 in this proceeding. Tesoro has known this for six  
4 months.

5 We're now two weeks into a hearing, and  
6 they are trying to disqualify a person who is both a  
7 very important witness, and a key member of our  
8 legal team. Mr. Beaver has enormous amounts of  
9 experience in litigation, and enormous amounts of  
10 experience regarding these issues, and enormous  
11 amounts of experience regarding the company.

12 If he were not available to us an attorney,  
13 it would be a tremendous hardship. If he were not  
14 available as a witness, the Commission would not get  
15 the information they need to decide regarding the  
16 legal exposure the company faces.

17 CHAIRWOMAN SHOWALTER: Why is that the  
18 case? Because if the witness is there for the  
19 purpose of showing, as you said, that there are a  
20 lot of legal proceedings that Olympic is contending  
21 with, and it costs a lot of money to deal with them,  
22 why -- you have known for even longer than Mr. Brena  
23 has known of this potential dual task of Mr. Beaver.  
24 And why wouldn't it be have been, or even still be  
25 possible to maintain him as an attorney, but have a

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1 different witness to talk about it?

2 MR. MAURER: Well, we have gone into this  
3 issue before, Madame Chairwoman. This is a small  
4 company. There's only a finite amount of people  
5 that can take the time out to read the thousands of  
6 pages of pleadings, and depositions, and other  
7 materials involving these lawsuits, and other  
8 issues. I mean, it would take somebody a very long  
9 time just to be able to read this stuff.

10 Mr. Beaver has done it over the course of  
11 his representation of Olympic. These are publicly  
12 available documents, but we're entitled to submit a  
13 summary of these documents, and we -- under evidence  
14 rule 1006, we have as prefiled testimony.

15 CHAIRWOMAN SHOWALTER: I still didn't hear  
16 your answer. If we apply RPC 3.7, if we say that  
17 yes, it does apply to our proceeding, what exception  
18 are you saying applies to Mr. Beaver?

19 MR. MAURER: I think No. 3.

20 CHAIRWOMAN SHOWALTER: I have A, B, C, D.

21 MR. MAURER: ABA is in its wisdom.

22 CHAIRWOMAN SHOWALTER: Well, I hope we're  
23 looking at our rules, and not anybody else's.

24 MR. MAURER: It's the same rule, but  
25 apparently they have changed the numbering

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1 conventions. It would be D, and it would also be  
2 that it would be A. I mean, none of the material in  
3 Mr. Beaver's testimony is of a particularly  
4 confidential nature.

5 CHAIRWOMAN SHOWALTER: That's why I asked  
6 the question, because your answer was his testimony  
7 relates to the issue of the expense and the prudence  
8 of the expense of carrying on litigation. Are you  
9 saying that that is not a contested issue, or it's a  
10 formality.

11 MR. MAURER: The existence of these  
12 lawsuits and the amounts claimed in them cannot be  
13 contested. Mr. Brena goes on at length in his  
14 motion to describe them.

15 CHAIRWOMAN SHOWALTER: But isn't the issue  
16 for rate making purposes, here, in front of us, from  
17 your point of view -- there are other issues from  
18 Mr. Brena's point of view -- but from your point of  
19 view, isn't the issue whether 2 million dollars --  
20 no, that was the rate case. Never mind -- whether  
21 certain amounts of money are reasonably spent or  
22 excluded, and have been excluded from our  
23 consideration?

24 I mean, what is -- how are you relating  
25 this back to other rate cases?

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1                   MR. MAURER:  How this relates back to the  
2                   rate case is the potential exposure of the company.  
3                   The existence of the lawsuit and how much the  
4                   company will or will not pay, or may or may not pay  
5                   is an issue, but what we were going to be concerned  
6                   with is not the issues in the case so much as the  
7                   fact that they are out there.

8                   CHAIRWOMAN SHOWALTER:  So when we heard  
9                   earlier company witnesses say this is a riskier  
10                  company among other reasons, because there's a big  
11                  huge liability out there, that's part of the  
12                  company's case, am I right?

13                  MR. MAURER:  Yes.

14                  CHAIRWOMAN SHOWALTER:  Then Mr. Brena comes  
15                  along and says, it's only risky, if it is risky,  
16                  because the company acted imprudently and brought  
17                  this upon itself.

18                  Doesn't that make the issue of potential  
19                  liability at riskiness that justifies certain rates,  
20                  a contested issue.  We could put it simply, isn't  
21                  the riskiness of the company a contested issue, or  
22                  the reason for the riskiness a contested issue?

23                  MR. MAURER:  I think the fact that there is  
24                  exposure to a pipeline company in the event of an  
25                  accident, regardless of the cause of the accident,

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1 is an issue in this case.

2 The issue of -- Tesoro assumes that all of  
3 these cases are going to be adjudged in the favor of  
4 the plaintiffs, that Olympic will have to pay the  
5 full amount. And that's just not -- that's not an  
6 issue in the case. What is the issue in the case is  
7 the existence and potentiality of these things, and  
8 the fact that their lawsuits exist in the event  
9 of -- regardless of the cause or the event of an  
10 accident.

11 COMMISSIONER HEMSTAD: Well, let me pursue  
12 that. The fact that the lawsuit exists, I assume  
13 counsel would want to explore the underlying for the  
14 lawsuit. Now, I am looking at page 3 of the  
15 proposed substitute direct testimony, which I  
16 think -- I took it as the heart of what this was  
17 about.

18 At eleven, and the question is, "Has there  
19 been a final adjudication or finding by either a  
20 Government agency or a court that Olympic  
21 negligently caused the Bellingham accident?" And  
22 the answer, No, there has not been a final  
23 determination by any Government agency or court  
24 regarding either of the causes of the Bellingham  
25 accident or responsibilities for the harm caused."

1                   Now, my question, if that's the testimony  
2 of the witness, is it your position that other  
3 counsel can't inquire into it if there's not a final  
4 determination? What are reasons for the action  
5 being brought in the first place? Have there been  
6 any settlements of any of those actions?

7                   And what about the times that have been  
8 imposed? Are they final actions, or not, and what  
9 is the reason for any fines, and the like?

10                  Is it your position that that kind of  
11 inquiry would be improper?

12                  MR. MAURER: Well, it would be partially  
13 not proper, because we have not claimed to want to  
14 recover costs associated with the Whatcom Creek  
15 accident. Also, there is no adjudication that  
16 Olympic is negligent in any of these proceedings,  
17 although there has been fines levied. And I believe  
18 those fines are going to be appealed.

19                  COMMISSIONER HEMSTAD: Is that what you  
20 mean by a final determination because the appeals  
21 are underway?

22                  MR. MAURER: Yes.

23                  COMMISSIONER HEMSTAD: Am I take it by that  
24 that a judgment of a Superior Court on appeal is  
25 not a final determination?

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1 MR. MAURER: In what context, Your Honor?

2 COMMISSIONER HEMSTAD: Well, I will pull  
3 the question back.

4 MR. MAURER: Sometimes it is, and sometimes  
5 it isn't.

6 COMMISSIONER HEMSTAD: Well, I thought a  
7 determination by a state agency to impose a fine, at  
8 least for purposes of -- cannot be considered or  
9 ignored. It can certainly be considered.

10 MR. MAURER: Well, at the time Mr. Beaver  
11 submitted testimony, there was no finding by either  
12 Government agency or court that Olympic -- there's  
13 no final determination that Olympic -- I am sorry.  
14 Let me read exactly what he says.

15 "There's not been a final determination by  
16 any Government agency or court regarding either the  
17 cause of the Bellingham accident or responsibility  
18 for the harm caused."

19 I think in part, Commissioner Hemstad, we  
20 have to turn to an examination as well of who was  
21 paying the expenses in the case. Mr. Beaver talks  
22 about insurance paying some of them, and I think we  
23 also need to think about the level of exposure.

24 Mr. Brena has repeatedly represented to  
25 this Commission that Olympic has entered into, in



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1 other words, paying 75 million dollars in a  
2 settlement. That's simply not the case. Olympic  
3 was one of a number of defendants in a settlement.

4 And while I can't tell you the exact amount  
5 because it's subject to a protective order, they are  
6 not 100 percent liable.

7 COMMISSIONER HEMSTAD: Well, let me ask my  
8 question this way. What is your understanding what  
9 this testimony to be offered, and the testimony at  
10 the second half of page 3 -- what would be your  
11 understanding of the scope of cross examination of  
12 the witness? What could be inquired into?

13 MR. MAURER: Mr. Brena is free to ask  
14 questions regarding these issues and Mr. Beaver is  
15 free to answer them, as long as he is not required  
16 to present attorney-client privileged information.  
17 There's no restriction on Mr. Brena from asking  
18 questions regarding this. If there's non-privileged  
19 information regarding these topics, Mr. Beaver will  
20 supply it.

21 CHAIRWOMAN SHOWALTER: But to give that  
22 answer, you either are asserting that nothing in the  
23 testimony violates -- or yields that privilege, or  
24 constitutes a waiver of that privilege, and no  
25 permissible question requires an answer as a subject

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1 matter basis that would waive that privilege.

2 That was a terrible sentence, and I have  
3 already lost the other half of it. I think what it  
4 means, is either you are saying this testimony and  
5 its scope and other questions Mr. Brena might ask  
6 simply don't invoke, in a substantive way, any  
7 testimony that would waive the privilege, or you are  
8 saying that it might, but that the privilege trumps  
9 an otherwise appropriate area of cross examination.

10 And if you are saying the latter, that the  
11 privilege trumps an otherwise appropriate area of  
12 cross examination, I would like to know, one, are  
13 you saying that at all? And if so, what is your  
14 rationale?

15 MR. MAURER: Well our rationale is that  
16 Mr. Beaver does not testify at any attorney-client  
17 privileged information. And if the scope of cross  
18 examination is properly limited to the subject of  
19 direct examination, then it will considerably lessen  
20 that problem.

21 CHAIRWOMAN SHOWALTER: So you are going on  
22 the first prong, not the second. You are saying it  
23 simply won't arise because of how narrow  
24 Mr. Beaver's testimony is.

25 MR. MAURER: I am fairly confident it will

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1 arise.

2 CHAIRWOMAN SHOWALTER: But you are saying  
3 you believe you have a valid objection that we would  
4 sustain on any question that Mr. Brena might ask  
5 that calls for an answer that would call for  
6 privileged information.

7 MR. MAURER: Let me say this so I am  
8 perfectly clear. Mr. Beaver will testify to proper  
9 questioning cross examination to the extent it does  
10 not call for attorney-client privileged information.  
11 If he is asked to provide information that is  
12 attorney-client privilege information, we will  
13 object and we will hope, A, that is not a usual  
14 occurrence because of the limited nature of his  
15 direct testimony. And B, we believe that this is --  
16 we are properly tendering Mr. Beaver, consistent  
17 with the Commission's rules and the Rules of  
18 Evidence.

19 CHAIRWOMAN SHOWALTER: It seems to me, just  
20 now, your answer was that the privilege trumps.

21 COMMISSIONER HEMSTAD: And in pursuing that  
22 point for the purposes of this discussion, assume  
23 you object, and we overrule your objection then, and  
24 require the witness to respond. Then what would you  
25 do? Would you seek to withdraw the witness?

1           MR. MAURER:    We would have to examine the  
2           situation in context, of course.  As I mentioned, it  
3           would be a substantial hardship on Olympic to not  
4           have Mr. Beaver either testify, or act as an  
5           attorney in this case.

6           So we would hope the Commission would  
7           consider that in determining whether to compel his  
8           testimony at this point.

9           COMMISSIONER HEMSTAD:  And in making this  
10          comment, I am not signaling how we will decide this  
11          issue.  But assuming the scenario that I described,  
12          and if we were to overrule, it seems to me unless  
13          you are going to go across the street and seek an  
14          extraordinary writ from the Superior Court that he  
15          would be required to answer, doesn't that put you in  
16          the position of if we deny Mr. Brena's motion and  
17          you are home free.

18          If we conclude the witness will testify  
19          about that, and the code of conduct rule applies,  
20          and the privilege would be waivable in the context  
21          of appropriate questions, don't you have to decide  
22          in advance whether you want to take that risk or not  
23          when you put the witness on the stand?

24          MR. MAURER:    May I confer with my  
25          co-counsel here for a second?

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1                   MR. BRENA:    May the record note that he's  
2                   conferring with Mr. Beaver.

3                                   (Discussion off the record.)

4                   CHAIRWOMAN SHOWALTER:  Were you going to  
5                   add something, or can I ask a question?

6                   MR. MAURER:    I believe there was an  
7                   outstanding question from Commissioner Hemstad,  
8                   although I don't know if I remember it at the  
9                   moment.

10                  CHAIRWOMAN SHOWALTER:  Well, come back to  
11                  it.  Doesn't this entire discussion demonstrate the  
12                  reason for the rule 3.7 in the first place; that is,  
13                  we cannot, any of us here, know the full extent of  
14                  an appropriate question to which Mr. Brena or any of  
15                  the other counsel have a right to an answer?

16                  And that is why it's so difficult to have  
17                  counsel also be witnesses.  Unless, if we were -- or  
18                  you were to proffer the testimony, and all the  
19                  counsel proffer their questions, and we hear all the  
20                  answers, and then we go back and decide what it  
21                  privileged or what is not, what is waivable and what  
22                  we will require and what is not, at the end of which  
23                  you say, oh, never mind, because if you are going to  
24                  do that, we don't want that as a witness.

25                  I mean, we can't go through that exercise.

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1 And we haven't gone through that exercise. So isn't  
2 it necessary to first, for us to tell you whether  
3 this rule applies, but then for you to decide, based  
4 on what we decide in advance, which way you are  
5 going to go?

6 Because it doesn't seem to me it's  
7 permissible for the witness to testify, and some  
8 questions get answered, and then we get to one that  
9 we say Mr. Beaver must answer, and he says, I won't,  
10 or in that case goodbye.

11 How do you manage this, other than making a  
12 decision now. I mean now -- tomorrow or whatever --  
13 based on whatever we decide, that he will or won't  
14 testify?

15 MR. MAURER: I think that the difficulty  
16 that the Chairwoman recognizes would be considerably  
17 lessened if we continued to concentrate on the scope  
18 of Mr. Beaver's direct testimony.

19 Mr. Beaver does not testify to anything in  
20 his direct testimony that can be even remotely  
21 classified as a communication between him and his  
22 client.

23 CHAIRWOMAN SHOWALTER: But the rule says  
24 testimony related to an issue. It seems to me if we  
25 go with this rule, the question goes to does the

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1 testimony relate to an issue that is either  
2 uncontested or a formality. Is it that?

3 MR. MAURER: May I toss in another rule,  
4 which is 611 B, which is the scope of cross  
5 examination. Which is that "Cross examination  
6 should be limited to the subject matter of the  
7 direct examination."

8 I think if the Commission keeps that  
9 principle firmly in mind, recognizes that Mr. Beaver  
10 is testifying as to a very limited set of facts in a  
11 very limited capacity, these difficulties that the  
12 Chairwoman has recognized will be considerably  
13 lessened.

14 CHAIRWOMAN SHOWALTER: What about the  
15 impeachment issue? I have no idea what is in  
16 Mr. Brena's head, and what kinds of questions he may  
17 want to ask to impeach Mr. Beaver on his testimony.  
18 But what if he has those questions.

19 MR. MAURER: To the extent Mr. Beaver is  
20 able to answer those impeachment questions without  
21 waiving the attorney-client privilege. To the  
22 extent it asks him to waive the attorney-client  
23 privilege, he will assert the privilege.

24 JUDGE WALLIS: Are you arguing that the  
25 scope of cross is strictly limited to the facts that

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1 the witness presents, and that on cross examination  
2 he cannot -- or she -- cannot be required to respond  
3 to facts that relate to the topic that are within  
4 the witness' knowledge.

5 MR. MAURER: I think to answer that  
6 question we have to turn to what Tesoro says they  
7 are going to ask Mr. Beaver. And I think there is  
8 going to be a problem if we allow Tesoro to do what  
9 it says it's going to do.

10 On page 4 of Tesoro's motion they say,  
11 "Tesoro expects in cross examination to probe  
12 everything Mr. Beaver has learned acting as chief  
13 legal advisor."

14 That is not -- the answer to your question,  
15 I can answer what the proper scope of cross  
16 examination is, and what it is not. Probing  
17 everything that Mr. Beaver has learned as acting  
18 chief legal advisor is not the proper scope of cross  
19 examination.

20 JUDGE WALLIS: Let's set that answer aside  
21 for just a moment, and ask if the testimony relates  
22 to an issue that is either uncontested or a  
23 formality. What is the loss if it is not presented?

24 MR. MAURER: The loss is that the  
25 Commission is not fully informed as the existence of



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1 these suits. May I pause for a second.

2 (Pause in proceedings.)

3 MR. MAURER: My co-counsel informs me  
4 as well, and this is an excellent point that I had  
5 not presented to the Commission either.

6 Mr. Beaver's testimony is uncontested.  
7 Mr. Brena did not submit any rebuttal, any answering  
8 testimony to Mr. Beaver. We had to establish in our  
9 prima facie case. We had to file information in,  
10 and Mr. Brena was entitled to challenge it in his  
11 answering case. He has not done so.

12 So as a point of fact, Your Honor, and as  
13 a point of law, Mr. Beaver's testimony is  
14 uncontested at the moment.

15 COMMISSIONER HEMSTAD: Well, the  
16 Interveners wouldn't have to put on any case. They  
17 could rely strictly on cross examination of your  
18 witnesses to establish what they believe would have  
19 to be brought out. That doesn't mean it would be  
20 uncontested.

21 CHAIRWOMAN SHOWALTER: Also, the Bench is  
22 entitled to ask questions.

23 MR. MAURER: As of the moment, Mr. Beaver's  
24 testimony is uncontested.

25 JUDGE WALLIS: Isn't it more accurate to

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1 say that his testimony, his proposed testimony is  
2 not opposed by proposed testimony from another  
3 party?

4 CHAIRWOMAN SHOWALTER: But in any event,  
5 the rule doesn't say the testimony is uncontested.  
6 It says the testimony relates to an issue that is  
7 uncontested.

8 MR. MAURER: I am not sure the existence  
9 of these lawsuits is a contested issue.

10 JUDGE WALLIS: If that's --

11 CHAIRWOMAN SHOWALTER: Well, that's how we  
12 define issue. And what is the way, the appropriate  
13 way in the context of our proceeding, to define  
14 issue. And that is why I asked you originally, why  
15 is this testimony on?

16 And it seemed to me that your answer was  
17 it was going to demonstrate, in part, the riskiness  
18 of the company, which does relate to the rate  
19 proceedings. If it didn't, it wouldn't be relevant.

20 MR. MAURER: The fact of the existence -- I  
21 mean, Mr. Beaver is a fact witness. The fact of the  
22 existence of these lawsuits is not challenged. Mr.  
23 Brena quotes liberally from them in his motion. So  
24 I am not quite sure that I am -- that there's a  
25 disconnect between my earlier statements and this

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1 one.

2 CHAIRWOMAN SHOWALTER: I think it's -- from  
3 your point of view, it's just some facts. But  
4 from Mr. Brena's point of view, it's the prudence.  
5 So as we have noted before, different people have  
6 different theories of the case, and no one party can  
7 control the proceeding by that party's theory of the  
8 case.

9 We will have to, as a Commission, allow  
10 everybody, within appropriate limits, to inquire of  
11 all the witnesses based on their theory of the case.  
12 Then we decide.

13 But at least on the issue of the riskiness  
14 of the company, and how the liability is related to  
15 that riskiness, so far it seems like an issue that  
16 is contested. Certain facts may not be contested.

17 COMMISSIONER OSHIE: And I would like to  
18 add to that before you answer. Because following up  
19 on the Chair's statement, isn't the credibility of  
20 the threat at issue, and isn't that what Mr. Brena  
21 wants to explore is how credible the risk is?

22 MR. MAURER: Well, I am actually glad you  
23 asked me that question, Commissioner Oshie.

24 COMMISSIONER OSHIE: You sound like the  
25 expert witnesses now.

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1 MR. MAURER: Is that a compliment, or --

2 COMMISSIONER OSHIE: It depends on what  
3 side of the bench you are on.

4 MR. MAURER: I guess in the end you have to  
5 ask, where does Mr. Beaver's testimony go? What is  
6 the ultimate point of Mr. Beaver's testimony? The  
7 ultimate point of Mr. Beaver's testimony is on page  
8 7 of his substituted rebuttal testimony, and it's on  
9 the last Q and A. That is the ultimate issue that  
10 Mr. Beaver is testifying to, and that relates to my  
11 earlier point, which is that the Whatcom Creek  
12 expenses have been taken out of our cost of service.

13 So the purpose, the point of Mr. Beaver's  
14 testimony is to get to this conclusion. And so to  
15 the extent that Mr. Brena wishes to, or -- and I  
16 don't mean to exclude Mr. Finklea or Ms. Watson or  
17 Mr. Trotter -- they want to inquire into this  
18 question, and the question doesn't get to or doesn't  
19 require the production of attorney-client privileged  
20 information, then I think we have properly defined  
21 the scope of the direct, and we have properly  
22 defined the scope of the cross examination.

23 CHAIRWOMAN SHOWALTER: That may be your  
24 ultimate purpose for this testimony. But I am not  
25 sure that this purpose can -- is a full limit to the

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1 scope of what is appropriate cross examination. I  
2 mean, we haven't heard from Mr. Brena in a long  
3 time.

4 MR. MAURER: I am happy to have you hear  
5 from somebody else.

6 MR. FINKLEA: For variety sake, I will  
7 offer that Tosco has stayed quiet for a reason, and  
8 it's a reason that might be helpful for this  
9 discussion.

10 Tosco is not taking a position on whether  
11 Mr. Beaver should or should not testify, and at the  
12 same time act as an attorney. But it is for a very  
13 specific reason.

14 Tosco's position throughout this case on  
15 the issue that I really think is the critical issue  
16 that Mr. Brena is getting at is our witness,  
17 Dr. Means, has put forward an adjustment mechanism  
18 for through-put, which goes to the issue of what the  
19 through-put of the company should be. Tosco's  
20 position being that there should be an adjustment  
21 mechanism, and how to do it, that will be debated as  
22 we go forward.

23 Tesoro's position, among other things, is  
24 that the current through-put on this system is  
25 affected by the Whatcom Creek incident, and that

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1       there is culpability for Whatcom Creek, that the  
2       through-put should be set accordingly.

3               The reason I am not involved in this debate  
4       about Mr. Beaver is because I don't take that same  
5       position, but that is Tesoro's position.  And if  
6       Mr. Beaver gets on the stand, I assume that  
7       Mr. Brena will be inquiring about these issues, in  
8       part, to go to the question not of whether there are  
9       litigation expenses or any costs associated with  
10      Whatcom Creek, but going to this critical issue of  
11      what the through-put should be.

12              So I want to make one thing clear on the  
13      record.  That Tosco is not taking a position on this  
14      debate, but I do want to clarify that the reason  
15      we're not is because the issue that we really think  
16      that this debate goes to is where our witness has a  
17      different way of approaching the through-put issue  
18      than our co-shipper Tesoro, and Tesoro does have a  
19      right to pursue its issue.

20              JUDGE WALLIS: Mr. Maurer, is it true or not  
21      true that Mr. Beaver's value to Olympic as a witness  
22      is they integrally related with his role, the  
23      knowledge he's acquired and the wisdom that he has  
24      acquired through his actions as counsel in these  
25      matters?  And if that's the case, how can you

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1 separate? If you say he's very important, how can  
2 you separate his knowledge as a lay person from his  
3 knowledge as counsel?

4 MR. MAURER: I actually think it's fairly  
5 easy, Your Honor. Mr. Beaver is not testifying as a  
6 lay person. He's testifying as a fact witness. And  
7 the facts that he has personal knowledge of is the  
8 existence of these suits, and the subject matter of  
9 the suits. His discussion of that under cross  
10 examination shouldn't necessarily elicit  
11 attorney-client privileged information.

12 His direct testimony deals with the fact  
13 that these suits exist, and he can testify as to  
14 what the subject matter of these suits are. That  
15 shouldn't implicate attorney-client privileged  
16 communication, because there's no discussion in his  
17 direct testimony of that.

18 So I think that to the extent that, you  
19 know, that you feel that there's -- you used two  
20 different words to describe what he's going to  
21 testify to. He's going to testify to facts  
22 regarding the existence of these suits, and he's  
23 going to testify as to his knowledge of the suits  
24 based on his review of the documents.

25 It gets back to our use of evidence rule

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1 1006.

2 JUDGE WALLIS: Mr. Brena.

3 MR. BRENA: Well, I have accumulated a few  
4 things. I thought that the Commission may  
5 appreciate my silence today a change.

6 But first let me get to the solution. You  
7 know, he ought to be -- to withdraw, or be told he  
8 waives his privilege if he takes the stand. He  
9 shouldn't be a witness in this proceeding. I am not  
10 asking that he with be disqualified as counsel.

11 And I just wanted to make a point. They  
12 have had eight or nine or 10 attorneys appear for  
13 them in this proceeding. I have lost count. I keep  
14 count of the number of lawfirms, but I have lost  
15 count of the number of attorneys.

16 When they put Mr. Beaver's testimony in, I  
17 had assumed that he had withdrawn as counsel. And  
18 if you recall, Judge Wallis, the first time he asked  
19 a question of a witness I objected -- or the first  
20 time he was shown information as a witness, I  
21 objected to him participating in argument.

22 I think it was on a confidentiality. I  
23 objected to a witness participating as an attorney  
24 in the hearing, and was reminded he had entered his  
25 appearance months before with regard to the



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1 preliminary things.

2           And so I thought, you know, you don't do  
3 both. You do one or the other, so he would withdraw  
4 as counsel, and now he was a witness. He has  
5 participated through this hearing. You can't unring  
6 that bell.

7           The question is, should he get on the stand  
8 so he's able to tell some, but not all, of the  
9 causes and share some, but not all, of the  
10 information that he's acquired as chief legal  
11 counsel.

12           Judge Wallis asked, and I believe  
13 Chairwoman Showalter followed up on it, why is he a  
14 necessary witness? Because he has the knowledge.  
15 Because he's chief legal counsel. The reason he's  
16 up there is because he knows all of those causes.

17           And all I am saying is, fine, let me  
18 explore those causes. He is suggesting somebody  
19 else is responsible for Whatcom Creek, and that you  
20 can't read his testimony any other way.

21           What I thought would happen -- and I  
22 couldn't believe that they would continue to try to  
23 insist to put him up as a witness and expose this  
24 risk of waiver with all of their liability out  
25 there. Who needs this?

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1           There will be absolutely no prejudice to  
2 their case at all for this Commission to say he  
3 can't take the stand. None. And what I thought  
4 would happen -- in fact, with regard to the  
5 existence of these lawsuits I would remind you that  
6 we had an exhibit introduced in the interim case  
7 that listed all 24 of the lawsuit that are out  
8 there. So the fact that these lawsuit are in  
9 existence, the fact that they are there is already a  
10 matter of record in this proceeding.

11           So the question is, where is there  
12 prejudice at all by not having him take the stand?  
13 What I assumed they would do is withdraw him as  
14 counsel to avoid this risk for themselves, because  
15 of everything else in their life, and just have  
16 Mr. Talley sponsor their exhibits, or some other  
17 witness that is heretofore to come.

18           I mean, they have told you about the  
19 backhoe, and Mr. Batch told you 23 times the backhoe  
20 hit. The same testimony has come in through  
21 Mr. Batch, Mr. Talley. Nobody is responsible for  
22 anything that happened on that line, and they are  
23 telling you through every witness that takes the  
24 stand.

25           COMMISSIONER HEMSTAD: I think you said he

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1 would withdraw as counsel. Did you mean he would  
2 withdraw as a witness?

3 MR. BRENA: I did. I thought he would  
4 withdraw as a witness and continue acting as counsel  
5 in this hearing, because he adds nothing to the  
6 record except for the fact that he wants to take the  
7 stand and give you two or three reasons, when he  
8 knows 100.

9 I was listened closely to opposing  
10 counsel's position with regard to the 75 million  
11 dollars. He told you there's a protective order so  
12 I can't tell you very much about it. But then he  
13 went on to tell you Olympic wasn't 100 percent  
14 liable.

15 Now, I don't know what the terms of that  
16 protective order are exactly, but he told you that  
17 Olympic was not 100 percent liable. So the question  
18 is, what percent liable was Olympic? Well, if we  
19 were to ask him that, he would say that's  
20 attorney-client privilege and it's protected by the  
21 protective order.

22 That is exactly the type of communication  
23 that should not occur in this hearing room. If he's  
24 going to represent that Olympic wasn't 100 percent  
25 liable for the 75 million dollars, but then where

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1 did he go? He went behind the protective order.  
2 The obvious question to have asked is, what  
3 percentage was Olympic responsible? And the obvious  
4 answer that he would have given, there's a  
5 protective order. I can't talk about it.

6 Well, you can't get started down that road.  
7 If you are going to stand and say they weren't 100  
8 percent liable, as not opposing counsel just did in  
9 his argument, and if he's on the stand, you have to  
10 give me the opportunity to explore to what degree  
11 they were liable, why they were liable, and how they  
12 assessed their liability, and the like.

13 So this is a huge potential taint to this  
14 case for no practical reason in the world that I can  
15 think of to, put this attorney on that stand and  
16 have them sit up there and say one or two facts, and  
17 then not let me explore the rest.

18 CHAIRWOMAN SHOWALTER: Mr. Brena, can I ask  
19 you a narrow question? And that is on the last page  
20 of the testimony.

21 MR. BRENA: Page 7, about the cost issue?

22 CHAIRWOMAN SHOWALTER: The very last  
23 sentence says, "Based on my review of the materials  
24 submitted to support its case, Olympic excluded all  
25 costs, judgments, and assessments associated with

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1 claims from its costs of service standpoint."

2 Is that particular sentence contested?

3 MR. BRENA: Yes.

4 CHAIRWOMAN SHOWALTER: Thank you.

5 MR. BRENA: I think Commissioner Hemstad  
6 got to the right quote, too, when he was on page 3,  
7 Has there been a final adjudication? He goes on to  
8 say, there's not a final adjudication of the causes.  
9 The whole purpose for testimony isn't whether to  
10 talk about whether Whatcom Creek costs are in or  
11 not.

12 As you listen to the argument, the  
13 testimony -- as they refile it it gets narrower and  
14 narrower and narrower. This has nothing to do with  
15 whether Whatcom Creek costs are in or out. It says  
16 there's no final adjudication. What difference does  
17 that make whether or not they included the Whatcom  
18 Creek costs in this process? If the costs are out,  
19 they are out, whether there's a final adjudication  
20 or not.

21 Their factual assertion has nothing to do  
22 with what he represented was the conclusion of the  
23 testimony. And the reason they are not connected is  
24 because the testimony isn't to get there. He  
25 suggested you with read all of this testimony, and

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1 went down to that one fact, that would be the only  
2 fact.

3 And Chairwoman Showalter, that fact is  
4 contested. But that isn't what this testimony does.  
5 The fact that there hasn't been a final  
6 determination doesn't go -- doesn't have anything to  
7 do with that conclusion. And you go through this  
8 how many times the backhoe hit, it doesn't have  
9 anything to do with that conclusion. The fact that  
10 not final, not final, other people were sued,  
11 nothing to do with that conclusion.

12 Find something in here prior to that  
13 individual Q and A that he said the entire testimony  
14 was geared to find that conclusion that has anything  
15 to do with the conclusion.

16 Olympic and other entities alleged to have  
17 some responsibility, what does responsibility have  
18 to do with it? It's either in the rate case, or  
19 it's out of the rate case. What's the difference  
20 what's the cause? What's the difference who's  
21 responsible? What's the difference how they  
22 responded to the notice of violation.

23 None of that -- I would submit that none of  
24 this testimony or the exhibits have anything to do  
25 whatsoever with that last statement, and can't be

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1 reasonably considered otherwise.

2 And with regard to final, final is a funny  
3 word. Commissioner Hemstad said, why isn't it  
4 final, and they said because it's on appeal.

5 Well, when this Commission -- you can't  
6 appeal until it's final, whether this Commission  
7 issues an order, as you do every day, it's a final  
8 determination by an adjudicatory body. And then it  
9 goes on appeal because a final order -- you  
10 can't appeal until it's a final order.

11 So with regard to levying of these fines,  
12 they are a final adjudication, and then they are on  
13 appeal. They can't be on appeal if they are not.

14 But the heart of it is -- it goes to the  
15 causes of Whatcom Creek. And they are saying the  
16 causes aren't related to operator imprudence. And  
17 the amount of evidence that is in the universe  
18 showing operator imprudence is huge.

19 They put the person on the stand that knows  
20 all of that evidence, and they want to bring two of  
21 the thousand things in in his testimony. I have to  
22 be able to explore the rest. It's only fair.

23 If I could just have a chance to go through  
24 my notes.

25 I would like to end on a point that I made,

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1 and I don't mean to remake it. But at the risk of  
2 being repetitious, there is no harm by taking  
3 Mr. Beaver off the stand.

4 If what he was being put on there for was  
5 anything close to what they have represented, an  
6 objective presentation of the existence of these  
7 things, we will stipulate to that. If they want a  
8 stipulation, have them draw it up. I will look at  
9 it. If it just lists these things I will stipulate  
10 to that.

11 There is nothing that Mr. Beaver adds to  
12 that process, except for what he's acquired as chief  
13 legal counsel. And all I would say is he shouldn't  
14 be on the stand. If he doesn't get on the stand, it  
15 doesn't compromise the case in the least, and  
16 there's other ways to get the information in if the  
17 purpose of the testimony is truly the scope that  
18 they have indicated, and it's not. Thank you.

19 JUDGE WALLIS: Thank you. Before we  
20 adjourn, I would like to talk for a couple of  
21 minutes about scheduling for tomorrow.

22 MR. MAURER: Your Honor, I apologize. I  
23 didn't mean to break in, but I have a couple of  
24 points that may ease the Commission's consideration  
25 of this issue.



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1           It seems clear to me that the Commission  
2           has some concerns about how this is exactly going to  
3           play out. I think that the law is fairly clear, and  
4           that we're entitled to put Mr. Beaver on as a  
5           witness to testify, and be cross examined on the  
6           subject of his direct testimony.

7           In order to minimize the Commission's  
8           concerns, however, we are prepared to do one of two  
9           things. One is either have Mr. Beaver limit his  
10          direct testimony to lawsuits involving the Whatcom  
11          Creek case, how the costs involving those cases are  
12          not in our direct case, and are not in our cost of  
13          service.

14          Or the alternative is to -- our second  
15          suggestion is that we do enter into a stipulation  
16          with the parties as to the existence of the suits  
17          and whether they are included in the cost of service  
18          request.

19          Just so I am clear, the stipulation would  
20          be as to the existence of the lawsuits, and that  
21          none of the costs of the lawsuit are included in the  
22          costs of service.

23                 CHAIRWOMAN SHOWALTER: But we can't make  
24                 the parties stipulate to anything.

25                 JUDGE WALLIS: Is that something Mr.

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1 Brena would accept?

2 MR. BRENA: Well --

3 MR. MAURER: Essentially what we would  
4 inter into a stipulation about -- I am sorry to cut  
5 you off, Mr. Brena. I want to get this clarified  
6 before you respond.

7 The stipulation would be to the existence  
8 of the suits, and to the conclusion in Mr. Beaver's  
9 testimony that all of the -- can you hold one  
10 second?

11 MR. MARSHALL: If I may, I have been  
12 conferring with Mr. Beaver. And the proposal would  
13 try to limit the difficulty Mr. Brena has described  
14 about whether this would go into the cause of  
15 Whatcom Creek.

16 I think we can limit the testimony to a  
17 rendition of every lawsuit that relates to Whatcom  
18 Creek, whether by stipulation or by summation. And  
19 then at the conclusion by Mr. Beaver, and the last  
20 part of his testimony, that as to that entire  
21 universe of material that relates to Whatcom Creek,  
22 lawsuits, fines, whatever it may be, that those,  
23 based on his review, have not been included in the  
24 cost of service for this case.

25 It seems to us that that is part of our

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1     prima facie case that we have to make, and it also  
2     has not been contested by anybody else.  It's an  
3     uncontested fact.  But the only person that can  
4     testify to that, because he is the chief legal  
5     counsel, is Mr. Beaver.

6             That doesn't involve, then, any kind of  
7     assessment of who was wrong, who was right, who was  
8     to blame, was it a backhoe, was it something else?  
9     Nothing about that.  That would be taken out, so  
10    that we have a simple, plain rendition of what those  
11    lawsuits and other costs are that relate to Whatcom  
12    Creek.

13            And then the conclusion that those costs --  
14    because I do think the Commission is rightly  
15    concerned -- are those costs included somehow in the  
16    cost of service.  That then won't involve privileged  
17    communication.  It would simply involve a question  
18    of how those costs have been paid.

19            The payment of costs don't involve  
20    privilege attorney-client information.  That can  
21    always be inquired of people; the name of the  
22    client, and certain other things, like payments are  
23    not attorney client privilege, so we would not even  
24    have to worry about the breaching of an  
25    attorney-client privilege if that were to be

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1 explored.

2 So that would, I hope, take care of the  
3 universe of concerns that's been expressed here.  
4 And I have consulted with Mr. Beaver, and I think  
5 with that kind of limitation, that would be fine.

6 I do agree with Mr. Brena that other  
7 witnesses have addressed the issue of what the cause  
8 might be, so Mr. Beaver is not necessary on that  
9 point. So we would stipulate that we would remove  
10 all of that material.

11 JUDGE WALLIS: Mr. Brena, would that  
12 satisfy your concerns?

13 MR. BRENA: It would not.

14 JUDGE WALLIS: Mr. Brena, let me ask  
15 whether the testimony relates to any issue or issues  
16 that is or are contested in this matter, in your  
17 view?

18 MR. BRENA: In my view, every Q and A is  
19 contested in Mr. Beaver's testimony.

20 JUDGE WALLIS: Very well.

21 MR. BRENA: May I respond briefly?

22 JUDGE WALLIS: The hour is very late. I  
23 would like to proceed to organize ourselves for  
24 tomorrow. Very briefly, before we adjourn, if you  
25 wish to make a very few limited remarks at this

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1 time, you may.

2 MR. BRENA: Well, I think at some point you  
3 have to fix what it is you are discussing, and I  
4 guess there's been three or four or five attempts  
5 to rewrite Mr. Beaver's testimony so that it weaves  
6 its way into this proceeding, getting narrower and  
7 narrower, with more and more stipulations.

8 At some point you have to quit moving the  
9 target, and that point is well past. That's one  
10 reason it wasn't acceptable, because I don't want to  
11 sit here when I am half awake and try to agree on a  
12 stipulation.

13 Mr. Beaver -- Ms. Hammer is the witness  
14 that knows whether those costs -- should know  
15 whether those costs are in or out. She's the  
16 financial accounting person. Mr. Beaver can't tell  
17 by review of the pleadings whether or not those  
18 costs are in or out of this rate case, and he's not  
19 being presented as a factual witness with regard to  
20 financial accounting matters.

21 So the whole direction of this is wrong. I  
22 stand by where I started out, shouldn't be a witness  
23 for all the reasons I said. And I am not asking for  
24 his disqualification as counsel, only that he's not  
25 the witness.

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1                   JUDGE WALLIS: Very well. I would like to  
2 note that we have potentially three witnesses for  
3 tomorrow. We have interrupted the testimony of  
4 Ms. Hammer. We have Mr. Means going to appear, and  
5 Mr. Ganz. Also, are counsel confident that we will  
6 be able to do that in the time available tomorrow,  
7 or will we need to convene an administrative  
8 conference for the purpose of setting our course for  
9 the day?

10                   MR. BRENA: I think the morning makes  
11 sense to me, Your Honor.

12                   JUDGE WALLIS: Very well. I would like to  
13 call us together at 9:00, then, for that purpose.  
14 And with that, say that the Commission will take  
15 this matter under advisement and will advise the  
16 parties of its decision.

17                   Thank you very much for your argument.

18                   MR. MAURER: Judge Wallis, my objection is  
19 still outstanding. My renewed objection regarding  
20 the criminal allegations. Would you prefer to take  
21 that up in the morning?

22                   JUDGE WALLIS: We can do that. I believe I  
23 am able to rule on that, and my ruling would be the  
24 same in the sense that the question arose in the  
25 context of references relating to rate making, and

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1 in presenting the topic of Mr. Beaver's testimony,  
2 and in the context of the motion.

3 It is not presented as a factual reference  
4 relating to rate making, but it is presented as a  
5 part of the argument only; not a factual argument  
6 only as to the narrow issue that the parties have  
7 been arguing.

8 And consequently, I think that the  
9 references were within the appropriate scope of  
10 argument, and that the ruling is still alive and  
11 well as to any other context in the proceeding.

12 MR. MAURER: Your Honor, I would like to  
13 have the opportunity to read to you what your ruling  
14 was on June 13 -- but my client has informed me that  
15 I am not to. So merely take that as a desire on my  
16 part.

17 MR. BRENA: And may the record reflect the  
18 client was Mr. Beaver.

19 JUDGE WALLIS: Thank you all, and we will  
20 reconvene for a scheduling discussion at 9:00 a.m.,  
21 and take up the evidentiary proceeding at 9:30.

22 (ENDING TIME: 6:30 P.M).  
23  
24  
25