

[Service Date July 23, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION)	DOCKET NO. TO-011472
)	SIXTEENTH SUPPLEMENTAL
Complainant,)	ORDER
)	
v.)	ORDER IMPOSING
OLYMPIC PIPE LINE COMPANY)	PENALTY SANCTIONS FOR
)	VIOLATIONS OF COMMISSION
Respondent.)	ORDER
.....)	

Synopsis: This order assesses penalties on Olympic Pipe Line Company in the amount of \$30,000 for violations of Commission order or rule pertaining to discovery.

I. Background.

1 This proceeding is a proposal by Olympic Pipe Line Company (Olympic) for a 62% increase in its rates and charges for transporting refined petroleum products within the state of Washington.

2 The issue we face in this order is whether to adopt the recommendation of the administrative law judge in the Thirteenth Supplemental Order that the Commission assess penalties in the amount of \$30,000 against Olympic for violations of a Commission order compelling it to produce information in response to a series of discovery requests by Tesoro Refining and Marketing, Inc. (Tesoro), for the compilation and analysis of certain information relating to historical throughput, *i.e.*, the volume of product that Olympic had transported during identified periods in the past.

3 The facts are not in dispute. The necessary context for the discussion is that Olympic has repeatedly failed to comply with discovery rules, directives, and orders in this docket, and that the failure resulted in the delay of this proceeding and an

extraordinary level of effort, detailed at page 2 of the 13th Supplemental Order, with a resulting extraordinary burden on the Commission and the parties. This order addresses the second motion for sanctions in this docket.

- 4 The issue arose during a hearing on April 4, 2002, that was convened to hear arguments on the Commission Staff's motion to dismiss the entire proceeding for Olympic's failure to comply with discovery requirements. During argument, the Commission sought the parties' views on Commission responses to the motion that would be less disruptive of the process than dismissal. The Commission Staff and the intervening parties agreed that finally receiving information that had been requested would provide the minimum necessary information to enable their preparation for the hearing, and they asked for an order compelling Olympic to provide the information.
- 5 In discussions on the timing of a deadline for production under such an order, Olympic drew attention to a series of eleven data requests that its counsel, Mr. Marshall, had received from Tesoro on March 27. At the (Thursday) April 4 hearing, Mr. Marshall represented that Olympic might not be able to complete its response by the following Tuesday, April 9, a date then being discussed as a deadline for production.
- 6 In response to the discussions, the Commission extended the date for response to intervenors' requests (including the eleven items mentioned on the record) until Friday, April 12, 2002, a date chosen to minimize burdens on Olympic in part because it was also the deadline for production of documents under a FERC order to compel. Olympic voiced no objection to entry of the order and expressed no objection to the order nor any expected difficulty in complying with the deadline that the Commission finally established.
- 7 Olympic failed on April 12 to produce seven of the eleven documents that Tesoro had requested on March 27. Tesoro filed a timely motion for sanctions on April 25, 2002, alleging violation of the Commission order and asking as sanction for the violation that the Commission limit its consideration of evidence in finding the proper level of throughput (transportation volume) to be used in calculating Olympic's rates.

8 The Commission denied the motion for policy reasons in the 12th Supplemental Order, but directed the administrative law judge to inquire into the details of the asserted violations, for a recommendation as to whether violations occurred and whether other sanctions should be imposed as a consequence for the violations.

9 The Administrative Law Judge entered the Thirteenth Supplemental Order in this docket on June 3, 2002, finding that Olympic failed to comply with the order as to six of the items requested on March 27 and recommending that the Commission assess a penalty of \$5,000 per item, for a total of \$30,000, based on the initial violation and four days' continuing violation of terms of the order under RCW 80.04.380.

10 Olympic, Tesoro, and Commission Staff commented on the recommendation. Olympic opposed the finding of violations and opposed the recommended sanction. Tesoro supported the finding of violations but opposed the recommendation. Each of those parties sought its desired result as stated at oral argument on May 21. Commission Staff supported the finding of violations and the proposal for sanctions. The matter is now ready for Commission review and determination.

II. Tesoro challenge to the recommended sanction.

11 Tesoro states that this discovery failure relates to an exceptionally sensitive issue, with large financial consequences. It points out that the Commission has recognized the seriousness of the patterns of discovery failures, citing to Commissioner comments during the hearing on the motion to dismiss. Tesoro argues that the proposed sanction is insufficient for the seriousness of the violations.

12 Tesoro first argues that the best sanction for the failure to provide needed information about variables in Olympic's performance is to bar Olympic from denying that the throughput performance on which rates were last calculated is the best and most accurate projection of the Company's future performance. It proposes to strike Olympic's evidence related to throughput, noting that the striking of evidence is specifically listed in WAC 480-09-480 as a sanction for discovery failures.

13 The Commission has already rejected this perspective, stating that in light of its public interest responsibilities, the Commission should not bar evidence as to the best basis for setting rates. To do otherwise, in this instance, could result in rates that

were higher or lower than fair, just, and reasonable, and that might not serve the public interest.

14 Tesoro suggests, in the alternative, that the Commission impose a greater penalty than recommended. It contends that the limited penalty fails to connote the true seriousness of Olympic's repeated pattern of discovery failures, the true costs of the discovery failures, and the true significance of the information that is the subject of the still-pending requests. It suggests a penalty at the maximum allowable level.

15 The level of penalties is a matter within the Commission's discretion. The recommendation is the first proposed levy of penalty sanctions for failure of discovery, and it is set at a level that connotes its seriousness. The Commission will not necessarily be totally without a means to estimate throughput, as it may have other evidentiary alternatives for determining the throughput component of fair, just and reasonable rates. It is entitled to weigh the credibility of Olympic's evidence presented during the hearing.

16 We deny Tesoro's challenge to the recommended penalties.

III. Commission staff response to the recommended sanction.

17 Commission Staff states in its response that the discovery failures experienced in this docket are unprecedented. It recommends that the proposed sanction is reasonable in light of the history of discovery failures expressed on the record of the proceeding.

IV. Olympic's challenge to the recommended findings and sanctions.

18 Olympic challenges the finding that violations occurred and, by denying the existence of violations, challenges the imposition of penalties.

19 **The FERC proceeding.** Olympic does not dispute that it failed to produce seven of the eleven items that Tesoro asked Mr. Marshall (Olympic's Washington State counsel) to provide on March 27, and that Olympic referenced at the April 4 hearing. Olympic's theory appears to be that the existence of and the process in a parallel proceeding before the FERC excuses it from compliance with the Washington State order.

20 Olympic argues that it is being sanctioned for failure to comply with a FERC deadline when the FERC has not found a violation. The essence of this argument is that the Commission is acting outside its jurisdiction to enforce a FERC order that FERC itself is not enforcing, which would countermand the result of the dispute before the FERC. The Commission strongly disagrees. The Commission is not sanctioning violation of a FERC order or deadline – it is sanctioning violations of a WUTC deadline and order. The Commission order was given orally and in writing, pursuant to Washington State law. The deadline was chosen to minimize burdens on Olympic when Olympic said it might not be able to provide the requested information by the Commission’s first-choice, earlier deadline. Olympic’s argument would completely void the WUTC order and the basis for the order, as though it had never happened.

21 Olympic contends that because the FERC and WUTC orders to compel addressed the same issues, and because Olympic was excused from performance at FERC, it need not make any response to the WUTC order. We reject this view. It is true that Olympic is seeking authority to increase rates in both forums, that some of the parties are appearing in both proceedings, and that some evidence was submitted word for word in both proceedings. However, the agencies are in different jurisdictions, are subject to different substantive and procedural laws and rules, have before them different proceedings involving different parties and different evidence, and have different decision makers and different appellate processes. We find no merit in Olympic’s contention that excuse from compliance with a FERC order excuses Olympic from compliance with a WUTC order.

22 **Excuse of performance by avoidance of duplication.** Olympic argues that the directions given to it and other parties by the bench in this proceeding to coordinate and eliminate unnecessary duplications relieve it from acting in the Washington docket if it has acted in the FERC docket. The imprecations to which it cites were implementations of an unprecedented direction to parties that arose from Olympic’s repeated failure to comply with Washington discovery rules and orders, in an effort to secure better compliance from Olympic by making it easier for Olympic to avoid some unnecessary duplication of effort.

23 The clearest refutation of Olympic’s argument that its failure to respond to the WUTC order resulted from coordination of efforts pursuant to instructions is that Olympic itself demonstrated no coordination of its responses to different bodies. At

the very time Olympic was representing to the Commissioners personally, through WUTC counsel, that it was in the process of gathering the information requested in the WUTC proceeding, its FERC counsel was informing Tesoro that Olympic would not provide the same information in response to the FERC order. It did not raise its FERC refusal and objection¹ during the hearing discussion, or in response to the Commission's oral directive, or in response to the Commission's written order.

24 Olympic cites to the Fourth supplemental Order and to transcript references in support of its "coordination" argument. Those references clearly refer to *minimizing*, not eliminating, *unnecessary*, not all, duplications. The logical extension of Olympic's argument is that Olympic need not submit evidence or subject itself to hearing in Washington State, as to do so would duplicate the FERC proceeding. The instructions were fashioned as a tool to relieve burdens on Olympic, to reduce excuses for discovery failures. They were not devised as a tool to enable Olympic to escape the effect of a discovery order.

25 **Waiver by Tesoro.** Olympic contends that Tesoro's agreement to accept an alternative in the FERC proceeding constituted acceptance of an alternative in the WUTC proceeding. It points to no specific Tesoro acknowledgment of such an acceptance.

26 Tesoro heard Olympic's April 4 representations to this Commission, to the effect that Olympic was proceeding to compile and provide the information, and heard Olympic make no objection during the discussion to the production of that information. Tesoro was entitled to rely, as this Commission did, upon the representations of counsel. While the information sought to be produced was identical to that ordered produced in a FERC order, the forums, the orders, and the laws of the forums were not. Olympic may have had a progress disclosure deadline in the FERC proceeding. Tesoro arranged with Olympic's FERC counsel to accept less information in the FERC proceeding. There was no mention of the WUTC proceeding or the WUTC order in any relevant pleading. Olympic's WUTC counsel provided no

¹ Olympic's excuse for nonperformance in the FERC proceeding was that it neither produced nor maintained records of the sort requested. That is not an excuse for nonperformance in Washington State under WAC 480-09-480(3)(c). Burden of a request is a potential response to a request for data, and it has excused Olympic's production of other data responses. Here, however, apart from Olympic's mention at the August 4 hearing that several days might be insufficient time for production, it did not argue excessive burden in argument, in response to the order to compel, in response to the motion for sanctions, or in response to the order recommending sanctions.

communication to Tesoro about the status of production under the WUTC order that was in any way inconsistent with Olympic's actions at the April 4 conference, leading to a reasonable expectation that the information would be provided.

27 **Failure to protest immediately.** Olympic contends that Tesoro is not entitled to bring a motion for sanctions because it did not immediately protest Olympic's failure to comply with the discovery order.

28 Tesoro's motion was timely filed and was subject to no precondition for its filing. Olympic at that point had already violated the Commission's direction and order to produce the information. Olympic's implicit argument that it would have provided the information if only Tesoro told Olympic after the violation that Tesoro really wanted it is negated by two persuasive factors. First, Olympic knew, because of prior requests and inquiries about throughput information, that the information was important to Tesoro and it chose despite that knowledge to violate a Commission order to produce the information. Second, in the considerable period since the motion for sanctions was filed, Olympic has had an extended opportunity to provide the information and it has not done so.² Consequently, we do not find credible Olympic's implicit contention that it would have produced the information if only it had known immediately after violating the order that the violation troubled Tesoro or that Tesoro might consider filing a timely motion for sanctions.

29 We are mindful of the requirements of WAC 480-09-480 and the rule of this case that counsel communicate with each other with regard to discovery matters. Here, however, Olympic's Washington State counsel represented that Olympic was preparing a response; counsel then did not communicate with Tesoro prior to the production deadline about Olympic's decision to refuse to comply with the order. Now Olympic charges Tesoro for an asserted failure to communicate. If Olympic had initiated discussions about the Washington order compelling production, the violations might not have occurred or, as in the FERC proceeding, they might have

² Tesoro and Olympic both confirmed at the hearing session on July 12 that Olympic had not yet provided the information to Tesoro. Olympic offered to provide testimony that it had begun to prepare the response upon receiving the recommended order. It did not state that it had notified counsel that it would be responding, consistent with the requirements of WAC 480-09-480. It neither raised the issue nor offered information during the examination of its witnesses on the topic of the data requests. It did not provide any partial responses to parties when they were ready, as required by repeated instructions regarding discovery. We find no information in the circumstances that Olympic offered to prove that would affect our decision.

been excused. At the expiration of the deadline, however, Olympic was simply in violation of the order. Discussions at that point would not ameliorate the passage of the deadline or Tesoro's eligibility to file a timely motion for sanctions.

30 **Amount of the penalty.** Olympic does not contest the amount of the penalty – merely its imposition. We rejected above Tesoro's suggestion that we increase the penalty. Here, we note that we find no mitigating circumstances to reduce the penalty. Olympic had not complied with the order as of the last scheduled week of the hearing. At the most fundamental level, Olympic did not acknowledge its obligation to comply with the WUTC order or its failure either to coordinate with other counsel or to be candid with this Commission that is evidenced by the two very different messages that it sent on April 4. That lack of acknowledgment is troublesome, and it alone should preclude mitigation of the recommended penalty sanction. Moreover, discovery rules are not simply rules to be followed. They are what enable all parties and the Commission to proceed with a fact-finding hearing in an orderly and well-prepared manner. Olympic's failure to follow the rules has compromised orderliness and preparedness, and has burdened everyone else in the proceeding.

FINDINGS OF FACT

- 31 (1) The Commission conducted a hearing on discovery matters in Olympia on April 4, 2002, at which Olympic represented that it was responding to data requests, including Tesoro's requests for eleven specified items. The Commission ordered on the record during that hearing and reiterated in its Tenth Supplemental Order that Olympic, *inter alia*, produce information in response to all of intervenors' outstanding data requests no later than April 12, 2002. The order covered, among other items, responses to the eleven specific requests from Tesoro for information relating to throughput.
- 32 (2) Olympic did not seek review of the Tenth Supplemental Order or of the obligations placed upon it in the order.
- 33 (3) Olympic provided information in response to four of the eleven items. It stated through FERC counsel in response to a FERC order to compel production of documents, but not through Washington State counsel in the Washington State proceeding, that it had conducted a search and failed to find

any information that would be responsive to a fifth item. It refused to provide information in response to the remaining six items. As to those items, Olympic's FERC counsel in the FERC proceeding, in a letter served on the day of the Washington State hearing on the issue, stated that it would not provide the information because it did not prepare or maintain compilations of the requested information in the form requested. Olympic did not otherwise communicate with Tesoro or the Commission on or before April 12, 2002, regarding the status of or progress toward producing the information requested and ordered to be produced in the Washington State proceeding.

CONCLUSIONS OF LAW

- 34 (1) The Commission has jurisdiction over this matter pursuant to the provisions of Chapters 81.04, 81.28, 81.88 and 34.05 RCW and 480-09 WAC.
- 35 (2) The Commission may impose penalties of \$1,000 per violation of a Commission order, rule, or directive under RCW 81.04.380 and may impose penalties of \$100 per violation of a Commission order, rule, or directive under RCW 81.04.405. The penalties are appropriate sanctions for violations of WAC 480-09-480, as stated therein. The terms of each statute provide that the penalty may be applied independently for each day of a continuing violation.
- 36 (3) Olympic Pipe Line Company violated the direction and the order of the Commission expressed on the record of the April 4, 2002, hearing on discovery issues and expressed in the Tenth Supplemental Commission Order in this docket by refusing to provide answers to six data requests. The violations occurred on April 12, 2002, the deadline established in the order for compliance, when Olympic failed to respond to outstanding data requests with the requested information. The violation continued, and the penalty may be independently imposed, for each subsequent day on which Olympic failed to comply with the Commission order.
- 37 (4) Olympic stated on the record of the proceeding on July 12, 2002, that it had not complied with the terms of the Commission order as of that date.

- 38 (5) A penalty of \$5,000 per each of six data requests, listed as items five through nine and item eleven, recognizing the failure to provide the information when due and four days' penalty for each continuing violation, reflects the seriousness of Olympic's violations and will provide incentive for Olympic to comply with the requirements of WAC 480-09-480 regarding communications about data requests, and to make timely responses to data requests in the future.
- 39 (6) No penalty should be assessed for the failure to provide the information requested in item No. 10, as Olympic through its Washington counsel has responded, verified Olympic's failure to find the requested information, and identified the exact steps it took to find the information.
- 40 (7) The Commission should impose a penalty of \$30,000 on Olympic pursuant to RCW 81.04.380 as a sanction for Olympic's refusal to comply with the Commission's oral directive on April 4, 2002, and with the Commission's Tenth Supplemental Order to produce documents in response to discovery data requests pursuant to WAC 480-09-480, and its failure to respond as to the status of its obligations under the Tenth Supplemental Order.

ORDER

- 41 (1) The Commission finds that violations of the Commission's Tenth Supplemental Order occurred with regard to six individual data requests, in that Olympic failed to produce the information on April 12, 2002, as required by the terms of the order, and that a separate violation has occurred with every day during which each violation continues.
- 42 (2) The Commission assesses penalties in the amount of \$30,000 against Olympic Pipe Line Company for its failure to comply with the Commission's Tenth Supplemental Order.

Dated at Olympia, Washington and effective this ____ day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).