

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)

4)

5 Complainant,)

6)

7 vs.)

8)

9 OLYMPIC PIPE LINE COMPANY,)

10 INC.,)

11)

12 Respondent.)

13

14 A posthearing in the above matter was held on
15 July 18, 2002, at 1:35 p.m., at 1300 South Evergreen
16 Park Drive Southwest, Olympia, Washington, before
17 Administrative Law Judge C. ROBERT WALLIS.

18 Parties were present as follows:

19 WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by DONALD T. TROTTER and LISA WATSON,
20 Assistant Attorneys General, 1400 South Evergreen Park
Drive Southwest, Post Office Box 40128, Olympia,
21 Washington 98504; telephone (360) 664-1189.

22 OLYMPIC PIPE LINE COMPANY, INC., by STEVEN C.
MARSHALL, Attorney at Law, Perkins Coie, 411 108th
23 Avenue Northeast, Suite 1800, Bellevue, Washington
98004; telephone (425) 453-7314; WILLIAM H. BEAVER,
24 Attorney at Law, Karr Tuttle Campbell, 1201 Third
Avenue, Suite 2900, Seattle, Washington 98101;
25 telephone, (206) 224-8054.

26

27

28

29 Kathryn T. Wilson, CCR
30 Court Reporter

1 TESORO REFINING AND MARKETING COMPANY, by
2 ROBIN O. BRENA, Attorney at Law, Brena, Bell &
3 Clarkson, 310 K Street, Suite 601, Anchorage, Alaska
4 99501; telephone (907) 258-2000.

5 TOSCO CORPORATION, by EDWARD A. FINKLEA
6 Attorney at Law, Energy Advocates, LLP, 526 Northwest
7 18th Avenue, Portland, Oregon 97209; telephone (503)
8 721-9118.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

5293

1 JUDGE WALLIS: Let's be on the record,
2 please, for a posthearing conference in TO-011472.
3 This session is being held at Olympia, Washington, on
4 Thursday, July 18th of the year 2002. My name is C.
5 Robert Wallis and I'm the administrative law judge.
6 Let's take appearances at this time. One counsel for
7 each party indicate your name, the name of any
8 associate who is appearing today, and the name of the
9 client for whom you appear.

10 MR. MARSHALL: I'm Steve Marshall for Olympic
11 Pipe Line Company, and with me is Bill Beaver. He's
12 associated with another firm, Karr Tuttle, and on the
13 line should be Jeannie Mar and Bill Maurer, associates
14 of mine.

15 MR. BRENA: Good afternoon. Robin Brena on
16 behalf of Tesoro Refining and Marketing Company.

17 MR. FINKLEA: Good afternoon. Ed Finklea on
18 behalf of Tosco Corporation.

19 MR. TROTTER: Donald T. Trotter and Lisa
20 Watson for Commission staff.

21 JUDGE WALLIS: On our brief agenda for today,
22 the next item is the status of the exhibit list. I
23 want to thank all the parties for the information
24 you've provided. We are in the process of developing
25 both a complete exhibit list and a complete set of

1 documents for the Commission's official file.

2 There are a couple of documents for which we
3 are awaiting the delivery to us of a transcript so that
4 we can check, and there are a few other matters, but I
5 expect that a completed exhibit list will be available
6 for parties within the next couple of business days.
7 That is our goal, certainly.

8 A couple of items relating to briefs. We
9 want to discuss the length of briefs, the issue of
10 proposed findings and conclusions, and the outlines for
11 briefs. I would suggest that we start with the
12 question of proposed findings and conclusions. One of
13 the parties inquired about this earlier in the
14 proceeding, and my response at that time was that we
15 hadn't planned on mandating that the parties provide
16 proposed findings and conclusions but that we thought
17 that it was often helpful on reflection.

18 I think my current views are that it would be
19 very helpful not just to the Commission but to the
20 parties to go through that exercise. If you start by
21 identifying the findings and the conclusions that are
22 necessary for the Commission to find in your favor, to
23 support an order in your favor, and then go back and
24 draft your brief to highlight the findings and
25 conclusions that are necessary and demonstrate that

5295

1 they do, in fact, exist and support your position, then
2 my thinking is that you would be in a much better
3 position to organize and to present the material in
4 your briefs. I would like to hear the parties'
5 comments on this supposition of mine. Mr. Marshall?

6 MR. MARSHALL: I believe Olympic was the
7 party that suggested that we make proposed findings and
8 conclusions, so I think we concur with your
9 observations. The only thing I would add is that if
10 that takes away other parts of the page limitations
11 that we have, we might want to do that as a separate
12 issue.

13 MR. FINKLEA: My only disagreement with
14 Mr. Marshall is that I thought Tosco was the one that
15 had suggested findings and conclusions. I have found
16 in other particularly very lengthy proceedings that
17 findings and conclusions are helpful. I have a similar
18 concern about whether that is in addition to the brief
19 as far as the page limitation, but otherwise, if the
20 Commission thinks it would be helpful, I agree with
21 your observation that I think in organizing your
22 thoughts about a record this voluminous that starting
23 with findings and conclusions is a helpful way to go
24 about it.

25 JUDGE WALLIS: Mr. Trotter?

1 MR. TROTTER: It's maybe not contrary but
2 it's a practical consideration. In the past, I've
3 found it very challenging and difficult to draft
4 appropriate findings and conclusions. I think I might
5 tend to agree that it does help in the manner that you
6 suggested, but it is very time-consuming, and in order
7 to do it right and getting the brief done on the time
8 schedule we've got is challenging enough. I don't
9 think I can do an adequate job on findings and
10 conclusions and write a brief in the time allotted. We
11 don't have the fleet of attorneys and law firms,
12 multiple law firms that other parties seem to be able
13 to command.

14 So it's very mixed. I don't think it can be
15 accomplished within the time limits we are talking
16 about here based on the resources that we are able to
17 bring to bear.

18 JUDGE WALLIS: Would there be objection on
19 the part of any other parties if Staff were excused
20 from this requirement?

21 MR. BRENA: Your Honor, I guess from my
22 perspective, I would share the same concerns as Staff
23 has. I think that ultimately it's what's helpful for
24 the Commission and what there is time to do, that's the
25 right balance. I've been in cases where we've done it

5297

1 and I've been in cases where we haven't.

2 I think the question is one of how do you
3 access the factual nature of the proceeding. I don't
4 know how helpful it's going to be to the Commission to
5 have three or four different sets of findings. I think
6 what people want to quote from, the factual record they
7 want to establish is helpful to set forth at some
8 point, but I think you can do that through exhibits and
9 other mechanisms other than this particular form.

10 I guess I would like for all the parties to
11 have similar requirements. I'm in the same position as
12 Mr. Trotter is in in terms of available resources, and
13 if this is something we are going to do, then we should
14 all do it together or we shouldn't do it. If the
15 Commission wants it done, then I'm happy to do it, but
16 the value of it doesn't leap out at me either.

17 MR. TROTTER: If the parties are inclined to
18 or you are inclined to ask the parties for findings, we
19 will provide them, and conclusions, we will provide
20 them.

21 JUDGE WALLIS: I have to draw a distinction
22 between the Commission's use of the proposed findings
23 on the one hand and the role of proposed findings in
24 assisting the parties to structure their arguments on
25 the other hand. I have seen parties submit findings

5298

1 that the Commission could pick up verbatim and use, and
2 I've seen parties who are not customarily in the role
3 of drafting findings for administrative agencies
4 produce a work product that is not suitable.

5 The value, to my mind, is in encouraging the
6 parties to begin their endeavors in posthearing process
7 by focusing on what the ultimate findings are, not the
8 recitations of testimony, which can be included in the
9 body of an order or which in some instances need not be
10 developed, but to look at what the ultimate findings
11 are that an agency would have to make in order to
12 sustain the view that you are supporting.

13 So while the task might be organizationally
14 challenging, I don't believe that it would necessarily
15 require a large number of pages, certainly relative to
16 the scope of the briefs that we are talking about, or
17 that it would require a large allocation of time,
18 again, compared with the scope of the task that's
19 before us.

20 MR. TROTTER: In that regard, Your Honor, I
21 have seen in certainly other commissions sometimes the
22 entire order is paragraph after paragraph of findings
23 and conclusions, and I take it that's not what you had
24 in mind. Perhaps we can accommodate all parties'
25 concerns expressed here by limiting the number of

5299

1 findings and conclusions to 10 pages double spaced in
2 the brief margin and font requirements or something of
3 that sort. Whatever you want to say in that 10 pages
4 for findings and conclusions is fair game. I just
5 throw that out as a number for discussion. That might
6 ease my concerns substantially.

7 So I am torn. I guess we could look at some
8 recent orders of the Commission and gauge what you are
9 really looking for, assuming that would be a model for
10 what you are looking for, and if that's it, then
11 perhaps we can do something that would be useful.

12 JUDGE WALLIS: We would be looking for a
13 statement of the ultimate findings and the legal
14 conclusions and not necessarily findings on every
15 single fact that would go up to support the ultimate
16 conclusions. We would like to have citations to the
17 record for the proposed findings of fact and to legal
18 authority, whether statutory or case law, for proposed
19 conclusions of law, and those again, I assume, that
20 parties would be providing at they draft the order for
21 the statements of fact and the citations of authority
22 that appear in the briefs.

23 MR. BRENA: If there is a page limit, and it
24 would be very helpful for me to have a sample to work
25 from. This is what we have in mind so that all the

5300

1 parties have the same concept in mind when we are
2 drafting.

3 I would again distinguish if the Commission
4 finds benefit in us doing this exercise, then I'm happy
5 to do it. I feel less compelled to do it for my
6 benefit for the purpose of organizing what I would like
7 to say in my brief. I know what I would like to say in
8 my brief and how I would like to present it in my head.
9 So to me, to the degree it's an organizing tool for
10 parties, it is not a typical organizing tool that I use
11 personally, and it would be of minimal value for me to
12 use it that way, but if the Commission could get some
13 benefit out of it and if I could get a clear sample of
14 what you have in mind, then I would be happy to do it,
15 and I think a page limit is a real good idea on it.

16 MR. FINKLEA: I concur with the page limit
17 idea. My sense from previous orders is that in
18 Commission orders that it may be as little as two or
19 three pages single space that are actual findings of
20 fact, even on this voluminous of a record.

21 MR. BRENA: If you are looking for ultimate
22 conclusions and ultimate findings of fact, then it
23 would be hard for me to imagine that running 10 pages.

24 JUDGE WALLIS: That is my concept as well.

25 MR. BRENA: I would favor a five-page limit

5301

1 or three-page limit, actually.

2 JUDGE WALLIS: Mr. Marshall?

3 MR. MARSHALL: I've looked at a number of
4 findings and conclusions that the Commission has issued
5 over the years. I don't think that any of us are
6 thinking of going beyond 10 pages in what we present.
7 I would hate to have an artificial limit because the
8 record is fairly voluminous.

9 In particular, we have a couple of unique
10 issues here. First, we are dealing with the first
11 contested oil pipeline case ever. Second, we are
12 dealing with two different kinds of methodologies, and
13 we have to discuss that, which is unique. Most of the
14 time, you don't have to decide methodologies. For that
15 reason alone, I think that we need a little more
16 latitude in terms of findings of fact and conclusions
17 here than we would in a standard electric power,
18 natural gas, or telephone company case. We are coming
19 in and you are using a format that's been used over and
20 over.

21 So I don't disagree with the 10-page limit.
22 If parties want to submit fewer pages, then do it, and
23 if we can submit fewer pages, then shorter is always
24 better, but sometimes you have to be able to cover and
25 have the opportunity to cover the facts and the

5302

1 conclusions that are necessary.

2 JUDGE WALLIS: It is sometimes a difficult
3 balancing act, and I would certainly share your
4 observation that it is often harder and often produces
5 a better product to have something shorter rather than
6 longer, which is a good segue into the length-of-briefs
7 discussion.

8 What are parties' thoughts on length of
9 briefs? Mr. Marshall, you submitted a filing
10 requesting that the Company be allowed to use the total
11 number of pages of all other parties combined in
12 presenting its arguments.

13 MR. MARSHALL: Correct. We find ourselves,
14 Olympic, in the unusual position of having three other
15 parties that basically take the same overall end result
16 position with some minor differences, all of which are
17 not good for Olympic, and Olympic taking the position
18 that it's quite to the opposite. There is a very clear
19 distinction between the party with the burden of proof
20 and the parties in opposition to Olympic's rate
21 request. So in that regard, we cited the practice on
22 oral argument of having an equal amount of time to
23 present the argument when all the evidence is in to a
24 court.

25 We have a very strong concern about just

5303

1 procedural due process and being able to respond to the
2 multiple facts that has been adduced in advance by
3 Tosco, Tesoro, and Staff. They are not all aligned,
4 and I'm not arguing that they have to combine their
5 briefs and submit one. But at the same time, Olympic
6 has to respond to each of the allegations, and we gave
7 one example of the issue of throughput. There are many
8 other examples where we will not only have to address
9 our position and support our position, but we will have
10 to advance the reasons why the positions of the other
11 parties should not be adopted.

12 So we bear not only the burden of proof, but
13 we bear the burden of response to three parties that
14 have taken different positions, all of which, by the
15 way, would not be good for Olympic. It would be nice
16 if we could have some friendly briefing on the other
17 side to help shore up some of the positions we would
18 have.

19 We took the position in our motion that we
20 should have an equal number of pages combined to all.
21 I don't think we would use that. Obviously, we are
22 going to be judicious in the page limitation and not
23 try to overwhelm the Commission. We understand that
24 for arguments to be read, they have to be fairly
25 compact and concise, but at the same time, we don't

5304

1 want to be at a disadvantage of being able to fully
2 respond to what our burden is and to the arguments
3 being made by those in opposition to Olympic.

4 I would note that we did receive a reply from
5 Staff on that, which cited the Washington
6 Administrative Code limitation of 60 pages, but it
7 didn't go on to quote the rest of the WAC, which said
8 it was to the discretion of the administrative law
9 judge for good cause shown, the presiding judge, to
10 allow additional pages. We think we've met that burden
11 of showing good cause. We think we have a procedural
12 due process, a significant procedural due process
13 question.

14 And we also added as an aside that the
15 testimony of Mr. Brown, which was, by the way, 62 pages
16 long, read very much like a brief already. If they
17 were to submit that as a brief, I suspect that that
18 could probably stand as a stand-alone brief in this
19 case. So we are already down in terms of trying to
20 respond to all of that argumentation that's been made,
21 all the briefing and all the citation to authority and
22 citation to other witnesses that Mr. Brown has already
23 done in his brief.

24 Staff suggested we should have objected to
25 that testimony. I don't think it's proper to object.

1 I think all the parties have cited in some cases this
2 was extraordinary, but now is the time for us to say
3 that this did operate much like a brief, and we do need
4 to respond not with a 60-page limitation as every other
5 party but with a limitation that allows us to have an
6 equal opportunity to respond to the arguments advanced
7 by the other side.

8 JUDGE WALLIS: How many pages do you think
9 that the Company needs in order to present its
10 arguments tersely but completely?

11 MR. MARSHALL: Abraham Lincoln was once asked
12 how long were his legs, and he gave the reply, they are
13 long enough to reach the ground. I think it depends on
14 how many pages the other side, Tosco, Tesoro, Staff
15 has, and if they are under 60 pages --

16 JUDGE WALLIS: You understand that the briefs
17 will be simultaneous.

18 MR. MARSHALL: Correct, but I think it does
19 go to how many pages they have to respond. If they
20 have 60 pages each, 180 pages total, then we don't plan
21 to use 180 pages. I think we can probably do that in
22 just double one of theirs at 120 pages, and I think
23 that thereto, we will be mindful of the need to be
24 concise, and we don't propose to take more than we
25 actually need to.

1 We are not going to go on at length, be
2 redundant. We will be concise, but I do think we will
3 have to respond to multiple arguments that are
4 different from each of the other parties that have been
5 advanced already, and I know the briefs will be
6 simultaneous, but the basic outlines and the issues are
7 very clear on everything from throughput to major
8 maintenance costs to capital structure. All those
9 things are already there, and we do have to respond to
10 each. Each of the cost of capital witnesses, we have
11 to respond to three. Each of the other parties have to
12 respond to just one.

13 MR. TROTTER: I filed the answer, and I would
14 like to take the first chance at it, but it's your
15 discretion, Your Honor.

16 JUDGE WALLIS: Mr. Trotter?

17 MR. TROTTER: First of all, the Company has
18 had a chance to respond. It's called rebuttal, and --

19 JUDGE WALLIS: I'm sorry. May I interpret
20 you just for a moment? Mr. Marshall, do you have any
21 citation of authority to any court or administrative
22 agency that adopts the view you are advancing.

23 MR. MARSHALL: In terms of having equal
24 number of pages for briefing? We cited the one
25 appellate court rule on argument, and frankly, we just

5307

1 didn't have the time to look up other citations, but I
2 think for good cause shown, you as the administrative
3 law judge can look at the situation here and allow
4 Olympic additional pages of briefing.

5 JUDGE WALLIS: I apologize, Mr. Trotter.

6 MR. TROTTER: The Company has already had one
7 opportunity to respond, particularly to Mr. Brown's
8 written testimony. It was called rebuttal, and they
9 filed lots of it, and they sponsored 13 witnesses in
10 rebuttal.

11 Secondly, the notion that we don't have to
12 respond to Tesoro and Tosco's cases on throughput is
13 just plain wrong. I cannot see how we cannot brief our
14 case to the Commission and address only the Company's
15 case on throughput. We would not be serving the
16 Commission well in that regard, and we would not be
17 serving our own interests in that regard.

18 We have to address the same issues covered by
19 the other parties as Olympic does. That's not a
20 distinction. We are going to be doing the same thing.
21 The rule does talk about good cause shown. In court, I
22 haven't seen one yet where you get much more than the
23 rule requires and maybe an additional 10 pages, but
24 they are very tough, and as we cite, the applicable
25 court rule, if they are going to analogize on court

5308

1 rules, is the rules on briefs, and all parties get the
2 same number of pages, so they cite the wrong rule and
3 then don't recognize the proper application of the
4 right rule by analogy.

5 A 60-page limitation is difficult. Granted,
6 we are just starting to do our drafting, but just
7 looking ahead, it's going to be tough, and we are going
8 to have to make choices on the arguments we emphasize
9 and the ones we don't, and the Company needs to do the
10 same, but we are all covering the same issues, and the
11 notion that only the Company has to respond to three
12 other parties is just flat wrong.

13 JUDGE WALLIS: Mr. Brena?

14 MR. BRENA: Thank you, Your Honor. First, we
15 have had more witnesses to respond to than any party
16 but Tosco. The Company has put on 13 or 14 witnesses
17 in rebuttal plus those witnesses in direct, Staff's
18 witness and Tosco's witness, so I guess in terms of who
19 needs to respond to the bulk, I guess the intervenors
20 have to respond to the bulk of the hearing record.

21 There is nothing unusual about this case or
22 about Olympic's procedural position in it, and there is
23 no procedural due process implications whatsoever in
24 requiring all the parties to have the same briefing
25 limits. They cite the rule for appellate procedure,

5309

1 11.48, and say they didn't have time to do further
2 research. That is a rule that goes to oral argument,
3 and oral argument has quite different implications
4 than briefing does.

5 The rule with regard to briefing is right
6 next to that rule. It's RAP 10.4(b), and it provides
7 each party have 50 pages in opening and 25 pages in
8 reply. That is the standard for appellate practice in
9 this state and that is allotted to each party, and that
10 reflects that each party has to do a complete brief.

11 In oral arguments sometimes, if the parties
12 divide up evenly on sides, you can kind of parse out
13 different types of arguments and present them together.
14 In briefing, you do not have that option. We are not
15 filing a joint brief with Tosco or Staff, and, in fact,
16 our position is different than Staff on the test year,
17 the capital structure, the rate of return on equity,
18 the debt cost, Bayview, whether it's end of period or
19 average, the treatment of one-time expenses, and
20 throughput.

21 I realize it's convenient for Olympic to
22 group us all together, but as Staff needs to respond to
23 us, we need to respond to Staff with regard to -- well,
24 I'm trying to think. I think that we end up in the
25 same place with regard to starting rate base and

5310

1 deferred return, but with regard to perhaps every other
2 issue in this proceeding, we are at slightly different
3 positions than Staff, and those differences need to be
4 briefed and explained and understood.

5 Because they are the company with the burden
6 of proof, that isn't a basis to give them twice as many
7 pages in the brief as any other party, and that isn't
8 my understanding that this Commission does it. The
9 relevant point I think is the one that you made. How
10 many pages do you need, and that same question is
11 relevant to every party, and whatever that relevant
12 number of pages is should be the same for every party
13 because every party has to cover every issue.

14 It's hard for me to imagine a procedural
15 due-process argument, basically, which says that the
16 procedural due-process rights are compromised when they
17 are allowed 60 pages before this Commission, but when
18 this case goes up on appeal, it will only be allowed
19 50, and there is no doubt how the appellate courts will
20 respond to the briefing requirements. So this is
21 another attempt to gain, I believe, a procedural
22 advantage in this case, and we have been way far behind
23 in procedure since the filing of a new case on rebuttal
24 that was huge, dwarfed their direct case and changed
25 it, and we've been trying to catch up with that ever

5311

1 since, so I don't think that the procedural equities
2 weigh the way they suggest they do in this proceeding.

3 There is nothing unique about Mr. Brown's
4 testimony. He is a regulatory policy expert. He's
5 also an attorney. He derived regulatory policy from
6 the cases that he knew and were familiar with and
7 advanced them in his testimony. So did the witnesses
8 for Olympic. So there is nothing -- you don't have
9 regulatory policy experts that don't refer to legal
10 authorities for the basis for those policies, and your
11 regulatory policy expert need be familiar with that.
12 Witness Smith certainly did that extensively
13 as did their capital structure and rate-of-return
14 person.

15 So I guess to me the issue is how many pages
16 are appropriate for each party to have to properly
17 state its position before the Commission in this case.
18 If there is just cause for deviation from the normal
19 page limits, I would suggest that that cause applies
20 across the board to all the parties and that briefing
21 shouldn't become a procedural maneuvering device to
22 give one party a procedural advantage over another.
23 Our positions are unique, and I have to brief
24 everything, and if some of those points coincide with
25 Staff or Tosco, so be it. It makes it easier for

5312

1 Olympic to respond, not harder. To the degree they are
2 different though, I think if you want to do something
3 like -- this to me goes to what page limit should be to
4 applied to reply, if any, and what page limit should be
5 applied to the briefing. It should not be a
6 justification for disparate treatment of the parties
7 appearing before the Commission. Thank you.

8 MR. FINKLEA: I can't disagree with either
9 Staff or Tesoro on most of the observations. We have
10 increasingly proceedings before the Commission where
11 there are very many more parties that are in this case.
12 If a utility were to start -- if there are 10 parties
13 and there is a 50 page limit and the utility gets 500,
14 then it goes to an extreme that's not going to serve
15 the Commission's interest.

16 I can conceive of a slight difference in page
17 limits on reply briefs more so than on opening briefs.
18 It seems to me we all have basically the same burden in
19 trying to tell our stories to the Commission for all
20 the reasons that Mr. Trotter and Mr. Brena just
21 articulated. If on reply there was maybe a 10-page
22 difference between the Company and the Staff and
23 Intervenors, I wouldn't find that offensive, but I
24 think otherwise, to set a 60-page limit or something in
25 that range and replies in the 25 to 30 range is

5313

1 probably going to serve us all well. It will probably
2 take us longer to write a 60-page brief than 120, but
3 it would also help the Commission more to have very
4 succinct briefs in what is very obviously a very
5 voluminous record.

6 JUDGE WALLIS: Mr. Finklea broke the ice in
7 terms of specific numbers. What do other parties
8 suggest? Mr. Trotter?

9 MR. TROTTER: What was your recommendation?

10 MR. FINKLEA: 60 for openings and 30 for
11 replies.

12 MR. TROTTER: That's satisfactory to Staff.
13 I was thinking 20 for replies, but 30 is fine.
14 Remember, we have one week to do it.

15 JUDGE WALLIS: Keeping in mind that the
16 purpose of answering briefs is to deal with matters
17 raised by others that the original opening brief did
18 not deal with, perhaps even a lower number would make
19 them more focused on that purpose. Mr. Brena?

20 MR. BRENA: I think that there has got to be
21 a compromise on all of the parties on what's sufficient
22 for an opening brief. I've heard Olympic say 120
23 pages. I've heard 60 pages, so whatever it is, we'll
24 comply with it, and it ought to be the same for all the
25 parties.

1 I would reinforce the thought that reply
2 should really be reply, and I would just note that the
3 appellate practice in this state is 50 pages and 25 for
4 reply, and so 60 pages for initial and 20 or 25 for
5 reply would seem to be appropriate. I could see if a
6 compromise need be struck maybe allowing 70 pages or 75
7 pages for all the parties on opening, but I agree with
8 the concept to keep reply tight.

9 JUDGE WALLIS: Mr. Marshall, did that
10 discussion help you quantify the Company's need?

11 MR. MARSHALL: Again, our position is that
12 whatever the limitation would be for each of the
13 parties on the other side that we have additional pages
14 because of the circumstances facing Olympic, and if I
15 might just respond to the arguments made by Mr. Brena,
16 Mr. Finklea, and Mr. Trotter.

17 I think just on the argument on pages, we've
18 seen what we are going to see in the briefs. That is,
19 Olympic gets to state its position, and then the same
20 parties in opposition come in and they make different
21 arguments, but they are basically the same end result:
22 Don't give Olympic anything more. We have to respond
23 to each of those arguments, and that's what's going to
24 happen in the brief.

25 When Mr. Brena said, Well, we have

5315

1 differences with Staff. They aren't going to dwell on
2 the differences with Staff, and we know that Olympic is
3 going to be the only party here, based on what we've
4 seen so far, that's going to be recommending to the
5 Commission to adopt the methodology used for interstate
6 rates. So the starting rate base, the deferred return,
7 the parents capital structure, all of those are going
8 to be issues that the other side, all three parties,
9 are not going to take issue with each other for which
10 we bear a significant burden for going forward and
11 proving that.

12 When we filed in October of 2001 for a
13 petition for an order clarifying the methodology to be
14 applied, it was our hope we could get that separated
15 out and done so we would all know which standard we
16 were going to be using, and I think if that had been
17 done, we might be talking about something different
18 here in terms of briefing, but it wasn't. The order
19 was in November that we decide the methodology issue in
20 the context of this adjudicative proceeding, and again,
21 we are the only party that has taken the position that
22 the interstate rates ought to be set in accordance with
23 FERC, and the intrastate rates ought to be parallel to
24 that on a cost-of-service basis.

25 I don't think that Mr. Brena and Mr. Finklea

5316

1 are going to take great issue with what Staff is doing
2 on throughput or anything else. They certainly didn't
3 address harsh questions on cross-examination to Staff
4 witnesses in those areas, and I don't think if they had
5 to make choices on the briefing pages they are going to
6 spend much time trying to address those relatively
7 minor differences. When it comes right down to it, the
8 end result, Staff, Tosco, and Tesoro is pretty much the
9 same.

10 So I think we do have a unique situation here
11 with an oil pipeline case for the first time, a
12 methodology issue being raised for the first time.
13 There is one party taking one position. The other
14 three parties are taking another position, and we have
15 to address in a very significant way each of those
16 other arguments. They do have a choice of ignoring.
17 If Mr. Brena wants to take on Staff on why they came up
18 with throughput, he can rely on Olympic to do that.
19 Olympic will make the arguments about whether Staff's
20 108 million barrels per year is a good figure to use.

21 So I think if you look at the underlying
22 structure of the arguments and the positions and the
23 facts and witnesses advanced so far by the parties,
24 Olympic stands on one side and the other three parties
25 stand on the other. By the way, people keep adding up

5317

1 witnesses. I just added it up. We had 11 witnesses
2 versus nine in the proceedings we just went through
3 here, so it's not a significant difference in terms of
4 numbers of witnesses that we've had versus the other
5 side.

6 But we do have basically a fundamental
7 procedural issue here on do we get to advance the
8 arguments that we need to and support the methodology
9 that we believe is appropriate and use of all the facts
10 and refute the arguments made by each of the other
11 three parties. I don't think we can do that -- I know
12 we can't do that with the same page limitation that the
13 other parties have. I think they can do it with a
14 60-page limit.

15 JUDGE WALLIS: Are you any better able,
16 following the discussion, to identify what you think is
17 an appropriate page limit for your presentation? That
18 is, what do you need, in your belief? Irrespective of
19 what the other parties have, what does the Company
20 believe that it needs?

21 MR. MARSHALL: I think the other parties'
22 suggestion of 60 pages for each of the other parties is
23 not an unreasonable position. As I said before and I
24 will repeat that if they do have that, 120 pages would
25 be the amount that I think would be sufficient for us

5318

1 to be able to respond to the various arguments and
2 facts advanced during the proceeding.

3 I think we may be able to do it for less, but
4 I think at this time, until we actually sit down with
5 the record and look at the methodology issues in more
6 detail, for us to suggest a lower page limit would be
7 unnecessary and a restriction. We will try, and I
8 frankly believe that Staff and Tosco and Tesoro would
9 try to shorten up their briefing if they could do. I
10 see the page limitation as exactly that, a limitation,
11 but not a floor, and we would consider a page
12 limitation to be just that too, not a floor.

13 MR. BRENA: May I briefly comment?

14 JUDGE WALLIS: Mr. Brena?

15 MR. BRENA: I think the issue is is what's an
16 appropriate number of pages for this case. I don't
17 think that that issue should properly be resolved by
18 saying they got this many pages; we should get that
19 many pages. I think the issue is it is a case of first
20 impression. There will be issues with regard to
21 whether FERC methodology, which will need to be briefed
22 by all the parties here, and there is nothing that any
23 party will brief here that I don't need to brief too.

24 I think that's the point. This isn't like
25 oral argument. I need to brief every single thing that

5319

1 supports our case as do they. I don't have the option
2 of not briefing something and leaving it and relying
3 upon another party. So if 120 pages, I've never heard
4 of a page limit anywhere approaching that. I've heard
5 in the Trans Alaska Pipeline case, which is the most
6 significant single pipeline, supplies 10 percent of the
7 total crude supply to our domestic refinery industry,
8 we didn't have page limits like that.

9 So if there is good cause to add additional
10 pages, that same good cause applies to all parties and
11 not just Olympic, and if that is 75 pages, let it be 75
12 pages, but I disagree with the very concept of putting
13 it in relation to other parties who have the same
14 obligation to brief every issue.

15 JUDGE WALLIS: Anything further?

16 MR. TROTTER: I just echo those comments. I
17 think the Company needs to focus on what do they need
18 to file their opening brief, and whether Staff has X
19 pages or Y pages shouldn't change that. What
20 objectively do you need to get the job done? I would
21 like more pages, but if everyone is going to be fair
22 about it, then we will be fair about it too, but we
23 will get the job done in 60 pages, and the Company can
24 do the same.

25 MR. BRENA: I would be happy with 75 and 25

5320

1 if the circumstances of this case if Your Honor thinks
2 merits an extension of that rule.

3 JUDGE WALLIS: I want to remind parties that
4 our rules do prescribe a format for briefs and a
5 minimum font size. Certainly kinds of fonts are
6 permitted, minimum margins, the size of footnotes. We
7 have had very resourceful attorneys in the past, and
8 when we establish a page limitation, we do it with
9 reference to the format requirements. My preference
10 would be to reserve a ruling on these matters and to
11 serve an order tomorrow that establishes the results of
12 our discussion.

13 I would like to share with you now that my
14 thinking -- and I would like to go back and look at
15 documents relating to the record -- my thinking would
16 be to set a page limitation of 70 pages, excluding
17 tables that within the format requirements exceed
18 one-half page and excluding a statement of proposed
19 findings and conclusions and that the parties have an
20 additional 10 pages for findings, conclusions, and
21 tables.

22 MR. BRENA: Tables and statement and
23 conclusions are all grouped to 10?

24 JUDGE WALLIS: They need not be physically
25 grouped, but my concept is that that would provide a

5321

1 total of 80 pages and that parties could include tables
2 in the text, if you wish. That, I think, would give
3 parties flexibility to organize your response and I
4 believe space to include everything.

5 MR. BRENA: Let me just ask, is the drafting
6 style -- something that I would like to do is attach in
7 the body of the text, for example, have an end note
8 where in a particular conversation I refer to the
9 citations in the record and put parentheticals in with
10 regard to what that is and put that in some sort of
11 form and do that by section by substantive section so
12 that a decision-maker can just look to the section with
13 regard to throughput and see the relevant transcript
14 cites that we are relying upon for our argument and
15 that we think should be considered. That would be
16 within the concept of tables or within the concept of
17 the findings of fact under your page limit concept;
18 right?

19 JUDGE WALLIS: So long as the total is 80,
20 and if you elect to do that, the total of your
21 findings, conclusions, and tables doesn't exceed 10.

22 MR. MARSHALL: May we see an example of that?
23 Because if that format would be used, just because you
24 have to have parentheticals in reference to a
25 transcript --

5322

1 JUDGE WALLIS: Let me say that my own
2 preference, based on my research style and my reading
3 style, would be to have foot notes rather than end
4 notes, and parties, if you are citing to a page in the
5 transcript, you need not use a note but may merely put
6 a parenthetical and cite to TR-2786, Line 23, and that
7 would provide the citation that we need when we are
8 checking and verifying and would take up less space in
9 the brief.

10 MR. BRENA: When we are discussing tables,
11 just so I know that we are using the common term here,
12 what kinds of tables are we discussing?

13 JUDGE WALLIS: Any tabular that is matrix
14 style presentation.

15 MR. BRENA: That wouldn't be incorporated in
16 the body of the brief.

17 JUDGE WALLIS: That could be incorporated in
18 the body of the brief or not, as you choose.

19 MR. TROTTER: Can I ask a couple of
20 clarifying questions here?

21 JUDGE WALLIS: Mr. Trotter?

22 MR. TROTTER: Your preference is for
23 citations to the record to be contained in footnotes?

24 JUDGE WALLIS: My preference would be for
25 citations to the record to be contained in the body.

5323

1 MR. TROTTER: And footnotes would contain
2 what?

3 JUDGE WALLIS: Footnotes would contain
4 parentheticals, citations to legal authority. It could
5 be either place. If you wish to expand upon authority,
6 you could do that in a footnote.

7 MR. TROTTER: Just so I understand Mr. Brena,
8 if I could pose it to him directly, I think what you
9 described is for your end note concept would be actual
10 portions of the record, like a large quote or something
11 like that that you would not put in the body of the
12 brief but reserve to an end note.

13 MR. BRENA: Like for example, for a certain
14 proposition, we would state the proposition and have a
15 footnote and have 30 cites to the transcript with
16 parentheticals that would be like a stream of
17 transcript cites.

18 JUDGE WALLIS: That would be appropriate for
19 a footnote.

20 MR. MARSHALL: If we could see an example,
21 and I think I understand what Mr. Brena is talking
22 about, but I'm not sure that I do.

23 JUDGE WALLIS: I think what we are focusing
24 in on, and Mr. Brena, please tell me if I'm overly
25 optimistic in my perceptions, is that we would not use

1 end notes but would use text and footnotes, and the
2 parties would have the opportunity to use those as they
3 choose.

4 MR. BRENA: My comments weren't to use end
5 notes versus footnotes. My comments were intended in
6 order to how do you get your arms around this
7 voluminous record, and the way that we do we've done
8 it, that we've done it traditionally, is string cites
9 to the transcript that support particular positions and
10 sometimes contain parenthetical and sometimes contain
11 quoted material, and that could be a couple of pages
12 long for a particular proposition.

13 So I was just trying to figure out where that
14 fit into the tables or statements or body, sort of how
15 to treat that within the concept. It sounds as though
16 it could fit into any one of the three places, but we
17 will certainly adopt your preference for footnotes
18 versus end notes.

19 MR. MARSHALL: Again, my question is just to
20 see an example of this so we understand what this
21 concept is. I hear it, but I'm not sure that I
22 understand what that might be. If it's a way of saving
23 space because you don't have to have a closing
24 parenthetical and another opening parenthetical so you
25 can have a string, that may be what Tesoro is looking

5325

1 to do. I don't know, but it would be very helpful to
2 have at least an example of that so we all understand
3 what the concept is that's being advanced by Tesoro.

4 MR. TROTTER: Your Honor, my understanding is
5 all he's referring to would be a footnote that has a
6 transcript, reference, witness reference, and perhaps a
7 quote, and there might be several of those to the
8 extent, several of them consistently support the same
9 position. That's all I've heard him say. If he can
10 confirm or deny that.

11 MR. BRENA: That's correct.

12 MR. TROTTER: The second issue I had, Your
13 Honor, as you may recall, we filed a single-page
14 document in our surrebuttal or supplemental direct
15 updating the kilowatt-hour rates for Olympic based on a
16 recent settlement in an electric utility rate case, and
17 we didn't track that through our entire pro forma
18 restated statement; although, I think there is
19 sufficient information there for the Commission to do
20 that.

21 We would, and I think this is typical,
22 although I haven't checked, but I recall in the past
23 that sometimes an appendix might contain the parties'
24 final pro forma and restated actual exhibit, not four
25 versions or four cases but their final case, but that

5326

1 might exceed the 10-page limit that you've set, so I
2 was wondering if the parties could agree that a single
3 pro forma restated actual-type portrayal could be
4 supplied to the accounting adviser for the Commission
5 to see what we think the numbers are and how they fit
6 all the way down to the last penny.

7 JUDGE WALLIS: Is that not something that you
8 would plan to include in your brief itself?

9 MR. TROTTER: I think we would include in
10 that discussion of each adjustment, we would perhaps
11 have a revenue amount or an expense amount that might
12 not discuss taxes and rate base and depreciation and
13 every single number that might be associated with that.
14 That would be shown in the main exhibit. So it would
15 be best, I think, portrayed in the detail that would
16 satisfy someone trying to get all the numbers together.
17 The best way to do that is the type of exhibit that
18 Mr. Kolbo sponsored, and I think that's simply more
19 than 10 pages.

20 On balance, we can live with the record like
21 it is, but I think it will make more work for the
22 Commission in pulling all those numbers and putting
23 them together. So I do this as an efficiency move for
24 the Commission, because there is a lot of tracking
25 through of tax effects and so on that might not be

5327

1 included in the body of the brief.

2 MR. BRENA: I'm concerned about where that
3 goes. We intended to summarize our ultimate position
4 and have some sort of summary. I'm concerned that that
5 may open the door to a new cost-of-service run, and I
6 hope that isn't what Staff is suggesting. I hope it's
7 a summary statement of its ultimate recommendations.
8 We intended to that in the conclusion and is
9 recommendations portion.

10 I think that Mr. Trotter is correct that that
11 would be helpful for a party to finally kind of
12 summarize their position. That would be helpful for
13 the Commission, but I would be loathe to take that
14 outside of these page limits that we've established
15 already or that we are thinking about.

16 JUDGE WALLIS: Other thoughts?

17 MR. MARSHALL: We have a similar concern with
18 having a multiple-page exhibit that summarizes all of
19 Staff's case. They ought to be able to do it in their
20 brief without an additional exhibit with additional
21 pages.

22 Again, for Your Honor's consideration on the
23 page limitation for Olympic, we are the party that
24 bears the burden of proof. We are distinct, and we are
25 going to hear that from each of the parties. They are

1 going to be united on that legal issue right at the
2 very beginning of their briefs, and we are going to
3 have to respond, and we bear a burden, and therefore,
4 we need to have for good cause shown, and we believe
5 we've shown it, and we need the additional pages. I
6 would object to Staff having additional pages.

7 MR. TROTTER: We will just withdraw the
8 request.

9 JUDGE WALLIS: Very well.

10 MR. BRENA: Your Honor did not suggest
11 anything with regard to the reply brief.

12 JUDGE WALLIS: My preference would be to see
13 those at a minimum length with the expectation that the
14 parties through the course of the proceeding and
15 development of issues list or outlines can anticipate
16 what others are going to say. The purpose of the
17 answering briefs is not to restate what's in your
18 opening brief but to respond to arguments that you did
19 not anticipate.

20 In accordance with the suggestions of the
21 parties, my thinking at this time would be 15-page
22 limitation, recognizing that parties only have a week
23 to analyze and respond, with an additional 10 pages for
24 the Company. I would be interested in parties' views
25 on whether that would be sufficient for your needs.

1 MR. BRENA: Your Honor, in this dynamic, I
2 will not restate my arguments with regard to equal
3 treatment of all the parties. The appellate rules
4 provide for that. Even though they have the burden, I
5 guess I would ask for 20 pages in that context to close
6 that gap.

7 MR. TROTTER: Your Honor, notwithstanding the
8 Company's comments of Staff and Intervenors being in
9 the same position, we will be need to respond both to
10 the Company and to Tesoro and Tosco, so we will support
11 the Company getting more, but I think 15 is probably on
12 the short side, so we would support 20 for Staff and
13 Intervenors.

14 MR. FINKLEA: I do think that 15 is going to
15 be awful tight. Even though I do think that given the
16 less would be more if we could do it, given the number
17 of issues, 20 and 30, we could support.

18 JUDGE WALLIS: Mr. Marshall?

19 MR. MARSHALL: 15 pages for Staff and
20 Intervenors each totals 45 pages. 20 for each totals
21 60 pages. I think 60 pages of response, and I think we
22 have to be realistic, will be focused 80 to 90 percent
23 on Olympic, puts us at a distinct disadvantage. I
24 think we've had enough testimony already that a total
25 of 45 pages to Staff and Intervenors is more than

5330

1 adequate.

2 Every argument that can be advanced I believe
3 has probably been advanced. I can't conceive of very
4 many surprising arguments that the parties will now
5 come up with that they have not already used in
6 cross-examination or their answering testimony. So I
7 would concur with Your Honor to at least limit Staff
8 and Intervenors to a total of 45 pages in their
9 rebuttal.

10 With additional pages for Olympic, I think we
11 could live with an additional 10 pages on rebuttal.
12 For the reasons I stated, I think we are all going to
13 have to anticipate in the opening briefs the arguments
14 that have already been made and the testimony already
15 received.

16 MR. BRENA: Your Honor, I would note that in
17 the appellate rules for briefing practice, it allows
18 25, and I think what the Intervenors and Staff have
19 said is they can live with 20, which is less than
20 anticipated within the appellate rules. I think an
21 amount below that hamstring us.

22 JUDGE WALLIS: My suggestion -- again, this
23 is subject to confirmation in an order tomorrow --
24 would be for 20 pages to Staff and Intervenors and 30
25 pages for the Company.

5331

1 Let's turn now to outlines. The
2 communications on this topic have been coming in over
3 the past day or so, and is it my understanding that
4 Tesoro, Staff, and Tosco are comfortable with a single
5 proposal.

6 MR. BRENA: Yes, Your Honor, as modified in
7 certain ways.

8 JUDGE WALLIS: Yes.

9 MR. FINKLEA: That's basically correct. The
10 one issue that we had suggested in our outline that
11 didn't make the consolidated outline is within
12 throughput, and this is a way to get to a broader issue
13 as well. Within throughput, our recommendation
14 includes an adjustment mechanism. Tesoro and Staff's
15 does not. Do you need to specify whether you are going
16 to address adjustment mechanisms or just say
17 throughput, and then within throughput, you either
18 suggest the specific number or suggest an adjustment
19 mechanism.

20 JUDGE WALLIS: Very well.

21 MR. BRENA: Your Honor, if you would like for
22 me to address the basic structure of that proposal, I'm
23 prepared to.

24 JUDGE WALLIS: Very well; Mr. Brena?

25 MR. MARSHALL: Your Honor, because again,

5332

1 Olympic has the burden of proof, we would like to be
2 heard first on the outline of the briefing, and there
3 is a further reason. The deadline for filing outlines
4 was June 13th per the 11th Supplemental Order,
5 Paragraph 10. Tesoro and Tosco did not meet that
6 deadline, and their recommendations on the structure of
7 the briefing should be disregarded, and the comments
8 here today come far in the game, but I would like to
9 point out one other thing from that same order, the
10 11th Supplemental Order, Paragraph 10. Regarding the
11 outline for the briefing, it was stated, quote, It is
12 not necessary for all parties to concur that an issue
13 exists. If one party wishes to address a matter, it
14 may do so, and the issue should be in the outline,
15 closed quote.

16 What we have here, I think, is a good example
17 of what Olympic was saying earlier, which is Tosco,
18 Tesoro, and Staff have one very different view of the
19 case and how to present the case on briefing than
20 Olympic. Olympic would like to use its outline and its
21 structure for the briefing. Much of Tesoro's briefing
22 outline is argumentative. It places a different
23 emphasis on different matters at different places in
24 the briefing than Olympic would like to do, and again,
25 I think they are out of time for having submitted this.

5333

1 Our brief outline, I believe, enables Olympic
2 to fairly present its case in the way in which it would
3 like to present it. The agreed briefing by Staff and
4 Intervenors does not. It puts us in a straitjacket.
5 Does not allow us to make the arguments in the manner
6 and the order and with the emphasis and with the
7 headings that we would choose to use.

8 So I strenuously object to Tesoro and Tosco
9 being able to speak to this issue at all. Obviously,
10 if Staff wants to submit an outline and other parties
11 want to follow it, that's to their discretion, but I do
12 think that the 11th Supplemental Order makes it clear
13 that if Olympic has issues it wishes to address in the
14 outline and the format it wishes to address, it should
15 be able to do that without having to be forced into the
16 same format that the Staff and Intervenors now
17 apparently have agreed on.

18 JUDGE WALLIS: Thank you, Mr. Marshall.

19 MR. TROTTER: Just briefly, Your Honor, I do
20 believe that your last notice did prevent parties to
21 comment on the status of the outlines, and those
22 comments needed to be filed by yesterday at two
23 o'clock, and Tesoro and Tosco filed consistent
24 therewith.

25 I don't view the Tesoro outline as modified

5334

1 to be a straitjacket. Rather, it has broader
2 categories than the Company's, and therefore, permits
3 arguments, I think, within that structure. So I think
4 the Company's outline is actually the straitjacket
5 because it does present a very slanted view of the
6 case. There is no place on their outline for
7 discussion of just depreciated original cost
8 methodology. It is nowhere to be found on their list;
9 whereas, Tesoro has a modified list but have the DOC
10 methodology and FERC methodology set forth, and parties
11 can use whatever subcategories they want. I thought
12 the focus of our task here was to get the parties'
13 briefing on a fairly consistent organizational
14 structure so that the Commission when they wanted to
15 see what the parties have to say about DOC, for
16 example, they could find that in a consistent place in
17 the briefs.

18 In addition, the Company has set forth eight
19 legal issues here, I think all of which could be
20 subsumed under just, fair, sufficient, and reasonable
21 rates category, but more to the point, Staff, for
22 example, may not have any interest in talking about
23 some of these issues at this point. They may reply to
24 see what the Company makes of them, but having said
25 that, Mr. Marshall did quote the Order correctly about

5335

1 parties wishing to address an issue that they should be
2 able to do that. I don't think this was intended to be
3 a limitation, but I do view the Tesoro as-modified
4 format to be more flexible than the Company's, and it
5 at least permits us to brief DOC, which is not
6 permitted under the Company's proposal.

7 MR. MARSHALL: May I speak to that issue of
8 the methodology?

9 JUDGE WALLIS: Let's here Mr. Brena in
10 response first.

11 MR. BRENA: Your Honor, I agree with the
12 principles that Mr. Marshall has set forth, that every
13 party should have an opportunity to brief whatever
14 their position is within the context of the outline
15 that is ultimately adopted.

16 First, let me point out what the
17 modifications are to Tesoro's outline, where the
18 current status of it is. Looking at it, Staff
19 suggested a modification under rate-making methodology,
20 which would include "A," which would be an overview, so
21 there would be a new "A" that would be overview, and
22 DOC and FERC methodology would be "B" and "C".

23 Secondly, Staff suggested a modification to rate base,
24 which is under 5-B, which would add CWIP and AFUDC as
25 individual items under rate base. So that's the status

5336

1 of the proposal as we speak.

2 I think that the heart of this issue is that
3 the outline should be simple enough and broad enough to
4 incorporate every parties' argument without showing
5 bias against any party arguing. I think that this
6 outline does that. For example, just take the
7 different categories that Olympic has proposed: nature
8 of oil pipelines and history of regulation. Well,
9 Tesoro doesn't have anything to say on that topic
10 because it doesn't think it's relevant to setting a
11 rate here, but to the degree that Olympic feels that
12 that is important under the rate-making methodology
13 overview, it can include that section under that
14 category in full, however it chose.

15 The end result test is a substandard under
16 the just and reasonable rate standard, isn't its own
17 creature. The public interest standard, we are here to
18 set just and reasonable rates, and that's what's been
19 held to be in the public interest, and that's also
20 under the just and reasonable rate standard.

21 And you go on in investor expectations,
22 potential for underinvestment, past practices. Many,
23 many of the categories that Olympic is suggesting are
24 not categories that Tesoro intends to address in its
25 briefing so would not serve the Commission's goal of

5337

1 getting into that level of specificity but are all
2 categories that Olympic can argue under the Tesoro
3 brief. You just can't find something that they want to
4 argue that doesn't fit into this brief somewhere,
5 because it's intended to be simple and very broad, and
6 it's intended not to be biased towards any parties'
7 position.

8 Under rate-making methodology, overview, DOC
9 and FERC, how can it be more -- for the Commission's
10 purpose, they want to see what people have to say as an
11 overview. They want to see what people have to say
12 with regard to DOC. They want to see what people have
13 to say about the FERC methodology. Everything they
14 want to say, they can say in there. Just, fair, and
15 reasonable rate, the test year, that's certainly not a
16 biased category. Staff has one test year and we have
17 another and Olympic has a third. Under rate base
18 methodology, that isn't biased language. Anybody can
19 argue anything. Starting rate base, that's a distinct
20 issue in this proceeding, and it doesn't bias any party
21 from raising any argument that they want to -- Bayview,
22 end of period --

23 Similarly, when you get to return on rate
24 base, you've got capital structure, and people can
25 argue what they want on capital structure. Under

5338

1 Olympic's fatal historic pipeline capital structure,
2 use of parent capital structure, under FERC 154-B,
3 those are their two categories. I don't have anything
4 to say under either of those categories, but just under
5 the capital structure, they can say those two things,
6 and I can say what I want, and the Commission can look
7 at capital structure and see all the arguments that go
8 to capital structure.

9 Overall rate of return, return on equity, in
10 Olympic's outline, they start breaking it out by
11 witness under that category uniquely. That isn't how I
12 choose to write my brief, by witness. That's not an
13 efficient use of what I consider to be a presentation
14 of the case, but if they want to do it that way, they
15 can. Under this rate of return and rate base under
16 2-A, they can do it exactly like they want to do it,
17 but there is nothing that forecloses their method of
18 argument.

19 Similarly, with regard to the request for an
20 upward adjustment, the risk additor issue under "E,"
21 which they have broken out as a separate section
22 different than the common equity return, which it's
23 not. It's an additor to equity return, so it shouldn't
24 be in a separate category, but again, it fits under
25 2-A, return on equity, and they can argue their additor

5339

1 position with regard to rate base.

2 So with return on rate base, on rate base
3 issue, on operating costs, and on rate base methodology
4 issues, this outline has broad, nonjudgmental,
5 nonbiased categories which are consistent with rate
6 setting. So I don't agree that it's biased towards us.
7 I could have done one that's biased towards us, but I
8 didn't, but similarly, when you go through the
9 categories -- I think there is 10 categories in
10 Olympic's brief that they have proposed that I don't
11 intend to write two sentences on in my brief, but you
12 can't point towards a single category in the outline
13 that's been jointly proposed where parties have nothing
14 to say. It allows every party to say everything they
15 want somewhere.

16 To my way of thinking, I agree with the
17 concept. If Tesoro has a concept they want to bring
18 forward or if Olympic has an issue they want to bring
19 forward, they should be able to do that, but every
20 issue that I'm aware of can be brought forward under
21 this outline, and if there is some exception to that, I
22 guess I would like to know what it is, and I don't read
23 the prior order as meaning that because the issue can
24 be briefed that it needs to have a separate category
25 and needs to be broken out in a separate loop and

5340

1 everybody needs to address it.

2 So to me, I tried to put together the
3 simplest broadest outline that I could that hit every
4 topic in the proceeding, and it has "other" under each
5 category so if there is something that's left off under
6 rate base, return on rate base, or operating costs that
7 parties can put that in that addresses all the major
8 issues.

9 Finally, with regard to the throughput, I
10 hesitated to put in Tosco's specific suggestion as a
11 subcategory because every party goes every which way on
12 throughput, so this is going to be one of those where I
13 think that staying broad and simple makes the most
14 sense. I don't intend to spend time briefing Tosco's
15 surcharge concept. I have things I want to say under
16 throughput which are unique and different from every
17 other party, but every party can say what they want on
18 throughput, and the Commission can turn to Section 5-E
19 on throughput and see what they had to say.

20 I heard characterizations of this outline,
21 but I didn't use biased language. I didn't include
22 issues that I want to brief but Olympic doesn't want to
23 brief, and every issue that I'm aware of that Olympic
24 wants to brief fits in here nicely, and the reverse is
25 not true.

5341

1 MR. MARSHALL: That was fairly lengthy, so
2 let me respond, but much less at length, to this.
3 First of all, I guess it would have been good if Tesoro
4 had provided this earlier than yesterday, but I think
5 the outline that Olympic provided is also objective and
6 not judgmental. We do have a reason to have the end
7 result test separated out from fair, just, reasonable,
8 and sufficient rates as we do with the public interest
9 standard.

10 Mr. Brena's legal conclusion is that the
11 public interest standard in this state is identical to
12 having, fair, just, reasonable, and sufficient rates,
13 and we just simply disagree. We think that has to be a
14 separate category. We think that the nature of oil
15 pipelines, including the history of regulation, the
16 financing and operation of oil pipelines is
17 sufficiently unique, that there ought to be a separate
18 category regarding the nature of oil pipelines and the
19 history of regulation. It should be there.

20 With regard to the methodology issue, we
21 disagree with Mr. Brena that the only issues on
22 methodology are DOC versus the FERC methodology. DOC
23 and TOC are just one part of the overall federal
24 methodology, which also includes starting rate base,
25 the parents capital structure, and we would also add in

5342

1 there the consistency with interstate rates and past
2 practices. The other parties may disagree that those
3 are issues that should be discussed in detail, and they
4 don't have to discuss them in detail if they don't want
5 to. They can simply disagree. These rates don't have
6 to be consistent with interstate rates or what may have
7 occurred in the past.

8 Investor expectations, I think investor
9 expectations is a separate category that should be
10 involved in rate-making methodology. It has in the
11 past. The potential for underinvestment is also a key
12 concern. This is a test that we've adopted in this
13 state. Will the rates provide for the ability to
14 attract sufficient capital on reasonable terms or not?
15 They collapsed their categories into just a couple
16 categories which we believe are incorrect and put them
17 in the wrong area.

18 Again, the order on the 11th Supplemental
19 Order says that if one party wishes to address a
20 matter, it may do so, and the issue should be in the
21 outline, and what we try to do is provide a place in
22 the outline for Olympic to be able to make the points
23 that it has been trying to make throughout this
24 proceeding starting with the petition to clarify the
25 rate-making methodology in October. Again, I don't

5343

1 think there is anything wrong with a separate category
2 about the Commission's discretion to choose a
3 methodology. I think that's also appropriate because
4 there is some confusion about what Olympic's position
5 has been on that, and if parties want to take a short
6 time to address it, that's fine, or if they want to
7 take a little more time to address it, that's fine.

8 Again, I think on the rate base and operating
9 expenses, rate of return, those are categories that
10 have been in what Your Honor handed out here sometime
11 ago on the outline of posthearing briefs where the
12 Company and Staff and other ideas were there, and we've
13 tried to incorporate, pick up what Staff originally
14 suggested in those very areas, and to have to go
15 witness by witness, that's a standard procedure here in
16 this state to identify what each of the cost-of-capital
17 witnesses claims to be the appropriate rate of return
18 on equity and the appropriate capital structure.

19 Mr. Brena wanted to see an example of an
20 order so he could look at what the form of the findings
21 of fact and conclusions are, and the orders that we are
22 familiar with, you do break out these witnesses
23 separately and you do discuss them separately. So that
24 was a nonjudgmental way, a traditional way of trying to
25 do an outline so that all the parties would be on the

5344

1 same page.

2 If they want to follow their outline and not
3 follow our outline, I think that's fine, but I don't
4 think we should be made to follow an outline that they
5 have constructed that omits key headings and topics
6 from the outline to make it appear that we are trying
7 to put in material that is not appropriate on the
8 nature of oil pipelines, the history, the public
9 interest standard, the Commission's dual role, which I
10 believe is significant, to regulate pipeline rates and
11 safety.

12 This will be the first oil pipeline case
13 where the Commission has to balance its duties with
14 regard to safety and its duties on rate-making. It's
15 an interesting topic. It has not been addressed
16 before, and I think to leave that off the outline and
17 to put it in I don't where, the Tosco and Tesoro and
18 Staff outline, makes it appear to be a category that's
19 not legitimate. I think that may be actually the most
20 important part of the outline is to address that dual
21 role that the Commission now has.

22 So we've followed the 11th Supplemental
23 Order. We filed our outline on time. We have a
24 structure that we believe will allow Olympic to address
25 the key points that we need to address in the order in

5345

1 which we want to address it. And again, I think if
2 they want to use their format, let them use their
3 format for their brief. Let Olympic use the format
4 that we've included here and sent to Your Honor.

5 MR. TROTTER: Your Honor, one thought. It
6 looks like the Roman numerals on the two outlines are
7 fundamentally the same, and at least under the fourth
8 Roman numeral, we seem to follow test year, revenues,
9 return, rate base, operating expenses, for the most
10 part, and just leave it at that, and parties can tailor
11 their outlines as they wish below that. I did not ever
12 assume that the outline that would be adopted would
13 prohibit subheadings under the categories that are
14 agreed to. Mr. Marshall has yet to tell us where DOC
15 fits into their outline.

16 MR. MARSHALL: 3-A(1).

17 MR. TROTTER: There is the problem. 3-A(1)
18 is trended original cost and background and principles,
19 so DOC is relegated to a subject issue there, and that,
20 I think, is a biased. I think maybe at this point the
21 parties seem to be extremely polarized. If it will
22 help the Commission just take, for example, the
23 Company's Roman numeral 1, 2, 3, and forget the "A"
24 through "H" and "A" through "E" and let people create
25 their own.

5346

1 JUDGE WALLIS: My goal in initially proposing
2 this concept is to have an organizational structure
3 that assists the Commission in reviewing the parties'
4 presentations, and I don't think that would be served
5 by just having four or five or six or seven major
6 outlines. I believe that it does need to be structured
7 a little more finely than that.

8 I would like to address Mr. Marshall's
9 concern about compliance with the 11th Order. We did
10 provide on the record for parties to make additional
11 submissions. There was no objection at that time or
12 subsequently, and I think that the Commission is served
13 by having comments and proposals by all of the parties
14 rather than less than all at this point. I think that
15 it's important to have the parties' views following the
16 presentation of evidence. It was helpful to have those
17 views going into the hearing, but the experience of the
18 hearing has enabled parties to identify matters that
19 they might not have seen the first time and to
20 supplement and develop the organizational structure and
21 patterns that they initially saw.

22 It would be my proposal to take the
23 suggestions of the parties and meld them into a single
24 document, and we will ask the parties to follow that
25 document in organizing your presentations, and I want

5347

1 to stress this. This is not to be a restriction on the
2 parties' presentations but merely an organizational
3 tool to assist the Commission in comparing the
4 presentations of the parties, so you are not restricted
5 from addressing any issue. If you wish to address an
6 irrelevant issue, you may do so. The pain that that
7 causes you is using up space that you might have used
8 for something that is relevant. So with that --

9 MR. BRENA: Your Honor, there is one brief
10 comment I will like to make. I'm not sure where we are
11 at in this process.

12 JUDGE WALLIS: I'm not sure where we are at
13 either in terms of your comment. I did have a question
14 or two of the Company about its proposal. Under Roman
15 3, Items B and C, are those methodological issues, or
16 are they more associated with the concept of fair,
17 just, reasonable, and sufficient rates and how to
18 identify rates that have that quality?

19 MR. MARSHALL: I think they are
20 methodological issues in the context of FERC, because
21 FERC adopted the trended original costs and the
22 starting rate base in order to meet investor
23 expectations and to avoid the potential for
24 underinvestment. So the very reasons we have what I'm
25 sure Tosco and Tesoro will say are odd issues -- like

5348

1 starting rate base, they tried to make a great deal out
2 of starting rate base. Was that a return of investment
3 on or of.

4 Starting rate base, which was also called the
5 transitional starting rate base, was specifically
6 addressed to the issue of investor expectation with the
7 potential for underinvestment, and therefore, it is
8 very much a part of the methodological issue in terms
9 of trying to bridge one methodology, which used to be
10 the evaluation method, ICC, and frankly here to before
11 1983, and it was designed to what do you do to take
12 investments that have a fair market value, which would
13 be higher than an original cost, and how do you make a
14 fair transition that won't impede investor expectations
15 and diminish the ability to attract the capital --

16 JUDGE WALLIS: I think you have answered my
17 question. Thank you, Mr. Marshall. Now, Mr. Brena?

18 MR. BRENA: I just wanted to make the point
19 that too specific of a designation of issues will play
20 into one theory or another. Too general will not be
21 helpful to the Commission, that there is a balance that
22 needs to be struck here. I attempted to get that
23 balance, and I agree with Mr. Trotter's observations.
24 There is nothing in the outline that contemplated that
25 a party couldn't put in subcategories and designate

5349

1 that category as they want.

2 For example, under Olympic's proposal under
3 3, they have rate-making methodology issues and they
4 have "A" through "E." There is nothing whatsoever
5 preventing them in the outline under FERC methodology
6 from using that identical outline as a subcategory and
7 flushing it out entirely. You can lift right out of
8 their outline and just put under FERC methodology,
9 that's the way they intend to address the FERC
10 methodology. I have no problem if they choose to
11 address it that way, and I'm not arguing that they
12 shouldn't be able to, and they shouldn't be able to
13 argue every single thing that he just advanced.

14 The question is, where am I going to argue
15 and where are we going to coexist? Well, I'm going to
16 approach FERC methodology with a different set of
17 subcategories that I want the Commission to consider
18 that is biased towards my view, as is his bias towards
19 his. Both can coexist under that one category, which
20 is now 4-C, FERC methodology. He can do whatever he
21 wants under there and so can I, and that's the kind of
22 freedom the parties need in this proceeding to advance
23 their theory of the case, and there isn't a single
24 position that Mr. Marshall has stated that I think he
25 should be foreclosed from arguing through the outline.

5350

1 The question is where.

2 Similarly, with regard to the overview,
3 No. A, which is now 4-A, the nature of oil pipeline
4 regulation and the history of regulation, he may want
5 that to be a 20-page section from the Hepburn Act
6 forward. That isn't how I'm going to choose to do it,
7 but he may choose to do it that way, and he should be
8 able to do that. Similarly, the end-result test, the
9 public-interest test, the Commission's role with regard
10 to safety, all of those issues go into how the
11 Commission should determine a just, fair, and
12 reasonable rate. Those are all factors that the
13 Commission should consider in setting a just and
14 reasonable rate.

15 I'm not saying that he can't argue every one
16 of those. He should be able to, but the statutory
17 standard that we are here to meet is we are setting
18 rates, and the statutory standard is a just, fair,
19 reasonable, and sufficient rate, so all of these fit
20 within that, so you can pick up everything that he said
21 under Roman numeral 2 and put it under just, fair,
22 reasonable, and sufficient rates, and that's the way he
23 may choose to use the subcategories with regard to his
24 outline.

25 Similarly, with regard to the equity capital

5351

1 section, he broke that out by witness and indicated
2 that that was typical. If that's typical for the
3 Commission, I have no problem with that. That's the
4 only substantive heading he did that with, but I don't
5 want that particular category and approach. I don't
6 want to be bootstrapped by it. You can pick up that 1
7 through 6 of his capital section and put under overall
8 return and return on equity and just superimplant it
9 there, and he can use those identical categories under
10 that category and argue it that way. Similarly with
11 the risk additor.

12 Under capital structure, historic pipeline
13 capital structure, use of parents capital structure
14 under FERC, FERC doesn't use a typical parent capital
15 structure. That's what the law is going to show when
16 we get to it, so I'm not going to use this category
17 under capital structure. Historic pipeline capital
18 structure, I'm not going to use that and I'm not going
19 to use 2. That's not the way I want to approach it,
20 but if he wants to approach it, he can lift it up and
21 put it right under the capital structure.

22 So the difference here is not in the
23 categories, as Mr. Trotter has pointed out, but the
24 difference is in how the specific issues are addressed
25 within the category, and I've left the outline open

5352

1 enough to allow both his theory of the case and my
2 theory of the case to coexist, I believe.

3 MR. MARSHALL: There is one problem with what
4 Mr. Brena has said. With the FERC methodology is a
5 package, and the way the outline that Tesoro has
6 adopted under Section 4, you have rate-making
7 methodology. Then you move into Section 5, and then
8 5-B on rate base. Numbers 2 and 3, starting rate base
9 and deferred return, those are FERC methodology issues.
10 They should be addressed in the overall FERC
11 methodology dealing with oil pipelines.

12 The reason we have certain starting rate base
13 and deferred return under trended original cost is
14 because of the unique nature of oil pipelines. To
15 break these out and to put them into different
16 categories, it makes the point and the argument that
17 Tesoro wants to make. It does not make the point and
18 the argument that Olympic wants to make. Olympic
19 believes that the FERC methodology, the interstate
20 methodology, comes as a unified package, including the
21 use of the parents capital structure when the parents
22 are large, integrated oil companies that are owning the
23 pipeline and where they have either guaranteed all the
24 debt of the pipeline or have advanced the loans for the
25 pipeline. That's what the FERC methodology has.

1 To break them out and scatter them through a
2 whole series of parts of the outline diminishes the
3 overall proposition that Olympic has, which is this is
4 a fair, just, and reasonable way of establishing rates
5 consistent with interstate rates, consistent with
6 investor expectations, consistent with past practices,
7 and I know that Tesoro doesn't want to have that
8 argument. They don't want to have it up in Alaska or
9 down here, but yet that is how oil pipelines are
10 separately regulated from other utilities, by the way
11 FERC regulates electric utilities, from gas utilities.
12 It has a whole separate FERC Form 6 dealing with oil
13 pipelines because of the unique nature of it. To
14 scatter these throughout and break them out diminishes
15 the overall point that Olympic needs to make.

16 MR. TROTTER: But, Your Honor, the Company's
17 proposal scatters them. He has rate-making methodology
18 and then use of parents capital structure split out
19 under rate-of-return capital structure, so it's exactly
20 the same.

21 MR. MARSHALL: But not on the rate base and
22 the starting rate base and the deferred return. Those
23 are all under the methodology issues, and the capital
24 structure, we will address that in the methodology and
25 then apply it here on rate of return. It's rate of

5354

1 return on a capital structure that we will already have
2 addressed earlier.

3 MR. TROTTER: But the exact same point
4 applies to rate base. You can talk about it under the
5 methodology section and apply it under the rate base.
6 It's exactly the same.

7 MR. BRENA: That is what is intended by this.
8 I want to address the scatter point. The rate-making
9 methodology issue was intended to incorporate the types
10 of arguments that Mr. Marshall just made that are that
11 it should be a package deal, that all the arguments
12 that he just made that is unique, but the fact of the
13 matter is that ultimately, the Commission has to
14 determine what the rate base is, and ultimately, it has
15 to determine what the rate of return is, and it can't
16 do that out of an ideological conversation about
17 whether it's a package or not. It needs to get into
18 numbers.

19 So what 4 is intended to do is to allow the
20 parties to agree those types of arguments, but then once
21 those arguments have passed, we need to get into the
22 specifics, and the Commission needs to know, for
23 example, what is the starting rate base, and to use the
24 FERC, the Commission could well decide to apply the
25 FERC methodology. The FERC methodology allows starting

5355

1 rate base to be argued on a case-by-case basis. In its
2 adoption of FERC methodology, it could disallow the
3 starting rate base, but it could adopt the FERC
4 methodology.

5 So because of the way the FERC methodology
6 works, at some point, you have to get into what the
7 elements are and how they are different, and the
8 Commission has to build those up to a rate base, so
9 under rate base, this is intended to contain those
10 elements. If the Commission decides to adopt FERC as a
11 package, it still has to go in and decided what the
12 proper way to apply FERC is to deferred return. Tesoro
13 took one position before the FERC, which is that it is
14 improper to use those deferred returns under the FERC
15 methodology.

16 So if the Commission decides to use the FERC
17 methodology, then it needs to decide what the FERC
18 methodology is, and then the parties' arguments will
19 go, is the parent capital structure appropriate to use
20 or not, and Tesoro argued that it was not because it
21 was atypical. Is a starting rate base appropriate
22 under the FERC methodology? Tesoro argued at FERC that
23 it was not; that under the starting rate base, it was a
24 case-by-case decision and shouldn't be applied, and
25 similarly with deferred return.

5356

1 So you can't get there from now. You need
2 the philosophy of regulation to be broken out and then
3 its application to be broken out by individual element,
4 because it ultimately boils down to numbers.

5 JUDGE WALLIS: I think we understand your
6 position, Mr. Brena. Mr. Marshall, do you have any
7 concluding comments?

8 MR. MARSHALL: I think I like Your Honor's
9 suggestion to take the two outlines and to meld them
10 together and allow a presentation consistent with the
11 11th Supplemental Order; that if one party, and
12 apparently here, Olympic is taking one side of the
13 issue, wants to have an issue that it wants to address,
14 it should be in the outline, and it should be there for
15 purposes of allowing the Commission to see that this is
16 a legitimate issue that is going to be addressed, at
17 least by Olympic.

18 JUDGE WALLIS: I think the purpose of the
19 organizational structure is to indicate where the
20 Commission would expect the parties to address a matter
21 if they choose to address it. So in that sense, I
22 think it would be helpful, if parties choose to address
23 matters, that there be a common structure in which they
24 may do so.

25 I would ask that the Roman numeral headings

5357

1 and the capital letter headings be put on separate
2 lines, and any subsidiary headings may be bold leads to
3 individual paragraphs.

4 MR. MARSHALL: I'm not sure --

5 MR. BRENA: You are saying one outline would
6 be in one format but what parties do with it would be
7 in a bold intro to paragraphs?

8 JUDGE WALLIS: When you address matters, if
9 we have Roman 1 as the introduction and Roman 2 as
10 legal issues and governing principles that you would
11 include those verbatim as separate lines in your
12 briefs, but down underneath "A" and "B" and "C,"
13 instead of having separate lines, you can use whatever
14 the outline designation would be and make it bold
15 heading or bold intro to a paragraph, a few words as
16 introduction to a paragraph.

17 We do ask that the parties number the
18 paragraphs in your briefs. This is a challenge more so
19 in Word than it is in Word Perfect, but it is something
20 that we have finally learned to master, and we ask the
21 parties to do that as well. It is very helpful in
22 citations to arguments and assists us in getting to the
23 right place very quickly.

24 MR. FINKLEA: You mean within the entire
25 brief, not just within sections?

5358

1 JUDGE WALLIS: Yes.

2 MR. FINKLEA: So if there are 250 paragraphs
3 in the brief, we would number from 1 to 250.

4 JUDGE WALLIS: Yes, that's correct, and you
5 can use recent Commission orders as examples.

6 MR. BRENA: That's set forth in the
7 Commission's formatting regulations?

8 JUDGE WALLIS: I don't believe that it is
9 because this has been an evolving practice, and we are
10 now just in the process of looking at our procedural
11 rules again after several years of being too busy to
12 even think about them. Is there anything else that the
13 parties wish to address?

14 MR. TROTTER: We didn't go through the
15 exhibit list status.

16 JUDGE WALLIS: No. What I have to say about
17 the exhibit list is we are working on it; that we
18 appreciate the comments that the parties have
19 submitted; that on some of the matters, we wish to
20 check the transcripts, and we do not have, or did not
21 when I came up to the hearing room, have in hand copies
22 of the earlier transcripts -- I'm sure that they are
23 available -- for the last couple of days of the
24 hearings.

25 But when we do that, we will prepare an

5359

1 exhibit list and we will circulate it again to the
2 parties. I expect that to be in either the Monday or
3 Tuesday of next week time frame. And again, we
4 encourage parties to take a final look at it to make
5 sure that your concerns have been addressed and that
6 the list is accurate.

7 We asked the parties at the conclusion of the
8 hearing to keep handy a couple of copies of documents
9 that were submitted during the hearing so that if the
10 copies that we've had have been marked on or for one
11 reason or another are not available that we will be
12 able to ask your for clean copies for inclusion in the
13 record. We are not to the point of having identified
14 any documents.

15 Again, we want to thank you very much. It
16 has been a true education over the course of the
17 hearing in matters that the Commission has not faced
18 with any frequency, and the quality of the
19 presentations has been excellent. The record is, I
20 believe, sufficient for the Commission to make an
21 advised and sound decision upon, and we look forward to
22 seeing the briefs that the parties are planning to
23 submit. Thank you all very much.

24

25 (Posthearing conference adjourned at 3:25 p.m.)