

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant,

v.

OLYMPIC PIPE LINE COMPANY, INC.,

Respondent.

DOCKET NO. TO-011472

PETITION FOR ADMINISTRATIVE
REVIEW OF EVIDENTIARY RULING

I. INTRODUCTION

1. Olympic Pipe Line Company (“Olympic” or “Company”) respectfully moves the Washington Utilities and Transportation Commission (“WUTC” or “Commission”), pursuant to WAC 480-09-780, to administratively review the Nineteenth Supplemental Order, dated August 26, 2002, with respect to the decision not to receive Olympic’s 2001 audited financial statement (“2001 Audit”) into evidence. The names and addresses of Olympic and its representatives are as follows:

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2. This Petition involves the following regulations and rules: WAC 480-09-425(5), WAC 480-09-750, WAC 480-09-780, WAC 480-09-740, RCW 34.05.452, Washington Evidence Rule 401, Washington Evidence Rule 402, and Washington Evidence Rule 403.

II. DISCUSSION

A. Introduction

3. On July 12, 2002, Olympic moved for an order to keep the evidentiary record open until August 15, 2002, to receive its anticipated audited financial statement covering the years 2000 and 2001. Commission Staff did not oppose introduction of the exhibit,¹ but Tesoro and Tosco opposed the motion. On July 12, 2002, the Commission ruled that it would take the motion under advisement.
4. On August 12, 2002, Olympic received from its independent auditors, Ernst & Young, an unqualified audited financial statement covering year end 2000 and calendar year 2001 which Olympic immediately served on all parties. On August 26, 2002, Administrative Law Judge Wallis issued his Nineteenth Supplemental Order denying Olympic's motion, stating:

Olympic's inability to produce an audited financial statement has been a matter of concern to the parties and to the Commission throughout this proceeding. Olympic has repeatedly stated that an audited statement would be produced. It was not yet available at the conclusion of the evidentiary hearing. The Commission neither agreed to accept the statement as a late-filed exhibit nor refused to receive it; instead, Olympic was granted leave to offer it, if it became available, and other parties to respond.

Reviewing the request and the responses, we believe the proposed exhibit should be rejected. At some point, a proceeding must conclude. Receiving the document would require additional

¹ In fact, Staff earlier opposed Olympic's June 12 motion for continuance on the basis that the 2001 Audit could come into evidence should it become available:

If this case is not continued, Staff would not object if Olympic is permitted to file a late-filed exhibit consisting of the Ernst and Young accounting statement regarding Olympic's 2001 financial statements.

Answer to Olympic's June 13, 2002, Motion for Continuance, dated June 17, 2002, at ¶5.

briefing and would invite further discovery, and reopening the record for further cross examination. Olympic already has presented a considerable volume of evidence on its own financial circumstances, its financial condition, and its financial records.

WUTC v. Olympic Pipe Line Co., Docket No. TO-011472, Nineteenth Supplemental Order Rejecting Proposed Exhibit, at ¶4 (“Order”).

5. The desire for finality of this proceeding must be weighed against the costs of an entirely new proceeding. Admission of the 2001 Audit provides valuable information to the Commission, is in the public interest, and will help avoid the greater cost of a new proceeding. The report was not available previously due to unavoidable circumstances; its receipt into evidence will prejudice no party; and the report will address the concerns stated at various times by intervenors, Staff, and the Commission (as acknowledged in the Order) regarding the accuracy and reliability of Olympic’s financial information. Olympic respectfully requests administrative review of the denial of its motion to allow introduction of the Ernst & Young audit report into evidence.

B. Olympic’s Audit Report Is Important Evidence to This Proceeding

6. The ALJ acknowledged that “Olympic’s inability to produce an audited financial statement has been a matter of concern to the parties and to the Commission throughout this proceeding.” Order at ¶3. Staff and Commissioners have questioned whether without an audited financial statement Olympic’s financial records were sufficiently reliable for purposes of evaluating Olympic’s requested tariff increase.

For example:

Q. [By Commissioner Hemstad] Mr. Kermode, I’m interested in your summary on Page 3 at Line 9 through 12 in which you say in your professional opinion, the accounting policies, practices, and procedures of Olympic Pipe Line cannot be reasonably expected to produce financial data that conforms to GAAP on a consistent and comprehensive basis, and then in your conclusion on Page 15, you take a paragraph to say it more elaborately, and your last

sentence is, at 9/11, “Reliance on the financial data for the test year that Olympic has produced based on its accounting system is limited due to the weaknesses in that accounting system that I have discovered.”

All well and good, so what do we conclude from your conclusion? I assume what you are saying is that the Company’s financial statements cannot be relied upon?

- A. [By witness Kermode] I’m not saying they can’t be relied on. I believe it’s in a gray area there. It’s not that they are totally worthless, but I believe that a close eye has to be put on the accounting of Olympic Pipe Line. They are going through the audit. I guess I’m concerned that in the future or as they go forward that they have to get their books in a better position.²

Tr. at 4588:8 through 4589:5 (colloquy between Commissioner Hemstad and Staff Witness Kermode); see also Tr. at 4265:14 through 4266:13 (colloquy between Commissioner Hemstad and Olympic Witness Smith); Tr. at 4482:23 through 4483:10 (colloquy between Commissioner Oshie and Olympic Witness Fox).

7. Because of the importance of the audit report, Olympic filed two motions requesting a continuance of the proceeding until the audited financial reports could be completed. See Motion of Olympic Pipe Line Company to Amend Hearing Schedule, dated March 21, 2002, at ¶¶11-12 and Olympic Pipe Line Company’s Motion for a Continuance of the Hearing to August 5th, dated June 13, 2002 , at 2. For example:

As discussed in the Declaration of Howard B. Fox (Attachment B), if the schedule in this case is reset . . . Olympic will have the opportunity to have an independent audit of its books and accounts completed. If the schedule is not amended, there will be no opportunity for the independent audit to be completed.

Motion of Olympic Pipe Line Company to Amend Hearing Schedule, dated March 21, 2002, at ¶11.

² Ernst & Young’s 2001 Audit of Olympic’s books was unqualified.

Even though the Company is currently working with its auditors to expedite the independent audits, the audited financial statements will not be available if the schedule proposed by Staff in this case is adopted. Staff has already indicated that the consequence of not having independent audited financial statements will be to reduce Olympic's rate request. Thus, unless the schedule is amended, Olympic may be irreparably harmed.

Id. at ¶12 (citation omitted).

Two new developments have occurred that would allow a continuance to August 5 when it is now expected that the independent audit will be completed. . . . The second development is that Olympic's independent auditors, Ernst and Young, will be able to complete their audit work for 2001 and issue a report by the end of July. See Olympic's supplemental response to data request 365 dated May 17, 2002. Howard Fox's prefiled rebuttal testimony confirms that Ernst and Young is on schedule to complete its audit and issue a report before the end of July.

Olympic Pipe Line Company's Motion for a Continuance, dated June 13, 2002, at 2.

[I]f the hearing is continued until August 5, Olympic will have the audited financial information and other information needed to respond to Tesoro's motion and will save the parties the time and expense of hearings on unaudited financial records.

Id. at 3.

C. The Commission's Regulations Allow Admission of the Report Into Evidence

8. WAC 480-09-425(5) allows "amendments to the pleadings or other relevant documents at any time upon such terms as may be lawful and just." WAC 480-09-750 specifically governs the admissibility of evidence in proceedings before the Commission and states:

Subject to the other provisions of this section, all relevant evidence is admissible that, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard to its necessity, availability, and trustworthiness.

WAC 480-09-750(1). In this proceeding, the Commission has reinforced this standard for the admissibility of evidence:

the Commissioners believe that it is in the public interest, and in the interest of all the parties, that in resolving matters of importance, the Commission consider the best information that is available to it.

Tr. at 2306:7-13.

9. The WAC also states that a presiding officer “may receive evidence as provided by RCW 34.05.452.” WAC 480-09-740. RCW 34.05.452 states in pertinent part:

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

1. “Best Evidence Reasonably Obtainable”

10. The first standard of WAC 480-09-750(1) requires the admissibility of evidence that is the “best evidence reasonably obtainable.” WAC 480-09-750(1). The Audit is the best information available regarding Olympic’s financial status. Prepared by a disinterested third party, this information presents a true and objective “snapshot” of Olympic’s financial activity during 2001 and as of year end 2000. As Staff Witness Elgin testified, “The auditor -- what the auditor does is certify that the books and records are an accurate representation of the financial condition of the company and conform to generally accepted accounting principles.” Tr. at 4889:16-20. While it is true that “Olympic already has presented a considerable volume of evidence on its own financial circumstances, its financial condition, and its financial records,” it is the *reliability* of that information which is addressed by the Ernst & Young audit. This is an issue of critical importance to this proceeding, and there is no other evidence in the record from an outside *independent* authority addressing that accuracy.

11. The Audit also directly responds to representations made during the hearing by Staff to the effect that based on its review of Olympic’s financial records, Olympic would not be able to obtain an unqualified audited financial statement until next year at the earliest and not even then unless Olympic addressed Staff’s stated concerns. Elgin testimony, Ex. 2101T at 12, ll. 1-17. The fact that Olympic did obtain an unqualified audited financial statement suggests strongly that the representations made by intervenors and Staff regarding Olympic’s financial data were inaccurate.

2. “Due Regard to its Necessity, Availability, and Trustworthiness”

12. The second standard of WAC 480-09-750(1) requires the admissibility of the best available evidence while giving “due regard to its necessity, availability, and trustworthiness.” WAC 480-09-750(1). There is no question regarding the necessity, availability, and trustworthiness of the 2001 Audit. Year end 2000 and calendar year 2001 financial data are central to the issues raised in this proceeding. Staff used a test year of calendar year 2001. Intervenors and Olympic used a test year of October 1, 2000, through September 30, 2001. Clearly, evidence that addresses the accuracy of the data upon which all parties’ cases are based is relevant and necessary.

13. As stated above, the accuracy of Olympic’s financial data was in question without a financial audit. Such an audit is now available. Olympic pushed Ernst & Young as hard as it reasonably could to complete the audit before briefs were due, as Olympic committed to do in its motion of July 12, 2002. It is not Olympic’s fault that the information was not available prior to completion of the evidentiary hearings. As discussed above, it was this very concern that prompted Olympic on two occasions to request a short continuance of the hearing.

14. With regard to the trustworthiness of the 2001 Audit, it is the only objective presentation of Olympic’s financial information by a disinterested third party with no stake in this proceeding. Applying WAC 480-09.745 and RCW 34.05.452, there is no question that the audited financial report is “the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” Ernst & Young is one of the nation’s largest and most respected independent auditors, and this report was generated after the concerns arising from the Andersen Enron audit. In short, the audit provides trustworthy financial data concerning Olympic for the Commission.

D. Admission of the 2001 Audit Is Permitted by and Consistent With the Washington Rules of Evidence

15. WAC 480-09-750(1) further states

[i]n ruling upon the admissibility of evidence, the presiding officer shall give consideration to, but shall not be bound to follow, the rules of evidence

governing general civil proceedings, in matters not involving trial by jury, in the courts of the state of Washington.

16. Washington Rule of Evidence 401 defines “relevant evidence” as

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. It is undisputed that the 2001 Audit is relevant evidence as contemplated under ER 401. The 2001 Audit provides the Commission with an independent and disinterested third-party evaluation of Olympic’s financial records. From this information, the Commission can verify the accuracy of Olympic’s case and make a better-informed decision based upon the best available evidence.

17. Washington Rule of Evidence 402 states that

[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state.

ER 402. As “relevant evidence,” the 2001 Audit is admissible under the Washington Rules of Evidence unless inadmissible under a separate rule of evidence--most notably ER 403.

18. Washington Rule of Evidence 403 states

[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay

ER 403.

19. Olympic submitted the information on August 12, 2002--the same day it received the report, 10 days before the initial briefs in this proceeding were due, 17 days before the reply briefs were due, and 49 days before the end of the current suspension period in this proceeding. To the extent that this did not allow sufficient time to review the materials before briefs were due, Olympic has twice requested a continuance of the proceeding in order to allow receipt of the 2001 Audit into the record. See, e.g., Olympic Pipe Line Company’s Motion for a Continuance of the Hearing to August 5th, dated June 13, 2002 (citing both the imminent availability of audited financial information and additional time needed for

responding to discovery as rationales for a continuance of the proceeding). Olympic also formally requested a two-week extension of the deadline to file reply briefs with a waiver of the current suspension period by the same two-week period, which would allow the Commission to consider Olympic's tariff increase request before the current suspension period expires.

20. Even if release of the 2001 Audit was "unduly delayed," the rules of evidence allow exclusion only where the "probative value [of relevant information] is *substantially outweighed* by . . . considerations of undue delay." ER 403. Given the substantial probative value of the 2001 Audit, any delay should not preclude the admissibility of the evidence, particularly when that evidence was not available earlier and Olympic was, and still is, willing to waive the statutory suspension period to the extent necessary.

E. Balancing Finality With the Public Interest

21. The Commission, in issuing its order denying admission of the audited financial statement, said, "[a]t some point, a proceeding must conclude." Order at ¶4. But if the facts the 2001 Audit shows are not considered in this proceeding and one result is insufficient rates, Olympic would be compelled to file a new rate request, which under RCW Title 81 would result in a new seven-month proceeding. Finality will not result from rejection of the 2001 Audit.

22. While the finality of a proceeding is desirable in the abstract, it is not desirable if it results in the immediate need for a new filing and proceeding and if not in the public interest. The relatively short additional time required to consider and admit the 2001 Audit into evidence must be balanced against the much longer time required by a new proceeding. Also, if rejection of the 2001 Audit contributes to an order that provides insufficient rates for Olympic, then the public interest will not be served.

23. "Unlike a court of general jurisdiction, the Commission is obligated to regulate 'in the public interest.' RCW 80.01.040(2)." Twelfth Supplemental Order at 2, ¶ 10. This is the Commission's paramount responsibility. As this Commission ruled in a related context:

[t]he public interest would not be served by resolution of this significant matter irrespective of the Commission's determination of the actual facts. A Commission order on the merits could thereby result in a decision that failed to

allow Olympic an opportunity to earn a fair return, or that allowed Olympic a windfall return at the expense of ratepayers.

Id. That same public interest concern should guide the Commission here.

24. The 2001 Audit is important in the "determination of the actual facts" that will affect the public interest. As the Commission stated in the Third Supplemental Order:

First, it is clear that the Company is in dire financial straits, in large part due to the need for safety improvements. Its case on this issue is compelling. . . .

Second, it is equally clear that safety must continue to be a top priority for this Company. It is essential that the Company have the means to buttress its ability to operate safely, to support public confidence that it will operate safely, and to avoid the occurrence of a major event that could precipitate complete financial meltdown and deprive the shippers and the region of an efficient and cost-effective means of transportation.

Third Supplemental Order at ¶¶ 9-10 (footnote omitted).

25. There appears to be an unstated assumption that this matter has already taken too long, and that it is time for it to conclude. But this proceeding should be taken in context. It is important to note that regulated utilities under Title 80 have 11 months for a rate proceeding, instead of just seven months under Title 81. Although this is a Title 81 proceeding, it has been as complex and important as any Title 80 proceeding involving a company facing multiple challenges. This case involved a proceeding for interim rates and involved the determination of the appropriate rate methodology to be used for an oil pipeline. By comparison, the FERC proceeding resulting in the adoption of the oil pipeline methodology in the Williams case took ten years. Comparatively simple civil cases in Washington State regularly take two or more years to come to trial.

26. Olympic raised the issue of the need for a continuance of the proceeding in order to complete the Audit well before the date set for the hearings. Staff opposed the request for a continuance, arguing that the audit could come into evidence without Staff's objection if one was completed before decision. See Answer to Olympic's June 13, 2002 Motion for Continuance at ¶5 ("If this case is not continued, Staff would not object if Olympic is permitted to file a late-filed exhibit consisting of the Ernst and

Young accounting statement regarding Olympic's 2001 financial statements"); see also Tr. at 5284:4-8. Courts will regularly grant continuances due to the need to obtain important evidence or to accommodate key witnesses. See, e.g., Lockwood v. A C & S, Inc., 44 Wash. App. 330, 363, aff'd, 109 Wash.2d 235, 744 P.2d 605 (1987) ("Surprise has been eliminated as one of the bases for permitting the exclusion of relevant evidence under ER 403 . . . except for circumstances which amount to prejudice. The preferred approach is to grant a continuance to permit the opposing party to prepare for the evidence") (citations omitted).

27. Here Olympic has offered to waive the statutory suspension period in its motions for a continuance. If the Commission believes that reasonable additional time is needed to consider the 2001 Audit report, Olympic will waive the statutory suspension period for that period. There will be no prejudice to the public interest in allowing the additional time. By contrast, rejection of the facts contained in the 2001 Audit report creates the prospect of prejudice to Olympic and thus to the public interest.

III. PRAYER FOR RELIEF

28. For the reasons stated above, Olympic respectfully requests that the Commission issue an order on administrative review admitting Olympic's 2001 Audit into the record of this proceeding.

DATED this ____ day of September, 2002.

Respectfully submitted,

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