

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant,

v.

OLYMPIC PIPE LINE COMPANY, INC.,

Respondent.

DOCKET NO. TO-011472

ANSWER ON BEHALF OF
COMMISSION STAFF OPPOSING
OLYMPIC'S PETITION FOR
ADMINISTRATIVE REVIEW OF
EVIDENTIARY RULING

1 This Answer is filed on behalf of Commission Staff (Staff), opposing Olympic's
Petition for Administrative Review of Evidentiary Ruling (Petition), filed September 16,
2002. As we discuss below, Olympic's Petition should be rejected because it is untimely
and inadequate, and/or it should be denied on the merits because it is ill-defended.

Rules involved are WAC 480-09-760, -770 and -780.

I. Olympic's Petition is Untimely and Inadequate

2 Olympic's Petition should be rejected because Olympic failed to comply with the
time limits in WAC 480-09-760.¹ A petition for review of an interlocutory order must be

¹ The 19th Supplemental Order is not an "initial order" subject to WAC 480-09-780, as Olympic assumes. E.g. Petition at 1, ¶ 1. WAC 480-09-780 involves orders determining litigation that will be resolved by a later final order.

filed within ten days after the order is entered. WAC 480-09-760(2). The 19th Supplemental Order was entered August 26, 2002. Therefore, Olympic's Petition was due September 5, 2002. Olympic did not file its Petition until September 16, 2002, eleven days late. The Petition should be rejected as untimely.

3 Even if Olympic's Petition was timely, it fails to properly bring the issue of admissibility before the Commission, because Olympic has yet to move into evidence the documents it filed.² After the evidentiary record is closed, a party cannot simply send documents to the Commission, state they are "for filing," and expect them to become evidence of record automatically.

4 If Olympic is somehow able to surmount these basic problems, the Petition should be denied on its merits, as we discuss below.

II. Background

5 On January 24, 2002, Olympic committed on the record to having audited financial statements "in the next couple weeks," or "before ... Commission Staff has to put on their rate case."³ In fact, Olympic failed to provide any audited financial statements within the time period it promised.

6 On May 21, 2002, Olympic committed to a new due date. Olympic told the Commission that audited financial statements for 1999, 2000 and 2001 would be

² Staff raised this issue in its August 20, 2002 letter to Administrative Law Judge C. Robert Wallis and the parties.

³ Olympic stated: "So not only can we get you audited statements here, I believe in the next couple weeks, certainly before – much before the end of the general rate case, before, I think, Commission Staff has to put on their rate Case..." (Marshall, Tr. 1304:16-21)(January 24, 2002 oral argument hearing).

available in “late November or December 2002.” Elsewhere, however, Olympic said only that audited statements for 1999 would be available by then.⁴

7 On June 11, 2002, Olympic again revised the due date for having audited financial statements. This time, Olympic told the Commission that the due date was sometime in “July 2002.” Olympic also indicated that only audited statements for 2001 would be available by then.⁵

8 Over the next several weeks, Olympic changed the due date several times. On June 13, 2002, Olympic confirmed the July 2002 due date, and that only the 2001 financial reports would be audited by then.⁶ Six days later, Olympic changed the due date to “July 21, 2002.”⁷ Less than three weeks after that, on July 9, 2002, Olympic changed the due date back to “by the end of [July 2002], for sure.”⁸ It took Olympic just three days to change the date again. On July 12, 2002, Olympic made its last promise of a due date for the 2001 audited financial statements: August 15, 2002.⁹

⁴ Olympic stated it “should have audited financial records for 1999, 2000 and 2001 ... by Late November or December 2002.” Motion of Olympic Pipe Line Company to Amend Hearing Schedule (May 21 Motion) at 8, ¶ 12. A declaration Olympic supplied to support the May 21 Motion referred only to the audit of Olympic’s books for 1999. (Fox Declaration at 2, ¶ 6, attached to Olympic’s May 21 Motion). Olympic’s May 21 Motion at 7, Caption “B,” contains a similar limitation to 1999.

⁵ Mr. Fox stated in testimony filed June 11, 2002 he “personally worked to expedite the audit work with Ernst & Young and expect to see audited financial statements available *in July*.” (Fox, Ex. 1701-T at 19 :15-17 (emphasis added), offered by Olympic into evidence on July 9, 2002 (Tr. 4364:4-7)). Olympic provided no explanation for the change of focus from 1999 to 2001. Olympic made no commitment at all with respect to audited statements for 1999 or 2000.

⁶ Olympic stated: “...Olympic’s independent auditors, Ernst & Young, will be able to complete their audit work for 2001 and issue a report by the end of July.” (June 13, 2002 Olympic Pipe Line Company’s Motion for a Continuance, at 2, 3rd ¶, first sentence).

⁷ Olympic stated: “...there will be an audited financial statement by July 21st. It will be of the test year period, which for the Staff is the year 2001.” (Marshall, Tr. 2073:21-23)(June 19, 2002 hearing).

⁸ Olympic gives sworn oral testimony that “I think we [will receive the audited financial statements] by the end of the month [July] for sure.” (Fox, Tr. 4458:11-12)(July 9, 2002 hearing).

⁹ Olympic requested the “evidentiary record be allowed to remain open until August 15 for [Olympic] to submit to this Commission what [Mr. Beaver] expects to have by then, which is our audited financial statement by Ernst & Young.” (Beaver, Tr. 5280:18-22)(July 12, 2002 hearing).

9 Finally, on August 12, 2002, after the evidentiary record was closed, Olympic sent copies of its audited financial reports for 2001. Olympic’s transmittal letter to the Commission stated the documents were being sent “for filing with the Commission in [this docket].”¹⁰ Olympic did not move the documents into evidence then, or since.

10 On August 13, 2002, Olympic sent copies of a “Summary of Required Communications” (Summary) prepared by Ernst & Young in connection with the 2001 audited financial statements. Olympic’s transmittal letter to the Commission stated only that Olympic had “forwarded to the parties” a copy of the Summary. Olympic did not move the Summary into evidence then, or since.¹¹

11 On August 26, 2002, Commission Administrative Law Judge C. Robert Wallis issued the 19th Supplemental Order rejecting the proposed exhibits.

12 On August 28, 2002, in its Opening Brief, Olympic improperly relied on the 2001 audited financial statements that had been rejected as evidence.¹²

13 On September 16, 2002 Olympic filed a “Petition for Administrative Review of Evidentiary Ruling,” invoking WAC 480-09-780 and seeking review by the Commission of the 19th Supplemental Order. This was eleven days after the last day for filing permitted by WAC 480-09-760(2).

14 In sum, Olympic has given an ever-changing and ultimately unsatisfying story about what audited financial statements would be provided, and when. This story includes Olympic’s improper reliance on the documents it filed, in the face of an order

¹⁰ The quote is from Olympic’s letter dated August 12, 2002, transmitting the 2001 audited financial statements.

¹¹ See Olympic’s transmittal letter dated August 13, 2002 under which Olympic filed the Summary.

¹² Opening Brief of Olympic Pipe Line Company (August 28, 2002) at ¶¶ 28 and 67. WAC 480-09-770 requires parties to cite the “evidence.” The audited financial statements were not evidence when Olympic cited them. Today, they are still not admitted as evidence.

rejecting those documents as evidence. And it reflects Olympic's failure to timely file a petition seeking Commission review of that order.

III. The 19th Supplemental Order

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Administrative Law Judge C. Robert Wallis rejected the filing of the audited financial statements, based on timeliness, finality and fairness:

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 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.

19th Supplemental Order at ¶4.

IV. Positions of the Parties at Hearing

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At hearing, Intervenors opposed the admission of the audited financial reports. Staff did not oppose their admission, when and if the audit was ever completed.

However, Staff counsel noted that admitting the financial statements:

... doesn't end the issue, because there are other problems with how the books are kept that are unrelated to audited financial statements. So we don't see that that advances us -- having it or not having it advances us too far. The Staff did file its case, and believed that what it filed was what it could file. And it's resting on that despite the lack of financial statements.

(Tr. 2085:1-8). And Staff counsel also expressed the concern that including the audited statements could raise significant issues, which was a problem given the close proximity

of the proposed filing date to the brief due dates. (Tr. 5283:14-23).

17 Now that a ruling has been made to reject the documents Olympic has offered,
Staff supports that ruling.

V. Argument on the Merits

18 As we noted at the outset, Olympic's Petition should be denied because it is
untimely and there has yet to even be a motion to admit the documents in question. But
procedural defects aside, Olympic provides no substantial legal reason to change the 19th
Supplemental Order.

**A. The Audited Financial Statements Justify Rejection of Olympic's
Case**

19 In its Petition, Olympic summarizes its argument as follows: "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."
Petition at 3, ¶ 5.

20 This is entirely insufficient. As we explain below, there is no legitimate concern
that admission of these documents is necessary to avoid a new proceeding. Moreover,
because Olympic has never fully explained the basis for due dates that varied from
February to December to July to August, Olympic cannot defend late receipt of the
documents on the basis of "unavoidable circumstances."

21 Most significantly, Olympic has not demonstrated how the 2001 audited financial statements “address the concerns” of the parties. Staff’s position is that Olympic neither timely records nor adequately documents its transactions, in violation of the Uniform System of Accounts (USoA) and Generally Accepted Accounting Principles (GAAP). This means any non-calendar year base period or test period is unreliable. *See* Staff Opening Brief at ¶¶ 33-43.

22 The 2001 audited financial statements filed by Olympic fail to address Staff’s case, and justify rejection of Olympic’s case. First, nowhere does Ernst & Young state that Olympic’s accounting conforms to the USoA or GAAP. Second, in the Summary Olympic filed on August 13, 2002, in the section entitled “Material Weaknesses in Internal Control,” Ernst & Young said it “observed the following conditions:

- the accounting for certain decisions made by management of the Company were not recorded on a timely basis:
- certain accounts or accounting entries lacked adequate supporting documentation: and
- many expenses were recorded in the period paid, rather than the period incurred.”

23 These findings by Ernst & Young fully confirm Staff’s point: the Commission should not use Olympic’s books of account for any period other than an annual period, and only if there has been a thorough analysis of pro forma and restating adjustments. Staff’s case meets these conditions. Olympic’s case does not. *See* Staff Opening Brief at ¶¶ 127-138.¹³

¹³ Olympic proposed a base year ending September 30, 2001, and a combination of budgeted amounts, actual amounts and estimated amounts for its test year ended September 30, 2002. *See* Staff Opening Brief at ¶¶ 131. The audited financial statements for calendar year 2001, together with Ernst & Young’s Summary, refute, not confirm, the reliability of Olympic’s actual financial records for periods other than calendar year 2001, such as Olympic’s 12 months ended September 30, 2001 base period, or Olympic’s 12
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24 Olympic relies on its earlier belief that Staff would “reduce Olympic’s rate request” due to lack of audited financial statements. Petition at 5, ¶ 7. Assuming Olympic’s belief ever had a basis, it has no basis now. Staff recommended use of 2001 test year results of operations and included extraordinary ratemaking adjustments favorable to Olympic to address regulatory lag.

25 Olympic’s idea that its lack of audited financial statements could result in “insufficient rates” (Petition at 9, ¶ 21) has no basis either. As we noted above, the 2001 financial reports that Olympic filed would justify rejection of Olympic’s case because Olympic’s case was not based on the calendar year 2001 results that were audited.

B. Olympic’s Reliance on Commission Regulations and Rules of Evidence is Misplaced

26 Olympic recites provisions from Commission rules, court rules, and the APA, and concludes that the 2001 audited financial statements are admissible relevant evidence, constitute the “best evidence obtainable,” and are “trustworthy.” Petition at 5-9, ¶¶ 8-20.

27 The provisions Olympic cites do not address a party’s attempts to admit documents into the record after the evidentiary phase of a case is over, without a motion to accomplish that. In any event, as ALJ Wallis observed in the 19th Supplemental Order, if the documents are admitted, the matter will not end there. Requests for discovery, hearings and briefing are inevitable, protracting this proceeding unnecessarily.

28 The fact remains that the evidentiary phase of this case is over. Nothing Olympic offers justifies any continuation of the hearing process in this case. The 19th Supplemental Order is well supported.

months ended September 30, 2002 test period. Moreover, Olympic’s 2001 audited financial statements do not relate at all to Olympic’s proposed budgeted, actual or estimated figures for 2002.

VI. Conclusions

29 For the reasons stated above, Olympic's Petition should be denied because it is untimely and lacks the required motion. If the merits are reached, the Petition should be denied for lack of substantial legal or factual support.

DATED this 19th day of September, 2002.

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