

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION)	
)	DOCKET NO. TO-011472
Complainant,)	
)	
v.)	
)	
OLYMPIC PIPE LINE COMPANY, INC.)	
)	
Respondent.)	
_____)	

**TESORO REFINING AND MARKETING COMPANY'S
ANSWER TO OLYMPIC'S PETITION FOR
ADMINISTRATIVE REVIEW OF EVIDENTIARY RULING**

I. Introduction.

1 Tesoro Refining and Marketing Company (“Tesoro”), by and through its attorneys, Brena, Bell & Clarkson, P.C., pursuant to WAC 480-09-780, hereby files its Answer to Olympic Pipe Line Company’s (“Olympic”) Petition for Administrative Review of Evidentiary Ruling (“Petition”) regarding the Nineteenth Supplemental Order issued by the Washington Utilities and Transportation Commission (“Commission”) on August 26, 2002.

2 Judge Wallis’s order should be upheld. The decision not to allow the record to stay open well after the hearing and on the eve of a decision in order to allow Olympic to introduce additional evidence without a sponsoring witness and without the other parties having the opportunity to serve discovery, take depositions, cross examine, or to offer an answering witness to challenge the proffered evidence is the correct decision. Olympic has had months to

advance an audit report and has not. Olympic is under a discovery duty to provide the underlying workpapers for any such audit report and has not. The evidence proffered does not even address the major flaw with Olympic's books and records which is that Olympic has not advanced a witness with knowledge of whether the expenses contained in its financial books are appropriate for ratemaking (i.e., whether the expenses have been normalized or non-normalized, recurring or nonrecurring, capitalized or noncapitalized). For that matter, Olympic has not advanced a witness with knowledge of the projects underlying Olympic's expenses. RCW 81.04.130 anticipates that a final order on these rate matters would be issued within seven months. This Commission has already accommodated Olympic by extending this time frame on more than one occasion. It is time to resolve this proceeding based upon the record before the Commission and not to prolong this proceeding while Olympic thrashes the undergrowth in search of support for its failed case. Judge Wallis's order should be upheld.

II. **Background.**

3 Olympic's petition should be considered within the proper procedural context. From the beginning, Staff and Intervenors have had difficulty confirming even the most basic financial information. Judge Wallis recognized this by stating:

I have to say that in my years with the commission, I have never been asked to participate at the level needed in the interim docket to produce results in terms of discovery, and I have never seen a company as challenged as Olympic appears to be in its ability to provide answers to discovery.

In particular, I'm gravely concerned by the company's either inability or unwillingness to follow the admonitions of the commission and the provisions of rules that require the company

to respond to data requests in a timely way and to respond in a more abbreviated time frame when the company knows that it's going to have problems or when the company has questions or when the company has objections, and the company did not do this during the interim phase and again appears not to be doing this.

Prehearing Conf. Tr. Vol. 12 (1/5/02) at 1335:17-1336:8. The Commission also recognized that the “[D]iscovery in this proceeding has proved to be a tortuous process.” Thirteenth Supplemental Order (6/3/02) at ¶ 5. Some responses to discovery requests came only after several motions and orders to compel. This process culminated in this Commission’s first order imposing sanctions for discovery violations.

4 Olympic’s representations regarding the audit of its financial statements were particularly egregious, changing one moment to the next. In response to an inquiry by Commissioner Hemstad, Olympic represented that:

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, but we can get you the closing numbers for the 2001 year, which unfortunately are nowhere near as rosy as the predictions were when we made them in November, unfortunately. But we will be amending and providing additional data.

Oral Argument Tr. (1/24/02) Vol. 11 at 1303:25-1304:25 (Emphasis added). On March 21, 2002, Olympic requested a continuance and represented that the audit report would not be complete until November or December 2002. See Motion of Olympic Pipe Line Company to Amend Hearing Schedule (3/21/01) at ¶12 and Declaration of Howard B. Fox (3/21/02) at ¶ 6. Thereafter, the range of dates changed, and Olympic represented that the audit report

would be complete sometime during the summer. This inconsistency has never been explained and was not explained in Olympic's most recent petition. The evasiveness was never so apparent as in the interim proceeding where Mr. Fox could not respond to basic questions regarding the nature, timing, and scope of the audit work being performed. See Interim Hearing Tr. Vol. 9 (1/15/02) at 838:14-850:16. To date, Olympic has explained neither the reasons for the delay in the audit report nor the rationale for having directed such a limited audit report as has been provided.¹

5 The disclosure of audit workpapers and related documents has also been inconsistent and incomplete. As part of an order to compel, Olympic represented that it would provide the audit workpapers for the audit of its financial statements. See Prehearing Conf. Tr. Vol. 16 (3/8/02) at 1482:2-25. If these documents were generated and had been produced prior to hearing, they may have been probative to the issues addressed. Nevertheless, they were not produced. The parties are left to speculate when the audit began and if any workpapers were generated prior to hearing.

¹ There was no audit of 1999 financial statements. There was no audit of the financial statements for 2000 (only the ending balance sheet figures were confirmed and this could have come from the company "guarantying" the figures). See discussion at page 847.

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To date, Olympic has yet to provide the audit workpapers for the audit report that it is seeking to introduce into evidence. On August 12, 2002, Olympic filed its audit report with this Commission and served it on the parties to this proceeding. On August 13, 2002, Tesoro requested that Olympic provide the workpapers to the audit report as ordered by the Commission. See Exhibit A. Olympic then requested that Tesoro “provide a citation to the record for your statement.” See Exhibit B. Tesoro responded and directed Olympic to Vol. 16 (3/8/02) at 1482:2-25 in which Mr. Marshall stated:

What we’ve said in our response is that when we made initial inquiry of Arthur Andersen, they indicated apparently that there were no workpapers. We have since found that there are workpapers. They are being assembled and they will be provided on review for privilege.

And we don’t know whether there’s any privileges, but Mr. - - explained that Mr. Beaver may have made some requests for different services from Arthur Andersen or Ernst & Young regarding Whatcom Creek litigation matters. And we would, of course, not consider that to be a regular financial audit but a special audit. But we are gathering those up now that Arthur Andersen has found those. Those will be reviewed and they will be produced.

See Exhibit C.

7

To date, the only response Tesoro has received from Olympic was an e-mail of August 16, 2002, in which Olympic stated that it is “making the inquiry to Ernst & Young, who necessarily would have any workpapers, and will let you know when we get a response.” See Exhibit D. Without these workpapers, it is impossible to evaluate what probative value, if any, to give to the audit report.

8 It seems unimaginable that Olympic would attempt to proffer the audit report while again refusing to provide the most basic discovery information necessary to assess the probative value of the audit report. Olympic's continuing and complete disregard for this Commission's discovery practice should not be lost on the Commission when considering whether to allow Olympic to proffer evidence after hearing while again committing a discovery violation by not providing the underlying audit workpapers.

III. **Argument.**

9 Olympic's Petition should be dismissed for at least three reasons. First, the petition does not comply with WAC 480.09.780(3).² Second, the petition does not adequately support Olympic's rationale for reversing the evidentiary ruling. Finally, the audit report has little or no probative value in this proceeding, and the delay to the proceedings resulting from its entry into the record and supplemental discovery and briefing is not justified.

A. **Olympic's Petition Fails to Comply with WAC 480.09.780(3).**

10 WAC 480-09-780(3) provides:

Petitions for review of initial orders must be specific. The petitioner must separately state and number every contention. A petition that challenges a finding of fact must provide citations to the pertinent page or part of the record or must otherwise state the evidence relied upon to support the petition, and should

² Olympic's petition should have been filed pursuant to WAC 480.09.760 since the order was an interlocutory order. In which case, the petition should be dismissed as being untimely since it was filed more than ten days after the order was entered. See WAC 480.09.760(2).

include a recommended finding of fact. A petition that challenges conclusions of law must cite the appropriate statute, rule, or case involved and should include a recommended conclusion of law. A petition that challenges the summary or discussion portion of an initial order must include a statement showing the legal or factual justification for the challenge, together with a statement of how the asserted defect affects the findings of fact, the conclusions of law, and the ultimate decision.

WAC 480-09-780(3) (emphasis added). Olympic's petition does not meet this regulatory standard for reconsideration. Olympic's petition does not challenge a finding of fact or a conclusion of law. Olympic's petition does not even challenge the summary or discussion portion of the order. Olympic simply disagrees with the result. This is not a basis for reconsideration of an order. Accordingly, Olympic's petition should be denied.

11 Olympic had months to complete a simple audit report and provide the audit report with a sponsoring witness so the merits of the audit report could be considered within this proceeding. Commissioner Hemstad put Olympic on notice as early as January 24, 2002. To this day, Olympic has not completed the audit report it represented it would complete to this Commission. To this day, Olympic is forced to proffer a limited audit report which does not tie back to its historic audit numbers. To this day, Olympic has not advanced a sponsoring witness for even its limited audit report. Notwithstanding these glaring omissions, Olympic's petition

stands mute in its defense without explanation or rationale as to why Olympic did not fulfill its many representations to this Commission to provide a complete and unqualified audit report from 1999 forward. The undeniable conclusion is that Olympic is unable to provide a complete and unqualified audit report that ties back to its historic audit balances. Rather than face this conclusion, Olympic seeks without explanation or rationale to substitute a limited audit report after the opportunity to challenge has expired and then to trumpet the limited audit report as the audit report it represented it would produce. This Commission should not countenance the heralding of a Trojan horse as a real horse. It is not, and the Commission should not take another moment of its time on this issue.

B. Olympic's Petition Does Not Support Reversing the Order.

12 Olympic's petition gives three reasons for reversing the order. First, it argues that the "[a]udit provides trustworthy financial data concerning Olympic for the Commission." See Petition ¶ 14. Second, Olympic asserts that "[I]t is not Olympic's fault that the information was not available prior to completion of the evidentiary hearings." See Petition ¶ 13. Finally, Olympic asserts that "[i]ts receipt into evidence will prejudice no party." See Petition ¶ 5. None of these reasons are supported by any evidence, exhibits, or citations to the record. They are merely unsupported assertions without merit.

13 As to the trustworthiness of the audit report, it has none. It is not and does not represent to be a complete audit report of Olympic's financial books and records for the unaudited years. It does not pretend to audit the balances forward from 1999 to date. It does not tie back to Olympic's most recent audit report in 1998. It is not even a complete audit

report of the year it represents to audit. It is certainly not what Olympic represented it would produce for the hearing.

14 Moreover, it is not obvious how Olympic expects this Commission to consider the audit report as evidence. To be accepted as evidence, materials must be the type of evidence for which official notice may be taken or must be sponsored by a witness. WAC 480-09-750 sets forth this Commission's standards for official notice. These standards are not met in this case. Olympic's audit report is simply not the type of document which may be introduced into evidence through official notice. Nor, for that matter, has Olympic even articulated a request for this Commission to take official notice of the audit report. Further, WAC 480-09-750 specifically requires that "[p]arties shall be notified before or during the hearing" of materials officially noticed and its sources. Official notice of objectionable materials after the hearing is complete is simply not what is anticipated under the Commission's official notice provisions.

15 Similarly, throughout this proceeding no materials were allowed into evidence without a sponsoring witness. With regard to each document, Judge Wallis tracked whether or not a witness was asked a question concerning the document. No document was allowed into evidence absent its use in questioning a witness in this proceeding. Olympic has voluntarily withdrawn the testimony of the only witness who could perhaps have provided testimony on the audit report; Mr. James Mach was with Ernst & Young and apparently worked on preparing the audit report.

16 For that matter, no document was allowed into evidence without advance notice of the document to be used, a copy being provided, an opportunity to serve discovery, and an

opportunity to cross examine. None of these standards are met by Olympic's request to accept the audit report into evidence at this point in the proceeding. Nor has Olympic even offered a rationale which would explain how or why the most basic rules governing the introduction of evidence should be set aside so it may file a document as evidence after a hearing is completed.

17 Under these circumstances, there would be significant prejudice to the other parties if this audit report was included in the record. The other parties have had no opportunity to review the engagement letter, audit workpapers, or correspondence regarding this audit report. Likewise, the other parties do not have the opportunity to present testimony or exhibits or cross examine witnesses regarding this evidence. Finally, the other parties have had no opportunity to conduct discovery with respect to this report. Therefore, there is clear prejudice to the other parties by reopening the record and allowing only one party the opportunity to enter an exhibit into the record.

18 Olympic provides absolutely no evidence in support of its assertion that it was not Olympic's fault that the audit work was not completed sooner. At a minimum, Olympic should have supported this argument with an affidavit indicating when the auditors were engaged to do the work, when the work was done, how many hours were involved, and why there was the "moving target." Olympic presented nothing. What is clear is that Olympic did not produce the audit workpapers or related documents either prior to or during the hearing so that the other parties could review them. In fact, they still have not produced these documents so that the other parties can even evaluate this unusual audit report.³ In January, Olympic was made aware

³ See Discussion below.

that the Commission was concerned about the fact that Olympic's books and records have not been audited since 1998. There was no excuse for the delay, the limited scope, or the lack of disclosure of the underlying workpapers.

19 Finally, nowhere in Olympic's petition does it identify why this audit report has any probative value to this proceeding. In essence, Olympic asserts that the mere existence of this report renders its books and records "trustworthy" and "reliable." There are no exhibits or declarations which support these conclusions. There is no reconciliation between Olympic's cost of service and these financial statements.⁴ There is no explanation as to why there are material differences between the information in the audit report and the information provided in the 2001 FERC Form 6. In short, there is no evidentiary support in the petition for Olympic's conclusions that this audit report renders its books and records "trustworthy" and "reliable." There isn't because the audit report is of little or no value in this proceeding.

C. The Audit Report Has Little or No Probative Value.

20 Without the opportunity for discovery, the other parties can only provide the most basic evaluation of the audit report. However, even this limited evaluation would lead one to conclude that the audit report is of limited or no evidentiary value.

21 Olympic's last proper audit, the one by Arthur Andersen in 1998, compared all parts of the financial audit for 1998 to the figures set forth in the prior audit for 1997. The comparisons included a comparison of the Balance Sheet, Statement of Income and Retained Earnings, and

⁴ This would have been difficult since the audit report does not cover income and expense information for 1999, 2000, and 2002, and such information was included in Olympic's cost of service.

Statement of Cash Flow. See Interim Exhibit 18. The proffered audit report does not compare any of the parts of the current financial audit to the figures set forth in the prior audit for 1998. There is simply no way to know if the balances used in the proffered audit report can be tied back to Olympic's last proper audit. What does seem apparent is that Ernst & Young was unable to tie them back or, in contradiction to its representations to this Commission, Olympic did not ask Ernst & Young to prepare an audit report which audited the balances brought forward on Olympic's books and records since its last audit. To state the obvious, without tying back the balances to previously audited balances, it is simply impossible to know whether the beginning balances are correct.

22 Moreover, the proffered audit report did not even contain the Statement of Income and Retained Earnings and Statement of Cash Flow for 2000. It merely has a Statement of Operations and Accumulated Deficit for 2001. So, even setting aside the lack of confirmation of the beginning balances, the proffered audit report is not even a complete audit report. It is limited in the statements it audited, and it is limited in the years it audited. The last thing this proceeding needs is more unsupported evidence married to grand representations by Olympic.

23 The proffered audit report contradicts Olympic's FERC Form 6 and, therefore, Olympic's own rate case before this Commission. To cite a few examples, the audit report lists Assets and Liabilities for 2000 and 2001 which are substantially different from those reported in the Form 6 for both periods. Carrier property in service reported in Note 4 is \$7 million greater than reported on the Form 6 while Accumulated Depreciation is \$1.7 million lower than reported on the Form 6. Operating Expenses in the report are almost \$8 million higher (before

extraordinary credit) than contained in the Form 6 (\$59 million vs. \$51 million). G&A is lower, but expenses related to the Whatcom Creek accident are higher by almost \$5 million. It also reports a net loss for 2001 which is \$5 million larger than reported in the Form 6. Thus, the proffered audit report presents yet another set of numbers which is not even consistent with its own rate case and frames yet another reason why this Commission should reject Olympic's entire rate case outright.

24 The proffered audit report does not even mention the write-off of "Other Accounts Receivables" and the corresponding expense resulting from the write-off. The insurance receivable was in the range of \$29 million for both 2000 and 2001. The "audited" statements reflect the write-down of the receivable as of 2000 but not the corresponding expense. It is as if the receivable just disappeared off the books.

25 Interestingly, the audit report does not even mention the Interest Payable on the Notes under Liabilities. Thus, the Shareholder Interest Payable that was used as a basis for interim rate relief is not even listed in the audit report.

26 Finally, the audit report lists several weaknesses in internal control which support the other parties' position that Olympic's financial information is unreliable. These weaknesses illustrate precisely the point made in Staff's testimony that capital expenditures were improperly categorized as expenses and improperly reported in the wrong period. Olympic's proposed late-filed audit report raises yet more concerns that its financial information is not reliable.

IV. Conclusion.

Olympic's untimely attempt to supplement the record with this audit report is without merit. It is a weak attempt to fill an obvious hole in its case—Olympic's rate case is not supported by expenses appropriate for setting rates. Olympic's proffered audit report does not even address much less fill this hole. In fact, Olympic's audit report contradicts its own rate case and raises more questions than it answers for this proceeding. Regardless of these substantive issues, however, Olympic's audit report is not appropriate to consider at this point in this proceeding. Judge Wallis's order was the correct call. This Commission should not delay the resolution of this proceeding one moment more waiting for Olympic to advance and support a proper rate case.

DATED this 26th day of September, 2002.

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CERTIFICATE OF SERVICE

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