

103 FERC ¶ 61, 101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Olympic Pipe Line Company

Docket No. IS03-218-000

ORDER ACCEPTING AND SUSPENDING TARIFF,
SUBJECT TO REFUND AND CONDITIONS, AND ESTABLISHING
HEARING AND SETTLEMENT PROCEDURES

(Issued April 30, 2003)

1. On March 31, 2003, Olympic Pipe Line Company (Olympic) submitted a tariff filing, with a cost-of-service (COS) justification that proposed to increase by 54.46 percent Olympic's rates for transportation of petroleum products from Anacortes, Ferndale, and Cherry Point, Washington to Linnton and Portland, Oregon.¹ As detailed below, we accept and suspend the instant tariff sheet, to be effective May 1, 2003, as proposed, subject to refund and conditions, and set this matter for hearing. The hearing will be held in abeyance pending the outcome of settlement procedures in this matter.

Background

2. On May 30, 2001, Olympic submitted a tariff filing, with a COS justification that proposed to increase by 76 percent, Olympic's rates for transportation of petroleum products from Anacortes, Ferndale, and Cherry Point, Washington to Linnton and Portland, Oregon.² Tosco Corporation (Tosco) and Tesoro West Coast Company d/b/a Tesoro Northwest Company (Tesoro) filed protests. Tosco and Tesoro claimed, among other things, that Olympic's filing did not provide the data required by Part 346 of the Commission's regulations.³ The Commission found that Olympic did not provide the required "statements, schedules, and supporting workpapers" to support its filing, and

¹Docket No. IS03-218-000 (Supplement No. 8 to FERC Tariff No. 24).

²Docket No. IS01-258-000 (Supplement No. 3 to FERC Tariff No. 24).

³18 C.F.R. § 346.2 (2002).

that it had not properly defined a 12-month base period consisting of actual experience and a 9-month test period consisting of revenues and costs which are known and measurable with reasonable accuracy at the time of the filing. Further, Olympic's tariff filing did not include throughput data for the test period. Therefore, the Commission rejected Olympic's tariff filing by letter order issued June 29, 2001.⁴

3. On July 30, 2001, Olympic submitted a second tariff filing,⁵ with a COS justification that increased by 62 percent, its petroleum products transportation rates for the same movements identified in the May 30 filing. Olympic stated that the reasons for filing the rate increase remained the same as in its previous submission, *i.e.*, it had an earnings gap that was due to, for example, increased power rates, system enhancements and an aggressive internal inspection and repair program.

4. On August 13 and 14, 2001, Tosco and Tesoro, respectively, filed protests to Olympic's July 30 filing and questioned Olympic's cost-of-service data supporting the proposed rate increases related to the Whatcom Creek accident.⁶ The Commission found that there was insufficient data before the Commission to resolve these disputes. It therefore established hearing procedures to examine the issues, since the rate increases had not been shown to be just and reasonable, unduly discriminatory or otherwise unlawful and were suspended and made subject to refund and the hearing.⁷

5. After initial settlement judge procedures proved unsuccessful, the Administrative Law Judge (ALJ) held prehearing conferences on October 18, 2001, and January 3, 2002. Pursuant to the procedural schedule set by the ALJ, a motion for summary disposition and striking testimony was filed on June 14, 2002, by Tesoro. In an initial decision issued July 19, 2002, the ALJ reviewed the Commission's oil pipeline rate

⁴95 FERC ¶ 61,488 (2001).

⁵Docket No. IS01-441-000 (Supplement No. 4 to FERC Tariff No. 24).

⁶The accident in Bellingham, Washington involved rupture of the pipeline and release of a significant amount of gasoline, which ignited, causing death and substantial property damage.

⁷96 FERC ¶ 61,250 (2001).

change regulations and concluded that Olympic's proposed rate increases were not supported, granted summary disposition, and ordered refunds.⁸

6. On August 19, 2002, Olympic filed a brief on exceptions to the initial decision. Briefs opposing exceptions were filed by Tesoro and Tosco on September 9, 2002. On November 26, 2002, the Commission issued an order affirming the initial decision,⁹ including the ALJ's requirement that Olympic make refunds within 30 days from the date of the Commission's final order. On December 20, 2002, Olympic filed a motion for stay of the Commission's November 26, 2002 order pending judicial review.¹⁰ On January 6, 2003, Tosco and Tesoro filed answers to Olympic's motion. On January 8, 2003, Olympic filed a motion for leave to file its reply to Tosco and Tesoro's answers. In an order issued January 17, 2003 (January 17, 2003 order),¹¹ the Commission denied the motion for stay of the requirement that Olympic cancel its currently effective rates, but extended the effective date for making refunds to February 1, 2003, and allowed Olympic to amortize the refunds over a 10-month period.

Instant Filing

7. On March 31, 2003, Olympic submitted a third tariff filing, proposed to be effective May 1, 2003, with a COS justification that proposed to increase by 54.46 percent, the transportation rates for the same petroleum product movements. Olympic states that it has filed documentation in accordance with 18 C.F.R. § 342.4(a) to support its rate increase caused by the same reasons as those stated in Olympic's previous submissions, *i.e.*, it had ongoing large and continuing earnings gap that was due to system enhancements, an aggressive internal inspection and repair program, increased regulatory and internal safety requirements, and increased routine operating costs.

8. Also, as a result, in part, of the Commission's rejection of Olympic's previous tariff rate filings, Olympic states its financial situation has deteriorated to the point that Olympic has sought protection under Chapter 11 of the United States Bankruptcy Code.

⁸100 FERC ¶ 63,005 (2002).

⁹101 FERC ¶ 61,245 (2002).

¹⁰Olympic filed an appeal of the Commission's November 26, 2002 order with the United States Court of Appeals for the District of Columbia Circuit on December 20, 2002, but did not file a request for rehearing with the Commission.

¹¹102 FERC ¶ 61,055 (2003).

As a result of this reorganization process, Olympic may experience reduced capital and operating expenses underlying the instant COS filing and, if such cost reductions are significant, will promptly file a new tariff seeking rate increases lower than those sought in the instant filing.

9. Olympic states the base period underlying the instant filing is the calendar year 2002, adjusted for known and measurable changes through September 2003, *i.e.*, the first nine months of 2003. Also, Olympic states that the bases of the capital structure, cost of debt, and rate of return on equity shown in Statement C are explained in the footnotes to Workpaper 1 of the COS justification.

Protests

10. On April 15, 2003, Tesoro and ConocoPhillips Company (ConocoPhillips),¹² filed timely protests to the March 31 filing. Tesoro urges the Commission to (1) reject the instant filing and direct Olympic to file a new tariff after its plan of reorganization is approved by the U.S. Bankruptcy Court or, in the alternative, (2) condition its acceptance upon compliance with prior Commission orders on Olympic's previous COS rate filings and suspend the instant tariff for the full statutory period of seven months. As in its previous protests, Tesoro questions the accuracy of numerous costs and the throughput volumes. ConocoPhillips states that because of the absence of Form No. 6 data to verify historical base period costs and volumes, Olympic's pending bankruptcy proceeding, and the continuing rehabilitation of Olympic's system following the Whatcom Creek incident, Olympic's instant filing contains major uncertainties which do not allow costs and volumes to be projected with a reasonable degree of accuracy and reliability.

11. Tesoro objects to Olympic's capital structure of 60 percent equity and claims Olympic's actual capital structure is a 100 percent debt capital structure. Also, Tesoro states Olympic's capital expenditure program appears to be pre-funded by its shippers, which will be required to pay twice for the facilities, once through rates and again through depreciation charges. In addition, Tesoro claims Olympic is treating nonrecurring, one-time expenses as recurring expenses which results in an inflated rate and/or an inflated rate base. ConocoPhillips states that although Olympic uses the year 2002 as the base period for its rate filing, the most recent Olympic Form No. 6 report containing reliable accounting data is the report for 1999, which is three years before the base period. ConocoPhillips claims there has been an unexplained 34 percent increase in Olympic's carrier property since the beginning of the base period and the end of the test

¹²ConocoPhillips' predecessor in interest was Tosco Corporation.

period. Also, ConocoPhillips states a review of the reports of the five proxy companies used to support Olympic's proposed equity ratio of 60 percent and proposed hypothetical debt cost of 7.80 percent, reveals lower medians of 44 percent and 5.16 percent, respectively.

12. Tesoro believes Olympic understated the throughput used in its COS and that the actual throughput is much higher. Tesoro also believes Olympic overstates the base and test year expenses because they include unreasonable expenses paid to affiliates, improper costs attributed to the Whatcom Creek accident and the contested Bayview Terminal facilities, and contain a high level of outside services that Olympic fails to explain. Also, Tesoro questions Olympic's rate of return and when used in conjunction with an improper rate base methodology, claims the total return and income tax allowances contained in the proposed COS are flawed. ConocoPhillips states that Olympic plans to restore most of its system to full operating pressure by August 2003 and the remainder in the first part of 2004 which will allow the effective use of the Bayview terminal and increase throughput volumes 25 to 30 percent above Olympic's projected test period level. In addition, ConocoPhillips states the range of uncertainty regarding the test period throughput runs from 105.6 million barrels projected by Olympic to at least 130 million barrels and is due to operational constraints, not to pipeline capacity or demand for Olympic's transportation service. ConocoPhillips also questions the accuracy of Olympic's outside services expenses and Olympic's interstate cost allocation, particularly the breakdown of distance-related costs and non-distance related costs.

13. Tesoro states there is a timing and intergenerational issue regarding Olympic's possible failure to maintain the integrity of its pipeline system and for the safety-related investments in Olympic's rate base. Also, Tesoro questions whether insurance covers, in whole or in part, the Whatcom Creek related costs included in the filing. ConocoPhillips notes that although Olympic stated in its prior rate increase filings it excluded Whatcom Creek related costs, Olympic has made no such claim in the instant filing which indicates they may have been improperly included in the COS justification.

14. Tesoro states that Olympic notes its bankruptcy status and assumes without legal analysis or argument, that this somehow relieves it from compliance with the Commission's January 17, 2003 order¹³ requiring it to pay refunds over a 10-month

¹³Ordering Paragraph (D) states: "Olympic must refund to its shippers each month for a 10-month period, beginning on February 1, 2003, one tenth of the refund amount,
(continued...)"

period. Tesoro states the proposed tariff supplement no longer includes the refunds that were ordered by the Commission and that Olympic's tariff filing seeks rates based upon a COS that includes expenditures that may not even be approved by the U.S. Bankruptcy Court. Further, Tesoro states the Commission should not allow Olympic to collect refundable rates that it is not in the position to refund and allowing such an overcollection at a time of such uncertainty is bad public policy. Tesoro estimates the proposed 54.46 percent tariff rate increase will increase Tesoro's transportation costs by approximately \$4 million per year. ConocoPhillips states that refunds to shippers are currently in jeopardy and Olympic should not be forced into a similar position where it may again default on its refund obligations. Therefore, Tesoro and ConocoPhillips request the Commission suspend the proposed tariff for the maximum statutory period of seven months because failure to do so will impose an undue hardship on both shippers.

Discussion

15. The issues of this case pertain to the data and methods used to determine Olympic's COS, and to specific aspects of Olympic's present and historic business practice. The resolution of these factual disputes will affect the cost impact on Tesoro and ConocoPhillips as individual shippers on Olympic. At present, however, there is insufficient information to enable the Commission to resolve these disputes. It is therefore appropriate to establish hearing procedures to examine the issues raised in the protests.

16. The Commission has, however, consistently encouraged parties to resolve disputes of this nature through settlement, and believes that formal settlement procedures may lead to a resolution of this case. The issues in this case involving Olympic's COS rate proposal are complex and numerous and should be resolved by settlement. Therefore, we shall hold the hearing in abeyance pending the outcome of formal settlement procedures in this matter. To aid the parties in their settlement efforts, a settlement judge shall be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁴ If the parties desire, they may, by mutual agreement, request a specific

¹³(...continued)
including interest, as prescribed in 18 C.F.R. § 340.1 (2002)."

¹⁴ 18 C.F.R. § 385.603 (2002).

judge; otherwise, the Chief Judge will select a judge for this purpose.¹⁵ If a settlement cannot be reached, the instant docket will be set for hearing. Because previous settlement negotiations have not been fruitful, an abbreviated settlement negotiation period will be established. In the event settlement negotiations are not successful, we will direct that evidentiary hearing procedures be expedited, and that an initial decision be issued on or before October 15, 2003. Expedited procedures are appropriate here to resolve long-standing issues between Olympic and the shippers with promptness and finality.

Suspension

17. Based upon a review of the filing, the Commission finds that Supplement No. 8 to FERC Tariff No. 24 has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission will accept and suspend the tariff, to become effective May 1, 2003, subject to refund and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

The Commission orders:

(A) Supplement No. 8 to FERC Tariff No. 24 is accepted for filing and suspended, to become effective May 1, 2003, subject to refund and subject to further order of the Commission.

(B) Pursuant to the authority of the Interstate Commerce Act, particularly Section 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Olympic's filing.

(C) Pursuant to the Section 375.304 of the Commission's regulations, 18 C.F.R. § 375.304 (2002), the Chief Administrative Law Judge shall designate a presiding administrative law judge for the purpose of conducting a hearing. The ALJ is authorized to conduct further proceedings pursuant to this order and to the Commission's Rules of Practice and Procedure. An initial decision, as specified in 18 C.F.R. § 385.708 (2002), shall be issued on or before October 15, 2003.

¹⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of the Commission's judges and a summary of their background and experience at www.ferc.gov/legal/oalj/bio/judges.htm.

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(D) The hearing established in Ordering Paragraph (B) is hereby held in abeyance pending the outcome of the settlement proceedings described in the body of this order.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is directed to appoint a settlement judge in this proceeding within 10 days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(F) Within 30 days of the date of this order issues, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.