

Thurston County Superior Court filed its order in Case Nos. 13-2-01576-2 and 13-2-01582-7 (*consolidated*) on July 25, 2014, Granting in Part and Denying in Part Petitions for Judicial Review. The Court remanded this case to the Commission “for further adjudication.”

- 2 On September 20, 2014, the Commission held a pre-hearing conference and subsequently issued Order 10, a prehearing conference order governing the scope and schedule of the remand proceedings, and establishing process for the conduct of the proceedings. As in the usual course of Commission adjudicatory proceedings, parties will have opportunities to prefile direct, response, rebuttal and cross-answering testimony. As these testimonies are developed and filed, the parties remain subject to the Commission’s discovery rules and process. We will conduct an evidentiary hearing and the parties will be allowed to brief the issues.
- 3 Order 10 anticipates that the parties will, in response to the Superior Court’s remand order, “provide focused and detailed analyses such as would have informed a determination of return on equity in early 2013 for purposes of updating PSE’s rates from the 2012 general rate case and for continued application through the rate plan period.”¹ The prehearing conference order also notes that the Superior Court’s order is ambiguous as to whether the issue of the effect of decoupling on PSE’s return on equity was remanded, or whether the remand reaches only the issue of whether an adjustment to return on equity in light of market conditions is appropriate.²
- 4 In Order 11, the Commission denied requests for review and other relief filed by ICNU and Public Counsel with respect to Order 10. Focusing on the Superior Court’s order, Order 11 states the Court:

[U]nequivocally puts [the Commission] to the task of reconsidering in the context of fully developed analyses of *data contemporaneous with the entry of Order 07* whether a 9.8 percent ROE remained, in fact, within the zone of reasonable returns at that time. Further, we must decide on the basis of a full record whether it would have been

¹ Order 10 ¶24.

² *Id.* ¶21.

appropriate to select 9.8 percent, or some other rate of return on equity found within the range of reasonable returns.³

Order 11 also rejected ICNU’s and Public Counsel’s arguments that the Commission should decide in advance of receiving any evidence the controversial question whether and, if so, how, decoupling may be considered in the context of the remand proceedings. In this connection, Order 11 states:

Were we to make the ruling ICNU and Public Counsel urge upon us at this early stage of the remand proceedings it would substantially prejudice the other parties who have a divergent perspective on the questions of whether and how decoupling or the rate plan should be taken into account as we determine ROE.⁴

II. Northwest Energy Coalition Motion to Limit Participation

- 5 During the time between the Commission’s entry of Order 10 and Order 11, the Northwest Energy Coalition (NVEC), a co-petitioner with PSE in the so-called Decoupling Dockets (*i.e.*, Dockets UE-121697 and UG-121705 (*consolidated*)), filed a motion seeking approval to limit its participation during the remand phase of these proceedings. This is principally because “[t]he NW Energy Coalition lacks the resources to participate fully in these remand proceedings.”⁵
- 6 NVEC states that the organization does not take a position on the appropriate return on equity for PSE in light of market conditions, arguably an issue only in the “Expedited Rate Filing” (ERF) Dockets (*i.e.*, Dockets UE-130137 and UG-130138). Referring to the ambiguity in the Superior Court’s order and the parties’ ongoing dispute concerning whether and how decoupling might be considered during the remand phase, NVEC states that its position in the proceedings that led to Order 07, and its position today, is “that a prospective reduction in PSE’s Return on Equity due

³ Order 11 ¶15.

⁴ *Id.* ¶12.

⁵ NVEC Motion ¶1.

to the adoption of decoupling was not appropriate at [the point in time when Order 07 approved decoupling mechanisms for PSE].”⁶ NWEC states further that:

The NW Energy Coalition has already presented evidence and arguments in support of this position in the adjudication of Dockets UE-121697 and UG-121705 leading up to Order 07. The NW Energy Coalition continues to take the same position on this issue and does not plan to offer new evidence in the remand proceedings, as the Coalition’s evidence and argument in support of this position is already before the Commission.⁷

Arguing that it is a “resource constrained” organization, NWEC asks for specific relief, as follows:

The NW Energy Coalition requests that its participation in the remand proceedings be limited to participating in the hearing for the limited purpose of allowing the Commission and opposing parties to cross-examine the Coalition’s expert witness, Ralph Cavanagh, on the testimony and evidence the Coalition has already presented in Dockets UE-121697 and UG-121705. The Coalition would not be permitted to file additional testimony or other evidence, would not be permitted to participate in discovery, would not be permitted to cross-examine other parties’ witnesses at the hearing, and would not participate in post-hearing briefing. Other parties would not be permitted to seek discovery from the Energy Coalition, as the Coalition would not be presenting any new evidence or testimony, but other parties would be permitted to cross-examine the Coalition’s witness on the testimony the Coalition has already submitted.⁸

- 7 PSE filed a response to NWEC’s motion, stating that it does not oppose granting the relief NWEC requests. PSE states its support for allowing NWEC to present its witness, Ralph Cavanagh, for questions from the Commission and cross-examination during the evidentiary hearing. Staff similarly responds that it has no objection to

⁶ *Id.* ¶6

⁷ *Id.*

⁸ *Id.* ¶9 (footnote omitted).

NWEC's motion and "appreciates NWEC's offer to make Mr. Ralph Cavanagh available for the hearing on December 7, 2014."⁹

8 ICNU objects to NWEC's motion, arguing that it would be prejudicial for the organization not to participate in the give and take of prefiled evidence and discovery that ordinarily precedes the presentation of a witness in Commission proceedings. ICNU says that it is acceptable for NWEC to rest on the case it presented through its witness Mr. Cavanagh in the proceedings that led to Order 07, but that it would be unfair "to have Mr. Cavanaugh take the stand again," the only practical purpose of which, in INCU's view, "is to have him respond to additional evidence on decoupling's impact on the ROE other parties produce in this remand proceeding."¹⁰ ICNU argues that "such a last-minute response, without the benefit of discovery, puts other parties, who have prefiled their testimony weeks beforehand, at a clear disadvantage."¹¹ ICNU asks that the Commission deny NWEC's motion.

9 Public Counsel also objects to NWEC's proposal insofar as the organization:

[A]sks it be allowed to participate in the hearing "for the limited purpose of allowing the Commission and opposing parties to cross-examine the Coalition's expert witness, Ralph Cavanagh, on the testimony and evidence the Coalition has already presented[.]"¹²

Public Counsel argues that NWEC has established no "legitimate purpose" for having Mr. Cavanagh take the stand at this stage of these proceedings given that the organization states clearly in its motion that it does not intend to introduce through him any new evidence. Public Counsel says this means either that his appearance would be wastefully duplicative given that he already presented his testimony and has already been cross-examined on it, or it will provide him an opportunity to give testimony in response to questioning from parties or the bench concerning "the new and additional evidence provided by other parties in the remand proceedings, or

⁹ Staff Response to NWEC Motion ¶1.

¹⁰ ICNU Response to NWEC Motion ¶6.

¹¹ *Id.*

¹² Public Counsel Response to NWEC Motion ¶6 (quoting NWEC Motion ¶9).

offering other new evidence of his own.”¹³ Public Counsel argues this is contrary to Commission practice and would violate principles of “fundamental fairness and due process.”¹⁴ Public Counsel argues his office:

[W]ould be substantially prejudiced with respect to Mr. Cavanagh’s testimony if he is permitted to provide live direct or cross-answering testimony, as to which Public Counsel has had no opportunity to conduct discovery, file a written response, or prepare cross-examination.¹⁵

Public Counsel urges the Commission to deny NWECE’s motion.

III. NWECE Motion for Leave to File Reply

10 On October 31, 2014, NWECE filed a motion requesting leave to file a reply along with its Reply. The Commission finds this matter is fully presented by NWECE in its motion, and in the other parties’ responses. NWECE’s motion for leave to file a reply accordingly should be, and is, denied.

IV. Commission Determination

11 NWECE states that it has presented all the evidence it wishes to present on the question whether the Commission should have ordered a prospective adjustment to PSE’s authorized return on equity in Order 07 based on the implementation of decoupling. NWECE’s witness, Mr. Cavanagh, testified during the earlier stage of these proceedings, was subject to cross-examination, and responded to questions from the bench. The Commission relied in part on the evidence he presented in determining that it should not order a prospective adjustment to return on equity unless and until actual experience with decoupling over the period of the Rate Plan showed such an adjustment to be warranted.

¹³ *Id.* ¶9.

¹⁴ *Id.*

¹⁵ *Id.* ¶10.

- 12 Given that NWEAC does not propose to present new evidence through Mr. Cavanagh, it most likely would be unnecessarily redundant, at best, to subject him to further examination. If, however, an adverse party, or the Commissioners, wish to inquire of Mr. Cavanagh concerning his earlier-filed testimony this would be allowed as in the case of any other witness, assuming relevance of the prior testimony. In the unlikely event Mr. Cavanagh is called upon to testify, the Commission would grant leave for him to testify via telephone thus limiting the expenditure of NWEAC's constrained resources.
- 13 If, however, Mr. Cavanagh were to be asked to respond to newly presented evidence, or provide additional direct testimony from the witness stand, this would be prejudicial to the other parties and would not be allowed. In Order 10, we established a process to develop the record required by the Superior Court's remand order. The process provides opportunities for parties to pre-file testimony, conduct discovery, and respond at appropriate points in time to other parties' pre-filed evidence. There is no objection to NWEAC electing not to avail itself of these opportunities, but ICNU and Public Counsel reasonably object to NWEAC's proposal to participate in the development of new evidence without the early exposure provided via the pre-filing process and without being subject to discovery concerning any such evidence.
- 14 We determine that we should not approve a special process for NWEAC to participate in further development of the record during this phase of our proceedings while shielding the organization from the obligations all parties have under the process established. This does not mean that NWEAC's voice cannot be heard. NWEAC remains a party to this case. Mr. Cavanagh's testimony and any exhibits NWEAC presented during the earlier phase of these proceedings remain part of the record. To the extent these are relevant, they can be considered during this phase of our proceedings. In addition, NWEAC may elect to brief, or avail itself of any other opportunities to argue, any issues that are contested. If one or more parties argue that the Superior Court remanded the question whether a prospective adjustment to return on equity is appropriate in response to decoupling, NWEAC will have an opportunity to argue this point, which is at the heart of its concern. On the other hand, parties may address the issue of any relationship between decoupling and return on equity without implicating the prospective adjustment question. In that event, NWEAC may elect not to address the matter at all.

- 15 In sum, the Commission will not deprive any party the opportunity to participate as the party sees fit within the constraints of the process we allow, but requires that all parties participate following the same rules. Because NWEC's motion would have us establish a special opportunity for the organization to provide new evidence, an opportunity not available to any other party, we determine NWEC's motion should be denied.

ORDER

- 16 THE COMMISSION ORDERS that the Northwest Energy Coalition's Motion to Limit Participation is DENIED.

Dated at Olympia, Washington, and effective November 7, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Senior Review Judge