

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION) DOCKET UE-210829
)
Complainant,)
)
v.)
)
PACIFICORP d/b/a/ PACIFIC POWER &)
LIGHT COMPANY,)
)
Respondent.)

REPLY BRIEF OF THE

ALLIANCE OF WESTERN ENERGY CONSUMERS

November 27, 2024

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT..... 1

 A. The Commission should reject RNW and NWECA’s recommendation that it should order PacifiCorp to initiate a near-term resource procurement process by which it can demonstrate necessary progress ahead of the 2030 deadline..... 1

 i. The Commission does not have the authority to require PacifiCorp to initiate a near-term resource procurement process. 2

 ii. Even if the Commission concludes that it has the authority to direct PacifiCorp to procure near-term procurement of CETA compliant resources through a new all-source RFP in early 2025, it should decline to do so as a matter of sound regulatory policy. 5

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Am. Legion Post No. 149 v. Dep't of Health, 164 Wn.2d (2008)..... 3

Hartman v. Wash. State Game Comm'n., 85 Wn.2d 176, 179 (1975)..... 3

Hillis Homes v. Snohomish Cty., 97 Wash. 2d 804, 808, 650 P.2d 193, 195 (1982)..... 2

Puget Soundkeeper v. State, 102 Wn. App. 783, 790 (2000) 4

State v. Alvarez, 74 Wn.App. 250, 258 (1994) 3

State v. Taylor, 97 Wn.2d 724,728 (1982)..... 3

State v. Van Wolvelaere, 195 Wn.2d 597, 607 (2020)..... 3

Statutes

RCW 19.405.010(5)..... 3

RCW 19.405.090 4

Regulations

WAC 480-100-645(2)..... 2

Administrative Authorities

Wash. Utils. & Transp. Comm'n. v. Cascade Natural Gas Corporation
Docket No. UG-930511, Fourth Supplemental Order Approving Special Contract (Apr. 29,
1994). 6

I. INTRODUCTION

1 Pursuant to the Washington Utilities and Transportation Commission’s (“Commission”) Order 11 in the above-referenced docket, the Alliance of Western Energy Consumers (“AWEC”) hereby files this Reply Brief. AWEC maintains the arguments and recommendations included in its initial post-hearing brief. In that brief, in response to testimony filed by Renewable Northwest (“RNW”), AWEC set forth legal and policy arguments as to why the Commission should not adopt RNW’s recommendation that it order PacifiCorp to pursue near-term procurement of new clean resources on an expedited basis.¹ In their joint post-hearing brief, RNW and the Northwest Energy Coalition (“NWECC”) recommend that the Commission “order PacifiCorp to initiate a near-term resource procurement process by which it can demonstrate necessary progress ahead of the 2030 deadline”² because “[t]he Commission has broad authority and substantial direction in its regulation of utilities in the public interest.”³ While true that the Commission has broad authority and substantial direction to regulate utilities, its authority is not unlimited and to do as NWECC and RNW suggest in this case is not supported by sound regulatory policy. For these reasons, NWECC and RNW’s recommendation should be rejected.

II. ARGUMENT

A. **The Commission should reject RNW and NWECC’s recommendation that it should order PacifiCorp to initiate a near-term resource procurement process by which it can demonstrate necessary progress ahead of the 2030 deadline.**

2 NWECC and RNW argue that the interim targets are “meant to be the primary tool for a utility’s demonstration of progress toward CETA’s mandates...”⁴ and that PacifiCorp’s request to

¹ AWEC Initial Post-hearing Brief at ¶ 26.

² NWECC and RNW Post-hearing Brief at ¶ 26.

³ *Id.* at ¶ 46.

⁴ *Id.* at ¶ 42.

lower its interim targets should be denied.⁵ However, instead of relying on the Commission’s existing CETA compliance framework wherein interim targets are determined and a utility either meets or does not meet those interim targets with potential remedies as a consequence, NWECC and RNW take the position that the Commission should effectively step into the shoes of the utility and micro-manage its compliance with CETA. Such an approach is not only beyond the Commission’s authority, but doing so would also set poor regulatory policy to the detriment of PacifiCorp’s customers.

- i. *The Commission does not have the authority to require PacifiCorp to initiate a near-term resource procurement process.*

3 In support of its recommendation, NWECC and RNW’s post-hearing brief argues that the Commission has broad discretion to “fashion a remedy” to its concerns that PacifiCorp is not demonstrating reasonable progress in meeting CETA requirements.⁶ In doing so, NWECC and RNW cite to several cases, statutes and administrative rules that it argues demonstrate the Commission’s broad authority to regulate, in the public interest, the rates of public utilities – an authority that was affirmed in the passage of CETA.⁷ To that end, CETA allows for the Commission to “approve, reject, or approve with conditions a utility’s CEIP or biennial CEIP update.”⁸ AWEC agrees. But NWECC and RNW stop short of pointing to operative language that provides the Commission with the specific authority to enact its proposed remedy.⁹ Instead,

⁵ *Id.* at ¶ 45.

⁶ *Id.* at ¶¶ 46-49.

⁷ *Id.* at ¶ 46.

⁸ *Id.* at ¶ 46 *citing* WAC 480-100-645(2).

⁹ *See Hillis Homes v. Snohomish Cty.*, 97 Wash. 2d 804, 808, 650 P.2d 193, 195 (1982) (“[N]o matter how desperate the needs of the counties, they remain creatures of the constitution and the Legislature... Their powers are limited to those granted them by the constitution and Legislature, expressly or by implication. Our review of the validity of counties' actions must therefore be an inquiry into whether those actions are authorized. If the Legislature has not authorized the action in question, it is invalid no matter how necessary

NWEC and RNW cite to RCW 19.405.010(5), characterizing it as a “directive,” that “utilities in the state have an important role to play in this transition, and must be fully powered , *through regulatory tools* and incentives, to achieve the goals of this policy.”¹⁰ However, the CETA language relied upon by NWEC and RNW is not, in fact, a Legislative directive and further underscores that utilities remain in the driver’s seat of specific resource procurement decisions to meet CETA requirements thereby retaining the regulatory risk associated with CETA compliance. RCW 19.405.010(5) is not an operative part of CETA – it is one of several legislative findings that have no binding effect on the Commission.¹¹ Moreover, the cited language places the impetus of action on *utilities*, not the Commission, stating that *utilities* “must be fully powered,” making clear that the Commission should not be an impediment to CETA compliance, as opposed to placing it in the shoes of management as NWEC and RNW advocate.

4 The only language that NWEC and RNW rely upon is the Commission’s organic statutes, and as AWEC set forth in its initial post-hearing brief, this reliance falls short. As AWEC set forth in its initial post-hearing brief, while the Commission does enjoy broad authority as an economic regulator that must regulate, in the public interest, the rates, services, facilities and practices of its jurisdictional utilities, this general grant of authority must be interpreted within the context of more specific and recently enacted provisions.¹² Even with Legislative findings serving as a “guide” to the meaning of operative sections, such policy remains “subject to...the

it might be.”); *see e.g. State v. Alvarez*, 74 Wn.App. 250, 258 (1994), *citing State v. Taylor*, 97 Wn.2d 724,728 (1982) (“Indeed, we are advised that it is safer not to add to or subtract from the language of a statute unless this is imperatively required to make the statute rational.”).

¹⁰ NWEC and RNW Post-hearing Brief at ¶ 47 (emphasis in original).

¹¹ *See e.g. State v. Van Wolvelaere*, 195 Wn.2d 597, 607 (2020), *citing Hartman v. Wash. State Game Comm’n*, 85 Wn.2d 176, 179 (1975).

¹² AWEC Initial Post-hearing Brief at ¶ 20, *citing Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 585-586 (2008).

specific requirements of the statute.”¹³ CETA has enforcement provisions that provide the Commission with its authority to enforce those provisions, which include penalties for utility non-compliance.¹⁴ Again, there simply is no language in CETA that provides the Commission with an alternative means of compliance that would allow it to “fashion the remedy” that NWEAC and RNW seek in this case. As such, NWEAC and RNW’s recommendation is not legally supported, and thus should be rejected.

5 Crucially, in considering the remedy NWEAC and RNW request, the Commission should look beyond the specific facts of this case to the broader implications of these parties’ proposal. NWEAC and RNW rely chiefly on the Commission’s general statutes to regulate utilities as the basis for the Commission’s authority to order PacifiCorp to engage in a resource procurement.¹⁵ Such a reading of these statutes to give the Commission effective managerial authority over a utility has massive long-term implications. Under this interpretation, there would appear to be almost no limit to the amount of mischief a future Commission could engage in. If the Commission can order a utility to undertake a resource procurement, why can it not order the utility to bargain for specific provisions in a union labor contract? Or why can it not direct that the utility hire certain individuals, or donate to certain causes or organizations, or take political positions before the legislature?

6 If, therefore, the Commission is inclined to agree with NWEAC and RNW and order PacifiCorp to initiate a near-term resource procurement, then at a minimum AWEC strongly

¹³ *Puget Soundkeeper v. State*, 102 Wn. App. 783, 790 (2000) (Washington Court of Appeals concluding that general legislative intentions must also be considered in the context of other public policy considerations “and to the specific requirements of the statute.”).

¹⁴ AWEC Initial Post-hearing Brief at ¶ 20 *citing* RCW 19.405.090.

¹⁵ NWEAC & RNW Post-hearing Brief at ¶¶ 46-48.

urges the Commission to find this authority through a specific directive in CETA and not based on its general grants of authority to regulate utilities so that it does not open a Pandora's box of future utility oversight.

ii. *Even if the Commission concludes that it has the authority to direct PacifiCorp to procure near-term procurement of CETA compliant resources through a new all-source RFP in early 2025, it should decline to do so as a matter of sound regulatory policy.*

7 Just because the Commission has the authority to take a particular action, which in the case of NWECC and RNW's recommendation in this case, it does not, it does not mean that the Commission should exercise such authority. In this case, NWECC and RNW's recommendation seeks to place the Commission in the shoes of utility management and in so doing, shift significant risk away from PacifiCorp's shareholders and onto its customers.

8 Again as set forth in AWEC's initial post-hearing brief, when a Commission manages the business decisions of a utility, "it disrupts the balance of risk" between ratepayers and shareholders and effectively deprives customers of a remedy in the event that resource procurement was imprudent.¹⁶ If the Commission-directed action turns out not to be in customers' best interest, it would be nearly impossible for the Commission to hold the utility accountable for a decision that it made at the Commission's direction – an outcome that would effectively deprive customers of their ability to seek a prudence review and subsequent disallowance of costs. Such actions only serve to create uncertainty and reduce PacifiCorp's risks associated with CETA compliance. The Commission has previously declined to substitute its

¹⁶ AWEC Initial Post-hearing Brief at ¶ 21.

own judgment for that of a utility, favoring a prudence review instead,¹⁷ and should do so again here.

9 More specifically to the circumstances at hand, PacifiCorp testified that it will not be able to procure long-term resources in time for it to meet its current interim targets, which are the item at issue in this case.¹⁸ Beyond the current CEIP, whose term ends in 2025, PacifiCorp maintains an incentive to procure resources in order to meet its 2030 obligations and its strategy for doing so is subject to review and Commission approval in its forthcoming CEIP covering the second compliance period. Taking a more prescriptive approach about how PacifiCorp will meet its 2030 obligations only serves to insulate PacifiCorp’s shareholders from taking on compliance risk and puts customers at risk of PacifiCorp complying with CETA at a higher cost than otherwise necessary.

III. CONCLUSION

10 The Commission has a Legislatively provided remedy should PacifiCorp fail to meet CETA requirements – it can levy penalties. NWECA and RNW have provided no compelling legal authority, precedent or rationale in support of their recommendation that the Commission order PacifiCorp to pursue near-term procurement of CETA compliant resources through a new all-source RFP in early 2025. As such, this recommendation should be denied.

¹⁷ Docket No. UG-930511 Fourth Supplemental Order Approving Special Contract at 5 (Apr. 29, 1994).
¹⁸ AWEC Initial Post-hearing brief at ¶ 11.

Dated this 27th day of November 2024.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Sommer J. Moser

Sommer J. Moser, OR State Bar # 105260

107 SE Washington St., Suite 430

Portland, OR 97214

(503) 241-7242 (phone)

sjm@dvclaw.com

Of Attorneys for the

Alliance of Western Energy Consumers