

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BELLINGHAM COLD STORAGE
COMPANY and GEORGIA-PACIFIC
WEST, INC.,

Complainants,

v.

PUGET SOUND ENERGY, INC.,
Respondent.

NO. UE-001014

NO. UE-000735

PUGET SOUND ENERGY, INC.'S
MOTION TO DISMISS

I. BACKGROUND

1. On June 29, 2000, Bellingham Cold Storage Company ("BCS") and Georgia-Pacific West, Inc. ("GP") (collectively, "Complainants") initiated this proceeding. Their Complaint set forth certain allegations as to matters governed by special contracts entered into by the parties in May of 1996 ("Special Contracts"). The Special Contracts were allowed to go into effect by the Commission on June 7, 1996, Docket No. UE-960612.

2. Complainants have not, up to and through the date of this motion, sought to amend their Complaint.

3. On July 19, 2000, a Prehearing Conference was held in this proceeding. At the parties' urging, the Commission agreed to conduct this proceeding in two phases. Phase I of the proceeding was to address "power pricing issues" raised in the Complaint. Prehearing Order, at 12.

4. At the Prehearing Conference, Complainants insisted on an aggressive schedule for this proceeding. Prehearing Order, at 9. Complainants argued that such a schedule was necessary to address circumstances that Complainants characterized as an "emergency." The schedule set forth in the Prehearing Order provides:

Complainants' direct case: Complainants will file their direct evidence on Power Pricing Issues: **August 10, 2000.**

Prehearing Order, at ¶ 12.

5. At the Prehearing Conference, GP gave PSE's counsel its first set of data requests. PSE responded on July 25, 2000, and supplemented this response with production of documents on July 27, 2000. Unsatisfied with the information provided by PSE, GP filed a motion to compel on August 2, 2000.

6. On August 3, 2000, GP gave PSE its second data request, to which PSE

objected on August 4, 2000. GP filed another motion to compel on August 9, 2000.

7. On August 1, 2000, PSE served data requests on Complainants, to which GP responded on August 3, 2000 and BCS responded on August 9, 2000. PSE's data requests primarily addressed factual allegations set forth in the Complaint. GP's responses to most of PSE's data requests state:

We are in the process of preparing such testimony now and will be filing such testimony by August 10, 2000, on an expedited schedule acceded to by all the parties.

GP Response to Data Requests, ¶¶ 1.7-1.17 (emphasis added). In effect, on August 1, GP promised to respond to PSE's data requests, in part, by filing testimony by August 10, 2000: "[w]e will be filing such testimony by August 10...."

8. The next day, on August 2, 2000, Complainants moved to immediately suspend the schedule in this proceeding *in order to negotiate*. See Complainants' Motion to Suspend Procedural Schedule Immediately, at p. 1, lines 20-24. Although GP filed its motion to compel on the same day, Complainants made no reference to any difficulties in preparing their direct case as a result of discovery issues. Complainants did not seek an alternative schedule in the event their motion for an indefinite stay was denied.

9. In its August 9, 2000 Order Granting Motion To Defer Briefing; Denying Motion To Suspend Procedural Schedule, the Commission stated:

Complainants consistently argued that expedited process and an aggressive procedural schedule are required under the circumstances that precipitated their filing to initiate these proceeding. The Commission accepted these arguments at prehearing and set a highly accelerated process in motion to accommodate the perceived "emergency" circumstances pled by the Complainants. All parties agreed to the schedule, which the Commission incorporated into its own schedule. The Commission finds nothing in Complainants' Motion to suggest any change in circumstances that would warrant any slippage of the present schedule, and certainly not an indefinite

suspension.

Order Denying Motion to Suspend Procedural Schedule, ¶ 12.

10. Yesterday, August 10, 2000, Complainants failed to file their direct case as required by the Prehearing Order and as reaffirmed by the Order Denying Motion to Suspend Procedural Schedule. Instead of filing their direct case, Complainants filed a "Motion For Continuance of Date To Submit Direct Evidence." In this motion, Complainants allude to theories and allegations that have never been pled in this proceeding.¹

II. ARGUMENT

11. Complainants have the burden of proof in this proceeding as to the allegations set forth in their Complaint. Complainants were required by the Prehearing Order to carry this burden by submitting their direct evidence as to such allegations on or before August 10, 2000.

12. Under the Commission's Rules of Procedure, the Commission "may refer to the rules in the superior court of Washington as guidelines for handling motions." WAC 480-09-420(8). Pursuant to CR 41(b)(3), a defendant is entitled, after the plaintiff has completed the presentation of his or her evidence, to move for a dismissal on the grounds that "upon the facts and the law the plaintiff has shown no right to relief." In this case, Complainants have presented no evidence by the required date. They have not provided testimony or any proof on any of the claims listed in their Complaint. Because Complainants have filed no testimony, they have failed to carry their burden and have failed to make a prima facie showing of any of the allegations in the Complaint. Their Complaint should be

¹PSE received this motion just before 5:00 p.m., August 10, 2000. PSE does not waive any of its rights to contest and file a timely answer to Complainants' "Motion For Continuance of Date To Submit Direct Evidence," in accordance with the Commission's Rules.

dismissed.

13. This Commission has the authority under WAC 480-09-420(8) and CR 41(b)(3) to dismiss this case based on Complainants' failure to present any evidence. For example, in GTE Northwest Inc. v. Whidbey Telephone Co., Docket No. UT-950277, 1996 Wash. UTC LEXIS 23 (1996), this Commission dismissed a complaint brought by GTE seeking a Commission order requiring Whidbey to charge rates sufficient to cover costs. Although in GTE Northwest, GTE did actually file testimony and exhibits in support of its case, Whidbey and Staff moved to dismiss GTE's complaint, arguing that GTE had not provided proof of its claim.

14. The Commission granted Whidbey's motion to dismiss under WAC 480-09-420(8) and CR 41(b)(3). The Commission held that GTE had failed to make a prima facie showing of its claim. In that case, the Commission emphasized the importance of complainants meeting their burdens and responsibilities in putting on a direct case:

In making this choice [to file a complaint], GTE assumed the burdens of the moving party in a complaint proceeding. It was the responsibility of GTE to analyze and determine what it believed to be the elements of a prima facie case. It was the responsibility of GTE to determine what proof would establish each of those elements, and to proffer the requisite evidence in its direct case. If data were required, it was GTE's responsibility to obtain those data. If studies were required, it was GTE's responsibility to perform those studies. We would expect GTE, and any other company filing a complaint against another company in a proceeding before the Commission, to evaluate its responsibilities and have a strategy for fulfilling them before a complaint is ever filed.

The Commission made a forum available to it, and GTE had the responsibility of satisfying the burdens imposed by the option chosen. This matter will be dismissed because GTE did not carry the burden of proof it undertook in choosing to bring the complaint.

GTE Northwest, 1996 Wash. UTC LEXIS, at *14-15 (emphasis added).

15. As in GTE, Complainants have failed to present a prima facie case. They assumed the burdens of the moving party in a complaint proceeding. They had the responsibility to proffer evidence in their direct case, as required of them by the law and this Commission's repeated scheduling orders. Their case should be dismissed.

16. It is particularly troublesome that Complainants would fail to submit their direct case, in hopes of a continuance, in light of the following undisputed facts:

- Complainants initially demanded that other parties to this proceeding, and the Commission, adhere to an aggressive and burdensome schedule. Complainants said this schedule was required due to an emergency. Based upon Complainants' recent filings, it appears that Complainants are no longer interested in an accelerated schedule.
- In response to PSE's data requests, GP argued that it was too busy to respond *because it was preparing its direct case*. If true, why did GP fail to file *any* direct case testimony by the August 10, 2000, deadline?
- On August 2, 2000, Complainants sought indefinite suspension of the schedule ordered in this proceeding because they wanted to turn their full attention to negotiation. Nowhere in that motion do Complainants suggest that they were concerned about discovery disputes of which they were then well aware. Why did Complainants wait until August 10, 2000 to raise these issues?

17. Complainants cannot circumvent the legal consequences of their failure to file any direct testimony as required by the Commission's orders by alluding to new theories that they have never alleged in their Complaint, were not considered at the Prehearing

Conference, and are not properly before the Commission.

18. It is quite apparent that Complainants have no direct evidence to submit in support of the allegations set forth in their Complaint. Just a few days ago, Complainants gambled on extending their own deadline, and tried to coax the Commission to suspend indefinitely the schedule for negotiation, a request that the Commission denied. And now, at the eleventh hour, Complainants gamble again, and seek to extend the schedule so as to buy more time to cobble together some sort of claim. Unfortunately for Complainants, their deadline was clear and they missed it. The consequences of failing to meet this deadline are also clear. Complainants' Phase I claims must be dismissed as a matter of law.

PRAYER FOR RELIEF

19. PSE moves the Commission for an order dismissing the Complaint as to all Phase I issues.

Respectfully submitted this _____ day of _____, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon all parties of record in this proceeding, via facsimile and via U.S. mail, postage prepaid to:

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Dated at _____, Washington, this _____ day of _____, 2000.

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