BEFORE THE WASHINGTON UTLIITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. PUGET SOUND ENERGY, INC. Respondent.	)	Docket No. UE-011163
In the Matter of the Petition of PUGET SOUND ENERGY, INC. for an Order Authorizing Deferral of Certain Electric Energy Supply Costs.	)	Docket No. UE-011170 COMMISSION STAFF'S RESPONSE TO PUGET SOUND ENERGY'S PETITION FOR RECONSIDERATION AND FOR REHEARING

I. INTRODUCTION

1 Puget Sound Energy, Inc. ("PSE" or "the Company") has petitioned for reconsideration and rehearing of the Commission's *Sixth Supplemental Order; Order Granting Motions, Dismissing Dockets* ("Order"). PSE's Petition was submitted on October 12, 2001, less than three weeks prior to a general rate case the Company has publicly committed to file as early as November 1, 2001. That general rate case can include a request for emergency rate relief that, if substantiated properly, could be approved expeditiously by the Commission.

2 Commission Staff opposes reconsideration and rehearing. The specific arguments made by PSE are each rebutted below. However, the overriding criticism cast by PSE is that the Commission has failed to make every effort to give utilities the financial support necessary to fulfill their public service obligations. Petition, ¶ 11. PSE's criticism insults the firm resolve, stated clearly by the Commission, to satisfy its legal obligation protect the public interest even if that interest requires utility rates to increase. Order, ¶ 17. RCW 80.01.040(3).

3 PSE's criticism is also made, once again[1], in total disregard of the legal obligation PSE alone bears to prove that its request meets the test for emergency rate relief *and* results in rates that are just and reasonable. RCW 80.04.130(2). The Company's clear failure to bear that burden should not be encouraged, condoned or otherwise rewarded through either reconsideration or rehearing.

4 Equally to the point, the Commission *has* made every effort to address the urgency and substance of PSE's allegation that emergency rate relief is necessary to preserve the Company's financial integrity. The Commission set an accelerated procedural schedule over the continued objections of other parties, and despite the controversy PSE itself provoked through its unpercedented request for a power cost adjustment (PCA) and PSE's election to ignore standards established by the Commission for approval of a PCA. Order, ¶ 19(5). *E.g., WUTC v. Avista Corporation*, Docket Nos. UE-991606 and UE-991607, Third Suppl. Order, ¶¶ 169-172 (Sept. 29, 2000).

5 And, the Commission allowed PSE to present its case for interim rate relief despite contrary provisions of the Merger Order and well-established Commission precedent. Order, ¶¶

[1] *See* Order, ¶¶ 29-30.

10, 22-26. In determining whether PSE demonstrated facts that entitled it to the emergency rate relief it requested, the Commission also took the Company's prefiled evidence in the light most favorable to the Company consistent with WAC 480-09-426(1) and analogous civil rules for superior court. Order, ¶¶ 12, 14, 16, 34 and 39.

6 Finally, while the Commission dismissed the Company's case, it did so expressly without prejudice to PSE's right to demonstrate its need for extraordinary relief or interim relief in the general rate case the Company intends imminently to file. Order, ¶¶ 42-43. PSE is free to exercise that right.

7 The Company has rejected or ignored all of these accommodations and options offered by the Commission, choosing instead to protract inappropriately the time, expense and controversy of this proceeding by requesting reconsideration. Worse yet, in the financial community, PSE seeks to blame the Commission for regulatory failures that are PSE's sole responsibility and then to use those failures as a basis for rehearing.

8 PSE's Petition should be denied.

II. ARGUMENT

A. The Commission's Order Is Consistent With State Law and Sound Public Policy

9 In its Petition, PSE argues that the Order is contrary to law and public policy, and that the Commission has improperly "raised the bar" for extraordinary relief. Petition, ¶¶ 5 and 12. PSE is wrong. As shown below, the Order dismissing PSE's filing is lawful, proper, and consistent with sound public policy. The Commission did *not* alter the standards for obtaining emergency relief – the Company simply failed to prove it is entitled to such relief under the applicable statutes and the well-established standards the Commission has followed for nearly thirty years.

10 Applicable law and underlying public policy require the Company's rates to be "just, fair, reasonable, and sufficient," regardless of whether they are emergency rates, interim rates or permanent rates. RCW 80.28.010(1). In any request for a rate increase, the utility has the burden of proving that its proposed rates are "just and reasonable." RCW 80.04.130(2). PSE's failure to meet this burden is continuing.

11 Indeed, rather than devote its resources to proving a need for extraordinary relief, PSE swipes broadly at the Commission's decision to hold the Company to its burden. PSE implies that the Commission must disregard its duty to set just and reasonable rates whenever the Company is faced with poor hydro conditions and volatile power costs. *See* Petition, ¶11. That is not the standard. The Commission will grant emergency relief where a company meets its burden of showing that an actual emergency exists and where necessary to prevent gross hardship or inequity to the company. *Washington Utilities & Transportation Commission v. Pacific Northwest Bell Telephone Co.*, WUTC Docket No. U-72-30, Second Suppl. Order Denying Petition for Emergency Rate Relief, at 13, (Oct. 12, 1972) ("PNB Order").

12 PSE quotes selectively and at length from the Commission's recent order granting extraordinary rate relief to Avista Corporation. Petition, ¶¶ 7-9 (quoting *In re the Matter of Avista Corporation, d/b/a Avista Utilities, Request Regarding the Recovery of Power Costs Through the Deferral Mechanism*, Docket No. UE-010395, Sixth Suppl. Order, 2-13, 15 (WUTC Sept. 24, 2001) ("Avista Order")).[2] PSE then faults the Commission for granting extraordinary rate relief to Avista in light of the recent volatility of the western power markets, while not

[2] Interestingly, PSE relies on the Avista Order to support its Petition, yet complains that the Commission improperly relied on the Avista Order in dismissing its Petition. *Compare* Petition, ¶¶ 7, 9 *with* Petition, ¶¶ 20-22. Staff addresses PSE's argument regarding the Commission's comparison of PSE's emergency rate request with Avista's *infra* at ¶¶ 22-26.

granting PSE's request. Petition, ¶¶ 7-9. However, as the Commission noted, Avista proved its need for such rate relief. Avista Order, ¶¶ 27-61. PSE simply did not.

13 PSE argues that "market volatility" and "frozen rate structures" have damaged PSE, and that these circumstances are beyond the Company's control and must be remedied by the Commission. Petition, ¶ 9 (citing Direct Testimony of Hillard, at 5). However, PSE had the option of filing for new permanent rates as early as February 1, 2001, but did not. Merger Order, Appendix A, at 6.[3] The Company cannot now fault the Commission for not acting promptly where PSE has not promptly availed itself of available mechanisms for the relief it now asserts is necessary for its financial stability.

14 The Company relies on unsupported assertions and mischaracterizations of the Order in hopes to persuade the Commission to reconsider its decision to dismiss these dockets. For example, PSE asserts that without relief it will no longer be able to safely and reliably serve its customers. Petition, ¶¶ 3A, 6, 10. Yet, PSE provides no evidence that without rate relief it would no longer be able to provide service. Similarly, PSE asserts that without relief it would no longer be able to secure financing on what it called "reasonable terms". *See* Direct Testimony of Donald E. Gaines, at 2, 7-11; Direct Testimony of Howard L. Hiller, at 3-4, 10-16. Yet, without more, the Commission cannot determine whether PSE's request would result in rates that are just, fair, reasonable, and sufficient.

15 In addition, PSE argues that the Commission's Order "requires that utilities suffer great financial harm *before* relief is granted." Petition, ¶ 11. PSE is wrong again. The Order properly

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[3] *In the Matter of the Proposal of Puget Sound Power & Light Co. to Transfer Revenues from PRAM Rates to General Rates and In the Matter of the Application of Puget Sound Power and & Light Co. and Washington*

requires a utility to prove that "failure to grant the requested relief would cause clear jeopardy to the utility or detriment to the ratepayers." Order, ¶ 38. The Commission clearly stated that present injury is not required and that it will grant interim relief where a company proves "circumstances to be imminent or foreseeable with certainty." Order, ¶ 41.

16 On the same point, PSE argues that the Commission "inappropriately raises the bar for 'extraordinary' relief requiring utilities to show 'critical need' or 'dire consequences' before relief can be granted." Petition, ¶ 12 (purporting to quote pages 7 and 8 of the Order.) Once again, PSE's citation to the Order is both incomplete and misleading. The Commission, in fact, concluded that "PSE's filing as a whole simply does not show that it is in dire, or emergency, or extraordinary, need of rate or accounting relief." Order, ¶ 21. Nowhere does the Commission define the standard for interim relief as "dire consequences."[4] Similarly, the Order does not, in fact, require a company to show a "critical need" before the Commission will grant a request for emergency relief. The Commission simply stated that Avista showed a critical need for emergency relief. Order, ¶ 19.

17 In sum, the Commission did not raise the standards for granting emergency rate relief. The bar is the same – Avista's request for emergency rate relief exceeded the bar; PSE's fell woefully short.

B. The Commission Properly Applied the PNB Standard to PSE's Request

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Natural Gas Co. for an Order Authorizing the Merger, Fourteenth Supp. Order Accepting Stipulation; Approving Merger, WUTC Docket Nos. UE-951270 and 960195 (Feb. 5, 1997) ("Merger Order").

[4] In fact, PSE claimed that without relief it faces "a dire financial condition." Direct Testimony of Donald E. Gaines, at 8. In its Order, the Commission properly rejected this assertion.

18 In its Order, the Commission addressed in detail each of the standards for emergency relief established in the PNB Order. Order, ¶¶ 33-39. The Company believes that the Commission misapplied the PNB standards. The Company is wrong.

19 First, PSE argues that the PNB standard may no longer be sufficient to meet companies' needs in the context of a restructured wholesale market and, therefore, the Commission must now apply the standard broadly "to enable companies to ward off disaster by ensuring prompt access to needed capital on reasonable terms." Petition, ¶ 16. However, as the Commission explained in the PNB Order, "An interim rate increase is an extraordinary remedy and should be granted only where an actual emergency exists or where necessary to prevent gross hardship or gross inequity." PNB Order, p. 13. In the PNB Order, the Commission also said that interim relief is "a highly unusual action." *Id.* at p.3. Therefore, the Commission must be careful not to apply the standards so broadly as to diminish the extraordinary and unusual nature of the remedy. As the Avista Order shows, the PNB criteria are just as viable today as they were thirty years ago. *See* Avista Order, ¶¶ 27-61.

20 PSE begins its assault on the Commission's application of the PNB standards by selectively defining one of the six PNB criteria. Petition, ¶ 16. When quoted in its entirety, one can see easily why PSE would want to quote only part of the criterion:

> In the current economic climate the financial health of a utility may decline very swiftly and interim relief stands as a useful tool in an appropriate case to stave off impending disaster. *However, this tool must be used with caution and applied only in a case where not to grant would cause clear jeopardy to the utility and detriment to its ratepayers and stockholders. This is not to say that interim relief should be granted only after disaster has struck or is imminent, but neither should it be granted in any case where a full hearing can be had and the general case resolved without clear detriment to the utility.*

PNB Order, at 13 (emphasis added to show text omitted by PSE). In essence, the Company selectively reads this criterion in order to create a new one: Whenever a utility is facing uncertain power supply costs associated with wholesale market restructuring, the Commission must grant any relief necessary to guarantee the utility financing on whatever terms the company defines as "reasonable." It is not the Commission that is changing the criterion; it is PSE. The Commission should reject PSE's new standard for emergency rate relief.

21 Nor did the Commission hold that a utility must show that it cannot obtain financing at any cost as a prerequisite for emergency rate relief. *See* Petition, ¶¶ 17, 18(A). Rather, the Commission determined that PSE's claim that the Company would be unable to obtain financing in the future at what it calls "reasonable rates" was not a sufficient showing of an emergency. Order, ¶ 20(3).

22 Nor did the Commission say that a utility must take extraordinary steps to preserve its financial integrity before interim relief will be granted. *See* Petition, ¶¶ 17, 18(B). In fact, the Commission simply noted the steps Avista took to preserve its financial integrity, which reflect the magnitude and credibility of Avista's need for interim relief. If PSE had taken similar measures, its own claim of hardship might have more credibility.

23 Nor did the Commission say that a utility must show that it is at the point of losing access to capital markets in order to obtain interim relief. *See* Petition, ¶¶ 17, 18(C). Simply because Avista made this showing does not mean that it is a requirement for all utilities seeking interim relief.

24 Finally, nowhere in the Order does the Commission say that a utility must have a negative rate of return in order to receive emergency rate relief. *See* Petition, ¶¶ 17, 18(D).

Once again, the fact that Avista was facing a negative rate of return does not mean that all companies must prove a negative rate of return. PSE requests interim rate relief in part because without it the Company may not meet its Commission-authorized rate of return. The Commission expressly did not disregard PSE's concern about its return, but noted that the Company's concerns are of the type that should be addressed in a general rate case. Order, ¶ 36. Nothing in PSE's filing shows that its projected rate of return requires immediate and extraordinary relief.

25 In sum, the Commission applied the PNB standards to PSE and properly held that the Company did not satisfy the criteria. Order, ¶¶ 34-39. Rather than provide the Commission with potentially relevant argument on whether the Commission's application of the PNB standards was improper, the Company instead faults the Commission for its comparison of PSE's financial situation with that of Avista, and generally argues that the Commission held it to a higher standard. In fact, the Commission measured PSE's request against the same standards it has used since 1972, and, as in many prior cases, the Commission found insufficient grounds to grant emergency rate relief.

C. The Commission's Order of Dismissal Did Not Rely Upon Evidence Outside the Record

26 In dismissing the Company's case, the Commission compared information presented by PSE in its direct filing with information that Avista presented in its direct filing in Docket No. UE-010395. Order, ¶¶ 19-20. The Commission concluded from that comparison that PSE's filing as a whole did not demonstrate that emergency relief was warranted or that a PCA should be considered on a fast track basis. Order, ¶ 21.

27 The Company argues that the Commission erred by relying upon facts not in evidence in this proceeding and that such reliance denied PSE due process. Petition, ¶¶ 20-22. The argument, surprisingly, is made even though the Company itself cites extensively to facts observed by the Commission in its Avista Order, but not contained expressly in the record in PSE's case. Petition, ¶¶ 7-9.

28 PSE's argument is surprising also because it was PSE itself that suggested the process utilized by the Commission to dismiss PSE's case. At the prehearing conference on September 4, 2001, the sufficiency of the Company's direct evidence was a topic of heated discussion. Mr. Quehrn proposed that Staff could move to dismiss on the basis that the Company had not made a *prima facie* case for emergency rate relief in its direct filing. (Tr. 26.) The Commission's Order merely adopted that procedure.

29 Most important, PSE's accusation is simply and completely wrong. Each and every item of information that Avista presented in support of its request for emergency rate relief was discussed in great detail in the Avista Order itself. Avista Order, ¶¶ 32-54, 81. That information was then compared to the entirety of the information PSE presented in its direct filing, and the two cases were distinguished on factual grounds. Making comparisons to distinguish between cases is a lawful practice undertaken every day by courts, agencies and lawyers. That process does not involve reliance upon evidence outside the record. Nor does it infringe on the due process rights of any party to the litigation.[5]

30 Moreover, while the Commission must base its decision on the evidence before it, the Commission may take into consideration the results of its previous experience in similar

situations. *State ex. Rel. Country Club v. Dept. of Pub. Serv.*, 198 Wash. 37, 48, 86 P.2d 1104 (1939). The Avista case certainly falls into that category.

[5] Indeed, in its criticism of the Commission's Order, PSE itself discusses factual distinctions between this case and prior interim rate decisions of the Commission. Petition, ¶¶ 17-19. The Company, therefore, contradicts its argument by engaging in the very same practice it criticizes the Commission for undertaking.

D. The Commission Should Reject the Phased Proceeding or Fixed Surcharge Proposed by the Company

31 By its own choosing, the Company requested a PCA mechanism as a form of emergency rate relief. The Company made this choice despite the controversy and complications such a request provokes. The Company made this choice, but refused to address the conditions the Commission has previously found necessary for PCAs. *Avista*, *supra,* Docket Nos. UE-991606 and UE-991607.

32 The Company even refused to submit a power cost study necessary to determine whether the resulting rates would be fair, just, reasonable and sufficient. (Tr. 36.) Indeed, in a letter from Mr. Quehrn to Administrative Law Judge Wallis, dated September 7, 2001, PSE took the position that the ability of the parties to challenge the PCA on its merits was beyond the scope of the hearing: "PSE stated [at the prehearing conference] that the issues of concern to Commission Staff and Public Counsel would and could be appropriately considered in a general rate case, but they were beyond the scope of a request for interim rate relief." Such an extreme position lends no credence to any effort to reconsider or rehear the issues in this case.

33 The Commission did not categorically reject a PCA as a form of extraordinary relief, but it did find that the Company, under these circumstances, had failed to prove the propriety of a PCA or any other form of emergency relief.[6] Order, ¶¶ 21 and 30. On petition for reconsideration, the Company asks the Commission to again consider its proposed PCA, but it offers no justification in addition to what the Commission has already considered and rejected.

[6] PSE's accusation that the Commission refused to fashion a remedy under the circumstances of this case is, therefore, unfounded. *See* Petition, ¶ 24.

34 In the alternative, the Company again asks the Commission to implement either the PCA in a "phased" proceeding or a fixed surcharge in lieu of a PCA. Petition, ¶¶ 25-26 and Exhibit C. Staff has previously expressed its opposition to both of these alternatives.[7] Attachment A: Letter from Mr. Cedarbaum to Administrative Law Judge Wallis, dated September 11, 2001. We see no reason to alter that opposition.

35 Moreover, PSE has produced no evidence supporting these proposals and no evidence even as to what an appropriate surcharge would be. At bottom, there is no evidence to reconsider.

36 Most important, the Company's alternative proposals offer nothing to cure the deficiencies the Commission already has found in PSE's direct case. The Company still has not demonstrated that it faces an emergency so great or so imminent as to require extraordinary relief. Nor has the Company quantified the amount of relief necessary to avoid any such emergency, whether through a PCA, fixed surcharge or any other remedy that the Commission could fashion.

37 The Commission has clearly advised the Company that it may refile for extraordinary relief or for interim relief in the general rate case that will be filed in the very near future. Order, ¶ 42. The Company is free to pursue those alternatives if it can demonstrate that its needs require such an emergency response. The Commission should reject PSE's invitation to resurrect a failed case by way of reconsideration.

[7] One basis of opposition by Staff rested on our interpretation of the Merger Order, which the Commission has now rejected. Our remaining objections, however, stand and are consistent with the Commission's Order in these dockets: (1) the phased proceeding would still set rates at levels that cannot be known to be just and reasonable without a power cost study; and (2) the fixed surcharge would still be based upon forward projections of power costs that may never materialize and, thus, should not be used to set rates on an expedited basis.

E. The Commission Should Deny Rehearing

38 The Company also asks the Commission to rehear PSE's request for relief because of "deteriorating financial consequences" the Company states were caused by issuance of the Commission's Order. Several rating agency publications are cited. Petition, ¶¶ 27-29 and Exhibit A, Attachment 1.

39 Staff opposes rehearing. First, each of the rating agency publications were issued either the same day (October 8, 2001) or the day immediately after the Company hosted a conference call with the rating agencies to discuss the Commission's Order. There is no evidence that the rating agencies based their opinions on anything other than statements by Company officials during a conference call. There is no evidence that the rating agencies were aware of the manifest deficiencies in PSE's direct case. Indeed, there is no indication that the rating agencies understood that the Commission's Order was the direct result of PSE's own failure to make its case for emergency rate relief. What we do find are repeated and unfounded accusations of an antagonistic regulatory environment in Washington State that is alleged to be pushing PSE "to the brink" of bankruptcy, California-style. *See* Merrill Lynch, October 9, 2001.

40 At bottom, the rating agency publications themselves do not support PSE's request for rehearing. They do demonstrate that the Company is fully committed to paying its current dividend, thereby placing any and all risk on its customers and none on shareholders. Merrill Lynch, October 9, 2001, Flash Note entitled "WUTC Decision: Just Plain Bad For All."

41 The publications also indicate that the rating agencies understand that the Company has the option to file a general rate case in November 2001 and can include a request for emergency

rate relief. D.A. Davidson & Co., October 8, 2001, page 2, last bullet. Therefore, the rating agencies have reserved final consideration of PSE's credit quality:

> Moody's Investor Services, October 9, 2001: "We will also consider the longer-term implications for PSE's credit quality given its need for regulatory support in its upcoming general rate proceeding to achieve its financial objectives in a less supportive jurisdiction compared to other surrounding states."
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> Standard & Poors, October 8, 2001, page 2: "Resolution of the CreditWatch listing will occur by year-end 2001 or when regulatory support, or lack thereof, is evident."

42 Most important, these rating agency publications are no substitute for an actual analysis by PSE that satisfies its burden to prove that it is in need of rate relief that cannot await its upcoming general rate case, or that quantifies and defends the specific amount and form of relief that would resolve any such emergency. Despite all that, the Commission left the door open for PSE to make that case in a new filing for extraordinary relief. The Company has presented no reason why that course of action should not be pursued, unless, of course, it remains unable to make a case for emergency relief.

III. CONCLUSION

43 The Commission approached this case with the firm resolve to protect the public interest even if performance of that obligation would require an increase in electric rates. Form was not to be placed over substance if necessary to preserve the Company's financial integrity. The provisions of the Merger Order were not permitted to stand in the way.

44 But, the Commission cannot exercise its discretion to grant emergency rate relief unless the circumstances warrant such relief. PSE's direct evidence failed to demonstrate, under well-established and tested standards, that circumstances justify extraordinary relief. PSE's Petition

for Reconsideration and for Rehearing do nothing to correct that deficiency. The Petition should be denied in all respects.

DATED this 19th day of October, 2001.

Respectfully submitted,

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