BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General Complainant v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE–011411 PUBLIC COUNSEL MOTION TO STRIKE

Pursuant to WAC 480-09-420(8) and 480-09-425(2), Public Counsel files the following motions to strike designated defenses in respondent Puget Sound Energy's (PSE) Answer in the above-captioned matter.

I. MOTION TO STRIKE PARAGRAPH 47 (WAIVER AND ESTOPPEL DEFENSE)

A. Motion to Strike.

Public Counsel moves to strike paragraph 47 of PSE's Answer as an insufficient and improperly pleaded defense under WAC 480-09-420(9)(a).

B. Argument.

Section III of PSE's Answer, paragraphs 43 through 47, is denominated "Defenses and Affirmative Defenses." Paragraph 47 of the Answer states, in its entirety:

> Public Counsel's claims as to PSE's alleged violation of the Merger Order are barred by the doctrines of waiver and equitable estoppel.

The Commission's rules for responsive pleadings are set out at WAC 480-09-420(9)(a) and require, in pertinent part:

> Answers must *fully and completely disclose the nature of the defense*….A respondent must separately state and number affirmative defenses (emphasis added).

PSE's defense set forth in paragraph 47 fails to comply with this requirement. It fails to set out a single fact or allegation that would establish the existence of either of the asserted defenses, much less "fully and completely disclos[ing] the nature of the defense."[1] As a result, it fails to fairly inform Public Counsel of the nature or basis for the waiver and equitable estoppel defenses in a manner that would allow Public Counsel to prepare to respond.

The Commission's pleading requirement parallels the requirement of the Superior Court Civil Rules that affirmative defenses, including waiver and estoppel, must be specifically pleaded. Civil Rule 8(c). While the Civil Rules do not govern Commission proceedings, the Commission may refer to the rules as guidelines for handling motions before it. WAC 480-09-420(8). Civil Rule 8(c) states in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively…estoppel…[and] waiver."

The reason for the rule requiring that affirmative defenses, such as waiver and estoppel, must be affirmatively pleaded is to avoid surprise. *Mahoney v. Tingley*, 85 Wn.2d 95, 100 (1975). Moreover, these defenses must be pleaded with "certainty and particularity." *Bonanza Real Estate v. Crouch*, 10 Wn. App. 380, 385-386 (1974)(reviewing elements of waiver and estoppel); *see also Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 76 (1976).

Here, PSE has merely labeled defenses it apparently plans to raise. No facts or allegations whatever are set forth sufficient to make out the elements of waiver or equitable estoppel. Public Counsel has no way to determine upon what basis these defenses are raised. The defense fails to meet the standard set out in WAC 480-09-420(9)(a) and should be stricken.

[1] PSE also does not identify whether paragraph 47 (or any other of the defenses pleaded) is to be treated as an affirmative defense.

II. MOTION TO STRIKE PARAGRAPH 46 (UNCONSTITUTIONAL TAKING)

A. Motion to Strike.

Public Counsel moves to strike paragraph 46 of PSE's Answer as an insufficient and improperly pleaded defense under WAC 480-09-420(9)(a).

B. Argument.

Paragraph 46 of PSE's Answer states in its entirety:

> Any order granting the Complaint would violate the Takings Clause of the Fifth Amendment of the United States Constitution and Article I, Section 16 of the Washington State Constitution.

The defense fails to set forth any facts or allegations that would establish the basis for a Takings Clause defense.[2] As argued in section I.B. above, the express intent of the Commission's rules is that the nature of a defense be fully disclosed. Merely labeling the defense to be raised does nothing to inform Public Counsel, the Commission or other parties of the basis for the defense.

A utility raising a takings argument, whether under the state or federal constitutions, "has the burden to establish with 'clarity and definiteness' that a Commission rate order results in confiscation." *U S West v. WUTC*, 134 Wn.2d 48, 71 (1997), *citing Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 169 (1934).[3] Takings clause arguments cannot be based upon mere speculation or conjecture. *Id.*, pp. 69-71. Given these principles, and given the Commission's pleading rule, if PSE intends to raise a takings argument in this case, its pleading must set out the basis for the defense with clarity. Certainly, on the face of the case as framed by the complaint, it is difficult to see how PSE can suffer a "taking" for following through on a commitment which the company itself agreed to as a condition of its merger.

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[2] Again, it is unclear from the pleading whether PSE intends paragraph 46 to be treated as a defense or as an affirmative defense.

[3] *See also*, *In re the Petition of U S West Communications, Inc., for an Accounting Order* ("Yellow Pages" case), UT-980948, Fourteenth Supplemental Order Denying Petition, ¶¶ 184-186 (rejecting unconstitutional takings argument).

Paragraph 46 should be stricken.

DATED this 15th day of November, 2001.

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