

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Bellingham Cold Storage Company and)	
Georgia-Pacific West, Inc.,)	DOCKET NO. UE-001014
)	
Complainants,)	
)	FIFTH SUPPLEMENTAL ORDER
v.)	GRANTING VOLUNTARY
)	DISMISSAL, WITHOUT PREJUDICE
Puget Sound Energy, Inc.,)	
)	
Respondent.)	
.....)	

1 **PROCEEDINGS:** This proceeding concerns a Formal Complaint, Request for Expedited Emergency Action, Including Waiver of Regular Notice Periods, Relating to Special Contract Transmission Obligations and Pricing Provisions, filed by Bellingham Cold Storage Company and Georgia-Pacific West, Inc., on June 29, 2000.

MOTIONS: This Order addresses three pending motions:

- 2 1. On August 11, 2000, Respondent Puget Sound Energy, Inc., filed its Motion To Dismiss. The motion seeks a partial dismissal of Complainant's claims. Specifically, PSE asks the Commission to dismiss the joint Complaint filed by Bellingham Cold Storage Company (BCS) and Georgia-Pacific West, Inc. (G-P West), insofar as the Complaint states allegations concerning the price Complainants are required to pay under their Special Contracts with PSE. These allegations presently are segregated as "Phase I" of the proceeding and are set for expedited process and hearing, as urged by Complainants. The basis for PSE's Motion is the failure by Complainants to pre-file their direct evidence on August 10, 2000, as required under the procedural schedule acquiesced to by all Parties. PSE urges us to act consistently with CR 41(b)(3), Rules for Superior Court, which governs involuntary dismissal on the basis of a defendant's motion after a plaintiff rests in actions before the Superior Court. Unless the court specifies otherwise, such a dismissal "operates as an adjudication upon the merits." CR 41(b)(3).
- 3 2. On August 11, 2000, Complainant Georgia-Pacific West, Inc., filed its Motion for Voluntary Dismissal of Pricing Claims. G-P West observes that the Commission does not have a specific procedural rule regarding the voluntary dismissal of actions, and refers

us to CR 41(a)(1)(B) of the Superior Court Civil Rules. CR 41(a)(1)(B) provides, in relevant part, as follows:

(a) Voluntary Dismissal.

(1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1 [class action and shareholder derivative suits], any action shall be dismissed by the court:

* * *

(B) *By Plaintiff Before Resting*. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

4 G-P West urges the Commission to follow CR 41(a)(1)(B) and submits that "there is no other extant [or] contrary guidance." G-P West's motion thus would effect, as to it, the essential relief sought by PSE's Motion, but our granting G-P West's motion would not be considered an adjudication on the merits. Thus, G-P West seeks to avoid the potentially preclusive effect of dismissal under the principles of CR 41(b)(3).

5 3. On August 14, 2000, Complainant Bellingham Cold Storage Company filed its Response to Motion To Dismiss (Voluntary Dismissal Without Prejudice). BCS's motion is mis-styled to the extent that its caption implies a response to PSE's motion. The motion, defined by its substance, in no way responds directly to PSE. We take it for what it is, a motion for voluntary dismissal of BCS's power pricing claims. BCS urges us to act in accordance with the principles of CR 41(a), but does not cite us to a specific subpart of that rule.

DISCUSSION AND DECISION

6 The motions by G-P West and BCS ask the Commission for an order dismissing the pricing claims of their joint Complaint. These claims had been segregated as Phase I of the proceeding and were set for expedited process and hearing at the Complainants' urging. During the first prehearing conference, on July 19, 2000, Complainants proposed a schedule for discussion that would have had the Commission enter a final order before the end of August 2000. After discussion, the Parties agreed that the proposal would not provide time to meet the minimum requirements of due process.

7 The Parties agreed to discuss the schedule among themselves, considering their own best estimates of the time required for adequate preparation, in an effort to balance the need for a speedy decision with the need for considered and professional presentations. The Parties agreed to a continued prehearing conference for the purpose of reviewing their scheduling agreements and resolving matters not agreed. The Commission convened that

conference on July 20, 2000, at 2:45 p.m. before C. Robert Wallis, ALJ. The Parties presented a proposed process and schedule, as outlined below.

- 8 At the Parties' urging, the Commission agreed to conduct Docket No. UE-001014 in two phases: Phase I--power pricing issues, and Phase II--transmission issues. The schedule adopted for Phase I included the requirement that Complainants pre-file their direct evidence concerning their power pricing allegations by August 10, 2000. G-P West failed to file any evidence as of the deadline and, during a status and motions conference on August 11, 2000, presented its Motion for Voluntary Dismissal of Pricing Claims. BCS also failed to file any evidence as of the deadline. Approximately four minutes before the Commission's close of business on August 10, 2000, however, BCS filed a Motion for Continuance of Date To Submit Direct Evidence.
- 9 On August 11, 2000, the Commission convened a motions and status conference before Administrative Law Judge Dennis J. Moss. ALJ Moss, among other things, denied BCS's Motion for Continuance, a decision we here endorse. The three motions to dismiss were taken under advisement for further deliberation by the full Commission.
- 10 It is the Commission's longstanding practice to look to the Rules for Superior Court for guidance when applying the Commission's procedural rules and when considering motions. WAC 480-09-420(8). We do so here. The process demands of administrative litigation, however, are different from the processes commonly encountered in the Superior Court. On close examination of CR 41, we find the circumstances we face here not squarely addressed. In particular, since prefiled testimony is not typically a feature of civil litigation, CR 41 does not address specifically the circumstance of motions to dismiss filed in the wake of a party's failure to meet a deadline for the submission of such testimony.
- 11 The benchmark established by CR 41 for determining what form of motion to dismiss is appropriate is stated in terms of "plaintiff rest[ing] at the conclusion of his opening case." CR 41(a)(1)(B); CR 41(b)(3). Complainants' motions were filed after they had let pass their opportunity to pre-file direct testimony. That is the required first step for Complainants under our usual process in formal adjudications. Complainants, however, have not "rest[ed] at the conclusion of [their] opening case" in the usual sense. This means the principles under Rules for Superior Court that govern when voluntary dismissal is mandatory (i.e., CR 41(a)(1)(B)) do not provide appropriate guidance here. This also means that we should not determine the matter under CR 41(b)(3), as PSE's Motion To Dismiss urges. CR 41(b)(3) contemplates that a defendant in a civil action may assert that the court should determine the facts after the plaintiff has completed its evidentiary presentation and rule in the defendant's favor. If the court grants such a motion, and intends it to act as an adjudication on the merits, the court must make findings in accordance with CR 52(a). We are not satisfied at this juncture that our record includes sufficient facts to support findings. For this reason, the principles under

the Rules for Superior Court that govern when involuntary dismissal on a defendant’s motion also fail to provide appropriate guidance here.

12 We find that CR 41(a)(2) provides the best guidance for determination of the pending motions. We construe Complainants’ motions liberally to encompass the principles stated by this subsection of CR 41. WAC 480-09-425(4). Although this rule also is stated in terms of plaintiff resting its opening case, that threshold event is less significant to the operation of this rule because CR 41(a)(2) both requires a showing of good cause and permits the bench certain discretion not available under the other subsections previously discussed. Thus, CR 41(a)(2) is sufficiently flexible in its requirements to guide our determination under the specific circumstances of administrative litigation that confront us. CR41(a)(2) provides:

(a) **Voluntary Dismissal.** * * *

(2) *Permissive.* After plaintiff rests his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

13 Although the circumstances are largely, if not exclusively, of their own making, Complainants’ failure to prepare and file their direct case in the time allowed under the procedural schedule they helped shape is understandable given the magnitude of the task to which they put themselves by filing this Complaint and urging expedited process. Their allegations are broad, even sweeping, in scope; they raise matters fundamental to the changing shape of electricity markets and regulation not just in Whatcom County, but in Washington State and the entire western states’ energy market. Complainants appear to have not appreciated from the outset the complexity and ramifications of the matters they have raised. These circumstances, then, establish for the Complainants’ good cause to permit them to voluntarily dismiss their Phase I claims without prejudice, consistent with the principles that govern permissive, voluntary dismissal of civil claims under CR 41(a)(2). On this basis, we dismiss Complainant’s power pricing allegations without prejudice.

ORDER

14 IT IS ORDERED THAT Georgia-Pacific West, Inc.’s, allegations constituting Phase I of these proceedings are dismissed, without prejudice, consistent with the terms of this Order.

15 IT IS ORDERED FURTHER THAT Bellingham Cold Storage Company’s allegations constituting Phase I of these proceedings are dismissed, without prejudice, consistent with the terms of this Order.

DATED at Olympia, Washington, and effective this 15th day of August, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner