

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	DOCKET NOS. UE-072300 & UE-072301
)	
Complainant,)	RESPONSE OF THE INDUSTRIAL
)	CUSTOMERS OF NORTHWEST
v.)	UTILITIES
)	
PUGET SOUND ENERGY, INC.,)	
)	
Respondent.)	
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I. INTRODUCTION

1 Pursuant to WAC § 480-07-375(4), the Industrial Customers of Northwest Utilities (“ICNU”) submits this response to the motions to strike (“Motions”) of the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) Staff and Puget Sound Energy (“PSE”). The Commission should deny the Motions and refuse to strike the portions of ICNU’s Brief which propose appropriate conditions if the Commission elects to continue PSE’s power cost only rate case (“PCORC”) mechanism. ICNU’s proposed conditions are well supported by the evidence in the record, the history of the PCORC mechanism, the Commission’s precedent, and the applicable legal standards. The Commission is free to impose any additional conditions upon the PCORC that are reasonable and lawful, and ICNU was not required to offer the specific details of its proposed PCORC conditions in its testimony.

II. BACKGROUND

2 ICNU witness Don Schoenbeck and Public Counsel witness Lee Smith submitted testimony opposing PSE's proposed PCORC on May 30, 2008. Mr. Schoenbeck testified, *inter alia*, regarding the history of the PSE's PCORC, and the difficulties faced by intervenors in reviewing, analyzing and litigating issues in the PCORC. Mr. Schoenbeck testified that PCORCs have only been filed when PSE has sought to recover all or part of a major new generating resource, and that the time provided in PCORC proceedings is inadequate to analyze the prudence of PSE's proposed costs.^{1/} Mr. Schoenbeck's primary recommendation was that the Commission should remedy these problems by eliminating the PCORC.^{2/} Mr. Schoenbeck, however, also testified that a "PCORC should only be allowed if PSE is acquiring a major resource."^{3/} Finally, Mr. Schoenbeck testified that there should be no difference between the time to review issues in a general rate case and a PCORC.^{4/}

3 On August 22, 2008, the parties to this proceeding submitted a partial settlement of issues. The parties agreed that PSE could not file a general rate case prior to April 1, 2009. ICNU supports this provision as a mechanism for providing rate stability for customers.^{5/}

4 On September 26, 2008, ICNU submitted its Brief arguing that the Commission should reject PSE's PCORC. In the alternative, ICNU argued that the

^{1/} DWS-1T at 5-6.

^{2/} Id. at 8-9.

^{3/} Id. at 6.

^{4/} Id. at 8.

^{5/} TR. 495: 2-7.

Commission should impose additional conditions on use of the PCORC process if the mechanism is continued. ICNU specifically proposed: 1) a PCORC can only be filed if PSE is seeking rate recovery for new resources that total at least 150 megawatts (“MWs”) of capacity; 2) the PCORC process should be the same eleven months as a general rate case; 3) any cost update must be filed at least six weeks prior to the due date for Staff and intervenor testimony; and 4) a PCORC cannot be filed prior to April 1, 2009.^{6/}

5 PSE and Staff separately filed their motions to strike ICNU and Public Counsel’s proposed PCORC conditions on October 3, 2008. Staff and PSE make similar arguments. Staff argues that ICNU did not raise the conditions until its Brief and that Staff should have a reasonable opportunity to respond to ICNU’s conditions.^{7/} Staff also argues that providing reply briefs would be an insufficient remedy because ICNU’s conditions are not part of the evidentiary record.^{8/} PSE raises similar arguments, but also claims that ICNU’s proposed conditions contradict ICNU’s testimony that there are no conditions which can remedy the PCORC.^{9/} PSE also argues that ICNU’s proposals are inconsistent with Commission precedent and the evidence in the record.^{10/}

III. RESPONSE

6 Staff and PSE incorrectly argue that the Commission cannot adopt any remedies to PSE’s flawed PCORC unless the specific details of the remedies are included in the evidentiary record. ICNU’s proposals must address issues in this proceeding and

^{6/} ICNU Brief at 15-16.

^{7/} Staff Motion at 3-4.

^{8/} Id. at 4.

^{9/} PSE Motion at 4.

^{10/} Id. at 4-7.

be based on the relevant evidence and applicable legal standards, but ICNU is not limited to proposing only remedies that have been fully fleshed out in the testimony. Similarly, the Commission has broad authority to adopt a PCORC that includes conditions that were not discussed in the testimony of any party. Finally, contrary to Staff and PSE arguments, ICNU's proposed PCORC conditions are well supported by the evidentiary record and Commission precedent.

A. ICNU Has the Right to Propose Revisions to the PCORC that Were Not Specifically Proposed in Testimony

7 ICNU's PCORC conditions must be supported by the evidence in the record; however, the specific conditions need not have been proposed in testimony. Imposing a requirement that the Commission can only adopt a remedy that has been proposed in testimony would illegally limit the discretion of the parties and the Commission to fashion solutions that fit the unique facts and legal situations for each case.

8 The purpose of legal briefings is for parties to present their arguments and legal authority in writing after the close of the hearing.^{11/} Legal briefs allow the parties to make their final proposals and arguments, based on the totality of the evidence in the record. The positions of the parties can change throughout the case, and parties often adopt final positions in their briefs that are not entirely consistent with the initial recommendations of their witnesses. Staff and PSE do not cite any Commission rule or previous decision which limits the ability of a party to propose unique solutions in its

^{11/} WAC § 480-07-390.

legal brief or that requires a party to submit all the specific details of its proposed remedies in its testimony.

9 Granting the Motions would also lead to absurd results. The primary purpose of testimony and exhibits is to provide a factual foundation for the Commission's order. Although witnesses frequently testify regarding the application of the law to the facts of particular circumstances, witnesses do not provide legal opinions.^{12/} In certain circumstances, witnesses do not have the requisite legal expertise and are not qualified to propose remedies or resolutions to cases. Limiting the parties to only proposing remedies that have been included in the testimony of their witnesses may require parties to submit testimony that consists of legal opinions.

10 The Commission recognizes that the evidence in the record allows the Commission to adopt a variety of remedies once a violation of law or rules has been established.^{13/} The only limitations are that the Commission cannot address issues which have not been framed by the pleadings or which the parties have not had an opportunity to address by presenting evidence or argument.^{14/}

11 The Commission itself has long had the discretion to adopt final orders that resolve issues in a manner not specifically proposed by the parties in a case. Staff and PSE are well aware that the Commission has previously fashioned remedies that no party has proposed. For example, the Commission adopted its own unique disallowance

^{12/} Worldcom, Inc. v. GTE Northwest, Inc., Docket No. UT-980338, Second Suppl. Order Denying Motion to Strike Testimony at 1 (Feb. 3, 1999).

^{13/} Tel West Communications v. Quest Corp., Docket No. UT-013094, Commission Decision at ¶ 28 (May 23, 2002).

^{14/} Id.

related to the cost of a PSE generating resources in a previous PCORC proceeding.^{15/} The Commission created its own disallowance for the Tenaska based on legal arguments not raised by any party.^{16/} No party was prejudiced by the Commission's unique resolution because the general issues regarding a prudency disallowance were raised and the Commission relied upon the evidence in the record.^{17/}

12 Staff and PSE have implicitly acknowledged that the Commission can impose conditions not proposed by any party in the boilerplate language in the partial stipulation in this proceeding. The partial stipulation expressly contemplates that the Commission may impose "conditions" to the resolution of issues that are different from the stipulation.^{18/} This language would be unnecessary if the Commission could only adopt conditions which parties had already testified about.

B. ICNU's Proposed Conditions Are Supported by the Evidence

13 All of ICNU's proposed conditions are well supported by the evidentiary record. The evidence supports a Commission conclusion that PSE's proposed PCORC suffers from fatal flaws which must be remedied by eliminating the PCORC or by imposing limitations on the PCORC, including allowing intervenors an adequate opportunity to review and investigate the prudency of PSE's costs. Although ICNU provided additional specificity regarding how the PCORC should be remedied in its

^{15/} WUTC v. PSE, Docket No. UE-031725, Order No. 14 at ¶ 102 (May 13, 2004).

^{16/} Id. ¶ 14, 102.

^{17/} Id. ¶ 67.

^{18/} Partial Stipulation at ¶ 29.

Brief, these issues and the support for ICNU's conditions were addressed in the testimony and record in this proceeding.

14 ICNU's Brief recommends that a PCORC only be allowed if PSE seeks rate recovery of a new resources at least 150 MWs of capacity. PSE inaccurately claims that ICNU only "offered testimony and evidence that a PCORC should be limited to new resources only."^{19/} In fact, Mr. Schoenbeck stated that "ICNU believes a PCORC filing should only be allowed if PSE is acquiring a major resource."^{20/} Although Mr. Schoenbeck's testimony did not define that a new "major resource" meant "a new resource of 150 MW of capacity," this is not a new issue or position. PSE and Staff had an opportunity to cross examine Mr. Schoenbeck on his testimony if they wanted additional specificity on what he meant by "major resource." ICNU raised this issue in testimony and simply provided additional clarification in its Brief. Further, defining a major resource as 150 MWs of capacity is a fairly broad reading of the term.^{21/}

15 ICNU's Brief also proposed that a PCORC should have the same procedural schedule as a normal general rate case. This recommendation is based on Mr. Schoenbeck's testimony that the time frame in the current PCORC process is insufficient to analyze PSE's proposed costs.^{22/} Mr. Schoenbeck testified that it "is simply impossible to compress the necessary and needed analytical time period to provide a

^{19/} PSE Motion at 4.

^{20/} DWS-1T at 6 (emphasis added).

^{21/} The Oregon Public Utility Commission has defined a major resource as a resource with a size greater than 100 MWs for the purpose of its competitive bidding rules. Re an Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 06-446, at 3-4 and Appendix A at 1 (Aug. 10, 2006).

^{22/} DWS-1T at 6-8.

meaningful difference between the current general rate case schedule and a reasonable PCORC schedule.”^{23/} Mr. Schoenbeck further testified that providing intervenors one or two months more than the existing PCORC schedule is inadequate.^{24/} Based on this evidence that intervenors need the full eleven month time period of a general rate case to adequately review power cost issues, ICNU proposed to a correction to the PCORC that would provide intervenors with sufficient time. There is sufficient evidence in the record for the Commission to adopt ICNU’s proposed condition.

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ICNU also proposed in its Brief that cost updates should be filed at least six weeks prior to the due date for Staff and intervenor testimony. Again, this proposal was based primarily on evidence submitted by Mr. Schoenbeck. Evidence demonstrates that PSE’s cost updates have been filed in past PCORC proceedings so that it “was simply impossible to meaningfully investigate portions of this update as the necessary discovery process could not be done in the allowed time frame.”^{25/} Staff and PSE could have conducted cross examination of Mr. Schoenbeck if they wanted additional specificity regarding the appropriate frame to review these costs. An obvious solution to this problem is to ensure that existing PCORC process be modified to provide intervenors with sufficient time to review these updates. ICNU’s Brief merely proposed the remedy of a minimum six week time period to review these costs. ICNU’s recommendation is based on Mr. Schoenbeck’s testimony, ICNU’s counsels’ experience in past WUTC rate filings, and the WUTC’s existing discovery rules.

^{23/} Id. at 8.

^{24/} Id.

^{25/} Id. at 7.

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Finally, ICNU recommended that PSE not be allowed to file a PCORC prior to April 1, 2009. This issue was not addressed by Mr. Schoenbeck's testimony, because the limitation on filing a new rate case was addressed in the partial stipulation that was agreed to well after Mr. Schoenbeck's testimony was filed. At hearing, ICNU explained that this provision is intended to provide rate stability for customers.^{26/} It is reasonable for the Commission to extend the rate freeze to the PCORC if the Commission adopts the limitation on filing general rate cases in the partial stipulation. Otherwise, the rate stability in the Stipulation would be illusory.

IV. CONCLUSION

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The Commission has the legal authority to adopt a fair and just resolution of the issues in this proceeding, regardless of whether the specific changes to the PCORC were recommended in testimony by any party to this proceeding. Limiting the Commission or the parties to supporting only those specific remedies included in testimony will unduly limit the Commission's ability to fashion reasonable resolutions of the issues in this and other proceedings. ICNU's proposed conditions seek to resolve problems with the PCORC that ICNU identified in its testimony. Although ICNU's Brief provides greater details, ICNU's proposed conditions are primarily based on the recommendations of its witness Don Schoenbeck. The Commission should deny Staff's and PSE's motions to strike, and impose meaningful conditions upon the PCORC, if the PCORC is not rejected.

^{26/} TR. 495: 2-7.

Dated in Portland, Oregon, this 9th day of October, 2008.

Respectfully submitted,

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/s/ Irion A. Sanger

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