

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET PG-160924

MOTION TO STRIKE PORTIONS OF
PUBLIC COUNSEL'S TESTIMONY
IN OPPOSITION TO SETTLEMENT

I. INTRODUCTION

I Commission Staff ("Staff") of the Washington Utilities and Transportation Commission ("Commission") moves to strike significant portions of Public Counsel's testimony filed on April 24, 2017, in Docket PG-160924. Those portions of Public Counsel's filing ignore procedural rules, are irrelevant to the issues currently before the Commission, and violate basic notions of fairness and due process rights. Staff is compelled to respond to Public Counsel's attempt at an end-run around both the scope of this case and the parties' fundamental rights.

II. RELIEF REQUESTED

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Commission Staff moves to strike portions of the Direct Testimony of Sebastian

Coppola Exhibit SC-1T and supporting exhibits as follows:

<u>Portion to Strike</u>	<u>Issue</u>	<u>Justification to exclude</u>
SC-1T at page 9, lines 2-4	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 9, line 15 beginning with “alternatively . . .” through line 17.	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 9, lines 18-21	Rate setting matters	Irrelevant/immaterial
SC-1T at page 9 line 22 through page 10 line 14	PC internal disagreement over inspection and remediation	Irrelevant/immaterial
SC-1T at page 17 line 13 through page 22 line 23 ¹	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 23 line 11 through page 24 line 2	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 26, lines 1-11	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 26, lines 12-22	Rate setting matters	Irrelevant/immaterial
SC-1T at page 33 line 19 through page 35 line 22	PC internal disagreement over inspection and remediation	Irrelevant/immaterial
SC-1T at page 36, lines 9-13	Attempt to amend or alter the complaint	Due process, violates procedural rules, and irrelevant to jurisdictional complaint
SC-1T at page 36, lines 14-17	Rate setting matters	Irrelevant/immaterial
SC-1T at page 36 line 18 through page 37 line 10.	PC internal disagreement over inspection and remediation	Irrelevant/immaterial

¹ Includes supporting testimony for Exhibits SC-6 and SC-7, which the Commission should strike as well.

III. STATEMENT OF ISSUES AND ADDITIONAL RELIEF

3 Commission Staff raises three general issues for the Commission’s determination. First, Staff moves the Commission to strike or otherwise exclude all of Public Counsel’s attempts to amend the complaint through expert testimony, rather than through established procedural means, at this late stage of the proceeding when no party can effectively respond and without adequate notice to affected parties. Public Counsel’s proposed amendments violate due process, ignore the applicable procedural rules, and are irrelevant to the complaint before the Commission.

4 Second, Staff moves the Commission to exclude all of Public Counsel’s attempts to expand the scope of this safety and liability proceeding to include non-binding rate treatment for an inspection and remediation program. Public Counsel’s request is irrelevant and immaterial to this proceeding.

5 Third, Staff asks the Commission to exclude those portions of Public Counsel’s expert testimony that appear to conflict with Public Counsel’s own position on the adequacy of the proposed inspection and remediation program. Apparent disagreement between Public Counsel and its expert is not relevant or material to the Commission’s decision, and the Commission does not need to spend its valuable time and resources considering an opinion that no party supports.

IV. STATEMENT OF FACTS

6 On September 20, 2016, the Commission issued its complaint in Docket PG-160924, alleging five causes of action. On October 3, 2016, Puget Sound Energy, Inc. (“PSE” or “Company”) filed its Answer and Affirmative Defenses to the Complaint. Public Counsel filed a notice of appearance on October 18, 2016, and became a party to the proceeding. Following a prehearing conference on November, 1, 2016, the Parties engaged in discovery.

On March 28, 2017, Commission Staff and PSE submitted a proposed settlement agreement to the Commission. On April 24, 2017, Public Counsel filed the Direct Testimony of Sebastian Coppola recommending the Commission reject or significantly alter the proposed settlement agreement.

V. EVIDENCE RELIED UPON

7 Staff's motion relies on Public Counsel's filing of April 24, 2017, in Docket PG-160924 and the existing record and documents on file with the Commission in Docket PG-160924. Staff also appends to this motion a letter from Public Counsel to the Commission's Chief Administrative Law Judge and presiding officer in this case, Gregory Kopta, filed by Public Counsel on April 12, 2017, in which Public Counsel represented that it supports the proposed inspection and remediation plan.

VI. APPLICABLE RULES AND STANDARDS

A. Motions to Strike

8 The Commission's authority to exclude evidence stems from the Administrative Procedure Act in RCW Chapter 34.05. More specifically, RCW 34.05.452 states that the presiding officer must exclude evidence that is inadmissible on statutory or constitutional grounds, but that the presiding officer retains discretion to exclude evidence on the basis of irrelevancy, immateriality, or repetition. The superior court rules of evidence act as guidelines but are not binding on the presiding officer. RCW 34.05.452 *and* WAC 480-07-495.

9 The Commission's procedural rules are also relevant to a motion to strike. Under WAC 480-07-375, a motion to strike is an evidentiary motion with a handful of formatting

requirements and a specific response time.² The Commission’s rules also allow for appropriate and timely objections to any exhibits or documentary evidence submitted into the record. WAC 480-07-490(7). Under WAC 480-07-495, the Commission largely repeats the standards in RCW 34.05.452 regarding the admissibility of evidence.

B. Due Process and Notice Requirements

10 Like all government agencies, the Commission is bound by due process requirements. Due process originates in the state and federal constitutions. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Government deprivation of a protected life, liberty, or property interest requires adequate notice and an opportunity for hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532,542 (1985). The notice and process afforded must be reasonable in proportion to the interest at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

11 State law and administrative rules provide more specific guidance on the minimum due process requirements. Under the APA, an agency must allow all parties an opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. RCW 34.05.437 and RCW 34.05.449. The APA also requires that an agency provide at least seven days’ notice of a hearing. RCW 34.05.434. The public service statutes in Title 80 and Title 81 generally require the Commission to provide at least ten days’ notice for complaints made on the agency’s own motion, and complaints must include all grievances the agency intends to “inquire into.” RCW 80.04.110 and RCW 81.04.110. The Commission’s administrative rules are often generous. Under WAC 480-07-430, notice of a prehearing conference related to a complaint must be reasonable and appropriate. Under

² WAC 480-07-395 lays out more detailed formatting requirements.

WAC 480-07-440, the Commission must provide at least 20 days' notice for a hearing, but the agency retains the authority to shorten notice to the APA-minimum of seven days where necessary.

VII. ARGUMENT

A. **Public Counsel's testimony asks the Commission to violate due process rights, skip over procedural rules, and consider argument that is irrelevant to the matter properly before the Commission in this case.**

12 Public Counsel's filing requests the Commission to find additional violations not previously noticed in the current complaint or somehow use those alleged violations as justification for the imposition of higher-than-noticed penalties in the current complaint.³ Public Counsel's testimony is effectively a request that the Commission amend the complaint on its own motion or contemplate some type of peculiar pseudo-complaint as justification to include additional violations and penalties in this Docket without any notice to the Company or an opportunity for any party to be heard. Such a request violates any reasonable interpretation of due process, ignores procedural rules for how to properly file a motion to amend, and is irrelevant to the scope of the issues before the Commission in the actual, jurisdictional complaint in this Docket.

1. **Due Process Problems: Public Counsel requests the Commission alter the substantive allegations and penalty amounts in the complaint without any further notice or hearing.**

13 The Commission cannot lawfully deprive PSE of a property interest without notice and an opportunity for hearing. Minimal notice requirements in the Commission's own rules range from 7 to 20 days, and RCW 81.04.110 expressly requires that the complaint include all grievances "to be inquired into." The Commission thus cannot enforce penalties beyond the noticed inquiries in its own complaint. Parties, including Public Counsel, also scheduled

³ Direct Testimony of Sebastian Coppola, Exhibit No. SC-1T at 9, 13:17.

nearly six months between the prehearing conference and evidentiary hearing in this case. The complexity of this case would thus almost certainly require significant additional notice for any substantive changes to the complaint and alleged violations.

14 In practical terms, the Commission cannot amend a complaint or use one party's idea of what the complaint should have said to justify non-noticed penalties. A new complaint or a new version of a complaint requires the basic step of notifying the affected parties and allowing those parties an opportunity to be heard. In other words, Public Counsel's attempt to alter the content of the complaint at this stage of the proceeding, remove parties' opportunities to respond, and dodge notice requirements is unfair and unconstitutional. Under the APA, the Commission's rules, and basic notions of fairness and due process, the Commission must exclude the above-noted sections of Public Counsel's testimony.

2. Procedural Rules: The Commission has rules and mechanisms in place for parties to move to amend complaints, and Public Counsel's request does not comply with those rules and mechanisms.

15 The APA and the public service statutes allow parties to petition the Commission for complaints or any additional violations. *See* RCW 34.05.419 (applications for adjudication) and RCW 81.04.110.⁴ Further, the Commission's administrative rules specifically provide for dispositive, procedural, or evidentiary motions to limit or add to the record in a proceeding. WAC 480-07-375. Subsequent Commission rules lay out specific formatting and structural guidelines for such motions.

16 Although the Commission typically construes all pleadings liberally, Public Counsel's use of expert testimony as the mechanism by which to seek to amend the

⁴ The relevant portion of RCW 81.04.110 states: "Complaint may be made by . . . any person or corporation . . . or any body politic . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service company . . . in violation, or claimed to be in violation of any provision of law or of any order or rule of the commission."

complaint does not comply with the above motion requirements. Indeed, there is not even an actual motion accompanying Public Counsel's request. Accordingly, the Commission should strike Public Counsel's request from Mr. Coppola's testimony, or at a minimum, force such a request to comply with the Commission's long-established procedural requirements.

3. Irrelevance: Public Counsel's proposed amendments are irrelevant to the jurisdictional complaint in this case.

17 The Commission's complaint in Docket PG-160924 is the jurisdictional document in this case. Non-noticed allegations are beyond the scope of that jurisdictional document and thus beyond the scope of this case. Therefore, Public Counsel's assertions of additional violations not contained in that jurisdictional document are irrelevant to the matter now before the Commission. The Commission should strike those assertions as irrelevant.

18 Public Counsel can avail itself of various mechanisms to petition the Commission or otherwise seek to have Mr. Coppola's allegations considered. Indeed, Public Counsel has had the previous seven months to bring these concerns forward.

B. Public Counsel's request that the Commission order specific rate treatment of inspection and remediation costs is irrelevant to the matters in this Docket.

19 Public Counsel's request that the Commission order specific future rate treatment in a pipeline safety case is unnecessary and beyond the scope of the current dispute. Docket PG-160924 is about pipeline safety. This is not a general rate proceeding and the complaint in this case does not include any express references to rate-setting mechanisms. The Commission simply has no reason, and no evidence on which to make a final rate-setting decision in this case. Such a decision would not be final, in any event. The Company can always ask for, and the Commission can always consider, updated rate treatment in the company's next general rate proceeding. Public Counsel is similarly free to argue for exclusion of these costs in the next rate case. In the end, Public Counsel's request is

irrelevant and simply an attempt to have the Commission order something that is both immaterial to the case and of no substantive consequence moving forward. The Commission should therefore exclude Public Counsel's request for guaranteed rate treatment as irrelevant, immaterial, and not properly before the Commission.

C. Public Counsel's expert testimony contesting the proposed inspection and remediation program contradicts Public Counsel's own position on the matter and is thus immaterial and should be disregarded.

20 In his testimony, Mr. Coppola allows as how the settlement's Deactivated Gas Line Inspection and Remediation Program is "generally acceptable." (SC-1T, at 9 and 36). Evidently, he "generally find[s] most of the actions and requirements reflected in the program acceptable." (Id. at 33). Mr. Coppola then proceeds to advocate for several modifications to the proposed Program. However, as an active participant in Program development, Public Counsel already has endorsed the Program and should not be heard to complain or offer amendments to it.

21 Public Counsel has formally endorsed the Program—in writing—not once, but twice. In an April 10, 2017, email to the parties, Public Counsel stated in part that it "agrees with the inspection and remediation plan, but will argue that the maximum penalty is appropriate." Again, in an April 12, 2017, letter to the Commission, Public Counsel informed the Commission and the Parties that: "In fact, Public Counsel will support the inspection and remediation plan, but we disagree with respect to penalties. This position is not a surprise or unanticipated by the parties or the Commission."⁵ The surprise, unanticipated testimony of Mr. Coppola evidences only that Public Counsel and its expert appear to disagree about the proposed inspection and remediation plan's adequacy. Internal

⁵ Letter to Judge Kopta in response to Commission Staff's email communication dated April 12, 2017, on behalf of Public Counsel, from AAG Lisa Gafken. (Attached as Appendix 1.)

disagreement at the Public Counsel Unit is not relevant to the Commission's decision. The Commission should consider and closely review the proposal put forward by Staff and the Company. Parties are of course available to answer questions from the Commission, but there is no reason to consider an expert opinion that none of the parties, including Public Counsel, supports.

VIII. CONCLUSION

22 For the reasons stated above, the Commission should: (1) grant Commission Staff's motion to strike the sections of Public Counsel's April 24, 2017, filing, identified above, (2) decline Public Counsel's invitation to amend the complaint, (3) decline to prescribe ratemaking treatment of costs associated with compliance plan implementation, and (4) adhere to the constitutional demands of due process and fairness in the conduct of its official business.

DATED this 28th day of April 2017.

Respectfully submitted,

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