

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UE-220216

REPLY BRIEF OF COMMISSION STAFF

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I. INTRODUCTION

1 In 2002, the Commission approved modifications to PSE's service quality index (SQI) program that added a new metric, SQI No. 11, to measure the average length of time between a customer call and the arrival of one of PSE's electric first responders. To meet the benchmark set for SQI No. 11, PSE's electric first responders must arrive within 55 minutes of a call.

2 PSE's SQI No. 11 performance deteriorated over the years before 2021. The company, however, did nothing to arrest or correct the slide. That failure had consequences.

3 In 2021, PSE averaged a 65-minute response time for SQI No. 11, exceeding the benchmark by 10 minutes. PSE's failure to meet the benchmark resulted in the automatic imposition of the penalties PSE now seeks mitigation of.

4 PSE cannot make the showings required for mitigation, namely that it faced unusual or extraordinary events and that it reasonably prepared for and responded to those events. And PSE offers nothing on brief that causes Staff to change its recommendation. The Commission, accordingly, should deny PSE's petition and require the company to pay the full \$613,636 penalty.

II. DISCUSSION

5 As Staff explained in its opening brief, PSE can show neither that unusual or extraordinary events underlie its failure to meet the benchmark nor that it reasonably prepared for and responded to those events.¹ Here, in reply, Staff will address: (1) Public Counsel's and PSE's arguments concerning the governing legal framework, (2) PSE's requests that the Commission consider events excluded from the SQI No. 11 calculation when disposing of the

¹ Post-Hearing Br. of Commission Staff (Staff's Br.) at 4 ¶ 14 – 9 ¶ 29.

petition for mitigation, and (3) PSE’s arguments that it reasonably prepared for the events of 2021.

A. The Governing Legal Framework

6 Public Counsel and PSE make several arguments about the law applicable here. Public Counsel contends that it remains unclear whether the Commission can partially mitigate a penalty imposed under the SQI program.² PSE argues that Staff (1) incorrectly blurred the distinction between how the Commission treats petitions for mitigation and enforcement actions in testimony,³ and (2) applied an incorrect standard for mitigation here.⁴ None of those arguments has merit: Public Counsel overlooks the plain meaning of the word “mitigation” and fails to account for Commission precedent, and both of PSE’s arguments fail on the plain text of the testimony it complains about.

7 Public Counsel erroneously indicates that the Commission may lack the power to partially mitigate a penalty.⁵ Under the relevant orders, PSE may file a petition for mitigation when it fails to meet an SQI benchmark.⁶ As neither those orders nor the underlying agreements define the term “mitigation,” the Commission must ascertain the term’s plain meaning,⁷ and, given the context, it should do so through recourse to a legal dictionary.⁸ Those define the term

² Opening Br. of Public Counsel (PC’s Brief) at 3 ¶ 4.

³ Initial Br. of Puget Sound Energy (PSE’s Br.) at 7 ¶ 17 – 8 ¶ 19; *id.* at 8 (“Thus, the eleven factors are not only inapplicable here, but it is unacceptable to raise them in an attempt to add criteria for mitigation beyond that which the parties agreed to in the Merger Stipulation.”). PSE levels this same criticism at Public Counsel, which will undoubtedly have thoughts on PSE’s allegations.

⁴ PSE’s Br. at 5 ¶ 14. Again, PSE contends that Public Counsel makes this same alleged error.

⁵ PSE complains about Public Counsel’s invocation of the factors set out in the Commission’s enforcement policy statement, but Staff sees no reason why those factors should not guide the exercise of the Commission’s discretion if it agrees that it should partially mitigate the penalty here.

⁶ *In re Proposal by Puget Sound Power & Light Co.*, Dockets UE-9513570 & UE-960195, Fourteenth Supplemental Order, Appx. A at 13 (Feb. 5, 1997).

⁷ *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 443, 359 P.3d 753 (2015).

⁸ *Citizens Alliance for Property Rights Legal Fund*, 184 Wn.2d at 443.

as meaning “a lessening in severity or intensity.”⁹ Nothing about that definition indicates the lessening must be complete to constitute mitigation, and, indeed, its plain text suggests otherwise by focusing on a reduction in severity rather than the elimination thereof. And the Commission has already suggested that it interprets the term in this way by entering orders that partially mitigate SQI penalties.¹⁰

8 PSE, for its part, alleges that Staff blended the Commission’s enforcement policy with the standard applicable to mitigation petitions thus applying an improper standard to PSE’s petition. Staff did not. PSE correctly identifies that the governing documents here are the ones setting up or modifying the SQI program.¹¹ That is why, as PSE admits,¹² Staff evaluated whether the events PSE cited were unusual or extraordinary and whether PSE reasonably prepared for them¹³ rather than through application of the enforcement policy’s factors.¹⁴ While Staff witness Roberts did cite the enforcement policy, he did so only when reviewing whether PSE reasonably prepared for events like those occurring in 2021, and only in the context of looking to whether or not PSE had a compliance program.¹⁵ He cited the enforcement policy to support his assertion that PSE was required to have such a program (for the record: PSE does,

⁹ BLACK’S LAW DICTIONARY (11th ed. 2019) (defining mitigation).

¹⁰ *In re Petition of Puget Sound Energy*, Docket UE-100338, Order 01, at 4 ¶ 14 (Aug. 12, 2010).

¹¹ Staff’s Br. at 3-4 ¶¶ 11 (“To obtain that mitigation, PSE must show that the failure to meet the benchmark, and thus the imposition of a penalty, “is due to unusual or exceptional circumstances for which PSE’s level of preparedness and response was reasonable.”) (quoting *in re Proposal by Puget Sound Power & Light Co.*, Dockets UE-9513570 & UE-960195, Fourteenth Supplemental Order, Appx. A at 13 (Feb. 5, 1997)).

¹² PSE’s Br. at 7 ¶ 17.

¹³ Staff’s Br. at 4 ¶ 13 – 10 ¶ 34; Roberts, Exh. AR-1T at 6:1-13:11.

¹⁴ See generally Roberts, Exh. AR-1T; see Staff’s Br. at 3-4 ¶¶ 11 (“To obtain that mitigation, PSE must show that the failure to meet the benchmark, and thus the imposition of a penalty, “is due to unusual or exceptional circumstances for which PSE’s level of preparedness and response was reasonable.”) (quoting *in re Proposal by Puget Sound Power & Light Co.*, Dockets UE-9513570 & UE-960195, Fourteenth Supplemental Order, Appx. A at 13 (Feb. 5, 1997)).

¹⁵ Roberts, Exh. AR-1T at 12:7-12.

and the enforcement policy says as much).¹⁶ That citation was appropriate and does not suggest that Staff applied the wrong standard here.

9 PSE also contends that Staff applied a test of adequacy rather than reasonableness for PSE's preparation.¹⁷ The Commission need not look farther than the relevant portion of Mr. Roberts' testimony to reject that claim. Specifically, Mr. Roberts was asked "[w]as PSE reasonably prepared for the events that it argues justify mitigation?"¹⁸ His answer, "[n]o," which he followed up with analysis that touched on reasonableness, not on adequacy.¹⁹

B. The Commission Should not Consider Excluded Events When Deciding Whether PSE Faced Unusual or Extraordinary Circumstances

10 PSE asks the Commission to grant it mitigation based on factors or events excluded from the SQI calculation. Specifically, it: (1) asks the Commission in multiple ways to consider the effects of the major event days on its SQI No. 11 performance, and (2) urges the Commission to also consider planned work dispatches on its SQI No. 11 performance.²⁰ The Commission should reject those attempts, which make an end run around the Commission's exclusion of those events from the SQI metric calculation.

11 PSE's attempts to do indirectly what they cannot do directly, and the law does not allow it to do so.²¹ PSE need not – indeed, it cannot – count the effects of major event days or planned work on its response time; those days are excluded from SQI-11 measurement.²² In the main, this benefits PSE as its average response time will not be inflated during events such as a major

¹⁶ Roberts, Exh. AR-1T at 12:7-12 & n.28.

¹⁷ PSE's Br. at 5 ¶ 14.

¹⁸ Roberts, Exh. AR-1T at 12:1.

¹⁹ Roberts, Exh. AR-1T at 12:2.

²⁰ PSE's Br. at 12-13 ¶ 31.

²¹ *Garfield County Transp. Auth. v. State*, 196 Wn.2d 378, 395, 473 P.3d 1205 (2020); *accord State v. White*, 148 N.M. 214, 221, 232 P.3d 450 (N.M. Ct. App. 2010) (collecting cases).

²² PSE's Br. at 10 ¶ 24 (major event days are excluded from the SQI No. 11 calculation), 13 ¶ 31 (planned outage work excluded from SQI No. 11 calculation).

outage incident. The corollary to that exclusion is that PSE cannot then rely on those same major event days or planned work dispatches to justify non-compliance with its SQI-11 obligations, even if by indirect effects. The exclusion, put otherwise, must encompass the direct and indirect effects of anything excluded from the SQI No. 11 calculation if the exclusion is to have balance and meaning.

C. PSE did not Reasonably Prepare for the Events of 2021

12 PSE argues that the Commission should conclude that it reasonably prepared for the events of 2021. Specifically, PSE claims that: (1) it did the best that it could, but that its efforts were swamped by the cumulative impacts of multiple events, and (2) multiple Commission orders support its claims. PSE is wrong on both counts.

13 PSE's cumulative effects claim²³ ignores two fundamental things. First, the Commission considers only unusual or extraordinary events when ruling on a petition for mitigation. That limit should extend to any cumulative impacts analysis, or else PSE has broadened the standards for mitigation beyond what the Commission adopted when setting up the SQI program. That matters here because, as discussed in Staff's opening brief, none of the events PSE cites were unusual or extraordinary. Neither their impacts in isolation nor their cumulative impacts warrant mitigation.

14 Second, PSE sets the issue up as if the Commission should consider only its efforts during 2021 when looking at the reasonableness of its preparations. But, as Staff has explained, PSE had notice that its SQI No. 11 performance was deteriorating for years in the run up to 2021.

²³ *E.g.*, PSE's Br. at 2 ¶ 4.

It did nothing to address the declining performance despite the warning signs.²⁴ By failing to do so, PSE failed to reasonably prepare for what came in 2021.²⁵

15 PSE nevertheless claims to find support for its petition in three Commission orders, claiming that each indicates that full mitigation of the penalty is warranted here.²⁶ The Commission entered the first two of these orders in dockets UE-072300 and UG-072301.

16 The first order (Order 21) addressed a petition by PSE seeking to temporarily suspend operation of SQI Nos. 6 and 8 because the contractor performing the surveys measuring PSE's performance for the metrics ceased operations.²⁷ The Commission denied that request in Order 21, but noted that PSE could petition for, and obtain, mitigation if it could make the requisite showing.²⁸

17 The second order (Order 24) addressed a petition for mitigation that PSE filed when it failed to meet the benchmark for SQI No. 5 due to a transition from one customer information system (CIS) to another.²⁹ The Commission spent the bulk of its discussion in Order 24 noting the "substantial efforts" PSE had undertaken to prepare for the "CIS switch-over" and the "mitigation plans" PSE had put in place "to minimize the impact of the implementation of the

²⁴ Roberts, Exh. AR-1T at 12:2-7 ("PSE states that heading into 2021, its electric first responder staffing was consistent with prior years. In the five years prior to 2021, PSE nearly missed the 55-minute benchmark three times. . . [D]espite nearly missing three times in the years leading up to 2021, PSE didn't decide to substantially increase its electric first responder staffing or begin to examine alternatives such as higher wages until 2021").

²⁵ See Roberts, Exh. AR-1T at 13:8-11 ([t]hat is significant and yet a symptom of the missed opportunities to make course corrections prior to the 2021 reporting period that would have eased the workload on the electric first responder staff and made achieving the 55-minute benchmark more likely for PSE").

²⁶ PSE's Br. at 20-21 ¶¶46-47.

²⁷ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-072300 & UG-072301, Order 21, 1 ¶ 1 (Apr. 8, 2013) (hereinafter "Order 21").

²⁸ Order 21 at 4 ¶¶ 9-10.

²⁹ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-072300 & UG-072301, Order 24, 1 ¶ 1 (Apr. 29, 2014) (hereinafter "Order 24").

new CIS.”³⁰ Given those efforts, the Commission concluded that PSE had reasonably prepared for events and granted the petition.³¹

18 Order 21 lends PSE no support for the proposition that the company reasonably prepared because it did not substantively discuss SQI penalty mitigation. While PSE’s briefing indicates that Order 21 waived penalties associated with SQI Nos. 6 and 8,³² and did so because PSE’s contractor went out of business,³³ Order 21 did not order any mitigation, and it certainly did not discuss whether PSE had reasonably prepared. It is inapposite here.

19 Order 24 offers no help to PSE either. While Order 24 did order mitigation, the Commission’s analysis, as noted above, turned almost exclusively on the efforts PSE had made to prepare for the problems associated with switching over to the new CIS.³⁴ PSE’s preparations here were much different. As both Staff and Public Counsel have noted, PSE long edged closer and closer to failing to meet SQI No. 11. And, as both note, PSE did nothing to address that reality. It thus undertook none of the kind of comprehensive preparation that the Commission deemed reasonable when mitigating the penalty for failing to meet SQI No. 5. It did not hire new employees until it was too late. It did not review its salary and benefit structure in an attempt to maintain the number of first responders it needed in the areas that it needed until it was too late.

³⁰ Order 24 at 2 ¶ 3; *id.* at 2 ¶ 4 (describing PSE’s plans for the technical aspects of the switchover, which included test phases to “ensure data integrity and system reliability”); *id.* at 2 ¶ 5 (describing PSE’s attempts to communicate with customers to prepare them for the switch-over); *id.* at 2-3 ¶ 6 (describing PSE’s limitation on operations during the actual switch-over, which were intended to minimize disruptions); *id.* at 3 ¶ 7 (describing PSE’s departmental planning efforts, creation of a “war room” to manage the switch-over, and hiring of additional employees to help address the “expected call volume increases, average handle time increases, and general performance dips.”).

³¹ Order 24 at 3 ¶¶ 9, 10.

³² PSE’s Br. at 20-21 ¶ 46 & nn.80 & 81.

³³ PSE’s Br. at 20 ¶ 46 (“Waiving the penalty here would not only be an appropriate application of the mitigation standard, but it would be consistent with the Commission’s prior orders. In a prior mitigation petition involving SQI-6 . . . and SQI-8 . . . the Commission waived the penalty after PSE failed to meet benchmarks because the entity named as the exclusive survey company discontinued its business. Just as cessation of [the contractor’s] business operations is a matter beyond PSE’s ability to control, so is the loss of First Emergency Responders despite PSE’s best efforts to recruit and train this workforce.”).

³⁴ Order 24 at 2-3 ¶¶ 3-7.

And it did nothing to engage in adaptive staff management to address the building workload evident in the years before 2021 until it was too late. The Commission should distinguish Order 24 on that basis.

20 PSE also cites the order the Commission entered to dispose of the petition for mitigation filed in docket UE-011603 (“2001 Mitigation Order”) after PSE failed to meet the benchmark associated with SQI No. 6.³⁵ PSE cited in its petition what no party disputed were extraordinary events – the western energy crisis and PSE’s response thereto, which included time-of-use rates and other measures “designed to reduce or shift demand for energy.”³⁶ The Commission, in addressing PSE’s petition, noted that it had approved PSE’s use of those measures “on a highly accelerated timetable.”³⁷ The Commission thus apparently determined that PSE had made reasonable efforts given the exigencies of the times and granted the petition for mitigation.³⁸

21 The 2001 Mitigation Order does not help PSE because it focuses on *ex post* response conduct rather than *ex ante* preparation, and it is the latter that is at issue here between Staff and PSE. Nothing in the 2001 Mitigation Order suggests that the Commission or the other parties thought PSE had any warning that it should have been preparing for the events of that year. That makes sense: PSE faced an unexpected energy crisis that had its roots in a drought and regulatory changes in California, and whose effects spilled over and affected most of the western United States.³⁹ Accordingly, the Commission did not focus on PSE’s preparedness for that crisis, but

³⁵ *In re Petition of PSE*, Docket UE-011603, Order Granting in Part and Denying in Part the Petition for Mitigation, at 1 ¶ 2 (Jan. 10, 2002) (hereinafter “2001 Mitigation Order”).

³⁶ 2001 Mitigation Order at 3 ¶ 8.

³⁷ 2001 Mitigation Order at 3 ¶ 8.

³⁸ 2001 Mitigation Order at 3 ¶ 12, 4 ¶ 19.

³⁹ Michael A. Yuffee, CALIFORNIA’S ENERGY CRISIS: HOW TO BEST RESPOND TO THE “PERFECT STORM,” 22 Energy L. J. 65, 65 (2001) (“the magnitude of the current electricity crisis in California is the result of a meteorological ‘perfect storm’ effect. Poorly structured markets, ineffectual regulatory responses to correct market flaws, limited generation supply, higher-than-anticipated increases in demand, an economic slow-down, dryer-than-normal weather, and sharp increases in natural gas prices – none of which alone would be likely to wreak debilitating havoc

instead looked to whether its response was reasonable under the circumstances.⁴⁰ Here, as discussed just above, PSE had plenty of warning signs that it needed to be making operational changes in the form of the long slide of its yearly SQI No. 11 performance. Staff’s criticism is less on PSE’s response to the events of 2021 and more on the lack of preparation for those events. The 2001 Mitigation Order is thus inapposite here and the Commission should distinguish it.

III. CONCLUSION

22 PSE failed to meet the SQI No. 11 benchmark, and it failed badly. Neither unusual or extraordinary events nor reasonable preparation excuse its failure. The Commission should deny the petition.

Respectfully submitted this 14th day of June, 2023.

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– have collided at just the right time to produce the current crisis.”); *Pub. Utils. Comm’n of Cal v. FERC*, 462 F.3d 1027, 1036-45 (9th Cir. 2006) (discussing the origins of and legal actions involved with the western energy crisis); 2001 Mitigation Order at 2-3 ¶ 8 (discussing the crisis).

⁴⁰ See generally 2001 Mitigation Order.