

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UE-100177

COMMISSION STAFF REPLY IN
SUPPORT OF MOTION FOR
SUMMARY DETERMINATION
RE FILING OF TEN-YEAR
CONSERVATION POTENTIAL

1 Puget Sound Energy has failed to show a genuine issue as to any material fact. The Motion of Commission Staff for Summary Determination should be granted.

I. ARGUMENT

A. The Commission May Consider Documents That UTC Staff Received From Puget Sound Energy on December 31, 2009

2 Puget Sound Energy does not appear to oppose Commission Staff's motion for an order declaring that, in determining whether Puget Sound Energy has complied with RCW 19.285.040(1) and WAC 480-109-010, the Commission may consider documents that UTC Staff received from PSE on December 31, 2009, and that were filed with the UTC Records Center in Docket UE-091986.¹ Puget Sound Energy itself relies on those documents in its responsive brief. There is no genuine issue as to any material fact, and Commission Staff are entitled as a matter of law to an order granting the requested declaration.²

¹ See Puget Sound Energy', Inc.'s Resp. to Mots. for Summ. Determination of Commission Staff, NW Energy Coalition, and Public Counsel ("PSE Response") ¶ 16 & n.33.

² WAC 480-07-380(2)(a).

B. Puget Sound Energy Substantially Changed its Ten-Year Conservation Potential Between December 31, 2009 and January 29, 2010

3 Commission Staff also request an order declaring that the fact that Puget Sound Energy substantially changed its identified ten-year conservation potential between December 31, 2009 and January 29, 2010 is evidence that Puget Sound Energy has not complied with RCW 19.285.040(1). Puget Sound Energy says the order must be denied because PSE did not substantially change its ten-year conservation potential after December 31. According to PSE, it identified two alternative ten-year conservation potentials on December 31, one based on its Integrated Resource Plan (IRP), and the other based on the Conservation Council's Fifth Power Plan Calculator.³ PSE says it then properly chose the latter as the basis for its January 29 filing.

4 The undisputed facts do not support PSE's characterization of what happened. The e-mail that Puget Sound Energy sent on December 31, 2009 said:

[A]ttached are PSE's projected cumulative ten-year conservation potential and biennial conservation target range. The changes from the draft figures presented on December 15 are due mainly to revision of the total conservation potential projects to be consistent with the data that was the basis for the graph in Figure 8-8 of the 2009 IRP . . .⁴

Attached to the e-mail was a file named "WAC 480-109 Potential Target FINAL 12-30-09.pdf," which contained seven pages of graphs and tables. They included two graphs with "IRP" in the title, a graph labeled "WAC Cumulative Ten-Year Conservation Potential," a table labeled "WAC Biennial Conservation Target Range," and three pages labeled "Acquisition Path."⁵ The e-mail explained that the ten-year and biennial

³ PSE Response ¶¶ 2, 7, 15, 16; Decl. of Eric. E. Englert Supp. PSE's Mot. Summ. Determination ¶ 12; see Supplemental Decl. Eric E. Englert Supp. PSE's Resp. Mots. Summ. Determination ¶¶ 8, 9.

⁴ Declaration of Stefanie Johnson ("Johnson Decl.") Attach. G; NW Energy Coalition's Mot. Summ. Determination Ex. A. The December 31, 2009 documents are also available online at <http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/859DCF80A5B1A712882576A2005CC235>.

⁵ Johnson Decl. Attach. G.

conservation numbers were derived from Puget Sound Energy's 2009 IRP, and that the "Acquisition Path" materials illustrated the pace at which PSE expected to acquire the ten-year energy savings, consistent with its IRP.

5 The e-mail added:

By contrast, PSE's share of the Power Council's 5th regional plan would be a cumulative ten-year potential of 219.4 aMW (2009 -2018, the latest period in the Council's published calculator) and a 2010-11 "target" of 42.7 aMW.⁶

6 On a motion for summary determination, all *reasonable* inferences must be drawn in favor of the non-moving party, here PSE.⁷ When the December 31 documents are read as a whole, it is not reasonable to infer from the single sentence quoted above that PSE was relying on "the Power Council's 5th regional plan" as a source for its ten-year conservation potential under RCW 19.285.040(1)(a) and WAC 480-109-010(1).⁸ The only reasonable inference is that PSE met the deadline of RCW 19.285.040(1)(a) and WAC 480-109-010(1) by deriving its ten-year conservation potential from its Integrated Resource Plan. There is no evidence that anyone, including Puget Sound Energy, thought otherwise at the time. As PSE acknowledges, "PSE did indicate that it anticipated using its 2009 IRP as the basis of its ten-year conservation potential."⁹

7 To avoid a summary determination, Puget Sound Energy must show that there is a genuine issue as to a material fact.¹⁰ An issue is "genuine" only if reasonable persons could

⁶ Johnson Decl. Attach. G; NW Energy Coalition's Mot. Summ. Determination Ex. A.

⁷ *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989) (CR 56 standards). In considering a motion for summary determination, "the commission will consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules." WAC 480-07-380(2)(a).

⁸ The Pacific Northwest Electric Power and Conservation Planning Council is sometimes called the "Power Council." It is called the "Conservation Council" in the UTC rules implementing Chapter 19.285 RCW. See WAC 480-109-007(4).

⁹ Supplemental Decl. Eric E. Englert Supp. PSE's Resp. Mots. Summ. Determination ¶ 8.

¹⁰ See WAC 480-107-380(2)(a); CR 56(e); *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517, 519 (1988).

differ.¹¹ Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.¹² The IRP-derived ten-year conservation potential that PSE identified on December 31 was 3,748,773 MWh.¹³ The ten-year conservation potential that PSE filed with the Commission on January 29 was 1,871,908 MWh.¹⁴ The only reasonable conclusion to be drawn from the record as a whole is that PSE substantially changed its identified ten-year conservation potential between December 31, 2009 and January 29, 2010.

8 The ten-year conservation potential that PSE filed with the Commission on January 29, 2010, and which it used as the basis for its biennial conservation target, was half of what PSE identified on December 31, 2009. Commission Staff are entitled as a matter of law to an order declaring that those facts are evidence that Puget Sound Energy is not in compliance with RCW 19.285.040(1).¹⁵

II. CONCLUSION

9 In determining whether Puget Sound Energy has complied with RCW 19.285.040(1) and WAC 480-109-010, the Commission may consider documents that UTC Staff received from PSE on December 31, 2009, and that were filed with the UTC Records Center.

10 Puget Sound Energy substantially changed its identified ten-year conservation potential after the statutory deadline of January 1, 2010. That fact is evidence that Puget Sound Energy is not in compliance with RCW 19.285.040(1).

¹¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) (interpreting Fed. R. Civ. P. 56(c) and (e)). Though federal decisions interpreting the federal counterparts of Washington rules are not binding on Washington courts, Washington courts treat them as persuasive authority. *Young*, 112 Wn.2d at 226.

¹² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) (interpreting Fed. R. Civ. P. 56(c) and (e)).

¹³ Johnson Decl. Attach. G; NW Energy Coalition's Mot. Summ. Determination Ex. A.

¹⁴ PSE's January 29 filing in this docket is available at <http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/AEEB685B91672D42882576BB00043AC7>.

¹⁵ See WAC 480-107-380(2)(a); CR 56(c).

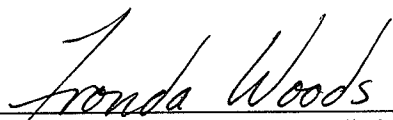
11 Puget Sound Energy can cure its noncompliance by filing a new ten-year conservation potential and biennial conservation target that are consistent with the ten-year conservation potential it identified on December 31, 2009.

12 The motion of Commission Staff for summary determination should be granted.

DATED this 22nd day of April 2010.

Respectfully submitted,

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