

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complaint,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKET NO. UE-100177

PUBLIC COUNSEL REPLY IN
SUPPORT OF PUBLIC COUNSEL
MOTION FOR SUMMARY
DETERMINATION

I. INTRODUCTION

1. On April 6, 2010, Public Counsel filed a Motion for Summary Determination¹ (Public Counsel Motion or Motion) moving the Commission for an order finding that the public participation afforded by Puget Sound Energy, Inc. (PSE) in connection with the development of the I-937 ten-year conservation potential and two-year target was insufficient to meet the requirements of the Energy Independence Act (EIA)² and the Commission's implementing rules.³ PSE, filed its Response on April 19, 2010 (PSE Response or Response)⁴.
2. As provided in the Commission's Prehearing Conference Order,⁵ Public Counsel hereby files its Reply to the PSE Response. PSE's Response fails to establish that there is any genuine

¹ The motion was supported by the Declaration of Stefanie Johnson.

² chapter 19.285 RCW.

³ chapter 480-109 WAC.

⁴ The Commission is presented with cross-motions for Summary Determination on the public participation issue. PSE's Motion For Summary Determination, filed April 6, 2010, asks the Commission for a ruling that "the public participation outlined in PSE's report is sufficient to meet the requirements of WAC 480-109-010(3)." PSE Motion for Summary Determination, ¶¶ 16, 46, 47 (Item C. 1).

⁵ Order 03, ¶ 8.

dispute as to a material fact and fails to rebut Public Counsel's legal argument. Accordingly, Public Counsel respectfully requests that the Commission find that Public Counsel is entitled to prevail on its Motion pursuant WAC 480-07-380(2)(a).

II. REPLY ARGUMENT

3. PSE's Response raises no new factual or legal arguments. PSE's arguments have already been addressed in Public Counsel's initial Motion, the Public Counsel Response to Motions for Summary Determination (Public Counsel Response), and accompanying Declarations of Stefanie Johnson.⁶ However, because the PSE Response restates and compounds a number of serious distortions of the record, some reply is required.

A. PSE Raises No New Factual Arguments and Raises No Disputes of Material Fact.

4. What is immediately striking in PSE's Response is that the Company does not respond to or rebut the detailed review of the substance of PSE's public participation process in the Declaration of Stefanie Johnson. As the Declaration and its appendices show, on multiple occasions and in multiple settings, right up to December 31, 2010, when it provided the metrics required by I-937, PSE explicitly stated it was developing and would file I-937 conservation metrics based on its Integrated Resource Plan (IRP) analysis.⁷ Conversely, on no occasion prior to January 25, 2010, did PSE propose to actually employ the Northwest Power and Conservation Council's (Conservation Council or Council) Calculator as the basis for its conservation metrics, nor did the Company undertake any stakeholder development process in that regard.⁸ It is

⁶The PSE argument that Public Counsel seeks "dispositive weight" for stakeholder input is fully addressed in the Public Counsel Response, ¶ 36, and is not covered in this pleading.

⁷ Declaration of Stefanie Johnson, ¶¶ 6-13.

⁸ Declaration of Stefanie Johnson, ¶¶ 15-17.

significant for purposes of Public Counsel's Motion that none of these facts is disputed or rebutted by the Company.

5. Instead, PSE's Response continues to rely on a few tangential references to the Fifth Plan Calculator as a means to somehow connect PSE's entire multi-year public participation process to the January 29 filing of conservation metrics based on the Council's Calculator. In PSE's words, "Public Counsel's claim that the public participation process was inadequate is not supported by the facts. PSE engaged in a robust public discussion of its conservation potential, and part of that public discussion involved the use of the Conservation Council's plan and calculator to determine PSE's conservation metrics."⁹

6. PSE makes much of a supposed Public Counsel "admission" that the Company "did in fact engage in a robust public process."¹⁰ This argument is illustrative of the degree to which PSE misstates the record in its advocacy. The statement made by Public Counsel in its initial comments in this docket is intentionally taken out of context. Public Counsel's full statement is shown below, with the portion quoted in PSE's Response underlined:

PSE did, in fact, engage in a robust public process. PSE's engagement of stakeholders and the public in the development of its conservation programs, potentials and targets is well recorded through documents provided to the IRPAG and CRAG. However, the focus of that public process was on PSE's IRP targets – *not* the Fifth Plan Calculator – and, thus, is *not* what was ultimately included in the Company's Compliance Report. The fact that the outcome of the public process is not reflected in the Compliance Report is one reason why its contents are particularly problematic. Ultimately, there was no public process regarding the *development* of the ten-year potential and biennial target PSE chose to file in its January 29, 2010, Compliance Report.¹¹

⁹ PSE Response, ¶ 2.

¹⁰ PSE Response, ¶ 3.

¹¹ Comments of Public Counsel, March 5, 2010, pp. 4-5, attached to and incorporated in the Second Declaration of Stefanie Johnson (PSE quoted language shown with underline, italicized emphasis in original Public Counsel Comments).

As this shows, the complete Public Counsel statement communicates the opposite point to that attributed to it by PSE. Moreover, this Public Counsel statement was contained in a section of Public Counsel's initial comments devoted to the argument that PSE's public process was inadequate under the rules. It is disturbing that PSE would present on brief such an obvious misrepresentation of the record to the Commission.

7. When the argument and rhetoric is stripped away, however, PSE's assertion that its public process included a "discussion" of the use of the Fifth Plan Calculator is based upon three events: (1) a Conservation Council presentation made at the UTC on September 3, 2009; (2) the reference in a December 31, 2009, e-mail to the Fifth Plan Calculator for purposes of contrast; and (3) the public meeting held by PSE on January 27, 2010.

8. First, PSE's reliance on the Conservation Council's September 3, 2009, presentation at the UTC hardly merits a response. PSE specifically highlights two items from this meeting, "Slide 39" of the presentation, which included a link to the Council's Calculator, and the "sample calculation" for PSE. Both of these items were presented by a third party, the Conservation Council, at a general informational meeting hosted by the Washington Utilities and Transportation Commission (UTC)¹² regarding the Council methodology. Neither the fact that a link to the calculator as available on the Council's website was provided in that meeting, nor the fact that the Council Calculator, which is capable of producing the "sample calculation" for PSE was shown to meeting participants proves anything of value in terms of the Motion. PSE is truly grasping at straws to present this as evidence of its own intent to rely on the Fifth Plan Calculator

¹² The UTC meeting is described in the Declaration of Deborah Reynolds, ¶ 8.

or as part of its own conservation development efforts.¹³ PSE's Response and Declarations fail to mention that following this meeting, on six separate occasions, PSE provided written information to participants in its public stakeholder process that indicated it intended to base its I-937 Compliance filing on the Company's IRP.¹⁴

9. Second, PSE describes the important December 31, 2009, e-mail which provided stakeholders with PSE's identification of its ten-year conservation potential as "providing numbers for the projection based on *both* of the allowed sources [IRP and Plan Calculator]." ¹⁵ This carefully worded statement uses literal truth to twist the actual meaning of the communication beyond recognition.

10. The e-mail is attached to the Declaration of Stefanie Johnson as Appendix G. After stating that "in response to input received at that [December 15, 2009, IRPAG meeting] and our own review, attached are PSE's projected cumulative ten-year conservation potential and biennial target range." The attachment presents the IRP-based metrics and the subsequent two paragraphs of the e-mail provide a detailed summary. A one sentence statement then follows:

By contrast, PSE's share of the Power Council's 5th regional plan would be cumulative ten-year potential of 219.4 aMW (2009-2018, the latest period in the Council's published calculator) and a 2010-2011 "target" of 42.7 aMW.¹⁶

¹³ PSE states that "no party objected" when PSE data was used in a sample operation of the Calculator at the UTC informational meeting, appearing to suggest that objections to any future use by PSE of the Calculator were waived. Supplemental Declaration of Eric Englert, ¶ 16. This is far-fetched to say the least. The meeting was not an adjudication or legal proceeding. Mr. Englert notably does not even assert that PSE stated any intention to rely on any version of the Calculator at this event. Indeed, Ms. Reynolds states that Council representative Tom Eckman "cautioned that none of the utilities in the room would be well served by relying on the Target Calculator alone, but that it would be useful for consumer-owned utilities that did not have an IRP." Declaration of Deborah Reynolds, ¶ 8.

¹⁴ See, Declaration of Stefanie Johnson, Appendices C, D, E, F, and G. See also, PSE Advice Letter No. 2009-31 to Energy Efficiency Services Tariff, Docket Nos. UE-091859, UG-091860, November 30, 2009, p. 2.

¹⁵ PSE Response, ¶ 7.

¹⁶ Declaration of Stefanie Johnson, Appendix G, p. 2.

11. This is the only reference to the Fifth Plan Calculator in the e-mail. The e-mail then returns to a detailed description of the IRP-based targets¹⁷ and ends by saying “the ten-year conservation potential and biennial conservation target range will be described and documented in compliance with reporting requirements in WAC 480-109-010 and filed with the UTC by January 31, 2010.”
12. A simple review of the e-mail leaves no confusion as to its meaning. Yet, PSE states that “Public Counsel acknowledges, as it must, that public participation *included discussion* of the Conservation Council power plan as a basis for calculating achievable ten-year conservation potential.”¹⁸ The implication is that by mentioning the December 31 e-mail, for example, Public Counsel is conceding PSE’s point, a patently inaccurate characterization.
13. PSE states that it is merely Ms. Johnson’s “opinion” that the reference to the Fifth Plan in the December 31 e-mail was “for comparison purposes.”¹⁹ PSE does not explain what meaning it attaches to the Company phrase “by contrast” if not to present a “comparison” of the results with the IRP-based metrics. The plain English definition of “contrast” is “juxtaposition or comparison ... showing striking differences.”²⁰
14. Again, nowhere does PSE provide evidence of any “discussion” of PSE actually using the Fifth (or Sixth Plan) Calculator *as a basis* for its I-937 filing. PSE offers no evidence that any such proposal was ever presented to the Conservation Resource Advisory Group (CRAG) or the

¹⁷ Significantly, immediately following the reference to the lower results of the Fifth Plan Calculator, the December 31 e-mail discusses the “Low Target” scenario derived from the IRP process. There is no suggestion in the e-mail that the Fifth Plan Calculator would establish a “low end” for a target range.

¹⁸ PSE Response, ¶ 4, (emphasis added).

¹⁹ PSE Response, ¶ 4, n.5.

²⁰ Concise Oxford Dictionary, Seventh Edition, p. 205.

Integrated Resource Plan Advisory Group (IRPAG). PSE's failure to offer such evidence when it has had the opportunity creates a permissible and reasonable inference that no such evidence exists. PSE's statement, therefore, that the Council plans were "discussed and identified as bases for the PSE's ten-year conservation potential" is another carefully crafted phrase designed to disguise the absence of substance in the underlying process.

15. The third leg of PSE's public participation argument cites the January 27 meeting which it scheduled for stakeholders. Public Counsel and Staff were unable to attend.²¹ Given the Company's reliance on this event to establish adequate public participation, PSE's Response and Supplemental Declaration provide surprisingly scant information regarding the details of the meeting beyond the fact that PSE "received additional comments"²² about its use of the Fifth Plan. Indeed, PSE effectively concedes in its Response that public participation regarding the Council's Calculator-based metrics was "less intensive" and that little if any "development" took place since the "Council's calculator has already built in most of the 'development' process."²³ In PSE's view, "all that remained in the development process was the step of

²¹ PSE claims that it notified stakeholders of the change in approach to the conservation metrics, and of this meeting, on January 24, a Sunday. No documentation is provided. Supplemental Declaration of Englert, ¶ 9. This appears to be an erroneous statement. Copies of the e-mails sent to the CRAG and IRPAG indicate the e-mail was sent after close of business on the January 25 (after 6 p.m.). Declaration of Stefanie Johnson, Appendices H and I. Thus, parties were not actually notified until January 26 of the meeting to be held the next day. During that week, Public Counsel Staff were involved in several significant Commission proceedings including PSE GRC post-hearing matters, Verizon/Frontier hearing preparations, and filing of testimony in the PSE REC case.

²² Supplemental Declaration of Eric Englert, ¶ 10.

²³ PSE Response, ¶ 10. Arguably, under this interpretation, no utility would be required to have any public participation in its goal development if it chose to use a Council plan calculator. PSE ignores at least two important questions where stakeholder input would be important in such an instance: (1) is it appropriate to use the plan calculator approach at all for the company?, and (2) if so, does the mechanical output of the calculator accurately reflect the company's conservation potential, or is further analysis and development required to determine the most accurate projection of the Company's achievable cost-effective potential?

selecting ‘Puget Sound Energy’ from the drop-down menu in the Conservation Council’s Fifth Plan Calculator.”²⁴

16. Public Counsel argues that “no public participation occurred in the development of the metrics”²⁵ because between May 2009 and January 2010 stakeholders were provided no proposal, tentative, preliminary or otherwise, that indicated PSE was actually considering relying upon on the Council’s Calculator. Stakeholders were informed for the first time on January 26, after the fact, that PSE had decided to change its approach and use the Council Calculator. Even if one grants PSE’s point, *arguendo*, that there was *some* public participation by virtue of the three events it cites, that participation was minimal, transitory and untimely. It falls far short of meeting any standard of adequacy under the rule.

B. PSE Does Not Respond To Or Rebut Public Counsel’s Legal Arguments.

17. As discussed above, while it argues for different conclusions from the facts, PSE does not dispute the basic factual assertions in Ms. Johnson’s Declarations or the attached appendices. This is not surprising since the appendices consist almost exclusively of documents prepared by PSE. As a result, there is no genuine issue as to any material fact on the issue of public participation. Accordingly, under WAC 480-07-380(2)(a) Public Counsel should prevail on its Motion for Summary Determination if the Commission concludes that Public Counsel is correct on the law.²⁶

²⁴ *Id.* This ties in with the Company argument that it need present nothing more than a mechanical output of the calculator in order to comply with the Energy Independence Act, a position which Public Counsel challenges in its April 19 Response. Public Counsel Response, ¶¶ 19-21. *See also*, Declaration of Deborah Reynolds, ¶ 8 (noting Eckman caution against IOU reliance on Target Calculator alone).

²⁵ Public Counsel Motion, ¶¶ 3, 5.

²⁶ At the Prehearing Conference in this case, Public Counsel initially took the position that there were disputed issues of fact as to public participation, based on its understanding of PSE’s position. After a review of the record in preparation of the Public Counsel Motion and upon review of PSE’s Motion and Response, Public Counsel

18. The legal issues are straightforward. By declaring that public participation in development of conservation metrics is “essential,” WAC 480-109-010(3)(a) establishes participation as a mandatory requirement that must be met by a utility as a part of its I-937 compliance. As a corollary to that point, if public participation has not occurred, or is so negligible as to be meaningless, then approval cannot be granted.²⁷

19. PSE’s Response does not address or respond to Public Counsel’s legal argument. By failing to dispute Public Counsel, PSE must be deemed to have conceded this part of the Motion. PSE apparently chooses to rely solely on its factual argument that the participation that occurred was adequate. As discussed earlier in this Response, PSE has failed to make that showing.

C. Request for Relief.

20. Public Counsel respectfully requests an order granting the Public Counsel Motion for Summary Determination. Public Counsel’s Motion suggested that if the Motion were granted, the Commission might wish to rule on adequacy of public participation, but postpone ruling on whether rejection was required on that basis. After review of PSE’s filings and those of other parties, Public Counsel now respectfully requests that the Commission find that: (1) public participation in the development of PSE’s conservation metrics filed January 29, 2009, was inadequate, and (2) PSE’s I-937 filing is therefore rejected.

21. In the event that, based on the record to date, the Commission concludes there are disputed material facts, the Commission should set the public participation issue for decision at hearing.

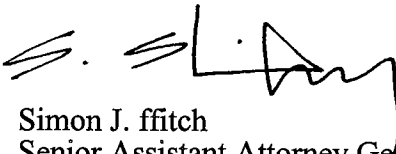
believes there are no material factual disputes on this issue. As discussed in this Reply, the dispute is based upon the interpretation given to the facts.

²⁷ Public Counsel Motion, Section II B and C.

22. Public Counsel recognizes that other parties have raised other substantial substantive bases for rejection of PSE's I-937 filing.²⁸ Should the Commission grant summary determination rejecting the filing on other grounds, Public Counsel respectfully requests that the Commission nevertheless rule on the adequacy of public participation in order to provide guidance to these parties and other utilities and stakeholders involved in the I-937 process.

23. DATED this 28th day of April, 2010.

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Public Counsel

²⁸ In the event that this matter is not disposed completely at the summary determination stage, Public Counsel intends to argue at hearing that the PSE Compliance Report does not demonstrate compliance with the EIA and implementing rules. By not making that argument on summary determination, Public Counsel does not waive the argument.