

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET PG-160924

**PUBLIC COUNSEL'S RESPONSE
TO COMMISSION STAFF'S AND
PSE'S MOTIONS TO STRIKE
PORTIONS OF PUBLIC
COUNSEL'S TESTIMONY IN
OPPOSITION OF SETTLEMENT**

I. INTRODUCTION AND REQUESTED RELIEF

1 The Public Counsel Unit of the Washington Attorney General's Office (Public Counsel) submits this response requesting the Utilities and Transportation Commission (Commission) deny Commission Staff's (Staff) Motion to Strike Portions of Public Counsel's Testimony in Opposition to Settlement (Staff's Motion). Public Counsel also submits this response requesting the Commission deny Puget Sound Energy's (PSE) Motion to Strike Portions of Public Counsel's Testimony in Opposition to Settlement (PSE's Motion). Accordingly, pursuant to WAC 480-07-375(4), Public Counsel responds to both Staff's and PSE's motions, collectively, "the Motions."

II. BACKGROUND

2 On September 20, 2016, the Commission issued its Complaint against PSE in relation to the March 2016 natural gas explosion in Seattle's Greenwood neighborhood. On October 3, 2016, PSE filed its Answer and Affirmative Defenses to the Complaint. On October 18, 2016, Public Counsel filed a Notice of Appearance, becoming a party to the proceeding. Pursuant to Commission Docket PG-160924, Order 01, the parties engaged in

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discovery.¹ On March 28, 2017, Staff and PSE submitted a proposed settlement agreement (Agreement) to the Commission. On April 24, Public Counsel filed the Direct Testimony of Sabastian Coppola detailing Public Counsel's opposition to specific terms of the Agreement.

III. ARGUMENTS

3 The Motions fail to cite relevant legal authority upon which the Commission may rely to justify striking any portions of Public Counsel's testimony in opposition to the Staff and PSE Agreement. The Motions contemplate four categories of arguments as justifications to exclude Public Counsel's testimony. In general, those arguments are that Public Counsel:

- A. Contradicts its own statements,
- B. Engages an expert who lacks the prerequisite qualifications,
- C. Presents rate setting matters in a Complaint case, and
- D. Attempts to amend the Complaint, thereby violating PSE's right to Due process.

4 This Response considers each category of arguments in succession and presents the Commission with legal authority to refute each argument and deny the Motions.

A. Public Counsel's Testimony Is Not Contradictory.

5 Both Staff and PSE allege that Mr. Coppola's testimony contradicts previous statements made by Public Counsel regarding the Deactivated Gas Line Inspection and Remediation Program (Program).² The parties rely on a letter from Public Counsel dated April 12, 2017, in which Public Counsel stated it would, "support the inspection and remediation plan..."³ Staff and PSE allege this statement contradicts Mr. Coppola's testimony, submitted on April 24, 2017,

¹ Order 01 ¶ 5.

² Staff Motion ¶¶ 20 and 21; PSE Motion ¶ 8.

³ Staff Motion, Appendix 1.

which states, in part, “[t]he Commission could approve the...[Program], with the following additions... .”⁴ Staff then concludes that when read together, these statements culminate in Public Counsel not supporting Mr. Coppola’s testimony.⁵ There is no contradiction and Public Counsel fully supports the testimony.

6 At the time Public Counsel sent the April 12 communication, it anticipated presenting testimony through Public Counsel Regulatory Analyst Corey Dahl. However, Public Counsel subsequently realized Mr. Dahl would be unavailable for the May 15th hearing and replaced Mr. Dahl with Mr. Coppola as a result of his background, expertise, and experience with this case. Mr. Coppola’s testimony includes compelling evidence regarding discrete modifications that would make the Program more robust, resulting in a safer natural gas system. In light of this, Public Counsel’s position on the Program evolved to align with Mr. Coppola’s insights, observations, and opinions. Thus, Public Counsel fully supports Mr. Coppola’s testimony, which recommends adopting the plan but including modifications vital to the public interest.

7 Evolving positions are not unfamiliar to Staff as noted by their initial recommendation to the Commission to impose the maximum penalty of \$3.2M on PSE in the Final Staff Investigation Report.⁶ Staff now recommends the Commission settle the Complaint and impose only \$1.5M in firm penalties yet offers no justifications for the reduction. Mr. Coppola’s testimony fills that void by explaining there are no justifications for the Commission to accept such a drastically reduced penalty amount. Mr. Coppola’s testimony offers substantial evidence to show that PSE should be held fully accountable for their failure to follow Washington State

⁴ Direct Testimony of Sebastian Coppola, Exh. SC-1T at 9:22 and 36:18.

⁵ Staff Motion ¶ 21.

⁶ See, Commission Staff Final Investigation Report, at 10.

and federal rules, regulations, and safety standards regarding pipeline safety. Public Counsel supports modifying the Program to better protect the public interest by ensuring PSE's gas operations comply with federal and state rules and regulations, and PSE internal policies.

B. Public Counsel's Testimony Is Admissible and Relevant.

8 The Commission may consider the superior court rules of evidence ("ER's") when weighing the admissibility of evidence. RCW 34.05.452; WAC 480-07-495. The admissibility of expert testimony in Washington is governed by ER 702, which provides as follows, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

9 The Commission routinely considers expert witnesses' opinions when evaluating issues of fact. Accordingly, the Commission may evaluate Public Counsel's testimony under Washington Rules of Evidence 702 (testimony by experts). As reflected in recent Washington cases, ER 702 involves a two-prong test: (1) Whether the witness qualifies as an expert, and (2) whether the expert testimony would be helpful to the trier of fact. *Reese v. Stroh*, 128 Wash. 2d 300, 305 (1995).⁷ Both Motions seek to exclude substantial portions of Mr. Coppola's testimony but fail to articulate or apply the *Reese* test.

⁷ *State v. Russell*, 125 Wash.2d 24, 69 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995); *State v. Kalakosky*, 121 Wash.2d 525, 541 (1993); *State v. Cauthron*, 120 Wash.2d 879, 890 (1993); see also 5A Karl B. Tegland, *Washington Practice Evidence* §88, at 380 (3d ed. 1989). The bases of an expert's opinion are set forth in ER 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

10 PSE disputes Mr. Coppola's status as an expert in this matter.⁸ Mr. Coppola's Declaration detailing his significant experience with subjects substantially similar to those at issue here appends this Response.⁹ In short, Mr. Coppola has more than 37 years of experience in public utility and related energy work in matters effecting utilities.¹⁰ Mr. Coppola has a thorough understanding of the procedures and processes involved with installing pipelines, services lines, and gas meters, as well as their safe removal and cut-and-cap procedures from his tenure with SEMCO Energy.¹¹

11 In applying the second prong of *Reese*, helpfulness to the trier of fact, Mr. Coppola's testimony will certainly assist the Commission in determining whether PSE complied with federal and state rules, regulations, and safety standards regarding gas pipeline installation, abandonment, and maintenance and in determining the appropriate level of penalties for PSE's failures. To be sure, the majority of Mr. Coppola's testimony focuses on those exact issues. SC-1T, 11:22 – 24:2. The testimony also recommends that the Commission, because of PSE's multiple failures to comply with applicable safety standards, should impose the maximum penalty amount of \$3.2M.¹²

12 Indeed, because the Agreement does not include any detailed information regarding the explosion, Mr. Coppola's testimony is the only evidence offered to the Commission explaining that it very likely would not have occurred but for PSE's safety violations. For example, PSE's

⁸ PSE Motion ¶¶ 9, 10.

⁹ See, Declaration of Sebastian Coppola in Opposition to Staff and Puget Sound Energy Motions to Strike Testimony.

¹⁰ Coppola, Exh. SC-1T at 4:13-14.

¹¹ Declaration of Sebastian Coppola ¶ 5.

¹² Coppola, Exh. SC-1T at 26:9 – 11.

failure to remove its abandoned aboveground facilities as required by PSE's internal procedures and PSE's poor record keeping contributed to the explosion and PSE's delayed ability to shut off the natural gas after the explosion.¹³ Mr. Coppola's testimony is vitally important and relevant to the Commission's evaluation of the Agreement.

13 The Motions' objections to the admissibility of Mr. Coppola's testimony are substantively and procedurally defective and should fail for not meeting either prong of the test articulated in *Reese*.

1. PSE's Other Objections to Public Counsel's Testimony.

14 PSE states that Mr. Coppola inaccurately states evidence in his testimony but does not cite or articulate the inaccuracy.¹⁴ Without these crucial facts, Public Counsel cannot address these ambiguous claims, and the Commission should reject them as unsubstantiated. Mr. Coppola describes the purpose of his testimony, the documents he reviewed, and the exhibits he presents, forming the basis of his testimony.¹⁵

15 PSE also disputes that Mr. Coppola's testimony would prove helpful to the Commission because neither he nor Public Counsel participated in the Staff Investigation of the incident.¹⁶ While Public Counsel and Mr. Coppola did not participate in the field investigation, PSE fails to mention that Staff and Public Counsel submitted a combined 84 data requests with multiple

¹³ See, Coppola, Exh. SC-1T at 17:12 – 22:23. The fire caused by the explosion lasted nearly six hours due to PSE lack of knowledge of their own system and subsequent inability to promptly disable the gas main. Coppola, Exh. SC-1T at 11:18 – 21.

¹⁴ PSE Motion ¶ 9.

¹⁵ Coppola, Exh. SC-1T at 6:12 – 8:13.

¹⁶ PSE Motion ¶ 9.

subparts, all of which Mr. Coppola reviewed in addition to Staff's field reports.¹⁷ Therefore, Mr. Coppola was privy to and knowledgeable of all the information Staff made available to Staff and PSE. PSE's motion to strike Mr. Coppola's testimony should be denied.

2. PSE's Description of the Settlement Process.

16 Public Counsel disagrees with PSE's description of the Background in this case regarding the settlement process. PSE claims, "the parties engaged in multiple settlement conferences, and Public Counsel participated in each one." PSE further states, "[P]ublic Counsel participated in all the settlement discussions... ." These statements simply are not true. WAC 480-07-700(3) defines a "settlement conference" as: "Any discussion or other communication, in person or otherwise, intended to resolve one or more disputed issues (whether actual or anticipated) between two or more parties in an adjudicative proceeding." PSE and Staff held several settlement conferences to which Public Counsel was not invited or even aware they occurred until they concluded. Any assertion stating otherwise is inaccurate and misleading.

C. Public Counsel's Testimony to Exclude Recovery of Inspection and Remediation Costs Is Based on Commission Precedent.

17 Both Motions argue that Public Counsel's recommendation under WAC 480-07-740(2)(c) that the Commission prevent PSE from recovering the costs of the Program through rates is improper.¹⁸ Staff does not cite any authority to bolster their claim. PSE cites Docket UT-090842 and argues, "there is no Commission precedent to exclude the cost

¹⁷ Public Counsel submitted 43 data requests; Staff submitted 41 informal data requests. Several data requests had multiple subparts.

¹⁸ PSE Motion ¶¶ 11-14; Staff Motion ¶ 19.

of a program that would be indistinguishably intertwined with PSE's routine maintenance and business operations."¹⁹ PSE's claim is erroneous.

18 In April 2008, this Commission held that PSE could not recover specific costs related to Commission ordered Quality Assurance and Quality Control plans. *See, Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket PG-060215, Order 02 ¶ 21 (Apr. 3, 2008) ("PSE is obligated to pay the first \$250,000 of audit costs without seeking recovery in rates."). In Docket PG-060215, PSE contractor Pilchuck (the same contractor that performed the faulty cut-and-cap and gas line abandonment in this case) was found to have intentionally falsified inspection records relating to gas leak surveys, resulting in over 209 reported violations.

19 As it did in Docket PG-060215, the Commission may exercise its broad discretion under WAC 480-07-750(2)(b), and require that PSE not be permitted to recover the costs of the Program through rates.²⁰ Public Counsel believes it is not in the public's interest to essentially reimburse PSE to perform work it should have completed correctly the first time.²¹ Additionally, PSE's assertion that the Program's costs would be, "indistinguishably intertwined with [the costs of its] routine maintenance and business operations" is illusory.²² The Commission may order

¹⁹ PSE Motion ¶ 13.

²⁰ WAC 480-07-750(2)(b) states:

If the commission accepts a proposed settlement upon conditions not proposed in the settlement, the parties may seek reconsideration of the decision and the settling parties must within the time for reconsideration state their rejection of the conditions. If a party rejects a proposed condition, the settlement is deemed rejected and (a) of this subsection applies.

²¹ That work is: properly cutting-and-capping gas lines, properly abandoning gas lines, removing abandoned above ground service lines, following internal procedures, properly performing gas leak surveys, properly performing atmospheric corrosion tests, properly performing external corrosion tests, maintaining accurate records, quickly terminating the gas supply to the site of an active fire, and maintaining a reliable Quality Control plan.

²² PSE Motion ¶ 13.

PSE to simply separate the costs of the Program from its “routine maintenance and business operations” costs using the same accounting methodologies it did to apportion costs in Docket PG-060215; where PSE was not allowed to recover the costs of the Quality Assurance and Quality Control plans. The Commission should reject these arguments and deny PSE’s and Staff’s Motions on these grounds.

D. Public Counsel’s Testimony Is Not a Motion to Amend the Commission’s Complaint and Does Not Violate PSE’s Procedural Due Process.

20 Staff states that Public Counsel’s testimony is a “pseudo-complaint” attempting to amend the Commission’s Complaint and deny PSE due process of law.²³ These are serious allegations. However, Public Counsel’s testimony is just that: testimony from an expert witness. As such, Public Counsel is well within the law to submit evidence, through testimony, oppose the settlement, and recommend alternative settlement terms to the Commission. WAC 480-07-740(2)(c).²⁴ To that end, Public Counsel’s testimony presents the Commission with additional evidence the Agreement does not capture.

21 The Commission has broad discretion to weigh whether Public Counsel’s evidence warrants imposing the maximum penalty on PSE. Chapter 34.05 RCW; Chapter 480-07 WAC. Specifically, under WAC 480-07-740, the Commission may consider Public Counsel’s evidence

²³ Staff Motion ¶ 12.

²⁴ WAC 480-07-740(2)(c) states:

Rights of opponents of a proposed settlement. **Parties opposed to the commission's adoption of a proposed settlement retain the following rights:** The right to cross-examine witnesses supporting the proposal; the right to **present evidence** opposing the proposal; the right to **present argument** in opposition to the proposal; and the right to **present evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result. The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.** (Emphasis added).

opposing the Agreement. Alternatively, the Commission, if it so chooses, may consider whether Public Counsel's evidence establishes finding additional violations suitable to amend the Complaint and impose additional penalties. Chapter 34.05 RCW. Public Counsel advocating that the Commission take a course of action that is entirely within its discretion falls far short of hypothetical outcomes resulting in procedural due process violations. Staff's Motion fails on these grounds and must be denied.

1. It Is Procedurally Impossible for Public Counsel to Violate a Party's Procedural Due Process Rights.

22 Public Counsel understands that it is procedurally barred from amending a Commission complaint and that only the Commission, exercising its broad discretion, may do so.²⁵ Staff's argument belies these critical facts. At its core, the Due Process Clause of U.S. Const. amend. XIV prohibits state and local governments from infringing on an individual's life, liberty, and property. Reciting this statement is where Staff's procedural due process analysis ends.

23 Proper application of the procedural Due Process Clause requires an analysis of whether the aggrieved party was denied notice and an opportunity to be heard prior to final agency action. *City of Redmond v. Arroyo-Murillo*, 149 Wash.2d 607, 612 (2003). Only final agency actions are considered when applying a procedural Due Process Clause analysis; tentative determinations that a right has been infringed upon do not constitute final agency action. *Pub. Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wash.2d 778, 793-94 (2002).

²⁵ Staff incorrectly cites RCW 80.04.110 and 81.04.110 as procedural authority to amend a Commission complaint. RCW 80.04.110 and 81.04.110 is the authority for filing a new complaint. An existing complaint cannot be amended under these provisions.

24 To establish a procedural due process violation, the party must establish that they have been deprived of notice and opportunity to be heard prior to a final, not tentative, determination. *State v. Storhoff*, 133 Wash.2d 523, 528 (1997). Even an agency's failure to comply with its own procedures does not violate procedural due process. *Pullman Power Prods. v. Marshall*, 655 F.2d 41, 44 (4th Cir.1981). Instead, to constitute a violation, denial of notice and the opportunity to be heard must actually prejudice the aggrieved party. *Id.* Prejudice relates to the inability to prepare or present a defense. *Id.*

25 In this case, there is no procedural due process violation. First, the Commission has not "acted" and Public Counsel does not have administrative authority to "act," making it procedurally impossible for Public Counsel to violate PSE's procedural due process rights. Second, the Commission has not issued a final order and again, Public Counsel does not have administrative authority to do so. For those reasons alone, Staff's allegations of violations of Commission rules and procedures do not establish due process violations. *Motley-Motley v. State*, 127 Wash. App. 62, 81 (2005). Third, the failure to comply with internal procedures does not establish a procedural due process violation unless there is prejudice. *Id.* Here, there would be no prejudice because PSE was provided with notice and an opportunity to be heard. More specifically, PSE freely participated in discovery and evidentiary proceedings. So, it remains unclear why Staff asserts PSE's procedural due process rights have been violated, are even in jeopardy, and has a constitutionally protected "property interest."²⁶

2. Staff's Assertion that PSE Has a Constitutionally Protected Property Interest Contradicts U.S. Supreme Court Precedent.

26 Staff states that PSE has a “property interest” that requires notice and opportunity for a hearing.²⁷ This statement infers tacit Due Process Clause protections but Staff’s Motion fails to identify the protections at issue. This theory is an incorrect statement of current law in the state of Washington and, as explained above, is a nonissue because the Commission has not issued a final decision.

27 The Washington Court of Appeals, held in *Morrison v. State Dep’t of Labor & Indus.*, 166 Wash. App. 1044 (2012), that the protections afforded by the Due Process Clause do not extend to purely economic interests. Due process is flexible and calls for such procedural protections as the particular situation demands. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In applying the *Mathews* test, the *Morrison* Court held, “the private interest implicated here is solely an economic, pecuniary one. There is no liberty interest involved.” *Morrison* at 2. Where the interest at stake is only a financial one, the right which is threatened is not considered “fundamental” in a constitutional sense. *Id.* (citing, *In re: Dep. of Grove*, 127 Wn.2d 221, 238, (1995)). Staff implies that any penalty imposed on PSE amounts to a property interest protected by the Due Process Clause of the Constitution.²⁸ This is incorrect under U.S. Supreme Court precedent and the motion must be denied on these grounds.

²⁷ Staff Motion ¶¶ 10 and 13.

²⁸ Staff Motion ¶¶ 10 and 13.

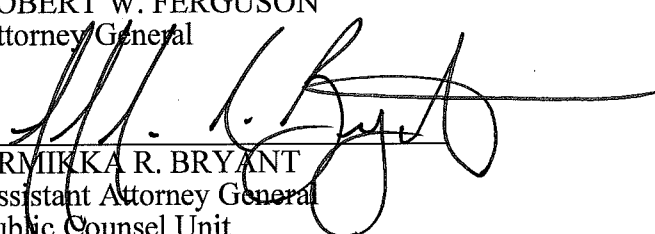
IV. CONCLUSION

28 For the reasons stated above, the Commission should: (1) deny Staff's Motion to strike the portions of Public Counsel's testimony in opposition of settlement, (2) deny PSE's Motion to strike portions of the prefiled testimony of Sebastian Coppola on behalf of Public Counsel, and (3) deny PSE the opportunity to recover costs associated with the Deactivated Gas Line Inspection and Remediation Program through rates.

29 DATED this 4TH day of May 2017.

Respectfully submitted,

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