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BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office  
of the Washington Attorney General,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

NO. UE-011411

PUGET SOUND ENERGY, INC.'S  
ANSWER TO PUBLIC COUNSEL'S  
MOTION TO STRIKE

**I. INTRODUCTION**

1. The Commission should deny Public Counsel's motion to strike<sup>1</sup> certain of the affirmative defenses asserted by Puget Sound Energy, Inc. ("PSE") in PSE's answer to Public

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<sup>1</sup> Public Counsel's motion was improperly served. As Public Counsel's service list indicates, the motion was served on Mark Quehrn. Mr. Quehrn is not listed on the Notice of Appearance, nor is his name included on PSE's answer to the complaint. This improper service delayed PSE's ability to properly respond to this motion. PSE respectfully requests the Commission instruct Public Counsel to properly serve all future pleadings on the persons listed in PSE's Notice of Appearance.

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL'S MOTION TO  
STRIKE - 1

[07771-0100/011411, PSE, Answer to Public Counsel's Motion to  
Strike, 12-5-01.doc]

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Counsel's complaint. PSE complied with the Commission rules and the Civil Rules in pleading these defenses.<sup>2</sup> PSE's full name and mailing address are:

Puget Sound Energy, Inc.  
P.O. Box 97034  
Bellevue, Washington 98009-9734  
Attn: Steve Secrist,  
Director, Rates & Regulation

2. Rules and statutes that may be brought at issue in this Answer include WAC 480-09-420(9)(a) and 480-09-425(4); CR 8.

**II. PSE'S OPPOSITION TO PUBLIC COUNSEL'S MOTION TO STRIKE**

3. In its answer to Public Counsel's complaint, PSE expressly pleaded the following defenses, which Public Counsel now asks the Commission to strike:

46. Any order requiring granting the Complaint would violate the Takings Clause of the Fifth Amendment of the United States Constitution and Article I, Section 16 of the Washington State Constitution.

47. Public Counsel's claims as to PSE's alleged violation of the Merger Order are barred by the doctrines of waiver and equitable estoppel.

PSE Answer at 11-12. Public Counsel argues that these defenses are not set out with the necessary particularity.

4. The purpose of pleading an affirmative defense is to prevent unfair surprise during trial or at a hearing and to allow the plaintiff to prepare the case; the rule is not interpreted in a rigid and mechanical way. Ben Holt Indus., Inc. v. Milne, 36 Wn. App. 468, 473, 675 P.2d 1256

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<sup>2</sup> Concurrent with the filing of this Answer, PSE is filing a Motion to Amend, pursuant to WAC 480-09-420(8), that requests that if the Commission finds that a more factual description of PSE's affirmative defenses is necessary, then PSE should be allowed to amend its answer to Public Counsel's complaint to assert additional facts to support these defenses.

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL'S MOTION TO  
STRIKE - 2

[07771-0100/011411, PSE, Answer to Public Counsel's Motion to Strike, 12-5-01.doc]

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(1984). In this case, PSE’s answer makes it clear that it intends to raise waiver, estoppel and Takings Clause issues in this proceeding. Public Counsel will not be unfairly surprised when these issues arise. Public Counsel now knows to prepare to address these issues. PSE therefore adequately pleaded these defenses.

5. The rules and case law on which Public Counsel relies do not support Public Counsel's motion. Public Counsel admits that the Commission may rely on the Civil Rules of the Superior Court ("CR") as guidelines when handling motions. CR 8(c) and WAC 480-09-420(9)(a) serve the same purpose. This Commission will look to analogous Civil Rules for guidance in interpreting its own rules. In re Application P-66283 for authority to transfer Common Carrier Permit No. CC-8779 From: Delta Trucking Co., Inc. To: Thorndike Trucking, Inc., 1982 Wash. LEXIS 6, at \*10 (1982). Both CR 8(c) and WAC 480-09-420(9)(a) require express pleading of affirmative defenses on which the answering party intends to rely. CR 8(c) states as follows:

**(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(Emphasis added).

WAC 480-09-420(9)(a) states as follows:

(a) Answer. Except as otherwise provided in WAC 480-09-425 and 480-09-810(4), any party who desires to respond to a complaint, motion, or petition shall file with the commission and serve upon all other parties an answer.

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL’S MOTION TO  
STRIKE - 3

[07771-0100/011411, PSE, Answer to Public Counsel's Motion to Strike, 12-5-01.doc]

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Answers must fully and completely disclose the nature of the defense and must admit or deny specifically, and in detail, all material allegations of the complaint or petition. A respondent must separately state and number affirmative defenses.

The Civil Rules require that waiver, estoppel, and all other affirmative defenses be "set forth affirmatively," or, in other words, be expressly pleaded. Similarly, WAC 480-09-420(9)(a) requires the answering party to "state and number affirmative defenses." PSE did so in its answer.

6. Public Counsel misinterprets the case law on which it relies. The cases Public Counsel cites involve situations where the defendants failed to plead the affirmative defenses on which they later sought to rely. See Bonanza Real Estate, Inc. v. Crouch, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974) ("The record discloses defendants did not affirmatively plead estoppel or waiver as required by CR 8."); Mahoney v. Tingley, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975) ("Plaintiff asserts that . . . defendants are precluded from raising a defense . . . because they failed to plead the defense affirmatively."); Farmer Ins. Co. of Wash. v. Miller, 87 Wn.2d 70, 76, 549 P.2d 9 (1976) ("Estoppel and waiver are affirmative defenses and must be pleaded. CR 8(c). Defendants did not plead either.").

7. Moreover, in the cases cited by Public Counsel, the court allowed the defendants to assert the defenses, although the defenses had not been pleaded. See Miller, 87 Wn.2d at 76 (describing CR 8(c) as a rule "not to be construed absolutely."); Mahoney, 85 Wn.2d at 101 ("To conclude that the defendants are precluded from relying upon [the] defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result."); Crouch, 10 Wn. App. at 386-88 (considering facts regarding waiver and estoppel despite the fact that neither defense was affirmatively pleaded).

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL'S MOTION TO  
STRIKE - 4

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8. Unlike the defendants in the cases cited by Public Counsel, PSE expressly pleaded the affirmative defenses at issue here. There is no danger of unfair surprise by PSE belatedly asserting a waiver, estoppel, or Takings Clause defense without having pleaded it in the answer. If Public Counsel seeks additional facts on which these defenses are based, it may request such information in data requests to PSE.

9. Additionally, the case law Public Counsel cites does not support Public Counsel's assertion that PSE's Takings Clause defense is insufficient. In US West Communications, Inc. v. Utilities & Transp. Comm'n, 134 Wn.2d 48, 71, 949 P.2d 1321 (1997), the Court held that at the evidentiary hearing, US West had not met its burden to establish a confiscation with "clarity and definiteness." The case does not address the standard for pleading a Takings Clause defense.

10. PSE has fully complied with the rules for pleading affirmative defenses cited by Public Counsel. Moreover, even if there were some technical noncompliance, the Commission's policy is to liberally construe pleadings:

(4) Liberal construction. The commission will construe pleadings liberally with a view to effect justice among the parties. The commission will, at every stage of any proceeding, disregard errors or defects in the pleadings or proceeding that do not affect the substantial rights of the parties.

WAC 480-09-425(4) (emphasis added).

11. For the reasons set forth above, PSE respectfully requests the Commission deny Public Counsel's motion to strike.

**III. PRAYER FOR RELIEF**

12. Based on the foregoing, PSE respectfully requests that the Commission deny Public Counsel's motion to strike.

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL'S MOTION TO  
STRIKE - 5

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DATED: December \_\_\_\_, 2001

**PERKINS COIE LLP**

By \_\_\_\_\_

Steven C. Marshall

William R. Maurer

Sheree Strom Carson

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Attorneys for Puget Sound Energy, Inc.

PUGET SOUND ENERGY, INC.'S ANSWER  
TO PUBLIC COUNSEL'S MOTION TO  
STRIKE - 6

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served Puget Sound Energy, Inc.'s Answer to Public Counsel's Motion to Strike upon all parties of record in this proceeding, by mailing with postage prepaid to:

Sally J. Johnston  
Assistant Attorney General  
1400 S. Evergreen Park Drive, S.W.  
P.O. Box 40128  
Olympia, WA 98504-0128

Simon fitch  
Office of the Attorney General  
Public Counsel  
900 - 4th Avenue, Suite 2000  
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Melinda J. Davison  
S. Bradley Van Cleve  
Davison Van Cleve, P.C.  
1000 SW Broadway, Suite 2460  
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Ken Canon  
Executive Director  
Industrial Customers of NW Utilities  
825 NE Multnomah, Suite 180  
Portland, OR 97232-2158

Donald W. Schoenbeck  
Regulatory & Cogeneration Svc., Inc.  
900 Washington Street, Suite 1000  
Vancouver, WA 98660

Dated at \_\_\_\_\_, Washington, this \_\_\_\_\_  
day of \_\_\_\_\_, 2001.

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Pam Iverson

CERTIFICATE OF SERVICE - 2  
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