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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 WASHINGTON UTILITIES AND)
4 TRANSPORTATION COMMISSION,)
5 Complainant,)
6 vs.) DOCKET NO. PG-041624
7 PUGET SOUND ENERGY, INC.,) Volume VI
8 Respondent.) Pages 79 - 98

9
10 A prehearing conference in the above matter
11 was held on September 9, 2005, at 9:00 a.m., at 1300
12 South Evergreen Park Drive Southwest, Olympia,
13 Washington, before Administrative Law Judge THEODORA
14 MACE.

15 The parties were present as follows:

16
17 WASHINGTON UTILITIES AND TRANSPORTATION
18 COMMISSION, by DONALD T. TROTTER, Assistant Attorney
19 General, 1400 South Evergreen Park Drive Southwest,
20 Post Office Box 40128, Olympia, Washington 98504;
21 telephone, (360) 664-1189.

22
23 PUGET SOUND ENERGY, INC., by JAMES F.
24 WILLIAMS and AMANDA BEANE (via bridge line), Attorneys
25 at Law, Perkins Coie, LLP, 1201 Third Avenue, Suite
4800, Seattle, Washington 98101; telephone, (206)
359-3543.

CITY OF BELLEVUE, by CHERYL A. ZAKRZEWSKI
(via bridge line), Attorney at Law, City Attorney's
Office, Post Office Box 90012, Bellevue, Washington
98009; telephone, (425) 452-6829.

Kathryn T. Wilson, CCR
Court Reporter

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1 PROCEEDINGS

2 JUDGE MACE: Let's be on the record in the
3 matter of Washington Utilities and Transportation
4 Commission against Puget Sound Energy. This is Docket
5 Number PG-041624. This is the date that's been
6 scheduled for a prehearing conference to discuss how
7 the parties intend to address concerns that the
8 Commission intends to raise at the settlement hearing,
9 which is scheduled for September 14th.

10 My name is Theo Mace. I'm the administrative
11 law judge who is assigned to this case. I would like
12 to have brief oral appearances from counsel now, and I
13 will begin with Mr. Trotter, who is in the hearing
14 room.

15 MR. TROTTER: My name is Donald T. Trotter,
16 assistant attorney general for the Commission staff.

17 JUDGE MACE: And on the conference bridge?

18 MR. WILLIAMS: James Williams and Amanda
19 Beane on behalf of Puget Sound Energy.

20 JUDGE MACE: Ms. Zakrzewski, would you just
21 briefly introduce yourself for the record?

22 MS. ZAKRZEWSKI: Cheryl Zakrzewski for the
23 City of Bellevue.

24 JUDGE MACE: We have just begun. This is
25 Theo Mace, the ALJ. I just introduced the case

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1 caption, and I had just taken oral appearances from
2 Mr. Trotter and Mr. Williams and Ms. Beane.

3 I have a few written remarks that I want to
4 make and then open this up for discussion amongst the
5 parties. For the record, a settlement has been filed
6 in this case purporting to resolve all the issues. A
7 settlement hearing is scheduled for September 14th,
8 2005, to allow the Commission to review the settlement.

9 Preparatory to the hearing, the Commission
10 has looked at the settlement and finds it has certain
11 concerns which it intends to raise on the record at the
12 settlement hearing. The Commission wants to advise the
13 parties ahead of time about these concerns so they will
14 be able to provide answers on the public record or
15 possibly be able to revise the settlement agreement to
16 accommodate those concerns.

17 I sent out a notice to all of you advising
18 you of this conference and I identified some of the
19 Commission concerns, and I have received a response
20 that was filed on behalf of Commission staff to the
21 issues that were raised in this notice, and I want to
22 express my appreciation for the prompt response. What
23 I have to indicate to the parties though is I think the
24 response, although very thorough, this is sort of a
25 central concern that the Commission has with this

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1 settlement.

2 In this case, Mrs. Frances Schmitz died. The
3 reports filed with her testimony show that she died as
4 a result of a huge natural gas explosion that
5 essentially leveled her house. She walked out of her
6 house after the explosion, her body literally
7 smoldering and lay down on the ground to be
8 administered to by her neighbors. She was so severely
9 burned that in a few days she died.

10 None of the documents -- the settlement
11 agreement, the narrative supporting settlement, or even
12 really this response -- have addressed this human
13 suffering that occurred in this incident. There are
14 references to Mrs. Schmitz' death as tragic, which it
15 was, but the documents seem really in some regards to
16 not notice it.

17 So in that context, what I want to do is just
18 raise the following questions that will be raised at
19 the settlement hearing. If the goal of regulation is
20 to prevent safety violations that could result in human
21 injury and death, what does it say to the public and
22 the companies if the Commission treats incidents where
23 there are fatalities with lesser or no penalties than
24 when there are simply technical safety violations.

25 Why do the parties agree that there should be

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1 no penalty in this case where a human fatality occurred
2 when in all recent gas pipeline safety cases, and I can
3 provide you with a list of the ones I looked at, where
4 the only issues were technical rules violations,
5 penalties, sometimes very heavy, were agreed to,
6 monetary penalties, that is.

7 Since the Commission already has a statutory
8 authority to collect the costs of an investigation
9 where there are extraordinary costs, why do the parties
10 regard PSE's agreement to pay costs as an adequate
11 remedy in place of the penalty assessment? If in the
12 settlement PSE admits that the standard for cathodic
13 protection was not met during the time the Vasa Park
14 rectifier was cross-wired -- see Paragraph 26 of the
15 settlement -- why is no penalty included in the
16 settlement agreement.

17 So I know these questions are somewhat
18 different than ones that were posed in the notice, but
19 I think they probably more clearly set forth the kind
20 of concerns the Commission intends to raise during the
21 settlement hearing, and they arise out of the questions
22 that were posed in the notice.

23 In other words, looking at the past several
24 settlements in gas pipeline safety cases, the
25 Commission has assessed, or the settlement agreement,

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1 for example, has called for payments of \$50,000 of
2 penalties in the Avista case in 2003; \$40,000 in
3 penalties in Basin Frozen Foods in 2003. PSE docket in
4 2005, Staff recommended penalties of a million dollars,
5 and there was an agreement to \$500,000 and no fatality
6 occurred in any of those cases. There was no injury.
7 Same with Cascade in 2005. There was an agreement to a
8 penalty of \$75,000 and, again, no fatality or injury.

9 So it's in this context, I think, that there
10 are concerns about the settlement agreement, and I
11 would at this point like to open the discussion up to
12 the parties. Again, I appreciate that we have received
13 a written response, but I think it hasn't gone to the
14 core issue here, the core concern, and I certainly
15 would be happy to hear from the parties at this point.

16 MR. TROTTER: Your Honor, this is Donald T.
17 Trotter. Perhaps I could take a first cut at it.
18 Thank you, first of all, for clarifying what the
19 Commission believes the core issue to be because part
20 of what you said this morning was not evident from the
21 four issues that were contained in the prior notice,
22 and that can explain, I hope, some of why you indicated
23 that our submittal of yesterday did not respond to the
24 core issue, because we did not anticipate or fully
25 appreciate what that core issue was.

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1 JUDGE MACE: Let me just say that the
2 questions in the notice may have been a little more
3 subtle than they ought to have been. I think in the
4 first one that had to do with looking at this
5 settlement in the context of other settlements was
6 intended to point the parties in the direction of
7 seeing that all those settlements had involved
8 penalties where there were no injuries or fatalities.

9 I'm sorry that I was not clear. I had hoped
10 that the parties would have reviewed the prior
11 settlements and perhaps have realized that there was a
12 difference between this proposed settlement and those,
13 particularly because of the unique circumstances,
14 Mr. Trotter, that you referred to.

15 MR. TROTTER: I didn't mean to be critical.
16 I just meant to be explanatory. We simply didn't grasp
17 that and I apologize for that.

18 One of your first questions was, and I'll
19 paraphrase, if the goal of regulation is to prevent
20 violations that result in death, then that suggests a
21 penalty, and I believe our response addressed that.
22 The consultants retained by the Commission in this case
23 could not tie the violation to the gas leak that
24 resulted in the death, so there was not a direct
25 connection. If there was, this certainly would be a

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1 different case, and we did attempt to explain that in
2 our submittal yesterday.

3 With respect to, and I'll just make a brief
4 statement, and if Mr. Rathbun wants to add comments, I
5 would appreciate your giving him the opportunity to do
6 that. We did try to distinguish this case from other
7 cases in our filing yesterday. As Mr. Rathbun's
8 testimony, I think, shows is that the Staff perspective
9 was, the primary goal here was to find out what caused
10 this accident and explosion and what are the
11 ramifications of that, and again, if the conduct that
12 caused the violations had caused this explosion, this
13 would be a different case.

14 With regard to collection of costs, you are
15 correct, Your Honor, that RCW 80.20 does permit the
16 Commission to collect costs. I believe that statute
17 only applies when the costs that the Commission incurs
18 exceed those that it incurs pursuant to the Company's
19 regulatory fee, and there are limitations as to how
20 often the Commission can collect those costs.

21 Also, those costs only go to the Commission.
22 They wouldn't go to the City of Bellevue, which is at
23 issue here. I'm not sure we are as far into the fiscal
24 cycle to be in a situation in which that statute would
25 apply.

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1 I think your fourth point was, and I just had
2 a chance to write it down quickly, if there was not
3 adequate cathodic protection, then why wasn't there a
4 penalty, and again, I believe that was covered, I
5 think, in the first point. But let me say finally
6 before Mr. Rathbun, if he wishes to comment, we now
7 understand the focus and we will be better prepared to
8 respond to those issues at the settlement hearing.

9 So Mr. Rathbun, if you had anything to add or
10 not and if Your Honor wishes or gives you an
11 opportunity, then perhaps you can add something.

12 JUDGE MACE: Mr. Rathbun?

13 MR. RATHBUN: Alan Rathbun, pipeline safety
14 director. I think Mr. Trotter has summarized the
15 comments that I would make. If we had found a
16 violation which had a direct causal link which led to
17 the explosion and fatality, we would have had a
18 different case here.

19 We found we could come with no expert
20 testimony that would make that link, and in fact, it
21 was found that the leak that ultimately caused the
22 explosion was something that was related to plant that
23 was in the ground for a long period of time prior to
24 any regulations requiring a comprehensive cathodic
25 protection system.

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1 So our strategy once finding that was to
2 ascertain and to, or the agreement was for the Company
3 to look at all their similar vintage pipe and to ensure
4 that similar circumstances weren't in existence
5 elsewhere and to mitigate those that were found. So
6 our strategy was twofold: One, to find what caused the
7 leak, which we feel we did accomplish, and then to
8 provide assurances that the remainder of PSE's system
9 was safe, and that's what we strived to accomplish in
10 the settlement.

11 MR. TROTTER: One other remark before you
12 turn to other parties. You mentioned at the outset
13 that none of the documents responded to the central
14 concern, and you mentioned the human suffering that
15 occurred here and the death that occurred here, and I
16 responded to part of that.

17 But in fact, and obviously, we may not have
18 been successful, but we were very sensitive to that
19 issue, and in the settlement agreement itself late in
20 the process, we agreed there needed to be some
21 meaningful statement about what happened in the Schmitz
22 case, and what happened there is explained in Paragraph
23 12, a joint statement of, to the best of our knowledge,
24 what had happened that caused this horrible accident,
25 and we wanted to provide that to the Commission to show

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1 that the primary goal of this docket was to find out
2 what happened and to determine what implications, if
3 any, there were to that of the system. So there was an
4 attempt to address that central concern. It may not
5 have succeeded, but there was an attempt.

6 JUDGE MACE: Mr. Williams?

7 MR. WILLIAMS: I think Mr. Trotter and
8 Mr. Rathbun are on the same page with Puget Sound
9 Energy on this. This is not a case that was lightly
10 investigated. You had months of intensive inquiry from
11 a variety of people who are investigators at the Staff
12 as well as PSE, and then you had some of the foremost
13 experts in the country taking a hard look at this. So
14 it's not as if these conclusions were lightly reached.

15 I think the bottom line is there was no
16 causal connection between the alleged violation and the
17 unfortunate death of Mrs. Schmitz. We understand
18 Commission's concern, but the fact still is it is what
19 it is. There was no connection there.

20 With respect to the absence of a penalty,
21 PSE's position has always been as stated in the prefile
22 testimony that although the cathodic protection issue
23 may have been an issue for a brief period of time, it
24 certainly was corrected expeditiously, and certainly
25 within a time frame that would warrant the absence of a

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1 penalty, and certainly that miswiring, all the experts
2 agree, had nothing to do with Mr. Schmitz's unfortunate
3 death.

4 So we agree with the Staff. We will be fully
5 prepared to respond to the Commission concerns at the
6 hearing room on the 14th.

7 JUDGE MACE: Ms. Zakrzewski, did you have
8 anything to add?

9 MS. ZAKRZEWSKI: Just briefly. The City
10 interceded, of course, because they were very concerned
11 about the death of one of its residents, which did come
12 from a gas leak that initially everyone thought might
13 be tied to a violation that was immediately noted.

14 We independently had experts look over the
15 data and material that was supplied by both sides, and
16 again, our expert also concluded that there was no
17 ability to tie the violation that was noted with the
18 cause of the explosion in this matter.

19 So we went on to the bigger issue, which is
20 there was a leak because of the age of pipe and stuff,
21 how to protect citizens from any other types of similar
22 leaks, but again, I have to agree with my counsel that
23 there just was nothing that anybody found to tie the
24 two together.

25 MR. WILLIAMS: Your Honor, if I may, under

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1 the regulations, PSE had 90 days to actually repair the
2 cathodic protection issue --

3 JUDGE MACE: Mr. Williams, I just want to
4 interrupt. I understand that and I think the
5 Commission understands that. I think that the
6 Commission gets that.

7 I think where the problem lies is in the
8 settlement. PSE admits that the standard for cathodic
9 protection was not met, and someone died and there is
10 no penalty. I think that the Commission understands
11 all of the other concerns that you have and appreciates
12 that, of course, PSE acted to try to improve the safety
13 of the system immediately. They were very responsive.
14 My sense is that that's not what the concern is about
15 the settlement agreement.

16 MR. WILLIAMS: I understand, but with any
17 decision-making body, the decision has to be based on
18 some evidence, and quite frankly, there is no evidence
19 that anybody has found to support a link between what
20 the Commission has flagged as a concern; that is, the
21 cathodic protection system being momentarily down and
22 the tragic death of Mrs. Schmitz, and I think that's
23 where we are. If you look at all the prefiled
24 testimony, that's the same result you are going to
25 reach every time you look at it.

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1 JUDGE MACE: I noticed this prehearing
2 conference just so that I could advise you of the kind
3 of things that the Commission is concerned about taking
4 into account everything that you've filed. I know the
5 Commission intends to ask these questions on the
6 record. I have appreciated hearing the responses that
7 you've made today; yet I cannot be certain that what
8 you have said will satisfy the Commission.

9 So I presume at this point I just have to
10 leave it up to you to notice that on September 14th,
11 the Commission does have concerns that it intends to
12 raise on the record along these lines and be prepared.
13 I think that I called the conference at this stage so
14 that if there was any possibility that the parties
15 could relatively quickly revisit the settlement
16 agreement to in some way address these concerns that
17 they would have the opportunity to do that before
18 September 14th.

19 Again, I've heard everything you've said, and
20 there is certainly a logic to it and it certainly makes
21 sense in certain ways, but in other ways, there remains
22 that central concern and problem.

23 MR. WILLIAMS: The other thing to consider is
24 to our knowledge -- maybe Mr. Trotter knows more about
25 this -- we are unaware of any concern raised by the

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1 Schmitz family about the settlement agreement, and this
2 is a matter of public record.

3 MR. TROTTER: Your Honor, this is Donald
4 Trotter again. Regarding the first question that you
5 identified today, I believe we will be prepared to
6 respond regarding the connection between the violations
7 and the death. We will add additional information
8 regarding the enforcement policies of the Commission.

9 With regard to cost collection, we will look
10 further into the statute, but I think my response here
11 is about all we will be able to say. The fourth issue,
12 I think, it was tied in with the first two, so we will
13 do our best to prepare response.

14 Is it necessary for us to provide orally the
15 points made in our filing of yesterday, or would you
16 just accept that into the record as part of the record,
17 or what is your intention in that regard?

18 JUDGE MACE: Let the record show I'm simply
19 reviewing the document at this time to be able to
20 answer Mr. Trotter's question.

21 I think that the response to the first two
22 items, the first one is related to assessing this
23 settlement in comparison with other recent gas pipeline
24 safety settlements, and the second one is related to
25 the Commission's authority for collecting the costs of

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1 consultants in an investigation.

2 It might be helpful for you to address those
3 concerns on the record, and I will try to make sure
4 that in the procedures that you have an opportunity to
5 do that, Mr. Trotter.

6 MR. TROTTER: Thank you. Frankly, Your
7 Honor, on Issue No. 3, which was the discussion of the
8 type of liability imposed on gas distribution companies
9 under RCW 80.28.210, many of us were confused as to
10 whether we had grasped what that issue was for. Did
11 our response get to it?

12 JUDGE MACE: I think the question that was
13 posed in the sense of is this the type of liability
14 that is a strict liability; in other words, that the
15 Company has to meet the safety requirements. I don't
16 have the phrase or what the statute says there, but in
17 other words, if something like this happens, is the
18 Company strictly liable, along those lines. Is it a
19 strict liability --

20 MR. TROTTER: You mean in a tort sense?

21 JUDGE MACE: I suppose it comes from torts,
22 but yes. There are some statutes that talk about
23 strict liability, product design. I'm not sure if that
24 statute talks about strict liability, but the courts
25 have found there is strict liability for product design

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1 defects, and I think the question is what kind of
2 liability did that impose on the Company.

3 MR. TROTTER: In a civil lawsuit, for
4 example?

5 MR. WILLIAMS: This is a different
6 proceeding. Is the question whether the Commission has
7 the ability to make a finding over ability?

8 JUDGE MACE: No. Just the sense of what is
9 the Company's liability to provide safe service under
10 that particular part of the statute.

11 MR. WILLIAMS: I'm sorry. I still need a
12 little clarity on that one. Is there a particular --
13 is the question, what is the range of violations and
14 resulting penalties?

15 JUDGE MACE: No. I think the question comes
16 from -- let's put it more in terms of philosophical
17 concern; that if something like this happens, a gas
18 pipeline explosion, and a residence is destroyed, under
19 this provision of the statute, and let me refer to it
20 if I can find my note on it, 80.28.20, does this
21 phrase, Every such company shall construct and maintain
22 such facilities as will be safe and efficient, is there
23 some way in which this statute would impose a very high
24 level of liability on the Company related to an
25 incident such as what happened to Mrs. Schmitz.

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1 MR. TROTTER: This is Don Trotter. You said
2 .20. Did you mean .210?

3 JUDGE MACE: Yes.

4 MR. TROTTER: By "liability," are you
5 referring to liability in proceedings before the
6 Commission or liability in a civil lawsuit for damages
7 by someone who is injured or both?

8 MR. WILLIAMS: Because those are different
9 questions. There is a state law dealing with
10 violations of regulations in a tort arena.

11 JUDGE MACE: I know that, and that's where
12 damages are awarded through court action, if I'm right,
13 81.04.440.

14 MR. TROTTER: Your Honor, I appreciate the
15 guidance. So you are referring in Issue 3 to civil
16 liability and tort as an aspect of that, or are you
17 looking just for what the Commission remedies would be?

18 JUDGE MACE: Well, that's a complicated
19 question. We are looking more at this from more of a
20 philosophical point of view, I would say. I recognize
21 that criminal penalties can be imposed under this
22 provision. I recognize that civil penalties can be
23 imposed under 80.28.212. I understand that the
24 Commission does not have authority to award damages as
25 might happen in a civil suit for a failure of a utility

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1 to operate safely. I think the question is what is the
2 Utility's obligation under that particular provision in
3 terms of providing safe service.

4 Again, let's go back to the central issue
5 here. The central concern is, if you will just move
6 away from a concern with the statutory language and
7 just think about the fact that a death occurred in this
8 case, that the Commission has had numerous cases
9 recently -- I know this is repetitive -- where there
10 have been technical violations of safety rules and it
11 has imposed penalties, and in this case, no penalty was
12 imposed. I guess what I'm trying to get you to focus
13 on is more the forest than the trees.

14 MS. ZAKRZEWSKI: But in those other
15 instances, was the violation, did it directly result in
16 the problem that was in front of the Commission?

17 JUDGE MACE: In those cases, and there have
18 been several of them in the last few years, generally,
19 these resulted from routine inspections where the
20 Commission found safety violations, and the settlements
21 imposed penalties on the companies, and usually there
22 was some type of a remedial action that the company
23 would take to improve so that no further violations
24 would occur in the future. In none of those cases were
25 there any injuries or fatalities.

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1 MR. TROTTER: Your Honor, we will be prepared
2 to address that issue.

3 JUDGE MACE: I'm sorry. I feel like I'm not
4 giving you as much guidance as I would like to. I'm
5 hampered in some respects in providing you with some
6 information. I'm trying to make you aware of where the
7 Commission's concerns are and what you are going to
8 need to do on the public record on Wednesday next week
9 in order to satisfy the Commission's concerns.

10 MR. TROTTER: Thank you, Your Honor.

11 JUDGE MACE: Mr. Williams, anything else?

12 MR. WILLIAMS: No. I appreciate your time.

13 JUDGE MACE: Ms. Zakrzewski, anything else?

14 MS. ZAKRZEWSKI: No.

15 JUDGE MACE: Thank you.

16 (Prehearing conference adjourned at 9:35 a.m.)

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