BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of PACIFIC POWER & LIGHT COMPANY, Petition For a Rate Increase Based on a Modified Commission Basis Report, Two-Year Rate Plan, and Decoupling Mechanism	DOCKET UE-152253 DECLARATION OF ELIZABETH M. DeMARCO

1 I, Elizabeth M. DeMarco, under penalty of perjury under the laws of the State of Washington, declare as follows:

2 I am over 18 years of age, a citizen of the United States, a resident of the State of Washington, and competent to be a witness.

3 I am employed by the Office of the Attorney General as a legal assistant for the Washington Utilities and Transportation Commission (Commission) division. I have been employed in this position since June 2005.

4 Attached to this Declaration is a true and correct copy of the Order Granting in Part and Denying in Part Petitions for Judicial Review, with Judge Murphy's letter ruling attached, filed July 25, 2014, in *Industrial Customers of Northwest Utilities v. Washington Utilities and Transportation Commission,* Thurston County Superior Court Case Nos. 13-2-01576-2 and 13-2-01582-7 (consolidated).

5 DATED at Olympia, Washington, and effective December 21, 2015.

ELIZABETH M. DeMARCO

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2014 JUL 25 AM 9:11

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set:
Date: Presented Ex Parte
Time:
THE HONORABLE CAROL MURPHY

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES,

Petitioner,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Respondent.

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, PUBLIC COUNSEL DIVISION,

Petitioner,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Respondent.

CASE NOS. 13-2-01576-2 and 13-2-01582-7 (*consolidated*)

~~[PROPOSED]~~ ORDER GRANTING IN PART AND DENYING IN PART PETITIONS FOR JUDICIAL REVIEW

ATTORNEY GENERAL OF WASHINGTON
Public Counsel Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
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THIS MATTER came before the Court pursuant to RCW 34.05.570 on the Petitions for Judicial Review of the Industrial Customers of Northwest Utilities and the Public Counsel Division of the Washington State Attorney General's Office. After considering the Petitions for Judicial Review, the administrative record, briefing and oral argument from the parties, and for the reasons set forth in the Court's written ruling, entered June 25, 2014, and attached to this Order as Appendix A ("Ruling") and incorporated herein by this reference, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The Washington Utilities and Transportation Commission's ("Commission") decision not to hold a general rate case in the administrative proceeding below is AFFIRMED;

2. The Commission's use of an attrition adjustment in the administrative proceeding below is AFFIRMED; and

3. The Commission's determination that the Puget Sound Energy, Inc. rates to be charged during the rate plan approved in the administrative proceeding below are just, fair, reasonable and sufficient is REVERSED because the Commission's findings of fact with respect to the return on equity component of Puget Sound Energy, Inc.'s cost of capital in the context of a multi-year rate plan are unsupported by substantial evidence and the Commission improperly shifted the burden of proof on this issue from Puget Sound Energy, Inc. to the other parties in the proceeding below, contrary to RCW 34.05.461(4) and RCW 80.04.130(4).

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IT IS FURTHER ORDERED, this case is REMANDED to the Commission for further adjudication, consistent with this Court's Order and attached Ruling, to establish fair, just, reasonable and sufficient rates to be charged under the rate plan, and to order any other appropriate relief.

Dated this 25th day of July, 2014.

Carol Murphy

The Honorable Carol Murphy
Thurston County Superior Court

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DATED this 24th day of July, 2014.

PRESENTED BY:

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APPENDIX A

Superior Court of the State of Washington
For Thurston County

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June 4, 2014

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Re: INDUSTRIAL CUSTOMERS OF NW UTILITIES V. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION and WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, PUBLIC COUNSEL DIVISION V. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Thurston County Cause Nos. 13-2-01576-2, 13-2-01582-7 (Consolidated)

Dear Counsel:

On May 9, 2014, this court heard oral argument for these two consolidated administrative appeals. The petitioners are Industrial Customers of Northwest Utilities (ICNU) and the Public Counsel Division of the State Attorney General's Office. The court also allowed intervention by Puget Sound Energy (PSE), Northwest Energy Coalition, and Northwest Industrial Gas Users.

There are three primary arguments for reversal in this case. First, Public Counsel argues that the Commission should have conducted this adjudication as a general rate case. Second, both Public Counsel and ICNU challenge the rate

plan. Third, Public Counsel appeals the attrition adjustment. The court affirms the procedural nature of this case, in which the Commission declined to conduct a general rate case. The court reverses the rate plan because it is not based on substantial evidence in the record and because the Commission shifted the burden of proof away from PSE. Finally, the court affirms the attrition adjustment.

1. Was a General Rate Proceeding Required?

The Commission used this case to experiment with a new process, called an expedited rate filing, as well as a decoupling plan[1] and attrition analysis. This expedited rate filing process was not the product of rulemaking, but instead the result of discussions among Commission staff and stakeholders. While the Court finds it unusual that an administrative change of this magnitude was made outside of the rulemaking process, no party has appealed the expedited rate filing process itself. The issue of whether that is an appropriate process for setting utility rates, in a general sense, is not before the court.

Public Counsel does, however, argue that this particular action should have been adjudicated as a general rate proceeding. This Court disagrees, holding that the Commission acted within its discretion to dispense with a general rate proceeding.

Typically, general rate proceedings are required under certain circumstances. Such proceedings have heightened evidentiary requirements. *See* Chapter 480-07 WAC. Public Counsel asserts that such a proceeding was required because "gross revenue provided by any customer class would increase by three percent or more." WAC 480-07-505(1)(b). The Respondent asserts that the increase was not over three percent, and the Commission specifically capped annual rate increases at three percent. While Public Counsel asserts that the increase is actually over nine percent when considering the three-year period in which this order will be in effect, it is not readily clear whether the standard should be based on annual impact or multi-year impact. The Court need not resolve these issues because the Commission acted within its discretion to waive the general rate proceeding.

"The commission may grant an exemption from or modify the application of its rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes." WAC 480-07-110. Here, the Commission articulated why it followed this process:

> [The] pattern of one general rate case filing following quickly after the resolution of another is overtaxing the resources of all participants and is

[1] Briefly, decoupling is the separation of a utility company's profit from its total sales of energy. This is considered desirable in order to encourage energy efficiency. Decoupling is not at issue in this appeal.

> wearying to the ratepayers who are confronted with increase after increase. This situation does not well serve the public interest and we encourage the development of thoughtful solutions.
>
> The solutions we approve here include an update to PSE's rates established in the 2011/2012 GRC in an Expedited Rate Filing (ERF) that is limited in scope and results in a relatively modest increase (1.6 percent) in electric rates and a slight decrease (0.1 percent) in natural gas rates.
>
> . . .
>
> The third initiative the Commission approves in this Order is a rate plan that will allow modest annual increases in PSE's rates while requiring that the Company not file a general rate increase before March 2016 at the earliest. This holds the promise of customers paying rates that are lower than might be the case under traditional approaches to ratemaking. The rate plan is designed to give an incentive to PSE to become more efficient and to implement cost-cutting measures that will promote its ability to earn its authorized overall rate of return. The rate plan includes important protections for customers, including an earnings test that requires PSE to share with customers on an equal basis any earnings that exceed its authorized return during the term of the plan. Annual rate increases also are capped at 3.0 percent.

AR 960-61.

This Court holds that the Commission acted within its discretion when it dispensed with a general rate filing case. The Commission considered the public interest when it articulated that participants' resources were being overtaxed, constant increases have been "wearying to the ratepayers," and the public interest has not been served well by the status quo of serial general rate cases. The Commission also soundly articulated that this approach is best for customers because the rates will ultimately be lower than for general rate filing cases, and that PSE will be given an incentive to become more efficient, another benefit to the public.

These reasons are consistent with the purposes of the underlying regulations and with applicable statutes, which articulate a general policy of making natural gas and electric services affordable to customers, advance efficiency, ensure that prices are reasonable, and permit flexible pricing. RCW 80.28.074. The Commission holds special expertise in advancing these goals, and this Court finds no basis to reverse the decision to dispense with a general rate filing in this case.

2. Did the Commission Err When it Set the Rate Plan?

Public Counsel and ICNU urge this court to reverse the rate plan, arguing that it was not based on substantial evidence and that the burden was improperly shifted. This Court agrees.

A core principal of public utilities law is that:

> All charges made, demanded or received by any gas company, electrical company, wastewater company, or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

RCWA 80.28.010(1). The analysis of whether a rate is "just, fair, reasonable, and sufficient" is complex, and generally is determined through sophisticated models. The Commission has particular expertise in understanding the relevant evidence, determining which evidence and models are credible, and determining what "fair, reasonable, and sufficient" means in the context of an individual rate case. *See ARCO Products Co. v. Utilities & Transp. Com'n*, 125 Wn.2d 805 (1995); *People's Organization for Wash. Energy Resources v. Utilities & Transp. Com'n*, 104 Wn.2d 798 (1985). This court does not attempt to override the Commission's expertise on such matters, but focuses on the procedural requirements.

The Legislature requires that:

> At any hearing involving any change in any schedule, classification, rule, or regulation the effect of which is to increase any rate, charge, rental, or toll theretofore charged, the burden of proof to show that such increase is just and reasonable shall be upon the public service company.

RCWA 80.04.130(4). Further, as the Commission stated, rates must be "based solely on the record developed in [the utility rate] proceeding."[2] All findings and orders in an adjudication must be limited to the record developed for that adjudication.[3]

In this case, the Commission increased electricity rates beyond the rate that was approved in the previous order. Moreover, it extended annual electric and gas

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[2] AR 975 (Order 07, at ¶ 28) (citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va*, 262 U.S. 679 (1923)).

[3] RCW 34.05.476(3) ("Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings."); RCW 34.05.461(4) ("Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding."; WAC 480-07-820(1)(b) (contested issues are resolved "on the basis of the official record in a proceeding.").

rate increases for a three-year period. It did not base these rates on a sophisticated model or complex presentation of evidence by PSE regarding its current situation. Instead, it based this rate on (1) rejection of the expert testimony that PSE's opponents offered, (2) reliance on a settlement agreement by another company, Avista, (3) generic evidence about other energy companies, not PSE, and, most strongly, (4) the Commission's determination of the proper rate in a separate, 2011 PSE general rate case.

The Commission expressed frustration about the lack of evidence in the record regarding rates, and specifically the return on equity component in rate-setting analysis. The Commission stated that "[t]he record on this issue in this case lacks the depth and breadth of data analysis, and the diversity of expert evaluation and opinion on which the Commission customarily relies in setting return on equity." AR 989. Commissioner Jones issued a dissenting opinion on this issue, asserting that the evidence was insufficient to warrant an adjustment to the return on equity and that PSE had not met its burden of proof. AR 1060-63.

Instead of requiring more evidence, however, the majority of the Commission purported to keep the status quo of 2011 rates. In fact, however, the 2011 rate was not adjudicated to continue for multiple years until the Commission issued this order. The Commission set rates in this Order, and by its own admission, it did so without the evidence it deemed necessary and customarily relied on. Instead, the evidence that it relied on was from a previous PSE adjudication, a settlement agreement by Avista, and generic information that was not specific to PSE. This does not satisfy the requirement of substantial evidence in the record. *See* RCW 34.05.570(3)(e); *U.S. West Communications v. Wash. Utilities & Transp. Com'n*, 134 Wn.2d 48 (1997).

Additionally, the Commission did not hold PSE to its burden of proof. Rather than putting on its own evidence, PSE merely attempted to rebut the respondents' evidence. AR 987. The Commission held that "on balance . . . the evidence in this case is simply too spare to support a reduction in PSE's current authorized [return on equity] to reflect current financial market conditions." AR 989. This demonstrates that the majority of the Commission did not hold PSE to the burden of proving that the rate increases are justified. Commissioner Jones dissented on this issue of burden of proof, and this Court holds that the majority followed improper procedure. For these reasons, the Court reverses the rate plan and remands for further adjudication consistent with this opinion.

3. Did the Commission Err When it Established the Attrition Adjustment?

Finally, Public Counsel takes issue with the attrition adjustment, escalating elements collectively referred to as the K-Factor. Public Counsel argues that the Commission departed from prior precedent by granting an attrition adjustment

without a finding of extraordinary circumstances and without an attrition study, and it failed in its duty to explain its departure from prior precedent.

This Court is sympathetic to Public Counsel's plea for consistency in adjudications. Litigants want to forecast what evidence will be persuasive to the adjudicators and want to be able to predict how a future case will likely be resolved. Public Counsel presents a historical analysis of attrition adjustments, and shows that they were greatly disfavored in the past. It appears that the Commission may be changing course and granting attrition adjustments more liberally now. The Commission disagrees that there has been a change.

This is certainly an appropriate topic for policy discussions and perhaps rulemaking. However, Public Counsel presents no mandatory authority to show that any change constitutes arbitrary and capricious agency action.[4] This Court is required to grant great deference to the Commission and may not reverse merely based on a dispute in the evidence or a departure from the expected course of action. *See ARCO Products Co.*, 125 Wn.2d 805; *People's Organization for Wash. Energy Resources*, 104 Wn.2d 798. The Court therefore affirms the attrition adjustment.

The Court will enter an order consistent with this ruling ex parte with all parties' counsel's signatures, or upon presentment with notice to all parties properly noted on a Friday civil motion calendar.

Sincerely,

Carol Murphy

Carol Murphy, Judge
Thurston County Superior Court

CM: emv

cc: Court File

[4] The cases that Public Counsel cite are not clearly applicable to Washington administrative cases, and even if applicable, they merely state that the agency must provide a reasonable explanation from its departure from the previous course. *See Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973);*Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970).