

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

Puget Sound Energy, Alberta Investment
Management Corporation, British
Columbia Investment Management
Corporation, OMERS Administration
Corporation, and PGGM Vermögensbeher
B.V.

For an Order Authorizing Proposed Sales
of Indirect Interests in Puget Sound Energy

DOCKET U-180680

COMMISSION STAFF'S RESPONSE
TO J. RICHARD LAUCKHART'S
PETITION FOR INTERLOCUTORY
REVIEW

I. INTRODUCTION

1 Pursuant to WAC 480-07-810(3), Staff of the Washington Utilities and
Transportation Commission (Commission) files this response in opposition to the Petition
for Interlocutory Review of J. Richard Lauckhart.

II. BACKGROUND

2 On November 13, 2018, Richard Lauckhart filed a petition to intervene
("Intervention") with the Commission. In his intervention petition, Mr. Lauckhart requests
leave to intervene to represent PSE customers. *Intervention* at ¶ 4. He asserts that his
intervention will not unreasonably broaden the issues, burden the record, or delay the
proceeding, and he states that he will propose conditions on the ownership transfer that will
prohibit behaviors by the new owners relevant to the Energize Eastside project. *Intervention*
at ¶ 5. At the prehearing conference, Mr. Lauckhart reiterated the arguments in his petition
to intervene and stated: "By allowing my intervention in this proceeding, the Commission
can develop a more robust understanding of the transmission planning problems that have
risen in the current ownership." TR. At 44:6-9.

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The Commission entered Order 03, the prehearing conference order, on November 21, 2018, which contains the decision of the Administrative Law Judge (ALJ) denying Mr. Lauckhart's petition for intervention. In Order 03, the ALJ found that Mr. Lauckhart failed to demonstrate he has a substantial interest in the proceeding that is not already adequately represented by another party. Order 03 at ¶ 28. Further, the ALJ found that Mr. Lauckhart's intervention would not be in the public interest, although the decision recognizes that Mr. Lauckhart's testimony could be valuable if framed by one of the other parties. Specifically, the ALJ reasoned that because Public Counsel represents residential customers and because Mr. Lauckhart's prior knowledge of PSE as an employee did not suffice as a foundation for party status, Mr. Lauckhart's participation as an independent party would not aid the Commission in its evaluation of the Joint Application. Order 03 at ¶ 29.

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On November 26, 2018, Mr. Lauckhart filed a petition for interlocutory review of Order 03 ("Petition"). In his Petition, he argues that his participation in the case will benefit the Commission and the public interest because of his unique qualifications and knowledge of abuses that foreign owners have placed on PSE customers, which he believes will continue. He lists five other documents that he has already filed in this proceeding. *Petition* at ¶ 5. He states that he does not understand the conclusion in Order 03 that his testimony would be of value as a witness for another party but that his intervention as a stand-alone party would not serve the public interest. *Petition* at ¶ 7. He suggests that the Commission should investigate "the abuses" that PSE has "made to the Transmission Planning process" now, in this proceeding. *Petition* at ¶ 8.

III. LEGAL STANDARD

A. Review of Interlocutory Orders

5 Under WAC 480-07-810, the Commission has discretion whether to review an interlocutory order. The Commission will only accept review of an interlocutory order if it finds that:

- a) The order terminates a party's participation in the proceeding, and the party's inability to participate thereafter could cause it substantial and irreparable harm;
- b) Immediate review is necessary to prevent substantial prejudice to a party that would not be remediable in the commission's final order; or
- c) Immediate review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

WAC 480-07-810(2).

B. Determining Intervention

6 Interventions in Commission proceedings are governed by the Commission's intervention rule, WAC 480-07-355, as well as by the Administrative Procedure Act (APA) at RCW 34.05.443. The APA provides for intervention if the petitioner qualifies as an intervenor under any provision of law and if the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. RCW 34.05.443(1). In addition, the APA provides that the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include: (a) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition, and (b) limiting the intervenor's use of discovery, cross-examination, and other procedures. . . . RCW 34.05.443(2).

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Under WAC 480-07-355(3), the presiding officer in a proceeding “may grant a petition to intervene if the petitioner has a substantial interest in the subject matter of the hearing or if the petitioner’s participation is in the public interest.” To determine if a petitioner has a substantial interest in a matter, the Commission applies a zone of interest test to see if the petitioner has shown that there is a nexus between the purpose of the organization and an interest protected by a Washington statute within the Commission’s jurisdiction.¹ With regard to whether intervention is in the public interest, the Commission “[has] more latitude to grant intervention when such action would enhance [the Commission’s] understanding and analysis of the matter at hand.”²

IV. ARGUMENT

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The Commission need not accept review of the decision to deny Mr. Lauckhart’s petition for intervention because he has not shown the substantial and irreparable harm, the substantial prejudice, or resource savings referenced in Commission’s intervention rule, WAC 480-07-355. If the Commission decides to exercise review, however, it should uphold the decision to deny Mr. Lauckhart’s petition. Under the Commission’s intervention rule, a petitioner for intervention must show either that he has a substantial interest in the proceeding or his participation in the proceeding is in the public interest. The first prong concerns a petitioner’s own interests, whereas the second prong considers the public interest. Mr. Lauckhart has not met either prong of the intervention rule. Further, the

¹ *In Re Joint Application of Verizon Communications Inc. and Frontier Communications Corporation For an Order Declining to assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest Inc.*, Docket UT-090842, Order 05, ¶ 14 (Sept. 10, 2009). The Commission recently confirmed this standard in *Wash. Utils. And Transp. Comm’n v. Avista Corp.*, Docket U-170970, Order 03, ¶ 14 (Nov. 20, 2017).

² Docket UT-090842, Order 05 at ¶ 14. The Commission applied this standard one year ago in Docket U-170970, Order 03 at ¶ 15.

Administrative Procedure Act (APA) supports denial of his intervention petition because Mr. Lauckhart's participation would likely impair and delay the proceedings.

A. Pursuant to the Commission's Rule on Interlocutory Orders, Interlocutory Review of the Decision Denying Mr. Lauckhart's Intervention Is Not Available

9 Under WAC 480-07-810, the Commission's rule on interlocutory orders, the Commission can elect to review an interlocutory order if it finds that certain factors are present. Regarding whether the prehearing conference order would terminate Mr. Lauckhart's participation and whether that would cause him substantial and irreparable harm, it is true that denying his petition for intervention limits his participation but the order does not cause him substantial and irreparable harm. Mr. Lauckhart has already been able to contribute written and oral comments to the record, and he has articulated particular conditions that he proposes be placed on an approval of the transaction. Not participating as a party in the remainder of the proceedings will not harm him.

10 In his petition for interlocutory review, Mr. Lauckhart claims that terminating his participation could cause harm to PSE customers. This is not the harm, however, that the Commission considers under the rule. The rule asks the Commission to consider harm to the petitioner and not to others: the consideration is whether "the party's inability to participate thereafter could cause *it* substantial and irreparable harm" (emphasis added). As one of PSE's customers, Mr. Lauckhart's interests in this proceeding will be represented by Public Counsel. Mr. Lauckhart has not shown any substantial harm to him, individually, from the ALJ's decision on his intervention.

11 Regarding whether immediate review is necessary to prevent substantial prejudice that would not be remediable in the Commission's final order, it is true that denial of intervention would terminate Mr. Lauckhart's participation in the proceeding, which cannot

be redressed once the case is before the Commission for a decision on the merits. Even in light of this fact, however, review remains discretionary. Given the context that Mr. Lauckhart is already represented as a customer by Public Counsel and that he has already participated significantly in the proceeding, the Commission need not revisit the ALJ's determination that Mr. Lauckhart does not have a substantial interest in the proceeding and that his intervention would not be in the public interest.

12 Regarding whether immediate review could save substantial effort or expense or whether some other factor is present that outweighs the costs in time and delay of exercising review, there is no factor present that makes exercising review worthwhile. If the Commission wishes to review the ALJ's determination, it must be done now or it is not useful to the petitioner. But there is no substantive reason for the Commission to exercise review. Mr. Lauckhart filed a written petition for intervention, argued in support of his intervention at the prehearing conference, and has not alleged anything new in his petition for interlocutory review. Reviewing the decision in the prehearing conference order and preparing a decision on interlocutory review of the order represent costs in terms of time and expended resources, which simply are not outweighed by anything. As Staff has stated before, Mr. Lauckhart's concerns are better addressed in other types of proceedings. His belief that the Commission should address them here and now does not support review of the prehearing conference order. Mr. Lauckhart should present his concerns in other proceedings, and the Commission need not expend further resources in this proceeding by exercising review of the prehearing conference order.

B. Mr. Lauckhart Does Not Have a Substantial Interest in the Proceeding

13 Mr. Lauckhart does not have a substantial interest in the “subject matter of the hearing.” In order to demonstrate a “substantial interest,” the petitioner must show that there is a nexus between the intervenor’s purpose and an interest protected by a Washington statute within the Commission’s jurisdiction. Mr. Lauckhart has expressed concern about transmission planning and costs. Indeed, the “abuses” he references, refer exclusively to PSE’s expenditures and process for transmission projects. While it is true that these matters certainly are within the purview of the Commission, they are not the subject matter of the instant proceeding. It is not enough that a petitioner state an interest that the Commission can adjudicate; rather, that interest must correspond with the matter that is before the Commission for decision. The subject matter of this proceeding is whether the transfer of a 43.99 percent ownership interest in PSE is in the public interest. Mr. Lauckhart’s interest is in PSE’s capital asset planning and construction process and not in the subject matter of the hearing.

C. Mr. Lauckhart Has Not Shown That His Intervention Is In the Public Interest

14 Mr. Lauckhart’s intervention is not in the public interest because he raises issues that are outside the scope of the proceeding. To determine whether a petitioner’s participation is in the public interest, the Commission considers whether the intervention “would enhance [the Commission’s] understanding and analysis of the matter at hand.” Mr. Lauckhart’s participation and knowledge, which certainly can be valuable in other proceedings, will not assist the commission in deciding “the matter at hand,” which is the transfer of a 43.99 percent ownership interest in PSE. Mr. Lauckhart’s issues are best considered in an

Integrated Resource Plan proceeding and/or a general rate case considering the investments and expenditures that are the subject of Mr. Lauckhart's concerns.

15 In the comments he filed in this docket, Mr. Lauckhart proposes seven conditions. All of these conditions relate to transmission, and one of them involves a prudence review of a project that has not yet been completed. The Commission has consistently considered the prudence of capital investments after the facilities are in service. The Commission does not grant pre-approval or pre-rejection of expenses and investments. And these prudence issues are typically considered in a general rate case. This has been true for over 25 years. For example, in 1994, the Commission said: "The Commission has stated consistently that the prudence review of new resource acquisitions would be conducted in general rate cases only."³ Yet Mr. Lauckhart persists in advocating that the Commission consider these issues in this proceeding. In proposing that the Commission investigate PSE's transmission planning process and costs, he is actually asking the Commission to conduct a prudence review of a project that is not in service in a proceeding that bears no relation to a general rate case. The issues that he raises do not belong in this proceeding and should not be decided in this proceeding. Accordingly, a presentation on these issues will not assist the Commission in deciding the Joint Application that is the subject of the instant proceeding.

D. Administrative Procedure Act Considerations Support Upholding the Denial of Mr. Lauckhart's Intervention

16 Finally, Mr. Lauckhart's intervention is inconsistent with the Administrative Procedure Act, which limits intervention to participation that will not impair the orderly and prompt conduct of the proceedings. Mr. Lauckhart's participation is likely to impair the

³ *Wash. Utils. & Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket UE-920499, Nineteenth Supplemental Order, p. 6 (Sept. 27, 1994) (citation omitted).

orderly and prompt conduct of this proceeding because, as discussed above, his concerns are outside the subject matter before the Commission in this proceeding. Allowing his intervention, even with conditions as provided in the APA, would not render his participation more helpful to the Commission. The ALJ has suggested that his testimony could be valuable if he worked with one of the parties. If not channeled by one of the parties, however, Mr. Lauckhart's participation is likely to stray from the matter at hand, which would impair and delay the proceedings. Staff believes that the Commission should deny Mr. Lauckhart's petition for intervention in this proceeding but continue to welcome his participation in other proceedings where his interests are properly before the Commission.

V. CONCLUSION

17 In summary, the Commission need not exercise review of the order denying the petition for intervention of Mr. Lauckhart. If the Commission decides to the review Order 03, however, it should uphold the ALJ's decision to deny Mr. Lauckhart's petition for intervention for the reasons set forth in this response.

DATED December 4, 2018.

Respectfully submitted,

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