

2 Some of the issues Petitioners seek to address through this Petition are currently being reviewed by the Commission in an ongoing investigation—the Commission’s Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs in Docket UE-151500 (“Investigation”). Some of the issues raised by Petitioners are currently being addressed in PSE’s integrated resource planning (“IRP”) process or will be addressed in PSE’s upcoming rate case. The Commission already has the tools in place to address issues raised by Petitioners that are legitimately within the Commission’s jurisdiction. As discussed in more detail herein, the Petition filed in this docket is unnecessary, duplicative, and seeks relief outside the Commission’s authority. For these reasons, the petition should be dismissed.

II. BACKGROUND

A. PSE’s Ownership Interest in Colstrip Units 1 and 2

3 As the Petition acknowledges, Colstrip Units 1 and 2 are coal-fired generating facilities located in Colstrip, Montana.² PSE owns a 50 percent interest in these units, and Talen Energy Corporation (“Talen”), a merchant generator, owns the remaining 50 percent interest in the units.³ As Petitioners acknowledge, Talen is not a regulated utility in the State of Washington,⁴ and the Commission has no authority to regulate Talen.

B. The Commission’s Ongoing Investigation

4 On July 21, 2015, the Commission opened an Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs in Docket UE-151500. The Commission

² Exhibit 1 to Petition at 2.

³ *Id.*

⁴ *See id.* (acknowledging important differences between merchant electric companies and regulated utilities). Despite the fact that the Commission has no regulatory authority over Talen or its business, much of Exhibit 1 to Petition (p.6-17) addresses Talen’s interest in Colstrip Units 1 and 2.

issued a Notice of Opportunity To File Written Comments (“Notice”), which invited PSE and other interested parties to submit written comments on several topics related to the cost of closing Colstrip Units 1 and 2 and the cost of environmental remediation. In its Notice, the Commission stated that it opened this docket in response to legislation considered in the 2015 Legislative Session that would have established a process for an electrical company to petition the Commission for approval of a plan to acquire and decommission one or more coal-fired generating units, and secure ratepayer funds to pay for environmental remediation.⁵ The Commission stated that “[w]hile the bills under consideration did not pass the Legislature, the Commission recognizes the need to assess the economic risks associated with continued operation of, and the costs to retire, certain coal-fired generating units included in Washington rates.”⁶

C. Preapproval Proceedings For New Major Investment at Colstrip

5 In 2014, as part of the review of PSE’s IRP, the Commission recognized that although it has historically relied on post-investment prudence review for major investments in power plants, a pre-approval process may be more suitable for major investment in Colstrip. As such, the Commission suggested PSE and Commission Staff consider such a process for preapproval of major investment decisions in Colstrip.⁷ PSE appreciates the opportunity to seek preapproval of major capital investment for Colstrip and, eventually, as major capital expenditures for Colstrip become necessary, PSE may use this process to bring such proposed expenditures to the Commission for preapproval.

⁵ Docket UE-151500 Notice of Opportunity To File Written Comments at 1 (July 21, 2015).

⁶ *Id.*

⁷ Utilities and Transportation Commission Comments on Puget Sound Energy’s Colstrip Study, Attach. B, Docket UE-120767 at 14-15. Exhibit 1, page 1 to Petition similarly recommends preapproval.

D. The Commission Has Charted a Plan For Considering Colstrip

6 The Commission has mapped out a path to address issues relating to Colstrip that are within the scope of the Commission’s authority. The Commission is undertaking an Investigation with respect to potential decommissioning and remediation costs, and the Commission is seeking input from PSE and interested parties in this Investigation. Additionally, the Commission has opened the door for utilities to file for preapproval before undertaking major investment at Colstrip, thus allowing the Commission and interested parties to weigh the costs and benefits of planned investment as compared to decommissioning and remediation. PSE recognizes that there may be an appropriate time to seek preapproval of major capital expenses for Colstrip Units 1 and 2. That time has not yet arrived, and it makes no sense to conduct a preapproval proceeding in a vacuum. The path that the Commission has charted is consistent with the Commission’s delegated authority, in contrast to the relief requested in the Petition which is outside the Commission’s authority.

III. STANDARD FOR GRANTING MOTION TO DISMISS

7 WAC 480-07-380(1)(a) provides that “[a] party may move to dismiss another party’s claim or case on the asserted basis that the opposing party’s pleading fails to state a claim on which the commission may grant relief.” When considering a motion to dismiss, the Commission must determine whether, viewing the petition in the light most favorable to the Petitioners, the Commission would grant the requested relief.⁸ Where the ultimate relief requested falls outside the Commission’s authority, the petition must be dismissed.

⁸ *WUTC v. PSE*, Docket UE-011163, Sixth Supp. Order at ¶ 16 (Oct. 4, 2001).

8 The ultimate relief the Petitioners seek in an adjudicative proceeding—closure of a plant outside the state, owned in part by an entity over which the Commission has no jurisdiction—is outside the scope of the Commission’s authority. Further, the Petitioners’ request for a broad prudence determination with respect to a power plant that is not currently undergoing major capital expenditures is inconsistent with the Commission’s past practice. Additionally, the requested adjudicative proceeding duplicates some issues to be addressed in the Commission’s ongoing Investigation. That Investigation is better tailored to fit within the Commission’s delegated authority. For these reasons the Petition should be dismissed.

IV. ARGUMENT

A. The Requested Relief Is Inappropriate For This Proceeding

9 Petitioners are requesting relief that is outside the authority of the Commission or that is more appropriately addressed in other proceedings. Petitioners request that the Commission “commence an adjudicatory proceeding for the purpose of determining the prudence of new capital expenses by Puget Sound Energy (“PSE”) in the Colstrip coal-fired electric generating facility and to establish a closure or partial-closure plan for Colstrip Units 1 and 2.”⁹

1. A general prudency proceeding is not justified or appropriate

10 Petitioners do not point to specific new major capital expenditures that are being made at Colstrip Units 1 and 2 and that require a prudence determination. While PSE is open to considering the Commission’s recommendation in Attachment B to the IRP compliance letter in Docket UE-120767 to seek preapproval of major capital expenditures at Colstrip,

⁹ Petition at ¶ 1.

there is no basis for a general prudence proceeding, outside of a general rate case, in the absence of actual or imminent major capital expenditures for an existing power plant.

The Commission should reject Petitioners' request to open an adjudicative proceeding to address vague claims of imprudence, outside of a general rate case or other preapproval proceeding. This is particularly true when their ultimate request is for the Commission to order closure of a plant located outside the state of Washington, owned in part by an entity outside the Commission's jurisdiction, which has been providing baseload generation at a reasonable cost to PSE's customers for decades.

2. The Commission lacks jurisdiction to provide the relief sought

11 Petitioners are requesting a proceeding that would require the Commission to step outside the realm of regulatory oversight delegated to it by the Legislature and to micromanage PSE's business as well as the business of Talen, which is not under the jurisdiction of the Commission. Specifically, Petitioners ask the Commission to issue an order in an adjudicative proceeding that "provides a definitive resolution on the future of Colstrip Units 1 and 2."¹⁰ Additionally, Petitioners' Prayer For Relief asks that the scope of the proceeding include: "A directive, if supported by the evidence, that Joint Petitioners, PSE, Commission Staff, and Intervenors propose a plan for the closure of Colstrip Units 1 and 2."¹¹ The Commission has no authority to issue a definitive resolution or directive to shut down a plant located outside the State of Washington and owned in part by a company outside the Commission's jurisdiction. The Commission exists as a creation of the Legislature without inherent or common-law powers, and it may exercise only those

¹⁰ Petition at ¶ 36.

¹¹ Petition at ¶ 41.

powers conferred on it either expressly or by necessary implication.¹² Petitioners have cited no authority that allows the Commission to order closure of a plant in Montana, owned in part by a company outside the Commission’s jurisdiction.

12 Moreover, it is a well-established principle that an agency such as the Commission does not act as a “super board of directors” for a regulated company.¹³ The Commission’s role is not to micromanage PSE’s business by ordering PSE to acquire a specific plant or to shut down another.¹⁴ This is even more true in this case, when the plant Petitioners seek to have the Commission order closed is in another state and owned in part by Talen (and operated by Talen), over which the Commission has no jurisdiction. Because the ultimate relief sought in the adjudication is outside the scope of the Commission authority, the Petition should be dismissed.

B. The Authority Petitioners Rely on Does Not Require an Adjudicative Proceeding

13 Petitioners have cited to no authority that *requires* the Commission to open a adjudicative proceeding with respect to Colstrip Units 1 and 2. In support of their request for an adjudicative proceeding, Petitioners point to RCW 34.05.413. However, this statute limits the Commission’s authority to commence an adjudication to matters “within the scope of its authority.”¹⁵ Moreover, the statute does not *require* the Commission to institute an adjudicative proceeding in all situations. Rather, it requires an adjudicative

¹² *Human Rights Comm’n ex rel. Spangenberg v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 125 (1982) (quoting *State v. Munson*, 23 Wn. App. 522, 524 (1979)). “The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein.” *McGuire v. State*, 58 Wn. App. 195, 198 (1990).

¹³ Leonard S. Goodman, *The Process of Ratemaking* at 134 (PUR 1998) (citing *Northern Penna. Power Co. v. Penna. PUC*, 5 A.2d 133 (1939)).

¹⁴ *See, e.g., id.* (citing *Re Integrated Resource Planning*, 139 PUR4th 379, 382 (Colo. PUC 1992)).

¹⁵ RCW 34.05.413(1).

proceeding when such is “*required by law or constitutional right.*”¹⁶ As discussed in more detail below, there is no statute, law, or Commission order requiring the Commission to institute an adjudicative proceeding under the circumstances set forth in the Petition, and in fact the relief requested in Petitioners’ proposed adjudicative proceeding exceeds the Commission’s authority. Moreover, RCW 34.05.416 expressly gives the Commission the right to decide *not to conduct* an adjudicative proceeding.¹⁷

14 Petitioner’s reliance on RCW 80.04.110 similarly does not mandate that the Commission commence an adjudicative proceeding. That statute allows for complaints to be made by filing a petition or complaint setting forth any act or thing done or omitted to be done by any public service corporation in violation or claimed to be in violation, of Title 80 RCW, Title 81 RCW, Commission order or rule. PSE has not violated Title 80 or Title 81, and the allegations cobbled together by Petitioners do not support a violations of these statutes or rules, nor do they state a claim for which relief may be granted by the Commission.

1. Petitioners rely on rate-setting statutes but this is not a rate case

15 Petitioners’ assertion—that the ongoing operation of Colstrip Units 1 and 2 somehow violates PSE’s duty to furnish safe, adequate and efficient electrical service through rates that are just and reasonable—is insufficient to state a claim on which relief may be granted. To support their claim, Petitioners improperly rely on RCW 80.28.010(2) (obligation to furnish and supply service, instrumentalities, facilities as shall be safe, adequate and efficient and in all respects just and reasonable); RCW 80.28.020

¹⁶ RCW 34.05.413(2).

¹⁷ “If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency’s reasons and of any administrative review available to the applicant.” RCW 34.05.416.

(obligation for practices or contracts affecting rates to be just and reasonable); RCW 80.28.040 (practices, acts or services may not be unjust, unreasonable, improper, insufficient, inefficient or inadequate).¹⁸ The statutes the Petitioners rely on to support their complaint are “rate setting statutes” as the Washington Supreme Court has recognized.¹⁹ In essence, Petitioners are claiming that PSE’s filed rates may not be fair, just, reasonable, and sufficient, because PSE supplies some electricity from a coal plant in Montana, despite the fact that this coal plant was included in PSE’s rates for the past several decades, including when the Commission last set PSE’s power cost rates in 2014. Petitioners have failed to state a claim on which relief may be granted, based on the statutes cited in the Petition.

2. Petitioners’ advocate for single-issue ratemaking

16 Petitioners base their complaint on a challenge to PSE’s filed rates. They claim these rates are unjust or unreasonable based on one component of the rates—power sourced from Colstrip Units 1 and 2. Their petition should be dismissed because it asks the Commission to engage in single issue ratemaking, which is contrary to fundamental ratemaking principles:

The Commission generally will not engage in single issue or “piecemeal” ratemaking. The ultimate determination to be made by the Commission in a rate proceeding is whether the proposed rates and charges are fair, just, reasonable, and sufficient. The Commission has consistently held that these questions are resolved by a comprehensive review of the company’s rate base and operating expenses, determining a proper rate of return, and allocating rate changes equitably among ratepayers.²⁰

¹⁸ Petition at ¶11.

¹⁹ See, e.g., *People’s Org. For Wash. Energy Resource (“POWER”) v. WUTC*, 104 Wn.2d 798, 824-25 (1985) (identifying RCW 80.28.010-020 as “rate setting statutes”).

²⁰ See *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, Docket No. UT-970653 (1997 Wash. UT LEXIS 68).

17 The issue of whether rates are just and reasonable rates should be adjudicated in a general rate case or power cost only rate case, not in a complaint such as this that looks at only a single aspect of PSE's rates, which have been approved by the Commission.

18 Moreover, Petitioners have identified no specific expenditure or practice that might be imprudent. They merely assert that continued expenditures on these plants violates ratemaking provisions.²¹ However, as discussed above, the Commission reviewed PSE's resources and power costs in PSE's last general rate case as well as in PSE's 2013 and 2014 power cost only rate case proceedings. None of the resources or capital expenditures considered—including Colstrip—were determined to be imprudent. None of these parties came forward to challenge Colstrip expenditures in the 2013 or 2014 power cost only rate cases. As required by the rate plan approved by the Commission in Docket UE-121697 *et al.*, PSE must file a general rate case prior to April 1, 2016,²² at which time the Commission will review the prudence of major capital expenditures made to PSE's production plant since the 2014 PCORC or that are planned for the rate year.

3. The Commission is not an environmental regulator

19 Petitioners' reliance on RCW 80.28.040 and RCW 80.28.130 likewise is insufficient to support a claim and justify an adjudicative proceeding. The authority granted to the Commission in these statutes allows the Commission to order repairs, improvements or changes to electrical plants and to fix acts or services by the company that are inefficient, unreasonable or inadequate, etc. They do not authorize the Commission to adjudicate the closure of an electrical plant, in another state, owned in part by a merchant generator.

²¹ Petition at ¶11.

²² See *In re Petition of PSE and NW Energy Coalition For an Order Authorizing PSE to Implement Electric and Natural Gas Decoupling Mechanisms and To Record Accounting Entries Associated With the Mechanisms*, Docket UE-121697 *et al.*, Order 14, Final Order on Remand, at 6 (June 29, 2015).

20 Moreover, the Commission is an economic regulator, not an environmental regulator. The Petition seeks to reprise environmental litigation that is ongoing in another forum. The Commission should decline Petitioners' efforts to bootstrap issues currently being litigated in Montana into a Commission adjudication.

C. The Petition Is Duplicative of an Ongoing Commission Investigation

21 To the extent the Petition raises issues that fall within the Commission's jurisdiction, these issues are already being reviewed by the Commission in another docket. The Commission initiated an Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs on July 21, 2015, ten days before Petitioners filed the Petition in this case. The Commission issued a Notice in that docket, which provides all interested parties the opportunity to file written comments by September 15, 2015. The proceeding Petitioners now request is duplicative of this ongoing proceeding. It will result in confusion and needless duplication of work.

D. The Additional Issues Are or Will Be Addressed in Other Proceedings

22 Petitioners ask the Commission to expand its Investigation to include four additional topics,²³ which are specifically addressed below.

- i. “Future capital and O&M costs necessary to operate Colstrip in compliance with pending or expected environmental laws and regulations”

This issue is currently being litigated in Montana. The Commission should allow that process to proceed and should not engage in a separate determination with respect to Colstrip's compliance with “pending and expected” environmental laws.

²³ Petition at ¶12.

- ii. “Expected net power costs of Colstrip in light of ongoing and expected capital, O&M, and fuel costs at Colstrip”

Power costs, in general, including Colstrip capital, O&M and fuel costs for the rate year, will be reviewed in PSE’s general rate case to be filed within the next seven months.

- iii. “Costs and risk of alternative generation supplies to meet system demand without Colstrip, including an analysis of renewable energy resources”

This analysis is ongoing in PSE’s IRP.

- iv. “A clear timeline and plan to close all or part of Colstrip”

As discussed above, this request is outside the scope of the Commission’s jurisdiction.

23 As shown above, an adjudicative proceeding is not required, and would cause unnecessary confusion. Accordingly, the Petition should be dismissed as duplicative of other processes and outside the scope of the Commission’s jurisdiction.

V. CONCLUSION

24 The Commission is taking reasonable steps, within the scope of its authority, to investigate the economics of the continued operation of Colstrip Units 1 and 2 over the next several years. The Commission will have several windows of opportunity to review Colstrip—including the economics of PSE’s power costs with and without Colstrip, and the costs related to decommissioning and remediation. These windows of opportunity include the ongoing Investigation, PSE’s upcoming general rate case, preapproval proceedings for major capital investment, and the ongoing IRP. PSE intends to fully engage with the Commission in these ongoing and scheduled processes. The requested adjudicative proceeding is unnecessary and will duplicate processes already in place or

scheduled to take place in the upcoming months. Moreover, the relief requested by the Petitioners, including an adjudicative proceeding that orders the closure of a Montana plant, is outside the Commission's authority. For these reasons, the Petition should be dismissed.

Respectfully submitted this 14th day of August, 2015.

PERKINS COIE LLP

By



Sheree Strom Carson, WSBA # 25349
Jason Kuzma, WSBA #31830

Attorneys for Puget Sound Energy, Inc.