

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-170033/UG-170034
(*Consolidated*)

MOTION TO STRIKE THE
TESTIMONY OF PATRICK M.
RISKEN

I. INTRODUCTION

1 Commission Staff (“Staff”) of the Washington Utilities and Transportation
Commission (“Commission”) moves to strike the cross-answering testimony of Patrick M.
Risken filed by the State of Montana in this docket on August 9, 2017. Mr. Risken’s
testimony is, quite simply, a legal brief addressing a number of immaterial issues while
purporting to be testimony. Even if the Commission determines that Mr. Risken offered
some factual testimony, Montana waived its right to present that testimony. The
Commission should strike the testimony.

II. RELIEF REQUESTED

2 Staff requests that the Commission strike from the record the testimony of Patrick M.
Risken, Exh. PMR-1T.

III. STATEMENT OF ISSUES

3 Should the Commission strike the Cross-Answering Testimony of Patrick M. Risken,
Exh. PMR-1T?

IV. STATEMENT OF FACTS

4 On January 13, 2017, Puget Sound Energy filed with the Commission revisions to its
currently effective tariffs governing the provision of electric and natural gas service. PSE
also filed on that date testimony and exhibits from a number of witnesses supporting its
proposed revisions. The Commission suspended the revisions and set these matters for
hearing.¹

5 Unlike the other parties to these dockets, the State of Montana, an intervenor, filed
no response testimony.² Montana did, however, submit cross-answering testimony,
specifically, testimony from Patrick M. Risken. Mr. Risken, an assistant attorney general for
Montana,³ testified about five issues: (1) the appropriate forum and venue for determining
the decommissioning and remediation costs for Colstrip Units 1 and 2, (2) the size of those
costs, (3) PSE's several liability for those costs, (4) the potential unconstitutionality of
several provisions in the public service laws, and (5) the Commission's jurisdiction to
decide issues concerning Colstrip Units 3 and 4.⁴

V. EVIDENCE RELIED UPON

6 Staff relies upon the record in this matter, including the Cross-Answering Testimony
of Patrick M. Risken, to support its motion to strike.

VI. APPLICABLE LEGAL STANDARDS

7 The Commission has the authority to strike testimony under both the Administrative
Procedure Act (APA), chapter 34.05 RCW, and its own procedural rules, chapter 480-07
WAC. RCW 34.05.452 grants presiding officers the discretion to exclude irrelevant,

¹ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-170033 & UG-170034, Order 01, at 1-4, ¶¶ 1-21 (Jan. 19, 2017).

² See Risken, Exh. PMR-1T at 2:1-15.

³ Risken, Exh. PMR-1T at 1:5-7.

⁴ Risken, Exh. PMR-1T at 2:21-3:11.

immaterial, or unduly repetitious evidence. WAC 480-07-375 permits motions to “limit or add to the evidentiary record in a proceeding,” and the Commission may exclude irrelevant evidence.⁵ Washington’s superior court rules of evidence serve as guidelines for the Commission’s evidentiary decisions.⁶

8 Under the rules of evidence, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁷ Irrelevant evidence is inadmissible under the civil rules.⁸

9 Title VII of the rules of evidence governs opinion and expert witness testimony. ER 702 allows expert testimony where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Accordingly, expert testimony must be helpful to the trier of fact to be admissible.⁹ Further, an expert witness may not “state opinions of law,” and any such testimony is inadmissible.¹⁰

VII. ARGUMENT

10 Whatever its merits as legal argument, Mr. Risken’s testimony is not permissible expert testimony. It provides no factual basis for the Commission’s ultimate decision in this matter, nor does it provide any relevant or helpful opinions. The Commission should strike the testimony to avoid setting a decidedly unwelcome precedent, as discussed below.

11 The Commission need not look farther than the first page of Mr. Risken’s testimony in order to strike it. Mr. Riskin is testifying as an “expert” because he apparently has no

⁵ WAC 480-07-495(1).

⁶ RCW 34.05.452; WAC 480-07-495.

⁷ ER 401.

⁸ ER 402.

⁹ *Anderson v. Azko Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011).

¹⁰ *Orion Corp. v. State*, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985).

personal knowledge of Colstrip. Problematically, Mr. Riskin is not an accountant, a regulatory analyst, or someone who can offer opinion about the costs of operating, decommissioning, or remediating Colstrip Units 1 through 4, or the policy considerations surrounding the retirement, decommissioning, and remediation of Colstrip.¹¹ Mr. Riskin is, instead, an attorney employed by the state of Montana.¹² He can offer the Commission nothing in the way of specialized knowledge that will help the Commission decide whether Puget Sound Energy has proposed fair, just, reasonable, and sufficient rates. He can offer only legal opinion. His testimony is unhelpful and inadmissible. The Commission should strike it.

12 If the Commission does move beyond its opening, Mr. Risken's substantive testimony begins with a discussion of "forum and venue" issues and opines that a Montana court, not the Commission, is the appropriate venue to determine PSE's liability for decommissioning and remediation expenses related to Colstrip Units 1 and 2.¹³ The Commission should strike this testimony for three reasons. First, Mr. Risken's testimony offers naked legal opinions. Venue is either a pure question of law or a mixed question of fact and law.¹⁴ Subject matter jurisdiction is also a question of law.¹⁵ Mr. Risken's forum and venue testimony simply provides his legal opinion as to which tribunal has subject matter jurisdiction over the clean-up costs related to Colstrip, and that opinion has no place in the record. Second, Mr. Risken's opinion is unhelpful. The Commission does not need expert testimony to assist it in determining the extent of its own jurisdiction, which is, after all, a legal question that it is well equipped to answer itself. Third, even if the Commission

¹¹ See generally Risken, Exh. PMR-1T at 1:1-28.

¹² Risken, Exh. PMR-1T at 1:5-7.

¹³ Risken, Exh. PMR-1T at 3:14-4:7.

¹⁴ 92A C.J.S. Venue § 301.

¹⁵ *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

were to conclude that Mr. Risken’s testimony has some factual component, Montana has waived its chance to present those facts by declining to raise these issues until its cross-answering testimony.¹⁶ Permitting Montana to raise this issue through cross-answer will prejudice every other party, which has no chance to answer it.

13 Mr. Risken next testifies about the costs involved with decommissioning and remediation. Specifically, he contends that those costs are unknowable at this time and that PSE’s current estimates are “grossly inadequate.”¹⁷ The Commission should strike this testimony for two reasons. First, Mr. Risken’s testimony is irrelevant. The ultimate cost of decommissioning and remediation associated with Colstrip Units 1 and 2 is not at issue in this proceeding. But the amount that is currently known and measurable, however, is at issue, and the Commission must use that cost to set rates that are fair, just, reasonable, and sufficient.¹⁸ Second, Montana has waived its chance to present this testimony. PSE raised the issue of decommissioning and remediation costs in its direct testimony,¹⁹ and Montana did not respond to that testimony. Montana cannot, in cross-answer, now respond to PSE.²⁰

14 Mr. Risken then testifies about PSE’s joint and several liability for any decommissioning and remediation costs related to Colstrip Units 1 and 2. Specifically, he testifies about PSE’s joint and several liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and PSE’s inability to

¹⁶ See *State v. Coe*, 109 Wn.2d 832, 847-48, 750 P.2d 208 (1988) (party may only testify in rebuttal to new matters raised by opponents) (quoting *State v. White*, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968)); *W.E. Roche Fruit Co. v. N. Pac. Ry. Co.*, 184 Wash. 695, 698-99, 52 P.2d 325 (1935) (“Rebuttal evidence, generally speaking, is receivable only where new matter has been developed by the evidence of one of the parties and is ordinarily limited to a reply to new points”).

¹⁷ Risken, Exh. PMR-1T at 4:21-5:13.

¹⁸ RCW 80.28.020.

¹⁹ E.g., Doyle, Exh. DAD-1T at 41:4-43:15.

²⁰ See *Coe*, 109 Wn.2d at 847-48 (quoting *White*, 74 Wn.2d at 394-95); *W.E. Roche Fruit Co.*, 184 Wash. at 698-99.

evade that liability through contract.²¹ The Commission should strike this testimony for two reasons. First, it is inadmissible legal opinion. Mr. Risken essentially offers the Commission a refresher on tort liability²² and the inability to contract around public policy,²³ and explains how those concepts apply to PSE's liability. He cannot testify about those matters. Second, Montana waived its opportunity to present this testimony. PSE discussed its proportionate share of Colstrip decommissioning and remediation costs in its direct testimony²⁴ and Montana, after failing to respond to that testimony, cannot do so in cross-answering testimony.²⁵

15 Mr. Risken moves on to “inform[ing] this proceeding about a potential commerce clause issue raised” by provisions in the public service laws.²⁶ Montana, through this testimony, appears to ask the Commission to determine that RCW 80.84.010 and .020 are unconstitutional. The Commission should strike this testimony for three reasons. First, it is irrelevant. The Commission lacks the power to declare statutes unconstitutional,²⁷ making this testimony of no consequence. Second, Mr. Risken offers pure legal opinion in the form of testimony, in this case his opinion as to whether the Commerce Clause invalidates a Washington statute. Third, to the extent that any of this testimony involves factual matters, Montana waived any chance to offer Mr. Risken's testimony by failing to offer it as

²¹ Risken, Exh. PMR-1T at 5:15-6:22.

²² *Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834 (1998) (discussing joint and several liability).

²³ *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004) (the freedom to contract limited by public policy).

²⁴ Roberts, Exh. RJR-1CT at 47:6-17.

²⁵ See *Coe*, 109 Wn.2d at 847-48 (quoting *White*, 74 Wn.2d at 394-95); *W.E. Roche Fruit Co.*, 184 Wash. at 698-99.

²⁶ Risken, Exh. PMR-1T at 2:27-3:3; see also *id.* at 6:24-9:24.

²⁷ *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) (“An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.”) (citing *United States v. Kissinger*, 250 F.2d 940 (3d Cir. 1958); 3 K. Davis, *Administrative Law Treatise* § 20.04, at 74 (1958)).

response testimony. Montana cannot wait until cross-answering testimony to set out its case concerning protecting the interests of its workers, communities, and tax base from the impacts of shutting down Colstrip Units 1 and 2.²⁸

16 Finally, Mr. Risken testifies that the potential retirement of Colstrip Units 3 and 4 is beyond the limits of “the Commission’s [j]urisdictional [r]each in this [p]roceeding.”²⁹ The Commission should strike this testimony for two reasons. First, Mr. Risken’s testimony is, again, legal in nature. He opines about the Commission’s “jurisdiction,”³⁰ which is a legal issue, and not a proper subject for testimony. He frets that “findings, conclusions, or even dicta”³¹ from the Commission in this proceeding could have preclusive effect on later proceedings in Montana, again offering legal opinion testimony,³² and he requests that the Commission not make certain findings and conclusions, which a party should do through legal briefing, not testimony. Second, Mr. Risken testifies, to the extent that he testifies about factual matters,³³ about irrelevant matters. No party has placed the retirement date of Colstrip 3 and 4 before the Commission, although several parties offer testimony about the depreciable life of those units.

17 Commission Staff is concerned that allowing testimony like Mr. Risken’s, which is essentially purely legal in content, to remain in the record creates unwelcome precedent. It will invite the parties to cross-examine Mr. Risken about legal matters, cluttering the record with material that provides no support to any decision the Commission makes. It will signal

²⁸ See *Coe*, 109 Wn.2d at 847-48 (quoting *White*, 74 Wn.2d at 394-95).

²⁹ Risken, Exh. PMR-1T at 9:26-28; see also *id.* at 10:1-12:22.

³⁰ Risken, Exh. PMR-1T at 10:17-18.

³¹ Risken, Exh. PMR-1T at 11:19.

³² *Satsop Valley Homeowners Ass’n, Inc. v. Nw. Rock, Inc.*, 126 Wn. App. 536, 542, 108 P.3d 1247 (preclusion through collateral estoppel is a legal issue); *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) (preclusion through res judicata is a legal issue).

³³ Risken, Exh. PMR-1T at 10:8-12, 11:15-22, 12:15-18.

that the Commission welcomes this kind of testimony, inviting other parties in other dockets to submit legal testimony in lieu of a legal brief. It creates administrative burden in the form of motions like this one, which the Commission may be called upon to decide more often should other parties accept what they believe is the Commission's invitation. The Commission should strike Mr. Risken's testimony from the record.

VIII. CONCLUSION

18 For the reasons stated above, the Commission should strike Mr. Risken's cross-answering testimony.

DATED this 16th day of August 2017.

Respectfully submitted,

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