

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

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

SIERRA CLUB MOTION TO STRIKE
THE TESTIMONY OF PATRICK M.
RISKEN

1. In accordance with WAC 480-07-375(1)(d), Sierra Club hereby moves to strike the pre-filed Cross-Answering Testimony of Patrick M. Risken on Behalf of the State of Montana, filed on August 9, 2017. Sierra Club notes that Staff filed a similar motion to strike Mr. Risken’s testimony on August 16, 2017. Sierra Club supports Staff’s motion and provides the following additional argument in support of its own motion.¹

I. STATEMENT OF FACTS

2. The Commission convened a prehearing conference in this docket at Olympia, Washington, on February 13, 2017, before Administrative Law Judges Dennis Moss and Rayne Pearson. Shortly thereafter, the Commission issued Order 03 in this proceeding setting, among other things, a schedule for the filing of pre-filed testimony. According to Exhibit B to Order 03, the deadline for intervenors to file response testimony was June 30, 2017. The deadline for Puget Sound Energy (“PSE”) to file rebuttal testimony, and for Staff and intervenors to file

¹ Sierra Club has no objection to the Commission consolidating this motion with Staff’s. Sierra Club considered filing a response in support of Staff’s motion, but notes that WAC 480-07-375(4) only provides for a response from parties who oppose a motion.

cross-answering testimony, was August 9, 2017. The State of Montana participated in that prehearing conference and was, or should have been, aware of those deadlines.

3. The State of Montana failed to file any testimony on June 30, 2017. In the following month, various news outlets in Montana noted that failure and criticized Montana's Attorney General, Tim Fox.²
4. On August 9, 2017, the State of Montana filed Mr. Risken's testimony, which it styled as "cross-answering" testimony.

II. LEGAL STANDARD

5. WAC 480-037-460(1) provides that "Parties must file and serve exhibits that they intend to submit or use in the evidentiary hearing, including proposed cross-examination exhibits, in advance of the hearing." WAC 480-037-430 further provides for a prehearing conference to, among other things, establish "a procedural schedule including, but not limited to, the need for, and timing of, prefiled testimony and exhibits" (emphasis added).
6. This Commission has held that it is unacceptable "for a party to present an alternative request for relief for the first time at the rebuttal stage of a proceeding."³ Such a delay tactic severely limits the opportunity for other parties to examine the proposal.⁴

² See, e.g., *Missoulian Editorial: AG Fox Owes explanation for Colstrip Silence*, The Missoulian, July 27, 2017, available at: http://missoulian.com/opinion/editorial/ag-fox-owes-explanation-for-colstrip-silence/article_166b4c1d-a511-5e5a-bfb4-1e32c540dc58.html; *Montana lawmakers shocked that attorney general didn't testify in Colstrip shutdown*, Billings Gazette, July 22, 2017, available at: http://billingsgazette.com/business/montana-lawmakers-shocked-that-attorney-general-didn-t-testify-in/article_7ab98ecf-2715-506c-a5c1-ed6d96bb2c74.html.

³ *WUTC v. Avista Corporation*, Docket No. UE-160228, Order No. 04 at ¶12 (Oct. 10, 2016).

⁴ See, *WUTC v. Puget Sound Power & Light Co.*, Docket Nos. U-89-2688-T and U-89-2955-T, Third Supplemental Order at 79 (January 1990) ("The Commission is concerned that the company waited to present its alternative rate design proposal until rebuttal. This tactic is unacceptable, since it severely limits the opportunity for other parties to examine the proposal. In future cases, the company will be expected to present its proposals in its direct case.").

III. ARGUMENT

7. The Commission should strike Mr. Risken's testimony because it is an improper attempt by the State of Montana to submit response testimony after the June 30, 2017 deadline has passed. All of the arguments made in Mr. Risken's testimony were ripe prior to parties' filing of their own response testimony. By waiting to file its own response testimony until the rebuttal and cross-answering stage of the proceeding, the State of Montana has ignored the prehearing order and severely prejudiced the ability of Sierra Club and other parties to respond to that testimony.
8. Mr. Risken's testimony can best be viewed as an attempt by the Montana Attorney General to avoid further embarrassment for the perception of having failed to adequately represent the interests of Montana in this proceeding. However, political embarrassment is not a valid excuse to allow late-filed testimony that, if accepted, would prejudice the rights of other parties who properly followed the deadlines established in this proceeding.
9. Mr. Risken's testimony consists primarily of broad and unsupported legal argument, with little to no factual evidence put forward.⁵ Even setting aside the problems with the purely legal arguments put forward by Mr. Risken, all of the arguments in Mr. Risken's testimony were available by the June 30, 2017 deadline to file response testimony. Mr. Risken organized his testimony as follows: (1) a vague argument about the impact that this Commission's order may have on decommissioning and remediation costs;⁶ (2) a very short assertion that PSE's estimates of ultimate decommissioning and remediation costs are speculative and

⁵ Staff's Motion to Strike addresses the problems with providing legal argument as expert testimony. Sierra Club therefore does not repeat those arguments here.

⁶ Montana Testimony, Ex. PMR-1T, Section II at p.3-4.

undervalued;⁷ (3) a legal argument on joint and several liability of Colstrip owners;⁸ (4) a vague assertion of Washington’s disparate treatment of in-state and out-of-state coal plants that has Commerce Clause implications,⁹ and (5) a jurisdictional argument claiming that this Commission does not have the authority to adjust depreciation rates applicable to Colstrip Units 3 and 4.¹⁰

10. To the extent Mr. Risken included any fact-based arguments, each of those arguments was or should have been known to the State of Montana prior to the June 30, 2017 deadline to submit response testimony. At no point in his testimony does Mr. Risken identify an issue or proposal he is responding to that was raised for the first time by parties in response testimony. Rather, to the extent the Mr. Risken references the response testimony of other parties, he does so only vaguely and only as a means to make his own argument in response to PSE’s application.

11. For example, Section 6 of Mr. Risken’s testimony (incorrectly labeled as “Section IV”), asserts a legal argument that the Commission has no jurisdiction to issue an order in this proceeding that “involves, affects or impacts” Colstrip Units 3&4. Aside from being entirely incorrect – this Commission clearly has jurisdiction over PSE’s request to recover costs associated with Colstrip Units 3&4 – this issue was fully apparent based on PSE’s filed case.

12. PSE clearly raised the issue of Colstrip 3&4’s depreciation schedule in the direct testimony of John J. Spanos: “[T]he probable retirement dates estimated for both Colstrip Units 1 and 2 and for Colstrip Units 3 and 4 have changed.”¹¹ Mr. Spanos went on to explain that the

⁷ Id., Section III at p.4-5.

⁸ Id., Section IV at p.5-6.

⁹ Id., Section V at p.6-9.

¹⁰ Id., Section IV [sic] at p.9-12.

¹¹ Exhibit No.__(JJS-1T), at p.8. (emphasis added)

currently applicable “probable retirement dates” for Colstrip 3 and 4 had been changed from 2044 and 2045, respectively, to 2035 for both units.¹²

13. In response to Mr. Spanos, Dr. Ezra Hausman testified in his June 30, 2017 response on behalf of the Sierra Club that “a much more reasonable assumption for the end of the useful life of those units is December 31, 2024...”¹³ Dr. Hausman went on to provide a substantive fact-based analysis of all the factors that supported his conclusion that it was more reasonable to assume, for purposes of setting a depreciation schedule, that Colstrip 3&4 would reach their end-of-life date by 2024 rather than 2035 (as proposed by PSE) or 2044/45 (current schedule).¹⁴

14. Notably, Mr. Risken did not address the difference in positions on whether 2035 or 2024 is the appropriate estimate for the end-of-life date for Colstrip Units 3&4 for purposes of setting a depreciation schedule. Rather, Mr. Risken failed to discuss any factual issues related to the proper assumptions to be used to set the depreciation schedule for Colstrip 3&4, and instead he challenged the Commission’s authority to address anything regarding the future of Colstrip 3&4. “[I]ssues relating to Colstrip 3 & 4, including its actual ‘retirement,’ are not presently before the Commission.”¹⁵

15. On the merits, Mr. Risken’s assertion is simply wrong. Estimating end-of-life dates for rate based investments is a normal and necessary function of the Commission’s ratemaking oversight. Moreover, aside from the merits and to the extent that the argument is even properly made through expert testimony,¹⁶ the State of Montana should have raised this issue in

¹² Id.

¹³ Response Testimony of Ezra D. Hausman, Ex. No. __ (EDH-1T) at p.5.

¹⁴ Id. at p.24-39.

¹⁵ Testimony of Patrick M. Risken, Ex. PMR-1T at p.12.

¹⁶ See Staff’s argument regarding the impropriety of asserting legal argument. Staff Motion to Strike at ¶ 16.

response to PSE's proposal to shift the depreciation schedule for Colstrip 3&4 from 2044/45 to 2035. The issue of advancing the expected end-of-life was raised in the first instance by PSE, not Sierra Club.

16. Sierra Club, along with Staff and several intervenors, complied with the deadline to file response testimony by June 30, 2017. Sierra Club also filed cross-answering testimony on August 9, 2017 that responded to the proposals set forth in Staff and ICNU's Response Testimony. Had Sierra Club been aware of the arguments presented in Mr. Risken's testimony prior to the August 9 cross-answering testimony, Sierra Club would have responded to those issues. However, the State of Montana's tactic to delay presenting its case until the final round of testimony prevented Sierra Club and other parties from having a fair opportunity to respond. The Commission should therefore strike the testimony to avoid prejudicing those parties that complied with the deadlines set at the prehearing conference.
17. WHEREFORE, Sierra Club respectfully requests that the Commission GRANT Sierra Club's and/or Staff's motions to strike the testimony of Mr. Risken.

Dated this 16th day of August, 2017.

Respectfully submitted,

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