BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the AVISTA CORPORATION, for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant	)	DOCKET NO. UE-991255
In the Matter of the Application of PACIFICORP for an Order Approving the Sale of Its Interest in (1) the Centralia Steam Electric Generating Plant, (2) the Ratebased Portion of the Centralia Coal Mine, and (3) Related Facilities, for a Determination of the Amount of and the Proper Ratemaking Treatment of the Gain Associated with the sale; and for an EWG Determination	)	DOCKET NO. UE-991262
In the Matter of the Application of PUGET SOUND ENERGY, INC., for (1) Approval of the Proposed Sale of PSE's Share of the Centralia Facilities, and (2) Authorization to Amortize Gain Over a Five-Year Period	)	DOCKET NO. UE-991409

ANSWER OF COMMISSION STAFF
TO PETITIONS FOR RECONSIDERATION

Petitions for Reconsideration have been filed by Puget Sound Energy, Inc., PacifiCorp, Avista Corporation, and Public Counsel. The Staff answer to each of these petitions is set forth below.

A. Puget Sound Energy

1. The Commission Should Reject PSE's Late-Filed Petition for Reconsideration

The Petition for Reconsideration of Puget Sound Energy (PSE) was filed with the Commission on March 17, 2000. The filing, therefore, occurred more than 10 days after the Commission's Order Approving Sale With Conditions, in violation of WAC 480-09-810. PSE admits this violation, but has filed a Motion for Leave to Late-File Its Petition for Reconsideration claiming that the late filing was inadvertent and that no parties' rights are substantially impaired by acceptance of the petition after the 10-day filing period.

Staff has no reason to doubt PSE's explanation of the circumstances which resulted in the petition being late-filed. Staff also agrees that no party would be impaired by acceptance of the petition.

However, the applicable statutes and rules prohibit the filing of a petition for reconsideration filed after the 10-day filing period established in WAC 480-09-810. First, the 10-day filing period contained in that rule derives from a specific statutory provision of the Administrative Procedures Act (APA), namely, RCW 34.05.470(1). It is not the product of any separate power of the Commission to establish or control the procedures for adjudications that occur before it. The provisions of WAC 480-09-135(2), which allow the Commission to change time periods stated in its rules, therefore, do not apply.

Second, Commission discretion to lengthen or shorten the time frames stated in the APA can be exercised only in accordance with the provisions of RCW 34.05.080. WAC 480-09-135(1). RCW 34.05.080 allows variations in time in only four situations: (1) by rule when the

agency heads serve part-time, do not have a permanent staff, and the rights of persons would not be substantially impaired; (2) by rule if the agency determines that the variation in time is necessary to the performance of its statutory duties; (3) when there is a conflict with federal requirements that are a condition for the receipt of federal funds; and (4) when a person waives any right conferred upon that person by the APA. None of these situations apply to PSE's late-filed Petition for Reconsideration.[1]

Third, rejection of PSE's petition as late-filed is consistent with Commission precedent.[2] In re GTE Northwest, Inc., Docket No. U-89-3031-P, Third Supp. Order (August, 1990) (petition filed one day late). In re Puget Sound Power & Light Company, Docket No. UE-910689, Commission Letter Rejecting Petition (January, 1992).

Fourth, under RCW 34.05.542(2), a petition for judicial review must be filed within 30 days of service of the Commission's final order. If a petition for reconsideration is filed, however, the 30-day appeal period does not commence until the Commission disposes of that petition. RCW 34.05.470(3). Therefore, if the Commission concludes it has the legal authority to allow a petition for reconsideration to be filed after the statutory 10-day period, it can postpone indefinitely the period for seeking judicial review. Such a result is contrary not only

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[1] RCW 34.05.080 is a specific statute governing waiver of the APA's 10-day filing requirement for petitions for reconsideration. Therefore, it controls over any general power the Commission may have to modify procedures in individual cases. (See, WAC 480-09-135(2) and WAC 480-09-010(3).)

[2] PSE cites Washington STS, Ldt. v. US West Communications, Inc., Docket No. UT-921213 (June 29, 1993), for the proposition that the Commission may lengthen time limits where justice is best served. (Motion at 3.) The cited case, however, concerned the late-filing of a petition for administrative review for which no specific time limits are required under the APA. (See, RCW 34.05.464.) The applicable time limit was, instead, established by Commission rule under WAC 480-09-780. The Commission, therefore, had the discretion under WAC 480-09-135(2) to lengthen the time limit in that case for filing a petition for administrative review. No such discretion exists for a petition for reconsideration.

with common sense, but also with the provisions of the APA that establish definite, jurisdictional requirements for obtaining judicial review.

Finally, PSE states that its petition arrived at the Commission on March 16, 2000, but after 5:00 p.m. (Motion at 2.) Filing, however, is complete only when the petition is delivered to the Records Center and stamped physically with the date and time. Documents received after 5:00 p.m. are not officially received until the next business day. WAC 480-09-101(1). PSE's petition, therefore, was not filed with the Commission until March 17, 2000 even though its legal messenger may have been knocking on the Commission's front door after hours on March 16th. (See also, In Re Puget, supra.)

In sum, PSE violated WAC 480-09-810. The Commission, therefore, should reject PSE's Petition for Reconsideration. Should the Commission reject our interpretation of the applicable rules and statutes, we have included below our response to the substance of PSE's petition.[3]

2. Taxes and Transaction Costs

PSE first asks the Commission to clarify its Order Approving Sale with respect to the allocation of taxes and transaction costs between shareholders and ratepayers. The Company then proposes a methodology which allocates virtually all taxes and transaction costs to ratepayers.[4] (Id. at Attachment 1, lines 10 and 12.)

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[3] Staff does not recommend rejection of PSE's petition because we seek to prevent the Commission from considering the company's concerns. We also sympathize with PSE's situation which clearly was inadvertent. We believe, however, that the Commission's rules do not allow a late-filed petition for reconsideration and we are concerned with the precedent that would be established if that rule is not followed.

[4] PSE's proposal allocates **transaction costs** based on the ratio that the gain before taxes and transaction costs is allocated between shareholders and ratepayers. (PSE Petition at 2-3 and Attachment 1, lines 9-10.) PSE allocates **taxes** by assigning to the accumulated depreciation component of the gain the reversal of deferred taxes due to accelerated depreciation. Remaining taxes are then spread proportionately to the remaining gain. (Id., Attachment 1, lines 11-13, Note 4.)

Staff agreed in its own Petition for Reconsideration that the Commission should clarify how state income taxes and transaction costs should be allocated between shareholders and ratepayers. The Order Approving Sale is ambiguous as to the treatment of these items and any other cost associated with the sale (e.g., the loss PSE will incur with respect to Materials and Fuel Inventory).

However, as it did in its own petition, Staff recommends that all transaction costs and state income taxes be shared equally between ratepayers and shareholders. This recommendation is consistent with the allocation of the Appreciation gain and the underlying principle that the costs of the transaction should be borne by those who benefit from the transaction. The company's proposed methodology is inconsistent with that principle and should be rejected.

3. Deferring Shareholder Gain

PSE asks the Commission to clarify that the company is not required to defer the share of the gain that is allocated to shareholders. (PSE Petition at 3.) Staff has no objection to that request, but only if ratepayers are treated with equal fairness. Therefore, the Commission should affirm its order that the allocated share of the gain to be deferred for ratepayers accrues carrying costs at 7.16% until the company's next general rate case. This ensures that ratepayers and shareholders are similarly treated in conformance with the Commission's principle to allocate the Appreciation gain evenly between them. The next section discusses additional reasons for affirming the carrying cost requirement.

4. Carrying Costs

The Order Approving Sale requires PSE to defer ratepayers' share of the gain and to pay carrying costs at 7.16% on the deferred amount until the company's next general rate case. The

company asks the Commission to delete the carrying cost requirement because this condition fails to recognize the additions to rate base made by PSE during the Rate Plan, but which PSE will be unable to recover until rates are set after the Rate Plan. (PSE Petition at 4-6.)

The Commission should affirm its requirement for PSE to defer ratepayers' gain with carrying costs at 7.16%. This requirement is consistent with the Commission's decision concerning PSE's sale of its Colstrip investment in Docket No. UE-991627. No similar request for reconsideration was made by PSE in the Colstrip case.

Moreover, PSE's argument has at least three critical flaws. First, it relies upon evidence of capital investments that has no basis in the record in this case. The introduction of such evidence should be rejected by the Commission. WUTC v. Puget Sound Power & Light Company, Docket Nos. UE-921262, et. al., Fifteenth Supp. Order (December, 1993); WUTC v. Puget Sound Power & Light Company, Docket Nos. U-89-2688-T and U-89-2955-T, Fifth Supp. Order (March, 1990).

Second, PSE assumes that any capital investments it made during the rate plan are reasonable and prudent. That assumption also has no basis in the record. It will not even be tested until after the Rate Plan expires during PSE's next general rate case.

Finally, the Rate Plan now governing PSE includes programmed revenue increases for five years to accommodate increases in PSE's costs and investments over that period. The company agreed to operate in such an environment. Its request that ratepayers, in essence, give PSE an interest-free loan rewrites the Rate Plan, especially given PSE's other request that shareholders be allowed to receive immediately their allocated portion of the gain.

For these reasons, the Commission should reject PSE's request that ratepayers not be compensated for the time-value of their money the company is allowed to keep until its next general rate case. Without that condition, ratepayers are harmed in violation of the Commission's Order Approving Sale.[5]

5. General Rate Case Requirement

PSE asks the Commission to clarify that the Order Approving Sale does not require the company to file a general rate case by a specified date. (PSE Petition at 6-7.) The genesis of the request is a Commission press release which states that PSE is required to file for new rates before June 30, 2002.

The Order Approving Sale, however, did not require a rate case filing as a condition of sale approval, despite any press release statement to the contrary. Therefore, no clarification is necessary. Staff does not object to the request, however, should the Commission believe otherwise.

6. Precedential Impact of the Order Approving Sale

The company asks the Commission to clarify that the Order Approving Sale is not precedential on the treatment of the gain from other asset sales. (PSE Petition at 7-8.) The clarification requested by PSE, however, is unnecessary. In addition to the language cited by PSE at paragraph 85 of the Order Approving Sale, the Commission also stated at paragraph 97 that:

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[5] As stated earlier, if the Commission accepts PSE's proposal to eliminate carrying costs, the Commission should order the company to file a proposal to refund immediately to ratepayers their portion of the gain. Any such proposal would be subject to review by the Commission and parties.

> We reiterate that this transaction presents a set of circumstances that may well prove to be unique. The fact of multiple ownership and the decision made by all of the owners to sell, taken together with the benefits we perceive the broader public will enjoy as a result of the sale, distinguish this transaction from those typical of a single utility with a single set of ratepayers. In addition, the sale proceeds exceed the historical investment made by the utilities and the ratepayers (through depreciation payments). These circumstances have led us to direct that the appreciation in plant value be shared between the ratepayers and the utilities. This sharing, in this case, appropriately aligns ratepayer and utility interests in capturing this appreciation by taking advantage of the opportunity presented by this sale. If presented with a different asset sale that presents different circumstances, opportunities, risks and benefits, we would not necessarily conclude that such a sharing of the gain is appropriate.
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> The Commission has stated clearly the precedential impact of its Order Approving Sale.

No further discussion is either required or warranted.

B. Avista Corporation

1. Effective Date of Order Approving Sale

Avista seeks reconsideration in two general areas. First, Avista asks the Commission to stay the finality of its Order Approving Sale until it issues an order in Docket No. UE-000080 on the treatment of the gain for the PGE 2.5% share. The purpose of this request is to allow Avista an overall view of the treatment of all of the gain in evaluating whether to proceed with the sale of Centralia or seek judicial review.

The Commission should reject the company's request. First, on March 22, 2000, the Commission issued its Order Approving Sale and Distribution of Gain in Docket No. UE-000080. The company's first request on reconsideration, therefore, is moot since it now has the overall view of the sale it was seeking.

Second, as a legal matter, the Commission cannot stay the finality of its orders for purposes of reconsideration or judicial review. Both RCW 34.05.470(1) on reconsideration and RCW 34.05.542(2) on judicial review have time limits that are triggered from the service of the

Commission's final order, rather than any date on which the Commission may deem its final order effective. RCW 34.05.473(1)(c) confirms that the determinative date for seeking judicial review is the date of service. Therefore, March 6, 2000, the service date of the Commission's Order Approving Sale, began the reconsideration and (unless tolled) judicial review clock, no matter what the Commission may say about the effective date of its Order.

Third, granting the company's request is unnecessary even if the Commission could stay the finality of an order, and even if the order in Docket No. UE-000080 had not yet been issued. Under RCW 34.05.470(3) the time for seeking judicial review does not begin until the Commission disposes of any petitions for reconsideration. Petitions for reconsideration have been filed by most of the parties in this consolidated case. The clock for seeking judicial review, therefore, is tolled until the Commission issues its order disposing of the petitions. Avista, therefore, has plenty of time to consider the transaction in its entirety.

2. Calculation of the Gain

The second area covered in Avista's petition asks clarification on a number of calculations the company questions in the Order Approving Sale. Staff agrees that the Order is unclear and we have no objection to the Commission clarifying its Order by detailing the calculation of the gain allocation consistent with the allocation methodology adopted by the Commission. Whether Avista's calculation (Attachment A) is accurate is for the Commission to determine. In any event, the final determination of the Washington portion of the gain will be made in Avista's current general rate case once all input amounts become final.

C. PacifiCorp

1. Reclamation Costs

The Order Approving Sale states "that PacifiCorp has indicated a willingness to indemnify its ratepayers" from future reclamation costs beyond the balance contained currently in the reclamation trust fund. The Order also assumes that PacifiCorp is willing to extend this indemnification to ratepayers of other owning utilities. (Order Approving Sale at ¶¶ 62 and 71.)

PacifiCorp challenges these statements as unsupported by the evidence. PacifiCorp also asks the Commission to delete any condition that PacifiCorp hold harmless from any future reclamation liability its own customers and the customers of PSE and Avista. (Petition at 2-7.)

Staff has three comments with respect to reclamation liability. First, we agree with the company that the record does not support the Commission's assumptions regarding PacifiCorp's willingness to cover future mine reclamation costs not covered by the trust balance or TransAlta. The indemnification extended not to reclamation liability but to liabilities which exceeded the reserves for environmental remediation.

Second, PacifiCorp cites Staff testimony (Tr. 512) for Staff's alleged concurrence that ratepayers would be held responsible for prudently-incurred reclamation costs not otherwise paid by TransAlta. (Petition at 6.) The cited testimony, however, concerns environmental remediation costs rather than the cost of reclamation for which Staff testified it did not have a position. (Tr. 512: 19.) Recovery of reclamation costs not otherwise paid by TransAlta, therefore, would be determined based upon the facts and circumstances at the time PacifiCorp seeks to hold ratepayers responsible for those costs.

Finally, Staff does not read the Order Approving Sale as conditioning approval specifically on PacifiCorp holding ratepayers harmless for reclamation liability. It appears, instead, that the assumption of indemnification by PacifiCorp was a significant factor in the Commission's conclusion that the sale was consistent with the public interest because the risk of future reclamation liability was eliminated for ratepayers and shareholders. (Order Approving Sale at ¶ 62.) The Commission must, therefore, decide whether the same conclusion is warranted given PacifiCorp's unwillingness to hold ratepayers harmless for reclamation costs that exceed the trust fund balance and are not paid by TransAlta.

2. Calculation of the Gain

Like Avista, PacifiCorp asks the Commission to clarify a number of calculations upon which the Order Approving Sale is based. Staff agrees that the Order is ambiguous with respect to many calculations, although Staff disagrees with any implication by PacifiCorp that these deficiencies can be cured by adopting the company's depreciation reserve methodology. The Commission, therefore, should clarify the calculations in its Order consistent with the methodology it adopted to allocate all Depreciation gain to ratepayers and to divide evenly the Appreciation gain between ratepayers and shareholders. Similar to Avista, the Commission should also clarify that the portion of the gain to be allocated to Washington should be determined finally in PacifiCorp's pending rate case when all input amounts are finalized.

3. Depreciation Reserve Method

PacifiCorp asks the Commission to adopt the company's depreciation reserve methodology for allocating the gain between ratepayers and shareholders. Two reasons are presented for this request.

First, the company argues that "Mysterious numbers and calculations" by the Commission make it impossible to allocate any portion of the gain to shareholders, which would be inconsistent with the Commission's adopted methodology. (Petition at 11.) The Commission stated clearly, however, that shareholders are to receive only 50% of the Appreciation gain. That allocation would be clearly exceeded under the company's approach that would give shareholders 35% of the entire gain.

Moreover, all parties that filed for reconsideration have asked the Commission to correct or clarify the calculation of the gain to be distributed between ratepayers and shareholders. The Commission should act on these requests consistent with its allocation formula. The company's resurrection of the depreciation reserve methodology is nothing more than a backdoor attempt to divert the Commission from that task.

Second, the company claims that its depreciation reserve methodology is the only mechanism to accomplish an equitable sharing of the gain between ratepayers and shareholders. (Id. at 11-12.) The Commission, however, clearly balanced the risks and benefits to ratepayers and shareholders, in light of the evidence and applicable regulatory principles, and it determined that shareholders should receive the net book value of the plant and 50% of the Appreciation gain, while ratepayers would receive all of the remaining gain. PacifiCorp's depreciation reserve methodology bears no resemblance to either the theory or the results of the formula the Commission adopted. The Commission should again reject PacifiCorp's depreciation reserve approach.

D. Public Counsel

1. State Income Taxes

Public Counsel asks the Commission to clarify its Order Approving Sale in two respects. First, Public Counsel asks the Commission to hold Washington ratepayers harmless for additional income taxes imposed by other states as a result of the gain.[6]

In its Petition for Reconsideration, Staff stated that ratepayers should not be liable for the entire amount of state income taxes allocated to Washington, but we disagree with Public Counsel that ratepayers should be insulated completely from that cost. We recommend, instead, that ratepayers and shareholders split evenly state income taxes. This recommendation is consistent with the allocation of the Appreciation gain, as ordered by the Commission, and it assigns fairly the state income tax liability to those who benefit from the gain. These beneficiaries include Washington ratepayers, whether the state income taxes originate in this or another state.

2. Excess Deferred Taxes

Public Counsel asks the Commission to condition the gain allocated to shareholders on a successful ruling from the Internal Revenue Service (IRS) that allows the companies to apply excess deferred taxes toward the taxes due on the Appreciation gain. This condition is suggested to cure any incentive the companies may have to submit intentionally a deficient request that the IRS would reject which, in turn, would allow the companies to keep all excess deferred taxes, rather than ratepayers.

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[6] For Avista, this involves an estimated tax rate of 37.5%, which includes a state income tax rate of 2.5%. For PacifiCorp, this involves a tax rate estimate of 37.95%, which includes a state income tax rate of 2.95%.

Staff agrees with Public Counsel that there is an incentive for the companies to fail before the IRS. To insulate ratepayers from this incentive, we recommend that the excess deferred taxes be split evenly between ratepayers and shareholders if the companies are successful before the IRS. On the other hand, if the companies are unsuccessful before the IRS, then the gain allocated to shareholders should be reduced by an amount equivalent to one-half of the excess deferred taxes that the companies are allowed to keep. Staff's recommendation is consistent with the Commission's formula to share equally the Appreciation gain between ratepayers and shareholders.

DATED this 30th day March, 2000.

Respectfully submitted,

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