

**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*)

ORDER 07

SUSTAINING OBJECTIONS TO  
PREFILED TESTIMONY OF  
PATRICK M. RISKEN;  
ACKNOWLEDGING INTERESTS  
OF THE STATE OF MONTANA

**BACKGROUND**

- 1 On January 13, 2017, Puget Sound Energy (PSE or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariffs for electric and natural gas services the Company provides in Washington. PSE's filing included extensive prefiled testimony and exhibits, as required by the Commission's rules. The Commission suspended the as-filed tariffs and set the matters for hearing in Order 01 on January 19, 2017. In Order 03, the Commission, among other things, established a procedural schedule including dates for parties to file Supplemental testimony, Response testimony, Cross-Answering testimony, and Rebuttal testimony.
- 2 Commission staff (Staff) and other parties filed Response testimony on June 30, 2017, in accordance with the procedural schedule. Intervenor, the state of Montana, did not file response testimony. Parties filed their Rebuttal and Cross-Answering testimonies on August 9, 2017. Among the filings on August 9, 2017, was the "Cross-Answering Testimony of Patrick M. Risken on Behalf of The State of Montana." Mr. Risken included twelve exhibits to his testimony. Mr. Risken is an assistant attorney general with the state of Montana, employed in that capacity since 2013.
- 3 On August 16, 2017, two parties, Staff and the Sierra Club, filed separate motions to strike Mr. Risken's prefiled testimony. We discuss these motions in more detail below, but here observe that their common and collective arguments are that Mr. Risken's testimony was untimely filed, violating acceptable Commission practice that protects all parties' due process rights; consists largely of legal argument that is the proper subject for

a legal brief, not testimony; is largely irrelevant; and is immaterial. Staff, in addition, points out that Mr. Risken's statement of his qualifications<sup>1</sup> does not disclose any education, background, or experience that would qualify him as an expert with specialized accounting, finance, economic, engineering, legal, or other knowledge or insight concerning any issue at dispute in this proceeding.<sup>2</sup>

4 The State of Montana filed a Response to Staff's and Sierra Club's motions on August 22, 2017. Montana's response begins with statements that the timing and purpose of Mr. Risken's testimony was to "to be respectful of other parties whose interests in the rate case are more immediate and will be determined . . . by these proceedings."<sup>3</sup> Thus, Montana states, "Mr. Risken's testimony was aimed at clarifying and informing other testimony."<sup>4</sup> This, presumably, was to the end of explaining, or arguing, how other witnesses' testimony bears on "the nature of Montana's interests here [that are] unique and unlike the nature of any other party to these proceedings."<sup>5</sup>

## DISCUSSION

5 As a technical matter, motions to strike prefiled testimony are actually premature in the sense that prefiled testimony, by its nature, has not yet been offered into the record subject to objections by other parties. However, the Commission, following its practice of liberally construing pleadings, routinely considers and rules on such motions as a practical means of resolving disputes over the admissibility of evidence before a hearing commences. This is done in the interest of gaining efficiency in the hearing process by not forcing parties to prepare discovery and cross-examination with respect to testimony that is irrelevant or otherwise inadmissible on its face. In addition, early rulings excluding such evidence avoid the need to expend valuable hearing time considering and resolving disputes over such evidence.

6 Typically, the Commission will grant a motion to strike, in whole or in part, or deny the motion. This has the effect of either closing the door to the admission of testimony in the same manner as might occur in response to the Commission granting a motion in limine

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<sup>1</sup> See Risken, Exh. PMR-1T at 1:2-28.

<sup>2</sup> Staff Motion ¶¶ 10-11.

<sup>3</sup> Montana Response ¶ 6. This implies, at least, that the State of Montana does not perceive itself to have interests that will be determined in this case. This, in turn, supports Staff's arguments concerning relevance, discussed below.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶10.

or sustaining an evidentiary objection to the admission of testimony, or leaving the door open for the subject testimony to be offered for admission into the evidentiary record at hearing, subject to objections. Here our response is to close the door to the admission of Mr. Risken's proffered testimony into the evidentiary record. In other words, we take Staff's and Sierra Club's motions to strike as objections to the admission of Mr. Risken's proffered testimony and, having heard full argument on the question, sustain their objections. We do so for several reasons, as follows:

- Mr. Risken's proffered testimony consists largely of legal opinion and argument. This is proper subject matter for a brief, not for testimony.
- Mr. Risken lacks any qualifications as an expert witness who can offer factual testimony or opine on factual matters that may be relevant to determination of any issue in this proceeding.
- The State of Montana's filing of Mr. Risken's testimony as cross-answering testimony is procedurally flawed and untimely. To the extent his testimony touches on issues before the Commission in this proceeding, those issues were raised, or at least suggested, by PSE in its direct case. The opportunity to respond to such testimony was on June 30, 2017, as established by the Commission's prehearing conference order, Order 03 in this proceeding, entered on February 15, 2017. Moreover, by waiting to file any testimony until the final round, Montana prejudiced all other parties in this proceeding by foreclosing their opportunity to respond in an orderly fashion in accordance with the procedural schedule established by Order 03.<sup>6</sup>
- Mr. Risken's testimony is largely irrelevant but to the extent it can be considered relevant, it is immaterial. It would in no way contribute to the Commission's ability to determine any fact in dispute in this proceeding.

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<sup>6</sup> We note, too, that Montana's filing in contravention of Order 03 created a substantial administrative burden at a time when the Presiding Officers' time could be more usefully focused on hearing preparation and management.

7 We do not agree with Montana that Staff’s motion “imprecisely describes the topics that Mr. Risken’s testimony covers.”<sup>7</sup> Nevertheless, we accept for purposes of discussion here Montana’s description of these issues, as follows:

Mr. Risken’s testimony covers: (1) forum and venue considerations; (2) the level of certainty – not size – of decommissioning and remediation cost estimates for Colstrip Units 1 and 2; (3) *joint and several* liability issues; (4) potential constitutional issues that could arise, depending on this Commission’s *application of* Washington public service statutes; and (5) Montana’s concerns surrounding other intervenors’ apparent attempts to secure a ruling that, directly or indirectly, would bear on Colstrip Units 3 & 4.<sup>8</sup>

8 Forum and venue considerations are inherently legal determinations and no party, including Montana, has challenged the Commission as a proper forum for determination of any issue now evident in this general rate case. Indeed, as stated in its response:

The State of Montana respects the Commission’s authority and responsibility to set rates and determine whether RCW 80.84.010 and .020 allow for recovery of “prudently incurred decommissioning and remediation costs” to be funded out of retirement accounts established under RCW 80.04.350.<sup>9</sup>

9 As to the “level of certainty” of decommissioning cost estimates provided by parties in this proceeding, Montana observes correctly that the actual costs of decommissioning and remediation of Colstrip are not known today. Montana, however, is entirely wide of the mark in suggesting that determination of these costs is an issue in this case. Nor is there an issue in this case concerning whether “costs associated with . . . economic development programs in Montana are ‘prudently’ incurred costs related to decommissioning and remediation under RCW 80.84.010 and .020.”<sup>10</sup> Briefly, then, Mr. Risken’s testimony in this regard is irrelevant.

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<sup>7</sup> Montana Response ¶ 7.

<sup>8</sup> *Id.* (internal citations to Risken testimony omitted).

<sup>9</sup> Risken Testimony at 3:17-20.

<sup>10</sup> Risken Testimony at 5:8-18.

- 10 Questions concerning joint and several liability are inherently legal determinations and would be proper subjects for briefing, not testimony, if this was an issue in this case, but it is not an issue. This testimony is irrelevant.
- 11 “Potential constitutional issues” are inherently legal in nature and were there any cognizable constitutional issues presented by PSE’s general rate case in Washington. Nor do we identify any such issues that might arise by the Commission’s determination of the issues in this general rate case. In the remote event that some constitutional issue might arise, it would be a proper subject for briefing in this case, or briefing on appeal of the Commission’s final order in this case. Constitutional issues and arguments are not a proper subject matter for testimony. This testimony by Mr. Risken is, again, irrelevant.
- 12 Finally, as to “Montana’s concerns surrounding other intervenors’ apparent attempts to secure a ruling that, directly or indirectly, would bear on Colstrip Units 3 & 4,” Mr. Risken’s testimony is simply incorrect. Contrary to Mr. Risken’s testimony, the depreciation schedule for Colstrip Units 3 & 4 *is an issue* in this case. PSE raised the issue in its prefiled testimony and other parties timely responded to this testimony. Montana failed to file timely response testimony, thus waiving its opportunity to do so.
- 13 As to the balance of Mr. Risken’s arguments in this connection, Montana will have the opportunity to present its legal arguments at the appropriate time. We emphasize that Montana will be required to adhere to the same deadline dates established by the procedural schedule in this case for filing an initial brief as every other party. That date presently is October 2, 2017. If, and only if, Montana files an initial brief, the state also will have an opportunity to file a reply brief, now scheduled for October 13, 2017.

#### COMMISSION DETERMINATION

- 14 **THE COMMISSION DETERMINES That it should construe Staff’s and Sierra Club’s respective Motions to Strike Mr. Risken’s prefiled testimony and exhibits as objections to the admission of his testimony. Having heard the state of Montana’s response to these objections, the Commission sustains them. Mr. Risken’s testimony and accompanying exhibits will not be entered into the evidentiary record of this proceeding.**
- 15 **THE COMMISSION DETERMINES FURTHER That Mr. Risken’s narrative, marked for identification as Exh. PMR-1T, will be made part of the overall record of this proceeding as a statement of Montana’s interests, but it will not be**

**considered as evidence. Nor will any of Mr. Risken’s “exhibits” filed with his narrative testimony be admitted or considered as evidence in this proceeding.**

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**Nothing in this ORDER affects Montana’s ability to cross-examine witnesses or submit post-hearing briefs in this proceeding consistent with the procedural schedule.**

Dated at Olympia, Washington, and effective August 25, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS  
Administrative Law Judge