

# BAR BULLETIN

## The Toothless Washington Utilities and Transportation Commission

**By Larry G. Johnson**

You may include yourself among Washingtonians who pride themselves on how enthusiastically we protect our environment by promoting conservation and forward-looking technologies, often demanded by robust citizen activism.

So, it may come as a shock to you, as it did to me, just how backward and impotent the Washington Utilities and Transportation Commission (WUTC) is when it comes to its authority to pre-approve the construction of any new, major infrastructure project by a private power utility.

It has no such pre-approval authority. None at all. I will explain, but first ...

### **Some Background and History**

I discovered just how powerless the WUTC is while working pro bono the past three years with a citizens group, CENSE, in opposing a \$300-million project that Puget Sound Energy is trying to build on the eastside, called "Energize Eastside." It would run 18 miles of new transmission lines and huge steel towers through densely populated residential areas in Redmond, Bellevue, Newcastle and Renton, placed in a narrow corridor with two existing petroleum pipelines that pump jet fuel under pressure from Blaine to the SeaTac and Portland airports.

The project has its roots in some interesting history. In 2006, Congress repealed a 1935 law called the Public Utilities Holding Company Act that prevented electric and gas utilities from being owned by foreign investors. The following year, half a dozen U.S. utili-

ties were bought by Canadian, Australian, British and Singaporean investment groups.

One of the acquired utilities was Puget Sound Energy. The purchase was initiated in 2007 by Macquarie, an Australian investment firm, leading a consortium of Canadian retirement funds. The consortium planned to invest \$5 billion in new infrastructure; no doubt incentivized by a state-guaranteed 9.8-percent return on that investment. Only one hurdle must be cleared to get those revenues: The WUTC must agree to charge rate-payers for each project. But the WUTC has never rejected a PSE project, so the hurdle is pretty low.

Macquarie bought PSE right during the 2007–08 financial crisis. Consumption of gas and electricity plummeted. There wasn't any need for more infrastructure, and there certainly wasn't any appetite to raise utility rates for customers.

Unfortunately for Macquarie, previous levels of energy consumption have never returned. In fact, both gas and electricity consumption in PSE's service area, as generally everywhere else in the U.S., have continued to decline. PSE's revenues are now 7 percent less than in 2009, when Macquarie completed its acquisition.

In December 2013, PSE dusted off an old project once designed to provide a perceived need to move more energy into Canada, and renamed it "Energize Eastside" as if it were something purely local and brand new. PSE justified it by pointing to all the new construction that began on the eastside after the post-2009 economic rebound (never mentioning the

fact that eastside energy consumption is declining). The 9.8-percent return on infrastructure investment now looks like the only way the Macquarie investment can pay off.

Environmentalists and affected citizens said the project is an unnecessary boondoggle, and their views are backed up by Richard Lauckhart, a former vice president of power planning for PSE. With his extensive knowledge of the Northwest grid and 22 years of service with the company, Lauckhart did extensive scientific and engineering studies into the project, and he concludes there is no need for "Energize Eastside."

### **First Stop, FERC**

So, how to stop what Lauckhart, I and many other concerned citizens thought was a senseless and wasteful project? We figured an appropriate forum to approach was the Federal Energy Regulatory Commission (FERC) with a complaint, citing among other things Lauckhart's expertise and computer model simulation evidence to support the claim that "Energize Eastside" was not needed and highly flawed in its technical assumptions.

To make a long story short, FERC dismissed the complaint for lack of jurisdiction. "This is a local project," FERC said, so any remedies had to come from state or municipal authorities.

### **Calling the WUTC to the Rescue**

Given the big stakes, public importance and significant controversy caused by PSE's project, we thought another obvious place to sort out the issues and

complaints over “Energize Eastside” would be the WUTC in Olympia. Moreover, the Washington Attorney General’s Office has a special public counsel devoted exclusively to representing the public interest in matters coming before the WUTC. Perfect!

So, I wrote both entities a letter on behalf of CENSE and others, asking the WUTC and AG to get involved and to listen to citizens’ and experts’ arguments against the project. The response I got from the public counsel was a shocker:

The Public Counsel Division of the Attorney General’s Office represents ratepayers as a whole, and does not act as the attorney for or provide legal advice to individuals or groups with specific interests.... Public Counsel’s role is generally limited to the same scope of issues that fall within the jurisdiction of UTC utility regulation. *Under Washington’s regulatory framework, the UTC does not pre-approve construction of utility plants or facilities....* In a situation such as the “Energize Eastside” project, the UTC regulatory function is triggered when PSE seeks cost recovery from customers. This normally takes place in a rate case *after the investment has been made and the utility plant has been placed in service.*<sup>1</sup>

Swell.

### **WUTC Asleep at the Wheel**

That’s right: The WUTC has no legal authority to approve or disapprove a project until *after* it is built. That makes no sense and invites waste. Several states have what are called “use and necessity” certification hearings before a regulatory

agency with public input, so that official prior approval is needed for a project before it can be built.

Why build something if it is not needed? Why risk possibly unnecessary, permanent damage and waste?

But as is it stands now with all new private utility projects in Washington,<sup>2</sup> the \$300-million “Energize Eastside” project could conceivably be built and then disapproved, but only after it caused an enormous amount of environmental damage and economic harm, not to mention the angst among affected residents.

Of course, investor-owned utilities such as PSE like the current process just the way it is. As previously mentioned, the WUTC has never in its history disapproved a project after it was built.

### **So, How “Progressive” Is Washington on Energy?**

The WUTC consists of three commissioners appointed by the governor. Recent governors have made a lot of public pronouncements about how they stand for a sound environment and innovative clean energy solutions.

So, it is hugely ironic that there is no meaningful regulatory framework to provide even *the prospect* of preventing massive retro-technology boondoggles from being built until it is far too late. If our politicians want to get serious about sensible energy, new laws have to be passed to plug this gigantic loophole.

Until that is accomplished, something can be done right away under existing law. The WUTC could issue periodic non-binding advisory opinions about any proposed new project before it is built and allow public input before issuing such opinions. There is nothing in existing

law to prohibit that.

And even with such thin gruel, both the public and the utility proposing the project would get helpful ideas in advance about what the chances are of a project’s approval, thereby hopefully deterring the bad ones.

That immediate measure could provide transparency to a process that is probably now taking place informally, anyway, between the WUTC and private utilities behind closed doors or on golf courses.

Of course, that step should serve only as a temporary stopgap measure until our Legislature brings Washington in line with the rest of the country by assuring that the WUTC and the public have the right to approve or disapprove any public utility project *before* it is built.

The WUTC and the politicians just might listen if you speak up. ■

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<sup>1</sup> September 9, 2014, letter from Senior Assistant Attorney General Simon J. Fitch (yes, that is how he spells his name) to the author (emphasis added). Full text copy is available for download at <http://e-dataevidence.com/simon%20fitch%20letter.pdf>.

<sup>2</sup> The WUTC has jurisdiction only over investor-owned private utilities such as PSE. PSE has lost some of its previous service area to public utility districts (PUDs) that serve the public interest and are subject to local voter control.