

**BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-170033/UG-170034
(Consolidated)

**Initial Post-Settlement-Hearing Brief of
the State of Montana in Support of
the Proposed Multiparty Settlement Stipulation and Agreement**

October 18, 2017

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I. INTRODUCTION

1 The Public Counsel Unit of the Washington Attorney General’s Office (“Public Counsel”), lone dissenter to the Multiparty Settlement Stipulation and Agreement (“Settlement”) proposed and supported by the Settling Parties in these consolidated rate proceedings,¹ has failed to show why the Commission should reject the proposed Settlement. Neither has Public Counsel shown that the Settlement should be approved only with conditions.²

2 The Settling Parties, on the other hand, have shown that (1) approval of the proposed Settlement by the Commission would be lawful; (2) the proposed Settlement’s terms are supported by the record; and (3) approving the proposed Settlement would serve the public interest.³ Because the proposed Settlement satisfies these three elements, the Commission should approve it.⁴ The State of Montana (“Montana”) further urges the Commission to make its approval unconditional.

II. FACTS

3 On February 6, 2017, Montana petitioned the Commission to intervene in these consolidated rate proceedings. In its petition, Montana described its interests in these proceedings. Specifically, Montana described Colstrip’s status as an “eligible coal plant” under RCW 80.84.010, which allows funds to be set aside in a retirement account to cover decommissioning and remediation costs associated with Colstrip unit closures. Montana further explained that, given

¹ “Settling Parties” includes: Puget Sound Energy (“PSE”); Commission Staff (“Staff”); Industrial Customers of Northwest Utilities (“ICNU”); Kroger Co.; The Energy Project (“TEP”); State of Montana; Northwest Industrial Gas Users (“NWIGU”); NW Energy Coalition, Renewable Northwest, and Natural Resources Defense Council (“NWEC, et al.”); Sierra Club; and Federal Executive Agencies (“FEA”). Intervenor Nucor Steel neither joined nor opposed the proposed Settlement.

² Public Counsel has not proposed a conditional approval of the proposed Settlement. At the September 29, 2017, settlement hearing, Public Counsel styled its objection to the proposed Settlement as an “alternative viewpoint.” As Chairman Danner observed, the Washington Administrative Code provisions that apply to Utilities and Transportation Commission adjudicative proceedings generally, and to Alternative Dispute Resolution mechanisms specifically, do not provide for “alternative viewpoint” positions. Settlement Hearing Tr. at 569:14-19 (Sept. 29, 2017).

³ See WAC 480-07-750(1)(stating the standard for Commission acceptance of proposed settlements).

⁴ See *id.* (stating that the Commission “will approve” such settlements).

Colstrip’s large economic footprint in Montana, closing Colstrip generating units would cause large job and tax revenue losses.⁵

4 On February 15, 2017, the Commission granted Montana’s petition to intervene,⁶ among other such petitions that it granted. The Commission concluded that Montana’s participation is “in the public interest,” and added that Montana should focus its “efforts on issues within the Commission’s jurisdiction that are related to the Colstrip facilities.”⁷

5 On June 2, 2017, Commission Staff (“Staff”) informed Judge Moss by letter that it had “no interest in pursuing settlement” at that time, viewing some of the issues in these consolidated proceedings as better suited to resolution by litigation and reserving judgment on whether settlement of other issues would be helpful. By September 15, 2017, Staff and the other Settling Parties had arrived at a settlement position for most of the issues presented to the Commission in these consolidated rate proceedings.

6 Specifically, between about July 17, 2017, and September 15, 2017, the Settling Parties negotiated certain stipulated settlement terms and memorialized the details in the proposed Settlement, filing the latter along with a joint memorandum in support of the proposed Settlement with the Commission on September 15, 2017. On September 11, 2017, Public Counsel informed the Commission that it had not joined the proposed Settlement and would “present an alternative viewpoint” for this Commission’s consideration.

7 Between September 15, 2017, and September 18, 2017, the Settling Parties filed documents supporting the proposed Settlement. On September 22, 2017, Public Counsel filed testimony opposing the proposed Settlement.

⁵ Montana Pet. at ¶¶ 5-9.

⁶ Order 03, ¶ 8.

⁷ *Id.* ¶ 8.

8 On September 29, 2017, the Commission held a hearing regarding the proposed Settlement.

III. LEGAL STANDARD

9 Settlement is a form of alternative dispute resolution that the Commission supports for resolving disputes “when doing so is lawful and consistent with the public interest.”⁸ While the Commission “cannot delegate to parties the power to make final decisions in any adjudicative proceeding,”⁹ it “will approve settlements when doing so is lawful, when the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission.”¹⁰ The Commission may also approve proposed settlements with conditions.¹¹ Accordingly, the Commission’s regulations favor settlement of matters that are at issue in adjudicative proceedings.

IV. ARGUMENT

A. **Montana’s interests in this proceeding are unique, and they inform Montana’s support for the proposed Settlement.**

10 As a state, Montana has powers and duties generally aimed at representing and protecting its citizens’ interests. Regarding Montana’s powers, its legislature may pass laws,¹² and several of Montana’s agencies may promulgate rules, which have the force of law. Among its duties, Montana must “maintain and improve a clean and healthful environment in Montana for present and future generations.”¹³ Montana funds its governmental efforts to represent and protect citizen interests through, among other things, tax revenue.¹⁴ As a result, the nature of Montana’s interests

⁸ WAC 480-07-700.

⁹ WAC 480-07-700(1).

¹⁰ WAC 480-07-750(1).

¹¹ *See id.*

¹² Mont. Code Ann. § 1-1-102.

¹³ Mont. Const. Art. IX § 1(1).

¹⁴ *See id.* Art. VIII; *but see id.* Art. IX § 5 (mandating coal severance tax revenues be dedicated to a constitutionally protected trust fund and requiring a three-fourths vote of each house of the Montana legislature to appropriate any of the coal severance trust fund’s principal).

here is unlike the nature of the interests of any other party to these proceedings.

11 Colstrip and any of its units' closure implicate Montana's unique interests in a unique way. On the one hand, as part-owner of all four Colstrip generating units, PSE has ownership interests in the largest employer and largest taxpayer in the City of Colstrip and Rosebud County, Montana. Indeed, much of southeastern Montana's economic wellbeing turns on the Colstrip facility and its operation. And, the economic and physical wellbeing of residents of the City of Colstrip and of Rosebud County are similarly tied to the proper and orderly operation, as well as the proper and orderly decommissioning and remediation, of any Colstrip units.

12 On the other hand, in order to ensure it has adequate funding to cover its costs from any Colstrip units' decommissioning and remediation, PSE may petition the Commission for a rate increase or other regulatory approvals, as it has in these proceedings. Montana's sovereign interests with respect to the people and community of Colstrip, then, directly center on raising issues in this PSE rate case proceeding which are unique to Montana, and which the Commission has already concluded are in the public interest.¹⁵

13 Montana's ultimate role in Montana will be to regulate the decommissioning and remediation of any Colstrip units, and the Montana Attorney General's Office has made clear its expectations that PSE will fulfill its obligations under Montana law as well as Washington law. The proposed Settlement is a good indicator that PSE will seek to fulfill its obligations in Montana; the proposed Settlement—viewed holistically—acknowledges and addresses several of Montana's interests that are within this Commission's power to address. Montana further believes that the proposed Settlement honors Washington law; is supported by the record in these proceedings; and serves the public interest, in large part, because it addresses ratepayer financial concerns in a

¹⁵ See Order 03, ¶ 8.

fiscally responsible way and will prevent or reduce rate shock to PSE ratepayers. In short, the proposed Settlement addresses those of Montana's interests that the Commission has power to address while also meeting this Commission's standards for settlement approval.¹⁶

B. The proposed Settlement's depreciation schedule balances the magnitude of rate increases associated with Colstrip depreciation expenses against a measure of certainty that ratepayers will not pay for Colstrip Units 3 & 4 for longer than is fair, just, and reasonable.

14 For accounting purposes only,¹⁷ the proposed Settlement establishes an accelerated depreciation schedule for Colstrip Units 3 & 4 ("Units"). That schedule will not force Washington ratepayers to bear an inordinate rate increase, but it does provide assurance that the depreciation expense for the Units will be fully and predictably funded.¹⁸ Similarly, as other Settling Parties have recognized through a general consensus of diverse opinions, the adjusted depreciation schedule minimizes future intergenerational inequities that might arise from the imprecise science of setting depreciation dates.

15 Further, by clarifying that the stipulated depreciation schedule for the Units is for accounting purposes only and does not set a retirement date for them, the Settlement preserves operational flexibility for an important source of reliable, low-cost baseload power for PSE customers while implicitly acknowledging that any decision regarding the Units' eventual retirement must be jointly made by all six of the Units' owners. This operational flexibility

¹⁶ Because the proposed Settlement resolves each issue implicating Montana's interests in these consolidated rate proceedings, Montana's initial post-hearing brief focuses solely on the issue of whether the Commission should adopt the proposed Settlement. Accordingly, Montana's initial post-hearing brief does not address any of the issues remaining to be litigated. Further, because the proposed Settlement resolves issues other than those that implicate Montana's interests, Montana's initial post-hearing brief focuses its support of the proposed Settlement solely on issues that implicate Montana's interests.

¹⁷ As PSE correctly observed in joint testimony supporting the proposed Settlement, the proposed Settlement's 2027 depreciation date does not equate to a retirement date. Joint Testimony of Puget Sound Energy, Exh. PSE-1JT at 7:4-12 (Sept. 15, 2017).

¹⁸ Settlement ¶¶ 24-27; *see also* Settlement Ex. B n.2 & Joint Memorandum in Support of Multiparty Partial Settlement ¶ 13.

mitigates cost uncertainty that PSE would otherwise face—e.g., the cost of replacement baseload power—if the proposed Settlement equated the Units’ depreciation life with their operational life.¹⁹

16 Public Counsel’s witness Roxie M. McCullar disagrees that December 31, 2027, is a reasonable depreciation date for Colstrip Units 3 & 4.²⁰ Ms. McCullar observes that 2027 is a number that falls between 2025 and 2035, stating that December 31, 2027 “seems early.”²¹ But Ms. McCullar’s only response is circular and conclusory—i.e., the depreciation date should be later.²² Ms. McCullar does not acknowledge that depreciation is an imprecise science—as Mr. Douglas H. Howell noted on behalf of Sierra Club’s full support of the proposed Settlement, “certainty of retirement dates is not required—nor is it advisable—in setting a depreciation date.”²³ Regulatory uncertainty, particularly in a cyclical industry such as energy, counsels in favor of a more conservative depreciation end-date in order to avoid intergenerational inequities.

17 Further, Ms. McCullar mischaracterizes Mr. Bradley G. Mullins’ testimony in support of the proposed Settlement in her own effort to support Public Counsel’s approach to setting a depreciation date for Colstrip Units 3 & 4. Specifically, Ms. McCullar focuses on to Mr. Mullins’ remark that ICNU would have preferred a 2030 depreciation year for Colstrip Units 3 & 4,²⁴ but Ms. McCullar ignores the crucial next sentence of Mr. Mullins’ testimony: “However, ICNU was willing to agree to a [December 31, 2027] depreciation date for Units 3 & 4 as part of a broader

¹⁹ Montana maintains that any reading of the proposed Settlement as purporting to establish a retirement date for Colstrip Units 3 & 4 would not be lawful, because it would be outside this Commission’s authority. Accordingly, by clarifying that depreciation does not equal retirement, the proposed Settlement appears to avoid any question of legality in that regard.

²⁰ Ms. McCullar’s testimony opposing the proposed Settlement also incorrectly states that December 31, 2027, is a retirement year. Testimony of Roxie M. McCullar, Exh. RMM-12T at 6:12-13 (Sept. 22, 2017).

²¹ *Id.* at 6:13.

²² *Id.* at

²³ Testimony of Douglas H. Howell, Exh. DHH-1T at 11:5-6 (Sept. 15, 2017).

²⁴ Testimony of Bradley G. Mullins, Exh. BGM-17T at 4; *see* RMM-12T at 7-8.

settlement package.”²⁵ This is the Settling Parties’ general sentiment regarding the settlement as a whole, which includes the adjusted depreciation date for Units 3 & 4.²⁶ Public Counsel’s opposition essentially amounts to a preference for a different depreciation date for Units 3 & 4 rather than the date reached in the Settlement among PSE and stakeholders of notably diverse interests.²⁷

18 Working to ameliorate cost uncertainty, which the adjusted depreciation schedule for Units 3 & 4 does, is in the public interest generally and the interest of Washington ratepayers specifically. December 31, 2027, is a lawful and well-supported depreciation date that arose from thoughtful negotiations among diverse interests. The depreciation date for Units 3 & 4 satisfies this Commission’s standards for settlement approval. Public Counsel’s opposition does nothing to aid the Commission’s decision process regarding this component of the proposed Settlement. The Commission should adopt the December 31, 2027, depreciation date for Units 3 & 4 as part of an unconditional approval of the proposed Settlement.

C. The proposed Settlement’s payment arrangements for decommissioning and remediation of Colstrip Units 1 & 2 are lawful, supported by the record, and serve the public interest.

19 The proposed Settlement outlines a lawful use of hydro-related Treasury Grants and Production Tax Credits (“PTCs”) which is supported by the record, because those assets will be split between (1) a dedicated retirement account pursuant to RCW 80.04.350 to fund and recover prudently incurred decommissioning and remediation costs for Colstrip Units 1 & 2 and (2) a non-

²⁵ BGM-17T at 4.

²⁶ See, e.g., Testimony of Ali Al-Jabir, Exh. AZA-7T at 2-3 (FEA witness characterizing the proposed Settlement as a “reasonable compromise” among the Settling Parties).

²⁷ Notably, Ms. McCullar did not review workpapers supporting depreciation rates for Colstrip Units 3 & 4. RMM-12T at 8:20-21. Literally, then, Public Counsel has stated no real basis to oppose the proposed Settlement’s negotiated depreciation date for Units 3 & 4.

Chapter 80.04 account that adheres to the description set out in Ms. Katherine Barnard's testimony.²⁸

20 The proposed Settlement's payment arrangements for decommissioning and remediation costs of Units 1 & 2 also serve the public interest, because they represent well-crafted, fiscally responsible strategies. Specifically, PSE's contribution of hydro-related Treasury Grants and PTCs to decommissioning and remediation costs for Colstrip will further reduce or prevent any rate shock for PSE ratepayers while also providing some measure of certainty to Montana regarding PSE's commitment to meet its decommissioning and remediation responsibilities in Montana.²⁹

21 "Public Counsel does not oppose the use of PTCs for Colstrip purposes."³⁰ Neither does Public Counsel appear to contest the proposed accounting structure for holding those assets. Rather, Public Counsel opposes only the proposed prioritization of use of monetized PTCs.³¹ The proposed Settlement orders \$280 million of monetized PTCs to be used first to fund community transition planning (\$5 million); second, to recover any unrecovered plant balances for all Colstrip Units; and third, to fund and recover prudently incurred decommissioning and remediation costs for all Colstrip Units, above whatever costs that hydro-related Treasury Grants would not cover.³² Public Counsel would like the Commission to flip that order, but Public Counsel's witness Ms. Colamonici undercuts her own recommendation.

22 First, Ms. Colamonici acknowledges that community transition and planning will be a key issue for the community of Colstrip, Montana.³³ Second, Ms. Colamonici acknowledges that the

²⁸ See Settlement ¶¶ 116-17; *see generally*, Testimony of Katherine J. Barnart, Exh. KJB-17T (Aug. 9, 2017).

²⁹ See Settlement ¶¶ 116-17.

³⁰ Testimony of Ms. Carla A. Colamonici, Exh. CAC-1T at 13:18 (Sept. 22, 2017).

³¹ *Id.* at 13-14.

³² Settlement ¶ 117.

³³ CAC-1T at 13:20-21.

balance of PTCs available to PSE (\$280 million) “appears”³⁴ sufficient to cover the relatively and admittedly modest \$5 million PTC contribution to community transition planning.³⁵ Third, Ms. Colamonici acknowledges that, “[r]ealistically, the transition planning will occur first in time.”³⁶ Apparently, Public Counsel’s view that community transition in Montana is not “primarily” a Washington ratepayer concern drives Public Counsel’s wishes that the PTC priority be opposite that from the proposed Settlement. While Montana will later address Public Counsel’s position on Washington ratepayer funding of community transition planning in Montana, that position and Ms. Colamonici’s concessions regarding PTCs undercut Public Counsel’s opposition to the proposed Settlement’s PTC funding priority.

23 The proposed Settlement, record, and Settling Parties’ positions at the settlement hearing have amply supplied the Commission with legal, evidentiary, and public policy grounds to approve the proposed Settlement’s use of hydro-related Treasury Grants and PTCs for decommissioning and remediation costs, as well as the funding priority for PTCs. Public Counsel either agrees with or fails to seriously oppose the portion of the proposed Settlement that concerns the use of PTCs. The Commission should adopt the proposed use of hydro-related Treasury Grants and PTCs as part of an unconditional approval of the proposed Settlement.

D. Reserving \$5 million of monetized PTCs for community transition planning in Colstrip, Montana, is legal, supported by the record, and serves the public interest.

24 The proposed Settlement establishes a balanced approach to PSE’s contribution of funds to a Community Transition Plan for the residents of Colstrip, Montana, and surrounding Rosebud County. These residents will be directly affected by any change to Colstrip facility operations, and

³⁴ *Id.*

³⁵ Indeed, \$5 million represents approximately 1.8% of the \$280 million PTC balance available to PSE.

³⁶ CAC-1T at 14 n.47.

PSE’s decision to contribute \$5 million of shareholder money and \$5 million of monetized PTCs is encouraging.³⁷ PSE’s contribution should encourage other Colstrip owners to contribute similar amounts—or more—to help fund community transition in southeastern Montana. This good-faith effort recognizes that the public interest here involves the intertwined concerns of Washington ratepayers and Montana residents who benefit from affordable, reliable Colstrip power and livable Colstrip wages, respectively. PSE’s contribution should also, as noted above, spur a shared effort among all stakeholders for Colstrip community transition. And, the existing workforce in Colstrip and Rosebud County, and the many trades and specialties that it represents, are available to PSE during the planning process and throughout decommissioning and remediation.

25 In its opposition to the proposed Settlement, Public Counsel does not *per se* oppose the use of PTCs to fund community transition planning in Montana, because its witness Ms. Colamonici remarks only that the “first priority” of PTC benefits should flow to ratepayers.³⁸ At the same time, Ms. Colamonici asserts that any PSE obligation to the Colstrip community “is primarily a shareholder and company obligation, not a regulatory, Washington utility ratepayer obligation.”³⁹ Ms. Colamonici’s assertion is misplaced.

26 First, Ms. Colamonici’s assertion that PTCs are tax credits “designed to benefit Washington ratepayers”⁴⁰ goes unsupported and is misleading. The Energy Policy Act of 1992 spawned the modern PTC.⁴¹ From then to present, the basic purpose of the modern PTC remains renewable energy subsidization.⁴² To say that the federal government designed PTCs to benefit

³⁷ Settlement ¶ 118.

³⁸ CAC-1T at 13-14.

³⁹ *Id.* at 13:21-22.

⁴⁰ *Id.* at 13:22-23.

⁴¹ See Pub. L. No. 102-486 § 1914, 106 Stat. 2776, 3020 (Oct. 24, 1992).

⁴² Cf. H.R. Rep. No. 102-1018, at 405 (1992) (noting that the modern PTC structure would generally disallow double-dipping, because any facility that received energy credits, governmental grants, or other “subsidized financing” would be ineligible for a PTC).

Washington's ratepayers is, at best, a stretch. Indeed, even assuming Washington's ratepayers benefit indirectly by the federal government's subsidization of renewable energy, to say that Congress designed the PTC with the interests of ratepayers at the forefront generally, let alone ratepayers in a single state, is untenable. Rather, coal community transition is a real possibility, and sometimes an inevitable consequence as with Colstrip Units 1 & 2, of renewable energy subsidization. Community transition planning for those communities, then, becomes an important cost factor to consider. Surely, Congress could have had community transition in mind just as much as, if not more than, ratepayer savings when it designed the modern PTC.

27 Second, even assuming *arguendo* Congress designed PTCs with ratepayer interests at the forefront, Public Counsel's implied assertion that community transition funding for workers in Montana does not benefit Washington ratepayers is unsupported. As long as they use Colstrip-generated electricity as low-cost, baseload power, Washington ratepayers benefit from the Colstrip community's reliance interests that have grown up around the Colstrip facility's operation. Were Washington ratepayers to benefit from the closure of certain Colstrip Units which no longer burned coal or occupied land and water, workers from the Colstrip community would supply the labor to make closure that possible, including required decommissioning and remediation. As noted, the existing workforce in Colstrip and Rosebud County, and the many trades and specialties that it represents, is available to PSE during the planning process and throughout decommissioning and remediation. In that circumstance, community transition planning would help align the interests of Washington ratepayers and Colstrip community members and, consequently, benefit Washington ratepayers.

E. The proposed Settlement is legal and serves the public interest, because it does not purport to release or waive any of PSE’s liabilities for decommissioning and remediation of any Colstrip Unit.

28 The proposed Settlement does not purport to release or waive any of PSE’s liabilities for decommissioning and remediation in the State of Montana, whether under Montana or federal law, for Colstrip Units 1 through 4.⁴³ This is a critical observation for two reasons.

29 First, if the proposed Settlement purported to release PSE from any decommissioning and remediation liabilities that arise under federal or Montana law, the Commission’s acceptance would have endorsed a void agreement.⁴⁴

30 Second, the Settlement explicitly recognizes that decommissioning and remediation costs may exceed the PSE contributions it identifies as of now.⁴⁵ This serves the public interest, because it provides fair notice to Washington ratepayers that PSE’s decommissioning and remediation responsibilities may increase in the future. Similarly, this provision adds some measure of assurance for Montana that PSE will not leave Montanans to clean up after the utility company and its fellow Colstrip owners.

V. CONCLUSION

31 Because the proposed Settlement is legal, supported by the record, and serves the public interest the Commission should accept the proposed Settlement unconditionally.

⁴³ Settlement ¶ 122.

⁴⁴ See, e.g., 42 U.S.C. § 9607(e); MCA § 75-10-701 (environmental statutes imposing joint and several liability).

⁴⁵ Settlement ¶ 122.

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