

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

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	DOCKET NO. UE-031725
)	
Complainant,)	ORDER NO. 11
)	
v.)	
)	GRANTING MOTION TO STRIKE
PUGET SOUND ENERGY, INC.,)	
)	
Respondent.)	
.....)	

MEMORANDUM

1 **PROCEEDINGS:** On October 24, 2003, Puget Sound Energy, Inc., filed with the Commission revisions to its currently effective Tariff WN U-60, designated as Twenty Fifth Revised Sheet No. 95, and Original Sheet Nos. 95-a through 95-e. This filing is a proposal to change PSE's rates recovering the cost of power, as a result of its decision to purchase a new generating resource, and for other reasons. The Commission entered its Complaint and Order Suspending Tariff Revisions; Instituting Investigation; and Authorizing Discovery on October 29, 2004. The Commission conducted evidentiary hearings on February 23-26, 2004.

2 **PARTY REPRESENTATIVES:** Todd G. Glass, Heller Ehrman White & McAuliffe LLP, Seattle, Washington, represents PSE. S. Bradley Van Cleve and Matthew W. Perkins, Davison Van Cleve, Portland, Oregon, represent the Industrial Customers of Northwest Utilities. Norman Furuta, Department of the Navy, represents the Federal Executive Agencies. Michael Alcantar and Donald Brookhyser, Alcantar & Kahl LLP, Portland, Oregon, represent the Cogeneration Coalition of Washington (CCW). Simon ffitich, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington

Office of Attorney General. Robert C. Cedarbaum, Senior Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff.

3 **MOTION TO STRIKE:** The Commission had not received responses to several Bench Requests as of the close of the evidentiary hearing in this proceeding. Accordingly, exhibit numbers for the receipt of parties' responses were reserved and the record was left open, in part, for the purpose of receiving such responses.¹

4 The Commission's Bench Request No. 6 was directed to PSE's attention and PSE was required to respond. PSE filed its response to Bench Request No. 6 on February 27, 2004, and the response was made part of the record as Exhibit No. 7. On March 1, 2004, ICNU submitted its own response to Bench Request No. 6. ICNU's response provides different information than what PSE provided, ostensibly to inform the record with data ICNU believes goes to the Commission's intent in propounding Bench Request No. 6.

5 On March 4, 2004, PSE filed its Motion To Strike ICNU's Response to Bench Request No. 6. PSE states seven grounds, as follows:

1. The Commission did not solicit the ICNU response.
2. The ICNU response attempts to rebut PSE's earlier response, which is not permitted.
3. PSE is prejudiced by the ICNU response.
4. The Exhibit List in this proceeding is final.
5. The ICNU response is inconsistent with the remaining schedule.
6. ICNU did not seek leave to file the response.

¹ There are other reasons to leave a record open for a brief period after the close of evidentiary hearings. Our procedural rules, for example, impliedly require that the record in any proceeding in which a witness is asked to respond to a question that requires the witness to accept information "subject to check" be left open for at least five days after the last date on which any such question is asked. See *WAC 480-07-0470(11)*.

7. The ICNU response is not responsive to Bench Request No. 6.

6 **RESPONSES:** The Commission received responses to PSE's Motion from Staff and ICNU. Staff filed a letter stating that it takes no position on PSE's Motion. ICNU filed a formal Response opposing PSE's Motion.

7 ICNU responds to each of PSE's arguments as follows:

1. ICNU's response meets all procedural requirements specified in WAC 480-07-405 and is not inconsistent with any instruction from the Bench.
2. ICNU's response does not contradict PSE's response but adds supplementary information to make a more complete record.
3. ICNU's response does not invalidate any of the information provided by PSE and therefore does not prejudice PSE.
4. The record in this proceeding has not been "finalized" in the sense argued by PSE, and there is no basis to exclude information that is directly relevant to issues in this case.
5. ICNU's response does not impact any party's ability to meet the procedural schedule any more than does the Commission's receipt of other post-hearing submissions by parties, including PSE.
6. Neither WAC 480-07-405 nor any instruction from the Bench requires ICNU to seek leave to file a response.
7. "Although the Bench Request solicited information regarding the relationship between NYMEX futures offered in September and actual average monthly gas prices for the calendar year, in the context of this case, variability between NYMEX futures in September and actual prices during the Rate Period is a more relevant comparison."

8 **COMMISSION DISCUSSION AND DECISION:** The Commission grants PSE's Motion. Our decision turns primarily on our finding that ICNU's response to Bench Request No. 6 is not responsive to the request as propounded. ICNU

acknowledges that PSE's response "technically complies with [Bench Request No. 6]" by comparing September NYMEX prices to actual prices for the following calendar year. This is exactly the information requested in Bench Request No. 6, which states:

Please provide any available analyses that examine the historical relationship between the average of NYMEX futures offered in September for the next calendar year (adjusted for basis differential for Sumas) and actual average annual gas prices at Sumas for each of the following five calendar years.

- 9 ICNU's response, however, does not address this request. Instead, ICNU argues that PSE's response "may not provide an accurate representation of the variability between NYMEX futures prices and actual results as they apply to the test period in the PCORC case." ICNU then offers discussion and data that purport to provide "a more accurate portrayal of the variability." Specifically, ICNU submits a "comparison between NYMEX prices for 10 days in September and actual prices for the period April through March of the following year from April 1997 to the present." All of the data ICNU presents are for Henry Hub, not Sumas. Thus, ICNU "responds" to a question we did not pose.
- 10 Although ICNU's response does not directly rebut PSE's earlier response, ICNU suggests that we should not rely on the data PSE submitted. Such argument is not appropriate for a response to a bench request. While we do not find ICNU's response prejudicial to PSE in this instance, a response to a bench request that includes argument, or is of tendentious nature, could be prejudicial to another party and could give rise to the sort of "point-counterpoint" exchange that PSE suggests.
- 11 Having stated our reasons for granting PSE's Motion To Strike, and having touched in our discussion on grounds 2, 3, and 7 asserted by PSE, we think it is

important to comment briefly on the other grounds (*i.e.*, 1, 4, 5, and 6) that PSE states in support of its Motion.

- 12 Bench requests, as the name implies, solicit information that the Commission thinks is important to a complete record in a proceeding, but which is not immediately available in the hearing room from any witness present. Bench requests often are directed to the individual party that is most likely to be able to produce the requested information quickly, without undue burden. This does not mean that other parties are barred from submitting responses. As previously discussed, however, all responses to bench requests must provide only information or data specifically requested. Parties are not free to reframe questions posed by the Bench.
- 13 The information sought via a Bench Request frequently cannot be produced before the end of an evidentiary hearing. In that situation, the Commission's practice is to reserve an exhibit number and leave the record open for receipt of the requested information. In this instance, Exhibit No. 7 was reserved for the receipt of responses to Bench Request No. 6. In practice, responses for which an exhibit number has been reserved simply become part of the exhibit, but are subject to a motion to strike, as occurred here. PSE's response and ICNU's response simply became part of that exhibit and no revision to the Exhibit List was required.
- 14 The fact that the Presiding ALJ informally distributed copies of the Commission's Exhibit List for the parties' convenience was not an act that has any legal significance with respect to closure of the record. In this proceeding, recognizing that certain exhibits would be provided after the close of the evidentiary hearings, the Commission left the record open and has taken no affirmative action to declare it closed.

15 We established February 27, 2004, as the target date for receipt of responses to all Bench Requests, but we did not establish that date as a firm deadline beyond which no response would be received. Indeed, we received responses to Bench Requests from PSE on February 27, 2004, and on March 1, 2004. PSE's response to Bench Request No. 4, received on March 1, 2004, was deemed timely and received into the record. We received ICNU's response to Bench Request No. 6 on March 1, 2004. We see no reason to deem that submission untimely either.

ORDER

16 THE COMMISSION ORDERS That PSE's Motion To Strike ICNU's Response to Bench Request No. 6 is granted.

17 THE COMMISSION ORDERS FURTHER That ICNU's response to Bench Request No. 6 is stricken from the record and will not be considered a part of Exhibit No. 7.

DATED at Olympia, Washington, and effective this 8th day of March, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge