

**BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

In the Matter of the Petition of:

Sierra Club, Climate Solutions, and  
Washington Environmental Council

For an Adjudicatory Proceeding Relating  
to the Prudence of Continued  
Investments in Colstrip Plant Units 1 and  
2.

Docket UE-151592

**JOINT PETITIONERS' OPPOSITION  
TO PUGET SOUND ENERGY'S  
MOTION TO DISMISS**

1. Pursuant to WAC 480-07-380(1)(c), Sierra Club and Washington Environmental Council (together, "Joint Petitioners")<sup>1</sup> hereby file this Opposition to Puget Sound Energy's ("PSE") August 14, 2015 Motion to Dismiss the Petition of Sierra Club, Climate Solutions, and the Washington Environmental Council (the "Motion to Dismiss").
2. PSE appears to misunderstand the relief requested by the Petition, and therefore based its Motion to Dismiss on a faulty premise. PSE asserted that the Petition requests the Commission to "order the closure of [Colstrip]." <sup>2</sup> PSE further asserted that Petitioners seek to change rates in this proceeding.<sup>3</sup> These assertions are incorrect.
3. Paragraph 41 of the Petition clearly articulated the relief requested by Joint Petitioners. The Petition requests that the Commission commence an adjudicatory proceeding to (1) address whether any new capital expenditures by PSE in Colstrip Units 1 and 2 are prudent and in the public interest, and (2) if supported by the evidence, direct PSE, Commission Staff, and Intervenors to propose a plan for the

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<sup>1</sup> Climate Solutions does not join this motion.

<sup>2</sup> MTD at ¶¶ 1 and 8 ("The ultimate relief the Petitioners seek in an adjudicative proceeding [is] closure of a plant outside the state...").

<sup>3</sup> MTD at ¶¶ 1 and 15 ("In essence, Petitioners are claiming that PSE's filed rates may not be fair, just, reasonable, and sufficient...despite the fact that this coal plant was included in PSE's rates for the past several decades...").

closure of Colstrip Units 1 and 2. This requested relief is within the Commission's jurisdiction, and therefore the Motion to Dismiss must be denied.

4. The Petition does not request an order to close Colstrip. Joint Petitioners seek an adjudicatory proceeding to consider new or continuing expenditures at Colstrip, and a requirement, if supported by the evidence in such a proceeding, that PSE develop a plan for the closure of Colstrip.<sup>4</sup> A proceeding to develop information and evidence that will inform ongoing and future decisions about Colstrip is within the Commission's broad authority to review the practices, acts, and budgets of PSE.<sup>5</sup>
5. Neither does the Petition suggest that this proceeding should result in any change to current rates. The purpose of the proceeding is to determine whether new or continued expenditures at Colstrip are prudent. Joint Petitioners would certainly expect such information to be incorporated into future rate case proceedings, but the current proceeding would not determine any change in rates on its own. Therefore, PSE's argument that the Commission should dismiss the Petition on the grounds that it seeks to change rates outside of a rate case,<sup>6</sup> or that the Joint Petitioners seek to engage in single-issue ratemaking are unsupported.<sup>7</sup>
6. PSE cites WAC 480-07-380(1)(a) as authority for its motion. That provision provides for a motion to dismiss for failure to state a claim. The rule continues: "The commission will consider the standards applicable to a motion made under CR 12 (b)(6) and 12(c) of the Washington superior court's civil rules in ruling on a motion made under this subsection." The applicable standard under the civil rules is that "a challenge to the legal sufficiency of the [petitioners'] allegations must be denied unless no state of facts which [petitioners] could prove, consistent with the complaint, would entitle the [petitioners] to relief on the claim."<sup>8</sup>

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<sup>4</sup> Petition, Prayer for Relief, at ¶ 41(e).

<sup>5</sup> See, Petition at ¶¶ 10-13.

<sup>6</sup> MTD at ¶ 15.

<sup>7</sup> MTD at ¶¶ 16-18.

<sup>8</sup> *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 103, 233 P.3d 861 (2010).

7. When examining a motion to dismiss, the Commission will assume all facts in the Petition are true and may even consider hypothetical facts supporting the Petition's claims.<sup>9</sup> "Given that, dismissals are only warranted if the agency concludes that, beyond a reasonable doubt, the complainant cannot prove any set of facts which would justify [relief]. The courts have opined that CR 12(b)(6) motions should be granted 'sparingly and with care.'"<sup>10</sup>
8. Joint Petitioners alleged in the Petition that further expenditures at Colstrip are a waste of ratepayer money and that it is imprudent for PSE to continue to spend money on Colstrip.<sup>11</sup> For purposes of PSE's Motion to Dismiss, the Commission must presume that the Joint Petitioners' allegations are correct. It follows then that the Commission has the authority to conduct a proceeding to consider information about PSE's acts and practices so that the Commission can make informed decisions about whether future expenditures at Colstrip are, or will be, imprudent.
9. The Commission's authority to regulate PSE is broad. It has authority to regulate not just the rates of public service companies, but their "services, facilities, and practices" as well.<sup>12</sup> This authority has been described as "plenary."<sup>13</sup> Requiring PSE to provide information related to Colstrip, or even requiring PSE to develop a plan that addresses the closure of Colstrip, is not outside the Commission's jurisdiction.
10. PSE concedes in its Motion to Dismiss that the Commission has the authority to consider the prudence of capital expenditures at Colstrip before they are made: "PSE appreciates the opportunity to seek preapproval of major capital investment for Colstrip and, eventually...PSE may use this process to bring such proposed

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<sup>9</sup> *Whatcom County v. Points Recycling And Refuse, LLC*, Docket TG-081089 (consolidated), Order 04 - Order Denying Motion to Dismiss and Denying Cross Motion at ¶ 19 (Jan. 13, 2009)( citing *Kinney v. Cook*, 159 Wash.2d 837, 842, 154 P.3d 206 (2007)).

<sup>10</sup> *Id.* (citing *Hoffer v. State*, 110 Wash.2d 415, 420-21, 755 P.2d 781 (1988)(internal citations omitted ).

<sup>11</sup> Petition at ¶ 26.

<sup>12</sup> RCW 80.01.040(3).

<sup>13</sup> *State v. Skagit River Tel. & Tel. Co.*, 85 Wash. 29, 36, 147 P. 885, 888 (1916) ("That the Public Service Commission has plenary powers to regulate all public utilities within the state has been thoroughly established and determined in this state and requires no citation of authority").

expenditures to the Commission for preapproval.”<sup>14</sup> The relief requested by the Joint Petitioners is similar to the predetermination identified by PSE. However, rather than seeking predetermination to approve certain expenses, Joint Petitions seek an adjudicatory proceeding to review whether predetermination to disallow certain expenses is appropriate. In both circumstances, the Commission could issue an order that provides more direction and certainty to PSE and its customers. However, neither a predetermination of an approval nor a predetermination of a disallowance would compel PSE to act. PSE would still retain the ability to make its own business decisions, and in addition it would have a better understanding of whether the Commission would allow recovery of the expenses at issue in a future rate case.

11. PSE’s assertion that the Commission is prohibited from considering the Petition outside of a rate setting case is irrelevant because the Petition does not request a change to any current rates.<sup>15</sup> Similarly, PSE’s concern about single-issue ratemaking is unfounded because the Petition does not request a change to any current rates.<sup>16</sup> As stated in the Petition, the Commission has the authority to review whether the “practices, acts or services” of PSE are “unjust, unreasonable, improper, insufficient, inefficient or inadequate” under RCW 80.28.040. The Commission also has the authority to order “improvements, changes, additions or extensions” to electrical plant, which includes Colstrip, under RCW 80.28.130. This authority is not limited to rate setting proceedings, and nothing in the authorities cited by PSE suggests that only services, practices, or facilities relating to rates are subject to Commission jurisdiction.<sup>17</sup>

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<sup>14</sup> MTD at ¶ 5.

<sup>15</sup> MTD at ¶ 15.

<sup>16</sup> MTD at ¶¶ 16-18.

<sup>17</sup> MTD at ¶ 15. Even if this case did impact rates, the Commission has permitted and even encouraged proceedings addressing limited issues affecting rates. One is the “power cost only rate case” (PCORC); another is an “expedited rate filing” (ERF). These provide some regulatory efficiency, as would the proceeding contemplated by this Petition.

12. Further, Joint Petitioners filed the Petition pursuant to RCW 80.04.110,<sup>18</sup> which allows for a complaint to be made by petition “setting forth any act or thing done or omitted to be done by any public service corporation in violation or claimed to be in violation, of any provision of this title [80], Title 81 RCW, or of any order or rule of the commission.” Title 80 includes the “rate setting statutes” addressed by the Motion to Dismiss,<sup>19</sup> and therefore it is proper for the Commission to consider the Petition as it relates to those statutes, as well as any other provision in Title 80, Title 81, or other Commission rule. Once the Commission receives such a complaint or petition under RCW 80.04.110, it has a non-discretionary obligation to hold a hearing. “At the time fixed for the hearing mentioned in RCW 80.04.110, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or she or it may desire.”<sup>20</sup>
13. PSE’s additional arguments in its Motion to Dismiss do not provide any grounds for dismissal. As discussed above, Joint Petitioners did not ask the Commission to act as an environmental regulator and do not anticipate any order resolving or reprising any ongoing environmental litigation.<sup>21</sup> The Petition is not duplicative.<sup>22</sup> Joint Petitioners expressly identified the scope of the Commission’s investigation in Docket UE-151500 as more limited than the scope of this proceeding and suggested that the Commission consider the issues in parallel or as a consolidated docket.<sup>23</sup> Finally, Joint Petitioners do not contest that some of the issues addressed in this docket may be relevant in other Commission proceedings.<sup>24</sup> The fact that issues in this proceeding may be relevant to other proceedings does not provide any basis for rejecting the Petition; to the contrary, an adjudicatory proceeding reviewing Colstrip

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<sup>18</sup> Petition at ¶¶ 1, 37, and 41(b). Joint Petitioners note that there are two typos in the Petition at ¶11 citing to RCW 80.01.110(1). The correct citations in ¶11 should be to RCW 80.04.110.

<sup>19</sup> MTD at ¶ 15.

<sup>20</sup> RCW 80.04.120 (emphasis added).

<sup>21</sup> MTD at ¶¶ 19-20.

<sup>22</sup> MTD at ¶ 21.

<sup>23</sup> Petition at ¶¶ 25 and 35.

<sup>24</sup> MTD at ¶ 22.

would likely benefit those other proceedings by providing additional information for the Commission and other parties to consider.

14. Indeed, a determination by the Commission of the continued viability of expenditures at Colstrip Units 1 and 2 will facilitate the anticipated PSE rate case in Spring 2016. Without an understanding of the future of those units, the participants in the rate case will have to prepare for optional scenarios, making that rate proceeding more complex and expensive for all involved.
15. For the foregoing reasons, Joint Petitioners respectfully request that the Commission deny PSE's Motion to Dismiss. Joint Petitioners also respectfully renew their request that the Commission avoid further delay and set this matter for a prehearing conference and an adjudicatory hearing consistent with the schedule set forth in ¶ 39 of the Petition.

Dated this 24th day of August, 2015.

Respectfully submitted,

  
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