

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	DOCKET NO. UE-121373
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	RESPONSE OF THE INDUSTRIAL
)	CUSTOMERS OF NORTHWEST
v.)	UTILITIES IN OPPOSITION TO
)	PUGET SOUND ENERGY'S PETITION
PUGET SOUND ENERGY, INC.,)	FOR RECONSIDERATION AND
)	MOTION TO REOPEN RECORD
Respondent.)	
_____)	

I. INTRODUCTION

1 Pursuant to the Washington Utilities and Transportation Commission’s (“WUTC” or the “Commission”) notice, the Industrial Customers of Northwest Utilities (“ICNU”) submits this response in opposition to Puget Sound Energy, Inc.’s (“PSE” or the “Company”) Petition for Reconsideration (“Petition for Reconsideration”) of the Commission’s Order No. 03 (“Order 03”) and Motion to Reopen the Record (“Motion to Reopen”). PSE has raised no new issues that warrant revising Order 03, but is instead attempting to secure another opportunity to make its case to the Commission. In addition, the “Global Settlement” proposed by Staff and PSE in Docket Nos. UE-121697, UE-121705, UE-130137, and UE-130138 does not provide a proper basis for granting PSE’s Petition. The Commission should reaffirm its conclusions in Order 03 and reject all aspects of the Petition for Reconsideration. Finally, the Commission should decline to reopen the record to allow PSE to present its one-sided “new” factual evidence.

II. RESPONSE IN OPPOSITION

A. The Commission Should Deny the Petition for Reconsideration

1. Legal Standard for Reconsideration

2 A petition for reconsideration must “request that the commission change the outcome with respect to one or more issues determined by the commission’s final order” and “must clearly identify each portion of the challenged order that it contends is erroneous or incomplete.”^{1/} Therefore, a petition for reconsideration is allowed for the limited purpose of correcting omissions and errors of fact or law.

3 The Commission has explained that petitions for reconsideration should not be filed simply to reargue or relitigate issues that have been fully addressed in the proceeding. The Commission has repeatedly explained that:

A petition for reconsideration must demonstrate errors of law, or of facts not reasonably available to the petitioner at the time of entry of an order. A petition that cites no evidence that the Commission has not considered, and merely restates arguments the Commission thoroughly considered in its final order, states no basis for relief. A petition for reconsideration is not a second opportunity to litigate issues which were fully developed prior to entry of the final order and which were discussed and decided in the final order. The mere fact that a party disagrees with a final order does not state a basis for reconsideration.^{2/}

Thus, it is not appropriate to request reconsideration merely because a party is dissatisfied with the Commission’s legal or factual resolutions that were fully litigated, but do not constitute an

^{1/} WAC § 480-07-850(1)-(2).

^{2/} Re Avista Corp. for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255 et al., Fourth Suppl. Order ¶ 40 (Apr. 21, 2000) (emphasis added and internal citations omitted); see also WUTC v. Olympic Pipe Line Co., Docket No. TO-011472, Eighth Suppl. Order ¶¶ 13, 15 (Mar. 29, 2002) ; WUTC v. PSE, Docket No. UE-011163, Seventh Suppl. Order ¶¶ 18, 22-23 (Oct. 24, 2001) (finding that PSE failed to meet its burden of demonstrating a basis for reconsideration where it had not shown error in the final order or that the order was incomplete).

error of fact or law. PSE’s Petition fails to meet these standards warranting reconsideration. PSE essentially argues that Order 03 fails to comply with the “letter or the spirit” of the Coal Transition Energy Bill.^{3/} As a result, the Petition raises no error of fact or law, because the Commission fully considered and complied with this legislation.

2. PSE’s Disagreement with Order 03 Does Not Warrant Reconsideration of Fully Addressed Issues

4 PSE has sought reconsideration upon three grounds, each of which was fully addressed in testimony, oral argument, and the Commission’s Order 03. Specifically, PSE is seeking reconsideration of the Commission’s: 1) determination of the appropriate “equivalent plant;” 2) imposition of a reporting requirement; and 3) conclusion that the question of deferred accounting should be reviewed in the context of a rate proceeding.^{4/} There are no errors of fact or law that meet the Commission’s standards for reconsideration in the Commission’s determinations on these three issues. PSE’s Petition for Reconsideration simply attempts to provide the Company with another bite at the apple and complain that the conditions imposed by the Commission places it at a “crossroad.” It is far from clear how customers will be harmed if PSE fails to execute the Coal Transition PPA. Thus, the Petition should be rejected, as PSE is improperly using the reconsideration process to voice its disagreement with Order 03 in an attempt to intimidate the Commission into changing factual, legal, and policy conclusions. Additionally, since filing its Petition for Reconsideration, PSE has attempted to use this Petition as leverage to force approval of other, unsupported filings.

^{3/} Petition for Reconsideration at ¶ 4.

^{4/} Id.

a. There Are No Legitimate Grounds to Reconsider the Commission’s Conclusions on the Cost of Equivalent Plant

5 The Commission fully considered and rejected PSE’s arguments regarding the cost of an equivalent plant. The Commission’s analysis did not simply repeat the parties’ arguments and cursorily select a cost for the equivalent plant; rather, Order 03 includes a long, detailed, and thoughtful discussion in support of the resolution of the issue of the cost of equivalent plant.^{5/} The Commission considered and rejected PSE’s argument that selecting any plant other than its proposal would not allow it an opportunity to earn its authorized equity adder.^{6/} Similarly, the Commission already concluded that “equivalent” plant may be measured by reference to a facility not currently available to PSE.^{7/} In fact, the Commission concluded that PSE’s previously raised position “defies logic.”^{8/} Reconsideration on this issue should be rejected, as PSE has raised no new issues nor identified any errors of law or fact.

b. The Commission Must Ensure that the TransAlta Contract Continues to Qualify as a Coal Transition Contract

6 The Commission’s reporting requirements were also fully considered by the parties and are reasonable conditions to ensure that the Commission maintains its obligations to regulate in the public interest. PSE does not object to the reporting requirement per se, but seeks reconsideration of the Commission’s conclusions that it will continue to monitor the TransAlta contract to ensure that it continues to qualify as a coal transition contract.^{9/} PSE argues that it is inappropriate for the Commission to maintain its jurisdiction over the contract, and that any such

^{5/} Order 03 at ¶¶ 27-43.
^{6/} Id. at ¶¶ 39-43.
^{7/} Id.
^{8/} Id. at ¶ 42.
^{9/} Id. at ¶¶ 4, 13-23.

monitoring would be inconsistent with how the Commission reviews other PSE resources and contracts.^{10/} PSE presents an inaccurate view of utility regulation that would require the Commission to abdicate its responsibilities to regulate in the public interest and protect customers.

7 The Commission adopted the Order 03 reporting requirements only after rejecting similar, but more stringent conditions recommended by Staff and Public Counsel. Staff and Public Counsel both recommended that the Commission condition any approval of the TransAlta contract upon requirements that would ensure that the contract retains its essential purpose as a coal transition contract.^{11/} In lieu of imposing more stringent conditions, the Commission simply required PSE to provide additional information in the future, which could be used to ensure that the facility continues to “qualify under the terms of RCW 80.04.570 and related authority as a ‘coal transition PPA.’”^{12/}

8 PSE’s claims that the Commission must approve or disapprove the TransAlta contract and that it is being treated differently than if it had built or purchased an equivalent plant are erroneous. For example, PSE asserts that if it had purchased or built its own power plant, once the Commission determined the construction was prudent, PSE would be allowed to recover all its costs throughout the life of the plant.^{13/} As a matter of law and sound regulatory policy, the Commission always retains the jurisdiction and option to review previously approved resources to ensure that they being prudently managed, continue to provide benefits to customers, and are used and useful. For example, the Commission recently disallowed the costs of a PacifiCorp

^{10/}

Id.

^{11/} Order 03 at ¶¶ 60-61.

^{12/} Id. at ¶¶ 58.

^{13/} Petition for Reconsideration at ¶ 21.

contract on the grounds that, even if it had been prudently entered into years ago, PacifiCorp failed to provide evidence that the contract was being prudently managed and was currently used, useful or needed to provide service to Washington customers.^{14/}

9 Order No. 3 is no different in substance, but simply requires additional reporting requirements, which is reasonable given the unique nature of the contract and the coal transition statute. The Commission recognized that the factual details of the TransAlta PPA could change in the future in a manner that causes it to no longer legally qualify as a coal transition contract.^{15/} Similar to any other resource that may no longer be necessary, used and useful, or may become imprudently managed, the Commission must continue to monitor and ensure that the TransAlta PPA complies with all statutory and public policy requirements. The Commission's imposed conditions do nothing more than this.

c. The Commission Appropriately Postponed Consideration of Whether a Deferral is Warranted

10 Finally, PSE argues that the Commission must issue a ruling on whether it will be allowed deferred accounting for costs associated with the TransAlta contract.^{16/} PSE already requested that the Commission resolve this issue in its favor, and provided arguments in its opening and rebuttal testimony.^{17/} PSE points to no specific statutory provision that requires the Commission to open a deferred account to resolve the question of deferred accounting at this time.^{18/} As the Commission explained, this is a ratemaking issue that is more appropriate to

^{14/} WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 06 ¶ 148-52 (March 25, 2011).

^{15/} Order 03 at ¶ 58.

^{16/} Petition for Reconsideration at ¶¶ 24-26.

^{17/} Order 03 at ¶¶ 95-97.

^{18/} Petition for Reconsideration at ¶¶ 24-26.

address in the context of a general rate proceeding.^{19/} The coal transition statute specifically states that a request for approval of the contact “is not considered a general rate case,”^{20/} and in the absence of a specific statutory provision, the Commission is entirely within its discretion to postpone final resolution of issues regarding the deferral of any costs to an actual rate proceeding.

B. The Commission Should Not Reopen the Record

11 The Commission should deny PSE’s motion to reopen the record, because it was deficiently filed in direct violation of Commission rules, and should be rejected on this basis alone. In addition, PSE has failed to establish that its additional evidence would meet any of the Commission’s requirements for reopening the record. Finally, PSE’s new evidence has not been reviewed or subjected to discovery and cross examination, and all parties must be provided an opportunity to respond if the record were reopened.

12 As a threshold matter, Commission rules bar consideration of PSE’s Motion to Reopen. WAC § 480-07-375(2) states that “[p]arties must file motions separately from any pleading or other communication with the commission. The commission will not consider motions that are merely stated in the body of a pleading”^{21/} A petition for reconsideration is a “pleading” under Washington rules.^{22/} PSE has included its Motion to Reopen as a subsection of its Petition for Reconsideration.^{23/} Therefore, it has not filed the motion separately from its pleading, and the Commission should adhere to its rule and refuse to consider PSE’s Motion to Reopen.

^{19/} Id.
^{20/} RCW § 80.04.570(3).
^{21/} WAC § 480-07-375(2).
^{22/} WAC § 480-07-370(1)(b).
^{23/} Petition for Reconsideration at ¶ 27.

13

PSE’s deficient motion asserts that it “is not clear whether the record in this case has been officially closed or whether it remains open,” but that the record should be reopened to review new evidence regarding an amendment to the TransAlta contract.^{24/} PSE here ignores Commission rule and practice. The Commission’s rules state that a final order issues “within ninety days after the commission receives transcripts following the close of the record, hears oral argument . . . receives a petition for administrative review or an answer to a petition for review, whichever occurs last.”^{25/} Therefore, unless the Commission makes exception, the record is closed by the time the Commission receives transcripts, and a final order is issued after a series of events have occurred, one of which is closure of the record. The fact that the Commission may not state in an order the precise day upon which closure of the record occurred is irrelevant. In this case, transcripts were received, oral argument and briefing occurred, an order was issued, and the record has long since closed. This is reinforced by the Commission’s rule on reopening proceedings, which states that “[a]ny party may file a motion to reopen the record at any time after the close of the record and before entry of the final order”^{26/} Thus, the record is closed at the end of the evidentiary hearing, and the rule allows a party to reopen the record after the close of the record only before entry of the final order. PSE’s request ignores the Commission’s rules and is not timely since it is seeking to reopen the record after the issuance of a final order.

14

The primary purpose of opening the record is to “allow receipt of evidence that is essential to a decision that was unavailable and not reasonably discoverable” at the time of the

^{24/} Petition for Reconsideration at ¶ 2, n. 2.

^{25/} WAC § 480-07-820(3).

^{26/} WAC § 480-07-830 (emphasis added).

hearing.^{27/} The Commission has explained that a request to reopen the record will be denied if a party does not meet these requirements, or if reopening the record is unnecessary to resolve disputed issues.^{28/} In this case, PSE is not presenting evidence that was unavailable and not reasonably discoverable at the time of the hearing. The evidence PSE seeks to introduce did not exist, and, in fact, was created in response to the Commission Order resulting from the hearing. If the Commission allows this unorthodox practice, then no party is ever assured of closure of the record.

15 The Commission has denied a request to reopen the record to enter evidence that was created by a party to bolster its case after an initial order was made by an administrative law judge,^{29/} let alone subsequent to a final, dispositive Commission order. Allowing a party to manufacture and enter new evidence designed to reach its desired outcome would make Commission findings of law and fact a moving target, and would violate basic due process. The evidence PSE seeks to introduce is not essential to the Order in this case, but, rather, is responsive to that Order. Additionally, the Commission’s Final Order “dispose[s] of the merits of a proceeding,” and a motion to reconsider does not stay the effectiveness of that resolution.^{30/} Therefore, subsequent to the Commission’s entry of final Order 03, there are no issues in dispute in this docket, so PSE’s proffered evidence cannot be necessary to resolve disputed issues. Because PSE seeks to introduce evidence not essential to the final order and not necessary to

^{27/} Id.
^{28/} WUTC v. Olympic Pipeline Co., Docket No. TO-011472, Eighth Suppl. Order ¶ 34 (Mar. 29, 2002); BNSF Railway Co. v. Snohomish County, Docket No. TR-090121, Order No. 04 ¶¶ 17-19 (Nov. 30, 2009).
^{29/} BNSF Railway Co. v. Snohomish County, Docket No. TR-090121, Order No. 04 ¶¶ 17-19 (Nov. 30, 2009).
^{30/} WAC §§ 480-07-820(b), 480-07-850(7).

resolve any existing dispute in this docket, the Commission should reject its deficient and untimely motion to reopen the record.

16 If the Commission were to decide to grant PSE’s request to reopen the record, the Commission’s rules require that after the record has been reopened, “[t]he commission will give all parties an opportunity to respond to any evidence received after the record has been closed.”^{31/} This means that if this record were to be reopened despite the procedural and substantive deficiencies of PSE’s motion, all parties must be given the opportunity to respond to this newly created evidence.

C. Reconsideration or Reopening the Record in Response to the “Global Settlement” Would Also be Contrary to Law

17 PSE and Staff cavalierly ignore the Washington Administrative Procedure Act (“APA”) and the Commission’s rules in requesting that the Commission substitute the terms of their Global Settlement, filed in the unrelated Decoupling and ERF proceedings, for the Commission’s determinations in Final Order 03.^{32/} By rule, a final order “dispose[s] of the merits of a proceeding.”^{33/} The law states that a request for reconsideration must be filed within ten days of a final order and state “the specific grounds upon which relief is requested.”^{34/} The Commission’s rules further clarify that a petition for reconsideration must “identify each portion of the challenged order that it contends is erroneous or incomplete, [and] must cite those portions of the record and each law or commission rule . . .” that demonstrate Commission error or that

^{31/} WAC § 480-07-830.

^{32/} WUTC v. PSE, Docket Nos. UE-121697, UG-121705, UE-130137, and UG-130138, Multiparty Settlement at 2 (March 22, 2013).

^{33/} WAC § 480-07-820(b).

^{34/} RCW § 34.05.470(1).

are incomplete.^{35/} Reconsideration is limited to considering allegations of error of law or fact, and does not constitute a second opportunity to litigate “issues that were fully developed prior to entry of the final order and which were discussed and decided in the final order.”^{36/} A motion for reconsideration does not stay the effectiveness of an order.^{37/}

18 The Commission issued Order No. 03 on January 9, 2013, disposing of the merits of this case. Thus, on reconsideration, the Commission must determine only whether the Commission made an error of law when it: 1) set the PPA equity adder at \$1.49 per mW; 2) stated that the Commission retained ongoing prudence authority regarding the PPA; or 3) deferred until a later proceeding determination of the particular method of cost recovery PSE will use to collect the costs associated with the contract.^{38/} All issues in this docket, other than the three discussed above, have been disposed of, and no party petitioned for a stay of Final Order 03. The Global Settlement created by Staff and PSE in unrelated dockets has no bearing whatsoever on the question of whether any one of these three Commission actions challenged in the PSE reconsideration constituted an error of law. The Global Settlement is not referenced in PSE’s Petition for reconsideration – indeed, it was not created until well after the ten days to petition for reconsideration had passed, therefore, it is irrelevant and unrelated to PSE’s petition for reconsideration.

19 Further, even if the Commission were to decide that any or all of the three challenged components of the order were erroneously decided, the APA specifically requires that that

^{35/} WAC § 480-07-850(2).

^{36/} Re Avista Corp. for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255 et al., Fourth Suppl. Order ¶ 40 (Apr. 21, 2000).

^{37/} WAC § 480-07-850(7).

^{38/} WUTC v. PSE, Docket No. UE-121373, Petition for Reconsideration at ¶ 4 (January 22, 2013).

decision must be made exclusively on the basis of the record in this docket, and making such a decision on the basis of the Global Settlement or the thin supporting evidence that has been introduced to the record in unrelated dockets would be a violation of law. The APA states that “the agency record constitutes the exclusive basis for agency action in adjudicative proceedings . . .”^{39/} Commission orders must contain statements of findings and conclusions on “all material issues of fact, law, or discretion presented on the record . . . [and] findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding . . .”^{40/} The existence of a record in other, unrelated dockets may not serve as the basis for decisions in this docket. The requirement that findings must “be based exclusively on the evidence of record in the adjudicative proceeding” clarifies that the record relied upon must be that of each specific adjudicative proceeding. This means that the Commission cannot legally rely on any facts outside of the record in this docket to issue an order in this docket. There is no evidence on the record in this docket that supports replacing Final Order 03 with the Global Settlement’s resolution of already decided issues; therefore, adopting the Global Settlement would violate Washington law.

20 PSE and Staff appear to acknowledge that the Washington APA’s due process protections stand as a legal bar to their inter-docket horse-trading. Staff Counsel attempted to have the hearing of the Decoupling and ERF dockets re-noticed so as to include Docket UE-121373 on one day’s notice, which would have been a violation of WAC § 480-07-440.^{41/} PSE, on the other hand, posits that all that is necessary to bypass the protections of the APA is a “hearing on the

^{39/} RCW § 34.05.476(3).

^{40/} RCW § 34.05.461(3)-(4).

^{41/} WAC § 480-07-440(1); compare Letter of AAG Sally Brown to ALJ Moss dated May 15, 2013.

settlement.”^{42/} PSE would have the fact that a settlement was suggested in a separate docket, in which a hearing occurred, sweep aside the APA and the Commission’s rules and all due process protection these contain, including the importance of finality in agency proceedings. PSE’s counsel elaborated, stating that the APA would be satisfied if there were a “joint evidentiary hearing looking at all—all the records together.”^{43/} While this simply is a misstatement of Washington law, as described above, it also misses the point that there has been no joint evidentiary hearing that included the present docket.

21 In what appears to be an ambitious effort to expand the record in this docket beyond those materials that were placed on the record by the Commission and that served as the basis for Final Order No. 03, Staff and PSE have sought to file voluminous materials from the Decoupling and ERF dockets in the present docket. In fact, at one point, PSE even sought to file in this docket a bench request response pertaining to its decoupling proposal, stating “Attached please find PSE's Responses to Bench Request Nos. 1 and 2 in Docket Nos. UE-121373, UE-121697 & UG-121705 (consolidated)” This is ironic, as a careful review of Bench Requests One and Two in this docket reveals no requests pertaining to decoupling rates.^{44/} Washington statutes and the Commission’s rules do not permit such sidestepping of due process requirements or conflating of Commission record from multiple proceedings. As discussed above, the Commission’s rules state that the Commission issues a final order after, among other things, closure of the record.^{45/} This means that the Commission cannot issue a final order until the

^{42/} WUTC v. PSE, Docket Nos. UE-121697, UG-121705, Hearing Transcript at p. 121 ll. 23-25 (May 16, 2013).

^{43/} Id. p. 123 ll. 4, 5.

^{44/} Bench Request 1 requested employment levels at the Centralia generation plant while Bench Request 2 requested historical generation data from the same location.

^{45/} WAC § 480-07-820(3).

record has been closed. Any argument that the record in this proceeding somehow remained open because the Commission did not explicitly state the date on which the record closed is opportunistic speculation because it is undisputed that Order No. 3 was issued on January 9, 2013. This is consistent with Washington law, which states that the record includes “[e]vidence received or considered,” in the past tense.^{46/} PSE simply cannot expand an agency record by filing extraneous papers in a resolved docket. Accordingly, all of the documents from the Decoupling and ERF dockets must be rejected here.

III. CONCLUSION

22 The Commission should reject PSE’s request to reconsider its Order 03 and decline to reopen the record. PSE’s disagreement with the Commission’s decisions does not rise to a clear error of law or fact, nor warrant granting any of the Company’s post-order requests. Further, the Commission should not consider PSE’s Motion to Reopen because it violates Commission rules. It should also be rejected because it does not seek to offer evidence essential to any disputed issue, but offers evidence created in response to the Commission’s Final Order 03. Finally, the APA limits Commission decisions to record evidence in each individual contested case, therefore, the Global Settlement proposed in unrelated dockets is both irrelevant to this resolved docket, and cannot substitute for the Commission’s decisions in Final Order 03 without violating the law.

^{46/} RCW § 34.05.476(2)(d).

Dated in Portland, Oregon, this 30th day of May, 2013.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Melinda J. Davison

Melinda J. Davison

Joshua D. Weber

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 telephone

(503) 241-8160 facsimile

mjd@dvclaw.com

jdw@dvclaw.com

Of Attorneys for Industrial Customers
of Northwest Utilities