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May 30, 2013

SENT VIA E-MAIL AND ABC LEGAL MESSENGER

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

RE: RE: *Petition of Puget Sound Energy, Inc. for Approval of a Power Purchase Agreement for Acquisition of Coal Transition Power, as Defined in RCW 80.80.010, and the Recovery of Related Acquisition Costs;*
Docket UE-121373

Dear Mr. King:

Enclosed please find the original and ten (10) copies of Public Counsel Response to PSE Petition for Reconsideration and Motion to Reopen for filing in the above-entitled docket.

Sincerely,

Simon J. ffitch
Senior Assistant Attorney General
Public Counsel Division
(206) 389-2055

SJf:cjb
Enclosure

cc: Service List (E-mail & U.S. Mail)
Dennis Moss, ALJ (E-mail)

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of PUGET SOUND ENERGY, INC. Petition for Approval of a Power Purchase Agreement for Acquisition of Coal Transition Power, as Defined in RCW 80.80.010, and the Recovery of Related Acquisition Costs	DOCKET UE-121373 PUBLIC COUNSEL RESPONSE TO PSE PETITION FOR RECONSIDERATION AND MOTION TO REOPEN

I. INTRODUCTION

A. The Petition for Reconsideration.

1. The Final Order in this case, Order 03, approved the Centralia Power Purchase Agreement (PPA), as requested by PSE, on January 9, 2013. The contract was found to be cost-effective, to meet a verified need for power, and to be prudent. PSE's requested return on equity of 9.8 percent in the case was granted, as was its requested method for determining levelized cost over the life of the contract. In addition, under the Order, PSE's investors will receive a $44.12 million (nominal) incentive for entering the contract, paid for through PSE customer rates. The Commission's Order only imposed one condition, a reporting requirement regarding the source of the power delivered.

2. Notwithstanding this favorable decision, PSE's Petition for Reconsideration (Petition) broadly challenges the Final Order and its findings and conclusions. PSE's Petition focuses on two issues: the determination of the financial incentive (equity component) and the alleged uncertainty created by the Commission's Order. The Petition is without merit. With regard to the equity component, PSE simply re-argues a position already fully presented at hearing,

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considered, and rejected in the Final Order. As to the resupply and greenhouse gas emissions issues, PSE's Petition does little to address the Commission's concerns with the fact that the PPA does not require any power under the contract to be provided from the Centralia plant. Nor does it effectively address the concerns about the termination of the Memorandum of Agreement (MOA). While PSE claims that the Order creates "uncertainty," in fact, the uncertainty associated with this Contract and these proceedings is instead a product of the PPA itself, as negotiated by PSE. The Commission's Final Order chose a moderate path to resolve the issues currently before it. Instead of rejecting the contract, the Commission addressed its concerns by reserving its ability to address the coal transition power, greenhouse gas emissions, and MOA issues at a later time if the facts warrant such review.

B. The Multiparty Settlement Filed March 22, 2013.

3. Subsequent to the filing of the Petition for Reconsideration, PSE entered into an agreement with Commission Staff and NWEC.[1] This agreement links this case to two others pending before the Commission. Under the agreement, PSE agrees to withdraw its opposition to the Commission decision regarding the amount of the equity component in this case,[2] in return for the other parties' agreement to support (1) the motion to reopen and the amendment of the PPA, and (2) PSE's Expedited Rate Filing (ERF), its Decoupling mechanism, and its multi-year K-Factor based rate plan, all as-filed.[3] The Settlement is discussed further below.

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[1] Dockets UE-121373, UE-121697, UG-121705, UE-130137, and UG-130138, Multiparty Settlement RE: Coal Transition PPA and Other Pending Dockets. (Multiparty Settlement) March 22, 2013.
[2] The equity component agreed to in the Multiparty Settlement has already been established in the Order 03. The Commission can simply deny the Petition and reaffirm its determination. Approval of the settlement is not necessary to achieve that result.
[3] Multiparty Settlement, ¶ 19.

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4. Public Counsel argued earlier in these proceedings, and reiterates here, that the Commission should decide the Centralia Petition for Reconsideration on its merits, while deciding the ERF and Decoupling cases separately on theirs. There is no connection between the two cases and no reason why the Centralia consideration should be influenced by the rate dockets, or vice versa. For this reason, this brief will focus on the Petition for Reconsideration, the Motion to Reopen, and the related parts of the Multiparty Settlement.

II. LEGAL STANDARD AND PROCEDURAL ISSUES

A. The Reconsideration Rule.

5. The Commission's procedural rules provide that a party may request reconsideration of a final Order as follows:

> Reconsideration Of A Final Order By Petition.
>
> (1) Petition- timing. Any party may Petition for Reconsideration of a final Order within ten days after the Order is served. The purpose of a Petition for Reconsideration is to request that the commission change the outcome with respect to one or more issues determined by the commission's final Order.
>
> (2) Petition- contents. The petitioner must clearly identify each portion of the challenged Order that it contends is erroneous or incomplete, must cite those portions of the record and each law or commission rule that the petitioner relies on to support its petition, and must present brief argument in support of its petition.[4]

6. As the rules states, PSE must specifically identify in what manner the Order is erroneous or incomplete and identify the portions of the record and any legal authority it has to support its position. The reconsideration petition is not intended as an opportunity for a party to simply re-argue evidence and legal arguments already presented and fully considered in the prior

[4] WAC 480-07-850(1) and (2).

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proceedings and the Final Order. PSE's Petition fails to meet the standards of the rule as discussed in further detail below.

B. Under the APA, The Commission Must Base Its Decision Exclusively on the Centralia Case Record.

7. Washington's Administrative Procedure Act (APA), RCW 34.05.461(4) requires, in pertinent part, that: "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." This principle is reinforced by RCW 34.05.476 which requires the agency to maintain an official record of the adjudicative proceeding and details the required matters to be included in the record. The statute then states:

> Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes *the exclusive basis for agency action* in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.[5]

Accordingly, in these proceedings, the UTC must make a decision in the Centralia case based solely upon the record in this case. It cannot base its decision in this docket on the record in the ERF and Decoupling dockets. The approach requested by PSE and Staff to resolve the five dockets in one settlement cannot be reconciled with the cited APA provisions. The Multiparty Settlement contemplates expressly that the result in the ERF and Decoupling dockets will be a function of the result in the Centralia docket, and vice versa.[6]

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[5] RCW 34.05.476 (3) (emphasis added).
[6] Multiparty Settlement ¶ 19.

C. Delegation.

8. The Commission rules state that "[t] he Commission cannot delegate to the parties the power to make final decisions in an adjudicative proceeding."[7] Moreover, Staff and PSE do not successfully explain how they can settle a Commission Final Order in Centralia. An evidentiary hearing and oral argument were held before the Commission, and the case was submitted for decision. A Final Order was issued based on that record and the applicable law, and the record is now closed. [8]

9. The only issue pending at this stage of the Centralia case is whether the Commission wishes to reconsider its order or reopen the record, based on PSE's motion. This case is now a matter for the Commission's decision, as applied to the record before it, according to the provisions of the Coal Energy Transition Bill and other applicable statutes in Title 80. It is not in the hands of the Commission Staff, PSE, or any other party to negotiate or modify the terms of the Commission Final Order. As the Commission rules state: "[t]he Commission cannot delegate to parties the power to make final decisions in any adjudicative proceeding." [9] Upon issuance of a Final Order, the proceeding is governed by Subpart E of the Commission's procedural rules regarding Orders and Post-Order Process.[10] There is no provision in the Commission rules for Commission Staff and PSE to renegotiate the Final Order in the manner suggested.

10. The Multiparty Settlement however, has the effect of requiring the Commission to take certain actions with respect to all three of the dockets. Because PSE and Staff treat the three

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[7] WAC 480-07-700(1).
[8] Subject to a ruling on PSE's Motion to Reopen.
[9] WAC 480-07-700(1).
[10] WAC 480-07-800 through 885.

dockets as one interrelated package, in order to achieve a certain result in the Centralia docket, the Commission is asked to delegate decision making responsibilities in the Centralia docket and to accept the outcomes prescribed by the parties. This violates the rule.

III. RESPONSE TO PETITION FOR RECONSIDERATION

A. The Commission's Determination of The Equity Component Was Proper.

11. PSE's Petition asserts that the Commission's use of Ferndale as a proxy measurement for the equivalent plant is "patently inappropriate."[11] In making this argument, PSE is merely re-arguing a position that it has already presented during the proceeding in rebuttal testimony, at the hearing, and on oral argument. The Commission has heard and fully considered PSE's arguments on this topic, as well as competing positions, and has rendered a decision. In any event, PSE's arguments are entirely without merit, for the reasons discussed below.

1. PSE's arguments are not consistent with the Coal Energy Transition Bill.

12. PSE distorts the statute, reading into it a simplistic mechanical requirement that the Commission must use the "next best ownership" option, or choose the "next available" plant from the Request for Proposals (RFP).[12] As the Commission Order states, however, the statute "is by no means prescriptive".[13] The Coal Energy Transition Bill sets out how the Commission should determine the value of the "equivalent plant for purposes of calculating the equity return."[14] The statute, by its terms, clearly contemplates that the determination of the equivalent plant is a proxy or hypothetical calculation.[15] As pointed out in the Commission's Final Order,

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[11] Petition ¶ 9.
[12] *Id.*
[13] Order 03, ¶ 28.
[14] RCW 80.04.570(6)(b).
[15] RCW 80.04.570(6)(b). For example, the Commission is permitted, but not required, to rely on the utility's most recent filed integrated resource plan.

the statute offers "guidance but also gives the Commission significant latitude to determine the cost of an equivalent plant…based on the record and the application of informed judgment."[16] The Commission goes on to find that this is "necessary" because "it is highly unlikely that an actual plant available for purchase at any given time will match perfectly[.]"[17] Moreover, it is "entirely conceivable" that no actual plant for sale or offer would meet the statutory least cost requirement.[18] Thus, "[t]he fact that the Alternative Plant was arguably available as a substitute for the Coal Transition PPA, even if that argument had merit, is simply beside the point."[19]

13. Despite the clear interpretation provided by the Commission in the Order 03, PSE's Petition does not address or dispute these points. Instead, PSE's argument relies primarily of the brief conclusory statement that "[t]he equivalent plant *must be* PSE's next best ownership option"[20] with little focus on the statutory provisions detailing how equivalent plant is to be determined.

14. PSE also implies that because the legislature did not expressly define the measure of equivalent plant as the "most recently purchased asset," the Commission is thus restricted from ever using a recently purchased asset as a proxy measure of equivalent plant.[21] This argument is specious. The statute allowed the Commission various options for determining equivalent plant. In this instance, the Commission determined that that Ferndale was the "best evidence,"[22] and a

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[16] Order 03, ¶ 28.
[17] Order 03, n.21.
[18] Order 03, n.44.
[19] *Id.*
[20] Petition ¶ 9 (emphasis added).
[21] Petition, ¶ 10.
[22] Order 03, ¶ 43.

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"key factor"[23] for use as a "measure…of an equivalent plant" using the "least cost plant" standard in the statute.

2. The Commission's Final Order regarding the equity component is fully supported by the record.

15. PSE's "next available resource" argument ignores the record evidence, which was drawn from PSE's own RFP analysis, and clearly shows that the Alternative Plant is not a suitable proxy for establishing least cost "equivalent plant." That evidence, which the Commission cited in Order 03, can be summarized as follows:

- The Alternative Plant is not the least cost plant demonstrated by the RFP to be available to PSE.[24] PSE acknowledged in discovery that Ferndale was the lowest cost option identified in the 2011 RFP.[25]
- The Alternative Plant was not chosen in additional optimization analyses performed on revised proposals received in June and July 2012.[26]
- The capacity of the Alternative Plant is considerably greater than the Centralia PPA.[27]
- The Alternative Plant was not among the four resources identified during the re-evaluation as meeting PSE's identified capacity need.[28]
- The Company's analysis listed multiple qualitative risks associated with the condition of the plant, the availability and cost of transmission, the adequacy of pipeline capacity, and

[23] Order 03, ¶ 39.
[24] Order 03, ¶ 41.
[25] Order 03, ¶ 33.
[26] Order 03, ¶ 35.
[27] Order 03, ¶ 37.
[28] Order 03, ¶ 37.

the possibility that the plant could not be upgraded to meet Emissions Performance Standards.[29]

16. Again citing PSE's own analysis, the Commission found that the Alternative Plant was "not a viable option," and "cannot be regarded as a 'least cost' alternative."[30] The Commission concluded:

> Indeed, by both quantitative evaluations and qualitative considerations it cannot be found to represent the least cost mix of electric resource(s) expected to provide PSE's customers with reliable service at the lowest overall expected long-term cost."[31]

17. PSE provides no evidence to dispute the Commission's above finding, yet the Company asserts that the Commission "ignored indisputable evidence that the Alternative Plant…is the least cost (expressed in dollars per kilowatt) purchased or self-built electric generation plant available to meet PSE's 2014 capacity needs."[32] Once again, this levelized cost analysis is not the standard for determining least cost. PSE relies on a tortured reading of RCW 80.04.570(6)(b), which specifically states that the cost of the equivalent plant is "the least cost purchased or self-built electric generation plant."[33] PSE's own analyses identifying "least cost resources" are not based on this type of simplistic comparison in dollars per kilowatt. Levelized cost is one tool in least cost analysis, but many additional quantitative and qualitative factors are

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[29] Order 03, ¶ 38.
[30] Order 03, ¶ 41.
[31] Order 03, ¶ 41.
[32] Petition, ¶ 11. PSE again artificially ties its argument and analysis to the circumstantial supposed availability of the Alternative Plant. It can only argue that the Alternative Plant is least cost because the Ferndale Plant has been purchased and is therefore not now offered for sale.
[33] RCW 80.04.570(6)(b).

considered before a least cost resource is selected. PSE's analyses take into account all the respective benefits and costs that each resource offers, including "qualitative" factors as well.[34]

18. Contrary to PSE's argument, the part of the statute discussing "the cost of the equivalent plant, in dollars per kilowatt" simply creates a mechanism by which the equity adder will be calculated once the appropriate equivalent plant has been selected. It is not the means by which the least cost plant is determined.[35]

3. PSE's "foregone" investment argument has no support in the statute and is not consistent with the terms of the Coal Transition Bill.

19. PSE seeks to translate the rhetorical notion of a "foregone" investment opportunity into an express legal or factual standard for determining the equity component.[36] However, no such language is found in the statute. Instead, the statute contains the previously discussed express provisions for the Commission's use in determining the equity component. The Commission is not mandated by the statute to investigate what generating plants PSE might have passed up purchasing or building in order to sign the Centralia PPA.

20. The suggestion that PSE gave up an opportunity to build a plant when it entered the PPA is at odds with the record. PSE witness Mr. Garratt was asked at the hearing what PSE would do if the Commission did not approve the PPA, and if PSE had a plan to procure power in lieu of the PPA.[37] Mr. Garratt acknowledged that PSE's 2013 Integrated Resource Plan (IRP) would soon be complete, and that its associated RFP would be completed before the time the contract is

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[34] *See,* for example, Ms. Seelig's Testimony, Exhibit No. AS-1T, pp. 8-9, which describes all the elements considered as a part of the Company's screening of resources *See also,* pp. 10 to 11 for a discussion of the outputs of the Optimization Model, which are not limited to resource capital costs.
[35] RCW 80.04.570(6)(b).
[36] Petition, ¶ 10.
[37] Garratt, TR. 83:19-22.

scheduled to commence in December 2014.[38] If this PPA was rejected, PSE would base its next resource decision on the RFP that would arise from the 2013 IRP, not on the 2011 rejected options. This further supports a conclusion that the Alternative Plant is not a real purchase option.

4. The Commission did not "reduce" or "decrease" PSE's equity return.

21. The Company's argument that the Order 03"decreased" an equity return that would have been otherwise earned is unfounded.[39] Both under Washington law and under fundamental principles of utility regulation, a utility does not have any expectation or right to earn an investment return (profit) from ratepayers when it makes no capital investment. As Commission Staff counsel pointed out at the oral argument, every dollar that PSE will receive under the equity component provision of the Coal Energy Transition Bill is a "bonus" that amounts to a positive incentive to enter the PPA that would not otherwise be earned for any other contract.[40]

22. PSE nonetheless treats its own recommendations in the case as if the Company's request itself is the definitive determination of the equity component. The apparent premise is that when the Commission did not accept the Company proposal, PSE's equity entitlement was "stripped away" or reduced. PSE treats the Alternative Plant or self-build options as if they were viable options, contrary to the evidence and facts in the case. PSE then argues that the Commission's equity determination constitutes a "reduction." There can be no "reduction" however, when the actual level of equity return is to be set by the Commission, based on the statutory analysis and the evidence in the record.

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[38] Garratt, TR. 84:5-15.
[39] Petition, ¶ 9.
[40] Trautman, TR. 262:19-263:4.

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B. The Final Order Appropriately Addresses the Uncertainty Created By The Centralia Transaction.

1. To the extent uncertainty exists in this case, it has been created by PSE and TransAlta in the terms of the PPA and MOA.

23. A substantial portion of the Petition for Reconsideration focuses on various arguments that the Final Order creates significant uncertainty for PSE going forward under the PPA. First, it is important to note that both the Coal Transition PPA (agreed to by PSE and TransAlta) and the MOA (agreed to by TransAlta and the State) were the primary sources of uncertainty in this case. PSE's Petition presented the Commission with the dilemma of resolving this uncertainty in some reasonable fashion. One option would have been for the Commission to simply reject the PPA as containing too much risk and uncertainty for both PSE and its customers. A second option would have been to adopt the Staff and Public Counsel recommendations regarding resupply and MOA termination, which could have avoided much future uncertainty.[41] The Commission chose a third way, deferring decision on these issues until a future time, based on reported experience under the PPA.

24. While PSE's Petition places great emphasis on the procedural components of the statute, it sidesteps any real effort to address the substantive and legal problems created by the PPA and the MOA which led to the Commission decision. Importantly, despite the Company's objections, PSE's Petition does not dispute the Commission's analysis and conclusions on these issues. The Petition thus fails to establish a basis for reconsideration under the Commission rules.

[41] Discussion between Chairman Goltz and Mr. Trautman, TR. 278:24-279:20.

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a. Resupply power.

25. One aspect of the uncertainty associated with the terms of the PPA is created by the so-called "resupply" provisions. There is no dispute that under the terms of the PPA, TransAlta could meet all of its obligations to deliver power to PSE without ever operating the Centralia power plant.[42] This is a problem because if PSE is not supplied with "coal transition power" as defined in statute, there is no legal basis to charge customers an equity return for the PPA power. Washington utilities are not permitted to earn a return on a power purchase agreement except in the case of "coal transition power." PSE initially sought to avoid this problem by entering into a "unit contingent" contract with TransAlta, to ensure that only "coal transition power" was delivered under the contract. Indeed PSE has expressly stated in this proceeding through a witness and through counsel that a "unit contingent" contract would have been preferable, but that terms offered by TransAlta made it uneconomic.[43] The PPA which PSE ultimately agreed to does not guarantee that the power will be delivered from Centralia.

26. The Commission addressed this problem in Order 03, stating:

> There may be times when it simply makes sense to shut down the two generators at the same time to conduct routine maintenance. Under these circumstances, there is a reasonable sharing of risks because TransAlta will have to obtain power for delivery to PSE regardless of whether it can do so at prices lower than the variable costs of operating the plant.
>
> It would be a different matter entirely, however, if TransAlta elects to shut down production from the CTCF generators and obtain power from other sources for a significant period of time, or permanently, simply because it is financially advantageous to TransAlta to do so. PSE argues, and the weight of the evidence supports, that this is not a likely eventuality. *No one denies, however, that TransAlta could continue to meet its delivery obligations using resupply power without violating the terms of the Coal Transition PPA. Were this to occur, the*

[42] Kuzma, TR. 237:2-17.

[43] Kuzma, TR. 323:11-19. The record in this case also shows that the contract provides arbitrage opportunities to TransAlta to profit by purchasing low cost power, while charging PSE the higher contract rate. Order 03, ¶ 59.

contract between TransAlta and PSE could be found to have lost its status as a coal transition PPA within the meaning of RCW 80.04.570 and Chapter 80.80 RCW. This is because RCW 80.80.010(5) defines "coal transition power" to mean "the output of a coal-fired electric generation facility that is subject to an obligation to meet the standards contained in RCS 80.80.040(3)(c)."[44]

27. It is reasonable to interpret "coal transition power" to include an amount of resupply power needed to deal with intermittent outages of the kind needed to do with scheduled or unscheduled maintenance and outages, or similar situations. This approach was recommended by Commission Staff.[45] As noted, however, the Commission, decided to make no definitive ruling on what constitutes reasonable resupply at this time, choosing to address the issue if facts warrant in the future.

b. Greenhouse Gas Emissions Requirements (80.80).

28. A second area of uncertainty created by the PPA and tied to resupply is the issue of compliance with the GHG requirements. This issue was identified by the Administrative Law Judge at the oral argument.[46] Stated briefly, there is a concern that if more than 12 percent of the power provided under the PPA comes from unspecified sources the PPA may be out of compliance with the requirements in RCW 80.80.040(7). That provision states:

> "In no case shall a long-term financial commitment be determined to be in compliance with the greenhouse gas emissions performance standard if the commitment includes more than 12 percent of electricity from unspecified sources."

The broad interpretation of resupply power argued by PSE would define provision of any amount of power, for any length of time, from any source as "coal transition power." This reading would create a sizeable loophole in the state's greenhouse gas emissions restrictions. The intent of the

[44] Order 03, ¶¶ 64-65.
[45] Trautman, TR. 268:10-267:3.
[46] TR. 239:10-20.

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legislature, however, as expressed in the statutory language, was to make an exemption from the RCW 80.80 requirements only in the case of "coal transition power."

29. The record in this case reveals that it is very possible that the PPA could exceed the RCW 80.80.040(7) limits for power from other sources (12 percent). Data regarding the operation of the Centralia plant provided by PSE in response to Bench Request No. 2 reveals that in 2011 and 2012, there were at least three consecutive months in which the Centralia plant was not operating at all. However, because the data provided in this bench request is not granular, it is likely that there are additional months, days and weeks in which the plant did not operate.

30. Moreover, considering the reduction in natural gas and power prices in recent years, and long term forecasts that anticipate current electric market price conditions will continue for a number of years, it is reasonable to assume that reduced operations at Centralia are the new normal in a low gas price scenario. Thus, it is likely that at least 25 percent of PSE's contract will be fulfilled via resupply power of an unknown origin in any given year, despite the requirement in RCW 80.80.040(7). The Commission reporting condition was a reasonable response to this issue.

2. MOA termination.

31. Another significant area of uncertainty is created by the MOA and MOA termination provisions. Again, this uncertainty was not caused by the Commission. The MOA allows TransAlta to terminate if it does not contract for a sufficient amount of power by year end 2013, or for other reasons.[47] If this occurs, the community benefits, which were an integral part of the Centralia coal transition legislation, would not be provided. This creates a potential scenario

[47] Exh. No. RG-8HC, p. 441.

under which PSE customers could be bound, through the utility, to pay for a contract (and the equity return) that no longer serves the legislative purpose and no longer is a contract for "coal transition power."

32. With respect to the MOA issues, the Commission expresses agreement with the principle that:

> the MOA and any agreement for the sale and purchase of coal transition power are so inextricably intertwined that the one should not exist in the absence of the other. The very concept of "coal transition power" depends in significant part on TransAlta's performance under the MOA that provides the funds for the transition.[48]

33. The Commission's Order details the interconnected nature of these three uncertainties: "we see the MOA, RCW 80.80 and RCW 80.04.570 as three intertwined elements that together establish the concept of coal transition power and define the rights and obligations of TransAlta, PSE, and most important, the people of Washington."[49] The Commission goes on to conclude:

> *We determine, however, that significant changes in circumstances such as a decision by TransAlta to terminate the MOA, or its failure to meet its financial obligations under the MOA as contemplated under RCW 80.80.100, may require a reexamination of the contract between TransAlta and PSE.* Should the contract be found under some set of circumstances to have lost its character, and its legal status, as a coal transition PPA, it may be incumbent upon the Commission to initiate proceedings to review the contract and, among other things, consider whether PSE can continue to earn the equity return allowed here, as provided only for a coal transition agreement under RCW 80.04.570.

[48] Order 03,¶ 94.
[49] Order 03, ¶ 92.

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34. PSE's Petition notably makes no reference to and contains no discussion or analysis of these key issues, which it is in part responsible for creating. PSE did not challenge any of the Commission's description of the PPA, the MOA, or the legal and policy framework, or address the issues the Commission raised about the consequences of termination and the nature of the contract. PSE does not argue that the contract remains a "coal transition power" contract if the MOA terminates and TransAlta no longer performs its obligations. PSE simply argues that the Commission is somehow barred by the statute's procedural terms from considering the issue if it should arise in the future.

35. The Commission chose to be practical and conservative, however, and to postpone a decision on these issues until presented with facts reflecting actual performance under the contract. A reporting requirement was imposed in order to ensure that the facts would be available. This is clearly within the Commission's regulatory authority.[50]

3. The Final Order is consistent with the Commission's statutory authority.

36. PSE argues that the Commission Final Order fails to constitute approval under the statute because the Commission states that it retains the ability to reevaluate the PPA depending on changed facts and circumstances, as they appear from reports that are filed regarding TransAlta performance under the contract.

37. PSE's arguments overlook or fail to take into account the nature of regulation, and the Commission's authority as a regulatory body. As the United States Supreme Court itself has

[50] RCW 80.04.070, 80.04.080, 80.04.090.

recognized, a regulatory commission:

> faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice...Regulatory agencies...are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile changing economy....[Agencies are] neither required nor supposed to regulate the present and future within the inflexible limits of yesterday.[51]

Accordingly, the regulator is not bound by inflexible rules of *stare decisis* or *res judicata*. "If new evidence becomes available, an appropriate remedy usually is available upon a Petition for rehearing or for the agency to institute a new proceeding."[52]

38. This principle is expressly incorporated in Washington statute. Under RCW 80.04.210, "[t]he Commission may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it." The Washington Court of Appeals has upheld the Commission's exercise of its authority under this statute.[53]

39. PSE has cited no provision of the Coal Energy Transition Bill that nullifies RCW 80.04.210. The statements in the Commission Order which indicate that the Commission may, depending on new facts that develop, choose to open a proceeding are unexceptional. They are entirely consistent with Commission authority and with the Commission's obligation as a regulatory body to regulate in the public interest.

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[51] *American Trucking Assns v. Atchison, Topeka, and Santa Fe Railway Co.,* 387 US 397, 416 (1967).
[52] Leonard Goodman, The Process of Ratemaking, p. 132.
[53] *Washington State Attorney General's Office v. Washington Utilities and Transportation Commission*, 128 Wn. App. 818, 826, 116 P.3d 1064 (2005) ("The Commission has wide discretion to modify its Orders" citing RCW 80. 04.210).

40. For this reason also, PSE's challenges to the Commission's authority to determine in the future if the Company may continue to receive a return on equity on the contract are not well taken. PSE overlooks the fact that any change in this determination would be based on changed future circumstances. The Commission's authority in the future to take changed circumstances into account has just been addressed.

41. PSE also expresses concern regarding the Commission's treatment of prudence, creating uncertainty about whether the current prudence finding could be reversed at a future time. While Public Counsel sees no basis for the Commission to revisit its determination of prudence with respect to PSE's initial entry into the contract, the Commission always retains the authority to review the prudence of future actions of the Company. The possibility that the Commission could review whether power delivered under the PPA in the future is "coal transition power" is also within the Commission's ongoing regulatory authority. This is not a prudence issue, nor is it a reversal of an earlier prudence finding. The question of whether, based on future new evidence disclosed in reports, delivered power is "coal transition power", is a question of law and fact distinct from prudence analysis. PSE may not prevent the Commission from addressing that question in the future, if appropriate. Any such decision would be prospective only.

42. Notwithstanding the substantial uncertainty created by PSE's PPA, the Order 03 gives PSE the benefit of the doubt on these questions, deferring any decision until facts indicate that there is an actual problem.

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IV. RESPONSE TO MOTION TO REOPEN AND RELATED SETTLEMENT PROVISIONS

A. The Motion Does Not Satisfy The Legal Standard In The Rules.

43. The Commission's procedural rule regarding reopening the record provides as follows, in pertinent part:

> In contested proceedings, the commission may reopen the record to allow receipt of evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause.[54]

44. The rule also 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.*"[55] The Final Order was issued in this case on January 9, 2013. The Motion to Reopen was filed subsequent to that date, on January 22, 2013. The Motion is not timely. PSE does not acknowledge or address this timeliness requirement in the rule or explain why it does not apply to PSE.

45. PSE argues that the information (the new contract provisions) was not previously available to the Commission. While this may be literally true, PSE cites no precedent showing that the rule is intended for the situation where the "new" information was created after issuance of the Final Order to support the Petition for Reconsideration.

46. PSE argues that the PPA amendment information is "essential" to the Commission decision. The record in the case, however, was sufficient for the decision before the Commission. The PPA amendment is submitted in an effort to support a different outcome.

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[54] WAC 480-07-830.
[55] *Id.* (emphasis added).

This evidence was not overlooked or unknown at the time of hearing, oral argument or deliberations.

B. The PPA Amendments and Settlement Cannot Limit The Commission's Regulatory Authority.

1. The Motion to Reopen, PPA Amendments, and Settlement Terms.

47. The Motion to Reopen submits for the record two amendments to the PPA which PSE states are intended to address the Commission's concerns regarding MOA termination (section 17.3) and permanent cessation of operation[56] at Centralia that would affect employment (section 17.4).[57]

48. Under both the MOA termination and the permanent cessation scenarios, the PPA amendments give PSE the option to make an initial decision as to whether to terminate or continue the PPA.[58] PSE must then file a "petition for concurrence" regarding its decision with the WUTC. Under the amendment terms, PSE may proceed to terminate or maintain the contract, regardless of whether the WUTC order agrees with PSE's determination.

49. Also submitted with the Motion to Reopen is a letter agreement between TransAlta and PSE in which TransAlta agrees to provide certain information to allow PSE to comply with the reporting requirement in Order 03.[59] PSE's position with regard to the reporting requirement is unclear. The Motion to Reopen refers to PSE's objections[60] but the petition and motion do not

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[56] Another issue raised at the hearing by the Chairman was whether the plant would be "used and useful" under RCW 80.04.250 if not operating for a long period of time. TR.221:24-222:7.
[57] Petition, ¶ 29, Affidavit of Roger Garratt, Appendix A. Permanent cessation is defined to include permanent closure, cessation of operations for 365 days or more, or specified employee reductions.
[58] PSE already had the option under the PPA (former section 17.3), though not the obligation, to terminate the PPA in the event that the MOA was terminated. The new amendment adds the Commission "concurrence" process.
[59] Order 03, ¶ 126.
[60] Petition, ¶ 28.

appear to directly request removal of the condition and the letter agreement just mentioned is provided apparently in contemplation future compliance.

50. The Motion to Reopen states that if the PPA amendments are allowed into the record, "it is no longer necessary for the Commission to retain authority to consider whether the PPA has lost its character as an agreement for the sale and delivery of coal transition power, or whether the PPA remains prudent, or whether PSE may earn its equity return in association with the PPA."[61] PSE therefore requests that the Commission remove a list of specified language from Order 03 which the Company finds objectionable, with regard to the foregoing issues.

51. The Multiparty Settlement adds additional gloss to the material in the Motion to Reopen. It states that the contract amendment "remedies the prudence concerns raised by the Commission in its Final Order."[62] It seeks to clarify the Commission authority in the approval process, to establish that "the Commission may condition any order concurring with or disapproving of a petition for concurrence, including but not limited to the recovery of cost and equity under the Coal Transition PPA" and states any such condition would be binding. Parties agree that conditions would be prospective only.[63]

52. The Multiparty Settlement also agrees to the deferral methodology. In return for the agreements regarding deferral and PPA amendments, as well as the ERF and Decoupling agreements PSE agrees to withdraw its challenge to the amount of the equity component adopted by the Commission in Order 03.

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[61] Petition, ¶ 31.
[62] Multiparty Settlement, ¶ 16.
[63] *Id.*, ¶ 17.

2. The impact of the PPA amendments and Settlement is unclear.

53. The intended effect of the PPA amendments is not clear with respect to Commission action. The amendments, as far as they go, are somewhat helpful in allowing the Commission to address two specific scenarios that may arise. As initially drafted, the amendments appeared to make Commission review ultimately irrelevant to PSE's final determination about whether to continue with the PPA. The parties have attempted to remedy that in the settlement agreement. The settlement terms "agree that the Commission may impose conditions." However, while settling parties can acknowledge Commission authority, they cannot determine if and when it is exercised. The settlement cannot limit the Commission's authority with respect to reviewing PSE's decision to terminate or continue the PPA in the event of MOA termination or cessation. If the language is interpreted as affirming that the Commission has authority to determine the prudence or imprudence of PSE's decision, or the availability of the equity adder going forward, or otherwise exercise its authority in any respect, it appears reasonable.

54. The reference in the Settlement to remedying the Commission's prudence concerns is unclear in effect. No specific paragraph or language of the Order is mentioned. While Public Counsel sees no basis for the Commission to revisit an initial prudence determination regarding PSE's entering into the TransAlta PPA, the Commission can certainly not be asked to surrender its regulatory authority and responsibility to review prudence of future PSE actions regarding the contract with respect to changes in circumstances.

55. The PPA amendments and the settlement are silent as to other scenarios regarding TransAlta's delivery under the PPA of power to PSE from other sources than the Centralia plant. It may be the case that excessive exercise of the resupply provision would not occur, as the

Commission observes.[64] If however, as an example, a situation arose where for six months of the year power came from non-Centralia sources the Commission may still need to address the issues raised in the Final Order regarding whether the power is "coal transition power" and whether the contract is in compliance with the GHG requirements. This would be the case even though this is not permanent cessation. It is properly the Commission's role under the Coal Transition Bill to protect PSE customers from these risks.[65]

56. These and other scenarios are not addressed in the PPA amendments or the settlement. However, in other language in the Motion to Reopen, as noted, PSE asks the Commission to delete all references in Order 03 to the exercise of its authority in the future in response to new information received from PSE regarding the MOA or TransAlta's exercise of resupply rights. PSE cannot contract with other parties, to restrict the Commission's regulatory authority in response to future events. The Commission cannot be asked to issue an Order in this case to bind itself or future commissions faced with new facts and circumstances. The Commission should deny the request to eliminate language from Order 03, all of which is consistent with its basic statutory authority.

57. The Commission retains authority to review this PPA in the future under RCW 80.04.210, *inter alia*, and cannot abdicate or delegate that responsibility. It may be reasonable for PSE to modify the contract, and the Commission may determine it can approve the amendments, but the amendments cannot dictate future Commission authority in response to unanticipated events. In its Order in this case, the Commission should clarify that the reporting

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[64] Order 03, ¶¶ 65, 68.

[65] RCW 80.04.570(4) ("the commission shall consider, among other factors, the long-term risks and benefits to the electrical company and its ratepayers of such a long-term purchase.")

requirement remains in place, and that nothing in the PPA amendments or settlement limits the Commission's authority regulate in the public interest by acting in response to future events.

V. CONCLUSION

58. For the foregoing reasons, Public Counsel respectfully recommends that the Commission deny PSE's Petition for Reconsideration in this matter with respect to the equity component. With respect to the Motion to Reopen, Public Counsel's primary concern is that, if the PPA amendments are approved, that the Commission not endorse any limitation on its regulatory authority to obtain information about the Centralia PPA or to respond to future events to ensure that the public interest is protected.

59. DATED this 30th day of May, 2013.

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CERTIFICATE OF SERVICE
Docket UE-121373

I hereby certify that a true and correct copy of the Public Counsel Response to PSE Petition for Reconsideration and Motion to Reopen was sent to each of the parties of record shown below in sealed envelopes, via: U.S. Mail and E-Mail.

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