

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Bellingham Cold Storage Company and)	
Georgia-Pacific West, Inc.,)	
)	
Complainants,)	DOCKET NO. UE-001014
v.)	
)	ORDER DIRECTING PARTIES TO
Puget Sound Energy, Inc.)	NEGOTIATE; DENYING MOTION
)	
Respondent.)	
.....)	

1 SYNOPSIS: This matter involves the interpretation of two Puget Sound Energy (PSE) tariffs under the Commission’s jurisdiction that have their origins as special contracts between PSE and the two complainants in this docket (referred to in this order as the “movants”) and PSE. Movants ask the Commission to revise a portion of the contracts on an emergency basis to impose an optional mechanism for price stability because, they contend, failure to do so will cause substantial loss to them and to the communities in which they operate. The Commission directs the parties to enter or continue good faith negotiations to pursue solutions acceptable to them. The Commission denies the motion for emergency relief because the relief requested requires the resolution of significant factual and legal issues to reach a decision and it is therefore not the proper subject for summary determination. The Commission notes that the underlying complaint is scheduled for hearing on an accelerated schedule that all of the parties acknowledge affords sufficient time for preparation and decision on the complex matters that are raised.

Procedural history

2 This is a motion for emergency relief filed on July 21, 2000, asking the Commission to order implementation of a “price stability” provision in the contracts under which the movants receive electrical service, by imposing a term proposed by the movants to meet their immediate needs. Movants contend that they are eligible for emergency relief via a motion under WAC 480-09-426 because there are no disputed issues of material fact and because they are entitled to relief as a matter of law.

3 The Commission established a schedule for responses and set oral argument on the motions for hearing on July 28, 2000.¹ Parties appeared as follows: Movant Bellingham Cold Storage by John A. Cameron, attorney, Portland; movant Georgia Pacific by John W. Gould, attorney, Portland; respondent PSE by Markham Quehrn, attorney, Bellevue; Intervenor Schedule 48 customers by Melinda J. Davison, Portland; Public Counsel, by Simon ffitich, asst. attorney general, Seattle; and Commission Staff by Robert D. Cedarbaum, Asst. Atty. General, Olympia.

Background

4 Movant Georgia Pacific (GP) is a company in the timber industry whose facilities include pulp, paper, and chemical production in Bellingham, Washington. Movant Bellingham Cold Storage (BCS) is a food processor and food storage facility also located in Bellingham. Both movants are large consumers of electricity. Their present electricity provider is the respondent, Puget Sound Energy (PSE), which provides electrical service under the jurisdiction of this Commission to customers within the state pursuant to title 80 RCW.

5 The sensitivity of the customers' needs is heightened because they are not only substantial industrial customers of Puget, but they are also significant in the communities and in the economies of the city and the region. GP is a substantial employer and manufacturer. BCS is not only an employer but also a significant food processor that takes agricultural crops and fish from others and processes and stores them. The complaint in this docket included a letter from the mayor of the City of Bellingham emphasizing the importance of the movants to the Bellingham community. We are very aware of their significance and their substantial contributions to the region.

6 There is a history of disagreement between these customers and PSE. They receive service under special contracts that the parties agreed would govern their purchase and sale of electrical service. Because the Commission approved these contracts, they thereby

¹Because of the importance of the issues presented, the Commission established the schedule for arguing this motion on an expedited basis despite two serious procedural flaws. First, the motion was presented in this docket as a dispositive motion, and the schedule requested was based on the schedule decided at the prehearing conference for dispositive motions. However, this motion fails to dispose of any issues in the complaint. Second, the movants failed to perfect service on the respondent by the close of the business day on which the motion was filed with the Commission. Counsel responsible for service knew of the service failure, knew by the close of the business day that the document was not received by respondent by the close of business day on which it was filed, and failed to disclose that to the Commission. Respondent's counsel did state that he had received a portion of the motion after business hours on Friday, sufficient to begin preparation, and the respondent had the resources to present a response of the highest quality despite the challenges. All counsel are on notice that the Commission will insist upon the highest standards of professional conduct.

have the force and effect of a tariff. For clarity in analysis, we also refer to them as tariffs in this discussion. *RCW 80.04.130, WAC 480-80-335(4)*.

- 7 In essence, the tariff provides that the price of PSE's electricity sales to GP and BCS will be based on an independent price indicator, reflecting the parties' desire that prices for these electricity consumers be based on market rates rather than on more traditional cost-based regulatory standards. The Commission found this approach to be fair, just, and reasonable under WAC 480-80-335 because it avoided movants' bypass of PSE entirely by securing another electricity provider and thereby losing any contribution the customers might provide to PSE's common costs and earnings.² The tariff also acknowledges that the movants accept certain risks that otherwise might render a tariff unfair, unjust, or unreasonable, thereby releasing PSE from the expense of covering those risks. In particular, the movants accepted the risk of market volatility:

The customer bears all the risk for price movements in the market price and will receive non-firm energy service in the absence of the election of related optional services.

(Power Sales Agreement, page 5).

The customers assume the risk of fluctuations in regional non-firm energy prices, but may purchase optional price stability at negotiated rates.

(Order Imposing Conditions on Special Contract Allowed To Go Into Effect, page 2, Commission Docket No. UE-960612, dated June 7, 1996).

- 8 In recent weeks, the parties have asserted their continuing difficulties in cooperation by presenting several issues to the Commission for resolution. In Docket No. UE-000735, GP complains that PSE is violating a statutory duty by failing to cooperate in the transition from PSE's equipment to GP's or Whatcom PUD's, which would facilitate GP's bypass of PSE's service.

²The contracts, approved by the Commission under the fair, just, and reasonable standard, provide for market-set rates. It is axiomatic that effective markets, driven by economic rather than social or legal forces, have no necessary correlation with fairness, justness, or reasonability. The Commission has the latitude to determine that a proposed market-based rate may be fair, just and reasonable under the circumstances facing the utility and the customers, particularly when they agree on the provision and the Commission is assured that the decision imposes no negative effect on "core" customers. The Commission might also determine, as it is asked to do in the complaint proceeding in this docket, whether the chosen measure in fact reflects a market-based rate.

- 9 The parties offered, and the Commission at its July 12, 2000, open meeting approved in Dockets UE-960612 (GP) and UE-960613 (BCS) jointly-agreed revisions to the tariffs by which the customers receive service. The revisions changed the index to be used for pricing, to the Dow Jones Mid-Columbia Electricity Index reporting “Firm On-Peak”, “Firm Off-Peak” and “Sunday & NERC Holidays 24 Hour Firm” energy prices (in dollars per megawatt-hour).
- 10 In this docket, UE-001014, GP and BCS filed a formal complaint against PSE. Its central allegation is that the market referent in the contracts – the “Dow Jones Mid-Columbia Index” the gauge upon which the price is based for sales to these customers – is “broken.” GP and BCS contend that the market referent is broken because it is not behaving as it has in the past or as it should be expected to operate. They point to the existence of prices that are both higher and more volatile (more changeable) than in the past. The tariff amendments recently approved in dockets UE-960612 and UE-960613 did not resolve the issues presented in the complaint this docket.

The present motion

- 11 The movants ask the Commission to enter an order implementing the “Optional Price Stability” provision of the tariffs under which they receive electricity service from PSE. The movants request that this provision be implemented by adding their detailed proposal to the tariff. They contend that they are entitled to the relief they ask because PSE has failed to offer the provision in a manner that is “customize to the needs of the customer.”
- 12 The motion raises two kinds of questions. One is whether the motion is substantively appropriate – that is, whether it seeks relief that the Commission decides is proper upon the record before it. Another is whether the motion is procedurally sound – that is, is the process movants have chosen lawfully proper? Does the law allow the Commission to take the action requested?

The parties’ presentations on the motion

The Movants

- 13 The movants ask the Commission to rewrite the tariffs and the contracts on which they are based.
- 14 In support of this request they argue that their motion does not depend on the development of evidence regarding West Coast electricity markets, or on an evaluation of the operation of the Dow Jones Mid-Columbia Index on which their contract pricing is based. The movants state “The **sole** objective of this motion is to relieve each Complainant from its total dependence on the Mid-Columbia Index as the sole pricing mechanism under the respective special contracts.” (Motion, page 1, emphasis in

original). According to the movants only two facts are relevant to this request and both are undisputed.

- 15 The first fact cited by movants as undisputed is that each of the special contracts contains a provision entitled “Optional Price Stability” which was, according to the movants, to be implemented “customized to the customers needs.” (Power Sales Contract, page 6)
- 16 The second fact cited by movants as undisputed is that contract pricing based on the Mid-Columbia Index³ produces energy prices that are excessive and volatile and that are causing each Complainant to suffer devastating losses that place thousands of jobs and production at risk.
- 17 The movants provide an affidavit prepared by Robert McCullough addressing recent and ongoing history of Western electricity price spikes and volatility. They also provide affidavits by Douglas Thomas, President and CEO of BCS, and James W. Cunningham, Vice President of GP and General Manager of the Bellingham Mill, to document the adverse affects electricity prices based on the Mid-Columbia Index are presenting for both complainants. Both Mr. Thomas and Mr. Cunningham argue that by the terms of the orders approving their contracts in Dockets UE-960612 and UE-960613, PSE no longer bears the responsibility to plan for their electricity needs and that the contract revisions they propose will equip GP and BCS with the ability to manage their energy prices.
- 18 Based on this information, and on the existence of the un-implemented “Optional Price Stability” provision in their special contracts, the movants request that the Commission find the special contracts to be unjust, unreasonable, and contrary to the public interest and to impose a new and detailed 3-page contract provision implementing the Optional Price Stability provision. The provision that they propose be written into the contract establishes procedures for contract pricing to be based on factors other than the Mid-Columbia Index. According to the movants’ Memorandum In Support of Emergency Motion, their objective is not to request a change in the Mid-Columbia Index, but only to “supplement” it with a new, complementary means of determining price. At oral argument the movants stated that the sole objective of their motion is a new contract provision to implement the existing “Optional Price Stability” provision by replacing the Mid-Columbia Index term in the pricing formula with another, more stable, measurement of market prices.

³The movants and the affidavits they submitted do not always distinguish between the Mid-Columbia *Firm* Index and the Mid-Columbia *Non-Firm* Index. Since the parties agreed, and the Commission approved on July 12, 2000, use of the Firm index, effective July 13, 2000, we are assuming movants are referring to the Firm index, but future pleadings should be more specific.

- 19 The movants argue that the Commission has the authority to grant interim or emergency rate relief under the broad grant of authority in RCW 80.01.040 and RCW 80.28.040 to “regulate in the public interest.” They cite a history of cases in which the Commission granted interim rate relief to utilities. The movants assert that, while the case-law pertains to granting interim or emergency relief to utilities, there is nothing in statute or case-law prohibiting a grant of emergency relief when requested by a customer.
- 20 Finally, the movants propose that, if PSE raises issues concerning the implications of the proposed contract revisions for retail wheeling policy or federal jurisdiction, the revisions should be implemented as a “pilot program” available only to PSE’s non-core electricity customers.

Puget Sound Energy Response

- 21 PSE responds that the Motion turns upon *disputed* issues of material fact. First, the emergency cited by movants is, according to PSE, a consequence of the business decisions made by the movants to not secure hedges to moderate the price risk they assumed under the tariffs. Second, PSE argues that, as tariffs filed with and approved by the Commission, the special contracts are presumptively just and reasonable and that the movants have failed to present evidence or argument to rebut this presumption. Third, PSE argues that the contract revisions the movants request be imposed constitute “retail wheeling” under the exclusive jurisdiction of the Federal Energy Regulatory Commission and that the special contracts do not provide a basis for the Commission to order such relief. Fourth, PSE argues that the special contracts provide that “Optional Price Stability” is implemented through negotiation and that the movants have no right, under the contracts, to the unilateral imposition of a solution they alone have fashioned. PSE acknowledged during argument that it has the obligation to negotiate in good faith under the terms of the contract.
- 22 PSE presents an affidavit prepared by William A. Gaines, Vice President for Energy Supply for PSE. Mr. Gaines states that PSE has on three occasions since 1997 and as recently as “earlier this year” offered price caps or fixed prices that would have insulated the movants from the prices and volatility they now face. He disputes a significant portion of the analysis presented by Mr. McCullough regarding West Coast energy markets and the Mid-Columbia Index. He states that the “Optional Price Stability” provision of the special contracts requires negotiation and cannot be imposed unilaterally by either party. Mr. Gaines attacks the statement of Mr. Cunningham that “[v]olatility is as bad as high prices” by pointing out that volatility in price since the inception of the contracts has afforded a benefit to the complainants of \$8 million. Mr. Gaines concludes that Mr. Thomas’ assertion that the contract revision proposed by the movants is fair to PSE is not true. Mr. Gaines argues that the movant’s proposal shifts risks and imposes potential penalties to PSE that are neither fair nor reasonable.

Commission Staff Response

- 23 The Commission Staff recommends that the Emergency Motion be denied. Staff notes that it understands the economic circumstances and risk of plant closures that form the context for the emergency motion and the original complaint. However, Commission Staff argues that no statutory or constitutional basis exists for the Commission to grant the interim rate relief requested. In WUTC v. Pacific Northwest Bell Telephone Company, 2nd Supplemental Order, Cause No. U-72-30, Staff notes that the Commission found statutory authority to grant interim rates by implication from its authority to suspend tariff revisions proposed by a utility. Staff argues that those circumstances do not apply to the emergency relief sought by this motion and therefore the implied statutory basis to grant interim rates found in that case does not exist here. Moreover, Staff notes that there is no constitutional basis to grant the requested relief because while the movants have a statutory right to fair, just and reasonable rates, customers have no constitutional entitlement to rates set at any particular level, *i.e.*, they are not a public service company with statutorily imposed public service obligations.
- 24 Commission Staff argues that the Commission has the authority to set rates that are fair, just, and reasonable to remedy existing rates that are found to be unjust, unfair, and unreasonable. However, such a finding is a matter of fact, and RCW 80.04.110 and RCW 80.28.020 establish the procedures for such a finding. Commission Staff states that the evidence presented in the affidavits of Mr. Thomas and Mr. Cunningham is not sufficient for the Commission to find, on a summary basis, that the current contract pricing is unfair, unjust, and unreasonable, or that the contract revisions proposed by the movants would result in pricing that is fair, just, and reasonable. Staff observes that any customer's mere assertion of its inability to pay a rate that has been negotiated between it and the utility and approved by the Commission is not sufficient evidence to support a conclusion that the rate is unjust, unfair, or unreasonable.
- 25 Finally, Staff observes that the Optional Price Stability provision of the contracts does "[a]ppear to establish a process for negotiation between Complainants and PSE to resolve their issues." Staff points out that the Commission may order the parties to negotiate under this provision since it is a part of a contract subject to enforcement by the Commission.

Public Counsel Response

- 26 Public Counsel does not take a position on whether the Commission should grant the emergency motion. Instead, Public Counsel reiterates the position it presented when the contracts were originally approved in 1996 – that no risks or costs be shifted to core electric customers as a result of the contracts. In addition, Public Counsel asks the Commission to consider carefully a number of policy issues raised by the emergency motion, including implications for other customers not on standard PSE tariffs, and

implications for contract stability. Public Counsel offers that, if the Commission finds that it has the statutory authority to grant interim or emergency relief, a number of modifications need to be made to the new contract provision proposed by the movants including removal of the requirement that PSE “beat the market” by 5-percent, and that PSE pay the movants for over-nominations based on the Mid-Columbia Index price. According to Public Counsel, the former would appear to benefit BCS and GP to a greater degree than the original contract intent – market-based prices. The latter requires PSE to bear the risk of the same market index that the movants claim is overly volatile and excessively priced.

- 27 Public Counsel also offers a number of alternatives to the contract revision proposed by the movants that could be considered by the Commission, including: use of financial hedging by the movants to manage their exposure to price risk; a return to standard tariff service with appropriate fees and conditions, and wholesale wheeling through Whatcom PUD.

Whatcom PUD Response

- 28 Whatcom PUD argues that the emergency motion should be granted. It cites the risk of adverse economic and employment impacts in Bellingham and Whatcom county due to the volatility F.O. the Mid-Columbia Index prices. The PUD states that the Commission has the authority to grant emergency rate relief to utilities, citing WUTC vs. Puget, Cause No. U-80-10, and states that emergency proceedings are appropriate under WAC 480-09-500 and RCW 34.05.479.

The Commission’s discussion and decision

- 29 Movants argue that they are entitled to the relief under the provisions of RCW 80.28.040, which allows the Commission, after hearing, to order improved services related to “rules, . . . practices, acts, or services” of electrical companies. Whether or not that statute governs the issue before us,⁴ it is clear that the statute permits the Commission to act over objection only when the action is taken “after hearing.” Oral argument does not constitute a hearing. In a hearing, each party has the opportunity to present evidence to

⁴Counsel admitted on argument that the essence of their concern was not just the stability or volatility of the price measure, but the level of the price. Decisions affecting the prices paid by customers of regulated utilities and the revenues of those utilities are governed by RCW 80.28.020, and the statute requires that the Commission determine whether rates or charges in contest are “unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that such rates are insufficient to yield a reasonable compensation for the service rendered . . .” If the remedy for the motion affects the price or the revenues to PSE, then the Commission may be required to consider after hearing whether the result is fair, just, and reasonable to both PSE and the customers.

the Commission. The Commission has scheduled an evidentiary hearing on a portion of the complaints pending in Docket UE-001014, and the parties have agreed that the minimum time for conducting the hearing process, to afford the parties the right to prepare and make an adequate presentation, will be about three months.

- 30 The motion for emergency relief was presented as a request for summary determination under WAC 480-09-426, which looks to Civil Rule 50(c) for pertinent standards. Such a motion is summary in nature. It may be granted only when there are no substantial disagreements about the facts and when the moving party is entitled to the requested relief as a matter of law – that is, that there is no real dispute about the entitlement to relief. Neither condition exists here.
- 31 Many -- indeed, perhaps most or all -- of the underlying material facts *are* disputed. The movants argue that no factual matter is at issue, but present supporting affidavits stating facts that they ask the Commission to consider. The “devastating losses” faced by the movants are not supported by profit and loss statements and have a short-term perspective that does not consider their gains over other periods. The parties disagree about whether PSE has met its obligation under the tariff, and about what kind of relief might satisfy that obligation. They disagree even about whether their negotiations have reached impasse. The responses to Commission requests – which the Commission considers only to aid in our determination of whether all material facts asserted in the motion are undisputed – indicate that there may be substantial questions about the asserted facts.
- 32 If we assume that we have the statutory power to grant the motion, and if we assume that the facts are undisputed, then to grant the motion we must determine that movants are entitled to the relief that they seek as a matter of law. Here again, the answer must be no. Legal issues abound as to whether the proposed amendments are required as a matter of law. Movants’ Counsel, stated on argument that the proposals were what movants viewed to be the most favorable to PSE of the options that movants considered, but in doing so acknowledged that other options are available. PSE and Public Counsel argue that movants’ proposals change the fundamental nature of the tariffs, imposing on PSE obligations that did not previously exist and that are not required as a matter of law. PSE also argues that the legal effect of the proposals would be to impose on it certain obligations under federal law. Serious questions are raised in each of these areas about the movants’ entitlement to their requested relief that are inappropriate to resolve in the context of a summary motion. At a minimum it is clear that the movants are not entitled to summary relief as a matter of law.
- 33 Movants provide insufficient legal support for their contention that they are entitled to interim rate relief. While they note that the Commission may provide such relief to regulated utilities under certain strict conditions, they do not analyze fully the legal basis for our ability to do so and do not show that the same basis exists to provide relief to customers. As Commission Staff points out, the Commission’s authority to grant interim

relief stems from the constitutional and statutory rights enjoyed by regulated utilities in exchange for their loss of pricing ability and their obligation to provide service. While customers enjoy no such rights, they do have the ability to participate in rate setting and do have the power to institute complaints against utilities, as the movants have done in this docket.

- 34 On balance, it is clear that the proposal is procedurally improper. It does not rely on undisputed facts, and it does not propose relief that movants are entitled to as a matter of law. The motion must be denied. In denying the requested relief we have made no conclusions about any of the details of the provisions proposed or discussed. We cannot legally, on a summary basis, impose them at the unilateral request of one party over the objections of the other.
- 35 Ending our discussion here, however, would be an incomplete response to the motion and would do the parties and the public a disservice.
- 36 While material facts are in dispute regarding the motion, and while the movants' entitlement to relief is not clear as a matter of law, some facts and conclusions are clear from the parties' presentations. It is essential that the parties recognize that they may need each other and that their communities need both of them. It is also essential for the parties to accept responsibility for their decisions. The movants acknowledged that they could have achieved price stability by means available either directly from PSE or through the use of financial hedging instruments available on a market basis. We note that the movants indicated that they "self-insured" against such risks. While movants are free to decline available means of moderating market fluctuations, a consequence of that decision is that when the market goes up, they must pay more. Other mechanisms are available to businesses in their situation, perhaps including independent purchases and sales on the spot market.⁵ Returning to tariffed service may also be an option.
- 37 The very abbreviated record of this proceeding, however, indicates that the problems are more complex than that. The parties may continue to have long-term relationships in which the interests of all must be met. Such circumstances cry out for negotiated settlements in which parties find a common ground that acknowledges each others' legitimate needs, and that enables them to meet their interests on a continuing basis. At a minimum, such resolutions would enable the parties to divert the substantial funds that they appear to be devoting to litigation into purchasing power and providing service.

⁵For example, the customers could acquire physical hedges not related directly to their contracted electricity service. We note that the accuracy of the Mid-Columbia Index at representing the true market price was not at issue in the motion, although it remains an issue in the complaint under this docket number.

38 The applicable tariffs allow the parties to reach a negotiated solution to meet customers' need for price stability. The Commission may not lawfully grant the substance of the relief that movants seek. It can, however, consistent with the tariff, direct the parties to continue or resume the negotiations in which they have been involved.⁶ The Commission does so. The Commission will be supportive of measures that are aimed at resolving these and other differences between them in a way that is consistent with their needs, with the requirements of regulation, with the needs of affected communities, and with the public-interest generally.

39 While the Commission is sensitive and concerned about the needs of ratepayers and communities within the state, these customers' predicament is the direct result of their own management decisions, first to accept certain risks not shared by other ratepayers in exchange for a lower rate, and next to decline to use available means of obtaining price stability from PSE or market-based services. It is unfortunate that the consequences of those decisions may fall on others who had no part in making those decisions. The best avenue for resolutions of these disputes is provided within the tariffs based on the parties' contracts, reaching a negotiated settlement.

THEREFORE, THE COMMISSION ORDERS:

- 40 1. The motion is denied.
- 41 2. PSE and BCS are ordered to enter or continue good faith negotiations.
- 42 3. PSE and GP are ordered to enter or continue good faith negotiations.

DATED at Olympia, Washington and effective this 31st day of July, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

⁶The Commission recognizes, as noted above, that movants also may choose third-party means to achieve price stability, and notes that the movants may settle with PSE or cover their needs independently through other means.

