

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:	)	DOCKET UE-151592
	)	
SIERRA CLUB, CLIMATE	)	
SOLUTIONS, and WASHINGTON	)	ORDER 01
ENVIRONMENTAL COUNCIL	)	
	)	
For an Adjudicatory Proceeding	)	DENYING MOTION TO DISMISS
Relating to the Prudency of Continued	)	and
Investments in Colstrip Plant Units 1	)	DETERMINING ELIGIBILITY
and 2	)	UNDER RCW 34.05.419(3)
	)	
.....	)	

**MEMORANDUM**

**I. Pleadings and Motions**

1 On July 31, 2015, the Sierra Club, Climate Solutions, and Washington Environmental Council (Joint Petitioners) filed a Petition for Adjudicatory Proceeding Relating to the Prudency of Continued Investments in Colstrip Plant Units 1 and 2 (Petition). Joint Petitioners request that the Washington Utilities and Transportation Commission (Commission) commence an adjudicatory proceeding for the purpose of pre-determining the prudence of any ongoing and new capital expenditures made by Puget Sound Energy (PSE or Company) to support the Colstrip coal-fired electric generating facility (Colstrip Facility).<sup>1</sup> Further, the petition seeks to establish a closure or partial-closure plan for Colstrip Units 1 and 2.

2 Joint Petitioners argue that the adjudicative proceeding they request the Commission to initiate would be timely. According to the petition, this is because:

[V]arious market and regulatory factors will have substantial influence on the economic outlook of Colstrip in the coming years. In particular, PSE’s 2013 [Integrated Resource Plan (IRP)] demonstrated that natural gas

---

<sup>1</sup> It is unclear whether this reference to the Colstrip coal-fired electric generating facility includes PSE’s interests in the four generating units that comprise the Colstrip facility or only Units 1 and 2.

prices, customer demand, and carbon dioxide regulation will have a critical impact on whether Colstrip remains a least-cost resource. Colstrip also faces uncertainty with regard to various capital expenses that may be triggered by environmental laws and regulations.<sup>2</sup>

3 Joint Petitioners acknowledge that on July 21, 2015, the Commission gave notice of an investigation into the costs of decommissioning and remediating Colstrip in Docket UE 151500.<sup>3</sup> They state that “written comments received in that docket no doubt will be informative” but are concerned that “the information received may not provide sufficient information for significant decisions that may be required relating to Colstrip Units 1 and 2.”<sup>4</sup> Joint Petitioners ask the Commission to initiate an adjudicative proceeding including “the opportunity to conduct discovery, submit evidence in the form of written testimony and exhibits, participate in evidentiary hearings, and submit legal briefing.”<sup>5</sup> They call for:

[A] proceeding with expert testimony and analysis that is comparable to the level of detail and analysis that is customary in a general rate case or a request to approve a new resource acquisition. This level of detail and analysis will allow the Commission to fully understand whether ratepayers would be better served by a resource decision to close Colstrip. The results of such a proceeding can and should lead to a Commission order that provides a definitive resolution on the future of Colstrip Units 1 and 2.<sup>6</sup>

4 Public Counsel supports the request to open an adjudicative docket to consider issues related to PSE’s ownership of the Colstrip plant. Public Counsel states that his office supports generally an orderly transition away from reliance on coal-fired electricity generation and believes the requested docket would provide an opportunity for the Commission and stakeholders to review and evaluate alternative regulatory avenues to address potential Colstrip transition issues. Public Counsel advocates no specific outcome for the proposed adjudicative proceeding, but argues the availability of the procedural

---

<sup>2</sup> Petition ¶ 3.

<sup>3</sup> *Notice of Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs, Docket UE-151500 (July 21, 2015)*.

<sup>4</sup> Petition ¶ 34.

<sup>5</sup> *Id.* ¶ 33.

<sup>6</sup> *Id.* ¶ 36.

tools characteristic of adjudicative proceedings will “allow more detailed fact gathering and policy analysis to address many of the issues raised during consideration of the Colstrip legislation in the 2015 Washington legislature.” Public Counsel argues in addition that “[a] well-developed record in this proceeding can provide a sound basis for future decision making regarding Colstrip.”

5 PSE responded to the Joint Petitioners’ filing on August 14, 2015, seeking dismissal of the Petition.<sup>7</sup> PSE’s Motion To Dismiss relies on several grounds, including:

- The Petition’s lack of specificity as to the capital expenses to be incurred at the Colstrip facility.
- The Commission’s lack of authority to order the closure of a facility located in Montana and owned in part by a company outside the Commission’s regulatory authority.
- The Joint Petitioners’ misplaced use of ratemaking principles to force a rate change outside a ratemaking proceeding.
- The Commission’s lack of specific authority to close a generating facility because of its impact on the environment.

Further, PSE cites to the Commission’s investigation in Docket UE-151500, arguing that the Joint Petitioners seek to duplicate the Commission’s ongoing investigation, which PSE contends will cause confusion and unnecessary work for the Commission and interested parties.<sup>8</sup> In addition, PSE argues that some of the issues raised by Petitioners are currently being addressed in PSE’s integrated resource planning (IRP) process and will be addressed in PSE’s next general rate case that the Company is required to file by April 1, 2016.

6 Staff supports PSE’s Motion To Dismiss, relying on the Commission’s denial of previous requests by the Sierra Club to initiate an adjudicative proceeding concerning future Colstrip costs, and the expected substantive and procedural value of the Commission’s pending investigation into the issues raised by the Joint Petitioners.<sup>9</sup> Further, Staff agrees

---

<sup>7</sup> Public Counsel Response to Petition for Adjudicative Docket (filed August 20, 2015).

<sup>8</sup> *In the Matter of Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs*, UE-151500.

<sup>9</sup> Staff Response Supporting Puget Sound Energy Inc.’s Motion To Dismiss (filed August 24, 2015).

with PSE that the Petition raises ratemaking issues and contemplates changes in rates that will come before the Commission in due course, without regard to the Petition.

## II. Discussion

### A. Does the Commission have a non-discretionary obligation to commence and adjudicative proceeding?

7 Joint Petitioners filed their Opposition to PSE’s Motion To Dismiss (Response) on August 24, 2015.<sup>10</sup> The Response presents a threshold legal issue. Specifically, even though RCW 34.05.413-419 provide several options to the Commission when a party asks it to commence an adjudicative proceeding, including a decision not to conduct an adjudication, Joint Petitioners assert in their Response that the Commission is required to do so.

8 PSE filed a motion seeking leave to reply to this argument, and a reply. We grant PSE’s motion and consider its reply to the threshold issue raised by Joint Petitioners’ Response.

9 Joint Petitioners assert that the Commission “has a non-discretionary obligation to hold a hearing”<sup>11</sup> because their Petition relies in part on RCW 80.01.110, the statute governing formal complaints against entities regulated by the Commission. Joint Petitioners argue that RCW 80.04.120 proves their point. They quote and rely on the first sentence of RCW 80.04.120, which states that: “At the time fixed for the hearing mentioned in RCW 80.04.110, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or she or it may desire.”<sup>12</sup>

10 This argument places the proverbial “cart before the horse.” RCW 80.04.120 applies if, and only if, the Commission first finds a “person”, or other entity expressly identified in RCW 80.04.110(1), has filed a “petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of this title . . . or of any order or rule of the commission.” The Petition, however, does not set forth any specific act or omission by

---

<sup>10</sup> Joint Petitioners’ Opposition to Puget Sound Energy’s Motion To Dismiss (Response) (filed August 24, 2015).

<sup>11</sup> Joint Petitioners’ Response ¶ 12.

<sup>12</sup> *Id.* (quoting RCW 80.04.120 with emphasis added by Joint Petitioners).

PSE that violates any provision of Chapter 80 RCW or any order or rule of the Commission. The Petition is cast in general terms expressing concerns about whether unspecified, and unknown future expenditures by PSE might be imprudent or somehow violate the Company's general obligations under RCW Chapter 80. As such, we read the Petition as calling for an abstract inquiry, not an investigation of a concrete act or failure to act vis-à-vis any legal obligation the Company may have under governing statutes, rules, and Commission orders. That is, the Petition relies not on extant facts but rather on the existence of uncertainty and risks PSE faces if it continues to own an interest in Colstrip. The Petition cites no demonstrable current violation by PSE of any law, Commission order, or rule, but rather raises the possibility that such a violation may occur in the future. In short, there is no case or controversy presented that the Commission can resolve in an adjudicative proceeding at this time.<sup>13</sup>

11 Potential future investments by PSE in Colstrip are not an act unless and until they are planned for or made. That is, only when the Company has concrete plans to make an investment and seeks pre-approval, or makes an investment and seeks to recover its cost in rates, does the Commission have authority to investigate and adjudicate the questions whether the investment is prudent and should be authorized for recovery in rates. The Commission historically has not entertained pre-approval requests, but it is not barred from doing so.<sup>14</sup> Thus, the Commission may consider a specific investment in Colstrip as to which the Company asks predetermination of prudence in advance of PSE actually making the planned investment. This would present a concrete question that the Commission could evaluate in an adjudicative proceeding. Following the more traditional approach, the Company can make an investment in Colstrip subject to a future review of prudence. Such review would occur in an adjudicative proceeding if and when the Company seeks to recover in rates the costs of its investment. In either of these circumstances the Commission would have before it issues that could be meaningfully and definitively evaluated in an adjudicative proceeding.

12 Given the generalized nature of the Petition and the absence of a concrete case or controversy, the Commission is not obligated to commence an adjudicative proceeding at this time in response to the pending Petition. Instead, it is in the Commission's discretion to decide whether to set the subject matter of the Petition for hearing in an adjudicative

---

<sup>13</sup> See WAC 480-07-305(2).

<sup>14</sup> Utilities and Transportation Commission Comments on Puget Sound Energy's Colstrip Study, Attach. B, Docket UE-120767 at 14-15.

proceeding, decide not to conduct an adjudication, or to take such other action with respect to the Petition as specified in RCW 34.05.413-419. This is what the Petitioners asked the Commission to do in their initial filing in this docket, and this is what we decide here.

**B. Should the Commission commence an adjudicative proceeding at this time to consider the issues raised by the Joint Petitioners' application?**

13 Although PSE and Staff suggest a number of reasons for the Commission to deny Petitioners' request that we initiate an adjudicative proceeding concerning PSE's continued reliance on Colstrip as a part of its generation fleet, we find two factors most compelling in our determination of the appropriate action to take under RCW 34.05.413-419:

- The Commission has two pending proceedings in which the issues raised by the Petition are being, or will be, considered in the near term; an investigation in Docket UE-151500 and PSE's 2015 IRP review.
- The petition implicates ratemaking issues and contemplates changes in rates that will come before the Commission for adjudication in due course, beginning early during 2016.

**1. Commission Investigation**

14 On July 21, 2015, the Commission opened an Investigation of Coal-Fired Generating Unit Decommissioning and Remediation Costs in Docket UE-151500. The Commission issued a Notice of Opportunity To File Written Comments ("Notice"), which invited PSE and other interested parties to submit written comments on several topics related to the cost of closing Colstrip Units 1 and 2 and the cost of environmental remediation. In its Notice, the Commission stated that it opened Docket UE-151500 in the wake of legislation considered in the 2015 Legislative Session that would have established a process for an electrical company to petition the Commission for approval of a plan to acquire and decommission one or more coal-fired generating units, and secure ratepayer funds to pay for environmental remediation.<sup>15</sup> The Commission stated that "[w]hile the bills under consideration did not pass the Legislature, the Commission recognizes the

---

<sup>15</sup> Docket UE-151500 Notice of Opportunity To File Written Comments (July 21, 2015).

need to assess the economic risks associated with continued operation of, and the costs to retire, certain coal-fired generating units included in Washington rates,” and whether depreciation schedules in current rates are sufficient to cover these costs.<sup>16</sup>

15 Beginning on July 22, 2015, and through September 28, 2015, the Commission received 22 written comments in response to its Notice.<sup>17</sup> These are from concerned individuals, members of the Washington legislature, members of the Montana legislature, the Governor of Montana, the Mayor of Olympia and, jointly, the King County Executive and the Mayors of seven other Washington municipal governments, the Northwest Energy Coalition, the Industrial Customers of Northwest Utilities, the Public Counsel Unit of the Washington Office of Attorney General, Pacific Power & Light Company, and joint comments from the Montana Environmental Information Center (MEIC) and the Sierra Club.

16 PSE filed on September 15, 2015, a 29-page narrative and a series of attachments including various data in response to the Commission’s Notice. PSE’s filing provides context and answers in some detail each of nine questions posed by the Commission’s Notice. Among the contextual points PSE presents as being important to a full understanding of its comments are the fact that there are several matters simultaneously pending in other fora regarding Colstrip Units 1 and 2 where many of the issues the Joint Petitioners wish to pursue in an adjudicative proceeding before the Commission are already being considered. Among other things, the Sierra Club has named PSE as a defendant in pending litigation set for trial in Montana on March 7, 2016.<sup>18</sup> In addition, the Sierra Club filed two lawsuits in the fall of 2012 against the Montana Department of Environmental Quality (MDEQ) challenging a Wastewater Pond Agreed Order on Consent (AOC) with Colstrip’s operator, now Talen Montana, LLC. One action has been dismissed but the other is scheduled for bench trial in Montana state court on April 18, 2016.

---

<sup>16</sup> *Id.*

<sup>17</sup> One email submission by the Sierra Club included a brief statement requesting that the Commission broaden its investigation, present its findings in an open public meeting, and allow for oral comments. The email includes an attachment bearing 1,831 names, with contact information, of persons represented to be “individual signers.” Email dated 9/15/2015 from Jessica Koski, Ph.D., Associate Organizing Representative Sierra Club’s Beyond Coal Campaign, to Chairman Danner, Commissioner Jones, and Commissioner Rendahl.

<sup>18</sup> PSE’s Comments state in this connection that: “PSE will oppose efforts to utilize this WUTC investigation for discovery or other uses that run counter to PSE’s defense of this litigation.”

17 In Washington, PSE points out in its Motion To Dismiss that the Company will soon file its 2015 IRP, the Commission is actively investigating in Docket UE-151500 the costs of decommissioning and remediating environmental harm caused by Colstrip operations, and PSE will file no later than April 1, 2016, a general rate case proceeding in which its continued reliance on power and capacity from Colstrip will be considered as part of the Commission's inquiry into power costs included in PSE's rates. The Commission is actively studying PSE's response to its Notice and is considering what additional steps should be taken in the near term in the investigation in Docket UE-151500. We discuss below how the IRP and general rate case proceedings inform our judgment of the pending Petition.

18 MEIC and Sierra Club filed joint comments on September 15, 2015, in response to the Commission's Notice. These comments are substantive and are accompanied by 10 detailed attachments including four reports submitted in connection with pending litigation in Montana and excerpts from two depositions of Gordon Criswell of Talen Montana in the same proceeding.<sup>19</sup>

19 MEIC and Sierra Club advocate that the Commission broaden its investigation to consider the following:

- (i) Future capital and O&M costs necessary to operate Colstrip in compliance with pending or expected environmental laws and regulations;
- (ii) Expected net power costs of Colstrip in light of ongoing and expected capital, O&M, and fuel costs at Colstrip;
- (iii) Costs and risks of alternative generation supplies to meet system demand without Colstrip, including an analysis of renewable energy resources; and
- (iv) Costs related to the continued emission of greenhouse gases from Colstrip.<sup>20</sup>

MEIC/Sierra Club's advocacy in Docket UE-151592 for a broader investigation in Docket UE-151500 is consistent in scope with its Petition here. While the Commission may elect to broaden its investigation in Docket UE-151500 as MEIC and Sierra Club propose, these same issues will be considered both in PSE's upcoming IRP review and in PSE's next general rate case that will be filed early next year.

---

<sup>19</sup> *Montana Env'tl. Info. Ctr. et al. v. Mont. Dept. of Env'tl. Quality et al.*, No. DV-12-42 (Mont. 16th Jud. Dist.), April 15, 2015.

<sup>20</sup> MEIC/Sierra Club Joint Comments ¶ 20.



## 2. IRP

- 20 As previously discussed, the Petition is forward-looking and implicates other types of proceedings including the Commission's bi-annual IRP process. The IRP process requires PSE to study continuously market and regulatory factors and plan for a least-cost portfolio of power to serve its customers. The IRP process allows the Commission to monitor the market and regulatory dynamics that affect whether Colstrip remains a least cost resource. The IRP process is not conducted as an adjudicatory proceeding but includes participation and input from Staff, Public Counsel, and interested persons such as those making up the Joint Petitioners.
- 21 PSE's most recently completed IRP in 2013 included a special study of Colstrip prepared at the Commission's direction. On November 30, 2015, PSE will file a new IRP. While it is not anticipated that the Company will refine its previous Colstrip study, the issue whether Colstrip remains a least-cost candidate in PSE's resource stack most certainly will be part of the IRP evaluation. There will be an opportunity for public participation in the Commission's review of the 2015 IRP and the Commission may order additional studies of Colstrip if less than fully satisfied with the Company's analyses.

## 3. Rate Proceedings

- 22 Most significantly, the Petition implicates PSE's next general rate case that is required to be filed no later than April 1, 2016. Power Cost Only Rate Cases (PCORCs), and Power Cost Adjustment Mechanism (PCAM) proceedings) also may involve consideration of issues related to Colstrip. Certain issues identified by Petitioners, including, for example, (1) capital and O&M costs necessary to operate Colstrip in compliance with pending or expected environmental laws and regulations, and (2) expected net power costs of Colstrip in light of ongoing and expected capital, O&M, and fuel costs at Colstrip, are important relative to power costs.<sup>21</sup> The costs and risks of alternative generation scenarios to meet system demand also are important considerations.<sup>22</sup>

---

<sup>21</sup> See Petition ¶ 35.

<sup>22</sup> *Id.*

- 23 General rate cases, PCORC, and PCAM proceedings are conducted under the statutes and rules governing adjudicative proceedings. Staff, Public Counsel, and those who demonstrate a substantial interest in the outcome of the issues addressed, or that their participation will be in the public interest, are afforded full rights as parties. They may conduct discovery, submit evidence in the form of written testimony and exhibits, participate in evidentiary hearings, and submit legal briefing. The Commission routinely enters protective orders in such proceedings to facilitate discovery, including the exchange of confidential and highly confidential information, with appropriate safeguards.
- 24 In its Response to the Commission's Notice in Docket UE-151500, PSE discusses the key importance of its depreciation studies as they relate to the costs of decommissioning and remediation at Colstrip.<sup>23</sup> Leaving aside the detailed accounting information PSE includes in its discussion of depreciation, both the introductory paragraph and the concluding paragraph of the discussion demonstrate that these issues will be considered in the Company's upcoming general rate case. These paragraphs state:

From an accounting perspective, costs associated with decommissioning and remediation of any facility are considered part of the "cost of removal" which is embedded in the approved depreciation rates of the utility. It is through depreciation studies that the costs of removal (net of salvage) are estimated and included in the depreciation rates so that theoretically at the end of the facility's life, there will be sufficient funds collected through a utility's rates to cover the cost of removal. Colstrip Units 1 & 2 plant retirement was not considered in previous depreciation studies, the last of which was adopted in rates in 2008.

\* \* \*

Beginning in the second quarter of 2015, PSE will be recognizing incremental annual depreciation expense associated with the estimated Asset Retirement Cost (FERC Account 403) and accretion expense (charged to FERC Account 411.10) of \$1.2 million per year through 2040, which provides for a five-year remediation period after the retirement date assumed in PSE's existing depreciation study. Although this \$1.2 million of annual incremental expense is not currently embedded in existing

---

<sup>23</sup> See PSE Response to Question 5 posed by the Commission's Notice.

depreciation rates and thus is not being recovered in rates, these changes in regulation and the associated additional legal and non-legal cost of removal will be incorporated into PSE's next depreciation study which will be timed for inclusion in the next general rate case.

PSE's Response includes additional discussion of the rate implications associated with Colstrip, and the possibility of its retirement. All of these issues can be developed by the parties, as appropriate, in the Company's upcoming general rate case.

#### 4. Determination

25 Certain of the issues implicated by the Petition will require, at the appropriate time, resolution in one or more adjudicative proceedings.<sup>24</sup> Prudence determinations with respect to specific capital investments that may be made, or proposed to be made, in the future are one example. The related question whether certain capital costs and operating costs should be allowed for recovery in rates necessarily will be considered in general rate case proceedings, or other adjudicatory proceedings considering both prudence and the fair, just, reasonable, and sufficient standard. Depreciation vis-à-vis Colstrip will be an issue in PSE's next general rate case, as discussed above. With respect to these issues, the Joint Petitioners application seeks relief that is not currently available, but that may be available in the future. Considering this, we dispose of the Petition by determining that the applicant and its individual members are "eligible applicants" within the meaning of RCW 34.05.419(3), which provides as follows:

If the application seeks relief that is not available when the application is filed but may be available in the future, the agency may proceed to make a determination of eligibility within the time limits provided in subsection (1) of this section. If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible

---

<sup>24</sup> In addition, these issues also may be addressed as a result of federal regulatory actions under the Clean Air Act. Specifically, the Petitioners note that the federal Environmental Protection Agency's (EPA) rulemaking to implement Section 111(d) of the federal Clean Air Act could have a significant impact on the future viability and operations of the Colstrip facility. Petition ¶ 21. The continued operations of the facility will likely be addressed either in the state of Montana's submission of a Section 111(d) compliance plan, or a Federal Implementation Plan, if Montana chooses not to submit a plan.

applicants as provided by law and, upon request, shall notify the applicant of the status of the application

Under this disposition of the Petition, they will be given notice of all future proceedings that raise, or potentially raise issues concerning Colstrip, and they will be allowed to participate and seek specific outcomes in such proceedings. Thus, we will take no further action on the Petition, at this time.

- 26 In addition to our disposition of the Petition in the fashion described, we further acknowledge its merit in suggesting that the Commission's review of PSE's 2015 IRP would benefit from the adoption of processes that will allow for a more rigorous inquiry. Petitioners raise important issues regarding the cost-effectiveness of the continued operation of Colstrip units 1 and 2, and PSE will need to make the case to the Commission that any future capital expenditures made to the plants are prudent before the company will be allowed to recover such costs in rates. Although we are not prepared at this time to convert our investigation into an adjudicative proceeding for the same reasons we are not approving Joint Petitioners' application for a separate adjudicative proceeding at this time, we have under active consideration the question whether we should broaden and deepen our investigation using such tools as are at our disposal to develop information and analyses that may usefully inform the records of future proceedings.

### **ORDER**

#### THE COMMISSION ORDERS THAT:

- 27 (1) Puget Sound Energy's Motion To Dismiss the Petition of Sierra Club, Climate Solutions, and Washington Environmental Council for an Adjudicatory Proceeding is denied.
- 28 (2) Joint Petitioners' Petition seeks relief that is not available at this time, but which may be available in the future in the context of one or more adjudicative proceedings. The applicants, meaning Joint Petitioners and its individual members, are "eligible applicants" within the meaning of RCW 34.05.419(3). They will be given notice of all future proceedings that raise, or potentially raise issues concerning PSE's ownership and operation of Colstrip, including those

issues identified in their Petition, and they will be allowed to participate and advocate specific outcomes in such proceedings.

Dated at Olympia, Washington, and effective October 13, 2015.

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**DAVID W. DANNER, Chairman**

**PHILIP B. JONES, Commissioner**

**ANN E. RENDAHL, Commissioner**