BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	)	DOCKETS UE-121697 and UG-121705 (*consolidated)*
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	)	DOCKETS UE-130137 and UG-130138 *(consolidated)* ORDER 11 DENYING PETITION FOR REVIEW, REQUESTS FOR CLARIFICATION, AND DENYING WITHOUT PREJUDICE MOTIONS TO MODIFY PROCEDURAL SCHEDULE

1 **PROCEEDINGS.** On July 24, 2013, the Washington Utilities and Transportation Commission (Commission) entered in these proceedings joint Order 07 - Final Order Granting Petition in Dockets UE-121697 and UG-121705 (*consolidated*), and Final Order Authorizing Rates in Dockets UE-130137 and UG-130138 (*consolidated*). The Industrial Customers of Northwest Utilities (ICNU) and the Public Counsel Division of the Washington State Attorney General's Office (Public Counsel) filed Petitions for Judicial Review. The Thurston County Superior Court filed its order in Case Nos. 13-2-01576-2 and 13-2-01582-7 *(consolidated)* on July 25, 2014, Granting in Part and Denying in Part Petitions for Judicial Review. The Court remanded this case to the Commission "for further adjudication."

2 The Court held that "the Commission acted within its discretion when it dispensed with a general rate filing case" and opted for an "alternative expedited rate filing"

form of ratemaking. On its face, this appears to be an endorsement of the Commission's exercise of its discretion to set rates without expending the considerable resources required to determine anew the Company's cost of capital based on updated analyses by PSE's and other parties' cost of capital experts. The Court, however, reversed the Commission's Final Order "because the Commission's findings of fact with respect to the return on equity component of Puget Sound Energy, Inc.'s cost of capital in the context of a multi-year rate plan are unsupported by substantial evidence." The Court remanded the case to the Commission to receive additional evidence on what rate of return on equity (ROE) should be used "to establish fair, just, reasonable and sufficient rates to be charged under the rate plan [approved by Order 07] and to order any other appropriate relief."

3 The Court observed that:

> The analysis of whether a rate is 'just, fair, reasonable, and sufficient' is complex, and generally is determined through sophisticated models. The Commission has particular expertise in understanding the relevant evidence, determining which evidence and models are credible, and determining what 'fair, reasonable, and sufficient' means in the context of an individual rate case. [Citations omitted.] This court does not attempt to override the Commission's expertise on such matters, but focuses on the procedural requirements.

The Court also referred to the requirement in RCW 80.04.130(4) that, when proposing increased rates, "the burden of proof to show that such increase is just and reasonable shall be upon the public service company."

4 The principal reason given by the Court for reversing and remanding the case are that the Commission, in Order 07, did not base its approval of proposed rates "on a sophisticated model or complex presentation of evidence by PSE regarding its current situation," but instead elected to leave in place the rate of return on equity approved in PSE's general rate case in 2012.[1] The Commission explained in a footnote to Order 07 the reason PSE did not present a full case on the issue of return on equity, as follows:

[1] *See WUTC v. Puget Sound Energy, Inc.,* Dockets UE-111048 and UG-111049 (*consolidated*), Order 08 (May 7, 2012).

> The concept of an ERF outlined by Staff testimony in PSE's 2011/2012 [general rate case], which we endorsed in principle, expressly envisioned that PSE would not be allowed to request a change in rate of return, except to update debt costs. *See* PSE 2010/2011 GRC Order ¶ 496 (citing Exhibit No. KLE-1T at 82:21-83:8). PSE worked actively with Staff as it developed the ERF before us here. It is not surprising, therefore, that 'PSE has not proffered a full cost-of-capital study.'[2]

Noting further Commissioner Jones's separate statement to Order 07, taking the view that PSE's failure to do so "means the Company failed to carry it burden of proof," the majority states in the same footnote that:

> The prevailing view, expressed in this Order, is that it is inappropriate to criticize PSE or claim that the Company has not carried its burden on cost of capital when the subject was not contemplated by PSE, Staff, or the Commission to be part of an ERF.[3]

The Court determined however that the Commission, having expressed the point that "the record on the issue [of return on equity] in this case lacks the depth and breadth of data analysis, and the diversity of expert evaluation and opinion on which the Commission customarily relies in setting return on equity," should not have left the previously approved rate of return on equity in place and should instead have required the submission of additional evidence.

5 It is the Commission's intention, following the Court's direction, to receive such evidence during the remand phase of these proceedings. To this end, we initiated further adjudicative proceedings by issuing a formal notice asking the parties to file proposals for the procedure the Commission should use on remand to comply with the Court's Order and a Notice of Prehearing Conference. The parties filed their respective proposals expressing divergent opinions concerning what evidence the Commission should receive and sharp disagreement concerning what issues the Court's order requires us to address. The parties continued to disagree on these matters during the prehearing conference held on September 30, 2014.

6 On October 8, 2014, the Commission entered Order 10 – Prehearing Conference Order, rejecting suggestions from some parties that it should be prescriptive, even

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[2] Order 07 ¶ 57 n. 72.

[3] *Id.*

narrowly prescriptive, and predetermine in some detail the scope of the evidence it will consider relevant to the issue of what rate, or rates, of return on equity should be used to set customer rates during the term of the rate plan. The Commission says in Order 10:

> The Commission does not undertake in general rate proceedings to prescribe the nature or extent of evidence parties present on the question of return on equity. As with respect to other issues in rate proceedings, we leave it to the parties to govern themselves when deciding what testimony and documentary evidence is sufficient to carry their respective burdens of going forward and, in the case of the Company, the burden of proof. We see no good reason to deviate from this well-established practice here.

7 The Commission states, in addition, that as in any other adjudicatory proceeding, parties may object to the admission of evidence and the Commission will hear argument and make rulings, as appropriate.

8 By way of further clarification of our intention for the conduct of this proceeding, Order 10 states:

> In the final analysis, we leave it to the resourcefulness of the parties to overcome the challenges we discuss above by presenting such evidence and making such argument as they individually decide will be sufficient to persuade us of one outcome or another. As in the context of a contested general rate proceeding, the Commission will consider all relevant evidence admitted on the question of return on equity, weigh the evidence, determine a range of reasonable returns, and set a return on equity that falls within that range.

9 **REQUESTS FOR CLARIFICATION AND MODIFICATION OF ORDER 10.[4]** On October 20, 2014, ICNU filed a Request for Clarification of Order 10 and, albeit not identified in the caption, a motion to revise the procedural schedule set by Order 10.[5] On the same day, Public Counsel filed a Petition for Review of Interlocutory Order; Request for Clarification and Modification of Order 10.

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[4] WAC 480-07-810 Interlocutory orders, allows a 10 day period for answers to petitions for review. The Commission finds there is no to await answers in this instance.

[5] WAC 480-07-375(2) requires that written motions must be filed separately from any pleadings or other communication with the Commission.

10 ICNU argues that the Commission's decision not to prescribe narrow boundaries that would limit the parties' ability to present evidence, coupled with the Commission's observation that it will hear argument and make appropriate rulings concerning any evidentiary objections that may be raised, creates "uncertainty . . . regarding what evidence may ultimately be received into the record." ICNU argues specifically that the Commission should "clarify" Order 10 by stating definitively that it will "consider evidence on whether PSE-specific mechanisms, such as decoupling and the rate plan, that may reduce the Company's risk profile, should impact the ROE." ICNU's argument ignores the fact that the parties demonstrated before and during the prehearing conference that they sharply disagree on this question.

11 Public Counsel acknowledges the parties' "opposing positions" but argues that "PSE customers will be substantially prejudiced if the impact of decoupling is not considered as part of setting rates for the rate plan pursuant to the remand." Public Counsel goes on to articulate, in part, the substantive point it "has consistently argued in this appeal, [that] determination of cost of capital, including return on equity, in the context of PSE's multiyear rate plan cannot accurately or lawfully be determined unless the impact of decoupling is considered." In effect, like ICNU, Public Counsel asks us to pre-judge this controverted, substantive issue by making "clear that the impact of decoupling is an issue that is within the scope of this remand case."

12 We reject the argument that it is somehow prejudicial to leave the parties in control of the cases they wish individually to present, reserving our rulings on any evidentiary objections until the time evidence is presented and any such objections are made. In so doing, we are following the usual and familiar process by which adjudicatory proceedings are routinely conducted by the Commission. Any "uncertainty" associated with our unwillingness to rule now on the admissibility of evidence yet to be presented is no different than the uncertainty the parties face in every adjudicatory proceeding. Were we to make the ruling ICNU and Public Counsel urge upon as at this early stage of the remand proceedings it would substantially prejudice the other parties who have a divergent perspective on the questions of whether and how decoupling or the rate plan should be taken into account as we determine ROE.

13 ICNU also argues that the Commission should "make explicit whether actual events subsequent to early 2013 will be considered." Public Counsel, similarly, "requests clarification on whether the Commission will accept and consider evidence regarding

cost of capital based on time periods after July 1, 2013, up to the present time." Public Counsel also argues that the Commission should "*require* all parties to file a cost of capital analysis as they would have done in early 2013, based on a time period between January 1 and June 30, 2013." In Public Counsel's view, "[t]here appears to be general consensus among the parties that it would be useful to establish a specific period for all analysts to focus on."

14 If there is such consensus as Public Counsel contends, the parties may agree to a common time frame for analysis by their respective cost of capital experts. The Commission has no objection to such an approach, but does not find it appropriate to prescribe it. What the Commission minimally requires on remand are fully developed analyses of data available prior to June 25, 2013, such as are usually undertaken to support advocacy on the issue of return on equity. That is, we expect to see from the expert witnesses their development of the usual models (*e.g.*, discounted cash flow analyses, capital asset pricing models, and other risk premium models) using such data. Beyond this, parties are free to develop and present such other evidence as they believe is relevant and helpful to the Commission in meeting its obligation to ensure that PSE's rates under the rate plan are fair, just, reasonable and sufficient.

15 We are mindful, as should be the parties, that the Court held the evidence upon which we relied in Order 07 when determining that "9.8 percent now resides at the higher end within the range of reasonable equity returns" was inadequate and inappropriate to support such a finding. Thus, the Court's order unequivocally puts us to the task of reconsidering in the context of fully developed analyses of *data contemporaneous with the entry of Order 07* whether a 9.8 percent ROE remained, in fact, within the zone of reasonable returns at that time. Further, we must decide on the basis of a full record whether it would have been appropriate to select 9.8 percent, or some other rate of return on equity found within the range of reasonable returns.

16 ICNU asks whether it should "develop full cost of capital analyses, which would include PSE's capital structure and debt" or to focus on the issue remanded, the return on equity component. Public Counsel asks similarly whether "experts may address all aspects of the cost of capital, or should restrict the testimony to return on equity." The Court's order speaks for itself, as follows:

> The Commission's determination that the Puget Sound Energy, Inc. rates to be charged during the rate plan approved in the administrative proceeding below are just, fair, reasonable and sufficient is

> REVERSED because the Commission's findings of fact with respect to the return on equity component of Puget Sound Energy, Inc.'s cost of capital in the context of a multi-year rate plan are unsupported by substantial evidence and the Commission improperly shifted the burden of proof on this issue from Puget Sound Energy, Inc. to the other parties in the proceeding below, contrary to RCW 34.05.461(4) and RCW 80.04.130(4).

It follows that if the Commission orders any change in PSE's rates for the rate plan period, it will be because the Commission's findings of fact with respect to the return on equity component of PSE's cost of capital in the context of a multi-year rate plan are supported by substantial evidence showing that a ROE other than 9.8 percent is justified by a preponderance of the substantial, competent evidence, including the evidence received during this phase of these proceedings. It may be necessary for the expert witnesses to analyze the question of return on equity in the context of PSE's capital structure and debt, or it may not. We should not, and will not, dictate how the experts do their work. We again leave it to the parties to determine for themselves what evidence to present. We emphasize, however, that the Court's order dictates that we reconsider and possibly change only "*the return on equity component* of Puget Sound Energy, Inc.'s cost of capital in the context of a multi-year rate plan." (Emphasis added).

17 Finally, Public Counsel "requests guidance from the Commission on whether parties should file testimony on the revenue requirement impact of their cost of capital recommendations, and the appropriate reflection of that outcome in terms of refunds or other requested relief" or should await the Commission's determination of return on equity with the expectation of presenting any such evidence during a compliance phase in these proceedings. It will best preserve the parties' and the Commission's resources to phase these proceedings. There is no need for parties to develop evidence concerning the impact of possible outcomes. Such analyses should be performed and presented, if appropriate, once the outcome of this initial phase is known. The Commission will set a schedule for any subsequent phase of these proceedings as necessary.

18 We find ICNU's and Public Counsel's requests for additional time to prepare cross-answering testimony premature. We deny their requests to modify the procedural schedule established by Order 10 without prejudice to renewal if the response testimony is of such nature and extent as to warrant the grant of additional time.

Dated at Olympia, Washington, and effective October 24, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner