BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of PUGET SOUND ENERGY, INC. For an Accounting Order Authorizing Accounting Treatment Related to Payments for Major Maintenance Activities	Docket No. UE-130583
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, v. PUGET SOUND ENERGY, INC.	Docket No. UE-130617 REPLY OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES TO THE ANSWER OF PUGET SOUND ENERGY, INC.
In the Matter of the Application of PUGET SOUND ENERGY, INC. For an Accounting Order Authorizing Accounting the Sale of the Water Rights and Associated Assets of the Electron Hydroelectric Project in Accordance with WAC 480-143 and RCW 80.12.	Docket No. UE-131099
In the Matter of the Application of PUGET SOUND ENERGY, INC For an Order Authorizing the Sale of Interests in the Development Assets Required for the Construction and Operation of Phase II of the Lower Snake River Wind Facility	Docket No. UE-131230

I. INTRODUCTION

1 Pursuant to WAC 480-07-370(1)(d)(ii), the Industrial Customers of Northwest Utilities ("ICNU") submits this reply ("Reply") with the Washington Utilities and Transportation Commission ("Commission") to the "Answer of Puget Sound Energy, Inc. to Petition for Accounting Order of The Industrial Customers of Northwest Utilities" ("Answer"), filed by Puget Sound Energy, Inc. ("PSE" or the Company") on August 28, 2014.

II. REPLY

A. The Company's Claim of Estoppel as an Affirmative Defense Is Legally Improper and Premised upon Factual Mischaracterizations

2 The Company contends that "ICNU is estopped from challenging the rates and terms that it agreed to in the 2013 PCORC settlement."[1/] PSE's assertion of estoppel as an affirmative defense is improper for several reasons. To begin, this statement mischaracterizes the 2013 power cost only rate case ("2013 PCORC") settlement stipulation terms, which do not contain any agreement concerning return on equity ("ROE"). Indeed, the settlement stipulation expressly provided that in executing the settlement, "no Party shall be deemed to have approved, admitted, or consented to the facts, principles, methods, or theories employed in arriving at the terms of the Settlement."[2/] Hence, whether considered from a factual or methodological perspective, ICNU cannot be said to have in any way approved or consented to the use of the unlawful ROE which formed a basis for the calculation of baseline rates used to derive revenue requirement in the settlement.[3/] Nor, since the 2013 PCORC Order (including the incorporated

---

1/ Answer at ¶ 18.

2/ 2013 PCORC Order 06, App. A at ¶ 29 (Oct. 23, 2013) ("2013 PCORC Order"); see also 2013 PCORC Order at ¶ 71 (confirming that the Commission approved, adopted and incorporated the 2013 PCORC settlement stipulation in its final order).

3/ See Petition for Accounting Order at ¶¶ 5-6 (Aug. 8, 2014) ("Petition") (providing factual support for the relationship of ROE to baseline rates used in PCORC proceedings).

settlement stipulation) never mentioned ROE, can ICNU be said to have "admitted" anything regarding the Company's unlawful ROE.

3 Further, a finding of estoppel requires that "[a]ll elements of estoppel *must be proved*."[4/] In its Answer, PSE did not so much as explain the elements of estoppel, never mind attempt to prove that all the elements exist. Nevertheless, a review of estoppel elements reveals that none are present. The Commission states:

> [E]stoppel requires a clear showing of (1) an admission, statement, or act, inconsistent with a claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement or act.[5/]

4 As to the first element, ICNU has not acted in any way or made any admissions or statements in its Petition which are inconsistent with the 2013 PCORC settlement terms. ICNU did not approve, admit, or consent to the ROE used in the 2013 PCORC. Accordingly, there is no inconsistency associated with the Petition's request for relief based on the Thurston County Superior Court's ("Court") holding that the Commission's findings regarding the ROE used in the 2013 PCORC were contrary to statute.[6/]

5 The second estoppel element cannot be proven because ICNU made no admissions, statements, or acts concerning ROE in the 2013 PCORC settlement which could have possibly induced PSE into action on the faith thereof. Nor, given the express settlement provision that ICNU shall not "be deemed to have approved, admitted, or consented to the facts" or methods employed at arriving at settlement terms, can ICNU be deemed to have consented to

---

4/ WUTC v. Olympic Pipe Line Co., Docket No. TO-011472, 20th Suppl. Order at ¶ 76 (Sept. 27, 2002) (*citing* Dept. of Ecology v. Adsit, 103 Wn.2d 698 (1985)) (emphasis added).

5/ Id. at ¶75 (*citing* Shafer v. State, 83 Wn.2d 618 (1974); Metropolitan Park Dist. v. State, 85 Wn.2d 821 (1975)).

6/ Petition Att., ICNU v. WUTC, Court Case No. 13-2-01576-2, Order at 2:18-24 (July 25, 2014) ("Court Order").

an unlawful ROE on the theory of "acquiescence."[7/] Moreover, the Company has not changed its position regarding ROE since the 2011 GRC—which should conclusively demonstrate that PSE simply has not acted at all on ROE. The Commission states: "Estoppel is founded in fraud, to prevent one who lures another into *changing position* from taking advantage from the misdeed."[8/] ICNU was not fraudulently luring the Company into any misconceptions via PSE's admission that ICNU entered into the 2013 PCORC settlement *after* filing a petition for review with the Court on the consolidated expedited rate filing ("ERF"), rate plan, and decoupling dockets ("ERF cases").[9/]

6 The third estoppel element cannot be proven because it would be farcical for PSE to claim injury through the establishment of a fair and just ROE. For instance, when considering an estoppel argument concerning The Washington Water Power Company, the Commission stated (what should be) the obvious in concluding that "it cannot be said that The Washington Water Power Company is injured by the Commission's determination of a fair, just, reasonable and sufficient rate of return."[10/] Likewise, PSE would suffer no injury were the Commission to order refunds and deferrals in accordance with the Petition in concluding that the ROE used to calculate baseline rates in the 2013 PCORC was unlawfully high. To conclude otherwise, and allow PSE to keep rate amounts which were not "just, fair, reasonable, and sufficient," would be plainly contrary to statute.[11/]

7/ See Air Liquide America Corp., et al. v. PSE, Docket No. UE-981410, Fifth Suppl. Order, p. 20 (Aug. 3, 1999) (noting that acquiescence can be construed to equal consent when a party would be expected to speak to protect its interest).

8/ WUTC Docket No. TO-011472, 20th Suppl. Order at ¶ 75 (*citing* Black's Law Dictionary, Equitable estoppel, 571 (7th Ed., 1999)) (emphasis added).

9/ Answer at ¶ 18.

10/ WUTC v. Washington Water Power Co., Cause No. U-77-53, 1978 Wash. UTC LEXIS 3 at *37 (Mar. 24, 1978).

11/ RCW § 80.28.010(1).

7 The Commission's statutory duty to set just and fair rates raises an additional problem with PSE's estoppel argument. In short, ICNU cannot be estopped from challenging any unlawful findings made by the Commission in the 2013 PCORC Order, regardless of ICNU's alleged settlement positions. The Commission's approval, adoption, and incorporation of the settlement are independent of any alleged action or representation of any settlement party: "The settlement *became* the Commission's Order when the Commission accepted the settlement and incorporated the agreement in [its] Order."[12/] In other words, once the settlement *literally* becomes part of a Commission order, "[t]he Commission will interpret its own Order incorporating the settlement agreement," rather than attempting to go beyond the order to "examine the subjective intentions of one party."[13/] The Company's estoppel defense is untenable because it would essentially require the Commission to violate this standard and unwind its incorporation of the settlement into the 2013 PCORC Order, as well as divine the subjective intentions of ICNU in 2013.

8 ICNU submits that the Commission *alone* has the authority to determine whether a proposed settlement meets "all pertinent legal and policy standards," and the Commission may not approve a settlement unless "doing so is lawful, … and when the result is consistent with the public interest in light of all the information available to the commission."[14/] Accordingly, if the Commission independently exercises its legal authority to approve and incorporate a rate settlement, then it is not inequitable for any party to challenge the Commission's independent action—especially when the Commission is later adjudged to have acted contrary to the law, as determined in the Court Order.

12/ In Re GTE Nw Inc. and Contel of the Nw, Inc., Docket No. UT-910499, Sixth Suppl. Order at 6 (Feb. 11, 1994) (emphasis added).

13/ Id.

14/ WAC §§ 480-07-740, -750(1).

9 Finally, the Commission should consider the highly questionable precedent that would be set if PSE's estoppel defense is accepted. Adopting the Company's estoppel "position would impair the Commission's ability to set fair, just, reasonable and sufficient rates in this proceeding and perhaps in other, future proceedings."[15/] Similarly, "[i]t could also act to the detriment of ratepayers, resulting in an improper advantage to one group of private individuals"—namely, PSE's owners—"to the detriment of others."[16/]

B. The Answer Misinterprets the Petition and Misrepresents Key Facts Relevant to the Commission's Consideration

10 Many of the denials and statements made by PSE in the Answer do not accurately interpret the Petition or fail to properly characterize pertinent facts. Accordingly, the following paragraphs provide clarification and shed additional light on allegations contained in the Answer.

11 According to PSE, paragraph 9 of the Petition mischaracterizes the Commission's notice in the ERF cases.[17/] This allegation does not bear scrutiny. The final sentence of the paragraph states: "In the body of these Notices, the Commission explicitly acknowledged the Court's conclusions regarding the illegality of the Commission's findings of fact with respect to ROE in the Company's rate plan."[18/] This is a perfectly accurate characterization, given that the Commission directly quoted the Court's conclusion that "the Commission's findings of fact with respect to the return on equity … in the context of a multi-year rate plan are unsupported by evidence and the Commission improperly shifted the burden of proof … contrary to RCW 34.05.461(4) and RCW 80.04.130(4)."[19/]

15/ Docket No. TO-011472, 20th Suppl. Order at ¶ 76.
16/ Id. at p. 25, n.16.
17/ Answer at ¶ 10.
18/ Petition at ¶ 9 (*citing* ERF cases, Notice Suspending Response Deadlines and Providing Opportunity to File Proposals and Notice of Prehearing Conference (Aug. 5, 2014) ("Notices")).
19/ Notices (*quoting* Court Order, p. 2).

12 The fact that the Commission quoted the Court's conclusion adjudging that the Commission's findings of fact were contrary to two specific statutes means "the Commission explicitly acknowledged the Court's conclusions regarding the *illegality* of the Commission's findings of fact."[20/] Finding that an action is "contrary to" statute means that it is illegal, period. The Commission should not allow PSE to flout common and ordinary use of the English language by casually throwing out allegations of "mischaracterization."

13 The Company also denies the statement in Petition paragraph 7 that, in the ERF cases, "the record evidence demonstrated that a reasonable ROE for the Company at the time that the ERF was issued was 9.3%."[21/] In support of this statement, ICNU cited to the final order in the ERF cases, in which the Commission recounted the analysis and recommendation of ICNU expert Michael Gorman in support of a 9.3% ROE.[22/] No other party had submitted a full cost of capital analysis into the record in the ERF cases.[23/] Thus, as ICNU's 9.3% ROE recommendation comprised the *only* complete cost of capital evidence in the record, ICNU's statement in Petition paragraph 7 is well supported by the factual record.

14 PSE denies Petition paragraph 15 in full, arguing that ICNU was a party to the 2013 PCORC settlement, which included the prudence of resources in that case.[24/] The Company appears to misinterpret the Petition by this denial. ICNU stated that, considering rate changes implemented in association with cases consolidated into the 2013 PCORC, "PSE's refund should include any *effect* of illegal ROE calculations on these other approved rate

---

20/ Petition at ¶ 9 (emphasis added).

21/ Answer at ¶ 8 (the last clause of the paragraph actually states that PSE "denies the remainder of paragraph 8" in the Petition, but this appears to be a typo since Answer paragraph 8 begins with: "Answering paragraph 7 of ICNU's petition ….").

22/ Petition at ¶ 7 (*citing* WUTC v. PSE, Docket Nos. UE-121697/UG-121705 and UE-130137/UG-130138, Order 07 at ¶ 51 (June 25, 2013) ("ERF Order 07")).

23/ See ERF Order 07 at ¶ 56.

24/ Answer at ¶ 16.

changes."[25/] ICNU went on to explain that this should include findings "as to the prudence of various resource acquisitions and upgrades."[26/] To clarify, the Petition does not challenge the prudence determinations agreed to in the 2013 PCORC settlement and which were approved by the Commission. Rather, the Petition requests the refund of any rate "effect" resulting from calculations which applied an improper ROE to Company acquisitions or upgrades found to be prudent. Therefore, to the extent that the Company's return on such prudent investments has been adjudged to be unlawfully high, PSE should refund those unlawfully high return amounts.

15 Finally, the Company repeatedly denies the illegality of 2013 PCORC rates because those rates were the product of a negotiated settlement; e.g., "PSE denies that the rates negotiated by the parties to the 2013 PCORC and approved by the Commission are illegal."[27/] Part II.A of this Reply addresses the estoppel defense and the flaws in the Company's apparent contention that rates are sacrosanct and unassailable simply because they are allegedly connected to a settlement. Additionally, PSE's statements here again misrepresent the Petition and the main issue, which is the conclusion by the Court that the Commission's findings of fact regarding ROE were contrary to statute. Since, as the Petition explains, a ROE is used in PCORC rate calculations, the Company's denials are irrelevant in light of the fact that the 2013 PCORC rates were derived using an unlawful ROE.

C. The Proposed Accounting in the Petition Should Survive the Allegations in the Requested Relief Section of the Answer

16 The Company concludes that the Commission should reject ICNU's deferral and refund proposals, essentially arguing that the Court did not pre-decide how the Commission would conduct the remand or remedy its error on the actual level of ROE which is legally

---

25/ Petition at ¶ 15 (emphasis added).

26/ Id.

27/ Answer at ¶¶ 12, 14; see also id. at ¶ 15 ("PSE further denies that the rates agreed to by ICNU and all other parties in the 2013 PCORC are unlawful as ICNU alleges").

appropriate in the ERF cases.[28/] ICNU continues to maintain that the only valid and supported ROE level in the record in the ERF cases was the 9.3% ROE proposed by ICNU. Further exposition on this point is contained within ICNU's proposal responsive to the Notices, in which ICNU explains the acute difficulties in attempting to reconstitute the record in the ERF cases to include new ROE analysis and data.[29/]

17 Nevertheless, even if the Commission were to decide against ordering an *immediate* refund and deferral in accordance with the Petition, a more prudent course would be to approve a refund and deferred accounting while at the same time requiring a later determination on allowable amounts.[30/] Alternatively, the Commission could also suspend ICNU's Petition requests pending final determination in the ERF cases remand. Such options would be in keeping with Answer rationale, including the Company's statement that "[t]he court remanded the case to the Commission to take action consistent with the court's order."[31/] That is, if on remand the Commission finds that a 9.3% ROE was and is the appropriate level of equity return "consistent with the court's order," a refund and deferral order in keeping with the Petition would be appropriate at that time.

III. CONCLUSION

18 ICNU requests that the Commission approve the Petition and reject the Company's estoppel claim and the relief requested in the Answer. In the alternative, ICNU requests that the

---

28/ Answer at ¶ 19.

29/ ERF cases, ICNU Proposal for Procedure on Remand (Aug. 26, 2014). The Commission may take official notice of ICNU's Proposal filing. See WUTC v. Washington Natural Gas Co., Docket Nos. UG-940034 and UG-940814, Fifth Suppl. Order at p. 31 (Apr. 11, 1995) (taking official notice of a party filing in a separate docket).

30/ See WUTC. V. Pacific Power & Light Co., Docket Nos. UE-140762/UE-140617, Order 03/01 at ¶10 (May 29, 2014) (authorizing deferral but requiring "a more complete and fully developed record before we can issue a decision on the eligibility of these amounts for inclusion in rates," and making "no finding as to whether the amount … is prudent but leave that issue for [future] determination").

31/ Answer at ¶ 19.

Commission either approve refund and deferral for later determination on allowable amounts, or suspend ICNU's Petition, pending the outcome of the remand proceedings in the ERF cases.

Dated in Portland, Oregon, this 5th day of September, 2014.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

Melinda J. Davison
Jesse E. Cowell
333 S.W. Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 telephone
(503) 241-8160 facsimile
mjd@dvclaw.com
jec@dvclaw.com
Of Attorney for Industrial Customers
of Northwest Utilities