

**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION
COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKET NO. UE-100177

PUBLIC COUNSEL MOTION FOR
SUMMARY DETERMINATION

I. MOTION FOR SUMMARY DETERMINATION

1. Pursuant to WAC 480-07-380(2), the Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) respectfully moves the Commission for an order of summary determination finding that the public participation afforded by PSE in connection with development of the I-937 conservation potential and targets filed January 29, 2010, is insufficient to meet the requirements of RCW 19.280 or WAC 480-109, and consequently that the filed targets are disapproved. The motion is supported by the Declaration of Stefanie Johnson which establishes that there is no genuine issue as to any material fact regarding the public participation in this matter. On the basis of the points and authorities set forth in this motion, Public Counsel is entitled to prevail as a matter of law.

II. MEMORANDUM

A. The Facts Regarding Public Participation Are Not In Dispute.

2. In support of this motion, Public Counsel has filed the Declaration of Stefanie Johnson, Public Counsel Regulatory Analyst assigned to represent Public Counsel in PSE's Conservation

Resource Advisory Group (CRAG) and Integrated Resource Plan Advisory Group (IRPAG).

Ms. Johnson's Declaration reviews in detail the history of the public involvement process which occurred in connection with the development of PSE's projected conservation potential and targets, tracking the events listed in the public involvement chart presented in PSE's Compliance Report, Section 6 (Appendix A to Ms. Johnson's Declaration). The Declaration relies for the most part on presentation materials and e-mails prepared by PSE itself, as well as the chart of participation activities provided by PSE. To Public Counsel's knowledge, none of the PSE-provided information contained in the Declaration appendices is disputed by the Company.

3. Ms. Johnson's Declaration establishes that PSE's public participation process solely and exclusively focused on developing conservation potential and targets on the basis of PSE's IRP process, up to and including December 31, 2009. Not until January 25, 2010, were Public Counsel and other CRAG and IRPAG participants notified that PSE would *not* be using the IRP-based targets, but instead would rely on the "5th Plan Calculator" of the Northwest Power and Conservation Council. Only four days later, PSE filed its Compliance Report with the newly announced targets. PSE held one public meeting January 27, on short notice, which neither Staff nor Public Counsel were available to attend. The meeting, in any event, was held after the January 25 announcement that PSE had already decided to use the 5th Plan Calculator, rather than in advance as part of a development process. As a practical matter, the facts show that *no* public participation occurred with respect to the ten-year conservation potential and the two-year target filed by PSE on January 29, 2009.

B. Public Participation in the Development of PSE's Filed Conservation Targets Is Inadequate As A Matter of Law.

The Commission's rules implementing the Energy Independence Act (EIA) require

public participation. WAC 480-09-010(3) and (3)(a) state:

(3) On or before January 31, 2010, and every two years thereafter, each utility must file with the commission a report identifying its ten-year achievable conservation potential and its biennial conservation target.

(a) Participation by the commission staff and the public in the development of the ten-year conservation potential and the two-year conservation target is essential. The report must outline the extent of public and commission staff participation in the development of these conservation metrics.

In its final order adopting the EIA rules, the Commission responded to Public Counsel's concern regarding the manner of public participation that would be included in the development of the targets:

Public Counsel recommends that utilities be required to use stakeholder advisory panels to develop their projected ten-year conservation potential. We agree that stakeholders should be involved in the process and WAC 480-109-010(3)(a) makes this point. The jurisdictional utilities currently have public processes and stakeholder groups involved in the development of conservation programs and we expect that to continue.¹

Under RCW 80.19.285.040(1)(e), "the Commission may rely on its standard practice for review and approval of investor-owned utility conservation targets." As the quoted language from the rule adoption order indicates, part of that standard practice is that public processes and stakeholder groups have been involved in the development of conservation programs in Washington. The intent of the rule was to continue that participation. As the Washington Supreme Court has noted, the term "participate" means "to take part in something...or share in something....[commonly understood, the word means something more than merely being

¹ *In the Matter of Adopting Rules to Implement the Energy Independence Act*, Docket No. UE-061895, General Order R-546, ¶ 27.

present. It connotes an active presence in which one contributes something to a common enterprise.”² No participation of this type occurred here.

4. As noted, the Commission rules state that public participation in “development” of the targets is “essential.”

Black’s Law Dictionary defines the term essential as:

Indispensably necessary; important in the highest degree, requisite. That which is required for the continued existence of a thing.³

The term “essential” has been defined by the Washington Supreme Court as “fundamental, basic, necessary, and indispensable [.]”⁴ In other words, public participation in target development is a requirement. It is integral not optional.

5. In this case, as the attached declaration shows, as a practical matter, there was no public participation in the development of the target that was submitted to the Commission as PSE’s I-937 target based upon the Fifth Plan Calculator. PSE has clearly failed to comply with the Commission requirement for public involvement in the *development* of the conservation targets. As Ms. Johnson’s Declaration reflects, in its review of documents provided to the CRAG and the IRPAG at stakeholder meetings, Public Counsel was unable to find a single instance in which potential targets based on the Council’s Fifth Plan calculator were proposed to either stakeholder group as a recommended path for developing the ten-year potential and biennial target that were to be filed in the Compliance Report.

² *State v. Eaton*, 82 Wn. App. 723, 734, 919 P.2d 116 (citing Webster’s Third New International Dictionary 1646 (1969)).

³ Black’s Law Dictionary, Sixth Edition, p. 546.

⁴ *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003)(defining the term “essential function” in the employment context, citing Webster’s Third New International Dictionary of the English Language 777 (1976) for the definition of “essential.”)

C. Absent Public Participation, PSE’s Filed Targets Cannot Be Approved.

6. PSE’s engagement of stakeholders and the public in the development of its conservation programs, potential and targets is reflected through documents provided to the IRPAG and CRAG and attached to Ms. Johnson’s Declaration. However, the focus of that public process was on PSE’s IRP targets—*not* the Fifth Plan Calculator—and, thus, is *not* what was ultimately included in the Company’s Compliance Report. Ultimately, there was no public process regarding the *development* of the ten-year potential and biennial target PSE chose to file in its January 29, 2010, Compliance Report.

7. If the Commission concludes that public participation is insufficient as a matter of law, and because public participation in the filed targets is “essential” under the WAC, the Commission could also issue an order at this stage of the case disapproving the targets in the January 29, 2010, Compliance Report. This leaves two potential paths for the Company. PSE could initiate a new public participation process to engage stakeholders in developing targets on the basis of the Fifth Plan.⁵ The far more appropriate and reasonable option would be for PSE to refile its I-937 targets on the basis of the extensive developmental process that has already occurred with respect to IRP-based projections and targets, for which sufficient public participation has already occurred. While this approach would expedite the proceeding, the Commission may also at this stage wish to rule only on the sufficiency of the public process, and reserve a ruling on disapproval until a later stage of the proceeding.

⁵ Even if this were to occur, the question would remain as to whether targets based on the Fifth Plan were in compliance with the fundamental statutory requirements to seek achievable and cost-effective conservation.

III. CONCLUSION

8. For the foregoing reasons, Public Counsel respectfully requests that the Motion for Summary Determination be granted. Public Counsel further requests that an order be issued finding that PSE's public participation is insufficient as a matter of law with respect to the targets contained in the January 29, 2010, Compliance Report, and that accordingly, the targets must be disapproved on that basis.

9. Dated this 6th day of April, 2009.

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Attorney General

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