

Service Date: July 9, 1985

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER of the Complaint of	)	
SUPERIOR ENERGY, INC.,	)	
	)	UTILITY DIVISION
Complainant,	)	
	)	
vs.	)	
	)	DOCKET NO. 84.8.46
	)	
PACIFIC POWER & LIGHT COMPANY,	)	ORDER NO. 5137a
	)	
Defendant.	)	

ORDER ON RECONSIDERATION

1. On May 2, 1985, the Public Service Commission (PSC) issued Order No. 5137 in this Docket.
2. following issuance of that order, both Pacific Power & Light (PP&L) and Superior Energy, Inc. (Superior) filed Motions for Reconsideration.

PP&L's Motion for Reconsideration

3. PP&L's Motion contests the PSC's finding that it is not entitled to insert into its contract a provision stating that PP&L would not pledge shareholders' funds to carry out its payment obligations if those costs were not recovered in the ratemaking process. PP&L bases its claims on an assertion that the PSC's findings are not in accord with federal and state law, which requires ratepayers to absorb costs incurred by this contract.
4. PP&L has confused the issue it presented to the PSC. Contrary to its assertions, neither federal nor state law require the PSC to allow a particular clause to be inserted into a contract.

5. Fundamental utility law does, of course, require ratepayers to pay for the reasonable cost of providing service. The PSC's Order No. 5137 repeatedly affirms that axiom as it is relevant to this Docket. PP&L has offered no support that this principle requires approval of the contract term at issue here. The time and place for PP&L's claim is when (and if) such costs are denied appropriate ratemaking treatment. Only at that time will the concerns PP&L expresses become relevant. Until that time, with or without a contract clause, it must be presumed that the PSC will comply with relevant law when and if the situation arises. Order No. 5137 expressly affirms that obligation in the situation as presented by this Complaint.

#### Superior's Objection and Motion for Reconsideration

6. Superior's filing in response to Order No. 5137 contains a number of objections, which will be addressed in turn.

##### A. Factual Issues/Evidentiary Hearing

7. Superior asks that the PSC dispose of factual issues after an evidentiary hearing is held. This claim, although somewhat confusing, seems to be based on claims that the PSC made findings that had no factual basis and that a factual hearing is required in order to fulfill the requirements of 69-3-603, MCA. Superior further claims that if the PSC believes that risk allocation is a relevant issue, a factual hearing must be held to resolve it.

8. As noted in Order No. 5137, "Both parties waived oral argument and an evidentiary hearing, and agreed that the Commission could make a decision based on pleadings filed with it." Superior's Motion does not dispute the accuracy of this statement but, rather, simply ignores it. Implicitly, at least, Superior's position seems to be that a hearing is not necessary only if the PSC adopts its positions. That is not the way the game is played.

9. As part of the basis for its claim, Superior makes much ado about the statement in Order No. 5137 that PP&L has substantial experience in power purchases from facilities such as that proposed by Superior. Contrary to the claim that no evidence supports the finding, PP&L as part of its pleadings, filed an affidavit by Raymond H. Swan that supports the finding. Although Superior

made no timely objection to the affidavit, and the PSC's own experience gained in two dockets involving such issues supports it, the PSC finds that the statement is dicta and can, therefore be stricken, and should be in order to avoid cluttering up the process with irrelevant discussion.

10. Superior further claims that if risk allocation is to be a factor, a factual hearing must be held and the PSC must, by law, make a risk allocation. Superior claims that all risk allocations were, in fact made as a matter of law when the PSC established avoided costs, and, therefore, should not be considered in this case.

11. Superior's position is faulty for a number of reasons. The controversy which gave rise to this complaint in the first place was, in essence an issue of risk allocation. PP&L wanted to limit the term of the contract since it perceived an unacceptable risk of performance because of fuel supply. The PSC rejected that position, but found, consistent with its orders currently in effect, that risk issues could be negotiated via security agreements. By the terms of its own previous orders, which have not been appealed by any interested person, the PSC found that method to be the preferable one. It should be noted that this preference was endorsed by a small power producer in that Docket (83.1.2). Superior's claims here represent nothing but an improper collateral attack on the findings contained in Order No. 5017 and 5017a and must, therefore, be rejected on that basis alone. In that order, the PSC said, in effect, "Negotiate risk factors relating to individual contracts through insurance provisions or other security arrangements. If you cannot agree on specific security terms, the PSC will resolve the issues through complaint proceedings." In the situation presented here, the PSC has no grounds upon which to conclude the parties are at an impasse as to security provisions, since the specific issue raised went only to the term of the contract.

12. Superior offers no support for its claim that risk allocation is a matter for Commission decision in the present situation only as it relates to the initial determination of avoided costs. That position is contrary to PSC orders currently in effect. Of course, the PSC in those proceedings, might have chosen to follow the course Superior now suggests by trying to incorporate risk factors into the prices to be paid by utilities. If it had chosen that course, however, the prices which Superior is now so eager to secure, in all likelihood, would have been substantially lower than they are. In essence, therefore, Superior's Motion seems to seek a price that does not account for risk

of performance, and then seeks to void any provision for an equitable sharing of risk, as contemplated by the PSC's previous orders. Such a strategy certainly comports with a risk minimizing corporate strategy; it does not, however, satisfy the PSC's obligation to assume that these purchases do not result in harm to PP&L's ratepayers.<sup>1</sup>

13. Given the discussion above, the PSC finds that an evidentiary hearing was specifically waived by parties and that Superior's demand for one at this late date is without merit. As previously mentioned, should PP&L and Superior fail to agree on risk sharing security provisions, the PSC, in carrying out the terms of its previous orders will, on petition of either party, decide the issue. Whether resolution requires a factual hearing will be determined when that issue is properly raised.

**B. Security of Superior's Fuel Supply**

14. In its Motion, Superior claims, 1) Superior has a secure source of fuel supply; 2) further analysis of the issue "can only lead to an inevitable morass of speculation."

15. Given its arguments that the issue is irrelevant, and the PSC's own findings that fuel supply was not essential to its determinations, the relevance of these claims is difficult to determine. The PSC reaffirms its findings on the issue.

**C. Risk Allocation as a Matter of Law**

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<sup>1</sup> It might be noted that in California, a jurisdiction which incorporates risk into price, the kind of financial arrangement available in Montana and so attractive to Superior, is not available.

16. Superior claims in its Motion, "Risk allocation should not be an area of speculation but instead should be limited as a matter of law to PP&L's own contract as signed by Superior and on file with the PSC." The statement is offered without support of any kind.

17. As previously discussed, the PSC, in Dockets now long closed, might have accepted Superior's "suggestion," with resulting lower prices. Contrary to that path, the PSC accepted evidence suggesting use of security provisions and a requirement that parties negotiate individual contracts in good faith. The PSC's approach realistically allows for a recognition of the real world, that is, that there will be individual differences that require accommodation on a case-by-case basis. Power producers who wish to contract with the utilities can be expected to be diverse, running the gamut from a backyard windmill to a 10 megawatt cogeneration unit. In its orders in now-closed dockets, the PSC decided to allow these differences to be reflected in reasonable individual contract terms. The PSC continues to believe that this approach is a reasonable implementation of its duties under relevant federal and state law, absent an indication of bad faith negotiating.

#### D. Fully Negotiated Contracts

18. Superior's Motion contests the PSC's finding that it does not have a fully negotiated contract. The basis of this claim is that, with the PSC's order, and with Superior's conclusion that risk allocation is not an issue, there is nothing left to negotiate. And there's the rub. The PSC, in interpreting its own previous orders and its order in this Docket, continues to believe that risk allocation is an important issue and, perhaps, even the vital issue. Superior states, "Merely because there has been a failure of the parties to agree upon two terms in the contract does not necessarily mean the contract is not fully negotiated." If the PSC's decision in this case had, in essence, "filled in" contract terms in dispute, Superior's claim might have merit. Under the circumstances, however, it is stretching the language too far to conclude that a contract is fully negotiated when one party explicitly refuses to sign it. By the terms of Order No. 5137, the contract is obviously not fully negotiated.

#### E. Insurance as a New Issue

19. Superior, in its Motion, claims that the concept of insurance is one that the PSC in its decision has injected "for the first time." As the previous discussion demonstrates, the claim is nonsensical. In Order Nos. 5017 and 5017a, the issue was discussed at length. The issues raised in this Complaint specifically required the PSC to apply general findings from those Orders to the individual facts of this case. That was the whole purpose of this proceeding, as is evident by the pleadings of both parties. The concept of insurance is nothing new, except, perhaps, to those who have not thoroughly reviewed or have chosen to ignore the PSC's pronouncements in previous Orders.

F. The PSC's Failure to Act Within the Required 120-Day Time Frame

20. As in previous filings before the PSC and now in a filing with the District Court, Superior's Motion notes that the PSC did not issue a decision in this case within the required 120-day deadline. The PSC chose to ignore these allegations in its initial decision, since they were deemed not to go to the merits of the Complaint. However, since Superior now seems to claim that they go to the merits of the fully negotiated contract issue and may be used as the basis for an award of attorney's fees in the pending District Court case, they should be addressed.

21. As the PSC files in this Docket demonstrate, both parties sought to involve the PSC Staff in their discussions. In addition to copies of correspondence routinely being forwarded to the Staff, the PSC has been informed that a number of telephone conversations were held between the staff and one or both parties. The PSC has further been informed that those discussions at times involved a discussion of the 120-day deadline and that Superior informally waived that deadline (with a confirming letter to follow) in hopes that the issues could be resolved through negotiation. Such information cannot, of course, be accepted as evidence by the PSC. However, the PSC's file does contain correspondence demonstrating that active negotiations continued after the 120-day deadline and that Superior's Motion for Summary Judgment was filed February 28, 1985, approximately two months after the 120-day deadline. (PP&L's response was filed March 25, 1985.) Based on such information, the PSC must question why Superior places continuing and increased emphasis on the issue.

22. The PSC, in matters such as those raised in this Complaint, has endorsed informal negotiations between parties as the preferable approach. Failing that, informal discussions with the staff have been viewed as preferable to all when compared to full hearings and other contested case proceedings. It was the PSC's understanding that interested parties approved of this approach. It is the PSC's understanding that such a course was followed in this case.

23. The PSC has clearly understood that its policy places a substantial burden on its staff; however, it believed that the burden was justified by the desire to work these matters out informally. Superior's claims in this case bring that conclusion into serious question.

24. Superior's Motion suggests that, but for the PSC's violation of the 120-day requirement, it would have clearly had a fully negotiated contract. The claim ignores the fact that even if the PSC had acted within that time frame, the decision could have come after the PSC's Order of December 10, 1984. It also assumes that the PSC's decision would have differed in substantial form and interpretation than what was issued in Order No. 5137. There is no basis for such a conclusion.

#### CONCLUSIONS OF LAW

1. Pacific Power and Light Company is required to purchase power from qualifying facilities, as defined in PURPA and Montana law, subject to the terms and conditions established by the Montana Public Service Commission.

2. The Montana Public Service Commission properly exercises jurisdiction over the matters raised by this complaint. 69-3-603, MCA.

3. This order is consistent with federal and state law and with the Commission's previous orders in Docket Nos. 81.2.15 and 83.1.2.

#### ORDER

1. The Pacific Power and Light Company's Motion for Reconsideration is hereby Denied.

2. Superior Energy's Objections and Motions for Reconsideration are hereby Denied, except that the following sentence is deleted from Order No. 5137, Finding of Fact No. 4: "In view of PP&L's substantial experience in power purchases from facilities such as that proposed by Superior, and in view of the evidence of good faith negotiation, the Commission finds that the issue should be left to the parties rather than to findings by the Commission."

DONE AND DATED this 9th day of July, 1985 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

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CLYDE JARVIS, Chairman

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JOHN B. DRISCOLL, Commissioner

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HOWARD L. ELLIS, Commissioner

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THOMAS MONAHAN, Commissioner

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DANNY OBERG, Commissioner

ATTEST:

Trenna Scoffield  
Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.