

consolidate their presentations before the Commission. The intervention of the Public Power Council was limited solely to the issue of the Residential Exchange Program. In addition, the Commission indicated that it might "limit participation by these intervenors during the hearings to competitive issues which the Commission determines in the course of this proceeding are relevant to the Commission's decision on the proposed merger." Page 8. Finally, the Commission clarified that the Tacoma Department of Public Utilities would be allowed to file a separate brief.

On June 20, 1996, Puget and WNG filed with the Commission the Joint Applicants' Motion for Reconsideration of the Third Supplemental Order. The applicants argue that the Third Supplemental Order disregards precedent, unnecessarily and inappropriately broadens issues, and places them at risk of suffering irreparable harm. The applicants claim that this proceeding is not the proper forum for parties to express concerns about the transition in the electric industry to a regulated competitive environment.

On July 8, 1996, the Washington Water Power Company (WWP) filed with the Commission a Petition for Interlocutory Review of Denial of Intervention. The petition asks the Commission to overturn the Second Supplemental Order's determination that WWP should not be allowed to intervene.

MEMORANDUM

1. The Competitors Were Properly Granted Intervenor Status

The applicants first proposition is that it is the interests of the applicants' customers that must be considered in ruling on intervention petitions, not the interests of nonregulated competitors, citing Cole v. Wn. Util. & Transp. Comm'n, 79 Wn.2d 302, 485 P.2d 71 (1971). In the Cole proceeding, the Commission exercised its discretion to grant or deny intervention by denying intervention to an association of fuel oil dealers who alleged that WNG's promotional practices harmed them as competitors. The Washington Supreme Court affirmed the Commission's action, noting that the decision whether or not to grant a petition for intervention under WAC 480-08-070(3) is a matter within the discretion of the Commission.¹

In the Third Supplemental Order, the Commission noted that in rate cases it generally does not grant intervention to unregulated potential competitors of a regulated company, on the basis that the Commission has no authority to consider the economic effects of practices of a regulated utility upon nonregulated competitors, and that the interest of the public which is to be protected is that only of customers of the regulated utility. The

¹Now WAC 480-09-430(3).

Commission went on to explain why it reached a different result in this proceeding than it did in Cole. The Commission stated:

This proceeding raises significant competitive issues beyond those involved in a typical rate case. The transition from monopoly to retail competition in the electric industry is a basic issue in this proceeding. In this transitional environment, the Commission believes that it is in the public interest for it to be generous in allowing issues on the table. WPUA and other competitors can bring an expertise to the table that may assist the Commission in determining how the merger will affect the Commission policy favoring a competitive model in the electric industry. Page 7.

The petitioners suggest that the Commission has adopted the intervenors' argument that Cole is distinguishable on the basis that it was a "rate case" rather than a "merger case." They argue that the distinction makes no difference under the rationale the Commission stated for denying intervention in Cole.

The Third Supplemental Order is not based on a distinction between rate cases and merger proceedings. It is based on the particular circumstances of this proceeding. Consistent with Cole, the Commission is not allowing the intervenors to intervene for the purpose of demonstrating the economic effects of the merger upon them individually. The Commission has granted intervention for the limited purpose of assisting the Commission in determining the economic effects of the merger upon competition generally as the industry transitions from monopoly to retail competition. The Commission hopes that it will benefit from the intervenors' expertise as we proceed to determine how the merger will affect the implementation of Commission policy adopted to benefit the applicants' customers.

The electric utility industry in this state, and in the nation, is in a period of rapid transition from a traditional regulatory model to a regulated competitive model. As market forces move into the forefront as a regulatory tool, the Commission has an expanded interest in ensuring that, where competition serves the public interest, markets become and remain truly competitive. The merger of Puget and WNG into the largest energy company in the state must be examined in light of these market changes in order for the Commission to decide whether the merger is in the public interest. The Commission, exercising its discretion, has determined that information on the competitive issue provided by the competitors could assist it in making this determination.

2. The Order Does Not Broaden the Issues

The applicants' second contention is that the Third Supplemental Order unnecessarily and inappropriately broadens the matters at issue in this proceeding. They disagree with the Commission's determination that "[t]he transition from monopoly to retail

competition in the electric industry is a basic issue in this proceeding.” Page 7. In support, they argue that this issue is beyond what the applicants intended, and beyond the scope of the proceeding as stated in the merger application. They note that other proceedings before the Commission have also examined regulation in face of change in the electric industry, and argue that this merger case was not intended to be a generic proceeding.

The Commission agrees with the applicants that this merger application is not a generic proceeding. As stated more fully in the previous section, however, the Commission believes that the impact of the proposed merger on emerging competition is an essential issue to explore in seeking to determine whether the merger is in the public interest. This is not a generic question, rather it is a specific question regarding the effects of this merger on this market and on the energy customers of this state. Let us emphasize again that these include the customers of Puget and WNG.

3. The Applicants’ Should Bring Specific Discovery Concerns to the Commission

The applicants’ third concern is that its competitors will use the Commission’s discovery rule to uncover the Applicants’ most sensitive proprietary information and use that information to gain an unfair competitive advantage. They argue that the Commission’s procedures are not adequate to prevent or even detect a misuse of sensitive competitive information. They state that the Commission Staff already possesses information that, in their opinion, competitors should not receive. Finally, they argue that counsel who are allowed by the protective order to see documents will discuss confidential information with their clients.

In the Third Supplemental Order, the Commission stated:

[T]he Commission is sensitive to Puget’s concern that this proceeding not be abused by potential competitors for the purpose of fashioning merger conditions that will hamper the merged entity’s ability to compete effectively. The Commission also is concerned that the proceedings remain manageable.
Page 7.

It went on to state:

The Commission also may limit participation by those intervenors during the hearings to competitive issues which the Commission determines in the course of this proceeding are relevant to the Commission’s decision on the proposed merger.
Page 8.

The Commission believes that access to confidential information should be granted on a need to know basis. It may be that none of the applicants’ most sensitive data

are relevant to the competitive issues which the competitors may address. Intervenors do not necessarily need to review all of the information provided to statutory parties. If data are sought which the applicants believe should not be released, those discovery disputes may be brought to the Commission for resolution.

In addition, the applicants' argument contains a misstatement of what is permissible with regard to the release of confidential information. We want to emphatically state our disagreement. Counsel who receive access to confidential information may not, under the terms of the Protective Order in this matter, disclose any confidential information to any person who has not signed a confidentiality agreement which has been on file, without objection, for ten days. They may not discuss any confidential information with their clients under any other circumstance. Any counsel who are unable to make this pledge, when signing their own confidentiality form, should refrain from viewing any confidential material.

4. The Public Power Council's Intervention is Proper

Finally, the applicants object to the grant of intervenor status to the Public Power Council. The Commission allowed the Public Power Council to intervene to address the limited issue of the Residential Exchange Program. Its intervention is subject to a consolidated presentation restriction. To the extent that the Residential Exchange is an issue, their intervention may assist the Commission.

5. The Washington Water Power Company May Intervene

The WWP petition asserts that it has a substantial interest in the outcome of this proceeding, and that its participation will be in the public interest because this proceeding raises significant competitive issues regarding the transition from monopoly to retail competition in the electric industry. WWP then argues that parties have been allowed to intervene in this proceeding with interests which are far more tenuous than those of WWP and its customers. It argues that unlike the other intervenors, WWP is regulated by the Commission and directly affected by the development of merger policies and/ or competitive issues; that WWP's customers are the "constituency" of the Commission; and that given the scope of issues defined by the Commission, WWP's customers will be affected by the outcome of this case. It wants the opportunity to participate in the development of the Commission policy favoring a competitive model in the electric industry.

WWP also argues that it has an interest in the development of the Commission's merger policies in general. It argues that, as a long-standing combination gas and electric company it has expertise to share and may be affected by conditions imposed by the Commission which pertain to the future operations of WNG and Puget. Finally, WWP argues that it is a party to a variety of agreements with Puget encompassing generation projects, transmission, and power supply arrangements. It is also a party to a variety of agreements with WNG, including the Gas Storage Project Agreement, which could be affected by changes in WNG's management philosophy.

WWP argues that good cause exists for waiving the requirement that petitions for interlocutory relief must be filed with the Commission within ten days, noting that WAC 480-09-760(2) recognizes, on its face, that "the Commission may alter these filing deadlines when doing so is consistent with the public interest." It argues that no party will be prejudiced by the timing of this petition, since the proceedings are still at an early stage. It pledges to live by the existing schedule. It argues that "most importantly" the Commission's Third Supplemental order provided the first indication that the scope of these proceedings would involve the "basic issue" concerning "the transition from monopoly to retail competition," and how mergers will affect the Commission policy "favoring a competitive model in the electric industry."

The Commission modifies the Second Supplemental Order to grant the petition to intervene of the WWP. It has a substantial interest in the outcome of this proceeding, and its participation will be in the public interest. Although the petition was filed late, the grant of intervenor status will not delay the proceedings or prejudice other parties' preparations.

ORDER

THE COMMISSION ORDERS That the Joint Applicants Petition for Reconsideration of the Third Supplemental Order is denied. The Second Supplemental Order on Prehearing conference is modified as set forth above. All outstanding objections and motions consistent with this order are deemed granted. Those inconsistent with this order are deemed denied.

DATED at Olympia, Washington, and effective this *10th* day of July 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner