

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKETS UE-151871
TRANSPORTATION COMMISSION,)	and UG-151872 (<i>consolidated</i>)
)	
Complainant,)	RESPONSE OF SHEET METAL AND
)	AIR CONDITIONING
v.)	CONTRACTORS NATIONAL
)	ASSOCIATION, WESTERN
PUGET SOUND ENERGY,)	WASHINGTON (SMACNA-WW) IN
)	SUPPORT OF STAFF'S MOTION FOR
Respondent.)	SUMMARY DETERMINATION
)	
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I. INTRODUCTION

I Intervenor Sheet Metal and Air Conditioning Contractors National Association, Western Washington (SMACNA-WW) supports the Commission Staff's Motion for Summary Determination: the proposal by Puget Sound Energy (PSE) for a lease tariff is not properly a utility service that should be regulated by the Commission and PSE has failed to make a prima facie case that the proposed tariffed rates are fair, just, reasonable, and sufficient as required by Washington Law.¹ SMACNA-WW concurs with Commission Staff that it is appropriate for the Commission to grant a waiver on the requirements for timing of filing such a motion and on the need for expedited response.

II. STATEMENT OF FACTS

2 SMACNA-WW also concurs in the Statement of Facts articulated by Commission Staff.

¹ RCW 80.28.010(1).

III. ARGUMENT

A. The Commission Should Grant Staff's Motion for Summary Determination Because PSE's Proposed Lease Tariff Is Not Properly a Utility Service to Be Regulated by the Commission.

3 SMACNA-WW agrees with Commission Staff's argument that the PSE Lease Tariff is not properly regulated by the Commission as a utility service. However, while a broad ruling defining the limits of Commission jurisdiction at the customer meter would be useful going forward, it is possible for the Commission to rule on the jurisdictional question in this case without articulating such a bright-line rule for contexts outside of the hot water heaters and HVAC systems proposed for leasing in this proceeding.

4 The basis of Commission jurisdiction lies in various definitions in RCW 80.04.010. A "public service company" includes a "gas company" or an "electric company."² The definitions of "gas company" and "electric company" are similar. Focusing on the definition of the latter, it includes a company that owns, operates, or manages "electric plant" "for hire."³ "Electric plant" includes, among other things, "fixtures and personal property" "owned, leased, controlled, used or to be used for or in connection with . . . the sale or furnishing of electricity for light, heat, or power."⁴ The appliances at issue in the proposed Lease Tariff are not used in the "sale or furnishing" of electricity. They are appliances that use electricity (or, in some cases, use natural gas).

5 This is not to say that the provision of some equipment in some contexts by a jurisdictional utility is not possible. There are other provisions of the public service laws,

² RCW 80.04.010(23).

³ RCW 80.04.010(12).

⁴ RCW 80.04.010(11).

and some other factors articulated in case precedent, that make some provision of equipment by utilities jurisdictional to the Commission even though they do not involve the sale or generation of electricity. The best example is the mandate placed on utilities to acquire all cost-effective conservation measures under the Energy Independence Act.⁵ Accordingly, providing or facilitating the acquisition of energy efficient appliances through the mechanisms of that Act is jurisdictional and an appropriate utility enterprise. Likewise, various statutes confirm that it is appropriate for utilities to engage in such activities as distributed generation and electric vehicle charging.⁶ Of course, those technologies, and the appliances that implement them, fall more neatly into the definition of “electric plant” as they relate to the generation or sale of electricity.⁷

6 The Washington Supreme Court has also recognized what apparently was a utility practice in the earlier part of the last century to provide customers with merchandise.⁸ Such utility practices led the Legislature in 1933 to enact a requirement that any utility engaged in the sale of merchandise or appliances to keep separate accounts for such activity.⁹ The Supreme Court in *Cole v. Utilities & Transportation Comm’n*¹⁰ held that

⁵ RCW 19.285.040(1).

⁶ See RCW 19.285.040 (2)(b)(distributed generation); RCW 80.28.360 (electric vehicle supply equipment).

⁷ In PSE’s filing, it indicated that its leasing service could be expanded to such things as solar panels and electric vehicle charging equipment, as well as to batteries. All of these, unlike appliances that use electricity, involve either the generation or provision of electricity, or both.

⁸ See *Cole v. Utilities & Transportation Comm’n*, 79 Wn.2d 302, 485 P.2d 71 (1971).

⁹ Chapter 165, Laws of 1933, *codified at* RCW 80.04.270. The annual report of the Department of Public Works (the predecessor agency to the Commission) described this legislation broadly as follows:

[The legislation] [r]equires any public service company engaged in the merchandising business to keep its accounts with reference thereto separate from its public utility accounts. Such companies are free to engage in business but are prohibited from treating either profits or losses or property as a part of their utility operations or property.

Thirteenth Annual Report of the Department of Public Works 7 (1934) (covering the period from December 1, 1932, to November 30, 1933).

the 1933 statute did not prohibit leasing of appliances, but noted that the leasing activity in that case was consistent with past Commission (or predecessor agency) practice to approve or encourage utilities to promote the use of electricity. Such promotional activities, at that time at least, benefitted the general body of ratepayers.¹¹

7 The policy favoring growing load is no longer. WAC 480-100-223 prohibits recovery of expenses for promotional activities “to encourage any person or business to select or use the service or additional services of an electric utility [or] to select or install any appliance or equipment designed to use the electric utility's service” As articulated by Commission Staff in its motion, there is no other Commission policy that would support this lease proposal.¹²

8 This is not a factual question that PSE could argue is in dispute and therefore its case could survive Staff’s motion. The question is not whether some benefits study does or does not net to a positive number in evaluating the possible results down the road of the proposed leasing program. The question is whether there is a Legislative or Commission policy that justifies the program: it is a question of law. There was such a policy in the 1930s regarding merchandising and the need to grow utility load, but no more.

9 Accordingly, the Commission should grant Staff’s Motion for Summary Determination that there is no jurisdictional utility service at issue here. Such a result would not prevent

¹⁰ 79 Wn.2d 302, 485 P.2d 71 (1971).

¹¹ See *Cole*, 79 Wn.2d at 308. The Commission has determined that promotional activities are not in the public interest. See, e.g., WAC 480-100-223.

¹² PSE may argue that the state policy favoring energy efficiency supports the program. Indeed, the cited Commission rule makes an exception for advertising to promote the use of energy efficient appliances. WAC 480-100-223(2)(e). However, by PSE’s own admission, its proposed leasing program is not a conservation program. Englert, Ex. EEE-1T, at 8:19-22. Some of the appliances it proposes to lease, while meeting code (as all appliances must), are not particularly energy efficient. Cebulko, Ex. BTC-1THC, at 32:12-16, 37:8 to 39:2.

PSE from getting into the leasing business if it wants to. However, it would have to do so as an unregulated business. Nor would such a dismissal of this case on jurisdictional grounds necessarily interfere with PSE's stated intention to "evolve PSE to a utility of the future."¹³ This case is not about solar panels, battery storage, electric vehicle charging, or other possible similar future lines of business that frequently have been cited as elements of such future utility service. Providing those products is more consistent with the legal roles of public service companies, as they involve the generation or sale of electricity. Of course, that is not to say that it would be appropriate for a utility to enter that line of business. It would depend on a number of factors related to the public interest. But the jurisdictional hurdles would be lower.

B. In the Alternative, the Commission Should Grant Staff's Motion for Summary Determination Because PSE Has Not Made a Prima Facie Case That Its Rates Are Fair, Just, Reasonable, and Sufficient.

10 SMACNA-WW agrees with the argument of Commission Staff: PSE has not made a case that its proposed rates are fair, just, reasonable, and sufficient, as it is its burden to do.¹⁴ PSE filed its proposal with no rates, and it seemed unclear what PSE expected the Commission to do with that filing. Rather than reject the filing, the Commission suspended it and, after a prehearing conference, ordered PSE to file a tariff, this time with

¹³ Prefiled Rebuttal Testimony of Liz Y. Norton at 2:9-10. Of all the states, New York has done the most work on struggling with the concept of the "utility of the future." We have found no appliance leasing program proposed as part of the New York's "Reforming the Energy Vision" effort.

¹⁴ SMACNA-WW's support of Staff's motion on this point should not be construed to imply that these are the only legal grounds for summary dismissal of PSE's case. Should this case go to hearing, we expect to make other arguments that would result in a dismissal as a matter of law. For example, state law imposes on utilities an "obligation to serve." RCW 80.28.110 requires that regulated utility service be offered to everyone "reasonably entitled thereto." The lease tariffs as proposed make it clear that the lease offerings may be available, or may not be, depending on whether contractors are available to provide the service. This is not a general service offering.

rates, by February 17, 2016. It did so. However, in its testimony supporting the revised tariff, PSE admitted that the lease rates were not based on costs, or even anticipated costs, to PSE. They were based on a survey of fifteen contractors of what it would cost those contractors to provide the equipment. Those survey responses were then averaged, and that was an input into the final lease rate.¹⁵ But the actual costs to PSE for the equipment would be different, presumably less, as those costs would be determined after PSE enters into contracts with whatever contractors seek to participate in the program. The implication was that PSE would update its rates after the contracts were entered into. This implication was formalized in PSE's rebuttal testimony in which it indicates that actual rates would not be determined until 60 days after the tariff is approved.¹⁶ Further, PSE says that at point it may add new products to the leasing schedules.¹⁷

11 Electric tariffs are not like some provisions of the public service laws relating to telecommunications that allow for flexible pricing.¹⁸ If PSE wishes to adjust rates from time to time as costs change, it can offer this program as an unregulated service and accept the risks and challenges of the unregulated market. However, if it wishes to afford itself of the protections of the regulated market, it needs to comply with the statutory provisions regarding the filing and approval of tariffs. These require the filing of tariffs

¹⁵ McCulloch, Ex. MBM-1T, at 19:4-23; McCulloch, Ex. MBM-7T, at 4:3-10.

¹⁶ McCulloch, Ex. MBM-7T, at 9:10-15.

¹⁷ McCulloch, Ex. MBM-7T, at 9:18-21.

¹⁸ RCW 80.36.310-.330 (classification of telecommunications companies or services as competitive). There is a provision in the energy chapter of the public service laws that allows for banded rates. However, that only applies if there is "effective competition" from other "energy suppliers." RCW 80.28.075. So, that section could not be used as authority for flexible pricing.

with actual rates and evidence adequate to justify those rates. The company's burden of proof cannot be met after the proceeding is over.

IV. CONCLUSION

12 Accordingly, the Commission should grant the Motion for Summary Determination filed by Commission Staff.

Dated July 20, 2016.

Respectfully submitted,



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