

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

KENNETH L. BINKLEY,

Complainant,

v.

SALMON SHORES RV PARK and
PUGET SOUND ENERGY, INC.,

Respondents.

DOCKET UE-091531

COMMISSION STAFF'S RESPONSE
TO PUGET SOUND ENERGY'S
MOTION FOR SUMMARY
DETERMINATION

I. NATURE OF PSE'S MOTION

1 Puget Sound Energy, Inc.'s (PSE) Motion for Summary Determination dated April
14, 2010, (Motion) requests the Commission to dismiss the Consumer Complaint
(Complaint) as to PSE.

2 PSE argues: (1) the Complaint does not allege PSE violated any statutes or rules of
the Washington Utilities and Transportation Commission (Commission); (2) after PSE
became aware of the matter, Salmon Shores changed its practices, and thereafter has not
been engaged in reselling electricity in violation of PSE's tariff; and therefore (3) the
Commission should dismiss the Complaint as to PSE.

3 In this Response, Staff agrees with PSE that it is permissible for Salmon Shores to
charge its tenants kWh usage based on the average PSE rate. However, Staff disagrees with
PSE that the Commission should ignore Salmon Shores' use of the "Energy Availability
Charge" (EAC) on the basis that it is not a kWh-based charge. In Staff's view, the EAC is a
charge for electricity and should be considered as such.

4 In the end, Staff argues that the EAC is permissible if it charges on a per capita basis for common area usage of electricity. However, EAC, as currently calculated by Salmon Shores, also charges for each tenant's individual metered usage on a per capita basis. Unless and until Salmon Shores eliminates the EAC or changes how it calculates the EAC, or recovers its electricity cost through rents, Salmon Shores is in technical violation of PSE's tariff. If Salmon Shores takes corrective action, PSE should not disconnect Salmon Shores.

5 Staff recommends if the Commission finds PSE violated its tariff, the Commission should not issue a penalty against PSE. Staff recommends no remedy to Mr. Binkley from Salmon Shores, because the Commission does not regulate Salmon Shores or Salmon Shores' relationship with Mr. Binkley.

6 Staff also requests the Commission to order PSE to file tariff revisions within 90 days of the final order in this docket, that define the term "resold" in Schedule 80, Sheet 80b, to provide the Commission a vehicle for consideration of the resale issue in a more comprehensive way.

II. RULES AND TARIFF PROVISIONS AT ISSUE

7 WAC 480-100-108(5) states: "A customer may not resell electricity unless specifically authorized in the utility's tariff." Commission rules do not define the term "resell" or similar terms.

8 PSE's tariff states: "Service shall not be resold unless specifically authorized by the applicable rate schedule."¹ PSE's tariff does not define the term "resold" or similar terms. No applicable PSE tariff specifically authorizes resale.²

¹ Declaration of Lynn Logen in Support of Puget Sound Energy's Motion for Summary Determination (April 12, 2010), Exhibit C, Tariff WN-U-60, Electric Tariff G, Schedule 80, Fourth Revision of Sheet 80b, last line.

² Though PSE's tariff does not define "resale," PSE Tariff WN-U-60, Electric Tariff G, Fifth Revision of Sheet 7-c expressly permits master meter customers to "directly pass electric costs on to the Occupants ... on a per

III. FACTS

9 Salmon Shores operates a recreational vehicle (RV) park. Salmon Shores has month-to-month tenants who reside in their RVs parked in individual stalls which each tenant rents from Salmon Shores.³ Salmon Shores is a customer of PSE.⁴ To provide electricity to Salmon Shores' tenants, Salmon Shores supplies each RV stall with a meter, which is connected to other electrical facilities that eventually run to PSE's meters.⁵

10 PSE bills Salmon Shores for electricity pursuant to PSE's UTC-approved tariffs.⁶ Salmon Shores charges its tenants for electricity by reading each of the Salmon Shores-supplied meters, and applying a per-kilowatt (kWh) rate to that metered electrical usage. These charges are shown on Attachments 2-7 to the Complaint. For the tenant's metered usage, Salmon Shores charges no more per kWh, and usually less, than what PSE calculates to be an "average rate."⁷ PSE calculates this "average rate" by melding the rates for each tariff schedule under which PSE serves Salmon Shores.⁸

11 In addition to charging for each tenant's metered usage, Salmon Shores also assesses an "Energy Availability Charge" (EAC).⁹ Attachment 8 to the Complaint is an example of Salmon Shores' EAC calculation. For the Commission's convenience, we include that document as Exhibit 1 to this Response.

kWh basis" so long as the rate is no higher than "the average cents per kWh calculated from the Company's monthly billing." This is the same concept PSE advances in this case. However, that tariff provision applies only to apartment buildings four stories or more. Staff requests the Commission take official notice of these provisions per WAC 480-07-495(2)(a)(1)(C).

³ Declaration of Steve Young in Support of Salmon Shores' Motion for Removing Salmon Shores RV Park as a Respondent (April 3, 2010) at 1, Paragraph 3.

⁴ Id. at 1, Paragraph 2.

⁵ Id. at 2, Paragraph 4.

⁶ Declaration of Lynn Logen in Support of Puget Sound Energy's Motion for Summary Determination (April 12, 2010) at 1, Paragraph 2, and at 2, Paragraph 4.

⁷ Id. at 4, Paragraph 12.

⁸ Declaration of Lynn Logen in Support of Puget Sound Energy's Motion for Summary Determination (April 12, 2010) at 4, Paragraphs 10-12.

⁹ Declaration of Steve Young in Support of Salmon Shores Motion for Removing Salmon Shores RV Park as a Respondent (April 3, 2010) at 2, Paragraph 4.

12 As Exhibit 1 shows, Salmon Shores begins with the amount PSE charged Salmon Shores for electricity (\$2,243.38) and subtracts the amount Salmon Shores charged its own tenants for electricity (\$1,440.78), i.e., the cumulative total of what Salmon Shores billed each tenant based on usage measured by the Salmon Shores-supplied meters. Salmon Shores further reduces the result (\$802.60) by the usage attributable to the Salmon Shores office, and “Maintenance,” which Staff understands is usage attributable to work Salmon Shores performs to improve a vacant RV stall ($\$802.60 - \$145.49 - \$37.05 = \620.06).

13 The resulting amount (\$620.06) is attributable to electricity used in common (such as outdoor lighting, i.e., usage other than tenants’ use and office use) and electricity “under-billed” by Salmon Shores of its tenant’s meter-specific usage of electricity.

14 As an example of such “under-billing,” Attachment 4 to the Complaint shows Salmon Shores charged less than the applicable PSE rate for June 2009, i.e., Salmon Shores charged its tenants \$.08717/kWh, which is less than the PSE calculated “average” rate of \$.088332/kWh shown on page 4 of Mr. Logen’s Declaration, Paragraph 12. Therefore, in part, Salmon Shores collects this difference through the EAC, but on a per capita basis, not on a per kWh basis. Had Salmon Shores charged PSE’s “average” rate (\$.088332) in the first place, the EAC would have been dramatically smaller.

15 The EAC has varied widely over time, and has even been a credit in one month:¹⁰

April:	\$21.86
May:	\$24.88
June:	\$26.17
July:	\$12.92
August:	\$ 5.87
September:	-\$.97

¹⁰ Attachments 2-7 to the Complaint are the source of these EAC amounts.

IV. DISCUSSION

16 PSE is correct that the Complaint contains no allegations that PSE did anything wrong. In fact, the allegations in the Complaint are directed to the landlord, Salmon Shores, which the Complainant, Mr. Binkley, alleges is overcharging for electricity. However, implicit in the Complaint is the allegation that PSE is not ensuring compliance with its general tariff prohibition on resale. Consequently, consistent with WAC 480-09-395(4), we will liberally construe the Complaint to allege in part that PSE is not ensuring compliance with PSE's tariff resale prohibition.

17 Staff also requests that the Commission order PSE to file tariff revisions defining the term "resold" in Schedule 80, Sheet 80b. This will provide more certainty for customers, PSE and the Commission regarding correct application of the resale concept.

A. The Plain Meaning of "Resale"

18 Neither the Commission's rules nor PSE's tariff define the term "resale," and Staff has found no relevant Commission orders deciding that issue. The plain meaning of "resale" is "the act of selling again,"¹¹ or "the act of selling a second time."¹² Under this plain meaning of "resale," Salmon Shores is "reselling" electricity because PSE sells electricity to Salmon Shores, pursuant to PSE's tariffs, and then Salmon Shores literally "sells that electricity a second time" to its tenants.

19 Were the Commission to apply the plain meaning of resale, Salmon Shores would have to stop billing its tenants for electricity altogether, or face disconnection by PSE. (Salmon Shores could do this by simply increasing its rental rate). This also means PSE would be failing to ensure correct application of its tariffs.¹³ The Commission could provide

¹¹ The American Heritage Dictionary of the English Language (4th ed. 2000) at 1482.

¹² The Random House Dictionary of the English Language (2nd ed. 1983) at 1637.

¹³ In Part V, *infra*, we discuss remedies as to PSE and Salmon Shores.

no direct remedy to Salmon Shores' tenants, such as the Complainant Mr. Binkley, because the Commission does not regulate the landlord-tenant relationship. For that reason, Staff does not address whether those tenants may have some other forum for asserting whatever legal rights they may have vis-a-vis Salmon Shores.

B. PSE's Concept of "Resale"

20 Staff's review of decisions by other regulatory commissions found that some commission decisions apply the plain meaning of "resale" to prohibit any remarketing of utility service by a customer under a general tariff resale ban. For example, in *Re Wisconsin Electric Power Co.*, 46 PUR 3d 495, 498-99 (Wisc. PSC 1962), the Wisconsin commission defined "resale" as any separate charge for electricity by a utility customer to a third person. The commission considered resale not to occur if a landlord recovered the electricity cost through rent, i.e., as an incident to a tenancy.¹⁴

21 On the other hand, some commission decisions do not consider resale to occur if the landlord allocates the landlord's utility bill among its tenants. For example, in *Re Compugas, Inc.*, 90 PUR 4th 450, 458 (Mich. PSC 1988), the landlord used a formula to allocate the gas charges from its utility's gas bill to each of its tenants, on the basis of the square footage of apartment and other factors. The Michigan commission did not consider this allocation of the utility bill by the landlord to be resale of gas.¹⁵

¹⁴ Staff found no case in which a commission or court considered the landlord's recovery of its electricity cost through rents charged its tenants to be "resale" of electricity.

¹⁵ Staff also reviewed the relevant tariffs for Pacific Power & Light Company and Avista Corp. Though neither tariff defines "resale," in Tariff WN U-74, Second Revised Sheet D2(e), PacifiCorp permits resale as follows (emphasis added):

Resale of service shall be limited to the Customer's tenants using such services entirely within the property described in the written agreement. Service resold to tenants shall be metered and billed to each tenant at the Company's regular tariff rate schedule applicable to the type of service actually furnished the tenants.

Avista Corp.'s tariff states: "... Customers shall not sell, or permit others to use such service, except when expressly authorized to do so under appropriate contract." Tariff WN-U-20, Original Sheet 70-A, Paragraph 4. Staff requests the Commission take official notice of these provisions per WAC 480-07-495(2)(a)(1)(C).

22 The Michigan example is analogous to PSE's theory in this case. PSE considers resale as occurring "only when a landlord (PSE's customer) charges tenants on a per kilowatt ("kWh") basis for electricity and the per kWh rate used by the landlord is greater than PSE's rate to the landlord."¹⁶ While PSE's resale concept permits resale in the literal sense of that term, it prohibits the landlord from charging its tenant more per kWh than PSE charged the landlord, which serves to protect tenants from abuse.

23 Staff can agree that if Salmon Shores charges its tenants no more than the "average" rate PSE charges Salmon Shores, the Commission need not consider this allocation of the PSE bill to be "resale" for purposes of PSE's tariff. However, PSE does not consider as resale any charge other than a per-kWh charge:

Salmon Shores' use of an EAC is likewise not in violation of PSE's tariff. Salmon Shores charges its tenants an EAC that is calculated by dividing the portion of their bill from PSE that remains after subtracting amounts charged to each tenant on a per-kWh basis, by the number of tenants. Allocation based on the number of tenants is not considered resale of electricity. Logen Declaration at ¶ 5.¹⁷

24 Thus, PSE does not further address the EAC, because Salmon Shores assesses that charge on a per capita basis, not on a per-kWh basis.

25 While Staff can support PSE's resale concept in general, Staff cannot support that concept as it applies to the EAC. First, as we described in detail above,¹⁸ Salmon Shores calculates the EAC based on the total amount PSE charged Salmon Shores for electricity, less each tenant's usage that is separately metered by Salmon Shores, and less the amounts

¹⁶ Declaration of Lynn Logen in Support of Puget Sound Energy's Motion for Summary Determination (April 12, 2010) at 2, Paragraph 3. Mr. Logen goes on to state in that same Paragraph 3: "Where a landlord recovers some or all of their costs relating to providing electric service to tenants on a basis other than on a per kWh basis, service is not considered resold, even if the practice results in charges to tenants that amount to a total greater than PSE's bill to the landlord." There is no evidence that Salmon Shores is charging its tenants in the aggregate or on a per customer basis an amount greater than what PSE has billed Salmon Shores. Consequently, the just-quoted statement by Mr. Logen is not applicable to this case, and Staff takes no position on the validity of that statement.

¹⁷ PSE Motion at 3, Paragraph 6.

¹⁸ See Paragraphs 11-15, *supra*.

attributable to Salmon Shores' office and maintenance. Left over are amounts attributable to electricity for common areas and any amounts resulting from Salmon Shores charging a per-kWh rate less than the "average" rate PSE calculates (which we called "under billing" above). This clearly shows that under the EAC as applied by Salmon Shores, Salmon Shores recovers not only the cost of electricity in common areas, but also a portion of its cost of electricity related to separately metered tenant usage.

26 Indeed, the EAC increases whenever Salmon Shores charges a per-kWh rate that is less than the applicable "average" PSE rate, and then collects this "under-billing" through the EAC. When that happens, Salmon Shores collects more of that "under-billed" amount from a below average usage tenant than an above average usage tenant. For that below average usage tenant, that could calculate to a per-kWh rate higher than the "average" rate PSE calculated in this case, depending on the level of under-billing in a particular month, and the specific EAC calculation that month. On the other hand, for above average usage tenants, the per-kWh rate could be lower than the PSE "average" rate.¹⁹

27 To be clear, Staff has no issue with the EAC to the extent it charges tenants for common area usage on a per capita basis, so long as the total charged tenants overall does not exceed the total PSE bill, less Salmon Shores' own usage. However, as Salmon Shores calculates the EAC, it does more than that; the EAC charges for "under billed" usage as well, i.e., a portion of the separately metered tenant usage.²⁰

¹⁹ This means that if Salmon Shores re-billed its tenants based on application of the full PSE "average" rate, some tenants may owe more than they previously paid, and some may owe less. It is unclear how Complainant Mr. Binkley would fare in that calculus, but that is between Salmon Shores and Mr. Binkley; it is not the Commission's issue.

²⁰ We note at this juncture that Salmon Shores characterizes the EAC as a charge to recover Salmon Shores' billing and collection costs. Salmon Shores' Motion for an Order Dismissing Salmon Shores RV Park as a Respondent (May 3, 2010) at 2, Paragraph 4, citing Steve Young Declaration at Paragraph 5. However, as we have explained, Salmon Shores calculates the EAC based directly on electric charges from PSE. Salmon Shores does not reflect in that calculation its own costs to bill and collect electricity charges from its tenants.

28 Consequently, the EAC violates PSE's concept of resale. Salmon Shores must either (1) eliminate the EAC;²¹ (2) demonstrate the EAC charges only for common area electrical usage, which is appropriate to be charged on a per capita basis; or (3) collect its electricity costs through rents. (Because Salmon Shores can dramatically reduce the EAC by simply charging the full PSE "average" rate, it would be an easy end to this case if Salmon Shores would inform the Commission that it had eliminated the EAC).

V. REMEDIES

29 Should the Commission find that Salmon Shores resold electricity in violation of PSE's tariff, both Salmon Shores and PSE would be in violation of PSE's tariffs.²²

30 In that scenario, Salmon Shores would need to conform its conduct, or face disconnection by PSE. Staff recommends the Commission not assess any monetary penalty against PSE. Mr. Logen's declaration provides ample evidence that PSE has been very direct and responsive to this particular consumer complaint, and this particular issue. If PSE's actions were deficient, that would be because PSE failed to apply an appropriate test for resale. Given the lack of any definition of "resale" in UTC rules or PSE's tariff, and the apparent lack of Commission orders addressing the issue, it is difficult to fault PSE in this case sufficient to justify a penalty.

31 The Commission should not order PSE to disconnect Salmon Shores' electric service at this time, because that would have a collateral, adverse impact on the Salmon Shores

Moreover, if Salmon Shores were correct that the EAC recovers Salmon Shores' billing and collection costs, those costs should be relatively stable over time. In fact, the EAC has varied widely, as we showed in Paragraph 15, *supra*. Therefore, this case does not present the issue whether Salmon Shores can charge its tenants for electricity billing and collection costs and avoid the PSE resale prohibition, because Salmon Shore does not calculate the EAC as a charge for billing and collection cost reimbursement.

²¹ Were Salmon Shores to simply charge the full amount of PSE's "average" rate to each tenant's metered kWh, the EAC likely would be so small as to not make it worthwhile.

²² PSE would violate its duty to enforce its tariff. This duty arises from the general requirement that PSE's rules be just and reasonable (RCW 80.28.010(3)), and that it would be an unjust and unreasonable practice under RCW 80.28.040 for PSE to fail to enforce its tariff.

tenants, who have done nothing wrong. Of course, should Salmon Shores fail to take appropriate action in response to the Commission's final order in this docket, the Commission and PSE may have no choice but for PSE to disconnect service.

32 In no event should the Commission order Salmon Shores to re-bill tenants, because the Commission has no jurisdiction over the landlord-tenant relationship. Salmon Shores' tenants would need to pursue whatever remedies they may have, if any, elsewhere. Of course, as we have explained,²³ some tenants may be worse off in the re-billing scenario.

VI. CONCLUSION

33 Staff recommends the Commission adopt PSE's concept of resale, except the EAC needs to be considered. Based on consideration of how Salmon Shores calculates the EAC, Salmon Shores would be reselling in violation of PSE's tariff, and Salmon Shores would need to: (1) eliminate the EAC; (2) demonstrate that the EAC charges only for common area electricity on a per capita basis; or (3) recover its electricity costs through rents. The Commission has no jurisdiction over Salmon Shores, so it cannot require Salmon Shores to do any of these things. However, the Commission can and should order PSE to disconnect Salmon Shores' electric service if Salmon Shores does not act appropriately.

34 The issues in this case arise primarily because of the lack of clarity surrounding the term "resold" in PSE's tariff. Therefore, Staff also requests the Commission to order PSE to file tariff revisions within 90 days of the final order in this docket, defining the term "resold"

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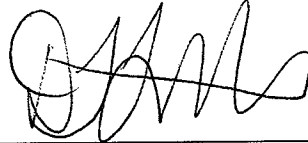
²³ See Paragraph 26, *supra*.

in Schedule 80, Sheet 80b. This will provide the Commission a vehicle for consideration of the resale issue in a more comprehensive way.

DATED this 24th day of May, 2010.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'D. Trotter', written over a horizontal line.

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