

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KENNETH L. BINKLEY,

Complainant,

v.

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

Respondents.

NO. UE-091531

MOTION OF PSE TO REPLY; REPLY TO
COMMISSION STAFF'S RESPONSE TO
PUGET SOUND ENERGY, INC.'S
MOTION FOR SUMMARY
DETERMINATION

I. PSE'S MOTION FOR LEAVE TO REPLY

1. Pursuant to WAC 480-07-370(d) and 480-07-375, Puget Sound Energy, Inc. ("PSE" or "the Company") requests permission to reply to the Commission Staff's Response to Puget Sound Energy, Inc.'s Motion for Summary Disposition filed on May 24, 2010 ("Staff Response"). A reply to the Staff Response is necessary because the Staff Response goes far outside the scope of PSE's original summary determination motion and the facts of this case and requests this Commission to rule on a matter of first impression. PSE should be allowed to rebut Staff's allegations.
2. The term "resale" is not defined in the Commission rules or orders and no other investor owned utility has defined the term either (see Staff Response, footnote 15: neither PacifiCorp nor Avista have defined resale in their tariffs). Yet, in this adjudicative matter, where the complainant did not seek such a remedy, Staff is requesting the Commission order PSE to define the term "resold" (or hereafter referred to as "resale") in its tariff. PSE is not

opposed to, and would actually support, an appropriate definition of "resale"; however, that should only be accomplished through a rulemaking proceeding wherein other interested parties are allowed to join and comment. This complaint is not the appropriate avenue to determine a definition of resale, which should be in the WAC and then possibly mirrored in PSE's tariff.

3. Furthermore, only when this Commission authorizes a definition of resale, will Staff or PSE be able to apply that definition to test whether Salmon Shores' EAC charge is reselling in violation of PSE's tariff and the WAC. It is premature to say that PSE somehow used the wrong "test", as asserted in Staff's Response, when there is no set test and no official definition of resale.

REPLY TO STAFF RESPONSE

II. PSE'S MOTION FOR SUMMARY DETERMINATION SHOULD BE GRANTED

4. In paragraph 16 of Staff Response, Commission Staff acknowledges that the face of Mr. Binkley's "Complaint contains no allegations that PSE did anything wrong." In fact, the allegations in Mr. Binkley's complaint are directed toward his landlord, Salmon Shores RV Park ("Salmon Shores"). However, Commission Staff claims that implicit in the complaint is the allegation that PSE is not ensuring compliance with its tariff. Commission Staff claims to rely on WAC 480-09-395(4)¹ to reach this conclusion. If this is the position Commission Staff wants to take, then Mr. Binkley's complaint should also be construed to allege that

¹ Commission Staff apparently intended to reference WAC 480-07-395(4).

Commission Staff has not ensured that Salmon Shores is compliant with the WAC prohibition on resale.

5. Footnote No. 2 to paragraph 8 of Staff Response asks the Commission to take official notice of the provisions of Schedule 7A on Tariff sheet 7-c. Schedule 7A was filed to offer master metering and was filed after the Commission revised WAC 480-100-123(1), which had previously prohibited master metering -- it is not a tariff offering resale. The provision that is quoted in the footnote is in the section of Schedule 7A titled "Customer Responsibility". The Commission should also take official notice of the paragraph titled "Company Responsibilities" on Sheet 7-e, which says: "The Company shall be responsible to the master metered Customer to perform its obligations under this tariff and applicable rules issued by the Washington Utilities and Transportation Commission. However, the Company shall have no responsibility to the Occupants under the provisions of this tariff or under applicable rules issued by the Washington Utilities and Transportation Commission including WAC 480-100 with the exception of WAC 480-100-128(6)(1)." WAC 480-100-128(6)(1) requires notice to tenants of a master metered premises.
6. In sum, it is the customer's (Salmon Shores') responsibility to ensure it is not reselling electricity in violation of PSE's tariff. It is not PSE's responsibility. Once the matter is brought to PSE's attention, PSE does have a responsibility to investigate and take steps to disconnect service if the customer does not come into compliance with PSE's tariff. PSE has met its obligation here. As noted in Staff's Response, PSE has taken significant steps to help Salmon Shores fix its billing and it is PSE's position that Salmon Shores is not in violation of

the tariff.² Moreover, PSE's interpretation of resale is reasonable, based on its historical practice, and supported by commission decisions in other jurisdictions as pointed out by Staff on pages 6-7 of Staff Response.

7. PSE has done nothing wrong, has broken no Commission rule or order, and has not violated its tariff. Mr. Binkley's complaint does not assert a cause of action, whether explicitly or implicitly, against PSE and this Commission should dismiss PSE from this action.

B. The EAC Charge is an Appropriate Means for Salmon Shores to Recover its Electricity Expenses

8. Staff's bottom line concern with the EAC is set forth on page 8 of Staff's Response:

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.

Provided that Salmon Shores' meters are correct – other than the timing differences – the second sentence is not a true statement. Each tenant is charged per kWh on the basis of energy used through their meter. Each tenant is not also charged for usage on a per capita basis. The EAC charge is for energy used in common areas which may include the water pump. Second, the "under billed" amount is more likely due to different billing schedules

² PSE's position is further supported by the case cited by Staff at paragraphs 20 and 21.

(Salmon Shores bills its tenants on a monthly basis beginning with the 1st; PSE's bills are through about the 25th of each month) and different meter reading times.

9. In paragraph 14 of Staff's Response "fact" section, Staff gives an example of the "under billing" stating that if Salmon Shores had used the actual average rate the "EAC would have been dramatically smaller." The EAC cited in paragraph 13 was based on dividing \$620.06 by 48 tenants and a resulting EAC of \$12.92. By using the actual average rate of \$0.08332/k/WH the total charges to tenants for metered usage would have increased from \$1,440.78 to \$1,459.95 and the EAC charge would have been reduced from \$12.92 to \$12.52 which is a reduction of \$0.40. This is hardly "dramatically smaller". Even though Salmon Shores collected \$0.40 from each tenant on a per capita basis rather than a per-kWh basis PSE's tariff does not require or prohibit either.

10. Staff's narrow interpretation of the EAC calculation seems to require Salmon Shores to exactly match PSE's billing to the penny. This would be nearly impossible to do. To meet Staff's test of eliminating the "under billing" amount, Salmon Shores would need to have people standing by at all of its meters to read them at exactly midnight on the date and time PSE reads its meters (the actual date that PSE reads meters has varied from the 23rd to the 27th over the last 18 months). This creates an absurdity, and does nothing to further the intent of the WAC and tariff provisions to prevent a customer from reselling electricity. The EAC charge utilized by Salmon Shores is a per capita usage charge, less Salmon Shores' own usage and does not exceed the total PSE bill. It is appropriate and does not constitute reselling in violation of PSE's tariff or the WAC.

C. Salmon Shores is Not the Only Customer Using an EAC.

11. Staff's Response requests a remedy not originally requested by Mr. Binkley and one which would impact more customers than just Salmon Shores. Salmon Shores is not the only customer of PSE's that uses an EAC. Any change to such billing would necessarily affect all master metered accounts, not just Salmon Shores. This would include office buildings, marinas and existing master metered residential complexes (those not on Schedule 7A).

12. Furthermore, if this Commission accepts Staff's recommendation, PSE will be left with an order requiring PSE to review each and every bill issued by its customers who have tenants to ensure that they are calculating their bills correctly. PSE does not have the authority to require its customers provide bills submitted to its tenant; nor does PSE have the manpower to ensure this is accomplished. PSE only has the right to enter a customer's property to "perform necessary functions such as meter reading, maintenance, repairs, testing, installation, or removal of the utilities property." WAC 480-100-168. Thus PSE has no right to verify that Salmon Shores (or any other customer) can "demonstrate the EAC charges only for common area electrical usage".

D. Charges Such as EACs Promote Conservation.

13. The EAC is a good mechanism for PSE's landlord customers to recover appropriate electricity charges while still promoting conservation by the tenants through billing based on metered usage. If it is made too difficult for landlord customers to bill for the amounts metered they will simply ignore the meters and allocate the entire amount by tenant, or some other basis. For example, as Staff points out in paragraph 19, Salmon Shores could stop reselling by increasing its rental rate. This rental increase would not be proportional to the

amount of electricity used and would discourage conservation by the tenants and may exceed the total of PSE's charges for electricity to the landlord.

14. The bottom line is that by making the charge so onerous to effectuate, the customers will likely do away with separate meters and simply do a per capita billing for all electricity charges, regardless of the amount used by each tenant. This will fly in the face of attempts at conservation. If tenants are charged a set amount, no matter how much electricity they use, they will have no incentive to conserve.

III. DEFINING "RESALE"

15. If this Commission decides it is appropriate to have a definition of "resale", that definition should be included in the WAC and not only in PSE's tariff because other utilities such as PacifiCorp and Avista, who do not have specific definitions of "resale", should also benefit by one single definition of "resale" so as to promote consistency.

A. "Resale" Should be Defined in the WAC, Not in Individual Tariffs.

16. This adjudicative proceeding is not the appropriate avenue to define "resale". Staff asks this Commission to require PSE to define the term in its tariff. As noted above, PSE is not opposed to, and would actually support, an appropriate definition of "resale"; however, that should only be accomplished through a rulemaking proceeding wherein other interested parties are allowed to join and comment pursuant to RCW 34.05.310, *et seq.* and WAC 480-07-200, *et seq.*

17. The concern with consistency is illustrated by Staff's request that the Commission take official notice of the provisions within PacifiCorp's and Avista's tariffs that speak to the

issue of resale.³ Neither PacifiCorp nor Avista specifically define "resale" and Avista's tariff language is similar to PSE's. PacifiCorp's, however, is not. While PSE has not had an opportunity to research the full impact of the PacifiCorp provision on resale or how it is applied in actual practice, at first glance, the PacifiCorp provision would appear to be very difficult for landlords to bill at the "regular tariff rate schedule applicable to the type of service actually furnished to tenants" and thereby, in general, discourage sub metering and the conservation benefits of sub metering. If PacifiCorp's provision were applied to PSE's tariff there would be a very real opportunity for landlords to collect more for electric service from tenants than PSE charges the landlord because landlords are typically billed at a non-residential rate while under the PacifiCorp provisions residential tenants would be billed at a residential rate that is an average of 1.35 cents more per kWh than the non-residential rate paid by the landlord. For example, in the case of Salmon Shores, the February 2009 billing showed an average rate per kWh on Schedule 25 of \$0.08667 per kWh while the average rate for Schedule 7 (the applicable tariff under the PacifiCorp provision) bills to Salmon Shores varied from \$0.09099 per kWh to \$0.096333 per kWh or a difference varying between \$0.00432 per kWh to \$0.009663 per kWh. Salmon Shores would bill tenants connected to the Schedule 25 meter an additional amount between \$114.91 and \$257.04 on Schedule 7 (residential) rates for the month. Thus the PacifiCorp solution is not appropriate.

18. This very brief analysis points out the lack of guidance in the WAC or Commission orders as to the definition and application of the term "resale", and the proper methods to allow the allocation of bills has resulted in three different tariffs, all of which it could be argued, should be revised based on the argument that Staff is making that PSE's tariff should

³ See Staff Response at footnote 15.

be revised. If this Commission is to require a definition of "resale", it should do so in a rulemaking proceeding whereby all interested parties could provide comments so as to come up with the best possible definition. It should not be required in this adjudicative proceeding where all interested parties have not had an opportunity to fully brief or comment on the issue.

B. Variation In Accordance with WAC 480-100-008.

In the event this Commission does order PSE to define resale in its tariff this Commission should order, in accordance with WAC 480-100-003(2)⁴, that the definition be specifically approved as a variation in accordance with WAC 480-100-008⁵, otherwise in the next complaint it could be argued that PSE's tariff definition of resale conflicts with WAC 480-100-108.

IV. CONCLUSION

19. For the above reasons, the Company respectfully requests this Commission (1) grant PSE's request for permission to reply to the Staff Response; (2) accept this reply; (3) dismiss Mr. Binkley's Complaint against PSE as it does not state a claim against the Company; (4) allow Salmon Shores to continue with its present calculation of the EAC; and (5) if necessary, initiate a rulemaking regarding the meaning of resale in the WAC rules.

⁴ WAC 480-100-003(2) provides: "The tariff provisions filed by utilities must conform with these rules. If the commission accepts a tariff that conflicts with these rules, the acceptance does not constitute a waiver of these rules unless the commission specifically approves the variation consistent with WAC 480-100-008, Exemptions from rules in chapter 480-100 WAC. Tariffs that conflict with these rules without approval are superseded by these rules."

⁵ WAC 480-100-008 provides: "The commission may grant an exemption from the provisions of any rule in this chapter in the same manner and consistent with the standards and according to the procedures set forth in WAC 480-07-110 (Exceptions from and modifications to the rules in this chapter; special rules)."

DATED: June 1, 2010.

PERKINS COIE LLP

By

A handwritten signature in blue ink, appearing to be "G. S. Warren", written over a horizontal line.

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CERTIFICATE OF SERVICE


I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by email and U.S. Mail, postage prepaid to:

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Dated at Belleuve, Washington, this 1st day of June, 2010.


Cynthia Main