



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

June 10, 2010

David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

RE: *Kenneth L. Binkley v. Salmon Shores RV Park and Puget Sound Energy, Inc.*
Docket UE-091531

Dear Mr. Danner:

Enclosed for filing in the above-referenced docket are the original and seven (7) copies of Commission Staff's Petition for Administrative Review, and Certificate of Service.

Sincerely,

DONALD T. TROTTER
Assistant Attorney General

DTT:klg
Enclosures
cc: Parties



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 PETITION
FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1 The Initial Order¹ applies an “aggregate” test for determining whether a customer of Puget Sound Energy (PSE) has “resold” electricity in violation of PSE’s tariff prohibition on resale. Under that test, a PSE landlord/customer violates that resale prohibition only if the landlord charges its tenants more in the aggregate than PSE charged that landlord for the same electricity.²

2 Staff considered recommending the Commission adopt the aggregate test, though in the end, Staff did not do so. However, and while no test is perfect,³ the aggregate test is

¹ Order 02, Initial Order, Docket UE-091531 (June 2, 2010).

² See, e.g., Initial Order at 9, ¶¶ 21-22.

³ For example, the aggregate test would not prohibit a landlord from billing its tenants for electricity “on a per capita basis without regard to their individual levels of use.” Initial Order at 12, ¶ 28. Yet, per capita billing would suffer from some of the same infirmities the Initial Order used to critique Staff’s position on “rent inclusion,” e.g., the tenants would not necessarily know how much electricity they used, or how much it cost, low use customers would effectively subsidize high use customers, and tenants would have no (or at least a reduced) incentive to conserve. See Initial Order at 13, ¶ 29.

simpler than the alternatives identified on this record, and it requires a very limited inquiry into the landlord/tenant relationship, over which the Commission has no jurisdiction.

3 For these reasons, Staff takes no exception to the Commission's use of the aggregate test to evaluate "resale" in the context of determining whether a PSE customer violates the resale prohibition in PSE's tariff, in the absence of a contrary statute,⁴ rule⁵ or tariff.⁶ It follows that Staff does not take exception to the result reached by the Initial Order, which is dismissal of the Consumer Complaint.⁷ However, because a Commission final order in this case will resolve an issue of first impression, Staff seeks administrative review so the Commission can refine the decision.

4 As discussed in detail below, Staff seeks administrative review of the Initial Order regarding: (1) the basis for Commission jurisdiction over entities that sell electricity, such as Salmon Shores RV Park (Salmon Shores); and (2) the "rent inclusion" issue, i.e., whether a PSE customer/landlord may recover its electricity costs through the rent it charges its tenants, without violating PSE's resale prohibition. Staff also recommends the Commission correct an apparent oversight in the Initial Order's description of party representatives.

⁴ Staff is aware of no Commission statute that directly addresses the resale issue.

⁵ Staff plans to raise the resale definition issue for Commission consideration in a future rulemaking.

⁶ The Commission's final order in this docket may inspire future tariff amendments to clarify resale prohibitions.

⁷ Staff concludes, as did the Initial Order, that Salmon Shores' billing methodology did not result in electricity charges to tenants being greater, in the aggregate, than the amount PSE charged Salmon Shores. *See* Commission Staff's Response to Puget Sound Energy's Motion for Summary Determination (May 24, 2010) at 4, ¶ 12-13 (analysis of Exhibit 1 shows Salmon Shores charged its tenants \$2,060.84 in the aggregate (\$1,440.78 + \$620.06) which is less than what PSE charged Salmon Shores (\$2,243.38)).

II. DISCUSSION

A. Nature of Commission Jurisdiction

5 The Initial Order holds that the Commission’s regulatory jurisdiction over Salmon
Shores depends on whether Salmon Shores sells electricity at a profit:⁸ “the Commissions’
regulatory authority is over private businesses that sell, or resell, electricity for a profit.”⁹

6 However, profit is not a jurisdictional prerequisite for Commission regulation of
electric companies. First, no Commission statute prescribes a profit requirement.¹⁰ Second,
a profit requirement does not make sense. For example, PSE would not be removed from
Commission regulatory jurisdiction if PSE failed to sell electricity for a profit, such as
during a severe drought or economic recession.

7 The correct legal analysis is whether Salmon Shores meets the definition of
“electrical company” in RCW 80.04.010 and if so, whether Salmon Shores also it meets the
“devotion of property to public use” test enunciated by the courts of this state. This is the
analysis applied by the court in *Inland Empire Rural Electrification, Inc. v. Department of
Public Service*, 199 Wash. 527, 537, 92 P.2d 258 (1939) (*Inland Empire*) and *West Valley
Land Co., Inc. v. Nob Hill Water Co.*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986) (*Nob Hill*).¹¹

⁸ As noted at the outset, Staff can agree with the Initial Order’s use of the “aggregate” test to determine when service is “resold.” However, that is an issue of tariff interpretation, i.e., the Commission should interpret the term “resold” to mean “resold at a profit,” measured in the aggregate. It is a separate legal question whether profit is a prerequisite for Commission regulatory jurisdiction over Salmon Shores.

⁹ Initial Order at 9, ¶ 20. The Initial Order reiterates this holding at 13, ¶ 30: “the Commission determines that Salmon Shores has not, and is not, reselling electricity. It therefore is merely a PSE customer and not a public service company subject to the Commission’s jurisdiction.” The Initial Order at 15, ¶ 37 (Finding of Fact No. 3) implements this analysis: “[Salmon Shores] is not a ‘public service company’ or an ‘electrical company’ as those terms are defined in RCW 80.04.010 and as those terms are otherwise used in Title 80 RCW.”

¹⁰ The Initial Order does not cite any specific statutory language to support the profit requirement. At pages 8-9, Paragraph 20, the Initial Order refers to Commission regulation of “public service companies,” and to the definition of “electrical companies” in RCW 80.04.010, but neither of those terms explicitly contains a profit element.

¹¹ *Inland Empire*, 199 Wash. at 534-35: “It is apparent that, upon a literal interpretation of the definitions [of electrical company], respondent would come within the scope of the regulatory provisions of the [statute]. ... However, the question ... is whether, despite these literal definitions, respondent is, in fact and law, a public

8

In *Inland Empire*, the court enunciated the legal test as follows:

a corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.¹²

9

In *Nob Hill*, the court applied this legal test to a non-profit water company and held the company was not subject to Commission regulatory jurisdiction because it exclusively served homeowners association members: “Nob Hill has chosen to serve particular individuals of its own selection, and does not serve the public as a class or that portion of it that could be served by Nob Hill.”¹³

10

To be sure, the *Nob Hill* decision considered the company’s non-profit status as an “additional” factor,¹⁴ but it did so in the context of Nob Hill’s status as a cooperative in which all members have a voice in the way the cooperative is operated.¹⁵ Even if this “additional” factor was not *dictum*, it does not apply here because Salmon Shores is

service corporation within the purview of the public service commission law.” (Emphasis in original). *Nob Hill*, 107 Wn.2d at 364: “Under a literal application of the definitions set forth in RCW 80.04., Nob Hill would come within the scope of the regulatory provisions of RCW 80.04.” In each case, the company at issue failed the “devotion of property to public use” test and was held not subject to Commission jurisdiction.

Staff addressed these cases in its Motion on Behalf of Commission Staff to Dismiss Complaint as to Salmon Shores RV Park (April 28, 2010) at 2-3, ¶¶ 3-5.

¹² This “dedication of property to public use” test is applied by the large majority of courts who have addressed the issue. See Phillip E. Hassman, Annotation, *Landlord Supplying Electricity, Gas, Water, or Similar Facility to Tenant as Subject to Utility Regulation*, 73 A.L.R. 3d 1204 (1977 & Supp. 2010).

¹³ The other case Staff analyzed in its April 28, 2010, Motion to Dismiss was a court decision virtually on all fours to the present case: *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 212 A.2d 237 (Penn. 1965). In that case, the Pennsylvania court ruled a landlord would not become subject to the Pennsylvania commission’s regulation if it purchased utility facilities from a regulated utility, with the intent of becoming a wholesale customer of the utility and then reselling utility services to tenants. The court reasoned that the landlord would not meet the “service to the public” element of Pennsylvania’s statutory definition of a regulated utility, and thus would not be subject to regulation by the Pennsylvania commission: “those to be served consist only of a special class of persons – those to be selected as tenants – and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged, and limited group and the proposed service to them would be private in nature.” 212 A.2d at 240.

¹⁴ 107 Wn.2d at 367.

¹⁵ 107 Wn.2d at 368.

unquestionably a profit-seeking business whose tenants have no voice in how that business is conducted.

11 When the Commission applies the analysis the court applied in *Inland Empire* and *Nob Hill*, it will reach the same result: Salmon Shores meets the literal definition of “electrical company” in RCW 80.04.010, because it “owns” and “operates” electric plant for hire in this state. However, there is no evidence Salmon Shores devotes its property to public use, and it is for that reason, not a lack of profit off electricity sales, that Salmon Shores is not subject to Commission regulation as an electric utility.

12 Therefore, the Commission should amend the Initial Order’s jurisdictional analysis in Paragraph 20, last sentence, and Paragraph 30, second sentence, to focus on the devotion of property to public use issue and not on whether Salmon Shores sells electricity for a profit. The Commission should also change Finding of Fact No. 3 to read:

Salmon Shores is not conducting business subject to Commission jurisdiction. There is nothing in the record to suggest Salmon Shores has devoted its property to public use. Therefore, the record does not demonstrate that Salmon Shores is a “public service company” for purposes of Title 80 RCW.

B. The Rent Inclusion Issue

13 “Rent inclusion” refers to the situation where a landlord provides electricity service in exchange for the overall rent payment, rather than as a separate charge. The issue is whether a PSE customer/landlord complies with PSE’s tariff resale prohibition in that scenario.

14 As a threshold matter, it is pertinent to note though Staff raised the rent inclusion issue, that issue is not directly presented in this case, because Salmon Shores does not include electricity as part of the services covered by the rental rate. Therefore, the Commission could simply eliminate Paragraph 29 (including footnote 29) from the Initial

Order as not relevant to the issues at hand, and limit the “aggregate” test to the facts of this case, i.e., discrete charges levied by a PSE customer/landlord on its tenants for electricity.

15 Alternatively, if the Commission decides to address the rent inclusion issue, it should reject the analysis in the Initial Order and conclude that rent inclusion is not resale in violation of PSE’s tariff.

16 Paragraph 29 of the Initial Order contests Staff’s point that rent inclusion is not resale by reasoning that if a landlord imbedded electricity charges in rent, that would “lack any transparency at all,” “[t]enants would not have any idea how much electric use cost them each month, low use customers would effectively subsidize high use customers, [and] there would be no incentive to conserve.” According to the Initial Oder, this cannot be “square[d] with the Commission’s paramount interest in having tenants such as those at Salmon Shores not pay more for electric costs than what the landlord is charged by PSE.”¹⁶

17 The Commission should reject the rationale in Paragraph 29 as unreasonable. For example, Staff knows of no hotel that separately charges for electricity when providing rooms to the public for compensation. But, if the Initial Order’s rationale were applied, the hotel would be required to charge an electricity fee separate from its room rate. Otherwise (and to paraphrase the Initial Order), if the hotel included its electricity cost in the room rates, that would lack transparency because hotel guests would not know how much the electricity is costing them, they would have no idea how much their electric use cost, low use hotel guests would subsidize high use hotel guests, they would have no incentive to

¹⁶ Initial Order at 13, ¶ 29. In footnote 29, the Initial Order provides an example of a landlord raising rent by the average charge it made to tenant’s for electricity, and concludes this cannot be reconciled by “Staff’s approach of translating the extra rent charge into a per-kWh rate for electricity ...” Footnote 29 of the Initial Order is technically correct: the example in that footnote cannot be reconciled with the approach Staff advanced in its prior pleading, even though Staff did not characterize (and does not consider) the Energy Availability Charge (EAC) as an “extra rent charge.” However, as we noted at the outset of this pleading, Staff has abandoned the prior test and is now amenable to the “aggregate” test adopted and applied by the Initial Order.

conserve, and this would not square with the interest in having hotel patrons pay no more for electricity than what the utility charged the hotel.

18 The same analysis would apply to many PSE customers, be it a movie theater, grocery store, or any other business customer that provides electricity service as part of the product or service it sells. Plainly, the Initial Order's rationale on rent inclusion is not reasonable, and the Commission should reject it for that reason.¹⁷

19 In sum, the Commission should either delete Paragraph 29, or, if the Commission opts to include the rent inclusion issue in its final order, the Commission should reject the analysis in Paragraph 29 and add a discussion consistent with the foregoing analysis. Under either option, Staff offers no changes to the Initial Order's findings of fact or conclusions of law, because Paragraph 29 does not appear to affect them.

C. **Correction**

20 Paragraph 5 of the Initial Order, entitled "Party Representatives," states Mr. Young appeared *pro se* on behalf of Salmon Shores RV Park. The Commission should correct Paragraph 5 to reflect the fact that Salmon Shores is represented by Deric N. Young, attorney, who filed a Notice of Appearance as counsel for Salmon Shores and a motion on Salmon Shores' behalf.

¹⁷ The Commission could reject the Initial Order's analysis regarding rent inclusion for the additional reason that it would be highly impractical, if not impossible to implement. Consider the situation in which a PSE customer included all services (including utilities) in its rent or other charges for the product or service it sells to its own customers. One of that PSE customer's own customers complains, alleging the PSE customer is reselling electricity for profit. It would be virtually impossible for PSE or the Commission to discern whether the overall charge for the product or service includes a "profit" on the sale of electricity. First, PSE or the Commission would have to conduct an extensive audit of the PSE customer's revenues and costs. Second, if the PSE customer made a profit overall, we would then have to figure out whether any of that profit is attributable to electricity, or some other factor. Staff doubts PSE and the Commission could ever successfully resolve that sort of complaint on its merits, absent a complex allocation analysis. Thus, even if the Initial Order's position on rent inclusion were reasonable in theory, it would be virtually impossible to implement. Staff located no court or commission decision in which rent inclusion constituted unlawful resale of electricity.

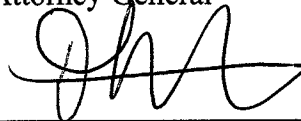
III. CONCLUSION

21 For the reasons stated above, the Commission should grant Staff's Petition for Administrative Review and change the Initial Order in the manner Staff recommends in Paragraphs 12, 19, and 20 above.

DATED this 10th ay of June 2010.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

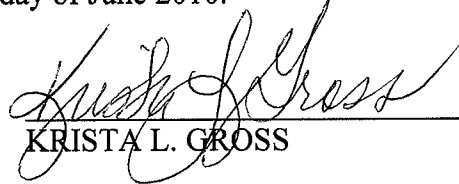


DONALD T. TROTTER
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

Docket UE-091531
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 10th day of June 2010.


KRISTA L. GROSS

For Kenneth Binkley:

Kenneth L. Binkley
PO Box 2213
Olympia, WA 98507-2213
Phone: 253-777-5209
E-mail: bink@wolfenet.com

For Salmon Shores RV Park:

Deric N. Young
Woodring Law Offices
2120 State Street Suite 201
Olympia, WA 98506
Phone: 360-754-7667
E-mail: dericyoung@woodringlaw.com

For Puget Sound Energy:

Sheree Carson
Gina Warren
Perkins Coie
10885 NE Fourth Street Suite 700
Bellevue WA 98004-5579
Phone: 425-635-1400
Fax: 425-635-2400
E-mail: scarson@perkinscoie.com
gwarren@perkinscoie.com