WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AIR LIQUIDE AMERICA CORPORATION, AIR PRODUCTS AND CHEMICALS, INC., THE BOEING COMPANY, EQUILON ENTERPRISES LLC, and TESORO NORTHWEST CO.,	)	
Complainants,	)	DOCKET NO. UE-981410
v.	)	SECOND SUPPLEMENTAL ORDER: ORDER DENYING MOTION FOR SUMMARY DETERMINATION
PUGET SOUND ENERGY,	)	
Respondent.	)	

Proceedings: This is a formal complaint brought by certain Puget Sound Energy (PSE) customers that receive service under PSE's Schedule 48 tariff. The customers allege PSE fails to comply with certain tariff provisions, and request an order to require compliance and refunds. Administrative Law Judge Dennis J. Moss conducted a prehearing conference on January 8, 1998, at the Commission's offices in Olympia, Washington, and, among other things, recognized PSE's pending Motion for Summary Determination filed on November 30, 1998. Complainants and Commission Staff answered PSE's motion on December 18, 1998. PSE asked for leave to file, and did file, a Reply on December 29, 1998. ALJ Moss granted PSE leave to file its Reply and denied PSE's request for oral argument, finding the parties' written submissions thorough and adequate to the Commission's needs for resolving whether to summarily decide the issues.

Appearances: Matthew Harris, attorney, Seattle, Washington, represents Puget Sound Energy (PSE). Bradley Van Cleve and Melinda J. Horgan, attorneys, Portland, Oregon, represent Air Liquide America Corporation, Air Products and Chemicals, Inc., The Boeing Company, Equilon Enterprises LLC, and Tesoro Northwest Company. Simon ffitch, Assistant Attorney General, Seattle, Washington, represents the Public Counsel. Robert Cedarbaum, Assistant Attorney General, Olympia, Washington represents Commission Staff (Staff).

Motion for Summary Determination: PSE filed a motion for summary determination and three supporting affidavits on November 30, 1998. Complainants filed an answer supported by one affidavit on December 18, 1998. Staff answered on December 18, 1998. PSE replied on December 29, 1998.

Commission: The Commission denies PSE's Motion for Summary Determination on finding there are issues of material fact that cannot be resolved on the basis of the parties' pleadings, motion papers, and affidavits. The proceeding will go forward in accordance with the procedural schedule.

MEMORANDUM

Background. PSE, then known as Puget Sound Power & Light Company, filed on May 24, 1996, a proposal to implement a "market transition plan" intended to provide customers access to competitively priced electricity. PSE proposed approval of Schedule 48, a so-called optional large power sales rate, as the first step toward bringing choice to all customers. During the next six months, PSE, Commission Staff, and various interested persons, including PSE customers, participated in an ongoing dialogue and in open meetings before the Commission to craft appropriate rates, terms, and conditions of service for sales of market priced power to PSE's largest industrial customers. On October 31, 1996, the Commission approved Schedule 48, subject to seven conditions. The Commission authorized a November 1, 1996, effective date.

This dispute concerns the pricing of non-firm energy under Schedule 48, one component of the overall rate. Non-firm energy pricing is described at First Revised Sheet Nos. 48c and 48d which state in part:

> 1. Non-Firm Energy. An hourly non-firm energy price equal to the index energy price in each on-peak hour or off-peak hour, adjusted for losses associated with power delivery to the customer, plus 2.5 mills/kWh for ancillary services and margin. Risk for price movements in the index energy price is borne by Customer; Customer will receive non-firm energy service in absence of the election of related optional services. . . .
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> "Index" in 1996 means COB less ½ mill/kWh. "COB" means the California-Oregon Border Revised Non-Firm Electricity Index prices last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month. After 1996, "Index" means the Mid-Columbia Revised Non-Firm Electricity Index prices, last reported by Dow Jones to Dow Jones Telerate subscribers for on-peak hours and off-peak hours for each day of the relevant billing month or such other, similar, published or verifiable index which reflects commodity electric energy prices in the Pacific Northwest, as determined by the Company. . . .

> If the Company and all of the Customers to which this Schedule is available pursuant to its terms agree that the Mid-Columbia Revised Non-Firm Electricity Index prices are not representative of non-firm electricity transaction pricing in the region, the Company will seek to obtain written agreement with all such Customers upon an index that is representative of non-firm electricity transaction pricing in the region, and if such agreement is obtained, then from and after the date of such agreement "Index" will mean that agreed-upon index.

Air Liquide, *et al.,* allege by their complaint that PSE is required to determine the energy price component of its charges under Schedule 48 by reference to "the Dow Jones Mid-Columbia non-firm price index, but instead PSE is charging customers based on an *ad hoc* blended pricing scheme . . . unilaterally developed by PSE . . . that combines both firm and non-firm Mid-Columbia prices." Complainants say Dow Jones first published a separate non-firm price index on June 1, 1998, and that PSE has overcharged customers since that time by using "a blended pricing methodology" that considers both firm and non-firm price indices. Complainants allege PSE has overcharged them, thus violating its tariff, and that PSE's adoption of a blended pricing methodology without customer consent also violates the express terms of Schedule 48.

To prove PSE violates its tariff, as alleged, Complainants must show Schedule 48, by its terms, requires PSE to determine the energy price component of its charges under Schedule 48 by reference to "the Dow Jones Mid-Columbia Revised Non-Firm Electricity Index;" must show the referenced price index exists as described in the tariff; and must show PSE cannot unilaterally decide to use an index other than, or in addition to, the one specifically identified in Schedule 48 for use "[a]fter 1996." To support their claim for refunds, Complainants must show in addition that charges to customers resulting from PSE's actions are higher than what PSE's tariff allows.

Commission Discussion and Decision. WAC 480-0-426(2) provides:

> (2) Motion for summary determination. A party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.

Thus, to resolve a motion for summary determination, the Commission should consider all facts submitted and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Tanner Electric Cooperative v. Puget Sound Power & Light Co.,* 128 Wn.2d 656, 668, 911 P.2d 1301 (1996). Summary determination is appropriate only when the parties' pleadings, motions papers, affidavits, and any other properly submitted, undisputed evidence establish there are no genuine issues of material fact. *CLEAN v. City of Spokane,* 133 Wn.2d 455, 462, 947 P.2d 1169 (1997); *Honey v. Davis,* 131 Wn.2d 212, 217, 930 P.2d 908, 937 P.2d 1169 (1997). A material fact is one upon which the outcome of the litigation depends. *Clements v. Travelers Indemnity Co.,* 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The purpose of summary procedures is to avoid unnecessary proceedings.

PSE's Motion for Summary Determination says the company "has done nothing more than implement the plain language of Schedule 48." Yet, PSE also says the tariff cannot be understood without consideration of extensive extrinsic evidence regarding "the nature of the indices available and relied on during [the] time period [when Schedule 48 was developed and approved]." PSE's Motion offers its version of the relevant facts, supported by affidavits. PSE provides detailed analyses of what transactions underlie various indices at various points in time and purports to tie the nature of these transactions back to the index requirements stated in Schedule 48. PSE claims Dow Jones' Mid-Columbia non-firm energy index, first published in June 1997, is not based on the transactions the parties had in mind when they participated in the development of Schedule 48. Although somewhat equivocal on the point, PSE at least suggests the index Complainants would have PSE use is not the Dow Jones Mid-Columbia Revised Non-Firm Electricity Index mentioned in the tariff. All three of PSE's affiants say they are unaware of any index by that precise name.

PSE disputes Complainants' assertion that PSE calculates and uses "an 'ad hoc' index contrived by PSE. PSE says "Dow Jones continues to calculate the equivalent of the Mid-Columbia Electricity Price Index" which PSE applied without objection from any customers from January 1, 1997, until June 1, 1998, when Dow Jones first reported firm and non-firm index prices separately. PSE says Dow Jones reports the combined index price to PSE and Complainants, among others.

PSE asserts the important consideration for the Commission is whether the energy price PSE charges is market based and compensatory, as determined by PSE in its claimed discretion under the tariff "to select the index used to calculate Schedule 48 prices." PSE says it need not consult with, or obtain approval of, customers to use an index other than the one expressly named in the tariff.

Both Complainants and Staff point out that PSE's motion depends on our accepting PSE's fact assertions on a host of issues. PSE asks us to interpret Schedule

48 on the basis of its assertions regarding the intent behind the pricing mechanism described in the tariff sheets and the means by which alternative indexes may be used, rather than simply relying on the language in the tariff sheets. PSE asks us to consider the practical results of pricing electricity according to its interpretation of the tariff, contrasted to the results using Complainants' interpretation. The bases upon which PSE would have us rule (*e.g.,* below market-cost power, noncompensatory rates, non-cost-based rates) are inherently factual. Complainants dispute PSE's fact assertions and offer Mr. Wolverton's affidavit in which he expressly disagrees with PSE's affiants on key points that underlie PSE's arguments. PSE offers no data to prove its assertions regarding below cost power, noncompensatory rates, or non-cost-based rates. Although we are not prepared to rule the determinations of these factors are dispositive of the customers' Complaint, they nevertheless should be considered and we require more than PSE's bare assertions to take these claims as established facts.

After reviewing the pleadings and record developed thus far, we cannot confidently know whether there exists today the "Mid-Columbia Revised Non-Firm Electricity Index" referred to in Schedule 48. All three of PSE's affiants state no index by that exact name exists and it appears undisputed that no such index existed at the time the Commission approved Schedule 48. PSE's affiants say no such index functionally exists today, at least insofar as Schedule 48 is concerned. Complainants contend the referenced index has been in existence since June 1997. We will need to hear more facts to determine this basic and highly material question.

The pleadings and motions papers raise questions of tariff interpretation that require development of a factual record. PSE itself argues that our recognition of PSE's and, perhaps, PSE customers' subjective intent behind Schedule 48's pricing mechanism is critical to our determinations in this case. It appears there may be some ambiguity in the provisions that allow PSE to use an index other than the two named in Schedule 48. PSE says there are two separate mechanisms by which an alternative index may be designated, one involving the customers, one that is PSE's unilateral right to exercise. Complainants say there is but one mechanism to select an alternative index and customer consent is required. Even if PSE has the right to select unilaterally an alternative index, there is a question whether the one it has adopted meets the Schedule 48 criteria. A record will be required to resolve these critical issues.

We need not inquire deeply into the intricacies of this case to understand there are genuine issues of material fact the resolution of which depends

on development of a record more thorough than that advanced by the parties so far. This proceeding is not susceptible to summary determination.

ORDER

THE COMMISSION ORDERS That Puget Sound Energy's Motion for Summary Determination is denied.

DATED at Olympia, Washington and effective this _19th_ day of January 1999.

ANNE LEVINSON,
Chair

RICHARD HEMSTAD,
Commissioner

WILLIAM R. GILLIS,
Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).