BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Washington Utilities and Transportation Commission, Complainant,	)	
v.	)	**Docket Nos. UG-080519 and UG-080530 (*consolidated*)**
Northwest Natural Gas Company, Respondent.	)	

NW Energy Coalition

Response to Staff's and Public Counsel's Motions for Summary Determination

August 8, 2008

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I. Introduction

The parties to these proceedings -- Northwest Natural Gas Company ("NWN" or the "Company"), Commission Staff ("Staff"), Public Counsel, and the NW Energy Coalition (the "Coalition") – have all filed Motions for Summary Determination under WAC 480-07-380(2). NWN and the Coalition assert that the proposed Smart Energy pilot program (the "Washington Program") should be approved as a tariffed service offering, and that a portion of the Program's start-up costs should be deferred for later recovery. Staff does not oppose the Smart Energy tariff, but does oppose the deferral request. Public Counsel opposes both the tariff and the deferral.

This Response addresses Staff's and Public Counsel's main arguments regarding the Washington Program. We organize the Response along the lines of our Motion. We begin by discussing the Program's policy rationale; the fact that Staff and Public Counsel either ignore or downplay this rationale; and the reasons why a policy analysis is critically important for these proceedings. Next, we repeat the utility-wide benefits that the Program will offer -- and refute Public Counsel's claim that the Program will not offer such benefits. We conclude by discussing NWN's deferral request and the reasons why the Commission should reject Staff's and Public Counsel's position on deferral.

II. Staff and Public Counsel Ignore or Downplay the Program's Policy Rationale.

The parties acknowledged at the Prehearing Conference that the Company's proposals present both legal and policy issues.[1] Accordingly, the Company and the Coalition filed Motions that outline the policy backdrop for the Washington Program, including the state's aggressive

[1] *In the Matter of the Petition of Northwest Natural Gas Company*, Docket Nos. UG-080519 and UG-080530 (consolidated), Order 02, Prehearing Conference Order (June 13, 2008) , at p. 3 ¶ 10 ("The parties agreed that these dockets appear to present only legal and policy issues that can be resolved without the necessity for an evidentiary hearing").

approach towards the issue of greenhouse gas ("GHG") emissions.[2] This policy backdrop encompasses the state's membership in the Western Climate Initiative; Governor Gregoire's issuance of Executive Order No. 07-02 (setting GHG reduction goals for Washington); the Washington Legislature's codification of these goals in Chapter 80.80 RCW; and, just this year, the adoption of strict GHG reduction requirements for the state.[3] The Legislature has found that the state possesses a "commitment to reduce emissions of greenhouse gases" and "should continue its leadership on climate change policy."[4] And the Commission has required gas utilities to analyze and consider the costs and risks associated with GHG emissions.[5]

These policy initiatives set the stage for the Company's proposals. There is no question but that the Washington Program furthers the state's articulated policies towards GHG emissions. As we note in our Motion,[6] by proposing the Washington Program, and by gaining approval for a very similar effort in Oregon, NWN has stepped up as the *first* gas distribution utility in the Pacific Northwest to offer its customers an opportunity to offset the GHG emissions that are associated with the customers' natural gas use. NWN has proposed an innovative program to help effectuate the Washington policy.

But Staff and Public Counsel do not discuss any of these policy initiatives in their Motions. They act as if Washington has never set emission reduction requirements, and never assumed a leadership role on climate change issues. By not engaging these policy issues, Staff

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[2] *See generally* NWN Motion for Summary Determination, at pp. 5 and 11; Coalition Motion for Summary Determination, at pp. 3-4.
[3] RCW 70.235.020(1)(a).
[4] RCW 70.235.005(1)-(2).
[5] WAC 480-90-238(2)(a)-(b).
[6] Coalition Motion for Summary Determination, at p. 3.

and Public Counsel ignore the very policies that NWN relied upon when it developed the Washington Program.[7]

These policies are all critically important for these proceedings. As we note in our Motion,[8] climate change has become the issue of our time – and Washington has adopted a wide array of policy initiatives that acknowledge and respond to the issue. It is both necessary and appropriate, therefore, for companies such as NWN to take steps to help implement the state's policies. That is what NWN proposes to do with the Program -- by giving its customers an opportunity to offset the carbon footprint that is associated with their natural gas use. We commend the Company for its initiative and effort.

With this backdrop in mind, we turn to the single policy statement relating to GHG mitigation that Staff does discuss in its Motion. In a finding that underlies RCW 35.92.430 (enacted in 2007 in response to the *Okeson* decision),[9] the Washington Legislature states: "The legislature finds and declares that greenhouse gases offset contracts, credits, and other greenhouse gases mitigation efforts are a *recognized utility purpose that confers a direct benefit on the utility's ratepayers.*" (Emphasis added) The Legislature thus links GHG mitigation efforts (including offset programs) to the service that a utility provides and that customers receive – and then finds that customers benefit if their utility offers a program to mitigate GHG emissions.

Staff refers to this legislative finding (albeit briefly) and concedes that it is "seemingly broad." Yet Staff attempts to distinguish the finding. The sole basis for Staff's position, apparently, is the fact that the Legislature did not include language similar to RCW 35.92.430 in the statutes that pertain to investor-owned utilities. Staff claims that the Legislature thereby

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[7] NWN Motion for Summary Determination, at p. 5 ¶ 10 ("Smart Energy was developed in response to state and federal policies to limit GHG emissions and slow global warming").

[8] Coalition Motion for Summary Determination, at p. 3.

[9] *Okeson v. City of Seattle*, 159 Wn.2d 436, 150 P.3d 556 (2007). We discuss *Okeson* in more detail later in this section and in Section V.

raised a "significant question" as to whether an investor-owned utility could recover GHG mitigation costs in rates.[10]

This position lacks merit. The Legislature passed RCW 35.92.430 for the purpose of responding to – and reversing – a court decision that dealt with a *municipal* utility's offset program. The statute thus appears where it belongs, in Chapter 35.92 RCW. But by passing this legislation, the Legislature did not raise a "question" as to an *investor-owned* utility's ability to recover, in rates, the costs of such a program. There is nothing in the statutory language, the legislative findings, or the legislative history that supports Staff's interpretation of RCW 35.92.430.

Nor is there anything in the statute, findings, or history that limits the Commission's broad scope of authority. The Commission remains fully empowered to "regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation."[11] There is nothing in RCW 35.92.430 that narrows this authority or that prevents the Commission from permitting an investor-owned utility to recover the costs of GHG mitigation efforts. Indeed, the statute *encourages* such recovery, by expressing the Legislature's general intent that such a program is a "recognized utility purpose that confers a direct benefit on the utility's ratepayers."

Finally, it does not make sense on an intuitive level to accept Staff's argument. Because customers of a publicly-owned utility benefit from GHG mitigation efforts (according to the Legislature), it follows that customers of an investor-owned utility should also benefit from these

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[10] *See generally* Staff Motion for Summary Determination, at p. 11 ¶ 18. In contrast to Staff, Public Counsel does not mention, discuss, or attempt to distinguish any of the legislative findings that underlie RCW 35.92.430. *See, e.g.*, Public Counsel Motion for Summary Determination, at p. 11 n. 26.

[11] RCW 80.01.040(3).

efforts. After all, customers of both types of utilities have carbon footprints -- and both types of utilities may employ measures to mitigate GHG emissions. A utility's ownership structure, standing alone, should not predetermine whether customers will benefit from a GHG mitigation program.

III. The Program Will Offer Value to NWN's Customers.

Staff agrees that the Washington Program has value -- but Public Counsel does not agree. In fact, Public Counsel spends a great deal of time attacking the Program and questioning whether the Company's mitigation efforts can ever be "effective."[12]

There are several problems with this argument. First, Public Counsel does not reconcile its position with the Washington Legislature's finding, discussed above, that an offset program confers a *direct benefit* on utility customers. This finding is entitled to more credence by the Commission than the single newspaper article cited by Public Counsel.[13]

Second, The Climate Trust is a very experienced provider of offset projects – indeed, one of the most experienced in the country according to NWN.[14] This fact alone bodes well for the Washington Program. NWN's customers will be well served by the services and opportunities that The Climate Trust offers. Public Counsel has not introduced any evidence to suggest otherwise.[15]

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[12] *See, e.g.*, Public Counsel Motion for Summary Determination, at pp. 5 (""Smart Energy has not been demonstrated to be effective...") and 6 (...concerns about its actual effectiveness warrant rejection of Smart Energy").

[13] *Id.*, at p. 6 n. 18 (referring to a 2007 article in *The Seattle Times*).

[14] NWN Motion for Summary Determination, at p. 6 n. 15; *see also* Affidavit of William Edmonds, at ¶ 5.

[15] Public Counsel thinks so highly of The Climate Trust, in fact, that it suggests that NWN's customers work directly with the organization through the program offered at www.carboncounter.org. *See* Public Counsel Motion for Summary Determination, at p. 4. Some of NWN's customers may indeed do so – but others may choose to work with The Climate Trust through the Washington Program. Together, the programs available through The Climate Trust represent a multi-faceted approach to dealing with global warming concerns. Smart Energy is not meant to be a single, exclusive program for mitigating GHG emissions.

Third, Public Counsel ignores the unanimous acclaim that NWN received for the Oregon Program. Every party to Docket UM 1327 applauded the Program, which involved the same project provider, tariffs, carbon offsets, customer benefits, and cost-sharing as the Washington Program. Their comments are illuminating:[16]

- "NW Natural has developed an attractive product in its Smart Energy program. The partnership with The Climate Trust and the focus on regional GHG offset projects for biogas is innovative and unique to local gas distribution companies in the Northwest." (*Oregon Public Utility Commission Staff*)[17]
- "[The Oregon Program] is well designed, technically sound, and provides for a fair recovery of costs." (*Oregon Department of Energy*)
- "[I]f you don't allow this effort to move forward, you will limit choices available to Northwest Natural's gas customers...and Oregon would miss a key substantive opportunity to confront the global warming challenge now faced at nearly every cog in Oregon's economy." (*Ecumenical Ministries of Oregon*)
- "There is no doubt that this option is timely and valuable both to the customer who has elected the option and to society generally." (*Citizens' Utility Board of Oregon*)[18]

For all of the above reasons, the Commission should reject Public Counsel's position and find that the Washington Program will indeed offer value to NWN's customers in this state.

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[16] The OPUC Staff's final report in Docket UM 1327 is attached as an appendix to the OPUC Order that approved the Oregon Program. Mr. Edmonds includes both documents as part of Exhibit F to his Affidavit. The comments from the other parties to the Oregon Program proceeding are collectively attached to his Affidavit as Exhibit G. (These comments include comments that the Coalition submitted in support of the Oregon Program.)

[17] The positive statements by OPUC Staff appeared in its *final* report on the Oregon Program, dated August 29, 2007. In its Motion for Summary Determination in these proceedings (at p. 4 n. 13), Commission Staff refers to OPUC Staff's *initial* report on the Oregon Program, dated August 15, 2007. Neither Commission Staff nor Public Counsel mentions the final report which, again, spoke very highly of the Oregon Program.

[18] The Citizens' Utility Board of Oregon ("CUB") represents the interests of residential utility customers in proceedings before the OPUC. As such, the function that CUB performs in Oregon is similar to the function that Public Counsel performs in Washington.

IV. Part of the Program's Start-Up Costs Should Be Deferred.

As our Motion argues, the cost deferral that NWN proposes is reasonable and appropriate because the Washington Program will create utility-related benefits that will accrue to all customers. These benefits include enhanced education, knowledge, and experience concerning GHG emissions, carbon footprints, and mitigation measures. Mr. Edmonds documents these benefits in his Affidavit.[19]

Other parties confirm these benefits. In the Oregon Program proceeding, for example, OPUC Staff noted that NWN "persuasively argued" that Smart Energy would provide knowledge and experience with carbon regulation that would reduce compliance costs, which in turn would lower the costs that would be passed on to the utility's customers. The Oregon Department of Energy asserted that Smart Energy would benefit customers by reducing climate impacts, raising the visibility of climate issues, and helping customers learn more about mitigation costs. The Ecumenical Ministries organization stated that NWN would develop "critical expertise" under the Oregon Program. And the Citizens' Utility Board of Oregon argued that Smart Energy would allow NWN to "learn about global warming issues, the potential regulatory mechanisms, and most importantly, the various mechanisms that this gas company might explore to reduce carbon emissions and comply with future regulatory regimes."[20]

Just as the Oregon Program now does in Oregon, the Washington Program will benefit *all* of NWN's customers in this state and not just the customers who sign up to participate. *All* customers will receive the benefits that result from mitigating GHG emissions. *All* customers will benefit from the experience that NWN gains regarding the production, integration, and use

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[19] *See generally* Affidavit of William Edmonds, at pp. 2-3 ¶¶ 5-8; *see also* NWN Motion for Summary Determination, at pp. 16-17 (discussing the particular benefits of the Washington Program).
[20] Affidavit of William Edmonds, Exhibits F and G.

of biogas, as well as the use of carbon offsets as a potential mitigation measure. And *all* customers will benefit by receiving NWN's comprehensive educational campaign.

Under these circumstances, the Commission has authority to spread some of the start-up costs to all customer classes, even to non-participants, because some of the Washington Program's benefits will flow to all customer classes.[21] NWN has shown that some benefits will accrue to all customers in this state, not just the customers who sign up for Smart Energy. Thus, and even though the start-up costs for the Washington Program may be relatively modest,[22] the Commission should permit NWN to defer part of these costs – just as the OPUC permitted NWN to defer part of the start-up costs for the Oregon Program.[23]

Staff and Public Counsel do not discuss any of the above benefits or the fact that some of these benefits will flow to all of NWN's Washington customers. Instead, they rely heavily on the language in RCW 19.29A.090(5) (the "Green Tariff law"), which allocates the costs and benefits of unrelated voluntary programs exclusively to participating customers. Staff and Public Counsel claim that the Commission should follow RCW 19.29A.090(5) in these proceedings because the law supposedly offers "particular relevance" and "useful guidance."[24]

There are many reasons why this reasoning is flawed. First, the Green Tariff law applies just to programs that are offered under that law, and then only to programs that electric utilities offer. The law is inapplicable on its face to GHG mitigation programs such as Smart Energy that

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[21] *See* NWN Motion for Summary Determination, at pp. 14-15. This cost recovery test also applies in Oregon – and Staff cites the test in its Motion for Summary Determination (at p. 4 n. 13).

[22] Staff and Public Counsel do not brief in their Motions the *de minimus* argument that Staff raised earlier. *See* Memorandum for April 30, 2008 Open Meeting, Docket No. UG-080530 (April 28, 2008), at p. 2. We assume that both parties have waived this argument.

[23] By citing the OPUC Order on cost deferral, we do not mean to suggest that the Commission has to make the same decision here. The Commission will exercise its independent judgment when it evaluates and decides the various Motions. We simply believe that the OPUC Order may prove instructive – because the Oregon Program that the OPUC approved is the same as the Washington Program.

[24] Staff Motion for Summary Determination, at p. 13 ¶ 21 ("particular relevance"); Public Counsel Motion for Summary Determination, at p. 10 ("useful guidance").

are designed and intended to reduce the carbon footprint associated with a utility customer's natural gas use. Second, the Green Tariff law is distinguishable due to the reasons that caused the Washington Legislature to pass the law in 2001. The energy landscape has changed significantly since then. Unlike in 2001, the issues of GHG emissions and GHG mitigation measures are now front and center before the public and the Legislature.[25]

If Staff's and Public Counsel's position is accepted, moreover, then the Commission would be unable to allocate any costs of a voluntary program to non-participating customers, no matter what the program and no matter how great the benefits those customers receive from the program. This approach would be inconsistent with Commission precedent and constrain the Commission in future proceedings. We do not believe that the Commission should adopt such a restrictive rule.

Further, Staff's and Public Counsel's position would hobble the Washington Program just as the state's policy initiatives are reaching critical mass, and just as NWN is attempting to develop and implement the Program. There is no question but that Washington policy favors an aggressive approach to the mitigation of GHG emissions. But Staff and Public Counsel now want to saddle the Washington Program with an artificial and significant impediment. Our Motion cites an earlier Commission analysis of the Green Tariff law and the concerns expressed therein that Section (5) is "restrictive" and presents a "challenge" to implementing the law.[26] Given this criticism of RCW 19.29A.090(5) and the fact that the statute is inapplicable on its face to the Washington Program, it makes very little sense from a policy perspective to apply the statute by analogy and thereby burden the Program.

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[25] *See generally* Coalition Motion for Summary Determination, at pp. 10-11.

[26] Department of Community, Trade and Economic Development, and Washington Utilities and Transportation Commission, *Green Power Programs in Washington: A Report to the Legislature* (December 2002), at pp. 8-9; *see also* Coalition Motion for Summary Determination, at p. 10 n. 24.

Finally, the position that Staff and Public Counsel take is both selective and inconsistent. On the one hand, they argue that an electric utility statute -- RCW 19.29A.090(5) – applies to a gas utility program by analogy, even though this statute *does not* address the issue of GHG mitigation. But on the other hand, Staff claims that a municipal utility statute -- RCW 35.92.430 – should not apply to the program by analogy, even though this statute *does* address the issue of GHG mitigation. We do not understand how Staff and Public Counsel can argue that the first law offers "guidance" and "relevance" for these proceedings, but the second law does not.

V. The *Okeson* and *Jewell* Decisions Do Not Apply to the Program.

Staff and Public Counsel claim that the *Okeson* decision – even though "limited" according to Public Counsel and reversed by the Washington Legislature in RCW 35.92.430 – prevents NWN from deferring part of the Washington Program's start-up costs. Staff also claims that the funds that NWN receives will be akin to "charitable contributions" under the *Jewell* decision.[27] Hence, according to Staff, none of the Program costs can be deferred.[28]

Okeson does not apply here. As we discussed earlier in this Response, that decision dealt solely with a governmental program. *Okeson* does not apply by analogy or otherwise relate to a program that an investor-owned utility offers under Commission scrutiny. And even assuming for the sake of argument that such an analogy could have been made at one time (*i.e.*, when the case was decided), the analogy no longer applies – because the Legislature has since reversed *Okeson* in RCW 35.92.430.[29]

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[27] *Jewell v. Washington Utilities and Transportation Commission*, 90 Wn.2d 775, 585 P.2d 1167 (1978).

[28] *See generally* Staff Motion for Summary Determination, at pp. 8-12 ¶¶ 16-19; Public Counsel Motion for Summary Determination, at p. 7.

[29] Public Counsel claims that "[*Okeson's*] reasoning is applicable here" despite the Legislature's reversal of that decision. *Id.*, at p. 7 n. 25-26. But we believe that the legislative reasoning that underlies RCW 35.92.430 offers far better guidance for these proceedings. The statute is the current law, after all.

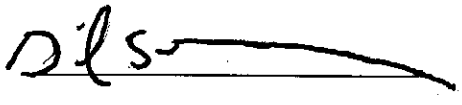
Nor does *Jewell* apply. Staff would have the Commission believe that NWN proposes the Washington Program simply to be a "good corporate neighbor" and to "improve the image of the corporation."[30] Staff is wrong. The Program responds to specific state policies and creates specific benefits for NWN's customers. In this regard, the Program directly links the provision of natural gas service – a core NWN function – to the environmental implications of that service, *e.g.*, GHG emissions. The Program thus bears no relation to charity or to charitable contributions.

VI. Conclusion

The Coalition respectfully requests that the Commission approve the tariffs and cost deferral that NWN proposes for the Washington Program.

DATED: August 8, 2008.

NW ENERGY COALITION



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[30] Staff Motion for Summary Determination, at p. 9 ¶ 16 (citing statements in *Jewell* regarding the definition and purpose of charitable contributions).