

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKETS UE-151871 and UG-151872
	)	
Complainant,	)	REPLY OF SHEET METAL AND AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, WESTERN WASHINGTON (SMACNA-WW) TO PSE OPPOSITION TO SMACNA'S PETITION TO INTERVENE
v.	)	
PUGET SOUND ENERGY,	)	
	)	
Respondent.	)	
.....	)	

**INTRODUCTION**

1 On December 29, 2015, pursuant to WAC 480-07-355 of the Procedural Rules of the Washington Utilities and Transportation Commission (Commission), RCW 34.05.443, and Order 01 in this proceeding, the Western Washington Chapter of the Sheet Metal and Air Conditioning Contractors National Association (SMACNA-WW) petitioned to intervene in the above-captioned proceeding. On December 31, 2015, Respondent Puget Sound Energy (PSE) filed a response in opposition to SMACNA-WW's Petition. Because PSE misstates the interests of SMACNA-WW in this proceeding and misapplies the applicable law on intervention, we file this Reply. Before rebutting PSE's evaluation of the regulatory criteria for granting standing, it is important that we place PSE's tariff proposal in proper context and describe briefly its impact.

2 In its tariff filing, PSE seeks to dramatically expand its activities in the provision of various types of equipment, starting with leased energy efficient hot water heaters and furnances, but perhaps

later expanding to such things as solar panels and electric vehicle charging equipment.<sup>1</sup> PSE justifies its action by alleging that “[c]urrent market actions and approaches are not fully realizing the public benefits they could.”<sup>2</sup> The Commission staff recommended the filing be suspended in part because it is “concerned that the company will enter an apparently already robust competitive market.”<sup>3</sup> In suspending the tariff filing, the Commission also referenced the market, citing the need to compare PSE’s proposal with “other relevant and available options.”<sup>4</sup> Thus, the focus of the Company, Commission Staff, and the Commission has been on possible impacts of PSE’s proposal, if approved, on the market.

3 SMACNA-WW and others have sought to intervene alleging this same issue: whether the entrance of PSE would adversely impact the market by which such equipment is provided to customers and, further, how the proposal would impact the provision of all cost-effective conservation as mandated by the Energy Independence Act (Initiative 937).<sup>5</sup> The impacts stated above are not just to the members’ financial interest, as alleged by PSE.<sup>6</sup> The issues are broader and affect significant questions of state energy policy.

4 In its opposition to SMACNA-WW Intervention, PSE cites the 1971 case of *Cole v. Utilities & Transportation Comm’n*, 79. Wn.2d 302, 485 P.2d 71 (1971), and argues further that the allowing contractor associations to participate in this significant commission proceeding would

---

<sup>1</sup> PSE Advice Letter No. 2015-23, at 2 (Sept. 18, 2015) (Sept. 18 PSE Letter).

<sup>2</sup> PSE Advice Letter No. 2015-23, at 2 (Nov. 6, 2015) (Nov. 6 PSE Letter).

<sup>3</sup> Commission Staff Open Meeting Memo at 2 (Nov. 13, 2015) (Open Meeting Memo).

<sup>4</sup> Order 01 ¶12.

<sup>5</sup> SMACNA Petition to Intervene ¶5.

<sup>6</sup> Puget Sound Energy’s Response in Opposition to the Sheet Metal and Air Conditioning Contractors National Association, Western Washington’s Petition to Intervene ¶1, 6 (PSE Opposition).

not be consistent with “the public interest.” PSE misapplies *Cole* and miscomprehends the public interest. The Commission should reject PSE’s argument and grant SMACNA-WW’s Petition to Intervene.

### LEGAL STANDARD FOR INTERVENTION

5 The Administrative Procedure Act provides that a person may intervene if the petitioner qualifies “under any provision of law.”<sup>7</sup> The Commission has set forth criteria in WAC 480-07.355(3), which states: “If the petition discloses a substantial interest in the subject matter of the hearing or if the petitioner’s participation is in the public interest, the presiding may [grant the petition].” SMACNA-WW qualifies for intervention both because it has a substantial interest in the proceeding and because its participation is in the public interest.

#### **SMACNA-WW Has a Substantial Interest in the Proceeding**

6 PSE argues that SMACNA-WW does not have a substantial interest in this proceeding because *Cole* holds that the interest of a non-regulated competitor does not have such an interest. PSE misapplies *Cole*, or the case is distinguishable, for three reasons.

7 First, in denying the intervention of the Oil Heat Institute, the Court simply upheld the Commission’s determination that, in the Commission’s discretion, it would not permit the Institute to intervene. The Court cited the discretionary nature of the Commission’s intervention rule (emphasizing “may”).<sup>8</sup> In other words, the Court did not hold that state law does not *permit* intervention, it was only that state law does not *require* it.

---

<sup>7</sup> RCW 34.04.440(1).

<sup>8</sup> *Cole*, 79 Wn.2d at 305.

8 Second, the *Cole* Court pointed out that the Oil Heat Institute was engaged in providing “an entirely different type of fuel service” from that provided by the gas utility.<sup>9</sup> The tariff at issue in *Cole* was for “dry-out service” that had the effect of creating an incentive for customers of Washington Natural Gas Company to seek out gas service to the detriment of oil heat providers. In contrast, here, PSE would be in the same business as SMACNA-WW members—providing energy-related equipment.

9 Third, perhaps most important, the scope of the interests expressed by SMACNA-WW and its members are broader than those expressed by the Oil Heat Institute in *Cole*, and those interests are squarely within the scope of the jurisdiction of the Commission. SMACNA-WW alleged an interest in full implementation of the Energy Independence Act, “particularly the pursuit of all cost-effective conservation,”<sup>10</sup> as well as in a competitive market for the provision of energy efficiency measures.<sup>11</sup> Clearly, the Commission has authority to consider how that market will work in the context of the State fulfilling its obligations under I-937.<sup>12</sup> Indeed, the Commission Staff raised such concerns, various other persons raised such concerns at the open meeting, and the Commission’s suspension order reflected those concerns.<sup>13</sup>

10 In addition to these distinctions with *Cole*, denial of SMACNA-WW’s Petition to Intervene would lead to anomalous results in two ways.

---

<sup>9</sup> *Id.*

<sup>10</sup> SMACNA-WW Petition to Intervene ¶5, *citing* RCW 19.285.

<sup>11</sup> *Id.* ¶9.

<sup>12</sup> *See, e.g.*, RCW 19.285.050; RCW 19.285.040(e).

<sup>13</sup> Open Meeting Memo, at 2; Order 01 ¶12.

11 First, denial of SMACNA-WW's Petition would be inconsistent with settled law that would allow SMACNA-WW judicial review of the Commission decision, leading to the anomalous result that SMACNA-WW could challenge a decision in court but not be allowed to exhaust its administrative remedies. Under RCW 34.05.530,

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

12 These three criteria are met. If the PSE tariff were to be approved, SMACNA-WW and its members would be prejudiced;<sup>14</sup> the interests of SMACNA-WW and its members in a competitive market as a means to implement the conservation mandates of I-937 are among those that the Commission would need to consider (and has so indicated in its Suspension Order); and judicial review of any Commission order approving the tariff could redress the prejudice.

---

<sup>14</sup> Indeed, the Washington Supreme Court has indicated that it adheres to the law on standing articulated by the United States Supreme Court that “‘routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy’ the injury-in-fact requirement.” *Washington Independent Telephone Ass’n v. Washington Utilities & Transportation Comm’n*, 110 Wn. App. 498, 512, 41 P.3d 1212 (2002), quoting, *Seattle Building & Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 795, 920 P.2d 581 (1986).

13 Second, PSE's filing would subject SMACNA-WW and its members to a regulatory "Catch-22."<sup>15</sup> Because PSE seeks to have its ambitious leasing program approved as a regulated tariffed service, it would be immune from strictures of Washington's Consumer Protection Act, RCW 19.86 (CPA), which exempts "actions or transactions otherwise permitted, prohibited or regulated under laws administered by the . . . the Washington utilities and transportation commission."<sup>16</sup> Accordingly, if approved, because PSE's actions would not be subject to the CPA, PSE's competitors, such as SMACNA-WW members, would not have a cause of action under the CPA against PSE for anti-competitive behavior.<sup>17</sup> And, to further the unfairness, remedies available under the public service laws, in RCW 80.04.110, by which competitors can bring complaints regarding unfair practices before the Commission, would not, under PSE's theory, be available to contractors.

14 So, here is the Catch: SMACNA-WW members would lose their CPA remedies because PSE would compete as a regulated service, but they could not take advantage of the remedies in the Public Service Laws, because they are not regulated. So, unlike the situation in *Cole*, the prospective intervenors here would actually lose a statutory right if the PSE tariff were to be approved as filed. Under current law, SMACNA-WW members would have statutory protections and rights under the CPA vis-à-vis all actors in the market. If the Commission were to approve the PSE tariff as a regulated service, then SMACNA-WW members would not have

---

<sup>15</sup> Joseph Heller, *Catch-22*.

<sup>16</sup> RCW 19.86.170.

<sup>17</sup> RCW 19.86.090. Ironically, under PSE's proposal, PSE would have a cause of action under the CPA against contractors.

those protections and rights vis-à-vis one significant market participant. Certainly maintenance of those CPA rights and remedies in this market constitutes a “substantial interest.”

15 Actually, the “Catch” is more elaborate. Not only would CPA and Title 80 remedies not be available to contractors, but, according to PSE’s reply to SMACNA-WW’s Petition to Intervene, associations of contractors may not even raise these issues at the outset in this proceeding.

SMACNA-WW and its members would be permanently relegated to the regulatory sidelines not just in the proceeding, but in the new market that PSE contemplates.

16 In sum, SMACNA-WW has a substantial interest in this proceeding, and *Cole* should not be read to deprive the Commission of the opportunity to hear from SMACNA-WW and its members who are engaged in the market into which PSE seeks to expand.

**SMACNA-WW’s Intervention Is in the Public Interest**

17 The Commission should also grant SMACNA-WW intervenor status because its participation is in the public interest.

18 The PSE proposal has dramatic implications for Washington’s energy policy. At issue is how Washington can best implement its policies of maximizing costs-effective energy conservation and developing distributed energy resources. These are legislative-type decisions that frequently are considered in rule-making proceedings, with broad participation invited and expected from many stakeholders. While it is clear that agencies may make policy either through generalized rule-making proceedings or in case-by-case adjudications,<sup>18</sup> Washington has

---

<sup>18</sup> See *Securities & Exchange Comm’n v. Chenery Corp.* 332 U.S. 194, 202-03 (1947).

articulated a preference for rule making and the broader participation that it entails.<sup>19</sup> While this proceeding currently is cast as an adjudication,<sup>20</sup> that does not mean that the Commission should artificially confine the participants to just a few parties.

19 PSE argues that the “independent business interests” of SMACNA-WW and its members “are not a public interest.”<sup>21</sup> Again, PSE fails to recognize the broader interests of SMACNA-WW in the operation of a competitive market as a means of effecting state policies on energy conservation. Because the Commission itself has indicated a need to examine how the existing market works in the provision of the goods and services PSE seeks to provide through its lease program, it would seem rational – indeed, in the public interest – to ascertain how that market is working from existing participants in that market. The public interest would not be served by criticizing the operation of the current market without hearing from the participants in that market.

## CONCLUSION

20 Accordingly, the Commission should grant the Petition to Intervene filed by SMACNA-WW and develop a schedule by which the parties can contribute information and argument in order to best assist the Commission as it develops policy on the issues raised in PSE’s proposal.

---

<sup>19</sup> See William R. Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 796-99 (1989) (describing public policy advantages of rulemaking over adjudication as a means to articulate policy).

<sup>20</sup> Of course, it is possible that the Commission could deem it desirable to convert this proceeding to a rule-making proceeding pursuant to RCW 34.05.070.

<sup>21</sup> PSE Opposition at 6.



Dated January 4, 2016.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jeffrey D. Goltz", written over a horizontal line.

Jeffrey D. Goltz  
Valerie K. Rickman  
Cascadia Law Group  
606 Columbia Street, N.W., Suite 212  
Olympia, WA 98501  
(360) 528-3026  
jgoltz@cascadialaw.com

Attorneys for Sheet Metal and Air Conditioning  
Contractors National Association, Western Washington  
Chapter (SMACNA-WW)