

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION  
COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION  
COMMISSION,

Complainant,

v.

NORTHWEST NATURAL GAS  
COMPANY,

Respondent.

.....  
In the Matter of the Petition of

NORTHWEST NATURAL GAS  
COMPANY

For an Accounting Order Authorizing  
Deferred Accounting Treatment of  
Certain Costs Associated with the  
Smart Energy Program.

DOCKET NO. UG-080519

DOCKET NO. UG-080530

(consolidated)

COMMISSION STAFF AND  
PUBLIC COUNSEL'S JOINT  
ANSWER TO NORTHWEST  
NATURAL GAS COMPANY'S  
PETITION FOR ADMINISTRATIVE  
REVIEW

1. Pursuant to WAC 480-07-825(4), Commission Staff and the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) file this Joint Answer to Northwest Natural Gas Company's (NW Natural or the Company) Petition for Administrative Review of the Commission's Initial Order.

**I. INTRODUCTION**

2. NW Natural wishes to resell, to its customers, greenhouse gas offsets obtained on the customers' behalf by a third party, The Climate Trust. According to the tariff proposed by the Company, the purpose of this "Smart Energy" program is to allow NW Natural's customers to "offset greenhouse gas emissions associated with their natural gas use by purchasing high quality

project-based emission reductions from offset projects developed by The Climate Trust.”<sup>1</sup> The tariff sheets list monthly “rates” for contributions to these greenhouse gas offset projects.<sup>2</sup> The Company also filed a petition for authorization to establish a deferral that would allow it to recover certain program start up cost from all of its ratepayers. The Company has stated that its tariff filing is contingent on the Commission’s approval of the deferral.<sup>3</sup> In other words, unless the Commission authorizes a deferral to allow the Company to recover part of the program costs through general rates, NW Natural will not offer the program in Washington.

3. The Initial Order grants Staff and Public Counsel’s motions for summary determination and rejects the Company’s tariff filing and petition for deferred accounting of certain program costs. The dispositive issue addressed by the Initial Order is whether the Commission may “place its legal imprimatur upon [the] program by authorizing it as a tariff service”<sup>4</sup> and whether the Commission may authorize a deferral for the purpose of enabling the Company to recover part of the cost of the program from ratepayers who do not elect to purchase greenhouse gas offsets through NW Natural’s Smart Energy program. The Initial Order finds that it is not within the Commission’s legal authority to approve the program, “particularly in light of the fact that the program requires involuntary payments by customers who do not choose to participate.”<sup>5</sup> Staff and Public Counsel support this central finding of the Initial Order. Regardless of whether the Commission has authority to approve the tariff filing (a point on which Staff and Public Counsel disagree), the Commission cannot approve the program as proposed and allow the Company to recover program costs from non-participants.

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<sup>1</sup> Schedule U, “Smart Energy Program (Pilot)” Tariff, Original Sheet U.1 (filed March 21, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Petition, ¶ 3.

<sup>4</sup> Initial Order, ¶ 17.

<sup>5</sup> *Id.*, ¶ 6.

## II. ANSWER

### A. NW Natural's Assertions of "Utility Related Benefits" Are Speculative, Unconvincing, and Insufficient to Defeat Staff and Public Counsel's Motions for Summary Determination.

4. Staff and Public Counsel's motions for summary determination presented two questions: (1) is the Smart Energy program a utility service that the Commission is authorized to regulate, and even assuming that it is, (2) is it permissible to allow recovery of program costs from non-participating ratepayers?
5. In its motion, Public Counsel argued that that Commission lacks authority to approve the tariff or to allow recovery of program costs from non-participating ratepayers. Staff argued that the Commission could approve the tariff, but lacks authority to allow recovery of program costs from ratepayers. The Initial Order concluded that it is unlikely that the Commission possesses the authority to approve any carbon offset program, regardless of whether non-participating customers bear any of the costs.<sup>6</sup> However, noting that the tariff approval question need not be reached, the Initial Order concluded: "[e]ven accepting the unlikely proposition that the Commission has implied authority to approve the program as a tariff service, it is appropriate to deny the Company's petition and the tariff filing that requires the petition's approval, according to the Company."<sup>7</sup>
6. NW Natural offers the same response to both issues raised by Staff and Public Counsel's motions. The Company asserts that the Smart Energy program provides "broad utility-related benefits" to all of the Company's customers because "participation in the program will provide

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<sup>6</sup> *Id.* at ¶¶ 18, 31.

<sup>7</sup> *Id.* at ¶ 31.

the Company with knowledge and experience that will reduce its costs to comply with future carbon regulation.”<sup>8</sup> This conclusory statement is not enough to defeat summary determination.

7. The Commission’s enabling statute, RCW 80.01.040, limits the Commission’s authority to regulation of utility services, e.g. the provision of electricity or natural gas. Moreover, gas distribution companies are not presently required to offer customers the option of purchasing carbon emission offset credits. It is important to note that customers purchasing greenhouse gas offsets under the Smart Energy program would not actually purchase either gas or a conservation service, but would instead make a voluntary contribution to fund projects to reduce the release of greenhouse gases from other sources (such as through reforestation) as a means of “offsetting” the carbon dioxide released by the customer’s combustion of natural gas supplied by NW Natural. Although it is possible that gas distribution companies may be required to meet emissions standards with the option of purchasing greenhouse gas credits or offsets, they are not presently required to do so.<sup>9</sup>

8. Thus, even when the evidence that NW Natural offers in support of these assertions is construed in the light most favorable to NW Natural, the purported “utility-related benefits” are highly speculative at best. The Company’s affidavits do not convincingly demonstrate that a greenhouse gas cap and trade regime is likely to be imposed on gas local distribution companies in the near term, or how the Smart Energy program—which simply facilitates customer contributions to The Climate Trust—would lower the Company’s cost of complying under such

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<sup>8</sup> Petition, ¶ 5.

<sup>9</sup> Additionally, there is debate over whether such a regulatory scheme should hold a gas distribution company responsible for its customer’s emissions. Staff Motion, Thompson Decl., Exh. C (NW Natural’s Response to Staff Data Request No. 5).

a regime. In summary, NW Natural has not asserted specific facts necessary to defeat summary judgment.<sup>10</sup>

**B. The Initial Order Correctly Concludes That Applicable Case Law Does Not Support Commission Authority to Approve Smart Energy or To Allow Recovery of Program Expenses Through General Rates.**

9. The Initial Order correctly concludes, based on the reasoning in *Jewell v. WUTC*<sup>11</sup> and *Okeson v. City of Seattle*<sup>12</sup>, that the Commission may not allow the Company to recover expenses associated with its carbon offset program, however laudable, from general ratepayers who have not volunteered the use of their money for this purpose.
10. NW Natural is incorrect in stating that the legislative response to *Okeson* supports its contention that the Commission has authority to approve Smart Energy.<sup>13</sup> In *Okeson*, a group of Seattle City Light customers brought a class-action lawsuit against the City of Seattle, arguing that payments City Light made for greenhouse gas offsets were “illegal because they lack[ed] sufficient nexus to the utility’s statutorily prescribed purpose, which [was] to supply people with electricity.”<sup>14</sup> The Supreme Court of Washington agreed.<sup>15</sup> Shortly after the Court’s decision in *Okeson*, the Legislature amended the statutory authority of the various publicly-owned (city and town, county, and public utility district) electric utilities to provide the statutory authority that the Court in *Okeson* found lacking.<sup>16</sup> In its Petition, NW Natural states that this amendatory language of RCW 35.92 suggests that the legislature wanted to clarify that purchasing carbon

<sup>10</sup> See *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13-14, 721 P.2d 1, 7-8 (1986) (holding that the nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment).

<sup>11</sup> 90 Wn.2d 775 (1978).

<sup>12</sup> 159 Wn.2d 436, 150 P.3d 556 (2007).

<sup>13</sup> Petition, ¶¶ 22-23.

<sup>14</sup> 159 Wn.2d 436, 444.

<sup>15</sup> *Id.* at 452.

<sup>16</sup> 2007 Wash. Laws, ch. 349.

offsets is a legitimate activity of municipal utilities and that there is no reason to believe that it would not feel the same way regarding investor-owned utilities.<sup>17</sup> The Company's reasoning strays far from the language of the statute. Moreover, it is not supported by legislative history. Finally and most critically, as the Initial Order correctly points out, "it is unavoidably true that the amendment of RCW 35.92 did not confer any power on the Commission concerning greenhouse gas offset programs for investor-owned utilities governed under RCW Title 80."<sup>18</sup> As a matter of law, amendments to RCW 35.92 apply only to municipal utilities and not to investor-owned utilities such as NW Natural.<sup>19</sup>

11. Moreover, as Staff and Public Counsel previously argued and as the Initial Order concludes, the Washington Supreme Court's decision in *Jewell* prohibits NW Natural from recovering program costs from all customers.<sup>20</sup> The Initial Order properly states that *Jewell* prohibits customers from being "required to make involuntary payments to provide benefits that are outside the scope of the Commission's regulatory authority."<sup>21</sup>

**B. The Commission's 1993 Washington Natural Gas Order Does Not Support Subsidy of Smart Energy Program Costs By Non-participating Customers.**

12. NW Natural contends that the Initial Order is incorrect in holding that the Commission lacks the authority to allow NW Natural to recover program costs from all customers. NW Natural argues that it *may* recover costs from all customers because "some of the benefits of the program flow to all customer classes" and supports this argument by citing a 1993 Washington Natural Gas Company (WNG) Order.<sup>22</sup> However, the Initial Order properly points out that the

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<sup>17</sup> Petition, ¶ 23.

<sup>18</sup> Initial Order, ¶ 24.

<sup>19</sup> Petition, ¶¶ 22-23.

<sup>20</sup> Initial Order, ¶ 21.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at ¶ 24.

Commission did not “accept in that case the argument that cross-subsidy among classes of ratepayers is permissible based on arguments of indirect benefits to all customer classes.”<sup>23</sup> Indeed, nothing in the WNG Order “explicitly allowed” a subsidy across customer classes, as NW Natural argues. On the contrary, the 1993 Order required WNG to increase rates for future years to reduce any cross-subsidization and to institute cost-recovering rates for new furnaces.<sup>24</sup> Moreover, NW Natural ignores the Commission’s more relevant ruling in the same docket, rejecting a proposal by WNG to subsidize construction of compressed natural gas filling stations.<sup>25</sup> Finally, as discussed above, the Supreme Court’s holding in *Jewell* prohibits NW Natural from recovering Smart Energy program costs through general rates.

**C. The Initial Order Properly Concludes That the Commission May consider RCW 19.29A.090’s Prohibition Against Recovery of Closely Analogous Electric Utility Green Tag Program Costs From All Ratepayers.**

13. NW Natural incorrectly states that the Initial Order “relies [on RCW 19.29A.090] to find . . . that the Smart Energy Program costs should not be borne by all customers.”<sup>26</sup> In fact, the Initial Order finds the green tag statute instructive, but not dispositive for its holdings. The Initial Order simply finds the statute, which applies to investor-owned electric utility “green tag” programs, to be a more closely analogous indication of legislative intent than the post-*Okeson* amendments to the municipal utility statutes on which NW Natural relies.<sup>27</sup> Moreover, the Initial Order does not, as NW Natural contends, ignore the differences between green tag and carbon

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<sup>23</sup> Initial Order, n.27. See also, Commission Staff’s Response to Motions for Summary Determination, ¶8; Public Counsel’s Response to Motions for Summary Determination, ¶¶ 13-17.

<sup>24</sup> *WUTC v. Washington Natural Gas, Co.*, Docket No. UG-920840, 4<sup>th</sup> Suppl. Order (Sept. 27, 1993), pp. 16-17.

<sup>25</sup> Docket No. UG-920840, 3<sup>rd</sup> Suppl. Order (March 12, 1993).

<sup>26</sup> Petition, ¶ 29.

<sup>27</sup> The Order prefaces its discussion by stating, “assuming for the sake of discussion that the Commission has implied power to authorize a tariff providing for customer purchases of carbon offsets . . . .” In a later paragraph, the Order again prefaces its discussion by stating, “[e]ven putting to one side the fundamental question of our legal authority to approve the Smart Energy Program at all . . . .”

offset programs. Instead, the Order focuses on the issue of cost-recovery for both types of programs, a comparable issue regardless of any differences between green tags and carbon offset programs. Thus it is instructive, although not necessary to the Initial Order's holding, that RCW 19.29A.090 does not allow recovery of program costs from all customers. It is also telling that the legislature has considered, and explicitly rejected, amending RCW 19.29A.090 to allow recovery of marketing and administrative costs.<sup>28</sup>

14. The similarity of the cost recovery issue is not outweighed by the differences between the programs that the Company points out. First, NW Natural's concern about the risks to its reputation that come from offering the program are weakened by the fact that NW Natural is itself requesting to offer Smart Energy absent any legislative mandate to do so—if the potential risks were indeed that great, NW Natural could simply not offer the program. Additionally, the educational potentials of Smart Energy are not so dissimilar from the educational benefit of a green tag program as to impose its costs on all ratepayers—the benefits of alternative energy and carbon offsets are both complex subjects that the public may not readily understand.

**D. The Focus of The Initial Order is Properly Limited to The Threshold Question of Commission Authority to Approve the Tariff Filing and Accounting Petition.**

15. The Initial Order focused on a single, threshold question: whether the Commission has the legal authority to approve the Smart Energy program as proposed, including NW Natural's requirement that program costs be recovered from non-participating customers.<sup>29</sup> Administrative Law Judge Dennis J. Moss properly constrained his consideration to this threshold question.<sup>30</sup>

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<sup>28</sup> Initial Order, n.30.

<sup>29</sup> *Id.* at ¶ 15.

<sup>30</sup> *Id.* at ¶ 12.



Judge Moss correctly concluded that the Commission lacks this authority.<sup>31</sup> The Commission need not consider the public policy arguments propounded by NW Natural in its initial filings and the current Petition because the Initial Order's critical determination of Commission authority renders such consideration moot.

### III. CONCLUSION

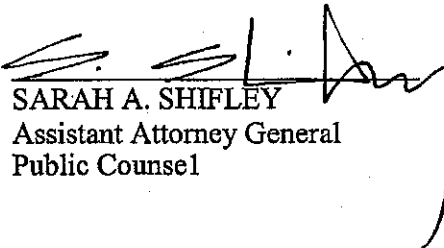
16. For the foregoing reasons, Commission Staff and Public Counsel respectfully request that NW Natural's Petition for Administrative Review be denied and that the Initial Order be entered as Final.
17. DATED this 13<sup>th</sup> day of November, 2008.

Respectfully submitted,

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<sup>31</sup> *Id.* at ¶ 6 (stating, “[i]t is not within the Commission’s expressed or implied power to order into effect and oversee a program to enable a regulated investor-owned natural gas company to purchase voluntary carbon offsets using revenue recovered from customers through a combination of voluntary and involuntary payments in rates.”)