

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET UG-080519
TRANSPORTATION COMMISSION,	)	(consolidated)
	)	
Complainant,	)	
	)	
v.	)	
	)	
NORTHWEST NATURAL GAS	)	
COMPANY,	)	
	)	
Respondent.	)	
.....	)	
	)	
In the Matter of the Petition of	)	DOCKET UG-080530
	)	(consolidated)
NORTHWEST NATURAL GAS	)	
COMPANY	)	ORDER 05
	)	
For an Accounting Order Authorizing	)	ORDER DENYING PETITION FOR
Deferred Accounting Treatment of	)	ADMINISTRATIVE REVIEW
Certain Costs Associated with the	)	
Smart Energy Program.	)	
.....	)	

1 ***SYNOPSIS.*** *This Order denies Northwest Natural Gas Company’s petition for administrative review of the Initial Order in this proceeding, finding the Company has not demonstrated that any utility benefit resulting from the program is commensurate with its costs. The Commission upholds the Initial Order’s decision to reject the accounting petition, finding that the Company’s proposal would inappropriately recover program costs from customers who elect not to participate.*

**SUMMARY**

- 2 **BACKGROUND AND PROCEDURAL HISTORY.** On March 21, 2008, Northwest Natural Gas Company (NW Natural or Company) filed with the Washington Utilities and Transportation Commission (Commission) in Docket UG-080519 revisions to its currently effective Tariff WN U-6 that would incorporate a new schedule implementing a pilot program allowing customers to voluntarily offset the greenhouse gas (GHG) emissions that result from their use of natural gas. The new tariff is referred to as the “Smart Energy Program (Pilot).” The Smart Energy Program tariff had a stated effective date of May 1, 2008.<sup>1</sup>
- 3 On March 24, 2008, NW Natural filed with the Commission in Docket UG-080530 a petition seeking an accounting order authorizing the deferred treatment of certain “start-up” costs associated with the Smart Energy Program.<sup>2</sup> Once authorized, the Company would recover these costs in rates charged to all customers who are eligible for the program, whether or not they elect to participate.<sup>3</sup>
- 4 The proposed tariff would establish a voluntary program for residential and commercial customers. The proposed rates are designed to fund the cost of carbon offsets<sup>4</sup> and the ongoing administrative costs associated with the program.<sup>5</sup> The start-

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<sup>1</sup> The Oregon Public Utility Commission (Oregon PUC) approved the Company’s request to establish the Smart Energy Program in Oregon on August 31, 2007. The Oregon PUC also approved NW Natural’s application for an accounting order allowing the Company to defer accounting treatment for start-up costs.

<sup>2</sup> NW Natural seeks authority to defer for later collection in general rates up to \$79,000 in “start-up” costs of the pilot in Washington, which it estimates will be required for 2008 and 2009 combined. This amount reflects the fact that only about 10 percent of the Company’s customers are in Washington.

<sup>3</sup> The Company states in its tariff filing that “implementation of the Smart Energy Program is contingent upon approval of the [accounting] Petition” and the Company “will withdraw this tariff filing in the event the Petition is not approved.”

<sup>4</sup> NW Natural has partnered with The Climate Trust to offer this program. The Climate Trust is a nonprofit organization headquartered in Oregon that purchases project-based emission reductions. The Climate Trust has agreed to develop greenhouse gas offset projects on behalf of Smart Energy participants.

<sup>5</sup> Administrative costs are expected to require approximately 30 percent of the anticipated revenue collected over the term of the pilot. Exhibit E to July 18, 2008, Affidavit of William R. Edmonds in support of NW Natural’s Motion for Summary Determination at 4:188 [Edmonds July 18 Affidavit].

up costs reflect principally the costs of promotional/educational materials describing the program and its benefits to customers, and soliciting their participation. However, the voluntary payments by customers were intentionally designed to recover only a portion of the program's full costs.<sup>6</sup> The remaining costs, about \$1,275,200 over the term of the pilot, are proposed to be paid by all of the Company's customers.<sup>7</sup>

- 5 After presentations by Commission Staff and the Company at the Commission's April 30, 2008, Open Meeting, the Commission entered Order 01 in Dockets UG-080519 and UG-080530 on May 2, 2008, consolidating the two proceedings, suspending the tariff revisions, and setting the proposed tariff revisions and accounting petition for hearing.
- 6 The Commission convened a prehearing conference on June 13, 2008, before Administrative Law Judge Dennis J. Moss. The Northwest Energy Coalition (NWECC) appeared and was granted status as an intervenor without objection. After the parties agreed that the dockets presented only legal and policy issues that could be resolved without an evidentiary hearing, the presiding officer set a procedural schedule requiring the parties to file motions for summary determination and responses. This schedule was adopted in Order 02. At the Company's request, Judge Moss entered Order 03, a protective order.
- 7 NW Natural, NWECC, Staff and Public Counsel filed motions for summary determination and answers. The Company attached to its motion and answer the affidavits of Kimberly A. Heiting and exhibits discussing customer communications and focus groups efforts, and the affidavits of William R. Edmonds and exhibits discussing the details of the proposed program, carbon offset programs generally and future prospects for greenhouse gas emissions legislation. Staff attached to its motion the Oregon PUC staff memos, Oregon PUC Order on the Smart Energy Program and the Declaration of Jonathan Thompson, attaching the Company's responses to certain data requests.

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<sup>6</sup> *Id.* at 1:17.

<sup>7</sup> *Id.* at 1:14.

- 8 After reviewing the parties' motions answers and attachments, Judge Moss entered Order 04, Initial Order Rejecting Tariff and Accounting Petition, on October 14, 2008. The Initial Order denied NW Natural's petition for an accounting order and rejected the Smart Energy Program tariff filing finding the Commission lacks express and implied legal authority to approve the filing, particularly because it requires involuntary payments by non-participating customers.
- 9 NW Natural filed a petition for administrative review of the Initial Order on November 3, 2008. Commission Staff and Public Counsel filed a joint answer opposing the petition on November 13, 2008.
- 10 **APPEARANCES.** Lisa F. Rackner, McDowell & Rackner, Portland, Oregon, represents NW Natural. David S. Johnson, Attorney, represents the Northwest Energy Coalition (NWECA). Sarah Shifley, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington Office of Attorney General (Public Counsel). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).<sup>8</sup>

### MEMORANDUM

- 11 The central issues in this case are whether the Commission has the authority to approve NW Natural's Smart Energy tariff, and whether the Commission has jurisdiction to adopt an accounting petition that would result in non-participating customers bearing the costs of a voluntary program. The Initial Order considered the issues on motions for summary determination and found, as a matter of law, that the Commission lacks the authority to approve the tariff, and that approving the petition is contrary to state law and prior Commission decisions.

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<sup>8</sup> In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. RCW 34.05.455.

12 NW Natural requests that we reverse the Initial Order, arguing that the initial decision is contrary to state policy, statute and case law. The Company requests that we approve the Smart Energy Program tariff and accounting petition, finding the program and petition within the Commission’s authority. The Company also claims the Initial Order failed to address the policy reasons for approving the filings. Staff and Public Counsel support the Initial Order’s decision.

13 For the reasons set forth below, we deny the Company’s petition for review.

### **I. Standard of Review**

14 In considering petitions for administrative review, the Commission conducts *de novo* review of the issues decided in an initial order.<sup>9</sup> The primary issues in this case were presented in cross-motions for summary determination. In resolving such motions, the Commission must determine whether there are any genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law.<sup>10</sup>

15 The Initial Order found that there were no material facts in dispute, and decided the threshold issues as a matter of law. NW Natural argues only that the Initial Order incorrectly decided the threshold legal issues, but does not contest the order’s finding concerning material facts. We consider the disputed legal issues below.

### **II. The Initial Order**

16 The Initial Order recognized that the Smart Energy Program’s goals are generally consistent with those set forth in the climate change policies established by the Governor and the state Legislature, but concluded that the Commission would require and lacks specific authority to approve the proposed tariff. Specifically, the order found that “the Legislature has not given the Commission express authority with respect to carbon emissions attributable to investor-owned natural gas utilities.”<sup>11</sup> It

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<sup>9</sup> See RCW 34.05.464(4): “The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing...”

<sup>10</sup> WAC 480-07-380(2).

<sup>11</sup> Initial Order, ¶¶ 17-18.

also determined that nothing in the Commission’s governing statutes implies such authority.<sup>12</sup>

17 The order found persuasive Staff’s arguments that while the Legislature has expressly authorized a number of means to address social and environmental objectives through utility rates and service offerings, it has not authorized addressing greenhouse gas emissions through the rates and services of natural gas companies.<sup>13</sup> Applying the principle of statutory construction that having expressly approved specific programs having similar attributes other such programs are necessarily excluded, the order concluded that the Legislature has not authorized programs for gas companies such as the Smart Energy Program.<sup>14</sup>

18 As further support, the Initial Order cited *Okeson v. City of Seattle*,<sup>15</sup> wherein the court found that municipal utilities, such as Seattle City Light, had neither express nor implied power to pay other entities to reduce their greenhouse gas emissions and to include those costs in rates paid by all ratepayers. Although recognizing that the Legislature later amended state law to allow municipalities to pursue such programs, the Initial Order stated correctly that the amendment did not extend such authority to investor-owned utilities subject to RCW Title 80.<sup>16</sup>

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<sup>12</sup> *Id.*, ¶ 18.

<sup>13</sup> *Id.*, ¶¶ 26-27, citing RCW 80.28.68 (allowing electric or gas companies to provide discount rates to low-income customers and include resulting lost revenues in rates recovered from other customers); RCW 80.28.303 (allowing gas, electric and water companies to file conservation service tariffs, and include bondable conservation investment in ratebase); and RCW 80.28.300 (allowing gas and electric companies to request donations from customers to support urban forestry).

<sup>14</sup> Initial Order, ¶¶ 26-27, citing *Washington Nat. Gas Co. v. Public Utility Dist. No. 1*, 77 Wash.2d 94, 459 P.2d 633, 636 (1969); *Silver Firs Town Homes, Inc. v. Silver Lake Water District*, 103 Wash. App. 411, 421 (2000). (“It is a well-established principle of statutory construction that ‘where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*-specific inclusions exclude implication.’”)

<sup>15</sup> 159 Wash.2d 436, 150 P.3d 556 (2007).

<sup>16</sup> Initial Order, ¶ 24.

19 Having made these determinations, the Initial Order went on to conclude that even if the Commission possessed the authority to approve the tariff, the Company's proposal to recover certain costs from non-participating customers would be unlawful, as it would require the recovery of certain costs from non-participating customers.<sup>17</sup>

20 In reaching this decision, the Initial Order also found persuasive Staff's argument that the Green Tag program provides the only statutory model for carbon offset programs in Washington, and that the Legislature prohibited recovery of program expenses from non-participants.<sup>18</sup> The Order found that if the Commission were to accept the Company's argument that legislative policy supports programs such as Smart Energy, we should also recognize the legislative policy that "volunteer programs related to environmental initiatives in utility tariffs are to be paid for by those who elect to participate, not by ratepayers generally."<sup>19</sup>

21 Further, the Initial Order rejected the Company's argument that a 1993 Commission order addressing the Washington Natural Gas Company's (WNG's) recovery of the costs of a water heater leasing program supports allocating the costs of a voluntary program to all customers, if all customers enjoy a utility benefit.<sup>20</sup> The Initial Order determined the Commission did not accept the argument that cross-subsidies among customer classes are permissible because of indirect benefits to all ratepayers, but found the tariff flawed because it did not recover an adequate return and ordered WNG to file a revised tariff to include a cost-recovering rate for the program.<sup>21</sup> The Initial Order noted that an earlier decision in the WNG case, in which the Commission rejected WNG's proposal for all customers to subsidize the cost of a voluntary program to establish compressed natural gas (CNG) fueling stations, is materially similar to NW Natural's proposal in this proceeding.<sup>22</sup>

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<sup>17</sup> *Id.*, ¶ 21. To support its reasoning, the order cited to *Jewell v. Wash. Util. & Transp. Comm'n*, 90 Wash.2d 775, 585 P.2d 1167 (1978), finding that the court determined that customers cannot be required to make involuntary payments to provide benefits that are outside the scope of the Commission's express or necessarily implied powers.

<sup>18</sup> Initial Order, ¶ 28, citing Staff Response, ¶ 6.

<sup>19</sup> *Id.*, ¶ 30.

<sup>20</sup> *Id.*, ¶ 28, n.27, citing *Wash. Util. & Transp. Comm'n v. Wash. Natural Gas Co.*, Docket UG-920840, 4<sup>th</sup> Suppl. Order (Sept. 27, 1993) [WNG 4<sup>th</sup> Supplemental Order].

<sup>21</sup> *Id.*, see also WNG 4<sup>th</sup> Supplemental Order, at 16-17.

<sup>22</sup> *Id.*, n.27, citing *Wash. Util. & Transp. Comm'n v. Wash. Natural Gas Co.*, Docket UG-920840, 3<sup>rd</sup> Suppl. Order (Mar. 12, 1993) [WNG 3<sup>rd</sup> Supplemental Order]. In that order, the Commission

### III. The Arguments of the Parties

22 NW Natural asserts that the Initial Order “gave short shrift” to the analysis of its Smart Energy Program, believing a more thorough study of the Commission’s authority would lead to a different result.<sup>23</sup> While conceding that such analysis was not necessary given that the Company has conditioned its tariff upon approval of the related accounting petition,<sup>24</sup> NW Natural argues that the Commission has broad authority under RCW 80.01.040(3) to “regulate in the public interest ... the rates, services, facilities and practices of all persons engaging within this state in the business of supplying any utility service ... to the public for compensation.”<sup>25</sup> Asserting that RCW 80.04.010 states that the term “service” should be used in its “broadest and most inclusive sense,” NW Natural claims that it is appropriate “under this mandate” to approve the program as a utility service that provides utility-related benefits to utility customers.<sup>26</sup>

23 NW Natural contends the Initial Order interprets *Jewell* too narrowly and misconstrues the decision. It argues that the decision does not turn on whether the Commission had express statutory authority to include charitable contributions in rates, but on whether the proposed service furthered the Legislature’s direction that the Commission ensure “prompt, expeditious and efficient service.”<sup>27</sup> The Company

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dismissed the proposal without prejudice, finding that: “[T]he proposal offers a direct subsidy to one class of ratepayers, purportedly to benefit society as a whole, at the expense of other classes. The company cites, and we recognize, public policies that proclaim various public benefits from natural gas vehicles, including reduced carbon emissions and reduced dependence on imported oil. The company proposes a transfer of funds from ratepayers to benefit a small group of users, although to support a public purpose. It may be more appropriate to spread the burden of supporting that public purpose among all the body politic, who all receive the social benefit, than to impose it on those who happen to be company ratepayers, who are a small group of that larger body politic. That task is for the legislature, not for the Commission.” WNG 3<sup>rd</sup> Supplemental Order, at 4.

<sup>23</sup> NW Natural Petition, ¶ 16.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, ¶ 17, citing *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 666, 911 P.2d 1301 (1996).

<sup>26</sup> *Id.*, ¶ 17.

<sup>27</sup> *Id.*, ¶ 18. The analogous statutory mandate for regulating gas companies requires the Commission to ensure that charges are fair, just and reasonable and that the companies provide safe, adequate and efficient service. *See* RCW 80.28.010(1), (2); RCW 80.28.020; *see also* NW Natural Petition, n.22.



argues that it has provided substantial evidence that its Smart Energy Program would “enhance its ability to carry out its statutory mission and will in fact result in more efficient and effective service.”<sup>28</sup>

24 NW Natural argues further that the Initial Order’s discussion of other statutes that authorize utility programs makes little sense: The order implies that any program that addresses social or environmental concerns that has not been specifically approved by the Legislature is outside the Commission’s authority. It concludes that its interpretation of *Jewell* is more appropriate.

25 The Company also disputes the Initial Order’s interpretation of the *Okeson* decision, arguing that the Legislature made clear through its recent amendments that “*Okeson* was wrongly decided and that carbon offset programs are in fact a legitimate utility service.”<sup>29</sup> It argues that if the Legislature believes that municipalities have the authority to purchase carbon offsets, then it must follow that investor-owned utilities have the same authority.<sup>30</sup>

26 NW Natural argues further that the Initial Order erred in finding the Commission lacks jurisdiction to approve the tariff and accounting petition, asserting that all customers will enjoy utility-related benefits of the program, regardless of whether they participate in the program.<sup>31</sup> To support its argument, the Company relies on the Commission’s 1993 WNG Order addressing recovery of the costs of a water heater leasing program.<sup>32</sup> The Company asserts that, as with the Smart Energy Program, the monthly lease rate was too low to fully recover program costs and WNG “proposed that all customers subsidize the cost of the program.”<sup>33</sup> NW Natural argues that the Commission found the program would provide an overall benefit to customers if the company made certain changes to the program. Thus, NW Natural argues that consistent with its interpretation of *Jewell*, the Commission has authority to approve

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<sup>28</sup> *Id.*, ¶ 20.

<sup>29</sup> *Id.*, ¶ 22.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, ¶¶ 6, 24.

<sup>32</sup> *Id.*, ¶ 24, citing *Wash. Util. & Transp. Comm’n v. Wash. Natural Gas Co.*, Docket UG-920840, 4<sup>th</sup> Suppl. Order (Sept. 27, 1993) [WNG 4<sup>th</sup> Supplemental Order].

<sup>33</sup> *Id.*

and spread costs to non-participating customers if the service provides some benefits to all customers.<sup>34</sup>

27 NW Natural also asserts the Initial Order relied improperly on the provisions of the recently enacted electric utility Green Tag statute to find that Smart Energy Program costs should not be borne by all customers.<sup>35</sup> NW Natural argues that the Green Tag statute does not apply to gas utility programs.<sup>36</sup> The Company also claims that there are policy and other differences between the Smart Energy Program and green tag programs that provide sound bases for distinguishing between them.<sup>37</sup> Specifically, the Company argues that the policy in the Green Tag statute against recovering costs from all ratepayers “is outweighed by the more timely and compelling policies the Legislature has articulated” in more recent laws requiring reductions in greenhouse gases, including statutory changes in response to *Okeson*.<sup>38</sup> The Company claims that gas utilities assume greater risks than electric utilities in offering carbon offset programs, as alternative energy options tend to enhance the image of electric utilities, while NW Natural is taking a risk that customers will view consuming natural gas as undesirable.<sup>39</sup> NW Natural also claims it will provide its customers greater educational benefits under Smart Energy than those offered by electric utilities.<sup>40</sup>

28 Lastly, NW Natural claims the Initial Order failed to consider whether the Commission should approve the tariff and accounting petition because the Smart Energy Program is good public policy.<sup>41</sup> The Company argues it has shown that the program is consistent with the policies announced by the Governor and state Legislature to reduce greenhouse gas emissions, including the Governor’s Executive Order and the passage of RCW 70.235.020 requiring the state to reduce overall greenhouse gas emissions.<sup>42</sup>

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<sup>34</sup> *Id.*, ¶ 25.

<sup>35</sup> *Id.*, ¶¶ 29-32.

<sup>36</sup> NW Natural Motion for Summary Determination, ¶¶ 42-46.

<sup>37</sup> NW Natural Petition, ¶¶ 30-32.

<sup>38</sup> *Id.*, ¶ 30.

<sup>39</sup> *Id.*, ¶ 31.

<sup>40</sup> *Id.*, ¶ 32.

<sup>41</sup> *Id.*, ¶¶ 7, 34, 39.

<sup>42</sup> *Id.*, ¶ 35.

- 29 Staff and Public Counsel agree with the Initial Order’s finding that the Commission lacks authority to allow the Company to recover from all customers the expenses related to its Smart Energy program. They concur with the Initial Order’s interpretation that *Jewell* prohibits the Company from recovering the costs of a voluntary program from all customers, thus precluding us from approving the tariff and petition.<sup>43</sup> In addition, they assert that *Okeson* and the legislative action that followed support this conclusion: The Legislature, in response to *Okeson*, amended statutes governing municipal authority and not those relating to investor-owned utilities, such as NW Natural.<sup>44</sup>
- 30 In addition, Staff and Public Counsel dispute NW Natural’s testimony that its Smart Energy Program will provide “broad utility-related benefits” to all customers by increasing its “knowledge of carbon offset projects and offset markets” and educating “Company management on the carbon offset market.”<sup>45</sup> The Company argues that such knowledge and experience will reduce costs to comply with future carbon regulations.<sup>46</sup> Staff and Public Counsel assert these claims are speculative and conclusory, and are not sufficient to defeat summary determination.<sup>47</sup> Further, Staff and Public Counsel argue that the program is not a utility service, as customers under the program would not purchase a gas or conservation service from the Company, but would instead make a voluntary contribution to fund projects by the Climate Trust, a private organization, to reduce the release of greenhouse gases. As gas companies are not currently required to meet greenhouse gas emission standards or provide customers the option to offset greenhouse gas emissions, Staff and Public Counsel argue that the “utility-related benefits of the program are at best speculative.”<sup>48</sup>
- 31 Staff and Public Counsel support the Initial Order’s finding that the Green Tag statute is instructive in this case, and should prohibit the Company from recovering administrative costs for the program from all customers.<sup>49</sup> Staff and Public Counsel also dispute the Company’s interpretation of the Commission’s WNG Order, and

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<sup>43</sup> Joint Answer, ¶ 11.

<sup>44</sup> *Id.*, ¶ 10.

<sup>45</sup> Edmonds July 18 Affidavit, at 3.

<sup>46</sup> NW Natural Petition, ¶ 5.

<sup>47</sup> Joint Answer, ¶ 6.

<sup>48</sup> *Id.*, ¶¶ 7-8.

<sup>49</sup> *Id.*, ¶ 13.

concur with the Initial Order that the Commission's rejection of a proposal that all customers pay for the construction of CNG filling stations as a part of a voluntary program is relevant to NW Natural's proposal in this case.<sup>50</sup>

#### IV. Discussion and Decision

32 The Initial Order examined the Commission's authority to approve the Company's Smart Energy Program tariff, and concluded that such authority had not been expressly established by law and could not be implied from the powers set forth in our existing statutory framework. In reaching this conclusion, the Initial Order did not decide whether the subject program performed a utility function, nor did it examine whether the program's costs were reasonable in light of its purported benefits. Having reviewed the record before us, we find that it is not necessary to decide the question of our authority, as the tariff should be rejected because the evidence presented by the Company, even taken in a light most favorable to it,<sup>51</sup> fails to establish a sufficient nexus between the program's benefits and its cost.<sup>52</sup>

33 The Company's tariff, as supported by its Motion for Summary Determination and attached affidavits, would establish an opportunity for customers of NW Natural to enroll in its Smart Energy Program. Enrollment in the program would be voluntary and entitle the enrollee to offset carbon emitted from the use of natural gas. The offsets would be sold to the enrollee for a fixed price of \$6.00 per month or \$0.10486 per therm, should the enrollee select to offset actual natural gas use. Commercial customers could elect from a set of fixed rates, with the minimum rate set at \$10.00 per month. Between 2007 and 2012, the program is expected to cost approximately \$5.7 million dollars, with \$3.1 million allocated to the purchase of carbon offsets from The Climate Trust, \$1.3 million to cover program administration costs, and \$1.3

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<sup>50</sup> *Id.*, ¶ 12.

<sup>51</sup> In resolving motions for summary determination, we must determine that there is no genuine issue as to a material fact, and that as a matter of law that summary determination is proper. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We must consider all the facts and inferences in the light most favorable to the non-moving party. *Id.*

<sup>52</sup> While we do not address directly the issue of our authority, we reject the Company's argument that the Commission may act on the basis of policy alone. An agency may only act under express or implied authority granted by the Legislature. *Cole v. Wash. Util. & Transp. Comm'n*, 77 Wash.2d 301, 306, 485 P.2d 71 (1971).

million in already expended “start-up costs.”<sup>53</sup> The benefits expected from the program can be summarized as creating an opportunity to educate Company management on the carbon offset market, and to increase its knowledge as to carbon offset projects.<sup>54</sup> The Company presents no evidence that the cost of the program is reasonable in light of the benefits received.

34 Staff and Public Counsel challenge the Company’s assertions as to the program’s benefits, arguing that its “purported utility-related benefits are highly speculative at best.”<sup>55</sup> They point out that the program does not purchase “gas or a conservation service,” but seeks to offset carbon emissions in a regulatory environment that does not require such action by natural gas utilities.<sup>56</sup> Neither party addresses the cost of the program and whether its cost is reasonable or commensurate with its purported benefits.

35 We acknowledge the Company’s arguments about the value of its program and the public policy benefits it believes will flow from its implementation. We also acknowledge Staff and Public Counsel’s assertions that the program’s benefits are speculative. The Initial Order did not address this apparent conflict in the parties’ positions. If we were to decide this issue today, we would be inclined to view this program as an exploration by the Company into the world of carbon offsets; the present value of which to be determined when a carbon management program is imposed and its details known. In this light, the program’s benefits are more speculative than certain, as it is within the realm of possibility that the carbon management program eventually selected by state or federal officials may not include the use of carbon offsets as a mitigation tool. Even if such a mitigation program is adopted, we do not know whether the training to be received by management would allow it to operate more efficiently or effectively in whatever carbon program is eventually created. All this said, the speculative nature of the program’s benefits is not the problem here. What we find lacking is evidence tying the program’s benefits

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<sup>53</sup> Edmonds July 18 Affidavit, Exhibit A, Table 2.

<sup>54</sup> Edmonds July 18 Affidavit, ¶¶ 6-9, 13. Other ancillary benefits include educating customers as to the relationship between their gas use and carbon emissions. *See* NW Natural Motion, at 4, 7.

<sup>55</sup> Joint Answer, ¶ 8.

<sup>56</sup> *Id.*, ¶ 7.

with its cost.<sup>57</sup> Neither the tariff nor the documents supporting the Company's Motion for Summary Determination provide evidence that link the program's costs to its overall benefit – no matter how uncertain.

36 For purposes of this inquiry, we examined the record provided by the moving parties to determine whether the nexus between the program's cost and its purported benefits had been developed.<sup>58</sup> We conclude it has not. Furthermore, we are skeptical that this issue can be addressed to our satisfaction. On its face, the program's expected \$5.7 million price tag seems an unreasonably high cost to provide management with a working knowledge of carbon offsets and an education as to carbon markets.<sup>59</sup> To counter, the Company would be required to show that the alternatives to this program are either more costly or less effective. As this question was not directly presented and answered, we reject the tariff. We note that the tariff may have been acceptable had the Company not conditioned implementation on approval of its accounting petition, which spreads program costs to non-participants.<sup>60</sup>

37 Requiring all customers to pay for the costs of voluntary program, and linking the Company's pursuit of the tariff to approval of the petition is problematic. We find instructive the treatment of administrative costs under the Green Tag statute applicable to electric utilities. The Green Tag statute provides, in relevant part, that "[a]ll costs and benefits associated with any option offered by an electric utility under this section must be allocated to the customers who voluntarily choose that option and *may not be shifted to any customers who have not chosen such option.*"<sup>61</sup> We concur with the Initial Order that the Green Tag statute, and its prohibition against cost recovery by all customers, provides an appropriate model for carbon offset programs

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<sup>57</sup> The questions of utility purpose, benefits to management or ratepayers, and the reasonableness of cost are all related. To approve any tariff, we must decide that the action proposed has a utility purpose, provides benefits (e.g. directly or satisfies a need), and that the rates proposed are fair, just, reasonable and sufficient. *See Jewell*, 90 Wash.2d 775, 585 P.2d 1167 (1978), RCW 80.28.020.

<sup>58</sup> In other words, the Company would have to demonstrate that the proposed tariff results in fair, just, reasonable and sufficient rates given its projected benefits.

<sup>59</sup> We understand that Company shareholders will cover certain start up costs. NW Natural Motion for Summary Determination, ¶ 22.

<sup>60</sup> We believe the tariff's purposes could be met by a voluntary program, wherein those customers seeking to satisfy social and environmental objectives could participate. In this circumstance, we would be less concerned with issues related to utility purpose and the cost/benefit analysis.

<sup>61</sup> RCW 19.29A.090(5) (emphasis added).

for investor-owned utilities. Thus, we reject NW Natural's accounting petition, and deny the Company's petition for review.

38 In denying the Company's petition for review, and rejecting the tariff and accounting petition, we do not provide an opinion on the merits of the Smart Energy Program, or dispute that its purpose is laudable. We simply find that the Company has not demonstrated that the program's utility benefits are commensurate with its costs, and that condition the Company imposes in the accounting petition, that all customers bear the start-up costs of the program, prevents us from approving the tariff and accounting petition.

### **FINDINGS OF FACT**

39 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

40 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates, rules, regulations, practices, and accounts of public service companies, including gas companies.

41 (2) Northwest Natural Gas Company (NW Natural) is a "public service company" and a "gas company," as those terms are defined in RCW 80.04.010 and as those terms otherwise are used in Title 80 RCW. NW Natural is engaged in Washington state in the business of supplying natural gas to the general public for compensation.

42 (3) NW Natural's Smart Energy Program tariff would implement a pilot program to allow customers to voluntarily offset greenhouse gas emissions that result from their use of natural gas.

- 43 (4) NW Natural filed an accounting petition requesting the Commission allow deferral of start-up costs for the Smart Energy Program, proposing to recover the deferred amounts from all customers whether or not they participate in the voluntary program.
- 44 (5) The Company conditions its implementation of the Smart Energy Program on the Commission's approval of the deferred accounting petition.

### CONCLUSIONS OF LAW

- 45 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 46 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 47 (2) The Commission conducts a *de novo* review when considering petitions for administrative review of initial orders. *See RCW 34.05.464(4)*.
- 48 (3) The Commission must grant a motion for summary determination if the moving party demonstrates that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law.
- 49 (4) The Company has not demonstrated that the Smart Energy Program's benefits are commensurate with its cost.
- 50 (5) The prohibition in the electric utility Green Tag statute against companies recovering the administrative costs of voluntary carbon offset programs from all customers provides guidance in considering the Company's accounting petition.



- 51 (6) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order. *RCW Title 80.*

**ORDER**

**THE COMMISSION ORDERS:**

- 52 (1) Northwest Natural Gas Company's Petition for Administrative Review is denied.
- 53 (2) Northwest Natural Gas Company's petition for an accounting order authorizing deferred treatment of certain Smart Energy Program costs for later recovery from all customers in general rates, filed on March 24, 2008 in Docket UG-080530, is denied.
- 54 (3) The Tariff Schedule designated as Sixth Revision of Sheet six, Original Sheet U.1 and Original Sheet U.2, (Smart Energy Program Pilot) filed by Northwest Natural Gas Company in Docket UG-080519 on March 21, 2008, is rejected.
- 55 (4) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington and effective February 27, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES: This is a Commission Final Order. 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 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.**