

COMMENTS OF ARCO PRODUCTS COMPANY

Re: In the Matter of Rulemaking Concerning Special Contracts for Electric, Water and Natural Gas Utilities
Docket No. U-001928
WAC 480-80-335

ARCO Products Company (“ARCO”) hereby submits the following written comments on the Washington Utilities and Transportation Commission’s proposed review of the rule governing the Commission’s regulation of special contracts for electric, water and natural gas utilities. WAC 480-80-335. Specifically, the Commission will inquire into and define the essential terms and conditions of special contracts subject to approval of the Commission under the rule. As part of its review of any proposed special contract, the Commission will make the essential terms and conditions of the contract available to the public.

In previous litigation, ARCO has made clear its strong concern over the possible public disclosure of valuable cost-related information contained in its 1995 and 1999 Power Sale and Services Agreements with Puget Sound Energy (“Puget”) relating to ARCO’s Cherry Point Refinery.¹ ARCO and Puget sought and obtained injunctions against disclosure of both the 1995 and 1999 Agreements.² The basis of the injunctive relief granted by Judges Berschauer and Pomeroy is a statute, RCW 80.04.095, which is part of the Washington Public Utilities Act, Ch. 80.04 RCW. A copy of the statute is attached to these Comments. The statute states that records submitted to the Commission “shall not be subject to inspection or copying” if such documents “contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer specific usage and network configuration and design information . . .” until (1) notice to the person(s) affected; and (2) if the person(s) obtain a court order protecting the records as confidential within ten days. (Emphasis added.) The statute further states that the court “shall determine the records are confidential . . . if disclosure would result in private loss, including an unfair competitive disadvantage.”

ARCO has genuine and serious concern that, should the Commission interpret “essential terms and conditions” too broadly in its rulemaking, ARCO would suffer significant private loss by being placed at a competitive disadvantage. As described in the declaration of Glenn Butler, Manager of ARCO’s Cherry Point Refinery, the petroleum refining industry is an intensely

¹ ARCO Products Co. and Puget Sound Energy v. Wash. Public Utilities & Trans. Comm., Thurston County No. 99-2-00548-9 (1999); Puget Sound Power & Light Co and ARCO Products Co. v. Wash. Public Utilities & Trans. Comm., Thurston County No. 96-2-01441-6 (1996).

² The 1996 temporary restraining order was converted to a permanent injunction by Judge Daniel Berschauer. The 1999 preliminary injunction issued by Judge Christine Pomeroy is still in effect, pending these rulemaking proceedings, pursuant to a settlement agreement entered into by the parties.

competitive business.³ Three other refineries compete with ARCO in the Northern Puget Sound area. Because of factors specific to its facility, ARCO's competitive position depends to large degree on the cost of two inputs: oil and electricity. After crude oil, electrical power is the single largest variable cost in producing ARCO's refined petroleum products at Cherry Point. The 1999 Agreement contains competitively sensitive information related to the terms of price, pricing formula, guaranteed supply, delivery conditions and other matters inextricably linked to the delivery and sale of electricity to the Cherry Point Refinery. It will govern ARCO's cost of electrical power until June 30, 2012, unless earlier terminated.

The value of ARCO's bargain with Puget would be dissipated if the provisions relating to pricing and cost are disclosed to members of the public, including ARCO's competitors. Because refineries are major consumers of energy, the arrangements they make to purchase electricity and natural gas are critical to their survival in a very competitive market. Disclosure of the customer-specific information in the 1999 Agreement would place ARCO at a competitive disadvantage with the other Puget Sound refineries, and would result in the very type of "private loss" that RCW 80.04.095 is designed to prevent. The same conclusion applies to future contracts of a similar nature.

The Commission's rulemaking must be consistent with its underlying statutory authority, specifically including, in this case, RCW 80.04.095. In a proceeding involving judicial review of a rule, a court must declare a rule invalid if it finds that the rule exceeds the statutory authority of the agency. RCW 34.05.570(2)(c). Courts have struck down Commission rules on this ground.⁴ Applying this principle to the instant rulemaking, the Commission must abide by the confidentiality requirements of RCW 80.04.095 in identifying and describing "essential terms and conditions" that will be publicly disclosed as part of the Commission's review of special contracts under WAC 480-80-335. The "essential terms and conditions" subject to disclosure must not include the specific pricing and cost-related information in ARCO's power contracts with Puget and other regulated utilities. Were the Commission to draft a rule requiring disclosure of such terms, it would directly conflict with ARCO's statutory right to obtain a court order prohibiting such disclosure. Such rulemaking would therefore conflict with a statute and be beyond the Commission's legal authority under its enabling legislation, of which RCW 80.04.095 is a part.

The Commission should therefore craft a rule that identifies important contract elements that will be publicly disclosed in summary form, while respecting the confidentiality of information protected by RCW 80.04.095. Requiring disclosure of pricing and cost information in ARCO's contracts with utilities would be beyond the Commission's legal authority, for the

³ Declaration of Glenn Butler in Support of TRO, No. 99-2-00548-9 (1999).

⁴ See, In Re Electric Lightwave, Inc., 123 Wn.2d 530, 536-42, 869 P.2d 1045 (1994) (Commission powerless to grant monopolies to Local Exchange Commissions); Wash. Independent Telephone Assoc. v. Telecomm. Ratepayers Assoc., 75 Wn. App. 356, 880 P.2d 50 (1994) (Commission exceeded its statutory authority in promulgating rule creating community calling fund).

reasons stated above. ARCO's proposed approach complies with RCW 80.04.095 and is consistent with the legitimate distinction between utility services provided under a rate schedule and services provided through a special contract. Maintaining the statutorily required confidentiality of such information will not impede the Commission's ability to review special contracts and act in the public interest, because the Commission, as it does now, will have before it the entire contract and required submittals from the applicant. The Commission has already approved the 1999 Agreement and found it to be in the public interest.⁵

ARCO appreciates this opportunity to provide the Commission with its written comments and looks forward to participating further in these proceedings.

⁵ See Order Approving Contract, Docket No. UE-990284