

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.

PUGET SOUND ENERGY
Respondent.

DOCKET UE-161123

ORDER 04

ORDER DENYING THE PETITION TO
INTERVENE FILED BY THE
NORTHWEST AND
INTERMOUNTAIN POWER
PRODUCERS COALITION

- 1 **PROCEEDING:** On October 7, 2016, Puget Sound Energy (PSE or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff WN-60, Schedule 451 – Large Customer Retail Wheeling. On October 18, 2016, the Commission entered Order 01, Complaint and Order Suspending Tariff Revisions. The Company requests approval of a new retail wheeling service for large non-core customers.
- 2 PSE proposes an optional schedule for customers who have maintained a minimum of an average of 10 average megawatts (aMW) at one or more customer sites served under Schedule 40 – Large General Service Greater Than 3 aMW over the entire test year of the most recent general rate case. PSE also seeks approval of the signed Service Agreement between the Company and Microsoft Corporation, including the Service Agreement’s \$23.685 million Power Supply Stranded Cost Charge.
- 3 **NIPPC’s Petition to Intervene.** On November 2, 2016, the Northwest and Intermountain Power Producers Coalition (NIPPC) filed a Petition to Intervene (Petition). NIPPC is a trade association whose members include independent power producers active in the Pacific Northwest and Western energy markets.¹ NIPPC contends that its “members’ ability to participate in competitive energy markets and sell power to Washington customers may be directly impacted by this proceeding.”² For this reason, NIPPC states that it has a substantial interest in the matter and requests that the Commission grant its Petition.

¹ NIPPC’s Petition, ¶ 4.

² *Id.*, ¶ 7.

- 4 **PSE’s Opposition to NIPPC’s Petition.** On November 4, 2016, PSE filed its Response in Opposition to NIPPC’s Petition (Opposition). The Company argues that NIPPC fails to meet either the substantial interest or public interest tests necessary for the Commission to grant the association’s Petition. PSE asserts that NIPPC “is only seeking intervention to further the independent business interests of its members.”³
- 5 PSE argues that NIPPC’s members are nonregulated competitors or potential competitors with commercial business interests in the outcome of the proceeding that “are wholly insufficient to grant the nonregulated entity the right to intervene.”⁴ The Company cites *Cole v. Washington Utilities and Transportation Commission* as precedent for this assertion.⁵ In *Cole*, the Washington State Supreme Court affirmed the Commission’s denial of the Oil Heat Institute’s intervention request. The case before the Commission involved a complaint against Washington Natural Gas Company (WNGC), which had been offering a lower rate of residential gas service to new homes than it typically charged its residential customers in an effort to encourage new home builders to increase usage of natural gas in new construction.⁶ As a fuel oil dealer and a residential customer of WNGC, Cole complained to the Commission that WNGC’s residential natural gas promotion was expanding WNGC’s customer base “at the expense of existing customers, who were forced to subsidize the promotions with higher rates.”⁷
- 6 The Oil Heat Institute, an association of independent fuel oil dealers, requested party status in the proceeding “in order to show the adverse impact of the gas company’s promotional practices on local fuel oil dealers.”⁸ The Commission denied the Oil Heat Institutes request on two grounds. First, it determined that “a rate complainant entitled to be heard had to be a gas customer and that the [Oil Heat Institute], therefore, had no standing.”⁹ Second, the Commission concluded that it did not have any jurisdiction over

³ PSE’s Opposition, ¶ 1.

⁴ *Id.*, ¶ 7 (citation omitted).

⁵ 79 Wn.2d 302 (1971).

⁶ *Cole v. Wash. Util. and Transp. Comm’n*, 79 Wn.2d 302, 304 (1971).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

the economic effects of the promotional acts of WNGC, a regulated company, on nonregulated competitors.¹⁰

- 7 In affirming the Commission’s denial, the Court found that “it is doubtful whether the [Oil Heat Institute] can prove a ‘substantial interest’ in rates charged to customers of a competitor who is regulated by different laws and who provides an entirely different type of fuel service.”¹¹ The Court also determined that it is outside the Commission’s jurisdiction to economically regulate the impact a regulated company’s practices have on a nonregulated competitor.¹²
- 8 PSE maintains that *Cole* is on point because NIPPC’s private, commercial interests, likewise, do not vest the association with a substantial interest in the rates charged by “a competitor who is regulated by different laws.”¹³ In addition, PSE states that NIPPC is forestalled from arguing that it possesses a substantial interest in the proceeding based upon its members’ customers or prospective customers as this relationship has been determined to be too remote by the Commission.¹⁴
- 9 Turning to the second possible qualification for party status, the Company alleges that NIPPC’s intervention is not in the public interest. The Commission is tasked with protecting the public interest, which PSE states has been defined by both the Commission and the Court to mean “the interest of customers of regulated utilities, not those of an unregulated competitor.”¹⁵ The Company insists that, even if the Commission wanted to consider the “speculative concerns”¹⁶ NIPPC raises in its Petition, “the Commission

¹⁰ *Id.*

¹¹ *Id.* at 305.

¹² *Id.* at 306.

¹³ PSE’s Opposition, ¶ 9 (citations omitted).

¹⁴ *Id.*, ¶ 10.

¹⁵ *Id.*, ¶ 13 (citing *Cost. Mgmt. Svc., Inc. v. Wash. Util. and Transp. Comm’n (Cost Management Services)*, Dockets UG-061256, et al, Order 06, ¶ 24 (Oct. 12, 2007)). The Court also made this determination in *Cole*, stating that:

[a]lthough RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause ‘as provided by the public service laws ...’ [and] Appellants fail to point out any section of title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional concern of the commission.

Cole, 79 Wn.2d at 306.

¹⁶ PSE’s Opposition, ¶ 15.

cannot, as a matter of law, consider the alleged anticompetitive or commercial impacts of PSE's proposed Schedule 451 on NIPPC or its members because the Commission does not have jurisdiction over those interests."¹⁷

10 **NIPPC's Reply to PSE's Opposition.** On November 7, 2016, NIPPC filed its Reply to PSE's Opposition (Reply). NIPPC asserts that some of its members could be the independent power producers that Schedule 451 customers would arrange to purchase power from if PSE's proposed tariffs are approved.¹⁸ NIPPC insists that it would provide a "unique perspective" on the issues raised by PSE's request.¹⁹

11 According to NIPPC, the association's purpose is "to foster healthy electricity markets,"²⁰ and it "is not intervening to advocate on behalf of its members"²¹ but to support the broader policy goal of the "expanded development of competitive markets."²² NIPPC insists that the Commission has, in prior cases, looked to broader policy goals of organizations when determining if granting the intervention request would be in the public interest.²³

12 The Commission has opined in the past that the standards for intervention under the Administrative Procedure Act "should be liberally interpreted."²⁴ In the case cited by NIPPC, the Commission granted various intervention requests from competitors because the "proceeding raises significant competitive issues beyond those involved in a typical rate case."²⁵ NIPPC also points to two instances when Pacific Power & Light Company (Pacific Power) attempted to prevent its competitor, Columbia Rural Electric Association, Inc. (CREA) from intervening in Pacific Power's rate cases. The Commission determined

¹⁷ *Id.*

¹⁸ NIPPC's Reply, ¶ 2.

¹⁹ *Id.*

²⁰ *Id.*, ¶ 6.

²¹ *Id.*, ¶ 7.

²² *Id.*, ¶ 8.

²³ *Id.*, ¶ 10 (citing *Re Proposal of Puget Sound Power & Light Co. to Transfer Revenues from PRAM Rates to General Rates (PSE Proposal)*, Dockets UE-951270 and UE-960195 (consolidated), Third Supplemental Order Modifying Prehearing Order at 7 (June 10, 1996)).

²⁴ *Id.*, ¶ 11.

²⁵ *Id.*, ¶ 14 (citing *PSE Proposal* at 7).

that it “has a strong interest in seeing that the record is fully developed relative to changes PacifiCorp proposes.”²⁶

- 13 Pursuant to the Company’s proposed Schedule 451, eligible customers will be able to arrange power purchases from non-PSE power suppliers in specific amounts and consistent with the terms and billing arrangements approved by the Commission.²⁷ NIPPC’s members “are experienced in obtaining transmission service for their own generation and selling power under retail access programs in states across the country.”²⁸
- 14 The association argues that the proposed tariff’s terms and conditions “could allow some, but not other, alternative power suppliers to sell power to Microsoft and other eligible customers,”²⁹ and if denied intervention “they will have no ability [to] challenge or otherwise participate in an [sic] proceeding that directly impacts their interest and causes an injury in fact.”³⁰
- 15 **Other Comments.**³¹ On the same day NIPPC filed its Reply, the Commission convened a prehearing conference before Administrative Law Judge Marguerite E. Friedlander. At the prehearing conference, Judge Friedlander requested comment on NIPPC’s Petition and PSE’s Opposition. Staff suggested that the Commission grant NIPPC’s intervention request as the association’s participation would provide for a robust discussion on PSE’s proposed tariff. Public Counsel agreed with Staff, voicing support for a liberal interpretation of the public interest standard. Public Counsel also suggested that the Commission could limit the scope of NIPPC’s participation in the proceeding.
- 16 PSE reiterated its opposition, stating that the association has the burden to prove that it has a substantial interest in the subject matter of the proceeding or its participation is in the public interest, and NIPPC has accomplished neither in its Petition or Reply. The Company countered NIPPC’s claim that its members have a stake in the terms and

²⁶ NIPPC’s Reply, ¶ 15 (*PacifiCorp, d/b/a Pacific Power & Light Company, v. Wash. Util. and Transp. Comm’n.*, Order 03, ¶ 6 (Feb. 14, 2013)).

²⁷ *Id.*, ¶ 19.

²⁸ *Id.*, ¶ 21.

²⁹ *Id.*, ¶ 27.

³⁰ *Id.*

³¹ The Commission granted the unopposed intervention requests of the Industrial Customers of Northwest Utilities, The Energy Project, the NW Energy Coalition, The Kroger Co. (Kroger), and Wal-Mart Stores, Inc. and Sam’s West, Inc. (Wal-Mart).

conditions of PSE's proposed retail wheeling tariff and argued that the terms and conditions of any eligible PSE customer leaving service will only be of concern to those eligible customers, not to independent power producers. PSE was uncomfortable with the possibility that NIPPC and its members would have access to confidential information, especially related to the Coal Strip plant closure.³² In addition, Microsoft Corporation voiced concerns that NIPPC, an association with members who Microsoft Corporation might negotiate the purchase of power, could receive a contractual advantage by gaining access to confidential load information.³³

17 **Commission Discussion and Decision.** WAC 480-07-355(3) states that the presiding officer may grant petitions for intervention when the petitioner "discloses a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest." We first examine whether NIPPC has a substantial interest in the subject matter of the proceeding.

18 NIPPC alleges "its members' ability to [...] sell power to eligible customers may be directly impacted by this proceeding."³⁴ The association does not indicate how this might happen. In fact, the main issues in this case are under what circumstances a small group of customers may terminate service with PSE and what terms and conditions should be imposed on departing customers to ensure that those who continue taking service from PSE are not harmed in the process.

19 Contrary to NIPPC's claim, the Commission's jurisdiction does not extend to either independent power producers like its members or to contracts between eligible customers and the independent power producers. We simply do not have the authority to "directly impact" from which independent power producer Microsoft Corporation may decide to take energy. The association has failed to establish a substantial interest in the proceeding.

20 We next turn to NIPPC's argument that its participation in this proceeding would further the public interest. The Commission has consistently viewed the public interest standard as protecting "the interests of customers of regulated utilities, not those of unregulated

³² Kuzma, TR 14:13-18.

³³ Thomas, TR 14:21-15:2.

³⁴ NIPPC's Reply, ¶ 3.

competitors.”³⁵ In *Cole*, the Court found the Commission properly denied the intervention of the Oil Heat Institute as it did not serve the public interest:

[a]lthough RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause “as provided by the public service laws ...” Appellants fail to point out any section of title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional concern of the commission.³⁶

- 21 NIPPC, a trade association whose members are nonregulated competitors of PSE, has likewise failed to reference any provisions within Title 80 which establish the Commission’s jurisdiction over NIPPC’s members. Instead, NIPPC points to a minority of Commission’s decisions in which we granted nonregulated competitors party status.
- 22 In Dockets UE-151871 and UG-151872, we allowed the limited intervention of various associations in the heating, ventilation, and air conditioning (HVAC) equipment trade. In authorizing the associations’ participation, we noted that PSE’s tariff filing was based on its claim that the services PSE proposed to provide would “fill an unmet customer need ...[and that t]he existing market is not currently adequately addressing this issue.”³⁷ The Commission found that the Company “placed the HVAC equipment market at issue in this proceeding.”³⁸ This case, however, is inapposite. Neither NIPPC nor PSE claim that the Company wishes to enter the independent power producer market or that the Company has raised any issue with the adequacy of the independent power producers’ service.
- 23 NIPPC argues that this case and others it cites to “illustrate that it is well within the Commission’s discretion to allow intervention of electric utility competitors, especially when the utility’s filing places the issue [sic] competition directly at issue.”³⁹ We agree that the Commission enjoys discretion in determining which intervenors’ participation will further the public interest, and that issues raised within regulatory proceedings may, occasionally, necessitate the participation of trade associations such as NIPPC.

³⁵ *Cost Management Services*, ¶ 24.

³⁶ *Cole*, 79 Wn.2d at 306.

³⁷ *Wash. Util. and Transp. Comm’n. v. PSE*, Dockets UE-151871 and UG-151872, Order 02, ¶ 10 (Jan. 7, 2016).

³⁸ *Id.*, ¶ 11.

³⁹ NIPPC’s Reply, ¶ 17.

- 24 The association has not demonstrated, with any specificity, that this proceeding will involve issues making NIPPC's participation necessary or in furtherance of the public interest. Even if NIPPC had met the public interest standard, the Commission would still have had to balance the association's participation against the Company and Microsoft Corporation's confidentiality concerns, possibly resulting in a substantial limiting of NIPPC's participation in the proceeding. That said, NIPPC has not met its burden of proof for intervention in this matter, and our inquiry is at an end.
- 25 Staff and Public Counsel have suggested that NIPPC might offer a unique perspectives on public policy issues related to this tariff filing. If either party believes that the association has relevant information that will provide the Commission with a full and complete record, Staff or Public Counsel may offer a NIPPC-related witness. It would be the sponsoring party's duty to maintain the confidentiality of any documents obtained during discovery and to protect commercially-sensitive information. Otherwise, the Commission will present NIPPC and other non-parties with the opportunity to publically comment on the tariff filing outside the context of the evidentiary hearing.

ORDER

- 26 **THE COMMISSION ORDERS That** The Petition to Intervene filed by the Northwest and Intermountain Power Producers Coalition is **DENIED**.

Dated at Olympia, Washington, and effective November 22, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.