BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AIR LIQUIDE AMERICA CORPORATION; AIR PRODUCTS AND CHEMICALS, INC.; THE BOEING COMPANY; CNC CONTAINERS; EQUILON ENTERPRISES, LLC; GEORGIA-PACIFIC WEST, INC.; and TESORO NORTHWEST CO.,	)	DOCKET NO. UE-001952
Complainants,	)	
v.	)	
PUGET SOUND ENERGY,	)	
Respondent.	)	
. . . . .	)	
	)	DOCKET NO. UE-001959
In Re	)	
	)	PETITION OF STAFF COUNSEL
PETITION OF PUGET SOUND ENERGY, INC.	)	FOR RECONSIDERATION OF
	)	THE ELEVENTH
for an Order Reallocating Lost Revenues Related to any Reduction in the Schedule 48 or G-P Special Contract Rates.	)	SUPPLEMENTAL ORDER, BY CLARAFICATION ON THE TAX REVENUES ISSUE
. . . . .	)	

On April 5, 2001, the Commission issued its Eleventh Supplemental Order Approving and Adopting Settlement Agreement, Subject to Conditions; Dismissing Proceedings; and Granting Other Relief ("Order"). Staff Counsel fully supports the Commission's decision to accept the Stipulation of Settlement, and to resolve years of heated controversy surrounding Schedule 48, is not at issue. What is at issue is the following statement in the Order:

> The Commission recognizes that the market arrangements that would be enabled under Schedule 449 (e.g., direct retail power sales by independent marketers) and promoted by both Schedules 448 and 449 (i.e., self-generation) may have state and municipal tax consequences. Certainly, our direct jurisdiction does not extend to the administration of the laws governing taxation. Nevertheless, the Commission is charged to regulate in the public interest, and potential effects on tax receipts must be considered in that context. We explored this question in some detail during our settlement hearing.

Order at ¶ 65 (emphasis added). This statement of legal conclusion was made without full legal briefing by the parties.[1] Given the specific facts of this case, it does not appear necessary to resolve that legal issue. Therefore, pursuant to WAC 458-09-810, Staff Counsel requests the Commission reconsider, and then clarify, its Order in a very limited manner to state:

> The Commission recognizes that the market arrangements that would be enabled under Schedule 449 (e.g., direct retail power sales by independent marketers) and promoted by both Schedules 448 and 449 (i.e., self-generation) may have state and municipal tax consequences. Certainly, our direct jurisdiction does not extend to the administration of the laws governing taxation. Nevertheless, the Commission is charged to regulate in the public interest, and potential effects on tax receipts may ~~must~~ be considered to the extent it may be allowed by law. ~~in that context.~~ We explored this question in some detail during our settlement hearing.

ARGUMENT

The Commission possesses only those powers that are granted to it by statute. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994). The Commission's general grant of power with respect to electrical companies is found in RCW 80.01.040(3), which states that the Commission shall:

> Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaged within this state in the business of supplying any utility service or commodity to the public for compensation . . . including, but not limited to, electrical companies . . . .

[1] At hearing, Staff Counsel did note the issue of the ability of the Commission to consider impacts on receipts by taxing authorities. (Tr. 2287.)

(Emphasis added.) Thus, the Commission can only regulate "as provided by the public service laws." And the Commission can only regulate the "rates, services, practices and facilities" of electrical companies. There is nothing apparent in the public service laws that relates explicitly or implicitly to the impacts on tax receipts by federal, state and local taxing jurisdictions.

The scope of RCW 80.01.040(3) was examined in *W.W. Cole, et al. v. Washington Natural Gas Co.*, Cause No. U-9621 (1968), *aff'd sub nom, Cole v. Utilities. & Transp. Comm'n.*, 79 Wn.2d 302, 485 P.2d 71 (1971). In that case, Washington Natural Gas Company had proposed a home "dry-out" gas service at a lower rate than that charged normally to residential customers. The Oil Heat Institute of Washington, Inc. ("Institute") was an association of non-Commission-regulated fuel oil dealers. The Institute moved to intervene, alleging that the proposed dry-out rate would promote the use of gas in areas of new construction, placing its members at a competitive disadvantage.

The Commission denied the motion for intervention. The Commission stated that under RCW 80.01.040(3), the "public interest" authority was qualified expressly by the phrase "as provided by the public service laws . . . ." Since there was nothing in the public service laws that gave the Commission the authority to consider the alleged effect upon non-regulated fuel oil businesses, the Commission held it could not consider the interests articulated by the Institute:

> Although the words 'public interest' are used extensively throughout the Public Service Laws, this interest of the public which is to be protected is that only of customers of the utilities which are regulated.

"Proposed Order" in Cause No. U-9621 (July 15, 1968), at 12.[2]

The court agreed. It quoted with favor from the Commission language in the "Proposed Order" just noted, and affirmed that order for the same reasons. *Cole*, 79 Wn.2d at 606.

[2]What is labeled the "Proposed Order" in Docket U-9621 was "affirmed and adopted as the Final Order of the Commission" in what the Commission labeled its "Final Order" (November 1, 1968) in that docket.

If RCW 80.01.040(3) does not permit the Commission to consider the impacts of its decisions on unregulated businesses, there is a substantial legal issue whether the Commission is permitted to consider the impacts of its decisions on the tax receipts of unregulated federal, state, and local taxing jurisdictions.[3]

CONCLUSION

For the reasons stated above, and unless the Commission is inclined to call for briefing by the parties on the tax receipts issue now (Staff does not see any need for that), the Commission should clarify its Order in the limited manner requested above. Should this issue arise again in the future, the Commission will be able to analyze this issue fully, based on full legal briefing, and render a decision accordingly.

DATED this 9th day of April, 2001.

CHRISTINE O. GREGOIRE
Attorney General

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[3]Similar to the Institute, the federal, state and local taxing authorities at issue here would not be acting in their capacity as customers of a regulated utility with respect to tax receipts.