

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UE-161123

ANSWER TO PETITION FOR
INTERLOCUTORY REVIEW
ON BEHALF OF WASHINGTON
UTILITIES AND TRANSPORTATION
COMMISSION STAFF

1 Pursuant to WAC 480-07-810, Commission Staff submits this answer to the petition of the Northwest and Intermountain Power Producers Coalition (NIPPC) for Washington Utilities and Transportation Commission (Commission) review of the administrative law judge's interlocutory order denying NIPPC's intervention in this proceeding (Order 04). Under WAC 480-07-810(2), interlocutory review is discretionary with the Commission. Staff recommends that the Commission accept interlocutory review and grant NIPPC's intervention.

2 RCW 34.05.443 and WAC 480-07-355 govern intervention in Commission proceedings. Under RCW 35.05.443(1), the Commission has broad discretion to grant intervention at any time, provided it is in the interest of justice and does not impede the conduct of the proceedings. Under WAC 480-07-355(3), the Commission considers whether a petitioner has a "substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest." The Commission may choose to impose conditions upon the intervener's participation in accordance with RCW 35.05.443(2).

3 Staff supports NIPPC's intervention for three reasons. First, NIPPC's participation will enhance development of the record. In this proceeding, Puget Sound Energy (PSE or Company) requests that the Commission undertake a profound policy shift by establishing

competitive retail energy supply for a class of customers with some of the largest electric loads in the state. The Company seeks to establish a new, voluntary, retail wheeling service that would allow customers with a load of 10 average megawatts at one or more customer sites to acquire retail electricity supply from an alternative power supplier. While the filing may have limited practical effect because PSE's proposal is only available to a class consisting of a few large customers, PSE's filing places important, and largely unprecedented, questions of law and policy (i.e., what does the Commission have fundamental authority to order and what is in the public interest) about competitive retail energy supply squarely before the Commission.

4 The Commission will have to address these questions of law and policy without clear statutory guidance. Unlike most state codes that allow some form of a competitive retail market, Washington law does not expressly address whether, or to what extent, customers of public service companies may purchase electricity from competitive retail energy suppliers while maintaining their regulated distribution service.¹ Nor does Washington law address whether, or to what extent, the Commission's jurisdictional authority and regulatory responsibilities would extend to the participating customers and their energy suppliers in such a competitive market.² Further, Washington law does not prescribe how the Commission should reconcile the impact of a competitive retail market on such things as the

¹ For example, Oregon law (Or. Rev. Stats. § 757.600 to 757.689) allows all nonresidential customers to choose an alternative electricity supplier or a market-based (Standard Offer) option from the utility. It expressly charges the Oregon Public Utility Commission with facilitating the development of a competitive market while minimizing the effect on customers that remain on the utilities' cost of service rate. Or. Rev. Stats. § 757.646(1), Or. Rev. Stats. § 757.607(1).

² The Commission declined to fully address this question when it approved a settlement that established PSE Schedule 449 in the immediate wake of the California energy crisis. See *Air Liquide America Corp. v. PSE*, Docket Nos. UE-001952 and UE-001959, Eleventh Supplemental Order Approving Settlement Agreement, Subject to Conditions; Dismissing Proceedings; and Granting Other Relief, at ¶¶ 48-52 (Apr. 5, 2001).

Energy Independence Act's renewable energy mandate, PSE's conservation and low-income programs, or the Commission's duty to provide consumer protection oversight.³ Without statutory guidance, the Commission will have to decide whether it can, must, or should, address these questions under its broad authority to regulate the practices of public utilities.

5

NIPPC and its members have experience in competitive retail electricity marketplaces and can provide testimony that will inform the Commission's decision about the public interest involved in this proceeding. For example, the success of PSE's proposed retail wheeling service for participating customers requires a functional competitive market.⁴ NIPPC is a non-profit trade association of independent power producers whose mission is to foster healthy electricity markets.⁵ NIPPC and its members are active in regulatory proceedings in numerous states including Oregon and Idaho.⁶ Accordingly, NIPPC is uniquely qualified to address whether a functional competitive market exists in the Northwest and whether the terms and conditions of PSE's proposed service will advance or impede participation in that market.⁷ No other party to this proceeding replicates NIPPC's expertise. NIPPC's experience also allows it to inform the Commission's determination about the public interests involved in this proceeding and the policy choices that would best advance those interests.

³ For example, both Oregon and California require alternative electric suppliers to meet their states' renewable energy mandates. *See* Or. Rev. Stats. §§ 469A.005, .050; § 757.600; Cal. Pub. Utils. Code §§ 399.12, .15.

⁴ Montana's Public Service Corporation had to suspend its retail choice program for residential consumers two years after the legislature ordered its initiation because "the state did not have a competitive power supply market in place." <http://www.eia.gov/electricity/policies/restructuring/montana.html>.

⁵ NIPPC Petition for Interlocutory Review at ¶¶ 2, 10.

⁶ *Id.*

⁷ *See In re the Commission's Inquiry Into the Provision and Regulation of Electric Service*, Docket No. 8738, Order No. 73834, 181 P.U.R.4th 185, 205 (Md. Pub. Serv. Comm'n Dec. 3, 1997) ("In deciding whether this public interest standard is met [by introduction of a competitive marketplace], we have first looked to determine whether competition is technically and economically feasible.").

6

Second, NIPPC has a substantial interest in the issues in this proceeding. PSE has volunteered to subject itself to limited competition for its largest customers. Its filing asks the Commission to create a new class of large customers that can choose to obtain their retail electric supply from alternative providers like NIPPC's members; these customers would receive only distribution services from PSE. NIPPC has an interest in ensuring this program is designed in a manner that ensures success for those PSE customers who choose to participate.

7

The Commission's decision in this proceeding could also carry jurisdictional consequences for NIPPC's members. If the Commission decides to establish limited competitive retail electric supply, it may decide that doing so requires conditions similar to those found in other state' statutes, but that are absent from PSE's proposed tariff schedule. For example, in Oregon alternative electric suppliers must demonstrate to the Commission that they meet certain standards before they can serve non-residential retail customers.⁸ Moreover, using an analysis similar to the one it followed in its policy statement concerning third-party owners of net metering facilities, the Commission may even find that alternative electric suppliers who serve PSE's participating customers are subject to Commission jurisdiction and should be subject to some form of regulatory oversight.⁹ NIPPC's absence from this proceeding could prevent the Commission from following such a course if the Commission determines that it is the proper one.

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Importantly, Staff is not now advocating for any particular outcome—it has only begun its analysis of the legal and policy questions raised by the proposed retail wheeling

⁸ See Or. Rev. Stats. § 757.649.

⁹ See *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies' interconnection with Electric Generators*, Docket UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities at ¶¶ 48-81 (July 30, 2014).

service. Nevertheless, the Commission should consider how establishing competitive retail energy supply for a class of PSE customers who comprise some of the largest electric loads in the state could necessitate additional terms and conditions that directly affect NIPPC's interests. NIPPC's participation can help inform what requirements would best further the public interest.

9 Third, there is no indication that NIPPC's participation will burden or otherwise impede the conduct of this proceeding. Relying heavily on *Cole v. Washington Utilities & Transportation Commission*, PSE objects to NIPPC's intervention on the basis that NIPPC is a competitor whose business interests are beyond the concern of the Commission.¹⁰ PSE's primarily argument is that NIPPC cannot demonstrate sufficient interest in this case. PSE's criticism, however, is inapposite because NIPPC's goal in this proceeding is to "foster healthy electricity markets and not the specific commercial interests of any particular members."¹¹ In fact, NIPPC expressly committed to not unduly burden the record or raise issues that are beyond the Commission's jurisdiction.¹²

10 Moreover, the new service PSE proposes here is not analogous to the gas appliance leasing program addressed in *Cole*. In *Cole*, a fuel oil industry association was denied intervention in a Commission proceeding that considered new, regulated services that encroached into an unregulated, competitive market at the expense of the fuel oil industry's business interests. The issue here is the exact opposite: rather than encroaching into an unregulated market, PSE is proposing to enable a select group of its captive customers to take advantage of the competitive market. PSE has volunteered to subject itself to

¹⁰ See PSE Response in Opposition to NIPPC Petition to Intervene; *Cole v. Washington Utilities & Transportation Commission*, 79 Wn.2d 302, 305-06, 485 P.2d 71 (1971).

¹¹ NIPPC Petition for Interlocutory Review at ¶ 10.

¹² Tr. 21:24-22-1.

competition from alternative suppliers like NIPPC's members. Consequently, it has placed the competitive market, and NIPPC's business interests, directly at issue. PSE has asked the Commission to determine (1) whether allowing a class of customers to take advantage of the competitive market is in the public interest, and (2) whether the terms and conditions of allowing them to participate in the competitive market are just and reasonable. As the potential alternative energy suppliers to this new class of customers, NIPPC offers a unique and important perspective that can inform the Commission's review.

11 Finally, Order 04 indicated concerns about protecting commercially-sensitive information. It suggested that Staff could sponsor a NIPPC-related witness, and thereby take responsibility for protecting the commercially-sensitive information, if it believed NIPPC offers unique perspectives on public policy issues related to this filing.¹³ Staff, however, does not intend to sponsor a NIPPC witness if the Commission denies NIPPC's intervention. Staff's concern is facilitating the Commission's review by providing impartial analysis of the Company's filing. If the Commission deems NIPPC's perspective as insignificant to its decision then Staff will conduct its analysis accordingly. While Staff sees no reason why the protective order with highly confidential provisions (Order 03) is insufficient to address any concerns related to commercially-sensitive information, it declines to assume the duties or potential liabilities of managing commercially-sensitive information for another party.

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¹³ Order 04 at ¶ 25.

For the reasons state above, the Commission should accept interlocutory review and grant NIPPC's intervention.

Dated this 12th day of December 2016.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General



CHRISTOPHER M. CASEY
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff