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Sent:	Monday, August 11, 2008 7:10 PM
To:	ffitch, Simon (ATG); Elgin, Ken (UTC); UTC DL Records Center; Public Comments DB
Cc:	Anderson, Rep. Glenn; Sanchez, Antonio; Brummel, Jack; Chase, Rep. Maralyn; Conway, Rep. Steve; Dickerson, Rep. Mary Lou; Swaim, Dru; Homan, Faith; Fraser, Sen. Karen; Haler, Larry; Hasegawa, Rep. Bob; Hewitt, Sen. Mike; Swenson, Jan; Leister, Janet (AGR); Freeburg, Jim; Kastama, Sen. Jim; McCoy, Rep. John; Roper, Joyce (ATG); Peters, Julie; Keiser, Sen. Karen; Kenney, Rep. Phyllis; Larry Clark; McCollum, Lisa; Lynn Jacobs; Hawkins, Marylyn; Osmundson, Nancy; Pflug, Sen. Cheryl; Prentice, Sen. Margarita; Rasmussen, Sen. Marilyn; Hurst, Christopher; Roach, Sen. Pam; Hamilton, Robert (CTED); Schoesler, Sen. Mark; Sheldon, Sen. Timothy; Shin, Sen. Paull; Taylor, Tracey; Van Schoorl, Meg
Subject:	PSE Transfer of Owners Docket No. U-072375

RE: PSE Transfer of Owners

Docket No. U-072375

In 2003, the Washington State Legislature created the Joint Legislative Oversight Committee on Trade Policy to monitor the impact of trade agreements on Washington state laws, and to provide a mechanism for legislators and citizens to voice their opinions and concerns about the potential impacts of these trade agreements to state and federal government officials.

Citizens in our state have raised concerns regarding of the sale of Puget Sound Energy [PSE] to possible foreign investors. At the present time Puget Sound Energy holds a monopoly in an eleven county service area providing essential electrical and natural gas services to some 1.3 million electricity users and some 750,000 natural gas users. PSE, as a domestic, publicly-traded corporation, is regulated by the UTC, a branch of state government.

The citizens believe that UTC protects consumers from runaway monopoly power by ensuring that utility and transportation services are fairly priced, available, reliable and safe. They believe those protections may be lost by the diminishing of the UTC's oversight regulation of a privately held monopoly with substantial foreign investor ownership.

The citizens also are concerned that the proposed purchasers, led by foreign investors, may have greater rights under the various trade agreements than our own domestic investors regulated by the UTC. Those greater rights, of course, could be asserted in litigation of contract terms regarding pricing and the safe and reliable availability of the services directly challenging the UTC's regulatory mission. In the absence of a strong regulatory structure, the citizens fear increases in rates for debt service, infrastructure investment, increased rates for ROI and sporadic service by absentee owners should the proposed sale go through.

In light of the citizens' concerns, I request your consideration of the questions that come to mind in considering the relationship of the rights of foreign investors to domestic laws

and regulations, especially in regard to monopoly control of essential public services and infrastructure, the absence of free competition and little state regulatory oversight.

I . Is the citizens' concern about corporate debt (and potential impact on the rate base, I assume) a relevant concern under NAFTA's investment chapter.

The utility commission has authority to set capital contributions and returns on equity, but NAFTA Chapter 11 says that investors have a right to transfer a variety of returns and payments. [See excerpt below].

I'm not saying there is a problem, but it raises a question that might *not* come up with a domestic investor. The possibility of the expectations of foreign investors as to litigation of contract terms is challenging when viewed within the context of the various trade agreements possible conflicts with domestic regulations.

For example, NAFTA doesn't say the investor can withdraw equity, but the investor can make payments under a loan agreement.

Does that mean a foreign investor has a NAFTA right to load up on debt, which would be held by (and with payments to) a corporate affiliate of the investor?

If the foreign investors incorporate in the United States, in New York or Delaware, for example, are they a domestic subsidiary of foreign investors or simply an independent domestic corporation?

If a registered subsidiary, owned by foreign investors (such as Macquarie Infrastructure Partners (New York) , The Canada Pension Plan Investment Board (Toronto), The British Columbia Investment Management Corporation (Victoria), Alberta Investment Management (Edmonton), Macquarie-FSS Infrastructure Trust (Australia) Macquarie Capital Group Limited,) loads up on debt to the foreign corporate affiliate investor, or requests increases in rates for debt service and ROI to the foreign investor holding the debt, does the foreign corporate affiliate holding the debt have NAFTA or GATS rights?

Article 1109: Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

(b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(d) payments made pursuant to Article 1110; and

(e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

II. What are the investment and trade implications of Canadian and Australian ownership?

Once those are understood, if the PUC is not in a position to deny a merger because of foreign ownership, are there mechanisms to (a) consider conditions to mitigate or (2) seek waivers of certain legal risks down the road.

In general terms what are the legal risks to PUC authority?

1. Are there foreseeable circumstances where NAFTA investor rights (ch. 11), energy rules (ch. 6) or service rules (ch. 12), new GATS disciplines on domestic regulation or existing GATS commitments on services incidental to distribution of energy govern? For example:

   A. Major policy changes in the future that could affect profit margin: e.g., carbon pricing in a cap-and-trade system, including anti-"leakage" measures that would apply to cross-border trade in gas or electricity. Sensitive electricity imports might be from Alberta (thermal generators fired by tar sands); sensitive gas imports might be LNG from the Pacific Rim.

   B. Major infrastructure permits that involve complex and expensive procedures: e.g., LNG terminals or major transmission lines.

2. Does experience with foreign investment in water utilities offer any guidance?

1. Conditions imposed by the Kentucky PUC on acquisition of private water companies by Thames (UK), which was at the time owned by RWE (Germany) may offer suggestions.

2. Is there the potential for incorporating disclosure and waiver provisions applying to utility concessions and/or the expectations of foreign investors as to litigation of contract terms into any merger agreement or PUC order?

Finally, what are the NAFTA/GATS implications of citizens forming a Public Utility District to assume responsibility for infrastructure and services held by a foreign investor or a domestic investor with NAFTA protected debt service to a foreign investor?

The citizens are well aware that trade agreements do not regulate industry, they regulate government activity. In this case, the UTC and perhaps the PUD may be impacted along with millions of citizens.

Thank you for your consideration of these issues.

Sincerely,

Maralyn Chase

Chair, Joint Legislative Oversight on Trade Policy

Cc: Mark Sidron, Chairman

Patrick Oshie

Philip Jones

Transmitted by email. Hard copy to follow.

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