BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BELLINGHAM COLD STORAGE COMPANY	)	
	)	
and	)	
	)	
GEORGIA-PACIFIC WEST, INC.,	)	
	)	DOCKET NO. UE-001014
Complainants,	)	
	)	
v.	)	**REPLY OF COMMISSION STAFF IN OPPOSITION TO MOTION FOR EMERGENCY RATE RELIEF**
	)	
PUGET SOUND ENERGY,	)	
	)	
Respondent.	)	
. . . .	)	

INTRODUCTION

This proceeding involves a Complaint filed on June 29, 2000 by Bellingham Cold Storage Company and Georgia-Pacific West, Inc. (collectively "Complainants") against Puget Sound Energy (PSE) with respect to service under identical special contracts. The contracts were entered in May 1996 and were approved by the Commission in Docket Nos. UE-960612 and UE-960613 on June 7, 1996. The Complaint was filed under RCW 80.04.110.[1]

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[1]The Complaint raises issues in two general areas. First, Complainants ask the Commission to find that use of the Mid-Columbia Index results in a rate for energy that is unjust, unfair, and unreasonable. Complainants ask the Commission to replace that Index with energy pricing equal to the cost to PSE of operating its least efficient power plant (the Whitehorn simple-cycle combustion turbine), until the parties negotiate a pricing methodology that "again tracks the intention of the Special Contract parties to price contract energy as it is priced in competitive markets." (Complaint at 9: 12-16.) These issues have been categorized as "Phase 1" issues and have been set for hearing on October 5, 2000 based upon prefiled direct and rebuttal evidence to be filed in the interim.

Second, Complainants ask the Commission to order PSE to provide unbundled transmission service. This request requires the Commission to interpret the special contracts in order to determine PSE's contractual obligations to Complainants with respect to transmission service. These issues have been categorized as "Phase 2" issues and have yet to be set for hearing.

On July 24, 2000, Complainants filed an Emergency Motion for Implementation of "Optional Price Stability" Provisions of Special Contracts and, if Necessary, for a Retail-Access Pilot Program. The Emergency Motion asks the Commission to grant interim rate relief on a summary basis, by requiring PSE to implement the Optional Pricing Stability provision of the special contracts according to specific and new terms and conditions of a detailed "Implementation Exhibit." The Emergency Motion does not ask the Commission to set temporary rates, subject to refund or surcharge. Rather, rates under the Implementation Exhibit would be charged pending hearing on the underlying Complaint, and would be changed only on a prospective basis if final rates are different than those interim rates.

Commission Staff recommends that the Commission deny the Emergency Motion. We stress, in this regard, our full understanding of the economic circumstances with respect to plant operations and the risk of shut-downs that have prompted Complainants to come before the Commission in the first instance. However, as discussed below, we can find no express or implied statutory authority, or constitutional provision, for interim rates of the type proposed in a customer complaint proceeding under RCW 80.04.110. We do, however, suggest an alternative process involving the enforcement of an existing provision of the special contracts which may remedy the dispute between Complainants and PSE.

ARGUMENT

The Commission's authority to grant interim rates must be based in either statutory or constitutional provisions. The Commission examined its statutory authority to grant interim rates

in WUTC v. Pacific Northwest Bell Telephone Company, 2nd Supplemental Order, Cause No. U-72-30 tr (October 10, 1972) (PNB case). The Commission stated as follows:

> There is no specific statutory authority in Washington for the granting of an interim rate relief increase to a utility. Such authority does, however, exist by inference and the Supreme Court of the State of Washington has affirmed that such authority does, in fact, exist. State ex rel. Puget Sound Navigation v. Department of Transportation, 33 Wn.2d 448, 206 P.2d 456 (1949). In Puget at page 482 the Supreme Court quoted from 51 C.J. 48, § 91, as follows:
>
>> A public utility commission having power to regulate rates may, when it deems it justified, fix a temporary rate to be charged by a utility pending a valuation of the utility's property and the determination of a reasonable permanent rate.
>
> and then went on to say (page 482):
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>> The power vested in the department to refuse to allow the new rate filed by appellant to become effective, necessarily implies the power to allow the tariff to become effective, pursuant to reasonable conditions or limitations.

Id. at 5.

Thus, the statutory authority for interim rates was implied from the Commission's authority to suspend the effectiveness of tariff revisions proposed by a utility (i.e., "the power . . . to refuse to allow the new rate . . . to become effective"), pending final resolution of a general rate filing. This is clearly not the context in which the Emergency Motion has been offered. Statutory authority for the Emergency Motion is, therefore, lacking.[2]

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[2] Complainants acknowledge that no express statutory authority exists for the Commission to grant the Emergency Motion. They argue, instead, that the authority of the Commission to grant their Emergency Motion may be implied from the Commission's broad powers to regulate in the public interest under RCW 80.01.040. (Memorandum in Support of Motion at 1: 24-25 and 3: 24-25.) No such implied power, however, was noted by the

We also cannot find a constitutional basis for the Emergency Motion. Again, in the PNB case, the Commission established a six-part test for determining whether or not to grant interim rate relief pending final resolution of permanent rates. Id. at 13. In general, that test focuses on the ability of a utility to meet its financing needs so as to satisfy its public service obligations to provide safe, adequate, and efficient service under RCW 80.28.010(3). In other words, without interim rates, the utility would be faced with an unsolvable dilemma. It can either fail to satisfy its statutorily imposed public service obligations or it can suffer returns so drastically deficient that its property is confiscated without just compensation, in violation of constitutional requirements. No similar dilemma is presented in the current proceeding, however. While Complainants have a **statutory** right to fair, just, and reasonable rates, there is no **constitutional** entitlement to rates set at any level or amount.[3]

We stress that our conclusion is limited strictly to the request for emergency rate relief filed by Complainants.[4] Clearly, Complainants may seek both a Commission determination that

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Commission in the PNB case.

Moreover, the Commission has the authority to regulate in the public interest, but only "as provided by the public service laws." RCW 80.01.040(3). No public service law provides the summary, emergency remedy sought by Complainants. As discussed below, their remedy requires a hearing on all relevant evidence under RCW 80.04.110 and RCW 80.28.020.

[3]Complainants cite WAC 480-09-510 for their conclusion that the Commission has authority to grant emergency rate relief, as requested, when immediate action is required due to imminent danger to the public health, safety or welfare. (Memorandum at 7: 7-9.) That rule, however, only establishes a process via RCW 34.05.479 for emergency adjudicative proceedings. It does not, and cannot, authorize a remedy (emergency rate relief) where, as here, no statutory or constitutional right exists for the remedy requested.

Moreover, the examples listed in WAC 480-09-510 concern issues of public safety such as inadequate service and lack of insurance. The rule, therefore, may not have been established for the circumstances presented by the Emergency Motion of Complainants.

[4] Our conclusion that there is no statutory or constitutional basis for interim rates in a consumer complaint under RCW 80.04.110 is consistent with Commission precedent. All of the interim rate cases cited by Complainants arose at the request of the utility. (Memorandum in Support at 4: 1-10.) Moreover, we conducted a search of judicial decisions in all states and found no cases where emergency rate relief was requested by customers of a utility.

existing rates are unjust, unfair, and unreasonable, and a Commission order setting just, fair, and reasonable rates for prospective application. However, pursuit of that remedy must comply with applicable statutory procedures established in RCW 80.04.110 and RCW 80.28.020, the latter of which requires a hearing before the Commission can decide the issues raised by Complainants:

> Whenever the Commission shall find, after a hearing had upon its own motion, or upon complaint, that the rates or charges demanded, exacted, charged or collected by any . . . electric company . . . or that the . . . contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential,. . . the Commission shall determine the just, reasonable, or sufficient rates, charges . . . or contracts to be thereafter observed and in force, and shall fix the same by order.

(Emphasis added.)[5] This is not to say that the hearing required by this statute must be protracted. Indeed, a hearing has been already set for October 5-6, 2000 under an accelerated schedule agreed upon by all parties including Complainants.

Complainants may argue that evidentiary hearings are unnecessary because they have asked only for a "very limited summary determination that our Special Contracts are unjust, unreasonable and contrary to the public interest" in order "to relieve each Complainant from its total dependence on the Mid-Columbia Index as the sole pricing mechanism under the respective Special Contracts." (Memorandum in Support at 7: 10-15; Emergency Motion at 1.) The summary determination requested by Complainants, however, is admittedly based entirely upon the affidavits of Messrs. Cunningham and Thomas.[6] (Memorandum in Support at 7: 17-18.)

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[5] In the PNB, supra, case, the Commission stated that it "has the authority in proper circumstances to grant interim rate relief to a utility but this should be done only after an opportunity for adequate hearing." Id. at 13. Thus, even if emergency relief were available, an adequate hearing must first be provided.

[6] Complainants state that the Emergency Motion is not dependent upon any allegation about current happenings in western U.S. energy markets or the efficacy of the Mid-Columbia Index, and that all such issues would be reserved without prejudice to any party. (Memorandum in Support at 7: 17-21.) This is inconsistent, however,

As stated before, we understand the impact that energy price increases have had on the operations of Complainants. However, these affidavits alone are insufficient to conclude that the energy prices negotiated under the Special Contracts by Complainants and PSE are unjust, unfair, and unreasonable. Evidence could be presented, under general contract law, that would allow Complainants to be excused from performance of their obligations under the special contracts, before the Commission could reform the contract itself. Otherwise, the mere inability to pay any rate by any customer would require the conclusion that the rate charged is unjust, unfair, and unreasonable, even in a situation where the rate was negotiated fairly by the utility and the customer, and approved by the Commission. Such a summary result is not appropriate and should be avoided.

The affidavits are also insufficient to conclude on a summary basis that the "Implementation Exhibit" for Optional Pricing Stability establishes replacement energy pricing provisions that are just, fair, and reasonable. The Optional Pricing Stability provision states simply as follows:

> Price of these Optional Price Stability services will be customized to the customer's needs. Those services could include guarantee on an average commodity price, price caps on the non-firm prices, or collars on the non-firm price.

In contrast to this "bare-bones," existing contractual provision, the Implementation Exhibit provides a detailed and exhaustive list of new terms and conditions by which PSE would be required to serve the Complainants. It is unclear whether the Implementation Exhibit reflects the intent of Complainants and PSE. It certainly is clear, however, that the Implementation Exhibit

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with their attachment of Mr. McCollough's affidavit which discusses these very topics. Mr. McCollough's affidavit also raises issues that are fundamental to the Complaint itself and require a hearing under RCW 80.28.020.

goes well beyond the limited provisions of the contract itself.

The Optional Price Stability provision of the special contract may, however, provide a reasonable avenue for addressing the heart of this Complaint. That provision clearly states that the price for optional services under the special contract must be customized to the customer's needs. This appears to establish a process for negotiation between Complainants and PSE to resolve their issues. The Commission may, therefore, wish to consider whether to order the parties to negotiate under the Optional Price Stability provision, since that is an existing provision of a contract already approved by the Commission and subject to enforcement by the Commission.[7]

CONCLUSION

For the reasons stated above, the Commission lacks authority to grant emergency rate relief when requested by a customer. Complainants must utilize the procedures established by statute which require an adequate hearing (but allows an expeditious one), and they may present evidence under applicable contract law that their special contracts may be rescinded and performance excused.

The special contracts at issue, however, appear to require the price for optional price stability services to be customized by negotiation to the customer's needs. That provision has

[7] This proposal is not novel. In Complainants' Joint Answer in Opposition to PSE's Request for Continuance and Extension of Time, Complainants indicate that they attempted to negotiate with PSE under the Optional Price Stability provision of their special contracts. (Joint Answer at 2: 14-21.) That attempt was unsuccessful at the time, but a Commission order to enforce the Optional Price Stability provision may assist the parties in their negotiation.

not been invoked, but is a provision that is enforceable by the Commission and may resolve the Complaint in its entirety.

DATED this 27th day of July, 2000.

Respectfully submitted,

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