BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

KENNETH L. BINKLEY, Complainant, v. SALMON SHORES RV PARK and PUGET SOUND ENERGY, INC., Respondents.	DOCKET UE-091531 MOTION ON BEHALF OF COMMISSION STAFF TO DISMISS COMPLAINT AS TO SALMON SHORES RV PARK

1 The Washington Utilities and Transportation Commission (Commission) Staff moves for a Commission order dismissing the Consumer Complaint (Complaint)[1] as to Salmon Shores RV Park (Salmon Shores). Liberally construed, the Complaint contains no material facts to support a claim that Salmon Shores is an electrical company subject to Commission regulation. Moreover, to the extent Salmon Shores has the status of a customer of PSE, the Commission does not have jurisdiction over customers of a public service company such as PSE. Therefore, the Commission should dismiss the Complaint as to Salmon Shores.

I. NATURE OF THE COMPLAINT

2 Respondent Salmon Shores is a landlord; Complainant Mr. Kenneth Binkley is one of Salmon Shores' tenants.[2] The Complaint claims Salmon Shores is "overcharging for

[1] Complaint (undated, but received by the Commission September 14, 2009).
[2] Complaint at 1, paragraph 1, first sentence.

electrical usage."[3] Although the Complaint identifies Salmon Shores' status as a "customer of Puget Sound Energy,"[4] Mr. Binkley later contended that "Salmon Shores RV Park is our power company,"[5] and he wants the Commission to institute a proceeding to classify Salmon Shores as a Commission-regulated electrical company.[6]

II. DISCUSSION

A. The Complaint Lacks Material Facts Sufficient to Support the Claim That Salmon Shores is a Commission-Regulated Electrical Company

3 The Commission liberally construes pleadings "with a view to effect justice among the parties."[7] A complaint is sufficient if it "states facts entitling the plaintiff to some relief ...". *State v. Adams,* 107 Wn.2d 611, 620, 732 P.2d 149 (1987). Liberally construed, the Complaint contains no material facts entitling Mr. Binkley to relief based on Salmon Shores being a Commission-regulated electrical company.

4 It is well settled that electrical companies subject to Commission regulation are those who devote their property to public use:

> A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

Inland Empire Rural Electrification, Inc. v. Dep't of Pub. Service, 199 Wash. 527, 537, 92 P.2d 258 (1939) (citations omitted). In that case, the court ruled a customer-owned

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[3] Complaint at 2, last paragraph, second sentence.
[4] Complaint at 1, first paragraph, second sentence.
[5] Mr. Binkley's "Response to Commission Staff Motion for an Order Removing Salmon Shores as a Respondent," at 3, second paragraph, last line. (Mr. Binkley uses the term "private utility." Given the context, we interpret that to mean a utility subject to Commission jurisdiction).
[6] Id. at 3, last paragraph. (Mr. Binkley cites RCW 81.04.510, which applies to transportation companies, not electrical companies. We assume Mr. Binkley intended to cite RCW 80.04.015).
[7] WAC 480-07-395(4); *see also* CR 8(f): "All pleadings shall be so construed as to do substantial justice."

electrical cooperative was not subject to Commission regulation because the owners served only themselves, and therefore, they had not devoted their property to public use.

5 Similarly, in *West Valley Land Co., Inc. v. Nob Hill Water Co.,* 107 Wn.2d 359, 365, 729 P.2d 42 (1986), the court ruled a non -profit water company was not subject to Commission regulation because that company exclusively served homeowners association members: "Nob Hill has chosen to serve particular individuals of its own selection, and does not serve the public as a class or that portion of it that could be served by Nob Hill."[8]

6 In *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 212 A.2d 237 (Penn. 1965), the court ruled a landlord would not become subject to the Pennsylvania commission's regulation if it purchased utility facilities from a regulated utility, with the intent of becoming a wholesale customer of the utility and then reselling utility services to tenants. The case was initiated when the utility filed an application seeking commission approval to sell some of the utility's water, gas and electric facilities to the landlord. Pennsylvania law required a person to seek commission authorization before becoming a regulated utility, and the landlord failed to do so. Therefore, the Pennsylvania commission denied the application, reasoning that the landlord would become a public utility subject to commission regulation, and the landlord failed to seek the required authorization.[9]

7 The superior court affirmed the commission, but the Pennsylvania Commonwealth Court reversed. The court construed a Pennsylvania commission statute defining "public

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[8] 107 Wn.2d at 367. In both the *Inland Empire* and *West Valley Land* decisions, the court also analyzed whether the entity in question operated at a profit and whether customers could be exploited if the entity in question was not subject to commission regulation. *Inland Empire,* 199 Wash. at 539; *West Valley Land,* 107 Wn.2d at 367-69. However, that analysis was not essential to the court's holding, because as the court plainly stated: "the ***controlling factor*** [is that the entity in question] has not dedicated or devoted its facilities to public use, nor has it held itself out as serving or ready to serve, the general public or any part of it." *Inland Empire,* 199 Wash. at 539 (emphasis added).

[9] *Drexelbrook Associates*, 212 A. 2d at 238-39.

utility" as a person providing "[utility] service to or for the public for compensation."[10] This statute has the same wording as the Commission's general statutory authority to regulate persons engaged in "supplying any utility service ... to the public for compensation."[11]

8 The court reasoned that the landlord would not meet the "service to the public" element of the statutory definition, and thus would not be subject to regulation by the Pennsylvania commission, because "those to be served consist only of a special class of persons – those to be selected as tenants – and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged, and limited group and the proposed service to them would be private in nature."[12]

9 Notably, the court gave no credence to the Pennsylvania commission's argument that tenants could face unfair or discriminatory rates if the landlord was not a regulated utility: "[t]he controlling consideration is not whether regulation is desirable, but whether [the landlord] is subject to regulation under the Public Utility Law."[13]

10 The foregoing decisions make crystal clear the Complaint must allege facts sufficient to support the claim that Salmon Shores is a utility subject to Commission regulation. In particular, the Complaint must allege facts regarding what the court considers the "controlling factor," i.e., that Salmon Shores has devoted its property to public use. The Complaint fails to do so. Therefore, the Commission should dismiss that claim.[14]

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[10] *Drexelbrook Associates*, 212 A.2d at 239, quoting 66 Penn. Stat. § 1102(a) and (b).
[11] RCW 80.01.040(3).
[12] *Drexelbrook Associates*, 212 A.2d at 240.
[13] *Drexelbrook Associates*, 212 A.2d at 441-42.
[14] In a case following *Drexelbrook Associates*, the Pennsylvania court outlined two relevant factors: 1) whether the service at issue is "merely incidental to the provider's non-utility business;" and 2) "whether the utility facility was designed and constructed only to serve specific individuals so that the resulting service is not properly considered to be for the public." *Waltman v. Penn. Pub. Util. Comm'n*, 596 A.2d 1221, 1224 (Penn. 1992) (citations omitted). These factors weigh heavily in favor of Salmon Shores not being a regulated electric utility, because: 1) Salmon Shores operates a substantial non-utility business (the RV park); and 2) there is no evidence Salmon Shores' designed its system to serve the broader public.

B. The Commission Lacks Jurisdiction Over Salmon Shores as a Customer of PSE

11 As we just discussed, based on the pleadings (liberally construed), the Complaint fails to support a claim that Salmon Shores is a public utility subject to Commission regulation. Thus, Salmon Shores has the status of a PSE customer. However, the Commission lacks jurisdiction over customers of electric utilities,[15] because the Commission's general regulatory authority is over persons engaged in "supplying any utility service … to the public for compensation."[16] This is confirmed by the Commission's complaint statute,[17] which does not contemplate complaints against a customer of a public service company. Therefore, in this case, the Complaint is not authorized to the extent it seeks relief regarding Salmon Shores as a customer of PSE.

III. CONCLUSION

12 For the reasons set forth above, the Commission should dismiss the Complaint as to Respondent Salmon Shores RV Park.

DATED this 28th day of April, 2010.

Respectfully submitted,

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[15] A person other than a public service company may not violate a Commission statute or order with impunity, because by statute, such violators are "guilty of a gross misdemeanor." RCW 80.04.390, last sentence. But, that is a matter for the superior court and the county prosecutor, because the UTC has no criminal jurisdiction.
[16] RCW 80.01.040(3).
[17] RCW 80.04.110.