

**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION
COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION,

Complainant,

v.

NORTHWEST NATURAL GAS
COMPANY,

Respondent.

.....

In the Matter of the Petition of

NORTHWEST NATURAL GAS
COMPANY

For an Accounting Order Authorizing
Deferred Accounting Treatment of
Certain Costs Associated with the
Smart Energy Program.

DOCKET UG-080519

DOCKET UG-080530

(consolidated)

PUBLIC COUNSEL MOTION FOR
SUMMARY DETERMINATION

I. MOTION

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) hereby moves for an order on summary determination: (1) rejecting Northwest Natural Gas Company's (NW Natural) proposed new and revised tariff sheets regarding the Smart Energy program (Docket No. UG-080519); and (2) dismissing the Company's Petition for an Accounting Order (Docket No. UG-080530).

II. MEMORANDUM

A. Background

On March 21, 2008, NW Natural filed revisions to its currently effective tariff to establish a Smart Energy program.¹ Smart Energy creates a means by which customers can opt to pay a monthly fixed or usage-based charge that will, after the company deducts for administrative costs, be used to purchase carbon emission offsets. NW Natural proposes to have The Climate Trust administer the Program. On March 24, 2008, NW Natural filed a petition seeking an accounting order authorizing deferred treatment of the first three years of marketing and education costs associated with the Program.² The Commission subsequently suspended the tariff revision, consolidated the matters, and set them for hearing.³

On June 13, 2008, the Commission convened a prehearing conference before Administrative Law Judge, Dennis Moss.⁴ The parties agreed that preliminary legal and policy issues should be settled through cross-motions for summary determination.⁵

B. Legal Standard for Summary Determination

Under WAC 480-07-380, parties may move for summary determination of one or more issues in a case if the pleadings, together with any properly admissible evidentiary support, demonstrate that there are no genuine issues of material fact and that the moving party is entitled to

¹ *UTC v. Northwest Natural Gas Company*, Initial filing on behalf of Northwest Natural Gas Company from Lisa Rackner, Docket No. UG-080519 (March 21, 2008) (hereinafter *Tariff Filing*). NW Natural already offers Smart Energy to its Oregon customers and seeks, here, to extend the Program to its Washington service territory.

² *In the Matter of the Petition of Northwest Natural Gas Company For an Accounting Order Authorizing Deferred Accounting Treatment of Certain Costs Associated with the Smart Energy Program*, Initial filing on behalf of Northwest Natural Gas Company from Kelly Miller, Docket No. UG-080530 (March 24, 2008) (hereinafter *Accounting Petition*). See also, NW Natural Response to Public Counsel Data Request No. 5(g). NW Natural is only seeking to defer 10 percent of total program costs, i.e. \$79,000, as Washington makes up 10 percent of its customers.

³ Order 01 (Complaint and Order Suspending Tariff Revisions; Consolidating Dockets/Order Setting Accounting Petition for Hearing; Consolidating Dockets).

⁴ Order 02 (Prehearing Conference Order), ¶4.

⁵ *Id.*, ¶10.

judgment as a matter of law.⁶ The Commission may consider the applicable standards from Civil Rule 56.⁷

C. The Commission Should Not Approve NW Natural's Proposed Smart Energy Program Offering (Docket No. UG-080519)

Public Counsel respectfully moves for an order on summary determination rejecting NW Natural's proposed Smart Energy program. Smart Energy will result in NW Natural collecting charges that are not fair, just, and reasonable. Moreover, the Program is not essential to NW Natural's provision of safe and reliable natural gas service to its Washington customers.

1. The Commission has jurisdiction to determine whether NW Natural can offer Smart Energy to its customers.

The Commission has broad jurisdiction to regulate all services offered by investor-owned public utilities. RCW 80.01.040(3) states that it is the UTC's duty to "[r]egulate in the public interest . . . the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation." This jurisdiction is not limited to non-voluntary services or programs. Moreover, the Commission has found it has jurisdiction over the tariff filing⁸ and, by filing its tariff revisions, NW Natural has consented to jurisdiction.

2. The charges that would be collected under Smart Energy are not fair, just, and reasonable.

RCW 80.28.010(1) requires that "[a]ll charges made, demanded *or received* by any gas company, electrical company or water company for gas, electricity or water, *or for any service*

⁶ WAC 480-07-380(2)(a).

⁷ *Id.*

⁸ Order 01, ¶¶10-11.

rendered or to be rendered in connection therewith; shall be just, fair, reasonable and sufficient.”⁹

The plain meaning of this statute indicates that the same standard applies to all charges received by a utility. No exception is stated for charges received under voluntary programs.¹⁰

The substantial administrative expenses of Smart Energy undermine its cost-effectiveness and lead to unreasonable rates. NW Natural estimates the Program’s administrative costs average 30 percent.¹¹ This means only 70 percent of the actual dollars paid by customers would go to The Climate Trust.¹²

Significantly, customers have the alternative of directly purchasing offsets from The Climate Trust without paying additional administrative costs.¹³ The Climate Trust offers a program, carboncounter.org, that allows individuals to “calculate carbon dioxide emissions from their daily activities, and make a tax-deductible donation to offset part or all of their emissions.”¹⁴ Information about carboncounter.org is easily accessible on The Climate Trust’s website and can be accessed from numerous other online sources as well. Thus, NW Natural’s customers do not benefit from NW Natural offering an option to purchase carbon offsets from The Climate Trust because they already have the ability to do just that. Moreover, the existing means of purchasing offsets allows customers to ensure that 100 percent of their money actually goes to The Climate Trust and is not spent in large part on NW Natural’s administrative and overhead expenses.

⁹ Emphasis added.

¹⁰ In Order 01, ¶9, the Commission stated that “the Smart Energy program may include elements that might injuriously affect the rights and interests of the public,” and that NW Natural “has not demonstrated that the Smart Energy service offering would result in rates that are fair, just, reasonable and sufficient.”

¹¹ See Letter to Carole Washburn from Kelley Miller, *Tariff Filing*, p. 2.

¹² The Climate Trust may have its own overhead costs that would further reduce the amount actually used to purchase offsets. Moreover, the ultimate carbon reduction programs may involve additional costs that neither NW Natural or this Commission could easily account for.

¹³ NW Natural acknowledges this in its Response to Public Counsel Data Request No. 2(a), stating “[T]he Climate Trust programs are open to any entity wishing to offset their emissions.”

¹⁴ See “Our Programs” link to “For Individuals” at <http://www.climatetrust.org/programs.php> (last visited July 8, 2008).

3. NW Natural customers will not be adequately informed that their Smart Energy payments will in large part go to administrative and overhead expenses.

It is not clear that NW Natural has, or will, adequately advise its customers of the significant administrative costs associated with Smart Energy. Potential participants expressed this very fear. Members of a biogas focus group on the feasibility of Smart Energy expressed concerns that the money paid by customers would go to NW Natural or other corporations, rather than to actual carbon reduction programs.¹⁵ The focus group report states in part, “[w]hat funds were being used for was a concern to respondents. Most were highly concerned about contributing to corporate coffers”¹⁶

NW Natural’s website only misleads customers further, explaining the Program as follows:

For as little as \$6 a month, you can support innovative environmental projects here in the Western United States. We'll invest your Smart Energy dollars in projects that prevent the release of greenhouse gases.¹⁷

The administrative costs are not disclosed until the customer navigates to the bottom of a separate FAQ webpage. This could mean that customers will end up paying Smart Energy fees believing they will be applied to carbon reduction programs when, in fact, they are being used for administrative, overhead, and marketing costs.

4. Smart Energy is not an effective conservation program, nor is it essential to NW Natural’s provision of safe, reliable natural gas service.

Smart Energy has not been demonstrated to be an effective conservation program and should not be offered to NW Natural’s customers in Washington. Many experts have found that carbon

¹⁵ Response to Public Counsel Data Request No. 4 (Attachment A), p. 3.

¹⁶ *Id.*

¹⁷ See “About Smart Energy,” available at https://www.nwnatural.com/services/smartenergy/smartenergy_about.asp?id=1101 (last visited July 8, 2008).

offset programs actually do little to encourage permanent carbon reduction.¹⁸ Coupled with the significant marketing and administrative costs associated with the Program, concerns about its actual effectiveness warrant rejection of Smart Energy.

NW Natural has not itself developed any of its own carbon reduction programs (i.e., energy efficiency, cogeneration, etc.) that are certified for carbon offsets by The Climate Trust.¹⁹ NW Natural could more effectively use the money it proposes to spend administering Smart Energy to reduce its own carbon emissions. The Company acknowledges that there are numerous ways that it can “reduc[e] the Company’s carbon footprint internally, such as reducing emissions associated with fleet operations, reducing Company energy use and modifying other field procedures to cut emissions.”²⁰

Moreover, giving customers the option of purchasing carbon offsets bears little relation to NW Natural’s provision of natural gas service to Washington residents. A quick review of The Climate Trust’s current portfolio shows that a large portion of the offsets it purchases have little or no connection with Washington state or energy production and none appear to relate to natural gas service.²¹ This remains true even given The Climate Trust’s commitment to recruit biodigester projects, because as the Company states, if such opportunities do not become available, Smart Energy money will go to other projects selected by The Climate Trust.²² Currently, there are no

¹⁸ Experts have raised numerous other concerns with offset programs. *See generally*, Zarembo, Alan, “Buying your way to carbon neutrality?” *The Seattle Times*, October 3, 2007. *See also*, Kevin Smith, *The Carbon Neutral Myth* (Transnational Institute, February, 2007), available at http://www.tni.org/detail_pub.phtml?&know_id=56.

¹⁹ NW Natural Response to Public Counsel Data Request No. 2(d).

²⁰ *See Accounting Petition*, ¶18.

²¹ *See* “The Climate Trust’s Offset Portfolio,” available at http://www.climatetrust.org/offset_projects.php (last visited July 16, 2008).

²² *See* NW Natural Response to Public Counsel Data Request No. 7(d).

biodigester projects underway.²³ Moreover, regardless of whether a biodigester project is commenced, Smart Energy funds will not be used at any time to actually purchase biogas.²⁴

Finally, there is no reason why NW Natural cannot pursue biogas development absent a carbon offset offering.

The Washington Supreme Court's recent decision in *Okeson v. City of Seattle*²⁵ supports Public Counsel's position on Smart Energy. In *Okeson*, the Court held there was not a close enough nexus between providing electric service and purchasing carbon offsets to allow Seattle City Light to recover the costs of offsets through rates.²⁶ While the Court's holding in *Okeson* may be limited, its reasoning is applicable here. NW Natural customers will not see safer or reliable natural gas service as a result of being offered the option of purchasing carbon offsets.²⁷ Nor does NW Natural's ability to provide natural gas service hinge on its ability to offer offsets to its customers.²⁸ Moreover, customers do not benefit from being given the option to purchase offsets since, as discussed above, they already can. In sum, NW Natural should focus on improving the quality and

²³ See "Smart Energy Questions and Answers," available at https://www.nwnatural.com/services/smartenergy/smartenergy_about.asp?id=1100 (last visited July 16, 2008).

²⁴ See NW Natural Response to UTC Staff Data Request No. 4.

²⁵ 159 Wash.2d 436 (2007). This case relates only to municipal utilities not regulated by the Commission. However, the Court's reasoning regarding the relationship between providing a necessary utility service and investing in carbon offsets may be applied to IOUs' involvement with carbon offset programs.

²⁶ *Id.* at 451-52. The legislature subsequently passed legislation specifically authorizing *municipal* utilities to purchase carbon offsets. However, it did not amend any of the statutes governing IOUs or the Commission. See An Act Relating to Authorizing Utilities to Engage in Environmental Mitigation Efforts, 2007 Wash Sess. Laws, ch. 349 (adding a new section to chapter 35.92 RCW; adding a new section to chapter 54.16 RCW; adding a new section to chapter 36.01 RCW; and creating new sections).

²⁷ One of the longest-term projects that The Climate Trust buys offsets from is a reforestation effort in Ecuador. See "Ecuadorian Rainforest Reforestation," available at http://www.climatetrust.org/offset_rainforest.php (last visited July 16, 2008). Moreover, some experts question the actual effectiveness of reforestation programs has been called into question. See Eric Bontrager, "Debate grows over tree planting's carbon-offset impacts," *Land Letter*, March 1, 2007, available at www.pacificforest.org/news/Media%20Clips%20PDF/TreePlanting-LandLetter-3-01-07.pdf - (last visited July 18, 2008).

²⁸ In its Accounting Petition, NW Natural claims that it will gain valuable knowledge and experience about the offset market through working with The Climate Trust. However, NW Natural already has substantial ties to The Climate Trust—NW Natural's Director of Environmental Policy and Sustainability, Bill Edmonds, sits on The Climate Trust board. See "The Climate Trust Board of Directors," available at http://www.climatetrust.org/about_us_board.php (last visited July 16, 2008).

reliability of its natural gas service and reducing its own carbon emissions rather than devoting time and energy to offering its customers a costly, questionably effective, carbon offset option.

D. The Commission Should Deny NW Natural's Petition for Deferred Accounting Treatment (Docket No. UG-080530)

Even if the Commission does not grant Public Counsel's motion to reject the Smart Energy program, it should deny NW Natural's Petition for Deferred Accounting. A utility may petition the Commission for authorization to defer certain costs where such accounting treatment is reasonable.²⁹ Approval of deferred accounting is *not* a predetermination of whether the costs were prudently incurred and thus recoverable.³⁰ However, deferred accounting may only be necessary and reasonable where a utility intends to later seek recovery of the costs through rates established in future rate proceedings. Here, NW Natural is seeking deferred accounting treatment for approximately \$79,000 which it has identified as "the first three years of marketing and education cost for Smart Energy."³¹ Deferring these costs is not reasonable because NW Natural cannot recover these costs through rates in the future.

1. WAC 480-90-223 prohibits NW Natural from recovering Smart Energy promotional marketing costs through rates.

WAC 480-90-223 prohibits natural gas companies from recovering promotional advertising expenses through rates. The rule defines promotional advertising as "advertising to encourage any person or business to select or use the service or additional services of a gas utility," and limits recovery to costs of "announcements or explanations of existing or proposed tariffs or rate

²⁹ WAC 480-07-370(1)(b).

³⁰ See Prehearing Conference Transcript, 11:4-8 (Judge Moss, stating, "[a]ll [the Commission does] if we issue an accounting order is say you can defer these costs. We will consider later whether they can be included in rates, and if so, how they will be recovered and from whom").

³¹ See NW Natural Response to Public Counsel Data Request No. 5(g) and (h).

schedules.”³² NW Natural has described the costs it seeks to defer as “*marketing/education*” and estimates that for three years, Program-wide expenses will exceed \$700,000.³³ It is likely that these costs go beyond minimal “announcement and explanations” and in fact, include promotion of Smart Energy and are thus not recoverable under WAC 480-90-223.

2. RCW 19.29A.090 suggests that NW Natural should not recover Smart Energy marketing and education costs from all ratepayers.

RCW 19.29A.090, which governs electric utilities’ green tag programs, expressly prohibits recovery of costs associated with voluntary green energy programs in rates.³⁴ Although this statute applies to electric utilities, the underlying policy—to protect general ratepayers from bearing the cost of voluntary programs—is equally applicable to similar programs offered by natural gas utilities.³⁵ The similarities between electric green tag programs and Smart Energy support this point. First, both allow customers to pay a flexible amount, often to a third party, for investment in greenhouse gas reduction programs. Also, like green tag programs, customers’ participation in Smart Energy is completely voluntary; the voluntary nature of the green tag programs was likely the primary motivation for statutory prohibition on collecting the costs of the programs from all ratepayers.

The prohibition on collecting program costs from all ratepayers is especially strong for marketing and education costs. Twice, lawmakers have considered amendments that would allow recovery of marketing and education costs of green tag programs. Both times, the Legislature

³² WAC 480-90-223(1) and (2)(g).

³³ See NW Natural Response to Public Counsel Data Request No. 5(g) (emphasis added).

³⁴ RCW 19.29A.090 reads in pertinent part, “all costs and benefits associated with any option offered by an electric utility under this section must be allocated to the customers who voluntarily choose that option.”

³⁵ Commission staff noted in its April 30, 2008 Open Meeting Memoranda that Smart Energy is similar to the Green Tag Programs governed by RCW 19.29A.090, and that in its opinion, it is “reasonable . . . to apply [the statute’s] recovery methodology to the Smart Energy Program.”

rejected these amendments. In 2002, the Legislature considered an amendment allowing utilities to recover “prudently incurred costs to encourage customers to choose [green energy] options.”³⁶

During Committee hearings, Senator Hochstatter raised the point that the amendment was merely an attempt to pass on advertising costs to the general customer base.³⁷ In 2008, the legislature considered a similar amendment, House Bill 3342, which proposed adding a new section to RCW 19.29A.090, allowing utilities to “promote voluntary programs to purchase qualified alternative energy resources and . . . recover their marketing and administrative costs . . .”³⁸ This bill did not make it past Committee hearings.

Applying the underlying policy reflected in RCW 19.29A.090, NW Natural should not be allowed to recover its marketing and education costs through rates because they are related solely to Smart Energy. The statute, while it does not apply to gas utility programs by its terms, provides useful guidance on this issue. Additionally, these costs are specifically the types of expenses considered in the two amendments discussed above, expenses the Legislature specifically denied utilities to recover from all ratepayers. Indeed, NW Natural’s Accounting Petition may be the first step towards what Senator Hochstatter feared; an effort by the Company to pass the expense of corporate imaging and green marketing onto its customers.

³⁶ 2669 AMS EEW S4588.1, 57th Leg., 2002 Reg. Sess. (Senate Committee on Environment, Energy & Water Amendment to H.B. 2669).

³⁷ Senate Journal, 2001, p. 869.

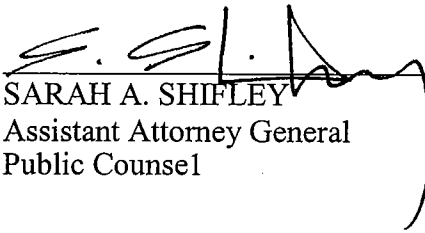
³⁸ H.B. 3342, 60th Leg., 2008 Reg. Sess.

III. CONCLUSION

For the reasons discussed above, Public Counsel respectfully moves for an order on summary determination: (1) rejecting NW Natural's proposed new and revised tariff sheets regarding Smart Energy (Docket No. UG-080519); and (2) dismissing the Company's Petition for an Accounting Order (Docket No. UG-080530).

DATED this 18th day of July, 2008.

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