

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of

MIDAMERICAN ENERGY
HOLDINGS COMPANY AND
PACIFICORP, d/b/a PACIFIC
POWER & LIGHT COMPANY

For an Order Authorizing Proposed
Transaction.

DOCKET NO. UE-051090

PETITION FOR INTERLOCUTORY
REVIEW OF PREHEARING CONFERENCE
ORDER NO. 1 BY PUBLIC UTILITY
DISTRICT NO. 1 OF SNOHOMISH
COUNTY, WA

COMES NOW Public Utility District No. 1 of Snohomish County, WA
("Snohomish PUD" and/or "Petitioner"), pursuant to Commission rule, specifically WAC
480-07-810(2)(a), and seeks interlocutory review of Order No. 1 on Prehearing
Conference, by and through its counsel, David W. Wiley of Williams, Kastner & Gibbs
PLLC.

I. PRELIMINARY STATEMENT

1 On July 22, 2005, Snohomish PUD filed a Petition to Intervene in the above proceeding.
On July 26, 2005, the Commission conducted an initial prehearing conference on this
matter before Administrative Law Judge Dennis J. Moss. At the prehearing conference,
the Industrial Customers of Northwest Utilities (ICNU), The Energy Project, and
Snohomish PUD sought to intervene in the proceeding. No objections were raised to the
intervention petitions of ICNU and The Energy Project, and their interventions were
granted. While the applicants questioned Snohomish PUD's interest in the proceeding,

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they did not object to its participation; but the staff did object, arguing, amongst other points, that Snohomish PUD's involvement would unnecessarily complicate the proceeding. The Administrative Law Judge concurred and ultimately denied intervention. It is to that denial of intervention and preclusion of further participation in this proceeding that this Petition is directed.

II. THE STATUTORY AND ADMINISTRATIVE RULES AT ISSUE

2 RCW 34.05.443, WAC 480-07-355(a), (3), and (5), and WAC 480-07-810.

III. RELIEF REQUESTED

3 Snohomish PUD asks that the portion of the Prehearing Order of the Administrative Law Judge denying intervention status to Snohomish PUD be reversed and that Snohomish PUD be authorized to participate in the above-captioned proceeding as an intervenor with appropriate limitations, if any, as prescribed by the Commission in its discretion.

IV. INTERLOCUTORY REVIEW OF DENIAL OF INTERVENTION IS APPROPRIATE NOW

4 Interlocutory review of the Prehearing Conference Order is appropriate here as the ruling of the administrative law judge terminates further participation by Snohomish PUD in the action and excises an important public power perspective from the proceeding. While post-hearing review of the ultimate order in this matter would allow for consideration of the denial, interlocutory review is obviously preferred as no party wishes to delay or re-litigate the issues presented. WAC 480-07-355(5) and WAC 480-07-810(2) authorize interlocutory review and anticipate review at this juncture in the interests of saving time and expense for all concerned, and in allowing Snohomish PUD's participation to prevent

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substantial prejudice and irreparable harm to it by thwarting development of a full and complete record in the proceeding.

- 5 Review of an interlocutory order is appropriate when the order would totally exclude a person from the proceeding and post-hearing review could not fully correct the person's exclusion without further proceedings, imposing substantial burdens on all parties and the Commission. Order No. 147856, *In re Joseph D'Amico d/b/a Security Services/Courier Services*, App. No. P-77496 (May 1994).

V. LIMITATION OF PARTICIPATION IS PREFERABLE TO EXCLUSION

- 6 At the prehearing conference and in its earlier filed petition, Snohomish PUD did not offer its view of RCW 34.05.443 and limitations on intervention as provided by WAC 480-07-355. Petitioner is well aware of the statutory and regulatory provisions to restrict intervenor participation and understands, particularly when an unregulated competitor participates in a Commission proceeding, there is a risk both of protraction of the proceeding and complication of the record to matters either irrelevant to the outcome or outside the Commission's jurisdictional purview. Snohomish PUD is prepared to tailor its presentation and participation in the record of this proceeding to avoid complication, delay or other protractions of this record. For the reasons described below and in the Declaration of John White, Petitioner believes it has an interest which it can uniquely articulate in the record, and that it should therefore be granted leave to participate as an intervenor.

**VI. NO OTHER PARTY CAN ADEQUATELY REPRESENT
SNOHOMISH PUD'S INTERESTS**

7 Under FRCP 24, an applicant for intervention is required to make only a minimal showing that existing parties' representation of its interests may be inadequate. Crosby v. St. Paul Fire and Marine Co., 138 F.R.D. 570, 573 (W.D. Wash. 1991), citing California ex. rel Van De Camp v. Tahoe Regulatory Planning Agency, 792 F.2d 779 (9th Cir. 1986).

Snohomish PUD is the only publicly owned utility seeking to participate in this record and no other party can be expected to advance the interests of Snohomish PUD or otherwise make the showings, articulate the positions or lend similar insights to the record it alone will contribute.

8 The Commission has, by analogy, looked to the Civil Rules in applying its own procedural rules in past cases. See in re Order M. V. No. 140273, Thomas C. Kolean and James B. Stuart d/b/a Olympic Transport, App. P-72389 (Sept. 1989), where it responded to the provisions of CR 59 in reviewing reopening standards.¹

9 FRCP 24, while different in context, in providing for intervention as a matter of right and for permissive intervention in federal court actions, is nevertheless relevant in announcing that intervention as a matter of right is established if the applicant claims an interest relating to the transaction, and the disposition of the action may impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties. The burden of establishing the adequacy of the existing parties'

¹ The Commission, in fact, has codified consideration of Civil Rules in certain of its procedural rules. See, i.e., the reference to CR 56 for summary adjudication standards in WAC 480-07-380(2)(a).

representation is on the party opposing intervention. *TPI Corp v. Merchandise Mart of South Carolina*, 61 F.R.D. 684, 688 (D.S.C. 1974). In *TPI Corp*, the U.S. District Court for South Carolina found sister corporations and individual partners, corporate officers or shareholders could not adequately represent the legal claim of a partnership or a corporation before the court who were, in turn, granted intervention.

10 Here, Snohomish PUD is a publicly-owned utility, organized under express state statutory authorization and, as set forth in argument below and by declaration attached, has “cognizable stakes” in the outcome of the merger proceeding. Whether or not the Commission ultimately believes that interest rises to “substantial” under WAC 480-07-355(3), or as analogous to intervention as a matter of right under FRCP 24(a), it is indisputable that no other party can here advance the public power perspective and that that unique perspective should be viewed as participation promoting the “public interest” in a relevant, non-delegable – indeed, indispensable manner.

VII. PREVIOUSLY-ARTICULATED OBJECTIONS TO INTERVENTION

11 The administrative law judge and the staff both raised concerns that Snohomish PUD’s asserted interests involved matters within the FERC’s or SEC’s jurisdiction, and would therefore broaden the issues in this intrastate proceeding and unduly complicate and/or expand the Commission’s consideration herein. (See Prehearing Conference Order at 3). Snohomish PUD has no such intentions and seeks intervention in this WUTC proceeding only to participate in the development of a record within the Commission’s regulatory jurisdiction.

12 As noted in the accompanying declaration, Snohomish PUD's interests in this proceeding are directed generally to an understanding and evaluation of the merged entity's role in a changing and dynamic, competitive electrical energy marketplace, to weighing and contributing evidence of the proposed impacts of the combined entity on existing and prospective electrical energy customers, and to whether electrical power generation and distribution forces impacted in the retail electrical energy marketplace may cause Snohomish PUD economic harm or otherwise detrimentally affect its ability to sustain an economically and technologically viable operation in the future.

VIII. ARGUMENT IN SUPPORT OF LEAVE TO INTERVENE

13 If granted leave to participate, Petitioner understands the Commission's statutory obligation under RCW 80.12.020 in evaluating the financial and operational fitness issues of the applicants, and does not seek, by its participation, to distract the Commission from its focal analytical mission here, but as indicated, views its participation at a minimum as consistent with the Commission's consideration of the "public interest" factor in reviewing the testimony and exhibits to be offered into the record to ensure it gives appropriate consideration to various factors in the broad amalgam of Washington investor-owned and public electric utility consumer relationships in evaluating this material merger application under Washington law. See, the Declaration of John P. White.

14 While the oft-cited *Cole v. WUTC*, 79 Wn.2d 302, 485 P.2d 71 (1971) case, clearly addresses the intervention interest of an unregulated entity under the substantial interest standard in a rate-making proceeding of a regulated company in finding the unregulated

entity lacked standing to participate as an intervenor, Cole also stands for the proposition that a proposed intervention can be considered in light of the general “public interest” standard. Indeed, under the pertinent procedural rule, WAC 480-07-355(3) . . . :

If the petition discloses a substantial interest in the subject matter of the hearing or **if the petitioner’s participation is in the public interest** . . . the presiding officer may . . . grant the petition

[Emphasis added].

- 15 The Commission’s articulation of an evolving public interest standard almost a decade ago in Docket Nos. UE-951270 and UE-960195, *In re Puget Sound Power & Light Company and Puget Sound Power & Light Company and Washington Natural Gas Company*, Third Supplemental Order Modifying Prehearing Order (June 1996), in which it reversed denial of intervention status to Snohomish PUD in a previous significant merger proceeding, bears pertinence today as well . . .

This proceeding raises significant competitive issues beyond those involved in a typical rate case. The transition from monopoly to retail competition in the electric industry is a basic issue in this proceeding. In this transitional environment, the Commission believes that it is in the public interest for it to be generous in allowing issues on the table. WPUDA and other competitors can bring an expertise to the table that may assist the Commission in determining how the merger will affect the Commission policy favoring a competitive model in the electric industry.

Docket Nos. UE-951270 and UE-960195 at 7.

- 16 While the “competitive model” in the electric industry may no longer have quite the currency or “hot button issue” status of a decade ago, the emerging shared technology intersection topics such as broadband service over electric lines and continuing concerns about regional transmission (including avoidance of regional brownouts such as occurred

recently in California) and lingering residential exchange issues under the 1980 Pacific Northwest Electric Power Planning & Conservation Act, 16 U.S.C. § 839c, raised by the merger of a prominent regional investor-owner utility and a public utility holding company whose subsidiary operations span approximately a third of the territory of the United States (all addressed in John White's declaration), are issues which Petitioner believes merit Commission consideration in this proceeding and which its participation will seek to encourage.


IX. CONCLUSION

- 17 The Commission should review Prehearing Conference Order No. 1 to the extent that it denies intervention status to Snohomish PUD. Snohomish PUD has a substantial interest in the merger proceeding which cannot be advanced by another party to the proceeding. Alternatively, its intervention will assist the Commission in evaluating various impacts of the proposed merger on emerging shared technology, ratepayer and regional transmission interplay issues, and its involvement is fully consistent with promotion of the public interest, which guides the Commission in reviewing transfers of property and merger transactions under Title 80 RCW. Snohomish PUD therefore asks that the denial of its intervention status terminating its participation herein be reversed, and that it be granted leave to intervene in the proceeding.

DATED in Seattle, Washington, this 8th day of August, 2005.

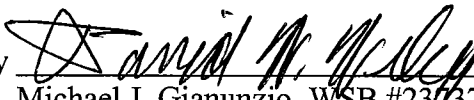
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2005, I caused to be served the original and 15 copies of the foregoing document to the following address via legal messenger delivery:

Carole Washburn, WUTC Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
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I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@wutc.wa.gov

and an electronic copy via email and a copy via first class mail, postage prepaid, to:

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DATED in Seattle, WA, this 8th day of August, 2005.


Sandra V. Brown

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