

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY

Respondent.

DOCKET UE-161123

ORDER 05

ORDER ACCEPTING
INTERLOCUTORY REVIEW OF
ORDER 04 AND GRANTING
INTERVENTION OF THE
NORTHWEST AND
INTERMOUNTAIN POWER
PRODUCERS COALITION WITH
CONDITIONS

BACKGROUND

- 1 On October 7, 2016, Puget Sound Energy (PSE or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff WN-60, Schedule 451 – Large Customer Retail Wheeling. The Company requests approval of a new retail wheeling service for large non-core customers. On October 18, 2016, the Commission entered Order 01, Complaint and Order Suspending Tariff Revisions.
- 2 On November 2, 2016, the Northwest and Intermountain Power Producers Coalition (NIPPC) filed a Petition to Intervene. NIPPC is a trade association the members of which include independent power producers active in the Pacific Northwest and western energy markets. On November 4, 2016, PSE filed its Response in Opposition to NIPPC’s Petition. The Company contends that NIPPC fails to meet either the substantial interest or public interest tests necessary for the Commission to permit the association to intervene. Rather, in PSE’s view, NIPPC seeks to intervene only to further the business interests of its members, which the Commission does not regulate.
- 3 On November 7, 2016, NIPPC filed its Reply to PSE’s Opposition. NIPPC asserts that it has a substantial interest in this docket because some of its members could be the independent power producers from which Schedule 451 customers would arrange to purchase power if the Commission approves PSE’s proposed tariffs. NIPPC also maintains that it would provide a “unique perspective” on the issues raised in this proceeding.

- 4 At the prehearing conference on November 7, 2016, the Administrative Law Judge provided all parties an opportunity to comment on NIPPC’s petition to intervene. Commission Staff (Staff) and the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) argued in favor of NIPPC’s intervention, suggesting that its participation would facilitate a robust examination of PSE’s proposed tariff. PSE repeated its opposition and further stated that it was uncomfortable with the possibility that NIPPC and its members would have access to confidential information; especially related to the closure of the certain units of the Colstrip plant. Microsoft Corporation (Microsoft) voiced concerns that NIPPC members, with whom Microsoft might negotiate the purchase of power, could receive a contractual advantage by gaining access to Microsoft’s confidential load information.
- 5 On November 22, 2016, the Commission entered Order 04 denying NIPPC’s petition. The Administrative Law Judge concluded that the Commission’s jurisdiction does not extend to either the independent power producers that comprise NIPPC or their contracts with eligible customers, and thus the association failed to establish that it has a substantial interest in the proceeding. The Judge further concluded that NIPPC’s participation would not be in the public interest, finding that the association had not demonstrated that its participation would benefit the Commission’s consideration of the issues to be determined.
- 6 On December 2, 2016, NIPPC filed a petition for interlocutory review of Order 04 (Petition). NIPPC urges the Commission to exercise its discretion to accept such review pursuant to WAC 480-07-810(2) because Order 04 terminates the association’s participation in this proceeding and the Commission cannot remedy the alleged substantial harm resulting from this order by reviewing it at the end of the proceeding.
- 7 On the merits, NIPPC contends that its “primary purpose in intervening is not to advocate on behalf of its members as PSE’s competitors but to ensure that whatever retail access program is adopted is ultimately successful.”¹ NIPPC, nevertheless, claims that it has a substantial interest in this docket because the retail wheeling terms and conditions the Commission establishes “could significantly harm any NIPPC member whose ability to sell power is limited,”² including by being subject to Commission regulation. NIPPC also asserts that it has extensive experience in, and unique knowledge of, competitive energy markets and retail wheeling that would be extremely useful to the Commission in

¹ Petition ¶ 12.

² *Id.* ¶ 5.

developing a complete record consistent with the public interest. The Commission, according to NIPPC, routinely permits such entities to intervene in adjudications.

8 On December 12, 2016, PSE filed its answer to the Petition. The Company continues to oppose NIPPC's intervention, contending that the association has failed to demonstrate that it has a substantial interest in this docket because NIPPC is not a PSE customer. Rather, PSE asserts, NIPPC is an advocacy trade group of unregulated independent power producers seeking only to further the business interests of its members, and thus its participation in this proceeding would not serve the public interest. The Company believes that the parties to the case include sophisticated and experienced entities that have sufficient knowledge and expertise to address the issues presented to the Commission for resolution. PSE asserts that NIPPC's involvement would inappropriately broaden and encumber those issues and cause competitive harm to the Company and other parties, and thus the Commission should affirm Order 04.

9 Staff, Public Counsel, and Kroger Co. also filed answers to the Petition on December 12, all in support of the Petition. These parties believe NIPPC has unique experience in competitive retail electricity marketplaces that it can share and thereby enhance development of the record in a case that presents important and largely unprecedented questions of law and policy. Staff further contends that NIPPC has a substantial interest in this docket because the Commission could adopt conditions on alternative energy suppliers seeking to serve Schedule 451 customers that would directly impact NIPPC members. Staff also accepts NIPPC's representation that its participation will not burden the proceeding or pose competitive harm to PSE or any other party.

DISCUSSION AND DECISION

10 No party opposes interlocutory review of Order 04, and we agree that such review is appropriate under the circumstances presented here.³ We also conclude that while NIPPC does not have a substantial interest in this proceeding, its participation could assist the Commission and be in the public interest to the extent no competitive harm would result. Accordingly, we will grant NIPPC's petition to intervene but deny the association, its representatives, and its members' access to confidential information.

11 The Administrative Procedure Act (APA) states that a presiding officer may grant a petition to intervene in an adjudication "upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the

³ See WAC 480-07-355(5); WAC 480-07-810(2).

interests of justice and will not impair the orderly and prompt conduct of the proceedings.”⁴ Commission rules provide the presiding officer with discretion to grant intervention “[i]f the petition discloses a substantial interest in the subject matter of the hearing or if the petitioner’s participation is in the public interest.”⁵ In addition, “the presiding officer may impose conditions upon the intervenor’s participation in the proceedings.”⁶

12 We agree with the conclusion in Order 04 that NIPPC has not demonstrated a substantial interest in the subject matter of this proceeding. NIPPC contends that the association’s members “could be directly harmed by the terms and conditions of Schedule 451 if the tariff allows only certain participants, unlawfully discriminates between particular non-utility power suppliers, or if it is designed in a way that subjects NIPPC’s members to the Commission’s jurisdiction.”⁷ NIPPC, however, identifies no such terms in the Company’s proposed tariff. NIPPC’s claim of substantial interest thus is based on nothing more than the possibility that the Commission *might* consider terms and conditions the Company did not originally propose, that *might* affect the ability of alternative power suppliers to offer service to Schedule 451 customers, and that *might* thereby harm NIPPC members.

13 Such speculation is insufficient to demonstrate that NIPPC has a substantial interest in the subject matter of this docket. Order 04 correctly states that the primary “issues in this case are under what circumstances a small group of customers may terminate service with PSE and what terms and conditions should be imposed on departing customers to ensure that those who continue taking service from PSE are not harmed in the process.”⁸ The focus of Schedule 451 and this adjudication is on PSE’s customers, not independent power producers. We are not prepared at this stage of the proceeding to expand the issues beyond those that arise from the tariff PSE filed, or to permit NIPPC to broaden the scope of this docket.

14 We nevertheless find that permitting NIPPC to intervene in this case would be useful to the Commission in compiling an appropriate record. No other party has NIPPC’s perspective and experience in the regional energy marketplace, and we are convinced that

⁴ RCW 34.05.443(1).

⁵ WAC 480-07-355(3).

⁶ RCW 34.05.443(2); *accord* WAC 480-07-355(3).

⁷ Petition ¶ 30.

⁸ Order 04 ¶ 18.

the association can provide insights into how the tariff terms and conditions will impact PSE's customers. We adhere to our view that "the public interest standard protect[s] 'the interests of customers of regulated utilities, not those of unregulated competitors.'"⁹ NIPPC's Petition and the supporting answers of other parties demonstrate, as prior pleadings and discussion did not, that NIPPC's participation would not necessarily be limited to advocating on behalf of its members' business interests but can meaningfully contribute to the Commission's understanding of retail wheeling as reflected in Schedule 451 and its effect on consumers.

- 15 PSE disagrees and relies on the Commission and Washington Supreme Court decisions in *Cole* and later cases¹⁰ to argue that NIPPC, as a nonregulated trade association, can represent no interests but its own, and its competitive interests do not qualify as a public interest. We agree that *Cole* remains good law even after the legislature adopted the more liberal intervention standards in RCW 34.05.443, but we find the circumstances presented here to be more akin to those in a recent Pacific Power & Light Co. (Pacific Power) rate case. In that 2013 proceeding, the Commission permitted Columbia Rural Electric Association (CREA) to intervene for the limited purpose of addressing a tariff that proposed to change the fees residential customers paid for removing service drops and meters. The administrative law judge concluded,

While CREA does not have a direct and substantial interest in charges to [Pacific Power's] customers, the Commission has a strong interest in seeing that the record is fully developed relative to changes [Pacific Power] proposes. CREA's participation, limited to this issue, may result in a record that more fully informs the Commission on this matter than would be the case without CREA's participation. The Commission determines for this reason that CREA's participation is in the public interest, which establishes sufficient grounds for allowing it to intervene.¹¹

- 16 Similarly here, we find that NIPPC's participation may result in a record that more fully informs the Commission on the retail wheeling matters PSE's tariff filing raises and thus

⁹ Order 04 ¶ 20 (quoting *Cost Management Servs., Inc., v. WUTC*, Dockets UG-061256, et al., Order 06 ¶ 24 (Oct. 12, 2007)).

¹⁰ *Cole v. WUTC*, 79 Wn.2d 302, 485 P.2d 71 (1971); accord, e.g., *WUTC v. Cascade Natural Gas Corp.*, Docket UG-070332, Order 02 ¶ 12 (May 17, 2007).

¹¹ *WUTC v. PacifiCorp, d/b/a Pacific Power & Light Co.*, Docket UE-130043, Order 02, ¶ 6 (Feb. 14, 2013). As an administrative law judge's order, this is not binding precedent, but we find it persuasive.

is in the public interest. PSE, however, argues that “given that NIPPC is an advocacy group financed by its members, any perspective offered by NIPPC would be inherently biased and self-serving, aimed at protecting the competitive interests of its members, not PSE customers.”¹² More specifically, PSE asserts that “NIPPC’s desire to promote its conception of how electric markets should operate does not constitute grounds for intervention, particularly when it is unclear how the public will be served by such a perspective, and when NIPPC’s motivations are questionable.”¹³

- 17 We are aware that NIPPC, like other private entities, advocates on its own behalf, but such inherent bias goes to the weight of the evidence it provides, not whether the Commission should consider that information at all. The Commission benefits from hearing from parties with competing interests, at least when each such party offers unique information or perspectives on the issues presented. NIPPC can provide such information and perspective, and we trust that PSE and other parties will provide their views on the accuracy and credibility of the evidence NIPPC presents.
- 18 PSE also takes issue with NIPPC’s claim to be uniquely qualified to opine on every issue in this proceeding. The Company argues that the other parties are equally, if not more, experienced and can provide the Commission with the evidence it needs to resolve the issues presented without NIPPC’s participation. In addition, PSE and Microsoft continue to have concerns that NIPPC’s ability to access their confidential information, even under the auspices of the protective order, threatens competitive harm that weighs against granting intervention.
- 19 While we find that NIPPC has experience in retail wheeling markets that other parties lack, we agree that the usefulness of that experience does not extend to all issues presented in this docket. In particular, we see little or no benefit from NIPPC’s view of the level of PSE’s stranded costs or Microsoft’s load, particularly when those issues involve consideration of competitively sensitive data. The APA authorizes a presiding officer to condition intervention by “[l]imiting the intervenor’s participation to designated issues in which the intervenor has a particular interest demonstrated by the petition,”¹⁴ but such a limitation often is less successful in practice than it is in concept.
- 20 Accordingly, we condition NIPPC’s intervention on precluding the association, its representatives, and its members from accessing any confidential information produced

¹² PSE Answer to Petition ¶ 26.

¹³ *Id.* ¶ 35.

¹⁴ RCW 34.05.443(2)(a).

in this docket, including confidential information contained in filings with the Commission, produced through discovery, or provided in oral testimony. That limitation addresses the competitive harm PSE and Microsoft fear and effectively will focus NIPPC's participation on the tariff terms and conditions and the retail wheeling market issues the association asserts are its primary concern.

ORDER

THE COMMISSION ORDERS That

- 21 (1) The Commission accepts interlocutory review of Order 04.
- 22 (2) The Commission grants the Petition to Intervene filed by the Northwest and Intermountain Power Producers Coalition with the limitation that the association, its representatives, and its members may not access any confidential information filed or produced in this proceeding.

Dated at Olympia, Washington, and effective January 3, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner