

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-151871 and UG-151872

PUBLIC COUNSEL'S RESPONSE
IN SUPPORT OF COMMISSION
STAFF'S MOTION FOR
SUMMARY DETERMINATION

1 Public Counsel files this Response in Support of Commission Staff's Motion for
Summary Determination pursuant to the Commission's Notice of Deadline to Respond dated
July 14, 2016. Public Counsel supports the Staff's Motion and agrees that a waiver of the
requirements establishing the time for filing a motion for summary determination is appropriate
and consistent with the public interest. Public Counsel agrees that Puget Sound Energy's (PSE)
proposed leasing tariff fails to qualify as a utility service subject to the Commission's jurisdiction
and, further, that PSE fails to make a prima facie case that the rates are fair, just, and reasonable.

I. STATEMENT OF FACTS AND STATEMENT OF ISSUES

2 Public Counsel adopts the Statement of Facts and Statement of Issues represented in
Commission Staff's Motion for Summary Determination.

II. ARGUMENT

A. **Waiver is appropriate in this case, and the Commission should accept and consider
Commission Staff's Motion for Summary Determination.**

3 The Commission may alter the procedural rules under WAC 408-07-110, and requests for
waiver are evaluated under a public interest standard. Public Counsel agrees that Staff's request

for the Commission to consider its Motion for Summary Determination under shortened time is in the public interest and should be granted. Under WAC 480-07-380(2)(b), motions for summary determination must be filed at least 30 days before the next applicable hearing. In this case, PSE's rebuttal testimony was due 30 days before the hearing. The procedural schedule rendered impossible compliance with WAC 480-07-380(2)(b). Had Commission Staff brought its motion before PSE filed its rebuttal testimony, the motion would have been premature. After PSE filed its rebuttal testimony, the totality of the deficiencies became known, making the motion timely and providing sufficient basis for a motion for summary determination.

B. PSE fails to propose a service that is a utility service regulated by the Commission.

4 PSE proposes a leasing program that would allow customers to lease space and water heating appliances directly from PSE. The lease would have a fixed term and price and, at the end of the term, PSE will either remove the equipment from the customer's home or replace the appliance under a new lease agreement. Repair and maintenance are included in the rate paid by customers under the lease.¹ Public Counsel agrees with Commission Staff's position that PSE's proposed leasing service is not a utility service as a matter of law.

5 Not every service offered by a regulated utility is a utility service. Whether a service is a regulated utility service depends on the character of the business activity that makes up the

¹ Prefiled Direct Testimony of McCulloch, Exhibit No. MBM-1T at 10:7 to 11:17.
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service.² In determining what constitutes a regulated service, the Commission has stated that, “regulation ... is predicated upon the proposition that the service rendered is a public service.”³

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The Commission has articulated three factors used to determine whether a company is offering a utility service, and analysis of the factors demonstrate that PSE’s proposed leasing program is not a utility service. The factors are (1) whether the service is being offered to the public, (2) the market power of the company, and (3) the need for consumer protection.⁴ The first factor is based on the rationale that a company serving the public as a class is more likely to dedicate its facilities to public use.⁵ In this case, although PSE purports to offer the leasing service to all of its customers, the program is optional and will not be utilized by every customer. Leasing customers would be required to own the premises where the equipment would be installed.⁶ Moreover, the leases are individualized and customers must meet certain credit approval requirements to participate in the program.⁷ PSE’s leasing program is not offered to the public in the same way that electricity or natural gas service is.

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The second factor, market power, is premised on and necessitated by the fact that the regulated company is a natural monopoly. As such, it may be more efficient for a monopoly to

² *Cushing v. White*, 101 Wash. 172, 181-82 (1918) (“[T]he question must be determined by the character of the business activity actually carried on”); see also, *In the Matter of Puget Sound Energy’s Application for Approval of a Special Contract Under WAC 480-80-143*, Docket No. UG-160748, Order 01 (Jul. 7, 2016).

³ *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third Party Owners of Net Metering Facilities, ¶ 55 (Jul. 30, 2014).

⁴ *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third Party Owners of Net Metering Facilities, ¶¶ 59-64 (Jul. 30, 2014).

⁵ *Id.*

⁶ Proposed Sched. 75, Sheet 75-G at 5. Lease Terms and Conditions 4(a).

⁷ Prefiled Direct Testimony of Kimball, Exhibit No. MMK-1HCT at 10:17-18; Proposed Sched. 75, Sheet No. at (1)(4).

provide the service in question than the competitive market.⁸ In this case, PSE is a natural monopoly with respect to the energy services it provides: electric and natural gas services. However, PSE is not a natural monopoly with respect to leasing end-use appliances used to heat space or water. There are numerous companies that sell appliances in a variety of models, with a variety of features, at a variety of price points.⁹ Additionally, there are multiple ways for a customer to finance the purchase of end-use appliances.¹⁰ Regulation is not needed to substitute for competition to ensure fair prices.¹¹

8 With respect to the third factor, the Commission is more likely to find that regulation is appropriate when there is a need for consumer protection. Consumer protection is needed when customers are “at the mercy of the company’s shareholders to provide an essential public service.”¹² Although customer protection concerns exist, including whether customers understand the total price of the lease contract as compared to alternatives, the service in question (leasing end-use appliances) is not an essential public service warranting regulation.

⁸ *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third Party Owners of Net Metering Facilities, ¶¶ 59-64 (Jul. 30, 2014) (citing *Munn v. Illinois*, 974 U.S. 113, 151-152 (1876)).

⁹ Prefiled Direct Testimony of Kimball, Exhibit No. MMK-1HCT at 12:11 – 15:7; *see also*, Exhibit No. MMK-6; Prefiled Direct Testimony of O’Connell, Exhibit No. ECO-1HCT at 18:9 – 21:10.

¹⁰ Prefiled Direct Testimony of Kimball, Exhibit No. MMK-1HCT 47:18 – 49:15; Prefiled Direct Testimony of O’Connell, Exhibit No. ECO-1HCT at 44:12 – 45:3; Cebulko, Exhibit No. BTC-5.

¹¹ *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third Party Owners of Net Metering Facilities, ¶¶ 59-64 (Jul. 30, 2014) (citing *State ex rel. Stimson v. Kuykendall*, 137 Wash. 602, 609, 243 P. 834, 836 (1926)).

¹² *Id.*

C. PSE fails to establish a prima facie case demonstrating that the proposed rates are fair, just, reasonable, and sufficient.

9 If the Commission determines that the leasing program is a utility service subject to its jurisdiction, rates must be fair, just, reasonable, and sufficient.¹³ Public Counsel agrees with Commission Staff that PSE has failed to establish that its proposed rates meet the standard. A critical flaw in PSE's presentation is that it assigns cost based not on actual products and services that it will offer to customers, but rather on estimations based on averages calculated from information received from potential vendors through a Request for Qualifications process.¹⁴

10 Costs included in rates must be known and measurable. To be known and measurable, the amount must be measurable and not an estimate or projection.¹⁵ An average of certain products and services that actually exist in the market fails to meet the known and measurable standard and, as a result, the proposed rates cannot be fair, just, reasonable, and sufficient. PSE's promise to submit a compliance filing within 60 days of a Commission order approving the leasing program to update its proposed rates based on known costs of the products PSE will select¹⁶ does not cure the violation of the known and measurable standard and does not render the rates fair, just, reasonable, or sufficient. As argued by other parties, PSE may not postpone meeting its burden of proof beyond the conclusion of a proceeding.

¹³ RCW 80.28.010(1).

¹⁴ Prefiled Rebuttal Testimony of McCulloch, Exhibit No. MBM-7T at 4:3-10, 5:4-11; McCulloch, Exhibit No. MBM-1T at 19:19-22; Kimball, Exhibit No. MMK-1HCT at 11:17 to 15:7.

¹⁵ *Wash. Utils. & Transp. Comm'n v. Avista Corp. d/b/a Avista Utils.*, Dockets UE-090134 and UG-090135, Order 10 ¶ 46 (Dec. 22, 2009); *Wash. Utils. & Transp. Comm'n v. Pacific Power & Light Co.*, Docket UE-140762, Order 08 ¶ 167 (Mar. 25, 2015).

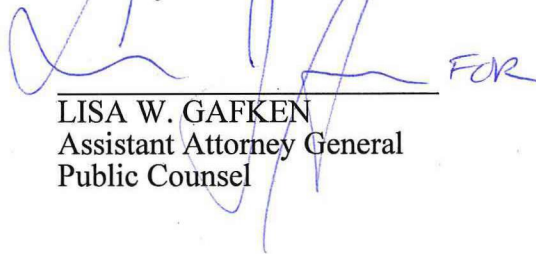
¹⁶ Prefiled Rebuttal Testimony of Norton, Exhibit No. LYN-1T at 8:1 to 9:7; Prefiled Rebuttal Testimony of McCulloch, Exhibit No. MBM-7T at 9:9-15.

III. CONCLUSION

11 For the reasons stated above, Public Counsel supports Commission Staff's Motion for Summary Determination. Public Counsel respectfully asks that the Commission consider the Motion and waive the timing requirements in WAC 480-07-380. Public Counsel further requests that the Commission grant Commission Staff's Motion for Summary Determination and reject PSE's proposed tariff Schedule 75. In doing so, the Commission should find that the proposed leasing program does not qualify as a utility service, or in the alternative, that PSE failed to establish that the proposed rates are fair, just, reasonable, and sufficient.

12 Dated this 22nd day of July, 2016.

ROBERT W. FERGUSON
Attorney General



LISA W. GAFKEN
Assistant Attorney General
Public Counsel

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