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Via WUTC Web Portal

Jeff Killip
Executive Director and Secretary
Washington Utilities and Transportation Commission
621 Woodland Sq. Loop SE
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Lacey, Washington 98503

Re: 2022-2023 Biennial Report of Conservation Accomplishments of Puget Sound Energy, Inc., Dockets UE-210822 and UG-210823

Dear Executive Director and Secretary Killip:

Puget Sound Energy, Inc. (PSE) submits the following comments in response to the Memos issued by Staff of the Washington Utilities and Transportation Commission (“Commission Staff”) in the above-referenced Dockets. In its Memos, Commission Staff recommends that the Commission impose three penalties (two for electric and one for natural gas) related to PSE’s electric and natural gas penalty thresholds for the 2022-2023 biennium.

PSE has worked collaboratively with its Conservation Resource Advisory Group (CRAG) over the 2022-2023 Biennium to adaptively manage its programs in an attempt to overcome unprecedented challenges caused by the lingering effects of the COVID-19 pandemic. PSE outlines the challenges and its adaptive management strategies in its Biennial Conservation Report filed in this proceeding. The CRAG generally agreed with PSE’s observations, shared by Commission Staff in the Memos, that this biennial was a challenging one for conservation due to the economic realities and the difficulty getting customers to participate. Indeed, Commission Staff recognizes PSE’s adaptive management efforts in its UG-210823 Memo:

In response to these challenges, the Company implemented several adaptive management efforts, which included increased measure incentives, extended limited time offers, virtual outreach events, and increased email and social media marketing to adapt to changing circumstances this biennium. **Table 2** shows that the Company’s conservation achievement trended upward over the course of the biennium

reflecting that its adaptive management likely helped ameliorate some of the challenges associated with COVID-19 pandemic.

For the reasons outlined in these comments, PSE disagrees with the premise and conclusions that underlie the Commission Staff recommendations to assess penalties in this matter and request that the Commission reject the staff recommendations.

A. PSE's Electric Conservation Penalty Thresholds

RCW 19.285.040(1)(b) requires each qualifying electric utility to establish and make publicly available a biennial acquisition target for cost-effective conservation and meet that target during the subsequent two-year period. RCW 19.285.040(1)(e) provides that the Commission shall consider a qualifying electric utility to be in compliance with a biennial acquisition target for cost-effective conservation if events beyond the reasonable control of the utility that could not have been reasonably anticipated or ameliorated prevented it from meeting the conservation target:

(e) A qualifying utility is considered in compliance with its biennial acquisition target for cost-effective conservation in (b) of this subsection if events beyond the reasonable control of the utility that could not have been reasonably anticipated or ameliorated prevented it from meeting the conservation target. Events that a qualifying utility may demonstrate were beyond its reasonable control, that could not have reasonably been anticipated or ameliorated, and that prevented it from meeting the conservation target include: (i) Natural disasters resulting in the issuance of extended emergency declarations; (ii) the cancellation of significant conservation projects; and (iii) actions of a governmental authority that adversely affects the acquisition of cost-effective conservation by the qualifying utility.¹

RCW 19.285.060(4) further provides that the Commission shall determine if an investor-owned utility may recover the cost of this administrative penalty in electric rates.

Additionally, in the proceeding for approval of its electric decoupling mechanisms,² PSE agreed to achieve conservation targets of five percent above the levels approved by the Commission for PSE's biennial conservation targets.³ PSE also agreed to submit itself to penalties equivalent to those outlined in RCW 19.285 for failure to achieve these incremental

¹ RCW 19.285.040(1)(e)

² *WUTC v. Puget Sound Energy*, Dockets UE-121697 & UG-121705, Order 07 (Dec. 5, 2017).

³ *See id.* at 93, ¶ 237

savings.⁴ While these agreements are silent on the matter of recovery of cost, because RCW 19.285 is the basis for the structure of these agreements and the Commission has the general authority to determine cost recovery issues pertaining to investor-owned utilities, it follows that the Commission has the authority to approve recovery of decoupling penalties in electric and gas rates.

PSE's total electric conservation penalty threshold established in the 2022-23 Biennial Conservation Plan (BCP) was 494,060 Megawatt-hours (MWh), which is the sum of an Energy Independence Act (EIA) electric conservation penalty threshold of 469,182 MWh and a decoupling electric conservation penalty threshold of 24,878 MWh:

**Table 1. Total Electric Conservation Penalty Threshold
Established in the 2022-23 Biennial Conservation Plan**

EIA Electric Conservation Penalty Threshold	469,182 MWh
Decoupling Electric Conservation Penalty Threshold	+ 24,878 MWh
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Total Electric Conservation Penalty Threshold	494,060 MWh

PSE achieved 467,933 MWh of conservation savings in the biennium. These conservation savings represent 99.7 percent of the EIA electric conservation penalty threshold and 94.7 percent of the total electric conservation penalty threshold established in the 2022-23 BCP.

B. PSE's Natural Gas Conservation Penalty Thresholds

PSE's 2002 General Rate Case Settlement outlines the enforcement provisions for PSE's natural gas conservation.⁵ Specifically, the Commission can assess the following penalties if PSE's average annual savings targets are not achieved during a biennium:

- Achieve savings that are 90 percent to 99 percent of the goal:
\$200,000 penalty applies.

⁴ *WUTC v. Puget Sound Energy*, Dockets UE-121697 & UG-121705, Exh. JAP-1T (Testimony of Jon A. Piliaris), at 36, ¶10-17 (Oct. 25, 2012).

⁵ *WUTC v. Puget Sound Energy*, Dockets UE-011570, *et al.*, Order 05, at 5-6, ¶ 13, (Sept. 28, 2010).

- Achieve savings that are 75 percent to 89 percent of the goal: \$500,000 penalty applies.
- Achieve savings that are less than 75 percent of the goal: \$750,000 penalty applies.

Additionally, PSE’s natural gas enforcement provisions related to the incremental five percent above the levels approved by the Commission for PSE’s biennial conservation targets due to the decoupling mechanisms are set forth in Order 08 in Docket UG-170034⁶ and provide as follows:

- \$20,000 for meeting between 4.5 percent and 5.0 percent of the incremental gas conservation commitment,
- \$50,000 for meeting between 3.75 percent and 4.5 percent of the incremental commitment, and
- \$75,000 for less than 3.75 percent of the incremental commitment.⁷

PSE’s total natural gas conservation penalty threshold established in the 2022-23 BCP was 9,726,088 therms, which is the sum of the 2002 Conservation Settlement (PSE General Rate Case UG-011571) natural gas conservation penalty threshold of 9,262,931 therms and a decoupling natural gas conservation penalty threshold of 463,147 therms:

**Table 2. Total Natural Gas Conservation Penalty Threshold
Established in the 2022-23 Biennial Conservation Plan**

2002 Conservation Settlement Penalty Threshold	9,262,931 therms
Decoupling Natural Gas Conservation Penalty Threshold	+ 463,157 therms
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Total Electric Conservation Penalty Threshold	9,726,088 therms

PSE achieved 9,327,416 therms of conservation savings. These conservation savings exceeded the 2002 conservation settlement penalty threshold of 9,262,931 but fell short of the total natural

⁶ *WUTC v. Puget Sound Energy*, Dockets UE-170033 & UG-170034, Order 08 at 85, ¶ 250, and at 91, ¶ 261 (Dec. 5, 2017).

⁷ *See WUTC v. Puget Sound Energy*, Dockets Nos. UE-170033 & UG-170034, Exh. JAP-1T (Testimony of Jon A. Piliaris), at 145, ¶ 11-20 (Jan. 13, 2017).

gas conservation penalty threshold, achieving 95.9 percent of the total natural gas conservation penalty threshold established in the 2022-23 BCP.

C. Discussion

In similar Memos issued by Commission Staff in Dockets UE-190905, UG-190913, UE-190912, UG-190920, UE-190908, UG-200964, and UG-210838, the Commission Staff recognized that the five electric and natural gas utilities subject to the jurisdiction of the Commission faced unique challenges due to the COVID-19 pandemic and recommended that Commission Staff did not believe the administration of fines for 2020-2021 conservation targets was appropriate given the extenuating circumstances:

In summary, Staff concludes that the companies have faced unique challenges in 2020 and 2021 that they have used appropriate adaptive management techniques to mitigate. As a result, Avista met its electric target, and Avista, Cascade, and PSE met their gas targets. On the other hand, PSE and PacifiCorp did *not* meet their electric target; and NW Natural did *not* meet its gas target. Staff does not believe administering a fine is appropriate given the extenuating circumstances of the biennium and recommends the Commission issue orders as described in the recommendation section of this memo.⁸

In the Commission Staff Memos in these proceedings, the Commission acknowledges adaptive measures undertaken by PSE to changing conditions and technologies but recommends penalties based on a finding that PSE could have anticipated the effects of the COVID-19 pandemic:

Regarding the second standard outlined above, Staff does not see evidence that the COVID-19 pandemic was an event that the Company could not have anticipated, as the COVID-19 pandemic and its adverse effects were underway when the targets were set.⁹

The Commission Staff Memos appear to misunderstand PSE's position with respect to the adverse effects related to the COVID-19 pandemic. Although PSE was aware of the COVID-19 pandemic at the time that PSE filed its 2022-23 BCP, the lingering impacts were not known. At the time that PSE filed the 2022-23 BCP on October 29, 2021, vaccinations for COVID-19 were generally available within the State of Washington, and it appeared that there would be a "return to normal" in 2022 and 2023. Although there was a "return to some normalcy" in 2022

⁸ Commission Staff Memo at 7, Dockets UE-190905, UG-190913, UE-190912, UG-190920, UE-190908, UG-200964, UG-210838 (July 26, 2022)

⁹ Commission Staff Memo at 5, Docket UE-210822 (Aug. 22, 2024); see also

and 2023, there was not a “return to normal,” at least as compared to the pre-2020 periods. In 2021, a new and more transmissible variant of COVID-19 first identified in India at the end of 2020—the Delta (B.1.617.2) variant—quickly spread throughout the U.S. and became the predominant strain in the fall of 2021.¹⁰ In late November of 2021, a new and even more transmissible strain of the COVID-19 virus—the Omnicron (BA.1) strain—was first identified in South Africa and quickly became the predominant strain throughout the world in 2022.¹¹ The emergence of these more communicable strains of the COVID-19 virus delayed the “return to work” expectations of many at the time of filing in the fall of 2021.¹²

The lingering effects of the COVID-19 pandemic continued throughout 2022 and into 2023. The COVID-19 and emergency orders and state of emergency in the State of Washington did not end until October 31, 2022—almost exactly a year after PSE filed the 2022-23 BCP.¹³ The Centers for Disease Control and Prevention was unable to declare an end to the federal COVID-19 Public Health Emergency Declaration until May 11, 2023¹⁴—more than 18 months after PSE filed the 2022-23 BCP. Even after the end of the state and federal emergencies in late 2022 and early 2023, respectively, there was no “return to normal.”

The lingering economic effects of the COVID-19 pandemic continued to make a significant impact on energy efficiency operations in the 2022-2023 biennium. In 2022, inflation, rising interest rates, skilled labor shortages, supply chain disruptions, and code changes were the key issues that affected customer participation and PSE’s ability to meet savings targets. In order to mitigate and adaptively manage these challenges, PSE implemented a variety of techniques like limited-time offers (LTOs), targeted marketing, larger incentives, increased distributor outreach, and personalized customer training. The CRAG was made aware of the challenges throughout the biennium and worked with PSE to develop adaptive management strategies.

The most significant conservation challenges experienced by PSE were in the commercial sector because building owners are reluctant to invest in underutilized facilities resulting from the lengthy reliance on remote work that has dramatically changed life in the region. According to Kidder Mathews, the largest independent commercial real estate firm on the West Coast, the regional vacancy rate for the Puget Sound Region in the second quarter of 2024

¹⁰ See Kathy Katella, “Omicron, Delta, Alpha, and More: What To Know About the Coronavirus Variants,” *Yale School of Medicine* (Sept. 1, 2023), available at <https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron>.

¹¹ See *id.*

¹² See, e.g., Kaia Hubbard, “Out of Office: Indefinitely,” *U.S. News & World Reports* (Dec. 10, 2021), available at <https://www.usnews.com/news/the-report/articles/2021-12-10/remote-work-extends-toward-two-years-as-omicron-pushes-more-companies-to-delay-return-to-office>.

¹³ Office of the Governor of the State of Washington, “Inslee announces end to remaining COVID-19 emergency orders and state of emergency by October 31” (Sept. 8, 2022), available at <https://governor.wa.gov/news/2022/inslee-announces-end-remaining-covid-19-emergency-orders-and-state-emergency-october-31>.

¹⁴ See Center for Disease Control and Prevention, “End of the Federal COVID-19 Public Health Emergency (PHE) Declaration” (Sept. 12, 2023), available at <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html>.

was 15.0 percent, marking the tenth straight quarter in which the regional vacancy rate¹⁵ increased¹⁶—a trend that began in the first quarter of 2022, after PSE filed the 2022-23 BCP—and represented a 9.0 percent increase above the 6.0 percent vacancy rate at the onset of the COVID-19 pandemic in 2020 and the highest vacancy level since the 13.4 percent vacancy rate in 2010 following the economic downturn of 2008-09.¹⁷ Moreover, the report by Kidder Mathews indicated that the availability rate¹⁸ also increased during the second quarter of 2024 to 17.2 percent, also at a historically high level, and that this availability rate “is expected to remain elevated in the near term until the market experiences higher levels of sustained leasing activity”¹⁹

In 2023, while supply chain disruptions were no longer as pressing of a concern for businesses, the other economic issues seen in 2022 persisted. However, there was a noticeable increase in customer program participation as PSE continued to implement and further refine its existing adaptive management efforts from 2022. Particularly in the last quarter of 2023, program participation increased to such a degree that PSE was able to not only meet but surpass savings targets set in the 2023 Annual Conservation Plan (ACP) for both electric and natural gas.

It is also important to understand that the EIA outlines the methodology for setting conservation targets in a collaborative process that includes assessment of potential through a conservation potential assessment (CPA), collaboration with stakeholders, integrated resource planning and regulatory review. This is a lengthy process that began as early as 2019 prior to the pandemic, with many of the inputs and decision points occurring well in advance of the biennium and in the face of the early period of the pandemic creating an inability for the targets to account for the lingering effects of the pandemic as described above. PSE followed the best process available to set reasonable targets as required by statute and as influenced by its Conservation Resource Advisory Group, including Commission Staff, who typically encourage setting aggressive targets.

PSE has recognized that it fell short of its total electric and natural gas conservation penalty thresholds for the 2022-23 biennium, notwithstanding the adaptive management efforts undertaken by PSE with the support of the CRAG. These ongoing, lingering effects of the COVID-19 pandemic were not—and could not have been known—by PSE or any other party at

¹⁵ The “vacancy rate” is the ratio of the number of units or square feet available for lease in a building to the number of units or square feet available for lease in a building. See Commercial Brokers International, “Vacancy Rates vs. Availability Rates” (Apr. 1, 2021), available at <https://www.cbicommercial.com/blog/vacancy-rates-vs-availability-rates>.

¹⁶ See Kidder Mathews, “Seattle Office Market Report: 2nd Quarter 2024,” available at <https://kidder.com/market-reports/seattle-office-market-report/>.

¹⁷ See *id.*

¹⁸ The “availability rate” is the ratio of square footage of commercial real estate available for rent to the total rental square feet and is calculated by dividing the total square feet available by the total rentable square feet. See Commercial Brokers International, “Vacancy Rates vs. Availability Rates” (Apr. 1, 2021), available at <https://www.cbicommercial.com/blog/vacancy-rates-vs-availability-rates>.

¹⁹ Kidder Mathews, *infra*, note 16.

the time that PSE filed its 2022-23 BCP on October 29, 2021. Moreover, in an effort to make up for—and exceed the amount of unattained electric and natural gas savings in the 2022-2023 biennium—PSE added 70,000 MWh and 640,000 therms of conservation to a variety of electric and natural gas programs in its 2024-2025 biennial portfolio. PSE anticipates that it can make up these unattained electric and natural gas savings with the momentum generated from customer participation in late 2023 that is attributed to effective adaptive management techniques, more favorable economic conditions, and the support of PSE’s advisory group.

Further, given that Commission Staff agrees that PSE has taken reasonable efforts to adaptively manage its programs in an attempt to ameliorate the effects of the pandemic, it is illogical and contrary to the aim of both electric and natural gas statutes—which are intended to encourage utilities to undertake robust conservation programs—to penalize a utility for setting a target that is too high in the face of unprecedented circumstances in the face of a global pandemic. In stating that PSE should have anticipated the lingering effects of the pandemic, Staff is asking the Commission to penalize PSE for setting the targets too high. This would set bad precedent and simply have the effect of encouraging utilities to set lower targets to account for unknowable future circumstances. Accordingly, PSE respectfully requests that the Commission exercise its discretion under RCW 19.285.040(1)(e) to find PSE to be in compliance with its biennial acquisition target for cost-effective electric conservation for the 2022-23 biennium due to events beyond the reasonable control of PSE that could not have been reasonably anticipated or ameliorated, which prevented it from meeting the conservation target.

With regard to penalties recommended by Commission Staff for failing to achieve PSE’s electric and natural gas decoupling penalty thresholds, PSE agrees that neither Order 07 in Docket UE-121697 nor Order 08 in Docket UG-170034 outlines penalty exemptions. However, the general authority of the Commission provides the discretion to waive penalties relating to statute or its own orders. The Commission has affirmed its discretion in assessing penalties or not assessing penalties as circumstances warrant in the final in Docket UT-971063,²⁰ in which the Commission noted its discretion under RCW 80.04.380 to elect not to assess penalties for violations by public service companies if such election serves the public interest:

RCW 80.04.405 specifies procedures whereby the Commission may mitigate penalties, in part or in whole, at its discretion. In contrast, RCW 80.04.380 grants the Commission discretion whether to subject a party to a penalty without opportunity to mitigate. Discretion whether to

²⁰ *MCI Metro Access Transmission Servs., Inc. v. U.S. West Commc’n, Inc.*, Docket UT-971063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming, in Part (1999).

*assess penalties under RCW 80.04.380 serves the public interest by retaining all powers expressly granted to the Commission by law.*²¹

In footnote 22 of the same order, the Commission unequivocally rejected arguments that penalties for violations were mandatory and not subject to mitigation:

*Parties cite our decision in Monroe v. Puget Sound Power & Light Co., Cause No. U-85-70 (October 23, 1986), for the proposition that we must always assess penalties if we find violations to occur. Examining the language and the context of the decision, we reject it as authority for the proposition cited. *It is clear in both of the statutes and we hold in this decision that upon finding a violation the Commission retains the full authority to assess or adjust a penalty at any level -- from zero to the full amount authorized -- that fits the circumstances of any given case and the process requirements of the pertinent statute.**²²

Thus, it is clear that the Commission has full discretion and authority to elect not to impose a penalty (RCW 80.04.380) or impose a penalty but adjust the penalty as necessary to fit the circumstances of any given case and the process requirements of the pertinent statute (RCW 80.04.405).

Additionally, the logic and circumstances of the penalty waiver language in RCW 19.285.040 should apply here as this statute was used as the basis for determining the penalty provisions associated with the decoupling stipulation and related Orders.²³ Finally, the Commission exercised this discretion with regard to the decoupling targets in its findings in Dockets UE-190905 and UG-190913 related to the 2020-21 biennium due to the effects of the first two years of the COVID-19 pandemic. For these reasons, PSE requests that Commission exercise its general authority to find PSE to be in compliance with its biennial acquisition target for electric and gas decoupling conservation for the 2022-23 biennium due to events beyond the reasonable control of PSE that could not have been reasonably anticipated or ameliorated.

Prior to assessing conservation penalties, the Commission should also consider whether it would be fair, just and reasonable to include the conservation penalty costs in customer rates. Because PSE took every adaptive management option available, but was prevented from meeting the conservation targets due to lower than expected customer uptake of programs, if the Commission were to assess penalties, PSE would immediately request that the Commission

²¹ *Id.* at ¶ 150 (italics added).

²² *Id.* at fn. 22 (italics added).

²³ *WUTC v. Puget Sound Energy*, Dockets UE-170033 and UG-170034, Order 08 at 84-91, ¶¶ 249-262 (Dec. 5, 2017), and Exh. JAP-1T at 144-145 and *WUTC v. Puget Sound Energy*, Dockets UE-121697 & UG-121705, Order 07, at 93, ¶ 237 (Dec. 5, 2017).

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include these costs in PSE's customer rates pursuant to RCW 19.285.060(4) and its general authorities to determine recovery of costs incurred by utilities. Conservation is ultimately a shared responsibility between the utility and its customers. PSE does not agree that either the Company or its customers should be penalized for the lingering effects of the COVID 19 pandemic.

PSE respectfully requests that the Commission exercise its general discretion to find PSE to be in compliance with its biennial acquisition target for cost-effective natural gas and electric conservation for the 2022-23 biennium due to events beyond the reasonable control of PSE that could not have been reasonably anticipated or ameliorated and prevented it from meeting the conservation target. The Commission made similar findings in Dockets UE-190905 and UG-190913 related to the 2020-21 biennium due to the effects of the first two years of the COVID-19 pandemic, and the Commission should do so in this proceeding because the lingering impacts of that pandemic were not known and could not have been known on October 29, 2021.

Please contact me at (425) 462-3051 if you have any questions regarding this filing.

Sincerely,

/s/ Wendy Gerlitz

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