BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In The Matter Of The Joint Application Of Puget Sound Energy, Alberta Investment Management Corporation, British Columbia Investment Management Corporation, OMERS Administration Corporation, And PGGM Vermogensbeheer B.V. For An Order Authorizing Proposed Sales Of Indirect Interests In Puget Sound Energy	DOCKET U-180680 JOINT PETITION FOR ADJUDICATION OF PUBLIC COUNSEL, ALLIANCE OF WESTERN ENERGY CONSUMERS, THE ENERGY PROJECT, AND THE WASHINGTON AND NORTHERN IDAHO DISTRICT COUNCIL OF LABORERS

I. PETITION FOR ADJUDICATION

1. Pursuant to WAC 480-07-305(3)(b), the Public Counsel Unit of the Washington Attorney General's Office (Public Counsel), Alliance of Western Energy Consumers (AWEC), The Washington and Northern Idaho District Council of Laborers, and The Energy Project (TEP) (collectively Joint Petitioners) hereby respectfully petition the Commission for initiation of an adjudicatory proceeding to review the Proposed Transaction described in the Joint Application filed by Puget Sound Energy (PSE) and certain purchasers (collectively Joint Applicants) on September 5, 2018.

2. The review of the Proposed Transaction in this docket is an active case and controversy with respect to a matter within the Commission's jurisdiction,[1] which involves interests of the Joint Petitioners as customers and stakeholders of PSE. Joint Petitioners believe and represent,

[1] Commission jurisdiction is acknowledged in the Joint Application. Joint Application ¶¶ 7-8.

as set forth more fully in the memorandum below, that the Joint Application raises material issues of fact and law which require adjudication.[2]

II. INTRODUCTION

3. The Proposed Transaction is a significant one for PSE. The acquisition of PSE in 2008 by a private equity Investor Consortium led by Macquarie represented a historic change for Washington's largest privately-owned utility, a company that had been publicly traded for nearly all of its 100-year history in the state. The transaction proposed in this filing represents the first major change in the ownership structure since that time.

4. Joint Applicants take the position that the "net benefit" standard established by the legislature in 2009 does not apply to this transaction. Joint Petitioners disagree with this reading of the statute. The legislative history and intent of the 2009 legislation indicates that the "net benefit" standard applies broadly to important changes in ownership of utility companies of the type presented here which result in the acquisition of substantial influence and effective control by purchasers.

5. The Proposed Transaction will result in the type of change of control the new statutory standard was intended to cover. While Joint Petitioners do not dispute that the particular Macquarie interest transferred in this filing would represent less than 50 percent ownership of PSE, the Macquarie departure is nonetheless a substantial event. The exit of Macquarie from the original Investor Consortium, and the addition of two new investors to that group, effectively and

[2] The Commission has issued a Notice of Opportunity to File Written Comments (by Wednesday, October 24, 2018) and issued a Notice of Recessed Open Meeting to be held on November 5, 2018. The Notice states that the Commission will address the proposed sale and accept comments at the Recessed Open Meeting but does not indicate whether the Commission is considering acting on the Joint Application at that time. Should the Commission be considering such action, this Petition is filed to request and recommend that the matter be set for adjudication.

substantially changes the nature and structure of the consortium. If the transaction is approved, as a practical matter, a new and different consortium will take ownership and control of PSE going forward.

6. Even if the Commission determines at the outset of this docket that the "net benefit" standard does not apply and that the transaction will be reviewed under the "public interest" test, an adjudicative proceeding is nevertheless necessary for several important reasons. First, the transaction is by definition material and requires review and approval by the Commission. Indeed, the size of the transfer, over 40 percent of the PSE's ownership, far exceeds the materiality threshold of 10 percent agreed to by PSE and established in the 2008 Acquisition Order.[3] It is not a routine matter where limited or cursory review might be appropriate.

7. Second, the "public interest" test itself is a robust test. For at least the last two decades, the Commission has employed adjudicative proceedings to conduct the "public interest" review of major utility ownership changes.[4] In these cases the Commission has reviewed (1) the purchasers' commitments to broad public service obligations, (2) protection for customers from rate increases caused by the transaction, (3) protection of the utility from financial distress, (4) the Commission's ability to regulate, (4) financial and managerial fitness, and (5) the enforceability of any commitments made.

8. Third, the Commission should examine the impact on PSE's access to capital. The Commission found that a significant benefit over the status quo provided by the 2008 acquisition was that the Macquarie Investor Consortium provided access to "patient capital," including very

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[3] *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket UE-072375, Order 08 ¶ 86 (2008 Acquisition Order).

[4] *See* 2008 Acquisition Order ¶¶ 112-21 (beginning with *Scottish Power Acquisition of PacifiCorp*, Docket UE-981627, Third Supplemental Order on Prehearing Conference (April 2, 1999)).

specific capital commitments. The new consortium does not appear to have made specific commitments and its plans are unclear. The consortium's plans need to be examined and understood before the approval is considered.

9. Fourth, the Proposed Transaction would result in Canadian government pension funds and investors controlling nearly 90 percent of PSE ownership. As discussed in detail in this Joint Petition, this concentration of ownership introduces new potential areas of financial risk. Adequate examination of these additional factual issues requires an adjudication.

10. Fifth, the Commission should closely examine whether the Joint Applicants' new set of Proposed Conditions, which would replace the commitments and conditions in the 2008 Acquisition Order, meet the public interest standard. Joint Applicants' initial proposal is a useful beginning point, but modification, elimination, or updating of 63 original commitments from the Multiparty Settlement Stipulation and an additional 15 conditions imposed in the 2008 Acquisition Order requires careful review by all parties and the Commission.

11. Lastly and importantly, Joint Petitioners will be prejudiced if the Joint Application is not set for adjudication. Without the right to conduct discovery, present evidence, and conduct cross-examination, Joint Petitioners cannot effectively participate in the review of this material transaction and ensure that their interests, which include those of PSE's customers, are protected. The adjudicative process need not be unduly burdensome. Joint Applicants have not requested that the transaction be approved outside of adjudication and the transaction is anticipated to close sometime in 2019, allowing adequate time for regulatory review. As in most past cases, the process may lead to resolution of some or all of the issues but parties must have an opportunity to review the underlying facts and circumstances of the case before reaching those agreements.

Ultimately, an adjudication will lead to a better record for decision and a fairer process for all parties.

III. BACKGROUND

12. The Joint Application proposes a fundamental restructuring of PSE's ultimate ownership. The largest owner, Macquarie,[5] will entirely divest its ownership interest, and the Canadian Pension Plan Investment Board will become the largest single shareholder. Additionally, two new owners, OMERS Administration Corporation and PGGM, will acquire "material" interests in PSE.[6] All told, Canadian public investment enterprises will go from holding a minority interest in PSE when the Commission approved the 2008 acquisition to owning nearly 90 percent of the utility.

13. It is important to view this transaction in the light of some key aspects of the 2008 private equity acquisition of PSE by the Macquarie-led Investor Consortium. That proceeding, the Multiparty Settlement Stipulation, and the Commission's final order provide important context and guidance for reviewing the application in this docket.[7]

14. In December 2007, PSE and Puget Holdings LLC filed an application with the Commission proposing to end PSE's status as a publicly traded company and to transfer ownership to Puget Holdings, an "Investor Consortium" consisting of three members of the Macquarie Group[8] and three Canadian pension funds.[9] The Commission established an adjudicatory proceeding for review of the transaction. Discovery was initiated and Commission

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[5] Macquarie in this context refers to Macquarie Infrastructure Partners and Padua MG Holdings LLC. Joint Application ¶ 1.

[6] 2008 Acquisition Order ¶ 86.

[7] 2008 Acquisition Order ¶ 297.

[8] Macquarie Infrastructure Partners, Macquarie-FSS Infrastructure Trust, and Macquarie Capital Group.

Staff, Industrial Customers of NW Utilities (ICNU), and Public Counsel raised serious concerns about the risks of the transaction in the initial round of testimony.[10]

15. Ultimately, a Settlement was reached by all parties except Public Counsel. The settlement included 63 conditions intended to address in detail the transaction risks identified by stakeholders. The Commission held an evidentiary hearing to review the Settlement terms and to consider the Public Counsel's objections. Four public comment hearings were held in Bellevue, Bellingham, and Olympia.[11] In 2008, the Commission issued its final order approving the sale and itself added a significant number of additional protective requirements to the parties' Settlement commitments.[12]

16. The Commission noted the significance of its order, describing it as "more protective of customers and the public interest, more far reaching, and at least as enforceable as any prior similar transaction in memory," a decision that could become an "important precedent in its own right because it embodies and extends important principles of the Commission's jurisprudence."[13] As the 125 page order reflects, the Commission conducted a "full and dispassionate analysis of all the evidence and careful consideration of all the arguments,"[14] following the "evaluative criteria" from its own precedents.[15]

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[9] Canada Pension Plan Investment Board, British Columbia Investment Management Corporation, Alberta Investment Management Corporation. These entities will retain an ownership interest in PSE after the Proposed Transaction.

[10] Northwest Industrial Gas Users supported ICNU by letter. NWIGU Letter in Support of ICNU Testimony (June 18, 2008), *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket U-072375.

[11] There was widespread public opposition to the transaction. 2008 Acquisition Order ¶ 32.

[12] 2008 Acquisition Order, Attachment B.

[13] 2008 Acquisition Order ¶ 273.

[14] *Id*. ¶ 26.

[15] *Id*. ¶ 271.

17. A number of the issues considered in the 2008 Acquisition Order are relevant for the current docket. The Commission noted that PSE would become a wholly-owned subsidiary of Puget Holdings, and the Consortium would take over the power to control the company previously exercised by the shareholders of the publicly traded company. For this reason, the Commission observed that "in evaluating the merits of this transaction, it is important to consider carefully the nature of these investors, their plans as owners of Puget Energy and PSE, and the governance structure of their holding company, Puget Holdings." The same approach is appropriate here.

18. One major issue addressed in the 2008 Acquisition Order was the future transfer of ownership by the Consortium or its members should the transaction be approved. Commitment 26(b)(2) of the Settlement requires PSE to notify the Commission of any "change in effective control or acquisition of any material part of PSE by any other firm, whether by merger, combination, transfer of stock or assets."[16] The original Settlement commitment did not define what would constitute a "material part of PSE," nor did it provide that Commission approval would be required for such a transfer. To address these concerns, as a result of examination of this issue at the hearing,[17] and issuance of a Commission Bench Request, the Commission adopted its Ninth Condition to make clear that the term "material part of PSE" meant "any sale or transfer of stock representing ten percent or more of the equity ownership of Puget Holdings or PSE (Exhibit 419)." The Ninth Condition further states: "No sale or transfer subject to Commitment 26 (b) may close prior to approval by the Commission."[18]

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[16] 2008 Acquisition Order, Appendix A to Multiparty Settlement Stipulation, Commitment 26(b)(2).

[17] Carson TR. 481:20-483:7, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction,* Docket U-072375; *Id.* at 485:1-14.

[18] 2008 Acquisition Order, Attachement B.

19. PSE's need for capital and the ability of the Investor Consortium to provide necessary access to the capital was one of the most contested issues in the case and the Commission conducted extensive and detailed analysis of this issue in its order.[19] An important context for Commitment 26(b) and the Ninth Condition, therefore, was the representation by the applicants that the Investor Consortium were providing long-term "patient capital" rather than capital committed to a finite term under which the investors had an exit strategy. Commitment 26(b) and the Ninth Condition gave the Commission a tool to monitor the stability of the Consortium and the role of the Macquarie Group.[20]

20. There were also concerns about the degree of increased control over PSE that could be exercised by Macquarie if it acquired additional ownership rights. The Macquarie Group was an important part of the Investor Consortium. Collectively, the three Macquarie entities held 51.4 percent of Puget Holdings. As Joint Applicants have noted, the Commission determined that this did not represent a "controlling share" under Puget Holdings governance structure because a vote of 55 percent was required for any action, and 80 percent or more for significant corporate decisions.[21] Nevertheless, the Macquarie group represented by a large percentage the largest ownership group, and was entitled to name 5 of the 9 members of the Puget Holdings Board. As Macquarie witness Mr. Leslie agreed at the hearing, holding even an individual board seat is "an important position with respect to ultimate control of the company."[22] The Investor Consortium itself was effectively led by Macquarie. The private placement memorandum for Macquarie

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[19] 2008 Acquisition Order ¶¶ 122-157.
[20] *Id.* ¶ 152.
[21] 2008 Acquisition Order ¶ 40.
[22] Leslie, TR. 860:14-861:2, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket U-072375.

Infrastructure Partners stated that "where practicable, MIP intends to seek significant influence over the management operations and strategic direction of its portfolio investments." Under questioning by Commission Chairman Sidran, Mr. Leslie explained

> "the nature of Macquarie Infrastructure Partners as a fund is an infrastructure fund where we raise money from investors and seek to invest it on their behalf, in return for which they pay us a fee. And in earning that fee, we believe investors are entitled to a degree of influence through us over the investments we make on their behalf. . . . It would be unlikely for us to take very small positions in businesses where we had no ability to influence the outcome of that business, basically because simplistically why would someone pay us if we couldn't do anything about our investment[.]"[23]

21. Mr. Leslie went on to comment that Macquarie would not have involvement in the day to day operations because of the quality of PSE management, but would have "an influence on the Company's construction of the business plan," would have monthly calls with management to understand how PSE was progressing against the business plan, and would "interrogate management on their plan and challenge them on their assumptions."[24]

22. The sale of the Macquarie interest, therefore, is an important event for both PSE and its customers. How the company will transition to the new ownership consortium, what risks may be created, and what protections are needed in the new environment for both customers and PSE itself deserve thorough consideration in this docket.

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[23] Leslie TR. 495:3-20, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket U-072375 (Referring to Exhibit 50. Confidentiality was partially waived for purposes of the examination)

[24] *Id.* at 495:21-496:20.

IV. ARGUMENT

A. The Net Benefit Standard is Applicable to This Transaction Under RCW 80.12.020

1. The legislative history shows an intent to apply the net benefit standard broadly to significant transfers of ownership

23. In 2009, the Legislature enacted legislation (SB 5055) stating that, "The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a net benefit to the customers of the company."[25] The Joint Applicants argue that there is no "controlling interest" involved in the proposed transaction because Macquarie is transferring a minority interest and no single entity is set to acquire an interest greater than 50 percent. In adopting the new standard, however, the Legislature indicated much broader interpretation of the intended reach of the statute in its statement of intent, declaring:

> the Washington utilities and transportation commission should require that a net benefit to customers be shown *in order to approve the acquisition of the franchises, properties, or facilities owned by a gas or electrical company in the state* and which are necessary or useful in the performance of the duties of a gas or electrical company, and that its decision to approve or deny such an acquisition should be made within a prescribed period of time.[26]

This language demonstrates no intent to narrowly restrict the "net benefit" standard as the Joint Applicants propose and, indeed, demonstrates the opposite—that the acquisition of a "controlling interest" in a gas or electric company should be broadly construed.

24. SB 5055 was passed in the legislative session following the Commission's 2008 Acquisition Order as a direct response to that order. The original Senate Bill Report explicitly

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[25] Codified at RCW 80.12.020(1).

[26] Laws of 2009, ch. 24, § 1 (emphasis added).

noted that the Commission applied a "no harm" test under the "public interest" requirement of the then-current law, and contrasted this interpretation with that of other states "like Oregon [that] apply a 'net benefit' test, which means a transaction will be approved only if customers and the public will somehow benefit from the transaction."[27]

25. Importantly, the Oregon law to which the Legislature looked in crafting amendments to RCW 80.12.020 does not contain an explicit "net benefits" requirement either. The Oregon law bars the acquisition by any person, directly or indirectly of the "power to exercise any substantial influence over the policies and actions of a public utility" without Oregon Public Utility Commission approval. ORS 757.111(1). Like the prior version of its Washington counterpart, ORS 757.511 contains a "public interest" test, requiring that the Oregon Public Utility Commission find that an acquisition of "substantial influence" over a utility "will serve the public utility's customers and is in the public interest."[28] In a 2001 order interpreting this statute, the Oregon Commission found that the phrase "serve the public utility's customers" required a finding of net benefits to those customers, while the remainder of the statutory language required a finding of no harm to the public at large.[29]

26. In passing SB 5055, therefore, the Legislature was telling the Commission that it should evaluate transactions like the 2008 Macquarie Consortium acquisition under a "net benefits" standard going forward, even though none of the individual members of the Investor Consortium acquired a controlling interest in terms of voting shares. The Legislature had a broader

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[27] S. COMM. ON ENVIRONMENT, WATER & ENERGY, 61ST LEG., S. B. REP. SB 5055 (Wash. Feb. 4, 2009) http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5055%20SBR%20EWE%2009.pdf.

[28] OR. REV. STAT. § 757.511(4)(a).

[29] *In re a Legal Standard for Approval of Mergers*, Docket No. UM 1011, Order No. 01-778, (Or. Pub. Util. Comm'n Sept. 4, 2001).

understanding of what a "controlling interest" meant for purposes of SB 5055's amendments to RCW 80.12.020 than the Commission did when it issued the 2008 Acquisition Order.

27. Indeed, the legislative history confirms that the Legislature understood this phrase far more broadly than the Commission used it in the 2008 Acquisition Order. The original version of SB 5055 provided that, like the Oregon statute, a net benefit was required if a person acquired "substantial influence" over the utility.[30] This phrase was ultimately replaced with the phrase "controlling interest," but that change was identified as merely a "technical" one, indicating that this change in language was not intended to be substantive.[31] Inclusion of an explicit "net benefits" standard in RCW 80.12.020, therefore, demonstrates a legislative intent to direct the Commission to interpret its merger statute consistently with how the Oregon Commission interprets ORS 757.511. That interpretation applies the "net benefit" standard to any acquisition that would result in the power to exercise substantial influence over a utility, which the Joint Applicants in this case will have.

28. Senator Lisa Brown, one of the sponsors of SB 5055, explained that she was supporting the "net benefit" standard because "whenever there is a change in ownership in a merger or acquisition," ratepayers are exposed to "a certain level of risk that the best analysis cannot completely eliminate . . . [G]iven this inherent level of risk in essence we would compensate the public by having the initial agreement demonstrate a net public benefit."[32] Senator Brown's

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[30] S.B. 5055 § 3, 61ST LEG., REG. SESS., (Wash. Jan. 12, 2009) (Original bill) http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Bills/5055.pdf ; *see also* OR. REV. STAT. § 757.511(1).

[31] S. COMM. ON ENVIRONMENT, WATER & ENERGY, 61ST LEG., S. B. REP. SB 5055 (Wash. Feb. 4, 2009) http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5055%20SBR%20EWE%2009.pdf.

[32] *Hearing on S.B. 5055 Before the S. Comm. on Environment, Water & Energy*, 61st Leg., Reg. Sess. (Wash. Jan. 21, 2009), https://www.tvw.org/watch/?eventID=2009011178.

explanation confirms that the "net benefit" standard was intended to protect ratepayers any time there was a change in ownership that exposes the public to risk, not just in those circumstances where a 50 percent or greater stake is acquired by a single entity.

29. This interpretation of "controlling interest" also makes intuitive sense. Joint Applicants' assertion that no controlling interest is being acquired here plainly allows for control over a Washington utility to change hands without triggering the statutory net benefits requirement. For example, if a Washington utility agreed to a sale to ten separate investors, each of which would own 10 percent of the utility, control would clearly change hands, but a showing of net benefits would not be required under the Joint Applicants' reasoning because no single owner would have a "controlling interest" in the utility. That cannot be the result the Legislature intended, yet it is precisely what the Joint Applicants are hoping the Commission will determine here, as no single owner of PSE will hold a "controlling interest" as the Joint Applicants have defined it.[33] A "controlling interest" can take a number of forms beyond holding a certain percentage of voting securities.

2. After the transaction, the new owners of PSE, both collectively and individually, will be in a position to "control" PSE within the meaning of the statute

a. A "change in control" will result from new owners acquiring veto power over PSE decisions.

30. Any one of the individual new owners acting in their singular capacities will be in a position to exert a "controlling interest" over PSE in certain key circumstances. PSE's Bylaws require supermajority approval for major decisions in the form of votes representing a least 80

[33] Further, as explained below, because of the 30 Percent Rule, federally regulated Canadian pension funds like OMERS, BCI, and AIMCo are prohibited by law from acquiring more than 30 percent of entities in which they invest. In other words, the purchasers in this transaction would never be in a position to acquire a 50 percent or

percent of the Holding Shares, plus the affirmative vote or written consent of at least one Independent Director. This 80 percent requirement applies to several important circumstances, including appointing a chairman of the Board, approving a budget or business plan, selling or acquiring a material component of the consolidated assets of the Company, appointing or terminating the Company's CEO, and several other matters.[34]

31. Under the rule, therefore, any owner with at least 20 percent equity ownership can block a decision, a potential veto power that can directly influence corporate decision making. New consortium member OMERS will acquire a 23.94 percent interest in Puget Holdings. Existing member, BCI which currently holds 16.86 percent equity, will increase its interest to 20.87 percent. If the transaction is approved both investors will acquire more than enough equity to prevent Puget Holdings and PSE from obtaining supermajority approval on several key issues related to PSE's operation.[35] Thus, for practical purposes, it is simply incorrect to assert that none of the purchasers will acquire a "controlling interest" if the transaction is approved. This acquisition of new interests of greater than 20 percent represents a change of control over the prior status quo.

b. The new consortium members will be in a position to collectively exert control to achieve their shared interests

32. If the proposed transaction takes place, the three entities all subject to Canadian provincial pension regulations —AIMCo, BCIMC, and OAC—would hold 58.41 percent of

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greater interest, as needed to trigger the net benefit standard according to PSE's interpretation. The Legislature did not intend to create wholesale exclusions from the net benefit standard.

[34] *See* Amended and Restated Bylaws of Puget Sound Energy, Inc., Article I (defining "Board Supermajority Approval"), Article III, Sec. 3(c) (appointment of Board chair requires supermajority), Article III, Sec. 9 (matters requiring Board Supermajority approval), https://www.sec.gov/Archives/edgar/data/81100/000119312509027209/dex34.htm.

[35] Existing consortium member Canada Pension Plan Investment Board already holds 31.57 percent interest and will not increase its share through this transaction.

PSE, a "controlling interest" in the company even under the Commission's use of that phrase in the 2008 Acquisition Order. Furthermore, together with CPPIB, these pension funds and investment managers would control nearly 90 percent of Puget's ownership. As a result, these entities could act together and exercise effective control over PSE.

33. The Canadian pension funds and investment managers all face unique exposures, future vulnerabilities, as well as common interests influencing their investment strategy. In search of higher returns for their beneficiaries, Canada's pension funds and managers, the top ten of which manage $1.1 trillion worth of assets,[36] have transitioned toward a more active investing style.[37] A request for public input by the Canadian Department of Finance describes three main reasons for this shift in investment strategy.[38] First, the longer life span of retirees has increased the cost of providing pension benefits, leading pension funds to look for new ways to increase their returns.[39]

34. Second, baby boomers' contributions have created an influx in cash flow in their most lucrative earning years, allowing plans to invest more aggressively.[40] Third, "low interest rates and volatility in global equity markets stemming from the global financial crisis of 2008 have diminished plans' ability to generate returns from passive investments such as long-term bonds to match their liabilities."[41] These developments have led Canadian pension funds and managers

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[36] DEPARTMENT OF FINANCE CANADA, PENSION PLAN INVESTMENT IN CANADA: THE 30 PER CENT RULE (last modified June 3, 2016), https://www fin.gc.ca/activty/consult/ppic-prpc-eng.asp#_ftnref1.

[37] Nicole Mordant, *Canada Pension Funds Lobby to End 'Bizarre' Rule*, REUTERS, July 16, 2007, https://www.reuters.com/article/canada-pensions-investing/canada-pension-funds-lobby-to-end-bizarre-rule-idUSN1633737420070716); Joel Kranc, *Canada's Model Evolves*, INVESTMENT & PENSIONS EUROPE, May 2016, https://www.ipe.com/pensions/pensions/briefing/canadas-model-evolves/10013047.fullarticle).

[38] DEPARTMENT OF FINANCE CANADA, PENSION PLAN INVESTMENT IN CANADA: THE 30 PER CENT RULE (last modified June 3, 2016), https://www fin.gc.ca/activty/consult/ppic-prpc-eng.asp#_ftnref1.

[39] *Id.*

[40] *Id.*

[41] *Id.*

to pursue methods to increase their returns in the medium term.[42] Adjudicatory proceedings in this case are necessary to examine whether the new owners involved in this transaction may seek to protect and advance their common interests by taking on a more active role in collectively managing PSE, directly or indirectly, through shareholder agreements or other structural maneuvers that would result in new owners acquiring effective control over PSE.

35. Such a possibility is particularly noteworthy in light of Canada's "30 percent rule." Canadian government pension plans are prevented from owning more than 30 percent of the voting shares to elect directors of a corporation under the Pension Benefits Standards Act of 1985.[43] This federal rule is applied to pension funds through provincial regulations, including to the British Columbia Investment Management Corporation (BCIMC),[44] OMERS Administration Corporation (OAC),[45] and Alberta Investment Management Company (AIMCo),[46] all of which are involved in the current transaction. Canada Pension Plan Investment Board (CPPIB), which already holds a 31.57 percent stake in PSE, is governed by a similar but separate rule.[47] Because

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[42] DEPARTMENT OF FINANCE CANADA, PENSION PLAN INVESTMENT IN CANADA: THE 30 PER CENT RULE (last modified June 3, 2016), https://www fin.gc.ca/activty/consult/ppic-prpc-eng.asp#_ftnref1.

[43] *See* Pension Benefits Standards Regulations, 1985, SOR/87-19 (Can.), Schedule III, s. 11(1), https://www.canlii.org/en/ca/laws/regu/sor-87-19/latest/sor-87-19 html) ("Subject to subsection (2), the administrator of a plan shall not, directly or indirectly, invest the moneys of the plan in securities of a corporation to which are attached more than 30 per cent of the votes that may be cast to elect the directors of the corporation.").

[44] BCI's statute subjects BCI to the standards in the Pension Benefits Standards Act and is therefore subject to this rule. *See* Public Sector Pensions Plan Act, SBC 1999, Ch. 44(3)(b) (Can.), https://www.canlii.org/en/bc/laws/stat/sbc-1999-c-44/latest/sbc-1999-c-44.html?searchUrlHash =AAAAAQAdUHVibGljIFNlY3Rpb24gUGVuc2lvbnMgUGxhbiAAAAAAAQ&resultIndex=1.

[45] *See* Pension Benefits Act, RRO 1990, Reg. 909, General (Can.), https://www.canlii.org/en/on/laws/regu/rro-1990-reg-909/latest/rro-1990-reg-909.html#PART_II_PENSION_FUND_REQUIREMENTS_519088.

[46] *See* Employment Pension Plans Regulation, Alta. Reg. 154/2014, s. 78(1) (Can.), https://www.canlii.org/en/ab/laws/regu/alta-reg-154-2014/latest/alta-reg-154-2014.html.

[47] *See* Canada Pension Plan Investment Board Regulations, SOR/99-190, s. (13)(1) (Can.), https://www.canlii.org/en/ca/laws/regu/sor-99-190/latest/sor-99-190 html ("The Board shall not directly or indirectly invest in the securities of a corporation to which are attached more than 30 per cent of the votes that may be cast to elect the directors of the corporation."). However, the CPPIB does not adhere to the same set of guidelines because it is governed by the Pension Benefits Standards Act. CPPIB is analogous to U.S. Social Security instead of a

of this rule, the Canadian pension funds and managers involved in this transaction would have been statutorily prohibited from acquiring what PSE would characterize as a "controlling interest" – e.g. more than 50 percent. Yet, even with the statutory prohibition on the pension funds acquiring more than 30 percent ownership interest, the new owners may nonetheless join together to collectively exert more control than Canadian law would allow them to wield individually.

36. The 30 percent rule was meant to prevent Canadian pension investors "from acquiring controlling stakes in business corporations. It was also intended to limit plans to a more passive role" and prevent involvement in the management decisions of the businesses in which these pension funds are investing.[48] However, in recent years, pension investors have been lobbying to change the 30 percent rule to allow for a more active role in controlling the businesses in which they are investing.[49] BCIMC, CPPIB, and OMERS all contributed comments to the Canadian Department of Finance regarding proposed rulemaking, urging the Department to abolish the 30 percent rule.[50]

37. While these group have been unsuccessful in lobbying to modify the 30 percent rule, Canadian pension investors have in the meantime utilized creative investing strategies to circumvent the 30 percent limit. Indeed, the Canadian federal government recently observed

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traditional pension fund and is thus governed by its own legal regime. *See* SOCIAL SECURITY ADMINISTRATION, AGREEMENT BETWEEN THE UNITED STATES AND CANADA (Aug. 2017), https://www.ssa.gov/international/Agreement_Pamphlets/documents/Canada.pdf.

[48] *Id*.

[49] Nicole Mordant, *Canada Pension Funds Lobby to End 'Bizarre' Rule*, REUTERS, July 16, 2007, https://www.reuters.com/article/canada-pensions-investing/canada-pension-funds-lobby-to-end-bizarre-rule-idUSN1633737420070716.

[50] CANADA PENSION PLAN INVESTMENT BOARD, CONSULTATION RESPONSE FROM THE CANADA PENSION PLAN INVESTMENT BOARD (CPPIB) (Sept. 2016), https://www fin.gc.ca/consultresp/ppic-prpc/data/ppic-prpc-09.pdf.

that, "large pension plans have been circumventing the 30 percent rule through e*laborate financial, legal, and organizational structures which effectively allow for control of a corporation with less than 30 percent* of the voting shares." [51] The Canadian Department of Finance notes that "these rules can be circumvented by using convertible debt which can be rolled into voting or non-voting shares, or a plan can appoint a nominee to vote according to the pension plan's directions."[52] Canadian public pension funds have complained that the rule means that "'we have to put resources against managing around (the rule) rather than using the resources to increase our investment value.'"[53] Pension investors have been forthright in their efforts to structure deals so as to avoid the 30 percent rule. For example, BcIMC's comments to the Department of Finance the fund noted, "[a]pplication of the 30 per cent rule may also result in an overall weighting of pension plan investment through third party investment funds with the resulting imposition of asset management fees, including profit participation."[54]

38. In one notable example, OMERS, AIMCo, and other funds in 2016 banded together to form a formal Consortium, which together purchased the company that owns and operates the

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[51] DEPARTMENT OF FINANCE CANADA, PENSION PLAN INVESTMENT IN CANADA: THE 30 PER CENT RULE (last modified June 3, 2016) (emphasis added), https://www fin.gc.ca/activty/consult/ppic-prpc-eng.asp#_ftnref1.

[52] *Id.*

[53] Nicole Mordant, *Canada Pension Funds Lobby to End 'Bizarre' Rule*, REUTERS, July 16, 2007 (quoting the spokesperson for the Ontario Teachers' Pension Plan), https://www reuters.com/article/canada-pensions-investing/canada-pension-funds-lobby-to-end-bizarre-rule-idUSN1633737420070716.

[54] BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION, CONSULTATION ON FEDERALLY REGULATED PENSION PLANS AND THE 30 PERCENT RULE (Sept. 16, 2016), https://www.fin.gc.ca/consultresp/ppic-prpc/data/ppic-prpc-02.pdf; *See also* CANADA PENSION PLAN INVESTMENT BOARD, CONSULTATION RESPONSE FROM THE CANADA PENSION PLAN INVESTMENT BOARD (CPPIB) (Sept. 2016), https://www.fin.gc.ca/consultresp/ppic-prpc/data/ppic-prpc-09.pdf ("Commercially, Canadian pension funds incur significant transaction costs, borne indirectly by contributors and beneficiaries of the funds, to create and implement structures to comply with the 30 per cent rule, and are often at a commercial disadvantage vis-à-vis others competing for investment opportunities in Canada and abroad."); OMERS, PENSION PLAN INVESTMENT IN CANADA: THE 30 PERCENT RULE (Sept. 15, 2016), https://www.fin.gc.ca/consultresp/ppic-prpc/data/ppic-prpc-14.pdf ("[T]here are various costs associated with compliance with the 30 per cent rule, including complexity of the investment structures employed to comply with the rule and of the partnering arrangements with equity partners who are not subject to a similar quantitative restriction.").

London City Airport.[55] In another recent example, Canadian pension fund managers including BCICM and PCCIB banded together to jointly purchase and then break up Asciano Ltd., an Australian rail, port, and terminal group.[56] While each of the pension investors alone were prohibited from acquiring this sort of control, they were able to act in concert to achieve the same end result.

39. The Joint Petitioners do not claim based on the slim record of this case that the Joint Applicants are pursuing a similar strategy with respect to PSE, but such a possibility is precisely why an adjudication is necessary here. The pattern of Canadian pension investors, including those at issue in this transaction, seeking to circumvent the 30 percent rule should cause the UTC to carefully examine this transaction to determine whether such an arrangement exists as part of the current deal, and if so, whether it will result in a net benefit to ratepayers.

c. The former Macquarie Investor Consortium is being effectively replaced by a new consortium which will control PSE

40. The net result of the Proposed Transaction, if approved, will be the substitution of a new ownership group for the existing Macquarie Investor Consortium. While the Joint Application seeks to characterize this change as making no difference to the nature of the Company's ownership and direction, this disregards some important substantive differences, a number of which have been discussed. First, the role of the Macquarie Group itself was very important as the leading investor. Macquarie took a predominant role in presenting the transaction for

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[55] Press Release, OMERS, Consortium Agrees To Purchase 100% of London City Airport From Global Infrastructure Partners and Highstar Capital (Feb. 26, 2016), https://omersprivatemarkets.com/consortium-agrees-purchase-100-london-city-airport-global-infrastructure-partners-and-highstar.

[56] Press Release, Benefits Canada, Canadian pension fund managers combine forces in Asciano bid (Mar. 15, 2016), https://www.benefitscanada.com/news/canadian-pension-fund-managers-combine-forces-in-asciano-bid-78454.

approval, through testimony and resolution of concerns in negotiating Commitments. Macquarie was a majority owner. With the "fundamental rationale"[57] for the acquisition being PSE's need for access to capital, Macquarie provided "a proven track record" of access to global capital markets[58] and in managing infrastructure investments.[59] The Investor Consortium operated within a defined framework, laid out in part in the private placement memorandum and other evidence in the case. Critical to the justification for the transaction was that PSE's need for capital would be met through a "multi-stage plan of recapitalization,"[60] described in detail in the testimony.[61] PSE Chief Financial Officer Eric Markell testified that the statutory public interest test was met because:

> The Proposed Transaction provides the best means for Puget Energy and PSE to meet the financial challenges facing PSE because it resolves PSE's current and future need for significant and secure capital investment on reasonable terms through a multi-part plan of recapitalization funded by a consortium of entities that have a proven track record of acquiring utility assets and holding and operating such investments on a long-term basis.[62]

41. The importance of this lies in the recognition of the difference between a publicly traded utility company and one which is closely held by private equity owners. In the latter situation, the sole source of capital for the utility is the private equity ownership group. In the Macquarie acquisition, the Commission was satisfied, based on a detailed review of testimony and evidence

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[57] Ronald H. Schmidt, Exh. RHS-1T at 17, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction,* Docket U-072375.

[58] Christopher J. Leslie, Exh. CJL-1T at 15-16, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction,* Docket U-072375; 2008 Acquisition Order ¶ 140.

[59] Leslie, Exh. CJL-1T at 23, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction,* Docket U-072375.

[60] 2008 Acquisition Order ¶ 142.

[61] Eric M. Markell, Exh. EMM-1T (Dec. 17, 2007) at 23-32, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction,* Docket U-072375.

[62] *Id*. at 47-49.

that Macquarie and the Consortium it led had the ability to obtain capital for PSE at a reasonable cost. An additional key consideration was that the specific nature of the capital commitments was clear, through the multi-stage plan of recapitalization.

42. In the last case, the Commission concluded after detailed review that "in stark contrast to the uncertainties Puget and PSE currently face in the public equity market, the evidence shows that the Consortium understands the extent and importance of PSE's capital needs *and has the capacity to fulfill them."* The Consortium had already injected $296 million in equity and committed to contribute $3.1 billion in equity at closing. Commitments 3 and 59 required Puget Holdings to secure no less than $1.4 billion in capital by establishing committed credit facilities for the benefit of PSE.

43. The new ownership consortium looks very different by contrast. Macquarie is departing entirely from the consortium and no comparable entity will replace it. Two new owners, OMERS and PGGM, will join the consortium, taking 1/3 of the ownership interest. The Joint Application does not indicate that there is any prospectus, private placement memorandum, or organizing document that would establish some framework going forward for the investment in and management of PSE. Very much absent is any specific information about how the "new consortium" will meet PSE's capital needs. There is no plan of capitalization, and no specific commitment by any of the consortium members. The largest remaining member of the group, the Canada Pension Plan Investment Board, has not filed testimony in the case.

44. In summary, if the transaction is approved, a "new consortium" group will take ownership and control over PSE. The "nature of these investors" and "their plans as owners of

Puget Energy and PSE" are different from the existing Investor Consortium.[63] As a result, effective control of the utility is being transferred to new a new ownership group. In this regard, the fact that none of the individual investors hold a greater than 50 percent interest is not relevant. What is relevant is the change in control of the company. This change must be carefully considered by the Commission under the "net benefit" standard.

3. PSE's gradual transfer of its majority ownership interest raises questions

45. Joint Applicants structuring of the divestiture of its majority ownership interest is concerning. Beginning with a majority ownership interest of 51.45 percent in February 2009, Puget Holdings has incrementally reduced its interest to the current 43.99 percent over the past decade, as the Joint Application details.[64] After reportedly beginning to consider sale of the Macquarie interest in mid-2017, [65] PSE filed in October 2017, a notice of the "Internal Reorganization of Upstream Owners of Puget Holdings" under which 9.9 percent of the equity ownership of Puget Holdings was transferred between Macquarie entities.[66] The Commission issued a letter acknowledging the transaction, and noting the requirement under Commitment 26(b) for approval of material transfers of ownership. The Commission concluded that "the transfer of 9.9 percent . . . falls just below the 10 percent threshold and does not result in a

[63] 2008 Acquisition Order ¶ 39.

[64] Joint Application at 7 n.4 (Notice of the initial transfer of 7.46 percent of Macquarie's interests to Canadian owners in 2009 was served to the merger case parties. Notice of the subsequent transactions appears not to have been given to the parties to the merger. Only Public Counsel received the courtesy notice filed with the Commission. None of the transactions were approved by Commission order.).

[65] *See, e.g.*, David French & John Tilak, *Macquarie taps advisers for up to $4.5 billion Puget Energy stake sale: sources*, REUTERS, July 25, 2017, https://www.reuters.com/article/us-puget-energy-m-a-idUSKBN1AA2OB.

[66] PSE Notice of Internal Reorganization of Upstream Owners of Puget Holdings (Oct. 11, 2017), *In re the Puget Sound Energy Notice of Internal Reorganization of Upstream Owners of Puget Holdings LLC*, Docket UE-171039.

change of the effective control of PSE." Accordingly, Commission approval was not required under the Commitment. [67]

46. Approximately one month later, an additional 3.72 percent of Puget Holdings was transferred, this time to existing Canadian owners. PSE stated in its filing that "the interest to be transferred is not a material part of PSE, as it constitutes less than five percent of the equity interest in Puget Holdings."[68] While there may have been legitimate business reasons for these transactions, it is also the case that as structured, they avoided the need for Commission review and approval under Commitment 26. Cumulatively, these transactions divested Macquarie of its majority ownership of the company without substantial review or approval, and now allow PSE to argue that the proposed transaction only transfers a "non-controlling minority interest" insufficient to require application of the "net benefit" standard. If utilities are permitted to structure transactions to avoid the application of the statute, simply through piecemeal transfers of larger ownership interests, the customer protections of the law are effectively rendered meaningless.

4. There is no reasonable policy basis for Joint Applicants' reading of the transfer statute standard

47. Finally, it is unclear what policy rationale would support the Joint Applicants' reasoning that the net benefits standard should not apply to this transaction. An investor that acquires the ability to totally control the operations of a utility and an investor that acquires the ability to substantially influence the operations of that utility both have the power to materially impact that

[67] Commission Letter to Ken Johnson (Nov. 6, 2017), *In re the Puget Sound Energy Notice of Internal Reorganization of Upstream Owners of Puget Holdings LLC,* Docket UE-171039.

[68] Letter of Ken Johnson (Nov. 15, 2017) at 1, *In re Notice of Sale of 3.72 Percent Ownership Interest in Puget Holdings LLC to Certain Existing Owners of Puget Holdings LLC*, Docket UE-171127.

utility's customers. The Joint Petitioners do not understand why the former investor should be required to demonstrate that its ownership will provide a net benefit to customers, but the latter investor should only be required to demonstrate that its ownership will not harm customers. Customers stand to be impacted by the change in ownership either way.

48. In short, substance should govern over form. The Commission should look to the underlying substance of this transaction rather than its technicalities in determining whether the statutory "net benefits" standard applies. The Commission previously authorized Macquarie to acquire a majority interest in PSE. If the current application is approved, Macquarie will have no interest in PSE. It stands to reason that this significant change will have at least some impact on PSE and its operations. Unlike in a competitive enterprise, where, if a change of ownership adversely impacts prices or service quality, customers may simply take their business elsewhere, regulated utilities like PSE have a captive customer base relying on an essential service. This basic circumstance is the very reason the Commission exists – to protect these captive customers from the unrestricted exercise of monopoly power. RCW 80.12.020 embodies one aspect of this obligation by requiring that customer interests are considered first when a material ownership change of a utility is proposed. Whether this inquiry is guided by the phrase "controlling interest," "substantial influence," or any similar test, the point is the same: if an ownership change of any amount is proposed that has the potential to materially impact the utility's operations, then RCW 80.12.020 requires the Commission to consider whether customers stand to benefit from this change. If customers do not benefit, then the Legislature has determined that such a transaction should be denied.

B. Whether the "Net Benefit," "No Harm" or Other Standard Applies, Multiple Factors Support the Initiation of an Adjudication to Review the Proposed Transaction

1. The determination of whether a controlling interest is being transferred is a threshold question

49. This is a case of first impression. For the first time, the Commission is asked to determine the type of transfer of ownership that is subject to the "net benefit" standard under RCW 80.12.020. In making this determination, one issue the Commission must decide is whether a "controlling interest" is being transferred. This may be a factual as well as a legal determination. PSE has submitted evidence in support of its argument that no controlling interest is changing hands. Stakeholders, however, must be permitted to examine that evidence, conduct discovery, and provide their own factual and legal arguments on the issue.[69]

50. A second issue of first impression that may arise is identification of the standard that applies if it is determined that "net benefit" is not appropriate. Joint Petitioners agree that the transaction must, at a minimum, be found to be in the "public interest" under WAC 480-143-170. However, it is not self-evident that the "public interest" test is necessarily restricted to a "no harm" standard. The Commission can reasonably exercise its discretion to determine whether to apply the pre-existing "no harm to the public interest" test urged by PSE, or whether the "public interest" evaluation now requires different considerations. As argued above, it is unclear why an

[69] The Commission did have one initial case which fell under the "net benefit" standard, an internal corporate reorganization of Northwest Natural Gas. The company transferred all of its stock to a newly created holding company. Each share of company stock was converted to a share of holding company stock. No third-party purchase was involved. No party disputed that the "net benefit" standard applied to the transaction. After pending for approximately 10 months, a settlement was presented at an Open Meeting. Acknowledging the unique nature of the case, the Commission held that "[o]ur decision today does not provide specific guidance for future transactions under RCW 80.12.020." *In re Northwest Natural Gas Co.'s Application for Approval of Corporate Reorganization to Create a Holding Company*, Docket UG-170094, Order 01 ¶ 14 (Dec. 28, 2017).

investor proposing to control a jurisdictional utility would need to demonstrate a "net benefit" to customers, but one claiming to be able to substantially influence the activities of that utility, without outright control, should only demonstrate a lack of harm. SB 5055 – passed in direct response to the 2008 Acquisition Order – has changed the analysis. A number of state regulatory commissions operating under a "public interest" standard of merger review have interpreted the standard as requiring net benefits for customers.[70] The Open Meeting process is not sufficient to resolve these issues.

2. This is a "Material" transaction that requires substantive review

51. As PSE acknowledges, the 2008 Acquisition Order requires the Company to notify the Commission of any sale or transfer of a material part of PSE ownership before the utility receives Commission approval for the transfer.[71] As discussed, the Commission in the prior case devoted attention to the definition of the term "material," ultimately clarified to mean ten percent or greater share of ownership. It was important to the Commission to ensure it would be made aware of and would have the right to approve or deny any such transfer. At the evidentiary hearing, examination by the Chairman explored the general significance of the ten percent threshold as indicative of materiality in terms of an ability to influence company affairs through the Board of Directors.[72]

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[70] Emmett N. Ellis, Monica W. Sargent & Steven C. Friend, *The Evolving Public Interest—Recent Decisions in Utility Merger Proceedings*, 55 INFRASTRUCTURE 1 (Summer 2016), https://www.hunton.com/images/content/3/6/v2/3690/Evolving Public Interest Recent Decisions in Utility Merger Proc.pdf.

[71] Joint Application ¶ 8.

[72] Leslie, TR. 860:14-861:2, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, Docket U-072375.

52. The 2008 Acquisition Order also cited the "material" transfer provision as an important safeguard to concerns regarding the long-term nature of the Consortium's investments. As the Order stated:

> We find the Consortium's testimony about the long-term nature of its investment persuasive. . . . [E]ven if a Consortium member should seek to sell its shares, that sale would require Commission approval if 10 percent or more of Puget Holdings' shares were involved. These facts support the credibility of the Consortium's testimony regarding the long-term nature of their investment perspective.[73]

53. This provision of the 2008 Acquisition Order reflects an expectation by the Commission and the parties that such a transfer had important implications for the utility, and would require serious examination by the Commission and stakeholders at a future time to determine its impact on the Company.

54. Accordingly, by virtue of the Settlement Agreement and the 2008 Acquisition Order, the transfer at issue in this proceeding has been determined by the Commission, PSE and the parties, to be a "material" issue. By definition, this is not a routine or inconsequential transfer, as PSE seeks to portray it.[74] In fact, the transaction is much more substantial (four times more) than the ten percent transfer benchmark adopted in the 2008 Acquisition Order. Moreover, it represents the final departure of the Macquarie group from the consortium. An examination of this material issue cannot reasonably be done in the context of an Open Meeting process but requires

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[73] 2008 Acquisition Order, ¶ 152.

[74] Black's Law Dictionary defines "material" as follows: "Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. An allegation is said to be material when it forms a substantive part of the case presented by the pleading. Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case." *Material*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/material/. A material fact is defined as one that is: "Crucial to the interpretation of a phenomenon or a subject matter, or to the determination of an issue at hand this is a specific type of confirmed or validated event, item of information, or state of affairs." *Material Fact*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/material-fact/.

establishment of an adjudicatory proceeding to allow interested stakeholders the ability to fully participate in the transaction review.

3. The "public interest" test is a robust test which must be applied in an adjudicative forum in a case of this magnitude.

55. If the Commission decides that the standard to be met by this transaction is the traditional "no harm to the public interest" test, that test is nevertheless robust and not perfunctory. After all, the 2008 Acquisition Order approved the Investor Consortium's acquisition of PSE subject to 63 Commitments contained in the Multiparty Settlement Stipulation and an additional 15 Conditions imposed by the Commission in the final order. Among the commitments made by Puget Holdings was the creation of "beneficial rate credits" of $100 million over a ten-year period,[75] designed to illustrate the long-term commitment of the investors and to "help to mitigate the impact on PSE's customers of the significant investment required to upgrade PSE's utility infrastructure over that period."[76] Even then, the Commission was pressed to approve this acquisition under the "no harm" standard, issuing a split 2-1 decision.

56. In the 2008 Acquisition Order the Commission devoted extensive discussion to the applicable standard.[77] After determining that the test was whether harm to the public interest would result, the Commission concluded that "among the factors that should be weighed in evaluating the transaction's effect on the public interest" are:

- Whether there are commitments by the purchaser to important public service obligations such as customer service, safety, reliability, resource adequacy

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[75] 2008 Acquisition Order ¶¶ 93, 283 (description, Finding of Fact).

[76] Brief of Puget Holdings LLC and Puget Sound Energy, Inc. (Oct. 23, 2008) ¶ 62, *In re the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For An Order Authorizing Proposed Transaction*, U-072375.

[77] 2008 Acquisition Order ¶¶ 106-21.

including energy efficiency and conservation, and support for low-income customers, and environmental stewardship

- Whether customers are protected from rate increases that might result from the transaction, from financial distress that might occur from the manner in which the purchase is financed, and distress at other companies affiliated with the purchaser
- Whether the Commission's ability to regulate the utility in the public interest is fully protected, including preserving access to all necessary information
- Whether the purchaser has the financial and managerial fitness to own and operate the utility in fulfillment of its public service obligations.
- Whether the commitments made in the transaction are enforceable.[78]

57. In order to review these issues, the Commission "conducted through a formal hearing process a thorough and detailed investigation."[79] The Commission allowed due process to Public Counsel, the sole party challenging the Settlement, including presentation of evidence, cross-examination, and argument. The Commission noted that it had performed "a full and dispassionate analysis of all the evidence and careful consideration of all the arguments."[80]

58. The adjudicatory process in the Macquarie docket was not unique. In order to determine whether the public interest standard has been met, the Commission has conducted an adjudication in every major transfer of ownership of a utility in Washington, including the acquisition of Pacific Power & Light (Pacific) by Scottish Power,[81] the later acquisition of

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[78] 2008 Acquisition Order ¶ 115.
[79] *Id.* ¶ 26.
[80] *Id.*
[81] *Scottish Power Acquisition of PacifiCorp*, Docket UE-981627, Fifth Supplemental Order (Oct. 14, 1999).

Pacific by MidAmerican Energy Holdings Company,[82] the acquisition of Cascade Natural Gas by MDU Resources,[83] and concurrently, the acquisition of Avista by Hydro One Limited.[84]

59. The Commission noted that "[t]his [public interest] determination must be made in each case, considering the context and the circumstances."[85] This docket is not simply a routine follow-on of the 2008 proceeding that requires little scrutiny. This is a different transaction than the one that took place ten years ago. New parties are involved and new issues are raised. The resulting ownership structure will differ. The "context and circumstances" have changed. As it did in the prior case, the Commission should again: "consider carefully the nature of these investors, their plans as owners of Puget Energy and PSE, and the governance structure of their holding company, Puget Holdings."

4. Joint Applicants' new proposed commitments deserve more careful review

60. An additional factor requiring an adjudication process in this case is the Joint Applicants' presentation of a new set of Proposed Commitments which would replace existing commitments and conditions.[86] As PSE witness David Mills explains, the Joint Applicants now propose a number of different approaches with regard to the existing commitments and conditions.[87] Certain of the prior conditions are retained without change and reaffirmed. Some commitments have been dropped because they are stated to no longer remain effective.[88] Other commitments

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[82] *In re the Joint Application of MidAmerican Energy Holdings Company and PacifiCorp, d/b/a Pacific Power & Light Co. For An Order Authorizing Proposed Transaction*, Docket UE-051090, Order 07 (Feb. 22, 2006).

[83] *In re the Joint Application of MDU Resources Group, Inc., And Cascade Natural Gas Corp. For An Order Authorizing Proposed Transaction*, Docket UG-061721, Order 06 (June 27, 2007).

[84] *In re the Joint Application of Hydro One Limited And Avista Corp. For An Order Authorizing Proposed Transaction*, Docket U-170970, Order 02 (Oct. 25, 2017).

[85] 2008 Acquisition Order ¶ 115.

[86] Joint Application, Appendix 1; David E. Mills, Exh. DEM-1T at 8-13; Mills, Exh. DEM-3.

[87] Mills, Exh. DEM-1T at 8-13.

[88] Joint Application at 23 n.18.

have been "updated" to reflect changes in circumstances. Finally, new commitments related to Colstrip and to the LNG facility would be incorporated.

61. It is reasonable for Joint Applicants to present a set of Proposed Commitments in connection with their filing, as is consistent with past practice in such cases. While some of the proposed conditions on first review appear unobjectionable, these proposals have not historically been approved without modification. Additionally, this docket presents an unusual, perhaps unique, situation where a set of conditions applicable to a previous ownership group is proposed to continue for a newly configured group.[89]

62. Joint Applicants' proposal raises several issues which require examination by the parties and the Commission, including:

- Are the commitment "updates" accurate and appropriate?
- Do parties and the Commission agree with Joint Applicants' determination as to expired or no longer relevant commitments? Should any of these be renewed in light of the new transaction?
- Are the new Colstrip and LNG conditions satisfactory?
- Are there any other new issues that need to be addressed with additional commitments due to the changes in the Consortium?
- Given the ten-year passage of time since the 2008 Acquisition Order and the changes in the Consortium, do any of the currently effective, ongoing commitments need modification?

[89] The filing of new Proposed Commitments constitutes a request to amend or modify the 2008 Acquisition Order in Docket U-072375 which would appear to require notice and an opportunity to participate to parties in that docket.

63. Ordinarily, questions regarding proposed conditions have been considered in the context of an adjudicated proceeding. Joint Petitioners cannot effectively review and consider these matters under the short timelines and limited procedural tools of the Open Meeting process.

5. Commission statutes contemplate adjudication for cases of this type and joint petitioners will be prejudiced without an adjudicative process

64. As a general matter, the Commission "may commence an adjudicative proceeding at any time with respect to any matter within its jurisdiction and within the scope of its authority."[90] As noted above, the Commission has ordinarily set major transfer of ownership cases for hearing in an adjudicative process. The transfer of property statutes expressly contemplate that this is appropriate. The Commission's "public interest" determination under WAC 480-143-170 can occur after examination of an application "or upon a hearing concerning the same." RCW 80.12.030 requires the Commission to issue its order approving or denying a transfer or property transaction within 11 months of the date of filing, allowing sufficient time for an adjudicative proceeding.

65. The material transaction proposed in this case raises a number of factual and legal issues as described above. Joint Petitioners respectfully represent that they cannot sufficiently review and respond to these issues without the ability to conduct discovery, present evidence, present legal argument, and cross-examine witnesses. Joint Petitioners are also not able to fairly develop settlement positions based on the current record. Joint Petitioners had anticipated that this matter would be set for hearing so that these procedural avenues would be available to them.

66. None of the Joint Petitioners have conducted discovery. The discovery rule is not currently in effect and Joint Petitioners were expecting that discovery would be initiated by

[90] WAC 480-07-305.

Commission order pursuant to WAC 480- 07-400 to -425. Consideration of and ruling on the proposed transaction at an Open Meeting, based solely on PSE's evidentiary filing would represent an unfair and unbalanced process. Such an approach does not afford Joint Petitioners, or other potential intervenors, available procedural rights and protections and their ability to protect and represent their interests will be prejudiced.

67. At the same time, Joint Petitioners are not aware of any prejudice to PSE that would result from adjudication. Joint Applicants state that the Proposed Transactions are scheduled to close in 2019 following the receipt of the necessary approvals.[91] This allows ample time for the Commission to conduct an adjudication. While PSE has requested issuance of an order approving the transaction "in an expeditious manner,"[92] none of its filings in the docket to date request that the matter be approved at an Open Meeting without an adjudicative process. PSE's filing, a Joint Application, supported by written testimony of witnesses and exhibits, is of the type which typically initiates an adjudicative proceeding. Joint Applicants' Motion for Amended Protective Order with "Highly Confidential" Provisions appears to contemplate that an adjudication will occur, noting that "information requested in discovery could require a 'confidential' or 'highly confidential' designation"[93] and that issuance of the requested order will "facilitate discovery."

68. The adjudicative process does not necessarily result in drawn-out litigation. Indeed, in the past, most major ownership transfer adjudications have been resolved through all-party or multiparty settlements. The adjudicative format lends itself to this type of resolution, since

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[91] Joint Application ¶ 15.
[92] Joint Application ¶ 49.
[93] Joint Applicants' Motion for Highly Confidential Protective Order ¶ 3.

parties have had a chance to investigate their concerns through discovery and negotiation, and testimony if needed. The adjudicative process allows the creation of a superior record that benefits the Commission in providing a basis for deciding the case, whether as to disputed or settled issues.

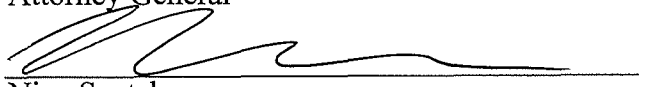
69. Joint Petitioners request is appropriate under WAC 480-07-305. The Commission has jurisdiction over the case and the matter is ripe for determination, having been presented for decision in the pending Joint Application. Joint Petitioners have standing as representatives of customers and stakeholders of PSE who regularly participate in Commission dockets. The Proposed Transaction is not being considered in another proceeding. The issues cannot be better addressed informally or in a different proceeding for the reasons discussed.

V. CONCLUSION

70. For the foregoing reasons, Joint Petitioners respectfully request that this matter be set for adjudication pursuant to WAC 480-07-305(3)(b). Joint Petitioners further respectfully request that the Commission review the Proposed Transaction under the "net benefit" standard set forth in RCW 80.12.020(1).

71. Dated this 24th day of October, 2018.

ROBERT W. FERGUSON
Attorney General



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