

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-151871 and
UG-151872 (*Consolidated*)

BRIEF OF PUBLIC COUNSEL

August 30, 2016

**Confidential and Highly Confidential Per Protective Order in
WUTC Dockets UE-151871 and UG-151872
(Confidential and Highly Confidential Information have been REDACTED.)**

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I. INTRODUCTION

1. Puget Sound Energy (PSE) proposes to expand its business by leasing space and water heating equipment under an optional tariff. Residential customers choosing to participate in the optional lease program would be able to lease natural gas and electric tank-style water heaters, electric heat pump water heaters, and natural gas furnaces. Commercial customers would be able to lease natural gas and electric tank-style water heaters. Even though it claims potential conservation savings as benefits of the program, PSE would not offer its leasing program as a conservation program. Lease customers would receive installation, maintenance, and repair of leased equipment, and PSE would enter into agreements with service partners for those services.¹

2. As discussed below, Public Counsel recommends that the Commission reject PSE's proposed leasing tariffs. PSE's proposed leasing program is beyond the scope of utility services regulated by the Commission. Alternatively, if the Commission deems the leasing service to be within the definition of utility service, PSE's proposed leasing service tariffs do not present fair, just, and reasonable rates. Moreover, PSE's proposed leasing service is not in the public interest because it raises consumer protection concerns.

II. THE COMMISSION SHOULD REJECT PSE'S PROPOSED TARIFFS BECAUSE THE SERVICE PROPOSED IS NOT A UTILITY SERVICE REGULATED BY THE COMMISSION

3. The Commission's jurisdiction is defined by statute. At its most basic, the Commission's authority is to regulate in the public interest the rates, services, facilities, and practices of all persons engaged in the business of supplying utility service.² While the term "utility service" is

¹ Direct Testimony of Mary M. Kimball, Exhibit No. MMK-1HCT at 3:7-19.

² RCW 80.01.040.

not defined, other statutory definitions, Commission rulings, and court decisions shed light on what is and what is not a utility service in Washington.

4. Not every service offered by a regulated utility is a utility service. Whether a service is a regulated service is a question of fact to be determined by the Commission, and in making its determination, the Commission may consider “any and all facts that may indicate the true nature and extent of the operations or acts” in question.³ The character of the business activity that makes up the service will inform whether a service is a regulated utility service.⁴ In determining what constitutes a regulated service, the Commission has stated that, “regulation . . . is predicated upon the proposition that the service rendered is a public service.”⁵

A. Under PSE’s Proposal, the Leased Equipment Would Simply Be Appliances that Use Electricity or Natural Gas, Not Utility Plant, Disqualifying the Proposed Service from Being “Utility Service.”

5. To be utility service, service must be provided by a public service company, such as an electric or natural gas company, as defined under Title 80 RCW. An electric company is a company that owns, operates, or manages electric plant for hire.⁶ Electric plant includes “all real estate, fixtures and personal property operated, owed, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat, or power for hire.”⁷ Electric plant also includes “any conduits, ducts or other devices,

³ RCW 80.04.015.

⁴ *Cushing v. White*, 101 Wash. 172, 181-82 (1918) (“[T]he question must be determined by the character of the business activity actually carried on”); see also, *In re Puget Sound Energy’s Application for Approval of a Special Contract Under WAC 480-80-143*, Docket No. UG-160748, Order 01 (Jul. 7, 2016).

⁵ *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities ¶ 55 (Jul. 30, 2014).

⁶ RCW 80.04.010(12).

⁷ RCW 80.04.010(11).

materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.”⁸

6. A natural gas company includes any company owning, controlling, operating or managing any gas plant within Washington.⁹ Gas plant includes “all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas, or the manufacture, transmission, distribution, sale or furnishing of other type gas for light, heat or power.”¹⁰

7. In comparing the definitions of electric and natural gas plant, common themes emerge. Transmission, distribution, sale, and furnishing of the energy to customers for the purpose of light, heat, or power are defining characteristics of utility plant. Space and water heaters, the appliances PSE proposes to lease under its proposed leasing program, are not used to transmit, distribute, sell, or furnish energy. Rather, they are consumer goods that use energy, similar to washers and dryers, stoves, refrigerators, televisions, or computers. Absent a provision under the public service laws or a compelling public purpose justifying the provision of equipment by a utility, the leasing program proposed by PSE in this case fails as a utility service because the leased equipment is not utility plant.

B. PSE’s Proposal Fails under the Commission’s Factors Used to Determine Whether a Company Is Offering a Utility Service.

8. The Commission has articulated three factors used to determine whether a company is offering a utility service, and an analysis of the factors demonstrates that PSE’s proposed leasing

⁸ *Id.*

⁹ RCW 80.04.010(14).

¹⁰ RCW 80.04.010(15).

program is not a utility service. The factors are (1) whether the service is being offered to the public, (2) the market power of the company, and (3) the need for consumer protection.¹¹

9. The first factor is based on the rationale that a company serving the public as a class is more likely to dedicate its facilities to public use.¹² In this case, although PSE purports to offer the leasing service to all of its customers, the program is optional and will not be utilized by every customer. Leasing customers would be required to own the premises where the equipment would be installed.¹³ Moreover, the leases are individualized and customers must meet certain credit approval requirements to participate in the program.¹⁴ Thus, PSE's leasing program is not offered to the public in the same way that electricity or natural gas service is.¹⁵

10. The second factor, market power, is premised on and necessitated by the fact that the regulated company is a natural monopoly. As such, it may be more efficient for a monopoly to provide the service in question than the competitive market.¹⁶ In this case, PSE is a natural monopoly with respect to the energy services it provides: electric and natural gas services. However, PSE is not a natural monopoly with respect to leasing end-use appliances used to heat space or water. There are numerous companies that sell appliances in a variety of models, with a

¹¹ *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket No. UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities ¶¶ 59-64 (Jul. 30, 2014) (Interpretive Statement).

¹² *Id.*

¹³ Proposed Sched. 75, Sheet 75-G at 5. Lease Terms and Conditions 4(a).

¹⁴ Kimball, Exhibit No. MMK-1HCT at 10:17-18; Proposed Sched. 75, Sheet No. at (1)(4).

¹⁵ One way that the leasing program is not offered to the public in the same way as electricity and natural gas is that PSE would have no obligation to serve a lease customer. While PSE has an obligation to serve customers in its electric and natural gas service territories, PSE would have no similar obligation to serve under its proposed leasing program. This obligation to serve is a key component to the regulatory compact, under which a utility provides service under regulation in return for the regulator's promise to set fair rates that provide an opportunity to earn a fair rate of return. Without the obligation to serve, the regulatory compact falls apart, and the proposed service is not rightly a utility service. This result makes sense given that there are other service providers, i.e., other entities through which customers are able to acquire space and water heating appliances.

¹⁶ Interpretive Statement ¶¶ 59-64 (Jul. 30, 2014) (citing *Munn v. Illinois*, 974 U.S. 113, 151-152 (1876)).

variety of features, at a variety of price points.¹⁷ Additionally, there are multiple ways for a customer to finance the purchase of end-use appliances.¹⁸ Indeed, outright purchase of equipment would be a major form of competition to PSE's proposed leasing program.¹⁹ As a result, regulation is not needed as a substitute for competition to ensure fair prices with respect to acquiring end-use appliances.²⁰

11. With respect to the third factor, the Commission is more likely to find that regulation is appropriate when there is a need for consumer protection. Consumer protection is required when customers are "at the mercy of the company's shareholders to provide an essential public service."²¹ The inquiry under this factor is not whether consumer protection concerns exist with respect to the proposed service, but whether the service is an essential public service for which the absence of regulation raises consumer protection concerns. In this case, although customer protection concerns exist, including whether customers understand the total price of the lease contract as compared to alternatives, the service in question (leasing end-use appliances) is not an essential public service warranting regulation.²²

12. PSE's proposed leasing program fails to meet the three factors used by the Commission to evaluate whether a service is a utility service. As a result, the Commission should reject PSE's proposed leasing program tariffs.

¹⁷ Kimball, Exhibit No. MMK-1HCT at 12:11 – 15:7; *see also*, Exhibit No. MMK-6; Prefiled Direct Testimony of Elizabeth C. O'Connell, Exhibit No. ECO-1HCT at 18:9 – 21:10.

¹⁸ Kimball, Exhibit No. MMK-1HCT 47:18 – 49:15; O'Connell, Exhibit No. ECO-1HCT at 44:12 – 45:3; Bradley T. Cebulko, Exhibit No. BTC-5.

¹⁹ Malcolm B. McCulloch, TR. 213:1-25.

²⁰ Interpretive Statement ¶¶ 59-64 (Jul. 30, 2014) (citing *State ex rel. Stimson v. Kuykendall*, 137 Wash. 602, 609, 243 P. 834, 836 (1926)).

²¹ *Id.*

²² Consumer protection concerns raised by PSE's proposed leasing program are discussed more fully below.

C. *Cole v. Washington Utilities and Transportation Commission Does Not Stand for the Proposition That Any Leasing Program Offered By a Utility Is Authorized as a Utility Service.*

13. Under *Cole v. Washington Utilities and Transportation Commission*, the Washington Supreme Court expressed openness to subjecting appliance leasing to Commission regulation.²³

However, *Cole* does not stand for the proposition that utility leasing of appliances is *per se* authorized without any compelling public purpose or statutory authority.

14. In *Cole*, the utility offered rental and leasing programs to promote the use of natural gas.²⁴ The Court held that leasing appliances was a “justifiable means of promoting the sale of natural gas.”²⁵ This case is distinguishable because PSE is not promoting the use of natural gas or electricity. Indeed, except for certain exceptions, PSE is precluded from promoting the use of natural gas or electricity under WAC 480-90-223 and WAC 480-100-223, calling into question the basis for the *Cole* ruling.

15. More broadly, PSE is not offering its proposed leasing program as a conservation program. If it was, the leasing program would qualify as a utility service and could be provided through a tariff.²⁶ However, it would also be subject to performance metrics, requiring PSE to provide a pre-set level of conservation savings. If it failed to do so, it would face regulatory

²³ *Cole v. Wash. Utils. & Transp. Comm’n*, 79 Wn.2d 302, 485 P.2d 71 (1971).

²⁴ *Cole*, 79 Wn.2d at 303-304.

²⁵ *Cole*, 79 Wn.2d at 308.

²⁶ PSE witness Mr. Eric Englert acknowledges the connection between conservation programs and classification as utility service at hearing. When asked whether he agreed with another witness’s statement that a utility could offer a program leasing windows and doors due to the conservation savings they could potentially offer, Mr. Englert replied, “I believed he answered that in the context of a conservation program, and I think conservation programs are part of a utility service.” Englert, TR. 401:1-7. However, Mr. Englert also testified that PSE could offer windows, doors, and insulation under the proposed leasing program if approved by the Commission because he saw no particular limitation of what constitutes a utility service under *Cole* or “the Commission’s language.” Englert, TR 402:2-6.

consequences, and this framework allowing a leasing program that is offered as a conservation program to be provided under tariff.

16. In this case, PSE intends to become a retailer of water and space heating appliances that offers a certain financing option. In doing so, PSE states that it intends to develop different relationships with its customers beyond its traditional energy relationships. While the utility industry is seeking different ways to serve customers, the regulatory umbrella should not include activities that are largely unrelated to the core business of providing utility service. This is beyond the scope and spirit of *Cole*. Thus, *Cole* does not support PSE's proposed lease program.

III. IF THE COMMISSION DEEMS THE PROPOSED SERVICE AS BEING WITHIN ITS JURISDICTION, THE RATES PROPOSED ARE NOT FAIR, JUST, AND REASONABLE

17. If the Commission decides that the proposed leasing program is within its jurisdiction, it must approve rates to be charged under the program's tariff. Rates approved by the Commission must be fair, just, and reasonable.²⁷ Because PSE's pricing model contains several flaws, it does not produce rates that are fair, just, and reasonable. Additionally, the evidence in this case is not sufficient for the Commission to determine fair, just, and reasonable rates. As a result, the Commission should reject PSE's proposed leasing tariff.

A. PSE's Pricing Model Contains Several Flaws.

18. PSE presents a highly confidential pricing model containing several defects that prevent the model from developing fair, just, and reasonable rates. These defects include using a flawed customer survey to assess customer interest in the proposed program, overstating the market

²⁷ RCW 80.28.010(1). *See also*, RCW 80.28.020 and RCW 80.01.040; Kimball, Exhibit No. MMK-1HCT at 4:18-20.

potential for the proposed program, basing rates on speculative equipment costs, and using an unsupported failure rate assumption.

1. PSE uses a flawed customer survey to estimate the potential customer participation rate in the proposed program.

19. Because PSE's proposed leasing program is voluntary, the customer participation rate must be estimated. The level of customer participation is important in setting the rate because the revenue requirement must be spread across a certain number of customers. If the number of participating customers assumed is too high, the rate set would be too low, and the utility will not recover the program costs. Customer participation is an important, and ultimately unknown, variable that is used to determine the proposed lease prices.²⁸

20. PSE uses the results from an online survey conducted by Cocker Fennessy, a market research firm engaged to gauge customer interest in the proposed leasing program and to project the level of customer participation. However, the survey suffers from several critical flaws and has not been sponsored by a witness knowledgeable on survey design. Additionally, PSE has provided only sparse information regarding the survey methodology. As a result, the survey results are fundamentally unsound to be used as an input for ratemaking.

21. PSE fails to provide sufficient evidence to establish potential customer participation, thus the Commission does not have before it sufficient evidence upon which to establish and approve a fair, just, and reasonable rate for the proposed leasing program.

a. The purpose of the online survey was to gauge interest, not likelihood of participation.

²⁸ Kimball, Exhibit No. MMK-1HCT at 15:9 – 16:13.

22. The Cocker Fennessy customer survey asked about “interest” in leasing.²⁹ In describing the scope of work to Perkins Coie, Cocker Fennessy stated that the research objective was to “test concepts related to a proposed appliance leasing program with existing PSE customers who have older appliances,” to “explore reactions to [the] concept,” and “determine interest in program.”³⁰ To achieve the research objective, Cocker Fennessy proposed to use a 10 to 12 minute online survey of a random sampling of PSE customers.³¹
23. In using the Cocker Fennessy results, PSE’s market potential analysis describes the survey results as providing “Residential Lease Likelihood.”³² PSE witness Dr. Faruqui further characterizes the survey results as identifying customers that “have indicated in the survey that they are likely to undertake a lease, if offered the option.”³³ However, as Ms. Kimball points out, “PSE’s online customer survey asked about ‘interest’ in the leasing concept, rather than likelihood of participation, an important distinction.”³⁴
24. A survey respondent may very well be interested in a concept, but upon examination of the specific details, the same survey respondent may decide that he or she is unlikely to participate. Particularly because the survey used in this case contained several flaws, drawing conclusions regarding “likelihood” from expressions of “interest” is unreasonable.

b. The survey did not provide relevant and accurate information to the survey respondents.

²⁹ McCulloch, Exhibit No. MBM-4 at 6-8.

³⁰ McCulloch, Exhibit No. MBM-43 at 3.

³¹ *Id.*

³² McCulloch, Exhibit No. MBM-40HC at 7.

³³ Prefiled Direct Testimony of Ahmad Faruqui, Ph.D., Exhibit No. AF-1T at 17:6-7.

³⁴ Kimball, Exhibit No. MMK-1HCT at 32:13-15.

25. Cost is of paramount concern to customers when making appliance purchase decisions, according to a Northwest Energy Efficiency Alliance (NEEA) study.³⁵ Although customers under PSE's proposed leasing program would not be purchasing the appliances, they would be making a decision to acquire particular equipment for use in their homes. Customers would compare the leasing option with options to finance or purchase through other vendors, and overall price would continue to carry high relevance in the decision-making process. The Cocker Fennessy survey failed to disclose the total cost of the leased equipment over the term of the lease, which is a substantial design flaw.³⁶

26. In response to criticism from Public Counsel and Commission Staff regarding the survey's failure to disclose the total price over the term of the contract, Mr. McCulloch for PSE stated, "The survey provided to respondents the average monthly payment and term of the lease. PSE's customer base is fully capable of performing basic calculations."³⁷ Mr. McCulloch also stated that the survey presented information "succinctly, consistent with industry best practices to avoid respondent confusion and fatigue."³⁸ No witness for PSE explains how presenting the total cost of the lease would have caused confusion and fatigue. Moreover, the basic calculation to determine the total cost requires a calculator.³⁹ The survey did not disclose this to respondents. Mr. McCulloch conceded at hearing that the total cost of the lease is important information for customers to consider.⁴⁰ The survey results would very likely have found lower

³⁵ Kimball, Exhibit No. MMK-1HCT at 17:5-7 (citing Exhibit No. MMK-3 at 6).

³⁶ Kimball, Exhibit No. MMK-1HCT at 16:14 – 17:12; Cebulko, Exhibit No. BTC-1HCT at 34:5-9.

³⁷ Prefiled Rebuttal Testimony of Malcolm B. McCulloch, Exhibit No. MBM-7HCT at 27:7-9.

³⁸ McCulloch, Exhibit No. MBM-7HCT at 27:9-11.

³⁹ For example, the calculation for a water heater lease, based on the prices disclosed in the survey, is as follows: \$18 per month * 12 months * 15 years = \$3,240. McCulloch, Exhibit No. MBM-4 at 5. *See also* Exhibit No. MBM-44 at 37-60 (survey screen shots).

⁴⁰ McCulloch, TR. 234:18 – 235:4.

customer interest in leasing had it disclosed the total cost of the lease,⁴¹ particularly since the majority of residential customers expect to pay approximately \$1,000 for a water heater, compared to \$3,240 under PSE's proposed lease program.⁴²

27. The survey also provided misleading information to respondents regarding energy efficient equipment offerings under the leasing program. The survey inaccurately described the proposed leasing program as offering "energy efficient equipment"⁴³ while quoting prices for water heaters and natural gas furnaces that were consistent with the lowest price lease offerings. Equipment offered at the lowest price is essentially consistent with current federal codes and standards, and the lowest price does not reflect the cost for energy efficient equipment.⁴⁴ The survey was misleading in that participants could have reasonably drawn the conclusion that the prices used in the survey were for energy efficient equipment. The survey failed to disclose to customers that energy efficient water heaters and furnaces would have higher monthly lease prices and higher total lease costs.

28. The Commission has noted that equipment leasing programs that provide less-than-efficient water heaters are flawed.⁴⁵ In response to criticism for offering inefficient water heaters, Washington Natural Gas proposed to only offer efficient water heaters under its program, along with other program improvements, and the Commission agreed to allow the

⁴¹ Kimball, Exhibit No. MMK-1HCT at 22:17 – 23:13; Cebulko, Exhibit No. BTC-1HCT at 34:5-9.

⁴² See, Kimball, Exhibit No. MMK-1HCT at 27:4-8. The cost of the asserted benefits of the program is discussed later in this brief.

⁴³ McCulloch, Exhibit No. MBM-44 at 48. See also Exhibit No. MBM-4 at 5.

⁴⁴ Kimball, Exhibit No. MMK-1HCT at 18:1-11.

⁴⁵ *Wash. Utils. & Transp. Comm'n v. Wash. Nat. Gas Co.*, Docket UG-920840, Fourth Supp. Order at 16 (Jun. 15, 1993).

program to continue.⁴⁶ In this case, some of the equipment PSE proposes to offer could not be offered under its current conservation programs.⁴⁷

c. PSE does not establish that the survey participants are representative of its customer base, even though it applies the survey results to its entire customer base.

29. PSE applied the results of the Cocker Fennessy survey to all of its residential customers, totaling over 1.3 million customers.⁴⁸ Although Dr. Faruqui characterizes the survey respondents as “a representative sample of [PSE’s] customers,”⁴⁹ no PSE witnesses provide any support for that claim.⁵⁰ A summary of the survey results was provided as an exhibit to Mr. McCulloch’s testimony (Exhibit No. MBM-4), which includes information referenced as “demographics/background” for the following categories: sex/gender; age; annual household income before taxes; race/ethnicity; and county of residence. That information shows that 59 percent of the respondents were female and 42 percent were male, and that 70 percent of survey respondents were over the age of 55.⁵¹ However, PSE has provided no evidence to support the company’s claim that the demographic information of survey respondents provided in Exhibit No. MBM-4 is representative of PSE’s 1.3 million customer base, to which the survey results have been applied.

⁴⁶ *Id.*

⁴⁷ McCulloch, Exhibit No. MBM-25 at 2. Of the 12 types of potential leased equipment, only four types of equipment, at most, are currently included in PSE’s conservation programs. Kimball, Exhibit No. MMK-1HCT at 34, n.78.

⁴⁸ This number includes electric, natural gas, and combined customers.

⁴⁹ Faruqui, Exhibit No. AF-1T at 16:8.

⁵⁰ Kimball, Exhibit No. MMK-1HCT at 20:3-10.

⁵¹ McCulloch, Exhibit No. MBM-4 at 11. The age information shows the following: age 55-64 = 31%; age 65-74 = 31%; 75 and older = 8%. 31+31+8=70%. *Id.*

30. To the contrary, Mr. McCulloch's testimony at hearing underscored that the Cocker Fennessy sample was not representative of all PSE's residential customers in one respect: the survey was limited to homeowners. Mr. McCulloch stated the survey only included homeowners because "[t]he lease is not available to customers who do not own their property."⁵² PSE's service territory includes customers who are renters, as Mr. McCulloch confirmed at hearing.⁵³ PSE's 2012 Corporate Fact Book includes data of renter occupied housing by county, and shows that in King County, [REDACTED] percent of occupied housing units are renter occupied.⁵⁴ The portions of renter occupied housing in Pierce and Thurston counties are [REDACTED] percent and [REDACTED] percent, respectively.⁵⁵ When Mr. McCulloch was asked at hearing whether PSE applied the results of the Cocker Fennessy survey to both homeowners and non-homeowners he responded as follows: "That's correct. Despite the fact that somebody might be renting their home to another individual doesn't mean that that owner can't enter into a lease agreement. So we think it's appropriate to include all those in there."⁵⁶

31. The Cocker Fennessy survey did not ask landlords if they would be interested in the leasing service for rental properties. PSE, not Cocker Fennessy, assumed that landlords would have answered the survey question the same way as homeowners.⁵⁷ This raises a methodological question: whether it is appropriate to make the assumption that the survey results from one demographic group (homeowners) can be applied to another group (landlords), based on the

⁵² McCulloch, TR. 235:21-24.

⁵³ McCulloch, TR. 235:25 - 236:2.

⁵⁴ McCulloch, Exhibit No. MBM-42C at 22. The data for King County shows [REDACTED] renter occupied housing / [REDACTED] occupied housing units = [REDACTED] percent. Data Source is shown as 2010 Census. *Id.*

⁵⁵ Exhibit No. MBM-42C at p. 22. The data for Pierce County shows [REDACTED] renter occupied housing / [REDACTED] occupied housing units = [REDACTED] percent. The data for Thurston County shows [REDACTED] renter occupied housing / [REDACTED] occupied housing units = [REDACTED] percent. *Id.*

⁵⁶ McCulloch, TR. 237:14-23.

⁵⁷ McCulloch, TR. 238:2-4.

sampling and survey population. There is insufficient evidence that such an assumption is appropriate.

d. PSE did not present a witness knowledgeable on survey design.

32. Mr. McCulloch is the PSE witness sponsoring the Cocker Fennessy survey results, provided in his Exhibit No. MBM-4. When directed to the section of his Exhibit No. MBM-4, entitled “Methodology,” Mr. McCulloch emphasized that he was not in a position to answer any questions regarding the survey methodology. He testified as follows: “This is a very broad stroke at explaining an executive summary, might I say, of explaining how this survey was conducted. I don’t think it goes to the scientific methodology of the survey. *And I’m not in a position to answer any questions regarding that process.*”⁵⁸

33. Mr. McCulloch also testified, “I’m not an expert in survey taking, so I can’t respond to that answer,” when asked about the shortcomings of online surveys.⁵⁹ The information in the record regarding survey methodology used by Cocker Fennessy is sparse and parties are not able to test it beyond identifying obvious flaws, discussed above. While those flaws are substantial and warrant discounting the survey results, PSE’s failure to adequately support the methodology used by Cocker Fennessy and the application of the survey results in PSE’s pricing model leave the Commission with inadequate evidence on which to base a decision on rates in this case.

2. PSE overstates the market potential for the proposed leasing program in its pricing model.

34. One significant input to PSE’s pricing model is the company’s market potential analysis. This analysis, however, suffers from a substantial flaw, resulting in the residential market

⁵⁸ McCulloch, TR. 205:5-10 (emphasis added).

⁵⁹ McCulloch, TR. 305:1-8.

analysis being overstated by █ percent. This error is due to the Company's failure to account for the fact that the residential product market share data applies only to single family homes. In addition to being utilized in the pricing model, this analysis is also used as an input to estimate conservation savings in the Public Benefits Model described in Dr. Faruqui's testimony.

35. PSE determined the potential market size for each residential product (gas furnaces, water heaters, air source heat pumps) by starting with the total count of all residential customers, including gas, electric, and combined service. The total count of all residential customers is over 1.3 million customers.⁶⁰ PSE then applies product market share data to the total customer count. For example, as Dr. Faruqui explains in his testimony, "PSE data show that 65 percent of PSE customers have natural gas furnaces."⁶¹ However, this gas furnace market share data applies only to single family residential customers, not PSE's entire residential customer base.

36. PSE's residential space heat market share data is shown in Mr. McCulloch's Exhibit No. MBM-3, entitled, "Primary heating equipment in single family homes, 2012."⁶² This data is also provided in PSE's 2012 Fact Book, which shows that gas forced air furnaces are present in 65 percent of single family homes, 19 percent of multifamily homes, and 13 percent of mobile homes.⁶³ However, as described in Dr. Faruqui's testimony, PSE applies the 65 percent figure, which pertains only to single family homes, to its entire residential customer market of over 1.3 million customers.⁶⁴ Consequently, PSE's market potential analysis overstates the size of the potential leasing market.

⁶⁰ Faruqui, Exhibit No. AF-1T at 17:3-5.

⁶¹ Faruqui, Exhibit No. AF-1T at 17:5-6.

⁶² McCulloch, Exhibit No. MBM-3 at 1, Figure 1.

⁶³ McCulloch, Exhibit No. MBM-41 at 5.

⁶⁴ Faruqui, Exhibit No. AF-1T at 17, n.39.

37. PSE's business plan for its proposed leasing program describes [REDACTED]
[REDACTED].⁶⁵ The business plan includes a section heading entitled, [REDACTED] and the initial sentence of the section states, [REDACTED]

[REDACTED]⁶⁶ The business plan continues by providing [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]⁶⁷

38. Examining the evidence, it is possible to calculate the amount by which PSE has overstated the potential residential market. For each type of equipment that would be offered to residential customers, the product market share data used by PSE in its pricing model applies to *single-family* customers,⁶⁸ and yet the Company's model applies these product assumptions to its entire residential customer base. Applying the equipment market share data to PSE's total residential customer count instead of to single-family residential customers overstates the potential residential market by [REDACTED] percent. The product market share data PSE relies upon is illustrated below in Table 1.

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⁶⁵ O'Connell, Exhibit No. ECO-3HC at 6.

⁶⁶ O'Connell, Exhibit No. ECO-3HC at 6.

⁶⁷ O'Connell, Exhibit No. ECO-3HC at 6.

⁶⁸ McCulloch, Exhibit No. MBM-41 at 5 (Excerpt of PSE 2012 Fact Book; Data source shown as 2010 Residential End Use Survey). *See also* McCulloch, Exhibit No. MBM-3.

Table 1. PSE Residential Product Market Share Data

Residential Product	Market Share	Applicable Market	Source
Gas Forced Air Furnace	65%	Single Family – PSE service territory	2010 Residential End Use Survey (PSE 2012 Fact Book)*
Air Source Heat Pump	5%	Single Family – PSE service territory	2010 Residential End Use Survey (PSE 2012 Fact Book)*
Tank-Style Water Heater	97%	Single Family - Washington	2012 NEEA RBSA**

*Exhibit No. MBM-41 at 5 (Excerpt of PSE 2012 Fact Book; Data source shown as 2010 Residential End Use Survey); McCulloch, Exhibit No. MBM-3, Figure 1.

** Exhibit No. MBM-3, Figure 2 (NEEA 2012 Residential Building Stock Assessment (RBSA)).

39. PSE’s market potential analysis for gas forced air furnaces is illustrated in Table 2 below:

Table 2. PSE Market Potential Analysis – Residential Gas Forced Air Furnaces

Source: Exhibit No. MBM-40HC at 8.⁶⁹

40. The annual market potential for residential natural gas furnaces of [REDACTED] is overstated by [REDACTED] percent, because it fails to recognize the product market share data applies only to single-

⁶⁹ Dr. Faruqui’s testimony identifies potential annual leased high-efficiency (95% AFUE) furnaces of 6,001 per year. His calculation is similar to that shown in Table 2 above, and also applies an assumption that 80% of housing stock is viable for high efficiency (95% AFUE) furnaces. See Faruqui, Exhibit No. AF-1T at 17, n.39 and at 18, n.41.

family homes. PSE's lease proposal business plan stated that [REDACTED] percent of its residential customers live in single-family homes.⁷⁰ If the total market potential count of furnace leases shown in Table 2 is multiplied by the [REDACTED] percent of customers in single-family homes, results in potential leased furnaces of [REDACTED] per year, or [REDACTED] percent less than PSE's analysis.

41. PSE's market potential analysis for residential air source heat pumps and residential tank-style water heaters should also be reduced by [REDACTED] percent, to recognize that product market share data applies to single-family homes.

3. PSE uses speculative equipment costs in its pricing model.

42. Another significant cost input to PSE's lease equipment pricing model is the equipment cost for hot water heaters, furnaces, and heat pumps that would be offered under the program. One major flaw in PSE's pricing model is that the equipment cost is estimated because PSE has not yet determined what brands and models of equipment it will offer under its proposed leasing program. To estimate the equipment costs, PSE issued a Request for Qualifications (RFQ) to potential service providers. PSE used information from the RFQ to estimate costs, including equipment costs, to develop proposed tariff rates. To estimate the equipment costs, PSE averaged the equipment costs received in response to its RFQ.⁷¹

43. The fact that PSE has not identified the equipment that it will offer under its leasing program is problematic. PSE bases its equipment cost on average market prices, which means that any equipment chosen will have a mismatch between the tariff rate and the actual cost. This

⁷⁰ O'Connell, Exhibit No. ECO-3HC at 6.

⁷¹ McCullough, TR. 219:18 – 221:20.

is inconsistent with standards the Commission uses to set rates for regulated utilities. For example, to be included in rates, changes in rate base⁷² must be known and measurable, meaning that the amount must be measurable and not an estimate or projection.⁷³ An average of certain products and services that actually exist in the market is inconsistent with the known and measurable standard since the average product and service is not what is being offered by PSE under its proposed service.

44. Additionally, prices and features vary widely for the leased equipment, as Ms. Kimball illustrates through her analysis of water heaters.⁷⁴ In her research, Ms. Kimball found prices meeting PSE’s specification ranging from \$379 to \$799.⁷⁵ With installation, costs ranged from \$1,040 to \$1,279.⁷⁶ As noted by Ms. Kimball, “Because we do not yet know the specific equipment offered to potential leasing customers, it is impossible for the Commission to effectively evaluate the relative value to customers of the equipment they may lease, or whether PSE’s proposed lease prices are fair, just, and reasonable.”⁷⁷

4. PSE uses a failure rate in its pricing model that is unsupported.

45. PSE’s pricing model assumes a failure rate of four percent for each type of equipment it plans to offer under its leasing program. It bases the failure rate assumption on the failure rate of water heaters in PSE’s current natural gas water heater rental program.⁷⁸ The current program failure rate was determined by analyzing water heaters that had failed after the manufacturer

⁷² PSE intends to include the leased equipment in rate base. Liz Y. Norton, TR. 116:12-19.

⁷³ *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE-090134 and UG-090135, Order 10 ¶ 46 (Dec. 22, 2009); *Wash. Utils. & Transp. Comm’n v. Pacific Power & Light Co.*, Docket UE-140762, Order 08 ¶ 167 (Mar. 25, 2015).

⁷⁴ Kimball, Exhibit No. MMK-1HCT at 12:11-14.

⁷⁵ Kimball, Exhibit No. MMK-1HCT at 26:8-9.

⁷⁶ Kimball, Exhibit No. MMK-1HCT at 26:9 – 27:1.

⁷⁷ Kimball, Exhibit No. MMK-1HCT at 12:14-18.

⁷⁸ Kimball, Exhibit No. MMK-1HCT at 24:4-7.

warranty, but prior to the end of the lease term proposed by PSE in Schedule 75.⁷⁹ PSE characterizes its failure rate assumption as “conservative” and as the “most current information available” to PSE.⁸⁰

46. PSE proposes to lease water heaters under its leasing program, but it also plans to offer natural gas and electric furnaces, as well as heat pumps. This diverse equipment has different useful lives than water heaters, and likely has different failure rates than water heaters. Furnaces and heat pumps have different components, features, and functionality and serve different purposes than water heaters. Additionally, the water heaters used under the rental program may have a shorter warranty period compared to the water heaters that may be offered under PSE’s proposed leasing program, which might affect the failure rate.⁸¹

47. PSE has provided no evidence demonstrating that the failure rate associated with the current water heater rental program is applicable to the equipment PSE may offer under its proposed leasing program. If the failure rate is higher, PSE’s actual costs will be higher (all other things being equal), putting an upward pressure on lease rates going forward. If the failure rate is lower, PSE’s actual costs will be lower (all other things being equal), and customers will pay unnecessarily high leasing rates. In either event, PSE has not demonstrated that its assumption results in fair, just, and reasonable rates.

⁷⁹ Kimball, Exhibit No. MMK-1HCT at 24, n.56.

⁸⁰ Kimball, Exhibit No. MMK-1HCT at 24:7-10.

⁸¹ Kimball, Exhibit No. MMK-1HCT at 28:11-15; Exhibit No. MMK-2 at 9.

B. Proposed Rates Are Excessive as Compared to Alternatives Available to Customers.

The public interest guides the Commission's regulation. "The interest of the public which is to be protected is that only of customers of the utilities which are regulated."⁸² In this case, the focus of the Commission's inquiry is the impact on PSE's customers who might choose to participate in PSE's proposed leasing program. The evidence in this case indicates that customers who choose to participate in PSE's proposed leasing program would likely incur excessive costs as compared to other options, such as outright purchase from existing vendors or the use of other financing options.

48. The difference between the assumed capital costs for the leased equipment and installation represents the cost to customers for the asserted benefits provided under the lease program.⁸³ Those benefits include no upfront costs, financing, maintenance and repair, and replacement upon failure during the course of the lease.⁸⁴ Customers under PSE's proposed leasing program would pay between [REDACTED] PSE's assumed capital costs for the equipment and installation over the life of the lease.⁸⁵ Ultimately, the question is whether the cost of the proposed lease program is in the public interest in light of the asserted benefits. Public Counsel suggests that the answer is no as the cost of the asserted benefits is substantially more than what customers would incur through other available purchase and financing options.

IV. PSE'S ANALYSIS OF MARKET GAP IS BLATANTLY OVERSTATED

49. PSE claims that one of the primary drivers for its proposed leasing program is a market gap created by equipment in the market that has outlived its useful life. PSE claims that "over

⁸² *Cole*, 79 Wn.2d at 306.

⁸³ Kimball, Exhibit No. MMK-1HCT at 25:7-10.

⁸⁴ Kimball, Exhibit No. MMK-1HCT at 25:10-12.

⁸⁵ Kimball, Exhibit No. MMK-1HCT at 26:1-5; Table 4: Premium for Leased Equipment.

40% of the relevant equipment in the market today is beyond its useful life.”⁸⁶ PSE derives its 40 percent market gap claim from Exhibit No. JET-3, which presents data from a 2012 assessment of building stock conducted by NEEA.⁸⁷ The data in Exhibit No. JET-3 is arranged by equipment type, and includes tables for Gas Forced Air Furnace, Air Source Heat Pump, Electric Storage Water Heater, and Gas Storage Water Heater. The data for each type of equipment is reported by vintage running from 1966 through 2011, and each vintage block identifies how many units exist and what percentage of the market it represents.

50. The four types of equipment measured in the NEEA building stock assessment have varying lengths of average useful life. PSE averaged the useful lives of the equipment and assumed a useful life of 15 years for purposes of measuring the “market gap.”⁸⁸ However, PSE incorrectly states that the NEEA building stock assessment demonstrates that 40 percent of equipment is beyond its useful life. Rather, Exhibit No. JET-3 shows that, at most, 23 percent of equipment is 16 years or older.⁸⁹

51. Instead of measuring the age of the equipment at the time of the 2012 NEEA building stock assessment, PSE measured the age of the equipment from the present time. The newest appliances in NEEA’s 2012 assessment were from 2011.⁹⁰ Appliances that exceeded a 15-year

⁸⁶ Prefiled Rebuttal Testimony of Liz Y. Norton, Exhibit No. LYN-1T at 10:18.

⁸⁷ Norton, Exhibit No. LYN-1T at 10:16-18; Jason E. Teller, Exhibit No. JET-3; Norton, TR. 134:21-24.

⁸⁸ Norton, TR. 134:12-15; 144:13-20. PSE used the average of the useful lives of the four types of equipment.

⁸⁹ Norton, TR. 136:12-25. Exhibit No. JET-3 shows that 14 percent of air-source heat pumps, 21 percent of electric storage water heaters, and 18 percent of natural gas storage water heaters are 16 years or older. Norton, TR. 145:21-146:10.

⁹⁰ Norton, TR. 135:3-5.

useful life would have had a vintage of 1995 or older.⁹¹ PSE included equipment with vintages from 1966 through 2000, instead of from 1966 through 1995.

52. To justify including equipment through 2000 in its measure of market gap, PSE claims that the 2012 NEEA building stock assessment is the most current data available and “nothing has really changed since 2012.”⁹² Even if that is true, it would not be true that 40 percent of equipment has exceeded its useful life because at the time of the NEEA study, 40 percent of the equipment was approximately 11 years or older. PSE’s use of the 2012 NEEA building stock assessment to conclude that 40 percent of equipment in the market today has exceeded its useful life is invalid, and PSE overstates the need for new equipment.

V. PSE IMPROPERLY USES CONSERVATION SAVINGS IN ITS FILING

A. PSE Fails to Follow Rules and Standard Practices Regarding Conservation Achievement.

53. PSE asks the Commission to recognize alleged conservation savings as a benefit from the proposed leasing program, and contends the leasing program would augment the Company’s energy efficiency programs by serving an additional market segment. However, PSE also asserts that its proposed leasing program is not a conservation program. Accordingly, PSE fails to follow the Commission’s rules and standard practices, as well as its own tariffs regarding conservation program requirements.⁹³ As Ms. Kimball observes, “[t]his is puzzling.”⁹⁴

54. All of the quantifiable benefits identified by PSE from the proposed leasing program derive from alleged conservation savings related to replacement of older appliances.⁹⁵ At

⁹¹ Norton, TR. 135:6-9.

⁹² Norton, TR. 135:13-16.

⁹³ WAC 480-109; PSE Schedule No. 83 (Electric) and Schedule No. 183 (Natural Gas).

⁹⁴ Kimball, Exhibit No. MMK-1HCT at 30:10.

⁹⁵ Kimball, Exhibit No. MMK-1HCT at 29:19 – 30:6.

hearing, PSE’s witness Dr. Faruqui stated that the leasing program was additive to the Company’s conservation programs, and would reach customers that have been “overlooked” by PSE’s conservation programs. Dr. Faruqui testified:

So there’s [sic] two world views. There’s the world with the conservation programs. They’ve gone out so far but some people have been overlooked. And so this new program comes it, it reaches out to them, enrolls them. And then what I’m doing is saying, okay, the fact that they enrolled has the opportunity to create additional benefits. I’m trying to measure those and quantify those.⁹⁶

55. The Commission has set forth rules and standards relating to conservation achievement.

Those requirements include that the utility “identify the cost-effective, reliable, and feasible potential of possible technologies and conservation measures in the utility’s service territory,” develop a portfolio of programs to meet that potential, and implement programs.⁹⁷ The Commission’s rules further require utilities to adaptively manage those conservation programs and to “continuously review and update as appropriate the conservation portfolio to adapt to changing market conditions and developing technologies.”⁹⁸

56. Although PSE seeks to claim conservation savings as a “benefit” of the proposed leasing program and claims that the potential conservation is incremental to that achieved under its existing conservation programs, PSE does not comply with the Commission’s rules and standards on conservation achievement. To claim conservation savings in compliance with the Energy Efficiency Resource Standard (EERS) established by the Energy Independence Act,⁹⁹ utilities must comply with these requirements and WAC 480-109. Among those requirements are obligations regarding appropriate energy savings values and application of cost-effectiveness

⁹⁶ Faruqui, TR. 258:3-10.

⁹⁷ WAC 480-109-100(1)(a)(i)-(iii).

⁹⁸ WAC 480-109-100(1)(a)(iv).

⁹⁹ RCW 19.285.

tests consistent with methodology used in the Northwest Conservation and Electric Power Plan.¹⁰⁰ PSE fails to do this, and the Commission should not allow PSE to count conservation savings as a benefit of its proposed leasing program.

57. Indeed, as Ms. Kimball and Mr. Cebulko both explain in testimony, PSE's conservation model is a "Benefits-Only" model that includes absolutely no costs. Relevant costs that should be included are the monthly lease payment, and total lease costs (excluding taxes) ranging from \$3,443 for a gas water heater of .62 Energy Factor, to \$25,056 for an air source heat pump.¹⁰¹ PSE has not performed any type of cost-benefit or cost-effectiveness analysis regarding the claimed energy savings and associated benefits of proposed leasing program.¹⁰² Cost-effectiveness analysis, such as the Total Resource Cost (TRC) test, is required by Commission rule¹⁰³ and by PSE's conservation tariffs.¹⁰⁴

B. PSE Substantially Overstates Potential Conservation Savings.

58. Moreover, the potential conservation savings identified in PSE's conservation model are substantially overstated, as explained by both Mr. Cebulko for Commission Staff and Ms. Kimball for Public Counsel. Dr. Faruqui explains that his conservation model utilizes an estimate of market size provided by PSE, "derived from the company's customer demographic data and as well [as] a customer survey."¹⁰⁵ The conservation model makes the assumption that

¹⁰⁰ WAC 480-109-100(5) and (8), Energy Savings and Cost-effectiveness, respectively.

¹⁰¹ Kimball, Exhibit No. MMK-1HCT at 6, Table 1.

¹⁰² Cebulko, Exhibit No. BTC-7.

¹⁰³ WAC 480-109-100(8).

¹⁰⁴ PSE Schedule No. 83 (Electric) and Schedule No. 183 (Natural Gas).

¹⁰⁵ Faruqui, Exhibit No. AF-1T at 16:6-7.

every customer expressing interest in the leasing concept through the Cocker Fennessy online survey would actually enroll in the leasing program.¹⁰⁶

At hearing, Mr. McCulloch invokes a term from conservation potential analysis, arguing that PSE's estimate of the potential market size "provides an assessment of the technical potential of the market."¹⁰⁷ In doing this, PSE seeks to selectively invoke certain aspects of conservation analysis and planning, while rejecting others, including cost-effectiveness analysis. The only rationale offered is that the proposed leasing program "is not a conservation program." If PSE wishes to claim conservation savings as a benefit, it should also be required to comply with standard conservation analysis and planning requirements.

Compounding the overstatement of conservation savings is PSE's overstatement of the potential lease market, as discussed above. Several inputs to PSE's conservation model overstate the potential lease market. For example, PSE's data that 65 percent of homes heat with natural gas furnaces applies to single-family homes. PSE applies this percentage to all of its 1.3M customers,¹⁰⁸ even though some of PSE's customers reside in multi-family or mobile homes.¹⁰⁹ Moreover, the Company's own business plan for the proposed leasing program explains that [REDACTED] percent of residential customers live in single-family homes.¹¹⁰ PSE's market potential analysis, which was utilized in both the conservation model and the lease pricing model, should have applied this ratio of single-family homes as an input to determine the market potential, rather

¹⁰⁶ Kimball, Exhibit No. MMK-1HCT at 32:7-11.

¹⁰⁷ McCulloch, TR. 232:5-8.

¹⁰⁸ Kimball, Exhibit No. MMK-1HCT at 33:5-11.

¹⁰⁹ McCulloch, Exhibit No. MBM-41 at 5. Excerpt from PSE's 2012 Corporate Fact Book provides primary heating source for single-family, multi-family, and mobile home premises. *Id.* PSE's 2012 Corporate Fact Book also provides data regarding housing occupancy structures by county, from the 2010 Census. *See* Exhibit No. MBM-42C at 22.

¹¹⁰ O'Connell, Exhibit No. ECO-3HC at 6.

than using 100 percent of residential customers. As a result, just as the market potential is overstated, the conservation savings are likewise overstated.

Several lease equipment offerings are not currently included in the Company's conservation program portfolio because they are not considered cost-effective. Of the 12 types of proposed lease equipment, only four are currently offered as part of PSE's conservation portfolio.¹¹¹ Further, as Mr. Cebulko points out, according to PSE's forecasted install rates, [REDACTED]

[REDACTED]
[REDACTED]¹¹²

59. The conservation model, also referenced as the "Public Benefits Model," claims energy savings for equipment not currently offered by PSE's conservation programs, including equipment that only meets current codes. In his rebuttal testimony, Dr. Faruqui agrees with Mr. Cebulko that "non-energy-efficient models would not produce conservation benefits."¹¹³ He continues by stating that "the Public Benefits Model does not calculate any energy savings or other benefits from these models."¹¹⁴ Similarly, at hearing, Dr. Faruqui stated that the Public Benefits Model is "not counting any benefits from customers who are just putting in equipment at the code because they would have done that anyway."¹¹⁵

60. Despite these claims, however, the model does claim energy savings for certain proposed lease equipment that largely just meets minimum federal standards. Specifically, the model assumes savings for residential gas water heaters with an energy factor of .62, which is code

¹¹¹ Kimball, Exhibit No. MMK-1HCT at 34:8-10.

¹¹² Testimony of Bradley T. Cebulko, Exhibit No. BTC-1HCT at 37:10-12 (citations omitted).

¹¹³ Faruqui, Exhibit No. AF-4T at 19:1-2.

¹¹⁴ Faruqui, Exhibit No. AF-4T at 19:2-3.

¹¹⁵ Faruqui, TR. 263:9-12.

minimum for a 40 gallon water heater.¹¹⁶ The model assumes █ thermes of energy savings for each .62 water heater.¹¹⁷ PSE has not offered a residential tank-style hot water heater rebate as part of its conservation program for several years, due to a 2010 evaluation that concluded the market had been transformed.¹¹⁸

C. PSE’s Proposed Leasing Program May Serve as a Setback to Conservation by Contributing to “Lost Opportunity.”

61. Even though PSE claims that its proposed leasing program will result in conservation savings, the program could serve as a detriment to efficiency acquisition by creating substantial lost opportunity. At hearing, in response to questioning from Commissioner Jones, Ms. Kimball provided the example of residential tank-style water heaters as an area where lost opportunity might occur. PSE assumes █ percent of the gas storage hot water heaters leased would be .62 Energy Factor and █ percent would be .67 Energy Factor,¹¹⁹ neither of which are offered in PSE’s conservation programs.¹²⁰ Ms. Kimball explained her concerns as follows:

And so what concerns me, just an underlying concern with this program, is that we could be creating essentially very substantial lost opportunity, what we say in the energy efficiency world. Because if we’re installing tank-style gas and electric water heaters, we’re not able to then install more efficient heat pump water heaters, for example.¹²¹

62. PSE’s proposed lease program creates another barrier to adoption of energy efficient equipment by requiring customers to bear all costs associated with any non-standard installations. As Mr. Cebulko explains, energy efficient equipment often requires changes in

¹¹⁶ Kimball, TR. 496:5-9.

¹¹⁷ Faruqi, Exhibit No. AF-5HC at 148. Energy savings values are not considered confidential in PSE’s annual and biennial conservation reports filed with the Commission pursuant to WAC 480-109-120(3) and (4).

¹¹⁸ Kimball, TR. 496:10-14 and TR. 498:19 – 499:6.

¹¹⁹ Faruqi, Exhibit No. AF-5HC at 149, row [4].

¹²⁰ Kimball, Exhibit No. MMK-1HCT at 34:10-18.

¹²¹ Kimball, TR. 498:12-18.

venting, particularly for natural gas equipment, which in turn would increase the likelihood of non-standard installation costs. Public Counsel agrees with Mr. Cebulko's conclusion that the proposed lease program is likely to increase the adoption of standard efficiency appliances, as opposed to energy efficient appliances, creating a lost opportunity that would not be addressed potentially until after the equipment met its useful life.¹²²

VI. PSE'S PROPOSED LEASING PROGRAM PRESENTS CONSUMER PROTECTION CONCERNS

63. PSE's proposed leasing program presents several consumer protection concerns. Although PSE describes its program as a "simple and elegant optional service,"¹²³ the terms and conditions are complicated and lacking simplicity.¹²⁴
64. Additionally, by offering the proposed leasing program as a regulated utility service, PSE removes the leasing program from the Consumer Protection Act, Chapter 19.86 RCW. Other companies offering water and space heating equipment will be subject to the Consumer Protection Act. Given the competitive nature of the water and space heating industry and the consumer protection concerns raised by the proposed program, the Commission should decline to allow PSE to offer the leasing program as a regulated service.
- A. Consumer Protection Concerns Raised by PSE's Proposed Leasing Program Include Quality of Information and Potential for Customer Harm.**
65. Consumers are able to make better choices when they are fully-informed and receive accurate, non-deceptive, and complete disclosures from sellers or service providers. Public Counsel is concerned that PSE's proposed leasing program poses challenges with respect to general consumer protection principles. Those challenges include whether customers will be

¹²² Cebulko, Exhibit No. BTC-1HCT at 38:10 – 39:2.

¹²³ Teller, Exhibit No. JET-1T at 3:4.

¹²⁴ See, Proposed Tariff 75.

fully-informed of all of their rights and responsibilities under the program, whether customers will be fully-informed about the total cost of the lease inclusive of all applicable taxes and fees, and whether information about alternatives to leasing will be provided to customers. PSE's role as a trusted energy advisor may also affect the proposed leasing program, and the proposed leasing program will affect PSE's existing natural gas rental program.¹²⁵

1. The terms and conditions of the proposed lease program are not straightforward and pose challenges to ensuring that appropriate consumer protections will be in place.

66. The terms and conditions of the proposed lease program are quite complicated. They are set forth in PSE's proposed tariff and span 19 pages. PSE's position with respect to when it will present customers with the terms and conditions has evolved during the case. During discovery, PSE stated that it would provide the leasing tariff on its website and would provide each customer with a full account of the terms and conditions either in paper form or electronically prior to the customer's acceptance of the service.¹²⁶ Also, PSE stated that it would present customers with a copy of the lease agreement and lease terms found in the tariff schedules, along with a copy of the manufacturer's specifications and instructions, at the time of installation.¹²⁷ These responses lead one to infer that customers have already committed, to some extent, to the leasing program before obtaining a full understanding of the terms and conditions.

67. At hearing, PSE stated that it would provide customers with the terms and conditions prior to the lease contract being signed. However, similar to PSE's responses in discovery, PSE's hearing testimony states, "customers are presented with the terms and conditions prior to

¹²⁵ Kimball, Exhibit No. MMK-1HCT at 38:8 – 39:7.

¹²⁶ Englert, Exhibit No. EEE-9.

¹²⁷ Englert, Exhibit No. EEE-10.

their accepting the lease, so they will have within their capability to fully review all the terms in the 19 pages that you stated, and attest to and verify that they've reviewed those and accepted those terms.”¹²⁸ PSE has no plans to provide additional documents to explain the terms and conditions of the service to customers.¹²⁹

68. Questioning from the Commissioners and Administrative Law Judge illustrate the complicated nature of the proposed leasing tariff.¹³⁰ For example, Mr. McCulloch for PSE answered questions regarding the term in proposed Schedule 75 that provides PSE with the option to terminate a lease with 30-days notice. Mr. McCulloch stated that his understanding was that the termination was predicated upon default, but Judge Kopta noted that the tariff did not contain a limitation.¹³¹ Similarly, Mr. McCulloch received questions regarding the proposed tariff's “as is” disclaimer of warranties clause.¹³² Chairman Danner aptly identified a major consumer protection concern with respect to PSE's proposed leasing program when he noted, “I'm trying to figure out how we do consumer protection when the terms of the tariff itself exculpates the Company's responsibilities.”¹³³

2. Pure application of *caveat emptor* is inappropriate given that customers will trust PSE and the regulatory process to protect their interests.

69. PSE's role as a trusted energy advisor may also affect how the maxim *caveat emptor* will apply to customers under PSE's proposed leasing program. *Caveat emptor* provides that the buyer should beware; the buyer has the responsibility to ensure that the deal is acceptable. However, PSE has expertise and regulatory oversight such that customers will trust the utility as

¹²⁸ McCulloch, TR. 199:15-19.

¹²⁹ Englert, Exhibit No. EEE-10 at 2.

¹³⁰ McCulloch, TR. 347:10 – 354:20.

¹³¹ McCulloch, TR. 350:19 – 351:11.

¹³² McCulloch, TR. 351:12 – 353:21.

¹³³ McCulloch, TR. 353:12-14.

a reliable source of information about energy decisions.¹³⁴ Any customer choosing to participate in the leasing program will rely on the regulatory process to ensure that the offering is fair, just, and reasonable, and that the necessary customer protections are in place.¹³⁵ Additionally, PSE has an Energy Advisors Team that is tasked with advising customers regarding their options with respect to energy decisions.¹³⁶ Elevated levels of customer trust, coupled with terms and conditions that are not entirely straight-forward, could lead to avoidable customer harm. Public Counsel is concerned about details contained in PSE's planning documents.

70. PSE planning documents indicate the Company plans [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] „137 [REDACTED]
[REDACTED] „138 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] „139 [REDACTED]

71. [REDACTED]
[REDACTED]
[REDACTED]

¹³⁴ Kimball, Exhibit No. MMK-1HCT at 44:18 – 45:1.
¹³⁵ Kimball, Exhibit No. MMK-1HCT at 52:6-13.
¹³⁶ Norton, TR. 138:1-14. *See*, Norton, Exhibit No. LYN-8.
¹³⁷ McCulloch, Exhibit No. MBM-63HC at 7.
¹³⁸ McCulloch, Exhibit No. MBM-63HC at 7.
¹³⁹ McCulloch, Exhibit No. MBM-63HC at 8.

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁰

72. PSE’s marketing plans also contemplate use of [REDACTED]
[REDACTED]

[REDACTED]¹⁴¹ PSE’s marketing plans raise consumer protection concerns, and as a result, the proposed leasing program is not in the public interest.

B. PSE has not Demonstrated the Careful Planning Necessary to Transition its Legacy Rental Customers to the Proposed Leasing Program.

73. PSE presented on rebuttal a plan to transition customers currently participating in its natural gas water heater rental program to the proposed leasing program.¹⁴² During discovery, PSE stated that it had not yet finalized plans to transition existing rental customers to the proposed leasing program.¹⁴³ Parties have not had adequate opportunity to address PSE’s proposed transition of customers from the rental program to the leasing program. PSE recognizes that transitioning 33,000 customers from the rental program to the leasing program will require “careful coordination” between the Company, the Commission, and stakeholders.¹⁴⁴ The issue of transitioning the existing rental customers is important because of its effect on

¹⁴⁰ McCulloch, Exhibit No. MBM-63HC at 5.

¹⁴¹ McCulloch, Exhibit No. MBM-63HC at 6.

¹⁴² McCulloch, Exhibit No. MBM-22.

¹⁴³ Kimball, Exhibit No. MMK-1HCT at 51:14-18.

¹⁴⁴ McCulloch, Exhibit No. MBM-22 at 1.

PSE's pricing model and raises further consumer protection concerns related to PSE's proposal.¹⁴⁵

C. Consumer Protection Authority of Commission Compared to Consumer Protection In the Unregulated Market.

74. The Commission recently reviewed consumer protection provisions where the regulated and unregulated worlds meet in the context of third-party solar leases.¹⁴⁶ Utility regulation contains certain consumer protections. The Commission has the duty to regulate in the public interest and ensure that rates charged by regulated utilities are fair, just, and reasonable.¹⁴⁷ Rates charged by regulated utilities must be filed with the Commission and published, and the utility may not charge rates that differ from its published rates.¹⁴⁸ The Commission requires companies to include certain information on customer bills and provides protection to customers facing disconnection during the winter months.¹⁴⁹ The Commission is also able to impose civil penalties on companies for violations.¹⁵⁰

75. The Attorney General's Office possesses specific authority to conduct non-binding arbitration of consumer complaints and to bring civil actions for unfair or deceptive business practices under the Consumer Protection Act, Chapter 19.86 RCW. Actions and transactions regulated by the Commission are specifically excluded from the Consumer Protection Act,

¹⁴⁵ Kimball, Exhibit No. MMK-1HCT at 51:21-23.

¹⁴⁶ *In re Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies – Interconnection with Electric Generators*, Docket UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities (Jul. 30, 2014) (Interpretive Statement).

¹⁴⁷ RCW 80.01.040(3); RCW 80.28.010(1).

¹⁴⁸ RCW 80.28.050, RCW 80.28.090, RCW 80.28.100. *See also*, RCW 80.28.068, allowing for discounted rates for low-income customers.

¹⁴⁹ RCW 80.28.010(4); RCW 80.28.010(7).

¹⁵⁰ RCW 80.04.380; RCW 80.04.405.

although concurrent jurisdiction between the Attorney General’s Office and the Commission exist in narrow fields.¹⁵¹

76. Specific to leases of personal property, Chapter 63.10 RCW requires leases to disclose certain information, such as the total amount under the life of the lease, the total amount that will be paid for fees and other charges, information regarding warranties, and information regarding what party is responsible for maintenance.¹⁵² Violations of Chapter 63.10 RCW are considered violations of the Consumer Protection Act.

77. PSE’s proposed leasing program, if it is deemed a utility service, will be shielded from the Consumer Protection Act, unless the Legislature provides for concurrent jurisdiction between the Attorney General’s Office and the Commission. Such concurrent jurisdiction might be appropriate given the competitive market PSE wishes to engage in by offering end-use space and water heating appliance. The Commission’s consumer protection provisions aim to protect a consumer from monopoly power. In a competitive market, protections against deceptive practices also become important. However, the decision on concurrent jurisdiction resides with the Legislature. Given the consumer protection concerns raised above and the competitive nature of the space and water heating industry, it would be in the public interest for the Commission to reject PSE’s proposed leasing tariffs.

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¹⁵¹ Interpretive Statement ¶ 29.

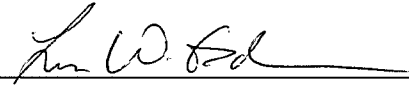
¹⁵² Kimball, Exhibit No. MMK-1HCT at 40:1-20.

VII. CONCLUSION

78. PSE's leasing proposal falls outside the scope of utility service, and the Commission should reject the tariffs for that reason. However, if the Commission finds that it has jurisdiction over the proposed leasing program, it should still reject PSE's proposed tariffs because the rates are not fair, just, and reasonable and the proposed program raises substantial consumer protection concerns.

79. DATED this 30th day of August, 2016.

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