BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NOS. UE-151871 and UG-151872
Complainant,	)	
v.	)	INITIAL POST-HEARING BRIEF OF INTERVENOR SMACNA-WW
PUGET SOUND ENERGY,	)	
Respondent.	)	
. . . . .	)	

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REDACTED VERSION

I. INTRODUCTION

1 Puget Sound Energy (PSE or the Company) seeks approval of the Utilities and Transportation Commission (UTC or Commission) to initiate a program to lease several types of furnaces and hot water heaters to PSE's customers, and customers of other utilities, and to set as "fair, just, reasonable, and sufficient" rates for 12 types of furnaces and hot water heaters that would constitute the program. Termed "Lease Solutions," the program is intended as a first step to a more robust leasing program, leading to leases of solar equipment, batteries, and electric vehicle charging equipment, as well as other types of HVAC equipment and hot water heaters.

2 Though operating this program as an unregulated service in competition with other providers of such equipment would be possible, that option was not evaluated by PSE. Instead, PSE seeks to operate the program as a regulated utility service under the public service laws, seeking Commission oversight of the program and Commission approval of prices.

3 Thought citing (somewhat belatedly, however, as explained below) the "utility of the future" as a potential vision and justification for the program, in reality the program is a remnant of a utility of the past: invest in equipment, put that cost in rate base, and earn a return on that investment.

4 The Sheet Metal and Air Conditioning Contractors National Association – Western Washington Chapter (SMACNA-WW) is a non-profit trade association affiliated, along with 102 other chapters, with the national association. Among its purposes is to "encourage and promote trade practices that will eliminate unfair competition" in the sheet metal, HVAC, and related industries and to "increase the efficiency of the industry and its ability to serve the public."[1] It

[1] Muller-Neff, Exh. No. JMN-1T 2:11-3:10.

consists of over 160 different firms. SMACNA-WW opposes the proposed PSE tariff and urges the Commission to reject it.

II. PROCEDURAL HISTORY

5 On September 18, 2015, PSE filed its proposed tariff to establish the Lease Solutions program. The tariff specified twelve types of equipment: two types of residential gas water heaters, two types of residential electric hot water heaters, two types of commercial gas hot water heaters, two types of commercial electric hot water heaters, two types of residential gas furnaces, and two types of electric heat pumps. However, the tariff contained no information about the equipment to be leased: no sizes, no efficiency levels, and, most puzzling, no prices.

6 The Commission Staff recommended that the Commission suspend the tariff, which the Commission did on November 13, 2015.[2] Two associations of contractors, SMACNA-WW and the Washington State Heating, Ventilation and Air Conditioning Contractors Association of (WSHVACCA) sought intervention. Both PSE and the Commission Staff objected arguing that under the case of *Cole v. Washington Utilities & Transportation Commission*,[3] the Commission may not consider the effect of a regulated utility on an unregulated business. However, at the prehearing conference held January 5, 2016, the Administrative Law Judge permitted intervention by the two associations (though denying it to Sunrun, a solar company). He noted that the Supreme Court in *Cole* was deferring to a Commission interpretation of its own authority[4] and concluded:

> Unlike the utility in *Cole*, PSE proposes to lease the same type of equipment that SMACNA-WW and WSHVACCA members provide. The Commission also does not intend "to consider the effect of a regulated utility upon a nonregulated business" or otherwise to expand the issues to be addressed in this proceeding. The Commission will consider the market for HVAC equipment to the extent necessary to determine the effect

[2] Order 01 (Nov. 13, 2015).
[3] 79 Wn.2d 302, 485 P.2d 71 (1971).
[4] Order 02 ¶12 (Jan. 7, 2016).

> of the tariffs on PSE's customers, not the impact on other market participants. The Commission is allowing SMACNA-WW and WSHVACCA to contribute to that inquiry, and the scope of those associations' intervention is limited accordingly.[5]

7 No party sought review of the ALJ's decision on the scope of intervention. As described below, though SMACNA-WW does not concur with that limiting application of *Cole*, it proceeded with its participation in the hearing given that the impact on the market and the consumers of PSE's proposal is the central question of interest to SMACNA-WW.

8 Prior to the hearing, Commission Staff filed a motion for summary determination arguing that the proposed lease tariff was not authorized under the public service laws. Public Counsel and the intervenor associations filed memoranda in support of that motion, and PSE filed briefs in response to the motion and the support from other parties. The Commission declined to rule on the motion prior to the hearing, and the legal issue was reserved for consideration in the final order and for further briefing.[6]

III. ARGUMENT

A. PSE's Lease Solutions Tariff Is Not Permitted Under the Public Service Laws and Other Laws Relating to Regulation of Businesses in a Competitive Environment

9 PSE's proposed lease tariff is unlawful and should be rejected as a matter of law for two reasons, either separately or in combination. First, the Legislature did not contemplate that regulated electric and gas utilities would engage in the sale or leasing of equipment such as the proposed leasing program at issue in this case. To the extent that the case of *Cole v. Washington Utilities & Transportation Commission* indicates that a utility may lease some equipment under some conditions, those conditions are not present in this case. Second, the proposed lease tariff is inconsistent with various statutes that protect free and competitive markets and provide

[5] Order 02 ¶13 (Jan. 7, 2016).
[6] TR. 106:12-19.

statutory or administrative remedies to market participants that protect those markets and the consumers that benefit from them.

1. State Law Does Not Allow a Gas or Electric Utility to Lease End Use Equipment as Proposed by PSE

10 The basis of Commission jurisdiction lies in various definitions in RCW 80.04.010. A "public service company" includes a "gas company" or an "electric company."[7] The definitions of "gas company" and "electric company" are similar. Focusing on the definition of the latter, it includes a company that owns, operates, or manages "electric plant" "for hire."[8] "Electric plant" includes, among other things, "fixtures and personal property" "owned, leased, controlled, used or to be used for or in connection with . . . the sale or furnishing of electricity for light, heat, or power."[9] The main jurisdictional question is whether the appliances at issue in the proposed Lease Tariff are used in the "sale or furnishing" of electricity. They are appliances that use electricity (or, in some cases, use natural gas), but they are not used in the "sale or furnishing" of electricity.

11 Of course, the Commission does not just have jurisdiction over matters concerning electric or gas "plant." Other statutes can come into to play. For example, the Energy Independence Act requires that utilities acquire all cost-effective conservation measures and, for investor-owned utilities, requires the Commission to oversee and enforce that mandate.[10] The resulting conservation "measures" can involve rebates on or provision of weatherization measures and efficient appliances. Those are not electric or gas "plant," but the Commission nevertheless has jurisdiction. However, PSE's filing is not pursuant to I-937; it is not a

[7] RCW 80.04.010(23).
[8] RCW 80.04.010(12).
[9] RCW 80.04.010(11).
[10] RCW 19.285.

conservation program.[11] In addition, various statutes confirm that it is appropriate for utilities to engage in such activities as distributed generation and electric vehicle charging.[12] Of course, those technologies, and the appliances that implement them, fall more neatly into the definition of "electric plant" as they relate to the generation or sale of electricity.[13] So, we need to return to the definitional (whether the appliances "used in the furnishing" of electricity) and other language in the public service laws in search of a jurisdictional hook.

12 PSE, in its briefing on the Staff Motion to Dismiss[14] and also in its testimony[15] argues that the Legislature obviously contemplated the leasing of equipment because of language in RCW 80.04 referencing "rentals" among the types of charges that, for example, can be the subject of a commission tariff proceeding. The implication is that the Commission has authority over at least some rental programs. PSE also cites to language in the definitions of "electric plant" and "gas plant" that indicates that such plant includes "property operated, owned, used or to be used for or *in connection with* or to facilitate the generation, transmission, distribution, sale or furnishing of electricity . . ." (emphasis added).[16] The argument apparently is that a hot water heater or a furnace is used "in connection with" the furnishing of electricity (or gas).[17]

13 A brief review of the legislative history of chapter 80.04 shows that the Legislature in using the "rental" language contemplated leasing of equipment only by telecommunications

[11] *E.g.*, Englert, Exh. No. EEE-3T 27:3-4.
[12] *See* RCW 19.285.040 (2)(b)(distributed generation); RCW 80.28.360 (electric vehicle supply equipment).
[13] In PSE's September 18, 2015, Advice Letter (Advice Letter No. 2015-23) at 22, PSE indicated that the program could be expanded to include such things as solar panels and electric vehicle charging equipment, as well as to batteries. All of these, unlike appliances that use electricity, involve either the generation or provision of electricity, or both.
[14] *E.g.*, PSE's Opposition to Commission Staff's Motion for Summary Determination ¶¶ 28-29 (July 22, 2016)
[15] Englert, Exh. No. EEE-3T 17:4-7.
[16] RCW 80.04.010(11) (definition of "electric plant"). The definition of "gas plant" contains identical "in connection with" language. *Id.* (15).
[17] *See also* PSE's Reply to SMACNA's Response in Support of Commission Staff's Motion for Summary Determination ¶3 (July 27, 2016)

companies, and not by electric and gas companies. And the reliance the "in connection with" language is insufficient to bring in the proposed leasing program under the Commission's jurisdiction.

a. The Reference to "Rentals" in the Public Service Laws Only Applies to Leases or Rentals of Telecommunications Equipment

14 In 1911, the Legislature renamed the Railroad Commission the Public Service Commission and gave it jurisdiction over rates and practices of electric, gas, and water companies, as well as telephone companies.[18] That law was divided in "articles" (similar to "titles" in more contemporary legislation or to "chapters" in later codifications). Article I contained "general provisions"; Article III related to gas, electric, and water companies; and Article IV related to telephone companies.

15 A comparison of language in the gas and electric article with the comparable language in the telecommunications article shows that the term "rentals" only is included in substantive provisions relating to telephone companies, and not included in the substantive provisions relating to electric, gas, and water companies. For example:

> Requirement that rates be "fair, just, reasonable, and sufficient"
>
> Article III, section 26 (electric and gas companies):
>
> "All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient."
>
> Article IV, section 35 (telephone companies):
>
> "All rates, tolls, contracts and charges, rules and regulations of telephone and telegraph companies, for messages, conversations, services rendered and *equipment and facilities supplied* . . . shall be fair, just, reasonable and sufficient . . ." (emphasis added).

[18] Laws of 1911, ch. 117.

Requirement to file tariffs

Article III, section 27 (electric and gas companies):

"Every gas company, electrical, and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, ..."

Article IV, section 36 (telephone companies):

"Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, *rentals*, contracts and charges of such companies . . ." (emphasis added).

16 And in Article VI on "powers of the commission in relation to public service companies," there were separate sections addressing electric and gas companies and telephone companies that, again, confirm the point that "rentals" were jurisdictional only for telephone companies:

Article VI, section 54 (electric and gas companies):

"Whenever the commission shall find, after a hearing . . . that the rates or charges demanded, exacted, charged or collected by any gas company, electrical company or water company, for gas, electricity or water, or in connection therewith . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of law . . . the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order . . . ."

Article VI, section 55 (telephone and telegraph companies):

"Whenever the commission shall find, after a hearing . . . that the rates, charges, tolls or *rentals* demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the *rental or use* of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device . . . or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, *rentals* or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the law, . . . the commission shall determine the just

> and reasonable rates, charges, tolls or *rentals* to be thereafter observed and in force, and fix the same by order . . .” (emphasis added).

17 In these and other provisions, the authorization to provide rentals or to set rental rates relate only to telephone companies. In all, the term “rental” or “rentals” appears 13 times in Article IV relating to regulation of telephone service. That term does not appear at all in Article III, relating to gas and electric service. The reason is obvious: telephone service is dependent on a handset or similar equipment in order to make the service useful. Such equipment was provided or rented by telecommunications companies.

18 Article III of the 1911 law evolved to chapter 80.28 RCW; Article IV evolved to chapter 80.36 RCW. The provisions in Article VI, along with other general provisions, including many in Article I, evolved in to the general section of current title 80, chapter 80.04 RCW. However, in that recodification evolution, the jurisdictional line remained clear: telecommunications companies could rent equipment; other public serviced companies could not.

19 However, apart from any potential “rentals” of equipment, public service companies sold equipment, through a “merchandising” function, apparently with the blessing of the Commission. This apparently was fairly standard practice around the county. However, the Washington Legislature looked askance at that practice as part of regulated utility operations, in 1933 adding a provision that moved sales revenue out of the utilities’ regulated operations:

> Any public service company engaging in the sale of merchandise or appliances or equipment shall keep separate accounts, as prescribed by the department, of its capital employed in such business and of its revenues therefrom and operating expenses thereof. The capital employed in such business shall not constitute a part of the fair value of said company’s property for rate making purposes, nor shall the revenues from or operating expenses of such business constitute a part of the operating revenues and expenses of said company as a public service company.[19]

[19] Laws of 1933, ch. 165, §8, *now codified as* RCW 80.04.270.

20 This was described by the Commission (then the Department of Public Works) in its annual report to the Governor as "requir[ing] any public service company engaged in the merchandising business to keep its accounts with reference thereto separate from its public utility accounts."[20] As this only related to sales, presumably this statute left "rentals" under preexisting law. Again, that law only permitted such rental of equipment by telecommunications companies. So, as of 1933, there was no provision for rental of equipment except for telecommunications companies and the Legislature directed that any direct merchandising be accounted for separately.

b. The Proposed Leasing of Equipment Is Not "In Connection With" the Operation of Electric or Gas Plant Sufficient to Make the Lease Program a Jurisdictional Service

21 However, leasing of equipment crept into the menu of offerings of utilities. Whether these leasing programs were in accordance with the public service laws was an issue that eventually came to a head in *Cole*. While that case upheld a Commission decision permitting the leasing program, there are at least three reasons why *Cole* is not controlling here.

22 First, the case involved a Commission interpretation that the "in connection with" language related to provision of equipment was related a policy of promoting the use of load-building appliances, citing *Department of Public Service v. Pacific Power & Light Co.*[21] In that case, the Commission's predecessor recognized the that "the business of selling and servicing load building appliances as carried on by utilities is directly a part of and inextricably interwoven with the utility business itself and it is extremely difficult to fix the line of

[20] Thirteenth Annual Report of the Department of Public Works (covering the period from December 1, 1932, to November 30, 1933) at 7 (1934).
[21] 13 P.U.R. (N.S.) 187 (Wash. Dept. of Pub. Serv. 1936).

demarcation between what is prescribed[22] and what is legitimate, much less make an accurate segregation of costs, etc."[23] The "connection" was load building. That connection – that policy – is no more. Indeed, today's policy is not load building, but energy efficiency, even load reduction. This is evident from the Energy Independence Act[24] and federal law.[25] It is also embodied in WAC 480-100-223 that prohibits recovery of expenses for promotional activities "to encourage any person or business to select or use the service or additional services of an electric utility [or] to select or install any appliance or equipment designed to use the electric utility's service . . . ."[26] As articulated by Commission Staff in its motion, there is no other Commission policy that would support this lease proposal.[27]

23 Second, the facts of the PSE proposal demonstrate that it is not "inextricably interwoven with the utility business itself." Indeed, PSE calls its proposed Lease Solutions program a "stand alone" service.[28] And the proposal is not just for PSE's electric or gas customers. Witness Englert admitted that the program is designed so that electric customers of another utility, such as Seattle City Light, could lease PSE's water heaters and furnaces.[29] So, this is not "intertwined" with PSE's service; it is designed to operate independently from it and even

[22] It may make more sense to read "prescribed" as "proscribed," though that wording ambiguity is not relevant to the issue here.
[23] 13 P.U.R. (N.S.), at 213.
[24] RCW 19.285.
[25] The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839(1)(A).
[26] In Puget Sound Energy's Reply to the SMACNA-WW's Response in Support of Commission Staff's Motion for Summary Determination ¶5 (Jan. 27, 2016), PSE seems to suggest that this regulation does not support the proposition that energy efficiency is a policy of the Commission, noting the regulation only prohibits use of ratepayer dollars for promotional advertising, in effect indicating that utilities can still use shareholder dollars to promote usage. This regulation is only one indicia of that state policy. We do not think PSE can make a serious argument that load building, as was the policy in the days of *Cole*, has not been displaced by a policy of conservation.
[27] PSE may argue that the state policy favoring energy efficiency supports the program. Indeed, the cited Commission rule makes an exception for advertising to promote the use of energy efficient appliances. WAC 480-100-223(2)(e). However, by PSE's own admission, its proposed leasing program is not a conservation program. Englert, Exh. No. EEE-1T 8:19-22. Some of the appliances it proposes to lease, while meeting code (as all appliances must), are not particularly energy efficient. Cebulko, Exh. No. BTC-1THC 32:12-16, 37:8-39:2.
[28] Norton, TR. 155:12-13.
[29] Englert, TR. 426:3-427:5

outside of PSE's customer base. This is not comparable to the service, or the purpose of the service, discussed in *Cole*.

24 Third, even if the PSE proposed leasing program is sufficiently analogous to the program at issue in *Cole*, the Court's decision was based on its affirmance of a Commission interpretation of the scope of its jurisdictional statutes. The Court reviewed a decision by the Commission in which a fuel oil dealer challenged a lease program offered by Washington Natural Gas (predecessor to PSE) that involved furnaces and water heaters.[30] Before the Commission, the Commission counsel "raised the question of whether or not the leasing program of the gas company was a 'jurisdictional' activity of a regulated public service utility."[31] The Commission rejected the argument of its counsel and interpreted the statutes that it administered in a way to permit the leasing activity. It had determined that the 1933 statute requiring sales of equipment to be separately accounted for did not impact the ability of a utility to engage in leasing, citing the legal distinction between a lease and a sale, and the Commission also supported its jurisdictional interpretation by reference to various provisions in RCW 82.04 to "rental" and to reference in provisions in 80.28 to "any other service rendered" "in connection therewith."

25 The Court's decision was based on its deference to the Commission's interpretation. The Commission had drawn a negative inference from the 1933 statute as indicating that rentals were permitted. This was not a holding by the Court based on the plain meaning of the statutes. Indeed, the Court did not review the above-chronicled history of the public service laws as those laws relate to rentals. Instead the Court simply deferred to the Commission's interpretation of its

[30] *Cole*, 79 Wn. 2d at 304.
[31] *Cole*, 79 Wn. 2d at 304-05.

statutes, stating that "[w]e are persuaded that the commission . . . correctly found that the leasing program was legal . . . ."[32]

26 It is a basic principle of public law that an agency has authority to change its interpretation of statutes it implements, and the fact that a court may have upheld that agency interpretation does not alter that principle. This was the holding of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[33] Quoting *Chevron U.S.A., Inc. v. NRDC*,[34] the *Brand X* Court stated: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances or a change in administrations."[35] In *Brand X*, that was true even though the Ninth Circuit Court of Appeals had upheld the earlier agency interpretation. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[36]

27 Accordingly, to the extent that *Cole* suggests that the public service laws permit utility leasing of equipment, the Commission may revise that interpretation, and, based on the history and structure of the public service laws, it would have a sound basis to do so.

28 Rejecting the Lease Solutions tariff on legal grounds would not prevent PSE from getting into the leasing business if it wants to.[37] However, it would have to do so as an unregulated

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[32] *Cole*, 79 Wn. 2d at 309-10.
[33] 545 U.S. 967, 981-82,125 S.Ct. 2688, 162 L.Ed. 2d 820 (2005).
[34] 467 U.S. 837, 863-64, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984).
[35] 545 U.S. at 982 (citations omitted).
[36] 545 U.S. at 982.
[37] It is possible that one or more "merger commitments" could come into play. *See* Englert TR. 417:24-25; *In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy for an Order Authorizing Proposed Transaction*, Docket U-072375, Order 08 (Approving and Adopting Settlement Stipulation; Authorizing Transaction

business. Nor would such a dismissal of this case on jurisdictional grounds necessarily interfere with PSE's stated intention to "evolve PSE to a utility of the future."[38] This case is not about solar panels, battery storage, electric vehicle charging, or other possible similar future lines of business that frequently have been cited as elements of such future utility service. Providing those products is more consistent with the traditional and legal roles of public service companies as they involve the generation or sale of electricity.[39]

2. The Proposed Lease Tariff Is Inconsistent with State Law That Protects Competitive Markets and the Consumers that Benefit from Those Markets

29 Washington's statutes provide competitors in a market with either judicial or administrative remedies against other competitors who engage in anti-competitive or "unfair" behavior. This is true in both regulated and unregulated markets.

30 In unregulated markets, Washington's Consumer Protection Act (CPA) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,"[40] any contract "in restraint of trade or commerce,"[41] or entering into a "lease . . . where the effect of such lease . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[42] The CPA permits "[a]ny person who is injured in his or her business or property a violation" of those statutes to bring an action to enjoin the

Subject to Conditions) ¶64 (Dec. 30, 2008) (referencing Merger Commitment 56). However, PSE could seek a modification to, or waiver from that requirement.

[38] Norton, Exh. No. LYN-1T 2:9-10. Of all the states, New York has done the most work on struggling with the concept of the "utility of the future." We have found no appliance leasing program proposed as part of the New York's "Reforming the Energy Vision" effort.

[39] Of course, that is not to say that it would necessarily be appropriate for a utility to enter that line of business. It would depend on a number of factors related to the public interest. But the jurisdictional hurdles would be substantially lower.

[40] RCW 19.86.020.

[41] RCW 19.86.030.

[42] RCW 19.86.050.

unlawful behavior and to obtain up to treble damages.[43] And if the allegation is unfair or deceptive practices, the plaintiff may prevail if the alleged act has injured or "has the capacity to injure other persons."[44] In other words, if a one business in a market is engaging in practices that injure consumers, a competing business may raise that in court.[45]

31 The public service laws contain similar remedies, though administrative and not with the specter of treble damages. RCW 80.04.110(1)(c) states:

> *When two or more public service corporations*, (meaning to exclude municipal and other *make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unrenumerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly*, and upon such complaint or upon complaint of the commission upon its own motion, the commission has power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as is found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it is proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.
> [Emphasis added.]

32 Here is the jurisdictional anomaly, and unfairness, in PSE's proposal: If two *regulated* public service companies are competing, one unfairly, there is a remedy in the public service laws. If two *unregulated* companies are competing, one unfairly, there is a remedy under the CPA. If a *regulated* company is competing against an *unregulated* company, the CPA would give the *regulated* company a remedy under the CPA, as it authorizes an action by "any person."

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[43] RCW 19.86.090.
[44] RCW 19.86.093.
[45] There are also substantial protections for consumers entering into leases for appliances under RCW 63.10 relating to consumer leases. A violation of the provisions of that act is deemed to be a violation of the CPA. RCW 63.10.050. However, as noted, PSE is exempt from the PSE on its regulated transactions.

The same is true if the two competitors are a regulated utility and a municipal utility, as RCW 80.04.110 does not apply to municipal utilities. However, a regulated utility like PSE gets a pass from administrative process brought by a competitor under RCW 80.04.110. And because it is exempt from the CPA,[46] it is immune from the remedies that statute provides.

33 So, if the Commission were to approve the Lease Solutions proposal, it would carve out a jurisdictional vacuum for PSE, immunizing it from remedies that competitors normally have under state law, but providing PSE with remedies. PSE could play offense, but never have to play defense. That is simply unfair, and it would violate the structure set up in the CPA and the public service laws.

34 Such an institutional advantage to PSE would be compounded by two other legal hurdles for PSE's unregulated competitors. First, under PSE's interpretation of *Cole*, supported to date by the rulings of the ALJ in this case, no competitor can raise certain competitive issues during the development of the lease proposal or in any future modifications to it.[47] Second, as alluded to by PSE witness Englert,[48] if two utilities are engaged in a leasing business, they can agree to divide the market by defining each other's service areas,[49] a practice that in the unregulated market is a blatant violation of the antitrust laws.[50]

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[46] RCW 19.86.170 states: "Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission . . . ."

[47] Order 02, ¶¶ 12-13; *see, e.g.*, TR. 515:1-16 (evidentiary ruling of Judge Kopta). With due respect to Judge Kopta, we think he erred in so limiting the arguments of the intervenors in this case. While we did not seek review of his decision in Order 02, as we believed that we could operate within its confines to make our case, we urge the Commission to, prospectively, realize the valuable role that information from competitors can play when a regulated utility seeks to operate in a competitive market. That would be more consistent with the structure of both the CPA and public service laws which provide opportunities to raise competitive issues among either non-regulated competitors or among regulated competitors. Such opportunities should not be limited when the competition is between a regulated company and various unregulated companies.

[48] Englert, TR. 426:14-15.

[49] RCW 54.48.030.

[50] 15 U.S.C. § 1(Sherman Act §1); *United States v. Sealy, Inc.*, 388 U.S. 350, 18 L.Ed.2d 1238, 87 S.Ct. 1847 (1967). The Washington Attorney General has published an online guide to antitrust laws that, among other things, discusses the illegality of market allocations. http://www.atg.wa.gov/guide-antitrust-laws

35 That the Legislature never contemplated such a result is confirmed by how the Legislature handled other instances in which competition developed between regulated and unregulated companies in the telecommunications area. In 1985, the Legislature enacted the Regulatory Flexibility Act,[51] allowing for telecommunications companies to be classified as competitive or to have some of their services classified as competitive. [52] It allowed pricing flexibility[53] and banded rates for such competitive services.[54] However, the Legislature was careful not to create the sort of jurisdictional gap PSE here seeks. The Legislature stated that for the purposes of the CPA, "actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited, or regulated by the commission."[55] In other words, the Legislature removed the CPA exemption for regulated telecommunications companies when they acted in competition.[56] The Commission would do well to defer to the Legislature to sort out the jurisdictional morass that PSE would have the Commission endorse.

B. Even If State Law Permits a Regulated Utility to Lease Equipment, in Implementing and Protecting "the Public Interest," the Commission Should Not Approve PSE's Lease Solutions Tariff.

1. The Proposed Tariff Would Result in a Skewed and Unfair Market for Appliances

36 Even if the statutory arguments articulated above do not warrant rejecting the proposed tariff as a matter of law, they warrant rejection of the tariff as a matter of sound regulatory policy, as they indicate a skewed competitive landscape that Commission should not endorse. In

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[51] Laws of 1985, ch. 450, *codified in* RCW 80.36.300-.370.
[52] RCW 80.36.310-.330. It also required that any losses incurred in the provision of competitive services could not be recovered through rates in non-competitive services. RCW 80.36.330(6).
[53] Such companies could file "price lists" instead of tariffs. *See* RCW 80.36.320-.330.
[54] RCW 80.36.340.
[55] RCW 80.36.330(6).
[56] RCW 80.36.360. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington*, 162 Wn.2d 59, 170 P.3d 10 (2007).

addition, under PSE's proposal, it would have competitive advantages in that it would have access to customer information that its competitors are not privy to,[57] including usage information.[58] Perhaps most important, it would have the benefit of a Commission imprimatur that the lease rates are "fair, just, and reasonable," a point that PSE's competitors could not include in their marketing materials.

37 Note that PSE seeks the advantages of a regulated business, but is loath to accept the responsibilities that usually accompany that regulated status. For example, while regulated companies have a so-called "obligation to serve" all those customers "reasonable entitled" to such service,[59] PSE balks at that obligation, as the service PSE is proposing would be optional, not just for the customer, but for the utility. If a service provider in a given area is not available, then the customers in that are cannot get the service. If the equipment is not available, then the customer is simply out of luck. And if the Company wishes to terminate the service at any time, it can do that.[60] Again, this is not the type of service the Legislature envisioned under our public service laws. The regulated utility should not be able to pick aspects of regulation that suits its purposes, and avoid obligations that do not.

38 Therefore, even if the Commission deems leasing as arguably within the scope of "utility service," it should reject the proposal as it would damage the existing market and harm consumers who operate within that appliance market.

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[57] Norton, TR. 157:14-158:5.
[58] *See* Exh. No. 62HC, at 5.
[59] RCW 80.28.110.
[60] While the proposed tariff states that the services is "[g]enerally available" in PSE's service territory, it qualifies that by stating that the "lease services may not be available in certain areas." Proposed Schedule No. 75, Part 1 (Availability) ¶2. The availability is also available only "where the Company has a service provider capable of installing the equipment" and "the equipment is available." *Id.* ¶3. Further, the tariff states that PSE may terminate the lease upon thirty days notice. *Id.* Part 5 (Lease Terms and Conditions), ¶12.b.

2. PSE Has Not Demonstrated a Need for the Proposed Tariff Sufficient to Justify the Extraordinary Proposed Broadening of "Utility Service"

39 PSE bases its proposal on the results of two sets of surveys. The first is the housing stock assessment by the Northwest Energy Efficiency Alliance (NEEA) that purportedly showed a "market gap" of 40%, meaning that 40% of existing HVAC systems and hot water heaters are "beyond their useful lives." The second is a series of surveys that purportedly show that there is a customer demand for a lease option. Both of these data-driven arguments are flawed.

a. There Is No "Market Gap" of 40%

40 PSE bases its case on data from a survey of housing stock conducted in 2011by NEEA that purports to show the vintage of HVAC systems and hot water heaters. The data are in Exhibit No. JET-1, at 1. It shows the vintage of four types of equipment as of the time of the survey:

Gas Forced Air Furnace		
Vintage	Count	%
1966-1970	8,485	2%
1971-1975	1,525	0%
1976-1980	4,956	1%
1981-1985	15,063	3%
1986-1990	38,710	7%
1991-1995	54,317	10%
1996-2000	91,504	17%
2001-2005	131,222	25%
2006-2011	161,783	31%
Before 1966	5,053	1%
Unknown	15,510	3%
Grand Total	528,127	100%

Air Source Heat Pump		
Vintage	Count	%
1976-1980	0	0%
1981-1985	0	0%
1986-1990	4,956	7%
1991-1995	4,956	7%
1996-2000	14,869	21%
2001-2005	4,956	7%
2006-2011	34,695	50%
Unknown	4,956	7%
Grand Total	69,391	100%

Electric Storage Water Heaters		
Vintage	Count	%
1966-1970	1,525	0%
1971-1975	7,367	0%
1976-1980	24,023	1%
1981-1985	40,764	2%
1986-1990	120,073	5%
1991-1995	289,126	13%
1996-2000	357,250	16%
2001-2005	550,854	24%
2005-2011	710,826	32%
Before 1966	2,337	0%
Unknown	145,147	6%
Grand Total	2,249,291	100%

Gas Storage Water Heaters		
Vintage	Count	%
1966-1970	0	0%
1971-1975	0	0%
1976-1980	5,250	0%
1981-1985	20,669	1%
1986-1990	74,730	5%
1991-1995	196,946	12%
1996-2000	308,063	19%
2001-2005	471,073	28%
2005-2011	494,255	30%
Before 1966	0	0%
Unknown	88,070	5%
Grand Total	1,659,056	100%

41 Looking at the left hand columns, relating to gas forced air furnaces, PSE shaded the vintage numbers and percentages to show which equipment was more than 15 years old. Reaching back from the present time, 2016, PSE added the data from vintages 1966-1970 through 1996-2000. Those numbers summed to 40%. However, because the survey was done in 2011, the proper vintages to sum were 1966-1970 through 1991-1995. That would show that, as of the time of the survey, 24 % of the equipment was 15 years or older. Actually, given that PSE witness McCulloch testified that useful live for a gas furnace is 18 years,[61] the actual percentage is less than that, probably closer to 20%, as a portion of the furnaces in the vintage 1991-1995 would be within their "useful life" and qualify for shading (or even less, as argued below).

42 The same is true for the calculations in the other columns. PSE treats those data as if they were gathered in 2016, but the data were not gathered then. Properly calculated, the sums for electric and gas hot water heaters would be 21% and 18% respectively, and for air source heat pumps, even less.

43 Simply put, PSE made an error. At one point, Ms. Norton admitted that, at the time of the survey, the data showed that closer to 23% of the equipment was older than 15 years.[62] But later she tenaciously adhered to the 40% gap message,[63] as did Mr. McCulloch.[64] It is unclear why PSE is so stoic in its resistance to arithmetic facts. Perhaps it is because this 40% gap figure was used to justify the program in the first instance and because that number is used as part of

[61] McCulloch, Exh. No. MBM-1T 3:23-4:2.
[62] Norton TR. 136:20-23 ("Q. [A]t the time of the NEEA assessment, the total amount of stock with the age of 16 years or greater would be 23%, and not 40 percent, correct? A. Correct.")
[63] Norton TR. 144:1-2 ("The data suggests that at that point time it was 40 percent."); 145:18-19 ("We are using 40 percent as our statement of the market gap.")
[64] McCulloch TR 268:17-19 ("[W]e believe that the 40 percent accurately represents what is the potential unmet need in the market today.").

subsequent analyses of benefits. As stated by Ms. Norton, "Our projections are relative to what we expect from that gap."[65]

44 And there are other flaws with PSE's analysis. First, for purposes of simplicity PSE assigned a useful life of 15 years to all equipment.[66] However, as noted, for the equipment described in JET-3, the useful life, based on the data, is 18 years. Using that 18-year figure, the 23% figure shrinks further.

45 Second, the survey was taken in 2011-2012, at a point in time when the economy was recovering from the "Great Recession." Of course people were not making investments in new equipment at that time, a point the surveyors concede.[67]

46 Third, that something is "beyond its useful life" is a nebulous concept, one that does not necessarily connote a policy failing. To say that something is "beyond its useful life" does not mean that it is not useful. It still can work just fine.[68] PSE's lead witness, Ms. Norton, testified that it was her understanding that "useful life" is an "average" of the lives of the equipment.[69] Therefore, on average, if a piece of equipment has a "useful life" of 18 years, then 50% of the equipment will last longer than that, and 50% will last for a shorter time. Mr. Wigen, apparently retained as an expert on this topic, provided a precise definition, but conceded that it was a concept in the eyes of the customer.[70] The fact that some equipment is over its "average" life is not a bad thing.[71] It probably is a good thing. And one would expect that, in the normal course

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[65] Norton TR. 145:18-19. This peculiar interpretation of data should not just reflect on this issue of market gap. It should reflect on the credibility of PSE's main witnesses in their other data-driven assertions as well.
[66] Norton, TR. 134:12-16.
[67] Exh. No. NNK-3, at 5 ("[T]he economic downturn has pared back water heater sales and made consumers more skittish about major purchases.")
[68] *E.g.*, Fluetsch, Exh. No. BF-1T 14:17-15:10; Norton TR. 176:21-177:1.
[69] Norton, TR. 148:24-149:2 ("'Useful life' is a common term to explain what is the average expected life of a piece of equipment. It's commonly used in the industry as what is the projected life of a piece of equipment."); 177:12-14 ("I mean, 'useful life' is a term used to suggest the average age or life that that equipment is intended to last . . . .").
[70] Wigen, TR. 368:17-23.
[71] It certainly does not mean that it is more inefficient than other equipment. *See* Fluetsch, Exh. No. BF-1T 15:1-10.

of things, even in the normal course of a market, some equipment would last beyond the average of comparable equipment.

b. There Is No Demand for a Lease Option

47 Having mistakenly postulated a need to replace equipment, PSE then misuses data in an attempt to show a demand for a lease service. People involved in the industry see no demand. Indeed, even in the commercial area, there has been no demand.[72] PSE's research (to the extent it has done research) shows only one small rental program in a community-owned utility outside of Toronto and one in Vermont for which PSE could not get the website to work.[73] And Dr. Faruqui, who did a literature search for reasons why customers do or do not acquire products, found no review of an appliance lease program.[74] The fact that there currently is little or no opportunity to obtain a product in a certain way in a market does not mean there is a profitable opportunity ready to be seized. To the contrary, the opposite makes more sense.

48 Nevertheless, PSE attempts to justify the need by survey data. The initial survey exploring this, and apparently on which PSE relied to pursue this program, asked this question exploring the demand for lease service:

> Instead of purchasing space heating or cooling equipment, imagine you were given the option to lease the equipment instead.
>
> You would pay a monthly fixed and all-inclusive charge, and *the sum of those charges would be similar to the combined cost of the upfront purchase, installation and permitting fees, maintenance, repair and future disposable costs.*"[75]

49 In other words, the survey recipients were told that the economics of the sale versus lease decision would be a wash: the sum of the lease charges would be "similar" to the overall sales

[72] Fluetsch, Exh. No. BF-1T at 5:15-16; van den Heuvel, Exh. No. JvdH-1T 8:17-19.
[73] Exh. No. MBM-50, at 3; *see* McCulloch, TR. 270:19-271:14.
[74] Exh. AF-6.
[75] Fluetsch, Exh. No. BF-1T at 20 (emphasis added by Mr. Fluetsch). The question refers to "disposable costs." We assume that it meant "disposal costs."

price. With that economic premise, it is surprising that only 13% of customers said they would be interested or somewhat interested is a lease of heat pump, 18% in a gas furnace, and 25% in a hot water heater.[76]

50 But the economics of the two options are not a wash. Mr. Fluetsch used PSE's own figures (and actually corrected them to increase the overall cost of the equipment, an adjustment that cut in PSE's favor in this analysis) and compared a sale with reasonable financing to a lease of that same equipment. Basically, a customer could own the equipment outright in 7 years for a monthly payment that is the same for a 17-year lease. And that does not account for the added sales taxes that the customer would pay over the 17 years and (if the consumer were in Bellingham and perhaps other jurisdictions) the effect of a local utility tax.[77]

51 Public Counsel witness Ms. Kimball comes to the same conclusion. She notes that the survey is flawed because it did not fully disclose costs and terms to the customer,[78] citing back to PSE its reliance on Dr. Faruqui who is concerned about customers who have "imperfect information" upon which to base a decision.[79] Certainly, that statement should apply to survey questions. She suggests a different result had the question noted the dramatic additional costs in a lease versus a sale.[80]

52 PSE may be arguing that there is a demand for the lease service, but the customers do not know it. PSE's witnesses argue that the information necessary to make purchasing decisions is too complicated and customers will be baffled by it. Their academic expert argues that

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[76] Norton, Exh. No. LYN-1T 12:6-7, *citing* McCulloch, Exh. No. MBM-4.
[77] Fluetsch, Exh. No. BF-1T 19:8-21:22. Mr. Fluetsch's analysis noted, but did not include, the costs of service calls. But the general point of the comparative economics is still valid.
[78] Kimball, Exh. No. MMK-1HCT 16:14-19:15.
[79] Kimball, Exh. No. MMK-1HCT 22:9-16.
[80] Kimball, Exh. No. MMK-1HCT 22:17-23:13.

consumers are "myopic."[81] In contrast, those with actual market experience testify that consumers are "savvy"[82] and want choices. These are two dramatically different views of market and of consumers. The Commission should not endorse a view that denigrates the ability of consumers to make decisions.

3. The Proposed Tariff Would Result in Rates to Consumers that Are Not Fair, Just, and Reasonable

53 PSE could have offered this service as an unregulated service, and then set prices as it sees fit.[83] However, it has opted to run this as a regulated service, with the obligations, opportunities, and limitations that status includes. Clearly, PSE believes it is an advantage to have this as a regulated service.[84]

54 One of the statutory obligations for a utility, and the Commission, is to ensure that the tariffed prices are "fair, just, reasonable, and sufficient."[85] Though PSE contends that the rates as filed meet that standard,[86] that is not the case for a number of reasons.[87]

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[81] *See* Faruqui, Exh. No. AF-1T 10:8-11-12. Dr. Faruqui was not using the term "myopic" in a pejorative way. He was attempting to define a trait that some consumers act in a near-sighted way when making certain decisions. But, perhaps picking up on Dr. Faruqui's opinions, PSE seems to adopt the view that consumers are not able to make choices, so it will make choices for them by offering them a maximum of two options for any type of leased equipment. They are channeling customers to those limited choices, "away from the more innovative, more efficient, and more appropriate options." *See* Fluetsch, Exh. BF-1T 7:18-22.

[82] van den Heuvel, Exh. JvdH-1T 8:19-22.

[83] However, if PSE had sought to do that, it would have had to seek staff familiar with how the unregulated sector operates. Mr. Englert testified that he did not know now prices are set in the unregulated sector. Englert, TR. 416: 10-23.

[84] *E.g.*, McCulloch, TR. 294:12-14.

[85] RCW 80.28.010.

[86] Norton, TR. 158:6-13; McCulloch, TR. 225:16-17. PSE, or its witnesses, seem to imply that the price really does not matter, as this is an optional service. But it does matter, for two reasons. The first is legal: the public service laws require the prices be reasonable. The second is practical: consumers will look to the fact that the rates are approved by the Commission as a government imprimatur of reasonableness.

[87] We did not evaluate the pricing model put forth by Dr. Faruqui. However, failure to counter expert with expert on the merits of that model is not the same as acquiescence in the merits of the model. The inputs are sufficiently flawed as to render the end result rates flawed, so parsing through all the details of the model is not necessary.

a. The Rates Are Not Cost-Based

55 The cost of the equipment to be leased that went into the model was not based on anything remotely resembling the lowest cost to PSE. The cost number was obtained from a survey of contractors to which 15 responded, and not all of the respondents submitted cost numbers for all the equipment.[88] There was no effort to show that the responses accurately reflected the universe of prices that may be available from the more than 1400 contractors doing business in PSE's service territory.[89]

56 Focusing on just one type of equipment, the electric heat pump, the responding contractors provided prices that ranged from $[redacted], with an average of $[redacted] Perhaps one reason why there is such a dramatic range of price figures is that RFQ was not very precise in the equipment for which it was seeking prices. As a result, the equipment varied substantially by size and by brand, with the smaller pumps being less expensive than the larger ones.[91] But that did not matter in PSE's process. PSE just averaged them all.

57 Rather than take the low price, or even, for example, one at the 25th percentile, PSE computed the mean and used that as an input to the pricing model. The problem is that that number ($[redacted] on Exh. No. ECO-8HC) will not be (and should not be) the cost to PSE. The Company has stated that if the Lease Solutions program it would then enter into contracts with the providers. The cost to PSE would be set in that contracting process.[92] If the service is approved, PSE said it may enter into a competitive bid process to obtain the merchandise and then "refresh" the rates.[93] Presumably, the cost to PSE will be lower than the $[redacted] cost that

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[88] McCulloch, TR. 274:21-275:3.
[89] van den Heuvel, Exh. No. JvdH-1T 3:18-19.
[90] Exh. No. ECO-8HC, at 1.
[91] McCulloch, TR. 220:6-222:13. There were two-ton heat pumps as well as three-ton heat pumps in the array of equipment and a variety of brands.
[92] McCulloch, TR. 279:1-6.
[93] McCulloch, TR. 306:18-21; 227:24-228:2.

went into the current proposed rate. The dollar figure used to calculate the rate will not be the cost to PSE. So, this proposed rate is not cost-based, and it certainly is not the lowest reasonable cost available to the company as its mini-survey of 15 contractors demonstrates.

58 When asked why PSE did pick the lowest price or the price at the 25th percentile, Mr. McCulloch responded that "it was important for us to capture . . . an average cost . . . ."[94] When a company (at least in the competitive market) sets out to purchase equipment or supplies that go into a service offering, it seeks the lowest cost of that equipment or those supplies. It would not (if it wanted to stay in business) survey the prices offered by various suppliers and then pay the average.

59 Mr. McCulloch seems adamant that the average price is the best methodology.[95] If PSE were to do that, it would be paying too much. If it did not pay the average, and presumably paid less, then would getting a windfall as the higher "average" number would be the one used to calculate rates. It appears that from the outset the Company was not intending to get to the lowest cost. In late 2015, when they filed tariffs with no prices, they expected that the contracts with partners would be signed by November 30, after a November 13 approval.[96] That clearly is not ample time within which to run a competitive process and get the lowest cost for the customer.

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[94] *See* McCulloch, TR. 275:14-20. On redirect questioning, Mr. McCulloch recited various examples where rates are on the basis of average prices. McCulloch, TR. 358:15-359:1. But there is a crucial difference between the examples given in response to that question on redirect and the proposed way of setting lease rates. PSE does use average costs in determining a number of rates. Obviously, PSE's costs to serve customers vary, so average costs are necessary. But the average is derived from the total costs to PSE. The average is charged to the customer, and PSE recovers its costs, no more. Here the "average" of the figures provided by the surveyed contractors is not derived from PSE's total costs. They are not related to costs, as the costs will be determined through the subsequent contracting process.

[95] McCulloch, TR. 276:8-9 ("As I stated, the costs that we presented, we feel confident in.").

[96] McCulloch, TR.284-85; Exh. No. MBM-64.

60 Using the average cost from the survey will result in a windfall to the Company, and the rate-setting process is flawed on that ground.

b. The Rate of Return as Applied to PSE's Investment Is Excessive

61 In calculating the lease rates, PSE proposes to use its existing weighted cost of capital,[97] which is 7.77%.[98] PSE's evidentiary basis for this figure is contained in the testimony of Mr. McCulloch: "In calculating the return on rate base for the annual revenue requirement, PSE's weighted cost of capital is assessed to the capital costs, which includes the leased equipment and installation costs."[99] That was the extent of the analysis, or "extent of the treatment" as Mr. McCulloch testified.[100] On rebuttal, Mr. McCulloch testified as follows:

> Q. Has any party questioned PSE's application of its weighted cost of capital in calculating its allowed rate of return?
> A. No.[101]

Apparently, PSE attempts to propose a return figure, without support, to be applied to the cost of equipment and installation costs in determining rates. In its rebuttal testimony, PSE then implies that the 7.77% figure should stand because no other party has retained expert testimony to support a different figure. That turns the burden of proof on its head, implying that the other parties need to rebut the 7.77% figure. PSE bears the burden of proof on this aspect of its proposed rates, as well as all other aspects of those rates. And, as PSE has learned in a past reversal of a Commission decision, PSE cannot so shift that burden.[102]

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[97] McCulloch, Exh. No. MBM-1T 18:22-23.
[98] Kimball, Exh. No. MMK-1HCT 11:4; *see In re Puget Sound Energy and Northwest Energy Coalition*, WUTC Dkt. Nos. UE-121697, UG-121705, Order 15 ¶10 (June 29, 2015).
[99] McCulloch, Exh. MBM-1T 18:22-19:1.
[100] McCulloch, TR. 287:3-10.
[101] McCulloch, Exh. MBM-7T 22:1-3.
[102] *See Industrial Customers of Northwest Utilities v. Washington Utilities & Transportation Comm'n*, Thurston Co. Nos. 13-2-01576-2, 13-2-01582-7, Order Granting in Part and Denying in Part Petitions for Judicial Review, App. A, at 5th unnumbered page (Order dated July 25, 2014; Appendix A dated June 4, 2014) (Judge Carol Murphy) ("[T]he Commission did not hold PSE to its burden of proof. Rather than putting on its own evidence, PSE merely attempted to rebut the respondents' evidence.").

62 PSE's proposed 7.77% is excessive for three reasons. First, the rate of return would be applied to the cost of the equipment used for setting the lease rate, not the actual cost to PSE. As described above, the cost of the equipment to PSE will be, or should be, lower than the figure in Exh. No. ECO-8HC. Because that figure was run through the pricing model, and that model applied the rate of return to that figure, it would result in a return on an investment that was not made by PSE.

63 Second, PSE used its existing rate of return of 7.77% as if the investment was an investment of generation or distribution plant. It is not. In fact, it is not investment at all. PSE updates indicate that the investment can be made through existing credit facilities.[103] In other words, PSE will use debt, not equity, to finance the investment. There is no reason to apply the overall company rate of return that was set on the basis of a capital structure that includes both equity and debt on an investment to be funded only by debt.

64 Third, even if some of the investment would come from the owners, applying PSE's existing return on equity would be inappropriate. The equipment would not be acquired ahead of time and then leased, with a risk of stranded assets in the form of a warehouse full of unleased hot water heaters. Instead, the company would not obtain the equipment until after a lease agreement is signed.[104] The risk of stranded assets would fall on the partner contractor who would have to perform under the contract. So, the cost of that risk to the partner would be passed on to the customer through the contract price paid by PSE to the partner. But in addition, by using the rate of return associated with its general investments, PSE would also be charging lease rates as if PSE bore that risk. The risk to PSE is not the same as the risk of a capital

[103] Exh. No. MBM-62HC, at 2; McCulloch, TR. 290:14-291:7.
[104] McCulloch, TR. 218:1-4 ("[N]o product would be purchased [by PSE] until it was installed.").

investment in the general rate context, so the 7.77% figure, and the rates as a whole, should be rejected.

c. The Lease Solutions Tariff Would Result in a Tax Burden Far Greater Than on a Sales Transaction

65 In evaluating the reasonableness of the rates, the Commission should consider all the components of costs to the customer, not just those in Schedule 75. Pursuant to other schedules, PSE passes on the effect of various state and local taxes.[105] While it is true that, for the most part, the types of taxes or tax burdens in a lease will be the same as in a sale, there are some differences.

66 The most obvious difference is that the sales tax is imposed once on the total value of the sale. For a lease, it is imposed on each monthly payment. So, the aggregate of the monthly sales tax payments will exceed the sales tax on a sale by a fair margin, even considering the time value of money.[106]

67 Another difference is property tax. According to PSE tariff schedule140, the property tax attributable to the leased equipment will be passed onto the customer pursuant to a formula that, frankly, is complex in the extreme.[107] This in effect leads to a double tax burden. The homeowner's property tax is based on the value of the home, including fixtures, such as furnaces. If the homeowner opts to lease a furnace, it seems unlikely that the county assessor would revalue the home to take that into account.[108] Indeed, the assessor would not likely know of the lease. So, the homeowner would be paying property tax as usual and, in addition, pay PSE

[105] Exh. Nos. MRM 8-9; Marcelia, TR. 450:22-452:3.
[106] Fluetsch, Exh. No. BF-1T 21:5-17.
[107] *See* Exh. No. MRM-6, at 1 ("PSE is unable to answer the request in a simple fashion."); Marcelia, TR. 453:18-456:4.
[108] *See* Marcelia, TR. 457:5-459:7.

for its burden of the tax attributable to the equipment.[109] While not a large ticket item compared to other costs passed on by PSE in the lease rates, a rough estimate of property tax is one percent of the value of the equipment.[110] On a $10,000 furnace, that could be meaningful, and the homeowner would have to bear the burden of PSE's property tax on that furnace (though in a depreciated amount) for the life of the lease.

68 Another potential significant tax burden (and a real one in Bellingham) is the effect of the local utility tax. According to PSE, among cities with local utility taxes, only Bellingham imposes that tax on PSE's lease revenue. So, in Bellingham, in addition to state and local sales tax, and property taxes, a Lease Solutions customer would also pay the effect of a 6% tax (grossed up to 6.38%[111]). This is not a burden for the sales customer of a unregulated contractor.[112]

d. A Comparison of Lease Rates with Sales Prices Shows that the Lease Rates Are Excessive

69 As indicated in section III.B.2.b above, a comparison of the lease rates and a sale with reasonable financing shows that the lease rate is unreasonable. According to Mr. Fluetsch, with reasonable financing, a purchaser of equipment could own the equipment in seven years for the same monthly payment as PSE would extract over 17 years.[113] Ms. Kimball's testimony was consistent with that of Mr. Fluetsch. She concluded: "Customers choosing to lease equipment

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[109] Tr. 457-58.
[110] Marcelia, TR. 459:8-16.
[111] Exh. No. BF-4.
[112] While, according to PSE, this result would be confined to Bellingham, many cities impose such a local tax, with rates from 3 to 9 percent. Exh. No. MRM-8. The application of Bellingham's tax was upheld by the court of appeals in *Puget Sound Energy, Inc. v. Bellingham*, 163 Wn.App. 329, 259 P.3d 345 (2011), *rev. denied*, 173 Wn.2d 1018 (2012). The Court held that a city may "define its taxation categories as it sees fit . . . ." *Id.* at 337, *quoting Commonwealth Title Insurance Co. v. Tacoma*, 81 Wn.2d 391, 394, 502 P.2d 1024 (1972). So, while, perhaps today, lease revenue is taxed as utility revenue only in Bellingham, that does not mean that is the way it would be in the future if more lease revenue is generated and municipalities interpret their tax ordinances. *See* Marcelia, TR. 463:23-464:24.
[113] Fluetsch, Exh. No. BF-1T 20:11-21:2

from PSE would pay total costs for the equipment over the term of the lease far in excess of the assumed capital costs for equipment and installation."[114] She then calculates the substantial "premium" that PSE's lease customers would pay if they chose to lease instead of purchase the equipment.[115] The results are revealing. In contrast, PSE did not attempt to compare its lease program with a purchase of similar equipment. The comparison they made, presumably to justify the reasonableness of its rates in an internal presentation was to several hypothetical lease programs.[116] Comparing the proposed program with ones that are made up is not evidence of reasonableness.

e. The Flawed Rates Cannot Be Corrected by "Refreshing" Them in a Compliance Filing

70 The rates are flawed, both in their methodology and in their final result. PSE has offered to "refresh" the rates in a compliance filing.[117] However, this is not like a general rate case where parties can and do challenge the inclusion of various costs and offer alternate views of the appropriate rate of return, the Commission adopts one side's view or the other's, and then the Commission orders the Company to rerun the numbers and file them in a compliance filing. It has to be that way in a rate case, because the Commission must come to a final rate that is fair, just, reasonable, and sufficient.

71 That is not the case here. This is a proposed optional program, so no final decision on rates is necessary. It is not incumbent on Commission Staff, Public Counsel, or the intervenors to salvage PSE's proposal by proposing rates that make more sense. To do that would require (1) retaining an expert on rate of return to ascertain the appropriate risk to investors of

[114] Kimball, Exh. No. MK-1HCT 25:7-9.
[115] Kimball, Exh. No. MK-1HCT 25:12-26:5.
[116] McCulloch, TR. 292:20-293:5; Exh. No. MBM-62HC at 3-9.
[117] *E.g.*, Norton, TR. 118:7-9.

investment in equipment for which leases are already signed, (2) an evaluation of true and *lowest* costs of the equipment rather than simply an average of costs in a survey of a small subset of providers, (3) and an evaluation of all the other costs included in the pricing model for inclusion in the lease rates. That is not Staff's, Public Counsel's, or the Intervenors' burden. The rate methodology is sufficiently flawed, and the rates are so unfair and unreasonable, that the proposal should simply be rejected.

4. The Proposed Tariff Would Limit Consumer Choice and Consumer Access to State of the Art Equipment, Contrary to the Public Interest and the State's Policies on Energy Efficiency

72 Proposed Schedule 75 includes only twelve types of equipment, no more than two for any given category. Size and efficiency are provided in general terms, as is fuel source. However, the brands are not provided, nor will brands be included in any tariff revision.[118] The problem is that the PSE tariff would tend to channel customers to a very limited set of options.[119]

73 But PSE seems to take pride in this limited menu of options. Its expert cites too much information and an inability to process information as an argument for limiting consumer choice.[120] In contrast, SMACNA-WW witnesses – the main witnesses in this case that work in the appliance market and understand the business firsthand – view customers as "savvy" and desirous of choices.[121] This is a very different view of the consumers and their ability to make choices.

74 While just a few decades ago there were few choices for consumers, now there are many.[122] Options for consumers in the existing market include:

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[118] McCulloch, TR. 324:1-4.
[119] Fluetsch, Exh. No. BF-1T 12::16-13:2.
[120] Faruqui, Exh. No AF-1T 8:15-9:1 ("[C]ustomers often face a plethora of competing products, technologies, and vendors."); 10:8-11.
[121] van den Heuvel, Exh. No. JvdH-1T 7:21-8-22.
[122] van den Heuvel, Exh No. JvdH-1T 4:8-6:10.

- Ductless heat pumps. These have become a major seller, having constituted 25% of the market in 2015.[123] They avoid the costs of duct work and are extremely energy efficient.[124]
- Zoned systems. These can heat or cool areas of homes, but not others, allowing the residents to conserve energy.[125] Ductless heat pumps are one example of such equipment.[126]
- Variable stage or capacity furnaces. These can be 98% efficient furnaces.[127]
- Equipment with remote-control features.[128]
- Equipment that works to control indoor air quality.[129]
- Tankless hot water heaters.[130] Most hot water heaters heat water whether it is used or not. Tankless hot water heaters heat water when it is needed, so overall energy use is substantially less.[131]
- Different venting options that are important depending on the space within which the equipment must fit.[132]

75 Within these and other products, there are many variations, different sizes, duct and venting configurations, and efficiency options. Mr. van den Heuvel notes that his company, GENSCO, is one of several distributors in PSE's service territory, providing approximately 30% of the HVAC equipment sold.[133] He placed into the record product lists from five manufacturers

[123] van den Heuvel, Exh. No. JvdH-1T 6:14-15.
[124] van den Heuvel, Exh. No. JvdH-1T 7:12-16.
[125] Fluetsch, Exh. No. BF-1T 6:17-7:7.
[126] van den Heuvel, Exh. No. JvdH-1T 7:12-14.
[127] Fluetsch, Exh. No. BF-1T 8:4-7.
[128] Fluetsch, Exh. No. BF-1T 6:18.
[129] Fluetsch, Exh. No. BF-1T 6:20.
[130] Fluetsch, Exh. No. BF-1T 8:9-10.
[131] van den Heuvel, Exh. No. JvdH-1T 3:1-9.
[132] Fluetsch, Exh. No. BF-1T 8:9-13.
[133] van den Heuvel, Exh. No. JvdH-1T 1:21-22

that show the diversity of the products available to customers.[134] There are 389 types of gas furnaces, 126 types of air conditioners, 121 types of heat pumps, 113 types of air handlers, and 233 types of ductless heat pumps, more than 980 individual products available to consumers, and that number continues to expand. And those are just from one distributor that covers 30% of the market![135] Even PSE's rebuttal witness Wigen admitted that customers like choices.[136]

76 There are more and more such products and variations on these products becoming available all the time. Mr. Fluetsch testified that almost every week he is visited by a manufacturer's representative with a new product to sell. And if the product makes sense for customers, it can be on the market within weeks.

77 As described above, the product offerings in the existing market provides consumers with energy efficient options that are non-existent in PSE's proposal. As pointed out by Staff witness Cebulko, many of PSE's choices are of "standard efficiency,"[137] and Public Counsel witness Kimball concludes that the overall conservation savings estimates of PSE are flawed.[138] Washington's policies on energy efficiency would be better served by many, state-of-the-art product offerings on the market, than by channeling consumers into a handful of options, many of which are merely "standard." As Ms. Kimball points out, there are other ways to get conservation savings rather than with a leasing program.[139]

78 In PSE's programs, choices for installers are limited (actually non-existent). PSE assigns a "partner" to the lease customer. That can make a difference with installation costs. Though PSE prices for furnaces include a so-called "standard installation," any other installation costs

[134] Exh. Nos. JvdH-2 – JvdH-6.
[135] van den Heuvel, Exh. No. JvdH-1T 5:18-6:7.
[136] Wigen, TR. 366:9-11.
[137] Cebulko, Exh. No. BTC-1HCT 38:1-3.
[138] Kimball, Exh. No. MMK-1HCT 31:16-34:3.
[139] Kimball, Exh. No. MMK-1HCT 35:15-36:6.

would be between the customer and the contractor. So, at that point, if the customer was not satisfied with the price offered for special installation by the PSE-assigned contractor, the customer would either be stuck with the assigned "partner," and its price, or it would have to seek special installation from some other source – so much for the simplicity for the customer.[140]

79 This is potentially significant. In the real world of furnaces, installation is complex. There is little that is "standard."[141] Just like one size does not fit all in the selection of equipment itself, one type of "standard" installation is not realistic. As Mr. Fluetsch summed up:

> A one size fits all mentality is not at all applicable today. Today, the market requires and demands many different solutions, not only to fit the particular characteristics of individual homes and businesses, but also to meet the desires of home and business owners. That is why it is important to have many providers offering a wide variety of products/solutions.[142]

80 The lack of consumer choice is not limited to installed equipment; it also extends to choice of provider. In PSE's service territory, there are over 1400 HVAC contractors doing business.[143] Customers care about the vendors they use. They care about their reputation, their accessibility, and even if they are union or non-union shops.[144] They also care if the vendor can help them with the decision about the equipment, its size, brand, efficiency, and economics. Private contractors help with this.[145] But PSE would not.[146] PSE would solve the choice issues relating to equipment size, brand, and efficiency, by choosing for the consumers. Regarding questions about economics and what the better economic choice would be between a lease and a

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[140] McCulloch, Exh. No. 7HCT 12:4-5 ("Under PSE's proposal, each individual customer will pay only non-standard installation costs if their individual circumstances require such treatment."); McCulloch, TR. 286:9-11 ("The equipment and the standard installation are the services that will be contracted with providers to fulfill this service."); Exh. No. MBM-53, at 1-2.
[141] Fluetsch, Exh. No. BF-1T 9:15-22; 18:11-14.
[142] Fluetsch, Exh. No. BF-1T 7:9-13.
[143] van den Heuvel, Exh. No. JvdH-1T 3:18-4:3.
[144] Fluetsch, Exh. No. BF-1T 10:1-8.
[145] Fluetsch, Exh. No. BF-1T 11:17-12:12.
[146] Teller (Norton), Exh. No. JET-1T 6:7-9) ("The customers will perform their own cost-benefit analysis based on their own preferences and needs.").

sale, PSE steps back. Once it enters into a lease agreement, and the service partner visits the home of the lessee, that partner would not be allowed to offer a sales option.[147]

81 PSE may say that it will (or, perhaps more accurately, could) offer more equipment options in the future. But that is not a certainty. As a provider with monopoly power and with a reputation as a "trusted energy partner,"[148] they may not have the incentive to offer more products. And if they did want to, as described below, under the regulatory system that PSE wants to opt into, it would require a time-consuming process. The competitive market gets new and innovative products to consumers quickly. Under PSE's proposed process, ideas for new products may languish in PSE's tariff section, to the detriment of potential lease customers and the public interest.

5. The Proposed Tariff Would Result in a Burdensome and Cumbersome Regulatory Process

82 Washington's regulatory system was designed to be a surrogate for competition for monopoly providers of essential services.[149] It works well to set rates, rule on merger applications, or decide other major policy issues. Some regulatory functions like setting rates and approving or conditioning mergers are handled as adjudications. Other functions, like setting general policies or rules of general applicability are better conducted as rule-making proceedings. However, as a mechanism to select products for lease and establish and update lease rates, the Commission's regulatory process is unduly cumbersome.

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[147] Exh. No. MBM-53, at 1.
[148] Teller (Norton), Exh. No. JET-1T 3:3-5.
[149] *E.g.*, *Jewell v. Washington Utilities & Transportation Comm'n*, 90 Wash.2d 775, 783, 585 P.2d 1167 (1978) ("How is the customer/ratepayer of a regulated monopoly protected? By the competitive surrogate of the commission which is required to set rates . . .").

83 PSE indicated that the process for determining lease rates going forward, and re-determining them as conditions change, would effectively mimic the process used to set rates in the current proposal,[150] namely:

- PSE would engage in a process to select the products it would provide;
- PSE would survey contractors to obtain costs of those products and then, presumably, average those cost proposals for insertion into the cost model;
- PSE would prepare and file a tariff showing the products and the proposed rates;
- Commission Staff, Public Counsel, and, perhaps, various stakeholders would review those products and rates;
- The Commission would schedule the proposed new tariff for consideration at an open meeting;
- If the tariff were suspended, then hearings would ensue; and
- If the tariff were ultimately approved after hearing, or if were allowed to go into effect without an adjudicatory hearing, PSE would then enter into some competitive process to obtain the equipment, which may or may not lead to a revision of the tariff.

84 This process would be done for each new product to be offered as well as for each existing product offered for lease in the tariff. And the number of products could be large: PSE has indicated that it will look to ductless heat pumps and tankless hot water heaters in the future, but, if it wants to be relevant in the market, and give consumers energy efficient options, it would need to update those product lists frequently. Further, PSE has stated that it sees this as a

[150] McCulloch, TR. 293:13-295:8; 339;16-340:4.

"platform" for adding such equipment as solar panels, electric vehicle charging equipment, and batteries to its menu of products.

85 So, instead of a one-time review of a tariff for 12 pieces of equipment, the Commission would be looking at an annual review (perhaps more frequently if costs change and prices need to change) of hundreds of products.

86 And rate regulation is just a piece of the regulatory effort that would be required. Because PSE would be exempt from the Consumer Protection Act, the Commission would be charged with a significant consumer protection function. It could enforce its consumer rules, but right now there are no rules covering things like deceptive trade or marketing practices – the very sort of thing that the CPA protects in the competitive marketplace.[151] So, if the Commission deems it necessary to protect the consumers in a way analogous to the way the CPA protects consumers, it would need to adopt a number of consumer rules. And those rules probably should be adopted on an emergency basis to cover the first customers coming into the program. Then, of course, the Commission would need to ensure that its consumer protection staff is able to handle questions and complaints from people who may enter into lease contracts with PSE.[152]

87 The Commission's commitment to consumer protection would have to be for the long term, even if PSE were to decide a few years out to terminate the program. The contracts would be 17 years in length, and the contract as drafted would allow PSE to immediately require all 17 years of payments if the lessee defaults.[153] The consequences to the consumer, financial and

[151] See Pt. III. A.2 above.
[152] The Commission's consumer protection staff would have some legal complexities to sort through. The CPA exemption would cover PSE, but not necessarily PSE's contractor partners. So, while the Commission would have authority over PSE, the partner's behavior would be subject to the CPA. *See* Kimball, TR. 505:3-507:22 (responding to questions from Chairman Danner and Commissioner Jones).
[153] *See* McCulloch, TR. 347:123-348:22 (responding to questions from Judge Kopta).

otherwise, could be severe. The Commission should not leave the consumer so exposed without regulatory support, both with adopted rules and in staffing.

88 Contrast this regulatory workload with the paucity of regulatory fees that would be generated to cover the costs of such regulation. The fees anticipated to be generated would be inadequate to fund even a fraction of these necessary regulatory functions. Even three years out, when presumably the program will be more robust, PSE estimates that the regulatory fees would only be approximately $20,000.[154] This would in no way cover the "substantial"[155] workload for the Commission staff.

6. Even if There Is a "Market Gap" as PSE Alleges, PSE Has Not Adequately Evaluated Options in Lieu of Its Proposed Tariff Nor Adequately Worked Through Details of the Program

89 The Commission has required utilities to evaluate options in a variety of contexts. In reviewing capital investments for prudency, the Commission requires that all options be considered.[156] In long-term resource planning the Commission requires evaluation of options, including energy efficiency.[157]

90 It would make sense, and be consistent with sound regulatory practice, for PSE to have evaluated options to fill any alleged "market gap." PSE did not. It did not consider an unregulated option.[158] It did not consider engaging with the Conservation Resource Advisory Group (CRAG) to develop other programs to get more energy efficiency appliances to consumers.[159] It did not consider other options to fill the gap, even though Dr. Faruqui indicated

[154] Exh. No. EEE-13; Englert, TR. 438:22-439:9.
[155] Cebulko, TR. 480;22-481:2-8.
[156] *See, e.g., WUTC v. Puget Sound Power & Light Co.*, WUTC Dkt. Nos. UE-920433, UE-920499, UE-921262 (consolidated), 19th Supp. Order, at 10-11 (Sept. 27, 1994).
[157] RCW 19.280.030(1); WAC 480-100-238(3).
[158] Norton, TR. 159:16-19.
[159] Kimball, Exh. No. MMK-1HCT 35:15-36:6.

that energy efficiency programs have addressed in part the issues he raises.[160] And PSE did not work with the major contractor association in developing its ideas.[161]

91 PSE did not even evaluate other lease programs such that may exist.[162] Granted, there are few models out there. However, one would think, or hope, that PSE would evaluate them to learn whey those few exist and how they are doing in light of the absence of such programs almost everywhere.

92 Beyond the lack of looking at alternatives, PSE has not worked out many issues with this filing. In questioning about various contract provisions, PSE offered up the idea that it could change them.[163] In response to questions about the rates, PSE offered up the idea that it could update or "refresh" them.[164] In response to questions about the limitations of its product choices, PSE said it could add products, even in the compliance filing.[165] And PSE has had unrealistic views of how to get this program from the approval to the operational stage. At one point, PSE indicated that after approval, they could get contracts signed with providers in slightly over two weeks.[166] Now it says that two months is more appropriate for those logistics.[167]

93 PSE's lack of evaluation of alternatives, and its constant revision of the existing proposal, should give the Commission pause. The Commission should expect and demand more rigor from PSE in developing and perfecting a proposal of this magnitude.

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[160] Faruqui, Exh. No. AF-1T 1:19-21.
[161] Muller-Neff, Exh. No. JMN-1T 9:12-16.
[162] McCulloch, TR. 272:7-16.
[163] Englert, TR 442:8-10 ("I think if there's something that's here – if there's something specific that can be made more clear, I think we're open to that.").
[164] Norton, Exh. No. LYN-1T 9:1; McCulloch, Exh. No. 7T 9:17-18; Norton, TR 117:7-9.
[165] Norton, Exh. No. LYN-1T 9:2; Norton, TR 117:9-11.
[166] Exh. No. MBM-64; McCulloch, TR. 285:7-22.
[167] McCulloch, Exh. No. MBM-7T 9:18-20

7. The Proposed Tariff Is Not Simply an "Extension" of the Existing Lease Program

94 PSE testified that this proposed program is an extension of the existing program,[168] implying, perhaps, that this extension is no big deal and also stating, specifically, that the experience with that program is a basis for trusting PSE's implementation of Lease Solutions.[169]

95 That is simply not true; the proposed program is different in scope and in kind from the preexisting program. The preexisting program involved month-to-month leases of hot water heaters, a carry-over from a prior program. It is not open to new customers, so it involves no marketing or significant consumer protection or regulatory concerns.

96 The Lease Solutions proposal, in contrast, would bind the consumers, and the company, to long-term leases. It would require the coordination of many more "partners" and, ultimately, include dozens if not hundreds of products. Optimistically, from PSE's point of view, it could evolve into a dramatic share of the appliance market.[170] This is not an "extension," but rather a dramatically new and risky endeavor.

8. The Proposed Tariff Is Not a Step Toward "the Utility of the Future" and, in Fact, Is Inconsistent with that Vision

97 On rebuttal, PSE argued that this is a "pathway" to the utility of the future.[171] It is nothing of the sort. Indeed, PSE's reliance on this argument is a recent phenomenon. After it became clear that the Commission was not just going to rubber stamp a rateless tariff at an open meeting, PSE indicated it could "pivot" to the utility of the future argument.[172] In other words,

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[168] Englert, Exh. No. EEE-1T 2:4-15.
[169] For example, in responding to a question about why PSE did not look at other lease models, Mr. McCulloch simply stated that "used our existing rental service as a baseline for developing this service." McCulloch, TR. 272: 10-12.
[170] *See* Exh. No. BTC-2HC, at 4.
[171] Norton, Exh. No. LYN-1T 3:11-22.
[172] Exh. No. MBM-65 ("While a recommendation to suspend is not what PSE hoped for, the team is pivoting its strategy. We will work on demonstrating how leasing is a key element of a customer focused "Energy Company of the Future" and why regulation to support this utility evolution is vital.").

Lease Solutions was not a product of a discussion of the "utility of the future." Instead, the "utility of the future" was a *post hoc* rationalization for Lease Solutions.

98 There is a robust "utility of the future" discussion taking place in New York. The "Reforming the Energy Vision" (REV) process has been going on for several years and promises to go on for several more. New York's efforts are intended to harness competition to foster innovation.[173] Programs for leasing, however, are noticeably, and notably, absent.

99 While the Lease Solutions is not a "pathway" to the utility of the future, this Commission has shown PSE the pathway to that future and has encouraged PSE to embark upon it. However, for reasons unknown, PSE has balked. In the Commission's Interpretive Statement on distributed energy resources issued over two years ago,[174] the Commission suggested that

> incumbent utilities . . . develop a strategy and business plan to compete more fully in the distributed energy resources market on either a regulated or non-regulated basis. To date, we have not received such plans from utilities under our jurisdiction, but look forward to reviewing them when ready, hopefully in the near future.[175]

At the hearing, Commissioner Jones questioned PSE witness Norton on whether PSE has developed such a comprehensive business plan. The answer was no.[176] Instead, PSE relies on that Interpretive Statement as support for a leasing program. However, as Commissioner Jones pointed out, and witness Norton admitted, the Interpretive Statement has no relevance to leasing.[177]

100 Indeed, instead of a "pathway" to the utility of the future, PSE is taking a well-worn path to the utility of the past. It seeks to add to rate base and earn a return on that rate base. Instead

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[173] *See Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, 319 P.U.R. 4th 1, 35 (N.Y. P.S.C., Feb. 26, 2015); for a broader view of the REV process, see https://www.ny.gov/programs/reforming-energy-vision.
[174] *Interpretive Statement Concerning Commission Jurisdiction and Regulation of Third-Party Owners of Net Metering Facilities*, Dkt. No. UE-112133 (July 30, 2014) (DER Interpretive Statement).
[175] DER Interpretive Statement, at 34-35, n. 100.
[176] Norton, TR. 167:21-168:13.
[177] Norton, TR. 170:8-11.

of offering consumer more choices, as is the essence of the utility of the future as contemplated in New York, it seeks to limit choices. Instead of focusing on need for and the merits of consumer choice, the PSE proposal is based on consumers being "myopic"[178] and stymied by making choices.[179]

C. The Commission Should Resist Modifying the Lease Solutions Proposal to Overcome the Tariff's Shortcomings

101 Already in this proceeding, PSE has offered to modify its proposal in its "compliance filing." It said it would "refresh" the rates, offer new products, and modify the contract language with lease customers.[180] In a post-hearing dispute about a bench request, PSE has modified it proposal to include revised criteria for credit eligibility.[181] We expect that this evolution of the Leases Solutions proposal may continue into the reply brief.

102 We urge the Commission to resist any impulse to accommodate this constant revision of the proposal and to take on the burden of resolving the many problems embodied in the proposal to be implemented in a "compliance filing." This is for two reasons.

103 First, this is not like a general rate case, in which the Commission has a legal obligation to "fix" rates pursuant to a statutory standard. This is a proposal that, even if salvageable, does not need to be implemented. It is not incumbent on the Commission to figure this out for the Company.

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[178] *See* Faruqui, Exh. No. AF-1T 10:8-11-12.
[179] *See* Faruqui, Exh. No. AF-1T 8:13-9-2. Dr. Faruqui finds a problem in the fact that equipment vendors have more information than their customers. Faruqui, Exh. Nol AF-1T 10:3-10. But is the solution to limit choices to consumers with a lease tariff that offers no more than two choices for any given type of equipment? A better solution, and one exists in our economy in countless ways, is to let the consumers choose among the products available and let them talk with the vendors who are knowledgeable and can help them sort through the variables.
[180] McCulloch, TR. 353:19-2; Englert, TR. 442:8-10; Norton, Exh. No. LYN-1T 9:1; McCulloch, Exh. No. 7T 9:17-18; Norton, TR 117:7-9. Norton, Exh. No. LYN-1T 9:2; Norton, TR 117:9-11.
[181] *See* Order 05 (Aug. 17, 2016).

104 Second, PSE's post-hearing strategy to move the final details of the program into the "compliance filing" stretches the concept of that term beyond that which the Commission allows by its rules. WAC 480-07-880 governs the post-order process, defining, and distinguishing, a "compliance filing" and a "subsequent filing." It states:

> When the commission enters a final order that authorizes or requires a party to make a filing to implement specific terms of the order with respect to the issues resolved in an adjudicative proceeding by implementing a precisely defined result, the filing is a "compliance filing."[182]

105 What PSE proposes in its "compliance filing" is not something that implements "specific terms" of the anticipated order. Rather, PSE asks the Commission to make a more general statement of policy that PSE would then implement. That is a "subsequent filing," that would require a new docket and trigger a whole new process.[183] WAC 480-07-885 states that the Commission will act on such a "subsequent filing that includes tariff sheets in the same manner that it would act on an original tariff filing . . . ." In other words, we would start anew. It would be better to end it now.

IV. CONCLUSION

106 In this proceeding, we see two divergent views of consumers and their ability to make informed choices. PSE wants a Commission-endorsed program that gives consumers few choices, as PSE believes that choices confuse consumers and they are "myopic" in their behavior. So, PSE offers them a short PSE-selected menu of choices. On the other hand, contractors want the consumers to have choices. They view the consumers as "savvy" and able and needing to make choices about their heating, comfort, energy use, and finances. State

[182] WAC 480-07-880(1).
[183] WAC 480-07-880(2).

policy, as expressed in the Washington constitution, Washington statutes, and Commission policy favor the latter approach.

107 Accordingly, the Commission should reject PSE's proposed lease tariff. It is unlawful because (1) the Legislature did not contemplate regulated electric and gas utilities would engage in the sale or leasing of equipment such as that at issue in this case, (2) to the extent that the case of *Cole v. Washington Utilities & Transportation Commission* indicates that a utility may lease some equipment under some conditions, those conditions are not present in this case, and (3) the proposed lease tariff is inconsistent with the panoply of state laws protecting and encouraging competition.

108 In the alternative, without ruling on the legal issues, the Commission should reject the proposal as it would result in an unfair market for appliances; is not needed; would result in excessive lease rates; would limit consumer choice contrary to the public interest and inconsistent with state policy; and would burden the Commission and stakeholders with an unwieldly regulatory process.

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109 Rejection of this tariff would not limit PSE's ability to move on a path to "the utility of the future." Indeed, rejection of this proposal may be the best first step toward that path.

Dated, August 30, 2016.

Respectfully submitted,

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