

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

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

**POST-HEARING REPLY BRIEF OF WASHINGTON STATE HEATING,  
VENTILATION AND AIR CONDITIONING CONTRACTORS ASSOCIATION**

September 19, 2016

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**I. INTRODUCTION**

1. The Washington State Heating, Ventilation and Air Conditioning Contractors Association (WSHVACCA) submits this reply brief responding to the initial brief of Puget Sound Energy (PSE). WSHVACCA is only filing a limited reply brief because few new issues or arguments were raised in the parties’ initial briefs and WSHVACCA finds that Commission staff, Public Counsel, and Sheet Metal Contractors National Association – Western Washington Chapter (SMACNA-WW) have more than adequately and properly addressed the legal issues regarding PSE’s proposed appliance leasing proposal.
2. WSHVACCA remains concerned, however, that PSE continues to misrepresent factual history and the meaning of that history, the complicated consumer protection morass that the PSE proposal would create and its implications for the consumer, and that the fundamental and historic policies regarding monopolies and the free market that PSE is attempting to sidestep, that have failed to be fully and properly addressed in this adjudication.

## II. ARGUMENT

### A. PSE'S "HISTORY" VS. ACTUAL LEGACIES

3. PSE now adds rental of timing devices in the 1940's to its list of "comparable" activities that justify its appliance leasing program.<sup>1</sup> From timing devices to substations<sup>2</sup>, however, the only actually comparable activities were the appliance merchandising and rental activities that the company gradually shed in the decade of the 1990's- by its own admission, unable to cost-effectively continue.<sup>3</sup>
4. What is actually demonstrated by the history is not that PSE's proposed leasing platform is simply a continuation of past activities, but that rather than being in error when staff urged the phasing out of the rental program in 1993<sup>4</sup>, staff was prescient. A five year phase-out as proposed by staff would have led to an orderly phase-out of the rental program as opposed to the existing problem of some 33,000 appliances<sup>5</sup>, almost all past the company's definition of "useful life"<sup>6</sup> and potentially dangerous per the company's own witness<sup>7</sup>, with no plan by the company to address the problem other than to hopefully fold it into the new program.<sup>8</sup>
5. In contrast to this "legacy" left by the company, the actual data and charts from the Northwest Energy Efficiency Alliance<sup>9</sup> show a very successful free market delivering hundreds

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<sup>1</sup> PSE Brief, page 3 lines 16 to 20

<sup>2</sup> Exh. No. EEE-1T, page 3, figure 1

<sup>3</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets, UE-151871 & UG-151872, Order 01 (Nov. 13, 2015) at 4

<sup>4</sup> Norton, EXH. No. LYN- 1T, page 18, lines 5 to 12

<sup>5</sup> PSE Brief, page 4, line 8

<sup>6</sup> McCulloch, Exh. No. MBM-1T, 4:1-10

<sup>7</sup> Wiggen, Exh. No. AJW-1T 3:12- 21

<sup>8</sup> E.g., Exh. Nos. MBM-26 and MBM-46

<sup>9</sup> Exh. No. MBM-45, pages 3 to 5

of thousands of energy efficient, well within useful life water heaters and HVAC appliances<sup>10</sup> - a much better legacy.

6. In addition, the free market has delivered technological innovation leading to a wide range of products suitable to varying customer needs<sup>11</sup>, made available to the consumer without the cumbersome and lengthy process that would be required for PSE under its proposal.<sup>12</sup>

### **B. COMPLICATING THE CONSUMER'S PROTECTION**

7. In its initial brief, PSE claims "PSE's leasing service will be subject to the Commission's consumer protection oversight in its leasing service just as it is in every other aspect of its business."<sup>13</sup> Unfortunately, PSE vastly overstates its position, as many of the company's activities are outside of the regulatory umbrella of the Commission- including PSE's Contractor Alliance Network, an essential part of the PSE leasing program, but not a part of the PSE proposed leasing proposal in before the Commission.

8. In fact, the tangled web of relationships PSE proposes to create will fall mostly outside the Commission's jurisdiction- including the consumer-to-contractor relationship, the consumer-to-supplier/manufacturer relationship, the utility-to-contractor relationship, the utility-to-supplier/manufacturer relationship, and the contractor-to-supplier/manufacturer relationship. All of these relationships will be subject to the state Consumer Protection Act rather than the Commission's regulatory authority.

9. It should be easy to see how the consumer can all too easily fall into the gaps in this web. PSE has stated that for a large portion of its ratepayer base the decision-making process "can be

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<sup>10</sup> Ibid.

<sup>11</sup> Van de Heuvel, Exh. No. JvdH- 1T, page 5, line 3 through page 6, line 7

<sup>12</sup> Transcript 418:2-22

<sup>13</sup> PSE Brief, page 54, lines 4 and 5.

overwhelming” and these customers can be “paralyzed” by this process.<sup>14</sup> How well do we expect these consumers to navigate a complicated consumer protection array?

10. The doublespeak consistently engaged in is epitomized by the contrast in PSE’s assertions regarding the consumer being protected, and the admission in its brief that “PSE’s Disclaimer of Warranty is a standard contractual provision providing that since PSE, “being neither the manufacturer, nor a supplier, nor a dealer in the equipment,”<sup>15</sup> cannot make any guarantees regarding the condition or merchantability of the equipment, and cannot be not (sic) liable if because of a defect in the equipment, a customer suffers damages or loss.<sup>16,, 17</sup>
11. PSE then chooses to limit its liability to repair or replacement if the equipment fails<sup>18</sup> That is a far more limited liability than would be provided in the free market, but is similar to the position PSE has taken on its legacy renting program.<sup>19</sup>

### C. AN ATTEMPT TO SIDESTEP LONGSTANDING POLICY

12. Puget Sound Energy has sought to justify its appliance leasing program by claiming that there is historic justification for the program. However, just as long-standing encroachment on public property will not lead to a valid claim of adverse possession<sup>20</sup>, this PSE argument is not valid.
13. Much has been made in this adjudication regarding *Cole*<sup>21</sup>, but the central truth is not that leasing is something the Commission and the Court have decreed must be allowed, but that the

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<sup>14</sup> Norton, Exh. No. LYN- 1T, page 14, lines 1 to 5

<sup>15</sup> Tariff Sheet No. 75-V.

<sup>16</sup> *Id.*

<sup>17</sup> PSE Brief, page 57, lines 11 through 14

<sup>18</sup> PSE Brief, page 57, lines 16 and 17

<sup>19</sup> Exh. No. MBM-29

<sup>20</sup> **RCW 7.28.090**

<sup>21</sup> *Cole v WUTC*, 79 Wn 2<sup>nd</sup> 302 (1971)

Commission has been granted great power, and its proper use of that power will be upheld by the courts.

14. From the post- Civil War regulation of the railroads (Interstate Commerce Act (1887), Elkins Act (1903), Hepburn Act (1906)), through the Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914), until today, the clear, bipartisan policies of the federal government has been to promote free markets, and tolerate and strongly regulate necessary monopolies, while prohibiting other monopoly power.<sup>22</sup>

15. In the state of Washington, after years of legislative regulation of the railroads, the Legislature, in 1905, created the Railroad Commission. In 1911, the Commission was expanded into the Public Service Commission, and began the state regulation of energy utilities.<sup>23</sup> The Public Service Commission was the predecessor agency to, today's Utilities and Transportation Commission.

16. In recent decades, those governmental policies have supported free market displacement of monopolies whenever feasible- in transportation, in telecommunications, and anywhere else that free market emergence has shown itself able to meet consumer needs.<sup>24</sup>

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<sup>22</sup> FROM THE FEDERAL TRADE COMMISSION'S WEBSITE "GUIDE TO ANTITRUST LAWS"

Free and open markets are the foundation of a vibrant economy. Aggressive competition among sellers in an open marketplace gives consumers — both individuals and businesses — the benefits of lower prices, higher quality products and services, more choices, and greater innovation. The FTC's competition mission is to enforce the rules of the competitive marketplace — the antitrust laws. These laws promote vigorous competition and protect co In recent decades, those governmental policies have supported free market displacement of monopolies whenever feasible- in transportation, in telecommunications, and anywhere else that free market emergence has shown itself able to meet consumer needs.

nsurers from anticompetitive mergers and business practices. The FTC's Bureau of Competition, working in tandem with the Bureau of Economics, enforces the antitrust laws for the benefit of consumers.

<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>

<sup>23</sup> Chapter 117, Laws of 1911 (SSB 102)

<sup>24</sup> From the Washington Utilities and Transportation Commission website:

### **Competition Challenges the Monopolies**

17. The public service laws were created to inhibit monopoly power in those unavoidable situations where it necessarily has to exist. But as was seen with the telecom industry, great benefit flows from the free market moving into previously monopoly territory, not the other way around. If PSE wants to turn the public service laws on their head, that is a much larger policy question than is appropriate in this limited adjudication, with many more necessary stakeholders to be involved.
18. PSE has chosen to avoid the fundamental policy discussion, seeking an endorsement of the Commission for the extension of monopoly power into a competitive free market for the first time, through a ratemaking process. This would set an unfortunate precedent, and the many

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Since the tiny Washington Railroad Commission opened its offices in 1905, the commission has grown and overseen huge changes in the utility and transportation industries. There was the explosive growth in the electric power industry, fueled by the region's hydroelectric power. There was a new interest in environmentally safe and renewable energy sources in the 1970s. Telephone service became nearly universal; and in the 1980s, the breakup of AT&T's local phone companies paved the way for the competitive rush in telecommunications. Add to this the deregulation of the railroad and trucking industries since the late 1970's, and you can see what tremendous changes we have been through.

For many decades, it made sense to have a single company provide a utility or transportation service to a particular service area. Many of the commission's practices were developed because it was not reasonable to duplicate telephone lines, water mains, power plants, and railroad tracks. Monopolies were more practical, stable, and economic for serving the public, although no one wanted to give them unlimited power.

As a result, private utility and many transportation services for years have been regulated by the state through the commission. In other words, these companies have a contract with the people of Washington. In exchange for enjoying an unchallenged monopoly over a specific service area, these companies can charge no more than the state allows and must agree to serve all customers in their service area.

In recent years, however, competition has become possible -- and even welcome -- in many regulated markets. Endorsed by many important federal and state court and legislative decisions, there now is some competition in nearly all of the industries we regulate.

More recently, these regulated companies have pushed for fewer commission controls in areas where they must react quickly to price and service competition. And while the commission has allowed more freedom and flexibility, competition is still developing unevenly.

In spite of all this change, the basic mission of the commission remains the same: consumer protection for our state's most essential services.

<http://www.utc.wa.gov/aboutUs/Pages/history.aspx>

stakeholders appropriately interested in such a major change in policy would not only not have been allowed to be involved, even those who have been involved have had their voices inappropriately muted and limited.

19. Such policy making should be conducted through rule-making in accordance with Chapter 34.05 RCW (the Administrative Procedures Act) if not deferred to the Legislature.

### **CONCLUSION**

20. Puget Sound Energy has failed to demonstrate that its Appliance Leasing Proposal would be more effective or efficient than the market has been in placing appropriate water heaters and HVAC appliances in the homes of consumers, and the objective data suggests just the opposite.

21. In addition, the increased complexity of consumer protection created by the mix of regulated and unregulated relationships necessary to implement the proposal, and the places ratepayers at risk.

22. Finally, PSE's proposal represents a radical new policy departure that, at a minimum, should be the subject of rulemaking- if not deferred to the Legislature. The Washington State Heating, Ventilation and Air Conditioning Contractors Association respectfully requests that the Commission reject the proposal.

DATED this 19th day of September, 2016.

James L. King, Jr.  
Representative  
Washington State Heating, Ventilation and  
Air Conditioning Contractors Association